IN THE SUPREME COURT OF THE UNITED KINGDOM ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION) B4/2018/0349 AND B4/2018/0754

WRITTEN SUBMISSIONS OF THE CHILDREN'S COMMISSIONER FOR ENGLAND

A: Introduction

1. The Children's Commissioner for England, Anne Longfield OBE, ('the Children's Commissioner') files these written submissions to address: (1) the factual context within which this appeal is brought;[1] and (2) the key safeguards that she considers need to be included in such orders as may be made in future.

2. The Children's Commissioner emphasises at the outset that she is conscious that this case arises out of an application brought by a Welsh local authority, and concerns (in part) the specific legal framework relating to the discharge by local authorities in Wales of their obligations towards children. The wider issues that the appeal raises are not confined to Wales, and the issues of principle apply equally to England where – numerically – the numbers of children involved are greater.

B: The Children's Commissioner

3. The post of the Children's Commissioner for England was initially created under the Children Act 2004, her primary function (under s.2(1) of that Act) being to promote and protect the rights of children in England, including promoting awareness of the views and interests of children in England. The Children and Families Act 2014 further strengthened the remit, powers and independence of the Commissioner, and gave her special responsibility for the rights of children who are in or leaving care, living away from home or receiving social care services. Her powers include the ability to require information of public bodies (s.2F Children Act 2004, as amended by the Children and Families Act 2014), and she has by exercise of this power undertaken detailed research relating to the issues before this court, addressed below.

4. The Children's Commissioner is due to publish a report in November 2020,[2] which will include the findings from a series of research visits to mental health wards, children's homes and residential special schools to determine what the current level of understanding is around deprivation of liberty. The research found that even in settings where high levels of restrictions

[1] Factual matters addressed in these submissions have been verified by the Children's Commissioner.
[2] A copy of which will be provided to the court upon publication.

were in place, staff were not usually aware of the principles of what counted as a deprivation of liberty. Staff were very aware of children's homes regulations saying they could not restrain a child to prevent them leaving (except if there was immediate risk of significant harm) but were not aware of issues which did not involve them physically stopping a child from leaving, such as constant supervision.[3]

C: The factual context

5. At the outset, the Children's Commissioner considers it important to emphasise to the court her concern that the legal framework in respect of Article 5 ECHR is not yet widely understood by local authorities and other bodies concerned with making arrangements for children. This position is made worse by the fact that the mechanisms by which authority in relation to deprivation of liberty can be sought are complex and overlapping: indeed, pending the outcome of this appeal, they are arguably so unclear at the moment as to fail the requirement in Article 5 that the procedures set down by law are foreseeable.[4] As a result, the Children's Commissioner emphasises her concern that there are very significant numbers of children and young people who are confined in England where there is no consent to that confinement,[5] state imputability is engaged, and where no steps have been taken to render that deprivation of liberty lawful, by either administrative[6] or judicial means. She examined this question in detail in May 2019 report "Who are they? Where are they?: Children locked up,"[7] showing that the data available for those detained in secure settings (a total of 1,465 in March 2018[8]) was likely to be missing significant numbers of children, including children whose parents have sought to consent to their deprivation of liberty, and where legal authority should – but has not been – sought. She will be considering this further in her forthcoming report.

6. Even where the inherent jurisdiction has been invoked, the Children's Commissioner further emphasises the limits to the official data available on the number of children deprived of their liberty under it. CAFCASS England has provided the Children's Commissioner with information

[3] An example being a teenage girl in a children's home visited by the Commissioner's team who reported that "*I can walk around the bit of garden but staff come with me, they follow you everywhere, it feels like a jail".* None of the young people in this home had a deprivation of liberty authorisation in place, and only one of the three social workers for the children had discussed the issue with the legal team.

[4] See e.g. *Medvedyev v France* (2010) 51 EHRR 39 at paragraph 80.

[5] The question of consent is addressed at section F below.

[6] The sole administrative mechanism at present being admission under the Mental Health Act 1983, where this is appropriate. In due course, from April 2022, the Liberty Protection Safeguards to be inserted into the Mental Capacity Act 2005 by the Mental Capacity (Amendment) Act 2019 will provide an administrative mechanism for authorising the deprivation of liberty of a 16 or 17 year old lacking the mental capacity to consent to arrangements for their care and treatment which give rise to a confinement.

[7] https://www.childrenscommissioner.gov.uk/report/who-are-they-where-are-they/.

[8] 505 detained under the Mental Health Act, 87 in secure children's homes on welfare grounds and 873 in youth custody.

based on cases where they have been involved. The number of children subject to these applications has increased in recent years, and is now almost equal to the number of children on applications for Secure Accommodation Orders: in 2019/2020, the number of children subject to applications under the inherent jurisdiction is 327 (up from 103 in 2017/8), compared to 347 children subject to applications under s.25 CA 1989 (down from 429 in 2017/18). This information does not tell us how many of these applications were successful, nor (without access to case files) does the Children's Commissioners know anything about where these children are being accommodated. The Commissioner requested similar information from the Ministry of Justice but were informed that the data was not held in a way which they could report on. The Commissioner does not have information on the number of children in similar circumstances placed by Welsh Local Authorities.

7. The lack of data – in particular centralised data – in relation to the matters set out above also severely hinders the state's ability to ensure that appropriate safeguards are in place for these children:[9] There are also fewer safeguards in place in non-secure settings, which are not subject to the same inspection regime as secure children's homes and do not need to be approved by the Secretary of State. Placements of under 13s in these settings do not have to be approved by the Secretary of State. Further, the lack of data hinders the National Preventative Mechanism's ability to ensure regular visits to places of detention in order to prevent torture and other ill-treatment, as required by the Optional Protocol to the Convention Against Torture (the Children's Commissioner being part of this mechanism).

8. For present purposes, and looking solely at situations where the relevant authorities have identified that: (1) there is a deprivation of liberty; and (2) sought to invoke the inherent jurisdiction, from her Office's research and the cases that have come to the helpline run by children's rights advisers in her team (Help at Hand), the Children's Commissioner considers that there are to be three distinct groups of children in play, addressed in turn below.

(1) Children for whom social workers believe a Secure Children's Home placement under s.25 Children Act 1989 is needed to keep them safe, but one cannot be found.

[9] Secure Children's homes are inspected twice a year by a dedicated Ofsted team, and there is a separate framework for inspecting them because of the increased vulnerability of children in closed settings. Children's homes that hold children deprived of their liberty but are not secure units may only have an inspection once a year (if they are good or outstanding, although can be inspected twice a year if a risk assessment deems this to be necessary) and will not be inspected against the Secure Children's Homes framework. Similarly, Secure Children's Homes have to be approved by the Secretary of State for Education, whereas homes holding children on deprivation of liberty authorisations do not. The Secretary of State also has to authorise the placement of any child under 13 in a Secure Children's Home, whereas this is not the case for a child with a deprivation of liberty authorisation placed elsewhere.

9. In order to assist the court with a sense of the scale of the problem, the Children's Commissioner invites the court to note that the Secure Welfare Co-ordination Unit[10] (SWCU) found that, on average in June 2019, 30 children a day were waiting for an available place in a Secure Children's Home.[11] Their latest data shows that the number of children waiting for a place peaked at 41 children in October 2019.[12] They have also found that there were 492 referrals for children in the year, of which 212 did not get a place. Some of these children will have been successfully placed elsewhere, but there were 135 children who, over the course of a year (July 2018 to June 2019), were referred multiple times and still did not receive a place. Eighty-five children were referred over 6 times, and/or were rejected over 3 times, but still did not receive a place. While it is not possible to say whether these children were being deprived of liberty in these settings, the Children's Commissioner invites the court to accept that it is likely that they would need a high level of restriction in place if they have been assessed as needing a secure placement.

10. The Children's Commissioner invites the court to note that the lack of availability is not simply a matter of insufficient places, but also because Secure Children's Homes do not always believe they are able to care for children with very high needs. A recent case[13] where the inherent jurisdiction has been used, for example, concerns a 13 year old child where her Secure Children's Home served notice because they felt they were not able to meet her needs. On visits by her office to Secure Children's Homes, managers have explained that they sometimes have to refuse children because they do not believe they can care for them alongside the children they already have in the setting.

(2) Children where a secure children's home is not the preferred option, but they are likely to meet s.25 CA 1989 criteria

11. Such children will have a history of absconding, and would abscond from other forms of accommodation, and would suffer significant harm if they absconded, or would be likely to injure themselves or others if placed elsewhere. An example from the report to be published in November is a children's home visited by the Commissioner's team where several children had deprivation of liberty authorisations in place but which was not a Secure Children's Home.

[10] A small unit grant funded by the Department for Education (DfE) for the purposes of administering placements and collecting data on secure welfare

[11] This data was provided to the Children's Commissioner's Office by the SWCU and will be published in her forthcoming report on children deprived of their liberty, due to be published in November 2020.

[12] SWCU Annual Report England, January 2019 to December 2019.

[13] *Z (A Child: DOLS: Lack of Secure Placement)* [2020] EWHC 1827 (Fam). The child in that case was in a secure children's home that served notice. No other secure children's home would take her. The local authority applied for a deprivation of liberty order and placed the child in a rented flat and brought in agency staff to supervise her on a 4:1 basis. There was no educative or therapeutic element to the placement. All professionals and judge agreed this was not a suitable home for this child. The "home" was not registered at the time the child went there (although the Children's Commissioner understands that the home has now applied to Ofsted).

Comments made by the children included: '*We live in the same 4 walls 24/7 and the front door is locked. It's hard'* and '*I'm nearly 18 and I can't get out of my own front door. I need to find staff to let me out for fresh air'.* Whilst the setting was designed to provide a high level of therapeutic care for children with certain mental health needs, and was highly specialised to do so, such that the Commissioner's team agreed with professionals that this was a better placement than a secure home, the fact remains that the children were still being deprived of their liberty there without the same safeguards as would have been in place in a secure children's home.

(3) Children who are unlikely to meet s.25 CA criteria (perhaps because they have never attempted to abscond, or because they could be cared for in a range of settings) but who also need to be deprived of their liberty to keep them safe.

12. The Children's Commissioner believes the latter group will include children with significant additional needs who are in children's homes or in residential special schools.

Unregulated settings

13. The Children's Commissioner has a particular concern in relation to unregulated settings,[14] especially as there is evidence that some children in need of a secure placement are being placed in such settings. The latest report from the SWCU shows that 10% of children referred for a secure home in a year were living in unregulated semi-independent settings at the time they were referred[15]. Additional data that the SWCU provided to the Children's Commissioner shows that of the 85 children repeatedly referred and repeatedly rejected by secure homes, 16 were living in what were described as unregulated, independent or semi-independent settings.[16] The Department for Education carried out a survey with 22 local authorities on their use of unregulated and unregistered placements, and 3 of these reported that they used settings which they considered to be 'unregulated'[17] (rather than unregistered) as an interim measure while they waited for a secure bed to become available.[18] It is particularly concerning if children who are receiving the high level of care that will be part of any deprivation of liberty are placed in unregulated care – as developed below, this appears by its definition to make these settings

[14] She addressed the position in her report 'Unregulated,' published in September 2020.
[15] Secure Welfare Unit Annual Report England, January 2019 to December 2019
[16] This data was provided to the Commissioner's office by the SWCU Unit and will be published in her forthcoming report on children deprived of their liberty, due to be published in November 2020
[17] Under the Care Standards Act 2000, Ofsted is required to register settings and domiciliary services that provide both care and accommodation for young people under the age of 18. This includes children's homes and fostering services, in which the majority of children in care are accommodated. Ofsted is not required to register settings that provide accommodation where the level of support provided does not meet the definition of 'care'. There are also a small number of settings used to accommodate children in care which are not required to be registered by Ofsted, where the accommodation is not fixed or is of a temporary nature and is for leisure, cultural or educational activities. Provision that meets the Care Standards Act definition of care and accommodation and therefore should be registered with Ofsted, but is not (i.e. unregistered provision), involves providers operating an unregistered setting, which is illegal.
[18] *Use of Unregulated and Unregistered Provision for Children in Care*, Department for Education, 12th February 2020.

illegal unregistered homes. In addition, some of the children the Children's Commissioner's team have supported are placed in caravans.[19] The latest report from the SWCU shows 16% of children referred for a place in secure were in 'other' settings which includes held by police, unregulated placements, holiday lets and rented houses with staff.[20] Recent research by the Department for Education has shown a lack of understanding by some local authorities as to whether holiday settings can be used for bespoke care packages including for children deprived of liberty without having to register.[21] The legislation governing this area, addressed further below, is complex and does not properly address the position where a setting that is both intended as a holiday or leisure setting for a child, and also being used to deprive them of their liberty, would need to register.

D: The availability of the inherent jurisdiction: the operation of Article 5 ECHR

14. By way of preliminary observation, the Children's Commissioner invites the court to consider what would be the case were inherent jurisdiction to be unavailable. The obvious practical question would then arise of how local authorities would or could comply with their statutory duties towards children who may require accommodation in situations where (for whatever reason) s.25 Children Act 1989 ('CA 1989') could not be used, or even adequately exercise parental responsibility in respect of them. The court may consider that the statutory scheme of the CA 1989 cannot have been intended to leave such children either unprotected, and ought properly to be interpreted in a manner that does protect them. The Children's Commissioner also submits that the court will no doubt wish to consider that, were the inherent jurisdiction to be unavailable to protect and safeguard such children, they would be deprived of the protection and scrutiny of the court which is currently afforded to them, however adequate or inadequate such protections might be. The Children's Commissioner also invites the court to consider whether one reason why the appellant's s.100(2)(d) CA 1989 statutory bar point might not have arisen for specific determination in previous cases is that the lower courts may have proceeded on the basis that they are not conferring a power on a local authority, but rather authorising the deprivation of liberty itself. What the court seeks to do is evidenced through the model order (and safeguards) proposed by Sir James Munby in *Re A-F (Children) (No 2)* [2018] EWHC 2129 (Fam) at paragraph [15]. It may, further, be that the same interpretation permeates the judgment of Sir Andrew McFarlane P in the Court of Appeal below.

[19] An example reported by the 'Help at Hand' team being a 14 year old subject to care proceedings. As his local authority was unable to find a home for him, he was housed in a campervan under 3:1 supervision with staff on 72 hour shifts. The team was not informed of any deprivation of liberty order being applied for.
[20] Secure Welfare Unit Annual Report England, January 2019 to December 2019.
[21] *Use of Unregulated and Unregistered Provision for Children in Care*, Department for Education, 12th February 2020.

15. In considering whether the inherent jurisdiction is capable of being a procedure prescribed by law sufficient to comply with the requirements of Article 5, the Children's Commissioner submits that the court may wish to have in mind that the lower courts have identified a range of safeguards as being required when exercising the inherent jurisdiction to authorise a deprivation of liberty in relation to adults[22] and children.[23]

16. If the court determines that the inherent jurisdiction can be deployed to authorise the deprivation of liberty of children either under Article 5(1)(d) or Article 5(1)(e) ECHR, the Children's Commissioner invites the court to set out a clear procedural framework which provides safeguards commensurate with the level of restriction to which the child is subject.

17. Such a framework would need to include the following requirements:

    17.1. Court applications must be made before a deprivation of liberty commences, other than in situations of genuine emergency, when applications should be made within 72 hours of a deprivation of liberty occurring;

    17.2. The child must be a party to the application and a Guardian appointed;

    17.3. Applications must specify the nature of the regime to be imposed, the child's circumstances, and the alternative options for the child's placement. They must include the views of the child, the parents, the Independent Reviewing Officer and any other relevant person (for example a CAMHS professional);

    17.4. Applications must state whether the deprivation of liberty is said to be justified on the basis of Article 5(1)(d) or Article 5(1)(e) ECHR. Where Article 5(1)(e) applies, there must be evidence from a child psychiatrist or psychologist satisfying the so-called *Winterwerp* criteria.[24] Where Article 5(1)(d) is relied on, there must be evidence of the educational provision and the supporting elements of care that are proposed. If a care plan authorises the use of physical restraint or medication, full details must be provided,

[22] See re *Re PS (an adult)* [2007] EWHC 623 (Fam); [2007] 2 FLR 1083, *Salford City Council v GJ and others* [2008] EWHC 1097 (Fam); [2008] 2 FLR 1295; and *Salford City Council v BJ* [2009] EWHC 3310 (Fam); [2010] 1 FLR 1373, [2010] Fam Law 242.
[23] *Re A-F (Children)* [2018] EWHC 138 (Fam); [2019] Fam 45. The then-President, Sir James Munby, set out precedent orders to be used in such applications in *Re A-F (Children) (No 2)* [2018] EWHC 2129 (Fam).
[24] After *Winterwerp v The Netherlands* (1979) 2 EHRR 387, i.e. that the child has a mental disorder of a kind or degree warranting compulsory confinement (which must then persist for the detention to continue to be justified): *Winterwerp* at paragraph at 39.

with confirmation that an appropriately qualified medical professional has approved these aspects of the care plan;

17.5. Local authorities must hold internal reviews after 28 days and then every three months while proceedings are underway, involving all relevant professionals and others with an interest in the welfare of the child;

17.6. The court must review the deprivation of liberty order at very regular periods, the starting point being a review after 3 months and at least every 6 months thereafter;

17.7. The orders should contain provision for review, in advance of any change unless urgent necessity renders this impossible, where any changes to the child's circumstances is proposed which gives rise to greater restrictions upon them or where a move to a different placement is envisaged;

17.8. The court should ensure that a record is kept in such a way that the Ministry of Justice / Department of Education can report upon the number of children subject to such orders and provide information to relevant bodies such as Ofsted, the Children's Commissioner, not least so that the constituent parts of the National Preventative Mechanism under OPCAT can fulfil their function. The record should include the identity of the placement, the age of the child, and whether the placement was authorised under Article 5(1)(d) or Article 5(1)(e).

18. These procedural requirements and substantive guidance need to be disseminated to all local authorities, residential special schools, children's homes and Ofsted in order that the law can properly be said to be transparent and accessible, and therefore comply with the requirement of certainty imposed by Article 5 ECHR.

19. The Children's Commissioner acknowledges that certain of the safeguards proposed above go beyond the current arrangements implemented by the High Court but, to the extent that they do so, submits that they are required to ensure the protection of the Article 5 rights of the children in question:

19.1. **Paragraph 17.1:** It is not currently clear that deprivations of liberty must be authorised

before they commence, other than in emergency situations. In *Re A-F* reference is made to applications being required if the accommodation in which the child is **or will be** living constituting a deprivation of liberty;

19.2. **Paragraph 17.4:** The model order prepared by Sir James Munby in *Re A-F (no.2)* does not specify which limb of Article 5(1) is relied on to authorise the deprivation of liberty and does not spell out that evidence satisfying the *Winterwerp* criteria must be provided;

19.3. **Paragraph 17.6:** The model order prepared by Sir James Munby in *Re A-F (no.2)* (as with the approach in relation to adults) provides for annual authorisation by the court of a deprivation of liberty, rather than reviews at 3 months and then 6 monthly, which is the requirement for s.25 secure accommodation orders. It is submitted that:

19.3.1. In respect of applications which are made because of a shortage of secure accommodation, the Supreme Court can properly find that Articles 5 and 14 ECHR read together dictate that the child must not be discriminated against as regards the steps taken to secure their Article 5 rights by the mere fact that the state is not in a position to provide sufficient secure accommodation placements;

19.3.2. In respect of applications which applications to authorise deprivation of liberty in placements which are in all but name secure accommodation, the vulnerability of the child and the intensity of the restrictions upon them means that she submits that the Supreme Court can properly find that review of equivalent intensity is required to that which would be required if they were the subject of an application under s.25 CA 1989;

19.4. **Paragraph 17.9:** There is no current obligation for data to be kept in respect of these orders.

E: The steps required of the court under Article 5 ECHR

The examination of appropriateness

20. In any situation where a local authority is advancing an application under the inherent jurisdiction to authorise deprivation of the child's liberty, whether because of a lack of secure accommodation or otherwise (including the situations where the individual is said to be too high

risk for such accommodation), the Children's Commissioner submits that the Supreme Court may wish to consider the obligations upon the court as a public body bound by Article 5 ECHR. In particular, the Supreme Court may wish to have regard to the requirements developed by the European Court of Human Rights to satisfy the criterion of "lawfulness" under Articles 5(1)(d) and (e):

20.1. In *Blokhin v Russia* [2016] ECHR 300, the Grand Chamber emphasised that detention for educational supervision pursuant to Article 5(1)(d) "*must take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements*;"[25]

20.2. In *DL v Bulgaria* (Application No 7472/14), decision of 19 May 2016), the Strasbourg court held that, "*once the State* [has] *chosen to introduce a system of educational supervision involving deprivation of liberty, it* [is] *under an obligation to put in place appropriate institutional facilities which met the demands of security and the relevant educational objectives, in order to be able to satisfy the requirements of Article 5 § 1 (d)*."[26]

20.3. In similar vein, in *Rooman v Bulgaria* [2019] ECHR 105, the Grand Chamber, expressly "refining" and "clarifying"[27] its previous case-law on detention on the basis of 'unsoundness of mind' under Article 5(1)(e), made clear that the administration of suitable therapy in an **appropriate** environment has become an requirement in the context of the wider concept of lawfulness of the deprivation of liberty.[28]

21. Despite the fact that two of these decisions emanate from the Grand Chamber of the European Court of Human Rights, none of them have, to the best of the Children's Commissioner's knowledge, been considered by the domestic courts.[29] She respectfully submits they make clear that a judge considering making an order under the inherent jurisdiction authorising the deprivation of liberty of a child or young person, whether on the basis of Article 5(1)(d) or Article 5(1)(e), is (1) required to consider the appropriateness of the place where the child or young person will be deprived of their liberty; and (2) if they are not satisfied that it is appropriate,

[25] Paragraph 167.
[26] *D.L.* at paragraph 74; at paragraph 81, the European Court also recalled that the State has "*positive obligations to protect minors and, where applicable, remove them from an unfavourable environment*."
[27] *Rooman* at paragraph 205
[28] *Rooman* at paragraph 208, amplified at paragraphs 209 and 210.
[29] Save that *Rooman* was noted, in passing, in the context of immigration detention in *R (ASK) v Secretary of State for the Home Department* [2019] EWCA Civ 1239 at paragraph 32.

cannot make the order sought.

22. If (2) appears to be in prospect, then so as to stay the right side of the well-demarcated line between the functions of the courts and the functions of public authorities in the allocation of scarce resources,[30] even if it cannot require the local authority to fund a specific placement or arrangements, it can require the local authority to "*go away and think again*," and engage in "[r]*igorous probing, searching questions and persuasion*."[31] Ultimately, however, if this process does not produce a result that meets the requirements of Article 5(1)(d) (or, if relevant, Article 5(1)(e)), the court cannot compatibly with its obligations as a public body bound by the Human Rights Act 1998 make the order having the effect of sanctioning the placement.

23. In this context, and having regard to Strasbourg case-law set out immediately above, the Children's Commissioner respectfully submits that it would be open to the Supreme Court to hold that:

    23.1. Placement of a child (of any age) in an unregulated placement will **always** be unlawful for purposes of Article 5(1)(d) (or, if relevant, Article 5(1)(e)). Either (which would be unlikely) the placement is providing support at a level which is below the threshold required to constitute confinement for purposes of Article 5 ECHR, or it would – in reality – be providing both support and care. If it is offering care, then it should be seen as an unregistered children's home; it is difficult – if not impossible – the Children's Commissioner submits, to see upon what basis it could be said to be lawful or appropriate for the court to place a child in an unregistered children's home in circumstances where the owner of the placement is committing a criminal offence.[32] If it is an unregulated placement, then the Children's Commissioner reminds the court that such would be outside the scope of inspection of Ofsted (in England) or the Care Inspectorate Wales (in Wales) and action cannot, in consequence, be taken to remedy any shortfall in provision or to secure the fitness of the individuals running the home;

    23.2. In any situation where (as contemplated in the President's Practice Guidance of 12 November 2019) the court is being invited to make an order in respect of a placement

[30] See e.g. *Holmes-Moorhouse v Richmond upon Thames* [2009] UKHL 7.
[31] See *MN (Adult)* [2015] EWCA Civ 411 at [2016] Fam 87 at paragraph 81, upheld on appeal [2017] UKSC 22; [2017] AC 549, in the context of the Court of Protection undertaking the same exercise.
[32] Under s.11 Care Standards Act 2000 (in England); s.5 Regulation and Inspection of Social Care (Wales) Act 2016 (in Wales).

where registration is in train,[33] the court should conduct a specific review as to whether the deprivation of liberty is lawful: (1) within a fixed, short, period of the registration having been received by Ofsted/CIW; and (2) immediately where the registration is either refused or the application withdrawn. In that latter context, the Children's Commissioner respectfully submits that the characterisation of the review at paragraph 21 of the Practice Guidance as being whether the placement continues to be in the child's best interests does not sufficiently address the test, which is not merely whether it is in their best interests, but whether the court can be satisfied that the deprivation of liberty which they are subject there is lawful;

23.3. Placement of a child (of any age) in locations such as caravans or outward bound centres will also **always** be unlawful for purposes of Article 5(1)(d) (or, if relevant, Article 5(1)(e)) as such cannot be said to be "appropriate" for purposes of either Article 5(1)(d) or (e).[34] That does not mean that the court cannot sanction a regime from an appropriate placement which includes trips for purposes of holidays to such places, but the Children's Commissioner submits that the use of such facilities as the primary placement falls foul of the appropriateness test set out in Article 5;

23.4. In any situation where the court has authorised deprivation of liberty, it must, itself, take steps to secure its continued satisfaction that the deprivation of liberty continues to be in "*an appropriate facility with the resources to meet the necessary educational objectives and security requirements*" (to use the language of *Blokhin*). The nature of those steps will depend – in part – upon the extent to which the court can be satisfied that other bodies (for instance Ofsted) are able to monitor the placement and its service, but in the current framework which places all the onus upon the court to authorise the position,[35] the ultimate responsibility for monitoring the position lies with it.

F: Consent

24. The Children's Commissioner notes that some children – including the appellant in this case – are keen to have their ability to make autonomous choices recognised, and assert their own

[33] See paragraphs 17-21.

[34] This is irrespective of the fact that such accommodation may fall outside the requirement to register with Ofsted because it is said to be used for holiday, leisure, educational or cultural purposes for under 28 days by virtue of the Residential Holiday Schemes for Disabled Children (England) Regulations 2013 (SI 2013/1394.

[35] The position may change in relation to those aged 16-17 with impaired decision-making capacity come April 2022 and the coming into force of the Liberty Protection Safeguards regime. However, the new Schedule AA1 to the Mental Capacity Act 2005 does not set out the circumstances under which a relevant local authority would be required to seek an order under s.25 CA 1989 as opposed to undertaking the authorisation procedure under the Liberty Protection Safeguards regime.

capacity to consent to what would otherwise constitute a deprivation of their liberty. She does not for one minute wish to downplay the importance of the voice of the children at the heart of these cases, but she must however note a real concern as to whether children are able to make genuine choices in these scenarios, given the lack of alternative options and their reliance on statutory bodies to identify possible placements. In *Secretary of State for Justice v MM* [2018] UKSC 60; [2019] AC 712 at paragraph 23, the Supreme Court queried whether valid consent for the purposes of Article 5 could be given where the 'choices' were a greater or lesser form of detention: detention in hospital under the Mental Health Act 1983, or detention in the community pursuant to a conditional discharge under the Mental Health Act 1983.

25. The Children's Commissioner would be concerned if the protections afforded by Article 5 were too easily given up or removed from children in the care of the State on the basis of their perceived agreement to the arrangements for their care, given the policy of caution identified in *Cheshire West*, the lack of choice they may have about those arrangements, and the wider concerns about the provision of appropriate care for these children. She invites the court to consider whether the appropriate way in which to secure the voice of the child is in the context of deciding whether or not the deprivation of liberty that the local authority is seeking to have approved is truly necessary and proportionate.

26. The Children's Commissioner notes, finally, that the importance of securing the voice of the child applies equally to the potential operation of parental authorisation of confinement. The Supreme Court in *Re D* confirmed that such cannot take confinement out of the scope of Article 5 ECHR in the context of those aged 16 and above. Whilst this case does not concern the question of whether a parent can authorise confinement of a child below 16,[36] the Children's Commissioner respectfully submits that the potential for a child's voice to be lost in such circumstances is equally present.

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20 October 2020

[36] Although Lady Hale in *Re D* observed that the same conclusion logically would also "*apply to a younger child whose liberty was restricted to an extent which was not normal for a child of his age*" (paragraph 50).
[37] 39 Essex Chambers, 81 Chancery Lane, London
[38] 39 Essex Chambers, 81 Chancery Lane, London
[39] Harcourt Chambers, London