



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 36
P1013/21

Lord Pentland
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LADY WISE

in the petition for the exercise of the *nobile officium*

by

THE LONDON BOROUGH OF HACKNEY

Petitioners

against

THE RIGHT HONOURABLE DOROTHY BAIN QC, THE LORD ADVOCATE

First Respondent

and

THE RIGHT HONOURABLE LORD STEWART OF DIRLETON QC, THE ADVOCATE
GENERAL FOR SCOTLAND

Second Respondent

Petitioners: Inglis, SKO Family Law Specialists

First Respondent: Irvine, SGLD

Second Respondent: Non-participating party

18 August 2022

[1] On 29 July 2022 after a hearing we granted the petitioners' motion for dismissal of the petition and indicated that we would write on the matter. This opinion provides the

background to and reasons for our decision. This case is one of many petitions brought in recent years to the *nobile officium* of the Court of Session seeking recognition and enforcement in Scotland of an order of the English High Court depriving a child of his liberty. The court's general approach to such petitions was summarised in the Extra Division note delivered by Lord Menzies involving petitions by the Mayor and Burgesses of the London Borough of Lambeth and Medway Council - [2021] CSIH 59. In short, there was a statutory lacuna; there was no legislation allowing for the recognition of such High Court orders. A legislative solution to the problem has now been devised. Since the present petition was raised the Scottish Ministers have laid and brought into force The Cross-border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022 (SSI 2022 No. 225) (the 2022 regulations). Those regulations put in place a new system designed to authorise the deprivation of liberty of a child in Scotland where the child has been made subject to an order of the High Court of England and Wales (or the High Court of Justice in Northern Ireland) imposing deprivation of liberty safeguards (DOLS). We comment further below on the general implementation of the regulations. The present case, however, is unaffected by the regulations as they came into force on 24 June 2022 after the expiry of the relevant deprivation of liberty order (DOL order) pronounced by the English High Court. The case came before us on the petitioners' motion to dismiss the petition on the basis that there is no extant DOL order and so nothing to be recognised and given lawful authority in Scotland. In advance of the hearing of the motion, the court raised concerns about the current circumstances of the young person involved given the absence of any apparent continuing lawful authority for his being held in restricted accommodation and under close supervision in this jurisdiction.

Chronological background

[2] The young person involved in this case, IB, was born in 2007 and is now 15 ½ years old. He was made the subject of a DOL order by the High Court in England on 3 December 2021. The court imposed eight deprivation of liberty safeguards which included his residing in residential accommodation and being supervised by staff on a ratio of two staff to one child. He was not given a mobile phone and contact with his family was supervised by video or phone. He was fully supervised when using the internet and out in the community. IB moved to Scotland on 12 December 2021. He was transferred to his current location on 25 March 2022. This court, by interlocutor of 4 April 2022, *ad interim* recognised and enforced the English order for a period ending on 17 June 2022.

[3] In May of this year the petitioners made an application to the High Court seeking an extension of the DOL order to 3 September. At that time the DOL order was due to expire on 3 June 2022. The paperwork now available illustrates that IB had made good progress in Scotland and is a young person of some ability and potential but remained vulnerable to the influences to which he had been subject prior to his move to Scotland. On 10 May 2022 the High Court continued the DOL order until 3 June 2022 but indicated that there should be some loosening of restrictions. The application to extend the order further to 3 September came before the High Court (Roberts J) on 25 May 2022. The social work statement accompanying the application (dated 20 May 2022 and produced as 6/10 in this process) confirms (at paragraph 8.5) that the proposed extension of the DOL order was supported by the reviewing officer because moving IB from his current placement was not in his best interests. The clear tenor of the application was that the petitioners' social work department considered that DOLS continued to be necessary, albeit with a view to loosening the restrictions over time. The proposal was that the restrictions should be "slightly adjusted"

to allow him to take part in activities outside the home (paragraph 8.5.4). IB was represented through a court appointed guardian and Counsel at the 25 May hearing. He addressed the judge personally by video link and indicated his opposition to the extension of the order. Roberts J refused the petitioners' application for an extension of the order to 3 September 2022 while acknowledging that the DOLS would remain in place until 3 June 2022.

[4] In the circumstances outlined above we asked to be addressed on the legal basis on which IB continued to be placed in restricted accommodation in Scotland notwithstanding the termination of the DOL order. When the motion was enrolled no information was available from which we could discern how many, if any, of the deprivation of liberty measures imposed by the original DOL order remained in place *de facto*. The information suggested that the child remained resident in the same type of restricted accommodation that a primary measure of the DOL order had authorised. An issue also arose about IB's views and whether he had been informed, following expiry of the order of the English High Court, that his liberty could no longer be restricted while he remained in Scotland.

Submissions

[5] Shortly in advance of the hearing a social worker from the London Borough of Hackney primarily involved in the care and planning of IB swore an affidavit (number 16 of process, sworn 28 July 2022) providing helpful up-to-date information. Mr Inglis, appearing at the hearing on the petitioners' behalf, highlighted that the affidavit supported the view that only minimal restrictions remained in place for IB. Counsel acknowledged from the outset that, there no longer being a DOL order in this case, IB could only reside in his current accommodation in Scotland if he had been made aware that he was free to leave at

any time (subject to any urgent welfare considerations). The affidavit did not clarify whether the restriction of 2:1 staff supervision had in fact been lifted nor the basis on which IB was said to consent to the placement while wanting to return to England as soon as possible. We were advised that the plan was to return IB to the petitioners' local authority area in England on 18 August.

[6] After an adjournment for Mr Inglis to take further instructions he confirmed that as the care proceedings had now been concluded in England with a full care order being made IB no longer had representation through a solicitor. However, when the decision was made by Roberts J on 25 May the judge had explained to IB that the restrictions contained in the order would no longer apply after 3 June. Further, as his solicitors and Counsel had been present on that date, this court could be confident that the absence of any lawful authority for deprivation of liberty after that date will have been explained directly to IB. Further, since the removal of any DOLS IB was now supported on a staff to young person ratio of 1:1. He was able to go into the community where he was supported but not supervised. For example, he is supported by being transported to activities but not accompanied or supervised in the gym. He now has full access to his mobile phone and is able to spend time at local retail stores by himself. In short, Mr Inglis submitted that IB's liberty was no longer restricted beyond such reasonable restrictions as are inherent in the usual parental authority of a 15 year old young person. On that basis he moved for the petition to be dismissed.

[7] For the Lord Advocate, Ms Irvine did not oppose dismissal of the petition. She had submitted in advance a helpful note outlining the transition from cases of this sort requiring to be dealt with under the *nobile officium* procedure to their being dealt with by local agencies under the 2022 regulations. While the present case was unaffected by the regulations, the Scottish Government Legal Department (SGLD) had appreciated the need to

effect a smooth transition from the requirement to petition the *nobile officium* of this court to the new regulatory regime. In relation to all existing petitions, so long as the child concerned is the subject of an extant DOL order recognised in Scotland by an interlocutor of this court it was important that any review or renewal of the English order should take place before the expiry of the order or the period of recognition in Scotland whichever was earlier. The position of the Lord Advocate was that where a petitioner failed to seek a review or a renewal of an extant English order prior to the expiry of the period of recognition in Scotland then the transitional recognition available under regulation 5 of the 2022 regulations would not be engaged and statutory recognition would not be available. In such circumstances it would be for the petitioner to take immediate steps to apply for a new DOL order from the relevant court in England, Wales or Northern Ireland and then to seek subsequent recognition through the route provided by the 2022 regulations.

[8] For all new cases where DOL orders are being made in England and Wales (or Northern Ireland) the regulations should obviate any need for this court to be involved under the *nobile officium* procedure. We asked counsel what would happen should a situation arise like that in the present case but after the coming into force of the 2022 regulations, namely where a DOL order imposed by the High Court expires and the child nonetheless remains in Scotland in the same form of restricted accommodation previously authorised by the now expired order. In broad terms, the position of the Lord Advocate was that the agencies involved in the notification procedure referred to in regulation 7 would all be informed of the extinction of the order. As the accommodation involved will be registered accommodation, the Care Inspectorate has responsibilities in terms of ensuring the appropriateness of any accommodation. It was submitted that the management of each establishment would be aware of the need for legal authority before a child could continue

to be held there. It was accepted, however, that the regulations do not cover such a situation.

Decision and observations

[9] We are grateful to counsel for their efforts in assisting the court. On the basis of the full explanation and assurances now given on behalf of the petitioners, we were satisfied that IB is aware of his legal rights and status and the absence of any current lawful authority for his being deprived of his liberty. As the concerns about whether his liberty was being deprived *de facto* had been assuaged, we decided to grant the petitioners' motion and dismiss the petition. We were grateful also for the explanation provided on behalf of the Lord Advocate as to the steps that had been taken to try to ensure the effective operation of recognition and enforcement of future orders under the 2022 regulations. Those regulations enable recognition of a DOL order from one of the other UK jurisdictions as providing legal authority to deprive the child of his liberty while in Scotland but only for the limited purposes of implementation and enforcement. Regulations 3 and 13 combined provide that the DOL order will be treated for those purposes as if it was a Scottish Compulsory Supervision Order. Through existing legislative powers, Scottish public authorities can then ensure that there is compliance with its terms, but the Children's Hearing will not become involved unless an urgent matter (such as breach of the order) arises. Importantly, the combined effect of regulations 3 and 13 is that the child concerned will at all times remain in the legal care of the local authority in the other jurisdiction.

[10] In all cases covered by the regulations, before a DOL order from the other jurisdiction can be recognised and enforced in Scotland, regulation 7 requires the placing authority to give notice in writing containing specified information and undertakings to a

number of Scottish agencies listed in regulation 8 who have relevant obligations to children and young people present in Scotland. Regulation 9 prescribes the information to be contained in the notice, which includes details of the child concerned, the Scottish residential care setting involved and critically the date that the DOL order (i) comes into effect and (ii) expires. The undertaking to be given by the placing authority must, in terms of regulation 10, specify that for the duration of the placement the authority will provide or secure the provision of all services required to support the child and meet all of the costs arising from, or in consequence of, the placement (except for advocacy costs). Importantly, recognition of the other jurisdiction's DOL order is restricted to three months, unless the court of primary jurisdiction continues the order before the expiry of that period – regulation 5(2)-(5).

[11] We have had sight of the Practice Guidance, Notice and Undertaking Template published by the Scottish Government in June of this year (produced as 14/2 in this process). It contains useful information about the background to the legislation, the wider policy context and the factors that a placing authority (such as the petitioners in this case) should consider before applying for a DOL order. Only a DOL order made by the relevant court in England and Wales or Northern Ireland will trigger the duties under the regulations. Careful and effective planning, engagement and information sharing will be required between the placing authority and the services in Scotland responsible for implementing the order. The placement notice and undertaking, in terms of regulation 7, for which there is a template, provides important information relevant to the Scottish authorities and agencies in relation to any child being moved to Scotland in circumstances where the DOL order can be legally recognised and so rendered compliant with article 5 ECHR.

[12] In relation to the review, extension and expiry of a DOL order the regulations are silent as to the obligations imposed. The Practice Guidance, Notice and Undertaking Template confirms (in paragraph 8) that the placing authority from the other jurisdiction must inform the relevant people and agencies in Scotland that are identified in the annex to the notice and undertaking template. As it is a prerequisite of the application of the 2022 regulations that there be a relevant High Court Order from the other jurisdiction in force and as such orders are necessarily time limited we recognise that further gaps in lawful authority for the deprivation of liberty of children present in Scotland could yet arise. In cases where the inherent jurisdiction of the English, Welsh or Northern Irish court is invoked to deprive the child of liberty, that court will remain the court of primary jurisdiction. Importantly, the English, Welsh or Northern Irish placing authority will retain primary responsibility for securing the needs and promoting the welfare of the child. We agree that the responsibility lies with the relevant placing authority to ensure that applications in the other jurisdictions are made timeously such that vulnerable young people are not left in restricted accommodation in Scotland without there being any extant lawful authority from the court of primary jurisdiction. Any change in the primary order from the appropriate court must be aligned with the *de facto* position of the child in Scotland. The regulations cannot elide the protective jurisdiction inherent in this court to intervene should such a situation arise and the welfare of the child so demands, but it is hoped and expected that, if the regulations are properly implemented, no future gaps in lawful authority will arise.

[13] Since we appreciate that the new scheme may require further training and guidance for all concerned in this and the other UK jurisdictions we will provide a copy of this opinion to the International Family Justice Office for England and Wales (and its Northern

Irish equivalent) so that any concerns arising from the operation of the 2022 regulations can be considered by the Cross-Border Judicial Protocol Group in due course.