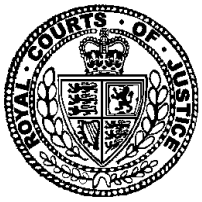

Neutral Citation Number: [2023] EWHC 129 (Fam)

Case No: DE22C00016 & DE2250258

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/1/2023

Before :

SIR ANDREW MCFARLANE (PRESIDENT OF THE FAMILY DIVISION)

- -

Re X (Secure Accommodation: Lack of Provision)

- -

- -

Hearing Dates: 16th November 2022 and 6th December 2022

- -

Ms Hannah Simpson, Counsel for the Applicant Local Authority
X's mother and step-father in person
Ms Louise Sapstead, Counsel for the 2nd Respondent Children's Guardian
Mr Jack Holborn, Counsel for the Secretary of State for Education

Approved Judgment

This judgment was handed down remotely at 10.30am on 25th January 2023 by circulation to the parties or their representatives by e-mail.

.....

Sir Andrew McFarlane P

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Sir Andrew McFarlane P:

1. The primary purpose of this judgment is for the court, once again, to draw public attention to the very substantial deficit that exists nationally in the provision of facilities for the secure accommodation of children. There are a number, and it is, sadly, an increasing number, of children and young people under the age of 18 years ['a child'] whose welfare and behaviour requires that they be looked after within a secure regime which restricts their liberty. These specialist units are limited in number and, at present, the number of secure beds is far out-stripped by the number of vulnerable young people who need to be placed in them. Courts are regularly told that, on any given day, the number of those needing a secure placement exceeds the number of available places by 60 or 70. It is not the role of the courts to provide additional accommodation; all the court can do is to call the problem out and to shout as loud as it can in the hope that those in Parliament, Government and the wider media will take the issue up.

2. There is a distinction between cases, such as the present, where the court has made a formal 'secure accommodation order' under Children Act 1989, s 25 ['CA 1989'] and other, bespoke, arrangements where the court may authorise the restriction, or deprivation, of a young person's liberty under its inherent jurisdiction ['DOL's cases']. This judgment is only concerned with the former.

3. A child may only be kept in secure accommodation if it appears:

    a) that –

        i) (s)he has a history of absconding and is likely to abscond from any other description of accommodation; and

        ii) if (s)he absconds, (s)he is likely to suffer significant harm; or

    b) that if (s)he is kept in any other description of accommodation (s)he is likely to injure him/herself or other persons. [Children Act 1989, s 25(1)]

4. Restricting the liberty of a child is a serious step that can only be taken if it is the most appropriate way of meeting the child's assessed needs [Government Guidance: *CA 1989 Guidance and Regulations, Vol 1: Court Orders* (2014), para 40]. The approach of the court is that such orders will 'only very rarely be appropriate' and 'must always remain a measure of last resort' [*Re SS (Secure Accommodation Order)* [2014] EWHC 4436 (Fam)]. For some children, placement in a secure children's home will represent the only way of meeting their complex needs, as it will provide them with a safe and secure environment, enhanced levels of staffing, and specialist programmes of support [Government Guidance (2014), paras 40-42].

5. In order to maintain focus on the wholesale failure to provide adequate resources to meet the needs of these most vulnerable and needy young people, it is neither necessary nor helpful to individualise the details of the particular case that is currently before the court. The young person, her parents, and the local authority responsible for care are, therefore, to remain anonymous. Within the proceedings it is accepted that no criticism can attach to the local authority, or the individual social workers, who have striven to find a suitable secure placement. The point to be made most firmly is that the situation faced by this local authority is one that can be, and is, faced by every other local

authority in England and Wales on a regular basis; it is, tragically, the norm. Naming the local authority in this judgment would therefore be an irrelevant distraction.

6. Further, in order to enhance the public understanding of just how desperate the circumstances of a young person who is found to need placement in secure accommodation may be, it is necessary to describe the history of 'X', the subject of the present case, in some detail ['X' being a randomly chosen letter in place of her name]. If her distressing personal history is, therefore, to be publicised, it is necessary to enhance the normal degree of anonymity by removing any reference to the geographical context, including the names of the solicitors acting for the various parties.

The factual background

7. X is a 15 year old girl. She is an only child. Her father has not actively participated in these proceedings and he has minimal involvement with X. Until 2020, X lived with her mother, her stepfather and two step-brothers.

8. X has suffered significant trauma and adversity in her childhood. Currently, X has a history of absconding, aggressive and threatening behaviour, self-harm and suicidal ideation. Additionally, X is assessed as having a low IQ, high functioning autism and Attention Deficit and Hyperactivity Disorder (ADHD).

9. At around age 10, X's behaviour deteriorated. There were several incidents where she assaulted family members or caused harm to herself. In 2019, when X was 12 years old, social services were made aware of X's aggressive behaviour towards others at school and her history of absconding. She was then charged with assaulting her grandfather. Multi-agency support was put in place and the situation improved for around 12 months. However, in the Summer of 2020, X became increasingly violent towards her mother and in August 2020 she was charged with assault. In turn, X alleged to the police that her stepfather and mother were violent towards her.

10. Reports of a deteriorating situation within the family led to the local authority instigating protective measures in October 2020 with X being deemed to be beyond parental control and a risk to herself and others. During the last two weeks of October, at just 13 years old, X absconded from home on four occasions. In November 2020, X was removed to local authority care by the police, after apparently assaulting her mother with a metal bar. Her mother then agreed to X being accommodated by the local authority under CA 1989, s 20.

11. In March 2021, X was detained under Mental Health Act 1983, s 136 by the police to enable them to take her to a hospital for a mental health assessment. This followed an incident at school where X attempted to jump from the roof. The school also reported that X had had numerous discussions with friends and professionals about ending her life. Whilst she was an inpatient X tried to abscond from the ward, she headbutted and punched the walls and doors and attempted to self-harm by scratching her wounds. She self-harmed using drawing pins, drawing blood from her arm and trying to strangle herself with her sock. X also made threats to kill staff and she damaged furniture.

12. In April 2021, the local Family Court made a secure accommodation order with respect to X (under CA 1989, s 25) and, X was then moved from the mental health ward and placed in a secure unit in Scotland. For much of her time in the secure placement, X

had been on a one-to-one staffing ratio with checks to avoid self-harm occurring once every 5 minutes during the night. The secure accommodation order was extended every three months until April 2022 when it was discharged on the basis that the criteria for such an order were no longer met.

13. Separately, care proceedings, which had been issued in 2021, concluded with the making of a full care order in April 2022 placing X in the care of the local authority.

14. Whilst in the secure placement X had undergone a full psychiatric assessment. On the basis of this assessment, on discharge from the secure unit, she moved in April 2022 to a residential placement in England, which was considered to be suited to meet her identified needs. The placement lasted for less than a month, during which there were many occasions on which X placed herself and others at risk of harm. As a result X was detained under MHA 1983, s 2 for assessment. Detention under the MHA 1983 section ended after some 10 days as the assessing psychiatrist advised that X did not present with a mental disorder requiring hospital treatment. She was therefore discharged to a series of unregulated placements in the community, under the supervision with a staffing ratio of five-to-one (staff to child).

15. The restrictions that were imposed upon X's liberty during this series of community placements were authorised by the High Court. The initial 'deprivation of liberty' ['DOLS'] order, made in May 2022, authorised the following restrictions:

> '(a) The child is subject to constant supervision on up to a 4:1 staff ratio;
>
> (b) The doors in the placement block will be locked where there may be a risk in regard to the child gaining access to items that she may use to cause herself or others harm.
>
> (c) All items capable of being used to cause harm to the child such as knives, pens and other sharps, items that could be ingested, materials that could be used to ligature to be kept locked away.
>
> (d) When the child is transported, car doors and windows will be locked.
>
> (e) Staff will use reasonable and proportionate measures to ensure that the child does not leave the block and to return her to the block if she does leave.
>
> (f) There will be constant visual observations of the child including, within reason, during her use of the bathroom. Should there be anything of concern, a full search to be completed of her room.
>
> (g) The door to her bedroom will remain open.
>
> (h) Checks will be made on her every 20 minutes during the night to ensure her safety. She will not be woken for these.
>
> (i) Reasonable and proportionate measures may be used to restrain her when distressed.
>
> (j) She will not be permitted access to her mobile phone or an internet enabled device at the present time.'

16. During her time in these community placements X absconded on four occasions, during which she had a number of sexual encounters with older males. X self-harmed, secreted weapons about herself and regularly threatened staff. On one occasion, in September 2022, X threw hot water over a staff member followed by a cup of urine and menstrual fluid. On another occasion she broke the plastic handle off a metal spoon and, pretending that it was a knife, threatened a staff member. She slashed her wrists and spoke of intending to jump off a local car park. Medical examination confirmed that she had had sexual intercourse during one absconding period.

17. In October, after being recovered by Police during a period of absconding, X claimed that she had inserted a razor blade into her vagina. She refused to comply with a medical examination to confirm this claim.

18. At the end of October she moved to the accommodation that she was occupying at the date of the hearings before me in November. That accommodation was an ordinary dwelling in a road in the suburbs of a small city. X was confined to the house and subject to the restrictions that had been authorised by the DOLS order, including continuation of a five-to-one staffing ratio.

19. In order to convey the extreme nature of X's behaviour, and the consequent inadequacy of the community placement either to contain her or to meet her needs, I will now quote directly from the social service records for one 18 hour period:

> '25/26th October - X refused her hair straighteners by staff and parents. Threats to stab and kill staff, boiled kettle and threw boiling water at staff, broke furniture, created a weapon from a 'wood picker' threatening to stab staff, managed to leave the property due to risk to staff. Staff followed her, but she climbed on top of a garage and jumped into neighbour's garden. Staff drove in the car, some builders said they had saw her, but staff eventually lost her. Continued to search but made the decision to return to the home. They completed a room search and did not find anything. X was found in [nearby town] around 8/8:30pm by Police. She was found at [shop] trying to shoplift alcohol. Police asked staff to come and collect her. Staff phoned parents, because parent use car to collect and staff use car to follow to offer parents support while two staff sits in the back seat with X. Parents refused to collect because they did not feel safe with X in their car. When X left the property she had a weapon but was not sure she was at [shop] with the weapon. Asked Police to support with transporting X back. There was a request to see if Police search her.
>
> Staff went to collect her from [shop] in [town]. X was there with a female police officer inside [shop]. Staff arrive, 6 staff in total and only four was going to support X. X refused to go into staff car stating she will cause a crash.
>
> Police escorted her back home. When she came out of the car, X said she was in pain because she inserted the razor and it was cutting her (up her vagina). Police said they could see blood trickling down. Police phoned the ambulance, which came at about 11:30pm/12am and they checked her over. She was brought to [hospital] in the ambulance. Staff attended Children A&E with her. While she was at Children A&E she was seen to put medical gloves up her vagina. The doctor believe she put a weapon in the glove and inserted it up her vagina. X left A&E at about 3:30am against medical advice as she had not been checked over by the doctor. Hospital security tried to get hold of her but had to let her go because she

was being physically violent. Staff followed but X disappeared in the bushes. Staff phoned the Police.

At about 4:30am Police said they found her on [the] dual carriageway and they took her back to Children A&E and staff were there waiting for her.

At about 6am. Registered Mental Health Nurse said she has been sectioned under 136 on the Mental Health Act and Police and Carers stayed with her. Registered Mental Health Nurse, called at 9:30am to inform the Police has left.

Police said because X is in a place of safety they can leave her. But nurse believe the Police need to stay with her because of section 136. Police later said they had not placed X on a 136, but hospital maintain that she was on a 136 when she arrived with Police.

X declined a scan to check for the razor.

CAMHS ['Child and Adolescent Mental Health Service'] saw X. The CAMHS worker was happy for her to be discharged. We were not aware until after she was discharged. Despite duty SW requesting we be invited to a discharge planning meeting.

Soon after this X has absconded from the hospital and all the support workers were out looking for her. Staff found her and we were informed they had taken her to McDonalds and then were taking her to see her mum.

There was some confusion around this time as to if X had been discharged or not as the ward were advising us that she needed to go back to hospital for MH ['mental health'] assessment. We were later advised that decision had been made that X does not need MH assessment and has been discharged. We were advised that CAMHS had spoken to carers about a safety plan.

Whilst X was in hospital there was an email to social care from [carer] which made reference to X having consensual sex whilst she was missing- it was not clear of this was the missing episode of the previous day or a previous one where there is an open investigation. Attempts were made to clarify this.'

20. This graphic record clearly demonstrates a number of factors:

a) The extreme behaviour that X was prepared to engage in to abscond from the placement;

b) The generally irrational and reckless nature of X's behaviour;

c) The potential for X's actions to cause serious harm to herself, staff or the public;

d) The risk of sexual abuse that this 15 year old girl was exposed to;

e) The inability of the combined efforts of significant numbers of social care staff, police officers, hospital security and medical staff to contain and control X's behaviour, which was sustained over many hours;

f) The degree to which X's actions were able to generate confusion between the three statutory agencies (police, social services and CAMHS) with the result that there was uncertainty over the legal regime that was applicable to her care at a time when the imposition of a legally supported care regime was urgently needed.

21. Those unfamiliar with the circumstance of children like X may be shocked by the extreme behaviour that is described. The truly shocking aspect to the eyes of judges sitting in the Family Court is that X's circumstances are not that unusual. There is a cohort of young people who are in extreme crisis to the same degree as X.

22. Although the point has not been argued before this court, it must be the case that the State has duties under the European Convention of Human Rights, Articles 2 and 3, to meet the needs of these children and to protect them from harm. The positive obligation that arises for public authorities under Arts 2 and 3 in cases such as this was explained by Lord Stephens in the Supreme Court in *Re T* [2021] UKSC 35 at paragraphs 175 and 176. The discharge of this positive obligation is currently being left to the court and to individual local authorities, yet neither of these agencies has access to the necessary resources to meet this obligation, nor, in the case of the court, the knowledge or real expertise to do so. One consequence of the lack of sufficient secure placements is that local authorities turn to the High Court to authorise a DOLS placement in other accommodation, often at very significant additional cost. Frequently, as the reported judgments describe, and as X's circumstances demonstrate, the accommodation that is authorised via DOLS is not appropriate to meet the young person's needs and is simply chosen as being the 'least worse', and often the only, option that is available.

23. Since mid-2022 all new DOLS applications have been issued in, and mainly heard in, London. The statistics are still being collated, but it is likely that the annual total number of DOLS applications may exceed 1,000. Whilst some of these cases may be renewed applications with respect to the same child, the number of cases, given the extremity of the behaviour of each young person and their need for a secure placement, is truly shocking. Many of these applications relate to children, like X, who should be in secure accommodation. The data suggesting that it is regularly the case that there will be, on any given day, some 60 or 70 children for whom a formal secure accommodation order has been made under CA 1989, s 25, yet no registered secure placement can be found, is therefore likely to understate the true position in circumstances where, instead of applying for a secure order (because of the lack of secure placements) local authorities simply by-pass the s 25 procedure and apply directly to the High Court for DOLS authorisation.

24. In 2019, and again in 2020, the Children's Commissioner for England published a report on children living in secure accommodation [*'Who are they? Where are they?*]. In addition to recording information about those children who are placed within the statutory scheme, either in registered secure children's homes or in a health service facility, the report shone a light on, what it called, the 'invisible' children whose placement is not reflected in the official statistics. The then Commissioner, Anne Longfield described the situation in her 2020 report:

> 'This year I have also found more evidence about the growing number of children locked up who do not appear in any official statistics and are not living in places designed to hold children securely. Often these children are incredibly vulnerable,

> at risk of being sexually or criminally exploited or harming themselves, yet there is no space in a secure children's home for them to be kept safe. Councils are having to come up with makeshift arrangements like flats or hostels or even caravans. We heard of one child who was living in a holiday home and had to move out for a weekend as it had already been let out to holidaymakers. Councils themselves know that this is often not nearly good enough, but they say it is the only way they can find to keep children physically safe as they wait for something better. These children exist in a grey area of the law, with fewer legal safeguards than other children. Some are locked up illegally with no court authorisation in place at all. Indeed, I have recently intervened in a Supreme Court case to share my concerns about the legal position these children are placed in.'
>
> …
>
> 'We also provide an update on the numbers of children who have been deprived of their liberty through the 'inherent jurisdiction' of the high court. This is used when no existing piece of legislation allows for a child to be deprived of liberty, but it is judged necessary to keep them safe. As our review of court cases shows, it is often used when a child needs a place in a secure children's home but there is none available. The numbers of children in this position appear to be rising, with 327 children included on applications to the high court in 2019/20 compared to 215 last year and 103 the year before.'
>
> …
>
> 'These numbers show that over the past three years the use of the inherent jurisdiction has been increasing. The inherent jurisdiction is often used when Section 25 of the Children Act would normally be used, but cannot be because the child is not being placed in a Secure Children's Home. It is therefore interesting to note that according to the comparable information from CAFCASS there are nearly as many children on applications through the inherent jurisdiction as through the statutory regime under Section 25 of the Children Act 1989.'

25. The insight gained by the Children's Commissioner is important. Her description of the situation is on all fours with the experience of the judiciary hearing these cases, with the court being obliged to sanction a range of less than satisfactory regimes because there is no available provision for placement in a statutorily approved unit. The report demonstrates that the number of children being placed in 'invisible' placements, outside the statutory scheme, is increasing and may roughly equal those who can be accommodated in a conventional secure home. On the basis of these figures, the current situation, where the scheme provided by the State is failing to meet the needs of half of the young people who need this level of State protection, is deteriorating so that soon, if not already, more than half of the children will be 'invisible' and under the radar.

26. Returning to the present case relating to X, it was promptly referred back to the High Court. On 6th November 2022 Mrs Justice Lieven made a secure accommodation order and directed that there should be a further hearing to consider the search for a secure placement for X, the court having been told that there were likely to be difficulties arising from the lack of availability of such places. Although post-dating that hearing, an account of the situation in a statement from X's social worker demonstrates just how sparse the provision of secure placements is:

> 'As of 14th November 2022, at 11.52am there are 72 live referrals [for secure placements in England and Wales] and 2 projected beds in the secure welfare estate. These 2 beds are suitable for males only. Therefore, there is currently no provision for X to be placed in secure accommodation.'

27. Pausing there, those unfamiliar with this jurisdiction may be surprised that the making of a court order authorising the placement of a child in secure accommodation is not immediately followed by that child being placed in a secure children's unit. When the criminal court passes an immediate prison sentence or makes a hospital order, the defendant is taken straight to a prison or to a secure mental hospital. There is no question of the authorities then having to engage upon a potentially lengthy process to find a placement because there are insufficient prison or hospital places. Neither is there a need for the criminal court to engage with the relevant authorities in establishing and holding on to substitute care arrangements which, because they fall short of 'secure accommodation' are, by definition, inadequate to meet the young person's needs. If there were no prison cells available to house those sent to prison there would be a public outcry; why should the lack of provision of secure units when a court has made a secure accommodation order be any less scandalous.

28. The situation facing the court and the local authority with respect to X is, unfortunately, typical. In recent years, judges of the Family Division have regularly published judgments seeking to draw attention to the parlous level of provision. In *Lancashire County Council v G, N v NHS England and Lancashire and South Cumbria, NHS Foundation Trust* [2021] EWHC 244 (Fam), MacDonald J set out extracts from such judgments. In order to illustrate the strength of these judicial observations and the extensive period over which they have been made, I will now reproduce MacDonald J's list and then add further extracts from cases that post-date *Lancashire CC v G*.

29. As long ago as 2017, in *Re X (A Child)(No.3)* [2017] EWHC 2036 (Fam) at [37], Sir James Munby, the then President, added these strong words to what had already become a matter of judicial comment in previous cases:

> "[37] What this case demonstrates, as if further demonstration is still required of what is a well-known scandal, is the disgraceful and utterly shaming lack of proper provision in this country of the clinical, residential and other support services so desperately needed by the increasing numbers of children and young people afflicted with the same kind of difficulties as X is burdened with. We are, even in these times of austerity, one of the richest countries in the world. Our children and young people are our future. X is part of our future. It is a disgrace to any country with pretensions to civilisation, compassion and, dare one say it, basic human decency, that a judge in 2017 should be faced with the problems thrown up by this case and should have to express himself in such terms."

30. In *Re M (A Child: Secure Accommodation)* [2017] EWHC 3021 (Fam) at [20], Hayden J said:

> "[20] It is profoundly depressing that having analysed the case in the way I have, the Local Authority has not ultimately been able to find a unit that is prepared to accommodate M. Thus I find myself, once again, in a position of considering the needs of a vulnerable young person in the care of the State where the State itself is unable to meet the needs of a child which they themselves purport to parent."

31. Sitting in the Court of Appeal in *Re T (A Child)* [2018] EWCA Civ 2136 at [2], as President, I said:

> "[2] …This court understands that, in recent years, there has been a growing disparity between the number of approved secure children's homes and the greater number of young people who require secure accommodation. As the statutory scheme permits of no exceptions in this regard, where an appropriate secure placement is on offer in a unit which is either not a children's home, or is a children's home that has not been approved for secure accommodation, the relevant local authority has sought approval by an application under the inherent jurisdiction asking for the court's permission to restrict the liberty of the young person concerned under the terms of the regime of the particular unit on offer.
>
> [3] Despite the best efforts of CAFCASS Cymru (this being a case concerning a Welsh young person), it has not been possible to obtain firm data as to the apparent disparity between the demand for secure accommodation places and the limited number available, nor of the number of applications under the inherent jurisdiction in England and Wales to restrict the liberty of a young person outside the statutory scheme. The data published by the Department for Education referred to in paragraph 2 simply measures the occupancy rate within the limited number of approved secure places without attempting to record the level of demand.
>
> …
>
> [5] It is plainly a matter for concern that so many applications are being made to place children in secure accommodation outside the statutory scheme laid down by Parliament. The concern is not so much because of the pressure that this places on the court system, or the fact that local authorities have to engage in a more costly court process; the concern is that young people are being placed in units which, by definition, have not been approved as secure placements by the Secretary of State when that approval has been stipulated as a pre-condition by Parliament".

32. In *Re B (Secure Accommodation Order)* [2019] EWCA Civ 2025 at [6], the Court of Appeal observed:

> "[6] This significant shortfall in the availability of approved secure accommodation is causing very considerable problems for local authorities and courts across the country. It has been the subject of expressions of judicial concern in a number of cases by judges dealing with these cases on a regular basis, notably by Holman J in *A Local Authority v AT and FE* [2017] EWHC 2458 (at paragraph 6):
>
> > 'I am increasingly concerned that the device of resort to the inherent jurisdiction of the High Court is operating to by-pass the important safeguard under the regulations of approval by the Secretary of State of establishments used as secure accommodation. There is a grave risk that the safeguard of approval by the Secretary of State is being denied to some of the most damaged and vulnerable children.'
> >
> > The absence of sufficient resources in such cases means that local authorities are frequently prevented from complying with their statutory obligations to

> meet the welfare needs of a cohort of vulnerable young people who are at the greatest risk of harm. The provision of such resources is, of course, expensive but the long-term costs of failing to make provision are invariably much greater. This is a problem which needs urgent attention by those responsible for the provision of resources in this area."

33. In *Dorset Council v E (Unregulated Placement: Lack of Secure Placements)* [2020] EWHC 1098 (Fam), His Honour Judge Dancey said at [42]:

> "I direct that this judgment be sent to the Secretary of State for Education and to the Children's Commissioner. The important message is that E is at risk of harm to himself or others, possibly fatally so, unless a secure placement can be found for him. At the moment, no such placements are available because there simply are not enough of them."

34. In *Z (A Child: DOLS: Lack of Secure Placement)* [2020] EWHC 1827 (Fam) at [23], Judd J said:

> "Because of the dire circumstances of this case the Secretary of State for Education was invited to attend this hearing by counsel to see if there was any possible assistance or suggestions that could be offered in circumstances where such a young and vulnerable person is without a suitable placement. I am very grateful that the Secretary of State arranged for Mr. Holborn of counsel to attend, but the response was quite clear. There is nothing that can be done and the local authority will have to keep searching."

35. In *Re S (Child in Care: Unregulated Placement)* [2020] EWHC 1012 (Fam) at [3], Cobb J said:

> "[3] Samantha's case is depressingly all too familiar to those working in the Family Court, and is I believe indicative of a nationwide problem. There is currently very limited capacity in the children's social care system for young people with complex needs who need secure care; it appears that demand for registered places is currently outstripping supply. This is the frustrating experience of the many family judges before whom such difficult cases are routinely presented. It is also the experience of the Children's Commissioner to whom I forwarded a number of redacted documents in this case, with the agreement of the parties. I have set out her response, having seen those documents, in full at [28] below. She has indicated that she would like the issues raised by this case, which she accepts are illustrative of similar cases up and down the country, to be raised directly with the Secretary of State for Education, the Rt Hon Gavin Williamson CBE MP. With my explicit permission, it shall be."

And at [31]:

> "[31] The President of the Family Division has had sight of this judgment in its final draft. He entirely shares the concerns which I have expressed above about Samantha's situation, and about the significant number of similar cases which are regularly brought before the Family Courts; the essential message of this judgment of course echoes what he himself had said eighteen months ago in Re T ."

36. In *H (Interim Care: Scottish Residential Placement)* [2020] EWHC 2780 (Fam) at [85], Cobb J said:

> "As this judgment was in preparation, the Children's Commissioner published a report entitled "Unregulated: Children in care living in semi- independent accommodation" (10 September 2020) which highlights the lack of capacity in children's homes in England and Wales, and reveals how thousands of children in care in England and Wales are living in unregulated independent or semi-independent accommodation. The report records that "residential care is failing to deliver the right placements in the right areas to meet children's needs". I had cause to discuss one such young person in Re S (Child in Care: Unregistered Placement) [2020] EWHC 1012 (Fam) and in that judgment at [16]-[20] outlined the wider context of the problem; HHJ Dancey had similar cause to highlight the problem a few weeks later in Dorset Council v E [2020] EWHC 1098 (Fam) , and Judd J similarly in Re Z (A Child: DOLS: Lack of Secure Placement) [2020] EWHC 1827 (Fam) ."

37. In the Supreme Court in *Re T* [2021] UKSC 35 at [166], Lord Stephens, setting out the context of the appeal, described the lack of provision as scandalous:

> "First is the enduring well-known scandal of the disgraceful and utterly shaming lack of proper provision for children who require approved secure accommodation. These unfortunate children, who have been traumatised in so many ways, are frequently a major risk to themselves and to others. Those risks are of the gravest kind, and include risks to life, risks of grievous injuries, or risks of very serious damage to property. This scandalous lack of provision leads to applications to the court under its inherent jurisdiction to authorise the deprivation of a child's liberty in a children's home which has not been registered, there being no other available or suitable accommodation"

38. In *Lancashire County Council v G, N* [2020] EWHC 3280 (Fam), MacDonald J said:

> “27. Amongst the fundamental principles reflected in the foregoing passage is that the development of children and the development of society are intrinsically and inseparably linked. As was recognised in the American case of Brooks v Brooks 35 Barb at 87-88 in 1861, the sound development of the child in all aspects is indispensable to the good order and the just protection of society. Human society benefits from the addition of the child as a member of that society, but the child and society will also suffer if society then fails to safeguard and promote the welfare of that child where the parents have proved, by reason of circumstance or inclination, unable to do so. G's welfare is the court's paramount consideration. But amongst the reasons that this is so is that the wellbeing of our society is dependent upon the physical, emotional and educational health of our children, including G.
>
> 28. Within this context we have a responsibility primarily to G but also to ourselves to ensure her physical, emotional and educational welfare is safeguarded and promoted. This is an imperative course not only in order to maintain dutiful fidelity to the principle that G's best interests are paramount, but

> also in order to ensure that society endures and develops for the benefit of each and all of its members, including G. At present, society, our society, is failing in that course with respect to G. As recognised by Sir James Munby in Re X (A Child)(No.3), that failure is, and can only ever be, a self-defeating mark of shame for us all."

39. In *Lancashire County Council v G, N v NHS England and Lancashire and South Cumbria, NHS Foundation Trust* [2021] EWHC 244 (Fam), MacDonald J said:

> "34. As a judge, I must assiduously avoid involving myself in matters that are properly the purview of Parliament. Likewise, the judicial role is not that of the polemicist. I have however, taken the judicial oath. In doing so (and as recalled by Sir James Munby P in a similar case in Re X (A Child)(No 3) [2017] EWHC 2036 (Fam)) I promised to do right by all manner of people according to the laws and usages of this realm. It is very hard, if not impossible, to do right by G, to keep her safe and to work to relieve her enduring and acute emotional pain, when the tools required to achieve that end are simply unavailable to this court. As I have commented in my previous judgments, this places the court in the invidious position of being required by the law of this realm to make decisions that hold G's best interests as the court's paramount consideration but being effectively disabled from doing so by an ongoing and acute lack of appropriate welfare provision for a constituency of the country's most needy, most vulnerable children."

40. In *Blackpool BC v HT (A Minor)* [2022] EWHC 1480 (Fam), MacDonald J at paragraph [19] said:

> "The courts have repeatedly emphasised the need for the State agencies engaged in cases of this nature to work co-operatively to achieve the best outcome for the child or young person. Within the context of the question of whether a child or young person should be provided with a placement by the local authority or with Tier 4 CAMHS provision, it is vital that local authorities, Clinical Commissioning Groups (which are responsible for commissioning CAMHS services for children and young people requiring care in Tier 1, Tier 2 or Tier 3) and NHS England (which is responsible for commissioning Tier 4 CAMHS services) recognise the emphasis that is placed by the courts and in the guidance on co-operation between State agencies."

41. In *Manchester City Council v K (J's Mother), An NHS Trust, J (By her Children's Guardian)* [2022] EWFC 121, Poole J said:

> "36. This case, as do many others involving the care of children with complex needs, calls into question the court's role. Very often the court is told that there is only one place where the child can be accommodated. The court's role is therefore very limited. There are no real choices for the court to make. The court cannot direct that placements shall be made available. The court is not a regulator and cannot inspect potential placements or oversee care regimes. On the other hand, even when there are no other placement options, the court does not merely provide a rubber stamp for the restrictions sought, and there are decisions to be made about the extent of the restrictions that are necessary and proportionate and in a child's

> best interests. However, the courts, like the parties, continue to be confined by the consequences of what Lord Stephens called a "scandalous lack of provision" for which it appears that there is no end in sight."

42. It is, of course, not for the courts and the judges to determine matters of policy and the allocation of additional resources with respect to increasing the provision of secure accommodation places to meet the welfare needs of this most vulnerable group of children. All the courts can do is seek to draw attention to the problem in the hope that those who do have responsibility for these matters in Parliament and in Government will take the issue up and look to bring about a change in the current chronic shortfall in secure placements. Despite the regular flow of judgments of this nature over recent years, it is, at least from the perspective of the experienced senior judges who regularly deal with these cases, a matter of genuine surprise and real dismay that the issue has, seemingly, not been taken up in any meaningful way in Parliament, in Government or in wider public debate.

43. It is against that background that in the order made on 6 November, Lieven J went on to invite The Children's Commissioner for England to attend the next court hearing, and to direct the Secretary of State for Education to attend by a representative and to serve a statement confirming the position in relation to the provision of secure accommodation for children, the demand in relation to the same and the availability of secure accommodation for X. It was at that stage that the proceedings were transferred for hearing before the President of the Family Division.

The secure accommodation allocation system

44. Before turning to the further progress of the court proceedings, it is helpful to outline the legal structure and the system by which a particular placement comes to be allocated to an individual child.

45. The duty to provide accommodation for those children who need it is firmly placed on the local social services authority for the area in which the child ordinarily resides [CA 1989, s 20]. In most ordinary circumstances, there is a general duty, imposed by CA 1989, s 22G, on a local authority to take reasonable steps to place such a child in accommodation that meets his/her needs within the authority's area. 'Accommodation' in this context, where the child cannot be placed in their own family, means placement in foster care or in a children's home [CA 1989, s 22G(5)].

46. Whilst every young person who meets the criteria in CA 1989, s 25 for secure accommodation will plainly be a child in need of accommodation and will trigger the duty on the relevant local authority to provide accommodation, there is no requirement for every one of the 152 separate local authorities to have sufficient secure units within their own borough available just in case a secure placement is needed. There are currently 13 secure children's homes in England; 12 are operated directly by an individual local authority and one is run by a charity.

47. In 2010, the Department for Education issued statutory guidance '*Sufficiency: Statutory Guidance on Securing Sufficient Accommodation for Looked After Children*'. This guidance expands on what is termed 'the sufficiency duty' in s 22G. It is of note that

the guidance does not engage with the topic of the provision of secure accommodation at all, save for one passing reference.

48. To assist individual local authorities in searching for a secure placement, the Secure Welfare Coordination Unit ['SWCU'] was established by the Department for Education ['DfE'] in May 2016. The unit, which is funded by the DfE, is operated by Hampshire County Council. The court has received a helpful letter from the Service Lead Manager for the SWCU which explains its role:

> 'The SWCU are effectively a broker for all local authorities across England and Wales to identify potential placements within a secure children's home. The decision as to whether to accept an individual child for a placement within a home remains with the manager of the individual unit. The SWCU … does not hold any statutory decision-making powers. The SWCU is a small unit, grant funded by the DfE for the purposes of administering placements and collecting data on secure welfare. ... The SWCU provides a transparent, dedicated single point of contact for local authorities in England and Wales to arrange secure welfare placements and streamline the process of finding the most suitable placement matching the individual needs of each young person needing secure care.'

49. The letter goes on to explain that the decision actually to make a placement once one has been identified is taken by the local authority, on the one hand, deciding if what is on offer is suitable for the individual child's needs, and by the provider of the particular secure unit, on the other hand, deciding to accept that child. Once a referral of a child is live on the SWCU system, it remains live until a placement is found or the referral is withdrawn. Every day each secure unit reports the availability of beds to the SWCU. Homes with a bed that may be available will search the live referrals to identify which young person's needs are compatible with the home's resources. The offer of a placement will then be made.

The position of the Secretary of State for Education

50. In response to the direction made in the order of 6 November, the court received a letter dated 11 November from the Deputy Director of Looked After Children Placements on behalf of the Secretary of State ['the DfE letter']. The letter makes the following points:

i) The responsibility for ensuring a looked after child is placed in the appropriate care setting lies with local authorities;

ii) Local authorities have a duty to ensure sufficient appropriate provision, including secure accommodation, for the children they look after;

iii) The final decision on placement lies with the provider of the children's home;

iv) The Secretary of State has no responsibility for decisions on the placement of individual children into secure accommodation in England;

v) The DfE set up and supports the SWCU;

vi) Local authorities should have their own placement policies based on the Care Planning, Placement and Case Review (England) Regulations 2010. While there

> is no duty to provide secure accommodation in their area, there are general duties on local authorities to provide accommodation for looked after children. Reference is made to the 2010 Statutory Guidance.

51. The letter then states:

> 'While clear that LAs must fulfil their sufficiency duty, we are sympathetic to the challenges presented in this case and recognise the difficulty LAs sometimes face in commissioning suitable accommodation for some children with complex and very high needs. The Government is supporting LAs to meet their statutory duty through the provision of significant capital investment. The 2021 Spending Review announced £259 million of capital funding to maintain capacity and expand provision in both secure and open children's homes. This will provide high quality, safe homes for some of our most vulnerable children and young people and create new places and support provision in secure children's homes in all nine regions of England.'

52. The letter concludes with a report of the current 'very high volume of referrals' [73] that are live on the SWCU, before indicating that the Secretary of State considers that 'it would not be an effective use of public funds' for counsel to be instructed to attend the planned hearing; the Secretary of State therefore asked to be excused from attendance.

53. The letter was placed before me. I refused the request for the Secretary of State to be excused from attendance at the hearing on 16th November.

Hearing on 16th November 2022

54. At the hearing on the 16th November it was not possible to resolve the pressing issue of identifying a placement in a secure unit for X. It was, however, possible to seek greater engagement from the Secretary of State on the wider issue of the chronic shortfall in the provision of secure welfare accommodation. I am grateful to Mr Jack Holborn, counsel representing the DfE, for engaging in the process, whilst firmly holding to his instructed position.

55. During the hearing I expressed my disagreement with the central proposition that the Secretary of State had nothing to contribute on this issue. The problem being faced by those trying to find a secure placement for X is not a one-off, it was, I explained, one being shared by the 70 or so others for whom places were being sought that day, and they and their forebears who have faced similar odds for the past decade or so, every time that these and similar statistics are quoted. The lack of secure placements is long-standing and chronic. My view, expressed during the hearing, was that the stance taken by the Department for Education, to the effect that it was not its problem and was the responsibility of individual local authorities, displayed a level of complacency bordering on cynicism. It was, I observed, shocking to see that the Department for Education seemed to be simply washing its hands of this chronic problem.

56. Whilst accepting that the account of the legal structure that is set out in the letter filed by the Department no doubt correctly described the current statutory system, I commented that that system is palpably not working and had not been working for many

years. It must, I observed, surely be for central government to monitor and, if necessary, get a grip upon what is a long-standing national problem.

57. The judges who sit in the High Court Family Division now spend a fair proportion of their time on cases of this nature, and much of that time is generated because there are not sufficient, suitable secure children's homes for those who need secure accommodation. I therefore expressed my surprise that the Secretary of State's response was simply to say that this desperate situation was not her responsibility and, indeed, it would be a waste public money even to engage with the court in considering the mismatch between the demand for secure welfare placements and the supply of them.

58. During the hearing, on instructions, Mr Holborn accepted the court's request for the Secretary of State to assist by filing a skeleton argument dealing with the supply and demand for secure children's home placements. It is fully accepted that these are not judicial review proceedings and there is no formal legal requirement that the court may place on the Secretary of State in this regard. I was, therefore, grateful to Mr Holborn and those who instruct him for understanding and accepting the need for this modest level of engagement. This part of the proceedings relating to X was therefore adjourned to a further hearing on 6th December.

Hearing on 6th December 2022

59. The skeleton argument prepared on behalf of the Secretary of State for the 6 December hearing includes a number of important passages:

> 'The SoS's position of principle is known to the Court and the parties, namely that the duty to provide for X's needs, including secure accommodation, lies upon the applicant local authority and not the SoS. However, the SoS accepts that, nationally, there are significant problems with the availability of sufficient placements particularly in those cases involving children with complex needs. This requires action by His Majesty's Government ("HMG") collectively (not just the SoS for Education) to support local authorities to meet their statutory duties. [para 2]
>
> …
>
> **'Steps being taken by HMG**
>
> 18. There are several strands to HMG's efforts to improve the provision for children who are deprived of their liberty.
>
> 19. As part of the 2021 Spending Review, HMG announced £259 million to maintain capacity and expand provision in secure and open residential children's homes.
>
> 20. Several phases of capital investment will create new places and support provision in open and secure children's homes. The programme will create a total of 350 children's open residential placements nationally by the end of 2025. The precise number, location and timing of additional SCH places is yet to be confirmed. However, the SoS can confirm that the programme includes work to

> create new units in London and the West Midlands where there is currently no SCH provision.
>
> 21. The SoS's position is that capital investment in new settings is only part of what is required. Meeting the needs of children in these circumstances often requires significant input from NHS services, such as child and adolescent mental health services. The SoS is contributing to ongoing work led by NHS England focused on children and young people with complex needs and emotional and behavioural issues, considering the scope the scale and gaps in provision for this cohort, alongside best practice examples, with a view to making recommendations for further work in future years.
>
> 22. To support the sector with recruitment and retention of the children's homes workforce, the Department of Education will undertake a workforce census in 2023 and 2024 with in-depth cases studies on recruitment, retention, qualifications, and training.'

60. The skeleton argument went on to note that the 'Care Review;' [https://childrenssocialcare.independent-review.uk/final-report/] published in May 2022 made a number of relevant recommendations including one for the establishment of 20 'Regional Care Cooperatives', which would take over the commissioning of all children's social care placements in place of individual local authorities. At the date of the hearing, the Secretary of State was not in a position to state her policy position with respect to that proposal.

X has moved to a secure unit

61. Eventually, in December 2022, a place in a secure unit in Scotland was found for X and she is now placed there. Given the geography, this is not the most satisfactory outcome, but it is of note that, once cases of this nature have been transferred to the High Court and the judge has sought to bring pressure to bear on the authorities, a secure placement is often located.

Conclusion

62. This judgment does not record any decision by the court, either about X or more widely as to the law. As I have said, its primary purpose is for the court, once again, to draw public attention to the very substantial deficit that exists nationally in the provision of facilities for the secure accommodation of children. In drawing to a close, it is simply necessary to reiterate the central message by stressing that very senior judges have, for over six years, been consistently calling for Parliament and government to acknowledge the need for action to address the gross lack of registered secure accommodation units.

63. Judges are currently being forced to perform functions which are properly the role of government by overseeing the search for suitable placements and by sanctioning ad hoc arrangements in individual cases because there is no placement available in the statutory scheme. Whilst the Supreme Court, in *Re T*, has held that using the inherent jurisdiction in this manner is lawful, due to the gross lack of secure accommodation provision the High Court is nevertheless having to operate outside the law as it has been made by Parliament and, despite the judge's consistently asking it to do so, Parliament has seemingly not even discussed this parlous and most worrying situation.

64. It must be accepted that simply adding to the number of judgments calling for action will not improve the position for young people such as X, but in the present situation, that is all the judges can do. It is a situation that will not change until urgent and effective action is taken by government and Parliament to discharge the obligation that is on the State to protect the country's most vulnerable children. The submissions made on behalf of the Secretary of State are therefore most welcome. They record, it would seem for the first time, an acceptance by the Secretary of State for Education that, nationally, there are significant problems with the availability of sufficient placements and that 'this requires action by His Majesty's Government collectively to support local authorities to meet their statutory needs'. It is to be hoped that this marked change from the approach trailed in the Department's letter of 11 November does indeed result in action and that the need for the court to hand down judgments of this nature will be a thing of the past.