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Case No: FD24C40727

IN THE HIGH COURT OF JUSTICE FAMILY DIVISION
AND IN THE MATTER OF THE INHERENT
JURISDICTION OF THE HIGH COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2024

Before:

MR JUSTICE KEEHAN

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Between:

CONWY COUNTY BOROUGH COUNCIL	**Applicant**
-and-	
PR	**1st Respondent**
-and-	
LR	**2nd Respondent**
-and-	
SB	**3rd Respondent**
(through her Children's Guardian, Lorraine Fozzard)	
-and-	
BETSI CADWALADR UNIVERSITY HEALTH BOARD	**4th Respondent**

- -

Re SB

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Joe O'Brien KC (instructed by **Conwy County Borough Council**) for the **Applicant**
Dominic Boothroyd (instructed by **HD Law**) for the **1st Respondent**
Nicholas Sefton (instructed by **Gamlins Solicitors LLP**) for the **2nd Respondent**
Neil Owen-Casey (instructed by **Gamlins Law**) for the **3rd Respondent**

Emma Sutton KC (instructed by **NHS Wales SSP Legal & Risk Services**) for the **4th Respondent**

Hearing dates: 29 and 30 October 2024

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Approved Judgment

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MR JUSTICE KEEHAN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment 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.

Mr Justice Keehan:

Introduction

1. I am concerned with one young person, SB, who was born on 25 January 2009 and is 15 years of age. Her father, the first respondent, is PR and her mother, the second respondent is LC.

2. On 5 July 2024 the local authority, Conwy County Borough Council, made an application for a care order in respect of SB. She was made the subject of an interim care order on 23 July 2024.

3. On 25 July 2024, the local authority made an application for the deprivation of SB's liberty to be authorised pursuant to the inherent jurisdiction of the High Court. The first deprivation of liberty order ('DoL') was made on 26 July 2024. It has subsequently been extended.

4. Since April 2024 SB has been exhibiting increasingly challenging and extreme behaviour which has placed herself and others at very real risk of very serious harm and, potentially, leading to her death or the death of others. She has been the subject of repeated referrals to the local authority, local psychiatric services, and the police.

5. SB is currently placed in a General Adolescent Unit located at the North Wales Adolescent Service ('NWAS') subject to a DoL. Betsi Cadwaladr University Health Board ('the health board') is responsible for caring for SB during her admission to NWAS. It was joined as the fourth respondent to these proceedings on 13 August 2024.

6. An issue has arisen between the local authority and the heath board as to which statutory body is responsible for the care and treatment of SB and under what legal framework. This issue culminated in the local authority seeking a declaration and ancillary orders from this court, in short form, that because SB was detainable under the provisions of the Mental Health Act 1983 ('the 1983 Act'), the court did not have jurisdiction to grant a DoL pursuant to the inherent jurisdiction. In practical terms, the thrust of the local authority's case was that it was the responsibility of the health board, pursuant to the provisions of the 1983 Act, to make provision for the care and treatment of SB, and not the responsibility of the local authority even with the benefit of a DoL, if authorised by the court.

7. The health board strongly opposed the position of the local authority. It asserted that this court had no jurisdiction to determine whether SB detainable in a hospital pursuant to the 1983 Act; it had no jurisdiction to exercise a reviewing or supervisory role of the decisions made by clinicians and professionals under the 1983 Act; and that for the court to make a declaration or findings as to whether SB was detainable under the 1983 Act put pressure on the health board to change its position, or otherwise, was an abuse of process.

8. The local authority's application and the health board's preliminary issue as to jurisdiction were listed for determination by me at this hearing.

9. The children's guardian and the mother supported the case advanced by the local authority. The father did not.

Background

10. I have had the benefit of a comprehensive and helpful chronology prepared by counsel. For the purposes of this judgment, I propose to focus on the principal events which have occurred since April of this year.

11. The context of these more recent events is that SB has been diagnosed with autism and with learning difficulties – she has low average cognitive ability. In 2020 SB's parents separated and the mother left the family home. These events greatly distressed SB who felt she had been abandoned by her mother. This distress was considerably exacerbated when SB became aware that her mother had given birth to a baby. Overlaying this was the alleged sexual abuse that SB had suffered by an older male relative which had repeatedly taken place since she was 12 years of age. The perpetrator was arrested in May 2024 and is the subject of an ongoing police investigation.

12. On 6 May, SB was located on the A55 dual carriage way. SB had a small knife in her possession which was removed by the police. SB was taken to a place of safety and her father was contacted. Her father reported discovering that a family member had been sexually abusing her.

13. On 30 May 2024, SB made allegations of sexual abuse against a family member. Later SB climbed out of the window of the family home. The police were called by members of the public. When the police approached SB, she was non-verbal and was carrying a bag with a handsaw. SB later said that she was having issues with a woman ('woman A') in Wolverhampton and wanted to go to her to 'sort things'. The police held each arm to prevent her from falling and tried to walk her to her father's car. SB stated she did not want to go home. When asked why, she stated 'I don't know' or 'just because'. SB resisted, dropped to the floor, and kicked a police officer 3 times. SB was restrained. SB was placed in the back of a police vehicle and arrested for assaulting a police officer and returned home. Once home SB was de-arrested.

14. On 11 June, SB was located on the A55 dual carriage way. SB was resistant towards officers and kicked out at them. SB had a screwdriver in her pocket.

15. On 16 June, SB was found by a member of the public walking along the dual carriageway. The police attended and returned her to her father's address. SB kicked out at the officers present.

16. On 15 June, SB was reported missing and found by the police. The police took her to A&E and then to the paediatric ward for a place of safety. The plan was for CAMHS to assess her in the morning, however before CAMHS were able to meet with her she assaulted members of staff by kicking and punching them and left the hospital. The police were called, and she was returned by three police officers whom she assaulted.

17. On 25 June, SB went missing twice and was found both times on the A55 heading to Wolverhampton to hurt woman A. On the second occasion, she assaulted police offers when they arrested her for threats to kill. In custody, SB assaulted police officers on at least three occasions. SB was charged with making malicious communications and

assaulting an emergency worker. SB was bailed with conditions and was interviewed by the police.

18. On 27 June, the police were called as SB walking along the A55 with a baseball bat. The police attended and found her father was driving behind her trying to encourage her to get in the car. SB assaulted the police officer with the baseball bat and was arrested and taken to St Asaph police station. SB was handcuffed and restrained using limb restraints. The custody officers refused to have her in detention and she was taken home. Her father refused to have her home because he could not keep her safe. SB was taken into police protection and was transported to a local police station. Whilst there, SB flooded the bathroom and assaulted police offers. SB was placed in the back of a police van in the car park. A mental health assessment was completed by Dr Hales (consultant CAMHS and adolescent forensic psychiatrist). SB wrote that she wanted to go to Manchester to get to a named woman ('woman B') to rape and murder her. Dr Hales' opinion was her differential diagnosis would be of '*ASC and trauma leading to emotional dysregulation'* and that SB did not fulfil the criteria for detention under the 1983 Act. SB returned home that evening with two support staff and was prescribed and given sedative medication. Notwithstanding this SB required restraint by police officers.

19. On 29 June, SB absconded from home and took her father's car. SB was driving at speeds in excess of 100 mph. Multiple traffic officers were deployed and SB was followed for a lengthy period before being stopped. SB would not leave the vehicle and a window was smashed to support removing her from the car. SB was placed in police custody and kicked the legs of two police officers when being transferred. A shard of glass was removed from her pocket. SB was taken to a local police station and placed under police protection. SB attempted to grab the water pipe valve and a police officer was required to hold her. SB kicked this police officer 10 times prior to another officer coming to assist. A search was completed during which she kicked staff. A social worker attended to work on a plan to support SB to return home with care assistance. SB asked to go to the toilet and kicked the shin of the police officer and damaged a door. SB was placed in limb restraints.

20. On 30 June, SB went for a walk with support staff and ran off. Support staff grabbed her and she started kicking their legs. A member of the public intervened and SB was placed on the floor where she repeatedly pinched a member of staff. The police were called. SB was hitting and kicking staff. When the police arrived, SB was assaulting staff and was restrained. She kicked at the police and was put in leg restraints. SB was placed in police custody. Her father attended. SB was charged with a number of offences including common assault. SB was taken to a local hospital for a mental health assessment but appears to have been transferred back to a local police station. Dr L and another section 12 approved doctor spent three hours with her and agreed she needed further assessment in hospital to rule out psychosis. SB was moved to the section 136 suite at a local hospital awaiting a PICU placement.

21. On 4 July, SB moved to NWAS General Adolescent Unit because she was more settled and no PICU bed had been found. SB damaged the bedroom destroying furniture, breaking glass, and damaging walls. SB was described as not outwardly angry or chaotic but methodical and focussed. The police were called and many officers arrived with a negotiator. Restraint was used and SB later settled.

22. On 5 July, Conwy County Borough Council applied for an interim care order. SB's behaviour escalated with her climbing fences and attempting to grab staff. Staff were able to verbally de-escalate, however, after a short time SB charged at staff placing her hands around one staff member's throat. SB was pushed back by staff but proceeded to charge at both staff members. The restraint team utilised supine hold. Restraint lasted 30 seconds and was released when SB's aggression stopped.

23. Thereafter, between 12 July and 12 August SB was aggressive, challenging and physically violent to staff members at the hospital on an almost daily basis. SB had to be physically restrained on a considerable number of occasions and on two occasions, on 14 and 18 July, she was chemically restrained after she had assaulted members of staff by kicking them and grabbing them around their necks.

24. On 25 July, the local authority made an application for the deprivation of SB's liberty to be authorised pursuant to the inherent jurisdiction. SB was detained for assessment pursuant to s.2 of the 1983 Act on 30 June. This expired on 28 July.

25. On 9 August, SB was given a non-internet enabled phone. SB texted woman A. Woman A then called the hospital and said that SB had contacted her and made sexual and violent threats. This was reported to the police and the phone was removed from SB.

26. On five subsequent days in September (13th, 14th, 16th, 20th, and 24th) and on 9 October, SB was aggressive, challenging and physically violent to staff. On each of these occasions she had to be physically restrained for a period of time. On 20 September, SB pulled out a significant amount of hair from the head of a member of staff. The police were called and SB was placed in handcuffs before being carried into a segregation area. On 9 October, after chemical restraint had been administered, SB was still physically aggressive and the police attended the hospital.

27. I have focussed on these events to illustrate the nature and degree of SB's challenging behaviours. I have not, save for one or two references, included the numerous occasions over the months since April this year when SB has been seen by consultant psychiatrists or other mental health and social care professionals, nor have I included the very frequent multi disciplinary meetings at which her care and treatment has been discussed. Suffice to note that her care and treatment has been the subject of intense and active consideration.

28. Over the last few months SB has been prescribed an anti-psychotic drug, Olanzapine, and an anti-obsessional drug, Fluoxetine. There have been limited occasions when SB has not been compliant with taking her medication. For the last few weeks, she has been entirely and readily compliant. There have been no episodes of challenging, aggressive, or physically violent behaviours since 9 October 2024.

Clinical Assessment

29. SB has been the subject of assessments as to whether she met the statutory criteria for detention for treatment pursuant to s.3 of the 1983 Act on no less than six occasions by eight consultant psychiatrists over the past four months. All of them concluded that she was not detainable and nor would it be in her interests to be detained in a hospital. It is of note that five of the eight consultant psychiatrists who undertook assessments of SB were not and are not employed by the health board.

30. On 6 August 2024, the court gave permission for the local authority to instruct on a joint basis, within the care proceedings, an independent consultant psychiatrist to assess SB and to prepare a report. The health board were not a party to this instruction Dr Vaidya's first report is dated 15 September 2024. His conclusions were:

> "3.2. SB shows behaviours that lend themselves to a diagnosis of Delusional Disorder in addition to her diagnosis of Autism Spectrum Disorder. In combination with her cognitive ability, her lethality to her potential victims increases.
>
> 3.3. Having considered all possible options (criminal justice system, child welfare system, Mental Health Act) and their longer term implications, it is my view that an outcome under the Mental Health Act will afford a marginally improved prognosis which is otherwise bleak.
>
> 3.4. The bleak prognosis arises from the risks of harm associated with a lifespan condition (ASD) alongside a mental disorder (delusional disorder)."

Contrary to the opinions of the above mentioned psychiatrists, Dr Vaidya was of the view that SB did satisfy the criteria of s.3 of the 1983 Act for detention for treatment in a hospital.

31. Subsequently, Dr Vaidya and Dr Hales, SB's treating consultant psychiatrist, produced a joint statement dated 7 October 2024 setting out the areas of agreement and disagreement between them and the reasons for the latter. The agreed matters were that:

i) SB had autism;

ii) She was of low average cognitive ability;

iii) There should be a step down plan albeit they did not agree on the legal framework for the same;

iv) The assessment of risk that she posed to herself and others; and

v) She may have to move outside of Wales for hospital care.

The matters upon which they disagreed were:

i) A diagnosis of delusional disorder;

ii) The legal framework for support and restrictions; and

iii) Whether SB could be characterised as having murderous intent.

32. For reasons which I shall set out later in this judgment, neither Dr Hales nor Dr Vaidya were required to give evidence and both were stood down from attending the hearing to give evidence.

33. I note, however, that even if I had heard evidence from them, and even if I had preferred the evidence and opinions of Dr Vaidya, that would not in and of itself have led to SB being detained under s.3 of the 1983 Act in hospital for treatment.

Statutory Framework

34. The criteria for the compulsory admission of a person with a mental disorder for treatment in a hospital is set out in s.3 of the 1983 Act which provides:

> "3 Admission for treatment.
>
> (1) A patient may be admitted to a hospital and detained there for the period allowed by the following provisions of this Act in pursuance of an application (in this Act referred to as "an application for admission for treatment") made in accordance with this section.
>
> (2) An application for admission for treatment may be made in respect of a patient on the grounds that—
>
> (a)he is suffering from [F1mental disorder] of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and
>
> (b). . . . . .
>
> (c)it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section; and
>
> (d)appropriate medical treatment is available for him.
>
> (3) An application for admission for treatment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2) above are complied with; and each such recommendation shall include—
>
> (a)such particulars as may be prescribed of the grounds for that opinion so far as it relates to the conditions set out in paragraphs (a) and (d) of that subsection; and
>
> (b)a statement of the reasons for that opinion so far as it relates to the conditions set out in paragraph (c) of that subsection, specifying whether other methods of dealing with the patient are available and, if so, why they are not appropriate.
>
> (4) In this Act, references to appropriate medical treatment, in relation to a person suffering from mental disorder, are references to medical treatment which is appropriate in his case,

> taking into account the nature and degree of the mental disorder and all other circumstances of his case."

35. An application for the detention of a person pursuant to s.3 may only be made by an approved mental health practitioner ('AMHP') or a nearest relative, but it is more usually made by an AMHP. The application is made to the managers of the hospital to which admission is sought: s.11(2) of the 1983 Act. It must be supported by the recommendations of two registered practitioners, one of whom must have special experience in the diagnosis of mental disorder: ss 11(7) and 12(2) of the 1983 Act. The recommendations of the medical practitioners must include their opinion that the statutory criteria of s.3(2) of the 1983 Act are satisfied in respect of the patient.

36. In Wales the provision of the 1983 Act is supplemented by the Mental Health Act 1983: Code of Practice for Wales, Review which was published in 2016 pursuant to s.118 of the 1983 Act. Where two medical practitioners are in support of the compulsory admission of a patient, paragraph 14.69 of the Code of Practice provides that:

> "When making recommendations for detention under section 3, doctors are required to state that appropriate medical treatment is available for the patient. It is their responsibility to take the necessary steps to secure a suitable hospital bed; it is not the responsibility of the applicant. In some cases, it could be agreed locally between the local authority and the relevant NHS bodies and communicated to the AMHP that this will be done by any AMHP involved in the assessment"

37. Child and Adolescent Mental Health Services ('CAMHS') are planned and commissioned on a four tiered system:

    i) Tier 1 provides universal services;

    ii) Tier 2 provides targeted services;

    iii) Tier 3 provides specialist CAMHS; and

    iv) Tier 4 provides highly specialist services.

38. Save for Tier 4 services, all other services for children and young people in Wales are provided by health boards. Tier 4 services in Wales were, until 31 March 2024, commissioned by the Welsh Health specialised Services Committee ('WHSSC') on behalf of the seven health boards in Wales. From 1 April 2024, these functions were taken on by the NHS Wales Joint Commissioning Committee ('NHS Wales JCC'). Tier 4 services include day and in-patient services and some highly specialist out-patient services. In-patient CAMHS hospital care is then further divided into different levels of service provision dependent on the degree of security required to safely meet the mental health needs of the young person – (i) a General Adolescent Unit ('GAU') (ii) a Psychiatric Intensive Care Unit ('PICU'), (iii) a Low Secure Unit ('LSU'), and (iv) a Medium Secure Unit ('MSU'). For residents of North Wales and North Powys, the General Adolescent Unit is located at NWAS, where SB is currently placed. There are currently no PICU's, LSU's or MSU's in Wales.

39. In respect of Tier 4 CAMHS services, 'taking the necessary steps to secure a suitable hospital bed' involves a determination of whether the child or young person is accepted into such a bed. In Wales, the need for Tier 4 CAMHS services is determined by a Gatekeeping process in accordance with WHSSC 'Specialised Services Policy: CP 232' titled 'Gatekeeping, Placement and Case Management for Specialised Mental Health Services' (2022), is a process now governed by NHS Wales JCC. Gatekeeping is the assessment process that determines if a referred patient requires care at a Specialised Mental Health Service. The gatekeeper, usually an experienced consultant psychiatrist, determines, inter alia, the type of specialised mental health required and not the placement or hospital. If commissioning is confirmed by NHS Wales JCC, the gatekeeping team will seek an appropriate bed at a named hospital. Whereas in England, the need for Tier 4 CAMHS services is determined in accordance with the NHS England Service Specification for Tier 4 services and must comply with the National Referral and Access Process which must be made via an Access Assessment. If a Tier 4 CAMHS service is agreed as being appropriate via the Gatekeeping or Access Assessment process, the authority to detain a child or young person does not commence unless and until the managers of the named hospital accept the application and complete the statutory form.

40. Dr Vaidya, in his report, referred to the benefits to SB of the provision of s.117 aftercare services if she was detained for treatment pursuant to s.3 of the 1983 Act. It is important to note that in Wales, individualised support is available to all persons with mental health needs who have received secondary mental health services, whereas the provisions of s.117 is only available to those who have been the subject of s.3 detention. This individualised support is provided for in the Mental Health (Wales) Measure 2010 (which is primary legislation in Wales), and includes the right to have a Care and Treatment Plan. This is separate and distinct from s.117 aftercare. The Measure is supplemented by the Mental Health (Care Co-ordination and Core and Treatment Planning) (Wales) Regulations 2011. SB is a relevant patient for the purpose of the Measure.

41. The statutory duties of a local authority in England to safeguard and promote the welfare of a looked after child and to provide accommodation for them are set out in Part III of the Children Act 1989 (see ss. 22(3), 22(3A), 22A, 22C, 22G). The corresponding (but not identical) provisions in respect of the statutory duties of Welsh local authorities are contained in the Social Services and Well-Being (Wales) Act 2014 (see ss. 74, 75 and 78 to 83).

Submissions

42. The local authority sought determination of one issue namely whether the inherent jurisdiction was available and could be appropriately deployed to authorise the ongoing detention of SB in a mental health hospital when another statutory scheme, namely the 1983 Act, applied to SB. It was the local authority's principal submission that SB 'falls within the scope of' s.3 of the 1983 Act and, therefore, the inherent jurisdiction cannot be deployed as an alternative to that detention as it would 'cut across' the statutory scheme.

43. The health board submitted that the position adopted by the local authority was wrong in law and invited the court to refuse the local authority's application for a declaration that SB was within the scope of s.3 of the 1983 Act and that she could not be made the

subject of a DoL under the inherent jurisdiction. Further, the health board raised as a preliminary issue whether the exercise which the court was invited to undertake by the local authority amounted to an impermissible supervisory or review function of the clinical decision makers under the provisions of the 1983 Act.

44. Ms Sutton KC, for the health board, set out the statutory framework under the 1983 Act and accompanying guidance to illustrate the complex process by which a child or young person could be detained in hospital for treatment pursuant to s.3 of the 1983 Act. Ms Sutton made the general point that the opinion of a medical practitioner that a child or young person satisfied the criteria of s.3(2) of the 1983 Act was a starting point, and not the conclusion, of a process which could lead to their compulsory detention in a hospital under the provisions of the Act. She made the specific submission that the opinion of Dr Vaidya, that SB was detainable under s.3 of the Act, was at variance with the opinions of eight other consultant psychiatrists including SB's treating psychiatrist Dr Hales.

45. The submissions of the health board on the preliminary issue were based on two principal pillars:

i) The court did not have the jurisdiction to exercise a supervisory or review function of the decisions made by clinicians under the provisions of the 1983 Act; and

ii) For the court to seek to use its powers and procedures to influence the decisions of the clinicians and those involved in the assessment and commissioning processes under the 1983 Act was an abuse of process.

46. In support of the first submission, I was referred to a number of leading authorities including *A v Liverpool City Council* [1982] AC 363, *Re W (A Minor) (Wardship: Jurisdiction)* [1958] AC 791, and *MN (Adult)* [2015] EWCA Civ 411. In the latter case, Sir James Munby summarised the limits of the court's jurisdiction in respect of matters entrusted by Parliament to another public authority at paragraphs 11 to 12 of his judgment:

> "11. The starting point, in my judgment, is the fundamentally important principle identified by the House of Lords in *A v Liverpool City Council* [1982] AC 363 and re-stated by the House in *In re W (A Minor) (Wardship: Jurisdiction)* [1985] AC 791. For present purposes I can go straight to the speech of Lord Scarman in the latter case. Referring to *A v Liverpool City Council*, Lord Scarman said (page 795):
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> > "Authoritative speeches were delivered by Lord Wilberforce and Lord Roskill which it was reasonable to hope would put an end to attempts to use the wardship jurisdiction so as to secure a review by the High Court upon the merits of decisions taken by local authorities pursuant to the duties and powers imposed and conferred upon them by the statutory code."
>
> He continued (page 797):

> "The High Court cannot exercise its powers, however wide they may be, so as to intervene on the merits in an area of concern entrusted by Parliament to another public authority. It matters not that the chosen public authority is one which acts administratively whereas the court, if seized by the same matter, would act judicially. If Parliament in an area of concern defined by statute (the area in this case being the care of children in need or trouble) prefers power to be exercised administratively instead of judicially, so be it. The courts must be careful in that area to avoid assuming a supervisory role or reviewing power over the merits of decisions taken administratively by the selected public authority."

12. Lord Scarman was not of course disputing the High Court's power of judicial review under RSC Ord 53 (now CPR Pt 54) when exercised by what is now the Administrative Court: he was disputing the High Court's powers when exercising in the Family Division the parens patriae or wardship jurisdictions. This is made clear by what he said (page 795):

> "The ground of decision in *A v Liverpool City Council* [1982] AC 363 was nothing to do with judicial discretion but was an application in this field of the profoundly important rule that where Parliament has by statute entrusted to a public authority an administrative power subject to safeguards which, however, contain no provision that the High Court is to be required to review the merits of decisions taken pursuant to the power, the High Court has no right to intervene. If there is abuse of the power, there can of course be judicial review pursuant to RSC Ord 53: but no abuse of power has been, or could be, suggested in this case."

It is important to appreciate that Lord Scarman was not referring to a rule going to the exercise of discretion; it is a rule going to jurisdiction."

47. In respect of the 1983 Act, I was referred to the decision of MacDonald J in *Blackpool BC v HT (A Minor)* [2022] EWHC 1480 (Fam). At paragraphs 43-44 of his judgment MacDonald J observed as follows:

> "43. It is plain on a proper analysis of the mental health legislation and guidance that, even where an application for admission for assessment is certified by two qualified medical professionals as meeting the criteria under s.2 of the Mental Health Act 1983, the provision of the Tier 4 CAMHS bed remains subject to the outcome of a referral that complies with the National Referral and Access Process, which includes the completion of an Access Assessment undertaken by reference to the criteria contained in the service specification for the Tier 4 CAMHS Service.

> 44. With respect to the role of the court where the Access Assessment has concluded that an admission to a Tier 4 CAMHS Service is not appropriate notwithstanding the certification of an assessment application by two qualified medical professionals, that role is necessarily limited. The court will not ordinarily entertain a claim for judicial review in respect of a decision not to allocate medical resources to a particular case, here the relevant decision being not to admit a child or young person to a Tier 4 CAMHS bed following an Access Assessment (see *R v Central Birmingham Health Authority ex parte Collier*, Unreported, 6 January 1988 and *R v Cambridge Health Authority ex parte B* [1995] 1 WLR 898). The court may, and in cases such as this one often does, join NHS England (and sometimes the relevant Clinical Commissioning Group) where the circumstances are such that the court may wish to invite reconsideration by the NHS Trust of the decision not to make Tier 4 inpatient provision for the subject child. By way of example, this step was taken by Sir James Munby in *Re X* [2017] EWHC 2036 (Fam). Alternatively, the court may consider directing a direct a single joint expert qualified in Tier 4 CAMHS to provide a second opinion, albeit that the efficacy of this approach is likely to be limited by the fact that upon receipt of the report the court's powers to give effect to an expert recommendation contrary to the position taken by NHS England are limited for the reasons I have already."

48. Thus, even where a medical practitioner is of the opinion that the statutory criteria of s.3 of the 1983 Act are met, the court's powers to give effect to the expert's recommendations, in this case only the opinion of Dr Vaidya, are limited. This approach was reinforced by the decision of Lieven J in *Re MK (Deprivation of Liberty and Tier 4 Beds)* [2024] EWHC 1553 Fam, where Lieven J observed that she, sitting as a Judge of the Family Division, could not force NHS England or a Tier 4 assessment unit to admit a child to a Tier 4 bed, even when it was accepted that the conditions for detention under s.2 of the 1983 Act were met.

49. In respect of the second principal submission, I was referred by Ms Sutton to the case *of R v Secretary of State for the Home Department ex parte T* [1995] 1 FLR 293. Hoffman LJ made the following two observations in the course of his judgment at pages 296 and 298:

> i) "in cases in which there is, apart from immigration questions, no genuine dispute concerning the child, the court will not allow itself to be used as a means of influencing the decision of the Secretary of State"; and
>
> ii) "the use of the court's jurisdiction merely to attempt to influence the Secretary of State by obtaining findings of fact or expressions of opinion on matters which are for his decision is an abuse of process."

50. I respectfully agree with all the above observations and comments.

51. In the written submissions on behalf of the local authority, Mr O'Brien KC acknowledged that the inherent jurisdiction only fills a lacuna where no statutory scheme is available.

52. Mr O'Brien referred to the observations of MacDonald J in respect of the Supreme Court decision in *Re T (A Child)* [2021] UKSC 35 in the case *of MBC v AM and Others (DoL Orders for Children under 16)* [2021] EWHC 2472 (Fam) where he said at paragraph 69 and 70:

> "69. In *Re T* the Supreme Court restated the seminal importance of the inherent jurisdiction of the High Court in respect to children. In particular, the Court emphasised its protective nature. As Lady Arden pointed out at [192]:
>
> > "The inherent jurisdiction plays an essential role in meeting the need as a matter of public policy for children to be properly safeguarded. As this case demonstrates, it provides an important means of securing children's interests when other solutions are not available".
>
> As noted above, Lady Black further highlighted the need for the protective jurisdiction to be deployed in a manner that anticipates and prevents harm, rather than seeking to repair harm already suffered.
>
> 70. Within this context, the Supreme Court further reiterated that, particularly in the context of the protective purpose of the inherent jurisdiction in relation to children, the Courts should be slow to hold that an inherent power had been abrogated or restricted by Parliament and should only do so when it is clear that Parliament so intended".

53. In support of the proposition that this court can properly analyse and determine whether the 1983 Act is an available scheme, the local authority relied heavily on the decision in the case of *Manchester University NHS Foundation Trust v JS & Others (Schedule 1A Mental Capacity Act 2005)* [2023] EWCOP 33. This was an appeal determined by Theis J from the first instance decision of HHJ Simon Burrows, sitting as a judge of the Court of Protection. The essential issue in the case was whether the 17 year old patient was ineligible to be deprived of their liberty pursuant to the provisions of the Mental Capacity Act 2005 ('the 2005 Act').

54. Schedule 1A of the 2005 Act establishes that certain categories of people cannot be deprived of their liberty under that Act. Schedule 1A sets out five situations ('cases') when a person is ineligible if they are "(a) within the scope of the Mental Health Act, but (b) not subject to any of the mental health regimes" (para 2 of Schedule 1A) and they object to being a mental health patient, or to some or all of the mental health treatment (para 5(4) of Schedule 1A).

55. Paragraph 12(1) of Schedule 1A defines the term "within the scope of the Mental Health Act" as:

> "P is within the scope of the Mental Health Act if –
>
> An application in respect of P could be made under s.2 of s.3 of the Mental Health Act; and
>
> P could be detained in a hospital in pursuance if such an application,
>
> were one to be made."

56. The meaning of the word 'could' in paragraph 12(1) of Schedule 1A was considered by Charles J in the case of *GJ v The Foundation Trust* [2009] EWHC 2972 (Fam). He concluded as follows at paragraph 80:

> "So, in my judgment the construction urged by the Secretary of State is the correct one, namely that the decision maker should approach paragraph 12(1) (a) and (b) by asking himself whether in his view the criteria set by, or the grounds in, s. 2 or s.3 MHA 1983 are met (and if an application was made under them a hospital would detain P)."

57. In the health board's skeleton argument, it was submitted that the *JS* case was distinguishable as it was limited to a discrete ability of the Court of Protection to determine ineligibility of detention under the 2005 Act for case E patients (i.e., those not already detained under the 193 Act), and did not extend to children below the age of 16, such as SB, within proceedings before the Family Division. In the local authority's skeleton argument, it was submitted that (i) by parity of argument with the ineligibility provisions of Schedule 1A of the 2005 Act, (ii) the interpretation of paragraph 12(1) of Schedule 1A endorsed by Charles J in *GJ* (above) and (iii) the approach taken by HHJ Burrows in the *JS* case (above), this court could and should find and declare that SB is detainable under s.3 of the 1983 Act. Accordingly, there is no lacuna for the inherent jurisdiction to deprive SB of her liberty in hospital where she is currently placed or in another placement.

58. However, at the conclusion of the health board's oral submissions and the court indicating that (i) the case of *JS* was distinguishable from the legal framework and factual matrix pertaining in this case, and (ii) did not provide material assistance to the court in respect of the issue to be decided in this case, the local authority did not oppose the submissions made by the health board and did not pursue its application for a declaration. No other party, in particular the children's guardian, sought to make any oral submissions in support of or in opposition to the case originally advanced by the local authority.

Analysis

59. The leading authorities are abundantly clear that this court has no role to supervise or review decisions which have been entrusted by Parliament to another public authority.

The 1983 Act is an obvious example where Parliament has provided for a statutory code in respect of the detention of people with a mental disorder for treatment in hospital.

60. Schedule 1A of the 2005 Act makes statutory provision for finding that a person is ineligible from being deprived of their liberty under the 2005 Act, where in case E, they could be detained under the provisions of the 1983 Act. This express statutory provision enables the Court of Protection to consider and determine the question of whether a person could be detained under s.2 or s.3 of the 1983 Act. It is limited to the exercise of determining the specific question of whether a person is ineligible to be detained under the provisions of the 2005 Act. I cannot see any basis for concluding that this provision is to be read as having a wider application, and, in particular, to permit the court to determine whether a person is 'within the scope of the Mental Health Act' when exercising its powers under the inherent jurisdiction.

61. There is no authority for the proposition that a court contemplating the exercise of the inherent jurisdiction to deprive a person of their liberty had jurisdiction to encroach upon the issue of whether a person was detainable or could, or would, be detained in a hospital under s.3 of the 1983 Act. In the absence of clear authority, I am satisfied that for this court to make findings and/or declarations about whether SB was detainable under s.3 of the 1983 Act would be to exercise an impermissible supervisory or review function of the clinicians and mental health professionals acting pursuant to the provisions of the 1983 Act. This court has no jurisdiction to make such findings or orders.

62. Further, and in any event, even if this court did find favour with the opinions of Dr Vaidya over those of Dr Hales and made a finding that SB was detainable under s.3 of the 1983 Act what would that achieve? It would not, of itself, lead to SB being detained in a hospital for treatment under the 1983 Act. It might lead to the clinicians and professionals charged with making the decision to detain her under the 1983 Act, to change their professional opinions and decisions. However, to make orders in these circumstances would, as Hoffman LJ set out in *ex p T* (above), be an abuse of process.

63. If the court did make such a finding, and then went on to make the declaration initially sought by the local authority that the court could not then exercise the inherent jurisdiction to authorise the deprivation of liberty, SB could find herself in a position where she was not afforded protection by being detained for treatment in a hospital nor afforded the protection of being deprived of her liberty in a safe place. This would be an intolerable and unconscionable state of affairs.

Conclusion

64. An issue was raised at the conclusion of the hearing by the local authority as to whether the court should give judgment on the contested issues in light of the local authority's concession not to pursue its application. I recognise the force of this submission, but I am satisfied that in light of the important matters raised in this case it is clearly in the public interest for the court to set out its analysis of and conclusions about the application made by the local authority.

65. As I have set out above, the behaviours exhibited by SB between April and October this year were extremely challenging and they placed herself and others at a real risk of very serious harm. As noted in recent weeks, her behaviour has been very markedly less challenging and she has been compliant with her prescribed medication, but these are early days.

66. SB will require a safe, secure and supportive placement outside of a secure hospital. She will need to remain compliant, for the foreseeable, with taking her prescribed medication. The health board have agreed to provide outreach and community based psychiatric services and support to SB. The local authority is seeking to identify a suitable, secure residential placement for her. It is clear that SB will require a very good deal of support and therapy to enable her to return safely to live in the community and to lead a happy and stable life.

67. The local authority did not pursue its applications for findings and/or a declaration. However, for the reasons I have given, the applications are refused. For the avoidance of any doubt, I do not intend any criticism of the local authority in making their applications.

68. By reason of the above, the court will continue to authorise SB's deprivation of liberty at NWAS pursuant to its inherent jurisdiction. Such an order is both necessary and proportionate having regard to the aim that is sought to be achieved, namely, to prevent SB, in the interim, causing harm to herself or others, pending her imminent discharge into a community placement.