Neutral Citation Number: [2016] EWHC 2271 (Fam)

Case numbers omitted

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 September 2016

Before:

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

- -

In the Matter of X (A Child)
In the Matter of Y (A Child)

- -
- -

Ms Julia Cheetham QC and Mr Michael Jones (instructed by the local authorities) for Cumbria County Council and Blackpool Borough Council
Mr Simon Rowbotham (instructed by Denby & Co) for X's guardian
Ms Susan Grocott QC and Ms Rebecca Gregg (instructed by Gaynham King & Mellor) for X
Ms Susan Grocott QC and Ms Alison Woodward (instructed by Cooper Nimmo) for Y's guardian

Hearing dates: 28 July, 1 September 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was handed down in open court

Sir James Munby, President of the Family Division:

1. I have before me two cases which raise important cross-border issues as between England and Scotland in relation to the making of secure accommodation orders. Put very shortly there are three questions: (1) Can a judge in England make a secure accommodation order under section 25 of the Children Act 1989 if the child is to be placed in a unit in Scotland? (2) If not, can the same outcome be achieved by use of the inherent *parens patriae* jurisdiction of the High Court? (3) In either case, will the order made by the English judge be recognised and enforced in Scotland? For the reasons which I now proceed to set out in some detail, the answers to these three questions are, in my judgment, respectively, (1) No, (2) Yes and (3) No. A subsidiary issue arises in relation to paragraph 19 of Schedule 2 to the 1989 Act. There are the same three questions. In my judgment the answers are the same.

2. These particular issues arise because of the shortage of places in secure accommodation units in England, so that local authorities and courts in England, particularly in the north of England, whether on the Northern Circuit or the North-Eastern Circuit, look to making use of available places in secure accommodation units in Scotland. Precise data are not available, but such material (including anecdotal material) as exists suggests that there have been at least five such cases.

3. These issues need to be viewed in the wider context of other cross-border issues arising as between England and Scotland in family cases. As will become apparent, there are serious lacunae in the law which, it might be thought, need urgent attention.

The proceedings

4. I propose in this judgment to be very sparing about the facts. I am concerned with two children, a girl aged 16, who I shall refer to as X, and a boy aged 15, who I shall refer to as Y. They live in the areas of two different local authorities: in the case of X, Cumbria County Council; in the case of Y, Blackpool Borough Council. Both have difficulties; each, in their different ways, met the criteria in section 25(1) of the 1989 Act (see below).

5. In the case of X, Cumbria County Council had begun care proceedings in April 2015. An interim care order was made the same month. Because of their complexity, and because the nature of the proceedings changed mid-course, it proved impossible to comply with the 26-week requirement. By an order dated 9 May 2016 the proceedings were listed for final hearing on 24 August 2016. X's behaviour deteriorated. On 18 June 2016 (a Saturday), a secure accommodation order under section 25 of the 1989 Act was made by Her Honour Judge Forrester, authorising Cumbria County Council to keep X in secure accommodation until 24 June 2016. The only available unit was in Scotland. Judge Forrester was conscious that this raised jurisdictional issues and was aware that Moylan J was due to hear Y's case on 22 June 2016 (see below), which is why she time-limited the order and listed the case for hearing on 24 June 2016. On 23 June 2016, following the outcome of the hearing the day before in Y's case, Cumbria County Council issued an application seeking authority under the inherent jurisdiction to continue X's placement in Scotland. On 24 June 2016 Judge Forrester made an order which, reciting that she was satisfied (a) that the criteria under section

25(1)(a)(i) and (ii) and (b) of the 1989 Act were met and (b) that the criteria in section 100(4) of the 1989 Act were met, gave Cumbria County Council permission to invoke the inherent jurisdiction and ordered that X be placed in secure accommodation at the unit in Scotland until 17:00 on 29 July 2016. Judge Forrester listed the matter for further consideration before me on 28 July 2016. The same day Judge Forrester made an order in the care proceedings, directing that they be listed for further directions as soon as practicable following 29 July 2016. (In the event, the hearing on 24 August 2016 subsequently had to be vacated.)

6. In the case of Y, Blackpool Borough Council had begun care proceedings in February 2016. An interim care order was made the same month. During May 2016, Y's behaviour deteriorated. On 16 June 2016, Blackpool Borough Council issued an application seeking authority under the inherent jurisdiction to place Y in secure accommodation in Scotland, there being no available unit in England. His Honour Judge Duggan made an order approving the placement on the basis, as the order recorded, of the court finding that the local authority "could place [Y] in secure accommodation in Scotland for a period of less than one month pending assessment of his level of understanding under the provisions of section 33(8)(a)" of the 1989 Act. He adjourned the application under the inherent jurisdiction for hearing on 22 June 2016. The matter came before Moylan J on 22 June 2016. He made an order which, reciting that he was satisfied (a) that the criteria under section 25(1)(a)(i) and (ii) and (b) of the 1989 Act were met and (b) that the criteria in section 100(4) of the 1989 Act were met, gave Blackpool Borough Council permission to invoke the inherent jurisdiction and ordered that Y be placed in secure accommodation at a unit in Scotland until 17:00 on 29 July 2016. He listed the matter for further consideration before me on 28 July 2016.

7. Both matters came before me on 28 July 2016. Both local authorities were represented by Ms Julia Cheetham QC and Mr Michael Jones. X's guardian was represented by Mr Simon Rowbotham. X was also, separately, represented by Ms Susan Grocott QC and Ms Rebecca Gregg. Y's guardian was represented by Ms Grocott and Ms Alison Woodward. I had the benefit of detailed skeleton arguments and sustained oral argument addressing the very difficult jurisdictional issues which, it was apparent, arise in such cases. By the end of the hearing I had come to the provisional conclusion that (a) section 25 of the 1989 Act does not enable the court to make a secure accommodation order in relation to a placement in Scotland but that (b) such a placement could, in an appropriate case, be authorised under the inherent jurisdiction. I made orders under the inherent jurisdiction authorising X and Y to continue to be placed in their respective units in Scotland until 17:00 on 1 September 2016. I directed that both matters were to be listed for further hearing before me on 1 September 2016.

8. In accordance with that direction the case came back before me on 1 September 2016. The representation was the same as on the previous occasion. By then, preparation of this judgment was far advanced. I informed the parties that I had come to the clear and concluded view that (a) section 25 of the 1989 Act does not enable the court to make a secure accommodation order in relation to a placement in Scotland, that (b) such a placement could, in an appropriate case, be authorised under the inherent jurisdiction, but that (c) there was, so far as I could see, no mechanism for any such order to be recognised or enforced in Scotland absent some order of the Court of

Session, if indeed such an order could in fact be made. So too in relation to paragraph 19 of Schedule 2 to the 1989 Act.

9. It was clear that X needed to remain in secure accommodation. I therefore extended the order under the inherent jurisdiction I had made on 28 July 2016 until 17:00 on 15 September 2016. It was apparent that Y had done well in secure accommodation and was ready for a 'step-down' move to suitable residential non-secure accommodation, also in Scotland. I therefore made an order under the inherent jurisdiction authorising Blackpool Borough Council to maintain Y in that placement until a date to be confirmed at the next hearing before me, which I fixed for 15 September 2016. I also re-allocated both sets of care proceedings to me, though directing that they were to remain in the Family Court.

The wider context

10. Within the United Kingdom[1] there are three separate legal jurisdictions, in England and Wales, in Scotland and in Northern Ireland. England and Wales, although one jurisdiction, have separate systems of law in certain areas, including family law. Putting matters very generally, so far as concerns family law, the law in Northern Ireland tends to be very similar to the law in England, while the law in Scotland tends to be rather different. Cross-border family law issues arising between England and its three neighbours within the United Kingdom therefore engage three different types of legal relationship: between England and Northern Ireland the relationship is between separate jurisdictions with very similar systems of law; between England and Scotland the relationship is between separate jurisdictions with rather different systems of law; between England and Wales the relationship is between two different parts of the same jurisdiction with systems of law which differ in certain respects.

11. My impression is that cross-border issues, in particular between England and Scotland, but probably in future also to a significant extent between England and Wales, have been on the increase of late, both in the family law context and also in the Court of Protection (where similar issues arise also between England and Ireland), and to a significantly greater extent than publicly available judgments would suggest. Reported examples include *An English Local Authority v X, Y and Z (English Care Proceedings: Scottish Child)* [2015] EWFC 89, and, in the Court of Protection, *Re PO* [2013] EWCOP 3932, [2014] Fam 197, *An English Local Authority v SW & Anor* [2014] EWCOP 43, *The Health Executive of Ireland v PA and others* [2015] EWCOP 38, *The Health Executive of Ireland v CNWL* [2015] EWCOP 48, and *Re DB* [2016] EWCOP 30. Similar issues have arisen in relation to cross-border issues between England and other Crown territories: see, in relation to Guernsey, *Re HM (Vulnerable Adult: Abduction) (No 2)* [2010] EWHC 1579 (Fam), [2011] 1 FLR 97, *Re HM (Vulnerable Adult: Abduction) (No 3)* [2010] EWHC 2107 (Fam), [2011] 1 FLR 1394, in relation to St Helena, *Re RB*[2] and *Re KL (An Adult)*,[3] and, in relation to the Falkland Islands, *Re KS*.[4]

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[1] The Channel Islands and the Isle of Man, although held by the Crown, are not part of the United Kingdom and have their own separate jurisdictions.

[2] Child placed in interim foster care in England by the St Helena Supreme Court pending permanent placement in the Falkland Islands. The background is set out in the judgment in March 2014 of Ekins CJ in the St Helena Supreme Court which can be found on the St Helena Government website, where the case is called *Re*

12. As will be appreciated, there are always two aspects to a cross-border issue such as the one I am concerned with here. Can the court in country A (in the present case, England) make an order to take effect in country B (in this case, Scotland)? If so, will such an order be recognised and enforced in country B (Scotland)? The first question is to be determined by the law of country A (England); the second is one to be determined by the law of country B (Scotland). For an English judge, the content of the law of England (including the English law relating to private international law, the conflict of laws) is a matter of law, to be ascertained in the light of legal argument. For an English judge, the content of the law of a foreign country, here Scotland (including the Scottish law relating to private international law) is a matter of fact, to be ascertained in the light of expert evidence.

13. In the case of an order, such as a secure accommodation order, which involves a deprivation of liberty and thus engages Article 5 of the Convention, these separate questions become particularly acute. Let it be assumed that the English court can make an order directing a child to be detained in secure accommodation in Scotland, what is the effect of that order in Scotland? What authority does a Scottish official have to implement the order, especially insofar as coercion is required?[5]

14. To the English lawyer, the point can most tellingly be made by imagining the reverse situation. Let it be assumed that a Scottish court, acting lawfully and within its jurisdiction, makes an order directing a child to be placed in secure accommodation in England. What if the child, having been removed to England, attempts unsuccessfully to escape, and is then detained in England and returned to the secure accommodation by an English police officer? If, in the course of the melee, the child assaults the police officer, is the child guilty of assaulting an officer in the execution of his duty? What return does the manager of the secure accommodation make if the child sues in the Divisional Court for a writ of habeas corpus? Is the order of the Scottish court a good return to the writ? Would it make any difference if the relevant order was of the Supreme Court of Ruritania? And, if so, why?

Domestic legislation

15. I go first to the relevant domestic legislation, starting with that applicable in England.

R, and in Chapter 8 of the December 2015 Wass Inquiry Report into Allegations Surrounding Child Safeguarding Issues on St Helena and Ascension Island (Redacted Version), where the case is called *Child F*. Orders were made in the English High Court by Moylan J and His Honour Judge Heaton QC (sitting as a judge of the High Court). There are, so far as I am aware, no published judgments from the English proceedings.

[3] Seriously handicapped incapacitous adult placed in accommodation in England by the St Helena Supreme Court. The background is set out in the judgment in April 2015 of Ekins CJ in the St Helena Supreme Court which can be found on the St Helena Government website, where the case is called *Re K*, and in Chapter 12 of the Wass Inquiry Report, where the case is called *Adult M*. Orders were made in England by Peter Jackson J. There are, so far as I am aware, no published judgments from the English proceedings.

[4] Child from the Falkland Islands and subject to a care order made in the Falkland Islands Magistrates Court placed in specialist accommodation in England in 2011. On subsequent application to the English High Court by the Attorney-General of the Falkland Islands in 2013, orders supporting the placement were made pursuant to the inherent jurisdiction by Bodey J and Keehan J. There are, so far as I am aware, no published judgments from the English proceedings.

[5] To get one point out of the way. This issue is obviously not cognisable before the English court. The English writ of habeas corpus does not run to Scotland: Farbey and Sharpe, The Law of Habeas Corpus, ed 3, 2011, p 209 and *Brown & Anor v Governor of Her Majesty's Prison Saughton* [2003] EWHC 1260 (Admin).

Domestic legislation: England

16. The starting point is section 25 of the 1989 Act. Entitled "Use of accommodation for restricting liberty", it provides as follows (emphasis added):

> "(1) Subject to the following provisions of this section, a child who is being looked after by a local authority *or local authority in Wales* may not be placed, and, if placed, may not be kept, in accommodation *in England* provided for the purpose of restricting liberty ("secure accommodation") unless it appears –
>
> (a) that –
>
> (i) he has a history of absconding and is likely to abscond from any other description of accommodation; and
>
> (ii) if he absconds, he is likely to suffer significant harm; or
>
> (b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons.
>
> (2) The *Secretary of State* may by regulations –
>
> (a) specify a maximum period –
>
> (i) beyond which a child may not be kept in secure accommodation *in England* without the authority of the court; and
>
> (ii) for which the court may authorise a child to be kept in secure accommodation *in England*;
>
> (b) empower the court from time to time to authorise a child to be kept in secure accommodation *in England* for such further period as the regulations may specify; and
>
> (c) provide that applications to the court under this section shall be made only by local authorities *or local authorities in Wales*.
>
> (3) It shall be the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in his case.
>
> (4) If a court determines that any such criteria are satisfied, it shall make an order authorising the child to be kept in secure accommodation and specifying the maximum period for which he may be so kept.

> (5) On any adjournment of the hearing of an application under this section, a court may make an interim order permitting the child to be kept during the period of the adjournment in secure accommodation.
>
> (6) No court shall exercise the powers conferred by this section in respect of a child who is not legally represented in that court unless, having been informed of his right to apply for the provision of representation under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and having had the opportunity to do so, he refused or failed to apply.
>
> (7) The *Secretary of State* may by regulations provide that –
>
> (a) this section shall or shall not apply to any description of children specified in the regulations;
>
> (b) this section shall have effect in relation to children of a description specified in the regulations subject to such modifications as may be so specified;
>
> (c) such other provisions as may be so specified shall have effect for the purpose of determining whether a child of a description specified in the regulations may be placed or kept in secure accommodation *in England*.
>
> (8) The giving of an authorisation under this section shall not prejudice any power of any court in England and Wales or Scotland to give directions relating to the child to whom the authorisation relates.
>
> (9) This section is subject to section 20(8).”

17. The words I have emphasised were inserted, with effect from 6 April 2016, by regulation 86 of the Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016, 2016/413, pursuant to powers conferred on Welsh Ministers by section 198 of the Social Services and Well-being (Wales) Act 2014. Nothing in the provisions of section 198 of the 2014 Act or in the 2016 Regulations confines the regulation-making power, or the effect of regulation 86, to Wales, to the exclusion of England. Although Mr Rowbotham comments that there is no clear basis for accepting the proposition that the words “in England” should take effect outside Wales, no-one has articulated before me any specific argument that these amendments to section 25 do not apply in England or as a matter of English, as distinct from Welsh, law. I proceed, therefore, on the basis that, as a judge sitting in England and applying the law of England, the text of section 25 is as I have reproduced it above. I note that this view is shared both by the editors of the Family Court Practice 2016 (see pages 505-506) and by the editors of Hershman & McFarlane’s Children Act Handbook, 2016-2017 (see pages 100-101).

18. I have been referred to the relevant regulations made under section 25. For present purposes I need refer only to regulations 3 and 5(2)(a) of The Children (Secure Accommodation) Regulations 1991, SI 1991/1505, as amended, which provide as follows:

> "3 Accommodation in a children's home shall not be used as secure accommodation unless it has been approved by the Secretary of State for such use and approval shall be subject to such terms and conditions as he sees fit.
>
> 5(2)(a) Section 25 of the Act shall not apply to a child … to whom section 20(5) of the Act (accommodation of persons over 16 but under 21) applies and who is being accommodated under that section."

19. Notwithstanding the dicta in *Re SS (Secure Accommodation Order)* [2014] EWHC 4436 (Fam), [2015] 2 FLR 1358, para 2(7), there is nothing to prevent a child over the age of 16 who is *subject to a care order* being made subject to a secure accommodation order under section 25: see Hershman & McFarlane, Children Law and Practice, Vol 2, paras F [398]-[399].

20. I should also refer to paragraph 19 of Schedule 2 to the 1989 Act which applies in both England and Wales. So far as material for present purposes, it provides as follows:

> "(1) A local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court.
>
> (2) A local authority may, with the approval of every person who has parental responsibility for the child arrange for, or assist in arranging for, any other child looked after by them to live outside England and Wales.
>
> (3) The court shall not give its approval under sub-paragraph (1) unless it is satisfied that—
>
> (a) living outside England and Wales would be in the child's best interests;
>
> (b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;
>
> (c) the child has consented to living in that country; and
>
> (d) every person who has parental responsibility for the child has consented to his living in that country.
>
> (4) Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard sub-paragraph (3)(c) and give its approval if the child

> is to live in the country concerned with a parent, guardian, special guardian, or other suitable person.
>
> (5) Where a person whose consent is required by sub-paragraph (3)(d) fails to give his consent, the court may disregard that provision and give its approval if it is satisfied that that person –
>
> (a) cannot be found;
>
> (b) is incapable of consenting; or
>
> (c) is withholding his consent unreasonably."

Domestic legislation: Wales

21. It is convenient at this point to look at the relevant Welsh legislation. Section 119 of the 2014 Act provides as follows:

> "(1) Subject to the following provisions of this section, a child who is being looked after by a local authority or a local authority in England may not be placed, and if placed, may not be kept, in accommodation in Wales provided for the purpose of restricting liberty ("secure accommodation") unless it appears –
>
> (a) that the child –
>
> (i) has a history of absconding and is likely to abscond from any other description of accommodation, and
>
> (ii) is likely to suffer significant harm if the child absconds, or
>
> (b) that if the child is kept in any other description of accommodation, he or she is likely to injure himself or herself or other persons.
>
> (2) The Welsh Ministers may by regulations –
>
> (a) specify a maximum period –
>
> (i) beyond which a child may not be kept in secure accommodation in Wales without the authority of the court, and
>
> (ii) for which the court may authorise a child to be kept in secure accommodation in Wales;
>
> (b) empower the court from time to time to authorise a child to be kept in secure accommodation in Wales for such further period as the regulations may specify;

(c) provide that applications to the court under this section be made only by a local authority.

(3) It is the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in the child's case.

(4) If a court determines that any such criteria are satisfied, it must make an order authorising the child to be kept in secure accommodation and specifying the maximum period for which the child may be so kept.

(5) On any adjournment of the hearing of an application under this section, a court may make an interim order permitting the child to be kept during the period of the adjournment in secure accommodation.

(6) No court is to exercise the powers conferred by this section in respect of a child who is not legally represented in that court unless, having been informed of his or her right to apply for representation funded by the Legal Services Commission as part of the Community Legal Service or Criminal Defence Service and having had the opportunity to do so, the child refused or failed to apply.

(7) The Welsh Ministers may by regulations provide that –

(a) this section is or is not to apply to any description of children specified in the regulations;

(b) this section has effect in relation to children of a description specified in the regulations subject to modifications specified in the regulations;

(c) other provisions specified in the regulations are to have effect for the purpose of determining whether a child of a description specified in the regulations may be placed or kept in secure accommodation in Wales.

(8) The giving of an authorisation under this section does not prejudice any power of any court in England and Wales to give directions relating to the child to whom the authorisation relates.

(9) The giving of an authorisation under this section does not prejudice the effect of any direction given by a court in Scotland relating to a child to whom the authorisation relates, in so far as the direction has effect in the law of England and Wales.

> (10) This section is subject to section 76(5)."

It will be seen that section 119 of the 2014 Act closely mirrors section 25 of the 1989 Act. Section 76(5) of the 2014 Act mirrors section 20(8) of the 1989 Act.

22. The jurisdictional cross-over between England and Wales is explained, from the Welsh perspective, in Part 6 (Looked After and Accommodated Children) of the Code of Practice under the Social Services and Well-being (Wales) Act 2014, issued under section 145 of the 2014 Act, paras 728-729:

> "728 For looked after children, applications to court under section 119 of the Act may only be made by the local authority which is looking after the child. This includes local authorities in England who decide to place a looked after child in secure accommodation in Wales.
>
> 729 Local authorities will note that applications to place a child in secure accommodation in Wales will be made under section 119 of the Act. However, where the intention is to place a child in a children's home providing secure accommodation in England, the application will need to be made to the court under section 25 of the Children Act 1989. Courts in Wales can hear applications under section 119 of the Act or section 25 of the Children Act 1989."

It would seem that courts in England can likewise hear applications under either Act, depending upon the location of the accommodation. After all, the family court is a single court exercising jurisdiction throughout the whole of England and Wales and every family judge is a judge of the family court, whether usually based in the one country or the other. There is nothing in the legislation to suggest that only a judge sitting in Wales can make an order under section 119 of the 2014, just as there is nothing in the legislation to suggest that only a judge sitting in England can make an order under section 25 of the 1989 Act.

Domestic legislation: Scotland

23. I turn to the corresponding Scottish legislation. There are, for present purposes, two relevant types of order.

24. The first, a "secure accommodation authorisation", as defined in section 85 of the Act, is provided for in sections 151-153 of the Children's Hearings (Scotland) Act 2011 and in The Secure Accommodation (Scotland) Regulations 2013, 2013 No 205. In very broad terms it corresponds to the schemes under section 25 of the 1989 Act and section 119 of the 2014 Act.

25. The other, a "compulsory supervision order", is defined in section 83 of the 2011 Act. There is no need for me to go into the details, except to note that, in accordance with section 83(2), a "compulsory supervision order" may include the following measures, amongst others:

> "(a) a requirement that the child reside at a specified place,

> (b) a direction authorising the person who is in charge of a place specified under paragraph (a) to restrict the child's liberty to the extent that the person considers appropriate having regard to the measures included in the order,
>
> …
>
> (d) a movement restriction condition,[6]
>
> (e) a secure accommodation authorisation".

26. Article 7(1) of The Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013, SI 2013/1465, made by the Secretary of State and (see Article 3(1)) extending to England and Wales and to Scotland, provides that the place specified in a requirement in accordance with section 83(2)(a) of the 2011 Act "may be a place in England or Wales."

Domestic legislation: conclusions

27. So far as is material for present purposes I can set out my conclusions very shortly.

28. It is, in my judgment, clear that a judge in England cannot make a secure accommodation order under section 25 of the 1989 Act if the child is to be placed in a unit in Scotland (and the same applies, mutatis mutandis, in relation to section 119 of the 2014 Act). There are two reason for this: first, that on the face of the statute the power extends only to secure accommodation "in England" (or, as the case may be, "in Wales"); secondly that secure accommodation in Scotland is not approved by the Secretary of State in accordance with regulation 3 of the 1991 regulations – it is approved by the Scottish Ministers in accordance with regulation 3 of The Secure Accommodation (Scotland) Regulations 2013, 2013 No 205.

29. It is difficult to see how the requirements of paragraph 19 of Schedule 2 to the 1989 Act will ever be satisfied where the child is to be sent out of the jurisdiction for the purpose of being placed in secure accommodation; and in the present cases they certainly are not. In the first place, unless dispensed with in accordance with paragraph 19(5), the consent of every person with parental responsibility is required. Secondly, unless dispensed with in accordance with paragraph 19(4), the consent of the child is required, and the child's consent cannot be dispensed with unless "the court is satisfied that the child does not have sufficient understanding to give or withhold his consent," and even then only if the child is to live "with a parent, guardian, special guardian, or other suitable person" – wording which, in my judgment, and notwithstanding Mr Rowbotham's submissions to the contrary, cannot include being placed in an institution such as a secure accommodation unit. "Person" here does not, in my judgment, extend to a corporate or other organisation or body. It means a natural person.

30. Ms Cheetham also suggests that the words "arrange for … [a] child in their care to live outside England and Wales" in paragraph 19(1) connote a permanent or at least long term arrangement, in contrast to a short-term placement in, for example, a secure unit.

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[6] This is defined in section 84 of the 2011 Act.

Ms Grocott makes the same submission. Mr Rowbotham begged to differ. There is no need for me to decide the point, which potentially has very wide ramifications, and I prefer not to.

English domestic law: the inherent jurisdiction

31. There being no relevant statutory power, I turn, therefore, to consider the inherent *parens patriae* jurisdiction of the English High Court.

32. I start with what I said in *Re PS (Incapacitated or Vulnerable Adult)* [2007] EWHC 623 (Fam), [2007] 2 FLR 1083, para 16:

> "It is in my judgment quite clear that a judge exercising the inherent jurisdiction of the court (whether the inherent jurisdiction of the court with respect to children or the inherent jurisdiction with respect to incapacitated or vulnerable adults) has power to direct that the child or adult in question shall be placed at and remain in a specified institution such as, for example, a hospital, residential unit, care home or secure unit. It is equally clear that the court's powers extend to authorising that person's detention in such a place and the use of reasonable force (if necessary) to detain him and ensure that he remains there: see *Norfolk and Norwich Healthcare (NHS) Trust v W* [1996] 2 FLR 613 (adult), *A Metropolitan Borough Council v DB* [1997] 1 FLR 767 (child), *Re MB (Medical Treatment)* [1997] 2 FLR 426 at page 439 (adult) and *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180 (child)."

So far as I am aware, that statement of principle has never been challenged.

33. If the starting point must be the important decision of Wall J, as he then was, in *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, recent authorities show the continuing use of the inherent jurisdiction to put a child in secure accommodation: see *Re B (Secure accommodation: Inherent jurisdiction) (No 1)* [2013] EWHC 4654 (Fam), *Re B (Secure accommodation: Inherent jurisdiction) (No 2)* [2013] EWHC 4655 (Fam), *Re AB (A Child: deprivation of liberty)* [2015] EWHC 3125 (Fam), [2016] 1 WLR 1160, and *A Local Authority v S* [2015] EWHC 3010 (Fam).

34. It is clear that there are two jurisdictional obstacles that have to be overcome if the inherent jurisdiction of the High Court is to be used in the way proposed here.

35. First, the local authority requires permission from the court – that is, the High Court; the family court cannot exercise the inherent jurisdiction – in accordance with section 100 of the 1989 Act. So far as material, this provides as follows:

> "(3) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.
>
> (4) The court may only grant leave if it is satisfied that –

> (a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and
>
> (b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.
>
> (5) This subsection applies to any order –
>
> (a) made otherwise than in the exercise of the court's inherent jurisdiction; and
>
> (b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted)."

36. Neither of the requirements for leave referred to in sub-section (4) will present any obstacle in this kind of case. The application for an order under the inherent jurisdiction is made precisely because section 25 (or section 119, as the case may be) does not apply. I reject Ms Grocott's submission that the existence of the statutory regime under section 25 of itself suffices to take the case outside section 100(4). The order which the local authority is applying for in a case such as this is an order authorising the placement of a child in secure accommodation outside the jurisdiction, and that is not, within the meaning of section 100(4)(a), a "result" which the local authority is able to achieve by means of an order under section 25 of the 1989 Act, nor is it, within the meaning of section 100(5)(b), an "order" which the local authority is "entitled to apply for" under section 25. Nor, in my judgment, despite Ms Grocott's submissions to the contrary, does it make any difference that the local authority would not be seeking to have recourse to the inherent jurisdiction but for the absence of a place in a secure unit within the jurisdiction. The fact is that, for whatever reason, the local authority is seeking a result which cannot be achieved by any means other than the inherent jurisdiction. So, in my judgment, sub-section (4)(a) is no obstacle. And in the nature of things, if a child requires to be placed in secure accommodation or under restraint there is not going to be any difficulty in demonstrating that the requirement in sub-section (4)(b) is satisfied.

37. The other potential jurisdictional obstacle arises from the well-known and long-established principle that the exercise of the prerogative – and the inherent jurisdiction is an exercise of the prerogative, albeit the prerogative vested in the judges rather in Ministers – is *pro tanto* ousted by any relevant statutory scheme.

38. I start with the recent statement by Baker J in *Re Z (Recognition of Foreign Order)* [2016] EWHC 784 (Fam), para 16:

> "It is well established that the High Court may in appropriate circumstances use its inherent jurisdiction to supplement a statutory scheme. As Lord Hailsham observed in *Richards v Richards* [1984] AC 174 at p199,

> "… where, as here, Parliament has spelt out in considerable detail what must be done in a particular class of case, it is not open to litigants to bypass the special Act, nor to the courts to disregard its provisions by resorting to the earlier procedure, and thus choose to apply a different jurisprudence from that which the Act prescribes."

On the other hand, as Lord Donaldson of Lymington observed in the Court of Appeal in *Re F (Mental Patient: Sterilisation)* 1990] 2 AC 1 at p30, in a passage approved by the House of Lords on appeal:

> "The common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill gaps is one of the most important duties of the judges. It is not a legislative function or process – that is an alternative solution the initiation of which is the sole prerogative of Parliament. It is an essentially judicial process and, as such, it has to be undertaken in accordance with principle."

The correct approach was summarised by Roderic Wood J in *Westminster City Council v C* [2007] EWHC 309 at para 119, in a passage subsequently approved by McFarlane LJ in the Court of Appeal in *Re DL* [2012] EWCA Civ 253 at para 62. Roderic Wood J observed that

> "consistent with long-standing principle, the terms of the statute must be looked to first to see what Parliament has considered to be the appropriate statutory code, and the exercise of the inherent jurisdiction should not be deployed so as to undermine the will of Parliament as expressed in the statute or any supplementary regulatory framework."

As Lord Sumption succinctly observed recently in *Re B* [2016] UKSC 4, para 85

> "the inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme."

For this reason, in a different context, I declined in a recent case to exercise the inherent jurisdiction so as to place a child for adoption abroad in circumstances prohibited by statute: see *Re JL and AO* [2016] EWHC 440 (Fam)."

39. The modern learning on this is usually treated as beginning with the decision of the House of Lords in *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, where Lord Dunedin (page 526) said that "if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules."

As may be imagined, the authorities on the point are legion. A recent statement at the highest level, relating to the analogous issue of the relationship between statute and the common law, is to be found in the judgment of Sir John Dyson JSC in *R v Secretary of State for Work and Pensions ex p The Child Poverty Action Group* [2010] UKSC 54, [2011] 2 AC 15, para 34:

> "The question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended by co-exist with it."

40. Well-known illustrations in the realm of family law include, in addition to the cases cited by Baker J, *B v Forsey* [1988] SC (HL) 28, 66 (holding, as Lord Keith of Kinkel put it, that the comprehensive statutory scheme laying down the powers of hospital authorities in relation to the detention of mentally disordered persons was "intended to be exhaustive," so that "any common law power of detention which a hospital authority might otherwise possessed has been impliedly removed") and *Re F (Adult Patient)* [2000] EWCA Civ 3029, [2001] Fam 38.

41. In the context of secure accommodation, the issue has been considered recently in an illuminating series of articles by Alex Laing published on-line in Family Law Week: *Ariadne's Golden Thread: Placing Children in Secure Accommodation*, 9 April 2015, *Daedalus's Twist? Secure Accommodation after a Child's 16th Birthday*, 9 April 2015, *And There Lurks the Minotaur: The Interrelationship Between the Inherent Jurisdiction and Section 25, CA 1989: Part I*, 22 June 2016, and *And There Lurks the Minotaur: The Interrelationship Between the Inherent Jurisdiction and Section 25, CA 1989: Part II*, 8 July 2016. In the latter two articles, Laing suggested that it is helpful to think of section 25 of the 1989 as having three, what he called gateway criteria, that determine its applicability in a given case. He identified these as being (i) that the child must be being looked after by the local authority, (ii) that the proposed accommodation must be provided for the purpose of restricting liberty (ie, must be secure accommodation in the statutory sense) and (iii) that the proposed accommodation, if a children's home, must be approved by the Secretary of State. (To these one must presumably now add (iv) that the proposed accommodation must be in England.) I need not follow Laing into the further stages of his analysis. It suffices for present purposes to note his proposition that, if one or more of the gateway criteria cannot be met, use of the inherent jurisdiction is in principle permissible.

42. That proposition is, at it seems to me, borne out by the case-law.

43. In *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, Wall J formulated the critical question as being (page 192):

> "is the clinic secure accommodation? … if it is not, detention in the clinic is outside the statutory scheme, and the major inhibition to the use of the inherent jurisdiction disappears."

His conclusion (page 194) was that the clinic "does not constitute 'secure accommodation' so as to bring it within s 25 of the Children Act 1989." Thus (page 196) this barrier to the exercise of the inherent jurisdiction was surmounted. Wall J went on to make an order under the inherent jurisdiction.

44. In *Re B (Secure accommodation: Inherent jurisdiction) (No 1)* [2013] EWHC 4654 (Fam), *Re B (Secure accommodation: Inherent jurisdiction) (No 2)* [2013] EWHC 4655 (Fam), His Honour Judge Wildblood QC adopted exactly the same approach, holding that the inherent jurisdiction was available to authorise a placement in secure accommodation of a child who was not being "looked after" by the local authority and where jurisdiction under section 25 was therefore, as he put it, not available. Keehan J adopted the same approach in *Re AB (A Child: deprivation of liberty)* [2015] EWHC 3125 (Fam), [2016] 1 WLR 1160, on the basis (para 32) that the relevant accommodation had not been approved by the Secretary of State. Bodey J in *A Local Authority v S* [2015] EWHC 3010 (Fam) would seemingly have adopted the same approach had the child not been, as he found her to be (paras 17-18), a "looked after" child.

45. I propose to follow the same approach as has commended itself down the years to Wall J, to Judge Wildblood, to Keehan J and to Bodey J. It is an approach which, in my judgment, falls comfortably within a proper application of the principle expounded in the *De Keyser's Royal Hotel* case. Section 25 does not, to use Lord Dunedin's phrase 'cover the whole ground', it is not, in contrast to the legislation being considered in the *Forsey* case, a comprehensive statutory scheme intended to be exhaustive. To have recourse to the inherent jurisdiction in a situation, as here, wholly outside the territorial ambit of the statute, does not, to use Lord Sumption's phrase 'cut across' the statutory scheme, nor, to use Sir John Dyson's phrase, would it be "incompatible with" the statutory scheme.

46. A similar analysis, in my judgment, applies and leads to the same conclusion in relation to paragraph 19 of Schedule 2 to the 1989 Act.

47. It follows, in my judgment, that, in principle, a judge in exercise of the inherent jurisdiction can make an order directing the placement of a child in secure accommodation in Scotland. So too, in principle, a judge in exercise of the inherent jurisdiction can make an order directing the placement of a child in non-secure accommodation in Scotland.

48. Since, as I have already observed, an order placing a child in secure accommodation involves a deprivation of liberty, and thus engages Article 5 of the Convention, any judge making such an order in exercise of the inherent jurisdiction must ensure that both the substantive and the procedural requirements of Article 5 are complied with.

49. Wall J was alert to this (I can vouch for the fact that he had been referred to the Strasbourg jurisprudence even although he did not refer to it explicitly) when he said this in *Re C*, pages 197-198:

> " … the following considerations should be borne in mind by the court when deciding whether, and if so on what terms, to make an order under the inherent parens patriae jurisdiction directing the detention of a child in a specified institution …
>
> (2) The child's parents should be involved in the decision-making process and must be given a fair hearing by the court.

> (3) Any order the court makes must be based upon and justified by convincing evidence from appropriate experts that the treatment regime proposed
>
> (a) accords with expert medical opinion, and
>
> (b) is therapeutically necessary.
>
> (4) Any order the court makes should direct or authorise the minimum degree of force or restraint, and in the case of an order directing or authorising the detention of the child the minimum period of detention, consistent with the welfare principle.
>
> (5) Any order directing or authorising the detention of the child should
>
> (a) specify the place where the child is to be detained,
>
> (b) specify (i) the maximum period for which the detention is authorised and, if thought appropriate, (ii) a date on which the matter is to be reviewed by the court, and
>
> (c) specify, so far as possible, a place whose location imposes the minimum impediments on easy and regular access between parents and child.
>
> (6) Any order directing or authorising the detention of the child should contain an express liberty to any party (including the child) to apply to the court for further directions on the shortest reasonable notice.
>
> (7) Any order directing or authorising the detention of the child should, so far as practicable, contain supplementary directions designed
>
> (a) to facilitate easy and regular access between parents and child, and
>
> (b) to provide the same safeguards for the child and the parents as they would have if the child were detained in accordance with some analogous statutory regime …"

I made very similar points in *Re PS*, paras 23-27.

50. I draw particular attention to paragraphs (5)(c) and (7)(a) in Wall J's checklist, which have a particular resonance in cases such as this where the proposed placement is in Scotland. I do not propose to go into the details except to observe that the journey between the place in Cumbria where X's mother lives and the place in Scotland where X is placed is exceedingly difficult and time-consuming if undertaken by public transport and, moreover, one which X's mother can ill-afford. That is why the order I

made on 1 September 2016 contained detailed provisions for the funding by Cumbria County Council of the costs of taxis and trains to enable her mother to visit X in Scotland.

Cross-border legislation

51. I turn now to the relevant legislation dealing with the cross-border effects of court orders, in particular as between England and Scotland. In the family law context there is, in fact, little statutory regulation of these intra-UK cross-border issues.

52. The Brussels regulation commonly known as BIIR or BIIA has no application to issues arising between territorial units within the same Member State, as for instance between England and Scotland. This is the common view of all three United Kingdom jurisdictions: see, in England, *Re W-B (A Child) (Family Proceedings: Appropriate Jurisdiction within UK)* [2012] EWCA Civ 592, [2013] 1 FLR 394, *Re PC, YC and KM (Brussels IIR)* [2013] EWHC 2336 (Fam), and *An English Local Authority v X, Y and Z (English Care Proceedings: Scottish Child)* [2015] EWFC 89; in Northern Ireland, *Re ESJ A Minor (Residence Order Application; Jurisdiction within United Kingdom; Applicability of Council Regulation (EC) No 2201/2003)* [2008] NIFam 6; and, in Scotland, *GOT v KJK* (unreported, 12 December 2012) and *B v B* 2009 SLT (ShCt) 24.

53. Where different Member States are involved, then BIIR applies: see *HSE v SC and AC (Case C-92/12)* [2012] 2 FLR 1040 (a case where the High Court of Ireland made an order placing an Irish child in secure accommodation in England) and *Re Z (Recognition of Foreign Order)* [2016] EWHC 784 (Fam) (a case where the High Court of Ireland made an order placing an Irish child suffering from a serious eating disorder for treatment, if need be involving the use of restraint, in a specialist unit in an English hospital).

54. I note that in the first of these cases the CJEU said this:

> "110 In that regard, it must be recalled that a judgment ordering the placement of a child in a secure care institution is a judgment made in the exercise of parental responsibility. In the main proceedings, the child opposed the judicial decision ordering her placement in such an institution because she was, against her will, deprived of her liberty. The referring court states, moreover, that if S.C. were to abscond from the secure care institution where she is placed the assistance of the United Kingdom authorities would be required in order to take her back by force to that institution, for her own protection.
>
> 111 A judgment ordering a placement in a secure care institution concerns the fundamental right to liberty recognised in Article 6 of the Charter as possessed by 'everyone', and, consequently, also by a 'child'.
>
> 112 It must be added that, in situations where persons exercising parental responsibility have consented to the

> placement of a child in secure institutional care, the position of those persons may alter if the circumstances change.
>
> 113 It follows that, in order to ensure that the system intended by the Regulation operates properly, the use of coercion against a child in order to implement a judgment of a court of a Member State ordering her placement in a secure care institution in another Member State presupposes that the judgment has been declared to be enforceable in the latter State."

55. In the second case, Baker J considered what the position would have been if BIIR had not applied:

> "29 In written submissions, and briefly in their supplemental oral submissions, counsel considered the options for recognition and enforcement of medical treatment orders in cases that fall outside Brussels IIA. As set out above, it was Mr Williams' submission on behalf of the parents that the case did indeed fall outside Brussels IIA. He invited the court to make use of the jurisdiction, well established in cases of international child abduction, for the making of mirror orders, as first analysed by Singer J in *Re P (A Child: Mirror Orders)* [2000] 1 FLR 435 and endorsed by the Court of Appeal in *Re W (Jurisdiction: Mirror Orders)* [2011] EWCA Civ 703. On behalf of the HSE, Mr Setright, whilst adopting the position at the hearing on 23rd March that the case fell within Brussels IIA, argued in the alternative that, if the court concluded that it did not so that the provisions of Part 31 of FPR were not available, the mirror order mechanism could be used.
>
> 30 However, the hearing on 23rd March took place with some limitations of time because the matter came on before me while sitting as the urgent applications judge. In the circumstances, there was insufficient time for counsel to develop these submissions. The jurisdiction to make mirror orders, whilst well established and in common use in cases of child abduction, has not hitherto been used as a means of recognising foreign orders in respect of medical treatment and in my judgment the ramifications of using it in this context requires careful consideration. Having concluded that this case does fall within Brussels IIA, I do not consider it necessary or appropriate to say anything further about the use of mirror orders as a freestanding remedy for the recognition and enforcement of foreign orders falling outside the regulation. I agree that, in urgent cases, a mirror order can be used – as in this case – for the short term recognition and enforcement of an order pending registration under Part 31, but the question whether such orders could be made to provide for indefinite or long term recognition and enforcement of foreign orders falling

> outside Brussels IIA is an issue to be considered on another occasion."

56. I shall return to this below.

57. Part I of the Family Law Act 1986 applies essentially only to what we would call private law proceedings. Section 1 does not include in the list of relevant orders an order placing a child in secure accommodation (whether under section 25 of the 1989 Act or otherwise) and section 1(1)(d)(i) applies only to a limited class of orders made under the inherent jurisdiction which does not, in my judgment, despite the inclusion in section 1(1)(d)(i) of the word "education", include an order made under the inherent jurisdiction placing a child in secure accommodation. So, in my judgment, Part I of the 1986 Act does not apply here. (I should add that, even in the case of orders which are within the ambit of Part I, enforcement in the 'foreign' court is dependent upon registration in that court, in the case of Scotland in the Court of Session, and is possible only if the child has not attained the age of sixteen: see sections 25, 27 and 32(1).)

58. In relation to the recognition and enforcement in England of orders in family matters made by courts in Scotland, the relevant instrument is The Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013, SI 2013/1465, made by the Secretary of State and (see Article 3(1)) extending to England and Wales and to Scotland. There are two separate groups of provision which are relevant.

59. The first deals with the consequences where (see paragraph 26 above) a court in Scotland has, in accordance with article 7(1), specified "a place in England or Wales" for the purposes of an order made in accordance with section 83(2)(a) of the 2011 Act. Article 7(2) provides that:

> "Where a compulsory supervision order … contains a direction of the type mentioned in section 83(2)(b) of the 2011 Act and the place at which the child is required to reside in accordance with the order is a place in England or Wales, the order is authority for the person in charge of that place to restrict the child's liberty to the extent that the person considers appropriate having regard to the measures included in the order."

60. This is supplemented by articles 5, 8 and 9, conferring various coercive and enforcement powers on persons in England and Wales where a child subject to a compulsory supervision order is "in" England or Wales; for example, conferring on police officers power, where the child has absconded, to "apprehend" or "arrest" the child and return the child to the place where, in accordance with the compulsory supervision order, the child is supposed to be.

61. The other provision to which I should refer is in article 13 of the same Regulations which, in terms similar to those regulating the converse situation as set out (see below) in Regulation 3 of The Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013, 2013 No 99, provides for the supersession of a compulsory

supervision order with appropriate orders under the 1989 Act (*not* including a secure accommodation order under section 25) when a child subject to a compulsory supervision order is transferred from Scotland to England and Wales.

62. In relation to the recognition and enforcement in Scotland of orders in family matters made by courts in England, there is much less statutory provision than in the converse situation I have just been considering. The relevant instrument is The Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013, 2013 No 99, made by Scottish Ministers in exercise of the powers conferred by section 190 of the Children's Hearings (Scotland) Act 2011. Regulation 3 provides as follows:

> "(1) This regulation applies where –
>
> (a) a child is subject to a care order made under section 31(1)(a) of the 1989 Act [defined in regulation 2(1) as meaning the Children Act 1989];
>
> (b) the court has given approval under paragraph 19(1) of Schedule 2 to the 1989 Act to the local authority ("the home local authority") to arrange, or assist in arranging, for the child to live in Scotland;
>
> (c) the local authority for the area in which the child is to reside, or has moved to, in Scotland ("the receiving local authority") has, through the Principal Reporter, notified the court in writing that it agrees to take over the care of the child; and
>
> (d) the home local authority has notified the court that it agrees to the receiving local authority taking over the care of the child.
>
> (2) The care order has effect as if it were a compulsory supervision order.
>
> (3) In this regulation "court" means the court which has given the approval in terms of paragraph 19(1) of Schedule 2 to the 1989 Act."

63. This is mirrored by Article 15(1) of The Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013, SI 2013/1465, which provides that, where regulation 3(2) of these Regulations applies, "the care order … ceases to have effect for the purposes of the law of England and Wales."

64. The language of regulation 3(1)(a) is very precise and very clear. In my judgment it applies only where there is a 'full' care order made under section 31(1) of the 1989 Act. It does not apply to an interim care order made under section 38 of the 1989

Act,[7] nor for that matter to a secure accommodation order whether made under section 25 of the 1989 Act or under the inherent jurisdiction.

65. I mention for the sake of completeness, though it does not arise here, section 50(13) of the 1989 Act which provides, in relation to a recovery order made by a court in England, that:

> "A recovery order shall have effect in Scotland as if it had been made by the Court of Session and as if that court had had jurisdiction to make it."

66. I add that the limited reach of the 1989 Act in Scotland is brought out by the list in section 108(11) of the provisions of the 1989 Act which "extend to Scotland."

Cross-border legislation: conclusions

67. In my judgment it is clear that none of these legislative provisions provides for the recognition and enforcement in Scotland of any of the orders made or proposed to be made in these cases nor, putting the point more generally, of any order made by an English judge under the inherent *parens patriae* jurisdiction. Nor has anyone been able to point me to any other provision in Scottish law having that effect.

68. The two local authorities have sought advice from Scottish lawyers on the point. In a position statement prepared for the hearing before me on 1 September 2016, Ms Cheetham summarised the position as she understood it in the light of that advice. I am told that what follows was agreed as accurate by a Scottish Queen's Counsel:

> "Orders made by the English court authorising detention of an English child in secure accommodation in Scotland whether made under the inherent jurisdiction or under Section 25 of the Children Act 1989 are not capable of being recognised under Scottish Law whether by way of mirror orders or registration. What is termed the inherent jurisdiction of the higher courts in Scotland would not extend to the recognition and enforcement of the orders by those courts. Nor is there any statutory basis for recognition and enforcement of such an order in Scotland."

The position is the same in relation to interim care orders:

> "There is no mechanism in Scottish law for the recognition and enforcement of interim care orders."

69. Ms Cheetham's position statement continues:

> "There is a procedure whereby an application can be made to the Inner House of the Court of Session for what is termed in Scottish law a "petition to the *nobile officium*". The *nobile officium* is the extraordinary jurisdiction of the Court of Session

[7] For a similar point which arose as between England and Northern Ireland see *Re P (Minors) (Interim Order)* [1993] 2 FLR 742.

> and the High Court of Justiciary to make orders where there is no existing legal remedy. It was described by Lord Hope as giving the court the ability to:
>
> > "… do something out of the ordinary to prevent oppression or injustice where no other remedy or procedure is available… it is open ended and there are no fixed rules or limits that govern its exercise."
>
> The application can be brought by any interested party. The Respondents would be the Lord Advocate in the public interest and [X] and [Y]. Other interested parties, such as the Advocate General as representing the UK Government for its interest, might also be called for their interest. In such an application, orders might be sought which would effectively authorise measures taken on the basis of the orders made in England in these cases, and in particular detention in secure accommodation. This would be a novel use of the remedy and it would be a matter for the Inner House of the Court of Session as to whether it was prepared to declare the detention of English children in Scottish secure accommodation pursuant to orders made under the inherent jurisdiction of the English High Court lawful …
>
> … the same procedure would need to be adopted … in order to provide for the recognition of the interim care orders in respect of both children and also the recognition of any orders which might be made in relation to any deprivation of liberty which may arise in the course of the step down regime for either child.
>
> The use of the *nobile officium* is an exceptional remedy. However Scottish senior counsel has confirmed that in his opinion this application might be made with reasonable prospects of success. In the circumstances the local authorities in this case can see no alternative but to make the application …"

The way forward

70. In the circumstances it seems to me that the only way in which these matters can be taken forward, whether in these two cases or more generally with a view to finding solutions in other comparable cases, is for an application to be made by the local authorities to the Court of Session seeking to invoke the *nobile officium.* Once the outcome of that application is known, the matters can be listed again before me to determine what should be done in the light of the Court of Session's judgment. One important question which will have to be considered at that stage, in the event that the Court of Session declines to exercise the *nobile officium* and does not identify any other basis for recognition and enforcement in Scotland of a secure accommodation order made by the English court under the inherent jurisdiction, is whether it is

appropriate for the English court to be making such an order at all in those circumstances.

71. There is one further topic which will require consideration both in the High Court and, if I may respectfully suggest, in the Court of Session. Because we are here in an area governed by Article 5 of the Convention, and because Article 5 requires any deprivation of liberty to be subject to regular judicial monitoring and review, there is a potentially difficult question whether in a case such as this that judicial function should be vested in the English court, or in the Scottish court or in some way jointly in both courts. It would be premature for me to express any view on a point which has not yet been argued in front of me and which will benefit from knowing (if possible) what the view is of the Court of Session. I observe merely that, on the one side, there is the argument that the court best suited to this role is the court – the English court – which is seised of the on-going care proceedings, and which therefore has responsibility for every aspect of X and Y's welfare; on the other side, there is the argument that the court best suited to this role is the court – the Scottish court – which, in the final analysis, has the responsibility of enforcing the secure accommodation orders, if need be by the use of coercion: consider the analysis of the CJEU in the passage in the *HSE case*, para 113, set out in paragraph 54 above.

Two final observations

72. Before concluding there are two other matters I should refer to.

73. The first relates to the point about mirror orders identified but not resolved by Baker J in the passage in *Re Z*, para 30, set out in paragraph 55 above. I certainly do not propose to make any definitive pronouncement here on a point which, as Baker J justly observes, has ramifications requiring careful consideration, and which, moreover, has not been the subject of any argument before me. I say only that the idea that the inherent jurisdiction extends to permit the use of mirror orders as what Baker J calls a freestanding remedy for the recognition and enforcement of foreign orders has obvious attraction; and that it is not at all obvious why the only context in which such orders should be made is that where they are already, as Baker J puts it, so well established and in such common use, namely in cases of child abduction. If the court has jurisdiction, as it undoubtedly has, in one context, then why not in others?

74. The other matter relates to the fact that, as I observed in paragraph 3 above, what now stand revealed are serious lacunae in the law which, I suggested, need urgent attention. If that is so, and I entirely recognise that others may take a different view, then the question rises as to how the problem should be addressed. On one view, it is the kind of problem which is admirably suited for consideration by a Law Commission – perhaps, given the subject matter, jointly by the Law Commission of England and Wales and the Scottish Law Commission. That is one possibility. No doubt there are others. But it seems to me that something really does need to be done.