



**IN THE SUPREME COURT
OF THE FALKLAND ISLANDS**

Case number: SC/CIV/09/23

12th July 2023

Before:

HHJ MALCOLM SIMMONS

BETWEEN

The Director of Health and Social Services

Applicant

v

[REDACTED]

Respondent

DECLARATORY JUDGMENT

AND ORDER

Mrs. Alice Sowman appeared for the Applicant

Ms. Alison Inglis, Guardian ad Litem

Mr. Mark Neves appearing for [REDACTED] and [REDACTED]

1. On an application by the Director of Health and Social Services to this Court inviting it to exercise its inherent jurisdiction and issue a declarative Judgment whether restrictions placed upon the liberty of [REDACTED] amount to a deprivation of his liberty and, if the Court so finds, that the deprivation of liberty is lawful.
2. This case invokes Article 5 of the Falkland Islands Constitution Order 2008 wherein, at section 5 (2) (i) it is stated that “*no person shall be deprived of his or her personal liberty save as may be authorized by law.*”
3. In the UK, issues relating to deprivation of liberty in cases such as this, fall under the provisions of the Mental Capacity Act 2005 and the Deprivation of Liberty Safeguards. The 2005 Act is not part of the law of the Falkland Islands and therefore it, and the Safeguards, are not applicable here. However, the Court may be guided by them.
4. Applications involving the exercise by the Court of its inherent jurisdiction are ordinarily heard in open court. However, given the matters in issue, I am satisfied that it is in the interests of justice that this case proceeds in private.
5. This is a case involving an obviously vulnerable person. A lacuna in the legislation of the Falkland Islands means that, in essence, cases such as this inevitably fall to this Court to determine. Absent legislation, the Court must rely upon its inherent jurisdiction. I am satisfied that this matter falls within the inherent jurisdiction of this Court and that it is appropriate for the Court to exercise its inherent jurisdiction in this case.
6. The Director of Health and Social Services is the person responsible for the provision of health and social services in the Falkland Islands. This application is made on behalf of the Director of Health and Social Services by Crown Counsel responsible for Safeguarding.
7. Alison Inglis was appointed Guardian ad Litem for [REDACTED].
8. Mark Neves, instructed by the Respondent’s parents, [REDACTED] and [REDACTED] observed by video link.
9. [REDACTED] was born on [REDACTED]. He is [REDACTED] years of age.
10. [REDACTED] is described in the application as a young man with profound and complex needs. He has a diagnosis of severe Autistic Spectrum Disorder, complex and severe learning difficulties, sensory integration difficulties and epilepsy.

11. [REDACTED] is a Falkland Islander and has been living at the [REDACTED], a residential home in the United Kingdom, since 2015. That placement comes to an end on 11th August 2023 and [REDACTED] is expected to return to the Falkland Islands on 21st August 2023, although his return may be delayed.
12. While resident at [REDACTED], [REDACTED] was subject to restrictions upon his liberty. On 24th March 2023, the Court of Protection authorizing those restrictions while resident at [REDACTED].
13. The Applicant seeks an order that the restrictions imposed upon [REDACTED] liberty, and to which he was subject in England & Wales, continue upon his return to the Falkland Islands. Those restrictions constitute a breach of his constitutional right to Personal Liberty.
14. [REDACTED] has been consulted about this application and his ascertainable views obtained. [REDACTED], the Respondent's mother, and [REDACTED], the Respondent's father, have also been consulted and I understand they support this application and agree the restrictions are in their son's best interests.
15. One of the issues to be determined by the Court is whether the measures imposed are more than mere restraint and amount to deprivation of liberty, the established consideration being whether they are free to leave a placement should they wish to do so. There is a clear distinction between 'deprivation' of liberty and 'restriction' of liberty. However, I recognize that any 'restriction' of liberty may, depending upon its circumstances and degree, amount to a 'deprivation' of liberty.
16. I have read the affidavit of Samantha Lowe sworn on 8th June 2023, the Best Interests Decision dated 31st May 2023, the Review of Care and Support Plan dated 15th May 2023 (updated on 31st May 2023) and the undated Balance sheets.
17. I have also read and taken into consideration the assessments and care plans completed in England as part of the Court of Protection process, including the COP 3 assessment of Capacity dated 17th January 2023, the Care Act Supported Assessment dated 26th September 2022, the My Care and Support Plan dated 29th September 2022, the Best Interests Decision dated 5th March 2023, the Balance Sheet Care and Support Arrangements whilst at the Loddon School, the Balance Sheet return to live in the Falkland Islands, the IMCA report dated 12th December 2022, the Mental Capacity Assessment dated 5th September 2022 and the Transition Plan.
18. [REDACTED] has been assessed in the UK as lacking capacity to consent to the restrictions to which he has been subject and which are part of the care plans before this court. A capacity

assessment dated 17th January 2023 determined that, by reason of his Autistic Spectrum Disorder and severe learning difficulty, [REDACTED] has an impairment of mental functioning such that he is unable to make decisions about his own welfare. He is subject to continuous supervision and control and requires 24-hour supervision on a 2:1 basis.

19. I am satisfied [REDACTED] lacks capacity to make decisions around his own welfare. Therefore, those decisions must be made by others. A care plan has been put in place for his return to the Falkland Islands. Inevitably, that plan includes supervision and control and restrictions on his autonomy that amount to a deprivation of his liberty. I am satisfied that those restrictions are reasonable, proportionate and necessary for his welfare and that less onerous provisions might put his health and well-being in jeopardy.

20. I make the following Findings:

- i. The Respondent lacks capacity to effectively participate in these proceedings;
- ii. The Respondent lacks the capacity to decide where he should live and what care and treatment he needs;
- iii. For the review period defined below, the Respondent shall reside and be cared for at [REDACTED], Stanley, Falkland Islands;
- iv. The arrangements made by the Falkland Islands Government through the Director of Health and Social Services for the Respondent's treatment and care to which reference is made herein are, insofar as they amount to a deprivation of the Respondent's liberty, lawful.

21. In consequence whereof, I make the following Order:

- a. The Guardian ad Litem shall monitor the implementation of the care plan;
- b. On or before 21st September 2023, the Guardian ad Litem shall file in court a report concerning implementation of the current care plan and future care;
- c. The Applicant is to file a Mental Capacity Assessment by 8th September 2023;
- d. The Applicant is to file an Affidavit (s) to update the court on/before 6th October 2023;

- e. This case is listed for review at 10am on 12th October 2023;
- f. Liberty to apply;
- g. No Order for costs.

HHJ Malcolm Simmons

Acting Judge of the Supreme Court