STATES OF JERSEY

DRAFT CHILDREN (ARRANGEMENTS TO ASSIST CHILDREN TO LIVE OUTSIDE JERSEY) (AMENDMENT) (JERSEY) LAW 202-

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Lodged au Greffe on 18th January 2022
by the Minister for Children and Education
Earliest date for debate: 1st March 2022

STATES GREFFE

Jersey

DRAFT CHILDREN (ARRANGEMENTS TO ASSIST CHILDREN TO LIVE OUTSIDE JERSEY) (AMENDMENT) (JERSEY) LAW 202-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Minister for Children and Education has made the following statement –

In the view of the Minister for Children and Education, the provisions of the Draft Children (Arrangements to Assist Children to Live Outside Jersey) (Amendment) (Jersey) Law 202- are compatible with the Convention Rights.

Signed: **Deputy S.M. Wickenden of St. Helier**

Minister for Children and Education

Dated: 13th January 2022

REPORT

1 Introduction

1.1 The Children (Jersey) Law 2002[1] (the "Children Law") provides a legal framework for arrangements to place children who are looked after by the Minister for Children and Education (the "Minister") in a suitable setting by providing for the provision of accommodation and maintenance by the Minister for children whom the Minister is looking after.

1.2 Paragraph 4 of the Schedule 2 of the Children Law confers a power on the Minister that relates to arrangements to assist children to live outside Jersey, and the conditions placed on this.

1.3 An issue has been identified that relates to the requirement for the court to approve the application for placement outside of Jersey only if satisfied, *inter alia*, that, in the case of a child placed outside Jersey in the absence of consent, the child is to live in the country concerned with a parent, guardian or other *suitable person*[2].

1.4 In practice, the placement of children outside Jersey can involve placement in residential care. The issue is that there has been uncertainty as to whether the term *suitable person* allows for a child to be placed, under that provision, in residential care.

1.5 The specific point of uncertainty is as to the proper interpretation of "person" and whether this can be interpreted to cover placements with corporate entities, such as a residential care home service, or is to be interpreted only as permitting placements with specific named persons, i.e. individuals.

1.6 By way of solution the Children (Arrangements to Assist Children to Live Outside Jersey) (Amendment) (Jersey) Law 202-has been drafted. If passed this draft Law will amend the Children Law to enable the Court to approve arrangements for a child that is cared for by the Minister for Children and Education ("Minister"), or is looked after by the Minister, to live outside Jersey whether with people with parental responsibility for that child, other suitable individuals, or in any suitable type of residential accommodation.

2 Background

2.1 Paragraph 4 of Schedule 2 to the Children Law enables the Minister to make arrangements, or assist in arrangements for, any child in the Minister's care to live outside Jersey. Schedule 2, paragraph 4 of the Law provides [*bold underline emphasis added*] –

"*(1) The Minister may –*

(a) with the approval of the court arrange for, or assist in arranging for, any child in the Minister's care to live outside Jersey; and

(b) with the approval of every person who has parental responsibility for the child arrange for, or assist in arranging for, any child not in the care of the Minister but looked after by the Minister to live outside Jersey.

[1] https://www.jerseylaw.je/laws/current/Pages/12.200.aspx
[2] Schedule 2, paragraph 4(2)(c)(ii) of the 2002 Law

(2) The court shall not give its approval under sub-paragraph (1)(a) unless it is satisfied that –

(a) it would be in the child's best interests to live outside Jersey;

(b) suitable arrangements have been, or will be, made for the child's reception and welfare in the country in which the child will live;

(c) the child has consented to living in that country except where –

(i) the court is satisfied that the child does not have sufficient understanding to give or withhold his or her consent, and

*(ii) the child is to live in the country concerned with a parent, guardian or other suitable **person**; and*

(d) every person who has parental responsibility for the child has consented to the child living in that country except for a person whom the court is satisfied cannot be found, is incapable of consenting or is withholding his or her consent unreasonably.".

2.2 In practice, the placement of children outside Jersey can and often does involve placement in residential care as the most suitable placement to meet the child's needs. The issue is that there has been uncertainty as to whether the term *suitable person* allows for a child to be placed, under that provision, in residential care.

2.3 In a recent case, the Royal Court was asked to give its view on the matter and found in favour of interpreting "*suitable person*" to include a body corporate. However, the Royal Court expressed the following view:

'*However, that is not an end to the matter, as the application creates great uncertainty in that a differently constituted Court may decide that my interpretation of this provision is wrong and decline to follow it or my decision may be overturned on appeal. Either way, consideration should be given by the Minister to seeking an amendment to Paragraph 4(2)(c)(ii) of Schedule 2 of the Children Law to make it clear that the Court can give approval to a child living outside Jersey in a residential home or other suitable facility run by a company as he is expressly able to do for children in Jersey under Article 21(b) of the Children Law or by the simple expedient of deleting Paragraph 4(2)(c)(ii), bearing in mind that in giving its approval to a child living outside Jersey the Court will always be concerned with ensuring that there are proper arrangements for the welfare of the child in the country in which the child will live*'.

2.4 By way of comparison, the English Court of Appeal[3], on hearing a similar question in relation to comparable provision in the Children Act 1989 (CA 1989), determined that 'person' means a natural person and, therefore, absent consent of the child, the comparable provision in the CA 1989 did not enable the placement of children in residential care outside of England. There has been a subsequent amendment to the CA 1989[4] to provide for placement outside England and Wales, in Scotland, for secure accommodation but not for other types of residential care.

2.5 There are a number of upcoming applications to place young people off-Island and a successful challenge would also cause significant and immediate difficulties for the care of a number of looked after children who are currently placed in residential care outside Jersey.

[3] Judgment attached at Appendix 1 to this report
[4] Schedule 2, paragraph 19.

2.6 Given the Court's uncertainty on the issue, and the risk of a contrary interpretation or potential challenge to the recent Court judgment, the Minister tasked officers to draft the Law in order to clarify the issue. The Court's view was that the ability to arrange residential placements overseas in the absence of consent could either be provided for expressly or, by removing reference to placing with a *suitable person* entirely, open up the Court's ability to approve any placement so long as the other conditions in paragraph 4(2) are satisfied and this is what the draft Law provides for.

3 Provisions of the draft Law

3.1 Article 1 states that the draft Law will amend the Children Law.

3.2 Article 2 amends paragraph 4 of Schedule 2 of the Children Law (arrangements to assist children to live outside Jersey):

3.3.1 By substituting sub-paragraph (2)(c) for the following –

"*(c) the child has consented to living in that country except where the court is satisfied that the child does not have sufficient understanding to give or withhold consent; and*".

By inserting after sub-paragraph 4 the following –

"*(5) Sub-paragraph (7) applies where, before the coming into force of the Amendment Law, the court gives its approval under sub-paragraph (1)(a), and sub-paragraph (4) applies where an appeal is made against the court's decision –*

(a) after the coming into force of the Amendment Law; or

(b) before the coming into force of the Amendment Law but that appeal does not fall to be determined until after the coming into force of the Amendment Law.

(6) Sub-paragraph (7) also applies where, before the coming into force of the Amendment Law, the court gives its approval under sub-paragraph (1)(a) but does not make an order under sub-paragraph (4) and an appeal is made against the court's decision –

(a) after the coming into force of the Amendment Law; or

(b) before the coming into force of the Amendment Law but that appeal does not fall to be determined until after the coming into force of the Amendment Law.

(7) In the cases described in sub-paragraphs (5) and (6), the court's decision in relation to the appeal is to be made on the basis of sub-paragraph (2) (as amended by the Amendment Law).

(8) Where, before the coming into force of the Amendment Law, the Minister has made an application for approval under sub-paragraph (1)(a) but that application does not fall to be determined until after the coming into force of the Amendment Law, the court's decision in relation to that application is to be made on the basis of sub-paragraph (2) (as amended by the Amendment Law).

(9) In this paragraph, "Amendment Law" means the Children (Arrangements to Assist Children to Live Outside Jersey) (Amendment) (Jersey) Law 202-.".

3.2.3 The substitution of Paragraph 2(c) has the effect of removing the additional conditions of a placement under Schedule 2(2) that if a child is to be placed outside of Jersey and does not consent that the child is to live in the country concerned with a parent, guardian or other suitable person. Although this clause has been removed the court will still consider the nature and suitability of the arrangements that have been made under conditions set by Schedule 2, 4(2)(a) and (b).

The addition after sub-paragraph 4 makes provision for transitional arrangements in respect of applications and appeals under paragraph 4 sub-paragraph (1)(a) of Schedule 2 to the Law, to provide certainty to the court and the parties to the proceedings as to the applicable law at the point at which the application or appeal is to be determined.

3.3 Article 3 allows for citation and commencement, and the Law is to come into force the day after it is registered.

4 Financial and manpower implications

There are no financial or manpower implications for the States arising from the adoption of this draft Law.

5 Human Rights Statement

The notes on the human rights aspects of the draft Law in **Appendix 2** to this report have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX 1 TO REPORT

Neutral Citation Number: [2019] EWCA Civ 1714

Case No: B4/2019/1841/1842/1846

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HHJ GREENSMITH
LIVERPOOL CIVIL AND FAMILY COURT
LV19CO1677

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2019

Before:

LORD JUSTICE FLOYD
LADY JUSTICE KING
and
LORD JUSTICE MOYLAN

Re C (A Child) (Schedule 2, Paragraph 19, Children Act 1989)

Mr R Howling QC (instructed by **Wirral Borough Council**) for the **Appellant**
The Mother in Person
The Father in Person
Miss G Irving QC (instructed by **Nyland and Beattie Solicitors**) for the **Child's Guardian**

Hearing date: 8th October 2019

Approved Judgment

Judgment Approved by the court for handing down. **C (A Child)**

Lord Justice Moylan:

Introduction:

1. The Local Authority appeals from the orders made by His Honour Judge Greensmith on 5th and 9th July 2019 by which, in essence, he refused to give the court's "approval" to the Local Authority arranging for the child C to live in Scotland in a residential home in which he had been placed.

2. A Local Authority may only arrange for a child in their care to live outside England and Wales with the approval of the court: paragraph 19(1), Schedule 2 to the Children Act 1989 ("the 1989 Act"). The court can only give its approval if a number of conditions are satisfied: paragraph 19(3). One of these is that the child "has consented to living in that country".

3. At the date of the judge's orders, C did not consent to his being placed in Scotland. However, paragraph 19(4) provides that the court can give its approval, even though the child does not consent, if the court "is satisfied that the child does not have sufficient understanding to give or withhold his consent" *and* "if the child is to live in the country concerned with a parent, guardian, special guardian, or other suitable person".

4. The Local Authority's appeal originally focused on the judge's approach to the first issue in paragraph 19(4), namely whether C had the requisite "sufficient understanding". However, following the filing of a Respondent's Notice on behalf of the Guardian, the focus of the appeal became whether placement in a residential home was capable of satisfying the second condition in paragraph 19(4). In simple terms, whether the words "live in the country concerned with … a suitable person" included living in a residential home.

5. The Local Authority is represented by Mr Howling QC and the Guardian by Ms Irving QC, neither of whom appeared below. The father is neither represented nor present (we were told that his application for legal aid had been unsuccessful). The mother is not present or represented but has provided the court with a full written presentation of her position.

6. This case, therefore, raises two issues: (i) Do the words "other suitable person" enable the placement of a child subject to a care order made by a court in England and Wales in a residential home in Scotland; and (ii) Was the judge's approach to the issue of "sufficient understanding" flawed.

7. In summary, on (i), Ms Irving submits that the provisions of paragraph 19 do not enable the court to approve a child in the care of a Local Authority being placed in a residential home in Scotland when the child does not consent to that placement. It is her case that the words "other suitable person" mean a natural person. Mr Howling

submits, relying principally on the Interpretation Act 1978, that "other suitable person" includes "persons corporate or unicorporate".

8. As to the judge's approach to issue (ii), during the course of the hearing it became clear that both Mr Howling and Ms Irving effectively agreed that the judge did not adequately address this issue.

9. At the end of the hearing we informed the parties that the appeal would be dismissed. These are my reasons for agreeing with that decision.

Background

10. C is a young teenager. He was first accommodated by the Local Authority in 2017 under section 20 of the 1989 Act. Care proceedings were then commenced and a care order was made early in 2018. These proceedings were determined by a District Judge but involved the same solicitor and Guardian who are involved in the current proceedings.

11. C was placed in a residential home in England until March 2019 when he was placed by the Local Authority in a residential home in Scotland. I do not propose to set out the details of what had happened prior to this but they included C repeatedly absconding from his placement and the Local Authority obtaining recovery orders which were made by His Honour Judge Greensmith.

12. The placement in Scotland was undertaken without the court's approval having been obtained. The Local Authority sought to remedy this by making an application dated 21st May 2019 for the court's approval. This application was supported by a statement from a social worker. This set out that C did "not want to be placed in Scotland", although he had more recently indicated "some willingness to stay" there. The statement also raised questions about why he was saying this, including that he was considered to be "vulnerable to exploitation".

13. On 23rd May 2019, HHJ Greensmith, made an order on the papers. He made the child a party and directed that a Guardian be appointed. He also gave interim consent to C's placement in Scotland.

14. At the first hearing on 30th May 2019 the judge again gave interim consent, until 5pm 9th July 2019. He also made a number of directions including that the Guardian should provide her analysis by 4pm 4th July 2019. A hearing was listed on 9th July.

15. The mother provided a statement which set out her support for the placement in Scotland as "the best placement" for C. This also stated that C had said he was "happy being in Scotland" but didn't want to be there. In his statement the father did not agree that the placement in Scotland was in C's best interests.

16. C's Social Worker provided a further statement dated 27th June 2019. This set out that C had been inconsistent about whether he consented to being in Scotland. It also contained a number of paragraphs under the heading of "sufficient understanding". In these the Social Worker explained why he was "concerned that C does not have sufficient understanding to consider the questions put to him about his placement". In a Report dated 2nd July 2019, the Social Worker said that C "continues to struggle to understand risk and the consequences of his actions".

17. On 27th June 2019 the solicitor for the Guardian made an application for an urgent directions hearing. No statement was provided in support of this application which relied on the information contained in that section of Form C2 which invites "brief details (of) your reasons for making the application". These were that C "no longer consents" to living in Scotland and that he had sufficient understanding to give or withhold his consent.

18. A hearing took place on 5th July 2019. It was, understandably, a brief hearing which had been listed quickly. The judge heard submissions on behalf of the Local Authority, the mother, the father and the Guardian. The Local Authority's position was that the court should deal with C's placement at the hearing listed on 9th July. It was submitted that this would enable the matter to be addressed in more detail including, it appears, by obtaining assistance from the Guardian who had not yet provided her analysis.

19. The solicitor for the Guardian told the judge that he had visited C and had left "with clear instructions that C didn't consent to the placement". The solicitor had then been told that C was reconsidering his decision. In a subsequent telephone call with the solicitor, C said that he wanted to speak to the social worker before making his decision. After this, again in a telephone conversation, C was "adamant" that he no longer consented to his placement in Scotland. Although the solicitor used the word "instructions", and without criticising the solicitor in any way, I would just note that C was in fact represented by his Guardian and was not instructing the solicitor directly.

20. The solicitor also told the judge that, in his submission, C clearly had sufficient understanding to give or withhold his consent. The solicitor made clear that, understandably, it was this assessment which had led him to make an urgent application because he was concerned that C's continued placement in Scotland was not lawful.

21. Both parents consented to C's placement in Scotland.

22. In a short judgment, the judge set out that C did not consent to his placement in Scotland and was "fully aware of the possible consequences of withdrawing his consent". In those circumstances, he decided that he should no longer approve the placement. He discharged the order of 30th May 2019, giving interim consent to the placement in Scotland, and indicated that he expected the Local Authority to arrange for C to be returned to England that day. The matter remained listed, "for directions", on 9th July 2019.

23. The Social Worker filed a further statement dated 8th July 2019. He again addressed the issue of whether C had sufficient understanding and set out his reasons for concluding that C did not have sufficient understanding. These included that C had "not rationalised his decision" and that he was not able "to evaluate the risks and consequences of saying no".

24. At the hearing on 9th July, counsel for the Local Authority sought to persuade the judge to reconsider his decision on 5th July including because the social worker had "serious concerns" about C's understanding, as set out in his evidence. The judge declined to do so largely because he accepted the Guardian's solicitor's assessment that C had the ability to make the decision not to consent and fully understood the consequences of doing so. The judge also refers to the Guardian's assessment as being to the same effect although, in this court, counsel were not sure of the source of this understanding as the Guardian had not provided any analysis pursuant to the previous order.

25. In his judgment on 9th July, the judge set out his conclusion that there was "no cogent evidence before the court that C is incapable of making a decision" about consenting or withholding consent to being placed in Scotland. The judge also said that the Local Authority had not adduced any evidence that C was "incapable of making his own decisions". The judge's order required C to be returned immediately to England.

26. Although the debate in this court has centred on the meaning of paragraph 19(4), we were told that the judge was not specifically referred to its provisions, in particular as to the issue of whether it could apply to C's placement in a residential home in Scotland.

Legal Framework.

27. Schedule 2 to the 1989 Act contains a number of provisions dealing with "Support for Children and Families provided by Local Authorities in England. Paragraph 19 contains "Arrangements to assist children to live abroad".

28. Paragraph 19 provides as follows:

> 19(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.

(6)Section 85 of the Adoption and Children Act 2002 (which imposes restrictions on taking children out of the United Kingdom)] shall not apply in the case of any child who is to live outside England and Wales with the approval of the court given under this paragraph.

.....

(9)This paragraph does not apply—

(a)to a local authority placing a child in secure accommodation in Scotland under section 25, or

(b)to a local authority placing a child for adoption with prospective adopters."

Sub-paragraph (9) was inserted by the Children and Social Work Act 2017 (the 2017 Act) consequent on the amendments made by that Act to section 25 of the 1989 Act to enable children to be placed in secure accommodation in Scotland pursuant to an order made by a court in England and Wales.

29. There appear to be no authorities dealing specifically with the meaning of "sufficient understanding" in paragraph 19(4). There are, however, a number of authorities which address this issue in other contexts. Because we decided, for the reasons set out below,

that paragraph 19(4) could not apply in the circumstances of this case, we did not explore these authorities in any detail during the hearing. I, therefore, very briefly mention that we were referred to *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 and *CS v SBH and Others* [2019] EWHC 634 (Fam). The first of these is, of course, the seminal case on when a child has the right to make their own decisions because he or she has "a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision"; Lord Scarman at p.186 D. Later Lord Scarman made clear that this is an issue of fact and, at p.189 C/E, that "there is much that has to be understood by a girl under the age of 16 if she is to have legal capacity to consent to" contraceptive advice and treatment.

30. In the latter case, Williams J was dealing with the question in the context of Family Procedure Rules 2010, r.16.6 which governs the circumstances in which a child may conduct proceedings without a guardian or litigation friend. In the course of his judgment, he referred to what Black LJ (as she then was) had said in *Re W (A Child) (Care Proceedings: Child's Representation)* [2017] 1 WLR 1027, at [27]: "What is sufficient understanding in any given case will depend on all the facts". Also relevant is what she said, at [36], namely that the "judge will be expected to be guided by the guardian and by those solicitors who have formed a view as to whether they could accept instructions from the child. Then it will be for the judge to form his or her own views on the material available". Williams J set out, at [64], that when determining the issue he needed to consider a "range of factors",

31. Turning to the question of what is meant by "live with a suitable person", the Interpretation Act 1978 ("the 1978 Act") provides that the word person "includes a body of persons corporate or unincorporated". As is made clear in *Bennion on Statutory Interpretation*, 7th Edition, the definitions in this Act "apply to Acts in general", paragraph 19.1(1). Specifically, in respect of the definition of the word "person", *Bennion* states that this definition "does not apply if the contrary intention appears, whether expressly or by implication"; a number of cases are then cited as examples to support this proposition, paragraph 19.5. Reference could also be made to the *ejusdem generis* principle of construction, which is dealt with in *Bennion* in Chapter 23.

32. On this aspect of the case, we were referred to *Re X and Y (Secure Accommodation: Inherent Jurisdiction)* [2017] Fam 80, in which Sir James Munby P said, at [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."

As referred to above, the difficulty envisaged by Sir James Munby in respect of secure accommodation has been addressed in the 2017 Act.

33. I would additionally note that 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, as the title states, make provision for the manner in which a care order made by a court in England and Wales is given effect if the child is to live in Scotland. It requires the local authority for the area in which the child is to live to notify the court in England and Wales, through the Principal Reporter, that it agrees "to take over the care of the child", reg. 3(1)(c).

Submissions

34. I am grateful to counsel for their succinct but comprehensive submissions.

35. Mr Howling stressed the "practical need" for some children subject to care orders made by courts in England and Wales to be placed in residential units in Scotland. He relied on the 1978 Act and submitted that this court should interpret paragraph 19 so as to enable this practical need to be met. He pointed to the benefit which it appeared C had gained by being placed there and submitted that, absent any legal obstacle, this placement would be in C's best interests.

36. On the issue of "sufficient understanding", he submitted that the judge appears to have overlooked the fact that there was evidence from the Social Worker which could support the conclusion that C lacked sufficient understanding in respect of his placement in Scotland. In his submission, the judge adopted too narrow an approach and should have undertaken a more extensive analysis of the evidence and should have waited for the Guardian's evidence. The judge should not simply have determined the issue by reference to the solicitor's view that C had sufficient understanding.

37. Ms Irving submits, simply, that the words "other suitable person" are confined to a natural person. She relies on *Re X and Y*. In her submissions, Ms Irving touched on the possible reasons for the wording in paragraph 19(4) by reference to the provisions they replaced and the need to ensure historic injustices were not repeated. Based on these she further submitted that, for a person to be within this provision, they had to have parental responsibility or decision-making capacity for the child.

38. On the issue of "sufficient understanding", Ms Irving sensibly effectively accepted that the judge's consideration of the issue had not been sufficient although she stressed the considerable experience of the solicitor instructed by the Guardian as providing the context for the judge accepting his assessment of whether C was, as the judge phrased it, "competent to give his consent".

Determination

39. I would first record that, as the Local Authority recognised, C should *not* have been placed in Scotland without the Local Authority having first sought and obtained the court's approval to the proposed placement. This was not merely a technical failing; it was a substantive failing. I would expect this Local Authority and, indeed, all Local Authorities to be aware of this obligation.

40. On the first issue, (i), paragraph 19(4) applies *only* if the child is "to *live* ... *with* a parent, guardian, special guardian or other suitable person". As Floyd LJ observed during the hearing it is not easy to see how a child could live *with* a company or an unincorporated "body of persons". For example, while a child can live in a residential home which might be owned by a company it would be difficult to argue that, as a result, the child was living with a person. Further, when this is added to the fact that the words "other suitable person" follow a list comprising natural persons, I do not consider it is possible to interpret this provision as meaning other than that it is confined, as decided by Sir James Munby P, to natural persons. Whilst I recognise that there might well be a practical need, as submitted by Mr Howling, this cannot counter the factors referred to above and such a need alone would not provide a legitimate basis for the proposed statutory interpretation.

41. The result of this conclusion is that, when a child does not consent, and regardless of whether they do or do not have sufficient understanding, the court is not permitted to approve their placement in Scotland other than with a natural person. The consequence is that a local authority cannot "arrange for, or assist in arranging for, any child in their care", who does not consent, to live in a residential home in Scotland (or, indeed, anywhere else outside England and Wales).

42. Given the limited submissions we heard on the history which might lie behind this particular provision and on the broader potential ramifications, I do not propose to address Ms Irving's additional submission as to whether the term "other suitable person" might be further confined. All I would say is that a court would clearly need to establish who would have parental responsibility or, in broader terms, legal responsibility, for a child before that child could be placed outside England and Wales. One of the problems that has been a feature of some care cases (and still can be judging by the very recent judgment of *Re K, T and U (Placement of Children with Kinship Carers Abroad)* [2019] EWFC 59) is a regrettable failure to address at an early stage of

the process the legal issues which require to be resolved to enable such a placement to take place in a manner which safeguards the child's best interests.

43. As to the second issue, (ii), we only heard very brief submissions because we had already decided that the legal point raised on behalf of the Guardian was correct. This is not, therefore, a case in which it would be appropriate to provide detailed guidance, if such is in any event required. I would, however, make the general point that the answer to the question of whether a child has "sufficient understanding" requires consideration of all the relevant information and evidence and involves a broad assessment of the child's intelligence, maturity and understanding of the factors relevant, in the context of paragraph 19(4), to the proposed placement outside England and Wales.

44. This need not be an extensive investigation or analysis but in my view, in the circumstances of this case, it required a more extensive consideration than that given by the judge. I fully accept that the judge was being given the opinion of a very experienced solicitor but there was also evidence from the Social Worker with which the judge needed to engage. It was a decision for the judge to make and not one which depended simply on the solicitor's opinion. It might, further, have been better to wait until the analysis which the Guardian had been ordered to file had been provided. Subject to the legal obstacle present in this case, it would have been open to the judge to give interim approval pending determination of the issue of whether C had sufficient understanding. I say this in the particular context of C having already been placed in Scotland.

45. Finally, I recognise the force of the submission made by Mr Howling as to the potential practical need for children to be placed in residential units in Scotland. This may be a "gap" in the legislative framework similar to the situation that previously existed in respect of secure accommodation. I, therefore, propose that this issue be brought to the attention of the President of the Family Division for his consideration.

Lady Justice King:
46. I agree.

Lord Justice Floyd:
47. I also agree.

APPENDIX 2 TO REPORT

Human Rights Notes on the Draft Children (Arrangements to Assist Children to Live Outside Jersey) (Amendment) (Jersey) Law 202-

These Notes have been prepared in respect of the draft Children (Arrangements to Assist Children to Live Outside Jersey) (Amendment) (Jersey) Law 202-, (the "**draft Law**") by the Law Officers' Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers' opinion, the draft Law is compatible with the European Convention on Human Rights ("**ECHR**").

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

Article 2(a) of the draft Law would amend paragraph 4(2)(c) of Schedule 2 to the Children (Jersey) Law 2002 (the "2002 Law"). Schedule 2 provides for ministerial support for children and families. Paragraph 4 provides for arrangements to assist children to live outside Jersey.

Paragraph 4(1)(a) of Schedule 2 provides, inter alia, that the Minister may with the approval of the court arrange for, or assist in arranging for, any child in the Minister's care to live outside Jersey. Paragraph 4(2) of Schedule 2 then states that the court shall not give its approval under sub-paragraph (1)(a) unless it is satisfied as to the matters listed therein. Paragraph (2)(c) states one such matter to be that –

> *"(c) the child has consented to living in that country except where –*
>
> *(i) the court is satisfied that the child does not have sufficient understanding to give or withhold his or her consent, and*
>
> *(ii) the child is to live in the country concerned with a parent, guardian or other suitable person;…".*

Article 2(a) of the draft Law substitutes for sub-paragraph (2)(c) a new provision: "the child has consented to living in that country except where the court is satisfied that the child does not have sufficient understanding to give or withhold consent". The effect of this amendment is to remove the present restriction in sub-paragraph (2)(c) as to the placement arrangements into which a child who is unable to give or withhold consent can be placed outside the jurisdiction. In its place is substituted a requirement that the court is satisfied as to the fact of consent from the child to the placement except where the child does not have sufficient understanding to give or withhold consent, there being no further restriction on the court's approval as there is presently in sub-paragraph (2)(c)(ii).

The placement of a child outside Jersey will engage the Article 8 ECHR right to private and family life of the child concerned and that child's family. The draft Law does not, overall, substantially affect the current process in Schedule 2 paragraph 4 for the approval of placements of children outside Jersey. That provision presently, and would following amendment, maintains several safeguards for the protection of the Article 8

ECHR rights of those involved. For example, placements are subject to the approval of the court which is required, inter alia, to satisfy itself that it would be in the child's best interests to live outside Jersey and to seek the consent of those persons with parental responsibility for the child.

Article 2(b) of the draft Law inserts "transitional provisions" relating to various scenarios in which an appeal has or has not been commenced at the point at which the amending Law is commenced. The effect of Article 2(b) (inserting new sub-paragraphs (5) and (6), in particular) is that the court's decision in relation to the appeal is to be made on the basis of paragraph 4(2) of Schedule 2 to the 2002 Law, as amended by the draft Law. So, for example, an appeal which is commenced prior to the coming into force of the draft Law but is not determined until after the coming into force of the draft Law is to be determined by the court on the basis of paragraph 4(2) in its amended form. The purpose of the transitional provision is to provide certainty to the court as to the applicable law at the point at which the appeal is to be determined.

From an ECHR perspective, the entry into force of a law when a case to which the State is a party is still pending engages an individual's right to a fair trial under the civil limb of Article 6 ECHR. The European Court of Human Rights (the "ECtHR") is mindful of the compatibility of legislation which has the effect of influencing the judicial determination of proceedings to which the State is a party. However, Article 6 ECHR cannot be interpreted as preventing any interference by the authorities with pending legal proceedings to which they are party. Where there are compelling public-interest motives the ECtHR has held that such interference can be justified. Moreover, ECtHR case law indicates that laws which are enacted before the start of proceedings or once they have ended do not raise an issue under Article 6 ECHR.

The effect of the draft Law in this regard, if passed, would be to require the court to determine appeal proceedings commenced under the 2002 Law, but yet to be determined, in accordance with paragraph 4(2) of Schedule 2 to the 2002 Law in its amended form, not the form in which the law was stated at the time the appellant commenced proceedings. Applying the ECHR principles and jurisprudence outlined above, the effect of the draft Law, if passed, would be to interfere with pending legal proceedings, i.e. those which have been commenced but which are yet to be heard or determined. ECtHR case-law suggests that such an interference can be justified if there are compelling public-interest motives.

The draft Law is a measure intended to address a statement by the Royal Court in In the Matter of RR (Interim Care Order)[5] that paragraph 4(2) of Schedule 2 to the 2002 Law is amended to clarify the jurisdiction of the Court in approving the placement of children outside Jersey in cases where the child does not have sufficient understanding to give or withhold his or her consent. Without the amendment there would continue to be some uncertainty in such cases, perhaps even the possibility of a contrary judicial interpretation on a challenge (as the Court suggests in RR), around the interpretation of paragraph 4(2)(c) and the scope of the power of the court to approve the placement of a child outside Jersey in every care setting where that child is unable to give or withhold consent.

In RR the Court explained what it considered to be the absurd and potentially detrimental consequence of the distinction, as drawn by paragraph 4(2)(c) in its present form –

> *"Where a child has consented to live outside Jersey and has sufficient understanding to do so, there is no restriction on who he or she may be placed*

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> *with, but where the child does not have sufficient understanding to give or withhold consent, there is such a restriction. So, a fourteen year old vulnerable child with sufficient understanding to give or withhold consent can be placed in a specialist residential home, but not a fourteen year old vulnerable child with insufficient understanding to give or withhold consent. There would seem to me to be no logic for such a distinction or why, in the case of the latter child, he or she should be deprived of the specialist placement he or she needs. This gives rise to the disproportionate counter-mischief of forcing the Minister to keep children with insufficient understanding to give or withhold consent in placements in Jersey which may not be suitable, or may even be harmful to them. In RR's case, it would require his return to the care of his maternal grandparents, a placement which the Court has found to be harmful (through no fault of the maternal grandparents)."*

In this paragraph the Court sets out a compelling public-interest motive for the amendment to the 2002 Law which it recommended later in its judgment. A challenge to the approval of the court for the placement of a child outside Jersey, heard on the basis of the 2002 Law in its current form, might, as the Court noted in RR, risk a resulting adverse judicial interpretation of paragraph 4(2)(c) that would continue what the Court considered to be the illogical distinction it highlighted therein.

Returning to the draft Law and its effect, if passed, of requiring the court to determine proceedings concerning the court's decision to approve a placement on the basis of paragraph 4(2) in its amended form: the effect of the draft Law engages Article 6 ECHR as it would interfere with those proceedings, directing the court to discount the law applicable when the challenge was initiated and to consider it in light of the law at the time the dispute is to be determined. That interference must be in pursuit of compelling public-interest motives for it to be justified. Arguments such as those set out by the Royal Court in RR are considered to be compelling and to reflect public-interest motives. It is considered, therefore, that the effect of the draft Law, if passed, in this regard would be justified under Article 6 ECHR and, as such, compatible with the ECHR.

EXPLANATORY NOTE

This draft Law (the "Law"), if passed, will amend the Children (Jersey) Law 2002 (the "Children Law") to clarify that the court (i.e. the Royal Court as defined by the Children Law) may approve arrangements for a child who is in the care of the Minister for Children and Education (the "Minister"), to live outside Jersey whether with people with parental responsibility for that child, other suitable individuals, or in any suitable type of residential accommodation.

Article 1 states this Law amends the Children Law.

Article 2 amends paragraph 4(2)(c) (arrangements to assist children to live outside Jersey) of Schedule 2 to the Children Law. The effect of the amendment is to clarify the court's ability to approve any placement of a child who is in the care of Minister (as to which, see the definition "care order" in the Children Law), in another country so long as the conditions in paragraph 4(2) are satisfied. Accordingly, in a case where a child does not have sufficient understanding to give or withhold consent to living outside Jersey it remains the case that, although the amendment removes paragraph 4(2)(c)(ii), the court may approve arrangements for a child to live abroad with a parent, guardian or other suitable person which could include an individual or residential accommodation. Paragraph 4 is further amended to make transitional provisions. The effect of those transitional provisions is that paragraph 4(2), as amended by this Law, applies where an application for approval of arrangements for a child in the Minister's care to live outside Jersey is made before the coming into force of this Law but is not determined until after the coming into force of this Law. Similarly, amended paragraph 4(2) applies in respect of any appeal against the court's decision to approve those arrangements made before the amendment takes effect but not determined until after that date. Amended paragraph 4(2) also applies in respect of appeals made after the coming into force of this Law which relate to applications for approval determined before the coming into force of this Law.

Article 3 provides for the title by which this Law may be cited and for it to come into force on the day after it is registered with the Royal Court.

DRAFT CHILDREN (ARRANGEMENTS TO ASSIST CHILDREN TO LIVE OUTSIDE JERSEY) (AMENDMENT) (JERSEY) LAW 202-

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Jersey

DRAFT CHILDREN (ARRANGEMENTS TO ASSIST CHILDREN TO LIVE OUTSIDE JERSEY) (AMENDMENT) (JERSEY) LAW 202-

A LAW to amend further the Children (Jersey) Law 2002.

Adopted by the States	*[date to be inserted]*
Sanctioned by Order of Her Majesty in Council	*[date to be inserted]*
Registered by the Royal Court	*[date to be inserted]*
Coming into force	*[date to be inserted]*

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Children (Jersey) Law 2002 amended

This Law amends the Children (Jersey) Law 2002.

2 Schedule 2 (Ministerial support for children and families) amended

In paragraph 4 (arrangements to assist children to live outside Jersey) of Schedule 2 –

(a) for sub-paragraph (2)(c) there is substituted –

"(c) the child has consented to living in that country except where the court is satisfied that the child does not have sufficient understanding to give or withhold consent; and";

(b) after sub-paragraph (4) there is inserted –

"(5) Sub-paragraph (7) applies where, before the coming into force of the Amendment Law, the court gives its approval under sub-paragraph (1)(a), and sub-paragraph (4) applies where an appeal is made against the court's decision –

(a) after the coming into force of the Amendment Law; or

(b) before the coming into force of the Amendment Law but that appeal does not fall to be determined until after the coming into force of the Amendment Law.

(6) Sub-paragraph (7) also applies where, before the coming into force of the Amendment Law, the court gives its approval under sub-paragraph (1)(a) but does not make an order under sub-paragraph (4) and an appeal is made against the court's decision –

(a) after the coming into force of the Amendment Law; or

(b) before the coming into force of the Amendment Law but that appeal does not fall to be determined until after the coming into force of the Amendment Law.

(7) In the cases described in sub-paragraphs (5) and (6), the court's decision in relation to the appeal is to be made on the basis of sub-paragraph (2) (as amended by the Amendment Law).

(8) Where, before the coming into force of the Amendment Law, the Minister has made an application for approval under sub-paragraph (1)(a) but that application does not fall to be determined until after the coming into force of the Amendment Law, the court's decision in relation to that application is to be made on the basis of sub-paragraph (2) (as amended by the Amendment Law).

(9) In this paragraph, "Amendment Law" means the Children (Arrangements to Assist Children to Live Outside Jersey) (Amendment) (Jersey) Law 202-.".

3 Citation and commencement

This Law may be cited as the Children (Arrangements to Assist Children to Live Outside Jersey) (Amendment) (Jersey) Law 202- and comes into force on the day after it is registered.