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Deprivation of liberty: A review of published judgments

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Report

This report summarises key themes and issues identified in 31 judgments, published between 2014 and 2021, relating to applications to deprive children of their liberty under the inherent jurisdiction of the high court or section 25 of the Children Act 1989 and section 119 of the Social Services and Well-being Act (Wales) 2014. A summary of each judgment is provided.

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Summary also available at the above link.

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This report was written in partnership with Andrew Powell , 4PB.

Introduction

Increasing concern has been raised about a small but highly vulnerable number of children who are deprived of their liberty by the family courts in England and Wales and the lack of appropriate placements that can meet these children's needs. As part of the Nuffield Family Justice Observatory's programme of work on young people, we are aiming to shine a spotlight on the needs of this group of children and how they could be better supported by the system. To date, this has included the following.

- An evidence review on what we know about children deprived of their liberty in welfare, mental health and youth justice settings: Roe, A. (2022). *What do we know about children deprived of their liberty in England and Wales? An evidence review.* Nuffield Family Justice Observatory. https://www.nuffieldfjo.org.uk/resource/children-and-young-people-deprived-of-their-liberty-england-and-wales
- A briefing paper on the legal mechanisms to deprive children of their liberty: Parker, C. (2022). *Deprivation of liberty: Legal reflections and mechanisms*. Briefing. Nuffield Family Justice Observatory. www.nuffieldfjo.org.uk/resource/deprivation-of-liberty-legal-reflections-and-mechanisms-briefing
- Analysis of trends in secure accommodation applications using Cafcass and Cafcass Cymru data: Roe, A., Cusworth, L. and Alrouh, B. (2022). *Children subject to secure accommodation orders: A data review.* Nuffield Family Justice Observatory. https://www.nuffieldfjo.org.uk/resource/children-subject-to-secure-accommodation-orders-a-data-review

In this report, we provide a summary of published judgments relating to applications to the family court to authorise the deprivation of liberty of a child in a secure children's home under section 25 (s.25) of the Children Act 1989 and section 119 (s.119) of the Social Services and Well-being Act (Wales) 2014, or under the inherent jurisdiction of the high court. These judgments provide clarification about the law in relation to use of the inherent jurisdiction to deprive children of their liberty as well as highlighting some of the concerns raised by judges in connection with these applications.

We identified 31 judgments, published between 2014 and 2021. Cases were identified by a search of the British and Irish Legal Information Institute (BAILII) database and by following up on other cases cited in these judgments.

The published judgments we have identified will relate to just a fraction of the actual number of cases heard, particularly of secure accommodation cases. This is because only a very small proportion of judgments are published in BAILLI from circuit judges and district judges, who are more likely to be the judges hearing applications under s.25 of the Children Act 1989. Deprivation of liberty applications under the inherent jurisdiction are heard by high court judges (or circuit judges sitting as high court judges), who are more likely to publish judgments.

In 2020/21, 392 applications were made in England and Wales for secure accommodation orders and 579 applications were made for deprivation of liberty orders under the inherent jurisdiction in England (Ministry of Justice 2021; and data provided by Cafcass, cited in Roe 2022).[1]

What is a 'deprivation of liberty'?

The term 'deprivation of liberty' comes from Article 5 of the European Convention on Human Rights (ECHR), which provides that everyone, of whatever age, has the right to liberty. The ECHR was incorporated into national law by the Human Rights Act (HRA) 1998. Article 5 of the ECHR protects everyone's right to liberty by setting out the limited circumstances in which a deprivation of liberty is allowed, and requires strict safeguards to be in place for those who are deprived of their liberty. Such safeguards include the requirement that any deprivation of liberty must be by 'a procedure prescribed by law' and that those who are deprived of their liberty have the right to have the lawfulness of their detention reviewed by a court.

The supreme court confirmed that whatever their age, a person's care arrangements will give rise to a deprivation of liberty if the following three conditions are met:

- the objective component of confinement in a particular restricted place for a not negligible length of time
- the subjective component of lack of valid consent
- the attribution of responsibility to the state (*Re D (A Child)* [2019] UKSC 42).

The family courts can authorise a child's deprivation of liberty via s.25 of the Children Act 1989 (and s.119 of the Social Services and Well-being Act (Wales) 2014), which authorises the placement of looked-after children in a registered secure children's home. Section 25 sets out the 'welfare' criteria that must be met before a child can be placed in secure accommodation:

- the child has a history of absconding and is likely to abscond from any other description of accommodation
- if the child absconds, they are likely to suffer significant harm
- if the child is kept in any other description of accommodation, they are likely to injure themselves or others.

Alternatively, the inherent jurisdiction of the high court can be used to authorise the deprivation of liberty of a child in an alternative, unregulated secure placement, when none of the other statutory mechanisms apply (i.e. there are no places available in secure children's homes or the criteria under s.25 are not met). In *Re T* [2021] UKSC 35, the supreme court confirmed that the inherent jurisdiction can be used to authorise the deprivation of liberty of children in alternative restrictive placements alongside the statutory scheme set out in s.25 of the Children Act 1989. The judgment is summarised in the 'Judgments considering issues of consent' section of this report.

[1] Equivalent data for Wales is not available.

Overview of key themes identified in the judgments

Shortage of appropriate placements

- There is a severe shortage of available placements in registered secure children's homes.
- It is also apparent that there is a cohort of children whose needs cannot be met by secure children's homes, particularly children who display very severe self-harming or aggressive behaviours. Often, in these cases, the children are assessed as not meeting criteria for detention under the Mental Health Act 1983 – with their behaviours judged to be the result of ongoing trauma or attachment difficulties rather than a 'diagnosable' mental health condition. They require specialist, intensive therapeutic provision, often in single occupancy restrictive placements. There is a severe lack of availability of this type of placement.
- There is also evidence of a shortage of availability of secure mental health inpatient beds for children who are in need of this type of provision.

Concerns about the use of the inherent jurisdiction of the high court to deprive children of their liberty

- As a result of the above shortages, there has been an increase in the use of the inherent jurisdiction of the high court to authorise the deprivation of liberty of children in placements that are unregulated and frequently unregistered. These placements are often intended to be short-term, while a more suitable placement is found. However, the judgments (often several relating to the same child) indicate that they can last much longer, with some children remaining in 'emergency placements' for many months.
- Serious concerns were expressed in these judgments about children being placed in 'suboptimal' settings that are unable to meet the child's needs, including lack of any therapeutic input, unspecialised staff and inadequate access to education or training. Judges expressed concern about the court's ability to properly consider the child's welfare in these cases. They have also commented that the lack of

therapeutic and educational provision in these settings may amount to a breach of children's Article 5 rights (Human Rights Act 1998). In a number of recent cases, the court has refused to authorise the use of such placements on the grounds that the placements were so inappropriate, they cannot be said to be in the child's best interests.

- Due to a difficulty finding suitable placements in England and Wales, some children are being placed in accommodation in Scotland, subject to restrictions on their liberty. Where these placements are not recognised providers of secure accommodation, applications are made to the high court for an order authorising the deprivation of liberty. The local authority placing the child then needs to seek a similar order in the Scottish courts but judgments in these cases indicate a lack of clarity as to whether such orders will be authorised by the court of sessions. In January 2022 the Scottish government published proposals that would enable the Scottish courts to automatically recognise deprivation of liberty orders issued by the high court in England and Wales without the need for a separate court application. Draft regulations are due before the Scottish parliament in Spring 2022.
- Judgments have confirmed that the inherent jurisdiction of the high court can be invoked despite the existence of the provisions relating to secure accommodation in s.25 of the Children Act 1989. However, some judgments have indicated a concern that, in some cases, the inherent jurisdiction is being used to bypass the statutory framework set out in s.25 of the Children Act 1989. Linked to this, judges have expressed concern that in some cases there have been delays with the child being appointed a guardian or joined as a party, or periods of time where no legal authorisation has been in place for restrictions placed on the child, or that review processes have been inconsistent.

The placement of children in unregistered or unregulated settings

- A number of judgments consider the impact of the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021, which prohibit the placement of a child under the age of 16 in an unregulated placement. According to the decision in *MBC v AM & Ors (DOL Orders for Children Under 16)* [2021] EWHC 2472 (Fam), it remains open to the high court to authorise, under its inherent jurisdiction, the deprivation of liberty of a child in such a placement.
- Judgments have also considered the implications of the President of the Family Division's Practice Guidance: Placements in Unregistered Children's Homes in England or Unregistered Care Home Services in Wales (2019), concluding that the court should not 'ordinarily countenance' the exercise of its inherent jurisdiction where an unregistered placement either would not or could not comply with the Practice Guidance requirement to apply expeditiously for registration.
- However, judgments indicate that children are placed in unregistered placements even where there are ongoing issues with their registration, for instance because

the provider refused to apply to Ofsted for registration, or because Ofsted refuse to register the placement.

Use of the high court for injunctions against adults to protect children

- Among the judgments were cases where the local authority had sought to apply to use the inherent jurisdiction of the high court for injunctions against men over the age of 18 who were identified as a risk to young women. This was considered a different approach to protecting children at risk of exploitation, by placing restrictions on the adults who exploited them, rather than (or as well as) restricting the liberty of children.
- These cases all took place between 2014 and 2016 and related to cases where children and young people were at risk of child sexual exploitation from identified men where criminal proceedings were not issued. It is not clear if this approach is still being used (and judgments not published) or not.

What can we learn about children subject to these applications from the judgments?

- Many children subject to restrictions on their liberty were known to children's services from an early age – either adopted, subject to multiple child protection interventions and/or entered care in early childhood. They often had behavioural issues that were identified early on (e.g. attention deficit hyperactivity disorder (ADHD), autism, emotion dysregulation) and that became harder to manage as the child reached adolescence, resulting in the escalation of issues that led to the child being placed in a secure setting. In many cases, there was lack of evidence of early intervention and support for families.
- In other cases, the child may have come to the attention of children's services relatively late and there was a relatively quick escalation in the child's behaviour and risks that led to them being placed in a secure setting.
- In the period before the application to the court, the majority of children were subject to multiple placement moves, frequent breakdown of arrangements made for their care, and disruption to their lives. This included previous periods of secure accommodation or placements in unregistered settings.
- Children subject to deprivation of liberty orders under the inherent jurisdiction were subject to a range of restrictions on their liberty, including constant supervision with high staff to child ratios, being kept in locked environments, having limited or no access to a mobile phone/internet, and being subject to restraint interventions.
- It was evident that a lot of children spent significant periods of time in suboptimal placements without the therapeutic support they needed to make significant long-term improvements. These placements were often many miles from the child's

home. One child had spent almost three years living in single occupancy placements, subject to restrictions on his liberty, with very limited opportunities to engage with other children in this time.

- The judgments provide an indication of the child's situation when the case is before the court. Some cases return to court and it is possible to get a sense of how the case progresses. However, in most cases, it is unknown what happens after an order is made. In general, there is a lack of research and evidence about children's outcomes following a secure placement (see Roe 2022).

Summaries of judgments (grouped by key theme)

Judgments concerning the use of the inherent jurisdiction because of a lack of appropriate secure accommodation or mental health settings

A Child (no approved secure accommodation available; deprivation of liberty) [2017] EWHC 2458 (Fam) – Holman J

This was an application for an order to authorise the deprivation of liberty of a child aged 13 in circumstances where a secure accommodation placement was not available.

For three months prior, the child had been living in an unregulated placement where he was subject to restrictions on his liberty, authorised by the court under the inherent jurisdiction. The local authority sought to extend the order for a further three months, having been unable to find a placement in a secure unit in this time.

The judge expressed concern at the increasing use of the inherent jurisdiction in circumstances where a secure accommodation placement was not available, stating that its use was 'operating to by-pass the important safeguards' under section 25 (s.25) of the Children Act 1989 (para. 6). In particular, he raised concern that the child in this case had not been made a party to the proceedings and did not have legal representation or a guardian, despite being subject to an order under the inherent jurisdiction for three months. Under s.25, a court cannot make a secure accommodation order '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 [...] and having had the opportunity to do so, he refused or failed to apply' (para. 8).

The court authorised the child's deprivation of liberty in the unregulated placement and instructed that a further hearing should be held in one month. The judge ordered that the child be joined as a party to proceedings and a guardian allocated by Cafcass to act on his behalf. The child was to be given the opportunity to attend the next hearing unless the guardian believed this was not in his best interests.

The judge said:

> *Quite frankly, the high court sitting here at the Royal Courts of Justice is not an appropriate resource for orders of this kind, and I personally have been almost drowned out by these applications this week. Further, although I have no time properly to consider this today, I am increasingly concerned that the device of resort to the inherent jurisdiction of the high court is operating to by-pass the important safeguard under the regulations of approval by the Secretary of State of establishments used as secure accommodation. There is a grave risk that the safeguard of approval by the Secretary of State is being denied to some of the most damaged and vulnerable children. This is a situation which cannot go on, and I intend to draw it to the attention of the President of the Family Division* (para. 6).

Re X (A Child) (No 4). [2017] EWHC 2084 (Fam) – Munby P

See also previous judgments in this case: Re X (A Child) (No 2) [2017] EWHC 1585 (Fam); *Re X (A Child) (No 3).* [2017] EWHC 2036 (Fam)

This was the fourth judgment in a case concerning a young woman, aged 17, who was, at the time of the application, detained in youth custody, where she had made multiple attempts to die by suicide. The local authority had applied for a care order, which was granted (see *Re X (A Child)* (2017)), although there was no plan at that stage as to what should happen to X when she was released from the secure unit. All parties acknowledged that, if X was released to a community setting under a care plan, she was highly likely to be successful in attempts to take her own life ('a suicidal mission to a catastrophic level' (para. 1)). She was diagnosed with emotionally unstable personality disorder (EUPD) and ADHD.

A report from a consultant child and adolescent psychiatrist set out that the secure unit where X was currently placed was unsuitable because her needs were above those that could be met by the unit – a view that was shared by staff at the secure unit, who had refused to keep her on welfare grounds at the end of her sentence – and an appropriate clinical setting (low secure mental health unit) should be sought. However, no placement was available anywhere in the country and no interim clinical placement of any kind could be found. The case was adjourned with the court directing NHS England to determine whether X's needs would be better met in an adult or child and adolescent mental health services (CAMHS), psychiatric intensive care unit (PICU), a medium secure unit, or at her current secure unit while waiting for a bed in a low secure unit to become available, and to set out proposals to find an appropriate placement. This judgment (*Re X (A Child) (No 3)* (2017)) received substantial media attention. Following this, a plan was made to convert a PICU unit into a low secure unit (providing eight beds in total); X was to be admitted to the PICU unit with a bespoke package of care, pending its conversion to a low secure unit, under the Mental Health Act 1983.

The judge said:

> *If, when in eleven days' time she is released from [current placement], we, the system, society, the State, are unable to provide X with the supportive and safe placement she so desperately needs, and if, in consequence, she is enabled to make another attempt on her life, then I can only say, with bleak emphasis: we will have blood on our hands* (para. 39).

In a subsequent judgment in 2018 (*X (A Child) (No 6)* [2018] EWHC 1005 (Fam), Munby P stated that the child had made significant improvements and was to be formally discharged from the unit. She returned home, with a package of support provided by the local authority and other agencies, where she was continuing to make positive progress.

Dorset Council v E (Unregulated placement: Lack of secure placements) [2020] EWHC 1098 (Fam) – HHJ Dancey (sitting as a deputy high court judge)

This was an application for an order to authorise the deprivation of liberty of a child, E, in an unregulated setting, issued alongside an application for an interim care order. At the time of the application, the local authority did not intend to apply for a secure accommodation order, given that there were no available placements (there were 46 other children waiting for a place at that time). However, they were instructed by the judge to also make an application for a secure accommodation order.

> *It seemed to me that if the test for the making of a secure accommodation order was made out and it was common ground that E required a secure placement, then Dorset should make an application for a secure accommodation order* (para. 4).

E was a young man aged 16, who was considered at high 'risk of killing himself, being killed or coming to serious harm' with concerns around drug use, self-harm and risk of criminal and sexual exploitation (para. 2). At the time of the application, he was living in an unregulated placement and had absconded from this placement multiple times. E was adopted when he was 13 months old, and had been diagnosed with ADHD, autism spectrum disorder (ASD) and mild intellectual impairment, all associated with possible foetal alcohol spectrum disorder. Since pre-pubescence he had struggled with significant emotional and behavioural difficulties, which escalated once he reached adolescence. He was placed in a secure unit in the United States privately by his adoptive parents in 2019. He returned to the UK for a planned visit in mid-March 2020 and was unable to return to the United States as a result of the COVID-19 pandemic.

An unregistered placement in a private house in a rural location was found. Restrictions placed on his liberty included having no access to the internet unless fully supervised by staff, his current phone removed, supervised at all times on a 2:1 basis, all doors and windows locked and any objects that could be used as ligature removed from his room. The court authorised the deprivation of liberty of E in this placement and, at the same time, made a secure accommodation order, despite there being no placement available in a secure children's home. At the point at which a placement became available, and if the criteria still applied to E, he was to be moved to secure accommodation.

Re S (Child in care: Unregistered placement) [2020] EWHC 1012 (Fam) – Cobb J

This was an application for an order to authorise the deprivation of liberty of a 15-year-old girl in an unregistered placement. At the time of the application, she was living in a

holiday cottage, which had been rented by the local authority for the sole purpose of accommodating her, and was under 3:1 supervision.

The child had experienced an 'unstable' childhood, with her mother suffering from mental illness and both parents using drugs and alcohol. Her behaviour deteriorated after her parents separated and she began to abscond from her mother's home. She was placed on a child protection plan, along with her younger brother, following several incidents where she had taken an overdose of prescribed drugs. She spent a number of months moving between her parents' homes, foster homes, and the homes of her friends' families. She was then placed in a residential children's home, where she was voluntarily accommodated under s.20 of the Children Act 1989, but continued to abscond on a daily basis and there were several serious incidences of self-harm. She was then placed in secure accommodation although her behaviour continued to deteriorate (self-harm and assaulting staff), and after four months, the home gave notice that they could no longer accommodate her. At that point, she became the subject of a number of consecutive deprivation of liberty orders and spent time at a training flat (unregistered care and accommodation provision owned by the local authority) and a holiday cottage (unregistered provision). The local authority then attempted to support her placement back with family members and with foster carers, while they continued to look for therapeutic secure provision, although each placement quickly broke down and she continued to abscond. She was then placed in another holiday cottage (unregistered, subject to deprivations of her liberty), but managed to abscond from this placement, during which she made multiple attempts to kill herself. Her current placement was due to expire, by which point, she would have been moved 16 times in 12 months.

The court authorised the continued deprivation of liberty and highlighted the difficulties the local authority had had in trying to find a suitable placement.

> *At the time of this hearing, 188 days have passed without a suitable registered placement having been found for [child]. In that time, she has had many moves and been accommodated in a range of placements, including, altogether 7 different unregistered children's homes* (para. 26).

Z (A Child: DOLS: Lack of Secure Placement) [2020] EWHC 1827 (Fam) – Judd J

This was an application for an order to authorise the deprivation of liberty of a young person, aged 13. At the time of the application, they were living in a secure children's home where they had been for seven months. The home informed the local authority that they wished to terminate the placement as they could no longer meet the child's needs or keep them safe. While in secure accommodation, the child's behaviour escalated with several serious incidences of actual and threatened physical harm (to self and others). The child was assessed by a consultant clinical psychologist who concluded that they did not have a mental illness.

The local authority could not find a suitable alternative secure placement, having approached over 30 institutions (including in Scotland and unregulated homes). They proposed to place the child in a rented council home with four members of staff. The restrictions placed on the child were to include: to not be allowed out at all, save for

appointments when they would be escorted by three staff; to be locked into a bedroom at night, and the house to be locked at all times; to be stripped of all loose items, and restrained in the event of attempted self-harm, attempts to harm others, or to escape; and that all furniture within each room would be secured to the floor or wall. At the time of the application, there was no provision at the placement for education or therapeutic support, although a plan was to be drawn up. The parents opposed the proposal and applied to discharge the interim care order and for the child to be returned to their care. The Secretary of State for Education was invited to attend the hearing by counsel and a representative of the Children's Commissioner was present at the judgment.

The court authorised the placement on the grounds that it 'safeguards and promotes Z's welfare better than any of the other available options' (para. 24) although the judge acknowledged that the placement was 'sub-optimal' (para. 22).

A Borough Council v E (Unavailability of Regulated Placement) [2021] EWHC 183 (Fam) – MacDonald J

This was an application for an order to authorise the deprivation of liberty of a child, just under 16 years old, in an unregulated setting.

The judge summarised the circumstances of the case as follows.

> *In this matter I am concerned once again with the question of whether the court should authorise the deprivation of a child's liberty in a placement unregulated by Ofsted in circumstances where she is presently deprived of her liberty in an inappropriate hospital setting, there being no regulated placements currently available or willing to meet her identified welfare needs* (para. 1).

The child's family had been known to the local authority for a number of years, following a referral regarding alleged incidents of domestic violence reported between the mother and the father. The child had made several allegations of sexual abuse against the father and, 10 months before this application, was accommodated under s.20 of the Children Act 1989. Her behaviour became increasingly challenging – including incidents of aggression, assault against her carers, going missing, self-harm, attempted suicide, drug use and concerns around sexual exploitation – resulting in the breakdown of 10 placements in that time. The court made an order authorising the deprivation of her liberty in her then placement, but difficulties with her behaviour continued. She was admitted to hospital shortly before this hearing took place, following an incident where she jumped from a landing, and she remained in hospital under a deprivation of liberty order at the time of this application.

There was some confusion about whether she met criteria for detention under the Mental Health Act 1983, having initially been assessed as meeting criteria, although no inpatient mental health bed was available at the time. A representative of the NHS Trust was directed to attend the hearing and confirmed to the court that she did not meet criteria for detention under the Mental Health Act 1983.

The local authority, which usually provided accommodation for children aged 16 and above, had identified an unregulated placement for the child. An application was made to Ofsted to register the placement. The proposed restrictions on the child's liberty included 2:1 supervision 24 hours a day, restrictions on the use of her mobile phone,

limited access to the internet, to leave the home only when accompanied by two members of staff, and to be reported missing to the police should she abscond from the home.

The judge authorised the deprivation of liberty of the child in this placement.

> *In the circumstances, and with the reservations I have outlined, I am satisfied on a narrow analysis that it is in E's best interests for the court to authorise the restriction of her liberty in the unregulated placement identified by the local authority* (para. 45).

North Yorkshire County Council v M & Ors (Medium Secure Bed) [2021] EWHC 2171 (Fam) – MacDonald J

This was an application for an order under the inherent jurisdiction to authorise the deprivation of liberty of a 15-year-old girl and for an injunction prohibiting the council from discharging her from her current placement in a secure children's home. The child had been assessed twice as requiring a medium secure inpatient bed but no placement had been found in over three months, despite there being 10 available beds in two NHS mental health trusts.

The child was initially placed in the secure children's home under a detention and training order. When her sentence ended, the home agreed that she could remain there on welfare grounds 'for a *short* period' while the local authority continued its search for alternative residential provision and pending a medium-secure bed becoming available. In order to continue to accommodate the child, the home also required that the local authority purchase two vacant welfare beds (at a cost of £2,868.57 per night including the child's current welfare bed) and that NHS England fund 24-hour care support. All parties agreed that the home was not capable of meeting the child's needs, and there was concern that the type of placement being provided for the child was beyond the remit of the home's statement of purpose approved by Ofsted, and the home was at risk of breaching its registration. The judge stated that:

> *Without determining the point, there must be a cogent argument [...] that M's current placement is so unsuitable as to amount to a breach of her Art 5 right to liberty and, arguably, a breach of her Art 8 right to respect for private life*' (para. 30).

Across England there are only three services that can accommodate girls in medium secure beds. At the time of the application, two of those units had five empty beds. However, they were refusing to admit the child on the grounds of staff shortages and inability to make appropriate provision for the child's seclusion; this was in spite of the fact that NHS England had made clear that it would provide whatever support was needed in order to address any difficulties in accommodating the child.

The court joined the two mental health trusts and the Secretary of State for Health as parties to the proceedings to investigate properly the obstacles to the child's admission and how these might be overcome. The court extended the deprivation of liberty order permitting the child to remain in the secure children's home, with instruction that the placement would end following the next hearing.

Judgments that consider challenges with decision making based on the child's welfare

Lancashire County Council v G (No. 4) (Continuing Unavailability of Regulated Placement) [2021] EWHC 244 (Fam) - MacDonald J

See also previous judgments in this case: Lancashire County Council v G (Unavailability of Secure Accommodation) [2020] EWHC 2828 (Fam); Lancashire County Council v G (No 2) (Continuing Unavailability of Secure Accommodation) (Rev 1) [2020] EWHC 3124 (Fam); Lancashire CC v G (No 3) (Continuing Unavailability of Secure Accommodation) [2020] EWHC 3280 (Fam)

These were a series of four judgments from MacDonald J that related to the ongoing situation of a 16-year-old girl, who had made multiple attempts to kill herself, and the local authority's search for an appropriate placement.

The local authority first made an application to authorise the deprivation of the child's liberty in a residential placement in August 2020. She was moved in September to another placement (a specialist mental health inpatient home), although the court was not notified of this move and accordingly, there was a period of time where no order was in place authorising the deprivation of liberty. A number of incidents occurred at this placement, including self-harm, assault to staff and damage to property, and in October 2020, the placement gave notice. The local authority then made an application for a secure accommodation order (see *Lancashire County Council v G (Unavailability of Secure Accommodation)* (2020) EWHC 2828 (Fam)). At the same time, the child was admitted to an adult mental health ward (due to a lack of CAMHS psychiatric intensive care beds), where she was assessed as not meeting criteria for continued detention under the Mental Health Act 1983 (the assessment indicated she had 'no underlying diagnosable mental disorder meriting clinical treatment in a hospital setting' (para. 20) although she had developed an emerging personality disorder), and was awaiting discharge. There were no secure placements available anywhere in the UK. The local authority sought to find a regulated non-secure placement as an alternative, however no such placement was available. The only placement that could be found was an unregulated placement that was not prepared to apply to Ofsted for registration and that all parties considered to be suboptimal.

The court authorised this 'emergency placement', initially for a period of 28 days (see EWHC 2828 (Fam)). The order was extended in November (*No 2* EWHC 3124 (Fam)) and again in December (*No 3* EWHC 3280 (Fam)). At the beginning of February 2021, the child remained in this placement, and the local authority sought a further order to authorise her continued placement there. Over this period her behaviour had deteriorated with repeated attempts to kill herself and multiple admissions to hospital. She was subjected to 3:1 supervision at all times when in the placement, and while being transported to and from the placement; to a 'waking watch' every 10 minutes during the night; not permitted access to her mobile phone; doors in the placement were locked; and staff were permitted to use 'reasonable and proportionate measures' to ensure she did not leave the placement and to return her if she did, and to restrain her.

She was assessed by numerous psychologists who were of the view that, while she did not meet criteria for detention under the Mental Health Act 1983, she required a regulated non-secure placement where extensive therapeutic input could be provided. While in previous hearings the local authority had argued that the child's welfare needs would best be met in secure accommodation (under s.25 of the Children Act 1989), they were now of the view that a regulated non-secure placement with therapeutic provision would best meet her needs, in agreement with the child's guardian. However, no such placement was available.

The court authorised the continued deprivation of liberty of the child in the current placement, noting that 'the continuing lack of options before the court essentially obviates the courts ability to apply the welfare test' (para. 4). A copy of the judgment was sent to the Children's Commissioner for England and the Secretary of State for Education.

> *In the circumstances I have set out above, I once again and wearily must authorise the continued deprivation of G in an unregulated placement that is not fully equipped to meet her complex needs by reason of the fact that I have no other option but to do so. I make clear that I consider that I can say that the placement is in G's best interests only because it is the sole option available to the court to prevent G causing herself serious and possibly fatal harm. Even then, it is clear that the placement is increasingly struggling to achieve even that limited goal. As has been the case each time this matter has come before me in the past number of months, I make the decision I do because I am left with no choice* (para. 32).

Q (A Child) (DOLS: Lack of Secure Placement) [2021] EWHC 123 (Fam) – Knowles J

This was an application for an order to authorise the deprivation of liberty of a 16-year-old boy because no suitable placement in secure accommodation could be found. A key concern was the child's harmful sexual behaviour, which had been an issue since he was four years old. The child had been living in single occupancy placements for the past three years, and was subject to increasing restrictions on his liberty such that he was not permitted to access the grounds of the home where he lived, including the garden, and was not permitted to open a window or have access to an open window.

The child was adopted at age 3 along with his sister following severe neglect. Following his adoptive parents' separation, the mother asked for him to be accommodated by the local authority as she struggled to manage his behaviour. He was initially placed in foster care. However, this placement – and two subsequent residential placements – broke down as a result of the child's aggressive behaviour, sexual behaviour and fire-setting risks. He was then placed in secure accommodation in Scotland for seven months. At this time he was also made subject to interim care orders and a final care order was made in March 2018.

After leaving secure accommodation in 2018, the child was placed in a series of single occupancy placements that broke down due to ongoing concerns about the risk that he posed to the public as a result of his sexual behaviour. He received therapeutic support from a specialist service for children and young people who display

problematic or harmful sexual behaviour. He was first subject to an order restricting his liberty in a residential placement in October 2018 (although this order did not state any review or expiry date). A further order authorising the restriction of his liberty was made in May 2020; this order was extended multiple times and remained in place at the time of this application. It was acknowledged that the placement the child was in was 'sub-optimal' and struggled to effectively manage the risks he presented and to deliver the highly complex therapeutic work he needed. In August 2020, the child absconded from the placement for over 24 hours, despite being under intensive supervision. During that time, he committed several criminal offences and was sentenced to an intensive referral order for a period of 12 months. At this time, the deprivation of liberty order was extended for a further two months and the restrictions imposed on his liberty were made more severe, including not permitting him to go outside. Therapeutic support from the specialist service had stopped and a substitute intervention was offered via the intensive referral order. In December 2020, he was moved to a different registered children's home in the local area, again as the single occupant.

In August 2020 the local authority started looking for a placement in secure accommodation. Attempts to find a suitable placement were wide-ranging. The judge invited the Secretary of State for Education and Secretary of State for Justice to attend hearings and discussed the process for making a youth justice bed available for the child. The judge was critical of the Secure Welfare Coordination Unit's (SWCU) process for identifying secure placements, the lack of information provided to the local authority during the search and the fact that the homes were not required to give feedback as to why a child was not offered a place. In the judgment, Knowles J stated that the SWCU made clear to the court 'that it had only the bare minimum of responsibilities towards the children for whom secure placements was sought via the service it offered' (para. 28).

Concern was also raised by the youth offending service about the effectiveness of efforts to rehabilitate the child given the restrictions on his liberty. Although he had attended all arranged supervision sessions and engaged with the tasks required of him, they reported that 'any long-term changes in Q's thinking and behaviour were unlikely given the limitations of his current environment' (para. 29).

The court authorised the deprivation of liberty while acknowledging that the 'placement is plainly suboptimal from the perspective of meeting Q's identified welfare needs' (para. 42). Knowles J also stated that, although the child met criteria for a secure accommodation order, she was 'prevented from authorising Q's placement in secure accommodation because there is no secure unit with a bed suitable for him' (para. 36). The court also directed that the local authority should start the process of planning for the child's transition out of the care system when he turned 18.

The judge observed:

> *The restrictions on Q's liberty are at the most extreme end of the spectrum. He has no interaction at all with any persons other than professionals working with him. He has no unsupervised access to social media or the internet. He is not permitted to even hold a mobile phone. During waking hours, he is subject to monitoring by three people at all times, and, at night-time, he is subject to a*

waking watch. He cannot leave his placement as he is locked into it. He cannot even go outside to enjoy fresh air or outside space. He is not even permitted to open a window in his placement. I observe that, were Q placed in secure accommodation, the level of restriction would be significantly less than that for which the local authority now contends. Q would at least have access to outside space and have interactions with other young people [...]

To be blunt, Q is being failed by the care system given the inability to locate a suitable secure placement in which he can receive the intensive therapeutic work which he so plainly and urgently needs. If he does not receive this work soon, he will be a huge risk to young children and others. [...] The window of opportunity to tackle and address his difficulties is running out since he will be 18 years old in just over a year's time' (para. 40–44).

Tameside Metropolitan Borough Council v C & Ors (Unavailability of Regulated Therapeutic Placement) [2021] EWHC 1814 (Fam) – MacDonald J

This was an application to extend an order authorising the deprivation of liberty of a 17-year-old boy in an unregistered placement. The order was initially made 17 months ago. The extension was opposed by the boy's parents, who sought the implementation of a staged plan to return the child to their full-time care. The child's guardian did not support the extension of the order on the grounds that it was not in the child's best interests as the placement was only operating 'at the very basic level of keeping him physically safe' and was unable to meet his emotional or psychological needs 'in any form' (para. 29).

The child was adopted aged 4 following concerns relating to his birth mother's alcohol use, neglect, inconsistent parenting and sexual abuse. As he grew older his behaviour began to escalate, including incidents of aggression, arson, sexually harmful behaviours and assault. He was accommodated under s.20 of the Children Act 1989 and care proceedings were issued a few months later. He was the subject of numerous assessments and reports that repeatedly stated his need for a package of extensive specialist therapeutic support. However, the judge commented that 'it is very difficult to identify what was done at this time to assist L and the family with his escalating behavioural issues' (para. 8). In the course of less than five years, between coming into care and the time of the proceedings, the child had had 13 placement moves and 7 separate residential placements. There remained no placement identified that could meet his assessed needs. He had been subject to restrictions on his liberty for 17 months and, during this time, lived in 3 unregistered placements. His behaviour had continued to escalate, including sexually inappropriate behaviour, repeated threats to kidnap, rape or kill others, and manic behaviours. Ofsted refused to register the current placement, due to concerns about the home conditions (which had improved at the time of the hearing) and poor compliance with policy and regulation. Serious concerns existed about the ability of the placement to meet the child's needs, including the lack of any therapeutic input, unspecialised staff, no education or training provision, and lack of stimulation. The child was assessed by psychiatrists to not meet criteria for detention under the Mental Health Act 1983 but that he should be in a placement with

'therapeutic milieu' and staffed by skilled and experienced professionals trained in trauma-informed care and attachment theory.

The judge authorised the extension to the deprivation of liberty order for a period of 14 days, 'with considerable reservations' (para. 79). The judgment stated that, in such cases, the court must consider the lack of any alternative placement when making decisions with regard to the child's best interests, and that the court should:

> *Consider the likely consequences of any order it does or does not make* (para. 74).
>
> *A course of action that can meet some of the child's needs may well not be acceptable where a course of action that meets all of the child's needs is available. But where a course of action that meets all of the child's needs is not available, a course that meets only some of the child's needs may become acceptable, particularly where the alternative is that none of the child's welfare needs will be met* (para. 71).

On these grounds, the judge stated that the risk of potential harm to the child was, 'at present, greater than the risks presented to him by the identified deficiencies in his current placement' (para. 79). However, the judge also warned that, should the search for an appropriate placement continue for much longer, 'there is an exponentially increasing risk that L's current temporary placement, and in particular the absence of educational and therapeutic provision in it, will come to amount to a breach by the State of L's Art 5 rights' (para. 82).

The judge stated:

> *I remain acutely aware that this is a further case in which the court is presented with only one, sub-optimal, option for promoting and safeguarding the child's welfare on the narrow basis of ensuring the child's physical safety and supervision. I am equally aware that, as I have observed elsewhere, that situation risks moving the test applied by the court further from welfare and closer to necessity. [...] L's case is only one of a number of similar cases in my list, and the lists of the Designated Family Judges of the Northern Circuit, this week in which a local authority is placed in the position of having to seek authorisation to deprive a highly vulnerable child of his liberty in a placement not equipped to meet his highly complex behavioural and emotional needs. In this case, since 2016, there have been no less than five evidence based recommendations that L requires a stable, secure and sustainable therapeutic placement with adequate supervision to address his emotional needs arising out of the trauma he suffered in early childhood. Five years later, a stable, secure and sustainable placement of this nature has still not been achieved for L* (paras. 86–87).

Judgments in cases where the courts refused to make a deprivation of liberty order or secure accommodation order

Deprivation of liberty orders

Wigan BC v Y (Refusal to Authorise Deprivation of Liberty) [2021] EWHC 1982 (Fam) – MacDonald J

In this case, the court was concerned with the welfare of a 12-year-old child, who displayed challenging, violent and increasingly self-harming behaviours. At the time of the hearing the child was accommodated on a paediatric ward of a hospital, where he was subject to regular chemical restraint, physical restraint and 5:1 staffing. The ward had shut to new admissions and parts of the ward were closed entirely due to the risk presented by the child and the disruption caused to other children on the ward. The local authority applied for an order authorising the child's continued deprivation of liberty on the hospital ward, in the absence of any alternative placement being available.

The child had ADHD and ASD. He first became known to the local authority around 10 years prior to this application. He had been subject to numerous child protection and child in need plans and was briefly accommodated under s.20 of the Children Act 1989. He was assessed as not meeting the relevant criteria for detention under the Mental Health Act 1983, as his behaviour was 'trauma based'. At the same time, the type of therapeutic treatment within a restrictive clinical environment that was recommended was unavailable. The local authority was unable to find any alternative placement to the hospital ward – including regulated residential placements, unregulated residential placements and the secure accommodation estate – let alone one that was appropriate for the child's extensive and highly complex needs.

The hospital was not Care Quality Commission-registered to provide mental health care and did not have staff trained to provide physical restraint. Professionally trained staff were provided by the local authority while the child was on the ward.

In making his decision, the judge emphasised that the court must, first, be satisfied that the placement constituted a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights (ECHR) – which was not disputed in this case – and second, that it considered the deprivation of liberty order to be in the child's best interests, acknowledging that, in making this decision, the court must also 'have regard to the fact that there is no alternative placement available' (para. 52).

The judge declined to authorise the child's continued deprivation of liberty on the grounds that it was not in the child's best interests and that the arrangements were 'so inappropriate that they constitute a clear and continuing breach of his Art 5 rights' (para. 59). The judge distinguished the factors in this case between those of previous cases where the court had authorised a deprivation of liberty in 'sub-optimal' placements, when no alternative was available [e.g. *Lancashire v G* [2021] EWHC 244 (Fam), *Tameside Metropolitan Borough Council v C & Ors* (2021) EWHC 1814 (Fam), see above], on the grounds that the current placement was 'manifestly harmful to

[child]' (para. 59) and there was no evidence that there was any positive for the child remaining in the placement.

The judge said:

> *The court must today prefer the lesser of two acknowledged evils, the hospital ward or the street, in circumstances where there is currently no alternative placement. But that is not a solution that can be countenanced in a civilised society. The test laid down by the law is not which is the lesser of two evils but what is in the child's best interests having regard to the child's welfare as the paramount consideration. The parens patriae inherent jurisdiction of the court is protective in nature. As I have observed above, it would border on the obscene to use a protective jurisdiction to continue [child's] current bleak and dangerous situation simply because those with responsibility for making proper provision for vulnerable children in this jurisdiction have failed to discharge that responsibility*' (para. 64).

Nottinghamshire County Council v LH (A child) (No. 1) [2021] EWHC 2584 (Fam) – Poole J

See also follow-up judgment: Nottinghamshire County Council v LH (A child) (No. 2) [2021] EWHC 2593 (Fam).

This was an application for an order to authorise the deprivation of liberty of a 12-year-old child who was placed in an acute psychiatric admission unit for adolescents. She did not meet criteria for detention under the Mental Health Act 1983. At the time of the application, the child had been on the ward for just under a week. The local authority could not find anywhere else for her to go.

The evidence before the court demonstrated that it was harmful for the child to remain on the unit and the judge refused to authorise the deprivation of liberty order. The judge said:

The proposed continued accommodation of LT in a psychiatric unit cannot possibly be described as a means of properly safeguarding her. Depriving her liberty in that setting would not provide her with a safety net - it would not keep her safe or protect her. To the contrary every hour she is deprived of her liberty on this unit is harmful to her. Her accommodation on the unit has exposed her to new risks of harm and will continue to do so. I cannot find that it would be in LT's best interests to be deprived of her liberty on the psychiatric unit (para. 14).

The next day, another application was made by the local authority for the court to authorise the deprivation of liberty of the child in an alternative placement (*No. 2* EWHC 2593 (Fam)). The local authority proposed to use an empty children's home to create a bespoke placement for the child. The placement was referred to by the local authority as 'the least bad immediate alternative available' (para. 4). The court authorised the deprivation of liberty in that placement, finding that 'it is necessary and proportionate and in [child's] best interests to be deprived of her liberty there, and for the purpose of her transfer there' (para. 11). At the time the order was made, the child remained on the psychiatric unit.

A County Council v A Mother & Ors (Refusal to make a DOLS order) [2021] EWHC 3303 (Fam) – Holman J

This was an application for an order to authorise the deprivation of liberty of a 14-year-old girl who was placed in a paediatric unit in a general hospital. An initial application was made to the court on a Friday evening and an order was granted for five days. The local authority sought to extend this order for up to 14 days as they could not find an alternative placement for the child. At the time of the hearing, the child had been on the ward for 11 days, despite being medically fit for discharge.

She had absconded from the ward several times and was causing significant disruption to the care of the other children on the ward. The ward's head of nursing was of the view that her continued detention in the hospital was 'not in her best interests' but was positively 'damaging for her and her future' (para. 29).

The judge refused to extend the order. Holman J expressed his sympathies with the difficult situation faced by the local authority in the case and noted the 'grave, and now scandalous, shortage of suitable establishments in this country where very troubled children such as this child can be kept safe' (para. 2), but was critical of the 'fallacy in so many of these DOLS applications [that] the court can provide that which the local authority themselves cannot provide' (para. 19).

The judge said:

> *I do not have a solution to this case. Clearly, it is the duty of the local authority to whose care this child was entrusted over seven years ago to keep her safe. Provided they act in good faith and do the very best they can, the lawfulness of what they do may be justifiable by a doctrine of necessity. I make crystal clear, as I have done many times during the course of this hearing, that I am not in any way whatsoever indicating to the hospital trust that it MUST now discharge this child, still less ordering it to do so. It must make its own decisions. If it does decide to keep her longer, then it also may be able to justify such a decision by a doctrine of necessity. But I am sorry to say that, at the end of this long day, I am simply not willing myself to apply a rubber stamp and to give a bogus veneer of lawfulness to a situation which everybody in the court room knows perfectly well is not justifiable and is not lawful* (para. 37).

Secure accommodation orders

A Borough Council v E & Ors (No. 2) (Refusal of Secure Accommodation Order) [2021] EWHC 2699 (Fam) – MacDonald J

This was an application for a secure accommodation order in respect of a 16-year-old child. Approximately eight months before this application the court had authorised the child's deprivation of liberty in an unregulated placement (see *A Borough Council v E* [2021] EWHC 183 (Fam); summarised above). She was then moved to a secure children's home, under a secure accommodation order, where she had been for seven months.

She had made significant progress while living at the home. In the weeks leading up to the application, her behaviour had become more agitated, as plans were made for her transition out of the secure unit. This included a serious incident that occurred while in

a car travelling back to the home after a visit to the planned placement, where she had to be restrained with the support of police. A few days later, she had also made threats to abscond from this future placement and to harm herself or others. The local authority submitted, that as a result of these incidents, the criteria under s.25 of the Children Act 1989 remained satisfied and that, accordingly, the child should remain the subject of a secure accommodation order while work was completed to provide a bespoke therapeutic placement for her. All other parties, including the children's guardian, submitted that, in line with the conclusion of the local authority's secure accommodation review panel, the criteria under s.25 were no longer met and that, accordingly, the child should be discharged from secure accommodation. They were of the view that the child's recent behaviour was likely a manifestation of her anxiety about moving on from secure accommodation, and not unusual for a child in her situation. The child, who attended the hearing by video link, also made clear that she strongly objected to remaining in secure accommodation, and that she had done everything that had been asked of her over the course of the past seven months in her secure placement.

The court refused to grant the secure accommodation order. It did not find that the criteria under s.25 of the Children Act 1989 were met and that the continued placement in the secure unit was not in the child's best interests:

> *I am satisfied that the weight to be attached to E's recent conduct when considering whether if kept in any other description of accommodation E is likely to injure herself or other persons is not as great as the local authority contend. Placed in the wider context of the progress E has made in placement over the course of the past seven months, and in the context of the uncertainty and anxiety generated in E during a period of change, I am not satisfied that a straight line can be drawn between the incident on 29 September 2021, and E's subsequent statements and conduct, and the second limb of the s.25 criteria* (para. 52).

The judge also made clear that it was not lawful to keep a child in secure accommodation once the criteria were no longer met, including in circumstances where there was a delay in procuring or implementing an alternative placement. The judge stated that if the court granted the secure accommodation order, there was a real risk of the child becoming trapped in a cycle of behaviour that would be used to justify the continuation of restrictions on her liberty. The judge said:

> *In circumstances where E is aware that the Secure Accommodation Review Panel and the Children's Guardian consider that the criteria are no longer met, and that E's welfare requires an alternative placement, there is a real risk that E will become trapped in a cycle of behaviour generated by anxiety, frustration and uncertainty, which behaviour will then be argued to justify the continuation of the restrictions that are placed upon by a secure accommodation order* (para. 53).

The judgment also captured the young person's lived experience of living in the secure children's home and the following description was provided by the child, entitled 'Life in Secure':

> *I have to ask someone to open my wardrobe so I can get my stuff. I have to ask someone to open my en suite so I can use the bathroom. We only get two 15 minute pushes on the shower before it goes off completely. When its time of the month we have no bin so we have to give staff our dirty sanitary products. In cells you sleep on a mat. Ours is a thick mat with a bed sheet on. It hurts my back. I would like to be more independent but no I can't. Theres cameras everywhere. I stay with the same girls day in day out. We eat, sleep, go school. I never get my own time. We only get to go out once a week on mobility. If I want a drink I have to ask someone to get it. We can only eat a certain times, not after or before. Breakfast – 8am, lunch – 1pm, dinner – 5pm. If I want time on my own and I spend too much time in my room, I get marked down. It's like being in prison. You get forced to engage with your peers even if you not in the mood. We restricted on what we can wear. It's not very cultural our belongings most are in a our contraband which is locked away. We are not allowed until we leave. It is horrible living here, like this.* (para. 13).

Re M (A Child: Secure Accommodation Order) [2017] EWHC 3021 (Fam) – Hayden J

In this case the court made a secure accommodation order despite no placement being available.

The local authority applied for a secure accommodation order in respect of a 15-year-old girl. The child and her family had been known to children's services for the child's whole life; she had been subject to three child protection interventions and was taken into local authority care when she was eight, along with her siblings, following 'very severe' neglect and abuse. Since coming into care, she had had a range of complex needs and behavioural problems, including multiple incidents of serious assault against care workers, and the local authority had struggled to find a suitable placement for her (and her younger siblings). She had been assessed as not having any 'serious or enduring mental illness' instead her difficulties arose from 'traumatic experiences and attachment difficulties' (para. 5, xi). She had a criminal record for numerous assaults and had most recently been sentenced to a youth rehabilitation order for 12 months with supervision.

Despite no current placement in secure accommodation being available, the court granted the secure accommodation order, with directions for a review to take place in seven days to monitor progress in finding a placement.

Re B (Secure Accommodation Order) [2019] EWCA Civ 2025 – Floyd LJ, Baker LJ and Green LJ

This was a court of appeal judgment following an appeal by the local authority against the refusal of its application for a secure accommodation order.

The case concerned a 15-year-old girl. Earlier that year, she had been accommodated under s.20 of the Children Act 1989, having assaulted her mother and step-father after alleging that she had been abused by them. The local authority initiated care proceedings. Her behaviour escalated, including absconding from the residential home where she was living multiple times, assaulting staff and other residents, and self-harming. The local authority, having failed to find a place in a secure children's home,

found an alternative (unregistered) placement and obtained authorisation under the inherent jurisdiction to deprive her of her liberty there. While at this placement, and despite the restrictions placed on her liberty, there continued to be several incidents where the child absconded and self-harmed although, at the time of the hearing, the child had started to settle. She was not currently attending school and comprehensive therapeutic support could not be provided.

The local authority subsequently found a place in a registered secure unit several hundred miles away and applied for a secure accommodation order. The order was refused on the grounds that the criteria for making such an order were not satisfied – the judge submitted that the 'effective' arrangements made at the existing placement meant that she was no longer 'likely to abscond from any other description of accommodation' or to 'injure herself or other persons' – and in, addition, that it would be disproportionate to make the order. The local authority was granted permission to appeal the decision.

The appeal was allowed. Baker LJ highlighted multiple issues with the judge's 'erroneous reading of s.25' criteria (para. 106).

- The meaning of 'secure accommodation': the original judgment proceeded on the basis that the accommodation was not 'secure' accommodation and that it therefore fell into the category of 'any other description of accommodation'. The judge found that the child was not likely to abscond from this placement or injure herself while staying there and that, accordingly, neither of the conditions in s.25(1)(a) or (b) was satisfied. However, Baker LJ states that, although the placement was not originally designed as secure accommodation, it became secure accommodation while the child was placed there 'because of the use to which it was put in her case' and it did not therefore fall 'into the category of 'any other description of accommodation' (para. 107). As such, the criteria under s.25 were met: 'The evidence clearly demonstrated that, unless she was detained in secure accommodation – either at her current placement or another establishment – she was likely to abscond and injure herself or others' (para. 108).
- Flawed evaluation of proportionality: Baker LJ submitted that the judge was right to carry out an assessment of proportionality and the child's welfare in the case, but stated that, in his evaluation, he failed 'to look carefully at the local authority's plan and the advantages as well as the disadvantages of its proposal to place [child] in an approved secure unit', in particular 'the clear evidence [...] that the regime [at the current placement] would not provide [child] with the comprehensive therapeutic support she needed' (para. 110).

Baker LJ set out six questions a court must ask in determining whether the 'relevant criteria' under s.25 are satisfied (para. 98).

> *(1) Is the child being "looked after" by a local authority, or, alternatively, does he or she fall within one of the other categories specified in regulation 7?*
> *(2) Is the accommodation where the local authority proposes to place the child "secure accommodation", i.e. is it designed for or have as its primary purpose the restriction of liberty?*
> *(3) Is the court satisfied (a) that (i) the child has a history of absconding and is likely to abscond from any other description of accommodation, and (ii) if he/she*

absconds, he/she is likely to suffer significant harm or (b) that if kept in any other description of accommodation, he/she is likely to injure himself or other persons?
(4) If the local authority is proposing to place the child in a secure children's home in England, has the accommodation been approved by the Secretary of State for use as secure accommodation? If the local authority is proposing to place the child in a children's home in Scotland, is the accommodation provided by a service which has been approved by the Scottish Ministers?
(5) Does the proposed order safeguard and promote the child's welfare?
(6) Is the order proportionate, i.e. do the benefits of the proposed placement outweigh the infringement of rights?'

Judgments that consider issues relating to the placement of children in unregistered and unregulated settings

W (Young Person: Unavailability of Suitable Placement) [2021] EWHC 2345 (Fam) – Knowles J

This was an application for a deprivation of liberty order in respect of a 15-year-old girl with severe emotional and behavioural problems, alongside an application for an interim care order.

The judge summarised the circumstances in the case:

> *This is, sadly, yet another case in which a young person is exhibiting emotional and behavioural difficulties consequent on past trauma where they are assessed as not meeting the criteria for detention under the MHA [Mental Health Act 1983] and the therapeutic treatment which they urgently require within a restrictive environment is not available. This is a depressingly familiar scenario to the judges of the Family Division* (para. 27).

The court made the interim care order and an order authorising the deprivation of her liberty. This provided for the child to be placed in rented accommodation and looked after by care agency staff, notwithstanding the fact that it was unclear whether the agency required Ofsted registration or whether registration with the Care Quality Commission was sufficient. The judge noted that the implications of the coming into force of the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 on the arrangement would be considered at a future hearing.

> *This placement will not only be potentially illegal but will be unlawful with effect from 9 September 2021 because of the amendments contained within the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021/161) [...] The aim of the amendment is to ensure that looked after children under the age of 16 are only placed in children's homes or foster care. Whilst there are obvious concerns about placing children in unregistered accommodation, it will be immediately apparent that finding or creating a*

bespoke placement for a young person who urgently needs care will be considerably harder following 9 September 2021 (para. 31–32).

The local authority entirely accepts the aims and appropriateness of the new regulatory framework, given the widely publicised difficulties caused by the use of unregistered children's homes. However, whilst the government has increased national funding for the expansion of the network of children's homes, there is a paucity of provision at this time. W is a young person who will not benefit from such an institutional setting and who cannot be placed in the alternative of foster care given the extent of her difficulties. She falls between two stools (para. 33).

MBC v AM & Ors (DOL Orders for Children Under 16) [2021] EWHC 2472 (Fam) – MacDonald J

This judgment concerned applications from four local authorities seeking clarification as to whether the amendments to the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021/161), which prohibited the placement of children under 16-years-old in unregistered settings, meant that children under 16 could not be placed in such settings even if the children were subject to an order depriving them of their liberty under the inherent jurisdiction of the high court.

The Secretary of State for Education and Ofsted accepted the judge's invitation to intervene in these proceedings. The judge decided that it remained open to the high court to authorise, under its inherent jurisdiction, the deprivation of liberty of a child under the age of 16 in a placement that would otherwise be prohibited by the terms of the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021.

Derby CC v CK & Ors (Compliance with DOL Practice Guidance) (Rev 1) [2021] EWHC 2931 (Fam) – MacDonald J

This judgment concerned three separate cases involving three separate local authorities and the children in their care who were in unregistered placements. An issue arose as to whether, given the President of the Family Division's Practice Guidance (2019), it remained open to the court to exercise its inherent jurisdiction where an unregistered placement either would not or could not comply with the guidance's requirement to apply expeditiously for registration. The Secretary of State for Education and Ofsted accepted the invitation to join as intervenors.

The judge highlighted concern regarding the use of the inherent jurisdiction to authorise the deprivation of children's liberty.

An order authorising the deprivation of a child's liberty is a truly draconian order that has a profound impact on the subject child. Further, that order is made within a legal framework that has been hastily adapted by the high court in circumstances of necessity, without public consultation or Parliamentary debate, to address a growing shortfall in secure placements and placements providing assessment and treatment for mental health issues within a restrictive clinical environment for the most vulnerable looked after children. Orders

> *authorising the deprivation of a child's liberty can confine a child to a specified location behind locked doors and windows, prevent a child from having contact with family members, deprive the child of the use of a telephone or access to the Internet and, in extreme cases, permit the chemical restraint of the child by way of administration of medication without consent and without the protective regime afforded by Part IV of the Mental Health Act 1983. In this context, the Supreme Court in Re T emphasised that the continued use of the inherent jurisdiction in these circumstances is "a temporary solution, developed by the courts in extremis"* (para 69).

The decision was that the high court would not ordinarily countenance the exercise of its inherent jurisdiction to authorise the deprivation of liberty of a child aged under 16 in circumstances where an unregistered placement either would not or could not comply with the requirement, contained in the President's Practice Guidance (2019), to apply expeditiously for registration.

> *For all the reasons I have given, whilst accepting that an unwillingness or inability on the part of a placement to comply with the terms of the President's Practice Guidance is a factor that informs the overall best interests evaluation on an application under the inherent jurisdiction, and that each case will turn on its own facts, I am satisfied that that the court should not ordinarily countenance the exercise the inherent jurisdiction where an unregistered placement makes clear that it will not or cannot comply with the requirement of the Practice Guidance to apply expeditiously for registration as mandated by law* (para. 94).

The judge also noted the issue about the lack of resources.

> *As in each of the cases that has come before this court, the issue at the heart of the legal questions that arise regularly for determination in this context is an ongoing lack of resources. Within this context, on behalf of the Secretary of State, Mr Auburn contends that this speaks of local authorities failing to fulfil their sufficiency duty under s.22G of the Children Act 1989. In turn, the local authorities before the court charge the Secretary of State with failing to provide them with the resources required to fulfil the sufficiency duty. The court did not hear detailed submissions regarding where responsibility for the manifest lack of suitable provision for vulnerable children lies, and I accept the submission of Mr Auburn that it is no part of the function of this court to arbitrate the respective financial responsibilities of central and local government. Within this context however, I do note that in Boumar v Belgium [1989] 11 EHRR 1, the ECtHR [European Court of Human Rights] held that where a State choses a system of educational supervision with a view to carrying out its policy on juvenile delinquency the State is under an obligation to put in place appropriate institutional facilities which meet the demands of security and the educational objectives of the policy in order to be able to satisfy the requirements of Art 5(1)(d) of the Convention* (para. 96).

These cases concerned the following.

- A 15-year-old girl who became subject to a care order aged 13 because she was beyond parental control (behaviours included: physically assaulting her mother, sibling and the police; damage to property; exclusion from school; self-harm;

attempted suicide; and problematic substance use). She was made subject to a secure accommodation order, which was renewed four times. She spent a total of 60 weeks in secure accommodation in Scotland, after which time the placement said they could no longer meet her needs. She was then sectioned under the Mental Health Act 1983 for a period of time. The local authority could not find suitable registered accommodation for her, so she was placed in unregistered accommodation and her deprivation of liberty was authorised by the court. This was the second time the case was back in front of MacDonald J, who had previously decided that a child could be deprived of their liberty under high court inherent jurisdiction in an unregistered setting.

- A 15-year-old girl with ASD who had self-harmed, absconded and made serious attempts at suicide. The local authority approached 225 potential placements without success. A secure accommodation order under s.25 of the Children Act 1989 was made, but no placement in a secure children's home was available, so a deprivation of liberty order under the inherent jurisdiction was granted for an unregistered placement. The local authority was going through the process of seeking registration with Ofsted but the placement was not registered as yet, and there was no sign of that being about to happen.
- A 14-year-old boy with ASD, ADHD and Tourette's syndrome. He was made subject to a care order and a placement order aged 4. The placement order was discharged two years later when no prospective adopters were found. The child lacks any awareness of risk and is very vulnerable to abuse and exploitation. He had spent periods of time in secure accommodation, where he caused damage to the property. He had to be moved from a children's home because of causing damage to the home and risk to passers-by. At the time of the hearing he was living in an unregistered placement (a lodge in a holiday park) with restrictions on his liberty authorised by the high court; the placement was unlikely to apply for registration. The local authority had been searching for secure accommodation without success. It was looking to purchase a special property and apply for registration of that but that would take time.

A Mother v Derby City Council & Anor [2021] EWCA Civ 1867 – Sir Andrew McFarlane PFD

This was an appeal by a mother of one of the children in the above cases, arguing that a deprivation of liberty order under the inherent jurisdiction could not authorise the placement of a child in an unregistered placement. The appeal was opposed by the local authority, and by the local authorities involved in the earlier cases and by Ofsted and the Secretary of State for Education. The court of appeal concluded that it was possible for the high court to authorise the child's deprivation of liberty even if the placement was unregistered.

> *On the central point of law upon which this appeal turns my conclusion is that where a local authority places a child under CA [Children Act] 1989, Part III in an unregistered children's home, that placement is outside the statutory scheme established by CA 1989, s.22C and the regulations. The Supreme Court determined in Re T that the high court nevertheless has jurisdiction, in an*

appropriate case, to authorise that restrictions may be placed on the liberty of a young person placed in such a placement where imperative conditions of necessity justify doing so (para. 87).

Birmingham City Council v R & Ors [2021] EWHC 2556 (Fam) – Lieven J

This was an application for an order to authorise the deprivation of liberty continued of a 16-year-old child in an unregistered placement.

The child had been living at the placement for almost a year and was relatively settled there and making good progress. It was a solo placement and not a registered children's home. The placement provider originally informed the local authority that they were in the process of registering the placement, however it then became clear that no application had materialised and the provider did not intend to apply for registration. Ofsted responded by threatening to prosecute the provider if the child remained in their care and subsequently, the provider served notice to terminate the placement, although they indicated that they were prepared to continue to care for the child until an alternative placement was found. The local authority had been unable to identify a suitable registered placement for the child.

The local authority invited the court to continue the deprivation of liberty order authorising the child's current placement until an alternative could be found. The court concluded that it had the power to authorise the deprivation of liberty at the placement 'whether or not the local authority has the vires to place [child] there' (para. 25), referring to the supreme court decision in *Re T (A Child)* [2021] UKSC 35, the statutory provisions under s.22 of the Children Act 1989 and the President's Practice Guidance relating to placements in unregistered children's homes (President of the Family Division 2019).

Judgments concerning the placement of children in Scotland

M (Deprivation of Liberty in Scotland) [2019] EWHC 1510 (Fam) – MacDonald J

This was an application for an order authorising the deprivation of liberty of a 13-year-old girl in a placement in Scotland.

The girl's family had been known to children's social care for a number of years, and she and her siblings had been on a number of child protection plans. Towards the end of 2017 the child started to go missing from home regularly, was not attending school, was aggressive to her mother, damaged property, displayed sexualised behaviour and self-harmed. She was considered to be a victim of child sexual exploitation. She was accommodated under s.20 and placed in residential provision. The local authority started care proceedings and obtained an interim care order. She continued to run away, and was exploited by older men, misusing drugs and alcohol, and engaging in sexual activity. It was felt that M needed to be placed away from her home area and a placement was ultimately found in Scotland.

The court made an order under the inherent jurisdiction to authorise the deprivation of her liberty in this placement. As the placement was in Scotland, case law and practice guidance indicated that the local authority also needed to apply to the Scottish court of sessions for a 'mirror order' (same order) under the Scottish system of *nobile officium*. The complicating factor in this case was that the placement was not authorised by Scottish ministers as a secure accommodation placement. At the time of this hearing the child was doing quite well in the placement and it was agreed that it would be in accordance with her welfare for her to stay there.

The judge extended the interim order for deprivation of liberty to allow the local authority to apply to the court of sessions for authorisation of the child's placement in Scotland but concluded that it was not clear from previous cases that this would be forthcoming. The expert advice on Scottish law suggested that the Scottish courts might not be able to make a mirror order because the placement was not authorised for secure accommodation.

The judge stated:

> *Finally, and in the foregoing circumstances, Cumbria Country Council and Ors, Re Children X, J, L and Y is not authority for the proposition that whenever a child is placed in accommodation in Scotland pursuant to an order made under the inherent jurisdiction of the high court an application can and must be made for a 'mirror order' to regularise the legal status of such a placement in Scotland. This may be the ultimate outcome of the local authority's petition to the Inner House of the Court of Session in this case. However, as matters stand, the question of whether a Scottish court will invoke the nobile officium in circumstances where the placement of a child in Scotland amounts to a deprivation of her liberty for the purposes of Art 5 of the ECHR, which deprivation of liberty has been authorised by an order made under the inherent jurisdiction of the high court but where the placement is not a placement approved by the Scottish Ministers for the provision of secure accommodation of children for the purposes of the relevant Scottish legislation, is one that remains undecided* (para. 81).

London Borough of X v Y (Deprivation of Liberty in Scotland) [2021] EWHC 440 (Fam) – Mr L. Samuels QC (sitting as a DHCJ)

This was an application for an order authorising the deprivation of liberty of a child in a placement in Scotland and potentially, while being transported to the proposed placement by a secure transport company.

The application concerned a 15-year-old boy, who was made subject to a care order in 2018. His placement at the time of the hearing was unable to keep him safe and he was considered at immediate risk of significant harm or death. He absconded from the placement on a regular basis, was involved with a number of gangs and believed to be running county lines. No appropriate placement could be found in England or Wales, despite requests sent to more than 100 providers. The proposed placement in Scotland was newly registered and yet to be inspected, and was not approved as secure accommodation in Scotland. The child opposed the application. He accepted

that he should move away from home but argued that Scotland was too far – indeed the judge was told he did not actually know where Scotland was.

A number of issues were raised with the local authority's initial application and the case was briefly adjourned. The issues included: a guardian had not been appointed to represent the child and Cafcass had not been given notice of the application; there was a lack of information about the proposed placement in Scotland including why a placement in England or Wales was not being considered and whether the placement was approved as secure accommodation by Scottish ministers; and lack of proper consideration of the legal complexities of placing a child outside the jurisdiction.

Ultimately, the judge authorised the deprivation of liberty, pending the local authority's petition to the inner house of the court of session asking the Scottish court to invoke the *nobile officium* to legally authorise the placement under Scottish law. Ultimately, an interim order of the Scottish court was made directing that the English order 'shall be recognised and enforceable in Scotland as if they had been made by this Court' (para. 28).

At a later hearing the judge made adjustments to the deprivation of liberty authorisation, following the child's request, to allow greater access to his phone so that he can listen to music and play games. The child reported that he liked the house and the staff and had settled in well.

Judgments dealing with unlawful deprivation of liberty

London Borough of Lambeth v L (Unlawful Placement) [2020] EWHC 3383 (Fam) – MacDonald J

This was an application for a deprivation of liberty order under the inherent jurisdiction to authorise the deprivation of liberty of a 13-year-old child in a placement in Scotland. The child had been living in the placement for approximately six months prior to the application to the court. The local authority was criticised for the delay in submitting the application. The child had been subject to restrictions on his liberty unlawfully for an extended period of time.

The court directed that a statement be provided from the director of children's services to explain the circumstances that had led to the unlawful placement. The local authority agreed that the child was unlawfully deprived of their liberty and put in place procedures to ensure that such mistakes did not happen again, including a comprehensive audit of its placement agreements and behaviour plans for every looked-after child and additional training for staff. The children's guardian notified the court that they intended to submit a claim on behalf of the child for damages for a breach of the child's fundamental rights.

The court authorised the deprivation of liberty on the grounds that the placement amounted to a deprivation of his liberty for the purpose of Article 5 of the ECHR, and that the placement was in the child's best interests. The local authority also petitioned

the inner house of the court of session in Scotland for an order under the *nobile officium* to legally authorise the placement under Scottish law.

The judge said:

> *The inherent gravity of any violation of a child's longstanding right to liberty and security of the person makes it essential that the State adhere to the rule of law when seeking to deprive a child of his or her liberty [...] If the child's right to liberty and security of the person is to be properly protected this approach must be applied with rigor by local authorities notwithstanding the current accepted difficulties in finding appropriate placements for children with complex needs who require their liberty to be restricted. Local authorities are under a duty to consider whether children who are looked after are subject to restrictions amounting to a deprivation of liberty. A local authority will plainly leave itself open to liability in damages, in some cases considerable damages, under the Human Rights Act 1998 if it unlawfully deprives a child of his or her liberty by placing a child in a placement without, where necessary, first applying for an order authorising the deprivation of the child's liberty* (para. 32).

AB (A Child: human rights) [2021] EWFC B100 (Fam) – Mr D. Dias QC (sitting as a Judge of the high court)

This case concerned a 13-year-old boy who was unlawfully deprived of his liberty in a registered privately owned children's home for a period of almost five months.

The boy had lived with his paternal grandmother under a special guardianship order since before he was a year old. This arrangement had broken down when the child was 12, as a result of the grandmother stating she could no longer cope with his behaviour. There were also concerns about the grandmother's care. The local authority issued care proceedings and the child was placed with foster carers under an interim care order. This placement also broke down due to the child's challenging behaviours. He was then placed in a residential unit.

While living in the unit, the child was subject to several incidences of physical restraint. An incident occurred in January 2021 where the child was physically restrained and claimed that he was tripped by a member of staff. The staff member was subsequently suspended.

At this point, the children's guardian recommended to the social worker that the local authority consider applying for a deprivation of liberty order. This recommendation was repeated by the guardian on several occasions over the next month but no action was taken. The guardian acknowledged that they should have referred the matter to the court at this point.

The final hearing for the care proceedings was listed for the beginning of March 2021. At this hearing the local authority raised further concerns about the residential unit where the child was placed and concluded that it was not appropriately safeguarding him. The hearing was adjourned. At this point, the local authority issued the first deprivation of liberty order application, which was granted. The social worker also informed Ofsted about concerns with the residential unit and Ofsted promptly carried out an inspection of the home. Ofsted raised serious concerns about the unit –

including that the child was 'living in a neglected, chaotic and unsafe environment' (para. 8) – and its registration was suspended. The child was subsequently moved to another residential unit.

The local authority now sought a second deprivation of liberty order in respect of the new placement. The deprivation of liberty was authorised by the court.

The judge was critical of the local authority for failing to apply for a deprivation of liberty order as soon as they became aware of the restraints, that the deprivation of liberty was unlawful and in breach of the child's human rights.

> *I have emphasised in proceedings that this historic illegality is a matter of the gravest concern to the court. This court exercises its inherent jurisdiction not as a mere technicality, but as a constituent part of the rule of law. To have a person confined without lawful authority, and particularly a child, and particularly an exceedingly vulnerable child, is a matter of the utmost seriousness. It is a fundamental interference with the child's rights under the European Convention on Human Rights and the UN Convention on the Rights of the Child* (para. 4).

The judgment ended with an apology to the child.

> *The very last thing I wish to say is to AB. If one day he reads this judgment, he may well ask with some justice why it took so long for so many professionals charged with safeguarding his best interests to make sure he was being treated lawfully.*
>
> *The only answer this court can give is this: that inexcusable failure to vigilantly scrutinise and safeguard the freedom and personal security of this highly vulnerable child ends here. His necessary deprivation of liberty has been put on a lawful footing. Too late, I acknowledge. But at last* (para 181–182).

Judgments considering issues of consent

Re Z (A Child: Deprivation of Liberty: Transition Plan) [2020] EWHC 3038 (Fam) – Knowles J

This was an application for a deprivation of liberty order under the inherent jurisdiction to authorise the deprivation of liberty of a 14-year-old boy during the transfer from his home to a residential school.

The child was adopted aged 5 and was living with his adoptive parents. He was diagnosed with autism with pathological demand avoidance traits and his behaviour had becoming increasingly challenging for his parents to manage at home. A 52-week placement in a residential school with expertise in caring for children with similar needs was agreed, but there was concern that the child would not go to the placement voluntarily and force might be required.

The local authority and the child's parents agreed that the placement in the residential school did not require court authorisation – the parents consented to the child being accommodated under s.20 of the Children Act 1989 and could consent to any deprivation of liberty at the school, given that the child was under 16, and 'this was an

appropriate exercise of parental responsibility' (para. 38). The use of 'reasonable force' to manage his behaviour in school would be authorised by s.93 of the Education and Inspections Act 1996.

A five-day plan was developed between the local authority and the parents to encourage the child to travel to the school voluntarily, with proposals to use a secure transport service and restraint and medication if necessary on the final day.

The court authorised the plan. Ultimately the child went to the school without restraint being required.

Re T (A Child) [2021] UKSC 35 – Lady Black, Lord Lloyd-Jones, Lady Arden, Lord Hamblen and Lord Stephens

This supreme court judgment considers the legality of using the inherent jurisdiction given certain provisions in the Children Act 1989 and whether such an order can be made if the young person consents to the placement and to restrictions on their liberty.

In 2017, T, was a 15-year-old child who was subject to a care order. The local authority wished to place T in secure accommodation. Since there were no places available in registered secure children's homes, they applied to the high court for orders under its inherent jurisdiction to authorise the deprivation of liberty of T in an unregistered placement. In 2018 the local authority made another application under the inherent jurisdiction so that T could move to a registered children's home but one that was not authorised to operate as a secure accommodation provider. T consented to the restrictions on her liberty in these placements and submitted that the orders restricting her liberty were, therefore, unnecessary.

The high court did not consider that consent to be valid, and duly made the orders sought by the local authority. T sought to challenge those orders: she did not object to the placements or the restrictions on her liberty but wished to be recognised as capable of consenting in law. The court of appeal dismissed her appeal and she then appealed to the supreme court. By the time she had obtained legal aid and been granted leave to appeal she had reached the age of 18 and was living independently and was in employment.

In the supreme court there were two issues to consider.

- Is it permissible to use the inherent jurisdiction of high court to deprive a child of their liberty?
- If it is permissible, how does the child's consent affect the decision of the court – if the child consents, does that indicate it would be contrary to welfare to make an order?

In relation to the first issue, it was argued that using the inherent jurisdiction was contrary to s.100 of the Children Act 1989, and/or that inherent jurisdiction should not be used to cut across the statutory scheme for secure accommodation set out in s.25 and/or that depriving a child of their liberty under the inherent jurisdiction would be contrary to Article 5 of the Human Rights Act 1998 because this would not be in accordance with a 'procedure prescribed by law'. The supreme court was not

convinced by any of these arguments and confirmed that the high court could use its inherent jurisdiction to deprive children of their liberty.

The main judgment was given by Lady Black, who stated:

> *Accordingly, I do not consider that the express terms of section 100 were an obstacle to the local authority's application under the inherent jurisdiction* (para. 121).

Then in relation to s.25, she said:

> *Cases such as those to which I have alluded earlier in this judgment demonstrate, it seems to me, that it is unthinkable that the high court, with its long-established role in protecting children, should have no means to keep these unfortunate children (and others who may be at risk from them) safe from extreme harm, in some cases death. If the local authority cannot apply for an order under section 25 because there is no section 25 compliant secure accommodation available, I would accept that the inherent jurisdiction can, and will have to be, used to fill that gap, without clashing impermissibly with the statutory scheme.*
>
> *This is a temporary solution, developed by the courts in extremis, but attended by regular expressions of anxiety of the kind articulated by the President in the present case in the Court of Appeal (see paras 5 and 88 of his judgment), and by Sir James Munby in 2017 when he was President of the Family Division (see para 7 above), and adopted with grave reservations of the type expressed in Lancashire v G. There have also been powerful expressions of concern in the submissions before us* (para. 141–142).

And in relation to being in breach of Article 5:

> *I come now to the appellant's argument that the use of the inherent jurisdiction to authorise the deprivation of liberty in cases such as the present falls foul of article 5 in that it is not in accordance with a procedure prescribed by the law. As will by now be apparent, I consider that it is open to the high court, in an appropriate case, to exercise its inherent jurisdiction to authorise such placements. Once a court order authorising the deprivation of liberty in this way is made, I do not see how the deprivation can be said to be not in accordance with the domestic law for article 5 purposes. I should perhaps reiterate that in reaching my view as to the permissible use of the inherent jurisdiction, I have taken fully into account that if the placement is in an unregistered children's home, the provider of the home will be committing a criminal offence, but concluded, as I have explained, that in view of the dire and urgent need for placements for such children, this is nevertheless a proper use of the court's powers. [...]*
>
> *It is unnecessary, for article 5 purposes, for the relevant law to be contained in statute law or other regulatory provisions. There is considerable case law demonstrating the basis on which the inherent jurisdiction is deployed in cases of this type. Sir Andrew McFarlane said in the present case (para 79) that the terms of section 25 should be treated as applying to the same effect when a local authority is placing a child or proposing to place a child in the equivalent of*

secure accommodation (and see also para 49 ibid). This accords with the approach that Wall J took in In re C (Detention: Medical Treatment) (see para 133 above), where he said that he did not consider he should make an order unless he was satisfied that the section 25 criteria were, by analogy, satisfied. The operation of section 25 was explored in depth recently by the Court of Appeal in In re B (supra para 3), the criteria for a section 25 order being gathered together at para 98 et seq of Baker LJ's judgment. It is no part of this appeal to review the approach laid down in those authorities. There are also reported first instance judgments describing and explaining particular uses of the inherent jurisdiction in what might be described as "secure accommodation circumstances". The law as to the exercise of the inherent jurisdiction in this area is, in my view, sufficiently accessible and foreseeable with advice. Outcomes need not be predictable with absolute certainty, and in this area of the law, it is important that flexibility is retained, in order that the courts can respond appropriately to the many different sets of circumstances that arise.

There are appropriate procedural safeguards built into the application process, broadly mirroring those applicable to a section 25 application. There is provision for the child to be made a party to the process, for example, and for the appointment of a guardian, as well as for reviews of the continuing confinement. By requiring that the structure imposed by section 25 should also be observed in an application to place a child in the equivalent of secure accommodation, the President has ensured that proper procedural protection is built in for the child (para. 150–153).

On the question of consent, the court found that this is something that should be considered and evaluated by the court when it is making its decision, but the existence of consent would not necessarily mean that an order could not be made.

Judgments in cases considering use of the high court for injunctions against adults to protect children

The cases identified under this theme sought to use a different approach to protecting children at risk of exploitation, instead of or alongside depriving them of their liberty for their own safety – namely, seeking injunctions against adults that are identified as a risk to the child. In some of these cases the injunctions are granted, and in others they are not. These cases were heard between 2014 and 2016, and all involved children who were at risk of child sexual exploitation from identified men in cases where criminal proceedings were not issued. It is not clear if this approach is still being used (and judgments not published) or not.

London Borough of Barking and Dagenham v SS [2014] EWHC 4436 (Fam) – Hayden J

This was an application for a secure accommodation order in respect of a 15-year-old girl. At the time of the application she had already been accommodated in secure accommodation for 4.5 weeks. The child had been brought to the UK against her will and was being groomed for sexual and financial exploitation. She was arrested in April 2014 and placed under police protection. Care proceedings commenced and a series of interim care orders were made. She was initially placed in a residential children's home before being placed with a foster carer with whom she had formed a good relationship. However, she absconded from this placement in October and was found by police in a vehicle driven by a man and with a woman known to police for prostitution. Within an hour of returning to the foster carer she absconded again, and was located at a property known to be used for prostitution.

The court refused to make a secure accommodation order, on the grounds that it 'would not be a justified restriction of SS's liberty' (para. 26). Instead, a specialist therapeutic residential placement was seen to be the most appropriate option. However, no such placement was available, and the local authority was instructed to investigate the possibility of providing a therapeutic support package to SS at the foster home, although it is not clear from the judgment if this approach was successful. The judge also indicated that the local authority should seek an injunction against the man who had been exploiting the child. The judge said:

> *The courts have seen a number of cases in recent years where vulnerable young girls have been exploited in a variety of ways by groups of predatory men. That so many of these men escape prosecution and continue to enjoy their liberty whilst the young girls they exploit are locked up (for their own protection) sends very confusing messages to the girls themselves, to the distorted minds of the men who prey on them and to society more generally* (para. 16).

Birmingham CC v Riaz & others [2014] EWHC 4247 (Fam) – Keehan J

The case concerns a girl, aged 17, who was the victim of sexual exploitation by at least 10 older men. The court had previously made a secure accommodation order and the girl was accommodated in a secure children's home. The local authority decided to take the 'bold and novel step' of applying for civil injunctions under the inherent jurisdiction to prevent the men from contacting AB or associating with any female under the age of 18 who was not already known to them. The police had concluded that there was insufficient evidence to secure criminal convictions against the men.

The court authorised the injunctive orders against the 10 men. The judge said:

> *I wish to commend Birmingham City Council for the bold and innovative approach it has taken in this case. All too often in such cases the only action taken by the authorities, where there is insufficient evidence to mount a prosecution, is in respect of the victim. They are invariably taken into care or, in more extreme cases, they are placed in secure accommodation as was the case with AB. Whilst that action is taken in the best interests and to protect the young victim, it strikes me as wrong and unfair that no action is taken against the perpetrators of child sexual exploitation* (para. 158).

London Borough of Redbridge v SNA [2015] EWHC 2140 (Fam) – Hayden J

This was an application to invoke the inherent jurisdiction of the high court in order to protect vulnerable children from a man (SNA) who the local authority perceived to present a sexual risk. The orders sought would prevent SNA from contacting or associating with 'any female under 18 years of age'. In this case, the court refused to authorise the injunction on the grounds that it went beyond the remit of the inherent jurisdiction, in that the application did not concern an identified child. The judge stated:

> *The inherent jurisdiction cannot be regarded as a lawless void permitting judges to do whatever we consider to be right for children or the vulnerable, be that in a particular case or more generally (as contended for here) towards unspecified categories of children or vulnerable adults* (para. 36).

The judge acknowledged that this was in contradiction of the approach taken by Keehan J in Birmingham CC v Riaz (see above), although pointed out that the recently amended Sexual Offences Act 2003 enabled criminal courts to make sexual risk orders, which would provide the protection sought by the local authority in this case. This remedy was not available at the time of the Birmingham case.

Rotherham MBC v M & Ors [2016] EWHC 2660 (Fam) – Cobb J

This was an application for injunctive orders against four men under the inherent jurisdiction to protect a teenage girl from child sexual exploitation.

Around two years prior to the hearing, concerns had been raised about the child's risk of sexual exploitation (relating to three men that she was known to have been sexually exploited by). In 2016, she went missing and was found in a hotel room by police in the company of one man; another man had already left the room. The officers attending at the scene believed that she was the victim of child sexual exploitation. She was immediately conveyed to, and placed in, a safe house, and the two men were arrested on suspicion of trafficking for sexual exploitation.

When the protective regime of the police orders expired, the local authority applied for injunctive relief against the four associated men under the inherent jurisdiction. Interim injunctive orders and reporting restricting orders were made at previous hearings, held in public. At the hearing, the local authority notified the court that it no longer wished to pursue the injunctive orders against the four men, given insufficient evidence. The court discharged the injunctions against the four men, and made no further injunctive order.

Cobb J raised concern about the local authority's decision making in the case and the collaboration with the South Yorkshire police – in particular that the police did not actively support the local authority's application for injunctive orders due to a lack of evidence. Cobb J noted that in future there needed to be 'focused and clear lines of communication between the safeguarding agencies [...] at all times' (para. 20).

References

Case list

- *A Borough Council v E & Ors (No. 2) (Refusal of Secure Accommodation Order)* [2021] EWHC 2699 (Fam)
- *A Borough Council v E (Unavailability of Regulated Placement)* [2021] EWHC 183 (Fam)
- *A Child (no approved secure accommodation available; deprivation of liberty)* [2017] EWHC 2458 (Fam)
- *A County Council v A Mother & Ors (Refusal to make a DOLS order)* [2021] EWHC 3303 (Fam)
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- *Birmingham CC v Riaz & others* [2014] EWHC 4247 (Fam)
- *Birmingham City Council v R & Ors* [2021] EWHC 2556 (Fam)
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- *W (Young Person: Unavailability of Suitable Placement)* [2021] EWHC 2345 (Fam)
- *Wigan BC v Y (Refusal to Authorise Deprivation of Liberty)* [2021] EWHC 1982 (Fam)
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Legislation

- Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021 No 161)
- Children Act 1989
- Education and Inspections Act 1996
- Human Rights Act 1998, Schedule 1
- Mental Health Act 1983
- Social Services and Well-being Act (Wales) 2014

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Nuffield Family Justice Observatory

Nuffield Family Justice Observatory (Nuffield FJO) aims to support the best possible decisions for children by improving the use of data and research evidence in the family justice system in England and Wales. Covering both public and private law, Nuffield FJO provides accessible analysis and research for professionals working in the family courts.

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