

*Deprivation of Liberty: What counts and what will sway the court in Deprivation of Liberty applications following the spate of recent cases?*

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# Youth Custody

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Mental Capacity Act 2005

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S. 25 Children Act 1989

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Inherent jurisdiction of High Court

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# Article 5 ECHR: Right to liberty and security

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1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(d) The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

...

# Article 37 UNCRC

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State Parties shall ensure that:

- a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

## Article 37 UNCRC cont.

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(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Re T [2022] AC 723

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# Article 2 ECHR: Right to life

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1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
  - a) in defence of any person from unlawful violence;
  - b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c) in action lawfully taken for the purpose of quelling a riot or insurrection.

# Article 3: Prohibition of Torture

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- No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

President's Practice Guidance September 2023

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Derbyshire County Council v AB, CD + EF  
[2023] EWHC 1574 (Fam) 25<sup>th</sup> June, 2023

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A Local Authority v EBY [2023] EWHC 2494  
(Fam) 9<sup>th</sup> October, 2023

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Re U (A Child: Deprivation of Liberty)  
[2024] EWHC 228 (Fam) 2<sup>nd</sup> February, 2024

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Peterborough City Council v Mother, Father &  
SM [2024] EWHC 493 (Fam) 6<sup>th</sup> March, 2024

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# What lawyers need to be mindful of in these applications...

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- a) Do the restrictions for which the local authority seeks the court's approval really amount to a deprivation of liberty?
- b) Do the arrangements satisfy the requirement in Article 5 for educational supervision?
- c) Is the application a measure of last resort?
- d) Are the restrictions proportionate to the anticipated harm?
- e) How are the conditions laid down by section 100 of the Children Act satisfied?
- f) Is the period of detention for which approval is sought the shortest appropriate period of time?
- g) How does the local authority plan to step down the restrictions?
- h) What arrangements have been made for contact between the child and his or her family? What arrangements have been made for the child to receive visits from family members?

# What lawyers need to be mindful of in these applications... cont.

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- i) Is the home in which the child is to live under the DoL order a registered children's home? If not, why must the child be placed there? Why is there no alternative in a registered placement? Can it be said that the choice of an unregistered children's home is driven by imperative conditions of necessity?
- j) If the home is unregistered, what steps are being taken to remedy that?
- k) What is likely to happen if the court does not make the DoL order? "Likely" is used in this context in the same way as when considering likely significant harm under the part IV of the Children Act.
- l) Is there a risk of a breach of the child's article 2 and/or 3 rights?
- m) Is the deprivation of liberty in the best interests of the child?

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