CHILDREN: DEPRVIATION OF LIBERTY

What are the unresolved issues - both legal and practical - over deprivation of liberty orders for children of all ages; their use, impact and the provision of secure accommodation?

Your freedom to come and go as you wish is very important and has been a protected right for centuries. From the ancient common law remedy of 'habeus corpus' we now look to Article 5 of the ECHR - everyone has the right to liberty and security of person. Being deprived of your liberty can only be lawful:

- if you consent to it, or someone else is allowed to consent on your behalf, or
- there is an existing legal framework that allows it, or
- you apply to the court for a declaration that its lawful.

Deprivation of liberty means that **someone is under continuous supervision and control and is not permitted to leave.** It doesn't make any difference if the conditions are pleasant or necessary. It is defined by using the criteria set out in the case of *Storck v Germany* 43 EHRR 96, as confirmed in 2014 in the case of Cheshire West and Chester Council v P [2014] UKSC 19, [2014] MHLO 16

- Confinement in a particular restricted place for more than a short period of time
- lack of valid consent
- attribution of responsibility to the State.

An obvious example of lawful deprivation of liberty is sending someone to prison after conviction of a criminal offence.

The current legal situation regarding depriving children of their liberty is a complex mixture of common law, the inherent jurisdiction, statute and European law. Although a child is defined as a person between 0-18, children aged 16 and over are treated

differently to younger children. There is also a forthcoming Supreme Court decision on the use of the inherent jurisdiction, which is discussed below.

We need to look carefully at the reasons behind any decision to restrict a child's liberty in order to identify the correct route to ensure that any detention is lawful. Sadly for family practitioners, The Children Act 1989 does not specifically address mental disorder, does not provide specific powers to enforce treatment, and does not provide specific safeguards for the rights of the detained patient. Family lawyers therefore may have to come out of their comfort zones when dealing with a case where a child needs to be deprived of their liberty. It may be that the family court is not the right place for such decisions to be made.

Why might a child be deprived of their liberty?

There are a variety of reasons why a decision is made to deprive a child of liberty.

Consent and exercise of parental responsibility.

In some circumstances, you can consent to your own confinement. Regarding children, parents may exercise 'parental responsibility' which means they are able to offer their own consent when a child cannot. The younger the child the less likely it is that the acceptable 'zone of parental authority' will be controversial - for example, when parents consent to a five year old receiving medical treatment. However, it has long been accepted by the courts that parental responsibility is a 'dwindling right' that diminishes as the child grows in age and understanding. Parental responsibility must also be exercised in the best interest of the child.

Once a child reaches the age of 16, they are treated differently to younger children – for example, they are presumed to be able to offer consent to medical treatment as if they were an adult. But what if a 16 year old does not have the mental capacity to make decisions? Can a parent then consent to a deprivation of liberty on their behalf? The short answer is no.

The Supreme Court in D (A Child) [2019] UKSC 42 (26 September 2019) held that a parent could not consent to deprivation of liberty once a child was 16, even if the child lacked capacity. Logically this should extend to younger children and require careful examination of what falls within the normal 'zone of parental control'. The key question was *Do the restrictions fall within normal parental control for a child of this age or do they not?* If they did not, Article 5 was engaged and the parent could not consent on the child's behalf.

However, as an indication of the complexity in this area and reasonable scope for disagreement, the court was split 3:2. The majority of those in support agreed that deprivation of liberty involved a fundamental human right and it could never be within the boundary of acceptable exercise of parental responsibility to deny a child a fundamental human right. Further, the court restated the principle set out in Cheshire West, that the living arrangements of the mentally disabled had to be compared with those of people who did not have the disabilities which they had. They were entitled to the same human rights, including the right to liberty, as any other human being. Even if they were deprived of their liberty for the best possible motives, they were still entitled to the protection of Article 5 so it could be independently ascertained that the arrangements were in fact in their best interests.

But, its interesting to consider one of the minority judgments. At para 151 Lord Carnwath said this:

Later in [Lady Hale's] judgment (para 48) she reinforces that view by equating deprivation of liberty with other "fundamental human rights" such as the right to life or freedom from torture. She argues that it would be a "startling proposition" that it lies within the scope of parental responsibility to authorise violation of such rights. I say at once, with respect, that I am not persuaded that such comparisons are fair or helpful. D's parents were not authorising the state to commit torture or anything comparable to it. They were doing what they could, and what any conscientious parent would do, to advance his best interests by authorising the treatment on which all the authorities were agreed. That this involved a degree of confinement was an incidental but necessary part of that treatment, and no more than that. On the President's view, with which I agree, they were not "authorising a violation of his

rights", but rather exercising their parental responsibility in a way which ensured that there was no such violation.

So it looks as if there is scope for that argument to be potentially revived.

Necessary treatment for mental illness A child can be compelled to accept treatment for a mental disorder under the Mental Health Act 1983.or consent to their own informal admission to hospital for treatment section 131(2). Detention under the Mental Health Act provides the child with a number of important safeguards, such as the right to appeal against detention and a duty to ensure an age-appropriate environment (s 131A).

Necessary protection for the mentally incapacitated The Mental Capacity Act 2005 applies only to children aged 16 or over. The Mental Capacity Amendment Act 2019 inserted a new Schedule to the MCA which sets out a new administrative scheme for the authorisation of deprivation of liberty in order to enable care or treatment of a person who can't consent. Under Schedule AA1, a 'responsible body' will be able to authorise arrangements giving rise to a deprivation of a person's liberty in any setting, if satisfied that the necessary conditions are met, including that the arrangements are necessary and proportionate to prevent harm to the person and proportionate in relation to the likelihood and seriousness of harm to the person.

Once an authorisation has been given, there are a number of safeguards put in place for the person which include regular reviews of the authorisation by the responsible body or care home and the right to challenge the authorisation before the Court of Protection.

Detention by the police See section 38 of Police and Criminal Evidence Act 1984. The custody officer must secure that any arrested child is moved to local authority accommodation unless it is not practical to do so, or once the child has reached the age of 12, that no secure accommodation is available and keeping him in other local authority accommodation would not be adequate to protect the public from serious harm.

Secure accommodation under the Children Act 1989

Use of section 25 of the Children Act 1989 and the accompanying regulations is a lawful way of depriving a child of liberty but it has proved not to be a 'straightforward' statutory provision. The inherent jurisdiction can be used to 'fill the gaps' but the courts are very clear - If section 25 applies it *must* be used as it provides statutory safeguards for the child. See *Re X, Re Y* [2016] EWHC.

This route has to be endorsed by court order; the consent of any party is not relevant. Re T (A child) (Secure Accommodation Order) [2018] EWCA Civ 2136

The Regulations set out various safeguards for the child, such as ensuring that parents are informed and that the deprivation of liberty is regularly reviewed.

In essence, section 25 operates to make deprivation of liberty lawful if the child is subject to a care order or is 'looked after' by the LA under section 20 of the Children Act 1989 and:

- the child has a history of absconding and is likely to abscond from any other description of accommodation; and
- if the child absconds they are likely to suffer significant harm; or
- if not placed in secure accommodation, the child is likely to injure themselves or another person.

Relevance of the child's age

A child younger than 13 can only be placed in secure accommodation if this is authorised by the Secretary of State under Regulation 4 - unless the child is 12 and has been arrested by the police.

If the child is 16 or older and lacks capacity under section 2 of the Mental Capacity Act, then the Court of Protection is the more appropriate venue. See *B v RM MM AM* [2010] EWHC 3801 for further consideration about transfer to and from the Court of Protection and Family Court.

There has been some confusion over whether or not a secure accommodation order can be made once a child reaches the age of 16 and this may depend on whether the child is accommodated under section 20(3) or section 20(5).

An alternative route could be to rely on the court's inherent jurisdiction which is theoretically limitless.

Scotland and Wales

Wales now has a separate regime for secure accommodation under s.119 of the Social Services and Wellbeing (Wales) Act 2014 ("SSW(W) 2014"), although the provisions are substantially the same as under s.25 of the Children Act 1989.

A shortage of available secure accommodation in England lead to some children being placed in Scotland. This caused some problems about jurisdiction. Just because an order is lawfully made in England, does not mean it automatically is lawful in Scotland. See the judgment of the President of the Family Division in *Re X, Re Y* [2016] EWHC 2271 (Fam), para 1.

This problem has now been dealt with by The Children and Social Work Act 2017, Schedule 1 which simply amends section 25 of the Children Act to extend it to Scotland.

An application of last resort

This is a serious application and should only be made when there is no alternative – for example, it should never be used to punish a child for running away or being a nuisance. The courts have confirmed it is an order of 'last resort'

If there isn't a court order a child can only be held in secure accommodation for 72 hours every 28 days: see Children (Secure Accommodation) Regulations 1991, reg. 10. If the court makes an order, the first order can be made for an initial maximum

period of 3 months and after that for further periods of up to six months. Time starts running from the date of the order.

Once the order is made, it can't be discharged unless the order was made incorrectly. If the child's circumstances change and the local authority think the secure accommodation order is no longer needed the courts have decided that the way forward is to apply for a writ of habeas corpus under RSC Order 54 . If the parents and the local authority disagree about whether or not it is still needed, the parents can make an application for judicial review.

How will the child make his wishes known to the court?

Under section 25(6) the court can't consider making a secure accommodation order if a child is not legally represented in court, unless the child decides not to apply for legal representation.

However, the court should usually appoint a guardian to represent the child under section 41(1) of the Children Act. The guardian will speak to the child and will give instructions to a solicitor; this will allow the court to say that the child is legally represented.

The guardian will recommend to the court what he thinks is in the child's best interest, but the child's welfare is NOT the 'paramount consideration' in these proceedings.

Rule 12.14 (3) of the Family Procedure Rules 2010 gives the court power to exclude a child who wants to attend court if it is in their interest to do so and they are represented although Rule 12.14(4) requires the court to give the guardian, the child's solicitor and child, if of sufficient understanding, the opportunity to make representations about the child's attendance.

When deciding whether or not a child should come to court, the starting point should be an evaluation of the consequences of attending or not attending upon the child's welfare taking into account the following factors. See Re K (A Child) [2011]

- the age and level of understanding of the child

- nature and strength of the child's wishes
- the child's emotional and psychological state
- the impact of influence from others
- the matters to be discussed
- practical and logistical considerations – how far would child have to travel?
- the impact on proceedings – is the child likely to need to be restrained in court? If so that is usually a sufficient ground to refuse to allow the child to attend.

Issues to consider when applying for a secure accommodation order

There have been many practical difficulties in applications for secure accommodation and the courts have had to look very carefully about what 'secure accommodation' means, the relevant criteria under section 25 that justify the order, to what extent the child's welfare is considered in the balance and the over arching demands of proportionality.

The complex interplay of various statutory provisions must then be seen in the context of the nationwide shortage of accommodation which is designated as 'secure' to meet the necessary statutory requirements.

The case of *B (Secure Accommodation Order)* [2019] EWCA Civ 2025, tackled these questions head on. The court was very concerned that the lack of designated secure accommodation meant that the court was increasingly being asked to use its inherent jurisdiction to make it lawful to deprive a child of their liberty.

The court took a wide ranging review of available case law and considered submissions from the Association of Lawyers for children and set out the questions that a court must ask and answer before making a secure accommodation order. See para 98.

(1) Is the child being "looked after" by a local authority under section 20 of the Children Act 1989 or, alternatively, does the child fall within one of the other categories specified in regulation 7 (which are children accommodated by health

authorities, NHS trusts, local educational authorities and children in residential care homes or nursing homes).

(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?

However, this did not end the confusion of many practitioners and required further guidance from the President of the Family Division in February 2020. This guidance focused on the discussion by the Court of Appeal about the definition of 'secure accommodation' which was found to be "any 'accommodation designed for, or having as its primary purpose, the restriction of liberty'"

However, the President was clear that this does not mean that an application to place a child in such a unit must be determined via a s 25 secure accommodation application and he referred back to the questions asked and answered in the Court of Appeal judgment, stating that question 4 was the 'clincher'.

"It follows that, although an unregistered and/or unapproved secure placement may come within the definition of 'secure accommodation' within s 25, that

accommodation cannot satisfy item (4) in the 'relevant criteria' with the result that a s 25 order cannot be made to authorise placement in that unit. In such a case any court approval would need to be sought under the inherent jurisdiction.

The bottom line is that Re B does NOT signal a need for the court to use s 25 to process applications for deprivation of liberty in a unit which is unapproved by the Secretary of State as 'secure accommodation'. Such applications should continue to be considered under the inherent jurisdiction. If the s 25 criteria are met, then, of course, s 25 should be used.

The inherent jurisdiction

If section 25 doesn't apply then the courts could rely on the inherent jurisdiction which is in theory a 'limitless' power of the High Court to make decisions if there is an apparent 'gap' in the statute law.

The case of *Wakefield Metropolitan District Council & Anor v DN & Anor* [2019] EWHC 2306 (Fam). Mr Justice Cobb provided a clear overview of how the inherent jurisdiction is used to authorise a deprivation of liberty of a vulnerable adult.

The court has found there is jurisdiction to make an order with regard to a 17 year old under the court's inherent jurisdiction, given the extraordinary circumstances of that case. See *Re B (Secure Accommodation: Inherent Jurisdiction)* [2013] The judge accepted the submission that the inherent jurisdiction of the High Court is theoretically limitless and in circumstances where the statutory code under section 25 is satisfied in relation to a 17-year old child (with the exception of the requirement that the child is looked after by the local authority), it is open to the court to exercise its inherent jurisdiction to direct that a child be detained in secure accommodation.

But In re T (A Child) (Secure Accommodation) [2018] EWCA Civ 2136, the court was clear that it is fundamentally unsatisfactory that many young people were being placed in secure accommodation outside the statutory scheme in units that by definition had not been approved by the secretary of state as secure children's

homes. This case has been appealed to the Supreme Court who heard the appeal in October 2020 and we are waiting for the judgment.

The appellant, T, was a 15-year-old child who was subject to a care order. The local authority wished to place T in secure accommodation but there were no places available in any registered secure children's homes. So the LA applied to the High Court for orders under its inherent jurisdiction authorising T's placement in non-statutory accommodation. T had consented to the restrictions on her liberty in the placements sought and submitted that the orders restricting her liberty were unnecessary. The Court of Appeal found that consent was not a relevant issue for the exercise of the inherent jurisdiction. T appealed to the Supreme Court, wishing to be recognised as capable of consenting in law.

The Supreme Court was asked to consider the following issues:

- In circumstances where insufficient places are available in registered secure children's homes, is the exercise of the inherent jurisdiction to authorise a child's placement in unregistered secure accommodation lawful?
- If it is, what legal test should the courts apply when determining whether to exercise the inherent jurisdiction?
- Is a child's consent to the confinement of any relevance when determining whether to exercise the inherent jurisdiction?

So watch this space!

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