

Secure Accommodation and Deprivation of Liberty

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November 2019

1. Introduction

2. In May 2019 the Children's Commissioner published a report entitled *Who are they? Where are they? Children Locked Up*. The Report analyses in detail the statistics in relation to children who are placed in secure accommodation and considers the position of those children in respect of whom a local authority has been granted permission to deprive of their liberty in placement which are not approved as secure accommodation.
3. The report is a thoughtful and timely piece of work and in this paper I will outline the recent legal developments which aim to address some of the issues raised.

4. Why is the legal framework important?

5. Children who are placed in Secure Accommodation for welfare reasons can only be placed there because the statutory criteria are met. The statutory criteria are concerned with the safety of the child and others. A child may be placed with other young people who have committed crimes and the very nature of the accommodation is such that they may feel that they have been "locked up". Secure accommodation on welfare grounds is not intended to be punitive but it will inevitably represent a curtailment of freedoms which the child may have been used to and the imposition of rules and regulations. In some cases the degree of curtailment will be severe and may include restraint. The aim of secure accommodation however is to provide to provide the support required to the child to enable them to access education, healthcare and therapeutic intervention where required. In order to be lawful as explained below any placement where a child's liberty is restricted must involve an educational element.
6. There are currently 259 places approved for use in 15 secure children's homes in England and Wales. Out of the fifteen secure places seven are for children who are in secure accommodation on welfare grounds and 6 take children who are placed on welfare grounds and children who come through the criminal justice system. There are 135 beds available for welfare cases. Not all of the available places are occupied all of the time but between March 2018 and March 2019 the percentage of children who were placed by a local authority on welfare grounds as opposed to the Youth Justice System rose from 47% to 56%.
7. The placement of any given child is not simply determined by the availability of a bed however. On 31 March 2018 the Department for Education reported that only 100 welfare beds were actually available for use. The precise cost of a bed is not known but in 2018 the Children's Commissioner estimated it at around £210,000 per year per bed. The statistics also show that in 2017/2018, 58% of the children in secure accommodation are under 16 years old and in the same time period, of those children, the highest number were between 10 and 13 years old. In July 2018 the Secure Children's Homes Network reported the highest ever number of open referrals since they began collating data in 2016, there were

37 open referrals. This resulted in some orders not being made where there was a clear requirement for one and prompted Her Honour Judge Lazarus to say:

1. *This case represents yet another sorry example of the state failing a child in need, and highlights the impact of there being far too few secure accommodation unit places for children like O.*
 2. *In summary, I have been driven not to grant a secure accommodation order for a child who needs one due to the unavailability of appropriate placements.*
 3. *That is clearly a wholly unacceptable situation. He is a child in local authority care who is at risk from his disordered background and the depredations of gang life. This is the opportunity to help him and make him safe, and it is being lost.*
 4. *Like my colleagues before me, whose published judgments increasingly feel like heads banging against brick walls, I am dismayed, frustrated and outraged; and to quote the former President of the Family Division from last year's case of **Re X**, I am deeply worried about the risk that 'we will have blood on our hands'.*
8. We do not have firm statistics for is the number of children who are currently accommodated in accommodation which restricts their liberty. These children have been termed "*invisible children*" by the Children's Commissioner. The part of the report which deals with the legal status of these children and how they are accommodated should not be relied on in light of the recent legal developments which will be discussed below. CAF/CASS estimate that there were 185 applications in 2018/2019. There were also 89 children dealt with by the Court of Protection.
9. **Secure Accommodation**
10. Section 25 of the Children Act 1989 sets out the criteria for the use of secure accommodation:

25. Use of accommodation for restricting liberty

(1) Subject to the following provisions of this section, a child who is being looked after by a local authority in England or Wales may not be placed, and, if placed, may not be kept, in accommodation in England or Scotland provided for the purpose of restricting liberty ('secure accommodation') unless it appears -

(a) that -

(i) he has a history of absconding and is likely to abscond from any other description of accommodation; and

(ii) if he absconds, he is likely to suffer significant harm, or

(b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons.

(2) The Secretary of State may by regulations - (a) specify a maximum period -

(i) beyond which a child may not be kept in secure accommodation in England or Scotland without the authority of the court; and

(ii) for which the court may authorise a child to be kept in secure accommodation in England or Scotland;

(b) empower the court from time to time to authorise a child to be kept in secure accommodation in England or Scotland for such further period as the regulations may specify; and

(c) provide that applications to the court under this section shall be made only by local authorities in England or Wales.

(3) It shall be the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in his case.

(4) If a court determines that any such criteria are satisfied, it shall make an order authorising the child to be kept in secure accommodation and specifying the maximum period for which he may be so kept.

(5) On any adjournment of the hearing of an application under this section, a court may make an interim order permitting the child to be kept during the period of the adjournment in secure accommodation.

(5A) ...

(6) No court shall exercise the powers conferred by this section 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 under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and having had the opportunity to do so, he refused or failed to apply.

(7) The Secretary of State may by regulations provide that -

(a) this section shall or shall not apply to any description of children specified in the regulations;

(b) this section shall have effect in relation to children of a description specified in the regulations subject to such modifications as may be so specified;

(c) such other provisions as may be so specified shall have effect for the purpose of determining whether a child of a description specified in the regulations may be placed or kept in secure accommodation in England or Scotland.

(d) a child may only be placed in secure accommodation that is of a description specified in the regulations (and the description may in particular be framed by reference to whether the accommodation, or the person providing it, has been approved by the Secretary of State or the Scottish Ministers).

(8) The giving of an authorisation under this section shall not prejudice any power of any court in England and Wales or

Scotland to give directions relating to the child to whom the authorisation relates.

(8A) ...

(9) This section is subject to section 20(8)."

11. Secure accommodation is defined in section 25, subsection 1 as accommodation '*for the purpose of restricting liberty*'. What this means in practice was considered by Lady Black in ***Re D (A Child)*** [2019] UKSC 42. ***Re D*** is a case which considers whether a parent can consent to the deprivation of liberty of a child aged 16 or over and although Lady Black gives detailed consideration to the Regime under Section 25 she is clear that in the absence of a 'real life situation and oral argument' her views should not be taken as final nevertheless they carry significant authority.
12. Regulation 7 of the ***Children (Secure Accommodation) Regulations 1991 (SI 1991/1505)*** extends Section 25 to children who are not looked after by the local authority but accommodated by NHS trusts, health authorities, CCG's, care homes or independent hospitals. Lady Black then goes on to consider how 'secure accommodation' can be identified, '*the challenge is to interpret section 25 in such a way as to provide the protection intended by the legislature, without getting in the way of meeting the varied needs of children for whom hospitals, care homes, and local authorities (in the exercise of their social services and educational functions) have responsibility.*' Her conclusions can be distilled as follows:
 - a. Whilst all secure children's homes approved by the Secretary of State for that use will be classed as secure accommodation there are other settings which are 'secure accommodation' which are not approved as such.
 - b. There is no reliable and universally applicable shortcut to identifying secure accommodation.
 - c. Some children will require a placement which requires a degree of restriction but which falls short of the criteria set out in Section 25 for secure accommodation. If Section 25 applied whenever a child's liberty was restricted then children for example in care homes and hospitals who were not at risk of absconding or a risk to themselves or anybody else may fall within the section if there was a degree to which their liberty was restricted.
 - d. The fact that a court determining a Section 25 application does not have the child's welfare as its paramount consideration is important. This can only have been intended to apply to a circumscribed group of children where the displacement of the paramountcy principle is unavoidable.
 - e. The focus should be on the accommodation and the purpose for which it is provided rather than the regime within the accommodation. One formulation of that may be that of Wall LJ in ***Re C (Detention: Medical Treatment)*** [1997] 2FLR 180 as accommodation 'designed for or having as its primary purpose' the restriction of liberty.

13. A judgment from the Court of Appeal is due to be published imminently which will deal in further detail with the identification of the various types of accommodation.

14. **Deprivation of Liberty**

15. Article 5 of the European Convention on Human Rights states:

ARTICLE 5

Right to liberty and security

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:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(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;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

16. Article 5 clearly includes children as they are specifically referred to at paragraph 1(d). What constitutes a deprivation of liberty? The principles in relation to the deprivation of a child's liberty are the same as those in relation to an adult. The Supreme Court in ***Surrey County Council v P; Cheshire West and Chester Council v P*** [2014] UKSC 19 confirmed that the appropriate test is that in ***Storck v Germany*** [2005] 43 EHRR 22:

37. The second question, therefore, is what is the essential character of a deprivation of liberty? It is common ground that three components can be derived from Storck, paras 74 and 89, confirmed in Stanev, paras 117 and 120, as follows:

(a) the objective component of confinement in a particular restricted place for a not negligible length of time;

(b) the subjective component of lack of valid consent; and

(c) the attribution of responsibility to the state. Components (b) and (c) are not in issue here, but component (a) is.

As per Lady Hale in ***Cheshire West***.

17. The difficulty in assessing whether a child being deprived of his or her liberty is that in general children may often be subject to a perfectly reasonable degree of parental control and restriction to keep them safe. Grounding, time out and even apps to track children are used by parents every day. According to Lady Hale the 'acid test' is whether objectively the person is under continuous supervision and control and not free to leave. In ***Salford City Council v M (Deprivation of Liberty in Scotland)*** [2019] EWHC 1510 (Fam) Mr Justice MacDonald considered the position in relation to a child of 13:

*38. In circumstances where it is accepted the first limb of the "acid test" does not require examination in the particular circumstances of this case, with respect to the application of the second and third limbs of the test to children and young people, in ***Re RD (Deprivation or Restriction of Liberty)*** [2018] EWFC 47 Cobb J, having reviewed the extensive case law, summarised the position as follows:*

*i) 'Free to leave' does not mean leaving for the purpose of some trip or outing approved by those managing the institution; it means leaving in the sense of removing herself permanently in order to live where and with whom she chooses (***Re A-F*** [2018] EWHC 138 (Fam) at [14], repeating comments made in ***JE v DE*** [2006] EWHC 3459 (Fam) at [115], which had been cited with approval in ***Re D (A Child)*** [2017] EWCA Civ 1695, [22]).*

*ii) It is accepted wisdom that a typical fourteen or fifteen-year old is not free to leave her home (***Re A-F*** at [31](i)).*

*iii) The terms 'complete' or 'constant' define 'supervision' and 'control' as indicating something like 'total', 'unremitting', 'thorough', and/or 'unqualified' (***Re RD (Deprivation or Restriction of Liberty)*** at [31]).*

iv) *It does not matter whether the object is to protect, treat or care in some way for the person taken into confinement (Cheshire West and Chester v P at [28]).*

v) *The comparative benevolence of living arrangements should not blind the court to their essential character if indeed those arrangements constitute a deprivation of liberty (Cheshire West and Chester v P at [35]).*

vi) *What it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities (Cheshire West and Chester v P at [46]).*

vii) *The person's compliance or lack of objection, the relative normality of the placement (whatever the comparison made) and the reason or purpose behind a particular placement are not relevant factors (Cheshire West and Chester v P at [50]).*

viii) *The distinction between deprivation and restriction is a matter of "degree or intensity" and "in the end, it is the constraints that matter" (Cheshire West and Chester v P at [56]).*

ix) *The question whether a child is restricted as a matter of fact is to be determined by comparing the extent of the child's actual freedom with someone of the child's age and station whose freedom is not limited (Cheshire West and Chester v P at [77]).*

x) *The sensible and humane comparison to be drawn is that between the situation of the child with the ordinary lives which young people of their ages might live at home with their families (Cheshire West and Chester v P at [47]).*

xi) *The 'acid test' has to be directly applied on each case to the circumstances of the individual under review. Where that individual is a child or young person, particular considerations apply (Re A-F at [30]).*

The types of measures which might amount to a deprivation of liberty were considered by the court in that case and included:

i) *M is the subject of 2:1 staff supervision whilst in the placement. This means that, subject to 30 minute walks in the garden and a 30 minute period in the local town once per week as noted below, M is under almost constant supervision when in the placement;*

ii) *Staff are always aware of M's whereabouts and will intervene by means of persuasion if she attempts to leave the placement (or, indeed, if she attempts to leave whilst out of the placement). M is not physically restrained from leaving but is encouraged to return if she leaves (and has always done so to date);*

iii) *When in her room staff will remain present in the corridor outside. M is able to lock and unlock her own bedroom but staff are able to and will unlock the room if they are concerned about her welfare. If she is locked in her room M will be observed every 15 minutes by staff unlocking the door;*

iv) M is monitored by staff during the night by way of a 'wake and watch' provision during the course of the night system. This constitutes a significant level of supervision of M during the course of the night. The doors to the placement are locked at night (albeit there is no suggestion that this is to ensure M does not leave as opposed to ensuring the general safety and security of the placement);

v) All challenging behaviour is managed and certain behaviour is physically restrained. Restraint is used in the placement to protect M or others if her behaviour escalates to the extent that she is at risk of harming herself or others. M has been the subject of physical restraint in seven occasions, the last being 20 April 2019 for approximately 18 minutes;

vi) M's access to the Internet is supervised in the placement and whilst at school;

vii) M is transported to and from school by two members of staff from the placement with those staff members remaining at school if M's behaviour requires it. Once again, this represents a significant degree of supervision within the context of an ordinary activity;

viii) When M attends a school activity or other outside activity she is accompanied and supervised by two members of staff;

ix) M is permitted 30 minutes each day in which she is able to be in the grounds of the placement and is permitted to be by herself in the local town for 30 minutes each week with two supervising staff remaining 'in the vicinity'.

18. Deprivation of Liberty and consent

19. There is no doubt that there has been a significant increase in the number of applications for declarations authorising local authorities to deprive children of their liberty. ***Re D (A Child) [2019] UKSC 42*** sets out some important ground rules for those application but also leaves some fundamental issues undecided as they did not arise directly in the case, in particular whether a parent could consent to a deprivation of liberty for a child under the age of 16.

20. Lady Hale points out that the issues at stake were the fundamental relationship between the concept of parental responsibility a private law concept, the common law and relevant statutory provisions and the protections offered to children under the European Convention on Human Rights, particularly Articles 5 and 8.

21. The Supreme Court decided by a majority that a parent could not consent to the deprivation of liberty of their 16 to 18 year old incapacitous child. Lady Hale expressed the reasoning for her decision thus:

39. That, as it seems to me, is the crux of the matter. Do the restrictions fall within normal parental control for a child of this age or do they not? If they do, they will not fall within the scope of article 5; but if they go beyond the normal parental control, article 5 will apply (subject to the question of whether parental consent negates limb (b) of the

Storck criteria, see para 42 below). Quite clearly, the degree of supervision and control to which D was subject while in Placement B and Placement C was not normal for a child of 16 or 17 years old. It would have amounted to a deprivation of liberty in the case of a child of that age who did not lack capacity. The question then arises what difference, if any, does D's mental disability make?

22. She went on to find that in a case where a child lacked capacity parental consent could not be substituted as valid consent thereby making the detention lawful.

23. **Scotland**

24. In *X (A Child) and Y (A Child) [2016] EWHC 2271 (Fam)* Sir James Munby dealt with a case where the children had been placed in secure accommodation in Scotland. Following that case amendments were made to Section 25 to allow for the placement of children in secure accommodation in Scotland but did not deal with the situation of children who were placed in children's homes but deprived of their liberty nor with the recognition of interim care orders.

25. Recently those matters have been dealt with by Mr Justice MacDonald in *Salford County Council v M (Deprivation of Liberty in Scotland) [2019] EWHC 1510 (Fam)*. Mr Justice MacDonald made it clear that recognition under the *nobile officium* would be required.

26. **Deprivation of Liberty under the inherent jurisdiction and unregistered placements**

27. On 12 November 2019 the President of the Family Division handed down Practice Guidance in relation applications under the inherent jurisdiction where authorisation for a deprivation of liberty is sought. The Guidance sets out the following requirements:

- When making an application to the court the applicant should make the court explicitly aware of the registration status of those providing the accommodation.
- If those carrying on the service are not registered then this must be made clear to the court.
- The court must be told of the reasons why registration is not required or the reasons for the delay in registration.
- Registration may not be required because the provision falls within the terms of "unregulated provision" such as supported living or where there is a statutory exemption.
- If the provision falls within those categories the court must be told of the steps which are being taken to ensure that the premises are safe and suitable for the child being accommodated (in England Regulation 27 and Schedule 6 of the Care Planning, Placement and Case Review (England) Regulations 2010 and in Wales Regulation 30 and Schedule 7 of the Care Planning, Placement and Case Review (Wales) Regulations 2016.
- If the provision is unregistered then the court will want to satisfy itself that the necessary steps are being taken for registration, that the provider has confirmed that it can meet the needs of the child and that the LA is taking steps to assure itself of the safety and suitability of the premises and those working there.
- The court must be kept informed of the exact status of the application for registration.

- Once the court is satisfied that a complete application has been received by OFSTED or CIW (Care Inspectorate Wales) the court will review the status of the application in 12 weeks (this is not the same as the review of the DOL).
- If registration is refused/withdrawn then the LA should inform the court as a matter of urgency and the court will take this into account in deciding whether the placement of the child in unregistered provision continues to be in the child's best interests.

28. **The Future**

29. The Mental Capacity Amendment Act 2019 introduces a new system of authorisation of deprivation of liberty 'Liberty Protection Safeguards'. These are expected to come into force next year together with a new Code of Practice. Children aged 16 to 18 will be brought into the scheme although it remains to be seen whether that will affect the number of children currently being dealt with under the inherent jurisdiction, most of whom are also the subject of public law proceedings.

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November 2019