
GARDEN COURT
CHAMBERS

Mind the Gap

Restrictions on liberty for children at risk

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Judicial deprecation 1

”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.”

Holman J, *A Local Authority v AT and FE* [2017] EWHC 2458 (Fam)

Judicial deprecation 2

"There are growing concerns around child sexual exploitation, County Lines and other forms of criminal exploitation as risks for these young people. The need for regulated placements is likely to increase. Social workers work tirelessly (and some silly hours) trying to find placements. When they turn up they are seized upon. Sometimes it has taken so long and trust has so broken down that it can be difficult to move young people on.

The problems are huge."

HHJ Dancey, Dorset Council v A

(Residential Placement: Lack of Resources) [2019] EWFC 62

The legal issue – Parliament required state registration

"It is plainly a matter for concern that so many applications are being made to place children in secure accommodation outside the statutory scheme laid down by Parliament. The concern is not so much because of the pressure that this places on the court system, or the fact that local authorities have to engage in a more costly court process; the concern is that young people are being placed in units which, by definition, have not been approved as secure placements by the Secretary of State when that approval has been stipulated as a pre-condition by Parliament."

Sir Andrew Macfarlane, President of the Family Division,

re T [2018] EWCA Civ 2136

Some stats

- There were 1,465 children in England securely detained in 2018, of whom 873 were in held in youth justice settings, 505 were in mental health wards and 87 were in secure children's homes for their own welfare. However, this number is likely to be an underestimate due to gaps in the data.
- There are an additional 211 children whose Deprivation of Liberty has been authorised by a court, who are locked away but whose whereabouts in the system is invisible.
- The Children's Commissioner has called for local authorities to provide data to the Children's Commissioner, Ofsted and the CQC on the number of children deprived of liberty in their area at any one time, the legal basis for that deprivation of liberty, and where those children are living.

Who are they? Where are they? Children locked up.

Office of the Children's Commissioner, May 2019

Why are so many children needing secure welfare placements?

- Sexual exploitation
- County lines
- Risky behaviours, high harm
- Gillick competent?
- Care plans requiring authorisation for restraint/use of force if necessary
- “All or nothing?”, Bespoke accommodation needs?

Section 25 Children Act 1989

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.

S 25 Orders for ‘registered’ accommodation only

The Children (Secure Accommodation) Regulations 1991 reg 3 provides:

"3 (i) Accommodation in a children's home shall not be used as secure accommodation unless:a) In the case of accommodation in England, it has been approved by the Secretary of State for that use;b) In the case of accommodation in Scotland, it is provided by a service that has been approved by the Scottish Ministers under Paragraph 6(b) of Schedule 12 of the Public Services Reform (Scotland) Act 2010.c) Approval by the Secretary of State under Paragraph 1(i) may be given subject to any terms or conditions that the Secretary of State thinks fit."

Nb The statutory scheme for secure accommodation does not make any reference to a need to establish a lack of consent on the part of the subject of the application.

Is Section 25 article 5 compliant? Domestic law

W Council v DK & others [2001] HRLR 13:-

- rejected complaint that s 25 CA1989 was incompatible with article 5

- citing Neilsen v Denmark, that restrictive measures imposed on young children within the ‘zone of parental responsibility’ would not normally be a deprivation of liberty,

- purpose of the s 25 regime, as set out in regulations made under it, was to

restrict the liberty of a child but is a “benign jurisdiction to protect the child as well as others” (§29).

- an order for secure accommodation under s 25 was a deprivation of liberty within the meaning of article 5 (§32) and was in the case before it justified as for purposes including educational supervision in its wider sense, bringing it within article 5(1)(d).

Is s 25 CA 1989 Art 5 compliant? Strasbourg authority

Koniarska v UK (2000) 30 E.H.R.R. CD139 - the Strasbourg court rejected as inadmissible an application alleging that s 25 ‘secure accommodation’ provisions were incompatible with article 5 reasoning that:

“The Court considers that, in the context of the detention of minors, the words “educational supervision” must not be equated rigidly with notions of classroom teaching. In particular, in the present context of a young person in local authority care, educational supervision must embrace many aspects of the exercise,by the local authority, of parental rights for the benefit and protection of the person concerned.”

So – what happens when the threshold is met but no appropriate secure accommodation (welfare) is available?

The welfare secure accommodation estate – sufficiency 'duty'

S 22G "It is the general duty of a local authority to take steps that secure, so far as reasonably practicable, the outcome in subsection (2).

(2)The outcome is that the local authority are able to provide the children mentioned in subsection (3) with accommodation that—

(a)is within the authority's area; and

(b)meets the needs of those children.

(3)The children referred to in subsection (2) are those—

(a) that the local authority are looking after…

(4)In taking steps to secure the outcome in subsection (2), the local authority must have regard to the benefit of having—

(a)a number of accommodation providers in their area that is, in their opinion, sufficient to secure that outcome; and

(b)a range of accommodation in their area capable of meeting different needs that is, in their opinion, sufficient to secure that outcome.

The National Secure Welfare Coordination Unit

- The general ‘sufficiency duty’ is silent as to ‘secure accommodation’. A distinction is generally drawn in practice between secure accommodation seen as part of youth justice requirements, and ‘welfare secure placements’.
- Secure placements for welfare reasons are funded directly by the placing LA using their placement budget.
- Access to placements is administered under the ‘National Secure Welfare Coordination Unit’ (SWCU). This is a small unit grant funded by the Department for Education (DfE) for the purposes of administering placements and collecting data on secure welfare.
- **The unit has no role in commissioning places**.
- Local authority resourced provision in its area cannot be ‘ring-fenced’. So an authority who has made ‘sufficient provision’ for its identified needs may find it is unable to access placements in its area. Broken system? What about bespoke care planning where no ‘suitable’ registered provision?

When can the inherent jurisdiction be invoked – current position?

- Inherent jurisdiction can be involved where DoL necessary to protect child from harm: T (A Child: Care Order: Beyond Parental Control: Deprivation of Liberty: Authority to Administer Medication) [2017] EWFC B1
- S 25 threshold criteria must be met: B (Secure Accommodation: Inherent Jurisdiction) (No. 2), Re A County Council v B [2013] EWHC 4655 (Fam)
- Is there no suitable registered accommodation available?
- Where the proposed order is not a 'mirror' of statutory authorisation, *Storck* criteria (approved in Cheshire West) apply attracting art 5 procedural safeguards:(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.

Recent case law on the use of the inherent jurisdiction

Re T [2018] EWCA Civ:

- Consent by a child (U 18) is relevant to the exercise of discretion to make an order but cannot deprive the court of jurisdiction to make an order
- Important to note that court-granted authority to restrict liberty does not mean that a child who is subject of such an order is ‘under lock and key’
- ‘Storck’ (b) ‘lack of consent’ criterion for a deprivation of liberty not relevant where exercise of inherent jurisdiction ‘mirrors’ stat scheme which makes no reference to consent of the child/young person

Using the inherent jurisdiction – check list

- Threshold criteria under s 25 must be evidenced fully and met
- Care plan approved by court – least restrictive options
- Does the child/young person consent to the **care plan –** general consent to a 'deprivation of liberty' not sufficient to give accurate indication to court of child/YP's informed consent (general view as to 'Gillick' competence unlikely to be sufficient for court address that question)
- **If informed consent given, consistent with previous behaviours – court may be reluctant to exercise discretion to make order**
- Consent does not need to be 'enduring' so much as valid and genuine
- Regular reviews and DoL time limited
- Lacuna – no state oversight of suitability of accommodation/permanence/staffing levels/location
- Importance of scrutinising care plans for 'least restrictive options'
- Building in regular DoLs reviews in addition to LAC reviews

But – watch this space!

- Re T epilogue:

- “Whilst the High Court has a duty to consider such cases and must come to a decision taking account of the welfare needs of the individual young person, in the wider context the situation is fundamentally unsatisfactory. In contrast to the Secretary of State, the court is not able to conduct an inspection of the accommodation and must simply rely upon what is said about any particular unit in the evidence presented to it. In like manner, where a local authority, as is typically the case, is looking to place a young person in a bespoke unit a great distance away from their home area, the local social workers must make decisions at arm's length and, it must be assumed, often without first-hand detailed knowledge of the particular unit.”

And the Supreme Court isn't happy either

Re D [2019] UKSC 42

- Court found that Parental consent cannot substitute for the subjective element in limb (b) of *Storck*. (para 42)
- Expressed anxiety about use of inherent jurisdiction to fill the gap: para 98.
- "It is possible to imagine a child who has no history, so far, of absconding, and who is not likely actually to injure himself or anyone else, so does not satisfy section 25(1)(a) or (b), but who, for other good reasons to do with his own welfare, needs to be kept in confined circumstances. If section 25 applies whenever a child's liberty is restricted, local authorities will not be able to meet the welfare needs of children such as this."

Thank you

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