WESTGATE CHAMBERS

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A guide to DOL Authorisations Involving Children

Andrew Judge and Louise Walls

INTRODUCTION

A guide to DOL Authorisations Involving Children

When safeguarding and promoting the welfare of children can involve depriving them of their liberty

1. What constitutes a deprivation of liberty p2

2. The legal framework p3
   A. Local authority duties to children
   B. Provisions dealing with secure accommodation p6
   C. Children's homes p10
   D. Section 100 of the Children Act 1989 and the inherent jurisdiction p12
   E. Article 5 ECHR p15

3. Acute Shortage of Appropriate Provision p17

4. The Children's Commissioner p20

5. The courts have expressing deep seated concerns about the present situation p22

6. Supreme Court Appeal - T (A Child), Re [2021] UKSC 35 (30 July 2021) p25 incl The President's Practice Guidance p30

7. Other relevant case law and general provisions relating to DOLS Applications p33

What constitutes a deprivation of liberty?

P v Cheshire West and Chester Council and another and P and Q v Surrey County Council, http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf

The Supreme Court judgment of 19 March 2014 in the case of Cheshire West clarified what constitutes a "deprivation of liberty".

The acid test states that an individual is deprived of their liberty for the purposes of Article 5 of the European Convention on Human Rights if they:

- Lack the capacity to consent to their care/ treatment arrangements
- Are under continuous supervision and control
- Are not free to leave.

All three elements must be present for the acid test to be met.

A deprivation of liberty for such a person must be authorised in accordance with either the Deprivation of Liberty Safeguards (DoLS – part of the MCA), or by the Court of Protection or, if applicable, under the Mental Health Act 1983 (MHA).

The Supreme Court held further that factors which are NOT relevant to determining whether there is a deprivation of liberty include:

- the person's compliance or lack of objection to the proposed care/ treatment
- the reason or purpose behind a particular placement
- the relative normality of the placement, given the person's needs, was not relevant.

This means that the person should not be compared with anyone else in determining whether there is a deprivation of liberty.

It can be difficult to be clear when the use of restrictions and restraint in someone's support crosses the line to depriving a person of their liberty.

Each case must be considered on its own merits, but in addition to the 'acid test' questions, if the following features are present, it would make sense to consider a deprivation of liberty application:

- *frequent use of sedation/medication to control behaviour*
- *regular use of physical restraint to control behaviour*
- *the person concerned objects verbally or physically to the restriction and/or restraint*
- *objections from family and/or friends to the restriction or restraint*
- *the person is confined to a particular part of the establishment in which they are being cared for*
- *the placement is potentially unstable*
- *possible challenge to the restriction and restraint being proposed to the Court of Protection or the Ombudsman, or a letter of complaint or a solicitor's letter*
- *the person is already subject to a deprivation of liberty authorisation which is about to expire.*

The Legal Framework

A. *Local authority duties to children*

Local authorities have statutory duties to protect and support children and families in various ways.

Part III of the Children Act 1989 includes duties of local authorities in relation to children looked after by them.

These include a general duty, in section 20, to provide accommodation for any child in need within the local authority's area who appears to require accommodation because no one has parental responsibility for him, or because s/he is lost or abandoned, or because the person caring for him is prevented from providing him with suitable accommodation or care.

Section 22 deals specifically with the duties of local authorities in relation to those children who are "looked after" by them.

S.22(3)

It shall be the duty of a local authority looking after any child—

(a) to safeguard and promote his welfare; and

(b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case.

Section 22(3) obliges the local authority to safeguard and promote the welfare of any child they are looking after. By section 22(3A), this includes a duty to promote the child's educational achievement.

The first preference for the local authority, by way of accommodating the child, is the parent or other person with parental responsibility (S 22C(2), (3)), but section 22C(4) does not require that sort of arrangement to be **made where it would not be consistent with the child's welfare, or would not be reasonably practical.**

If the local authority is not able to arrange for accommodation with a parent etc, they must place the child "in the placement which is, in their opinion, the most appropriate placement available" (section 22C(5)).

Relevant regulations the Care Planning, Placement and Case Review (England) Regulations 2010.

Regulation 27 is headed "General duties of the responsible authority when placing a child in other arrangements" It deals with placing the child in accommodation "in an unregulated setting" and imposes a duty on the authority to be satisfied that the accommodation is suitable for the child.

The local authority should arrange for the child to visit the accommodation (unless it is not reasonably practicable) and inform the independent reviewing officer.

Further provisions have been added to the regulations by the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021. They add a new regulation 27A, which limits the circumstances in which a local authority can place a child under 16 in alternative accommodation under section 22C(6)(d). These changes became effective, on 9th September 2021.

Prohibition on placing a child under 16 in other arrangements

> **27A.** A responsible authority may only place a child under 16 in accommodation in accordance with other arrangements under section 22C(6)(d), where the accommodation is—
>
> (a) in relation to placements in England, in—
>
> (i) a care home([3]);
>
> (ii) a hospital as defined in section 275(1) of the National Health Service Act 2006([4]);

(iii) a residential family centre as defined in section 4(2) of the Care Standards Act(5);

(iv) a school within the meaning of section 4 of the Education Act 1996(6) providing accommodation that is not registered as a children's home(7);

(v) an establishment that provides care and accommodation for children as a holiday scheme for disabled children as defined in regulation 2(1) of the Residential Holiday Schemes for Disabled Children (England) Regulations 2013(8);

Arrangements should not be made for placement of the child unless in consequence of a review carried out in accordance with the regulations.

Part of the Care Planning, Placement and Case Review (England) Regulations 2010, is a generally applicable approach to:

- care planning including the preparation of a care plan for the child
- placement
- visits by a social worker to children in placement at specified intervals, and
- regular care reviews for all looked after children.

B. Provisions dealing with secure accommodation

A Secure Accommodation Order can only be made to a secure setting which has been approved by the Secretary of State for Education to detain children.

Section 25 "*Secure accommodation*" in Part III of the Children Act 1989 regulates the circumstances in which a child who is being looked after by a local authority in England and Wales may be placed in "accommodation … provided for the purpose of restricting liberty"

Sections 25(1) serves two purposes.

First, it places a limitation on the ways in which a local authority can provide accommodation for a child who is being looked after by it, ruling out secure accommodation as a routine provision.

Second, it also establishes the basis for permitting the use of secure accommodation in limited circumstances, setting out in (a) and (b), criteria that have to be satisfied before secure accommodation may be used. The remainder of the section then builds upon this foundation.

"**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;**

(currently an aggregate of 72 hours, whether or not consecutive) in any period of 28 consecutive days – Reg 10 Children (Secure Accommodation) Regs 1991)

and

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

(Under Reg 11 this is 3 months in the first instance)

(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

(Under Reg 12 it is six months for further periods)

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

It is the duty of a court hearing an application under S.25 to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in his case S.25(3)

> **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. S.25(4)**
>
> 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. S.25(5)
>
> Where a local authority in England or Wales are authorised under S.25 to keep a child in secure accommodation in Scotland, the person in charge of the accommodation may restrict the child's liberty to the extent that the person considers appropriate, having regard to the terms of any court order. S.25 (5A)
>
> No court shall exercise the powers conferred by this section in respect of a child who is not legally represented 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 (Sch 1 Part 1 1(1)A) and having had the opportunity to do so, he refused or failed to apply. S.25(6)

The balance of section 25 deals, for the most part, with the court's approach to an application made to it.

Regulations 3 and 4 of the 1991 Regulations provide:

3. Accommodation in a community home shall not be used as secure accommodation unless it has been approved by the Secretary of State for such use and approval shall be subject to such terms and conditions as he sees fit.

4. A **child under the age of 13 years shall not be placed in secure accommodation in a community home without the prior approval of the Secretary of State** to the placement of that child and such approval shall be subject to such terms and conditions as he sees fit

C. Children's homes

Central to the English statutory provisions and regulations are the concepts of "secure accommodation" and of "a children's home".

What is classed as a children's home?

In the 1991 Regulations, **"children's home**" is defined by regulation 2(1)(a) as:

> **"a private children's home, a community home or a voluntary home in England"**

Section 1 of the Care Standards Act 2000, **following the signpost in section 105(1) of the 1989 Act which provides that** "In this Act" (and therefore also in the Regulations made under it):

> "**children's home -**
>
> **(a) has the same meaning as it has for the purposes of the Care Standards Act 2000** in respect of a children's home in England (see section 1 of that Act); …"

Section 1(2) of the Care Standards Act 2000 provides:

> “(2) **An establishment in England is a children’s home** (subject to the following provisions of this section) **if it provides care and accommodation wholly or mainly for children**.”

The following subsections of section 1 then exclude various specific situations, for instance hospitals and most schools, so that they do not qualify as children’s homes.

The Care Standards Act 2000 makes provision for registration and regulation of children’s homes, with **the registration authority for children’s homes in England being the Chief Inspector for Education, Children’s Services and Skills.** The Chief Inspector is **supported by** the Office of Standards in Education **(“Ofsted**”).

Regulations made under section 22 of the Care Standards Act, namely the Children’s Homes (England) Regulations 2015, prescribe quality standards for children’s homes.

In regulation 20, “restraint and deprivation of liberty” is addressed**: restraint only being permitted to prevent injury or serious damage to property or,** where a child is accommodated in a secure children’s home, **to prevent the child absconding from the home.**

Any restraint in relation to the child must be necessary and proportionate.

By regulation 20(3), however, the Regulations do not prevent a child from being deprived of liberty “where that deprivation is authorised in accordance with a court order”.

Section 23 of the Care Standards Act enables the publication of statements of national minimum standards, and the Secretary of State has accordingly published a “Guide to the Children’s Homes regulations including the quality standards (April 2015)”.

Annex B to this Guide sets out additional information for secure children’s homes. In this respect, it is particularly important to recall regulation 3 of

the 1991 Regulations dealing with the need for approval by the Secretary of State of secure accommodation in a children's home.

Registered, Regulated and Unregulated

Children's homes have to be registered. If not an offence may be committed, but where an establishment *is* a children's home, it is undoubtedly "regulated", even if it is not registered.

An "unregulated placement" usually refers to a place which is not actually required to register at all, because it does not come within the definition of a children's home, for example because it cannot be said that it "provides care and accommodation wholly or mainly for children".

D. Section 100 of the Children Act 1989 and the inherent jurisdiction

The President Sir Andrew McFarlane commented on the use of the inherent jurisdiction to meet the needs of vulnerable young people who would otherwise be the subject of a secure accommodation order under section 25 of the Children Act 1989, but for whom there was no available place in an approved secure children's home:

> "as a primary justification for the continued use of the inherent jurisdiction with respect to children in modern times is to provide protection for young people when their welfare demands it, it would be difficult to argue against the assumption of jurisdiction in such cases."

The use of the inherent jurisdiction goes back a long way. Lord Eldon LC in an application to put the children of Mr Wellesley under the protection of the court, in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1, p 18:

> "… it has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done."

Lord Denning MR in *In re L (An Infant)* [1968] P 119, 156 commented on the inherent jurisdiction

> "It derives from the right and duty of the Crown as parens patriae to take care of those who are not able to take care of themselves. The Crown delegated this power to the Lord Chancellor, who exercised it in his Court of Chancery. … the Court of Chancery had power to interfere for the protection of the infant by making whatever order might be appropriate. … This wide jurisdiction of the old Court of Chancery is now vested in the High Court of Justice and can be exercised by any judge of the High Court."

The assistance of the High Court, acting under its inherent jurisdiction, was commonly sought by local authorities through wardship proceedings. This explains the heading to section 100: *Restrictions on use of wardship jurisdiction*

However, the court can exercise its inherent jurisdiction without the child being made a ward.

S.100(2) removed the use of the inherent jurisdiction where it would duplicate the use of the statutory scheme in the 1989 Act in respect of orders for: care or supervision, accommodation; wardship for those subject of care orders, and under S.100(2)(d), preventing the inherent jurisdiction being used to confer on the local authority any degree of parental responsibility which it does not already have.

However, subsections 100(3)-(5) do permit local authorities to use the inherent jurisdiction in limited circumstances - imposing a requirement that prior leave be obtained for any such application - and establishing the circumstances in which leave can be granted.

Section 100(4) of the Children Act 1989 provides:

The court may only grant leave if it is satisfied that -

(a) **the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and**

(b) **there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm**.

By S.100(5) This subsection applies to any order -

(a) made otherwise than in the exercise of the court's inherent jurisdiction; and

(b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted)."

By these provisions, under S.100 the inherent jurisdiction becomes a backstop provision to prevent a child suffering *significant harm.*

Lady Black in T (A Child), Re [2021] UKSC 35 (30 July 2021 endorsed the view expressed in *Bromley's Family Law* (now in the 12th ed (2021), page 773 by Nigel Lowe, Gillian Douglas and others), that courts should be slow to hold that an inherent power has been abrogated or restricted by Parliament, and should only do so where it is clear that Parliament so intended. *I would endorse that as being of particular importance where the inherent power exists for the protection of children.*

E. Article 5 ECHR

The courts and parties should also be mindful of Article 5 ECHR which provides: “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**:
>
> …
>
> (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;** …
>
> (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.”.

In respect of the article 5(1) ground “for the purpose of educational supervision” within article 5(1)(d). the guidance from the European Court of Human Rights establishes that, in the context of the detention of minors, the concept of “educational supervision” is particularly broad, see *Koniarska v United Kingdom* 30 EHRR CD 139.

The applicant claims that the detention was not “for” the purpose of educational supervision, but that any education which was offered was purely incidental to the real reason for the detention, which was … “a need for protection and containment pending the actioning of her care plan”.

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*.* [para 143]

The Court noted that the place to which the applicant was sent was a specialist residential facility for seriously disturbed young people. As part of its multi-disciplinary approach, it provided an educational programme in which young people were taught in groups of three or four, or sometimes on a one-to-one or a one-to-two basis. … The fact that the number of classes attended by the applicant was limited because she chose not to go could not affect the underlying position, which was that extensive educational provision was made, and the applicant benefitted from it to a certain extent.

In *re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377 ("*In re K*"), a broad interpretation of article 5(1)(d) was adopted. The facts were that there was a place available for K in an approved secure unit and orders could be, and were, made in relation to him under section 25 of the Children Act 1989.

K had a long history of difficulties and, from an early age, was fascinated by fire and behaved in a sexualised way. He was first placed in a secure unit in his early teens in 1998. The events that led up to this were described by Dame Elizabeth Butler-Sloss P in the Court of Appeal (para 7):

> *"Between October and December 1998 there was a marked deterioration in K's behaviour. He was charged with two offences of indecent assault on a girl at his placement. He was moved and moved again. He was involved in two incidents of fire setting. He assaulted two female members of staff and was charged with indecent assault. In November 1998 he was aggressive and assaulted a male member of staff."*

His worrying behaviour continued, even in the secure unit. He was acting out sexual fantasies, even in that controlled and highly supervised environment, and posed a considerable risk to others. Matters reached

the point where the professional concern was such that he was not allowed any outside visits.

Judge LJ commented on the width of the wording “for the purpose of educational supervision”:

> “This goes far beyond school. It is not just about the restriction on liberty involved in requiring a reluctant child to remain at school for the school day. It arises in the context of the responsibilities of parents which extend well beyond ensuring the child’s attendance at school. So it involves education in the broad sense, similar, I would respectfully suggest, to the general development of the child’s physical, intellectual, emotional, social and behavioural abilities, all of which have to be encouraged by responsible parents, as part of his upbringing and education, and for this purpose, an appropriate level of supervision of the child to enhance his development, where necessary, by restricting his liberty is permitted.”

*‘**In any given case, it will be necessary for the court to decide, on the evidence, which will include a detailed care plan for the child, whether article 5(1)(d) is satisfied. It will do so bearing in mind the broad meaning that should be given to “for the purpose of educational supervision**”, **taking into account** the relevant jurisprudence, including decisions of the ECtHR, and also having regard to **the extensive duties concerning provision for children which are placed upon local authorities by domestic law**, in particular by Part III of the 1989 Act and by Regulations.* (As per Lady Black in T (A Child), Re [2021] UKSC 35 (30 July 2021)

<u>Acute Shortage of Appropriate Provision</u>

The reality is that there is an acute shortage of provision for children and young people whose needs are such that they require special limitations on their liberty.

Two reports published in November 2020 by the Children's Commissioner for England provide further insights into the problem.

The children who no-one knows what to do with (11th November 2020)

This report refers to the "growing crisis in children's residential care" and sets out the action the Children's Commissioner considers is needed by government, local and national, "to fix this broken system".

In 2018-19 there were 6,570 children in children's homes in England at an average cost of just under £200,000 per child per year.

'Generally, children's homes care for the most vulnerable children in England; with complex mental and physical health issues, or who have been subject to appalling sexual and physical abuse, or are at risk of serious harm from criminal gangs. The standard of care these children receive should concern us all. However, as this paper demonstrates, the standard of care is variable; there aren't enough places; children are being left at huge risk waiting for suitable accommodation; and the problem is getting worse. **Again and again the courts have castigated the Government for a failure to plan and provide for these most desperately vulnerable children; just last week Mr Justice Macdonald issued a High Court judgment in the case of 'G', a 16 year old girl being discharged from an adult mental health ward to an unregulated home where she was to be kept locked and guarded because there was no place in a home available for her:**

"It is plain that, despite the issue being highlighted in multiple court decisions since 2017, and by the Children's Commissioner, the shortage of clinical provision for placement of children and adolescents requiring assessment and treatment for mental health issues within a restrictive clinical environment, the shortage of secure placements and the shortage of regulated placements remains. In this context, children like G with highly complex needs and behaviour continue to fall through the gaps that exist between secure accommodation, regulated accommodation and detention under the mental health legislation." - Lancashire CC v G (Unavailability of Secure Accommodation) [2020] EWHC 2828 (Fam)

‘**Thousands of children with complex needs fall through these gaps in the system each year. They experience huge levels of instability which undermines all their relationships and compounds existing problems, or are placed far from home which damages family relationships and experience the “home” in which they are placed as hostile. These homes can, and do, throw them out at short notice, and such is the shortage of other homes that many children are left in limbo, in flats surrounded by agency staff, waiting for somewhere, anywhere in the country, willing to take them. No child should be treated like this; that it is our most vulnerable children, and those looked after by the state, to whom this is happening is simply unacceptable.’** (p1)

‘Unfortunately, the situation appears to have deteriorated further, culminating in a series of High Court judgments this year involving children for whom no suitable care home place can be found anywhere in England, even when the Court has found that their life will be endangered by the failure to find a home. This was **Mr Justice Macdonald’s conclusion**:

“The stark choice thus faced by the court is to refuse to authorise the deprivation of G’s liberty in an unregistered placement, which will result in her discharge into the community where she will almost certainly cause herself possibly fatal harm, or to authorise the deprivation of G’s liberty in an unregistered placement that all parties agree is sub-optimal from the perspective of her welfare because that unregulated placement is, quite simply, the only option available.

The background to this matter is one that is now depressingly familiar to the Family Division of the High Court.” (p2)

‘While councils have a statutory duty to ensure sufficiency of high-quality local accommodation for children in care, they have mostly failed to prioritise this within their capital spending. However, **it is the Department for Education which has the ultimate responsibility to ensure that councils have the resources to discharge their obligations, and that they actually do so; and to forecast and co-ordinate provision. The Department has failed in each regard.** Given the growing crisis in children’s residential care and the mounting evidence of its impact on children, these failures imply a deep-rooted institutional ambivalence to the needs of these very vulnerable children.’

‘Issues constantly raised by children who speak with the Commissioner – or call our helpline for children in care, Help at Hand – include frequent

and unwanted moves, which cause an child's entire life to be uprooted; children being placed far away from home, friends and family; struggles accessing healthcare, education or fun activities; and homes which feel overly institutional, sterile or even filthy.' (p3)

'Moreover, there are not enough places available and local authorities are left ringing round for last- minute, over-priced, possibly inadequate placements. Children can be stuck in limbo because no children's home in the country will accept them, or they can be kicked out of homes with just weeks', or even days' notice, not knowing when they will be leaving or where they will be going to. Often these children end up in flats where they are overseen by teams of unknown agency staff while awaiting a more permanent place. The Children's Commissioner's helpline regularly intervenes in cases where children are caught up in the process of 'reverse auctions' where multiple councils are bidding for a place for one child, with the result that the place goes to the child with the lowest level of need, who is easiest for the home to accommodate.' (p3)

'Millie, a girl in her early teens, was placed in numerous unregulated and unregistered homes including a hotel. She was then admitted to a mental health ward under section. When she was due to be discharged from hospital the local authority said there was not one registered place that could have her in the country and she had to go into another unregistered setting. This was a flat with care being provided despite no Ofsted registration, which is illegal.' (p4)

The Children's Commissioner

'The Children's Commissioner has spoken to children across England, convened roundtables of professionals and led a multi-disciplinary research trip to visit different models of residential care in Sweden and Norway. Among all, **there was broad agreement that we need greater provision at five levels:**

1. **Small, flexible and local children's homes which can keep children close to where they currently live and can adapt to a child's needs so that children don't need to move home frequently.**
2. **Specialist secure and semi-secure homes with a very high level of clinical and therapeutic input for the children with the highest level of need, for short term stays.**

3. Good-quality supported accommodation for 16-17 year olds who prefer it, which is clean, safe, stable and provides a decent place to live.
4. Foster care to provide loving, stable and sometimes long-term homes for children in care, especially older ones.
5. **Specialist foster care, to help meet the needs of children with complex emotional or behavioural problems**.' (p9)

'**The Children's Commissioner is calling for**:

- **Council leaders and chief executives to prioritise children's social care within their capital budget allocations**. Local authorities have clear statutory obligations in this regard, and these must take precedent over more visible, and therefore popular, uses of these capital funds. The needs of vulnerable children cannot be ignored so that councils can boast of shiny new projects.
- Councils to collaborate better to improve provision.

The Department for Education also has a crucial role to play here. It is responsible for ensuring local authorities discharge their statutory duties. It is responsible for ensuring they have the funds to do so. Beyond this, it also has a responsibility to ensure provision is available for children needing secure care (where the Children Act 1989 gives the Secretary of State for Education particular obligations). The needs of some children in care are so complex that it is hard for one local authority – or even one agency – to deliver provision that will rarely be required**. The Department for Education should be forecasting need and co-ordinating the provision to match, and ensuring that other agencies (such as health) provide the support that is needed. It should also be providing the funding if required. But, as successive reports from numerous bodies have shown, it is not fulfilling any of these duties.** '(p11)

Who are they? Where are they? – Children Locked Up

'combined data from a range of different sources to show that 1,465 children in England were securely detained in March 2018, of whom 873 were in youth justice settings, **505 were detained under the Mental Health Act, and 87 were in secure children's homes for their own**

welfare. In total, we estimate that it costs over £300 million a year to look after these children. … **there are at least 200 children deprived of liberty in other settings, but they are 'invisible'** … from publicly available data as no information is published about where they are living or why they need to be there.

"*Use of unregulated and unregistered provision for children in care*

A research report published in February 2020 commissioned by the Department for Education, including material relevant to the sort of placements available.

Some of these children need to be placed in a secure children's home but no place can be found for them in one of the small number of approved secure children's homes that there are in England and Wales. Some would be likely to meet the criteria for placement in secure children's home but would be better served by specialised therapeutic care of a different kind, albeit still with their liberty strictly limited.

<u>The Courts have expressing deep seated concerns about the present situation</u>

The High Court has faced a significant number of applications by local authorities seeking orders under the inherent jurisdiction authorising alternative restrictive placements of children. In 2018 in this case in Court of Appeal, the Court expressed concern that so many applications were being made to place children in secure accommodation outside the statutory scheme laid down by Parliament. It described the situation as "fundamentally unsatisfactory".

This critical comment continued *In re B (A Child)* [2020] Fam 221 where reference was made to the "crisis in the provision of secure accommodation in England and Wales" which appeared to have worsened during the intervening 12 months.

Baker LJ recorded that the "significant shortfall in the availability of approved secure accommodation" was "causing very considerable problems for local authorities and courts across the country".

The absence of sufficient resources meant that local authorities were "frequently prevented from complying with their statutory obligations to meet the welfare needs of a cohort of vulnerable young people who are at the greatest risk of harm". It was, he said, "a problem which needs urgent attention by those responsible for the provision of resources in this area".

In *Lancashire County Council v G and N* [2020] EWHC 2828 (Fam) (referred to above) G had said repeatedly that she wanted to kill herself and had attempted to strangle herself more than once, as well as engaging in violent and aggressive behaviour, and setting light to items in a mental health in-patient home where she was living. She had had various placements, and at the time of the first application before MacDonald J, she was on an adult mental health ward where she had been detained under the Mental Health Act 1983. No CAMHS (Child and Adolescent Mental Health Service) bed had been available. The multi-disciplinary mental health team had concluded that she had no diagnosable mental disorder meriting clinical treatment in a hospital setting, and she was about to be discharged.

The local authority considered that she was in need of a secure placement, but none was available for her anywhere in the United Kingdom. Various alternatives were explored, in a diligent and comprehensive search by the local authority, but without success. **There was only one placement available at all, and this was not registered as required, and was not prepared to apply for registration.**

There being no other options, the local authority applied under the High Court's inherent jurisdiction for an order authorising the deprivation of G's liberty in that setting, on the basis that this was the only way in which to safeguard her welfare.

MacDonald J referred to a number of previous judgements underlining that the shortage of provision for children and young people such as G was a serious problem and that it has been drawn repeatedly to the attention of those who could be expected to take steps to ameliorate the situation, without noticeable effect.

Reference was made to the observations made in 2017, by the then President, Sir James Munby, when he was dealing with a child (X) who had similar difficulties to G's. Amongst a number of forceful observations in the course of the case, he referred to what he termed "a well-known scandal", namely: *"the disgraceful and utterly shaming lack of proper provision in this country of the clinical, residential and other support services so desperately needed by the increasing numbers of children and young people afflicted with the same kind of difficulties as X is burdened with." (Re X (A Child) (No 3) [2017] EWHC 2036 (Fam), para 37)*

In para 59 of his October 2020 judgment, MacDonald J said: *"It is plain that, despite the issue being highlighted in multiple court decisions since 2017, and by the Children's Commissioner, the shortage of clinical provision for placement of children and adolescents requiring assessment and treatment for mental health issues within a restrictive clinical environment, the shortage of secure placements and the shortage of regulated placements remains. In this context,* ***children like G with highly complex needs and behaviour continue to fall through the gaps that exist between secure accommodation, regulated accommodation and detention under the mental health legislation**."*

MacDonald J ultimately considered that he was left with no option but to grant the order that the local authority sought under the inherent jurisdiction, notwithstanding that "the placement is plainly sub-optimal from the perspective of meeting G's identified welfare needs and is an unregulated placement" (para 65).

If the order were not made, G would be discharged into the community and there would be *"an unacceptable risk that G will end her own life or cause herself, and possibly others, very serious physical harm"* (para 66). When he considered the case again in November 2020, there was still no alternative placement available, and he was again left with no option but to make a further order authorising the deprivation of G's liberty in the same placement, notwithstanding his *"grave reservations"* about the decision. He gave a fourth judgment on 11 February 2021 ([2021] EWHC 244 (Fam), and see para 6 thereof for the neutral citation references of the three prior judgments). G's emotional state and her behaviour had continued to deteriorate. She had made further repeated attempts to strangle herself and had put herself at risk of harm through swallowing objects, including screws, and also batteries from a remote-control unit.

The local authority, which had been advocating secure accommodation, had come to agree with the solution advocated by G's guardian, namely a regulated non-secure placement where therapeutic input could be provided to G. But there was no placement available.

The judge was satisfied that if G were to be discharged into the community, she would *"almost certainly cause herself serious and possibly fatal harm".*

The only other option was that she remained in her existing unregulated placement, despite it not being fully equipped to meet her complex needs. He authorised that she continue to be deprived of her liberty there. Considerations of safety forced his decision, and he observed that the test applied comes *"far closer to being one of necessity than it does to being one of best interests"*. But it was *"the only option for keeping G safe in the broadest sense".*

Supreme Court Appeal - T (A Child), Re [2021] UKSC 35 (30 July 2021)
URL: *http://www.bailii.org/uk/cases/UKSC/2021/35.html* Judgement of Lady Black

This appeal concerned a particular aspect of the use of the inherent jurisdiction of the High Court to authorise a local authority to deprive a child of his or her liberty.

Proceedings were begun by Caerphilly County Borough Council in July 2017 to address aspects of the care of T, who was then a 15-year-old and in its care by virtue of a care order. T's circumstances had changed very considerably since that time, and so had the legal issues that require determination.

The legal issues

First, whether it is a permissible exercise of the High Court's inherent jurisdiction to make an order authorising a local authority to deprive a child of his or her liberty.

On behalf of T (whose appeal this was), it was argued that such a use of the inherent jurisdiction was not permissible: the reasons advanced in support of the argument were:

i) section 100(2)(d) of the Children Act 1989 bars the use of the inherent jurisdiction for this purpose;

ii) the inherent jurisdiction must not be used in such a way as to cut across the statutory scheme in the Children Act 1989;

iii) deprivation of liberty authorised under the inherent jurisdiction would fall foul of article 5 of the European Convention on Human Rights ("article 5") which provides that "No one shall be deprived of his liberty save … in accordance with a procedure prescribed by law"

Second, if, contrary to T's argument, the High Court *can* have recourse to its inherent jurisdiction to make an order of the type in question, what is the relevance of the child's consent to the proposed living arrangements?

It was the appellant child's submission that consent is highly relevant to the evaluation of whether it is in the child's best interests to make the orders sought, and that, on the facts of this case, it was contrary to T's best interests to make the order, given her consent to the regime arranged for her.

Lady Black observed relevant cases were those concerned with children who the local authority considers require to be deprived of their liberty, and in relation to whom the statutory criteria for the making of a secure accommodation order under section 25 of the Children Act 1989 are satisfied, but who the local authority propose to place elsewhere than in a secure children's home which is approved for that purpose.

There could be two distinct categories of children:

(1) children who would be placed in a secure children's home but there is no place available for them, and

(2) children whose needs would, in the local authority's assessment, be better met in an alternative placement

also children who fall entirely outside the group because they are unlikely to satisfy the statutory criteria in section 25, although they do need to be deprived of their liberty to keep them safe.

In relation to the challenge to the inherent jurisdiction Lady Black observed:

[Para 116] that *the principal driving force behind section 100(2) was to ensure that the statutory scheme which the Act was establishing in relation to the intervention of local authorities in the lives of children and families would not be undermined, or evaded, by the use of the inherent jurisdiction*.

[Para 118] *a local authority needing the power to determine any question in connection with parental responsibility must seek it through the medium of a care order. For the most part, the care order would clothe the local authority with the required parental responsibility and, in so far as the local authority was aiming at an element of parental responsibility … section 33 itself would dictate whether the limit on the local authority's parental responsibility was absolute (see section 33(6), for example, which prohibits a local authority from causing a child to be brought up in a different religious persuasion) or qualified (for example, section 33(7) provides that no person shall cause the child to be known by a new surname except with the written consent of every person with parental responsibility or leave of the court)*

[Para 119] *Parliament made it very clear that it was not intended that the inherent jurisdiction should be entirely unavailable to local authorities, and that it appreciated that there could be cases in which it would be necessary to have recourse to it because there was reason to believe that the child would otherwise be likely to suffer significant harm.*

It was determined that:

- the court *was not satisfied that T's consent was authentic and likely to endure so more robust Gillick* competence was not the issue

- *The court's authorisation was undoubtedly required in this case for any deprivation of her liberty. An application under section 25 could not be made because no approved "secure accommodation" was available for T … there was no means by which the local authority could seek the authorisation it required other than under the inherent jurisdiction.*

- *As for section 100(4)(b) (likely significant harm), it* had not been argued that it was unnecessary for T to be in the placements provided by the local authority, her argument being simply that there was no need for a court order because reliance could be placed on her consent.

In relation to the Appellant's argument that the use of the inherent jurisdiction was wrong because it cut across the statutory scheme in the Children Act 1989 and/or its use was not in accordance with a procedure prescribed by law as required by article 5, Lady Black observed that:

[Para 129] it is clear from other cases the inherent jurisdiction is being used to authorise the placement of children in accommodation which should be registered as a children's home, but is not so registered.

The primary focus of the Practice Guidance issued by the President of the Family Division, (12 November 2019) entitled "Placements in unregistered children's homes in England or unregistered care home services in Wales" is said to be "to ensure that, where a court authorises placement in an <u>unregistered</u> unit, steps are immediately taken by those operating the unit to apply for registration.

In the introduction the President observes that where an application is made to the High Court under the inherent jurisdiction for the deprivation of liberty to be authorised, *"it is highly likely the place at which the child is to be accommodated will meet the definition of a children's home."*

[Para 140] per *Lord Lloyd-Jones asked during the hearing what the Secretary of State said a judge could do where the child meets the section 25 criteria but there is no approved secure accommodation available. … The Secretary of State's response is that the inherent jurisdiction can be used to authorise deprivation of liberty of a child placed in a children's*

home, and section 100(4)(a) is satisfied given that the local authority cannot achieve the result they seek through a section 25 order, assuming of course that the court is satisfied that there is reasonable cause to believe that the child is likely to suffer significant harm if the inherent jurisdiction is not exercised, in which case section 100(4)(b) is also satisfied.

[Para 141] 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.

[142] *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)*

Authorising placements where a criminal offence would be permitted

[145] ***I have been particularly concerned as to whether it is a permissible exercise of the inherent jurisdiction to authorise a local authority to place a child in an unregistered children's home in relation to which a criminal offence would be being committed.***

Ultimately, however, I recognise that there are cases in which there is absolutely no alternative, and where the child (or someone else) is likely to come to grave harm if the court does not act.

there are other duties in play, in addition to those which prohibit carrying on or managing an unregistered children's home. … How can a local authority fulfil these duties (to protect and support children) … *if they cannot obtain authorisation from the High Court to place the child in the only placement that is available, and with the ability to impose such restrictions as are required on the child's liberty?*

It is such imperative considerations of necessity that have led me to conclude that the inherent jurisdiction must be available in these cases.

There is presently no alternative that will safeguard the children who require its protection.

[147] In the Practice Guidance, the President seeks to ensure that where the court authorises such a placement:

(i) registration is sought expeditiously

(ii) the court has information about the proposed placement, so it can satisfy itself that steps are being taken to apply for the necessary registration

(iii) the provider of the service has confirmed they can meet the needs of the child

(iv) the local authority is taking steps to assure themselves that the premises, those working there, and the care being given, are safe and suitable for the child.

The Guidance obliges the court to monitor the progress of the application for registration and, if registration is not achieved, to review its continued approval of the child's placement. Time scales are set for the various steps.

Ofsted has an annex (Annex C) to its "Introduction to children's homes" (2018) *(a guide to registration*) recognising the acute practical difficulties.

The annex acknowledges placements are made in an unregistered children's home when it has been difficult or even impossible for the local authority to find registered accommodation that would accept the child.

In order to decide whether to take regulatory action in relation to unregistered providers, it will carry out an investigation of each individual case, including assessing the permanency of the arrangement and the

purpose of the provision of care and accommodation. It makes clear that an application for registration must be submitted as soon as possible, and that if a provider is refused registration and continues to operate, it would be liable to prosecution.

[150] In reaching her view as to the permissible use of the inherent jurisdiction, Lady Black took 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: *in view of the dire and urgent need for placements for such children, this is nevertheless a proper use of the court's powers.*

Apply the terms of S.25 to the inherent jurisdiction

In such cases involving the inherent jurisdiction Sir Andrew McFarlane said in this 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.

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 and *Sir James Munby P* In *re A (Children) (Care Proceedings: Deprivation of Liberty)* *[2018] EWHC 138 (Fam)*; *[2019] Fam 45*

Appropriate procedural safeguards

Appropriate procedural safeguards built into the application process, broadly mirroring those applicable to a section 25 application.

There is:

(a) provision for the child to be made a party to the process and for the appointment of a guardian

(b) reviews of the continuing confinement

(c) The court does not regulate detailed operation of the authorised DOL, but will not give the local authority the authorisation without considerable exploration of the circumstances, to ensure that the proposal is appropriate, necessary and proportionate in meeting the child's welfare needs

(d) The court will need to know the child's views on the matter

(e) The order will include an express liberty to any party, including the child, to apply to the court for further directions on the shortest reasonable notice

(f) Careful provision is also made for reviews by a judge, at intervals or if there is a significant change, which reviews will be in addition to the local authority's own reviews of the case.

Consent

[162] In considering the local authority's application, any consent by the child will form part of the circumstances that it evaluates in deciding upon its order. The implications of the consent (or lack of it) will depend on the facts. The child is protected by the proceedings and the involvement of the court. His or her personal autonomy is respected by being fully involved in those proceedings, and able to express views about the care that is being proposed, as ensured by the procedures stipulated by S.25 and case law for the inherent jurisdiction.

Conclusion of Lady Black

[163] Lady Black spoke of her *deep anxiety that the child care system should find itself struggling to provide for the needs of children without the resources that are required. … It is fortunate that the inherent jurisdiction is there to fill the gaps in the present provision, but it cannot be doubted that it is only an imperfect stop gap, and not a long term solution.*

Lord Stephens (with whom Lord Lloyd-Jones, Lord Hamblen and Lady Black agree):

Para 166 *'This scandalous lack of provision leads to applications to the court under its inherent jurisdiction to authorise the deprivation of a child's liberty in a children's home which has not been registered, there being no other available or suitable accommodation. However, any person who carries on or manages a children's home without being registered is guilty of an offence under section 11 of the Care Standards Act 2000 (see para 55 above). So, the issue arises as to whether the inherent jurisdiction of the High Court can be used to authorise a deprivation of liberty in circumstances in which a criminal offence may be committed by those carrying on or managing a children's home.'*

Para 168 ***'It is no part of the court's function to "authorise" the commission of any criminal offence. Any order under the inherent jurisdiction does not do so. Rather, if the inherent jurisdiction is used, then the court "authorises" but does not "require" the placement by a local authority of a child in an unregistered children's home despite the potential that a person may be prosecuted for and convicted of an offence under section 11 of the Care Standards Act 2000'.***

<u>Other relevant case law and general provisions relating to DOLS Applications</u>

Judgment of Keehan J in A Local Authority v D and Others [2015] EWHC 3125 (Fam):

(10) Irrespective of the means by which the court authorises the deprivation of a child's liberty, whether under s 25 or the inherent jurisdiction, the local authority should cease to impose such deprivation as soon as: (1) the s 25 criteria are not met; or (2) the reasons justifying the deprivation of liberty no longer subsist. <u>Authorisation is permissive and not prescriptive (para 38)</u>.

Re A-F (Children) [2018] EWHC 138 Fam- rule of thumb re 10-12year olds and the matter must be reviewed at least every 12months

Re D (a child) [2019] UKSC 42- Parent's cannot consent to their 16 or 17 year old child's deprivation of liberty on their child's behalf.