

Re B (Secure Accommodation Order)

[2019] EWCA Civ 2025

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Introduction

1. **Re B (Secure Accommodation Order) (Rev 1) [2019] EWCA Civ 2025** is an enormously important decision which deals with four interrelated key points relating to the proper interpretation of section 25 of the Children Act 1989.

Executive Summary

2. The four key points for practitioners to note from the judgment are as follows:

(1) The meaning of 'secure accommodation' in section 25?

3. If the accommodation was designed for the restriction of liberty, or the primary purpose of the placement is to restrict liberty, this is '*secure accommodation*' for the purposes of section 25. If there is a different primary purpose (e.g. treatment) the accommodation will not be '*secure accommodation*' even if there is a degree of restriction on liberty.
4. In some cases, it will not be easy to say whether the accommodation is or is not '*secure*'. Likewise, there are cases where it is not easy to determine whether accommodation is being provided for the purpose of restricting liberty.

(2) The 'relevant criteria' for making a secure accommodation order pursuant to section 25?

5. The '*relevant criteria*' which must be satisfied, at the date of the hearing, before an order can be made are:
 - a. The conditions set out in section 25(1);
 - b. Whether the child is being '*looked after*' by a local authority, or otherwise comes under one of the other categories of children

identified in regulation 7 of the Children (Secure Accommodation) Regulations 1991;

- c. Whether the accommodation proposed by the local authority is '*secure accommodation*' (as previously discussed);
- d. Whether, if the local authority is proposing to place the child in a secure children's home, the accommodation has been approved for that use by the Secretary of State;
- e. If the child is aged under 13, the placement of that specific child has been approved by the Secretary of State;
- f. Whether the proposed placement would safeguard and promote the child's welfare (see below); and
- g. Whether the proposed secure accommodation is a proportionate means of achieving a legitimate aim (see below).

(3) What consideration should be given to the evaluation of welfare when the paramountcy principle does not apply to applications under section 25?

- 6. Even though the child's welfare is not paramount for the purposes of section 25, it is still '*of great importance*' when considering whether an order should be made. The court and the local authority must both consider whether the placement proposed would safeguard and promote the child's welfare.
- 7. That will need to be addressed on a case-by-case basis. There may be cases where, for example, the child's welfare needs are outweighed by the need to protect the public from serious harm.

(4) The correct approach to analysing proportionality?

- 8. An order under section 25 is both a deprivation of liberty (for the purposes of Article 5) and an interference with private and family life (for the purposes of Article 8). It is only lawful if it complies with the provisions of Articles 5 and 8, relevant caselaw from Strasbourg and domestic jurisprudence.

9. The local authority and the court are bound by the Convention to consider the human rights involved. The local authority must carry out its evaluation of proportionality before applying for an order under section 25. The court must carry out a proportionality analysis before granting such an order. Even though section 25 is compatible with Article 5, the court must still consider the human rights involved.

10. The assessment of proportionality contains four distinct elements:

- a. Whether the objective of the measure is sufficiently important to justify the limitation of a protected right;
- b. Whether the measure is rationally connected to the objective;
- c. Whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and
- d. Whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

11. The statutory guidance about the Children Act ('*Court Orders and Pre-proceedings for Local Authorities*' 2014) is wrong and inconsistent with principle. Secure accommodation is a '*last resort*' and rarely appropriate. Depriving a child of liberty in circumstances which were not a last resort would be disproportionate.

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Law is correct as at 27th November 2019

Whilst every effort has been taken to ensure these notes are as correct, they are intended to give a general overview of the law. Delegates are respectfully reminded that they are not intended to be a substitute for specific legal advice. No liability is accepted for an error or omission contained herein.