



The Prerogative Rules, Not the Statute: How to Place Children under Sixteen in Unregulated Placements

Tom Harrill

Introduction

1. On 9 September 2021, the law changed prohibiting local authorities from placing a child under the age of sixteen in an unregulated placement (The Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021).
2. An unregulated placement is one which is not a children's home, pursuant to section 1(2) of the Care Standards Act 2000 and does not have to be registered with Ofsted. Such placements often include independent and supported accommodation.
3. The *bête noire* of a lack of regulated placements has featured regularly in decisions of the Senior Courts in recent years. Notable decisions which will be well known to practitioners include **Re T (A Child) [2021] EWCA Civ 2136** from late summer 2021 and **Lancashire County Council v G (Unavailability of Secure Accommodation) [2020] EWHC 2828 (Fam)** from the preceding autumn.
4. Those decisions and the legislative change followed the independent review of children's social care, *The Case for Change*, which addressed the problem this way, in chapter four:

The use of unregulated accommodation for children under the age of 18 should come to an end. The strength of feeling about unregulated independent and semi-independent accommodation has been clear in our Call for Advice, Call for Evidence and through the many conversations the review has had. It remains a national scandal that children aged 13 and younger were placed in provision that did not provide care and that some teenagers are living in completely unsuitable settings, such as bed and breakfasts, canal barges and caravans (Department for Education, 2020b) (Children's Commissioner, 2020a). It is right that the Government is banning this provision for under 16s from September 2021. This

change will particularly help Unaccompanied Asylum Seeking Children who are overrepresented in unregulated homes - who represent a quarter of children under the age of 16 in unregulated homes, but only 1% of the whole cohort of Children Looked After under the age of 16 (Department for Education, 2021c).

5. **Tameside MBC v AM & Ors [2021] EWHC 2472 (Fam)** ('**Tameside MBC v AM**') is the latest important decision for practitioners to be aware of. It is particularly significant because it addresses a key issue which was not expressly considered by the Supreme Court in **Re T**: what to do about the change in the law? Given the significance of the decision, the Secretary of State for Education and Ofsted intervened.

The Key Issue

6. The decision of The Honourable Mr Justice MacDonald in **Tameside MBC v AM** concerned four local authorities who had placed a child under sixteen years of age in an unregulated placement:
 - (1) Tameside MBC in respect of AC, age 15;
 - (2) Derby City Council, in respect of CK, age 15;
 - (3) Lambeth LBC in respect of BM, age 15; and
 - (4) Manchester City Council in respect of DC, age 14.
7. The question of law was the same for each case: despite the change in the legislation, does it remain open to the High Court to use its Inherent Jurisdiction to authorise the deprivation of liberty of a child under sixteen where the placement is prohibited by the terms of the amended statutory scheme?

The Answer

8. His Lordship's conclusion was: yes, the High Court can. However, that answer is subject to the rigorous application of the President's Guidance of November 2019 entitled

Placements in unregistered children's homes in England or unregistered care home services in Wales and the addendum thereto dated December 2020.

9. In those particular circumstances, ***Tameside MBC v AM*** exists as authority for the proposition that the Inherent Jurisdiction can be used to authorise the deprivation of liberty of a child under sixteen where the restrictions that are subject of that authorisation without cutting across the amended statutory provision.
10. Whether that authority is precarious and liable to future challenge or a foundation on which further like decisions will be made remains to be seen. Practitioners should remain on high alert for decisions in the near future on this issue.

Reader's Digest

11. Starting at paragraph 68 of the judgment, His Lordship's reasons for reaching that all important affirmative answer were:
 - (1) The inherent jurisdiction is a protective one. It plays an essential role in meeting the public policy need for children to be properly safeguarded, including to provide a means of securing children's interests when other solutions are not available;
 - (2) A protective jurisdiction is to be deployed proactively and not after-the-event. It should anticipate and prevent harm, rather than seeking to repair harm already suffered;
 - (3) Unless Parliament was clear that it explicitly intended to remove or restrict the power of the High Court to exercise its inherent jurisdiction (which Parliament was not) then the Court should be slow to hold that was indeed Parliament's intention;
 - (4) In that respect, there is a distinction between the statute which proscribes the powers of the local authority and not the powers of the Court (following ***Re T***). Prerogative powers go beyond what is covered by the statute (***Re De Keyser's Royal Hotel Ltd [1920] AC 508 (HL)***);

- (5) Just as in **Re T**, the legality of the placement under the statutory scheme is a matter for the local authority. Any order under the Inherent Jurisdiction should not be taken to authorise the commission of any criminal offence or unlawful act;
 - (6) To do so would fundamentally misunderstand the exercise of the inherent jurisdiction and fails to recognise that authorisation by the Court for the deprivation of a child's liberty in this way does not confer immunity from prosecution in respect of any criminal or regulatory offence that may arise from the placement of that child in an unregulated placement (see ***Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2021] 2 WLR 1333**);
 - (7) Those conclusions are fortified further by the Convention rights under Art. 2 and Art. 3. This was a point accepted by the Secretary of State for Education: where it is necessary to place a child in a particular place in order to prevent a breach of that Child's Convention rights, a local authority has a power (which may be a duty) to place the child there. The fact that a local authority may employ a placement which is unlawful under the new statutory scheme does not relieve the Court from taking the positive operational step of authorising the deprivation of the child's liberty in the placement in order to discharge its duty under Art. 2 (where there is a real and immediate risk to the life of an identified individual or individuals) or Art 3. (where there is actual or constructive knowledge of treatment reaching the minimum level of severity); and
 - (8) It must be open to the Court to deploy its protective jurisdiction where a failure to do so would result in a failure to safeguard and promote the welfare of the subject child. Moreover, an order under the Inherent Jurisdiction is consistent with the statutory scheme and the cardinal purpose of Part III of the Children Act 1989.
12. Paragraph 90 contains important principles which apply to the key question (covered at paragraph 7 of this note):
- (1) It remains open to the High Court to exercise its inherent jurisdiction to authorise the deprivation of liberty of a child under the age of sixteen where the placement would be unlawful to the local authority under the statutory scheme;

- (2) The application for a declaration will be governed by the particular facts of each case. The existence (or absence) of conditions of imperative necessity will fall to be considered in context of the best interests analysis the Court is required to undertake;
 - (3) Without conditions of imperative necessity, it will be difficult for the Court to conclude that it should exercise its inherent jurisdiction where the regulations render such a placement unlawful;
 - (4) Defining '*imperative considerations of necessity*' is not appropriate. Each case must be decided on its own facts;
 - (5) The Court must rigorously apply the President's Guidance. That includes:
 - (a) the need to monitor the progress of the application for registration;
 - (b) where registration is not achieved, the Court must rigorously review and continue approval of the child's placement in an unregistered home;
 - (c) Ofsted should be notified of the placement immediately; and
 - (d) Ofsted is then able to take immediate steps under the regulatory regime.
13. The judgment concludes with an observation that local authorities do not choose to utilise unregulated placements for vulnerable children in great need, but rather have no choice but to employ such unregulated provision because of the acute lack of appropriate provision.
14. It is precisely in this context—what Lord Stephens in ***Re T*** called '*the enduring well-known scandal of the disgraceful and utterly shaming lack of proper provision for children who require approved secure accommodation*'—that it remains open to the High Court to deploy its protective inherent jurisdiction to authorise that deprivation of liberty, notwithstanding the statutory scheme as amended.



Tom Harrill
ST IVES CHAMBERS

Law is correct as at 12 October 2021

Whilst every effort has been taken to ensure that the law in this article is correct, it is intended to give a general overview of the law for educational purposes. Readers are respectfully reminded that it is not intended to be a substitute for specific legal advice and should not be relied upon for this purpose. No liability is accepted for any error or omission contained herein.

www.stiveschambers.co.uk | +44 (0)121 236 0863 | @StIvesFamily

St Ives Chambers, 1-3 Whittall Street, Birmingham, B4 6DH, DX: Fountain Court, Birmingham