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

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. The question of whether that authority is precarious and liable to future challenge, or a foundation on which further like decisions will be made, has recently received an early answer. Eagle-eyed practitioners will already have noted that the Court of Appeal (comprising The President of the Family Division and Baker and Simler LJJ) heard an appeal from MacDonald J's decision in this case on 16 and 17 November 2021. The judgment was formally handed down on 7 December 2021 and is available at https://www.bailii.org/ew/cases/EWCA/Civ/2021/1867.html under the name ***A Mother v Derby City Council & Anor* [2021] EWCA Civ 1867**.

11. The Court of Appeal dismissed that appeal, with the consequence that MacDonald J's judgment remains valid and applicable to the system as a whole.

Reader's Digest

12. So what does one need to know of MacDonald J's decision? 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 Statue 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.

13. 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 bests 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 is continued 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.

14. 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.

15. 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.

16. In dismissing the appeal in ***A Mother v Derby City Council & Anor***, Sir Andrew McFarlane, President of the Family Division, explains at paragraphs 73-74:

    (1) Placement in an unregistered children's home is, and has always been, wholly outside the statutory scheme, and not therefore within section 22C(6)(d);

    (2) The recent amendments, which relate to placements within sub-subsection (d), have no relevance to placement in an unregistered children's home;

    (3) The fact that placements were from time to time being made in unregistered children's homes in these challenging cases was expressly before the Supreme Court, and was the subject of the *President's Guidance*;

    (4) The authority of ***Re T*** squarely dealt with the issue and approved the use of the inherent jurisdiction in such cases where there were imperative circumstances of necessity;

    (5) Even if it were the case that placement in an unregistered children's home was prohibited by the statutory scheme (which is not the case), that question was, again, directly considered and determined in ***Re T***; and

    (6) Where it is necessary to do so to meet the overarching needs of the child (or to protect the safety of others), the inherent jurisdiction of the High Court must be available, notwithstanding that the underlying placement is prohibited by statute.

17. The points worthy of further emphasis are set out by The President from paragraph 76:

(1) It is not possible, on an ordinary approach to construction, to read section 22C(6) as expressly including unregistered children's homes. They are plainly excluded from sub-subsections (a)-(c) in that they cannot fall into the first two categories and, as they are not registered, cannot be within (c). Placements of this type have always required registration: section 22C(6)(c) makes express reference to placement in a registered children's home, making clear that such placements are subject to the regulatory regime specifically designed to safeguard and protect some of the most vulnerable children;

(2) Subparagraph (c) is the territory within section 22C(6) which relates to children's homes and, if unregistered children's homes were to be covered in the subsection it would be in (c), and not elsewhere. If unregistered children's homes are within (d), then the purpose of (c) falls into question; why, if an unregistered home is potentially lawful under (d), is it necessary to have a separate category for registered homes in (c). Plainly it would not be, and the regulatory regime carefully designed by Parliament to secure the welfare and protection of the most vulnerable children in registered homes would be undermined and capable of being circumvented. Unregistered children's homes do not fall within (d) as '*other arrangements*';

(3) Insofar as some local authorities may, have been operating, as a matter of practice, on the basis that unregistered homes did, indeed, fall into section 22C(6)(d), that development created a mischief which allowed placements to be made which, if that interpretation were correct, would escape from the requirement of registration. Regulation 27A made clear that practice was to stop, but it does not alter the conclusion that unregistered children's homes do not fall within sub-section (c) as a matter of ordinary domestic statutory construction, and there is nothing to suggest that Parliament ever intended to permit local authorities to place children in unregistered children's homes;

(4) The '*other arrangements*' referred to in section 22C(6)(d) are therefore arrangements other than those with a relative, friend or other connected person, or a local authority foster parent or in a children's home. Placement in an unregistered children's home has been unlawful since 2000 and Parliament cannot have intended to create a lawful category for such placements (without expressly saying so) under the regulations made some years later; and

(5) Unregistered children's homes have never been covered by section 22C(6)(d). It follows that **the position of such homes is unaffected by the amendments to the regulations that came into force in September 2021 relating to children under the age of 16 which are limited to placements that do fall within sub-subsection (d)**.

18. The reality for social workers and other professionals dealing with young people who are exhibiting behaviour which is dangerous to themselves or others, and where there is a requirement for that behaviour to be safely contained, is that it is often simply not possible to find a suitable, bespoke, placement which fits within the statutory scheme. It is beyond contemplation that strict adherence to the regulatory scheme should prevent a young person in such a parlous situation being accommodated in a placement that is outside the statutory rules, at least for a short time, if one is available, and is the only option for protecting the young person.

Tom Harrill
ST IVES CHAMBERS

Law is correct as at 8 December 2021