



PUMP COURT

CHAMBERS

**DOLS Applications in the wake of Re T
Catherine Ellis**





PUMP COURT

CHAMBERS

DOLS Applications in the wake of Re T Catherine Ellis



DOLS Jurisdiction

- “DOLS” = Deprivation of Liberty Safeguards
- “DOLS Order” is an order containing a declaration from the High Court authorising the deprivation of liberty of a vulnerable person (for purposes of this talk, a child)
- Authorises deprivation of liberty outside the s25 CA 1989 secure accommodation scheme
- **Secure Accommodation** defined in s25(1) CA 1989: “*Accommodation in England or Scotland provided for the purpose of restricting liberty*”
- But accommodation must be approved by the Secretary of State to come within s25 – if “secure” but not approved DOLS authorisation is required
- Wider variety of restrictions on liberty covered by DOLS – not simply being in a locked establishment

Secure Accommodation under s25

Test for placement in secure accommodation s25(1) CA 1989:

Child being looked after by a LA may not be placed or kept in 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.”

Children (Secure Accommodation) Regulations 1991 also apply

Leave (s100(3) CA 1989)

- The Local Authority must first obtain the leave of the court to make this application (s100(3) CA 1989).
- S100(4) CA 1989:

“...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”*

Is DOLS application required?

- Three components of deprivation of liberty - “*the Stork criteria*”
- (*P (By his litigation friend the Official Solicitor) v Cheshire West & Cheshire Council* [2014] UKSC 19 (“*Cheshire West*”); (*Storck v Germany* (2005) 43 EHRR 6) namely:
 - a. The objective component: Confinement in a particular restricted place for a not negligible length of time;
 - b. The subjective component of a lack of valid consent;
 - c. The attribution of responsibility to the state;

Is DOLS application required (2)?

- The “Acid Test” (in respect of the Objective Component of Stork Criteria)
- Whether the person is

(a) “under continuous supervision and not free to leave.”

Further:

(b) The fact that such restrictions may be necessary in order to prevent a person from harming himself or others makes no difference..”

(Per Lady Hale, paragraph 33, Re D (A Child) (Residence Order: Deprivation of Liberty) [2019] UKSC 42) (“Re D [2019]”)

- Comments on impact of “normal parental control” at paragraph 39



- Focussed only on situations where children placed in equivalent of s25 accommodation – e.g. secure but not within s25
- Essential question for Supreme Court:
 - Could the High Court have recourse to its inherent jurisdiction to make an order depriving a young person of liberty in such circumstances?
 - Did it impermissibly cut across the statutory scheme or fall foul of Article 5 ECHR?
- Lengthy and comprehensive judgment of Lady Black – sets out in detail the applicable law for both England and Wales and history behind it
- Essential Answers:
 - Yes it can
 - No it doesn't

- Unregistered vs Unregulated placements (para 58):
 - Unregistered – a children’s home which should be registered but is not (all children’s homes are regulated even if not registered)
 - Unregulated – a place which is not required to register because it doesn’t come within the definition of a children’s home
- *“An establishment in England is a children’s home ...if it provides care and accommodation wholly or mainly for children”*
(S1 Care Standards Act 2000)
- Summary criminal offence for a person to carry on or manage a children’s home without being registered (s11(5) Care Standards Act 2000)



Re T [2021] UKSC 35 cont.

- Para 141 *“it seems to me that 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 LA 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.”*

BUT

- Also recognised that important safeguards that come with registration will be absent.

President's Guidance

- President's Guidance Nov 2019 *“Practice Guidance: Placements in unregistered children's homes in England or unregistered care home services in Wales”* and addendum Dec 2020
- Principles of “Best Practice” when unregistered placement
- In short:
 - Must be made clear to court if placement unregistered and reasons why;
 - Court will need to ascertain that steps are being taken to apply, that provider has confirmed can meet needs of child, steps that LA is taking in meantime to assure itself of safety and suitability;
 - If application submitted court to be made aware of status of application;
 - If order granted and no application – order must provide that application submitted to Ofsted within 7 working days;
 - Guidance for timescales of keeping court informed of progress of application.
 - If refused, LA to advise court as a matter of urgency – court will take into account when deciding if placement is in child's best interests.



Re T [2021] UKSC 35 cont.

- Supreme Court highlighted need to comply with President's Guidance – an important safeguard for subject children.
- Per Lord Stephens (paragraph 170) (endorsed):

“The courts, in the exercise of the inherent jurisdiction, must only authorise such a placement where there are “imperative considerations of necessity” and where there has been strict compliance with the matters contained in the Guidance issued by the President of the Family Division on 12th November 2019 in relation to placing a child in an unregistered children’s home.”

(Emphasis added)

- Court must include in any order a requirement on the LA to immediately notify Ofsted that the child has been placed in an unregistered placement

Focussing on:

- *Tameside MBC v AM & Ors [2021] EWHC 2472*
(Macdonald, J) 8th Sep 2021 (and subsequent appeal *A Mother v Derby City Council [2021] EWCA Civ 1867*)
- *Birmingham City Council v R [2021] EWHC 2556*
(Lieven, J) 21st Sep 2021
- *A County Council v LH [2021] EWHC 2584*
(Pool, J), 23rd Sep 2021
- *A borough Council v E (A Minor) [2021] EWHC 2699 (Fam)*
(MacDonald J), 11th Oct 2021
- *Derby City Council v BA [2021] EWHC 2931 (Fam)*
(MacDonald J), 3rd Nov 2021
- *A County Council v A Mother [2021] EWHC 3303*
(Holman, J) 1st Dec 2021

Tameside MBC v AM & Ors *[2021] EWHC 2472*

- 3 joined cases
- Macdonald, J:

“...question of law before the court is whether it remains open to the High Court to authorise, under its inherent jurisdiction, the deprivation of liberty of a child under the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is prohibited by the terms of the statutory scheme... answer is yes”

(para 1) (Subject to rigorous application of presidents guidance)

- Para 58 onwards sets out a useful and comprehensive precis of the law applicable to a DOLS application (esp para 61)
- M in one case appealed to Court of Appeal (*A Mother v Derby City Council [2021] EWCA Civ 1867 - 7th Dec 2021*). Appeal was dismissed.

A Mother v Derby City Council *[2021] EWCA Civ 1867*

Questions considered on appeal:

- Can High Court authorise the DOL of child under 16 where placement is a placement that is prohibited by the terms of the CPP&CR (England) Regs 2010 (as amended) without cutting across that statutory scheme?
(Permission granted by Macdonald J)

and

- Whether LA retains the power lawfully to place a child in an unregistered children's home (because s22C(6)(c) specifies children's home "in respect of which a person is *registered...*")?
(Question posed by Appeal Court: "*that secondary, unaddressed, point of law lies at the centre of the present appeal and must now be determined by this court*")

A Mother v Derby City Council *[2021] EWCA Civ 1867*

Court of Appeal (P) concluded:

- Placement in an unregistered children's home is, and has always been, wholly outside the statutory scheme, and not therefore within s22C (6)(d). Therefore recent amendments to regs had no relevance
- Question of whether Inherent Jurisdiction was still available (even if placement in unregistered children's home was prohibited by statutory scheme) had been considered by Lady Black in *Re T: Inherent Jurisdiction* must be available where necessary to meet the overarching needs of the child (or protect the safety of others). (Para 74)
- Para 81 *"Standing back, 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."*

- Lieven J, 21st Sep 2021.
 - Child (T), doing v well in a solo placement but placement had decided not going to apply for registration with Ofsted
 - Ofsted indicating were intending to prosecute
 - Placement saying T could not remain – but because of Ofsted position
 - J *“keen... to try and ensure that T does not have to move again until there is a reasonably certain and secure plan for her where the court can have some optimism she can stay for a reasonable period...”*
 - No party arguing DOLS shouldn't be continued for a period

Birmingham City Council v R *[2021] EWHC 2556 cont.*

Lieven J:

- Directed statements from placement and from Ofsted to explain position.
- Noted President's Guidance "*is guidance and not law*"(para 19)
- Concluded "*clear that I retain the power to authorise the deprivation of liberty at the placement whether or not the local authority has the vires to place T there.*" (Para 25)
- Ordered case to return in 4 weeks – expressed concern about the Ofsted position.
- (Return not reported?)

- Poole, J, Sep 2021 (2 days after Lieven J judgment); Child (LT) aged 12.
- **J refused to grant the DOLS authorisation;**
- Similar facts to *Wigan MBC v W [2021] EWHC 1982* - completely inappropriate and unsuitable placement – acute psychiatric ward (no clinical need to be there).
- Environment having extremely detrimental effect on LT mental health – rapidly learning maladaptive coping behaviours – e.g. 10 ligature incidents in short period of admission (new behaviour). LT presence having significant negative impact on other adolescents placed at unit.
- Sole reason LA were inviting court to find in LT’s best interests “*is that there is nowhere else for her to go – nowhere in the whole of the country*” (para 2)

A County Council v A Mother *[2021] EWHC 3303*

- Holman J, 1st Dec 2021 (interposed). 14 ½ year old girl.
- **J refused to grant the DOLS authorisation**
- Highly inappropriate placement – specialist paediatric unit for which she had no needs clinically justifying her being there;
- Staff not equipped to meet her needs – extreme behaviours very distressing to other children on ward, including oncology patients and those receiving palliative care.
- Stronger terms than Poole J:
 - J said that being asked to make DOLS authorisation *“to give a veneer of legality to what they seek and propose”*
 - Para 33 *“there has to be some limit to these repeated applications to this court for DOLS type orders”*

A County Council v A Mother *[2021] EWHC 3303*

- At para 37 *“I do not have a solution to this case. Clearly it is the duty of the local authority to whose care this child was entrusted over seven years ago to keep her safe. Provided they act in good faith and do the very best they can, the lawfulness of what they do may be justifiable by a doctrine of necessity...”* (similar comment about the NHS trust)

“I am simply not willing myself to apply a rubber stamp and to give a bogus veneer of lawfulness to a situation which everybody in the court room knows perfectly well is not justifiable and is not lawful.”

- Both Poole J and Holman J expressed considerable sympathy to the LAs concerned. However:

“It needs clearly to be understood by this LA, and by all LAs, that the court itself does not have any resources at all available to it, nor a cheque book.” (Holman J)

A borough Council v E (A Minor) *[2021] EWHC 2699 (Fam)*

- MacDonald J, 11th Oct 2021.
- E was a 16 year old girl who had been accommodated pursuant to s25.
- LA said wanted that to continue whilst work completed to provide a bespoke therapeutic placement for her.
- All other parties submitted that s25 criteria no longer met (Also conclusion LA Secure Accommodation Review Panel) and so should be discharged from secure accommodation and step down to a lesser restrictive placement with a DOLS.
- E experiencing regulation issues - most likely from anxiety arising from proposed move and “step down” to a therapeutic placement. Significant incident where police required on return car journey from transition visit.
- Unusual because LA seeking to go behind the decision of its own panel (made twice!)
- J satisfied that the s25 criteria were no longer met. Held: falls to court to make its own independent assessment. Views of panel are a factor to be taken into account but not determinative. (para 46)

Derby City Council v BA *[2021] EWHC 2931 (Fam)*

- MacDonal J, 3rd Nov 2021 (3 conjoined cases – Derby, York and Plymouth). Derby had been one of the cases in *Tameside* – hearing pre-dated M’s appeal.

- Question for court:

“Whether given the central role accorded to the President’s Guidance by the Supreme Court in Re T and by this court in Tameside MBC... , it remains open to the court to exercise its inherent jurisdiction in cases where a placement either will not or cannot comply with the Practice Guidance?”

Each LA said “yes” ... Secretary of State and Ofsted said “no”

- Answer to the question is applicable to all cases in which the President’s Practice Guidance applies
- Very comprehensive judgment

Derby City Council v BA [2021] EWHC 2931 (Fam)

Brief facts:

- Derby and York – young person in unregistered placement and prospects/timescales for registration unclear (in Derby, the provider had given notice in any event).
- Plymouth wanted to place subject child (QV) in a secure unit under s25 but unable to identify such a placement – having to place in a holiday lodge and did not believe the placement would consent to an application being made to register with Ofsted.

Derby City Council v BA *[2021] EWHC 2931 (Fam)*

Useful Paragraphs:

- Para 31 – repeats distinction between “unregulated” and “unregistered”
- Para 35 – 37 considered the statutory regulatory regime that ordinarily governs chemical restraint under the MHA 1983 (such safeguards not necessarily in place when DOLS authorisation);
- Paras 42-Considered the status of the President’s Practice Guidance – distinctions between Practice Directions made by President of FD with concurrence of the LCJ (and sometimes LC) and non-statutory practice guidance under the court’s inherent jurisdiction:
“Accordingly, where a Head of a Division gives guidance, that guidance does not have the status of law or create a legal requirement, nor does it give rise to a cause of action if not followed” (para 45)

Derby City Council v BA *[2021] EWHC 2931 (Fam)*

- *Para 62 “I am satisfied that an unwillingness or inability to comply with the terms of the President’s Practice Guidance does not act per se to oust the inherent jurisdiction of the High Court to authorise the deprivation of a child’s liberty in an unregistered placement confirmed in Re T”*

BUT

- *Para 63 “However, I am equally satisfied that compliance with the Practice Guidance is central to the safe deployment of that jurisdiction and to its deployment in a manner consistent with the imperatives of Art 5”*

AND

- *“Within this context, whilst accepting that an unwillingness or inability on the part of a placement to comply with the terms of the President’s Practice Guidance is a factor that informs the overall best interests evaluation on an application under the inherent jurisdiction, and that each case will turn on its own facts, I am satisfied that the court should not ordinarily countenance the exercise the inherent jurisdiction where an unregistered placement makes clear that it will not or cannot comply with the requirement of the Practice Guidance to apply for registration.”*

Derby City Council v BA *[2021] EWHC 2931 (Fam)*

Para 66:

“Compliance or non-compliance with Practice Guidance is not determinative of the existence of the court’s substantive jurisdiction. This is, I am satisfied, the plain position as a matter of law.”

AND

“The existence of the protective jurisdiction of the court does (not?) turn on conformity with a procedural requirement or requirements set out in practice guidance. The question for the court in such circumstances is whether that jurisdiction should be exercised where there has been non-compliance with the Practice Guidance”

(Original Emphases)

Derby City Council v BA *[2021] EWHC 2931 (Fam)*

- Para 68:

“Where an unregistered placement makes clear that it will not or cannot comply with the Practice Guidance, and in particular the requirement to issue an expeditious registration application, a number of factors militate against the deprivation of the child’s liberty in such a placement being in the child’s best interests that are not, in any sense, a mere matter of legal theory.”

- Para 71 – recognised if unregistered placement will not or cannot comply:

“the child is placed for the duration of that placement wholly outside the relevant statutory regulatory regimes, and in certain cases outside the statutory regime for administration of medication without consent contained in the MHA 1983... the subject child is deprived, again for the duration of that placement, of the protection of the regulatory provisions deemed necessary by Parliament”

and noted that for children requiring secure accommodation, it also deprives them of the regulatory protection of Children (Secure Accommodation) Regulations 1991 and regulatory regime under Care Standards Act 2000 and attendant regs.

Derby City Council v BA *[2021] EWHC 2931 (Fam)*

Para 74: Not sufficient to say court able to maintain oversight of the unregistered placement:

“The High Court is not a regulatory body and nor is it equipped to perform the role of one. It cannot, for example, deploy inspectors to inspect the placement in question nor does the court have the institutional expertise of an independent regulator. Whilst it can direct evidence from the local authority, that evidence will be from a party who has an interest in maintaining the placement in question.”

Para 80

“An unwillingness or inability to apply for registration in accordance with the Practice Guidance does not act to extinguish the court’s inherent jurisdiction. Rather, it borders and curtails the circumstances in which that jurisdiction can be deployed....each case will turn on its own facts, the court should not ordinarily countenance the exercise of the inherent jurisdiction where an unregistered placement makes clear that it will not or cannot comply with the requirement of the Practice Guidance to apply expeditiously for registration”

(Original emphasis)

Derby City Council v BA *[2021] EWHC 2931 (Fam)*

- Para 82 : Observations on the question of what “cannot or will not” means:
 - Provider that refuses to apply is unlikely to be a viable option for meeting the subject child’s best interests;
 - Given the burden of application process – such a stance might be understandable if provider doesn’t ordinarily make such provision – e.g. private landlord, owner of holiday park
 - However, placements in those categories are most likely to result in unsuitable placement for obvious reasons – *“a refusal by a provider to apply for registration immediately following a placement deprives the child for the duration of that placement of regulatory oversight where it is arguably most needed”* (original emphasis)
- Para 83: *“The court may be required to make a very short order (measured in hours or days and not weeks) to hold the ring whilst alternative arrangements are put in place... a timetable for the identification of a placement that is registered or willing to apply for registration set by the court...”*

Derby City Council v BA *[2021] EWHC 2931 (Fam)*

Where Registration Application Refused or Withdrawn

- Para 84: Guidance does not expressly prohibit the continuation of a placement where registration application refused or withdrawn – but court should not *ordinarily* countenance exercising Inherent Jurisdiction in those circumstances.
- Para 85: Stark distinction between provider who makes application and fails in first instance and the provider who refuses to apply or cannot apply.
- Para 87: *“Whilst the absence of a placement may place the child at risk, the courts must also take account of the fact that it is likely to be antithetic to a child’s best interests to be deprived of the protections of the statutory regulatory regime mandated by parliament”*

Derby City Council v BA *[2021] EWHC 2931 (Fam)*

Situation where provider does not apply because it could never meet the requirements to be successful

- Para 89
- No steps being taken to regularise the position by applying for registration
- *“The inherent jurisdiction should not be used in circumstances which lead to the perpetuation of such an outcome.”*
- But could make v short order (days or hours not weeks) to “hold the ring”

Derby City Council v BA *[2021] EWHC 2931 (Fam)*

Situation where provider states intent to apply but doesn't take that application forward

Para 91:

"...if a provider fails to apply for registration in a timely manner, and if a local authority fails to require that they do so, they must expect at some point that the court will refused to continue authorising the deprivation of liberty of very vulnerable outside of the regulatory regime carefully designed by Parliament to protect and safeguard them."

Derby City Council v BA *[2021] EWHC 2931 (Fam)*

- Para 92 – slight nod to the impact on welfare?

“I accept the general proposition that cases in which a child has been placed in an unregistered placement for a significant period of time by reason of delay in securing registration, and is making sustained progress in such a placement will raise more difficult welfare questions in circumstances where moving the child by reason of an unacceptable delay in securing registration may conflict with the child’s wider welfare needs...”

- Says this will be avoided if registration applications are made timeously – optimistic?
- Stressed importance of LA and provider working transparently with Ofsted (para 93)

Conclusions?

- Depressingly little by way of solutions
- “Sympathy” expressed to LAs but no real acknowledgment of the reality faced by SW or parents if no registered placement available
- Providers must undergo the registration process
- Increasing sense that placements detrimental to child’s welfare will no longer be authorised
- Remains to be seen whether/how long before there is a significant appeal against decision not to authorise
- Ultimately – as recognised – court’s options are extremely limited without the resources issue being addressed by government.

Don’t hesitate to get in touch if you have any questions arising.

Thank you for listening.

Catherine Ellis

29th June 2022