



The Royal Courts of Justice

**nyas** national youth advocacy service  
gwasanaeth eiriolaeth ieuenctid cenedlaethol

## "The enduring scandal"

**Views from the High Court on the lack of available placements in secure children's homes for welfare**

**March 2022**

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**There can be no keener  
revelation of a society's soul  
than the way in which it treats  
its children.**

(Nelson Mandela, as quoted by Mr. Justice McDonald  
in the case of Lancashire County Council and G)

“



While there does exist a widespread assumption that secure children's homes are necessary to care for some of the most vulnerable children in our society, according to many judges, **the system is in crisis.**

NYAS' second report on secure children's homes for welfare sheds light on cases when the inherent jurisdiction of the High Court is used to authorise the deprivation of liberty of children and young people. This is often in cases where a child or young person should be placed in a secure children's home for their welfare, but must live elsewhere due to no places being available.

High Court judges have expressed their frustration that the legal system is unable to fill this gap in children's social care. This report highlights several key judgments that demonstrate the need for more places to be funded for children in need of a secure home for their welfare.

**The term 'secure children's homes' is used in this document to describe homes for children subject to s25 orders. While these homes also offer accommodation for children in custody or under the Mental Health Act 1983, the research only includes children in those homes subject to s25 orders.**



**A deprivation of liberty is when a child or young person's freedoms are restricted in certain places, such as secure children's homes.**



Depriving a child or young person of their liberty, as one judge says, is a **“truly draconian order that has a profound impact on the subject child”**.<sup>1</sup>

In our first report on secure children's homes for welfare NYAS explained that these homes provide care and accommodation for young people in which their liberty is restricted due to welfare concerns.<sup>2</sup>

While these homes can also offer accommodation for children in custody or under the Mental Health Act 1983, the research only includes children in those homes subject to section 25 Children Act 1989 and section 119 of the Social Services and Well-being (Wales) Act 2014 secure orders for welfare.



# Article 5 of the European Convention of Human Rights

Article 5 of the European Convention of Human Rights was brought into UK domestic law through the Human Rights Act 1998 and provides that everyone has the right to liberty and security of person.

The ECHR being enshrined into UK domestic law means that if a local authority breaches the rights of someone in the UK, that individual may be able to take legal action.

Children and young people have the same ECHR rights as adults. However, depriving a child or young person of their liberty on welfare grounds is a lawful exception on welfare grounds under Article 5(4) of the ECHR:<sup>3</sup>

## ECRC Rights

### Article 5

Everyone has the right to liberty and security of person. No one shall be deprived of their liberty except in specific cases and in accordance with a procedure prescribed by law. Everyone deprived of their liberty shall be entitled to have a court consider whether that detention is lawful and release them if not.

### Article 8

Everyone has the right to respect for his private and family life, his home and his correspondence.



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.<sup>4</sup>



Children deprived of their liberty are subject to continuous supervision and control, and are not free to leave the home.<sup>5</sup>

# UNCRC Rights

The UNCRC (UN Convention on the Rights of the Child) must also be considered when depriving a child or young person of their liberty.<sup>6</sup>

## Article 2

All children have the rights set out in the UNCRC, and individual children and young people shouldn't be discriminated against when these rights are realised.

## Article 3

The best interests of children and young people should be thought about at all levels of society.

## Article 6

All children and young people have the right to survive and the right to develop.



## Article 9

Children and young people shouldn't be separated from their parents in most cases.

## Article 12

Children and young people have the human right to have opinions and for these opinions to be heard and taken seriously.

## Article 20

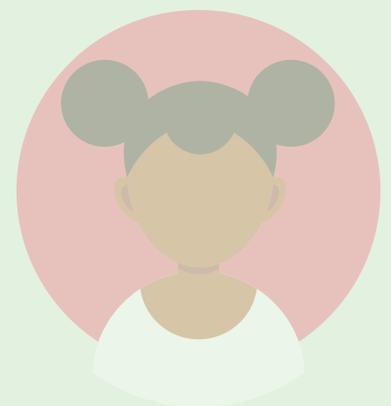
Children and young people have the right to special protection and help if they cannot live with their family.

## Article 37

Children and young people have the right to be protected from cruel, inhuman or degrading treatment or punishment, and a right not to be deprived of their liberty unlawfully or arbitrarily.

## Article 39

Children and young people have the right to recover from abuse and trauma.



# Placing a child in a secure children's home for welfare



Local authorities can bring a case to the courts of England and Wales for a child or young person to be deprived of their liberty on welfare grounds and placed in a secure children's home.

This power can either be given by a section 25 (England) or section 119 (Wales) welfare order or by the inherent jurisdiction of the High Court.

## **SECTION 25 OF THE CHILDREN ACT 1989 (ENGLAND) / SECTION 119 OF THE SOCIAL SERVICES AND WELL-BEING ACT (WALES)**

When is this used?

When a local authority seeks to deprive a child or young person in their care of their liberty in a secure children's home.

As the High Court is what is known as a 'superior' court, it has the power to hear any matter that comes before it, unless limited by a statute or rule that grants exclusive jurisdiction to another court or tribunal.

## **THE INHERENT JURISDICTION OF THE HIGH COURT**

When is this used?

When welfare' criteria under s25/s119 cannot be met by a local authority, they may be able to apply for leave to apply for an order depriving the child of liberty under the inherent jurisdiction of the High Court in cases where approved secure children's homes are unavailable.

The inherent jurisdiction of the High Court was designed only to be used in exceptional circumstances.<sup>7</sup>

## SECTION 25 OF THE CHILDREN ACT 1989 (ENGLAND) / SECTION 119 OF THE SOCIAL SERVICES AND WELL-BEING ACT (WALES)

How can this be used?

Relevant 'welfare' criteria must be satisfied before a child or young person can be deprived of their liberty on welfare grounds.

A child or young person should not be placed in secure accommodation unless:

a) He has a history of absconding and is likely to abscond from any other description of accommodation; and

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.<sup>8</sup>

Only one out of the two 'welfare' criterions, (a) or (b), must be satisfied for a child or young person to be deprived of their liberty on welfare grounds under these provisions.

## THE INHERENT JURISDICTION OF THE HIGH COURT

How can this be used?

The inherent jurisdiction of the High Court must evaluate whether:

"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".<sup>9</sup>



This legislation only applies to 'looked-after children', who NYAS call children and young people in care. In England and Wales, a 'looked-after child' is a child or young person who:

a) has been in the care of their local authority for more than 24 hours;<sup>10</sup> or

b) is subject to a care order.

## **SECTION 25 OF THE CHILDREN ACT 1989 (ENGLAND) / SECTION 119 OF THE SOCIAL SERVICES AND WELL-BEING ACT (WALES)**

**How long does this order last?**

If a section 25 or section 119 order is made, this can be for no more than three months, whilst renewals of section 25/section 119 orders can then last up to six months without review.<sup>11</sup>

Further court authorisation must not exceed one month.



## **THE INHERENT JURISDICTION OF THE HIGH COURT**

**How long does this order last?**

A judge must review the child's position at least every 12 months.<sup>12</sup>



# High Court Judgments

Applications to the High Court to use the inherent jurisdiction to place children in unregulated settings have significantly increased in recent years. In 2020/21, 579 applications were made under the inherent jurisdiction in England, representing a 462% increase from 2017/18.<sup>13</sup> The number of applications made under the inherent jurisdiction even outnumbered applications under section 25 of Children Act 1989 for the first time.<sup>14</sup> Judges are clear that this is not how the inherent jurisdiction should be exercised.

**There are very few secure children's homes across England and Wales — only 14 in total.**

Recently, High Court judges have been raising concerns about the lack of appropriate secure placements for children and young people. Although there were places for **390** children and young people available in England and Wales in 2006, this figure has fallen over the years down to space for **253** children and young people.<sup>15</sup>

In addition, NYAS found that on average, children are placed in secure children's homes **141 miles away** from their previous home.<sup>16</sup>

**That is as far apart as London and Cardiff, or Manchester and Newcastle.**

Other times, the option to relocate to a secure children's home is not available. In these circumstances, children and young people can be placed in unregulated settings, where important safeguards are absent.<sup>17</sup>

Judges are also concerned about how the inherent jurisdiction of the High Court is being used. The use of the inherent jurisdiction was described by Mr Justice MacDonald as "a temporary solution, developed by the courts in extremis".<sup>18</sup>

This part of the report sets out concerns in High Court judgments over the inappropriate overuse of inherent jurisdiction.

# T (A Child), Re [2021] UKSC 35<sup>19</sup>

**This Supreme Court appeal dismissed the case of T, a 15-year-old child on a care order, who their local authority wished to place in secure accommodation. T’s case at the Court of Appeal considered that the inherent jurisdiction could only be exercised if the child had not consented to the arrangements, as T had done. When T’s appeal was dismissed by the Court of Appeal, T then applied to the Supreme Court.**

**As there were no places available in registered secure children’s homes, the inherent jurisdiction of the High Court was used by T’s local authority to authorise placing her in an unregistered placement. As noted in the judgment by Lady Black, “the court is not able to carry out the sort of inspections and checks that Ofsted and the Care Inspectorate Wales are obliged to carry out”.**



“  
**The enduring well-known scandal of the disgraceful and utterly shaming lack of proper provision for children who require approved secure accommodation.**

Lord Stephens, 2021.

”

**Lady Black concluded the judgment by declaring it “unthinkable that the High Court, with its long-established role in protecting children, should have no means to keep these unfortunate children... safe from extreme harm, in some cases death.”**

**Five Supreme Court judges expressed grave concerns throughout the course of this judgment over the use of the inherent jurisdiction to authorise the deprivation of liberty. In the words of Lady Black, the inherent jurisdiction of the High Court “is only an imperfect stop gap, and not a long term solution”.<sup>20</sup>**

# Derby CC v CK and Ors (Compliance with DOL Practice Guidance) [2021] EWHC 2931 (Fam)

“  
There remains  
no entirely  
satisfactory  
child-centred  
answer.”

Mr Justice MacDonald, 2021.

21

This case saw the judge consider three cases of young people under-16 with very high levels of need. All three young people were placed in unregistered placements in instances where an application for the registration of these homes had not yet been made or would not be made.

Mr Justice MacDonald made clear that there had been a failure to follow Practice Guidance to apply for children’s homes registration. <sup>ii</sup>

He submitted that this deprived the children of the regulatory protection Parliament has deemed they should benefit from.

However, given the “continuing and acute shortage of appropriate resources”, the judge acknowledged that if the local authority had followed Practice Guidance and waited for registration, this would risk a vulnerable looked after child having “nowhere to go”.



The two judgments below concerning the child G are from connected cases, as the question of child G's liberty regularly returned to Mr Justice MacDonald's court.

# Lancashire CC v G (Unavailability of Secure Accommodation) [2020] EWHC 2828 (Fam)<sup>22</sup>

In this instance, both the judge and the local authority could not identify a single regulated secure children's home that had capacity to care for the child in question, G.

As a result, the judge was therefore left with "no option" but to authorise G's deprivation of liberty in an unregulated placement not subject to Ofsted inspections, the only identified care arrangement. Prior to the hearing, this unregulated placement had informed the local authority that they were not prepared to apply to Ofsted for registration.

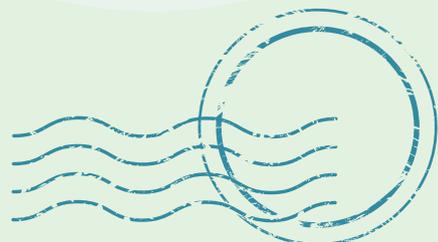


— “ —

I am left acutely  
conscious of my  
powerlessness,  
of my inability  
to do more

Mr Justice MacDonald  
acknowledged his decision to be  
“sub-optimal”. The decision was  
based on “the bare need to prevent  
G (the child) from harming herself.”

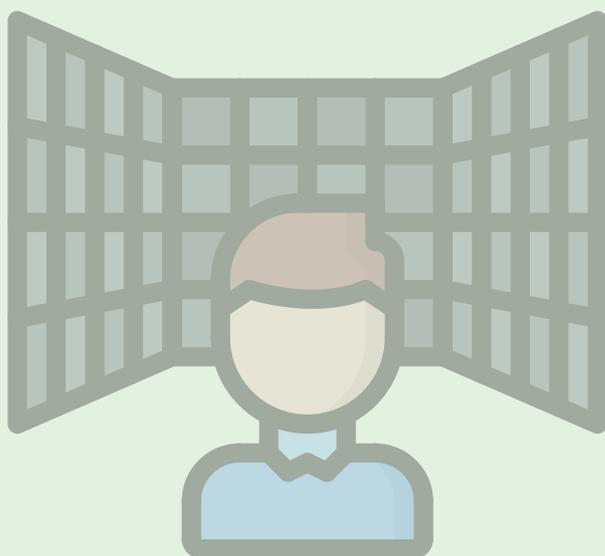
” —



# Lancashire CC v G (No 4) (Continuing Unavailability of Regulated Placement) 2021 EWHC 244 (Fam)<sup>23</sup>

Six months later, the judge was – for the fourth time – asked by a local authority to authorise the continued deprivation of liberty of G – the child deprived of her liberty in the case above.

The judge submitted that it is “very hard, if not impossible, to do right by G, to keep her safe and to work to relieve her enduring and acute emotional pain, when the tools required to achieve that end are simply unavailable to this court”.



“  
I am again  
today reduced  
to little more  
than a rubber  
stamp  
”

In his fourth judgment delivered on the matter, Mr Justice MacDonald once again returns to Nelson Mandela’s quote [above]:

that there can be no keener revelation of a society’s soul than the way in which it treats its children.

# Nottinghamshire CC v LH (A child (No. 2) [2021] EWHC 2593 (Fam)

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” **Depriving her liberty in that setting would not provide her with a safety net – it would not keep her safe or protect her.** ”

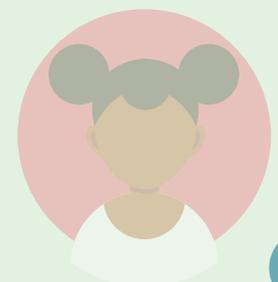
This is the judgment of Mr Justice Poole with respect to the best interests of LT, a 12-year-old child whose corporate parent wished to authorise the continued deprivation of her liberty on an acute psychiatric admission unit. The continuation of the inherent jurisdiction, in this case, was refused.



Although LT had absconded in the past, she was “not suffering from a mental illness of a nature of degree which makes it appropriate for her to receive treatment in a hospital setting”. This meant she was not detainable under the Mental Health Act 1983 and instead, in the words of Mr Justice Poole, “needs a therapeutic placement”.



As noted in the judgment, by Article 5(1) of the ECHR, no-one shall be deprived of their liberty save in circumstances described by Article 5 and in accordance with a procedure prescribed by law. As Mr Justice Poole emphasises, it is the national shortage of resources which had led to the current position.



[continued]

An update on LT's case was given a few days later when the local authority had come up with an alternative placement, proposing to use an empty children's home as a "bespoke placement" for LT.



“There is nowhere else for her to go – nowhere in the whole country – such is the national shortage of accommodation suitable for vulnerable children

Mr Justice Poole

To conclude the judgment, Mr Justice Poole referenced Lady Black's comments in *Re T* [2021] UKSC 35At [145]:

How can a local authority fulfil these duties in the problematic cases with which we are concerned 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.**<sup>25</sup>

# References

- 1 Derby CC v CK and Ors (Compliance with DOL Practice Guidance) [2021] EWHC 2931 (Fam), Available at: <https://www.bailii.org/ew/cases/EWHC/Fam/2021/2931.html>.
  - 2 National Youth Advocacy Service (2021) 'Secure children's homes for welfare: 141 miles from home', Available at: <https://www.nyas.net/wp-content/uploads/Secure-Childrens-Homes-for-Welfare-NYAS-report-E.pdf>.
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  - 4 Human Rights Act (1998) Schedule 1, Available at: <https://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/1/CHAPTER/4?view=plain>.
  - 5 Storck v Germany (2005) (Case 61603/00) 43 EHRR 96, Available at: <https://www.globalhealthrights.org/wp-content/uploads/2013/02/ECTHR-2005-Storck-v-Germany.pdf>; Cheshire West and Cheshire Council v P [2014] UKSC 19, Available at: <https://www.bailii.org/uk/cases/UKSC/2014/19.html>.
  - 6 Al Adsani V UK [2001] (Case 35763/97) [2001] 12 BHRC 88, Available at: <https://documents.law.yale.edu/sites/default/files/Al%20Adsani%20v.%20UK%20-%20ECHR%20-%202001.pdf>.
  - 7 Children's Commissioner (2019) 'Who are they? Where are they? Children locked up' [online] Available at: <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/05/cco-who-are-they-where-are-they-may-2019.pdf>.
  - 8 Children Act (1989) 'Section 25', Legislation.gov.uk, Available at: <https://www.legislation.gov.uk/ukpga/1989/41/section/25>.
  - 9 Children Act (1989) 'Section 100(4)', Available at: <https://www.legislation.gov.uk/ukpga/1989/41/section/100>.
  - 10 Children Act (1989) 'Section 20' Legislation.gov.uk, Available at: <https://www.legislation.gov.uk/ukpga/1989/41/section/20>
  - 11 Children (Secure Accommodation) Regulations 1991 / Children (Secure Accommodation) (Wales) Regulations 2015.
  - 12 A-F, Re (Children) [2018] EWHC 138 (Fam) [2018] 2 FLR 219, Available at: <https://www.familylawweek.co.uk/site.aspx?i=ed187954>.
  - 13 Nuffield Family Justice Observatory (2022) 'What do we know about children deprived of their liberty? An evidence review', Available at: [https://www.nuffieldfjo.org.uk/wp-content/uploads/2022/02/nfjo\\_report\\_summary\\_DoL\\_evidence\\_review\\_final\\_20220203.pdf](https://www.nuffieldfjo.org.uk/wp-content/uploads/2022/02/nfjo_report_summary_DoL_evidence_review_final_20220203.pdf).
  - 14 Ibid.
  - 15 Gov.uk (2021) 'Children accommodated in secure children's homes' Available at: <https://explore-education-statistics.service.gov.uk/find-statistics/children-accommodated-in-secure-childrens-homes/2021>.
  - 16 National Youth Advocacy Service (2021) 'Secure children's homes for welfare: 141 miles from home', Available at: <https://www.nyas.net/wp-content/uploads/Secure-Childrens-Homes-for-Welfare-NYAS-report-E.pdf>.
  - 17 Nuffield Family Justice Observatory (2022) 'Deprivation of liberty: Legal mechanisms', Available at: [https://www.nuffieldfjo.org.uk/wp-content/uploads/2022/02/nfjo\\_briefing\\_DoL\\_final\\_20220203.pdf](https://www.nuffieldfjo.org.uk/wp-content/uploads/2022/02/nfjo_briefing_DoL_final_20220203.pdf).
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  - 20 Ibid.
  - 21 Derby CC v CK and Ors (Compliance with DOL Practice Guidance) [2021] EWHC 2931 (Fam), Available at: <https://www.bailii.org/ew/cases/EWHC/Fam/2021/2931.html>.
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  - 23 Lancashire CC v G (No 4) (Continuing Unavailability of Regulated Placement) 2021 EWHC 244 (Fam), Available at: <https://www.judiciary.uk/wp-content/uploads/2021/02/Lancashire-CC-v-G-No4Continuing-Unavailability-of-Regulated-Placement-judgment.pdf>.
  - 24 Nottinghamshire CC v LH (A child (No. 2) [2021] EWHC 2593 (Fam), Available at: <https://www.familylawweek.co.uk/site.aspx?i=ed223848>.
  - 25 T (A Child), Re [2021] UKSC 35, Available at: <https://www.bailii.org/uk/cases/UKSC/2021/35.html>
- i The legislative criteria uses male pronouns but should be read as applicable to all gender pronouns he, she, and they.
- ii Under section 1(2) of Care Standards Act 2000, an 'unregulated' placement is not legally required to be registered. On the other hand, an 'unregistered' placement does constitute a children's home, and therefore must be registered to meet the requirements of section 1(2) of Care Standards Act 2000.

NYAS is a socio-legal charity that campaigns for the rights of care-experienced children and young people across England and Wales, championing their voices to be heard in the decisions made about them.

**Every year, we provide advocacy support to over 10,000 children and young people across England and Wales.**

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This report was written by Jennifer Downie and Ben Twomey.

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