DEPRIVATION OF LIBERTY WHERE A CHILD IS NOT SUBJECT TO A CARE ORDER

(A City Council v LS and others)

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Local Government analysis: Shaun Spencer, barrister at St John's Buildings, examines the High Court decision in A City Council v LS and others concerning inherent jurisdiction, in which the definition of that jurisdiction being 'theoretically limitless' as to the authorisation of the deprivation of liberty of a child by a local authority where that child is not 'looked after' was challenged.

A City Council v LS and others [2019] EWHC 1384 (Fam), [2019] All ER (D) 12 (Jun)

What are the practical implications of this case?

Although the courts have traditionally declined to define the limits of the inherent jurisdiction and it is traditionally described as 'theoretically limitless' (see *Re R (A Minor) (Wardship: Medical Treatment*) [1992] 1 FLR 190), this case identifies in practice a manner in which the exercise of the inherent jurisdiction is limited. The use of the inherent jurisdiction to authorise the deprivation of liberty of children has been growing at significant pace in recent years. Most commonly in circumstances either where there is no placement available within a secure accommodation unit and therefore a deprivation is to occur in alternative accommodation or where the nature of the care regime of a child—who is looked after by a local authority—is such as to amount to a deprivation of liberty thus requiring authorisation by the court. The judgment in *A City Council v LS* is a key decision in relation to the availability of deprivation of liberty authorisations (DOLA) for 17-year olds who are not subject to care orders.

If a child has reached the age of 17 without having been made subject to a care order, then the only way in which that child can be placed in secure accommodation is via section 25 of the Children Act 1989 (ChA 1989), which in turn requires that child to be accommodated by the local authority pursuant to ChA 1989, s 20(3). The court does not have the power under the inherent jurisdiction to achieve that same end even where that child is at risk of being killed or seriously harmed.

The exercise of the inherent jurisdiction is limited by ChA 1989, s 100. Such limitation includes the prohibition on the use of the inherent jurisdiction to require a child to be placed in the care or put under the supervision of a local authority or to require a child to be accommodated by or on behalf of a local authority (ChA 1989, s 100(2)). Where a child is not looked after and (in circumstances where a parent or person with parental responsibility objects to the child's accommodation and where the child cannot be made the subject of a care order by reason of their age) cannot be a looked after child, the effect of authorising a deprivation of liberty would be to require that child to be accommodated by the local authority. In effect, a parent with parental responsibility can prevent the court from requiring a child (who is not subject to a care order) to be deprived of their liberty in secure accommodation, even where that child is at grave or fatal risk of harm, by opposing such a course.

While the court reiterated the positive obligation on the state (including the court) to protect the right to life under Article 2 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which includes the positive obligation on the authorities to take preventative

operational measures to protect individuals from others and themselves—such obligations can only be discharged through taking 'measures within the scope of its power'. Therefore, the Article 2 ECHR obligations cannot justify and do not permit the court to act in a way which lies outside the identified limits of its powers under the inherent jurisdiction.

The court also doubted whether *A County Council v B* [2013] EWHC 4654 (Fam) was correctly decided.

What was the background?

Any reader of this case naturally would be struck by the immense seriousness of the factual background. The references to attempted murder, gangs, guns, county lines, drugs, and 'a child' would likely be sufficient to raise alarm in most minds.

The court was concerned with a 17-year-old boy who lived with his mother in one of the country's major cities. He was said by the police to be an active member of an organised crime group (OCG). That OCG is believed to be involved in violent feuds grounded in attempts to take control of drug trafficking activity in the city, further exaggerated by racial tensions. Police intelligence indicated that the child is presently in dispute with other members of the criminal community. The police considered that those involved have the ability to use firearms and display a willingness to conduct retaliatory attacks and to seek violent acts of retribution. The child had been identified by the police as a suspect in the shooting of an adult male in broad daylight in the presence of members of the public. He was arrested on suspicion of attempted murder and bailed. He was believed to be at significant risk of reprisal. His mother was advised to leave the family home with the child's two younger siblings and to remain out of the area.

The local authority applied to the court for an order under the inherent jurisdiction on a without notice basis for a 'deprivation of liberty order', which was made by HHJ Sharpe in 'considerably wider' than usual terms for such an order. Inter alia, the order permitted the local authority to enter premises to search for the child and to remove him and thereafter detain him at an identified residential placement. It was the local authority's intention to maintain the child in that placement until a placement at a secure unit could be identified. The child subsequently absconded from the residential placement and as at the time of the substantive hearing before Macdonald J, his whereabouts remained unknown.

The matter was transferred for hearing before Macdonald J. At that hearing the child, who had been in telephone contact with those representing him, opposed the local authority's application. The mother also opposed the application on the basis that she believed that the orders sought were counterproductive and would prevent the child's return and would expose him to continuing risk of harm.

As at the time of the substantive hearing, it was the local authority's application for authorisation for the child to be deprived of his liberty within a secure unit.

What did the court decide?

The court began by noting that the child was not subject to a care order and had never been (save as a result of the interim order earlier made) accommodated by the local authority. Given his age, he could not now be made subject of a care order. It was agreed by all parties that save and unless the child was accommodated pursuant to ChA 1989, s 20(3), he could not be made subject to a ChA 1989, s 25 secure accommodation order, given that his mother was willing and able to provide accommodation for the child and objected to his being accommodated. The statutory route to a ChA 1989, s 25 order was not available.

The question therefore for the court to decide was whether the High Court has the power under its inherent jurisdiction to authorise the placement in secure accommodation of a 17 year old child who is not looked after by that local authority within the meaning of ChA 1989, s 22(1), whose parent objects to that course of action, but who is demonstrably at grave risk of serious, and possibly fatal harm. It was held that it did not.

The basis for this decision was that ChA 1989, s 100 imposes specific prohibitions on the use of the inherent jurisdiction. Those prohibitions include restrictions on the court exercising the inherent jurisdiction so as to require a child to be placed in the care of or accommodated by a local authority. The dicta in *Re E (a child)* [2012] EWCA Civ 1773, [2012] All ER (D) 262 (Nov) (at para [16]) being 'unambiguous' on the point. The court therefore had to consider whether the order sought would contravene this provision. In concluding that it would, the court found that, where a child is not already being accommodated or looked after by a local authority, in order to deprive a child of their liberty, it was also necessary for a local authority to accommodate and care for that child—matters prohibited by ChA 1989, s 100.

The court considered whether the positive obligations imposed on the court to protect life under Article 2 ECHR might require a different conclusion but determined that they did not, and it being noted that the duty extended only as far as taking 'measures within the scope of its power'. The positive obligation did not enable the extension of the court's powers, in circumstances where such power was expressly prohibited by statute.

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