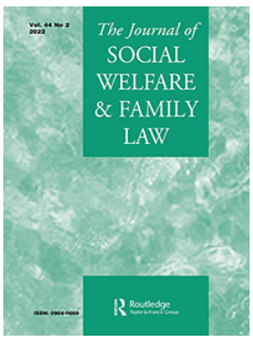

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ARTICLE

Vulnerable children in unregulated care: the unstoppable inherent jurisdiction

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KEYWORDS Secure accommodation; inherent jurisdiction; statutory restrictions; court's powers

The 'scandal' of teenagers with especially high levels of need being accommodated in unregistered and often inadequate accommodation stems from 'the disgraceful and utterly shaming lack of proper provision in this country of the clinical, residential and other support services so desperately needed' (*Re X (No 3)* [2017] EWHC 2036 (Fam), Munby P). While various issues may call for a young person to be placed in secure accommodation, most involve serious risks. When – rarely – secure accommodation places are available, the court can usually make use of its statutory powers under s 25 of the Children Act 1989 to authorise the placement of a vulnerable child or young person. However, the statutory scheme requires that the secure accommodation used for the placement be authorised by the Secretary of State (Children (Secure Accommodation) Regulations 1991, r 3); the lack of such authorised secure accommodation creates the 'lack of proper provision' to which Munby P referred.

This intense shortage has resulted in the courts pressing the inherent jurisdiction into use, determining that the High Court may approve the deprivation of children and young people's liberty in unauthorised secure accommodation placements (*Re T* [2021] UKSC 35). Indeed, not even the fact that the accommodation provider may be committing a criminal offence by failing to register as a children's home (Care Standards Act 2000, s 11) stops the court using its inherent jurisdiction in this manner (*Re T*, above, para 145).

Already the scope of the High Court's inherent jurisdiction appears remarkable. A cardinal rule of the inherent jurisdiction's continued survival is that it is not used to undermine, or 'cut across', a statutory scheme (*Attorney-General v de Keyser's Royal Hotel Ltd* [1920] AC 508, HL). Nonetheless, the court says in *Re T* that even the law's highest sanction – criminal prohibition – does not stop the inherent jurisdiction because, in effect, it is not the court's concern if some third party is committing a criminal offence as a result of the court's order. Lady Black simply states that 'there is presently no alternative that will safeguard the children who require [the inherent jurisdiction's] protection' (*Re T*, above, para 145).

Remarkable as *Re T* is, it is as nothing compared to what comes next. In the run-up to *Re T*, the issue of secure accommodation received significant publicity, led in particular by the then-Children's Commissioner for England, Anne Longfield CBE (see, e.g.

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Children's Commissioner 2019, 2020). A particular concern was the use of these unregulated placements for children under 16, depriving them of protections and safeguards under the statutory scheme.

Consequently, Parliament passed the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021. At the Committee stage, the Minister for Universities Michelle Donelan MP stated that the Regulations '*ban the practice* of placing children under the age of 16 in unregulated independent and semi-independent settings' (Hansard, Delegated Legislation Committee, 20 July 2021; emphasis added). Likewise in the Lords Debates, Baroness Berridge spoke for the Government in saying that 'Children should be placed in children's homes or foster care, which is why we have laid these regulations that will *ban the practice* of placing children under the age of 16 in unregulated independent and semi-independent settings' (Hansard, HL Deb, 22 March 2021, Vol 811, Col 701; emphasis added). The Explanatory Memorandum to the Regulations (2021/161) states that the purpose of the Regulations is 'to ensure that looked after children under the age of 16 are *only* placed in children's homes or foster care' (para 2.2; emphasis added). It continues:

> The effect of the amendments will be that looked after children under 16 *can no longer be placed in unregulated settings* . . .. Unregulated independent and semi-independent settings cannot meet the needs of looked after children under the age of 16 who are very vulnerable and often have complex needs which require the care and support provided by regulated settings. (Para 6.7; emphasis added.)

The 2021 Regulations amend the general Care Planning, Placement and Case Review (England) Regulations 2010 by adding a new r 27A, entitled 'Prohibition on placing a child under 16 in other arrangements'. Reg 27A provides that a 'responsible authority' (i.e. a local authority):

> may only place a child under 16 in accommodation in accordance with other arrangements under section 22C(6)(d), where the accommodation is—
>
> (a) in relation to placements in England, in –
> (i) a care home;
> (ii) a hospital . . .;
> (iii) a residential family centre . . .;
> (iv) a school . . . providing accommodation . . .;
> (v) an establishment that provides care and accommodation for children as a holiday scheme for disabled children . . .;

There are equivalent provisions for placements in accommodation in Wales or Scotland. While the provisions themselves are complex, the point of this Regulation is clear: unregulated accommodation for children under 16 is banned, and the local authority may only place such a child in one of the five types of accommodation listed in the Regulation itself. The new Regulations came into force on 9 September 2021.

Following that lengthy introduction, we come to *A Mother v Derby City Council* [2021] EWCA Civ 1867, an appeal against a decision of MacDonald J. The question before the court was, as formulated by MacDonald J, '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 amended statutory scheme' ([2021] EWHC 2472 (Fam), para 1).

Against that background, the answer would appear to be straightforwardly 'no'. Parliament having specifically set out to prohibit the placement of children under 16 in unregulated accommodation, it would seem self-evident that the court cannot circumvent that statutory prohibition by using its inherent jurisdiction to authorise the exact thing that Parliament has forbidden. However, that was not the answer reached by MacDonald J or by the Court of Appeal (McFarlane P, Baker and Simler LJJ).

The Regulation, as seen, is directed to the 'responsible authority'; the court seems to take the view, therefore, that this prohibition has no relevance to its own powers. The court is free to make an order which would be in breach of r 27A. As Lady Black noted in *Re T* (above, para 168), 'the court "authorises" but does not "require" the placement by a local authority of a child in an unregistered children's home'; the court itself is therefore not strictly in breach of any requirement of the new Regulations by authorising such a placement. Holding that the court retains its ability to authorise such placements under the inherent jurisdiction, the court effectively nullifies the new Regulation, since the local authority required the court's authorisation for secure accommodation in any event. But this leaves unanswered how the local authority can act on that authorisation without itself being in breach of the Regulations.

The President's answer is that 'placement in an unregistered children's home is, and has always been, wholly outside the statutory scheme, and not therefore within s 22C(6)(d) [of the Children Act 1989]' (para 73). Given that s 22C states that it applies 'where a local authority are looking after a child' (which they undoubtedly are in all these cases), this is a curious claim. The relevant sub-paragraph provides that where a local authority cannot place a child with a parent or someone else with parental responsibility for that child, they 'must' (per sub-section 5) place the child in one of the types of accommodation listed in sub-section 6:

> In subsection (5) 'placement' means –
>
> (a) placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;
>
> (b) placement with a local authority foster parent who does not fall within paragraph (a);
>
> (c) placement in a children's home in respect of which a person is registered under Part 2 of the Care Standards Act 2000 or Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016; or
>
> (d) subject to section 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section.

While an unregulated placement may indeed be outside paragraph (d), the local authority would seem to be in breach of sub-section (5) by placing a child in such accommodation.

That raises the question of what the court's power is to authorise a placement that is otherwise contrary to the Act.

That leads to McFarlane P's second reason for concluding that the placement is nonetheless permissible, namely that the Supreme Court in *Re T* said so: 'All of the Justices agreed with Lady Black that, 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' (para 74). This is flawed reasoning. The Supreme Court considered that a potential criminal offence committed by a third party did not prevent the use of the inherent jurisdiction to authorise the accommodation (*Re T*, above, para 145), but that was in circumstances where it was clear that there was no direct limitation on the actions of the local authority. Here, the Regulation explicitly limits the local authority's ability to place a child in this way, and the court's authorisation simply cannot circumvent the statutory scheme.

These cases raise acute difficulties, and the immediate and often critical needs of the vulnerable teenagers concerned is not to be underestimated. It is obvious why the judiciary do not wish to allow the only remedy at their disposal to be limited or removed, but the courts are acting in a constitutionally concerning manner, failing to comply with their role in applying the law. It is hard to see how Parliament could have been clearer. It is not permissible to place children under 16 in these unregulated placements, and the court's continued complicity in allowing the use of such placements is unacceptable. The answer to these cases is for the state to make proper provision for its most vulnerable young people, not for the court to permit the continued use of sub-standard unregulated accommodation.

Disclosure statement

The author acted as Junior Counsel for the appellant young person in *Re T* [2021] UKSC 35.

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