

Secure Accommodation: Out of sight, out of mind?

The issue of detention without charge for terrorist suspects has been a hot political potato but no-one seems to express the same level concern about hundreds of children who have committed no crime being locked up for months or, in some cases, years. Such children are detained in secure accommodation on the 'welfare' ground set out in s25 Children Act 1989 ('CA89'). Effectively, they are deprived of their liberty for their own good or for the sake of others. These children represent the most difficult, disturbed and vulnerable group in the care system, who pose a particular challenge to the local authorities looking after them and those who try to represent their interests.

The Law

S25 CA89 provides that a looked after child (whether in care or accommodated) cannot be placed or kept in 'accommodation provided for the purpose of restricting liberty' except if it appears:

'(a) that –

- (i) he has a history of absconding and is likely to abscond from any other description of accommodation;
- (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.'

Whether the grounds are met is a matter for the local authority for up to 72 hours' detention in any 28 day period (The Children (Secure Accommodation) Regulations 1991, SI 1991/1505). If the secure placement lasts no longer than that, no court authority is required. If, however, the authority wants the placement to continue beyond 72 hours, it must apply for court authority. The court determines whether the grounds set out in s25 are made out on the evidence but this is the limit of its role – it does not determine whether placement in secure accommodation is in the child's best interests. The Court of Appeal in the case Re M (secure accommodation order) [1995] 1FLR 418 decided that detention is not a question concerning the upbringing or maintenance of a child so s1 CA89 does not apply. The child's welfare is not the court's paramount consideration; it is simply a question of whether the grounds are made out or not. If they are, the order is made, authorising the local authority to place the child in a secure unit. It is up to the authority then to decide whether exercising this power is the right way to proceed. In Re LM v Essex County Council [1999] 1 FLR 988 Holman J made it clear however that the local authority could not lawfully continue to keep a child in secure accommodation within the maximum period specified in a "secure accommodation order" at a time when the local authority themselves did not consider the criteria in s 25(1) continued to be met.

Human Rights

Deprivation of liberty clearly raises questions of human rights. In the case Re K (A Child) (Secure Accommodation Order: Right to Liberty) [2001] 1 FLR 526, the

Court of Appeal decided, not surprisingly, that Article 5 of the European Convention on Human Rights is engaged in all applications under s25 CA89. Under that Article, any deprivation of liberty can only be justified if it falls within one of the specified exceptions. The only exception concerned with children (in the absence of alleged criminal conduct) is the lawful detention of a minor 'for the purposes of educational supervision'. Given that local authorities are hardly likely to use s25 CA89 for truants, is the section and its current use compatible with the Convention? The Court of Appeal decided that s25 did not need to make explicit mention of education, as education is compulsory up to the age of 16 in any event. It also decided, following a European Court of Human Rights authority (*Koniarska v UK*) that the word 'education' is not limited to classroom learning, but includes many aspects of parental responsibility for the child's welfare and protection, taking the widest view of education to cover social, emotional and behavioural and development. Thus the Court of Appeal decided that s25 CA89 is compatible with the Convention.

The other key consideration is Article 6, which guarantees the right to a fair trial. This was addressed in *Re C (Secure Accommodation Order: Representation)* [2001] 2FLR169, where the Court of Appeal found that although a secure accommodation order is not a criminal matter, as liberty is at stake, the child should nevertheless be accorded the minimum rights to a fair trial as in criminal matters under Article 6(3), namely

Everyone charged with a criminal offence has the following minimum rights :

- a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b) to have adequate time and facilities for the preparation of his defence;
- c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

However, these safeguards may in practice be more apparent than real. In the Re C case itself, the Court of Appeal found that there was no breach of Article 6 when the child's parents, and Guardian's solicitor were served and child informed of the application the day before the hearing. The child instructed her own solicitor, who was only informed of the application on arrival at court, and had only a short time with the child. This scenario is very familiar to practitioners,

who are commonly presented with a mass of papers the day before the hearing if they are lucky, and meet their client for the first time at court. By definition that client is likely to be disturbed and vulnerable, as well as probably emotional or angry at the prospect of being locked up. Local authorities do not make secure accommodation applications lightly and usually the papers reveal a catalogue of alarming incidents and grounds for extreme concern. The reality is that the child's representative is unlikely to have any viable argument and an order is effectively a fait accompli.

Use of secure accommodation

As at the 31st March 2007 the department for Children, Schools and Families statistics showed that 305 children were accommodated in secure children's homes in England and Wales. Out of these 80 (27 percent) were placed by local authorities on welfare grounds. And of that 80 children 75 were placed by local authorities in England only.

(for link see www.dcsf.gov.uk/rsgateway/DB/SFR/s000736/index.shtml)

A research report for the DfES by Jane Held Consulting Ltd ('Qualitative Study: The Use by Local Authorities of Secure Children's Homes', HMSO 2006) found that most local authorities used secure accommodation as a last resort and only after trying other types of placement which, in some cases, were inevitably doomed to failure. This approach is arguably consistent with the authorities'

statutory duty under CA89 Schedule 2 paragraph 7 (c) to take reasonable steps to avoid children being placed in secure accommodation, as well as human rights imperatives and the need to satisfy the wording of s25 CA89 itself by showing that no other type of accommodation will prevent absconding or causing harm. The Held study, however, found that outcomes were more favourable where local authorities viewed secure accommodation as a more positive potential intervention.

Interestingly, and in line with the authors' professional experience, the study found a significant gender bias. Most young people in secure placements are girls and they tend to be younger than boys when placed. The study hypothesised that there are unconscious differences in thresholds of concern, intervention and judgments about risk between boys and girls. For girls, concerns were largely related to risks of sexual abuse, harm or exploitation along with self harm and mental health problems. Most authorities did not explicitly address risk of sexual harm and prostitution for boys, who were more often placed in secure accommodation for threats to others and potential criminal behaviour. The study also suggests that boys are more likely to end up in the youth justice system earlier and faster than girls.

The report also highlights an issue which is often the cause of despair for practitioners, namely the patchy provision of mental health services for young people. Sometimes secure accommodation is the only way to keep a young

person safe when there is no available mental health secure placement, or there is professional disagreement about such a placement. As the report says (paragraph 5.8):

‘the boundaries between those young people who are sectioned under mental health legislation and those who are placed in secure welfare provision are somewhat confused. It appears that many young people end up in welfare secure after psychiatrists refer them on to social services because they do not have a diagnosable and treatable mental health disorder, regardless of the behaviour disorders they may be exhibiting’. This ‘reflects the position that local authorities often find themselves in when everyone else can refuse to take or work with a young person but the authority has (rightly) to continue to support and care for them’ (paragraph 9.28).

The report’s findings, which again match the authors’ experience, are that within secure units themselves, psychiatric and psychological services are often inadequate. The result is often that the most that a secure placement achieves is what the report describes as ‘the lowest common denominator of a good outcome’ – namely that they keep the young person alive. Nothing seems to have changed since that report was published in 2006. As an objective for a vulnerable young person, this is pitifully low.

Holly’s case

Holly (not her real name) was aged 12 when care proceedings were issued and I represented her father. She had a history of violent behaviour and sexual promiscuity and was beyond the control of her mother who was her primary carer. As she was under 13, the Secretary of State's permission had to be obtained by the local authority before an application could be made to place her in secure accommodation (the procedures for obtaining this permission are set out in a DfES letter to Directors of Children's Services dated 16 November 2006, accessible at *insert web address*). She was placed in Secure but after a while the local authority was persuaded to make one final effort to contain her in an open unit, but that lasted two weeks before she absconded again, putting herself at physical and sexual risk. She was therefore inevitably made subject to a further secure accommodation order. As is commonly the case, the only unit available was hundreds of miles from Holly's home area. None of the usual good practice in choosing placements (proximity to home area, family, friends, maintaining links with involved professionals) applies to secure accommodation, due to the scarcity of supply – authorities have to take what they can get. Indeed, local authorities sometimes obtain a secure accommodation order only to find that there is no secure placement available.

In total, Holly spent two years in a secure unit which did no more than contain her. Holly's mental health actually deteriorated while she was there, and she continued to try to harm herself, including incidents where she put a ligature around her neck. Holly repeatedly told the Guardian that she did not want to be

at the unit as she recognised that the staff could not understand her or help her. The psychiatric and psychological services available at the unit proved woefully inadequate.

But what else could be done? No-one involved in the case really believed that the unit was able to help Holly and indeed everyone recognised that she was deteriorating there but knew that if she went elsewhere, she was frankly unlikely to survive. The court's hands were effectively tied; there was no alternative to an order. Sadly, Holly's case is far from unique.

Eventually, only after persistent and determined efforts by her representatives, Holly was finally properly psychiatrically assessed and was admitted to psychiatric hospital where she at last started to receive the expert help she needed.

Alternative provision

The Held study found among local authorities a considerable level of dissatisfaction with services available in secure units and the consequent development of other alternatives to try to cope with such challenging cases. These included single child units, 'outward bound' style activities and professional specialist foster care. Such creative and often individually tailored programmes can prove even more expensive than secure accommodation.

However, some of these provisions risk straying into dangerous legal territory. The Chief Inspector of the Commission for Social Care Inspection felt obliged on **(insert date)** to write to all Directors of Children's Services reminding them that liberty can only legally be restricted in premises approved as secure accommodation by the Secretary of State and only in respect of children where the requirements of s25 CA89 are met. There is no such animal in law as a 'semi-secure' unit. It is important to remember that s25 CA89 applies to accommodation 'for the purpose of restricting liberty' and is not limited by the label attached to the unit. As the Chief Inspector put it 'an establishment is either using its premises for the purpose of restricting liberty or it is not'.

Children in placements which may in fact cross the legal boundary but which are not identified as 'secure units' are unlikely to receive the protections, such as they are, of representation by a lawyer and a Guardian or the scrutiny of the court, all of whom only become involved where the local authority takes the initiative to apply to court. Such children are heavily dependent on their Independent Reviewing Officers to spot the issue.

The future

Part of the difficulty in dealing with young people such as Holly is that such extreme cases are relatively few and far between. Each local authority only has a small number of such young people in its area, although each one is likely to absorb a disproportionate amount of time, money, and professional anxiety.

Likewise, courts and practitioners only come across a limited number of cases. It seems sensible, therefore, to develop a national strategy. We suggest the following:

- A clear understanding should be developed as to when it is appropriate to consider secure accommodation, including explicit consideration of gender bias.
- Expectations of services to be provided by all secure units should be nationally specified and crucially these must include proper psychiatric and psychological support.
- The interaction between mental health and social services provision must be urgently addressed and a common understanding achieved of the appropriate roles of each.
- Local child and adolescent mental health provision must be strengthened nationwide – appropriate intervention at an earlier stage may even avoid the need for some children to end up in secure units.
- Alternative forms of provision must be carefully analysed against the provisions of s25 CA89 and Independent Reviewing Officers should be expressly alerted to and trained on the issue.
- Each local authority should have a designated officer responsible for overseeing such cases, ensuring that any alternative provision is operated lawfully and liaising with other authorities to share experience and good practice.

- Children's representatives (Guardians and lawyers) should maintain an active network to ensure that they are aware of resources, good practice and alternatives.

It is not enough simply to contain this troubled, troublesome and troubling group of young people. We all need to aim higher.