

Whether the High Court may authorise unregulated placements for children under 16 from 9 September 2021 (Tameside MBC v AM and others)

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Family analysis: The issue in the conjoined appeals in *Tameside Metropolitan Borough Council v AM* was whether it remained 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 is prohibited by the terms of the amended statutory scheme in place from 9 September 2021, in the context of the coming into force of amendments to the Care Planning, Placement and Case Review (England) Regulations 2010. Tahmina Rahman, barrister at 1GC Family Law, considers the issues.

Tameside Metropolitan Borough Council v AM and another (Secretary of State for Education and another intervening) and other cases [\[2021\] EWHC 2472 \(Fam\)](#)

What are the practical implications of this case?

In the context of a severe shortage of available settings where restrictions can be lawfully applied, local authorities were awaiting this judgment with bated breath. This is good news for them. The wider context of the decision is this that from 9 September 2021 the types of accommodation that may be lawfully used by social services when placing a looked after child are limited to those placements that are regulated by the new regulations, ie the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021, [SI 2021/161](#), which amend the Care Planning, Placement and Case Review (England) Regulations 2010, [SI 2010/959, reg 27](#) as to the general duties of the responsible authority when placing a child. Consequently, it will be unlawful for local authorities to place children under the age of 16 in settings that are not regulated by Ofsted and the pool of available placements will be reduced. In this case, the High Court determined that it could declare that a deprivation of liberty in an unregulated placement was capable of being lawful, if there was no alternative available.

This decision follows that of the Supreme Court in *Re T (A Child)* [\[2021\] UKSC 35](#), [\[2021\] All ER \(D\) 113 \(Jul\)](#), in relation to which it was noted by Mr Justice MacDonald that while the Supreme Court ‘...was cognisant of the impending implementation of the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021’, that the question that arose in the four conjoined cases in *Tameside Metropolitan Borough Council v AM* was ‘...not one that was expressly considered by the Supreme Court’ (para [67]).

What was the background?

[Section 22\(1\)](#) of the Children Act 1989 defines children who are provided with accommodation by a local authority, including those in the care of the local authority, as ‘looked after children’. Local authorities have duties to provide accommodation to defined categories of vulnerable children. The effect of the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021, [SI 2021/161](#) is that from 9 September 2021 a placement by a local authority in an unregulated setting will not be lawful for any looked after child under the age of 16 years. MacDonald J dealt with four conjoined cases that gave rise to the same question, ie whether the High Court could authorise such placements. A further issue arose, which was whether a local authority retained the power to place a child in an unregistered children’s home. This was not determined at the hearing as the court accepted that the parties had limited time to consider the issue and it was not necessary to determine the legal question before the court.

What did the court decide?

MacDonald J decided that the High Court had the power to authorise, under its inherent jurisdiction, the deprivation of liberty of a child under 16 where the placement is prohibited under the amendments made to the Care Planning, Placement and Case Review (England) Regulations 2010, [SI 2010/959](#).

[reg 27](#) by the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021, [SI 2021/161](#). The court referred to the need for the protective jurisdiction to be used in a manner that anticipates and prevents harm rather than seeking to repair harm already suffered.

The court was satisfied such an authorisation would not undermine the will of Parliament and that the regulations were meant to regulate the powers of local authorities and not the powers of the High Court. MacDonald J referred to the words of Lady Arden in *Re T (A Child)* [\[2021\] UKSC 35](#), [\[2021\] All ER \(D\) 113 \(Jul\)](#) (similarly, in the context of a consideration of the use of the inherent jurisdiction of the High Court to authorise a local authority to deprive a child of their liberty), when she said (at para [190]):

'The Court must also, as it seems to me, respect Parliamentary sovereignty and the separation of powers. So, the question becomes not simply whether by authorising the local authority to place a child in an unregistered home a criminal offence would be committed. Rather the question is whether there is legislative intent in section 11 of the [\[Care Standards Act 2000\]](#)...to exclude the inherent jurisdiction of the court.'

But also that in *Re T (A Child)*, Lord Stephens said (at para [173]):

'The judgment of Lady Black is confined to the permissible use of the inherent jurisdiction in the context of the commission of an offence under [section 11](#) of the Care Standards Act 2000. On that basis the decision in this case should not be taken as a wider-ranging precedent for the use of the inherent jurisdiction notwithstanding that the court is aware that some other criminal offence may be committed.'

MacDonald J took the view (at para [84]) that:

'The fact that, in cases of the type that are before this court, the exercise of the inherent jurisdiction gives rise to the potential for a placement that Parliament has decided is unlawful by reference to the amended statutory regime, justifies a similarly rigorous approach to the exercise of the inherent jurisdiction to that taken in *Re T* in seeking to identify conditions of imperative necessity. However, it is not useful in my judgement to talk of those conditions of imperative necessity (articulated by Lord Stephens at [172] as "the test of necessity") as being some sort of static condition precedent or gateway to the exercise of the inherent jurisdiction in cases of the type before this court.'

Before concluding (at para [85]) that:

'...the conditions of imperative necessity contended for by a local authority as justifying in a given case the authorisation of the deprivation of the liberty of a child under the age of 16 in an unregulated placement notwithstanding the requirements of the amended statutory regime will be factors to be taken into account in the best interests analysis that the court is required to undertake when deciding an application for a declaration. They will likewise inform the court's decision on whether the authorisation is a necessary and proportionate step to take having regard to the aim it is sought to achieve.'

Noting that '...the court must ensure rigorous adherence to the procedural safeguards' (para [87]), MacDonald J also said that '[t]he inherent jurisdiction with respect to children is the safety net that, among other things, acts to ensure that laws promulgated by Parliament, however commendable their aims, do not inadvertently operate so as to do harm to children' (para [89]), before setting out (at para [90]) the principles that will apply, including that each case will turn on its own facts.

Each of the four cases before the court was therefore to be listed separately to decide the applications on the merits of each individual case.

Case details:

- Court: Family Division
- Judge: MacDonald J
- Date of judgment: 08 September 2021

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