LAW MAP:

Deprivation of liberty

Revised April 2024

This law map relates to children up to the age of 18 who are deprived of their liberty within a children's social care or health context outside the Mental Health Act 1983. It does not consider the specific rights and protections of children who are deprived of their liberty after they have been remanded to custody or been given a custodial sentence.

Case studies:

Amy is 15 and has been in care for 18 months, following the sudden death of her mother. She recently told her children's home key worker that she started self-harming when she was 7 or 8 after witnessing serious violence within her family. Around six months ago, Amy began staying away overnight from her children's home, and she now goes missing at least once a week. Last week she was taken to hospital by ambulance after two separate drivers called the police when they saw her walking along a busy dual carriageway very distressed and dishevelled. The child psychiatrist who saw Amy said she was not poorly enough to be admitted to hospital. Amy has telephoned your advocacy service because she's heard her social worker is going to court to get her a place in a secure unit in Scotland. Amy has never left her hometown. She says she'll lose her best friend if she's forced to move, and fears that if she's sent to Scotland she'll have to stay there until she's 18.

Wilson is 17 and has lived with his grandparents since he was a baby. He has learning difficulties and attention deficit hyperactivity disorder (ADHD). Last year, a new family moved in next door and Wilson struck up a friendship with their eldest boy, Jack. Wilson told Jack that his grandad locks him in his bedroom at night, and when he goes with his grandparents to their caravan he is locked in when his grandparents go out. His grandad has also sealed his windows at home and in the caravan, so Wilson cannot open them. Wilson doesn't mind being locked in his bedroom at home, but gets very scared when he hears noises in the caravan. Jack's dad emails your advocacy service to ask if Wilson's grandparents are allowed to lock him in his bedroom and in the caravan.

Your advocacy service has been contracted by a private company to make monthly visits to a children's home where three children aged 12, 14 and 17 live. On your first visit, you notice there are CCTV cameras outside the kitchen and in two places on the landing upstairs, so that the areas around each of the three children's bedroom doors are captured. You ask a senior member of staff about the cameras, and they tell you the one downstairs was installed a couple of years ago because food was going missing from the kitchen. Apparently, a child who lived in the home then was caught taking snacks to give to her friends at school. You are told the cameras upstairs are more recent: they were fitted shortly after the 12 year-old arrived because he tends to wander at night and this is a safeguarding risk. None of the children has mentioned the cameras to you.

© Article 39, April 2024 v2. Please note: the information we provide is general and does not constitute legal advice.

Key: Primary legislation; Secondary legislation; International (human rights) law; Statutory guidance; Domestic case law; Non-statutory/other guidance

Most relevant law:

European Convention on Human Rights

Domestic case law

Human Rights Act 1998

Children Act 1989

Mental Capacity Act 2005

The Children (Secure Accommodation) Regulations 1991

The Children's Homes (England) Regulations 2015

The Cross-border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022

Additional information:

United Nations Convention on the Rights of the Child

Mental Capacity Act 2005 Code of Practice

President of the Family Division of the High Court (September 2023): Revised practice guidance on the court's approach to unregistered placements

Ofsted guidance (August 2023): Placing children: deprivation of liberty orders

Revised National Listing Protocol for applications that seek Deprivation of Liberty Orders relating to children under the inherent jurisdiction (October 2023)

© Article 39, April 2024 v2. Please note: the information we provide is general and does not constitute legal advice.

Introduction

Article 5 of the European Convention on Human Rights (ECHR) grants everyone – children and adults – the right to liberty and personal security. It protects children (and adults) from unlawful deprivation of liberty. This protection has been in place ever since the UK ratified the ECHR, in 1951.

The Human Rights Act 1998 gives children (and adults) the right to challenge human rights breaches through the UK courts, rather than through only the European Court of Human Rights in Strasbourg, France. (Cases can still be taken to Strasbourg after they have passed through all of our domestic courts).

Section 6 of the Human Rights Act 1998 requires all public authorities (which includes private bodies and organisations carrying out a public function) to act compatibly with the rights in the ECHR.

Important case law from the European Court of Human Rights (***Storck v Germany*** [2005]) and the UK courts assists advocates in identifying whether a child's living conditions means that they are (or are not) deprived of their liberty and, if so, whether the deprivation of liberty is justified. It is vital that advocates are attuned to whether or not a child is deprived of their liberty. To be lawful, any restrictions placed on a child's liberty must be necessary and proportionate (otherwise they can be legally challenged). Where deprivation of liberty is lawful, there are important safeguards which advocates should be aware of.

There are three aspects of a child's living conditions which will determine whether or not they are deprived of their liberty, and their article 5 ECHR rights are engaged. When human rights are engaged, this means the protection within those rights apply.

A child will be deprived of their liberty when the following three conditions occur:

1. They are confined for more than a negligible period. This is called the **'objective element'**. While each situation must be considered on its own facts, broadly the restrictions imposed on a child must be more than what is ordinary for a child of their age living within a family setting. While it is commonplace for parents to restrict the movements of infants and young children, as children grow older they are able to exercise more autonomy. The same analysis applies to disabled children as for non-disabled children – the comparator is what is ordinary for children their age. The motivations of those who deprive the child of their liberty are irrelevant in applying this objective element. For example, parents or local authorities may impose restrictions on a child because they deem this to be in the best interests of children. This is irrelevant when assessing whether the child is, objectively, deprived of their liberty.

2. The second condition is the **'subjective element'**. This relates to consent. A child aged 16 or 17 who has either not consented to their confinement or cannot give consent (because they lack the mental capacity to do so) is deprived of their liberty: this was confirmed by the Supreme Court in 2019 in the case of ***Re D*** (D (A Child) [2019] UKSC 42).

   For children under the age of 16 who are deemed '***Gillick* competent**', it is highly likely that confinement in the face of their refusal to give consent could amount to deprivation of liberty.

   A High Court case (***Lincolnshire County Council v TGA***, August 2022) held that those with parental responsibility (or those who are guardians by virtue of a will) can consent to a child's confinement when the child is **not *Gillick*** competent **and it is not disputed that the parent is acting in the child's best interests** ([2022] EWHC 2323 (Fam)).
   (NB this does not apply to secure accommodation orders made under the Children Act 1989).

The High Court ruling in ***Lincolnshire County Council v TGA*** contradicts earlier non-binding comments made by the then President of the Supreme Court, in the 2019 ***Re D*** judgment noted above, which concerned parental consent to confinement when a child is aged 16 (or 17). In ***Re D***, the President of the Supreme Court indicated that there may be strong human rights arguments for limiting the exercise of parental responsibility when it comes to children under the age of 16 being deprived of their liberty. However, the comments carry no formal legal weight because they were not part of the main case. Nevertheless, there is other important UK case law which holds that it is legitimate for the state to restrict the exercise of parental responsibility (see, for example, ***R (Williamson and others) v. Secretary of State for Education and Employment*** paras 71-86 concerning parents' right to manifest their religion through authorising schools to inflict corporal punishment on their children).

3 The third condition is that **the state is involved to some degree in the child's confinement**. The state may be directly responsible for the child's confinement: for example, a local authority may have arranged for the child to be confined in a placement it pays for; or it may be keeping the child in circumstances where they are deprived of their liberty in one of its own children's homes. Alternatively, the state may know about, or should know about, the child's confinement – through social workers, advocates or others observing confinement when they visit a child in a children's home, supported accommodation or other setting, for instance.

If all three conditions apply, a child will be deprived of their liberty and they are protected by article 5 of the ECHR. They will also, separately, be protected by other ECHR rights, including article 8 which is the right to psychological and physical integrity.

A child does not have to be kept in a locked room or a locked building for their article 5 rights to be engaged. They may, for example, be subject to continuous monitoring and supervision through a high staff to child ratio and/or the use of CCTV cameras or electronic tracking devices. Or they may be subject to restrictions on their movement through the use of physical or chemical restraint.

Advocates should be alert to any situation where a child under 16 appears to be confined, and reliance is being placed by a public authority on the consent of a person with parental responsibility. In any situation where the confinement goes beyond the type of restrictions ordinarily imposed upon a child of the same age, advocates should always consider whether the deprivation of liberty is really necessary and proportionate. Further, if the child is Gillick competent to make a decision whether or not to accept the restrictions, and is refusing, then parental consent is very unlikely to be sufficient.

The ***Cheshire West*** [2014] UK Supreme Court case concerned two sisters in their early twenties who had been in care as children, and a man in his late thirties. They were each subject to constraints on their liberty arising from their disabilities. The Supreme Court emphasised that "people with disabilities, both mental and physical, have the same human rights as the rest of the human race" and "Far from disability entitling the state to deny such people human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities" (see para 45). The case established the so-called 'acid test' for deprivation of liberty under the Mental Capacity Act 2005, which applies to people aged 16 and over – deprivation of liberty occurs when a person is under the complete supervision and control of those caring for them, they are not free to leave and the restrictions on their liberty are the responsibility of the state. The court held that individuals who lack capacity to give their consent to deprivation of liberty must have the protection of the deprivation of liberty safeguards (DOLS). The Cheshire West judgment contained this very important reasoning from two separate Supreme Court judges:

"The question whether one is restricted (as a matter of actuality) is determined by comparing the extent of your actual freedom with someone of your age and station whose freedom is not limited. Thus a teenager of the same age and familial background as [the two sisters] is the relevant comparator for them. If one compares their state with a person of similar age and full capacity it is clear that their liberty is in fact circumscribed. They may not be conscious, much less resentful, of the constraint but, objectively, limitations on their freedom are in place." [2014] UKSC 19 (para 77)

"... what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage." [2014] UKSC 19 (para 46)

Four years after ***Cheshire West***, the then President of the Family Division of the High Court gave the following 'rule of thumb' guidelines in respect of children, in the case of ***Re A-F***:

"A child aged 10, even if under pretty constant supervision, is unlikely to be "confined" for the purpose of [the objective element].

A child aged 11, if under constant supervision, may, in contrast be so "confined", though the court should be astute to avoid coming too readily to such a conclusion.

Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion [that s/he is subject to deprivation of liberty]." [2018] EWHC 138 (Fam)

Potential routes in law leading to a deprivation of liberty of a child

Use of secure accommodation to deprive a child of their liberty	Use of the High Court's inherent jurisdiction to deprive a child of their liberty	Deprivation of liberty under the Mental Capacity Act 2005
↓		↓
Children Act 1989 section 25		Mental Capacity Act 2005 section 4A(3)-(4)

Use of secure accommodation to deprive a child of their liberty

Section 25(1) of the Children Act 1989 gives local authorities the power to apply to the family court for an order authorising the placement of certain looked after children* in secure accommodation, in the following circumstances:

- The child has a history of running away (the 1989 Act uses the term 'absconding' which is now avoided because it is impersonal and institutional) and is likely to run away from any other type of accommodation; **and**
- If the child runs away, they are likely to suffer significant harm.

*Secure accommodation orders may be made in respect of children who are the subject of a care order under section 31 of the Children Act 1989, or if they are accommodated under section 20(3) of the Children Act 1989 (see ***Re P*** case). Secure accommodation orders **cannot** be made in respect of children who are detained under the Mental Health Act 1983, or children who have been sentenced under section 250 or 259 of the Sentencing Code. They may not be made in respect of children accommodated under section 20(5) of the Children Act 1989 or in respect of children who are the subject of a child assessment order under section 43 of the Children Act 1989 – see regulation 5, The Children (Secure Accommodation) Regulations 1991.

The use of secure accommodation is meant to be a measure of last resort: the Children Act 1989 requires local authorities to avoid the need for children in their area to be placed in secure accommodation (Paragraph 7(c), Schedule 2 of the Children Act 1989). In the High Court case of ***Re SS***, the judge explained:

> "*The use of s.25 will very rarely be appropriate and it must always remain a measure of last resort. By this I mean not merely that the conventional options for a child in care must have been exhausted but so too must the 'unconventional', i.e. the creative alternative packages of support that resourceful social workers can devise when given time, space and, of course, finances to do so. Nor should the fact that a particular type of placement may not have worked well for the child in the past mean that it should not be tried again. Locking a child up (I make no apology for the bluntness of the language, for that is how these young people see it and, ultimately, that is what is involved) is corrosive of a young person's spirit. It sends a subliminal and unintended message that the child has done wrong which all too often will compound his problems rather than form part of a solution.*" [2014] EWHC 4436 (Fam)

There are important procedural safeguards relating to the use of secure accommodation:

- A court cannot make an order under section 25 of the Children Act 1989 if the child is not legally represented at the hearing unless the child has been informed of their right to representation and has refused this or failed to apply (section 25(6) Children Act 1989).
- Local authorities must appoint at least three persons – with at least one not employed by the local authority – to review the keeping of the child in secure accommodation within one month of the start of the placement and then at intervals not exceeding three months (regulation 15, The Children (Secure Accommodation) Regulations 1991). Statutory guidance states that an independent reviewing officer (IRO) may be one of the two panel members employed by the local authority, but s/he must not be the IRO for the child who is the subject of the secure accommodation review (para 4.14, IRO handbook). The guidance further emphasises: "A 'secure accommodation panel' review is not the same as a review of the child's overall care plan and is restricted to the specific question about the necessity of a placement in secure accommodation for an individual child" (para 4.15, IRO handbook).

- Secure accommodation panel reviews must consider whether:

  (a) the criteria for keeping the child in secure accommodation continue to apply;

  (b) the placement in such accommodation in a community home continues to be necessary; and

  (c) any other description of accommodation would be appropriate for him,

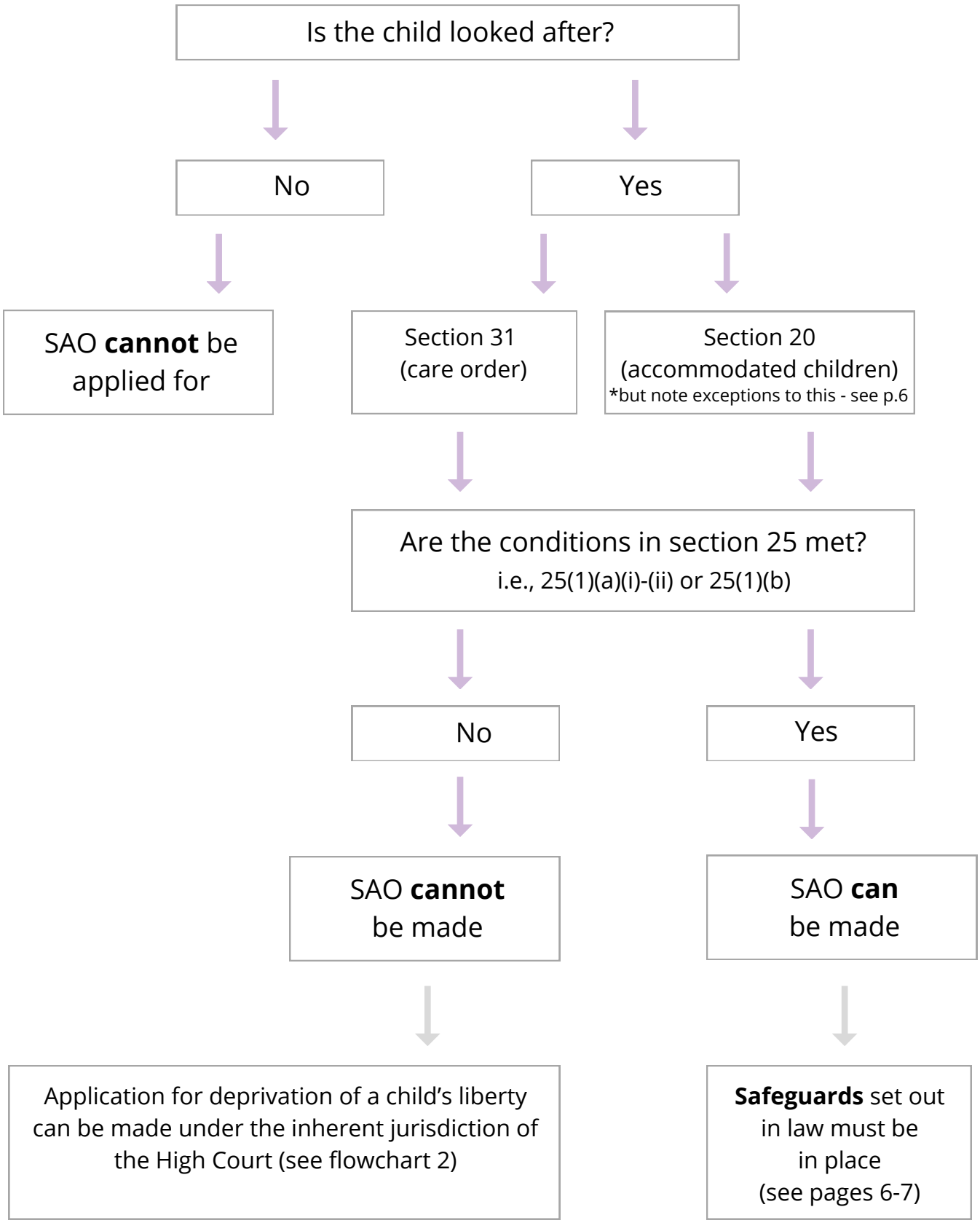
  and in doing so shall have regard to the welfare of the child whose case is being reviewed (regulation 16, The Children (Secure Accommodation) Regulations 1991).

- The wishes and feelings of the child, his or her parents and any independent visitor must (wherever practicable) be taken into account during reviews of the use of secure accommodation (regulation 16).

- If the secure accommodation panel believes the criteria for depriving the child's liberty no longer applies, or another placement would be more appropriate, an urgent review of the child's care plan must be convened, chaired by the child's IRO (para 1.44, Guide to Children's Homes Regulations). **It is unlawful for a child to be detained in secure accommodation on welfare grounds, when the Children Act 1989 criteria no longer applies.**

In 2017, due to a shortage of places in England, amendments were made to the Children Act 1989 which permit local authorities in England (and Wales) to seek the authorisation of the court under section 25 to place a child in secure accommodation in Scotland (section 10 and Schedule 1 of the Children and Social Work Act 2017). The duties around secure accommodation reviews (in regulation 15 of The Children (Secure Accommodation) Regulations 1991) were not extended to children deprived of their liberty in secure accommodation in Scotland, meaning children looked after by English local authorities and placed in secure accommodation in Scotland are not legally entitled to the same level of protection and oversight as those who are placed in England.

Flowchart 1: Deprivation of liberty and secure accommodation orders (SAO) - section 25 of the Children Act 1989



Use of the High Court's inherent jurisdiction to deprive a child of their liberty

The High Court's inherent jurisdiction is an ancient 'safety net' power to make orders to protect highly vulnerable children and adults. It is a common law power, meaning it is derived from case law rather than an Act of Parliament.

Section 100(4) of the Children act 1989 provides that the High Court may only grant leave for an application for it to exercise its inherent jurisdiction in respect of an individual child where there is no other statutory order available and there is reasonable cause to believe that the child is likely to suffer significant harm without the court exercising its inherent jurisdiction.

The use of the High Court's inherent jurisdiction may apply to a child of any age, including those aged 16 and 17. There is no requirement that the child lacks ***Gillick*** competence (if aged 15 or below) or mental capacity (if aged 16 or 17) to consent to the proposed confinement.

In 2019, in the case of ***A City Council v LS, RE and KS (A Child)***, the High Court confirmed that use of the inherent jurisdiction power is not available when a child is not looked after, is aged 17 and their parent does not give consent for them to be accommodated by the local authority ([2019] EWHC 1384 (Fam)). This is because section 100(2)(b) Children Act 1989 prevents the High Court's inherent jurisdiction power being used as a means of the local authority requiring a child to be accommodated.
(**NB** care orders under section 31 of the Children Act 1989 cannot be made in respect of children aged 17, and children may only be accommodated under section 20 of the Children Act 1989 with parental consent (though parental consent is not required when a child is aged 16 and 17 and agrees to being accommodated (section 20(11) Children Act 1989)).

Inherent jurisdiction orders are invariably made when there is no secure accommodation available for a looked after child (and therefore section 25 of the Children Act cannot assist) or where other arrangements (i.e. not under section 25) would be more suitable for the child.

In ***T (A Child)*** [2021], the Supreme Court considered, among other matters, whether the court's inherent jurisdiction power could be used to deprive a looked after child of their liberty when Parliament has made provision for this under section 25 of the Children Act 1989. The court highlighted that children deprived of their liberty under the inherent jurisdiction are often placed in accommodation which has not been designed for this (as secure children's homes are), and that children therefore lose important safeguards. The judge giving the leading judgment expressed "deep anxiety that the child care system should find itself struggling to provide for the needs of children without the resources that are required" and concluded: "It is fortunate that the inherent jurisdiction is there to fill the gaps in the present provision, but it cannot be doubted that it is only an imperfect stop gap, and not a long term solution" (para 163). She explained the possible consequences for children of the High Court not being able to use its inherent jurisdiction power:

> *"...it is unthinkable that the High Court, with its long-established role in protecting children, should have no means to keep these unfortunate children (and others who may be at risk from them) safe from extreme harm, in some cases death. If the local authority cannot apply for an order under section 25 because there is no section 25 compliant secure accommodation available, I would accept that the inherent jurisdiction can, and will have to be, used to fill that gap, without clashing impermissibly with the statutory scheme".* [2021] UKSC 35 (para 141)

The courts have developed procedural safeguards for children which mirror some of the section 25 safeguards, namely:

- The child is separately legally represented;
- A Cafcass guardian is appointed to assist the court;
- Reviews by the court of the child's continuing confinement.

However, deprivation of liberty orders made under the inherent jurisdiction power inevitably mean the court is authorising children to be placed in accommodation which has not been approved by the Secretary of State (in effect, Ofsted) for the purpose of depriving children of their liberty.

Advocates may become aware of supported accommodation for looked after children aged 16 and 17 being used where the child does not receive any day-to-day care or consistent adult supervision. It is difficult to imagine a child being in circumstances where the court has deemed it necessary to deprive them of their liberty to prevent significant harm but that they don't need day-today care. Ofsted guidance (August 2023) states that: "Children of any age, subject to a DoL [deprivation of liberty order], generally require high levels of care and supervision. This means that a child subject to a DoL will likely be placed in a children's home or a care home service".

Advocates should start from the presumption that a child deprived of their liberty should be living in accommodation where they receive care (not supported accommodation) which is registered and inspected by Ofsted or Care Inspectorate Wales (CIW). Ofsted's August 2023 guidance states:

A DoL order makes it lawful for a child to be deprived of their liberty. The court authorises the order and any restrictions are set out clearly in the order.

The order allows these restrictions as a maximum – it does not mean that, as a provider, you must apply all the restrictions at all times (for example, if the need for the restrictions has reduced and this has been agreed with the child's social worker).

The order only makes the restrictions/deprivation of liberty lawful – it does not mean that the provider does not need to register with Ofsted or CIW if operating a children's home or care home service.

The court may refuse to authorise a deprivation of liberty order if the placement provider will not apply to register.

The President of the Family Division of the High Court issued revised guidance in September 2023. This states that:

The Courts when considering a DoL application should enquire into whether the proposed placement is registered or unregistered. If it is unregistered it should enquire as to why the local authority considers an unregistered placement is in the best interests of the child.

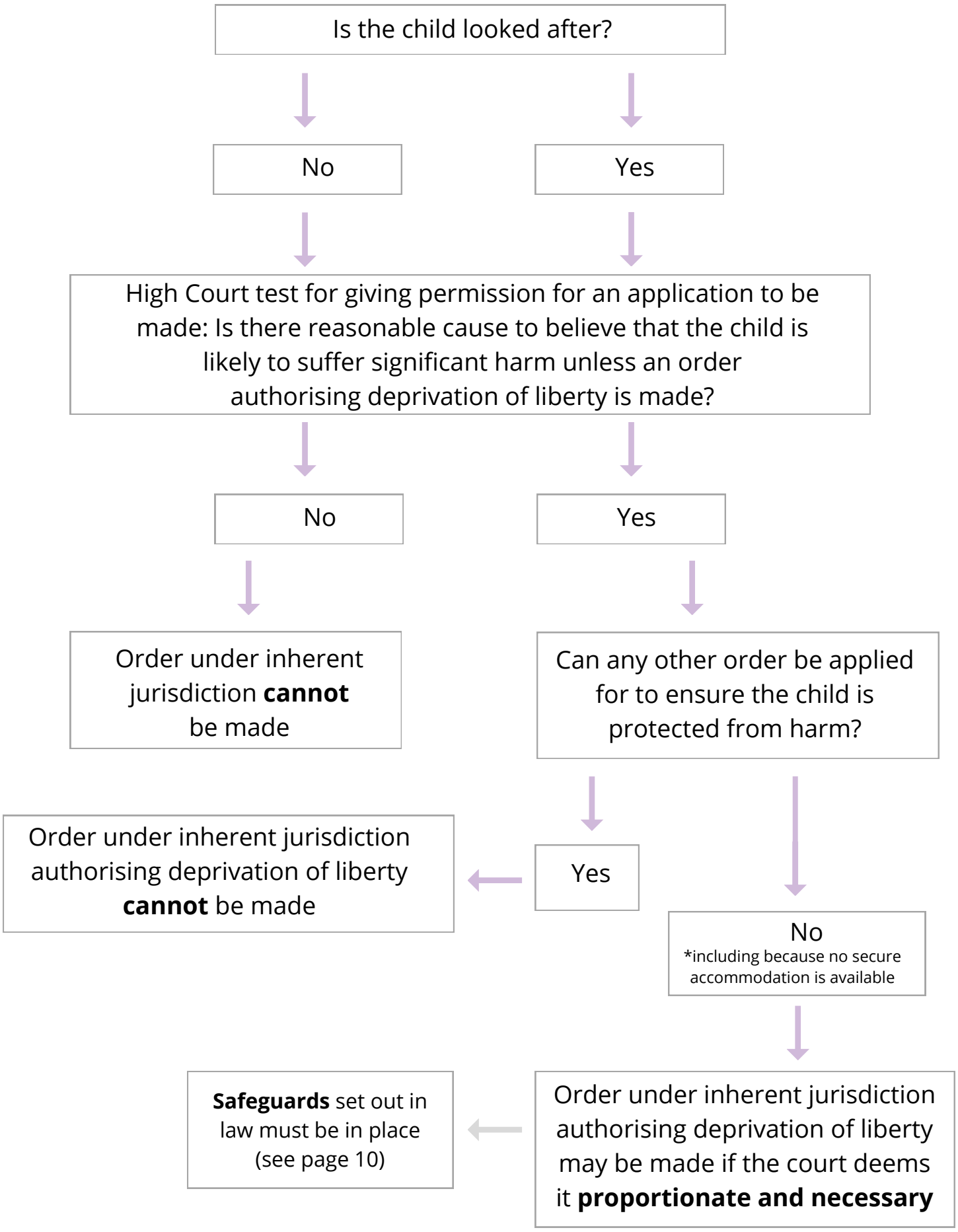
The Court may order the local authority to inform Ofsted/CIW within 7 days if it is placing a child in an unregistered placement.

It is increasingly common for children to be deprived of their liberty in conditions of 'solo living' – that is, there are no other children living in the accommodation. This inevitably raises safeguarding challenges and risks, including increased isolation and loneliness and lack of child witnesses where there are concerns about inappropriate or harmful treatment by staff.

Regulations introduced in 2022 in Scotland mean that English local authorities no longer must seek parallel authorisation from the Scottish courts when the High Court has used its inherent jurisdiction to authorise the deprivation of liberty of a child in Scotland.

Importantly, the 2022 Regulations require that a child subject to a deprivation of liberty order is informed by the Scottish Government of the availability of advocacy services "as soon as reasonably practicable". Advocacy services in this context are defined as: "services of support and representation provided for the purposes of assisting a child to convey their needs and views to the manager of the residential care setting in which they have been placed". The 2022 Regulations allow the Scottish Government to enter into arrangements with those outside local authorities, the Scottish Children's Hearings System or the Scottish Children's Reporter to provide these advocacy services.

Flowchart 2: Deprivation of liberty using the inherent jurisdiction of the High Court



Deprivation of liberty under the Mental Capacity Act 2005

A 16 or 17 year-old who lacks capacity to consent to arrangements for their care and treatment which give rise to a confinement may be deprived of their liberty under section 4A(3) and (4) of the Mental Capacity Act 2005, through an order granted by the Court of Protection (section 16(2)(a) Mental Capacity Act 2005).

The lack of capacity can be temporary or permanent. Section 2(1) of the Mental Capacity Act 2005 defines a lack of capacity as:

> *"... a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."*

Importantly, section 2(3) provides that:

> *"A lack of capacity cannot be established merely by reference to—*
> *(a) a person's age or appearance, or*
> *(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity."*

There must also be medical evidence that the 16 or 17 year old has a mental disorder (within the meaning of the Mental Health Act 1983*) in order for any order to be made.

> * But ignoring the so-called 'learning disability' exception that applies to detention for treatment under section 3 Mental Health Act 1983. In other words, it would be possible for the Court of Protection to authorise the deprivation of liberty of a 16 or 17 year-old with a mild learning disability if they lacked capacity to consent to their confinement.

An application to the Court of Protection for a deprivation of liberty order may be made by, among others, a person with parental responsibility or a local authority. The expectation is that the application should be made by a local authority, even if it relates to situations where the child (aged 16 or 17) is not a looked after a child. Prior to making the application, the applicant must consult the child and in particular inform them:

- that an application is being made to the court;
- that the application is concerned with whether they lack capacity and if the court should authorise their deprivation of liberty;
- about the proposed arrangements under the order sought;
- that they have the right to express their views, wishes and feelings, and that these will be communicated to the court;
- that they have the right to take part in the proceedings by being joined as a party or by some other arrangement;
- about the help that is available if they do not agree with the proposed arrangements in the court application (para 35, PRACTICE DIRECTION 11A – DEPRIVATION OF LIBERTY APPLICATIONS)

The local authority should also identify who can act as the child's representative in the proceedings (see the COPDOL11 form, section 4).

In the case of ***KL (A Minor: deprivation of liberty)*** ([2022] EWCOP 24), the Senior Judge of the Court of Protection made clear her concerns as to the circumstances of cases put to the court for authorisation of deprivation of liberty of 16 and 17 year-olds, and stated that such cases would almost invariably be called in for a full hearing before the court.

The Mental Capacity Act 2005 places a duty on local authorities to make arrangements for independent mental capacity advocates (IMCAs) to be available to support 16 and 17 year-olds (and adults) in a limited set of circumstances. However, it is rare for any of these limited circumstances to apply to 16 and 17 year-olds in the context of deprivation of liberty for two reasons:

- The legislation only imposes a duty to appoint an IMCA in cases involving accommodation provided by local authorities under provisions relating to adults;

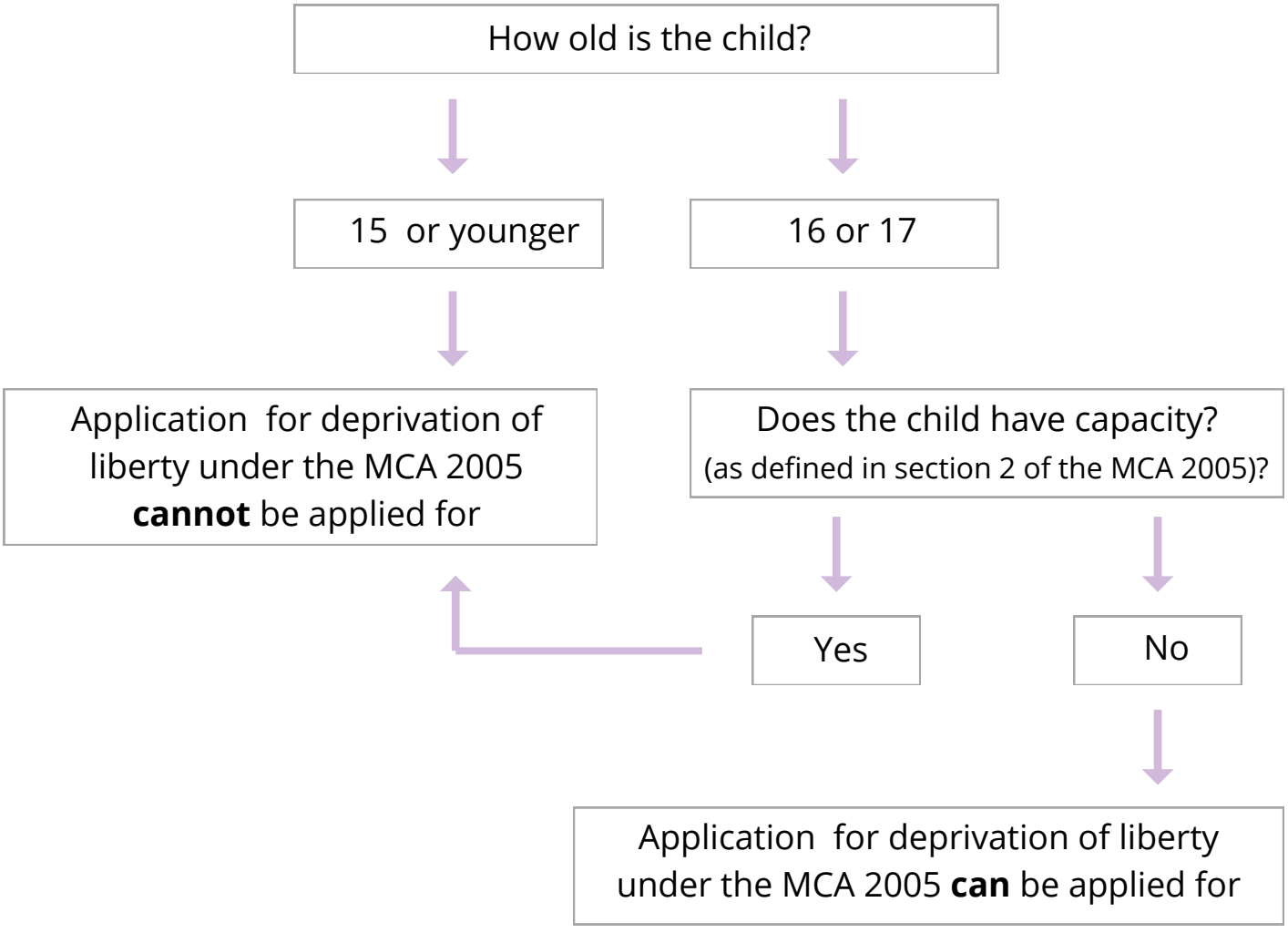
- Although an IMCA must be appointed when an NHS body is proposing to accommodate a person aged 16 or over in hospital for longer than 28 days, or in a care home for longer than 8 weeks (section 38 Mental Capacity Act 2005), an IMCA only has to be appointed when there is no other non-professional person who can be consulted about the child's (or adult's) best interests. The majority of 16 and 17 year-olds will have parents or other family members who can be consulted.

In the very limited circumstances where there is a duty to appoint an IMCA, section 35(6) entitles them to:

- Undertake interviews in private with the child (or adult);

- Examine and take copies of any health record, any local authority social care record and any record held by a person registered under Part 2 of the Care Standards Act 2000 (this includes children's homes) "which the person holding the record considers may be relevant to the independent mental capacity advocate's investigation".

Flowchart 3: Deprivation of liberty under the Mental Capacity Act 2005



Key points

- A child aged 16 or 17 who lacks capacity may be deprived of their liberty under the Mental Capacity Act 2005 via an application to the Court of Protection.

- The framework for all other deprivation of liberty of children (outside the mental health and criminal justice systems) is either section 25 Children Act 1989, which provides for the making of a secure accommodation order in respect of a looked after child, or an application for the High Court to use its inherent jurisdiction to prevent a child suffering significant harm.

- Local authorities do not have the power to consent to the confinement of a child of any age.

- In ***D (A Child)***, the Supreme Court held that a parent does not have the power to authorise the confinement of their child aged 16 or 17.

- In respect of children under the age of 16, advocates should be alert to the possibility that a child may be unlawfully deprived of their liberty in circumstances when restrictions have been imposed on the basis of parental consent and the child is approaching their 16th birthday and/or is clearly ***Gillick*** competent. In such scenarios, it is very likely that deprivation of liberty will be lawful only if authorised by the court.

- Parental consent for deprivation of liberty in respect of a child under the age of 16 who is not ***Gillick*** competent will be lawful only if the deprivation of liberty is in the child's best interests / no reservations have been raised by the local authority or other body.

- The Mental Capacity Act 2005 provides no power to public bodies to authorise deprivation of liberty. Deprivation of liberty safeguards (known as 'DOLS') do not apply to children; they protect adults in hospitals and care homes. The Liberty Protection Safeguards will apply to children aged 16 and 17 (and adults), and extend across residential and community settings. However, they are not being implemented during this parliamentary session so any changes will take place after the 2024 general election. Article 39 will update this law map once the Liberty Protection Safeguards come into force.

- Any application to authorise deprivation of liberty under the Mental Capacity Act 2005 should be made to the Court of Protection. The Court of Protection's power to authorise deprivation of liberty under the Mental Capacity Act 2005 applies only to children aged 16 and 17 who lack capacity to consent to the arrangements which will confine them. In some cases, the Court of Protection may transfer the case to the High Court for it to consider authorising deprivation of liberty under its inherent jurisdiction power (article 2, The Mental Capacity Act 2005 (Transfer Of Proceedings) Order 2007).

- A child who is looked after by an English local authority and is living in a secure children's home in England or Wales or a secure centre in Scotland is, by definition, deprived of their liberty. A local authority can place a child in such accommodation for up to 72 hours (in a 28-day period), after which it must seek authorisation of the court (regulation 10, The Children (Secure Accommodation) Regulations 1991).

- In ***T (A Child)***, where a place in a secure children's home was unavailable, the Supreme Court held that it was lawful for the High Court to use its inherent jurisdiction power to authorise the placement of a child in a children's home or other accommodation which had not been authorised as secure accommodation.

- A looked after child who is not living in a secure children's home or a secure centre (in Scotland) may be subject to restrictions which amount to a deprivation of liberty, and in such situations the court's authorisation is required (either under section 25 of the Children Act 1989, or through the High Court using its inherent jurisdiction power). Failure to seek such authorisation may mean the child is being unlawfully deprived of their liberty.

- **Whatever the legal route, whenever a child is deprived of their liberty there must be robust safeguards in place to ensure the restrictions are proportionate and that they last only as long as is absolutely necessary. Blanket use of CCTV in private living areas or other general constraints on children's privacy and liberty - that is, arrangements that have not been carefully tailored to an individual child's current needs and circumstances - are likely to be disproportionate and a breach of their human rights.**

- **Supported accommodation for looked after children aged 16 and 17 (formerly known as semi-independent and independent accommodation) is very unlikely to be suitable for children deprived of their liberty. This is because supported accommodation is intended for children who are deemed to be able to manage with a higher degree of independence than their peers, and to not require day-to-day care or consistent adult supervision.**

- **There is an expectation that accommodation that is not already registered with Ofsted will be registered as a matter of urgency when it is used to deprive a child of their liberty. Ofsted has a priority application process in these circumstances.**

- **Independent reviewing officers (IROs) are required to consider referring a child's situation to Cafcass where there is a breach of their rights in any material respect – this includes breach of a child's rights under the Human Rights Act 1998 (regulation 45(3), The Care Planning, Placement and Case Review (England) Regulations 2010).**

- **Cafcass is empowered to bring Human Rights Act 1998 claims on behalf of looked after children, following referral by an IRO (regulation 3, The Children and Family Court Advisory and Support Service (Reviewed Case Referral) Regulations 2004).**

- **Advocates have different areas of knowledge and specialisms. Where children are looked after by local authorities, Article 39 is strongly of the view that information and support from a Children Act 1989 advocate should continue to be available when, very rarely, the local authority has appointed an independent mental capacity advocate.**