

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

Supplementary submission to Education, Children and Young People Committee from the Children and Young People's Commissioner Scotland 20 May 2022

We are grateful to the Committee for the opportunity to provide evidence on 18 May 2022. We would like to offer the following supplemental evidence in response to the discussions and the questions of Committee members.

Temporary/Emergency nature of Regulations

We wish to draw the Committee's attention to the risk that these Regulations provide no means of restricting the length of time for which a child may be placed in Scotland on a succession of three-month orders.

We are aware of three recent cases where children have been placed in Scotland for 18 months; 19 months; and 22 years 4 months, respectively. This cannot be justified as an 'emergency' or 'temporary' placement. This unregulated practice is not consistent with the requirement that any deprivation of liberty should be for the "shortest appropriate period of time" (Article 37 UNCRC). This kind of drift will be almost inevitable in every case, given the shortage of suitable accommodation in England, unless the Regulations distinguish between emergency/temporary and more permanent placements. As highlighted in our main submission to the Committee, there are existing Regulations which are intended to meet the children's needs in more long-term or even permanent placements of children in Scotland.¹

Competence of restricting length of initial order

¹ The Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013. Available here: <https://www.legislation.gov.uk/ssi/2013/99/contents/made>

In relation to Ross Greer MSP's question on restricting the length of time for which the High Court can make an order, we note that the intended effect of the proposed Regulations is to restrict the length of time for which a High Court Order is enforceable in Scotland i.e 3 months.

In terms of its own powers, the High Court has been routinely making Deprivation of Liberty (DoL) orders for up to six months. Therefore, if our proposal to limit the first order to 22 days is not competent, then neither is the provision in Regulation 5 which limits the DoL order to three months.

In practical terms, our proposal is that the High Court must be notified of the child's needs at the 22 days point, which is what would happen to all children under secure accommodation interim orders. There would have to be a consideration of the child's rights and needs and a Child's Plan in place for their care, education and treatment if it is in their best interests to protect them in the emergency placement. These safeguards do not exist at all in the Regulations.

Advocacy and Legal Representation

The clear and consistent messaging from care experienced children and young people, particularly during the independent Care Review, is that they often feel like the decisions made in the care system happen to them rather than with them; instead of being supported to be active agents in their own lives, they are passive recipients of adult charity. Providing guaranteed access to legal advice and representation, as well as to judicial scrutiny, is critical to empowering children to access their rights under Scots law. Any role for the Scottish Ministers should be a backstop to that. As noted in The Promise, the provision of advocacy does not replace rights to legal representation, rather the two roles have a separate, distinct purpose.²

Practice solutions and Legal Rights

² Page 116. Report available here: <https://www.carereview.scot/conclusions/independent-care-review-reports/>

We are aware that the Scottish Government is developing practice documents to manage the relationships and information sharing between the placing local authority, the receiving local authority and the residential unit. While we welcome much of this, we strongly reiterate our comments about the necessity of ensuring that rights are protected in law. There must be full, comprehensive and holistic assessment across all services aligned with the National Practice Model and GIRFEC frameworks for assessment and planning, rather than the English law model. The child and parents must be meaningfully involved in all decision-making for these needs assessments. We ask the Committee to note the limitations of policy/practice documents and guidance in ensuring statutory duties are fulfilled and rights upheld.

The role of the Scottish Ministers

There are a number of questions around the proposed role for the Scottish Ministers as a human rights safeguard for the child, and a deterrent to local authorities placing children in Scotland unnecessarily. We have framed these questions around an exemplar case study which would allow the Minister to answer these questions and set out in more detail how this process would work to protect the child's rights in practice. The Case Study is included in Appendix A.

We trust this will be of assistance to the Committee in its deliberations.

Children and Young People's Commissioner Scotland

20 May 2022

Appendix A - Case Study and Questions

F is 14 years old. She is autistic and has significant experience of trauma stretching back to early childhood. She was moved to Scotland in the middle of the night after being admitted on an emergency basis to an adult mental health facility in England, in January 2021. She was transported in a van, restrained by strangers employed in a private security company and driven hundreds of miles from home. She has been deprived of her liberty in a three-bedroom residential unit in a remote and rural part

of Scotland. She is the only child in the unit and is supervised on a 24-7 basis by a rotating shift of three members of staff whom she had never met before.

F is only receiving 4 hours per week of basic level education, which is provided online in her bedroom. She wants to be able to attend school and spend time with other children her age. F has her mobile phone and internet access and access to a television monitored and restricted by the staff. She only has contact with her mother and siblings once per month for a few hours inside the unit. Her allocated social worker contacts her by telephone once per fortnight and she has not heard from her Guardian or the solicitor she was given in England since she arrived in Scotland.

She is routinely restrained when she exhibits distressed behaviours. She has not been assessed by local social workers, CAHMS services or a Mental Health Officer, F misses her family and friends and has pleaded with her carers to allow her to 'go home'. F has never met an advocate or a solicitor in Scotland. She has self-harmed and had to be hospitalised on two occasions. The placing local authority and the providers have declined to make arrangements for other local and community services. F has been told that she has to stay in Scotland until a place becomes available in England.

In these circumstances, how would the Regulations protect this child's rights?

How will F be made aware of her rights under Scots law, and in terms of these Regulations?

How would the Scottish Ministers be made aware that F does not believe she is receiving an adequate education or additional support for learning? Or access to play and leisure or association with other children, or direct contact with her family?

What steps will the Scottish Ministers take upon being alerted?

Will they speak directly to F about what she wants? Who will do this?

The placing local authority says it has conducted welfare needs assessment (based on English law and policy) and is of the view that A's needs are being met, and that it is not possible for her to attend a school even on a part time basis.

Will the Scottish Ministers instruct their own Scots law-based assessment? From whom?

Under Scots law would F be able to raise proceedings in the Health and Education Chamber of the First-tier Tribunal for Scotland (ASN Tribunal)?

If not, how would F be able to challenge the failure to fulfil statutory, human rights and Corporate Parenting duties of each of the public authorities in Scotland?

The Scottish Ministers send a notification to the placing authority alleging a breach of the undertaking to meet the child's needs.

What will be the terms of the notification? What supporting evidence will be required?

Would the child automatically be granted legal aid and be a party in the proceedings?

Any there any legal or constitutional barriers to the Scottish Ministers taking action against an English Placing authority for breaches of the undertaking?

Unlike a relationship between a solicitor and a client, there is no formal or regulated relationship between F and the Scottish Ministers. The Scottish Ministers are therefore not acting on behalf of, nor on the instructions of F.

Do the Scottish Ministers owe a fiduciary duty to F? What rights does F have in terms of the Scottish Ministers' role?

How will the Scottish Ministers ensure they are taking ongoing instruction from F and that they have her informed consent at all stages? Who will explain her legal rights to her?

The Scottish Ministers lodge an application at the Sheriff Court in terms of Regulation 13.

In what terms would an application to the Sheriff court be made?

What order would the Sheriff court make?

Will there be an interim hearing of evidence?

Will the child be supported to participate in any hearing?

If granted, would the Placing Authority be able to appeal the decision?

If refused, would the child, parents or Scottish ministers be able to appeal the decision?

How would any order be enforced on the English authority?

What would happen to keep the child safe in the meantime? Are the duties of the Scottish authority engaged here?

What would be the consequences if the placing authority failed to comply or obtemper any order of the Sheriff Court?

Would the child have a remedy against the Scottish Ministers if they failed to raise these proceedings?