



ECHR 70 - Child protection, consent and confinement: is article 5 jurisprudence in a head on collision with safeguarding?

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Crisis in secure accommodation

Holman J in [***A Local Authority v AT and FE \[2017\] EWHC 2458***](#) (at paragraph 6):

"I am increasingly concerned that the device of resort to the inherent jurisdiction of the High Court is operating to by-pass the important safeguard under the regulations of approval by the Secretary of State of establishments used as secure accommodation. There is a grave risk that the safeguard of approval by the Secretary of State is being denied to some of the most damaged and vulnerable children."



Use of accommodation for restricting liberty.

(1) Subject to the following provisions of this section, a child who is being looked after by a local authority may not be placed, and, if placed, may not be kept, in accommodation provided for the purpose of restricting liberty (“secure accommodation”) unless it appears—

(a) that—

(I) he has a history of absconding and is likely to abscond from any other description of accommodation; and

(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.



S25 CA 1989

Section 25 of the Children Act 1989 provides the Family Court with the power to grant an order affording a local authority discretion to keep a child within secure accommodation. Secure accommodation is defined within s 25 as 'accommodation for restricting liberty'.

Secure accommodation in a community home must be approved by the Secretary of State², with such placements often being referred to as 'registered' or 'approved' secure accommodation, on the basis that they have the required approval to operate as secure children's homes. Regulation 3 of the the Children (Secure Accommodation) Regulations 1991 ('the 1991 Regulations') is unequivocal in its terminology:

'Accommodation in a community home shall not be used as secure accommodation unless it has been approved by the Secretary of State for such use and approval shall be subject to such terms and conditions as he sees fit'.



S25 CA 1989

Section 25 itself does not prescribe limits or requirements on what can and cannot be lawfully used as secure accommodation or 'accommodation restricting liberty', rather it is the regulations that do so.



Re B

This case raises four important and overlapping questions on the interpretation of s.25.

- (1) What is the meaning of "secure accommodation" in s.25?
- (2) What are the relevant criteria for making a secure accommodation order under s.25?
- (3) What part does the evaluation of welfare play in the court's decision?
- (4) When considering an application for an order under s.25, is the court obliged, under Articles 5 and 8 of the ECHR, to carry out an evaluation of proportionality?



The meaning of "secure accommodation"

58. Lady Black was careful to stress that her observations about s.25 were not to be considered as definitive or binding. At paragraph 112, she said:

"S.25 has played no direct role in the proceedings in the present case, and the bulk of the argument about it has occurred in writing after the conclusion of the hearing in this court. Nothing that we say about it will conclusively resolve the difficult questions that arise as to its scope and operation, and that is as it should be, because it would be undesirable that final views should be formed, without there having been an opportunity for oral argument. Furthermore, it would be better that such issues as there are about the scope of section 25 should be resolved in a case where the relevant facts have been found, so that the section can be interpreted with reference to a real factual situation."



The meaning of "secure accommodation"

With that caveat, however she set out her conclusions in these terms, at paragraphs 113-5:

"113. The exercise in which we have engaged has, however, been sufficient to persuade us that section 25 is not intended to be widely interpreted, so as to catch all children whose care needs are being met in accommodation where there is a degree of restriction of their liberty, even amounting to a deprivation of liberty. There is much force in the argument that it is upon the accommodation itself that the spotlight should be turned, when determining whether particular accommodation is secure accommodation, rather than upon the attributes of the care of the child in question. This fits with the language used in section 25(1), when read as a whole. It is also consistent with the objective of ensuring that the section is not so widely drawn as to prejudice the local authority's ability to offer children the care that they need, and it ought to make it more straightforward to apply than would be the case if the issue were dependent upon the features of a child's individual care regime, so that the child might be found to be in secure accommodation in all manner of settings.



The meaning of "secure accommodation"

114. A restrained construction of the section is also justified by the fact that, far from being concerned with the routine sort of problems that might require a child's freedom to be curtailed, the section has a "last resort" quality about it. It is concerned with accommodation which has the features necessary to safeguard a child with a history of absconding who is likely to abscond from any other description of accommodation or to prevent injury where the child in question would be likely to injure himself or others if kept in any other description of accommodation.



The meaning of "secure accommodation"

115. Of course, training the spotlight on the accommodation itself does not provide a complete answer to the question as to what falls within the definition of secure accommodation. Some secure accommodation will be readily recognisable from the fact that it is approved as such by the Secretary of State, but that is by no means a universal hallmark, as that approval is not needed for all types of secure accommodation. Moreover, given that it is contemplated that secure accommodation might be provided in places such as hospitals, it seems likely that there will not infrequently be more than one purpose of the child being in the accommodation, and there is much to commend Wall J's approach to such a situation, that is to count within the definition of secure accommodation "designed for or having as its primary purpose" the restriction of liberty. Equally, the section will have to be interpreted in such a way as to allow for situations where only a part of the premises is made over to restricting liberty."



The meaning of "secure accommodation"

59. I respectfully agree with Lady Black's obiter observations in *Re D* as to the meaning of "secure accommodation". Like her, in considering this issue I have been increasingly drawn back to Wall J's analysis in *Re C*. In my judgment, "secure accommodation" is accommodation designed for, or having as its primary purpose, the restriction of liberty. As Wall J acknowledged, however, premises which are not designed as secure accommodation may become secure accommodation because of the use to which they are put in the particular circumstances of the individual case.



Relevant criteria revisited

98. Having analysed the roles played by welfare and proportionality in the decision-making process under s.25, I conclude that, in determining whether the "relevant criteria" under s.25(3) and (4) are satisfied, a court must ask the following questions.

(1) Is the child being "looked after" by a local authority, or, alternatively, does he or she fall within one of the other categories specified in regulation 7?

(2) Is the accommodation where the local authority proposes to place the child "secure accommodation", i.e. is it designed for or have as its primary purpose the restriction of liberty?

(3) Is the court satisfied (a) that (i) the child has a history of absconding and is likely to abscond from any other description of accommodation, and (ii) if he/she absconds, he/she is likely to suffer significant harm or (b) that if kept in any other description of accommodation, he/she is likely to injure himself or other persons?



Relevant criteria revisited

(4) If the local authority is proposing to place the child in a secure children's home in England, has the accommodation been approved by the Secretary of State for use as secure accommodation? If the local authority is proposing to place the child in a children's home in Scotland, is the accommodation provided by a service which has been approved by the Scottish Ministers?

(5) Does the proposed order safeguard and promote the child's welfare?

(6) Is the order proportionate, i.e. do the benefits of the proposed placement outweigh the infringement of rights?



What are the relevant criteria for making an order under s.25?

61. As set out above, s.25(3) provides that "it shall be the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied" and s.25(4) provides that, "if a court determines that any such criteria are satisfied, it shall make an order authorising the child to be kept in secure accommodation and specifying the maximum period for which he may be so kept".



What are the relevant criteria for making an order under s.25?

62. What is meant by "any relevant criteria"? At first sight, it might appear that the criteria that are "relevant" to the court's decision are merely the conditions in s.25(1). On closer examination, however, that is plainly not the whole answer. S.25(3) does not simply require the court to determine whether the conditions in s.25(1)(a) or (b) are satisfied, and s.25(4) does not oblige the court to make the order if it determines that one or other of those conditions is satisfied. Plainly there are other "relevant criteria" which must be satisfied before an order must be made. These include (1) whether the child is being "looked after" by a local authority (or alternatively comes under one of the other categories of children identified in Regulation 7); (2) whether the accommodation proposed by the local authority is "secure accommodation" in the sense already discussed; (3) whether, if the local authority is proposing to place the child in a secure children's home, the accommodation has been approved by the Secretary of State for that use, and (4) whether, if the child is aged under 13, the placement of that specific child has been approved by the Secretary of State.



What are the relevant criteria for making an order under s.25?

63. In addition, over the years since implementation of the Children Act, a number of judges have suggested, in differing terms and with varying levels of confidence, that a court determining an application under s.25 is obliged to consider the welfare of the child and/or the proportionality of the proposed order. As I read his judgment in this case, Judge Hayes took both matters into consideration as the alternative ground for his decision. It is therefore necessary for this Court to consider the role which welfare and proportionality play in the court's decision-making. Are they "relevant criteria" under s.25(3) and (4)?

Does an assessment of welfare play any part in the court's decision?

72. In my judgment, the "displacement of the court's welfare role" as required by the decision in *Re M* extends only to the displacement of the paramountcy principle. It does not require the court to abdicate responsibility for evaluating impact of the proposed placement on the child's welfare. On the contrary, as Butler-Sloss LJ said, the child's welfare is plainly of great importance in deciding whether or not an order should be made. The local authority and the court must each consider whether the proposed placement would safeguard and promote the child's welfare. In some cases, the child's welfare needs will be served by a period in secure accommodation, particularly if supported by a comprehensive therapeutic programme. In other cases, the child's welfare will not be promoted by such a placement. However, just as s.22(6) allows the local authority to exercise its powers in a way that does not promote the child's welfare if necessary to protect the public, there may be cases where the court concludes that the child's welfare needs are outweighed by the need to protect the public from serious harm. Welfare is therefore not paramount but is plainly an important element in the court's analysis. It is one of the relevant criteria.



Does an assessment of welfare play any part in the court's decision?

The President in *Re T (A Child) (Secure Accommodation Order)* [[2018](#)] [EWCA Civ 2136](#), [[2019](#)] [1 FLR 965](#) at para [5]:

'It is plainly a matter for concern that so many applications are being made to place children in secure accommodation outside the statutory scheme laid down by Parliament. The concern is not so much because of the pressure that this places on the court system, or the fact that local authorities have to engage in a more costly court process; the concern is that young people are being placed in units which, by definition, have not been approved as secure placements by the Secretary of State when that approval has been stipulated as a pre-condition by Parliament.'



Practice Guidance: Placements in unregistered children's homes in England or unregistered care home services in Wales

13 November 2019

- President of the Family Division, Sir Andrew McFarlane, has issued new practice guidance to explain the registration and regulation structure applicable in England and, separately, in Wales for residential care facilities for children and young people.
- The Guidance requires the court to monitor the progress of the application for registration and, if registration is not achieved, to review its continued approval of the child's placement in an unregistered unit.



Inherent jurisdiction and s25 CA 1989

s100 (4) CA 1989

- 4)The court may only grant leave if it is satisfied that—
- (a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and
- (b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.



Recent case law on the use of the inherent jurisdiction

- Threshold criteria under s 25 must be evidenced fully and met
- Care plan approved by court – least restrictive options
- Does the child/young person consent to the **care plan** – general consent to a ‘deprivation of liberty’ not sufficient to give accurate indication to court of child/YP’s informed consent (general view as to ‘Gillick’ competence unlikely to be sufficient for court address that question)
- **If informed consent given, consistent with previous behaviours – court may be reluctant to exercise discretion to make order**
- Consent does not need to be ‘enduring’ so much as valid and genuine
- Regular reviews and DoL time limited
- Lacuna – no state oversight of suitability of accommodation/permanence/staffing levels/location
- Importance of scrutinising care plans for ‘least restrictive options’
- Building in regular DoLs reviews in addition to LAC reviews



S (Child in care: Unregistered Placement) [2020] EWHC 1012 (Fam)

Cobb J

1. This judgment concerns Samantha ¹. She is 15 years old, and an extremely vulnerable young person, with complex needs. She is the subject of an interim care order in favour of East Riding of Yorkshire Council ('ERYC'). Samantha is currently living as the only young person in a holiday cottage in rural North Yorkshire which has been rented by ERYC solely for the purposes of accommodating her. She is living with, and is supervised day-by-day by, up to three adult members of staff employed by an independent care agency. This placement is unregistered, and therefore unregulated by Ofsted ². The current holiday short-term let is due to expire in mid-June; if the lease is not extended, Samantha and her adult carers will then have to move. This will be her 16th move of 'home' (if it can be so called) in the last 12 months.



s25 CA 1989 – lack of secure accommodation cases

- *Lancashire CC v G* [2020] EWHC 2828 (Fam);
- *Z (DOLS: Lack of Secure Placement)* [2020] EWHC 1827 (Fam);
- *A Local Authority v A Mother* [2020] EWHC 2395 (Fam);
- *Dorset Council v AB* [2020] EWHC 1098 (Fam)
- *A Local Authority v SW* [2018] EWHC 576 (Fam), *Bromley LBC v O* (4 December 2018) and *Re K (A Child)* (17 January 2018).
- *London Borough of Southwark v F* [\[2017\] EWHC 2189 \(Fam\)](#)
- *Re M (Lack of Secure Accommodation)* [2017] EWFC B61
- *Re A Child (No Approved Secure Accommodation Available: Deprivation of Liberty)* [\[2017\] EWHC 2458 \(Fam\)](#), [\[2018\] 1 FLR 621](#),
- *A City Council v LS and others* [\[2019\] EWHC 1384 \(Fam\)](#), [\[2019\] 3 WLR 475](#).



Salford City Council v M (Deprivation of Liberty in Scotland) [2019] EWHC 1510 (Fam)

- process for placing a child in a secure placement in Scotland.
- Using the inherent jurisdiction to place children in Scotland. Quite apart from the damage, both to the child and to the child's family, caused by, for example, placing a Kent child so far away from home, this has given rise to considerable legal complexities on both sides of the Border: see *In re X (A Child) (Jurisdiction: Secure Accommodation)*, *In re Y (A Child) (Jurisdiction: Secure Accommodation)* [\[2016\] EWHC 2271 \(Fam\)](#), [\[2017\] Fam 80](#), [\[2017\] 2 FLR 1717](#), and, in the Court of Session, *Cumbria County Council v X* [\[2016\] CSIH 92](#), [2017 SC 451](#), and *Re M (Deprivation of Liberty in Scotland), Salford City Council v NV, AM and M* [\[2019\] EWHC 1510 \(Fam\)](#), only partly ameliorated by the subsequent amendments to section 25.



Article 5, consent and child protection Restrictions on liberty for children at risk

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10 November 2020



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Judicial deprecation 1

”I am increasingly concerned that the device of resort to the inherent jurisdiction of the High Court is operating to by-pass the important safeguard under the regulations of approval by the Secretary of State of establishments used as secure accommodation. There is a grave risk that the safeguard of approval by the Secretary of State is being denied to some of the most damaged and vulnerable children. This is a situation which cannot go on, and I intend to draw it to the attention of the President of the Family Division.”

Holman J, *A Local Authority v AT and FE* [2017] EWHC 2458 (Fam)



Judicial deprecation 2

“There are growing concerns around child sexual exploitation, County Lines and other forms of criminal exploitation as risks for these young people. The need for regulated placements is likely to increase. Social workers work tirelessly (and some silly hours) trying to find placements. When they turn up they are seized upon. Sometimes it has taken so long and trust has so broken down that it can be difficult to move young people on.

The problems are huge.”

HHJ Dancey, Dorset Council v A
(Residential Placement: Lack of Resources) [2019] EWFC 62



The legal issue – Parliament required state registration

“It is plainly a matter for concern that so many applications are being made to place children in secure accommodation outside the statutory scheme laid down by Parliament. The concern is not so much because of the pressure that this places on the court system, or the fact that local authorities have to engage in a more costly court process; the concern is that young people are being placed in units which, by definition, have not been approved as secure placements by the Secretary of State when that approval has been stipulated as a pre-condition by Parliament.”

Sir Andrew Macfarlane, President of the Family Division,
re T [2018] EWCA Civ 2136



Why are so many children needing secure welfare placements?

- Sexual exploitation
- County lines
- Risky behaviours, high harm
- Gillick competent?
- Care plans requiring authorisation for restraint/use of force if necessary
- “All or nothing?”, Bespoke accommodation needs?



Is Section 25 article 5 compliant? Domestic law

W Council v DK & others [2001] HRLR 13:-

- rejected complaint that s 25 CA1989 was incompatible with article 5
- citing *Neilsen v Denmark*, that restrictive measures imposed on young children within the ‘zone of parental responsibility’ would not normally be a deprivation of liberty,
- purpose of the s 25 regime, as set out in regulations made under it, was to restrict the liberty of a child but is a “benign jurisdiction to protect the child as well as others” (§29).
- an order for secure accommodation under s 25 was a deprivation of liberty within the meaning of article 5 (§32) and was in the case before it justified as for purposes including educational supervision in its wider sense, bringing it within article 5(1)(d).



Article 5 – the right to liberty

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.



Article 5(1) – what is a ‘deprivation of liberty’

More than simply ‘restrictions’ -

contains both an objective element of a person’s confinement in a particular restricted space for a not negligible length of time, and an additional subjective element in that the person has not validly consented to the confinement in question (*Storck v. Germany*, § 74; *Stanev v. Bulgaria* [GC], § 117).

In *Cheshire West* the Supreme Court adopted the ‘*Storck*’ three limb formula of

- (a) Constant supervision and control
- (b) Lack of valid consent
- (c) By the state.



Article 5 – the role of consent

The fact that a person lacks legal capacity does not necessarily mean that he is unable to understand and consent to situation (also *N. v. Romania*, § 130; *Shtukaturou v. Russia*, §§ 107-09; *D.D. v. Lithuania*, § 150).

But can a child - who lacks legal capacity - consent to restrictions with the result that the court need not make any order? What effect does this have on access to the supervisory function of the court? What does ‘validly’ mean in this circumstance?



Article 5 – ‘a procedure prescribed by law’

The requirement of lawfulness is not satisfied merely by compliance with the relevant domestic statute and (in the UK context, common law); domestic law must itself be in conformity with the Convention, including the general principles expressed or implied in it (*Pleso´ v. Hungary*, § 59).

The general principles implied by the Convention to which the Article 5 § 1 case-law refers are the principle of the rule of law and, connected to the latter, that of legal certainty, the principle of proportionality and the principle of protection against arbitrariness which is the very aim of Article 5 (*Simons v. Belgium* (dec.), § 32).



How art 5 protects the liberty of those deprived for their own welfare

The right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention, especially when that person is legally incapable of consenting to, or disagreeing with, the proposed action (*H.L. v. the United Kingdom* (“*the Bournemouth case*”, § 90; *Stanev v. Bulgaria* [Grand Chamber], § 119

The key principle is the duty operate a system which prevents *arbitrary* deprivations of liberty.



Article 5 – justification in the case of a minor

Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty (*Khlaifia and Others v. Italy*, § 71).

Sub-paragraph 5(1)(d) is not only a provision which permits the detention of a minor. It contains a specific, but not exhaustive, example of circumstances in which minors might be detained, namely for the purpose of (a) their educational supervision or (b) bringing them before the competent legal authority (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, § 100).

The first limb of Article 5 § 1 d) authorises the deprivation of a minor’s liberty in his or her own interests, irrespective of the question whether he or she is suspected of having committed a criminal offence or is simply a child “at risk” (*D.L. v. Bulgaria*, § 71).

99. In the context of the detention of minors, the words “educational supervision” must not be equated rigidly with notions of classroom teaching but include the exercise of parental rights for the benefit and protection of the person concerned (*P. and S. v. Poland*, § 147; *Ichin and Others v. Ukraine*, § 39; *D.G. v. Ireland*, § 80).

“Educational supervision” must nevertheless contain an important core schooling aspect so that schooling in line with the normal school curriculum should be standard practice for all detained minors, even when they are placed in a temporary detention centre for a limited period of time, in order to avoid gaps in their education (*Blokhin v. Russia* [GC], § 170).



Is s 25 CA 1989 Art 5 compliant? Strasbourg authority

Koniarska v UK (2000) 30 E.H.R.R. CD139 - the Strasbourg court rejected as inadmissible an application alleging that s 25 ‘secure accommodation’ provisions were incompatible with article 5 reasoning that:

“The Court considers that, in the context of the detention of minors, the words “educational supervision” must not be equated rigidly with notions of classroom teaching. In particular, in the present context of a young person in local authority care, educational supervision must embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned.”

The Court of Appeal in *K* (Butler-Sloss LJ) adopted this reasoning.



Is the use of the inherent jurisdiction here art 5 compliant?

- Inherent jurisdiction can be involved where DoL necessary to protect child from harm: T (A Child: Care Order: Beyond Parental Control: Deprivation of Liberty: Authority to Administer Medication) [2017] EWFC B1
- S 25 threshold criteria must be met: B (Secure Accommodation: Inherent Jurisdiction) (No. 2), Re A County Council v B [2013] EWHC 4655 (Fam)
- Is there no suitable registered accommodation available?
- Where the proposed order is not a 'mirror' of statutory authorisation, *Storck* criteria (approved in *Cheshire West*) apply attracting art 5 procedural safeguards: (a) the objective component of confinement in a particular restricted place for a not negligible length of time; (b) the subjective component of lack of valid consent; and (c) the attribution of responsibility to the State.



Recent case law on the use of the inherent jurisdiction

Re T [2018] EWCA Civ:

- Consent by a child (U 18) is relevant to the exercise of discretion to make an order but cannot deprive the court of jurisdiction to make an order
- Important to note that court-granted authority to restrict liberty does not mean that a child who is subject of such an order is ‘under lock and key’
- ‘Storck’ (b) ‘lack of consent’ criterion for a deprivation of liberty not relevant where exercise of inherent jurisdiction ‘mirrors’ stat scheme which makes no reference to consent of the child/young person



But: judicial disquiet about article 5 compliance unregulated placements

- *Re T* epilogue:
- “Whilst the High Court has a duty to consider such cases and must come to a decision taking account of the welfare needs of the individual young person, in the wider context the situation is fundamentally unsatisfactory. In contrast to the Secretary of State, the court is not able to conduct an inspection of the accommodation and must simply rely upon what is said about any particular unit in the evidence presented to it. In like manner, where a local authority, as is typically the case, is looking to place a young person in a bespoke unit a great distance away from their home area, the local social workers must make decisions at arm's length and, it must be assumed, often without first-hand detailed knowledge of the particular unit.”



Can a parent consent to the DoL of a 16 year old?

Re D [2019] UKSC 42

- Court found that Parental consent cannot substitute for the subjective element in limb (b) of *Storck*. (para 42)
- Expressed anxiety about use of inherent jurisdiction to fill the gap: para 98.
- “It is possible to imagine a child who has no history, so far, of absconding, and who is not likely actually to injure himself or anyone else, so does not satisfy section 25(1)(a) or (b), but who, for other good reasons to do with his own welfare, needs to be kept in confined circumstances. If section 25 applies whenever a child’s liberty is restricted, local authorities will not be able to meet the welfare needs of children such as this.”



Questions for discussion

- How relevant is the concept of ‘Gillick competence’ to Storck limb (b) – lack of valid consent?
- What is the difference between a 15 year old’s consent and a 16 year old? What should/does age signify?
- Can a child consent themselves out of procedural safeguards?

Does the current system reflect the needs of children and the emphasis on child-centred care planning?

In a clash between best interests and regulation - what wins?

- Is an unregulated placement unlawful in article 5 terms ?
- Is the President’s guidance – and the steps it sets out – sufficient to protect against risk of arbitrariness for article 5 purposes?



Thank you

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