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Under what circumstances can children lawfully be detained by the police?

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Crime analysis: Shu Shin Luh, a barrister at Garden Court Chambers, explains the legislative requirements and case law regarding the detention of children by the police.

Original news

Detaining children in cells overnight breaches law, police chief warns, LNB News 13/01/2014 31

Guardian, 13 January 2014: Detaining children overnight in police cells before a court appearance the next morning is a 'chronic breach' of the law, assistant chief constable of Greater Manchester Police, Dawn Copley has said. On 40,716 instances in 2011, children aged 17 and under were detained in cells overnight.

What obligations are the police under when dealing with the detention of children?

Under the Children Act 2004, s 11 (CA 2004), certain statutory agencies are duty-bound to make arrangements which safeguard and promote the welfare of children in the exercise of their public functions. The police is one of them. The arrangements under CA 2004, s 11 must be directed to improving the child's well-being in the areas of:

- o physical and mental health and emotional well-being
- o protection from harm and neglect
- o education, training and recreation
- o the contribution made by them to society
- o social and economic well-being

Depriving a child of their liberty can clearly have a potential (adverse) impact on any/all aspects of a child's well-being as defined under CA 2004, s 10(2). Thus, where the police exercises a power to detain a child and/or to maintain the detention of a child, it must put its mind to whether doing so does safeguard/promote the welfare of the child.

The CA 2004, s 11 duty must also be read with the obligations set out under the schedule to the Human Rights Act 1998 (HRA 1998), the police being a public authority within the meaning of HRA 1998, s 6.

It is now well established that the European Convention on Human Rights, art 8 (ECHR) has to be construed in the light of the UN Convention on the Rights of the Child, art 3 (UNRC) to impose a duty on public authorities (including the police) to treat the welfare of the child as a primary consideration in all actions that could affect them (see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 All ER 783, *H(H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2012] UKSC 25, [2012] 4 All ER 539 and, more recently, *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] All ER (D) 3310 (Nov)). As a matter of logic, that duty entails a duty not to detain children except as a last resort and for the shortest appropriate period. Also, as a matter of logic, if ECHR,

art 8 must be read in the light of UNCRC, art 3, so must ECHR, art 5, requiring the police to treat the best interests of the child as a primary consideration when deciding whether to detain a child.

Under ECHR, art 5 it must of course be borne in mind that there is a starting presumption of liberty. Article 5 must therefore in this context be read in the light of UNCRC, art 37 which provides that '37(b)...the...detention...of a child...shall be used only as a measure of last resort and for the shortest appropriate period of time'. Thus, for example, 'pre-trial detention of minors should be used only as a measure of last resort and for the shortest possible period', otherwise the detention will be in breach of art 5 (see *Korneykova v Ukraine* (Application No. 39884/05, 19 January 2012)) and the cases referred to therein. As a matter of logic, ECHR art 8 must also be read in the light of UNCRC, art 37.

The obligations outlined above do not just arise at the time of the initial decision to detain but also in any decision to maintain the detention and in relation to the conditions of detention.

Finally, it is important to reiterate the position in domestic law and under the ECHR that the presumption is in favour of liberty, and the onus is on the police to show that it is justified in detaining a person in accordance with the limits on its powers (*R v Secretary of State for the Home Department ex parte Khawaja* [1984] 1 AC 74, [1983] 1 All ER 765).

Are there any circumstances under which the police can justifiably detain a child overnight?

Because of a presumption in favour of liberty, it is difficult to see a situation where the police would be prima facie justified in detaining a child overnight. The duty under CA 2004, s 11 referred to above requires the police to cooperate with other statutory agencies in the discharge of its safeguarding welfare duty, including coordination with local authority children's services, youth offending team (YOT) and relevant health authority. The duty to coordinate/cooperate requires the police to explore alternatives to detention, with other statutory agencies--detaining being a means of last resort.

Of course, the police have emergency powers under the Children Act 1989, s 46 (ChA 1989) to remove a child for child protection reasons. However, those powers do not displace the presumption in favour of liberty, and certainly do not operate on any presumption that detention is the only measure by which a police force can achieve child protection. Those powers still must be exercised within the confines of CA 2004, s 11 and the obligations under ECHR, arts 5 and 8.

What is the legal obligation on the local authority where a police force requires a child to be placed in the case of the local authority overnight?

Under ChA 1989, s 17 the local authority has a general duty to safeguard and promote the welfare of any child 'in need' in its area by providing him and his family with a range of services to meet his needs. A child who is homeless or without safe/suitable accommodation is a child in need (see *R v Northavon District Council ex parte Smith* [1994] 2 AC 402, [1994] 3 All ER 313 at para [406] per Lord Templeman, approved in *R (G) v LB of Barnet* [2003] UKHL 57, [2004] 1 All ER 97).

Under ChA 1989, s 20, there is a mandatory duty to accommodate a child who requires it by reason of:

- o (a) there being no one with parental responsibility able to accommodate him
- o (b) his being lost/abandoned
- o (c) the person caring for him being prevented from providing suitable accommodation or care to him

See *R (G) v LB of Southwark* [2009] UKHL 26, [2009] All ER (D) 178

ChA 1989, ss 20(3), 20(4) provides that there are further duties and powers to accommodate children where their welfare is likely to be prejudiced if not accommodated. Where the criteria for accommodation are met under ChA 1989, s 20, the local authority must take a child into 'voluntary care' as s 20 is loosely referred to. Under ChA 1989, s 21, there is a further duty to accommodate where a child has been removed from a situation in exercise of the police's emergency protection powers or after charge. These duties, together with ChA 1989, s 11, require the police and the local authority to work together to make arrangements in the best

interests of the child and to only use detention as a last resort where there are no alternative means of accommodating a child. This, as one can see, should in principle set a high bar to overcome.

Could children seek redress if they are improperly detained?

The short answer is yes. If children are detained unlawfully, they could immediately seek judicial review of the decision to detain them and seek an interim injunction from the court for their immediate release. There is of course the writ of habeas corpus under the Habeas Corpus Act 1816, which gives the detained the right to be brought before a court of law to determine whether his detention is justified. As stated earlier, the onus is on the police/executive to show that the detention is justified in accordance with the law and its limits, and moreover that the condition in which the child is detained is in accordance with the law.

If the detention is in connection with a criminal matter, for example, the child is arrested and charged with an offence for which they are to be produced before a magistrates' court for a first appearance, they also have the right to make a bail application before the magistrates' court. Often in those circumstances, the YOT will be involved and it is possible for the court and/or the lawyers for the prosecution and/or the defence to request that the YOT assist to arrange for accommodation for the child under ChA 1989 if they have no suitable bail address. YOTs now fall within the remit of the local authority children's services and there will be a social worker appointed to any given YOT. Thus it is entirely possible for a request to be made to YOT to exercise its social services functions under ChA 1989, ss 20, 21 and/or 25 to offer up so as to enable the child to make a successful bail application for release (see for example *R (TG) v LB of Lambeth* [2011] EWCA Civ 526, [2011] 4 All ER 453).

Children may also take private law claims in damages for their false imprisonment against the police. False imprisonment is a strict liability tort and where it cannot be shown that the detention was justified, it will likely sound in damages.

How have the courts approached the detention of minors in recent cases?

It is for a court to determine whether on the facts the executive has detained a person in accordance with the limits on its powers (see *Khawaja*). In cases involving liberty, the standard of review is not limited to the *Wednesbury* principles (*Associated Provincial Picture House Ltd v Wednesbury Corporation* [1947] 2 All ER 680) which would restrict the review of an executive's act. With the function of habeas corpus (which detention would engage), the court must examine 'the truth of the facts' asserted by the executive as justifying the detention. The burden is always on the executive to justify any detention and the function of the courts is to guard liberty with 'jealous care'. See Toulson LJ (as he then was) in *R (A) (Somalia) v Secretary of State for the Home Department* [2007] EWCA Civ 804, [2007] All ER (D) 467 (Jul) at para [62]:

'Ultimately, however, it must be for the court to decide what is the scope of the power of detention and whether it was lawfully exercised, those two questions being often inextricably interlinked. In my judgment, that is the responsibility of the court at common law and does not depend on the Human Rights Act (although Human Rights Act jurisprudence would tend in the same direction).'

This was the approach taken by the Divisional Court in *R (T) v Secretary of State for Justice and Birmingham Magistrates' Court* [2013] EWHC 1119 (Admin), [2013] All ER (D) 124 (May) where a 13-year-old boy with autism, ADHD and a severe impairment of intellectual functioning was arrested and detained by the police after breaching a bail condition. Before he was brought before a magistrates' court, he was detained in the cells at court. He was placed in a cell immediately opposite the custody suite--his cell had a glazed door so he could be observed by staff. He was led from the cell to an interview room to see his solicitor, passing two adults also being taken from cells. In the cell area, there was a 'cacophony' of sounds, with those detained shouting at each other. This all caused him great distress in view of his disabilities and his age. The Divisional Court found that although the police had a lawful power to detain the child, the conditions of his detention were in breach of the Children and Young Persons Act 1933, s 31 for being unsuitable on the facts of that case.

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