What else can the courts do?

1. In **Re X (Secure Accommodation: Lack of Provision)** [2023] EWHC 129 (Fam), the President of the Family Division lamented the '*wholesale failure to provide adequate resources*' in the form of secure accommodation places and noted that around half of the young people in need of such a placement could not access it. But he also said '*It is, of course, not for the courts and judges to determine matters of policy and the allocation of additional resources with respect to increasing the provision of secure accommodation places to meet the welfare needs of this most vulnerable group of children. All the courts can do is seek to draw attention to the problem in the hope that those who do have responsibility for these matters in Parliament and Government will take the issue up and look to bring about a change in the current chronic shortfall in secure placements.*'

2. The President asked for input from the Department for Education, who initially responded that it was up to local authorities to make provision for looked after children. This did not impress the President, who observed that "*the stance taken by the Department for Education, to the effect that it was not its problem and was the responsibility of individual local authorities, displayed a level of complacency bordering on cynicism. It was…shocking to see that the Department for Education seemed to be simply washing its hands of this chronic problem.*" After some persuasion, the court eventually got the Secretary of State to admit that the significant problems nationally with supply did require action by the government to support local authorities. That support was presently being offered in the form of capital investment announced in 2021, and investigation by NHSE about gaps in CAMHS provision.

3. Is it right to say that the courts can't do more than draw attention to the problem because considerations of policy and resources are outside their remit? What options might there be for strategic litigation aimed at forcing faster change? The following suggestions are put forward with the aim of provoking debate and creative thinking.

    a. **HRA claim against the government in respect of the secure accommodation shortfall.** There are now numerous reported cases with examples of children needing secure accommodation but instead having to wait in inappropriate

and even harmful settings. A HRA claim ultimately lies against the State, in Strasbourg – the division of responsibility between central government and local authorities will not be relevant, if overall there is a systemic failure. It may be possible to persuade a court that given the Government's concession in **Re X** that its input is required to support local authorities, that duties in do in fact lie under the HRA with central Government. These could range from duties to have in place a plan that is actually capable of changing the current position (is the capital investment sufficient? Are the timescales compatible with the scale of the current problem?) to substantive duties to provide secure accommodation given its specialist nature and the relatively low level of need for an individual local authority which makes area-by-area provision unrealistic. Potential claimants could include children at risk of admission to secure accommodation, or those already trapped in unsuitable provision awaiting a placement.

Note that the Good Law Project attempted to bring judicial review proceedings against five local authorities on the ground that they were failing to meet the 'sufficiency duty' (s.22G CA 1989), and against the Secretary of State for Education on the ground that an unlawful approach had been taken to the exercise of enforcement powers against local authorities under s.84 CA 1989 and/or s.487A EA 1996. Permission was refused. That application was focused on the placement of children out of area, not on the provision of inadequate and inappropriate provision, regardless of location, and was not brought on human rights grounds.

It may be possible to obtain declarations in individual cases that the circumstances in which a child is being provided with care and support violate Articles 3 or 8 ECHR. The more complex question is whether, having established that to be the case, the courts could be persuaded that these are systemic failings, based on the number of individuals in similar positions and the persistent and recurrent nature of the problem – exemplified by the increasingly desperate judgments of the High Court judges in the past few years. It is possible that expert evidence as to systemic problems (including from local authorities themselves) might persuade a court that there is a

systemic failure, in addition to the sheer number of children affected. See **Director of Legal Aid Casework v IS** [2016] EWCA Civ 464 per Laws LJ at §18 for an illustration of what will be required by way of proof:

> *"[P]roof of a systematic failure is not to be equated with proof of a series of individual failures. There is an obvious but important difference between a scheme or system which is inherently bad and unlawful on that account, and one which is being badly operated. The difference is a real one even where individual failures may arise, or may be more numerous, because the scheme is difficult to operate."*

b. **Change in approach by the Family Court when DOL applications are made.** At present, the Family court judges have effectively been forced into approving applications in most cases, no matter how appalling the provision being made to a child or young person. The orders made arguably remove the child's ability to bring an HRA claim about their treatment against a local authority or other statutory agency, as the court sanctions the confinement for the purposes of Article 5 ECHR and by making a best interests finding, could be said also have held that the requirements of Articles 3 and 8 are satisfied. Where the only reason for approving a manifestly inappropriate placement is because the only available alternatives are so much worse that the child's life would be at risk, should the court limit itself to declaring that the child's Article 2 rights require the placement to keep the child safe, but not declare that the requirements of Articles 5 or 8 are met? Would this pave the way for damages claims to be made by children in this position and would that encourage local authorities and government to act? Is it time to review decisions such as **North Yorkshire County Council & Anor v MAG** [2016] EWCOP 5, on the basis that the conditions of detention are relevant to Article 5 in light of more recent caselaw such as **Rooman v Belgium** [2020] MHLR 250? Should the child DOLs court look at cases where children have mental health problems and require therapeutic input under Article 5(1)(e) not 5(1)(d)?

c. **Claims in respect of CAMHS**. It is widely recognised that there are serious failings in the adequacy of community mental health support for children and young people. This quote dates from 2015, but resonates today: '*The Government agrees…that too often the mental health and wellbeing support offered to children and young people, their families and carers, falls short, and accepts there is need to improve the current system.*' (Government response to a Health Select Committee recommendation that noted there were '*serious and deeply ingrained problems with the commissioning and provision of CAMHS*'). Have any of the recommendations of the Children and Young People's Mental Health Taskforce in 2015 been implemented – '*By 2020 we would wish to see…in every part of the country, children and young people having timely access to clinically effective mental health support when they need it*' as well as community-based care to avoid inpatient admissions, a move away from a tiered system, and mechanisms to monitor action plans and track improvements. Is there a potential systemic HRA claim that could be brought alongside individual claims for breaches of Articles 3 and 8 ECHR as a result of the lack of appropriate and timely community mental health provision?

VICTORIA BUTLER-COLE KC
STEVE BROACH
39 Essex Chambers
6 March 2023