Neutral Citation Number: [2021] EWHC 2472 (Fam)

Case Nos: MA20P02230, FD21P00578, FD21P00472 and MA21P02001

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/09/2021

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

Case No. MA21P01965

Tameside Metropolitan Borough Council	**Applicant**
- and -	
AM	**First Respondent**
-and-	
AC	**Second Respondent**
-and-	
The Secretary of State for Education	**First Intervenor**
-and-	
Ofsted	**Second Intervenor**

Case No. FD21P00578

Derby City Council	**Applicant**
- and -	
BA	**First Respondent**
-and-	
OM	**Second Respondent**
-and-	
CK	**Third Respondent**
-and-	

The Secretary of State for Education	**First Intervener**
-and-	
Ofsted	**Second Intervener**

Case No. FD21P00472

London Borough of Lambeth	**Applicant**
- and -	
DE	**First Respondent**
-and-	
BM	**Second Respondent**
-and-	
The Secretary of State for Education	**First Intervenor**
-and-	
Ofsted	**Second Intervenor**

Case No. MA21P02001

Manchester City Council	**Applicant**
- and -	
DM	**First Respondent**
-and-	
DF	**Second Respondent**
-and-	
DC	**Third Respondent**
-and-	
The Secretary of State for Education	**First Intervener**
-and-	
Ofsted	**Second Intervener**

- -

Case No. MA21P01965

Ms Lorraine Cavanagh QC and Mr Shaun Spencer (instructed by **Tameside MBC**) for the **Applicant**
The First Respondent did not attend and was not represented
Ms Samantha Bowcock QC and Ms Emma Barron-Eaves (instructed by **McAlister Family Law**) for the **Second Respondent**
Mr Jonathan Auburn QC (instructed by **Government Legal Department**) for the **First Intervenor**
Ms Joanne Clement (instructed by **Ofsted**) for the **Second Intervener**

Case No. FD21P00578

Ms Lorraine Cavanagh QC and Mr Shaun Spencer (instructed by **Derby City Council**) for the **Applicant**
The First Respondent appeared in person
The Second Respondent did not appear and was not represented
Mr Brendan Roche QC and Ms Kathleen Hayter (instructed by **Kieran Clarke Green Solicitors**) for the **Third Respondent**
Mr Jonathan Auburn QC (instructed by **Government Legal Department**) for the **First Intervenor**
Ms Joanne Clement (instructed by **Ofsted**) for the **Second Intervener**

Case No. FD21P00472

Ms Elizabeth Isaacs QC and Ms Elizabeth O'Donnell (instructed by **London Borough of Lambeth**) for the **Applicant**
Mr John Buck (instructed by **All Family Matters**) represented the **First Respondent**
Ms Tara Vindis (instructed by **Charles Paulin & Co**) for the **Second Respondent**
Ms Annie Dixon (instructed by **Lawrence & Co Solicitors LLP**) for the **Children's Guardian**
Mr Jonathan Auburn QC (instructed by **Government Legal Department**) for the **First Intervenor**
Ms Joanne Clement (instructed by **Ofsted**) for the **Second Intervener**

Case No. MA21P02001

Ms Lorraine Cavanagh QC and Mr Shaun Spencer (instructed by **Manchester City Council Legal Services**) for the **Applicant**
The First Respondent appeared in person
The Second Respondent appeared in person
Mr Callum Brook (instructed by **Temperly Taylor LLP**) for the **Third Respondent**
Mr Jonathan Auburn QC (instructed by **Government Legal Department**) for the **First Intervenor**
Ms Joanne Clement (instructed by **Ofsted**) for the **Second Intervener**

Hearing date: 6 September 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 12 noon on 8 September 2021.

Mr Justice MacDonald:

INTRODUCTION

1. I am concerned with four cases which give rise to the same question of law in the context of the coming into force on 9 September 2021 of the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021, which statutory instrument amends the Care Planning, Placement and Case Review (England) Regulations 2010. The effect of those amendments is, in short, to prohibit the placement of a looked after child under the age of 16 in unregulated accommodation. Within this context, the question of law before the court is whether it remains open to the High Court to authorise, under its inherent jurisdiction, the deprivation of liberty of a child *under* the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is prohibited by the terms of the amended statutory scheme. For the reasons set out in this judgment I am satisfied that the answer to that question is yes, subject always to the rigorous application of the President's Guidance of November 2019 entitled *Placements in unregistered children's homes in England or unregistered care home services in Wales* and the addendum thereto dated December 2020.

2. At directions hearings held on 1 September 2021, I dealt with seven cases in which the issue articulated above has arisen. I listed four of those cases to be heard together on 6 September 2021 for legal submissions and invited the Secretary of State for Education, the Office for Standards in Education, Children's Services and Skills (hereafter "Ofsted") and the Children's Commissioner for England and Wales to intervene on the legal question set out above. The Secretary of State for Education and Ofsted accepted the invitation to intervene and I have had the benefit of written and oral submissions on behalf of the Secretary of State from Mr Jonathan Auburn of Queen's Counsel, and on behalf of Ofsted by Ms Joanne Clement of counsel. The court is grateful to the Secretary of State for Education and to Ofsted for accepting the invitation to intervene. The Children's Commissioner for England and Wales declined the invitation to intervene but has requested a copy of the judgment and is following the issues raised by these cases closely.

3. From the written submissions of the parties and interveners, and during the course of the hearing, there emerged a further question of law with respect to the precise ambit of the local authorities' continuing power to place a looked after child in accommodation following the coming into force of the amended statutory scheme. Specifically, whether the local authority retains the power to lawfully place a child in an *unregistered* children's home. The four local authorities before the court contend that this question arises from what they submit is the focus given by the Parliamentary materials associated with the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 to semi-independent and independent placements and, hence, to *unregulated* as opposed to unregistered placements. The Secretary of State proffers that the placement of a child under the age of 16 in an unregistered children's home will not fall within the express powers conferred either by s.22C(6)(c) (as the placement is unregistered) or s.22C(6)(d) (as the subject child is under the age of 16) of the Children Act 1989. The Secretary of State's position is that all children who require care of the sort provided by a children's home should be in a children's home which is registered by Ofsted.

4. Whilst each of the local authorities and Ofsted invited the court to determine this latter point, the Secretary of State cautioned the court against doing so in circumstances where it did not form part of the question of law raised by the court for determination at this hearing, where the parties had had a very limited time to prepare submissions for the hearing and where reaching a conclusion on the point was not necessary to determine the legal question before the court. I accept the force of the submissions of the Secretary of State in this regard. To the extent that there may now be, in light of the amending regulations, an issue as to the ambit of a local authority's power to place a child in an unregistered children's home, that issue does not lead to a different analysis of the question concerning the ambit of the inherent jurisdiction that is before the court, the Supreme Court having confirmed that the power to place a child and the power to authorise a deprivation of liberty are separate and distinct. Further, the question of whether the local authority otherwise retains the power to lawfully place a child under the age of 16 in an unregistered children's home requires a wider examination of the statutory scheme than simply an examination of the effect of the Care Planning, Placement and Case Review (England) Regulations 2010 as amended, which is the primary focus of this hearing. Finally, the Secretary of State concedes that where it is necessary to place a child in a particular place in order to prevent a breach of that child's Art 2 or Art 3 rights, the local authority has a power, and that power may be a duty, to place the child there.

5. In the circumstances, whilst I make some observations below that may be relevant to the future question of whether the local authority retains the power to lawfully place a child under the age of 16 in an unregistered children's home, it is not necessary or appropriate for me to offer a definitive answer to that question in this judgment.

6. Given the complex legal issues raised in the four cases before the court, I reserved judgment for a short period and now proceed to set out my decision and the reasons for it. I begin by recording the court's gratitude to all leading and junior counsel, instructing solicitors and professionals involved in each of the cases before the court for the skill and diligence they have demonstrated in ensuring these matters were made ready, within the span of the very short period between Wednesday 1 September and Monday 6 September 2021, for an urgent hearing on the multifaceted legal question raised by these four sets of proceedings.

BACKGROUND

7. The background in the four cases with which the court is concerned can be stated relatively shortly for the purposes of determining the legal question currently before this court in each case.

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8. Tameside Metropolitan Borough Council, represented by Ms Lorraine Cavanagh of Queen's Counsel and Mr Shaun Spencer of counsel, applies for permission to apply for an order under the inherent jurisdiction of the High Court and an order under the inherent jurisdiction authorising the deprivation of the liberty of AC. That application was issued on 23 August 2021. AC was born in 2005 and is now aged 15 years old. She is represented through her Children's Guardian, Peter Hubbard, by Ms Samantha Bowcock of Queen's Counsel and Ms Barron-Eaves of counsel. AC's mother is AM. She did not appear and was not represented. AC's father is AF. He does not have

parental responsibility for AC and has not sought to engage in these proceedings to date.

9. AC has been known to the local authority since 2007. The difficulties within the family comprised drug and alcohol misuse, the presence of inappropriate adults in the household, difficult behaviour by AC and confrontational parenting, allegations of physical abuse and AC absconding from home, rough sleeping and engaging in risk taking and anti-social behaviour. Care proceedings were issued on 17 July 2019. AC was placed in residential care on 5 February 2020 but continued to abscond. Difficulties at this time included AC using alcohol and being exposed to a risk of child sexual exploitation. The expert assessment of AC undertaken in the care proceedings identified serious and complex psychological difficulties for AC, resulting in a consistent pattern of risk-taking behaviour triggered by the feeling that her needs are not being met. The care proceedings concluded on 16 March 2020 with a final care order under Part IV of the Children Act 1989. That order subsists.

10. Difficulties continued in AC's residential placement, with high levels of absconding, episodes of physical aggression, self-harm and non-engagement with education. AC continued to use alcohol and drugs. As a result of these issues, AC moved to an alternative children's home on 23 August 2020 but once again absconded. Within this context, on 9 October 2020 AC was made the subject of an order under the inherent jurisdiction authorising the deprivation of her liberty. That order expired on 20 April 2021. Since that time, episodes of property damage, physical aggression and absconding by AC have again increased. On 18 July 2021 an allegation was made that AC had sexually assaulted another young person, causing the children's home to give notice on her placement. This alleged offence is currently under investigation by the police.

11. Within the foregoing context, AC has had multiple placement moves from registered children's homes, each of which have given notice to terminate the care of AC due to her dysregulated behaviours. AC meets the criteria under s. 25 of the Children Act 1989. AC is currently placed at an unregulated placement with staff registered with the Care Quality Commission (hereafter "CQC") to provide homecare agencies. Within this context, AC continues to self-harm, damage property, threaten violence to staff and to abscond. She continues to place herself at risk and seeks to obtain drugs. She is highly emotionally dysregulated, struggles with boundaries and remains at significant risk of sexual exploitation. AC is subject to 2:1 supervision at her placement and in the community and her access to money and to her communication devices is strictly controlled. AC is strongly opposed to being deprived of her liberty. AC urgently requires a solo therapeutic placement which will prevent her absconding and protect her from the consequences of her high-risk status for child sexual exploitation and self-harm.

12. The local authority considers AC's current placement to be temporary and a search for a regulated secure unit is ongoing. To date, that search has proved fruitless. The local authority does have an offer to care for AC from a therapeutic placement which is awaiting registration. However, that placement will not become available to AC for some 4 to 6 weeks. In these circumstances, the local authority contends that there is an imperative need for AC to remain at her current placement until a suitable alternative is identified. In the circumstances, a short order authorising the deprivation of AC's liberty was made by Newton J on 26 August 2021 to 1 September 2021 and on that date

I extended that order until 9 September 2021, pending the determination of the question of law with which the court is now seised.

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13. Derby City Council, also represented by Ms Lorraine Cavanagh of Queen's Counsel and Mr Shaun Spencer of counsel, applies for permission to apply for an order under the inherent jurisdiction of the High Court and an order under the inherent jurisdiction authorising the deprivation of the liberty of CK. The application was issued on 25 August 2021. CK was born in 2006 and is now aged 15 years old. CK is represented through her Children's Guardian by Mr Brendan Roche QC and Ms Kathleen Hayter of counsel. CK's mother, BA appears in person. CK's father, OM does not appear before the court and is not represented.

14. On 12 November 2019, the local authority issued care proceedings in respect of CK under Part IV of the Children Act 1989 on the grounds that she was beyond parental control for the purposes of s. 31(2)(b)(ii) of the 1989 Act. This followed a period during which CK was frequently excluded from school, physically assaulted her sibling and exhibited behaviour that was difficult to manage, including assaults on the police and her mother and physical aggression against property, including threats to burn down her father's home. Whilst placed at a series of children's homes CK frequently absconded, was the subject of arrest by the police for alleged assaults, threatened staff with serious harm, engaged in self-harm and attempted suicide. CK tried to hang herself at multiple placements and has repeatedly tied ligatures around her neck. On occasion, CK has stated that she has a voice in her head that she is unable to get rid of. CK regularly used drugs and alcohol to the extent of requiring medical attention. Between April 2019 and December 2019 CK had over 100 missing episodes and 6 incidents leading to her involvement with the police as a result of her criminal activity. The court has before it a chronology prepared by the local authority that sets out these complex difficulties in detail. Those difficulties have continued to date and, at present, show little sign of improving. CK still experiences visual and auditory hallucinations.

15. On 21 May 2020 the local authority applied for a secure accommodation order in respect of CK pursuant to s.25 of the Children Act 1989. A secure accommodation order was granted on 22 May 2020 for a period of 12 weeks and CK was placed in an approved secure placement in Scotland. CK was made the subject of a final care order on 29 May 2020. The secure accommodation order was extended by the court on 21 August 2020 for a further 24 weeks, on 18 February 2021 for a further 12 weeks and on 11 May 2021 for a further 12 weeks. On 28 June CK's approved secure placement gave notice on the basis they could no longer meet her needs. CK's needs exceed the ability of the secure estate to keep her safe.

16. On 4 July 2021 CK began to restrict her food intake and to refuse all food other than liquids. She also began to refuse medication. Whilst the local authority at that point applied for permission to invoke the inherent jurisdiction, that application was withdrawn upon CK being detained under the Mental Health Act 1983 on 28 July 2021. By the time of CK's discharge from detention under the Mental Health Act 1983, the local authority had not, despite an extensive search, been able to locate a registered placement for her to take the place of CK's approved secure placement. In the circumstances, CK was placed in unregistered provision with externally commissioned staff. An urgent hearing took place on 25 August 2021 before Newton J at which stage

the court authorised a deprivation of CK's liberty in that placement until 1 September 2021. On that date, I extended that order until 8 September 2021, pending the determination of the question of law with which the court is now seised.

17. The local authority continues to be unable to locate a placement for CK in regulated provision and considers itself unlikely to do so by 9 September 2021. CK is the subject of 3:1 supervision in placement, locked doors, the confiscation of items that could do CK harm, an escort when outside the placement, the use of reasonable and proportionate measures to ensure she does not leave the placement and to restrain her when she is distressed, visual checks on her bedroom twice each day and night time checks every 20 minutes. Her food and liquid intake is monitored.

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18. Lambeth London Borough Council, represented by Ms Elizabeth Isaacs of Queen's Counsel and Ms Elizabeth O'Donnell of counsel, apply for permission to apply for an order under the inherent jurisdiction of the High Court and an order under the inherent jurisdiction authorising the deprivation of the liberty with respect to BM. The application was issued on 26 July 2021. BM was born in 2005 and is now aged 15 years old. Due to a conflict between the position of BM, who strenuously opposes being placed in accommodation provided by the local authority, and that of the Children's Guardian, who supports that course of action, BM is now separately represented by Ms Tara Vindis of counsel. The Children's Guardian, Lorraine Walker, is represented by Ms Annie Dixon of counsel. BM's mother is DE. She was represented by Mr John Buck, counsel. BM's father does not appear and is not represented.

19. On 14 April 2020 the police made a referral to the local authority with respect to intelligence received that BM was involved in drug dealing, had a history of offending, including the possession of offensive weapons, and was at risk of physical and emotional harm. On 18 September 2020 BM was identified under the National Reference Mechanism as a victim of criminal exploitation. He was made the subject of a remand order on 6 October 2020 and remanded to local authority care. Further remand orders to secure children's homes followed. On 18 March 2021 the police issued an 'Osman' warning following what they considered to be a credible threat to BM's life arising from his gang associations. An Osman warning is a warning of death threat or risk of murder issued to a potential victim (after *Osman v UK* [1998] ECRR 101). The outcome of a child exploitation risk assessment was that BM was at continued high risk of exploitation.

20. On 15 July 2021 the local authority issued an application for a care order under Part IV of the Children Act 1989 and an application for a secure accommodation order under s.25 of the Children Act 1989 in respect of BM. The local authority considers that BM is beyond parental control and that his mother is unable to implement boundaries to keep BM safe in the context of his involvement in gang activity, leading to aggressive outbursts, police attendance at the family home and the relocation of the family away from the family home due to risk of harm arising from BM's criminal associations. On 22 July 2021, in a decision published as *Re G (Young Person: Threat to Life: Unavailability of Secure Placement)* [2021] EWHC 2066 (Fam), Cobb J found that there is reliable intelligence that there is a serious and credible threat to BM's life. On 25 August 2021, Cobb J made an interim care order in respect of BM. He further listed the matter before me on 1 September 2021 and requested that the Secretary of State for

Education attend that hearing with legal representation in the context of difficulties in locating an approved secure placement for BM.

21. Since proceedings in respect of BM were issued nearly two months ago the matter has been before the High Court on *seven* occasions. During that period an attempt was made by unknown persons to smash the front door leading into the family home. The local authority has still not been able to identify a placement in the secure estate for BM. Pending such a placement becoming available, the local authority has been able to identify a short-term placement, followed by a longer-term placement, that could offer BM a placement that would meet his needs subject to the court granting an order authorising his deprivation of liberty. Neither of these placements is regulated. The local authority contend the placements are nonetheless necessary, and urgently so, to keep BM safe from serious injury or death.

22. On 1 September 2021 the court was again informed that the local authority had still not been able to locate a secure placement. Based on highly graphic and disturbing evidence provided to the court on 1 September 2021 arising from a recent incident in the community, and in the context of the subsisting 'Osman' warning issued by the police in respect of BM, the court was satisfied that if BM was not deprived of his liberty within the unregulated placements identified by the local authority there was an *extremely* high and continuing risk that BM would be seriously injured or killed. In the circumstances, this court made a short order authorising the deprivation of BM's liberty until 8 September 2021, pending the determination of the question of law now before the court.

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23. Manchester City Council, also represented by Ms Lorraine Cavanagh of Queen's Counsel and Mr Shaun Spencer of counsel, applies for permission to apply for an order under the inherent jurisdiction of the High Court and an order under the inherent jurisdiction authorising the deprivation of the liberty of DC. The application was issued on 25 August 2021. DC was born in 2006 and is now aged 14 years old. DC is represented through his Children's Guardian by Mr Callum Brook of counsel. DC's mother is DM and appears in person, as does DC's father, DF.

24. DC was removed from the care of his parents in November 2013 following difficulties with respect to neglect, exposure to domestic abuse, missed medical appointments and mental health issues in respect of both parents. DC was made the subject of a final care order on 5 December 2014. In March 2021, DC's foster placement broke down following DC assaulting his foster carers. Thereafter, DC moved through a number of placements. He was ultimately detained under s.2 of the Mental Health Act 1983 on 5 July 2021 following an admission under s.136 of the 1983 Act on 27 June 2021. DC was described as having four distinct personalities and claimed to be able to hear voices. During this admission, two members of staff required medical treatment following an assault by DC. DC has a significantly compromised ability to self-regulate emotionally, has a poor perception of danger and is prone to becoming physically and verbally aggressive and destructive of property. On occasion DC presents a risk of significant harm to both himself and others. DC was discharged from hospital on 21 July 2021 and currently resides in an unregulated placement.

25. As matters stand, no alternative regulated placement is available for DC. The local authority is in process of considering a proposal by the current provider for it to provide long term care to DC, in which context Ofsted registration would be sought. This course of action has the advantage of DC being able to continue in a placement in which DC has now made very significant progress and which is, notwithstanding its current unregulated status, meeting well DC's very complex needs. DC is safe and has settled. The consensus of professional views is that DC could not cope with a further move of care provider/placement. If the course proposed by the local authority is adopted, upon the local authority applying for registration the timescales for registration will be dependent on Ofsted. It is clear however, that registration will not be achieved prior to 9 September 2021. This matter came before the court on 1 September 2021. Within the foregoing context, on that date the court once again made a short order authorising the deprivation of DC's liberty until 8 September 2021, pending the determination of the question of law with which the court is now seised.

POSITION OF PARTIES AND INTERVENERS

26. Each of the local authorities, each of the Children's Guardians and both the Secretary of State for Education and Ofsted submit that it remains open to the High Court to authorise, under its inherent jurisdiction, the deprivation of liberty of a child under the age of 16 notwithstanding that the placement in which the restrictions that are the subject of that authorisation will be applied is one prohibited by the terms of the Care Planning, Placement and Case Review (England) Regulations 2010 as amended from 9 September 2021.

27. As is often the case in proceedings of this nature, many of the parents of the subject young people with whom the court is concerned are either unrepresented or have not attended the hearing. Within the context, the court did not receive legal arguments from the parents who attended the hearing, those being the mother of CK, the mother of BM, represented by Mr John Buck, counsel, and the mother and father of DC.

28. Within the foregoing context, and with respect to the question of law identified by the court, the submissions of the advocates during the course of the hearing concentrated primarily on the question of the conditions that govern the use of the inherent jurisdiction of the High Court that all submit, is preserved in the context of the Care Planning, Placement and Case Review (England) Regulations 2010 as amended. Those submissions concentrated on the issue of whether, as submitted by Ofsted, the Supreme Court decision in *Re T* [2021] UKSC 35 limits the use of the inherent jurisdiction *only* to those cases in respect of children under the age of 16 in which there is no placement available that is lawful by reference to the amended statutory scheme, the Secretary of State for Education supporting that submission on behalf of Ofsted, or whether the inherent jurisdiction is preserved in *all* circumstances where the exercise of the inherent jurisdiction to approve a deprivation of liberty with respect to a placement that is unlawful by reference to the amended statutory scheme, is required to protect the welfare of the subject child; the latter submission being made by each of the local authorities. This question is of particular relevance in the case of DC who, as I have observed, is currently in a position where moving him from his current, unregulated, placement would be harmful to him.

29. Finally, as I have noted, a question arose during the course of written and oral submissions as to the precise ambit of the local authorities continuing power to place a

looked after child in accommodation following the coming into force of the of the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 and, specifically, whether the local authority retains the power to lawfully place a child in an unregistered children's home. For the reasons I have already given, I am satisfied that it is not necessary or appropriate to determine that question at this hearing.

LAW

The Statutory Scheme

30. Part III of the Children Act 1989 is titled "Support for children and families provided by local authorities in England". The position in Wales is governed by the Social Services and Wellbeing (Wales) Act 2014. In circumstances where the Explanatory Memorandum to the 2021 Regulations makes clear that the territorial extent of the statutory instrument is England and Wales but the territorial *application* of the instrument is limited to England, it is not necessary to consider in this judgment the position under the 2014 Act.

31. Section 22(3) of the Children Act 1989 places on local authorities a duty to safeguard and promote the welfare of any child looked after by the local authority including, pursuant to s.22(3A) of the 1989 Act, a duty to promote the child's educational achievement. Within this context, s. 22A of the Children Act 1989 places a duty on the local authority to provide a looked after child with accommodation. Pursuant to s. 22G of the Children Act 1989, local authorities are subject to an overarching duty to ensure sufficient accommodation is available to accommodate children with different needs (the "sufficiency duty"). In addition, pursuant to s. 53 of the 1989 Act, local authorities are under a duty to make arrangements to secure that "community homes" are available for the care and accommodation of children looked after by them and for connected purposes.

32. With respect to the manner in which the duty provide accommodation can be discharged, and in so far as is relevant in this case, s.22C of the 1989 Act provides as follows with respect to the placement options from which a local authority may choose:

> "**22C Ways in which looked after children are to be accommodated and maintained**
>
> (1) This section applies where a local authority are looking after a child ("C").
>
> (2) The local authority must make arrangements for C to live with a person who falls within subsection (3) (but subject to subsection (4)).
>
> (3) A person ("P") falls within this subsection if –
>
> a) P is a parent of C;
>
> b) P is not a parent of C but has parental responsibility for C; or
>
> c) in a case where C is in the care of the local authority and there was a child arrangements order in force with respect to C immediately before the care order was made, P was a person named in the child arrangements order as a person with whom C was to live.

(4) Subsection (2) does not require the local authority to make arrangements of the kind mentioned in that subsection if so doing –

a) would not be consistent with C's welfare; or

b) would not be reasonably practicable.

(5) If the local authority are unable to make arrangements under subsection (2), they must place C and the placement which is, in their opinion, the most appropriate placement available.

(6) In subsection (5) "placement" means –

a) placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;

b) placement with a local authority foster parent who does not fall within paragraph (a);

c) placement in a children's home in respect of which a person is registered under Part 2 of the Care Standards Act 2000 or Part one of the Regulation and Inspection of Social Care (Wales) Act 2016; or

d) subject to section 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section.

(7) In determining the most appropriate placement for C, the local authority must, subject to subsection (9B) and the other provisions of this Part (in particular, to their duties under section 22) –

a) give preference to a placement falling within paragraph (a) of subsection (6) over placements falling within the other paragraphs of that subsection;

b) comply, so far as is reasonably practicable in all the circumstances of C's case, with the requirements of subsection (8); and

c) comply with subsection (9) unless that is not reasonably practicable.

(8) The local authority must ensure that the placement is such that –

a) it allows C to live near C's home;

b) it does not disrupt C's educational training;

c) if C has a sibling for whom the local authority are also providing accommodation, it enables C and the sibling to live together

d) if C is disabled, the accommodation provided is suitable to C's particular needs.

(9) The placement must be such that C is provided with accommodation within the local authority's area."

33. The term "children's home" in s.22C(6)(c) is defined in s.105(1) of the Children Act 1989 as having the same meaning as in the Care Standards Act 2000. The Care Standards Act 2000 s 1(2) defines "children's home" widely, stipulating that an establishment in England is a children's home if it provides care and accommodation wholly or mainly for children. An establishment will not be a children's home merely because a child is cared for and accommodated there by a parent or relative of his or a foster parent. Nor will it be a children's home if it is a hospital within the meaning of the National Health Service Act 2006 or a residential family centre. An establishment is not a children's home if it is a school, unless the conditions in section 1(6) of the 2000 Act are satisfied (identifying those residential schools that do constitute children's homes). By section 1(4A) of the 2000 Act, an establishment will not be a children's home if it is of a description excepted by r. 3 of the Children's Homes (England) Regulations 2015.

34. There is no further definition in the Care Standards Act 2000 as to what constitutes "care" for the purposes of the foregoing definition. Both the Secretary of State for Education and Ofsted submit that, in line with the President's Practice Guidance of November 2019 entitled *Placements in unregistered children's homes in England or unregistered care home services in Wales* and the observations of the Supreme Court in *Re T* at [129], a child who is the subject of a declaration authorising the deprivation of their liberty at a placement is likely to be receiving "care" with their accommodation for the purposes of the definition of a 'children's home'.

35. With respect to "other arrangements" under s.22C(6)(d) of the 1989 Act, regulations made for the purposes of s. 22C include the Care Planning, Placement and Case Review (England) Regulations 2010 (SI 2010/959). Prior to 9 September 2021, r. 27 of those regulations provided that "other arrangements" under s.22C(6)(d) constituted placements in an "unregulated setting", and set out various steps that had to be taken before such a placement could be made. From 9 September 2021 those regulations will stand amended by the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021/161). It is useful to set out what will be the final form of the amended Care Planning, Placement and Case Review (England) Regulations 2010 from 9 September 2021 with respect to the duties in relation to children who are looked after by local authorities:

"**General duties of the responsible authority when placing a child in other arrangements**

27. Before placing C in accommodation in accordance with other arrangements, under section 22C(6)(d), the responsible authority must—

(a) be satisfied that the accommodation is suitable for C and, where that accommodation is not specified in regulation 27A, must have regard to the matters set out in Schedule 6,

(b) unless it is not reasonably practicable, arrange for C to visit the accommodation, and

(c) inform the IRO.

Prohibition on placing a child under 16 in other arrangements

27A A responsible authority may only place a child under 16 in accommodation in accordance with other arrangements under section 22C(6)(d), where the accommodation is—

(a) in relation to placements in England, in—

(i) a care home;

(ii) a hospital as defined in section 275(1) of the National Health Service Act 2006;

(iii) a residential family centre as defined in section 4(2) of the Care Standards Act;

(iv) a school within the meaning of section 4 of the Education Act 1996 providing accommodation that is not registered as a children's home;

(v) an establishment that provides care and accommodation for children as a holiday scheme for disabled children as defined in regulation 2(1) of the Residential Holiday Schemes for Disabled Children (England) Regulations 2013;

(b) in relation to placements in Wales—

(i) accommodation provided by a care home service, within the meaning of paragraph 1(1) of Schedule 1 to the Regulation and Inspection of Social Care (Wales) Act 2016 ("the RISCWA 2016");

(ii) in a hospital as defined in section 206(1) of the National Health Service (Wales) Act 2006;

(iii) accommodation provided by a residential family centre service, within the meaning of paragraph 3(1) of Schedule 1 to the RISCWA 2016*;*

(iv) in a school within the meaning of section 4 of the Education Act 1996 providing accommodation together with nursing or care that does not constitute a care home service;

(c) in relation to placements in Scotland—

(i) in a residential establishment, within the meaning of paragraph (a) of the definition in section 93(1) of the Children (Scotland) Act 1995;

(ii) accommodation provided by the Scottish public fostering service, within the meaning of paragraph 10(a) of Schedule 12 to the Public Services Reform (Scotland) Act 2010 ("the PSR(S)A 2010");

(iii) accommodation provided by a care home service, within the meaning of paragraph 2 of Schedule 12 to the PSR(S)A 2010;

(iv) accommodation provided by a school care accommodation service, within the meaning given by or under paragraph 3 of Schedule 12 to the PSR(S)A 2010;

(v) in a hospital as defined in section 108(1) of the National Health Service (Scotland) Act 1978.

Exception to the prohibition on placing a child under 16 in other arrangements

27B –

(1) Subject to paragraph (2), a responsible authority placing an unaccompanied asylum seeking child whose age is uncertain and who claims to be 16 or 17 may place that child in accommodation in accordance with other arrangements under section 22C(6)(d).

(2) Where that child is later assessed as being under 16, a responsible authority may not leave the child in such accommodation where that accommodation is not specified in regulation 27A for longer than 10 working days beginning with the day on which the child's age has been assessed as being under 16.

(3) In this regulation, an unaccompanied asylum seeking child has the same meaning as in regulation 5(1)(f)(ii)".

36. The matters set out in Schedule 6 of the 2010 Regulations as amended, as referred to in r. 27, are as follows:

"**SCHEDULE 6**

Matters to be considered before placing C in accommodation in accordance with other arrangements under section 22(6)(d)

1. In respect of the accommodation, the—

(a) facilities and services provided,

(b) state of repair,

(c) safety,

(d)location,

(e) support,

(f) tenancy status, and

(g) the financial commitments involved for C and their affordability.

2. In respect of C, C's—

(a) views about the accommodation,

(b) understanding of their rights and responsibilities in relation to the accommodation, and

(c) understanding of funding arrangements."

37. Pursuant to s.11(5) of the Care Standards Act 2000, it is a summary offence for a person to carry on or manage a children's home without being registered. This applies to providers, not a local authority making an arrangement with such a setting. The Care Standards Act 2000 has not, however, been amended to provide for an offence of placing a child under 16 in other arrangements as prohibited by the amended statutory scheme. Accordingly, placing a child in an unregulated placement contrary to the new Regulation 27A is not a criminal offence.

38. When it comes to considering the purpose of the amended statutory regime, it is important in the foregoing statutory context to be clear about the terminology used with respect to placements, which terminology has been apt to cause confusion in the past.

39. An "unregulated" placement appears intended to refer to a placement that is not required to register with Ofsted under the relevant provisions of the Care Standards Act 2000 and the Care Standards Act 2000 (Registration) (England) Regulations 2010, which make provision for the registration and regulation of children's homes, because it does not come within the definition of a children's home and is hence not liable to regulation. Such unregulated placements will include independent and semi-independent settings for older children, such as supported accommodation, supported lodgings or independent accommodation. The Explanatory Memorandum to The Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (hereafter "the Explanatory Memorandum") makes clear that the Government took the view that the term "other arrangements" in s. 22C(6)(d) of the 1989 Act was intended to refer mainly to independent and semi-independent settings for older children.

40. An "unregistered" placement refers to a placement that is required by the Care Standards Act 2000 and associated regulations to register with Ofsted but has not yet done so. Her Majesty's Chief Inspector of Education, Children's Services and Skills (hereafter "HMCI") is the registration authority for children's homes in England, and is responsible for regulating children's homes. HMCI is also responsible for inspecting the overall performance by any local authority in England of various functions, including children's social care services and functions under the Children Act 1989. HMCI is supported by the body corporate known as Ofsted. Within this context, a children's home as defined by in s.105(1) of the Children Act 1989 that is not registered will nonetheless be *liable* to regulation under the 2000 Act and associated regulations. Such a placement may not have been inspected by Ofsted and the standards required for registration will be uncertified, but they may be capable of being met. The Addendum to the President's Practice Guidance dated December 2020 introduced a

requirement that the court include in any order concerning a child in an unregistered placement, a direction that the local authority must immediately notify Ofsted (or the Care Inspectorate Wales in Wales) and provide them with a copy of that order and the judgment of the Court. This was to ensure that Ofsted is aware of the unregistered children's home in England and could immediately take steps to make certain that either an application for registration is made, or enforcement action is taken if appropriate.

41. Within the context of the foregoing distinction, the purpose of the secondary legislation comprising the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 is set out in the Explanatory Memorandum as being:

> "… to prohibit placement of a child under the age of 16 in 'other arrangements' settings with limited exceptions. The effect of the amendments will be that looked after children under 16 can no longer be placed in unregulated settings while continuing to allow 'other arrangements' placements in alternative regulated settings by exemption. Unregulated independent and semi-independent settings cannot meet the needs of looked after children under the age of 16 who are very vulnerable and often have complex needs which require the care and support provided by regulated settings …"

And:

> "The intention of the ban is to ensure that looked after children under 16 are placed in children's homes or foster care instead of unregulated settings…"

42. The Explanatory Memorandum further makes clear, in a passage highlighted by Mr Auburn in his Skeleton Argument on behalf of the Secretary of State, that the prohibition on the use of "other arrangements" given effect by the amending regulations, was made on the basis of the Government's view that the term "other arrangements" in s. 22C(6)(d) were primarily intended by Parliament to be used for young people who were ready to live in a more independent or semi-independent setting with support, rather than with the provision of care as provided for by foster placements or children's homes. Within this context, in his Skeleton Argument on behalf of the Secretary of State Mr Auburn submits that r. 27A concerns unregulated placements made in accordance with other arrangements for the purposes of s. 22C(6)(d) of the 1989 Act rather than placement in as yet unregistered children's homes (as I have noted, Mr Auburn however further submits that the question of whether the local authority retains the power to lawfully place a child in an unregistered children's home in the context of the amended statutory regime is one that ranges much wider than simply an examination of the effect of r.27A).

43. The Explanatory Memorandum also records a "grace period" that local authorities have been provided with ahead of the implementation of the amending regulation as follows:

> "… local authorities will have a six-month grace period in which to find children under 16 placed in unregulated independent and semi-independent provision alternative placements in either a children's home, foster care or one of the limited exemptions should such a setting be consistent with the child's welfare. On or after 9 September 2021 (the coming into force date) it will no longer be lawful for local authorities to place children under 16 in

> other arrangement settings other than those specifically exempted where it is consistent with the child's welfare."

44. Within the foregoing context, on 26 July 2021 the current Parliamentary Under-Secretary of State for Children and Families, Vicky Ford MP, wrote to each of the Directors of Children's Services notifying them that she had laid the regulations before Parliament and that the relevant statutory guidance had been amended. The letter further requested local authorities to review their placement provision and to put in place provision to address the forthcoming prohibition on the placement of children under 16 in unregulated provision.

45. As noted by Cobb J in *Re G (Young Person: Threat to Life: Unavailability of Secure Placement)*, whilst the aim of the new regulations is laudable, it is also the case that the regulations will make the hard task of finding or creating placements for vulnerable children whose needs are such that they require limitations on their liberty harder still; Baker LJ having noted a year earlier in *Re B (A Child)* [2020] Fam 221 that the absence of such resources means that local authorities are already "frequently prevented from complying with their statutory obligations to meet the welfare needs of a cohort of vulnerable young people who are at the greatest risk of harm". Within this context, I note that in the DfE Research Report entitled *Use of unregulated and unregistered provision for children in care*, published in February 2020, it was stated at p.8 that:

> "According to the LAs interviewed, the growth in the use of unregulated and unregistered provision for children with complex needs and/or challenging behaviour is being driven by two interrelated factors. The first is that demand for registered places is currently outstripping supply. This is consistent with indications from Ofsted that supply is not keeping pace with demand (Cowen and Rowe, 2018) and research by the Independent Children's Homes Association (ICHA, 2018). The second factor identified by the LAs we interviewed is that registered children's homes are becoming increasingly reluctant to accept children with highly complex needs and challenging behaviours due to concerns about the possibility of their Ofsted rating being negatively affected if they are unable to secure positive outcomes. The ICHA's (2019) most recent annual state of the market survey also indicates that this is the case."

46. Within the context of these challenges, and as I have noted, this case gives rise to the question of whether it remains open to the court in an appropriate case to grant a declaration authorising the deprivation of liberty of a child under the age of 16 where the placement in which the restrictions that are the subject of the declaration will be applied is a placement that is prohibited by the terms of the statutory scheme as amended from 9 September 2021 outlined above. To put the question in the terms adopted by Lady Black of Derwent in *Re T* at [80], the question is whether, in light of the implementation of the amended statutory scheme, the applications by the four local authorities before the court can still fall, if necessary, within the territory preserved for the inherent jurisdiction.

The Inherent Jurisdiction Generally

47. The inherent jurisdiction of the High Court with respect to children derives from the royal prerogative, as *parens patriae*, to take care of those who are not able to take care

of themselves (see *In re L (An Infant)* [1968] P 119 at 127A). The origins of the jurisdiction with respect to children lie in the feudal period when, as an incidence of tenure, upon a tenant's death, the lord became guardian of the tenant's surviving infant heir's land and body (see NV Lowe & RAH White, *Wards of Court*, 2nd ed (1986)).

48. Within this context, one of the defining features of the inherent jurisdiction of the High Court in relation to children (consistent with principle enshrined in the term *parens patriae* that State authority carries with it the responsibility for the protection of citizens unable to protect themselves) is that it is *protective* in nature. In *S v S* [1970] 3 All ER 107, Lord McDermott observed as follows in this regard:

> "The duty of the High Court as respects the affairs and welfare of infants falls into two broad categories. There is, first of all, the duty to protect the infant, particularly when engaged or involved in litigation. This duty is of a general nature and derives from the Court of Chancery and to some extent also, I believe, from the common law courts which have merged along with the Court of Chancery in the High Court by Act of 1873. It recognises that the infant, as not *sui juris*, may stand in need of aid. He must not be allowed to suffer because of his incapacity…I shall refer to this duty and the power of the court relative thereto as the 'protective jurisdiction'…"

49. As Lady Black pointed up in *Re T* at [66], it is important to note that the courts have emphasised, consistent with the protective character of the inherent jurisdiction, the importance of anticipating and preventing harm, Lord Eldon LC noting in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 18:

> "… it has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done."

50. Within this context, it has long been recognised that the courts' inherent jurisdiction may be used notwithstanding the existence of a statutory scheme to supplement that statutory scheme in order to fill a gap or to avoid injustice (see for example *Willis v Earl Beauchamp* (1886) 11 PD 59 at 63). As Lord Donaldson of Lymington MR observed in the Court of Appeal in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 13, in a passage approved by the House of Lords on appeal:

> "…the common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill gaps is one of the most important duties of the judges. It is not a legislative function or process—that is an alternative solution the initiation of which is the sole prerogative of Parliament. It is an essentially judicial process and, as such, it has to be undertaken in accordance with principle."

51. By way of examples in the context of the law relating to children, in *Re C (A Minor)(Adoption: Freeing Order)* [1999] Fam 240 the court made an order under the inherent jurisdiction revoking a freeing order in circumstances where Parliament had provided no mechanism in the Adoption Act 1976 for revocation of a freeing order in the circumstances of that case. Likewise, in *Re W and X (Wardship: Relatives Rejected*

as Foster Carers [2004] 1 FLR 415 the court gave effect to a placement with relatives that was prohibited by the terms of the Fostering Services Regulations 2002 by exercising the inherent jurisdiction to make the subject children wards of court.

52. However, whilst the jurisdiction of the High Court under the inherent jurisdiction is *theoretically* unlimited, it is important to bear in mind that there are, in fact, extensive limitations on the exercise by the High Court of that jurisdiction (see *In re X (A Minor) (Wardship: Jurisdiction)* [1975] Fam 47 at 61).

53. A statutory limitation on the use of the inherent jurisdiction with respect to children is imposed by the Children Act 1989 s. 100, which stipulates specific prohibitions on its use. Pursuant to s. 100 of the 1989 Act, no application for any exercise of the court's inherent jurisdiction with respect to children may be made by the local authority unless that local authority has obtained the permission of the court pursuant to section 100(3) of the Act. The court will only grant such permission if it is satisfied, pursuant to section 100(4), that (a) the result the local authority seeks to achieve could not be achieved through the making of any order otherwise than in the exercise of the inherent jurisdiction and for which the local authority is entitled to apply and (b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he or she is likely to suffer significant harm. The rationale underpinning s. 100 of the Children Act 1989 has been said to be the need for the legal basis for State intervention in family life to be uniform and certain in circumstances where the proper limits of that intervention must be "clearly perceivable in the law" (see Lord Mackay of Clashfern LC *Perceptions of the Children Bill and Beyond* (1989) 139 NLJ 505 at 507–508).

54. Within this context, paragraph 1.1 of FPR Practice Direction 12D now makes plain that proceedings under the inherent jurisdiction for an order to determine any issue in relation to a child should not be commenced *unless* it is clear that the issues concerning the child cannot be resolved under the statutory regime. In this context, in *Re T* Lady Black observed as follows at [79] with respect to the ambit of s.100 of the 1989 Act:

> "…section 100 does not remove the High Court's inherent jurisdiction powers entirely, as can be seen from section 100(3)-(5). These permit local authorities to have recourse to the inherent jurisdiction in limited circumstances, imposing a requirement that prior leave be obtained for any such application, and establishing the circumstances in which leave can be granted."

And later at [113] regarding the proper interpretation of limits on the use of the inherent jurisdiction imposed by s.100 of the 1989 Act:

> "…the restrictions placed by section 100 upon the use of the inherent jurisdiction should be put carefully into context. This court should not, in my view, be led into an interpretation of them which focuses so intently on the detail of the legal theory underpinning the words that the intended sense of the provision as a whole is lost, with consequent damage to the ability of the High Court to react when the assistance of the inherent jurisdiction is truly required. I recorded earlier the time-honoured role that the inherent jurisdiction plays in protecting children whose welfare requires it (see paras 64 and following). CCBC invite attention, in their written case, to an

> observation which can be found in Bromley's Family Law (now in the 12th ed (2021), p 773 by Nigel Lowe, Gillian Douglas and others), to the effect that courts should be slow to hold that an inherent power has been abrogated or restricted by Parliament, and should only do so where it is clear that Parliament so intended. I would endorse that as being of particular importance where the inherent power exists for the protection of children."

55. In addition to the statutory limitation contained in s.100 of the Children Act 1989, the doctrine of the sovereignty of Parliament places the courts under a duty to apply legislation made by Parliament. From this cardinal constitutional principle derive further limitations on the exercise of the inherent jurisdiction of the High Court that are relevant in the context of the matters before the court.

56. In *A-G v De Keyser's Royal Hotel Limited* [1920] AC 508, Lord Dunedin observed that "if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules". Within this context, in *Richards v Richards* [1984] AC 174 at 199, the House of Lords made clear that where Parliament has spelt out in considerable detail what must be done in a particular class of case it is not open to the court to disregard those provisions and apply a different jurisprudence from that which the statutory scheme prescribed by Parliament provides. Similarly, where Parliament has made detailed provisions as to how certain statutory functions are to be carried out, there is no scope for implying the existence of additional powers which lie wholly outside the relevant statutory code (see *Crédit Suisse v Waltham Forest London Borough Council* [1997] QB 362 at 374). In *Wicks v Wicks* [1999] Fam 65 the Court of Appeal (referring to the decisions in *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210 at 262 and *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923 at 942) reiterated the need for circumspection in respect of the proposition that the inherent jurisdiction of the court confers a general residual discretion to make any order necessary to ensure justice is done, orders affecting the parties' substantive rights requiring to be governed by the general law and rules and not by resort to a wide judicial discretion derived from the court's inherent jurisdiction. Finally, in the context of the law relating to children, in *Re B (A Child)(Reunite International Child Abduction Centre and Others Intervening)* [2016] AC 606 at 656 Lord Sumption, in a dissenting judgment, stated plainly that:

> "…the inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme…I do not accept that the inherent jurisdiction can be used to circumvent principled limitations which Parliament has placed upon the jurisdiction of the court."

57. Within the foregoing context, and as noted by Baker J (as he then was) in *Health Service Executive v Ireland v Z* [2016] Fam 375, the correct approach to determining, as the court is required to do in this case, whether and how far the inherent jurisdiction has been ousted by a given statutory provision, is that set out by Wood J in *Westminster City Council v C* [2007] EWHC 309 (Fam) at [119], in a passage left undisturbed by the Court of Appeal in *Westminster City Council v C and Ors* [2009] Fam 11 and approved by McFarlane LJ (as he then was) in the Court of Appeal in *Re L (Vulnerable Adults with Capacity: Court's Jurisdiction)(No.2)* [2013] Fam 1 at [62], as follows:

> "Consistent with long-standing principle, the terms of the statute must be looked to first to see what Parliament has considered to be the appropriate

> statutory code, and the exercise of the inherent jurisdiction should not be deployed so as to undermine the will of Parliament as expressed in the statute or any supplementary regulatory framework."

Inherent Jurisdiction and Deprivation of Liberty

58. With respect to children's homes, the Children's Homes (England) Regulations 2015 provide as follows with respect to the restraint and deprivation of liberty:

> " **Restraint and deprivation of liberty**
>
> **20.**—(1) Restraint in relation to a child is only permitted for the purpose of preventing—
>
> (a)injury to any person (including the child);
>
> (b)serious damage to the property of any person (including the child); or
>
> (c)a child who is accommodated in a secure children's home from absconding from the home.
>
> (2) Restraint in relation to a child must be necessary and proportionate.
>
> (3) These Regulations do not prevent a child from being deprived of liberty where that deprivation is authorised in accordance with a court order."

59. As I have referred to at a number of points already in this judgment, the use of the inherent jurisdiction by the High Court to authorise the deprivation of a child's liberty in accordance with a court order was considered recently by the Supreme Court in *Re T* in the context of cases where there was no approved secure accommodation available for a subject child who required to be placed in such accommodation. The Supreme Court held that the High Court could use its inherent jurisdiction to authorise the deprivation of a child's liberty in a registered children's home which had not been approved as secure accommodation by the Secretary of State (and hence its use as such was prohibited by r. 3(1) of the Children Act (Secure Accommodation) Regulations 1991) and an unregistered children's home (where the person who carried on / managed the home would be guilty of a criminal offence under section 11(5) of the 2000 Act) in circumstances where there is no approved secure accommodation available with which to give effect to an order made under s.25 of the Children Act 1989. In this context, Lady Black observed at [141] that:

> "Cases such as those to which I have alluded earlier in this judgment demonstrate, it seems to me, that 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."

60. In a passage quoted with approval by Lady Black in the judgment of the Supreme Court in *Re T* at [111], the effect of such an authorisation by the High Court under the inherent jurisdiction was noted by the President in the Court of Appeal in *Re T* [2018] EWCA Civ 2136 at [77]:

> "In like manner to the effect of a secure accommodation order, an order under the inherent jurisdiction in these cases does not itself deprive a young person of his or her liberty, it merely authorises the local authority (or those acting on their behalf) to do so. This distinction was, unfortunately, not made sufficiently clear by Keehan J in *Local Authority v D* when he summarised the issue before the court (at paragraph 9) in terms of determining whether or not C was deprived of his liberty. With respect, the issue in such cases is, rather, whether the court should give a local authority the authority to deprive a young person of their liberty should they consider that that is necessary."

61. The legal principles that apply when the High Court is deciding whether to exercise the jurisdiction confirmed by the Supreme Court to authorise the deprivation of liberty of a child are well settled and can be summarised as follows:

i) It is a fundamental principle of a democratic society that the State must adhere to the rule of law when interfering with a person's right to liberty and security of person (*Brogan v United Kingdom* (1988) 11 EHRR 117 at [58]).

ii) Within this context, Art 5(1) of the ECHR stipulates that everyone has the right to liberty and security of person and that no one shall be deprived of his liberty save in the circumstances described by Art 5 and in accordance with a procedure prescribed by law.

iii) The purpose of Art 5 is to ensure that people are not deprived of their liberty without the safeguards that secure that the legal justifications for the constraints which they are under are made out (*P (acting by his Litigation Friend the Official Solicitor) v Cheshire West and Chester Council* [2014] A.C. 896).

iv) Whilst Art 5(1)(d) of the ECHR provides a specific example of the detention of children, namely for the purposes of educational supervision, that example is not meant to denote that educational supervision is the only purpose for which a child may be detained (see *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2008) 46 EHRR 449).

v) The rights enshrined in the ECHR are to be read and given effect in domestic law having regard to the provisions of the UN Convention on the Rights of the Child. Art 37 of the UNCRC provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily.

vi) The court may grant an order under its inherent jurisdiction authorising the deprivation of a child's liberty if it is satisfied that the circumstances of the placement constitute a deprivation of liberty for the purposes of Art 5 of the ECHR *and* it considers such an order to be in the child's best interests.

vii) With respect to the first question of whether the arrangements in the placement amount to a deprivation of liberty for the purposes of Art 5, three broad elements

comprise a deprivation of liberty for the purposes of Art 5(1) of the ECHR, namely (a) an objective element of confinement to a certain limited place for a not negligible period of time, (b) a subjective element of absence of consent to that confinement and (c) the confinement imputable to the State (see *Storck v Germany* (2006) 43 EHRR 6). Only where all three components are present is there a deprivation of liberty which engages Art 5 of the ECHR.

viii) Within this context, in *Cheshire West and Chester v P* [2014] AC 896 the Supreme Court articulated an 'acid test' of whether a person who lacks capacity is deprived of their liberty, namely (a) the person is unable to consent to the deprivation of their liberty, (b) the person is subject to continuous supervision and control and (c) the person is not free to leave (see also *Re RD (Deprivation or Restriction of Liberty)* [2018] EWFC 47 per Cobb J).

ix) To determine whether someone has been "deprived of his liberty" within the meaning of Art 5, the starting point must be his or her concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Guzzardi v Italy* [1980] 3 EHRR 333).

x) The courts have utilised comparators against which to measure the elements of that test in respect of the subject child. Within this context, it is important to note that all children are (or should be) subject to some level of restraint, which adjusts with their maturation and change in circumstances. Childhood is not a single, fixed and universal experience between birth and the age of majority, but rather one in which, at different stages, in their lives, children require differing degrees of protection, provision, prevention and participation.

xi) With respect to the second question, namely whether it is in the child's best interests to authorise the circumstances that amount to a deprivation of liberty for the purposes of Art 5, that deprivation will only be lawful if the court is satisfied that it is in the child's best interests having regard to the child's welfare as the court's paramount consideration.

xii) When the court is considering the welfare of the subject child as its paramount consideration in the evaluative exercise with respect to welfare required on an application made pursuant to the inherent jurisdiction of the High Court, the court surveys and takes into account a wide range of matters. The child's welfare needs must be considered both holistically and realistically, which approach demands that the court consider the likely consequences of any order it does or does not make (see *Tameside MBC v L* [2021] EWHC 1814 (Fam)).

62. Within the context of the foregoing principles, at various points in its judgment the Supreme Court emphasised that the exercise of the inherent jurisdiction in the circumstances with which the Supreme Court was concerned in *Re T* required the existence of what the court termed "imperative conditions of necessity". As noted above, this has led in this case to a difference of view regarding the nature and effect of imperative conditions of necessity and, in particular, whether the Supreme Court decision in *Re T* limits the use of the inherent jurisdiction to cases in respect of children under the age of 16 *only* to those cases in which it has been established that there is no placement available that is lawful by reference to the statutory scheme or whether the

jurisdiction is preserved in *all* circumstances where the exercise of the inherent jurisdiction to approve a deprivation of liberty with respect to a placement that is unlawful by reference to the amended statutory scheme is required to protect the welfare of the subject child.

63. In this context, and as I have observed above, in *Re T* Lady Black observed at [141] that:

> "Cases such as those to which I have alluded earlier in this judgment demonstrate, it seems to me, that 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." (emphasis added)

And at [145]

> "I have been particularly concerned as to whether it is a permissible exercise of the inherent jurisdiction to authorise a local authority to place a child in an unregistered children's home in relation to which a criminal offence would be being committed. Ultimately, however, I recognise that there are *cases in which there is absolutely no alternative, and where the child (or someone else) is likely to come to grave harm if the court does not act*. I also have to recognise that there are other duties in play, in addition to those which prohibit carrying on or managing an unregistered children's home. I gave an idea earlier (see para 30 *et seq*) of the duties placed upon local authorities to protect and support children. How can a local authority fulfil these duties in the problematic cases with which we are concerned if they cannot obtain authorisation from the High Court to place the child in the only placement that is available, and with the ability to impose such restrictions as are required on the child's liberty? It is such imperative considerations of necessity that have led me to conclude that the inherent jurisdiction must be available in these cases. There is presently no alternative that will safeguard the children who require its protection." (emphasis added)

And at [150]

> "As will by now be apparent, I consider *that it is open to the High Court, in an appropriate case, to exercise its inherent jurisdiction to authorise such placements.* Once a court order authorising the deprivation of liberty in this way is made, I do not see how the deprivation can be said to be not in accordance with the domestic law for article 5 purposes. I should perhaps reiterate that in reaching my view as to the permissible use of the inherent jurisdiction, I have taken fully into account that if the placement is in an unregistered children's home, the provider of the home will be committing a criminal offence, but concluded, as I have explained, that in view of the dire and urgent need for placements for such children, this is nevertheless a proper use of the court's powers." (emphasis added)

64. In the context the authorisation of the deprivation of liberty of a child in an unregistered placement, involving the potential commission of a criminal offence under s. 11(5) of the Care Standards Act 2000, in his concurring judgment, Lord Stephens of Creevyloughgare stated as follows at [168]-[170] regarding the proper approach of the court when deciding whether to exercise the inherent jurisdiction in that context:

> "[168] As Lady Black has set out, the inherent jurisdiction of the High Court in relation to children is wide: it is the ultimate safety net (see paras 64-68 above). To my mind the central focus of this aspect of the inherent jurisdiction is on the welfare and safety of children rather than on the potential commission of a criminal offence under section 11 of the Care Standards Act 2000 by others. Obviously, that central focus requires the court to give anxious and detailed consideration to the risks to the child in respect of a placement in which such an offence may be committed. However, the High Court is not required to determine whether an offence will be committed or whether the individual has an available defence. It is sufficient for the court to be aware of the potential that such an offence may be committed by another and to examine how that impacts on the best interests of the child. It is no part of the court's function to "authorise" the commission of any criminal offence. Any order under the inherent jurisdiction does not do so. Rather, if the inherent jurisdiction is used, then the court "authorises" but does not "require" the placement by a local authority of a child in an unregistered children's home despite the potential that a person may be prosecuted for and convicted of an offence under section 11 of the Care Standards Act 2000. If a prosecution is brought, which it can be, then it is a matter for the criminal courts to determine whether an offence has been committed and if so, as to the appropriate sentence to impose.
>
> [169] The Secretary of State for Education, in his post-hearing submissions dated 3 June 2021 submits "that the High Court's inherent jurisdiction can be used to authorise an unregistered placement, but only in circumstances … where a defence to the crime in section 11 of the [Care Standards Act] 2000 can be made out" (emphasis in the original). The defences postulated are "necessity/duress of circumstances". I agree with the submission of the Secretary of State that the inherent jurisdiction can be used but reject the proposed qualification as to the circumstances in which it can be used. The existence of a defence to a criminal charge misplaces the focus of the inherent jurisdiction which at all times is on the child. The inherent jurisdiction is available despite the potential that a person may be prosecuted for and convicted of an offence under section 11 of the Care Standards Act 2000: that possibility does not abrogate or restrict the inherent jurisdiction. The jurisdiction exists to protect children, not to decide issues of criminal liability."
>
> [170] Accordingly, the courts, in the exercise of the inherent jurisdiction, must only authorise such a placement where there are "imperative considerations of necessity" and where there has been strict compliance with the matters contained in the Guidance issued by the President of the Family Division on 12 November 2019 in relation to placing a child in an unregistered children's home ("the Guidance") (see para 147 above) and with

> the addendum dated 1 December 2020 to the Guidance. Furthermore, if a placement is authorised in an unregistered children's home then the court must monitor the progress of the application for registration in accordance with the Guidance and, if registration is not achieved, the court must rigorously review its continued approval of the child's placement in an unregistered home."

65. Lady Arden likewise concluded that the potential that a person may be prosecuted for and convicted of an offence under s. 11 of the Care Standards Act 2000 does not act to abrogate or restrict the exercise of the inherent jurisdiction, Her Ladyship observing as follows in *Re T* at [189] to [193] regarding the circumstances in which it is permissible to deploy the inherent jurisdiction in those particular circumstances:

> "[189] This judgment does not seek to identify all the other limits of inherent jurisdiction in this appeal, but that there are some limits is clear also from this appeal. Where the field is already populated by intense statutory regulation, it should in general only be used in cases where there is a high degree of necessity about its exercise: the court must in general be left with no alternative if it is to fulfil an important objective within the inherent jurisdiction. That might be because of urgency and the lack of the availability of an alternative, coupled with appropriate conditions attached by the court to the exercise of the inherent jurisdiction.
>
> [190] The Court must also, as it seems to me, respect Parliamentary sovereignty and the separation of powers. So, the question becomes not simply whether by authorising the local authority to place a child in an unregistered home a criminal offence would be committed. Rather the question is whether there is legislative intent in section 11 of the 2000 Act to exclude the inherent jurisdiction of the court.
>
> [191] In considering this question, I have found valuable assistance in the following analysis of *Bromley's Family Law* (N V Lowe, G Douglas, E Hitchings and R Taylor (2021)) (extracted from pp 773 to 774, omitting footnotes), a work thoughtfully cited by counsel for Caerphilly County Borough Council. It reads:
>
> > 'Courts have traditionally declined to define the limits of their inherent powers to protect children which have often been described as theoretically unlimited. Nevertheless, although the High Court's inherent power to protect children is wider than that of a parent, it is equally well established that, whatever may be the theoretical position, there are 'far-reaching limitations in principle' on the exercise of that jurisdiction … [B]ecause of the court's tendency to approach the issue on a case-by-case basis rather than by laying down general guidance, the precise limits, even to the extent of determining whether there are … necessarily de facto rather than de jure limits, remains unclear.

> *The de jure limits*
>
> Although the established limits have developed more as a result of practice than of strict legal restraint, there are clearly some de jure limits to the inherent powers. … There is no inherent power to make orders prohibited by statute, as, for example, committing children into local authority care or to making supervision orders, which power was expressly revoked by section 100(2)(a) [of the Children Act 1989]. As a general proposition, however, courts should be slow to hold that an inherent power has been abrogated or restricted by legislation, and should only do so where it is clear that Parliament so intended. Nevertheless, it can be a matter of fine judgment to determine what the legislative intention is. Another complication is the acceptance that the inherent powers can be used to fill unintended *lacunae* in legislative schemes.'

[192] In my judgment (and I note that this point is also made by the ALC), if section 11 had criminalised the use of unregistered homes, the court could not have exercised its inherent jurisdiction: this would be ruled out on Bromley's text as well. But if the criminal offence is visited upon the operator of the home, then there is no clear legislative intent to remove the court's inherent jurisdiction in cases of absolute necessity. As it is, the court is not the object of the prohibition and, applying the guidance in Bromley, the court should be slow to find that it is. Furthermore, as already made clear, the order of the court does not grant any immunity from the offence (cf *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2021] 2 WLR 1333). Moreover, I note that the sentence on conviction for a first offence is absolutely restricted by primary legislation to a fine, irrespective of the circumstances of the case. I have not found any precedent for this situation, but some assistance might be drawn by analogy from the decision of the Court of Appeal in *In re R-J (Minors) (Fostering: Person Disqualified)* [1999] 1 WLR 581. The court treated the interests of the child as paramount and declined to take the view that a statutory impediment to making one type of order should restrict the making of another sort of order to the same effect but to which the statutory impediment did not apply.

[193] It is always going to be a case of the court being satisfied that the unregistered home will meet the child's needs *and that there is no realistic alternative to the placement* and imposing the strict conditions set out in the President's Guidance, with which all concerned are familiar." (emphasis added)

66. The Supreme Court further held that the continuing availability of the inherent jurisdiction of the High Court in the circumstances with which the court was concerned in *Re T* was also supported by consideration of what Lord Stephens termed the "positive operational duty" under Art 2 and Art 3 of the ECHR. Within this context, His Lordship stated as follows in *Re T* at [175] to [177]:

> "[175] The positive operational duty to protect life under article 2 arises where the state, or in this case the High Court as a public authority, has actual or constructive knowledge that there is a real and immediate risk to the life

of an identified individual or individuals. If the duty arises then it falls to be discharged by public authorities, including by the High Court but this does not necessarily mean that action, or any particular action, needs to be taken. Rather the nature of the action depends on the nature and degree of the risk and what, in the light of the many relevant considerations, the public authorities, including the High Court, might reasonably be expected to do to prevent it. In this way the positive operational measures must be chosen with a view to offering an adequate and effective response to the risk to life as identified. However, any measures taken must remain in compliance with the other obligations under the ECHR, including article 5. So, for positive operational measures involving a deprivation of liberty to be permissible under article 5, any deprivation of liberty must be both lawful under the domestic law of the United Kingdom (which law includes the inherent jurisdiction), and in compliance with the exhaustively enumerated grounds for detention set out in article Page 59 5(1). In relation to the application of article 5 in cases of this nature I refer to the judgment of Lady Black at para 87 above. These principles in relation to article 2 can be discerned from, amongst other authorities, *Osman v United Kingdom* (1998) 29 EHHR 245, *Kurt v Austria* (Application No 62903/15) 15 June 2021 and *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72. In the context of this case the many relevant considerations in respect of the content of any positive operational measures include the impact, if any of the lack of registration. The fact that a criminal offence under section 11 of the Care Standards Act 2000 may be committed by others does not relieve the court from taking the positive operational step of placing a child in an unregistered placement in order to discharge its duty under article 2 where "there is absolutely no alternative, and where the child (or someone else) is likely to come to grave harm if the court does not act" (para 145 above). Again, there must be "imperative considerations of necessity" (ibid) together with strict compliance with the Guidance and the addendum.

[176] There is a similar positive operational duty on the High Court under article 3 ECHR. The Grand Chamber of the ECtHR, the composition of which included Arden LJ, at para 73 of *Z v United Kingdom* (2001) 34 EHRR 3, stated that article 3 enshrines one of the most fundamental values of democratic society: it prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The ECtHR held that the positive operational obligation under article 3 requires public authorities to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. Under the formulation in *Z*, whether the operational duty arises is linked to actual or constructive knowledge of treatment reaching the minimum level of severity - that is, the high level of severity needed to attract the protection of article 3. If the duty arises, the relevant public authorities should adopt consequential measures which provide effective protection of children and other vulnerable persons. The measures should include reasonable steps to prevent the ill-treatment. The duty is to do what is reasonable in all the circumstances. Again, the fact that a criminal offence under section 11 of the Care Standards Act 2000 may be committed by others does not relieve the court from taking the positive

> operational step of placing a child in an unregistered placement in order to discharge its duty under article 3 where "there is absolutely no alternative, and where the child (or someone else) is likely to come to grave harm if the court does not act" (para 145 above). Again, there must be "imperative considerations of necessity" (ibid) together with strict compliance with the Guidance and the addendum.
>
> [177] Thus there is coherence between the common law and the requirements of articles 2 and 3 ECHR, so that the outcome under both the common law and under the ECHR where the positive operational duty is engaged will be the same."

67. Finally with respect to the law, it is important to note that, whilst when giving judgment the Supreme Court was cognisant of the impending implementation of the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021, the question that arises in the four cases before this court was not one that was expressly considered by the Supreme Court in *Re T.* In this regard, at [183] Lady Arden made clear as follows, having cited a paragraph from the submissions on behalf of the Secretary of State for Education recognising that exceptional circumstances may arise where it is not possible to meet that child's needs in a children's home that is currently registered as required by the Care Standards Act 2000:

> "I read the paragraph I have cited against a later point made in the Secretary of State's submissions that Parliament has now made a statutory instrument which as of September 2021 prohibits local authorities in England from placing children under 16 years in an unregistered home (Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021/161, regulation 4). I proceed on the basis that the Secretary of State is not asking the court to exercise its jurisdiction in this appeal to authorise the placement of a child under that age in an unregistered home. In this judgment, I go no further than the Secretary of State invites us to do in relation to the children of 16 years and above in the passage that I have set out. Any other application will have to be considered on its merits."

DISCUSSION

68. Having considered carefully the comprehensive written and oral legal submissions of the parties and interveners, I am satisfied that it remains open to the High Court to authorise under its inherent jurisdiction the deprivation of liberty of a child under the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is a placement that is prohibited by the terms of the Care Planning, Placement and Case Review (England) Regulations 2010 as amended from 9 September 2021, without cutting across that amended statutory scheme. My reasons for so deciding are as follows.

69. In *Re T* the Supreme Court restated the seminal importance of the inherent jurisdiction of the High Court in respect to children. In particular, the court emphasised its protective nature. As Lady Arden pointed up at [192]:

> "The inherent jurisdiction plays an essential role in meeting the need as a matter of public policy for children to be properly safeguarded. As this case

> demonstrates, it provides an important means of securing children's interests when other solutions are not available."

As noted above, Lady Black further highlighted the need for the protective jurisdiction to be deployed in a manner that anticipates and prevents harm, rather than seeking to repair harm already suffered.

70. Within this context, the Supreme Court further reiterated that, particularly in the context of the protective purpose of the inherent jurisdiction in relation to children, the courts should be slow to hold that an inherent power has been abrogated or restricted by Parliament, and should only do so where it is clear that Parliament so intended. It is in this context that the question of whether the exercise of the inherent jurisdiction to authorise the deprivation of liberty of a child under the age of 16, where the placement in which the restrictions that are the subject of that authorisation will be applied is prohibited by the terms of the amended statutory scheme, would undermine the will of Parliament as expressed in that amended statutory scheme. I am satisfied that it would not.

71. The statutory scheme as amended by the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 is directed at regulating the powers of the local authority to place looked after children, as conferred by the Children Act 1989, and *not* the powers of the High Court under the inherent jurisdiction. The terms of the prohibition contained in r.27A provide that a *local authority* may only place a child under 16 in accommodation in accordance with other arrangements under section 22C(6)(d) in the limited circumstances provided for, in respect of placements in England, in r.27A(a). During the course of their submissions Ms Isaacs and Ms O'Donnell suggested that there was a discrepancy between the terms of r.27A, which uses the terms "may only" with respect to the power of the local authority and *The Children Act 1989 guidance and regulations - Volume 2: care planning, placement and case review* (July 2021), which uses the term "must not". However, I do not, for my part, see any discrepancy.

72. A phrase used in a statute must be construed in light of surrounding text and purpose of statutory scheme (see *AG v HRH Prince Ernest Augustus of Hanover* [1957] AC 436 at 461). That the term "may only" was intended by Parliament to ban the use by local authorities of other arrangements for children below the age of 16 save as provided for in r.27A is made clear in the Explanatory Memorandum. It is also made clear by the language of the regulation. The word "may" is a permissive or enabling expression and, *prima facie*, therefore conveys that the authority which has the power to act also has an option to act or not to act. However, the word "may" can acquire a mandatory meaning when paired with the word "only" having regard to its surrounding context. Within the current context, the term "may only" conveys that the authority covered by the statute is entrusted with a discretionary power but that the authority can exercise that discretionary power only within limits Parliament has prescribed. Under r.27A the authority retains a discretion to choose from placements in a defined set considered appropriate by Parliament but may not, in exercising its discretion, look outside that defined set. Within this context, the language of the legislation, and the accompanying Explanatory Memorandum, make it clear that the intention of the amended statutory scheme is to prevent local authorities from placing a child under the age of 16 in other arrangements, except in limited defined circumstances approved by Parliament. The term "may only" in r.27A amounts to a mandatory prohibition.

73. As I have noted, within the foregoing context the amended statutory scheme proscribes the powers of the *local authority* and not the powers of the court. The court is not the object of the mandatory prohibition created by the amended statutory scheme. In the circumstances, I am satisfied that the same distinction drawn by the Supreme Court in *Re T*, between (i) the exercise by the High Court of the inherent jurisdiction to authorise a deprivation of liberty where there is no alternative and where the child (or someone else) is likely to come to grave harm if the court does not act and (ii) compliance with any legislative requirement on the part of the local authority or the provider of a placement, can be drawn with respect to the amended statutory scheme that takes effect on 9 September 2021. In the context of that clear distinction, and in circumstances where the courts should only hold that a power has been abrogated or restricted by Parliament where it is clear that Parliament so intended, there is no legislative intent evidenced in the amended statutory scheme to remove the courts inherent jurisdiction to authorise the deprivation of liberty in respect of a child under the age of 16 in an unregulated placement.

74. I am further satisfied, again by reference to the analysis of the Supreme Court in *Re T*, that this conclusion is not altered by the fact that the exercise by the High Court of the inherent jurisdiction to authorise a deprivation of liberty in cases of this nature relates to placements rendered unlawful by the amended statutory scheme. As stated by the President when *Re T* was before the Court of Appeal, an order under the inherent jurisdiction does not itself deprive a young person of his or her liberty, it merely authorises the local authority (or those acting on their behalf) to do so should the local authority consider that action necessary. In this context, the Supreme Court made clear in *Re T* that, having regard to the distinction between the power of the local authority conferred by the statutory regime and the power of the court under the inherent jurisdiction, the question of the legality of the placement under the statutory scheme is a matter for the local authority. The Supreme Court further made clear in *Re T* that, in this context, it is no part of the court's function to "authorise" the commission of any criminal offence (in that case an offence under s.11(5) of the Care Standards Act 2000) and that any order under the inherent jurisdiction does not do so.

75. In my judgment, the foregoing position also pertains in respect of a placement of a child under the age of 16 that is unlawful by reference to the amended statutory regime with which this court is concerned. The decision by the court to authorise the deprivation of a child's liberty does not act to authorise the placement. The question of whether to place the child in a placement that is unlawful by reference to the amended statutory scheme remains one for the local authority and not the court. Within this context, the inherent jurisdiction of the High Court to authorise the deprivation of the liberty of a child under the age of 16 is not abrogated by the fact that the amended statutory scheme makes certain placements for such children unlawful. On behalf of Ofsted, Ms Clement urged the court to emphasise that a decision by the court to authorise the deprivation of a child's liberty does not also act to authorise a placement that is unlawful by reference to the statutory regime. Ofsted is concerned that it is still not fully appreciated that a court order authorising the deprivation of a child's liberty does not confer immunity from prosecution. To reiterate, and as made clear in *Re T*, the fact that the court has authorised the deprivation of a child's liberty does *not* grant immunity from prosecution in respect of any criminal or regulatory offence that may arise from the placement of that child in an unregulated placement (see *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2021] 2 WLR 1333).

76. The foregoing conclusions are in my judgement further reinforced by the imperatives of the Convention rights regularly engaged in cases of this nature. By parity of reasoning with *Re T*, the fact that the local authority may employ a placement that is unlawful by reference to the amended statutory regime does not relieve the court from taking the positive operational step of authorising the deprivation of the child's liberty in the placement proposed in order to discharge its duty under Art 2, where there is a real and immediate risk to the life of an identified individual or individuals, or Art 3, where there is actual or constructive knowledge of treatment reaching the minimum level of severity. Further, in circumstances where s.6 of the Human Rights Act 1989 makes it unlawful of a public authority to act in a way which is incompatible with a Convention right, where there is an immediate risk of breach of Convention rights of an individual child, however that risk has come about, then if there is no other alternative the local authority can place the child in an unlawful placement to avoid such a breach. Within this context, and as very properly conceded by the Secretary of State for Education, where it is necessary to place a child in a particular place in order to prevent a breach of that child's Convention rights, the local authority has a power, and that power may be a duty, to place the child there. Accordingly, as noted by Lord Stephens in *Re T* at [177]:

> "Thus there is coherence between the common law and the requirements of articles 2 and 3 ECHR, so that the outcome under both the common law and under the ECHR where the positive operational duty is engaged will be the same."

77. As recognised by Lady Black in *Re T*, it would be unthinkable if the High Court could not use its prerogative jurisdiction to protect a child in circumstances where, but for the exercise of that jurisdiction, the child would be left at risk of significant harm or cruel or inhumane treatment or death because it is not possible, by reason of a lack of resources or other compelling consideration of necessity, to comply with the amended statutory scheme. In such situations, it cannot be said, as Lord Dunedin famously observed in *A-G v De Keyser's Royal Hotel Limited*, that the whole ground of something which can be done by the prerogative is covered by the statute. In circumstances where the statutory scheme does not oust the inherent jurisdiction, it must be open to the court to deploy that jurisdiction where the application of the statutory scheme in circumstances not covered by or anticipated by the Act would result in a failure to safeguard and promote the welfare of the subject child. Indeed, such an order under the inherent jurisdiction is *consistent* with that statutory scheme, the cardinal purpose of Part III of the Children Act 1989 being to ensure that the welfare of a looked after child is safeguarded.

78. For all these reasons I am satisfied that the statutory scheme as amended does *not* prevent the High Court from exercising its inherent jurisdiction to authorise the deprivation of liberty of a child under the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is a placement that is prohibited by the terms of the amended statutory scheme. Within this context, the applications by the four local authorities before the court remain within the territory preserved for the inherent jurisdiction notwithstanding the implementation of the amended statutory scheme. During the hearing, the court heard oral submissions regarding the principles that govern the application of the subsisting inherent

jurisdiction in the context of the cases before the court. It is to that issue that I turn next.

79. As set out above, the task of the court when determining whether to exercise its inherent jurisdiction to grant a declaration authorising the deprivation of liberty of a child is to determine (a) whether the restrictions proposed constitute a deprivation of liberty for the purposes of Art 5 of the ECHR and (b) if so, whether the deprivation of liberty is in the child's best interests. As I have noted above, the legal principles that govern that task are well settled. With respect to the question of best interests, as I observed in *Tameside MBC v C* [2021] EWHC 1814 (Fam):

> "[57] It is well recognised that, when the court is considering the best interests of the child as its paramount consideration in the evaluative exercise with respect to welfare required on an application made pursuant to the inherent jurisdiction of the High Court, the court surveys and takes into account a wide range of matters. To take but one example in the decision of the Court of Appeal in *Re G(Children)(Same Sex Partner)* [2006] 2 FLR 614:
>
> > 'Evaluating a child's best interests involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations. Everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment, and the child's social, cultural, ethnic and religious community, is potentially relevant and has, where appropriate, to be taken into account. The judge must adopt a holistic approach…'"

80. Within this context, the submissions made by the parties and the interveners concentrated on the significance of the Supreme Court's stipulation in *Re T* that the employment of the inherent jurisdiction in the cases with which that court was concerned required the existence of considerations of imperative necessity and how, if at all, that requirement fits into the task of the court in determining an application for authorisation under the inherent jurisdiction in cases of the type with which this court is concerned.

81. Ms Clement (who was instructed on behalf of the Secretary of State for Education before the Supreme Court in *Re T*) submits that the requirement for the existence of considerations of imperative necessity reflects the Supreme Court's concern that, in order to accord proper respect to the principle of Parliamentary sovereignty and the principle of the separation of powers, there must be limits to the exercise of the inherent jurisdiction where the outcome of that exercise gives rise to the potential for conduct that Parliament has decided constitutes a criminal offence, in that case pursuant to s.11(5) of the Care Standards Act 2000.

82. Within this context, on behalf of Ofsted, Ms Clement submitted that the approach adopted in *Re T* must (in circumstances that, as in the cases before this court, involve the exercise of the inherent jurisdiction in a manner that gives rise to the potential for a placement that Parliament has decided is unlawful) confine the use of the inherent jurisdiction to cases in respect of children under the age of 16 in which there is no placement available that is lawful by reference to the statutory scheme. Indeed, Ms

Clement submitted that the lack of availability of a lawful placement is a condition precedent to the exercise of the inherent jurisdiction in such cases. Ms Clement later moderated this submission slightly in conceding that a lawful placement may be said not to be available not only by reason of it not existing, but also if it existed but was manifestly incapable of meeting the subject child's needs. The Secretary of State for Education supported the submissions made by Ms Clement. Against this, each of the local authorities submitted that the inherent jurisdiction is preserved in *all* circumstances where the exercise of the inherent jurisdiction to approve a deprivation of liberty with respect to a placement that is unlawful by reference to the amended statutory scheme is required to protect the welfare of the subject child, the question of imperative considerations of necessity simply forming part of the best interests analysis in each case.

83. It is tolerably clear that the requirement stipulated in *Re T* for conditions of imperative necessity to justify the deployment of the inherent jurisdiction to authorise the deprivation of liberty of a child in an unregistered children's home stemmed from a concern on the part of the Supreme Court to respect the boundaries of Parliamentary sovereignty and the separation of powers in circumstances where Parliament has determined that, pursuant to s.11(5) of the Care Standards Act 2000, it is a criminal offence to carry on or manage a children's home without it being registered. However, it also is important to note the following passage from the judgment of Lord Stephens in *Re T*:

> "[173] The judgment of Lady Black is confined to the permissible use of the inherent jurisdiction in the context of the commission of an offence under section 11 of the Care Standards Act 2000. On that basis the decision in this case should not be taken as a wider-ranging precedent for the use of the inherent jurisdiction notwithstanding that the court is aware that some other criminal offence may be committed."

84. The fact that, in cases of the type that are before this court, the exercise of the inherent jurisdiction gives rise to the potential for a placement that Parliament has decided is unlawful by reference to the amended statutory regime, justifies a similarly rigorous approach to the exercise of the inherent jurisdiction to that taken in *Re T* in seeking to identify conditions of imperative necessity. However, it is *not* useful in my judgement to talk of those conditions of imperative necessity (articulated by Lord Stephens at [172] as "the test of necessity") as being some sort of static condition precedent or gateway to the exercise of the inherent jurisdiction in cases of the type before this court.

85. The task of the court in determining whether to grant a declaration authorising the deprivation of liberty comprises the two stages to which I have referred to above. I agree with the submission of Mr Auburn that nothing in the decision of the Supreme Court in *Re T* suggests that that approach has changed. Within this context, the conditions of imperative necessity contended for by a local authority as justifying in a given case the authorisation of the deprivation of the liberty of a child under the age of 16 in an unregulated placement notwithstanding the requirements of the amended statutory regime will be factors to be taken into account in the best interests analysis that the court is required to undertake when deciding an application for a declaration. They will likewise inform the court's decision on whether the authorisation is a necessary and proportionate step to take having regard to the aim it is sought to achieve. Within this context, the question of the existence of imperative conditions of necessity

is one that informs the best interests test. The contended for conditions of imperative necessity in a given case may justify the exercise of the inherent jurisdiction as being in the child's best interests, either by themselves or in concert with other factors. Likewise, in circumstances where the exercise of the inherent jurisdiction gives rise to the potential for a placement that Parliament has decided is unlawful by reference to the amended statutory regime, the absence of conditions of imperative necessity will make it difficult to conclude that the deprivation of the liberty of a child under the age of 16 in an unregulated placement is in that child's best interests.

86. Whilst, ordinarily, it is likely to be the absence of a regulated placement that will be said to constitute the condition of imperative necessity that informs the outcome of the best interests test (in circumstances where it will generally be the case that an available regulated placement will be better for the child than an unregulated placement), that is not to exclude the possibility of other conditions of imperative necessity that may justify the exercise of the inherent jurisdiction as being in the child's best interests in a given case. Each case will turn on its own facts. In these circumstances, it is neither desirable nor appropriate to attempt a definitive list of what may constitute an imperative consideration of necessity. However, by way of one example, it is difficult to see on the face of it how the need to avoid significant psychological harm to a child that would be caused by a temporary move to a regulated placement, consequent on a delay in the process of registration in respect of the child's current, successful and intended long term placement, would not amount to a situation in which the court is left with no alternative but to grant the order sought if it is to fulfil the important objective within the inherent jurisdiction of safeguarding the child's welfare.

87. Finally, and as emphasised by the Supreme Court in *Re T*, in exercising the inherent jurisdiction to authorise the deprivation of liberty of a child under the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is a placement that is prohibited, the court must ensure rigorous adherence to the procedural safeguards. At [170] Lord Stephens stated as follows in this regard:

> "[170]… Accordingly, the courts, in the exercise of the inherent jurisdiction, must only authorise such a placement where there are "imperative considerations of necessity" and where there has been strict compliance with the matters contained in the Guidance issued by the President of the Family Division on 12 November 2019 in relation to placing a child in an unregistered children's home ("the Guidance") (see para 147 above) and with the addendum dated 1 December 2020 to the Guidance. Furthermore, if a placement is authorised in an unregistered children's home then the court must monitor the progress of the application for registration in accordance with the Guidance and, if registration is not achieved, the court must rigorously review its continued approval of the child's placement in an unregistered home."

88. On behalf of Ofsted, Ms Clement informed the court that Ofsted is concerned that not all local authorities and providers appear to be following the President's Practice Guidance, Ofsted's own statistics demonstrating that providers are either not applying for registration or do not meet the requirements for registration. Having regard to the emphasis placed by the Supreme Court on the importance of the guidance being followed, and whilst the following list summarises the key requirements of the Guidance, that Guidance must be read and applied *in full*:

i) The applicant must make enquiries with either Ofsted or the Care Inspectorate Wales ("CIW") as to whether the home is registered. That process of enquiry means that either Ofsted or CIW are informed as to whether a home is being carried on or managed without registration.

ii) The applicant should make the court explicitly aware of the registration status of those providing or seeking to provide the care and accommodation for the child.

iii) If those providing, carrying on and managing the service are not registered, this must be made clear to the court. The court should be made aware of the reasons why registration is not required or the reasons for the delay in seeking registration.

iv) The applicant must make the court aware of the steps it is taking (in the absence of the provision falling within Ofsted or CIW's scope of registration) to ensure that the premises and support being provided are safe and suitable for the child accommodated.

v) Due to the vulnerability of the children likely to be subject to an order authorising a deprivation of their liberty, when a child is to be provided with care and accommodation in an unregistered children's home or unregistered care home service, the court will need to be satisfied that steps are being taken to apply for the necessary registration.

vi) The court should also be informed by the local authority of the steps the local authority is taking in the meantime to assure itself that the premises, those working at the premises and the care being given are safe and suitable for the accommodated child.

vii) Ofsted should be notified immediately of the placement in order that it is able to take *immediate* steps under the regulatory regime.

viii) Where an application for registration has been submitted to Ofsted or CIW, the court should be made aware of the exact status of that application.

ix) If an order is granted and no application for registration has been made, then the court order should provide that the application for registration should be submitted to Ofsted or CIW within 7 working days from the date of the order.

x) Once the court is satisfied that a complete application has been received by Ofsted or CIW, the court will review the situation regarding the registration status of those carrying on and managing the children's home or care home service in a further 12 weeks. Such review (which may be on paper) will be in addition to any review the court requires to ascertain whether the deprivation of liberty should continue.

xi) If the court has not received confirmation from the local authority within 10 working days of the initial order that a complete application for registration has been received by Ofsted or CIW, the court should list the matter for a further immediate hearing.

xii) If registration is refused or the applications for registration are withdrawn, the local authority should advise the court of this as a matter of urgency. The court will take this into account when deciding whether the placement of the child in the unregistered children's home or unregistered care home service continues to be in the child's best interests.

CONCLUSION

89. It has long been recognised that there are practical limits to what the law can achieve in circumstances where the tools at its disposal are relatively blunt and the problems the law seeks to address are usually complex. A law with a laudable aim may, for some of those who are the subject of it, end up exacerbating the problem it was intended to solve, whether because the problem is more complex than the law alone can cater for or because, for example, the introduction of the law is not accompanied by the resources required to give it proper effect. The inherent jurisdiction with respect to children is the safety net that, amongst other things, acts to ensure that laws promulgated by Parliament, however commendable their aims, do not inadvertently operate so as to do harm to children.

90. Within this context, in cases in which the question before the court is whether the court should authorise, under its inherent jurisdiction, the deprivation of liberty of a child under the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is prohibited by the terms of the Care Planning, Placement and Case Review (England) Regulations 2010 as amended, I am satisfied that the following principles will apply:

i) It remains open to the High Court to authorise under its inherent jurisdiction the deprivation of liberty of a child under the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is prohibited by the terms of the Care Planning, Placement and Case Review (England) Regulations 2010 as amended.

ii) In deciding whether to grant a declaration authorising the deprivation of liberty, the existence or absence of conditions of imperative necessity will fall to be considered in the context of the best interests analysis that the court is required to undertake when determining the application for a declaration on the particular facts of the case.

iii) Whilst each case will turn on its own facts, the *absence* of conditions of imperative necessity will make it difficult for the court to conclude that the exercise of the inherent jurisdiction to authorise the deprivation of the liberty of a child under the age of 16 in an unregulated placement is in that child's best interests in circumstances where the regulations render such a placement unlawful.

iv) It is not appropriate to define what may constitute imperative considerations of necessity. Again, each case must be decided on its own facts.

v) The court must ensure the *rigorous* application of the terms of the President's Guidance, which will include the need to monitor the progress of the application for registration in accordance with the Guidance. Where registration is not

> achieved, the court must rigorously review its continued approval of the child's placement in an unregistered home. Ofsted should be notified immediately of the placement. Ofsted is then able to take immediate steps under the regulatory regime.

91. Each of the four cases with which the court has been concerned is listed before me individually later this week for determination of those applications on the merits, having regard to the court's foregoing conclusions regarding the legal principles that apply. Whilst it may well be that most cases in which a child under the age of 16 is currently placed in an unregulated placement will be the result of there being no alternative, when cases in which there are subsisting orders authorising the deprivation of liberty of a child under the age of 16 in an unregulated placement come up for review or renewal on or after 9 September 2021, the principles that I have set out above will fall to be applied in those cases. To repeat, the President's Guidance must be applied rigorously in *all* cases.

92. Meanwhile the central problem of resources remains. On behalf of Lambeth, Ms Isaacs and Ms O'Donnell made submissions regarding the ability of local authorities to meet the sufficiency duty under s.22G of the 1989 Act. On behalf of the Secretary of State, Mr Auburn rightly cautioned the court that in circumstances where no direction has been made for evidence, it would not be appropriate for the court to make findings in respect of the nature and extent of, and the responsibility for, the acute shortage of placements highlighted by judges of the Family Division, the Court of Appeal and now the Supreme Court, by the Children's Commissioner for England and Wales and by the research commissioned by the Department of Education itself.

93. However, I can observe that, in the experience of *this* court, the prohibition on placing children under the age of 16 in unregulated accommodation contained in the amended statutory regime is not coming into force on 9 September 2021 in the context of local authorities *choosing* to utilise such placements for vulnerable children in great need. Rather, it is coming into force in the context of local authorities having *no choice* but to employ such unregulated provision due to the well-recognised acute lack of appropriate provision. In BM's case, on 1 September 2021 the Secure Welfare Coordination Unit (SCWU), which administers secure placements around the country, confirmed that there are no projected beds in the secure welfare estate and *fifty* live referrals. As at the date of the hearing, the number of referrals had risen to *fifty four*, again in the face of there being no projected beds.

94. In *Re T* Lord Stephens reflected, at [166], the dismay voiced in the many judgments of the lower courts that preceded the judgment of the Supreme Court when observing that, of the two important contexts to the appeal:

> "First is the enduring well-known scandal of the disgraceful and utterly shaming lack of proper provision for children who require approved secure accommodation. These unfortunate children, who have been traumatised in so many ways, are frequently a major risk to themselves and to others. Those risks are of the gravest kind, and include risks to life, risks of grievous injuries, or risks of very serious damage to property. This scandalous lack of provision leads to applications to the court under its inherent jurisdiction to authorise the deprivation of a child's liberty in a children's home which has

> not been registered, there being no other available or suitable accommodation."

95. Within this context, in *Re T* at [185] I note that Lady Arden observed as follows with respect to the lack of appropriate provision in the type of cases with which the court is concerned:

> "…it is not entirely clear to me from the Secretary of State's submissions why the Secretary of State cannot or cannot yet enable all children who need to do so to enjoy the security of a registered home. This problem is clearly not a new one. It may require more resources and/or the acceleration of the processes of registration if that can be achieved. Policy may be evolving on these issues and that may be why the inherent jurisdiction is invoked. It is not satisfactory that the courts should be used to address not just a specific gap but a systemic gap in the provision of care for children. Our conclusion in this case does not address or resolve the underlying cause of the problem, and no doubt will add materially to the workload of the High Court judges of the Family Division."

96. I find myself in the same position in respect of each of the cases before this court. I again recognise that the court did not direct the Secretary of State to file and serve evidence on this point. It nonetheless remains unclear to me, as a judge dealing with these cases on a weekly basis, what precisely is being *done* to ensure the necessary provision so urgently required in the large number of cases that continue to come before the courts and in which it has proved impossible to find a regulated placement for the subject child.

97. In *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2005] 2 AC 68 at [99] Lord Hope of Craighead, recognising the duty of the court to protect the rights of the individual, also observed as follows with respect to the obligations of government more widely:

> "It is the first responsibility of government in a democratic society to protect and safeguard the lives of its citizens. That is where the public interest lies. It is essential to the preservation of democracy, and it is the duty of the court to do all it can to respect and uphold that principle."

98. Within the context of the continuing inadequacy of resources highlighted by all tiers of court in this jurisdiction, by multiple agencies concerned with the welfare of children and by the Department of Education's own research, where the deprivation of the liberty of a child aged under 16 in an unregulated placement is demonstrated to be in that child's best interests, it remains open to the High Court to deploy its protective inherent jurisdiction to authorise that deprivation of liberty, notwithstanding the statutory scheme as amended.

99. That is my judgment.