THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of her family in connection with these proceedings.

Trinity Term
[2021] UKSC 35
On appeal from: [2018] EWCA Civ 2136

JUDGMENT

In the matter of T (A Child) (Appellant)

before

Lady Black
Lord Lloyd-Jones
Lady Arden
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON

30 July 2021

Heard on 28 and 29 October 2020

Appellant
Mark Twomey QC
Dr Rob George
Alexander Laing
Rachel Cooper
(Instructed by Duncan Lewis Solicitors (Harrow))

Respondent (1)
Amanda Weston QC
Amanda Meusz
Lyndsey Sambrooks-Wright
Bethan Manners
(Instructed by Caerphilly Council Legal Services)

Respondent (4)
Paul Hopkins QC
Matthew Rees
(Instructed by Cafcass Cymru)

1st Intervener
(written submissions only)
Deirdre Fottrell QC
Lorraine Cavanagh QC
Siobhan F Kelly
Sharon Segal
(Instructed by Royds Withy King (Swindon))

2nd Intervener
Joanne Clement
Hannah Slarks
(Instructed by The Government Legal Department)

3rd Intervener
Paul Hopkins QC
Matthew Rees
(Instructed by Welsh Government Legal Services Department)

4th Intervener
(written submissions only)
Victoria Butler-Cole QC
Alexander Ruck Keene
Edward Bennett
(Instructed by Leigh Day (London))

5th Intervener

(written submissions only)
Janys Scott QC
Paul Harvey
(Instructed by Balfour +
Manson LLP (Edinburgh))

Respondents:
(1) Caerphilly County Borough Council
(2) [T's mother]
(3) [T's father]
(4) Cafcass Cymru

Interveners:
(1) Association of Lawyers for Children
(2) Secretary of State for Education
(3) Welsh Government
(4) Children's Commissioner for England
(5) Commissioner for Children and Young People in Scotland

LADY BLACK: (with whom Lord Lloyd-Jones, Lord Hamblen and Lord Stephens agree)

1. This appeal concerns a particular aspect of the use of the inherent jurisdiction of the High Court to authorise a local authority to deprive a child of his or her liberty. This judgment should be read together with the judgment of Lord Stephens, with which I entirely agree.

The wider context

2. The background to the litigation is the shortage of provision for children and young people (hereafter generally referred to simply as "children") whose needs are such that they require special limitations on their liberty. Some of these children need to be placed in a secure children's home but no place can be found for them in one of the small number of approved secure children's homes that there are in England and Wales. Some would be likely to meet the criteria for placement in a secure children's home, but would be better served by highly specialised therapeutic care of a different kind, albeit still with their liberty strictly limited.

3. Both the Children Act 1989 and the Social Services and Well-Being (Wales) Act 2014 ("the SSW(W)A 2014") make express provision for the use of accommodation for restricting a child's liberty, but over recent years, the High Court has found itself faced with a significant number of applications by local authorities seeking orders under the inherent jurisdiction authorising alternative restrictive placements of children. In 2018, in the present case, the Court of Appeal expressed concern that so many applications were being made to place children in secure accommodation outside the statutory scheme laid down by Parliament. It described the situation as "fundamentally unsatisfactory" (para 88). This was not the first expression of concern by the courts, nor has it been the last. The Court of Appeal reiterated its disquiet in November 2019 in the case of *In re B (A Child)* [2020] Fam 221, speaking of the "crisis in the provision of secure accommodation in England and Wales" which appeared to have worsened during the intervening 12 months. Baker LJ recorded that the "significant shortfall in the availability of approved secure accommodation" was "causing very considerable problems for local authorities and courts across the country". The absence of sufficient resources meant that local authorities were "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". It was, he said, "a problem which needs urgent attention by those responsible for the provision of resources in this area".

4. Judges of the Family Division of the High Court have also repeatedly called attention to the problem over recent years. *Lancashire County Council v G and N* [2020] EWHC 2828 (Fam) (hereafter, "*Lancashire v G*"), a case which first came before MacDonald J towards the end of last year, illustrates, with uncomfortable clarity, the extreme difficulties that continue to face the child care system and the courts, and will serve to demonstrate the wider context in which this court must determine the present case. In so far as the concepts referred to are unfamiliar, further explanation can be found later in this judgment.

5. In *Lancashire v G*, MacDonald J was concerned with the welfare of G, who was 16 at the time of the first of his several judgments, in October 2020. A very brief summary of the circumstances, as they then stood, will capture the nature of the problems from which G had the misfortune to suffer, and the trials that beset those who were trying to help her, but it is important to emphasise that her difficulties are by no means exceptional.

6. G had said repeatedly that she wanted to kill herself and had attempted to strangle herself more than once, as well as engaging in violent and aggressive behaviour, and setting light to items in a mental health in-patient home where she was living. She had had various placements, and at the time of the first application before MacDonald J, she was on a mental health ward where she had been detained under the Mental Health Act 1983. This was an adult ward, as no CAMHS (Child and Adolescent Mental Health Service) bed had been available. The multi-disciplinary mental health team had concluded that she had no diagnosable mental disorder meriting clinical treatment in a hospital setting, and she was about to be discharged. The local authority considered that she was in need of a secure placement, but none was available for her anywhere in the United Kingdom. Various alternatives were explored, in a diligent and comprehensive search by the local authority, but without success. There was only one placement available at all, and this was not registered as required, and was not prepared to apply for registration. There being no other options, the local authority applied under the High Court's inherent jurisdiction for an order authorising the deprivation of G's liberty in that setting, on the basis that this was the only way in which to safeguard her welfare.

7. In the course of his judgment dealing with the local authority's application, MacDonald J set out a number of excerpts from what other judges had said in their judgments in other cases in the Family Division, calling attention to the same problem that he was facing. It is unnecessary to rehearse all of this material here, but it underlines that the shortage of provision for children and young people such as G is a serious problem, that it is by no means new, and that it has been drawn repeatedly to the attention of those who could be expected to take steps to ameliorate the situation, without noticeable effect. It is worth recording one short extract from the observations made, in 2017, by Sir James Munby, then President of the Family Division, when he was dealing with a child (X) who had similar difficulties to G's.

Amongst a number of forceful observations in the course of the case, he referred to what he termed "a well-known scandal", namely:

> "the disgraceful and utterly shaming lack of proper provision in this country of the clinical, residential and other support services so desperately needed by the increasing numbers of children and young people afflicted with the same kind of difficulties as X is burdened with." (*In re X (A Child) (No 3)* [2017] EWHC 2036 (Fam), para 37)

8. Bringing matters up to date, in para 59 of his October 2020 judgment, MacDonald J said:

> "It is plain that, despite the issue being highlighted in multiple court decisions since 2017, and by the Children's Commissioner, the shortage of clinical provision for placement of children and adolescents requiring assessment and treatment for mental health issues within a restrictive clinical environment, the shortage of secure placements and the shortage of regulated placements remains. In this context, children like G with highly complex needs and behaviour continue to fall through the gaps that exist between secure accommodation, regulated accommodation and detention under the mental health legislation."

9. As for G's particular circumstances, MacDonald J ultimately considered that he was left with no option but to grant the order that the local authority sought under the inherent jurisdiction, notwithstanding that "the placement is plainly sub-optimal from the perspective of meeting G's identified welfare needs and is an unregulated placement" (para 65). If the order were not made, G would be discharged into the community and there would be "an unacceptable risk that G will end her own life or cause herself, and possibly others, very serious physical harm" (para 66). When he considered the case again in November 2020, there was still no alternative placement available, and he was again left with no option but to make a further order authorising the deprivation of G's liberty in the same placement, notwithstanding his "grave reservations" about the decision. He gave a fourth judgment on 11 February 2021 ([2021] EWHC 244 (Fam), and see para 6 thereof for the neutral citation references of the three prior judgments). G's emotional state and her behaviour had continued to deteriorate. She had made further repeated attempts to strangle herself and had put herself at risk of harm through swallowing objects, including screws, and also batteries from a remote-control unit. The local authority, which had been advocating secure accommodation, had come to agree with the solution advocated by G's guardian, namely a regulated non-secure placement

where therapeutic input could be provided to G. But there was no placement available. The judge was satisfied that if G were to be discharged into the community, she would "almost certainly cause herself serious and possibly fatal harm". The only other option was that she remained in her existing unregulated placement, despite it not being fully equipped to meet her complex needs. He authorised that she continue to be deprived of her liberty there. Considerations of safety forced his decision, and he observed that the test applied comes "far closer to being one of necessity than it does to being one of best interests". But it was "the *only* option for keeping G safe in the broadest sense".

10. Two reports published in November 2020 by the Children's Commissioner for England provide further insights into the problem. They are entitled, "The children who no-one knows what to do with", and "Who are they? Where are they?". The first of the reports refers to the "growing crisis in children's residential care" and sets out what action the Children's Commissioner considers is needed by government, local and national, "to fix this broken system". It refers to an "acute lack of capacity" in secure children's homes approved by the Secretary of State for Education. The second focuses specifically on children who are deprived of their liberty in various settings, whether through the mental health system, the criminal justice system, or otherwise.

11. Also to be noted is a research report published in February 2020, entitled "Use of unregulated and unregistered provision for children in care". This was commissioned by the Department for Education, and includes material relevant to the sort of placements with which this court is presently concerned.

The issues in the instant case

12. That is the wider context of these proceedings. I must now turn to the legal issues arising in this particular case.

13. These proceedings were begun by Caerphilly County Borough Council ("CCBC" or "the local authority") in July 2017 in order to address aspects of the care of T, who was then a 15-year-old and in its care by virtue of a care order. T's circumstances have changed very considerably since that time, and so have the legal issues that require determination. It will be convenient to set out, immediately, the legal questions which now require to be decided by this court. This will be followed by an outline of the evolution of the case, which will be expanded, where necessary, later in the judgment.

14. Two main issues require the court's attention.

15. First, there is the overriding question of whether it is a permissible exercise of the High Court's inherent jurisdiction to make an order authorising a local authority to deprive a child of his or her liberty in the sort of case that is under consideration here. On behalf of T (whose appeal this is), it is argued that such a use of the inherent jurisdiction is not permissible. The principal reasoning advanced in support of the argument is:

i) section 100(2)(d) of the Children Act 1989 bars the use of the inherent jurisdiction for this purpose;

ii) the inherent jurisdiction must not be used in such a way as to cut across the statutory scheme in the Children Act 1989, as it would do here;

iii) deprivation of liberty authorised under the inherent jurisdiction would fall foul of article 5 of the European Convention on Human Rights ("article 5") which provides that "No one shall be deprived of his liberty save … in accordance with a procedure prescribed by law".

16. Secondly, if, contrary to T's argument, the High Court *can* have recourse to its inherent jurisdiction to make an order of the type in question, what is the relevance of the child's consent to the proposed living arrangements? It is the appellant's submission that consent is highly relevant to the evaluation of whether it is in the child's best interests to make the orders sought, and that, on the facts of this case, it was contrary to T's best interests to make the order, given her consent to the regime arranged for her.

17. It is important to note that the focus of the present appeal is upon a relatively narrow group of cases. The Court of Appeal said (para 84 of the judgment of Sir Andrew McFarlane P, with whom the other two members of the court agreed) that the case did "not concern the placement of children in other than the equivalent of secure accommodation", and that "[d]ifferent considerations will apply when an application is directed towards, and only directed towards, a deprivation of liberty". Matters cannot, perhaps, be quite so simply stated now, given the evolution of the proceedings since the Court of Appeal hearing, but the focus of the appeal is still confined. In essence, it is concerned with children who the local authority consider require to be deprived of their liberty, and in relation to whom the statutory criteria for the making of a secure accommodation order under section 25 of the Children Act 1989 are satisfied, but who the local authority propose to place elsewhere than in a secure children's home which is approved for that purpose. There could be said to be two distinct categories of children within the group: (1) children who would be placed in a secure children's home but there is no place available for them, and (2) children whose needs would, in the local authority's assessment, be better met

in an alternative placement. There will also be children who fall entirely outside the group because they are unlikely to satisfy the statutory criteria in section 25, although they do need to be deprived of their liberty to keep them safe.

The evolution of the proceedings

18. By July 2017, when the proceedings commenced, T had already spent time living in an approved secure accommodation unit, pursuant to an order made under section 119 of the SSW(W)A 2014. However, in view of her particular needs, CCBC had to seek alternative accommodation for her. Having identified potential accommodation (referred to hereafter as "Placement 1"), the local authority applied to the High Court for an order under the inherent jurisdiction authorising it to place T there in circumstances involving her being deprived of her liberty. Placement 1 was neither registered as a children's home nor approved by the Secretary of State for use as secure accommodation. The arrangements were authorised by Mostyn J on 19 July 2017, and T moved there on 21 July 2017. Thereafter, the authorisation was renewed at subsequent hearings. After some months, however, the placement broke down and, in March 2018, the court authorised a move to another placement ("Placement 2"), where it was also envisaged that the regime would involve T being deprived of her liberty. Placement 2 is a registered children's home, but not approved by the Secretary of State for use as secure accommodation.

19. T's position from the start was that she had the capacity to consent to the care regime that was proposed in each of the placements, that she wanted to be in those placements, and that she consented to the restrictions placed on her. Her case was that, in those circumstances, there was no need for court involvement, because her consent was all that was required to legitimise the arrangements, and that it was important to her that confidence was placed in her decision. However, in authorising the placements, Mostyn J took the view that a court order was required because, in his assessment, T's consent did not have the "authentic and enduring" quality which, he held, was necessary for the purposes of article 5.

20. T appealed to the Court of Appeal against the authorisation of both placements, challenging the judge's approach to the question of consent. It was not part of her case, at that stage, that (as is now submitted) the inherent jurisdiction was not available to the court at all, as a matter of law, as a vehicle by which to authorise placements such as these. Her argument did include, at one point, the more limited contention that, as a matter of principle, the inherent jurisdiction could only be exercised if the child was not consenting to the arrangements. However, as the hearing before the Court of Appeal developed, even this argument was not pursued, with the result that the appeal proceeded upon the basis that recourse *could* be had to the inherent jurisdiction in an appropriate case, notwithstanding the child's consent. The active debate was, ultimately, about whether it was appropriate to make

an order in this particular case, given T's apparent consent to the proposed regime. The Court of Appeal found no basis to conclude that, on the facts of this case, Mostyn J was wrong to exercise his discretion by making an order, so dismissed the appeal.

21. Despite applying almost immediately after the Court of Appeal gave judgment in October 2018, it was not until August 2019 that T was granted legal aid for an application to the Supreme Court for permission to appeal. By the time the Supreme Court granted permission for the appeal, at the start of November 2019, the order authorising CCBC to deprive T of her liberty had already been discharged, on the application of the local authority, and in the spring of 2020, T turned 18. To her great credit, she is living independently, and is in employment. It follows that the issues with which this appeal is concerned are no longer of relevance to T personally, but they do continue to affect a significant number of children.

22. As has been foreshadowed, not only has the factual situation moved on, but the legal issues have also evolved. As can be seen from para 16 above, there is still a question as to how consent on the part of the child should affect the court's decision making. But there is also the new argument, not advanced in either of the courts below, that the inherent jurisdiction is simply not available to the court as a means by which to authorise arrangements of the kind made for T, depriving a child of his or her liberty (see para 15 above). In addition, we have received wide-ranging submissions going to the question of how, if the inherent jurisdiction *is* available, the proceedings need to be managed so as to safeguard the position of the children who may be subject to arrangements depriving them of their liberty.

23. It should be said that it has been far from easy for this court to address legal arguments which were not advanced at earlier stages of the proceedings (and therefore without the benefit of relevant factual findings and of the views of the lower courts on the issues) and in litigation which, at least in so far as it concerns practical arrangements for T, has now become academic, given that she has reached majority, and in light also of her impressive progress. It will be necessary to recall throughout that it is the role of the court to resolve issues that have arisen between the parties to the litigation, and not to provide generalised advisory guidance.

The interrelation between England and Wales

24. Social care, health and education were devolved to Wales by the Government of Wales Act 2006 and remain so under the Wales Act 2017. Accordingly, whilst the law applies uniformly to both England and Wales in many respects, including the law relating to the inherent jurisdiction of the High Court, the law relating to *Gillick* capacity (see *Gillick v West Norfolk and Wisbech Area Health Authority*

[1986] AC 112), and the Mental Capacity Act 2005, there are material differences between Welsh and English law in relation to provision for children in need and those looked after by local authorities. These differences include, of particular relevance here, differences in respect of secure accommodation (different statutory provisions and different regulations), and in relation to the statutory duties imposed on local authorities.

25. Whereas Part IV of the Children Act 1989 applies in both England and Wales, as does section 100, Part III of the Act and the statutory regulations made thereunder have been replaced in Wales by the SSW(W)A 2014, together with a number of regulations and supporting codes. Where relevant to the issues in this case, reference will be made to both the English and the Welsh provisions.

26. Whilst much similar ground is covered in the English and the Welsh provisions in relation to the duties of local authorities, some distinctions stand out. These include the fact that, in contrast to the English legislation, which makes no reference to the United Nations Convention on the Rights of the Child ("UNCRC"), section 7(2) of the SSW(W)A 2014 provides, summarised broadly, that a person exercising functions under the Act in relation to a child "must have due regard to" the Convention, and local authorities are reminded, by the Code of Practice to Part 6 of the SSW(W)A 2014, of the need to have regard to the Convention when exercising their functions relating to looked after and accommodated children. Other material differences will become apparent in due course.

27. There are also separate statutes governing social care in England and in Wales. In England, the central statute is the Care Standards Act 2000 which, amongst other things, makes provision for the registration and regulation of children's homes. Also relevant are the Care Standards Act (Registration) (England) Regulations 2010 and the Children's Homes (England) Regulations 2015. The registration authority is the Chief Inspector for Education, Children's Services and Skills who also has inspection duties. In Wales, the governing statute is the Regulation and Inspection of Social Care (Wales) Act 2016 ("RISCA 2016"), which operates together with the Regulated Services (Registration) (Wales) Regulations 2017 and the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017. The process of registration, inspection and regulation of the premises is conducted by the Care Inspectorate Wales.

Centrally relevant provisions of statutes and regulations

28. I have collected together, in this section of the judgment, a number of legal provisions which are of particular relevance in resolving the issues in this case. This will serve to introduce the framework within which a local authority must operate,

in a case such as the present one, and I will draw on, and amplify, the material when discussing the legal issues later on. Part A of this section looks at the duties that local authorities owe to children. Part B sets out the statutory provisions which deal expressly with secure accommodation (section 25 of the Children Act 1989 in England, section 119 of the SSW(W)A 2014 in Wales), and the regulations made under those sections. Children's homes play a significant part in both regimes, and Part C deals with the law establishing what is meant by a "children's home" and how such homes are regulated. This requires consideration of the Care Standards Act 2000 (England) and RISCA 2016 (Wales), as well as certain regulations made under the statutes. Part D then turns to section 100 of the Children Act 1989, and considers the background to it coming into being, and aspects of the inherent jurisdiction of the High Court generally. Finally, article 5 is dealt with in Part E.

A. Local authority duties to children

29. Local authorities have statutory duties to protect and support children and families in various ways.

(i) England

30. A principal source of these duties, in relation to English local authorities, is Part III of the Children Act 1989, which is entitled "Support for Children and Families Provided by Local Authorities in England". It covers, inter alia, the provision of services for children in need and their families, the provision of accommodation for children, and the duties of local authorities in relation to children looked after by them. It is unnecessary to go into the detail of the duties here and what follows is intended as an indication of their nature, not as a comprehensive statement of their ambit. They include a general duty, in section 20, to provide accommodation for any child in need within the local authority's area who appears to require accommodation because no one has parental responsibility for him, or because he is lost or abandoned, or because the person who has been caring for him is prevented from providing him with suitable accommodation or care.

31. Section 22 deals specifically with the duties of local authorities in relation to those children who are "looked after" by them (as defined in section 22(1)). Had the local authority in the present case been an English one, T would have been "looked after" by them, within the meaning of the Children Act 1989, being "in their care" by virtue of the care order in relation to her; as it was, CCBC being a Welsh authority, she was "in its care" and therefore "looked after" by CCBC in accordance with section 74 of SSW(W)A 2014.

32. Section 22(3) obliges the local authority to safeguard and promote the welfare of any child they are looking after, and it is worth noting that, by section 22(3A), this includes a duty to promote the child's educational achievement. Section 22A provides that, when a child is in the care of a local authority, it is the local authority's duty to provide the child with accommodation. Section 22C sets out the ways in which this duty, and the local authority's duty to maintain the child in other ways (section 22B), is to be fulfilled. The first port of call for the local authority, by way of accommodating the child, is the parent or other person with parental responsibility (see section 22C(2)), but section 22C(4) does not require that sort of arrangement to be made where it would not be consistent with the child's welfare, or would not be reasonably practical. If the local authority is not able to arrange for accommodation with a parent etc, they must place the child "in the placement which is, in their opinion, the most appropriate placement available" (section 22C(5)). Section 22C(6) deals with what is meant by "placement" for these purposes. It covers placement with an individual who is a local authority foster parent, whether connected with the child or not, 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 1 of RISCA 2016, and, by section 22C(6)(d):

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

33. Section 22C(6)(d) merits a little more consideration, given the difficulty in placing children such as T in the other sorts of placement mentioned in section 22C(6). The relevant regulations for the purpose of (d) are the Care Planning, Placement and Case Review (England) Regulations 2010. Regulation 27 is headed "General duties of the responsible authority when placing a child in other arrangements". It deals with placing the child in accommodation "in an unregulated setting" and imposes a duty on the authority to be satisfied that the accommodation is suitable for the child, informing the independent reviewing officer, and (as long as it is reasonably practicable) arranging for the child to visit the accommodation. Since the hearing of this matter, further provisions have been added to the regulations by the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021. These amending Regulations alter the wording of regulation 27. They also add a new regulation 27A, which limits the circumstances in which a local authority can place a child under 16 in alternative accommodation under section 22C(6)(d). These changes will need to be taken into account once they are effective, later this year. As for section 22D, to which section 22C(6) is made subject, it imposes certain obligations to review the child's case prior to placement.

34. Also to be found in the Care Planning, Placement and Case Review (England) Regulations 2010 (supra), is a more generally applicable structure for matters such as care planning (including the preparation of a care plan for the child), placement,

visits by a social worker to children in placement at specified intervals, and regular care reviews for all looked after children.

35. Section 22G deals with the general duty of a local authority to take steps to secure, "so far as reasonably practicable", that they are able to provide accommodation needed for children within their area.

(ii) Wales

36. In Wales, as I have said, Part III of the Children Act 1989 has been replaced by SSW(W)A 2014, and in particular Part 6 of that Act. Like an English local authority, a Welsh local authority has a general duty to safeguard and promote the welfare of any child they are looking after, including a duty to promote the child's educational achievement (section 78).

37. Section 75 is the equivalent of section 22G in the Children Act 1989, imposing a general duty on Welsh local authorities to secure sufficient accommodation for looked after children. Section 79 of the Act deals with the provision of accommodation for specific children. It obliges the local authority to provide a child in its care with accommodation, and section 81 sets out the ways in which such looked after children are to be accommodated and maintained. Section 81 is very similar to section 22C of the Children Act 1989. Section 81(6)(d) is the equivalent of section 22C(6)(d), with the Welsh adjustment that it is made subject to section 82 of SSW(W)A 2014, not to section 22D, although the substance of the proviso is the same in that like section 22D, section 82 imposes obligations to review the child's case prior to placement.

38. Section 83 is designed to ensure that children looked after by the local authority have a care and support plan, which is kept up to date. The Code to Part 6 deals further with this, as do the Care Planning, Placement and Case Review (Wales) Regulations 2015. Together, the provisions cater for many issues which touch upon a child's welfare, ensuring that attention is given to matters such as education, health, and emotional and behavioural development, imposing requirements for regular visits to the child by a representative of the local authority, establishing obligations to review the child's case at regular intervals, and so on. Bearing in mind that T was placed in England, it is worth noting that a local authority may only decide to place a child outside its area if it is satisfied that there is no placement available within its area capable of meeting his or her needs, and the decision must be referred to and approved by a panel which has to be satisfied, inter alia, that the placement is the most appropriate one for the child, and consistent with his or her care and support plan (regulation 12 of the Care Planning, Placement and Case Review (Wales) Regulations 2015).

B. Provisions dealing with secure accommodation

39. Section 25 of the Children Act 1989 regulates the circumstances in which a child who is being looked after by a local authority in England and Wales may be placed in "accommodation … provided for the purpose of restricting liberty" (entitled "secure accommodation" by the section) in England or Scotland. Section 119 of SSW(W)A 2014 makes equivalent provision in relation to the placement of children in secure accommodation in Wales. It is the geographical situation of the accommodation which determines which of section 25 or section 119 applies, not whether the local authority is an English or a Welsh local authority. In T's case, as both Placement 1 and Placement 2 were in England, had those placements been treated as "secure accommodation", they would have been subject to section 25 rather than section 119, notwithstanding that the local authority is a Welsh local authority, but both sections will be set out here. It is important to note, however, that there is Welsh provision governing the powers and duties of Welsh local authorities in this context even where the authority places a child outside Wales (see para 48 below).

40. Section 25 is in Part III of the Children Act 1989 (see para 30 above). As I have explained, Part III covers, inter alia, the provision of services for children in need and their families, the provision of accommodation for children, and the duties of local authorities in relation to children looked after by them. Within Part III, section 25 has the separate sub-heading, "*Secure accommodation*". The section reads:

> "**25. Use of accommodation for restricting liberty**
>
> (1) Subject to the following provisions of this section, a child who is being looked after by a local authority in England or Wales may not be placed, and, if placed, may not be kept, in accommodation in England or Scotland provided for the purpose of restricting liberty ('secure accommodation') unless it appears -
>
> (a) that -
>
> (i) he has a history of absconding and is likely to abscond from any other description of accommodation; and

(ii) if he absconds, he is likely to suffer significant harm, or

(b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons.

(2) The Secretary of State may by regulations -

(a) specify a maximum period -

(i) beyond which a child may not be kept in secure accommodation in England or Scotland without the authority of the court; and

(ii) for which the court may authorise a child to be kept in secure accommodation in England or Scotland;

(b) empower the court from time to time to authorise a child to be kept in secure accommodation in England or Scotland for such further period as the regulations may specify; and

(c) provide that applications to the court under this section shall be made only by local authorities in England or Wales.

(3) It shall be the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in his case.

(4) If a court determines that any such criteria are satisfied, it shall make an order authorising the child to be kept in secure accommodation and specifying the maximum period for which he may be so kept.

(5) On any adjournment of the hearing of an application under this section, a court may make an interim order permitting the child to be kept during the period of the adjournment in secure accommodation.

(5A) Where a local authority in England or Wales are authorised under this section to keep a child in secure accommodation in Scotland, the person in charge of the accommodation may restrict the child's liberty to the extent that the person considers appropriate, having regard to the terms of any order made by a court under this section.

(6) No court shall exercise the powers conferred by this section in respect of a child who is not legally represented in that court unless, having been informed of his right to apply for the provision of representation under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and having had the opportunity to do so, he refused or failed to apply.

(7) The Secretary of State may by regulations provide that -

(a) this section shall or shall not apply to any description of children specified in the regulations;

(b) this section shall have effect in relation to children of a description specified in the regulations subject to such modifications as may be so specified;

(c) such other provisions as may be so specified shall have effect for the purpose of determining whether a child of a description specified in the regulations may be placed or kept in secure accommodation in England or Scotland;

(d) a child may only be placed in secure accommodation that is of a description specified in the regulations (and the description may in particular be framed by reference to whether the accommodation, or the person providing it, has been approved by the Secretary of State or the Scottish Ministers).

(8) The giving of an authorisation under this section shall not prejudice any power of any court in England and Wales or Scotland to give directions relating to the child to whom the authorisation relates.

(8A) Sections 168 and 169(1) to (4) of the Children's Hearings (Scotland) Act 2011 (enforcement and absconding) apply in relation to an order under subsection (4) above as they apply in relation to the orders mentioned in section 168(3) or 169(1)(a) of that Act.

(9) This section is subject to section 20(8)."

41. Section 119 is in Part 6 of the SSW(W)A 2014 (see para 36 above), under a separate sub-heading "*Secure accommodation*" as with section 25 of the Children Act 1989. It reads:

"**119. Use of accommodation for restricting liberty**

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

(a) that the child -

(i) has a history of absconding and is likely to abscond from any other description of accommodation, and

(ii) is likely to suffer significant harm if the child absconds, or

(b) that if the child is kept in any other description of accommodation, he or she is likely to injure himself or herself or other persons.

(2) The Welsh Ministers may by regulations -

(a) specify a maximum period -

(i) beyond which a child may not be kept in secure accommodation in Wales without the authority of the court, and

(ii) for which the court may authorise a child to be kept in secure accommodation in Wales;

(b) empower the court from time to time to authorise a child to be kept in secure accommodation in Wales for such further period as the regulations may specify;

(c) provide that applications to the court under this section be made only by a local authority or a local authority in England.

(3) It is the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in the child's case.

(4) If a court determines that any such criteria are satisfied, it must make an order authorising the child to be kept in secure accommodation and specifying the maximum period for which the child may be so kept.

(5) On any adjournment of the hearing of an application under this section, a court may make an interim order permitting the child to be kept during the period of the adjournment in secure accommodation.

(6) No court is to exercise the powers conferred by this section in respect of a child who is not legally represented in that court unless, having been informed of his or her right to apply for the provision of representation under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

and having had the opportunity to do so, the child refused or failed to apply.

(7) The Welsh Ministers may by regulations provide that -

(a) this section is or is not to apply to any description of children specified in the regulations;

(b) this section has effect in relation to children of a description specified in the regulations subject to modifications specified in the regulations;

(c) other provisions specified in the regulations are to have effect for the purpose of determining whether a child of a description specified in the regulations may be placed or kept in secure accommodation in Wales.

(8) The giving of an authorisation under this section does not prejudice any power of any court in England and Wales to give directions relating to the child to whom the authorisation relates.

(9) The giving of an authorisation under this section does not prejudice the effect of any direction given by a court in Scotland relating to a child to whom the authorisation relates, in so far as the direction has effect in the law of England and Wales.

(10) This section is subject to section 76(5).

(11) An order made under this section in relation to a child, if it would otherwise still be in force, ceases to have effect when the child reaches the age of 18."

42. Sections 25(1) and 119(1) are to essentially the same effect. They serve two purposes. First, they place a limitation on the ways in which a local authority can provide accommodation for a child who is being looked after by it, ruling out secure accommodation as a routine provision. But, secondly, they also lay the foundations for the regime permitting the use of secure accommodation in limited circumstances,

setting out, in subparagraphs (a) and (b), criteria that have to be satisfied before secure accommodation may be used. The remainder of each section then builds upon this foundation.

43. Section 25(2) and (7), and section 119(2) and (7), make provision as to the use of regulations by the Secretary of State/the Welsh Ministers. Topics that can be covered include how long a child can be kept in secure accommodation with and without court authority, who can apply to court under the section, and the description of children to whom the section is to apply. Section 25(7)(d) should be noted in particular, providing for regulations to be made which impose a requirement for certain accommodation to be approved by the Secretary of State. It will be necessary to revisit this later. It should also be noted that there is no equivalent to sub-paragraph (7)(d) in section 119.

44. It can be seen that the balance of section 25 and of section 119 deals, for the most part, with the court's approach to an application made to it under the section. Whereas the content of the two sections is similar, it is not identical; for example, the Welsh section has no equivalent to section 25(5A) and (8A), dealing with a local authority in England and Wales keeping a child in secure accommodation in Scotland.

45. Regulations have been made under sections 25 and 119. Those made under section 25 include the Children (Secure Accommodation) Regulations 1991 ("the 1991 Regulations"), which are important for the issues in this case. By regulation 1A, they do not apply to the provider of a children's home in Wales or to an application under section 119 SSW(W)A 2014, and certain of the provisions are disapplied in the case of a local authority in Wales in respect of placement in secure accommodation under section 25 Children Act 1989. The relevant regulations made under section 119 are the Children (Secure Accommodation) (Wales) Regulations 2015 ("the 2015 Welsh Regulations") which deal with the placement of children in secure accommodation situated in Wales, and also impose specific duties on Welsh local authorities which are applicable to placements that they make outside Wales.

46. The following provisions of the 1991 Regulations and the 2015 Welsh Regulations are of note.

47. Regulations 3 and 4 of the 1991 Regulations provide:

> "**3. Approval by Secretary of State of secure accommodation in a children's home**

(1) Accommodation in a children's home shall not be used as secure accommodation unless -

(a) in the case of accommodation in England, it has been approved by the Secretary of State for that use;

(b) in the case of accommodation in Scotland, it is provided by a service which has been approved by the Scottish Ministers under paragraph 6(b) of Schedule 12 to the Public Services Reform (Scotland) Act 2010.

(2) Approval by the Secretary of State under paragraph (1) may be given subject to any terms and conditions that the Secretary of State thinks fit.

4. Placement of a child aged under 13 in secure accommodation in a children's home

A child under the age of 13 years shall not be placed in secure accommodation in a children's home without the prior approval of the Secretary of State to the placement of that child and such approval shall be subject to such terms and conditions as he sees fit."

48. Regulation 8 of the 2015 Welsh Regulations now provides (slightly amended from the form it took at the time of the first instance orders):

"**8. Placement in a regulated setting**

A local authority may only place a looked after child in secure accommodation -

(a) provided in Wales by a secure accommodation service in respect of which the provider is registered,

(b) in a home in England which is registered under Part 2 of the Care Standards Act 2000 as a children's

> home providing accommodation for the purpose of restricting liberty, or
>
> (c) provided by a secure accommodation service in Scotland."

49. Regulation 13 of the 2015 Welsh Regulations is similar to regulation 4 of the 1991 Regulations. It prohibits a Welsh local authority placing a child aged under 13 in secure accommodation without the prior approval of the Welsh Ministers to that placement.

C. Children's homes

50. Central to the English and Welsh statutory provisions and regulations are the concepts of "secure accommodation" and of "a children's home". It will be necessary to look in some detail later on at the concept of secure accommodation. It is convenient, however, to expand here upon what classes as a children's home.

51. In the 1991 Regulations, "children's home" is defined by regulation 2(1) as:

> "(a) a private children's home, a community home or a voluntary home in England, or
>
> (b) an establishment in Scotland (whether managed by a local authority, a voluntary organisation or any other person) which provides residential accommodation for children for the purposes of the Children's Hearings (Scotland) Act 2011, the Children (Scotland) Act 1995 or the Social Work (Scotland) Act 1968 …"

52. For further elucidation of the concept of a "children's home", it is necessary to go to section 1 of the Care Standards Act 2000, following the signpost in section 105(1) of the 1989 Act which provides that "In this Act" (and therefore also in the Regulations made under it):

> "children's home -

> (a) has the same meaning as it has for the purposes of the Care Standards Act 2000 in respect of a children's home in England (see section 1 of that Act); …"

53. Section 1(2) of the Care Standards Act 2000 provides:

> "(2) An establishment in England is a children's home (subject to the following provisions of this section) if it provides care and accommodation wholly or mainly for children."

54. The following subsections of section 1 then exclude various specific situations, for instance hospitals and most schools, so that they do not qualify as children's homes.

55. As stated earlier, the Care Standards Act 2000 makes provision for registration and regulation of children's homes, with the registration authority for children's homes in England being the Chief Inspector for Education, Children's Services and Skills. The Chief Inspector is supported by the Office of Standards in Education ("Ofsted") and, hereafter, I will refer simply to "Ofsted". The registration process is dealt with in detail in sections 12 to 21 of the Act, and the Care Standards Act 2000 (Registration) (England) Regulations 2010. Any person who carries on or manages a children's home without being registered is guilty of an offence (section 11). Sections 31 and 32 provide for inspections to be carried out by Ofsted.

56. Regulations made under section 22 of the Care Standards Act, namely the Children's Homes (England) Regulations 2015, prescribe quality standards for children's homes. In regulation 20, "restraint and deprivation of liberty" is addressed, restraint only being permitted to prevent injury or serious damage to property or, where a child is accommodated in a secure children's home, to prevent the child absconding from the home. Any restraint in relation to the child must be necessary and proportionate. By regulation 20(3), however, the Regulations do not prevent a child from being deprived of liberty "where that deprivation is authorised in accordance with a court order".

57. Section 23 of the Care Standards Act enables the publication of statements of national minimum standards, and the Secretary of State has accordingly published a "Guide to the Children's Homes regulations including the quality standards (April 2015)". Annex B to this Guide sets out additional information for secure children's homes. In this respect, it is particularly important to recall regulation 3 of the 1991

Regulations dealing with the need for approval by the Secretary of State of secure accommodation in a children's home (see para 47 above).

58. In amongst all of this detail, there is one feature that must be emphasised: children's homes have to be registered. It is necessary at this point to mention a particular use of terminology which, not at all surprisingly, appears to have given rise to some unfortunate confusion. This concerns the use of the expression "unregulated", for example "an unregulated placement". This is not, it seems, apt to describe a children's home which should be registered but is not, although it appears to have been used in that sense at times. It is apparently intended to refer to a place which is not actually required to register at all, because it does not come within the definition of a children's home, for example because it cannot be said that it "provides care and accommodation wholly or mainly for children". Where an establishment *is* a children's home, it is undoubtedly "regulated", even if it is not registered.

59. Turning then to the position in relation to accommodation provided at a place in Wales (albeit rather more briefly because this case concerns accommodation in England), there is a similar requirement for children's homes to be registered.

60. A "regulated service" has to be registered with the Care Inspectorate Wales under Part 1 of RISCA 2016, and, as in England, it is an offence for a person to provide a regulated service without being registered (section 5 RISCA 2016). Section 2 of RISCA 2016 sets out the meaning of "regulated service" in the Act. It includes "a care home service" and "a secure accommodation service". A "care home service" is further defined, by Schedule 1(1) to the Act, as (subject to certain exceptions) "the provision of accommodation, together with nursing or care at a place in Wales, to persons because of their vulnerability or need". One of the exceptions is "a place providing a secure accommodation service". A "secure accommodation service" is also defined separately, this time by Schedule 1(2). It is "the provision of accommodation for the purpose of restricting the liberty of children at residential premises in Wales where care and support is provided to those children".

61. Regulated services are subject to extensive requirements, by virtue of RISCA 2016, and the regulations mentioned at para 27 above, and they are periodically inspected by the Care Inspectorate Wales. There are provisions addressing, inter alia, the appropriate use of control and restraint, prohibiting corporal punishment, and prohibiting depriving anyone of their liberty without lawful authority.

62. It will be recalled that regulation 8 of the 2015 Welsh Regulations (see para 48 above) provides that a Welsh local authority placing a looked after child in secure

accommodation in England can only do so in a home which is registered under Part 2 of the Care Standards Act 2000 as a children's home providing accommodation for the purpose of restricting liberty. If the proposed placement is in Wales, it has to be in accommodation provided by a secure accommodation service in respect of which the provider is registered. From regulation 1(5) of the 2015 Welsh Regulations it can be seen that this is a reference to registration under Part 1 of RISCA 2016.

D. Section 100 of the Children Act 1989 and the inherent jurisdiction

63. The first of the appellant's arguments against the use of the inherent jurisdiction as a basis for authorising a local authority to deprive a child of his or her liberty is founded on section 100 of the Children Act 1989, and in particular upon section 100(2)(d). Before turning to that section, it is necessary to have a preliminary look at the inherent jurisdiction, as it has been developed in relation to children.

64. In his judgment in this case in the Court of Appeal, commenting on the fact that no party was (at that stage) taking issue with the use of the inherent jurisdiction to meet the needs of the group of vulnerable young people who would otherwise be the subject of a secure accommodation order under section 25 of the Children Act 1989, but for whom there was no available place in an approved secure children's home, Sir Andrew McFarlane said (para 6):

> "Indeed, as a primary justification for the continued use of the inherent jurisdiction with respect to children in modern times is to provide protection for young people when their welfare demands it, it would be difficult to argue against the assumption of jurisdiction in such cases."

65. The inherent jurisdiction, as a means by which to provide protection for children whose welfare requires it, has an extremely long history. An often-quoted description of its roots is to be found in the judgment of Lord Denning MR in *In re L (An Infant)* [1968] P 119, 156. As he said:

> "It derives from the right and duty of the Crown as parens patriae to take care of those who are not able to take care of themselves. The Crown delegated this power to the Lord Chancellor, who exercised it in his Court of Chancery. … the Court of Chancery had power to interfere for the protection of the infant by making whatever order might be appropriate. … This wide jurisdiction of the old Court of Chancery is now

> vested in the High Court of Justice and can be exercised by any judge of the High Court."

66. Also worth repeating are the following well-known words, from the judgment of Lord Eldon LC in an application to put the children of Mr Wellesley under the protection of the court, in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1, p 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."

67. The inherent jurisdiction has had to rise to the challenge of some of the most extreme human and moral dilemmas imaginable, a notable example of this in relatively recent times being *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147. As Lord Donaldson of Lymington MR said in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, p 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."

68. The route by which the assistance of the High Court, acting under its inherent jurisdiction, was commonly sought (including by local authorities) used to be by means of wardship proceedings. This no doubt explains the heading to section 100, which can be found set out in the next paragraph below. However, this was, as Lord Denning succinctly put it in *In re L*, "only machinery", and the court could exercise its inherent jurisdiction without the child being made a ward.

69. Section 100 of the Children Act 1989 provides:

> "**100. Restrictions on use of wardship jurisdiction**
>
> (1) Section 7 of the Family Law Reform Act 1969 (which gives the High Court power to place a ward of court in the care, or under the supervision, of a local authority) shall cease to have effect.

(2) No court shall exercise the High Court's inherent jurisdiction with respect to children -

(a) so as to require a child to be placed in the care, or put under the supervision, of a local authority;

(b) so as to require a child to be accommodated by or on behalf of a local authority;

(c) so as to make a child who is the subject of a care order a ward of court; or

(d) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

(3) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.

(4) The court may only grant leave if it is satisfied that -

(a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and

(b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.

(5) This subsection applies to any order -

(a) made otherwise than in the exercise of the court's inherent jurisdiction; and

> (b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted)."

70. Section 100 will require further detailed consideration later, but it is instructive, at this point, to recall its origins. Child care law was the subject of extensive review in the run up to the passing of the Children Act 1989, as plans were made for new legislation. In consequence, there is a great deal of material available revealing the thinking of the time. What follows is a selection from this material, which it is hoped will serve to demonstrate the objectives behind the section.

71. Before the passing of the Children Act 1989, there were many different routes by which a child could come into the care of a local authority. The Review of Child Care Law, published by the Government in 1985 as a consultative document, said, at paragraph 2.4c, that there were then more than 20 separate provisions leading to care under a court order, with several different sets of criteria for the court to apply, and that there were "defects and anomalies in each of these".

72. Sometimes local authorities chose to apply for wardship instead of seeking to resolve a child's problems by means of one of the more specific statutory provisions. This might occur, for example, where the local authority wished to seek guidance from the High Court when faced with a particularly onerous and difficult decision in relation to a child. But equally, local authorities had recourse to wardship proceedings where they sought care and control of a child about whom they were gravely concerned, in circumstances where they were not confident that any of the specific grounds for the making of a care order under the Children and Young Persons Act 1969 could be made out. In wardship, the child's welfare was to be the court's first and paramount consideration. Section 7(2) of the Family Law Reform Act 1969 provided that if there were exceptional circumstances making it impracticable or undesirable for the ward to be under the care of either of his parents or of any other individual, the court may make an order committing the care of the ward to the local authority.

73. Further useful background details can be found in the Law Commission's Working Paper No 101 on Wards of Court (5 March 1987). Summarising its conclusions, the Law Commission suggested:

> "that the universal character of wardship and the restrictions on its use create anomalies and make it inconsistent with the statutory codes relating to custody and to the care of children by local authorities."

It felt moved to put forward "[s]ome basic options for reform, designed to reduce or eliminate these defects".

74. The Government's White Paper "The Law on Child Care and Family Services" (Cm 62), presented to Parliament in January 1987, proposed, amongst other things, to introduce new improved grounds for the making of a care order (see, for example, paras 54 and 59 ibid). It recorded that where future harm was at issue, the local authority often made application to the High Court for wardship, and that it was intended that the inclusion of likely harm in the new grounds should allow those cases to be heard in juvenile courts instead.

75. The Children Bill embodied the proposals for change. It was introduced into the House of Lords in November 1988. The Explanatory and Financial Memorandum which accompanied it said this of clause 71, which in due course became section 100:

> "Clause 71 prevents the inherent power of the High Court being used to put a child in local authority care or under its supervision or otherwise to give local authorities compulsory powers in respect of a child. It also requires that before a local authority may otherwise invoke the inherent jurisdiction they must obtain the leave of the court by showing that the remedy they are seeking is not otherwise available and that in its absence the child will suffer significant harm. The clause seeks to protect children and families from compulsory care or supervision except where the statutory grounds for care exist under the Bill and in other cases to preclude intervention by local authorities unless harm to the child is likely."

76. When the Lord Chancellor, Lord Mackay of Clashfern, introduced the Bill at the Second Reading stage in the House of Lords, he said:

> "I must say a word about wardship. The Government, in line with the Law Commission's decision to postpone making recommendations about wardship, have not sought in this Bill to reform that area of child law as such, although many of the reforms both in the private and public statute law should substantially reduce the need to invoke the High Court's inherent jurisdiction. There is one exception, however. The conditions in the Bill which must be satisfied before the state, in the guise of the local authority, can intervene in families by seeking emergency protection, care or supervision orders are

> carefully designed as the minimum circumstances which can justify such action.
>
> Accordingly, the Bill prevents the High Court's inherent jurisdiction, which is not limited by such conditions, being used to confer compulsory powers on local authorities. It is recognised that in practice the High Court would not be likely to exercise its power in circumstances where a care order would not be justified under the Bill. However, as a matter of principle it is important for the law in a free society expressly to protect the integrity and independence of families save where there is at least likelihood of significant harm to the child from within the family.
>
> The Bill does not prevent the High Court when hearing a wardship application making a care or supervision order under the Bill where the statutory conditions for such an order are satisfied. And what I will say in a moment about the concurrent jurisdiction will mean that complex or weighty care cases which require the expertise of the High Court will benefit from it under the Bill. Further, local authorities may still invoke wardship for other purposes, provided that there is no alternative statutory procedure and there is an apparent likelihood of substantial harm to the child." (Hansard (HL Debates), 6 December 1988, col 493)

77. From this, it can be seen that the central concern was to protect families from intervention by local authorities except in carefully regulated circumstances. The Bill therefore sought to ensure that local authorities could only intervene compulsorily in family life where statutory conditions were satisfied. In relation to care and supervision orders, these statutory conditions (which came to be known as "the threshold criteria") were set out in section 31 of the Children Act 1989.

78. The structure of section 100 reflects this central concern. It commences by removing section 7 of the Family Law Reform Act 1969 from the picture, thus removing the power used by the High Court to place wards of court in the care, or under the supervision, of a local authority. Section 100(2) then prohibits the use of the inherent jurisdiction in various ways which involve conferring powers on the local authority. Section 100(2)(d), upon which the appellant focuses in this appeal, prevents the inherent jurisdiction being used to confer on the local authority any degree of parental responsibility which it does not already have.

79. However, 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.

80. The question in the present case, of course, is whether the local authority's application in relation to T fell within the territory preserved for the inherent jurisdiction.

E. Article 5 ECHR

81. As material, article 5 ECHR provides:

> "Right to liberty and security
>
> (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; …
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

82. Article 5 protects a person's liberty, providing substantive protection by stipulating (in article 5(1)) the only grounds upon which someone may be deprived of their liberty, and procedural protection by requiring that this can only occur in accordance with a procedure prescribed by law.

83. There is agreement that the only potentially relevant article 5(1) ground in the present circumstances is "for the purpose of educational supervision" within article 5(1)(d). It does not appear to have been contended in the High Court or the Court of Appeal that T's placements were outside this provision. However, the appellant now argues (albeit not, perhaps, as a mainstay of her case) that "placement of a child in a children's home that is not regulated offers no guarantee of '*educational supervision*' (however broadly interpreted)" (para 67 of the appellant's written case). This appears to be based, essentially, upon there being no regime (of the sort enforced in relation to registered children's homes) whereby the nature and quality of the provision in the home is prescribed, and inspected. In this regard, the relevant guidance from the European Court of Human Rights ("ECtHR") must be noted. It establishes that, in the context of the detention of minors, the concept of "educational supervision" is particularly broad, see *Koniarska v United Kingdom* (2000) 30 EHRR CD 139. It is not to be equated rigidly with notions of classroom teaching. The court observed, at p 143:

> "In particular, in the present context of a young person in local authority care, educational supervision must embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the persons concerned."

84. Similarly, in *In re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377 ("*In re K*"), a broad interpretation of article 5(1)(d) was adopted. Before turning to that interpretation, I want to divert to set out the facts of *In re K* here, as they provide a further vivid illustration of the sort of children for whom the system has to cater, the sort of children that this court must have firmly in mind in making its decision. In marked contrast to the situation of some of these children nowadays, there was a place available for K in an approved secure unit and orders could be, and were, made in relation to him under section 25 of the Children Act 1989.

85. K had a long history of difficulties and, from an early age, was fascinated by fire and behaved in a sexualised way. He was first placed in a secure unit in his early teens in 1998. The events that led up to this were described by Dame Elizabeth Butler-Sloss P in the Court of Appeal in this way (para 7):

> "Between October and December 1998 there was a marked deterioration in K's behaviour. He was charged with two offences of indecent assault on a girl at his placement. He was moved and moved again. He was involved in two incidents of fire setting. He assaulted two female members of staff and was charged with indecent assault. In November 1998 he was aggressive and assaulted a male member of staff."

His worrying behaviour continued, even in the secure unit. He was acting out sexual fantasies, even in that controlled and highly supervised environment, and posed a considerable risk to others. Matters reached the point where the professional concern was such that he was not allowed any outside visits.

86. Returning to the interpretation of article 5(1)(d), the width of the wording "for the purpose of educational supervision" was remarked upon by Judge LJ, for example, in these terms:

> "107. This goes far beyond school. It is not just about the restriction on liberty involved in requiring a reluctant child to remain at school for the school day. It arises in the context of the responsibilities of parents which extend well beyond ensuring the child's attendance at school. So it involves education in the broad sense, similar, I would respectfully suggest, to the general development of the child's physical, intellectual, emotional, social and behavioural abilities, all of which have to be encouraged by responsible parents, as part of his upbringing and education, and for this purpose, an appropriate level of supervision of the child to enhance his development, where necessary, by restricting his liberty is permitted."

87. In any given case, it will be necessary for the court to decide, on the evidence, which will include a detailed care plan for the child, whether article 5(1)(d) is satisfied. It will do so bearing in mind the broad meaning that should be given to "for the purpose of educational supervision", taking into account the relevant jurisprudence, including decisions of the ECtHR, and also having regard to the extensive duties concerning provision for children which (as can be seen from paras 29 to 38 above) are placed upon local authorities by domestic law, in particular by Part III of the 1989 Act (and the equivalent Welsh provisions), and by Regulations.

88. As no issue was taken earlier in the proceedings about whether T's placements were "for the purpose of educational supervision", this court is in no position to consider the point in relation to T herself, and I should not be taken to be expressing any view about her specific circumstances. There is nothing to be gained from further consideration of this in the abstract.

89. The main thrust of the appellant's argument in this court in relation to article 5 is that use of the inherent jurisdiction to authorise the deprivation of liberty in cases like the present was not "in accordance with a procedure prescribed by law" as the article requires. This element of article 5 ties in with the requirement in article

5(1)(d) that the detention of a minor be "by lawful order". The appellant's case in this respect will be examined below, but there are some general points which can be set out concerning this element of article 5. *HL v United Kingdom* [2004] 40 EHRR 32 helpfully collects together the essential requirements (see paras 114-115 and 135).

90. Article 5 imposes an obligation to conform to the substantive and procedural rules of national law. Accordingly, the detention must have a legal basis in domestic law, and the law must be of a quality which is compatible with the rule of law. This means that where the domestic law authorises deprivation of liberty, it must be sufficiently accessible, precise and foreseeable in its application to avoid the risk of arbitrariness. It must be attended by fair and proper procedures. An individual who is deprived of their liberty is entitled to have the lawfulness of that detention reviewed by a court.

91. There is nothing in article 5, or in the case law of the European Court of Human Rights, that requires that the domestic law and procedure should be set out in statute and/or regulations, rather than being common law based.

The parties' positions

92. After this survey of the legal framework within which the issues in the case must be considered, it is possible at last to begin consideration of the legal arguments advanced. The court has been provided with far-reaching submissions from the parties and interveners, for which I am grateful. It will be necessary to resist the temptation to go into all of the topics raised in those submissions in the course of this judgment, in order to focus only on that which is essential to the court's determination, and thus, it is hoped, to enable matters to be addressed with an acceptable degree of clarity.

93. The appellant's position can be found set out in outline at paras 15 and 16 above but it may be helpful to recap here, and to add a similarly brief summary of the positions taken by the other parties and the interveners.

94. T's argument is that the court cannot use its inherent jurisdiction in order to authorise the deprivation of a child's liberty in circumstances such as hers. The principal obstacles that she submits exist in the way of this are:

i) section 100(2)(d) of the Children Act 1989 prohibits it;

ii) it would cut across the statutory scheme in the Children Act 1989;

iii) there would be a breach of article 5 of the European Convention on Human Rights.

Her supplementary argument, deployed if this court is of the view that the High Court can, in fact, have recourse to its inherent jurisdiction to make an order of the type in question, is directed to the issue of the child's consent to the proposed living arrangements, which she complains was not correctly dealt with in the Court of Appeal. Consent is highly relevant to the evaluation of whether it is in the child's best interests to make the orders sought, she submits, and on the facts of this case, it was contrary to her best interests to make the order, given that she consented to the regime arranged for her.

95. Turning to the positions of the other parties/interveners, and taking first the question of whether the inherent jurisdiction is available at all, the Secretary of State for Education, Cafcass Cymru, and the Welsh Government all see no obstacle to its exercise in a case such as the present, whether in the shape of section 100(2)(d) of the 1989 Act, or of article 5, or because such exercise would cut across the statutory scheme in relation to secure accommodation.

96. CCBC submit that it is not only lawful to use the inherent jurisdiction in this way, but vital that it is possible to do so. Recourse to the inherent jurisdiction is required in order to enable the local authority to provide a nuanced solution where a child has complex needs, as T did, and also in order to address the situation where there is insufficient secure accommodation available.

97. The Children's Commissioner for England also appears to invite the court to take the view that the inherent jurisdiction may be used. However, she submits that, in order to ensure compliance with the requirements of article 5, it is necessary for the court to set out a clear procedural framework for such applications, incorporating appropriate safeguards for the children concerned. She also makes observations as to certain types of placement which, having regard to Strasbourg case law, will, in her submission, always be unlawful, and fail to comply with article 5.

98. The Children's Commissioner for Scotland raises particular concerns in relation to the placement of children in Scotland pursuant to the exercise of the inherent jurisdiction of a court in England and Wales. Whilst it is useful to have this information as broader background to the issues in the case, the present litigation does not concern such a placement, and it is important to concentrate upon the situation in England and Wales.

99. The Association of Lawyers for Children does not make submissions on the substantive issues in the appeal. In general terms, it considers that the exercise of the High Court's inherent jurisdiction is required to achieve the optimum outcome for a vulnerable child who falls outside the section 25 framework but is nonetheless in need of protection. However, it envisages that the use of the inherent jurisdiction would be inappropriate in certain circumstances, particularly where an approved secure accommodation unit is the only description of accommodation that would keep the child from suffering significant harm.

100. In relation to the question of the child's consent, there is no longer any contention that absence of consent is a jurisdictional requirement, to be satisfied in order to permit the court to intervene at all. Although this issue occupied the Court of Appeal, it need not feature in this judgment. The focus is, instead, upon how the presence or absence of a child's consent should feature in the court's decision as to whether or not to make the order sought by the local authority.

101. CCBC submit that welfare and proportionality are material to the court's decision as to the order it should make under the inherent jurisdiction, and that the child's consent is one factor to be considered. It is for the court to assess whether it is necessary to make an order authorising the deprivation of liberty, notwithstanding that the child is expressing consent to that. Here, the evidence was that an order would assist in providing stability and safety for T, and the court was rightly satisfied that an order was required in her best interests.

102. The Secretary of State for Education submits that if the accommodation which is being authorised under the inherent jurisdiction would fall within the meaning of secure accommodation for the purposes of section 25, the terms of section 25 should be treated as applying. If the accommodation is not of this type, the Secretary of State's position is that no order is necessary where a *Gillick*-competent child provides valid consent to confinement that would otherwise amount to a deprivation of liberty, because the consent prevents the confinement being a deprivation of liberty within the meaning of article 5. But, if the child has not adopted a consistent position, or has demonstrated by actions that he or she does not truly consent, the court can consider whether it is necessary to make an order authorising any deprivation of liberty that may arise.

103. Cafcass Cymru and the Welsh Government point out that Mostyn J found that T's consent to her confinement was not "*Storck* compliant" (a reference to *Storck v Germany* (2005) 43 EHRR 6), and submit that it was unsurprising, given her behaviour at the time, that the judge took that view of her consent and considered that it was in her best interests to make orders. They support the President's approach to consent in the Court of Appeal.

104. The Children's Commissioner for England expresses concern lest the protections afforded by article 5 be too readily lost on the basis of perceived agreement by a child to the arrangements for his or her care, and questions whether children in the sort of scenario with which we are concerned are able to make genuine and valid choices. Accordingly, emphasising the importance of the child's views, she invites the court to consider whether the appropriate way in which to secure the voice of the child is in the context of deciding whether or not the deprivation of liberty for which the local authority seek approval is necessary and proportionate.

105. The Association of Lawyers for Children submits that the child's consent can be taken into account, and that the child's personal autonomy is best protected by adherence to procedural safeguards, including ensuring the child's participation by joining him or her as a party to the proceedings.

Discussion

A. The inherent jurisdiction and section 100(2)(d)

106. I turn first to the appellant's argument that section 100(2)(d) prohibits the use of the inherent jurisdiction to authorise deprivation of liberty in circumstances such as the present case.

107. Section 100 can be found set out in full at para 69 above. To recap, section 100(2)(d) provides that no court shall exercise the High Court's inherent jurisdiction with respect to children "for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child".

108. Section 100(2)(d) cannot be read in isolation from the rest of section 100. It is the last in a list of four functions which are expressly spelled out by section 100(2) as being outside the permitted uses of the inherent jurisdiction. Section 100(2)(a) is immediately recognisable as being related to the regime imposed by Part IV of the Children Act 1989 in respect of the intervention of local authorities in family life. Part IV makes provision for local authorities to apply for care and supervision orders and establishes the threshold criteria for the making of such orders, and section 100(2)(a) establishes that that regime cannot be circumvented by the local authority being granted an order to the same effect under the inherent jurisdiction, without having to satisfy the threshold criteria. It would also, of course, prevent anyone else who wished to force a care or supervision order on the local authority from making an application to that effect under the inherent jurisdiction. Sections 100(2)(b) and

(c) supply further support for the express statutory provisions dealing with local authority care and services, preventing those provisions being circumvented by an order under the inherent jurisdiction requiring a child to be accommodated by or on behalf of the local authority, or invading the local authority's domain by making the child a ward.

109. The balance of section 100 makes provision for the circumstances in which applications which are not already doomed by section 100(2) may be made by local authorities. Section 100(3) requires leave to be obtained, and section 100(4) provides for the only circumstances in which leave may be granted, that is to say where the result which the local authority wish to achieve could not be achieved through the making of any order of the kind to which section 100(5) applies, and there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child, he is likely to suffer significant harm. The orders to which section 100(5) applies are orders "made otherwise than in the exercise of the court's inherent jurisdiction", and for which the local authority are entitled to apply (assuming leave is granted, if the application in question is one which requires leave).

110. Turning specifically to the appellant's section 100 argument, this has section 100(2)(d) as its central focus, little reference being made to subsections (4) and (5), indeed so little that the Secretary of State says, in his written case, that it was his understanding that it had been common ground throughout that those subsections were satisfied in the present case. The appellant subdivides subsection (2)(d) into two elements and submits that both of them are present here, with the result that the inherent jurisdiction cannot be exercised. The first of the two elements is that the order is made "for the purpose of conferring on [the] local authority power …", the second is that the power conferred is "power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child".

111. The appellant points out that the authorisation given, in a case such as the present, by an order under the inherent jurisdiction, does not itself deprive the child of her liberty. As Sir Andrew McFarlane said, at para 77 of his judgment in the Court of Appeal in the present case (and see also para 82), it merely authorises the local authority to confine the child should they consider that necessary. This is not something that the local authority could do anyway under the parental responsibility that they have by virtue of the care order (per section 33(3) of the Children Act 1989) because, the appellant says, there would not be compliance with article 5 if the local authority themselves, as an organ of the state, purported to consent to the removal of the child's liberty. Therefore, the argument goes, the court's order confers on the local authority a power which they did not have.

112. It is also, on the appellant's argument, a power of a kind that falls within section 100(2)(d) because it is "in connection with [an] aspect of parental responsibility". The appellant would interpret the decision of this court in *In re D (A Child)* [2019] UKSC 42; [2019] 1 WLR 5403 as leaving it open for a parent of a child under the age of 16 to give valid consent to a confinement of the child which would otherwise amount to a deprivation of liberty within article 5. Therefore, it is argued, confinement of a child of that age is "in connection with [an] aspect of parental responsibility". Indeed, the appellant submits, even if parents cannot validly consent to the confinement of a child of this age, the act of confinement is still "in connection with" parental responsibility, even though outside the permitted exercise of it. And once the court authorises the deprivation of liberty, the local authority's decisions in implementing this are without doubt in connection with parental responsibility, so the argument goes.

113. In considering this argument, 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. Relevant in approaching the issue are both the words used in the section and the section's origins (as to which see para 70 et seq above).

114. In his written case, the Secretary of State puts the case against the appellant's section 100(2)(d) argument very simply and, it seems to me, essentially correctly, as I shall explain further below. The remainder of this paragraph sets out the essence of his argument. He submits that the orders made here under the inherent jurisdiction did not confer on the local authority the power to determine any question, let alone any question arising in connection with parental responsibility for a child. The local authority already had parental responsibility by virtue of the care order and, T being in their care, they had a duty to accommodate her by virtue of section 22A of the Children Act 1989. What the court's order did was to authorise the local authority to deprive T of her liberty in certain placements in accordance with their care plans. The court determined that this was lawful in accordance with article 5. Once it authorised the placement, the local authority merely exercised the parental responsibility that they already had by accommodating the child and caring for her

in accordance with the care plan. The Secretary of State seeks to confirm this interpretation by looking at the mischief that section 100(2) was intended to address. This demonstrates, in his submission, that it was not intended that section 100(2)(d) would bar the exercise of the inherent jurisdiction in the present case.

115. As I have said, I find myself in agreement with the general thrust of the Secretary of State's analysis of this point, which I propose now to examine in a bit more depth.

116. Both the material that we have about the lead up to section 100, and the wording of the section itself, suggest to me that the principal driving force behind section 100(2) was to ensure that the statutory scheme which the Act was establishing in relation to the intervention of local authorities in the lives of children and families would not be undermined, or evaded, by the use of the inherent jurisdiction. The structure of section 100 bears this out, in that it commences with the removal of section 7 of the Family Law Reform Act 1969, and the first express prohibition in section 100(2) rules out the use of the inherent jurisdiction to require a child to be placed in the care or under the supervision of the local authority, both of which events were, in the new world of the Children Act 1989, to be the exclusive province of Part IV of the Act.

117. The other express prohibitions in section 100(2) need to be interpreted with a proper appreciation of the effect of a care order made under Part IV of the Act. For this, it is necessary to go to section 33 of the Children Act 1989. Section 33(1) sets out the first effect of a care order, that is that it imposes a duty on the local authority designated by the order to receive the child into their care and keep him or her in their care during the currency of the order. The rest of section 33 is essentially concerned with the second effect of the care order which is, as set out in section 33(3), that whilst the care order is in force, as it was at the relevant time in this case, the designated local authority "shall … have parental responsibility for the child". From this parental responsibility are excepted only a few specific matters which are expressly set out in the section. Furthermore, although a care order does not extinguish the parental responsibility of a parent, the local authority have the upper hand in the sense that, if it is necessary to do so in order to safeguard or promote the child's welfare, they are given power to determine the extent to which anyone who also has parental responsibility for the child may meet his or her parental responsibility. Once the child is in the care of the local authority, other statutory provisions impose responsibilities on the local authority in respect of providing for the child. An outline of these can be found set out commencing at para 30 above. Importantly for present purposes, they include duties to provide accommodation for the child (section 22A of the Children Act 1989 and section 79 of SSW(W)A 2014).

118. It should be possible, now, to see how section 100(2) is moulded to the effects of a care order detailed in the provisions to which I have just referred. Having started with prohibiting the use of the inherent jurisdiction to place the child in local authority care or under their supervision, it then prevents the court using the inherent jurisdiction to order the accommodation of a child by a local authority, and, of course, prevents it being used to put the local authority in a position to determine any question in connection with parental responsibility. This seems to me to be entirely consistent with the aim being to confine matters to the statutory scheme in Part IV of the Children Act 1989, the thinking being that a local authority needing the power to determine any question in connection with parental responsibility must seek it through the medium of a care order. For the most part, the care order would clothe the local authority with the required parental responsibility and, in so far as the local authority was aiming at an element of parental responsibility which receives special treatment in section 33, section 33 itself would dictate whether the limit on the local authority's parental responsibility was absolute (see section 33(6), for example, which prohibits a local authority from causing a child to be brought up in a different religious persuasion) or qualified (for example, section 33(7) provides that no person shall cause the child to be known by a new surname except with the written consent of every person with parental responsibility or leave of the court).

119. It must also be borne in mind that Parliament made it very clear that it was not intended that the inherent jurisdiction should be entirely unavailable to local authorities, and that it appreciated that there could be cases in which it would be necessary to have recourse to it because there was reason to believe that the child would otherwise be likely to suffer significant harm. This is evident from sections 100(3) to (5). Like the express prohibitions in sections 100(1) and (2), the more general conditions imposed by subsections (3) to (5) are shaped to confine the local authority to orders otherwise available to them, but building in a safety net where those other orders would not achieve the required result in a risky situation.

120. Turning to the requirement in section 100(4)(a) that leave may only be granted if the desired result could not be achieved through another form of order, this is satisfied, it seems to me. Mostyn J was not satisfied that T's consent was authentic and likely to endure so this is not a case in which to consider the impact of more robust consent of a *Gillick*-competent 15-year-old child. The court's authorisation was undoubtedly required in this case for any deprivation of her liberty. An application under section 25 could not be made because no approved "secure accommodation" was available for T (as to which I will say more later), and there was no means by which the local authority could seek the authorisation it required other than under the inherent jurisdiction. As for section 100(4)(b) (likely significant harm), it has not been argued that it was unnecessary for T to be in the placements provided by the local authority, her argument being simply that there was no need for a court order because reliance could be placed on her consent. I will

look briefly, later, at the impact of consent more generally but, as I have said, the facts here did not provide any foundation for this particular argument.

121. Accordingly, I do not consider that the express terms of section 100 were an obstacle to the local authority's application under the inherent jurisdiction.

B. The use of the inherent jurisdiction in the present case was wrong because it cut across the statutory scheme in the Children Act 1989 and/or its use is not in accordance with a procedure prescribed by law as required by article 5

122. The appellant deals separately with her argument that the court's orders here cut across the statutory scheme in the Children Act 1989, and her article 5 argument. However, I propose to deal with the two arguments together, as they inform each other.

123. The appellant's argument in relation to the statutory scheme concentrates particularly upon section 25 of the Children Act 1989/section 119 SSW(W)A 2014, which are set out, together with the relevant regulations, starting at para 39 above. It will be recalled that it was section 25 which was potentially in point in T's case, because the placements were in England, hence my concentration largely on that hereafter.

124. The appellant submits that the two placements provided for the appellant were "provided for the purpose of restricting liberty" and thus "secure accommodation" (see section 25(1)). In so saying, she relies upon what I said, in *In re D (A Child)* [2019] UKSC 42; [2019] 1 WLR 5403, paras 103 to 115, about how to interpret the concept of "secure accommodation", and upon Baker LJ's agreement, in his judgment in the Court of Appeal in *In re B (A Child)* [2019] EWCA Civ 2025; [2020] Fam 221, with my obiter observations on its meaning (see para 59 of his judgment). It follows, in her submission, that the two placements fell within the statutory scheme in section 25.

125. She submits, furthermore, that both placements were children's homes, but Placement 1 was not registered as such, as required (see para 55 above), and the person who carried on/managed it was guilty of an offence. There was also the additional problem that neither was approved by the Secretary of State for use as secure accommodation, and regulation 3 of the 1991 Regulations (see para 47 above) accordingly prohibits their use as secure accommodation.

126. The appellant points out that CCBC were subject to the additional restriction in regulation 8 of the 2015 Welsh Regulations. This provision can be found in its

present form in para 48 above; at the time of the first instance orders, it was to the same effect, although with slightly different wording, providing that a local authority may only place a child in secure accommodation "in a home which is registered as a children's home providing accommodation for the purpose of restricting liberty".

127. So, the appellant submits, it is wrong in law to use the inherent jurisdiction to authorise the placements because that cuts across this statutory scheme, and the inherent jurisdiction must not be used where that is its effect. If support for this proposition were needed, she refers the court to *Attorney General v de Keyser's Royal Hotel Ltd* [1920] AC 508, as well as other authorities, including authorities in the field of children law. She also raises practical objections to using the inherent jurisdiction in this way, in that it permits the most vulnerable of children to be placed without the protection of the express provisions of the statute about secure accommodation.

128. The Secretary of State points out that this court faces the difficulty that, because this argument has developed only late in the day, no findings were ever made about whether the placements were actually "secure accommodation" within the meaning of section 25, or, in the case of Placement 1, whether it was within the definition of a children's home.

129. This court is in no position to make its own factual finding at this stage as to whether Placement 1 was a children's home or not. However, CCBC accept that it was, and it is, in any event, impossible to ignore the issue of the use of placements which are in fact children's homes and are unregistered. It is clear from other cases in the law reports that the inherent jurisdiction *is* being used to authorise the placement of children in accommodation which should be registered as a children's home, but is not so registered. This is underlined by the fact that the primary focus of the Practice Guidance issued by the President of the Family Division, dated 12 November 2019, and entitled "Placements in unregistered children's homes in England or unregistered care home services in Wales" is said to be "to ensure that, where a court authorises placement in an <u>unregistered</u> unit, steps are immediately taken by those operating the unit to apply for registration (if the unit requires registration)" (emphasis in the original). In the introduction to that Guidance, the President observes that where an application is made to the High Court under the inherent jurisdiction for the deprivation of liberty to be authorised, "it is highly likely the place at which the child is to be accommodated will meet the definition of a children's home or, in Wales, a care home service." Given the amount of care that will be required for a child who is deprived of his or her liberty, this is an understandable observation.

130. As for the question of whether the accommodation here was "secure accommodation", again it is not possible to make findings at this late stage about T's specific placements. However, the question of what accommodation falls within the definition of secure accommodation for the purposes of section 25 does merit consideration in more general terms here. I do not propose to go over, again, the territory that I explored in *In re D* (supra), commencing at para 91 of that case. However, the issue has benefitted from further consideration during the course of this hearing, and it is possible to build upon that to develop the ideas that I set out there.

131. The concern of section 25(1) is a child who is "placed … in accommodation in England or Scotland provided for the purpose of restricting liberty ('secure accommodation')". I expressed caution in *In re D* (para 100) about an unduly wide interpretation of "secure accommodation" which might prevent a local authority from providing the appropriate care for a child whose needs can only be met if their liberty is restricted, but who does not fall within the terms of section 25(1)(a) or (b). I observed, also, that the criteria set for placing or keeping children in secure accommodation might be taken to reveal something of the problems which it was anticipated such children would present, which, in turn, could be taken as a pointer towards the characteristics that one would expect to find in "secure accommodation".

132. The court now has available to it considerably more information about the varied difficulties suffered by the group of children in relation to whom a local authority might have to consider deprivation of liberty in some shape or form. By deprivation of liberty, I do not, of course, mean the imposition of the sort of restrictions that are part of normal parenting for a child of that age, which would not amount to deprivation of liberty within article 5 (see, for example, Baroness Hale of Richmond's judgment in *In re D* at para 39). We also have further information as to the nature of approved secure accommodation units, and the alternative bespoke arrangements that local authorities make to meet the needs of children. All of this helps in interpreting the concept of secure accommodation in section 25(1). It does not deflect me from my inclination that section 25 should not be too widely interpreted, and that care has to be taken to ensure that it provides the protection intended by the legislature but without getting in the way of meeting the varied needs of the children for whom hospitals, care homes, and local authorities have responsibility.

133. I am confirmed in my view that the focus should be on the accommodation itself and the purpose for which it is provided, rather than the regime in the accommodation. I also remain of the view that there is much to commend Wall J's approach to the issue in *In re C (Detention: Medical Treatment)* [1997] 2 FLR 180, 193, that is that the words "provided for the purpose of restricting liberty" mean "designed for, or having as its primary purpose" the restriction of liberty.

134. Building on the two limbs of Wall J's interpretation, the Secretary of State submits that the only accommodation that is "designed for" the restriction of liberty is a secure children's home approved by the Secretary of State. It is difficult to consider this entirely in the abstract, as we are required to do in the present case, as the determination of whether a particular arrangement constitutes secure accommodation within the meaning of section 25 will depend very much on the specific facts. However, I can see the force in the submission that this category will be made up of secure children's homes, designed and developed as such. As to whether all will be approved by the Secretary of State, it is to be hoped that no such homes would be in use without such approval of the Secretary of State, but I suppose that it would, at least in theory, be possible for that to happen.

135. It is worth reflecting on the characteristics of approved secure children's homes, which can be gleaned from the materials before the court, because it seems to me that this insight should shape the scope of the second limb of Wall J's interpretation (that is to say, premises having as their primary purpose the restriction of liberty). Secure children's homes are said to be "a locked setting". Some of the children in them come through the youth justice system, rather than for welfare reasons. Hayden J, in *In re SS (Secure Accommodation Order)* [2015] 2 FLR 1358, provides a useful insight into the regime that might be expected to operate in a secure children's home. He had been told about the regime in one particular unit, but said he had no reason to believe that this was different from any other of the welfare-based units. This is what he said about it at para 18 of his judgment:

> "… this unit has what is referred to as an 'air-locked security system'; that is to say that only one room can be left open at any stage. There is no computer access. There is a reward system by which privileges are both earned, and taken away. It is difficult not to see, from the eyes of the young people concerned, a custodial complexion to this environment."

136. The Association of Lawyers for Children say in their written intervention in the present case that, in their experience, the sort of restrictions described by Hayden J are a common feature of approved secure children's homes, and that other restrictions that operate in such homes (varying from home to home) include "CCTV, monitoring a child in their bedroom such as audio monitoring, high fencing or walls with limited views, locked windows". This ties in with what is said on behalf of the Secretary of State about the features that tend to be present in accommodation he approves as secure children's homes, namely: a secure vehicle lock on arrival, a secure perimeter fence forming the boundary of the home, air-lock controlled access, security doors which are specially reinforced and constantly locked, reinforced secure windows and walls, and high quality digital CCTV save for bedrooms, bathrooms and medical rooms. The specialist design is said to limit

hazards such as ligature points and stairs. Education and health services are said to be provided on site.

137. There can be no doubt that the characteristics of approved secure children's homes have been developed to respond to the needs of the children who can be expected to be placed there under section 25. Those children will, of necessity, already have a history of absconding and have demonstrated that they are likely to abscond again from any other description or accommodation (section 25(1)(a)) or have demonstrated that if they are kept in any other description of accommodation they are likely to injure themselves or some other person (section 25(1)(b)). During the hearing of the appeal, Lord Stephens put the suggestion that the criteria in section 25(1) give an indication of the type of accommodation that would satisfy the definition of "secure accommodation" and should be fed into the definition. The Secretary of State agrees with that proposition and submits that secure accommodation should contain features that reduce the risk of absconding and that would substantially reduce the risk of the child injuring him or herself or another person. This is supported by the Welsh Government/Cafcass Cymru, but not by the appellant who considers that this would be likely to be unhelpful, introducing uncertainty.

138. I am prepared to accept the Secretary of State's assertion that the only form of accommodation which will properly be said to be *designed for* the purpose of restricting liberty is likely to be secure accommodation units of the sort approved by the Secretary of State as secure children's homes. The Secretary of State submits that only very rarely will there be accommodation which is properly termed "secure accommodation" on the basis that, whilst it cannot be said to have been designed for the purpose of restricting liberty, it nonetheless has the restriction of liberty as its primary purpose. I would agree with this view. In so doing, I am influenced by the fact that this second category of secure accommodation should take its colour from the purpose-designed category. I am also influenced by the fact that it seems to me that the Secretary of State is correct in saying that accommodation outside a purpose-built unit, which may well be part of a highly specialised therapeutic care package specifically designed for the individual child, will usually have as its *primary* purpose the provision of care and/or treatment for the child, rather than preventing the child absconding or causing harm to him or herself or others. This will therefore limit the class of placements that can properly be termed "secure accommodation" within section 25. And where the placement is not "secure accommodation", there can be no question of the use of the inherent jurisdiction cutting across the statutory scheme in section 25.

139. There may, however, be placements (perhaps more likely in the "primary purpose" category than the purpose-designed category) which *can* properly be said to be "secure accommodation" within the meaning of section 25, but which cannot be used as such because they are children's homes and have not been approved by

the Secretary of State in accordance with regulation 3 of the 1991 Regulations (see para 47 above). The argument that the making of an order, under the inherent jurisdiction, authorising placement in accommodation of this type, would cut unacceptably across the statutory scheme cannot be dismissed easily.

140. Lord Lloyd-Jones asked during the hearing what the Secretary of State said a judge could do where the child meets the section 25 criteria but there is no approved secure accommodation available. Given the serious shortage of approved placements, this is clearly a question of the greatest importance. The Secretary of State's response is that the inherent jurisdiction can be used to authorise deprivation of liberty of a child placed in a children's home, and section 100(4)(a) is satisfied given that the local authority cannot achieve the result they seek through a section 25 order, assuming of course that the court is satisfied that there is reasonable cause to believe that the child is likely to suffer significant harm if the inherent jurisdiction is not exercised, in which case section 100(4)(b) is also satisfied.

141. The Children's Commissioner expressly invites the court to consider what would be the case were the inherent jurisdiction to be unavailable. How would local authorities comply with their statutory duties towards children who require secure accommodation which is unavailable? How would they discharge their parental responsibility for these children? The Welsh Government and Cafcass Cymru ask what the court would do in the sort of situation confronting it in this case, if it could not have recourse to the inherent jurisdiction. These are questions which underlie many of the submissions made to this court, and they are questions which have caused me profound anxiety, not least in view of the fact that judges and others have been drawing attention to the dangerous inadequacy of this aspect of the child care system for years, without any effective steps having been taken to solve the problem of resources for children with exceptional needs. 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.

142. This is a temporary solution, developed by the courts in extremis, but attended by regular expressions of anxiety of the kind articulated by the President in the present case in the Court of Appeal (see paras 5 and 88 of his judgment), and by Sir James Munby in 2017 when he was President of the Family Division (see para 7 above), and adopted with grave reservations of the type expressed in *Lancashire v G*. There have also been powerful expressions of concern in the submissions before us.

143. It has to be recognised that when the local authority applies under the inherent jurisdiction for the court to authorise a secure placement which is either not in a registered children's home or is in a children's home that has not been approved for secure accommodation, those placements will not satisfy all the requirements of the regulatory framework. If the placement is in an unregistered children's home, a criminal offence will be committed by any person who carries on or manages the home. The important safeguards that come with registration will be absent. If the placement is in an unregulated setting, it will equally escape these safeguards, and it is noted that the Children's Commissioner expresses particular concern about children being deprived of their liberty in unregulated placements, to the point of questioning whether such placements, for example in caravans and outward bound centres, could ever be classed as sufficiently appropriate for article 5 purposes.

144. The courts have put in place such safeguards as they can to overcome the shortcomings of the present arrangements, and I will come to these in due course. But whatever the courts devise cannot replicate the official safety net that the regulatory framework provides when it is applicable. To take an obvious example, the court is not able to carry out the sort of inspections and checks that Ofsted and the Care Inspectorate Wales are obliged to carry out.

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.

146. I am reinforced in this by the way in which the President of the Family Division (in his Practice Guidance, see para 129 supra), Ofsted, and the Care Inspectorate Wales have each responded to the problem.

147. Rather than outlawing placement in an unregistered children's home, in the Practice Guidance, the President seeks to ensure that where the court authorises such

a placement, registration is sought expeditiously, and that meanwhile, the court has information about the proposed placement, so it can satisfy itself that steps are being taken to apply for the necessary registration and that the provider of the service has confirmed they can meet the needs of the child, and that the local authority is taking steps to assure themselves that the premises, those working there, and the care being given, are safe and suitable for the child. The Guidance obliges the court to monitor the progress of the application for registration and, if registration is not achieved, to review its continued approval of the child's placement. Time scales are set for the various steps.

148. Ofsted has an annex (Annex C) to its "Introduction to children's homes" (2018) (a guide to registration) which also appears to recognise the acute practical difficulties that can be encountered. The annex acknowledges that there may be instances where placements are made in an unregistered children's home when it has been difficult or even impossible for the local authority to find registered accommodation that would accept the child. It explains that, in order to decide whether or not to take any regulatory action in relation to unregistered providers, it will carry out an investigation of each individual case, including assessing the permanency of the arrangement and the purpose of the provision of care and accommodation. Blending practicality with protection, however, it makes clear that an application for registration must be submitted as soon as possible, and that if a provider is refused registration and continues to operate, it would be liable to prosecution. It appears from the written submissions of the Welsh Government and Cafcass Cymru that the Care Inspectorate Wales may be taking a similarly practical approach.

149. It can also be borne in mind that as well as the court's oversight, and the part being played by Ofsted and the Care Inspectorate Wales, also playing a vital part in securing the protection and well-being of the children are the local authorities, fulfilling their own statutory/regulatory duties for the children they are looking after.

150. I come now to the appellant's argument that the use of the inherent jurisdiction to authorise the deprivation of liberty in cases such as the present falls foul of article 5 in that it is not in accordance with a procedure prescribed by the law. 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.

151. The appellant also submits that the law is not accessible (complaining of a lack of applicable statute or guidance), not precise (given the wide range of children and placements covered) and not foreseeable (in that there are no definitive criteria for its use, and no direction is given to the local authority with regard to putting the authorisation into practice). I think it should be taken that the complaint also encompasses an absence of proper safeguards in the procedure for the making and determination of applications of this sort under the inherent jurisdiction.

152. It is unnecessary, for article 5 purposes, for the relevant law to be contained in statute law or other regulatory provisions. There is considerable case law demonstrating the basis on which the inherent jurisdiction is deployed in cases of this type. Sir Andrew McFarlane said in the present case (para 79) that the terms of section 25 should be treated as applying to the same effect when a local authority is placing a child or proposing to place a child in the equivalent of secure accommodation (and see also para 49 ibid). This accords with the approach that Wall J took in *In re C (Detention: Medical Treatment)* (see para 133 above), where he said that he did not consider he should make an order unless he was satisfied that the section 25 criteria were, by analogy, satisfied. The operation of section 25 was explored in depth recently by the Court of Appeal in *In re B* (supra para 3), the criteria for a section 25 order being gathered together at para 98 et seq of Baker LJ's judgment. It is no part of this appeal to review the approach laid down in those authorities. There are also reported first instance judgments describing and explaining particular uses of the inherent jurisdiction in what might be described as "secure accommodation circumstances". The law as to the exercise of the inherent jurisdiction in this area is, in my view, sufficiently accessible and foreseeable with advice. Outcomes need not be predictable with absolute certainty, and in this area of the law, it is important that flexibility is retained, in order that the courts can respond appropriately to the many different sets of circumstances that arise.

153. There are appropriate procedural safeguards built into the application process, broadly mirroring those applicable to a section 25 application. There is provision for the child to be made a party to the process, for example, and for the appointment of a guardian, as well as for reviews of the continuing confinement. By requiring that the structure imposed by section 25 should also be observed in an application to place a child in the equivalent of secure accommodation, the President has ensured that proper procedural protection is built in for the child. The matter is also dealt with in considerable detail by Wall J in *In re C (Detention: Medical Treatment)* and Sir James Munby P in *In re A (Children) (Care Proceedings: Deprivation of Liberty)* [2018] EWHC 138 (Fam); [2019] Fam 45. In addition, the President's Practice Guidance (see above) makes a contribution to the procedural protection for the child.

154. I do not propose to go through all the detail here, only to mention some of the elements of the procedure that the courts have devised, in order to demonstrate

why it seems to me sufficient to comply with the requirements of article 5. In so far as any adjustments are desirable, they must be the province of judges who have experience of dealing with these cases in practice and of the Court of Appeal.

155. It is, of course, correct that the court will not itself regulate the detailed operation of the authorised deprivation of liberty, when it authorises a proposed placement and the regime that it is planned will be adopted there. However, it will not give the local authority the authorisation that they seek without considerable exploration of the circumstances, to ensure that the proposal is appropriate. By way of example, in addition to procedural matters that I have already mentioned, I would pick out that the procedure prescribed in the case law requires that the court be provided with evidence describing the nature of the proposed regime and justifying why the proposed arrangements are necessary and proportionate in meeting the child's welfare needs. The court will need to know the child's views on the matter. And the order will include an express liberty to any party, including the child, to apply to the court for further directions on the shortest reasonable notice. Careful provision is also made for reviews by a judge, at intervals or if there is a significant change, which reviews will be in addition to the local authority's own reviews of the case.

Consent

156. Turning finally to the appellant's argument in relation to consent, it seems to me that there is a fundamental difficulty with it. The role of this court is to determine issues that arise in the litigation between parties but by the time of the hearing before us, this litigation had already passed the stage at which the court's decision could have any bearing on T's care. She was no longer a minor and no longer required any form of restrictive living arrangements. In relation specifically to the consent ground of appeal, there is an additional reason why the appeal has an academic quality. Mostyn J's initial finding was that T's consent was not an enduring consent. When the case came before him again a little later, the evidence of T's behaviour in the intervening period confirmed his view that, although it had been apparently authentic, her consent "was not genuinely expressed". The Court of Appeal did not interfere with this assessment and endorsed the making of the orders authorising the two placements for T. It is worth setting out in full what Sir Andrew McFarlane said at para 86:

> "86. T's appeal, as it had become by the close of argument, is now no more than a challenge to the judge's discretion and could only succeed if this court were to be satisfied that the judge was wrong to grant authorisation to the local authority notwithstanding the apparent consent of the young person. There is no basis for holding that Mostyn J was 'wrong' to

> authorise restriction of liberty in this case. Indeed, as the judge himself observed, the breakdown of the placement so soon after the January order had been made vindicated his determination on that occasion; it also justified the making of a further order in respect of the new placement."

157. Given the facts as they were, there was no basis on which the appellant could have sought, in this court, to have the orders authorising her two placements set aside on the basis that her consent rendered them unnecessary. Although much of the Court of Appeal's concentration, in its judgment, remained upon the argument that there was no jurisdiction to make an order unless consent was absent, it can be seen from the passage (para 86) set out above, that that argument had actually ceased to be part of the appellant's case before the end of the Court of Appeal hearing. It followed, inevitably, that Mostyn J had a discretion as to the orders he made, and it is no surprise that the Court of Appeal dismissed the appeal against them, especially as events had vindicated his assessment that T's apparent consent could not be relied upon to last. Nothing that T argues now could make any difference to this outcome, and I do not think it is unfair, in those circumstances, to describe her present argument on consent as entirely academic. It is right, therefore, that I should be particularly circumspect in any views that I express about it and I propose to be brief on this subject. Furthermore, I should make it quite clear that I have no intention, in what I say, of setting up new tests to be applied in cases of this type. This is an area in which it is uncommonly difficult to choose language which captures the position with precision, and that difficulty is compounded by the fact that the problem has to be addressed in the abstract.

158. The point that T wishes to make about consent is, as I understand it, that it would have been conducive to her welfare if the court had been prepared to put weight on her consenting to the restrictive placements, rather than making its own order. The importance of ascertaining and taking into account children's wishes and feelings about all aspects of their lives is well established, and there is no need to spell out here the various provisions that maintain this. T says, and I would accept, that it was of particular significance to her that her views should be respected.

159. In terms of the legal analysis deployed by the appellant in support of her position that her consent was all that was required, it appears to be along these lines:

i) If valid consent is present, a person is not deprived of his or her liberty;

ii) I consent, so I am not deprived of my liberty;

iii) Therefore there is no need for an order under the inherent jurisdiction authorising the proposed arrangements, and no welfare/article 8 basis on which a court should make such an order.

160. As I see it, this is too simplistic an analysis of the court's role in an application of this type under the inherent jurisdiction. As the President said in the Court of Appeal, there is an important distinction between, on the one hand, determining whether, in any given set of circumstances, someone is deprived of their liberty for article 5 purposes, and, on the other hand, making an order (whether under section 25/section 119 or under the inherent jurisdiction) authorising a local authority to restrict a child's liberty. The former is a factual question, involving categorisation of a specific past or present set of circumstances. The latter is a prospective order, authorising (but not requiring) a local authority to take steps in response to events which it is anticipated are likely to occur. The focus is upon whether or not the factual circumstances justify the restriction proposed, should things transpire as the local authority predict.

161. The President was rightly anxious to stress (para 79 of the Court of Appeal judgment) the importance, for the protection of a child, of the court's involvement in authorising a deprivation of liberty, whether under section 25/section 119 or under the inherent jurisdiction. This is not the occasion for a comprehensive exploration of the complications attending consent to deprivation of liberty. For the moment, it is enough to observe that, even leaving to one side difficult issues about the pressures that circumstances may place on a child to consent to a proposed arrangement, an apparently balanced and free decision made by a child may be quickly revised and/or reversed. The facts of this case clearly demonstrate how insecure may be the child's apparent consent. Having said that, there may also be cases in which the child is expressing a carefully considered and firm view.

162. When the court considers the local authority's application, any consent on the part of the child will form part of the circumstances that it evaluates in deciding upon its order. I would not presume to forecast, still less dictate, what its implications would be for any particular case. That must depend upon the facts. The child needs to be, and is, protected by the institution of the proceedings and the consequent involvement of the court. His or her personal autonomy will be respected by being fully involved in those proceedings, and able to express views about the care that is being proposed, as ensured by the procedures stipulated by statute (for section 25) and by case law (for the inherent jurisdiction). It is worth noting that, in a case where the local authority is authorised to deprive the child of his or her liberty but, when it comes to putting the restrictive arrangements into practice, the child is in fact consenting to them in circumstances where that consent is valid and sufficient, there would be no deprivation of liberty. In that situation, the local authority would simply be providing the child with accommodation.

Conclusion

163. Stepping back from the detail, I would dismiss the appeal. The appellant's consent ground of appeal could not have led to success on the facts of this particular appeal, and in so far as the ground raises points of more general importance, I have dealt with them briefly above. As for the appellant's principal argument, that is that the inherent jurisdiction cannot be used to authorise a local authority to deprive a child of his or her liberty in the circumstances we have been considering here, I would reject that for the reasons fully set out above. I have punctuated this judgment with expressions of my deep anxiety that the child care system should find itself struggling to provide for the needs of children without the resources that are required. I reiterate this in concluding. It is fortunate that the inherent jurisdiction is there to fill the gaps in the present provision, but it cannot be doubted that it is only an imperfect stop gap, and not a long term solution.

LORD STEPHENS: (with whom Lord Lloyd-Jones, Lord Hamblen and Lady Black agree)

164. It is right that I should begin by expressing my admiration for the judgment of Lady Black and my indebtedness to her for her mastery of the many complex legal issues that arise in this difficult appeal. I agree with her judgment. I do not propose to traverse all the ground which she has covered. At the beginning I should state that the most appropriate solution to the issues in this appeal should be the provision of suitable accommodation. That, however, is something which it is not in our power to arrange.

165. There are important contexts to this appeal.

166. 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. However, any person who carries on or manages a children's home without being registered is guilty of an offence under section 11 of the Care Standards Act 2000 (see para 55 above). So, the issue arises as to whether the inherent jurisdiction of the High Court can be used to authorise a

deprivation of liberty in circumstances in which a criminal offence may be committed by those carrying on or managing a children's home.

167. Second, in the High Court and in the Court of Appeal it was not part of the appellant's case that the inherent jurisdiction was not available to the court at all, as a matter of law, as a vehicle by which to authorise her placements. Rather, as Lady Black observes at para 20 above, the appeal in the Court of Appeal proceeded upon the basis that recourse *could* be had to the inherent jurisdiction. The arguments that the inherent jurisdiction is simply not available are new arguments which were not advanced in either of the courts below (see para 64 above). This has meant that there have been no factual findings in relation to important issues (see paras 88 and 128-130 above). It has also meant that with the passage of time the issues with which this appeal is concerned are no longer of relevance to the appellant personally (see para 21 above).

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. I agree with Lady Black, at para 141, 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". I also agree that 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" that 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" (para 145 above with emphasis added). In this context, as in the context of section 31 of the Children Act 1989 (see Lord Nicholls in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 585), "likely" should be taken to mean a real possibility, that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case. 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.

171. I set out below the matters which must be considered in compliance with the Guidance and the addendum prior to a court authorising a placement in an unregistered children's home. I do so to emphasise the importance of those matters, in addition to any other matters which are relevant on the particular facts of an individual case. The information made available to the court is to be seen in the context of the parties' obligation to bring all matters of relevance to the welfare of children to the attention of the court to enable the court to decide the issues on an adversarial basis, or to direct further evidence or enquiries in accordance with its inquisitorial role. The matters in the Guidance are as follows:

> (a) 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.

(b) 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.

(c) The court should be made aware of the reasons why registration is not required or the reasons for the delay in seeking registration.

(d) The court will need to be satisfied that steps are being taken to apply for the necessary registration.

(e) The court will wish to assure itself that the provider of the service has confirmed that it can meet the needs of the child.

(f) The court will need to 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.

(g) 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.

This is a summary of the matters contained in the Guidance. It is the Guidance to which reference should be made. At para 167 above I set out how the issues in the present case developed, such that certain factual findings were lacking. The Guidance post-dates the decisions of the High Court in this case but going forward any decision to place a child in an unregistered children's home must make factual findings in relation to these matters.

172. If a court authorises a placement in an unregistered children's home, then the addendum to the Guidance provides that the court must include in any order a requirement on the local authority that it should immediately notify Ofsted - if the placement is in England - or the CIW - if the placement is in Wales - that the child has been placed in an unregistered placement. The requirement extends to the local authority providing a copy of the order and the judgment of the court to either Ofsted or the CIW. In this way Ofsted or the CIW will be aware of the unregistered children's home so that immediate steps can be taken to register. Thereafter, the aim of the Guidance is to work expeditiously towards registration, so as to comply, as soon as possible, with the requirement to register under section 11 of the Care Standards Act 2000 or section 5 of the Regulation and Inspection of Social Care (Wales) Act 2016. The Guidance requires the court to monitor the progress of the application for registration and, if registration is not achieved, to review its

continued approval of the child's placement in an unregistered unit. Paragraph 21 of the Guidance provides that if registration is refused or the applications for registration are withdrawn, the local authority should advise the court as a matter of urgency. It further provides that the court will take this into account when deciding whether the placement of the child in the unregistered children's home continues to be in the child's best interests. It is unnecessary to envisage all the sorts of factual situations that might arise which would still call for an order authorising a placement where the children's home remains unregistered except to say that the test of necessity should be applied all the more strictly and that there will be a heightened level of anxious enquiry and scrutiny. In any event, the Guidance primarily envisages that the children's home will become registered so that a criminal offence is no longer being committed by others. The Guidance must be followed so that, in practice, within a short period of time the children's home is registered. This process of registration should continue to be energetically and pro-actively monitored by the courts.

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.

174. So far, I have considered the position at common law as to the use of the inherent jurisdiction in circumstances where a person may be prosecuted for and convicted of an offence under section 11 of the Care Standards Act 2000. To my mind that position is supported by consideration of the positive operational duty under articles 2 and 3 ECHR.

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

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.

178. I agree with Lady Black that recourse to the inherent jurisdiction in the face of this scandalous lack of provision should be a temporary measure (see para 142 above). The appropriate permanent solution is the provision of appropriate accommodation. I add my name to the list of judges who have called attention to this issue which is a scandal containing all the ingredients for a tragedy.

LADY ARDEN:

Limits on the inherent jurisdiction?

179. I have had difficulty with the limits of the inherent jurisdiction of the court in this case, as opposed to the exercise of the jurisdiction in the circumstances of this case. So in this judgment I set out my additional reasons for agreeing with the judgments of Lady Black and Lord Stephens on that issue. The concern arises from the fact that section 11 of the Care Standards Act 2000 ("the 2000 Act"), as currently in force, creates a criminal offence on those who carry on or manage a children's home without being registered. Section 11 provides:

> "**11. Requirement to register**
>
> (1) Any person who carries on or manages an establishment or agency of any description without being registered under this Part in respect of it (as an establishment or, as the case may be, agency of that description) shall be guilty of an offence.
>
> ...
>
> (5) A person guilty of an offence under this section shall be liable on summary conviction -
>
> > (a) if subsection (6) does not apply, to a fine not exceeding level 5 on the standard scale;
> >
> > (b) if subsection (6) applies, to imprisonment for a term not exceeding six months, or to a fine not exceeding level 5 on the standard scale, or to both.
>
> (6) This subsection applies if -

> (a) the person was registered in respect of the establishment or agency at a time before the commission of the offence but the registration was cancelled before the offence was committed; or
>
> (b) the conviction is a second or subsequent conviction of the offence and the earlier conviction, or one of the earlier convictions, was of an offence in relation to an establishment or agency of the same description."

180. I set out for the record the specific and exceptional exercise of the inherent jurisdiction which the Secretary of State seeks:

> "5. … the Secretary of State recognises 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. These exceptional circumstances are likely to arise in an emergency following a placement breakdown: for example, if a secure children's home or other registered children's home gives notice on a placement because the child's needs have become too complex for them to meet, or where the child poses a risk of significant harm to other children in the setting or to members of staff. This may arise where a child has complex mental health needs and high levels of self-harm and suicidal behaviour, or a history of arson or sexually harmful behaviours, or has violent offending behaviours. In these circumstances, local authorities will often need to create urgently a 'bespoke' and highly specialised solo placement for the child to meet their immediate needs by keeping them safe while therapeutic work is carried out and/or alternative (registered) placements are being identified. Such placements will often not be registered at the time they are required. If the courts are not able to authorise the child's deprivation of liberty in such placements, the consequences for all involved, but particularly the child in question, could be dire. An already troubled child may suffer significant harm and possibly even death. Those with whom the child is otherwise forced to be accommodated could be exposed to violence and other significant harm. Those doing their best to look after the child in a placement that cannot meet their needs may face similar consequences. If the child absconds because the placement is not able to meet his needs and keep him safe, members of the public may also be exposed to significant harm."

181. Therefore, the placements for which the exercise of the inherent jurisdiction is required are those where "local authorities … need to create urgently a 'bespoke' and highly specialised solo placement for the child to meet their immediate needs by keeping them safe while therapeutic work is carried out and/or alternative (registered) placements are being identified." It is these placements which on the Secretary of State's case will often not be registered at the time they are required. The court is therefore concerned with a very limited and exceptional class of case.

182. 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.

183. I agree with Lord Stephens that the court cannot, by authorising a child to be placed in an unregistered home, prevent the commission of a criminal offence by those who carry on or manage the establishment. The difficulty is the same even if the unregistered home gives an undertaking to the court to make an application for registration. It must be remembered that the application may not be successful and pending registration Ofsted will not have the powers of inspection that it would have if the home was registered.

184. The reasons why Parliament required registration are obvious. The child requires the protection of the statutory scheme before she or he is deprived of their liberty. As I see it, it is for Parliament to decide on any appropriate defence or exception to section 11 of the 2000 Act.

185. In my judgment it is probably a necessary but not a sufficient condition that the Secretary of State supports the exercise of the inherent jurisdiction in these particular circumstances. Having said that, 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.

186. The Secretary of State submits that there are two routes to reaching a conclusion in his favour: extension of the defences under section 11 using articles 2 and 3 of the Convention, and the interpretative obligation under section 3 of the Human Rights Act 1998. I reject the first submission: it is no part of the function of the inherent jurisdiction to grant immunity from prosecution and in my judgment the interpretative obligation in section 3 of the Human Rights Act 1998 could not be used to introduce defences into an offence. In their helpful submissions, the Association of Lawyers for Children ("ALC") submit a third route: that on its true interpretation section 11 does not criminalise the placement by the local authority or the making by the court of its order in the circumstances of this case. I have yet to deal with that submission.

187. The way I would additionally analyse the matter is as follows.

188. Any exercise of any inherent jurisdiction of the Court has to be conducted on a principled basis, and inherent jurisdiction cannot be without limits. For example, in *Al Rawi v Security Service* [2012] 1 AC 531, this Court held that the courts could not under the inherent jurisdiction introduce closed material procedures in civil proceedings. In addition (per Lord Dyson and Lord Hope), the appropriate conditions for a closed material hearing would be better formulated in the Parliamentary process, a point that might also be made in this case. Likewise, in *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, the question arose whether the court could make an order that conjoined twins might be separated even though one would die. The Court of Appeal held that it was necessary in the very exceptional circumstances of the case for the operation to take place because otherwise both would die, that one was dependent on the other for life and with a separation the other would be expected to survive and lead a normal life and in addition that the causing of the death of the weaker twin was not with criminal intent or unlawful either under the common law or the Convention. In my judgment, the distinctive inherent jurisdiction in relation to safeguarding children must nonetheless form a coherent part of the wider law. Moreover, parties cannot expect the inherent jurisdiction to be available in every conceivable case. Hence the search for any limits.

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.

194. Another limitation on the inherent jurisdiction to be considered (not expressly mentioned by *Bromley*) is the rights guaranteed by the European Convention on Human Rights and the Human Rights Act 1998, where applicable. There are three articles to be considered, namely articles 2, 3 and 5. Lord Stephens has dealt comprehensively with articles 2 and 3. I will limit my attention to article 5.

195. The child's Convention right to liberty and security is limited by article 5(1)(d) of the Convention in circumstances that do not apply to adults: the relevant words of article 5 are that "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (d) the detention of a minor by lawful order for the purpose of educational supervision …". Therefore, the limits on that right must be strictly observed. It seems to me that that has to be an essential part of any exercise of any inherent jurisdiction in this area in any future case: see section 6 of the Human Rights Act 2000. Although the matter does not arise on this appeal, it

may be a matter which family judges may wish to be specifically mindful of when reviewing the care plan for the child.

196. I would, however, wish to express no view on the question whether the exercise of the inherent jurisdiction in the circumstances of this case leaves the UK in breach of the Convention. Protecting the child under the inherent jurisdiction is what the High Court did in *DG v Ireland* (2002) 35 EHRR 33. The accommodation in the penal institution into which the child was placed was modified for the child's needs and to reflect the fact that the child was not there for a breach of the criminal law, but that did not prevent the state from being in breach of article 5 because it had not provided sufficient facilities for very difficult children under the statutory powers conferred on courts.

Conclusion

197. 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 *Bromley* concludes,

> "It is evident that the High Court's inherent powers still have a useful role to play. As Sir James Munby P commented in respect of wardship, cases continue to demonstrate the continuing need for the jurisdiction, which 'despite its antiquity, has shown, is showing and must continue to show a remarkable adaptability to meet the ever-emerging needs of an ever-changing world'. … [T]he inherent jurisdiction continues to provide an invaluable additional means of securing certain children's interests who would otherwise not be safeguarded." (p 797)

198. There are, however, limits to the jurisdiction, some of which are discussed above, but none of them prevents the dismissal of this appeal in the circumstances of this case.