Neutral Citation Number: [2021] EWCA Civ 1867

Case No: CA-2021-000096

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
The Hon Mr Justice MacDonald
FD21P00578

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 December 2021

Before :

SIR ANDREW MCFARLANE, PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE BAKER
and
LADY JUSTICE SIMLER

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Between :

A Mother	**Appellant**
- and -	
Derby City Council (1)	**Respondents**
CK (by her children's guardian) (2)	
Secretary of State for Education (1)	**Interveners**
Ofsted (2)	
Tameside Metropolitan Borough Council (3)	

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Richard Drabble QC and Christopher Barnes (instructed by **Bhatia Best**) for the **Appellant**
Lorraine Cavanagh QC and Shaun Spencer (instructed by **Derby CC and Tameside MBC**) for the **First Respondent and Third Intervenor**
Brendan Roche QC and Kathleen Hayter (instructed by **Kieran Clark Green**) for the **Second Respondent**
Jonathan Auburn QC and Ruth Kennedy (instructed by **Treasury Solicitor**) for the **First Intervenor**
Joanne Clement (instructed by **Ofsted**) for the **Second Intervenor**

Hearing date : 16 and 17 November 2021

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Approved Judgment

Sir Andrew McFarlane, President of the Family Division :

1. On 9 September 2021, the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 came into force amending the Care Planning, Placement and Case Review (England) Regulations 2010. The amended regulations make it unlawful for a Local Authority to place a looked after child in accommodation other than that which is expressly stated in Children Act 1989, s 22C(6)(a) to (c) ('CA 1989') or stated within the new r 27A.

2. In a judgment delivered on 8 September 2021, Mr Justice MacDonald, after hearing applications to authorise the deprivation of liberty of four young people, each in the care of different local authorities, but who were each under the age of 16 years, considered the following central question of law:

> "The question of law before the court is whether it remains open to the High Court to authorise, under its inherent jurisdiction, the deprivation of liberty of a child *under* the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is prohibited by the terms of the amended statutory scheme."

3. The context within which the question considered by MacDonald J arose was the, sadly, now familiar one of a young person whose behaviour or other circumstances are such that the welfare of the young person requires that their liberty is restricted to an extent that would otherwise infringe their ordinary right to freedom which is enshrined within European Convention on Human Rights, Art 5 ('ECHR'). In such cases the High Court has assumed jurisdiction to authorise the "deprivation of liberty" ("DOL") of the young person to the extent that to do so is necessary, proportionate and in their overall welfare interests.

4. The lawfulness of the High Court's assumption of jurisdiction to authorise DOL in the case of children, generally, was considered by the Supreme Court in the case of *Re T (A Child)* [2021] UKSC 35; [2021] 3 WLR 643. The Supreme Court held that it was indeed lawful for the High Court jurisdiction to be deployed where the circumstances of a particular case established "imperative conditions of necessity" (a phrase used by Lady Black at paragraph 145 and endorsed by the other Supreme Court Justices).

5. MacDonald J concluded, at paragraph 68, that "it remains open to the High Court to authorise under its inherent jurisdiction the deprivation of liberty of a child under the age of 16 where the placement in which the restrictions that are the subject of that authorisation will be applied is a placement that is prohibited by the terms of the Care, Planning, Placement and Case Review (England) Regulations 2010 as amended from 9 September 2021, without cutting across that amended statutory scheme".

6. MacDonald J's conclusion is now challenged by the mother of one of the four young people whose case was before the court. The mother, who was not represented at first instance, was granted permission to appeal by MacDonald J and her appeal has now been presented by Mr Richard Drabble QC and Mr Christopher Barnes.

7. Before turning to the substance of the appeal itself, it is necessary to describe a further question of law which, whilst current in the first instance hearing, was expressly not

determined by MacDonald J. The point turns upon an accepted distinction that exists between the role of the High Court, which is confined to authorising a local authority to deprive a young person of their liberty in particular circumstances, and the role of the local authority which actually makes the placement of the child and implements any restriction of liberty at any particular time. The further question of law which was not answered in the court below is whether the local authority retains the power lawfully to place a child in an *unregistered* children's home. The point arises because, whilst placement in "a children's home" comes within the list of statutorily authorised placements in CA 1989, s 22C(6)(c), such a placement is expressly restricted to a children's home "in respect of which a person is *registered*" [emphasis added] under the relevant statutory provision. MacDonald J concluded that, whilst the question of the legality of the placement was undoubtedly one for consideration by local authorities, it did not directly arise in the four cases before the court, where the focus was on the jurisdiction of the court, rather than the lawfulness or otherwise of any local authority's subsequent actions.

8. As will become apparent, that secondary, unaddressed, point of law lies at the centre of the present appeal and must now be determined by this Court.

The Appeal

9. Mr Drabble and Mr Barnes rely upon two short grounds of appeal in support of the general contention that in exercising the inherent jurisdiction of the High Court to authorise the deprivation of liberty of this child in an unregistered children's home the judge fell into error:

   Ground 1: With the coming into force of amendments to the Care, Planning, Placement and Case Review (England) Regulations 2010 on 9 September 2021, a placement of a child under the age of 16 in an unregistered children's home was unlawful for the purposes of domestic law and it was therefore not open to the court to authorise the deprivation of liberty as being in accordance with ECHR, Art 5;

   Ground 2: In circumstances where Parliament had legislated, by way of the amended regulation, to prohibit placement of a child under the age of 16 in an unregistered children's home, the court could not authorise a deprivation of liberty within that placement under the inherent jurisdiction without cutting, impermissibly, across the statutory scheme.

10. The appeal is opposed by Ms Lorraine Cavanagh QC and Mr Sean Spencer for Derby City Council, and acting for Tameside Metropolitan Borough Council as interveners, and by Mr Brendan Roche QC, leading Ms Kathleen Hayter, for the children's guardian. It is also opposed by Mr Jonathan Auburn QC, leading Ruth Kennedy, on behalf of the Secretary of State for Education and Ms Joanne Clement of behalf of OFSTED (which is the statutory registration and regulation body in this context).

The Statutory Scheme

11. The Statutory Scheme for the placement of children who are looked after by local authorities is contained within CA 1989, Part III in so far as it relates to England. The position in Wales is governed by the Social Services and Well-being (Wales) Act 2014.

The current appeal relates entirely to the English provisions and the court is not, therefore, concerned with the parallel Welsh regime.

12. CA 1989, s 22(3) places on local authorities a duty to safeguard and promote the welfare of any child looked after by a local authority. Further, CA 1989, s 22A places a duty on a local authority to provide a looked after child with accommodation.

13. CA 1989, s 22C stipulates the "ways in which looked after children are to be accommodated and maintained." Section 22C provides:

"22C Ways in which looked after children are to be accommodated and maintained

(1) This section applies where a local authority are looking after a child ("C").

(2) The local authority must make arrangements for C to live with a person who falls within subsection (3) (but subject to subsection (4)).

(3) A person ("P") falls within this subsection if—

(a) P is a parent of C;

(b) P is not a parent of C but has parental responsibility for C; or

(c) in a case where C is in the care of the local authority and there was a child arrangements order in force with respect to C immediately before the care order was made, P was a person named in the child arrangements order as a person with whom C was to live.

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

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

(b) would not be reasonably practicable.

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

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

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

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

(c) placement in a children's home in respect of which a person is registered under Part 2 of the Care Standards Act 2000 or Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016; or

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

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

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

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

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

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

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

(b) it does not disrupt C's education or training;

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

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

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

(9A) Subsection (9B) applies (subject to subsection (9C)) where the local authority—

(a) are considering adoption for C, or

(b) are satisfied that C ought to be placed for adoption but are not authorised under section 19 of the Adoption and Children Act 2002 (placement with parental consent) or by virtue of section 21 of that Act (placement orders) to place C for adoption.

(9B) Where this subsection applies—

(a) subsections (7) to (9) do not apply to the local authority,

(b) the local authority must consider placing C with an individual within subsection (6)(a), and

(c) where the local authority decide that a placement with such an individual is not the most appropriate placement for C, the local authority must consider placing C with a local authority foster parent who has been approved as a prospective adopter.

> (9C) Subsection (9B) does not apply where the local authority have applied for a placement order under section 21 of the Adoption and Children Act 2002 in respect of C and the application has been refused.
>
> (10) The local authority may determine—
>
> (a) the terms of any arrangements they make under subsection (2) in relation to C (including terms as to payment); and
>
> (b) the terms on which they place C with a local authority foster parent (including terms as to payment but subject to any order made under section 49 of the Children Act 2004).
>
> (11) The Secretary of State may make regulations for, and in connection with, the purposes of this section.
>
> (12) For the meaning of "local authority foster parent" see section 105(1)."

14. The term "children's home" in s 22C(6)(c) is defined in CA1989, s 105(1) as having the same meaning as in the Care Standards Act 2000. The Care Standards Act 2000, s 1(2) defines "children's home" widely, stipulating that an establishment in England is a children's home if it provides care and accommodation wholly or mainly for children. An establishment will not be a children's home merely because a child is cared for and accommodated there with a parent or relative of his or a foster parent. Nor will it be a children's home if it is a hospital within the meaning of the National Health Service Act 2006, or is a residential family centre. An establishment is not a children's home if it is a school, unless the conditions in s 1(6) of the 2000 Act are satisfied. Finally, by s1(4A) of the 2000 Act, an establishment will not be a children's home if it is of a description excepted by the Children's Homes (England) Regulations 2015, r 3.

15. Whilst there is no definition of "care" in the Care Standards Act 2000, submissions both at first instance, and on appeal, have been made on the basis that it is hard to contemplate a placement which is a candidate for a DOL authorisation in the High Court which does not involve the child receiving "care" within the proposed accommodation for the purposes of the definition of "a children's home".

16. With respect to "other arrangements" not listed at subsection (6)(a)-(c), under CA 1989, s 22C(6)(d), regulations made for the purposes of s 22C include the Care, Planning, Placement and Case Review (England) Regulations 2010. Prior to 9 September 2021, r 27 of those regulations read as follows:

> "27. Before placing C in accommodation in an unregulated setting under s 22C(6)(d), the responsible authority must:
>
> (a) be satisfied that the accommodation is suitable for C, having regard to the matters set out in Schedule 6,
>
> (b) unless it is not reasonably practicable, arrange for C to visit the accommodation, and

(c) inform the IRO."

17. Schedule 6 referred to in r 27 prior to amendment is short and sets out a tick-box list of various general elements related to the suitability of any such unregulated accommodation.

18. The Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 made two amendments to r 27. First, in the opening phrase "an unregulated setting" is removed and substituted by "in accordance with other arrangements". Secondly, paragraph (a) is removed and replaced by:

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

19. There is a trap for the unwary in the context of placements for looked after children which arises from the use of two similarly sounding phrases, namely "an unregistered placement" and "an unregulated setting" (as in r 27 before its amendment). I shall explain the distinction between these two after completing this recital of the relevant statutory provisions by setting out the new r 27A which came into force on 9 September 2021:

> "27A. A responsible authority may only place a child under 16 in accommodation in accordance with other arrangements under section 22C(6)(d), where the accommodation is—
>
> (a) in relation to placements in England, in—
>
> (i) a care home;
>
> (ii) a hospital as defined in section 275(1) of the National Health Service Act 2006;
>
> (iii) a residential family centre as defined in section 4(2) of the Care Standards Act;
>
> (iv) a school within the meaning of section 4 of the Education Act 1996 providing accommodation that is not registered as a children's home;
>
> (v) an establishment that provides care and accommodation for children as a holiday scheme for disabled children as defined in regulation 2(1) of the Residential Holiday Schemes for Disabled Children (England) Regulations 2013;
>
> (b) in relation to placements in Wales—
>
> (i) accommodation provided by a care home service, within the meaning of paragraph 1(1) of Schedule 1 to the Regulation and Inspection of Social Care (Wales) Act 2016 ("the RISCWA 2016");

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

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

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

(c) in relation to placements in Scotland—

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

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

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

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

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

20. Having referred to the need for caution when deploying the terms "registered"/"unregistered" and "regulated/unregulated" in this context it is necessary to do no more than explain that the Children's Homes (England) Regulations 2015 apply to "children's homes in England" (reg 1(2)(a)). It follows that any accommodation which falls within the definition of "children's home" within Care Standards Act 2000, s 1(2) will be covered by the Children's Homes (England) Regulations 2015 and will therefore be "regulated".

21. Any person who carries on or manages an establishment or agency (including any children's home) without being registered under Care Standards Act 2000, Part II will be guilty of a criminal offence (CSA 2000, s 11(1)). It follows that whilst accommodation will become a "children's home", and therefore will immediately be "regulated", the overall cohort of "children's homes" will, at any particular time, include, as sub-categories, those homes which are "registered" and those which are not, or not yet, registered – and are therefore "unregistered".

22. The distinction drawn above is of importance in the present appeal as a result of the wording of CA 1989, s 22C(6)(c) which restricts those children's homes coming within the definition of "placement" in that section to those "in respect of which a person is

registered under Part II of the Care Standards Act 2000". As will be seen, the central submission made on behalf of the Appellant is that it is not lawful for a child to be placed under s 22C in an "unregistered" children's home.

President's Guidance

23. On 12 November 2019, as President of the Family Division, I issued '*Practice Guidance: Placements in unregistered children's homes in England or unregistered care home services in Wales*'. In paragraph 1 I described the primary focus of the Guidance:

> "The primary focus of this Guidance is to ensure that, where a court authorises placement in an unregistered unit, steps are immediately taken by those operating the unit to apply for registration (if the unit requires registration) so that the placement will become regulated within the statutory scheme as soon as possible. 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."

24. On 1 December 2020, the 2019 Guidance was supplemented by an addendum providing that any court order in such cases must require the local authority immediately to notify OFSTED (or the Care Inspectorate Wales) of the circumstances of the case and to provide OFSTED with a copy of that order and the judgment of the court.

Re T (A Child)

25. The decision of the Supreme Court in *Re T (A Child)* [2021] UKSC 35 was of central importance in the judgment of MacDonald J, as it has also been in the present appeal. The primary issue in *Re T* was whether it was a permissible exercise of the inherent jurisdiction of the High Court for the court to authorise deprivation of the liberty of a child in circumstances where it is said that the child's welfare requires it.

26. The Supreme Court unanimously held that the use of the inherent jurisdiction to authorise the deprivation of liberty in cases like the present is permissible. The court stressed the jurisdiction should be confined to cases where 'imperative considerations of necessity' justified its deployment. Lady Black gave the main judgment, with which Lord Lloyd-Jones, Lord Hamblen and Lord Stephens agreed, and Lord Stephens gave a short concurring judgment, with which Lady Black, Lord Lloyd-Jones and Lord Hamblen agreed. Lady Arden gave a short judgment setting out her additional reasons for agreeing with the judgments of Lady Black and Lord Stephens.

27. For the purposes of this appeal, it is not necessary to describe the content of the wide-ranging judgments in *Re T* at this stage, before describing the more narrowly based point that is at the heart of this appeal. Reference will be made to relevant passages from the judgments in *Re T* during the course of the description of the submissions made to this court which now follows.

The Appellant's case

28. The central premise behind both grounds of appeal, which turns, first, on the assertion that only a registered children's home comes within s 22C(6)(c), and, secondly, that a children's home is not one of the narrowly defined categories of placement in s 22C(6)(d), is that, consequently, a placement in an unregistered children's home is unlawful. That assertion supports the submission that it cannot be possible for the High Court to be satisfied that any such placement will be in accordance with ECHR, Art 5, which requires compliance with national law, and the substantive and procedural rules thereof (Ground 1). Secondly, because of the unlawful nature of a placement in an unregistered children's home, the use of the inherent jurisdiction to authorise such a placement establishes an impermissible clash with the statutory scheme.

29. The Appellant's counsel set out their interpretation of the statutory scheme, as it is now amended, with commendable clarity at paragraph 36 of their Skeleton Argument as follows:

    (a) The definition of placement in subsection 22C(5), as set out within subsection 22C(6), is a closed list into which a local authority *must* place a child if arrangements cannot be made under subsection 22C(2);

    (b) An unregistered children's home cannot fall within sub-subsection 22C(6)(c) (because that expressly requires registration);

    (c) All other classes of accommodation, which do not fall within sub-subsections 22C(6)(a)-(c), fall within the ambit of sub-subsection 22C(6)(d);

    (d) Prior to the amendment of regulation 27, placement in an unregulated setting was permissible, subject to satisfying the conditions set out therein;

    (e) Either:

        (i) Reg 27, prior to amendment, took 'unregulated setting' to include unregistered children's homes; or

        (ii) Reg 27 was silent in respect of unregistered children's home;

    (f) Thus, placement within an unregistered children's home was either permissible on satisfying the condition under Reg 27 or fell outside the scope of the regulation;

    (g) The amended Reg 27, by mirroring the wording of sub-subsection 22C(6)(d) "*other arrangements"*, makes plain it applies to *all* classes of placement falling within the subsection;

    (h) The list at Reg 27A(a) makes plain that "*other arrangements*" includes placements which go beyond "*unregulated settings*" (indeed most, if not all, of the placements are in settings which are subject to regulatory schemes) and is itself a closed list;

(i) Having widened the scope of Reg 27, the effect of Reg 27A is that a local authority "*may only*" place a child who is under 16 in accordance with other arrangements where the setting falls within the list of Reg 27A(a); and

(j) A local authority is thus prohibited from placing a child under 16 in an unregistered children's home, (noting that no equivalent prohibition applies to the placement of a 17 or 18 year old under the amended regulation).

30. Orally, Mr Drabble submitted that the statutory scheme, following amendment, is now very clear and a placement in an unregistered children's home falls outside that scheme and is therefore unlawful, meaning that placement of a child under the age of 16 in an unregistered children's home is ultra vires with respect to a local authority's power.

31. Mr Drabble relies particularly on his submission that the list of categories of placement in s 22C(6) is a "closed list". An unregistered children's home falls outside any of the categories listed in s 22C(6)(a)-(c), and the list of "other arrangements" falling within subsection s 22C(6)(d) is now also closed by the new regulation r 27A in so far as it relates to under 16 year olds. Mr Drabble submits that the whole point of the new regulations is to outlaw placement of an under 16 year old in an unregistered children's home.

32. Mr Drabble accepts that the Supreme Court decision in *Re T* (to which I will turn in more detail later) held that, despite the need for a children's home to be "registered" to come within s 22C(6)(c), it was not unlawful for the High Court to exercise its inherent jurisdiction to authorise DOL because of two separate distinctions that were drawn by the Supreme Court Justices. First, there is the distinction, which is accepted by Mr Drabble and all parties in this appeal, between the role of the court in authorising a deprivation of liberty, and the, separate, role of a local authority which actually makes the particular placement of the child. The second distinction drawn by the Supreme Court, and, submits Mr Drabble, available to be drawn on the law as it was prior to September 2021, was between the local authority which made the placement, and, separately, the manager of the home who is an individual who is required to be registered. It is that individual who will be committing a criminal offence if there is no registration (as will the owner), rather than the local authority that makes the placement.

33. Mr Drabble's case is that these two distinctions no longer apply. Taking them in reverse order, in addition to any criminality attaching to the children's home manager if there is no registration, it is now, he submits, simply unlawful for the local authority to make a placement in an unregistered children's home. Secondly, the distinction between the role of the court in authorising, and the role of the local authority in the placing, whilst still existing, no longer isolates the court from the legal impact of the underlying failure to register. This is because it is now, on his submission, the local authority which is acting unlawfully, and the court cannot be satisfied that any placement that it authorises in such a children's home will accord with national law and therefore be compatible with the rights protected by ECHR, Art 5.

34. In that manner, Mr Drabble seeks to distinguish the legal landscape that now applies with respect to unregistered children's homes, from that which was considered and accepted by the Supreme Court in *Re T*.

35. Mr Drabble made the following seven short points in seeking to make good this submission:

    (i) The new regulatory scheme is part of a set of crucial safeguards for children under 16 years old.

    (ii) Since the implementation of the new regulation, it has been ultra vires for a local authority to place a child in an unregistered children's home.

    (iii) Regs 27 and 27A are part of the safeguards built into the domestic scheme, and the fact that a local authority will now be acting ultra vires is itself a safeguard.

    (iv) The ability of the High Court to authorise deprivation of liberty cannot and does not cure the illegality which is at the heart of an unlawful placement as the detention of the child necessarily takes place in the context of that placement.

    (v) A distinction is to be made with *Re T* in that neither Lady Black nor Lord Stephens JSC thought that a local authority would be acting unlawfully in placing a child in an unregistered children's home because it was for the owner of that home to register rather than the authority. That line of argument is no longer available under the new regime.

    (vi) Lady Arden JSC thought that the criminal activity was the lack of registration.

    (vii) When one of the actors (the local authority or the court), in a case concerning making a placement, makes a placement which is expressly prohibited, the very making of the placement is undertaken in a context which is itself unlawful.

36. In response to questions from the court, Mr Drabble accepted that Lady Black and Lord Stephens did not regard the placement as ultra vires, notwithstanding that a criminal offence would be committed by the operator of the children's home. Finally, and more generally, despite the clarity of his submissions and the sharp edged description of the strict criteria that are now said to apply, Mr Drabble accepted that, if the appeal were allowed, his client was not asking the Court to direct termination of the placement. Further, he accepted that the circumstances of a child in any particular case may be so parlous as to establish a breach, or potential breach of ECHR, Art 2 or Art 3 relating to the right to life and the right not to be tortured or subjected to inhuman or degrading treatment.

Placement in an unregistered children's home: submissions in response

37. The ten carefully crafted steps set out in paragraph 36 of the Appellant's skeleton argument (see paragraph 29 above) rest upon the validity of the first three propositions in that sequence, namely that the list in s 22C(6) is a "closed list" into which a local authority *must* place a child, that an unregistered children's home cannot fall within s

22C(6)(c) and, thirdly, that any class of accommodation not falling within s 22C(6)(a)-(c) must fall within s 22C(6)(d).

38. If those first three premises are established then the argument proceeds on the basis that placement in an unregistered children's home is within s 22C(6)(d) and therefore covered by r 27 and, now, r 27A and, as an unregistered children's home not mentioned in the closed list in those two regulations, such a placement is not permitted.

39. It is by this means that the question of law that was expressly not decided by MacDonald J at first instance as to the legality of placement in an unregistered children's home must now be determined within the compass of this appeal. The need so to confront the issue was squarely accepted by Ms Clement, counsel for OFSTED, who made the following helpful oral submissions.

40. As a preliminary point, Ms Clement explained that OFSTED recognises that, in certain emergency situations, exceptional circumstances may arise where it is not possible to meet a child's needs in a children's home that is currently registered. Whilst the High Court should not ordinarily authorise a deprivation of liberty in an unregistered children's home, the court, as MacDonald J has held in a subsequent judgment in this group of cases, has jurisdiction to do so in an emergency – but should not ordinarily countenance the exercise of that jurisdiction where it is clear that the owner of the home either will not, or cannot, apply for registration: see *Derby CC v CK and Others (Compliance with DOL Practice Guidance)* [2021] EWHC 2931 (Fam) at [94].

41. The Supreme Court in *Re T* held that the High Court can invoke the inherent jurisdiction to authorise a deprivation of liberty in respect of placement outside the statutory scheme, or in a placement prohibited by the scheme or otherwise ultra vires, but only subject to the conditions that the Supreme Court laid down, including the condition that the placement is to be brought within the statutory scheme as soon as possible and in accordance with the *President's Guidance*. Such conditions limit the extent to which the court's order authorising deprivation of liberty cuts across the statutory scheme. That principled approach, as determined by the Supreme Court, binds this court and gives the answer to the difficulty identified by the Appellant and, submitted Ms Clement, that approach holds and provides jurisdiction for the High Court even if the Appellant is right that there is in fact a statutory prohibition against placing a child in an unregistered children's home.

42. Ms Clement's more detailed explanation of the correct statutory construction proceeded as follows.

    (a) If a looked after child cannot be accommodated under s 22C(2), then the placement will be under s 22C(5) so that the local authority *must* place the child in the placement which is, in their opinion, the most appropriate placement available.

    (b) The term "placement" is defined in s 22C(6) as meaning one of four categories.

    (c) An unregistered children's home cannot fall within any of s 22C(6)(a)-(c).

(d) Neither can an unregistered children's home fall within s 22C(6)(d), because if (d) was sufficiently broad to cover unregistered children's homes, then the local authority would simply be able to bypass the express requirement for registration in (c). Sub-subsection (d) was intended to deal with "other arrangements" which were neither foster placements nor children's homes.

(e) There has, therefore, always been a prohibition, as a matter of domestic law, on placing a child in an unregistered children's home.

(f) The requirement for a children's home to be registered was established by Parliament in the Care Standards Act 2000, some eight years prior to the insertion of s 22C into the CA 1989. It follows that Parliament cannot have intended in 2008, when amending the CA 1989, to establish a provision which permitted a local authority to place a child in an unregistered children's home.

(g) Looked at purposefully, Parliament would never have intended a local authority to make a placement where to do so inevitably involved the manager of a home committing a criminal offence.

(h) There is, therefore, clearly a prohibition on placement in an unregistered children's home, but that prohibition comes from s 22C itself and is not a provision that has been newly introduced by the 2021 Regulations.

(i) If placement in an unregistered children's home has never been within s 22C(6)(d) at all, then the introduction of a new prohibition within the 2021 Regulations, which only deal with sub-subsection (d), does not concern unregistered children's homes and the new regulations are not therefore relevant to such a placement.

43. Ms Clement moved on to submit that if the construction she proposes means that in some extreme circumstances a child's rights under Art 2 or Art 3 of the ECHR would be breached because a local authority is not able to place the child in an unregistered children's home, then the Human Rights Act 1998 comes into play with respect to the local authority's power, nevertheless, to make a placement in an unregistered home.

44. Ms Clement accepts that HRA 1998, s 6, which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, is insufficient to give the local authority a freestanding power to make a placement which is outside the statutory scheme. She therefore relies upon HRA 1998, s 3 relating to the interpretation of legislation which by s 3(1) provides that:

> "(1) so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

45. To achieve compatibility Ms Clement submits that words need to be read into s 22C(6) to avoid a breach of a child's Art 2 or Art 3 rights by enabling a local authority to place the child in an unregistered children's home. The requirement to read in such words will only arise where the operational duties established by Art 2 or Art 3 are triggered by the circumstances of a case, and any placement thus permitted in an unregistered children's home can only be maintained for the minimum time necessary to achieve registration, thereby bringing the placement into the statutory scheme.

46. Ms Clement submits that, if the jurisdiction under HRA 1998, s 3 can be deployed in the manner she describes, then the Court is not in the territory described in paragraph 36 of the Appellant's skeleton argument as there would be no statutory prohibition, and the central premise of the Appellant's argument cannot be made out. However, Ms Clement went on to assert that, even if the Appellant is correct and there is a statutory prohibition, the overall legality of the placement is unaffected as that very circumstance was dealt with and approved by the Supreme Court in *Re T*.

47. In making good her secondary submission, which relies on *Re T*, Ms Clement referred to ECHR, Art 5(1)(d) which reads:

> "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."

48. Ms Clement submits that the Supreme Court in *Re T* held that the focus of Art 5(1)(d) was the existence of "the lawful order". Once an order has been made under the inherent jurisdiction, where the court has jurisdiction, that, said Ms Clement, is the end of it. There is no focus under Article 5, or in the Strasbourg jurisprudence, on whether the underlying placement complies with national law. A local authority does not need a court order in order to place a looked-after child; indeed it has a duty or a power to place irrespective of any court order. The court order is needed where the young person is to be deprived of their liberty outside the statutory secure accommodation regime.

49. Ms Clement submitted that the argument now advanced on behalf the Appellant by Mr Drabble is on all fours with the argument advanced by the Appellant before the Supreme Court in *Re T*. The submission that the inherent jurisdiction could not be used to authorise a deprivation of liberty in a placement which cut across the statutory scheme would breach Article 5 because it did not comply with the requirements of national law was rejected.

50. In the course of her judgment Lady Black expressly considered the statutory scheme for secure accommodation under CA 1989, s 25. Between paragraphs 130–138 Lady

Black analysed and then adopted a narrow definition of "secure accommodation" under s 25 which was, very largely, confined to purpose built secure accommodation that had been approved by the Secretary of State (whilst not dismissing the possibility of there being other purpose built accommodation which met the criteria but was, for some reason not approved.) Based on that narrow interpretation, Lady Black's primary conclusion in this part of her judgment was that if a placement was not "secure accommodation", then there can be no question of the use of the inherent jurisdiction cutting across the statutory scheme in s 25.

51. But, Ms Clement points out, Lady Black went on, at paragraph 139, to accept that there may be placements where the "primary purpose" can properly be said to be "secure accommodation" within the meaning of s 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 Children (Secure Accommodation) Regulations 1991, reg 3. When considering that potential category of placements Lady Black observed:

> "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."

52. However, after due consideration, Lady Black's conclusion was plain (at paragraph 141):

> "Cases such as those to which to I have alluded early 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."

53. Thus, submits Ms Clement, Lady Black expressly agreed that, even where there is a statutory prohibition, it is still permissible to use the inherent jurisdiction in certain tightly defined circumstances. Lady Black considered these matters expressly at paragraphs 143-145:

> "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."
>
> ….

> "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 other duties in play, in addition to those which prohibit carrying on or managing an unregistered children's home. I gave an idea earlier (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."

54. The condition described by Lady Black, namely the existence of "imperative considerations of necessity", was endorsed by the other Supreme Court Justices and expressly so by Lord Stephens JSC.

55. Lady Black expressed herself as being reinforced in her view by the scheme established under the President's Practice Direction, which was developed with OFSTED and the Care Inspectorate of Wales, and which, rather than outlawing a placement in an unregistered children's home, seeks to ensure that where the Court authorises such a placement, registration is sought expeditiously.

56. Finally, in terms of *Re T*, after Lady Black had expressly dealt with placement in unregistered children's home, she observed, at paragraph 150, that:

> "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."

57. Ms Clement observed that Mr Drabble's references to *Re T* predominantly focussed upon quotations from the judgment of Lady Arden. In so far as Lady Arden dealt with additional maters, not covered in the judgments of the other Justices, it cannot be said that the other members of the Court were tacitly in agreement with Lady Arden. In any event, Lady Arden was in agreement with the primary judgments of Lady Black and Lord Stephens and such observations as Lady Arden went on to make in her own judgment, cannot be said to be authority.

58. Finally, by reference to the Appellant's two grounds of appeal, Ms Clement submitted that, once the judgments in *Re T* are considered, it is plain that placement in an unregistered children's home is not unlawful in the context of Article 5 or impermissible in so far as the authorisation made by the High Court may be outside the range of placements included within the statutory scheme.

59. Although OFSTED is an intervenor in this appeal, I have quoted the submissions of Ms Clement in detail as, in my view, they engaged directly with the Appellant's case regarding placement in an unregistered children's home and did so in clear terms.

60. Turning to the parties in the case, Ms Lorraine Cavanagh QC, for the two local authorities, submitted that, where the placement being considered is not covered by s 22C(6), the child falls outside the statutory scheme but the local authority remain subject to the overriding duties established by s 22(3)(a) and s 22A to safeguard and promote the child's welfare and to provide the child with accommodation.

61. Ms Cavanagh, who made her submissions prior to those of Ms Clement which focussed on the power to read words into the statutory scheme under HRA 1998, s 3, drew attention to the approach taken by MacDonald J at first instance at paragraph 76:

> "By parity of reasoning with *Re T*, the fact that the local authority may employ a placement that is unlawful by reference to the amended statutory regime does not relieve the Court from taking the positive operational step of authorising the deprivation of the child's liberty in the placement proposed in order to discharge its duty under Art 2, where there is a real and immediate risk to the life of an identified individual or individuals, or Art 3, where there is actual or constructive knowledge of treatment reaching the minimum level of severity. Further, in circumstances where s 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with a convention right, where there is an immediate risk of breach of convention rights of the individual child, wherever that risk has come about, then if there is no other alternative the local authority can place the child in an unlawful placement to avoid such a breach. Within this context, and as very properly conceded by the Secretary of State for Education, where it is necessary to place a child in a particular place in order to prevent a breach of that child's convention rights, the local authority has a power, and that power may be a duty, to place the child there. Accordingly, as noted by Lord Stephens in *Re T* at [177]:
>
> "first 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.""

62. In common with the submissions of Ms Clement, Ms Cavanagh submitted that an unregistered children's home is outside s 22C(6)(c) and did not fall within (d) either. She submitted that such a placement is, therefore, outside the statutory scheme all together.

63. Ms Cavanagh submitted that it was not possible to argue, as the Appellant seeks to do, that the placement in this case had no legal basis in domestic law. The deployment by the High Court of its inherent jurisdiction, which has now been expressly approved in this context by the Supreme Court, is part of domestic law and therefore any such

deprivation of liberty authorised by the High Court complies with the necessary element of legality in the domestic context.

64. For the Secretary of State for Education, Mr Auburn QC submitted that the insertion of the amendment to the Regulations in September was intended to address unregulated accommodation, and not unregistered accommodation. Mr Auburn sought to argue that, whilst an unregistered children's home is not expressly within s 22C(6)(c), it is a placement that should be within that sub-subsection, but cannot come within it because of the lack of registration. That circumstance does not mean that such a placement is to be included within sub-subsection (d) and such placements never were considered to be in (d). The amendments to the Regulations, which are limited to sub-subsection (d), therefore do not have any impact upon unregistered children's home placements as such a placement does not come out of the 'territory', to use Mr Auburn's word, of sub-subsection (c) as a consequence of non-registration.

65. Despite his divergence in interpretation of the statutory scheme from that offered by Ms Cavanagh and Ms Clement, Mr Auburn is at one with the submissions of the local authorities and of OFSTED in asserting that a placement in an unregistered children's home is permissible for a short time where that is the only option available to the local authority and it is necessary to avoid a breach of ECHR, Art 2 and/or Art 3. He submits that the legal context is unaffected by the introduction of the new Regulation and that when the matter is properly considered the outcome will be the same as that reached by the Supreme Court in *Re T*.

Placement in an unregistered children's home: the Appellant's reply

66. In response Mr Drabble took the Court to two passages in the judgment of Lady Arden which drew attention to the fact that placement in unregistered accommodation, which was often urgently created as a "bespoke" and highly specialised solo placement, and was therefore in a "very limited and exceptional class of case". Mr Drabble drew particular attention to paragraph 182:

> "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. 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."

67. On this point, Ms Clement, who was counsel for the Secretary of State for Education before the Supreme Court in *Re T*, respectfully suggested that Lady Arden, in the passage quoted from paragraph 182 of her judgment, may have misread the written submission to which that paragraph refers. The point was dealt with solely in written argument submitted months after the oral hearing. Ms Clement has now provided the Court with a copy of her written submission and the relevant paragraph reads:

> "Unregulated accommodation
>
> 21. For completeness, the Secretary of State notes that since the hearing of this appeal, the Secretary of State has published a response to the consultation paper described at paragraphs 51-53 of the written case. The Secretary of State decided to ban the placement of children under the age of 16 in unregulated provision. Regulations implementing the ban have been made and will come into force on 9 September 2021. The Secretary of State is also currently consulting on new national minimum standards for unregulated provision."

68. Ms Clement submits that the passage in her submission to the Supreme Court related to "unregulated accommodation", and therefore she submits within s 22C(6)(d), and not "an unregistered home", being the category referred in paragraph 182 of Lady Arden's judgment.

69. Mr Drabble summarised his submission on the basis that it was clear that a regulated, but unregistered, children's home had been previously treated as being within sub-subsection (d). The content of that sub-subsection can be controlled by subsequent regulations. Prior to September 2021 the regulations did not limit unregistered children's homes but, relying upon Lady Arden's judgment, Mr Drabble submitted that now such placements are caught and are plainly prohibited.

70. In response to the submissions of the other parties to the effect that the Supreme Court judgments in *Re T* expressly deal with placement in an unregistered children's home, Mr Drabble responded that that is not so and that Lady Black never stated that she was dealing with a placement that was prohibited by statute. Finally, Mr Drabble submitted that if this Court were to conclude that there is incompatibility between the statutory regime and the requirements of ECHR, Art 2 or Art 3 there was no need to "read in" wording under HRA 1998, s 3 and that the better course would be to disapply the new regulations and to hold that the previous regime was compatible with the ECHR in the manner permitted under HRA 1998, s 6.

Discussion

71. Following the oral hearing, the court issued an order recording that the appeal was dismissed. I will now set out my reasons for reaching that conclusion.

72. The careful and logically developed argument presented by Mr Drabble and Mr Barnes rests upon the contention that placement of a child under the age of 16 years in an unregistered children's home is now prohibited within the statutory scheme in its amended form. Such a placement is therefore unlawful and, if made by a local authority, would be ultra vires the authority's powers. In distinction with the legal context that was in the contemplation of the Supreme Court in *Re T*, where the element of unlawfulness was one step removed and related to the potential criminality of a home owner who did not register, the Appellant submits that where it is the local authority that would be acting unlawfully, the High Court cannot have jurisdiction to authorise such a placement.

73. I am persuaded that the Appellant's case fails for two separate reasons. First, I accept the submissions on behalf of OFSTED and the local authorities that placement in an unregistered children's home is, and has always been, wholly outside the statutory scheme, and not therefore within s 22C(6)(d) as asserted by the Appellant. As a result, the recent amendments, which relate to placements within sub-subsection (d), have no relevance to placement in an unregistered children's home. The fact that placements were from time to time being made in unregistered children's homes in these challenging cases was expressly before the Supreme Court, and was the subject of the *President's Guidance*. The authority of *Re T* squarely dealt with the issue and approved the use of the inherent jurisdiction in such cases where there were imperative circumstances of necessity.

74. The second reason for rejecting the Appellant's case is that, even if it were the case that placement in an unregistered children's home was prohibited by the statutory scheme (which I have concluded is not the case), that question was, again, directly considered and determined in *Re T*. All of the Justices agreed with Lady Black that, where it is necessary to do so to meet the overarching needs of the child (or to protect the safety of others), the inherent jurisdiction of the High Court must be available, notwithstanding that the underlying placement is prohibited by statute.

75. The staged submissions of Ms Clement analyse the issues accurately and correctly. I have set them out in full in paragraph 42 and I now endorse each step in the chain without the need to repeat the entire sequence here. A number of points do, however, merit emphasis.

76. It is not possible, on an ordinary approach to construction, to read s 22C(6) as expressly including unregistered children's homes. They are plainly excluded from sub-subsections (a)-(c) in that they cannot fall into the first two categories and, as they are not registered, cannot be within (c). Placements of this type have always required registration: s 22C(6)(c) makes express reference to placement in a registered children's home, making clear that such placements are subject to the regulatory regime specifically designed to safeguard and protect some of the most vulnerable children. I accept, as Mr Auburn submitted, that (c) is the territory within s 22C(6) which relates to children's homes and, if unregistered children's homes were to be covered in the subsection it would be in (c), and not elsewhere.

77. I reject stage (d) in the Appellant's staged argument which asserts that 'all other classes of accommodation, which do not fall within s 22C(6)(a)-(c), fall within the ambit of s 22C(6)(d)'. If unregistered children's homes are within (d), then the purpose of (c) falls into question; why, if an unregistered home is potentially lawful under (d), is it necessary to have a separate category for registered homes in (c). Plainly it would not be, and the regulatory regime carefully designed by Parliament to secure the welfare and protection of the most vulnerable children in registered homes would be undermined and capable of being circumvented. In my judgment unregistered children's homes do not fall within (d) as "other arrangements".

78. Further, insofar as some local authorities may, as Mr Auburn submitted, have been operating, as a matter of practice, on the basis that unregistered homes did, indeed, fall into s 22C(6)(d), that development created a mischief which allowed placements to be made which, if that interpretation were correct, would escape from the requirement of registration. Regulation 27A made clear that practice was to stop, but it does not alter

the conclusion that unregistered children's homes do not fall within sub-section (c) as a matter of ordinary domestic statutory construction, and there is nothing to suggest that Parliament ever intended to permit local authorities to place children in unregistered children's homes. The Secretary of State's assertion that unregistered children's homes have never been considered as 'other arrangements' under sub-subsection (d) supports the overall conclusion that Ms Clement's interpretation is correct.

79. The "other arrangements" referred to in s 22C(6)(d) are therefore arrangements other than those with a relative, friend or other connected person, or a local authority foster parent or in a children's home. This conclusion is supported by Ms Clement's submission, which I accept, to the effect that placement in an unregistered children's home has been unlawful since 2000 and Parliament cannot have intended to create a lawful category for such placements (without expressly saying so) under the regulations made some years later.

80. From those central conclusions, which establish that unregistered children's homes have never been covered by s 22C(6)(d), it follows that the position of such homes is unaffected by the amendments to the regulations that came into force in September 2021 relating to children under the age of 16 which are limited to placements that do fall within sub-subsection (d).

81. Standing back, the reality for social workers and other professionals dealing with young people who are exhibiting behaviour which is dangerous to themselves or others, and where there is a requirement for that behaviour to be safely contained, is that it is often simply not possible to find a suitable, bespoke, placement which fits within the statutory scheme. It is beyond contemplation that strict adherence to the regulatory scheme should prevent a young person in such a parlous situation being accommodated in a placement that is outside the statutory rules, at least for a short time, if one is available, and is the only option for protecting the young person.

82. Over and above the regulatory framework there is a higher order of requirement and duty arising from the positive obligations placed upon the State, in the form of a local authority and the court, by ECHR, Art 2 and Art 3, and upon a local authority by CA 1989, s 22(3) and 22A. It was to those duties that Lady Black must have been referring when she encapsulated the rationale justifying such placements at paragraph 145:

> "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?"

And earlier at paragraph 141:

> "Cases such as those to which to I have alluded early 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."

83. It is, however, not necessary for this court to traverse territory that has already been comprehensively covered by the Supreme Court in *Re T* in a decision which is plainly

binding upon us. Once it is established that placement in an unregistered children's home is not within s 22C(6)(d), the legal context is unchanged from that which was before the Supreme Court and there is no question of a deprivation of liberty order cutting across the statutory scheme. The judgments of Lady Black and Lord Stephens expressly dealt with placement in an unregistered children's home, which was the category of home in which T had been first placed. It is to such placements that the *President's Guidance*, which was seen as central to the legal context by the Supreme Court, is addressed. The judgments in *Re T* endorse the exercise of the inherent jurisdiction to authorise deprivation of liberty with respect to a placement in an unregistered children's home, where imperative conditions of necessity justify doing so and there is no alternative available.

84. Approached in this manner, Mr Drabble's submission that a placement that is prohibited by the statutory scheme, and therefore not 'prescribed by law', as is required by ECHR, Art 5, falls away. The Supreme Court has held that the exercise of the jurisdiction of the High Court in these cases is lawful under the common law. The exercise of the jurisdiction is therefore 'prescribed by law' and an order made by the High Court authorising DOL is a 'lawful order' of the type required by Art 5(1)(d). There is no basis for distinguishing this case from that considered in *Re T*.

85. In like manner, this court is bound by *Re T* to accept that, where a particular placement may be expressly prohibited under the statutory scheme, for example use of 'secure accommodation' in the circumstances described by Lady Black at paragraph 141, even then the High Court retains jurisdiction to authorise deprivation of a young person's liberty. On the basis of my primary conclusion, which is that, rather than being prohibited by the statutory scheme, placement in an unregistered children's home is simply outside it, the need to consider the second point does not arise. If, however, it did then, again, the Supreme Court decision in *Re T* provides a comprehensive answer which is binding upon this court.

86. With due respect to the short concurring judgment of Lady Arden in *Re T*, in which additional reasons for dismissing the appeal were given, and upon which Mr Drabble relies so heavily, it cannot be said that the other four members of the Supreme Court were in agreement with or otherwise endorsed those additional matters.

Conclusion

87. On the central point of law upon which this appeal turns my conclusion is that where a local authority places a child under CA 1989, Part III in an unregistered children's home, that placement is outside the statutory scheme established by CA 1989, s 22C and the regulations. The Supreme Court determined in *Re T* that the High Court nevertheless has jurisdiction, in an appropriate case, to authorise that restrictions may be placed on the liberty of a young person placed in such a placement where imperative conditions of necessity justify doing so.

88. We have found that the scheme does not allow unregistered placements, but does not expressly prohibit them. In those circumstances, as in *Re T*, where conditions of imperative necessity require, the common law steps in and allows the High Court to exercise its inherent jurisdiction. That exercise of the inherent jurisdiction is not in breach of Art 5 and nor does it cut across the statutory scheme. As it is not the High Court that is making the placement, the exercise of the inherent jurisdiction is not part

of the statutory scheme at all. In this respect, the situation is exactly as it was in *Re T* where the Supreme Court did not feel the need to read any words into the statute.

89. In those circumstances there is no need to read words into the statutory scheme to enable it to be exercised.

90. For the reasons that I have now given, I concluded that the appeal must be dismissed.

LORD JUSTICE BAKER

91. I agree.

LADY JUSTICE SIMLER

92. I also agree.