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.

30 July 2021

PRESS SUMMARY

In the matter of T (A Child) (Appellant)
[2021] UKSC 35
On appeal from: [2018] EWCA Civ 2136

JUSTICES: Lady Black, Lord Lloyd-Jones, Lady Arden, Lord Hamblen, Lord Stephens

BACKGROUND TO THE APPEAL

This appeal concerns the use of the inherent jurisdiction of the High Court to authorise a local authority to deprive a child of his or her liberty. The background to the litigation is the shortage of provision for children who require special limitations on their liberty, for example by a placement in one of the small number of approved secure children's homes in England and Wales, but for whom no space is available, or who would be better served by highly specialised care albeit still with their liberty limited. This shortage has forced local authorities to seek orders from the High Court under its inherent jurisdiction authorising alternative restrictive placements of children elsewhere than in an approved secure children's home. A secure children's home is typically accommodation designed for the purpose of restricting liberty, and while the regime may vary from home to home, would commonly include extensive CCTV, high fencing or walls with limited views, and reinforced and locked doors and windows.

These proceedings were begun by Caerphilly County Borough Council ("**CCBC**") in July 2017 to address the care of T, who was then a 15-year-old in CCBC's care by virtue of a care order. In view of her particular needs, CCBC intended to accommodate T in a placement in England which was not a registered children's home or approved for use as secure accommodation, in circumstances which involved her being deprived of her liberty. It applied to the High Court for an order under the inherent jurisdiction authorising it to deprive T of her liberty there, and the order was granted. After that placement broke down, the court authorised CCBC to deprive T of her liberty in a registered children's home in England, which was not approved for use as secure accommodation.

There are two main issues before the Supreme Court:

i. **First**, is it 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 this category of case? T argues that such a use of the inherent jurisdiction in this case is barred by the Children Act 1989 (the "**CA 1989**") and contrary to article 5 of the European Convention on Human Rights (the "**ECHR**"). This argument was not advanced before the courts below.

ii. **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? T argues that consent is highly relevant, and that as she consented to the placements, it was contrary to her best interests to make the orders.

These issues are no longer of relevance to T personally, whose circumstances have changed, but they continue to affect a significant number of children.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. It holds in particular that the use of the inherent jurisdiction to authorise the deprivation of liberty in cases like the present is permissible, but expresses grave concern about its use to fill a gap in the child care system caused by inadequate resources. Lady Black gives the main judgment, with which Lord Lloyd-Jones, Lord Hamblen and Lord Stephens agree, and Lord Stephens gives a short concurring judgment, with which Lady Black, Lord Lloyd-Jones and Lord Hamblen agree. Lady Arden gives a short judgment setting out her additional reasons for agreeing with the judgments of Lady Black and Lord Stephens.

REASONS FOR THE JUDGMENT

Issue 1: the use of the inherent jurisdiction to authorise a deprivation of liberty

Local authorities have statutory duties to protect and support children, including a specific duty to provide any child in care with accommodation. Section 25 of the CA 1989 in England, and section 119 of the Social Services and Well-Being (Wales) Act 2014 in Wales, are the basis of a regime for placing, in limited circumstances, a child who is being looked after by a local authority and who is at risk of harm in accommodation provided for the purpose of restricting liberty ("**secure accommodation**"): **[30]-[44]**. Regulations provide that a children's home must only be used as secure accommodation if it has been approved for that purpose by the Secretary of State for Education (in England) or by the Welsh Ministers (in Wales); and that children's homes must be registered with Ofsted (in England) and Care Inspectorate Wales (in Wales). Any person who carries on or manages a children's home without being registered commits an offence: **[45]-[62]**.

The shortage of such placements has prompted local authorities to seek orders from the High Court under its inherent jurisdiction, authorising them to deprive children of their liberty in other accommodation. The inherent jurisdiction is a means of providing protection for children whose welfare requires it. It has been described as the great common law safety net which lies behind all statute law: **[63]-[68]**. But it is subject to limits. Section 100 of the CA 1989 prohibits the use of the inherent jurisdiction to confer, in particular, power to determine any question in connection with any aspect of parental responsibility for a child on a local authority. That, however, reflects the requirement of the CA 1989 that local authorities which need such a power must obtain a care order. It does not prevent recourse to the inherent jurisdiction in a case such as this, where the local authority already had parental responsibility by virtue of a care order: **[106]-[121]**.

As to the contention that the use of the inherent jurisdiction cuts across section 25 of the CA 1989, there are no findings as to the precise regulatory status of T's placements. But it is in any event unthinkable that the High Court should have no means to keep children safe from extreme harm. If the local authority cannot apply for an order under section 25 because there is no secure accommodation available, the inherent jurisdiction can be used to fill that gap. 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, the inherent jurisdiction may be used to authorise a local authority to deprive a child of his or her liberty, notwithstanding that the placement will be in an unregistered children's home in relation to which a criminal offence would be being committed: **[122]-[145]**. Nor does the use of the inherent jurisdiction in these circumstances fall foul of article 5 ECHR, given the safeguards which the courts have devised, in particular by mirroring the procedural protections applicable in a section 25 application: **[150]-[155]**.

Lord Stephens notes that any order made under the inherent jurisdiction to authorise a deprivation of liberty where the placement is in an unregistered children's home does not authorise the commission of a criminal offence or prevent an offence from being committed. He emphasises the matters which must be considered prior to a court authorising a placement in an unregistered children's home and the

ongoing monitoring which must take place thereafter: **[170]-[172]**, and notes that such a placement may also be justified, and required, where the positive operational duties to take steps to protect life or prevent inhuman or degrading treatment under articles 2 and 3 ECHR are engaged: **[174]-[177]**. This is a temporary solution developed to deal with an extremely difficult situation caused by a scandalous lack of provision. The appropriate permanent solution is the provision of appropriate accommodation: **[178]**.

Lady Arden states that she has difficulty with the limits of the inherent jurisdiction in this case. She goes no further than to countenance its use in the exceptional circumstances described by the Secretary of State, for children 16 and above, which are likely to arise in an emergency following a placement breakdown where the consequences of the court being unable to authorise a deprivation of liberty are likely to be dire: **[181]-[182]**.

Issue 2: the relevance of the child's consent to the proposed arrangements

T argues that it would have been conducive to her welfare if the court had placed more weight on her consent to the restrictive placements, rather than making an order. But, Lady Black notes, an apparently balanced and free decision made by a child may be quickly revised. That is illustrated by the facts of this case, where T's behaviour in the first placement confirmed the judge's view that her consent was not genuinely expressed. There is therefore no basis for holding that the judge was wrong to authorise restriction of liberty in T's case, and her argument is entirely academic. Lady Black acknowledges, however, that any consent on the part of the child will form part of the circumstances that the court must evaluate in considering an application for an order authorising a local authority to restrict a child's liberty: **[156]-[161]**.

References in square brackets are to paragraphs in the judgment