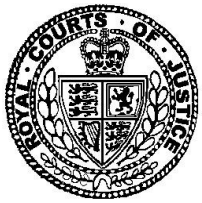

Neutral Citation Number: [2023] EWHC 2494 (Fam)

Case No: FD23C40336

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 October 2023

Before:

Paul Bowen KC (sitting as a Deputy Judge of the High Court)

- -

Between:

A LOCAL AUTHORITY	**Applicant**
- and -	
EBY (a child) (1) AY (mother) (2) BY (father) (3)	**Respondents**

- -

Re. EBY (A Child) (Deprivation of Liberty Order: Jurisdiction) (17-year-old)

- -

Colin Morgan (instructed by a Local Authority) for the Applicant
James Turner (instructed by Jackson West, Solicitors) for EBY
Simon Miller (instructed by HLA Family Law) acting pro bono for the Second Respondent, BY (the father)
The mother (AY) attended with her communicator but was not represented
The Guardian attended but was not represented

Hearing dates: 3 October, 9 October 2023 (remotely via Microsoft Teams)

- -

APPROVED JUDGMENT

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Paul Bowen KC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is an application by a Local Authority for an order under the High Court's inherent jurisdiction authorising and permitting the Local Authority to deprive a 17-year-old child, EBY, of her liberty (a 'deprivation of liberty order', hereafter a 'DOLO') in accommodation provided by the local authority under s 20(3) of the Children Act 1989 ('the 1989 Act') with the consent of her parents. The accommodation is not registered as a children's home but there is an extant application for registration with Ofsted. The DOLO was sought for an initial period of three months before returning to court for a review. I made a DOLO on an interim basis on 21 September 2023 which is due to expire at 23:59 on 9 October 2023. I heard argument and evidence at a hearing on 3 October 2023 and indicated my intention to extend the order beyond 9 October 2023 for a short period to allow further evidence to be obtained. I reserved my judgment which I now set out and I make the order today, as attached. The parties have been anonymised for reasons of privacy, but I give leave for the judgment to be published in this anonymised form provided no other details are published that may identify EBY or her family.

2. The Local Authority maintains that a DOLO is in EBY's best interests and is a necessary and proportionate measure for the purposes of Article 5(1)(d) in her best interests to protect her from further serious harm as a result of her involvement in criminal gang activity. If a DOLO is not made no other legal means are available to protect her and she would then be at such a risk of harm as to breach the state's protective duties under Article 2 (the right to life) and Article 3 (the right to be free from torture and inhuman and degrading treatment) of the European Convention on Human Rights ('the Convention') as set out in and given effect by the Human Rights Act 1998 ('HRA').

3. The Local Authority's application is supported by the parents, BY and AY. The application is opposed by EBY, who is separately represented, and by the Guardian.

The issues

The first issue: whether the inherent jurisdiction is available

4. The present case is a sadly familiar example of a group of cases in which the inherent jurisdiction is relied upon to deprive vulnerable children of their liberty for their own welfare in circumstances where existing statutory measures are not available and in which the Court must determine not only whether the jurisdiction should be exercised but whether it is available at all, most relevantly in *Birmingham City Local Authority v D* (SC(E)) [2019] 1 WLR 540 (*'Re. D'*), *A City Local Authority v LS* (MacDonald J) [2020] Fam 28 (*'Re. LS'*), *Re. T (A Child)* (SC(E)) [2022] AC 723 (*'Re. T'*) and *Derby City Local Authority v BA (No. 1)* (CA) [2022] Fam 351 (*'Re. BA'*). In particular, this case (one involving a competent, non-consenting 17-year-old accommodated under s 20 of the 1989 Act) raises three questions which are not answered directly by existing case-law, namely: whether the inherent jurisdiction is expressly excluded by either s

100(2)(b) or 100(2)(d) of the 1989 Act or whether it is impliedly excluded by s 31(3) of the 1989 Act. I identified these as potential issues at the hearing of 21 September when the solicitor for EBY argued that the Court had no jurisdiction to make the order. I therefore directed that the parties address this issue at the hearing of 3 October 2023. Although by the time of the hearing all the parties agreed the jurisdiction is available, I must be satisfied that I have the necessary jurisdiction to make the orders sought. I invited, and received, submissions from Counsel on the issue at the hearing, for which I am grateful.

The second issue: whether the jurisdiction should be exercised

5. If I am satisfied the jurisdiction is available, I must still decide whether the jurisdiction should be exercised in my discretion. This involves consideration of a number of overlapping tests. First, whether leave to invoke the inherent jurisdiction should be granted under s 100(3)-(5) of the 1989 Act. I must be satisfied that the result sought by the Local Authority cannot be met by some other order that the Local Authority is entitled to seek and that, if the jurisdiction is not exercised, EBY is likely to suffer significant harm. Second, if I grant leave, I must conduct a welfare assessment to determine whether a DOLO is in EBY's best interests. Although I am not bound to do so, I may have regard to the matters set out in the welfare checklist in s 1(3) of the 1989 Act as a useful guide. In conducting this assessment, EBY's wishes and feelings are likely to be of particular relevance given her age and understanding. Third, I must be satisfied that the deprivation of liberty (the fact of which is not disputed) complies with Article 5, in particular that it is 'for the purpose of educational supervision' (Article 5(1)(d)) (which has been interpreted broadly as encompassing all of the child's welfare needs) and that the deprivation of liberty is a necessary and proportionate means of meeting those needs and is attended by adequate safeguards: *Re. T*, [155]. Fourth, where (as here) the proposed placement is in an unregistered children's home, which itself may constitute a criminal offence under s 11 Care Standards Act 2000, I must be satisfied that there is an 'imperative necessity' for such a placement and that the President's Guidance[1] has been complied with, in particular that Ofsted has been notified and an application for registration has or will be made: *Re. T*, [141, 170]. Fifth, I must consider whether EBY is at a real and immediate risk of death or life-threatening injury or of treatment crossing the Article 3 threshold triggering a positive duty to make a DOLO under Articles 2 or 3: *Re. T*, [174-177].

Summary of my judgment

6. I am satisfied that the jurisdiction is available (the first issue) and that it is necessary and proportionate to make a DOLO in light of the risks to EBY (the second issue), but only until shortly after 27 October 2023, when the matter will return for review in the light of updating evidence.

[1] The President's Guidance of 12 November 2019 in relation to placing a child in an unregistered children's home and the addendum dated 1 December 2020 to the Guidance

Background

7. EBY turned 17 in August 2023. She is a bright girl and has an ambition to become a police officer. She is currently in her last year of A levels, but her school academic performance has suffered as a result of recent events. She is a talented footballer and plays for a local team. Her parents are divorced. EBY's mother is registered as both blind and deaf and is assisted by a communicator. Due to the mother's difficulties, EBY has been living at home with her father, BY, who has Asperger's Syndrome. BY is a train driver and works shifts and is often not at home, so EBY has regularly been left unsupervised. There is no question that both EBY's parents love her dearly, but in the absence of parental supervision she has been drawn into the malign orbit of local criminal gangs who have groomed and exploited her to become involved in their criminal activities. The Local Authority has been actively involved in her case since May 2023 when EBY was reported missing by her mother, although they had previous engagement with the family as a result of the parents' acrimonious separation when care proceedings were contemplated, but never issued. EBY disclosed to social services that she had become involved with a criminal gang at whose hands she had suffered serious physical sexual assaults, including rape, which were not reported to the police. In June 2023 EBY was made the subject of an Adolescent Risk Management Plan. This had limited effect; rather, the situation continued to deteriorate.

8. On 25 August 2023 at 4.40 am, EBY was found by Police with blood on her face. Details of this incident are recorded in a record of a 'public protection notice' ('PIN') of the same date. A member of the public had seen a girl covered in blood and called 999. When officers attended, EBY ran off and, when they stopped her, she initially refused to answer questions. She then reported to police 'I need to go meet someone, I'm going to miss my time frame, I need to bait them out'. She refused to explain further and kept trying to push past officers. After some persuasion and communication and questions around her injuries, she stated, 'obviously someone's decked me in the face, why do you think I took my gum shield out with me, so I wouldn't break any of my teeth'. She refused to say when or where this happened or who had been involved but hinted that she had gone out intentionally to meet the person and 'have it out with them'. Officers returned her to her home where her father disclosed this was the third occasion since April 2023 when EBY had gone missing and been found with injuries. He said that in the last couple of years EBY had been showing signs of gang ideology, dressing differently, going out late at night wearing a ski mask and gloves and taking a gumshield with her, but she would not disclose to her parents who she was meeting and how she knew them. Officers did not consider there was sufficient evidence to justify removing EBY under their child protection powers in s 46 of the 1989 Act ('the s 46 power') but gave 'extensive words of advice' to the father.

9. On 31 August 2023 police officers conducted a welfare check at EBY's home. A PIN of the same date records that bruising was still evident on her face and police checks revealed she had been the victim of an alleged rape, a stabbing and three incidents of assault by unknown males since February 2023. EBY

was very guarded, and officers referred their concerns to social services for a 'signs of safety' assessment.

10. In the early hours of 1 September 2023, the police found EBY sitting on the side of a main road. The incident is recorded in a further PIN. She had sustained significant injuries including a nosebleed, a cut to her forehead, bruising around the eyes, and bruising around the neck as if she had been choked. Although initially reluctant to disclose what had happened, EBY eventually told police that she had been involved in organised fights involving rival gang members. The other participants in the fights were all male. The fights were watched by three male gang members; two others would select those who were to fight. She explained that she had originally become involved with these gangs following the murder of a friend. She could not extricate herself from her involvement because of her fear of the consequences. EBY declined to be taken to hospital for medical attention, so the officers took her home to her father.

11. On 5 September 2023 EBY again suffered a serious assault and came to the attention of police officers who exercised their s 46 power and removed her, first, to a local Hospital A&E department where she required a CT scan. She initially refused any medical examinations. EBY was put in a watched ward which resulted in four staff watching her on her bed (two being police officers to prevent her from leaving the unit). The police rescinded their powers of protection later that day and EBY was returned home.

12. A Child in Need (CIN) plan prepared by the Local Authority social services team on 11 September 2023 recorded that there had been three incidents in the previous week in which EBY had been assaulted and that she had disclosed to police officers that in, the last few months, she had been stabbed, raped and assaulted on 'numerous occasions'. She was often locked out of the house until her father returned from work and did not carry a house key for fear this would put her home at risk from gang members. She had been late to school on many occasions and had missed at least one whole day. Concern was expressed she would not achieve her hoped for A level grades if matters continued (I was informed at the hearing that EBY had only passed one of her mock A levels this year). The father was not complying with the safety plan that had been put in place and EBY continued to go out at night despite having often been physically harmed. Social services were concerned that she was being exploited but at this stage were not fully aware of who or what she was involved with. EBY did not want to be accommodated by the Local Authority and reported that she was safe at home. EBY's mother was very worried about her and was angry that the father was not sticking to the safety plan and curfew expectations.

13. EBY was reported missing on 12 September 2023 by her father who had returned home at 01.45 to find EBY was not at home. She returned later that night. Police officers attended the home and reported that she appeared to have fresh facial injuries. EBY shared with police that she would go to a location to collect a burner phone, she would then receive a text message with a location and a time frame to attend at a pre-arranged location for organised fights in which she would act as a lookout. She was reluctant to seek police help as she knew another person who had been badly assaulted after doing so and she did not want to be in the same position. The police PIN records that the Local

Authority social services team was actively considering making an application for a DOLO and an emergency protection order ('EPO'). A further PIN record of 13 September states that EBY had been given a 'Buddi tag' (an electronic GPS device that tracks her whereabouts), that the CIRV (Community Initiative to Reduce Violence) team was involved and that she was considered at the highest possible risk (level 1 of 10) on the grounds 'she is at significant risk of harm, there is no safeguarding in place for her' and '[s]he is trapped in a lifestyle that every time she leaves the house she may not return'. The Local Authority were proposing to seek a DOLO and EPO as a matter of urgency.

14. Officers were again called to EBY's home on 14 September after she was reported missing by her father and was believed to be in the company of gang members. She was contacted by telephone and police officers collected her and returned her home, apparently without injury, but she refused to say where or with whom she had been. She was reported to be wearing her Buddi tag.

15. In the early hours of 15 September EBY was again reported missing by her father on his return home. Officers texted her and she then contacted them at 0400 explaining where she was and agreeing to meet the officers at a Chinese restaurant. She was found to have significant facial injuries including blood from her nose covering most of her lower face, grab scratch marks around her neck, an injury to her forehead and significant bruising around both upper cheeks and eyes. After initially claiming she had 'fallen over and hit her head on a curb' she then revealed that she had been involved in a further organised gang fight. She explained that she was involved with a gang (thought to be 'county lines') which would invite rival gang members to 'meets', under false pretences, and then 'jump' and badly beat them. EBY was one of the 'watchers', but on occasion these incidents had escalated and turned into a mass brawl in which she became involved. This had all begun because of an incident as a result of which she felt she needed 'street protection', which no one else was able to offer her. EBY claimed not to know any of the names of those involved and that all information was passed over burner phones. On this occasion she had attended the 'meet' and had been searched by gang members who discovered her Buddi tag and decided she had been deliberately leading police to their location and beaten her up. When she was returned to her home her father explained that he did what he could to keep her safe around his shift pattern, but he was unable to stop EBY even when he was at home as she would often sneak out of the back of the house.

16. On the morning of 15 September 2023 an application was made by the Local Authority to the High Court for a DOLO to ensure EBY's removal to accommodation organised by the Local Authority in a town one hour from EBY's home. This accommodation is registered with the CQC but is not registered as a children's home although there is a live application for registration with Ofsted. The matter came before the Court (HHJ Harrison KC sitting as DHCJ) on the same day. At this stage the Local Authority was not accommodating EBY under s 20 of the 1989 Act as the father did not consent. During the hearing, in light of the authority of *LS* and the father's refusal to consent to s 20 accommodation, the Court was invited to make an Emergency Protection Order under s 44 of the 1989 Act, which authorised the Local

Authority to remove EBY to accommodation provided by them for a period of eight days. The Court granted the EPO (which expired at 11:59pm on 23rd September 2023) and a DOLO, authorising the Local Authority to impose several restrictions, including 2:1 supervision in the placement and in the community, the locking of doors and windows, searching of EBY's possessions and the use of restraint.

17. EBY absconded twice after the hearing on 15 September 2023. The first time was immediately after the hearing, and she was picked up later that night. She was located by police and taken to the placement. She then tried to abscond a second time but was apprehended and restrained by police officers. I understand that this was significantly distressing for EBY.

18. During a welfare visit on 18 September 2023 EBY disclosed to a police officer and CIRV worker that during the incident in the early hours of 15 September 2023 she had been raped by gang members. EBY explained that she had run from her home after her father had told her she was going to be taken to a placement by the Local Authority. She had gone to meet the gang members as it had been planned for her to leave the gang but she 'had to pay' by being raped and hit around the face with a glass bottle. She had now 'paid the price' to get out of the gang and now wants to be at home to rest and heal. She claimed the gang did not know her name or where she lives and she had made a sacrifice in order to return to normal. She wanted to return to her home, to go back to school and to see her mum again after school, as she had used to. The police reported this account to a professionals' meeting which took place on 19 September 2023. The meeting concluded that the current DOLO continued to be necessary to safeguard EBY's welfare.

19. The matter came before me on 21 September 2023 for a one-hour review hearing. By this point both the mother and father had given their consent to EBY being accommodated under s. 20 of the 1989 Act. EBY was not consenting to the accommodation or to the deprivation of her liberty. The EPO was due to expire and could only be extended for a further seven days and this has now lapsed. The parents and the Guardian supported the application. EBY did not attend, and I was informed by her solicitor that she wished to be separately represented from the Guardian and to have an opportunity to prepare a statement and to attend and give evidence to resist the DOLO. I directed that EBY be separately represented paragraph 7.2 (b) and (d) of Part 4 of Practice Direction 16. Her solicitor also argued that the Court did not have jurisdiction to exercise the inherent jurisdiction. I was sufficiently satisfied that, now EBY was accommodated under s 20, that I could and should make a DOLO on an interim basis until 23.59 on 9 October 2023. However, I gave directions for further evidence and skeleton arguments and for the matter to return for a full day's hearing on 3 October 2023 to hear argument as to whether the jurisdiction was available and should be exercised on a longer term basis.

20. In her statement dated 25 September 2023, EBY explains the events of the last few months. She states that in March 2023 a good friend had been murdered after being set upon by a group of teenagers in response to an altercation that had taken place the previous day at a McDonald's restaurant. These were not gangs, just different groups of friends. After her friend's memorial, relations

between the two groups had further deteriorated and there was a succession of violent assaults by the rival groups, including one on EBY in April 2023, on Easter Sunday. She took to wearing a ski mask and hoodie because she was embarrassed about the bruising to her face. Soon after that assault she was approached by a group of young men who asked her if she wanted anyone 'sorted out'. They explained that they could set someone up to get beaten up for her, but in return she would have to work for them. EBY says she was 'hesitant', but agreed to get involved because she wanted help to stop the attacks on her and her friends and retribution on the group who had murdered her friend. The gang later reneged on their agreement to offer that help. The first time she worked for the 'gang' (her words) she was blindfolded and taken to a nearby park; thereafter she walked or ran to the 'meets' herself. She said she acted as a 'watcher' while the gang lured people to collect drugs and were then 'jumped' and beaten up. She was advised to wear a gumshield and balaclava. Sometimes other 'watchers' failed to turn up, and someone else would be beaten as punishment in front of the others, using knuckle dusters and bats. She described this as 'horrible', but she kept returning because she was afraid someone else would be beaten if she did not come. The first time she was beaten was because one of the other 'watchers' failed to turn up. She was randomly picked and hit with a knuckle duster and a baseball bat. Further serious assaults followed when she decided she did not want to continue and started deliberately failing to do her job properly as a 'watcher'. After a period of this, she was considered by the gang to be a liability and was told she had to do one more job, on 15 September 2023. She attended the 'meet' where she had a bottle smashed over her head and was raped twice. After this she considered herself to be no longer part of the gang and was 'strangely happy that I was now out of the gang'.

21. The Guardian filed a written analysis dated 29 September 2023. She opposed the continuation of the DOLO, although acknowledged that the Local Authority had been correct to apply for one in the first place. She accepted the Local Authority's risk assessment that EBY had been the victim of professional grooming and exploitation by a criminal gang and that EBY continued to be at risk of future harm. However, having met and discussed the case with EBY, she felt the risks had reduced since EBY had been in her placement. She showed good insight into how she had been exploited. Given her age and maturity, her opposition to the placement and her agreement to voluntary restrictions such as an electronic tag, a curfew and a temporary foster placement of 4-6 weeks, the risks were such that a continuing DOLO was not necessary or proportionate.

22. At the hearing on 3 October 2023, I heard submissions from counsel for the Local Authority, EBY and her father and evidence from EBY's social worker, her mother, the Guardian and from EBY. The mother and father both supported the Local Authority's application. Counsel for the Local Authority began by informing the Court that there was further police intelligence relevant to the risk posed to EBY but that this was not in a form that could be disclosed to the parties or to the Court. Following my invitation, he declined to make an application to put that intelligence before the Court by means of the closed material procedure in *Official Solicitor v K* [1965] AC 201. Having developed

submissions on the jurisdiction issue he called EBY's social worker to give evidence, who was also questioned by counsel for EBY and the father.

23. The social worker explained that the Local Authority still sought a continuation of the DOLO, given the significant nature of the incidents in which EBY had been involved, the fact the last of these had occurred barely two weeks ago and that neither the Local Authority nor the police yet understood the level of 'pull' (control) that the criminal gang had over EBY. She did not accept EBY's statement that she had disengaged from the gang having 'paid the price' on 15 September so the risks are no longer present. She pointed out that EBY had previously said to her by a text on 1 September 2023 that there was 'one last planned fight' and that would be 'the end', but the incident that then took place on 5 September 2023 (when EBY was hospitalised) had not turned out to be 'the end', as further incidents had taken place, notably on 15 September. In any event, even if EBY did believe that she was finished with the gang, that might be easier said than done given the influence that they had clearly had over her.

24. The social worker explained that EBY was currently being supervised 2:1 in her placement and 3:1 in the community. EBY has not been able to attend school because of the assessed risk and has had to get by with self-learning with a laptop and materials provided by her teachers. EBY's schooling and sporting activity have therefore suffered since she had been taken to her current placement, although she pointed out that EBY's educational attainment had already been adversely affected by her involvement with the gang. She believed the current provision could be improved, including a reduction in the level of supervision, although this was a matter that she had to discuss with her service manager, the placement, and the school. She agreed that there could be some flexibility in the provision of supervision to allow EBY to resume school, but this would need authorisation from above and a further discussion with EBY's school. As regards football training, she had already agreed that EBY could attend training sessions with suitable supervision and was not sure why that has not happened as she has been on sick leave. She has chased that with the service provider at the placement on this issue and was awaiting a response. She has also chased the management of the unit in relation to their application for registration with Ofsted and made a request with the police to disclose their most recent intelligence as regards risk to EBY, though the usual officer was away on a training course.

25. As regards care planning, EBY had been receiving weekly social work visits and was receiving counselling from the specialist CIRV worker. CAMHS counselling and rape counselling had both been offered but declined by EBY, but these would remain on offer. Given the limited timeframe the Local Authority have not been able to do more but a further care planning meeting was due to take place imminently. She agreed that EBY had been compliant with the restrictions at the placement since her initial resistance on 15 September 2023 and checks on her mobile phone revealed no contacts with gang members. She was unable to confirm EBY's assertion that the gang members do not have her phone number or address. She agreed with the Guardian's assessment that EBY has a good level of insight as to the triggers that led her to be part of the gang which is relevant when assessing risk in the

future. She strongly agreed that EBY is mature and articulate. However, while significant weight should be given to EBY's opposition to a DOLO, that did not mean the DOLO should be refused for that reason. Although she accepts EBY believes she is free of the gang and that they do not have a way of contacting her, EBY had consistently put herself in positions that put her at a risk to life, had given conflicting accounts about her experiences and refused to disclose details of her assailants to police or social services. She accepted that depriving her of liberty would be perceived negatively by EBY.

26. The social worker did not agree with the Guardian's assessment that any risk could be met by placing her with a foster carer for 4-6 weeks with support from the Local Authority. The fact that EBY has agreed to a curfew and a tag would not be adequate to meet the risks. Although the risks have reduced, that is because of the DOLO and removing EBY from her hometown. The Local Authority was still awaiting further intelligence from the police before they can join all the dots and she is aware there are other ongoing investigations. EBY's position has changed at various times which makes the Local Authority unsure as to how her involvement in the gang began and her exact involvement and role. She did not yet have a sufficient understanding of the risk to be able to recommend the DOLO be withdrawn. Before the DOLO she had been really worried she was going to receive a police report that EBY had been murdered.

27. The Guardian gave evidence to supplement her written analysis dated 3 October 2023. While she maintained her position that a DOLO was not necessary or proportionate, she agreed that there was a particular risk if EBY returned home while she was travelling to and from school and while at school if she was not supervised. She therefore agreed that an additional restriction of supervision by the Local Authority was necessary; however, this did not need to be imposed by means of a DOLO if EBY was willing to accept such supervision.

28. I then heard from EBY herself. She said she had no intention of getting involved again with any of the gang. Her priority was to return to school in a staggered way and to keep herself safe. She is willing to learn more about gang exploitation and how to keep herself safe and to submit to voluntary restrictions on her liberty including an electronic tag, curfew, and Local Authority supervision to and from and at school.

29. The mother addressed the Court directly with the assistance of her communicator. For her, EBY was still at high risk from gang members. She wants EBY to return to school immediately and to continue with her football. She told me how proud she was of EBY, and how much she loves her, but first and foremost EBY has a right to life. She continues to need the armoury of protection provided by a DOLO.

Legal framework

Article 5 and 'deprivation of liberty'

30. The legality of depriving children and vulnerable adults of their liberty is a complex and contentious area, hedged around by a thicket of legislation and the subject of a rich body of case-law. This is driven, in large part, by the

incorporation of the Convention into domestic law by the HRA and developments in the case-law of Article 5. The definition of 'deprivation of liberty' in Article 5 is, in significant respects, broader than the common law definition of 'detention': contrast *R v Bournewood Community Mental Health NHS Trust ex p. L* [1999] AC 458 (*'Bournewood'*) with *HL v United Kingdom* (2005) 40 E.H.R.R. 32 (*'HL'*). This broader definition of 'deprivation of liberty' was later developed further by both Strasbourg and domestic law, notably in *Storck v Germany* (2005) 43 EHRR 6 and the Supreme Court case of *Surrey County Local Authority v P; Cheshire West v Chester Local Authority v P* [2014] AC 896 ('*Cheshire West'*). The components of a deprivation of liberty are threefold: (a) the objective component of confinement in a particular restricted place for a not negligible length of time; (b) the subjective element of lack of valid consent; and (c) the attribution of responsibility to the state: *Storck*, [74, 79], *Cheshire West*, [37], *Re. D*, [1]. The deprivation of liberty must be for one of the limited purposes prescribed by Article 5(1), materially (in the case of incapacitated adults) Article 5(1)(e) ('the lawful detention of persons … of unsound mind'), and in accordance with a procedure attended by adequate safeguards in terms of criteria, length and review of detention, with a right of review by a court as required by Article 5(4).

31. Following *HL,* it became apparent that a significant number of incapacitated adults in the UK were being deprived of their liberty for their own welfare in circumstances where the criteria for detention under the 1983 Act were not met and without the legal safeguards required by Article 5. In the absence of specific legislation, compliance with Article 5 initially required prior authorisation by the High Court under its inherent jurisdiction in relation to incapacitated adults: see, for example, *Sunderland City Local Authority v PS* [2007] EWHC 623 (Fam) (Munby J). Legislation authorising the deprivation of liberty of incapacitated adults has since been made in the Mental Capacity Act 2005 ('the 2005 Act').[2]

Deprivation of liberty of children

32. These developments primarily affected incapacitated adults. However, the definition of 'deprivation of liberty', and the procedural safeguards of Article 5(1), apply equally to children. This is demonstrated by Article 5(1)(d), which permits 'the detention of a minor by lawful order for the purpose of educational supervision'. The concept of 'educational supervision' is particularly broad, not limited to classroom teaching but extending to embrace many aspects of parental rights and responsibility exercised for the benefit or protection of a child, whether by their parent or a local authority in whose care they are placed: *Re. T*, [83-87]. Formal procedures may not be necessary for such a deprivation to comply with Article 5(1), however. A very young child subject to ordinary restrictions by a parent is not deprived of their liberty at all: *Re A* [2019] Fam

[2] The 2005 Act (which came into force on 1 October 2007) introduced a new jurisdiction in the Court of Protection to make a DOLO under s 16. Given the significant number of adults to whom this procedure applied, the Mental Health (Amendment) Act 2007 was then passed (with effect from 1 April 2009), amending the 2005 Act so as to introduce the 'deprivation of liberty safeguards' ('DOLS') procedure for incapacitated adults which allowed such adults to be deprived of their liberty without the need for a court authorisation (see Schedule A1), subject to a right of appeal to the Court of Protection under s 21A.

45. For older children who are under 16, a parent's consent to a deprivation of their child's liberty may be compatible with Article 5(1): see *Nielsen v Denmark* (1988) 11 EHRR 176 and *Re. D*, at first instance [2016] EWCOP 8, Keehan J at [25]. This reasoning was left untouched in the Supreme Court in *Re. D*, although the Court made clear that parental consent cannot authorise the deprivation of liberty of a 16 or 17-year-old, which therefore requires formal powers of detention with adequate safeguards. Moreover, the fact a 16- or 17-year-old child is in care does not give a local authority power to deprive the child of liberty. Although a care order imposes a duty on a local authority to accommodate a child (s 22A), the parental responsibility conferred by a care order under s 33(3) does not extend to depriving liberty, as was accepted by all parties in *Re. T*, [111]. In any event, a care order is not available in the case of a child of 17 by virtue of s 31(3). Furthermore, the provision of accommodation to any child under s 20 does not bring with it a power to deprive a child of their liberty. Accordingly, it is necessary to look to other sources of authority, power or jurisdiction to identify an Article 5-compliant procedure for a deprivation of liberty in EBY's case.

33. Three such sources of legal authority may be available for children of 16 and 17 who have mental capacity for the purposes of the 2005 Act[3] such as EBY, leaving aside the short-term powers of detention under s 44 and 46 of the 1989 Act. First, a *Gillick* competent child may consent to restrictions placed upon them, in which case the second component of a deprivation of liberty (a lack of valid consent) is not present, although in such a case the Court will have to give careful consideration to whether the consent is real and the risk that it might be withdrawn: *Re. T*, [162]. As EBY does not consent to her current placement, this option is not available. Second, a secure accommodation order under s 25 of the 1989 Act may authorise the detention of 'looked after' children and certain other categories of children,[4] including children aged 16 and 17 (*Re. LS*, [33]), for periods of up to six months at a time. Section 25 is not satisfied in EBY's case, so this provision is not relied upon by the Local Authority. Third, the High Court may authorise the deprivation of liberty in its inherent jurisdiction, to which I now turn.

The inherent jurisdiction in relation to children

34. The High Court's inherent jurisdiction in relation to children is of great antiquity, rooted as it is in the Crown's prerogative *parens patriae* power and duty to protect the person and property of children, and 'theoretically boundless' in the measures it may authorise in the child's best interests,

[3] For mentally incapacitated children aged 16 or 17, both the Court of Protection (under the 2005 Act, ss 4A and 16) and the High Court, Family Division (under the inherent jurisdiction) have jurisdiction to make deprivation of liberty orders. The appropriate court is to be determined by reference to the Mental Capacity Act 2005 Transfer of Proceedings Order SI 2007/1899 and the criteria set out in *B (A Local Authority) v AM* [2011] 1 FLR 1635. The DOLS procedure does not apply to 16 or 17-year-olds. The significant numbers of such children prompted the further amendment of the 2005 Act to apply the new 'Liberty Protection Safeguards' (which will replace the DOLS procedure once they come into force) to both incapacitated adults and children aged 16 and 17 by the Mental Capacity (Amendment) Act 2019 ('2019 Act'). The 2005 Act does not apply to incapacitated children under 16.

[4] Section 20(7)(a) of the 1989 Act and regulation 7(1) of the Children (Secure Accommodation) Regulations SI 1991/1505

including the deprivation of a child's liberty, even in the face of objection by the parents or of a *Gillick* competent child: *Re. T* (SC(E)) [2022] AC 723, [65-67] (per Lady Black); *Re. Z (A Minor) (Identification)* [1997] Fam 1, pp. 14C-18G (per Wall LJ); *A v A Health Authority* [2002] Fam 213, [30-34] (Munby (then) J). It is 'the ultimate safety net' where other legal measures are not available: *Re. T*, [64-68, 168]. It is not without limit, however: 'the boundaries of the inherent jurisdiction, whilst malleable and moveable in response to changing societal values, are not unconstrained': *LS*, [35], per MacDonald J. The inherent jurisdiction 'is now supplemented and, to a very large extent superseded, by the 1989 Act which is a near comprehensive codification of the law relating to children': *A v A Health Authority*, [33]. In particular, the operation of the inherent jurisdiction is expressly excluded in the circumstances set out in s 100(2) of the 1989 Act and may only be exercised with the Court's leave where the criteria in s 100(4) and (5) are met. Both *Re. T* and *Re. LS* concerned the effect of s 100(2) and are considered below. The jurisdiction may also, at least in theory, be impliedly excluded where it is inconsistent with, or 'cuts across', the 1989 Act or another statute: an argument made to, and rejected by, the Supreme Court *Re. T*. I will return to this in more detail below once I have considered s 100(2).

Express exclusion of the inherent jurisdiction: s 100(2) of the 1989 Act

35. Section 100, which is titled 'Restrictions on use of wardship[5] jurisdiction', provides:

> (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.

[5] Although s 100 refers to 'wardship', that is only one manifestation of the inherent jurisdiction. 'Subject to the distinguishing characteristics of wardship being that custody of the child is vested in the court' so that 'no important step can be taken in the child's life without the court's consent, the jurisdiction in wardship and the inherent jurisdiction of the High Court are the same': *Re. LS*, [36].

> (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).

36. Section 100 therefore imposes a strict statutory prohibition on the court exercising the inherent jurisdiction in the circumstances outlined in s 100(2), together with a requirement for leave (s 100(3)) which may only be granted if the Court is satisfied of the conditions in s 100(4). The circumstances in which s 100 came to be enacted are explained by Lady Black in *Re. T* at [70-79]. As she explains, at [78], Parliament's 'central concern was to protect families from intervention by local authorities except in carefully regulated circumstances'. However, s 100 'does not remove the High Court's inherent jurisdiction powers entirely, as can be seen from section 100(3)-(5)': ibid. The question in each case is whether the application falls within the territory preserved for the inherent jurisdiction or is excluded by one of the sub-sections in s 100(2).

37. In *Re. T* the Supreme Court held that s 100(2)(d) did not exclude the inherent jurisdiction in the circumstances of that case. T was a 15-year-old child who was subject to a care order and who met the criteria for a secure accommodation order, but no such accommodation was available. The local authority invoked the inherent jurisdiction to authorise them to deprive her of liberty in an unregistered care home rather than in secure accommodation. It was argued on T's behalf that such an order was prohibited by s 100(2)(d) because the effect of an order was 'for the purpose of conferring on [the] local authority a power in connection with [an] aspect of parental responsibility'. Given that an order in the inherent jurisdiction does not, itself, deprive the child of her liberty, but rather authorises a local authority to confine the child should they consider that necessary, the order conferred on the local authority a power that it did not have: *Re. T*, [111]. That power was 'in connection with [an] aspect of parental responsibility' because the power to consent to a deprivation of liberty of a child – at least one under 16 - was an aspect of 'parental responsibility' that had been left open by *Re. D*: [112]. The argument was dismissed, in these terms (per Lady Black):

> 114. … 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 s 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.

38. In *Re. LS*, on the other hand, MacDonald J held that the inherent jurisdiction was excluded, in that case by s 100(2)(b) because the effect of an order was 'so as to require a child to be accommodated by or on behalf of a local authority'. Unlike the child in *Re. T,* LS was not a 'looked after child' because she was 17, so could not be made the subject of a care order, and was not accommodated under s 20 because her parents did not consent. The effect of an order under the inherent jurisdiction would breach s 100(2)(b) because it would 'not only authorise the accommodation of KS in a secure placement, but would, a priori, have the effect of authorising his removal from his mother's care without her consent for this purpose in circumstances where his mother, who retains exclusive parental responsibility for him, objects to this course of action': [48].

39. Both *Re. T* and *Re. LS* are distinguishable from EBY's case, however. I consider, below, under 'Discussion', whether the jurisdiction is excluded in her case by either s 100(2)(b) or (d).

Implied exclusion of the inherent jurisdiction

40. In *Re. T*, it was also submitted that the inherent jurisdiction was impliedly excluded and so could not be used to authorise the detention of a 15-year-old child in an unregistered children's home, rather than in s 25 'secure accommodation', because it 'cut across' the careful statutory scheme set out in s 25: [127]. Lady Black (giving the leading judgment) dismissed this argument, holding that the term 'secure accommodation' was limited to accommodation specifically designated by the Secretary of State for that purpose. It did not include accommodation that is not so designated for a child whose needs can only be met if their liberty is restricted, but who does not fall within the terms of s 25: [132]. The same applied to a child, such as T, who did meet the terms of s 25 but for whom no placement in secure accommodation was available: [141]. In short, s 25 was not intended to establish a comprehensive scheme for the detention of children so as to impliedly abrogate the inherent jurisdiction in circumstances where s 25 secure accommodation was not available. She also rejected the alternative argument, namely that the inherent jurisdiction was not available to authorise a deprivation of liberty because an order would authorise the commission of a criminal offence under s 11 of the Care Standards Act 2000, which makes it a criminal offence for a person to carry on or manage (materially) a children's home without registration by Ofsted. There was no other legal mechanism that could authorise such placements that would enable local authorities to discharge their statutory duties to safeguard the welfare of certain vulnerable children. These 'imperative considerations of necessity' led her to conclude that the inherent jurisdiction should be available in such cases, although its exercise was tightly regulated by the leave requirement in s 100(4) and the court must be satisfied that the President's Guidance has been followed: [145, 147]. Lord Stephens, in his concurring speech, drew the same conclusion, which he found to be supported by the positive protective duties owed to vulnerable children under Articles 2 and 3 which might otherwise be violated if the High Court was prevented from exercising the inherent jurisdiction, which was the 'great safety net': [174-177].

41. A similar argument that the inherent jurisdiction was impliedly ousted was considered, and rejected, by the Court of Appeal in *Re. BA*. BA was a 15-year-old 'looked after' child accommodated by a local authority under s 20 in an unregistered children's home in circumstances amounting to a deprivation of liberty which the local authority requested the High Court to authorise in its inherent jurisdiction. It was argued that the inherent jurisdiction was inconsistent with s 22C(6)(c) of the 1989 Act read with regulation 27A of the Care Planning, Placement and Case Review (England) Regulations 2010, as introduced by amending regulations in 2021. 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, s 22(6)(a)-(c), which (among others) stipulates that those children's homes in which a 'looked after' child may be accommodated must be registered for the purposes of the Care Standards Act 2000. Accordingly, for the inherent jurisdiction to be used in an unregistered setting would not only authorise a criminal offence under s 11 of the Care Standards Act 2000 but was also a breach of the regulations governing the provision of accommodation to looked after children. The President, in a judgment with which Baker and Simler LJJ agreed, identified the *ratio decidendi* in *Re. T* as being that the inherent jurisdiction could be invoked to authorise a deprivation of liberty 'in respect of a placement outside the statutory scheme, or in a placement prohibited by the scheme or otherwise ultra vires', provided it complied with conditions laid down by the Supreme Court including compliance with the President's Guidance: [41]. That ruling was binding and provided an answer to the difficulty. The inherent jurisdiction could be invoked to authorise the placement notwithstanding it was otherwise unlawful.

42. Again, EBY's case is distinguishable from both *Re. T* and *Re. BA* because she is 17. I consider under 'Discussion', below, whether this fact means the inherent jurisdiction is impliedly excluded by the 1989 Act, in particular given the terms of s 31(3) which prohibits the making of a care order or supervision order in the case of a 17-year-old.

Discussion: whether the inherent jurisdiction is available (the first issue)

43. Against that background I can deal relatively shortly with the first issue, not least as the parties are agreed that the inherent jurisdiction is available.

Whether the inherent jurisdiction is expressly excluded by s 100(2)(b)

44. In my judgment, the inherent jurisdiction is not excluded by s 100(2)(b) because a DOLO made in the inherent jurisdiction in respect of a 17-year-old who is accommodated under s 20(3) would not operate 'so as to require a child to be accommodated by or on behalf of a local authority'. I reach that conclusion for four reasons. First, the local authority already has a duty to accommodate a child to whom it provides accommodation under s 20(3) with the permission of her parents. Although a DOLO would authorise the Local Authority to deprive EBY of her liberty, it does not 'require a child to be accommodated by' the Local Authority: it is s 20(3) that has that effect. Second, this conclusion is not affected by the fact that *Re. T* is distinguishable on its facts because EBY, unlike *T*, is not in care (and cannot be placed in care because she is 17). The significance of the fact that *T* was in care, so that the local authority had

parental responsibility for her, was that the local authority thereby came under a duty to accommodate her under s 22A: *Re. T*, [114], quoted above at paragraph 37.. The duty to accommodate in s 22A has the same effect as the duty to accommodate under s 20(3): when either provision operates, a DOLO does not 'require a child to be accommodated' because the local authority is already statutorily required to accommodate the child. The only distinction is that, under s 20(3), the local authority's duty to accommodate will end if the parent's consent is withdrawn, at which time (applying *Re. LS*) a DOLO would no longer be authorised by virtue of s 100(2)(b). But this is a distinction without a difference while the s 20(3) duty persists. Third, EBY's case is therefore distinguishable from *Re. LS*, who was neither in care nor accommodated under s 20(3). Accordingly, there was no existing statutory duty to accommodate the child under either s 20(3) or s 22A so that, as MacDonald J found, a DOLO *would* 'require a child to be accommodated' and so was excluded by s 100(2)(b). Fourth, I am reinforced in my conclusion by the fact that in *Re. Z (A Child: Deprivation of Liberty)* [2021] 2 FLR 94, Gwynneth Knowles J made a DOLO in the inherent jurisdiction to authorise the deprivation of liberty of a 14-year-old child accommodated under s 20. I note that the question of whether the inherent jurisdiction was excluded by s 100(2)(b) was not raised. The case is also distinguishable as the child was only 14, so the parents could give a lawful consent to what would otherwise have been an Article 5 deprivation of liberty: [38]. Nevertheless, her judgment is consistent with the conclusion that I have reached.

Whether the inherent jurisdiction is expressly excluded by s 100(2)(d)

45. I have also concluded that the inherent jurisdiction is not expressly excluded by s 100(2)(d) because a DOLO would not have the effect 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'. That is because, first, although a DOLO does confer power on a local authority to deprive a 16 or 17-year-old child of their liberty, such a deprivation is not permitted by, and is therefore not 'in connection with', any aspect of parental responsibility, as *Re. D* makes clear. Second, it matters not that *Re. T* is distinguishable on its facts because the child in that case was in care so the local authority already had parental responsibility, whereas EBY is not (and cannot be) in care. That, again, is a distinction without a difference. For the reason I have already given the DOLO would not confer any power to deprive her of liberty as an aspect of parental responsibility that it otherwise did not have, because parental responsibility cannot authorise a deprivation of liberty for a child over 16.

Whether the inherent jurisdiction is impliedly excluded by s 31(3)

46. This issue arises because, unlike in *Re. T* and *Re. BA*, this case concerns a 17-year-old. The Supreme Court in *Re. T* and the Court of Appeal in *Re. BA* held that the inherent jurisdiction is not impliedly excluded in circumstances where a s 25 order cannot be made, either because the s 25 criteria are not met, no secure accommodation is available or because it would be otherwise *ultra vires* to deprive them of their liberty under s 25. Those cases are distinguishable, however, because they each concerned a child under the age of 17, so the

question of the effect of s 31(3) of the 1989 Act was not considered. Section 31(3) prohibits the making of a care order or supervision order for a child of 17 in the following terms: '(3) No care order or supervision order may be made with respect to a child who has reached the age of seventeen (or sixteen, in the case of a child who is married).' Does the statutory prohibition in s 31(3) impliedly exclude the operation of the inherent jurisdiction to deprive such a child of their liberty, at least one who has mental capacity and is *Gillick* competent? This issue does not appear to have been addressed in the case-law and raises a point of some significance. In my judgment the inherent jurisdiction is not so excluded. I reach that conclusion for four reasons.

47. First, the 1989 Act does not exclude the making of orders authorising the deprivation of liberty of 17-year-olds in all circumstances. In particular, a secure accommodation order may be made for a child under the age of 18 where the criteria under s 25 are satisfied. A 'child' is defined by s 105(1) of the 1989 Act as a 'person under the age of 18'. The court therefore has power to make an order under s 25 in relation to a child of 17 who is accommodated under s 20, save where the child is accommodated under s 20(5): *Re. LS*, [33]. Second, a care order does not authorise a deprivation of liberty: above, paragraph 32.. Accordingly, it does not necessarily follow from the express exclusion of a power to place a 17-year-old child in care that the High Court's inherent jurisdiction to deprive such a child of their liberty is impliedly excluded. Third, had Parliament intended to exclude the deprivation of liberty of such children in all cases it would have said so in terms similar to those in s 31(3) or s 100(2). The presence of an express statutory exclusion in one context is a strong indicator that there is no implied statutory exclusion in another context: *expressio unius exclusio alterius* or 'specific mention of one thing indicates an intention to rule out others': *Minister of Energy v Maharaj* [2020] UKPC13, [56]. Fourth, to exclude the inherent jurisdiction in these circumstances may leave the High Court unable to authorise measures that are necessary to protect a vulnerable (but otherwise competent) 17-year-old from serious, life-threatening harm, in breach of the state's positive protective duties under Articles 2 and 3. This was considered a powerful factor that militated against the exclusion of the inherent jurisdiction in *Re. T*: see above, paragraph 40.. The Court is bound by s 3 HRA to give a statutory provision a Convention-compliant construction, 'so far as it is possible to do so'. This is a strong interpretive obligation: *Re S (A Minor) (Care Order - Implementation)* [2002] 2 AC 291, [39-40]. I am satisfied it precludes an interpretation of s 31(3) of the 1989 Act that excludes the operation of the inherent jurisdiction in a case such as this.

48. In conclusion, s 31(3), read in context, does not demonstrate, by necessary implication, a Parliamentary intention that the 1989 Act excludes a competent, objecting 17-year-old from being deprived of her liberty under the inherent jurisdiction in all cases. The test of 'necessary implication' is a strict one (*Bennion, Bailey and Norbury on Statutory Interpretation*, 7th ed., s 25.12; *R (Morgan Grenfell) v. Inland Revenue Commissioners* [2003] 1 A.C. 563, Lord Hobhouse, [45-46]) and the same 'imperative considerations of necessity' referred to by Lady Black in *T* at [145] also demand that conclusion. It follows, in my judgment, that it is not excluded in the case of a 17-year-old simply

because a care order or supervision order cannot be made in such a case. Such an objection is clearly a weighty factor to weigh in the balance, but that goes to the exercise, not the existence, of the jurisdiction.

Discussion: whether the inherent jurisdiction should be exercised (the second issue)

49. I turn, then, to the second issue of whether the jurisdiction should be exercised. I first set out my findings of fact before applying these to the relevant tests outlined at paragraph 5., above.

Findings of fact

50. Since at least February 2023, on her own evidence, EBY has been exposed to serious, life-threatening harm in the form of serious physical and sexual assaults by unknown gang members in her hometown. These gang associations may have been ongoing for the last couple of years, although it appears the more serious harm to EBY has occurred since February of this year. I am informed that there is further police intelligence about these gang members to suggest their geographical reach extends well beyond her hometown. EBY has been groomed and exploited by this criminal gang and the extent of their influence upon her has been profound, which is demonstrated by the lengths to which she has gone to maintain contact with them despite being subjected to serious assaults and her reluctance to disclose details of the names and whereabouts of gang members to police, social services and her parents.

51. EBY has been particularly vulnerable to exploitation because she has spent long periods without the supervision of her parents who, through no fault of their own, have not been sufficiently able or present to provide such supervision. Her mother is unable to supervise her because of her disabilities. EBY lives with her father who works irregular hours and is often not at the house late at night when EBY is most at risk. Even when he is present, EBY has demonstrated a willingness and ability to abscond by 'sneaking out' of the back of the house. She has continued to be at risk despite the intense involvement of the police, social work and CIRV teams and the range of protective measures that they have used, including a Buddi tag.

52. I am unable to accept that EBY is no longer at risk from these gang members because, as she put it, she has 'paid the price' to leave the gang by the assault and rape she suffered on 15 September 2023. While I accept that she may genuinely believe that she is no longer involved, and that these gang members cannot identify her, the nature of the influence that they have held over her in the past is such that it is likely to be re-exerted should EBY return home and come into contact with gang members, particularly without appropriate supervision. I also place weight on the fact that EBY has previously told her social worker (on 1 September 2023) that her involvement with the gang would end, but it did not. She has also given differing accounts of events: notably, the account of events of the early morning of 15 September 2023 she gave to police (above, paragraph 15.) is very different from that she gave to social workers on 18 September 2023 (above, paragraph 18.). It is currently not clear to the police or social services what precipitated her involvement with the gang or the nature of that involvement. On her own account, she became involved out of a desire

for ‘revenge’ against another group that she considered responsible for the murder of her friend and has herself been party to the commission of serious criminal offences. Police investigations are continuing and I was told that further intelligence will, in due course, become available. Until I have seen that intelligence, and until the nature of the gang’s influence on EBY and the nature of her involvement is better understood, I have no reason to disagree with the police assessment that she is at the highest risk of harm of the most serious nature, including life-threatening injury or death. She is also at a high risk of less serious harm, namely that her schoolwork and sporting achievements will continue to be adversely impacted and her aspirations for her future undermined or destroyed should she commit criminal offences requiring the involvement of the criminal justice system.

53. I do not accept the Guardian’s assessment that a DOLO is no longer necessary because EBY shows such insight and maturity that the continuing risks can be addressed by voluntary measures. As I have explained, during the course of her evidence the Guardian accepted that EBY continued to require not only a temporary foster placement with a curfew and electronic tag (which EBY was willing to accept voluntarily) but would also need to be supervised to and from, and at, school. In the end, it appeared to me that the Guardian’s only dispute with the Local Authority (save in relation to care planning, to which I will come) was whether EBY should remain in her current placement or move to a foster placement in her hometown, and whether the necessary restrictions on her liberty should be applied with EBY’s consent rather than with the coercive power of a DOLO. While I accept that if EBY was to voluntarily comply with these proposed restrictions that would go a considerable way towards meeting the risks, I am also conscious that EBY can withdraw that consent at any time, whether explicitly or simply by taking steps to avoid them by subterfuge in the event that contact with the gang was resumed. Again, until the nature of the influence that they have over EBY is known it would be too much of a risk, at this very early stage, either for EBY to return to a placement in her hometown or for the compulsory measures in the DOLO to be substituted by voluntary restrictions. I accept that EBY has some insight into her situation and is very mature, but I do not see how those have developed significantly since a few short weeks ago when she was still involved with the gang. While I have the greatest respect for the Guardian’s experience in these matters, her views carry no special weight in the forensic process: *M W, Hertfordshire County Council v A, V (By their Children's Guardian), Mr & Mrs J* [2014] EWCA Civ 405, [32]. In this case, they do not outweigh the views of the relevant professionals and of EBY’s parents, who support the continuation of the DOLO.

54. I am concerned, however, that the current care planning for EBY is failing to meet her needs and may, in some respects, be exacerbating the situation. In particular, EBY has not attended school since she was removed to her placement on 15 September 2023 and the current arrangements for her continuing education are plainly inadequate. This is her A level year and it is crucial that there are as few interruptions with her education as possible. Her social worker sees no particular reason why she cannot resume school, provided she is adequately supervised, but this requires the corporate agreement of the school and local authority. Her social worker also did not understand why EBY

was not being supported to attend football training and matches, as supervision for this had already been agreed by the local authority with the placement. In her view it may also be possible to reduce the current level of supervision of 2:1 in the placement and 3:1 in the community. She will take all of these issues up and discussions are to take place over the next week or so. I have directed that an updated care plan be prepared and filed by the close of play on 13 October 2023 which will be the primary focus of the proposed hearing on 27 October 2023. In my judgment, suitable care planning is of crucial importance when assessing the necessity and proportionality of the proposed DOLO. The longer it takes for suitable arrangements for EBY's education, health and welfare to be put in place the more that factor will weigh against the continuation of a DOLO.

55. Last, but by no means least, significant weight must be given to EBY's wishes and feelings, particularly given her age and maturity. She will turn 18 in less than a year, at which time she will be free to make any decision about where she lives and with whom she associates, although I remind myself that significant coercion or duress may justify the involvement of the High Court even in the case of a competent adult: *In re L (Vulnerable Adults with Capacity - Court's Jurisdiction) (No 2)* [2013] Fam. 1. Until the extent of the gang's influence on EBY can be better understood I cannot discount the possibility that her *Gillick* competence has been undermined by her experiences, but I make no finding in that regard. It may also be that while EBY expresses her understanding of the risk and her insight into the fact she was groomed, she is only saying what she understands the relevant professionals want to hear.

Whether the relevant tests are met

56. In the light of those findings I am satisfied that each of the overlapping tests set out at paragraph 5., above, are met.

57. First, this is a case where leave should be granted under s 100(3). The result the authority wishes to achieve cannot be achieved by the making of any order that it might otherwise apply for, in particular EBY does not meet the criteria for s 25 accommodation. There is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to EBY she is likely to suffer significant harm: s 100(4) and (5).

58. Second, a DOLO is in EBY's best interests, in particular that she be protected from serious life-threatening harm, and having regard to the other welfare considerations which I have addressed in my findings. I am acutely aware that further police intelligence is or may be forthcoming which will enable a better understanding of the risk to be formed. While significant weight is to be given to EBY's refusal to consent to the DOLO, the extent to which her competence is compromised by the coercive influence of the gang is still unknown. While the fact she is prepared to submit voluntarily to some restrictions is welcome, in my judgment the risk that she resumes her contact with the gang and then withdraws her consent – which may involve subterfuge and so not be immediately apparent - is such that the restrictions should remain compulsory, at least until the Court has heard further evidence at the hearing of 27 October 2023.

59. Third, a DOLO complies with Article 5 in that it is 'for the purpose of educational supervision' (Article 5(1)(d)), given the broad definition of that term. There is a strong educational aspect to the current arrangements in that EBY is receiving counselling from the CIRV and her social worker to understand the risk she faces and steps have been taken to enable her to access her schoolwork. The deprivation of liberty is a necessary and proportionate means of meeting those needs and is attended by adequate safeguards, notably the requirement of approval by this Court with regular review. While I am concerned that the current care plan is inadequate, which undermines the proportionality of the restrictions, I accept the Local Authority's evidence that these shortcomings are to be addressed in the proposed care plan. This factor does not yet outweigh the benefits of the current restrictions that are authorised by the DOLO but will be a matter for review at the hearing on 27 October 2023.

60. Fourth, although the proposed placement is in an unregistered children's home, which may constitute a criminal offence under s 11 Care Standards Act 2000, there is an 'imperative necessity' for such a placement given the risks to EBY. I heard evidence that the President's Guidance is being complied with, in particular Ofsted has been notified of the placement and an application for registration has been made, although the Court will wish to see better evidence of that at the hearing on 27 October.

61. Fifth, I am satisfied that EBY is currently at a real and immediate risk of death or life-threatening injury and of treatment crossing the Article 3 threshold of which the Local Authority and the Court are aware triggering a positive operational duty to take steps to protect her under both Articles 2 and 3. The only adequate and effective means of discharging that duty is by means of a DOLO which, for reasons I have given, is lawful as a matter of domestic law and complies with Article 5: see *Re T*, [174-177]. I would add that the fact EBY is a *Gillick* competent 17-year-old who is objecting to the making of a DOLO does not affect that conclusion. I acknowledge that a positive operational duty *may* not arise where the risk of death or injury is one to which a competent adult has chosen to expose herself, if state intervention in that choice would otherwise violate her right to autonomy under Article 8: see *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 E.H.R.R. 39; *Haas v Switzerland* (2011) 53 EHRR 1169, [51]. EBY, however, is still a child. Her competent objection to the making of a DOLO is a relevant, but not determinative, factor for the Court when considering whether a positive operational duty arises under Articles 2 or 3. In my judgment, that factor is currently outweighed by imperative considerations of necessity to protect her from serious harm.

62. I therefore make the order in the attached approved form, although publication of that order is not permitted in its unanonymised form.

63. That is my judgment.