



Neutral Citation Number: [2023] EWHC 2179 (Fam)

Case No: FD23C40188

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/08/2023

Before :

MR DAVID LOCK KC
SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

A London Borough

Applicant

- and -

LC (1)

Respondents

JC (2)

CC (By her Guardian Lorraine Walker)

Manjit Dogra (instructed by **the London Borough**) for the **Applicant**
Ms Olivia Bliss (instructed by Thomas Dutton Solicitors) for the **First Respondent**
No appearance by the Second Respondent who has not been served
Ms Catriona Allen (instructed Goodman Ray) for the **Third Respondent**

Hearing dates: 24 August 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....
MR DAVID LOCK KC

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.

Mr David Lock KC :

1. A London Borough (“the Local Authority”) applies under the inherent jurisdiction of the High Court for authorisation of arrangements made by the Local Authority which have resulted in CC being deprived of her liberty whilst she is residing at an Ofsted registered children’s home located in a rural area some distance out of London (“the Placement”). This application is actively opposed by both CC’s Mother and her Guardian. Both submit that there is no justification for depriving CC of her liberty whilst she is placed in the Placement and that the only reason that the Local Authority is seeking this order is the concern that, absent an order, the Placement may give notice to terminate the Placement. The position of the Guardian is that, as a matter of principle, absent good evidence based on the risks to a young person, a threat by a private provider to terminate a placement should be insufficient to justify the court making a deprivation of liberty order.
2. In view of the dispute between the Local Authority and the Guardian, I have made directions to bring this matter on for a speedy trial. There is, however, a difficult issue as to whether I should make any interim declarations concerning the lawfulness of the restrictions that the Local Authority wishes to have applied to CC in advance of that trial. It was accepted by all parties that I have to approach that matter on a conventional American Cyanamid basis, namely to ask first whether the Local Authority has an arguable case to support its claim that the Court, after examining all the evidence, will conclude that a DOLS order should be made and, if I accept that the Local Authority has established an arguable case, I should look to the balance of convenience. However, as the argument progressed, it became clear that the outcome of this interim relief application may well be determinative because I was told that if the Local Authority fail to secure a DOLS order, they are fearful that Cambian Group PLC (“Cambian”) which operates the Placement will be minded to serve notice to terminate the Placement. That consideration may affect the balance of convenience but it also means that I should have a more acute focus on which party is likely to be successful at the final hearing as this judgment might prove to be determinative. I also consider that, if there is an issue of law to consider which will not be affected by the facts found at trial, if I reach a clear view on the resolution of that issue of law, it would save all parties time and money if that issue of law was considered now as opposed to being delayed to the trial.

What restrictions are the Local Authority seeking?

3. Although, on a day-to-day basis, Cambian have responsibility for the management of the Placement, they operate their regime under instructions from the Local Authority. Thus, any restrictions on CC’s liberty as a result of restrictions imposed by Cambian is attributable to the Local Authority. The Local Authority thus seeks approval from the court for the following specific restrictions to be applied to CC (although in practice they are all imposed by Cambian):
 - i) CC should be supervised by staff from the Placement at all times, with staff following her and keeping her in their line of sight should CC decide to leave the Placement without permission, or without staff. In the event CC were to leave without supervision or permission, efforts would be made to encourage her to return to the Placement and to support her on a one-to-one basis. In the event this is unsuccessful, police and the local authority would be notified;

- ii) When leaving the Placement for planned activities, CC will always be accompanied by a member of staff;
 - iii) The doors to the Placement are to remain locked to CC at all times. CCTV is used in connection with the accommodation and contributes towards the ongoing supervision of those who are living at the Placement;
 - iv) CC is not to have access to the internet on any devices; and
 - v) Trained staff at the Placement are entitled, as a last resort, to use reasonable force to prevent CC self-harming or harming others.
4. The Local Authority acknowledged that it has not been necessary for any physical restraint to be used with CC during her Placement to date but it became clear during submissions that the Placement staff are not only seeking the right to use reasonable force to prevent CC absconding but also, if she does so, to ask the police to use reasonable force to bring her back to the Placement.
5. This case is unusual because the restrictions that the Local Authority are seeking with respect to CC do not, in practice, apply (a) for the whole of CC's week or (b) to all of the other residents at the Placement or (c) are actually enforced by the Placement staff at the moment. Those conclusions follow because:
 - i) The Local Authority, as CC's corporate parent, has set up a regime where CC is allowed to leave the Placement to spend weekends in London, with CC being permitted to spend between one and two weekends a month in London. Although her foster care Placement broke down (as explained below), she has returned to London for regular weekends to live with her former foster parents and has spent at least one weekend with her aunt. During these periods in London, the Local Authority has not made any arrangements for CC to be supervised by any member of the Placement staff or other care staff engaged by the Local Authority. Her Guardian tells me that, subject to any restrictions imposed by whoever she is staying with, she is generally free to socialise with her family and friends and no specific restraints are put on her activities. She thus has largely the same freedoms as any other 15 year old when in London. There is no evidence that she has come to any harm whilst on these weekend visits;
 - ii) The Local Authority also explained that some residents at the Placement are provided with key fobs so they can enter and leave the house as they choose. However, the management at the Placement have taken the decision that CC should not currently have access to a key fob. Hence, CC is required to live in a locked building, and can only leave with the consent of the Placement staff, in contrast to other residents of the home who have a greater measure of freedom; and
 - iii) Whilst CC is prevented from having access to the Placement internet, she has had her "smart phone" returned to her after a period when it was confiscated. The contract for this smartphone includes data and is paid by a relative. Thus, CC has the ability to access the internet on her phone, to use social media, including sending and receiving messages with photos, as well as using the

phone for voice calls. No explanation was given as to why the removal of her ability to use the internet was a restriction that was necessary to protect her from one or more risks but the decision was taken by Cambian staff for her smartphone to be returned to her. It is equally unclear why she is allowed internet access on her smartphone but is prevented from using the house Wi-Fi.

6. It seems to me that these features, which only emerged during the hearing, make this a somewhat unusual case.

The factual background

7. CC was born on 20 August 2008 and is now aged 15. She formerly lived with her mother and she has three siblings, namely an older sister who is aged 17 and a younger sister aged 7 and a younger brother aged 6. CC's father is not involved in CC's life and despite the best efforts of the Local Authority it has not been possible to locate him.
8. The three younger children are the subject of ongoing care proceedings brought by this local authority. Those proceedings are listed for a final hearing on between 19 and 26 September 2023. All three children are the subject of interim care orders made in favour of the London Borough on 8 August 2022.
9. CC's older sister was also the subject of proceedings, but a special guardianship order has been made in respect of her. All 3 children (other than CC) have been placed with family members. The background to the care proceedings is that the Local Authority are said to have longstanding concerns relating to the Mother's substance misuse, unstable mental health, criminal behaviour and the Mother associating with risky individuals. I make it clear that I do not have the care proceedings before me and do not know anything about the substance of the Local Authority's case or whether it will be proven at trial. Nothing I say in this judgment should have any bearing on the outcome of the child protection proceedings.
10. The Local Authority's involvement with CC and her siblings escalated on 8 October 2021 when they were made subjects of Child Protection plans based on allegations of neglect. Unfortunately, the Local Authority's position is that limited or no progress was made in addressing these concerns and public law proceedings were commenced.
11. On 1 August 2022, the mother was admitted to hospital due to concerns that her mental health had deteriorated and she reported feeling suicidal with plans to end her life. Drug testing is said to have confirmed cocaine and cannabis use and arrangements were made for the children to be cared for by various family members. On 4 August 2022, the mother indicated that she was planning to self-discharge and that she would be seeking to resume caring for the children. That led the Local Authority to commence care proceedings and the children were made subject of interim care orders on 8 August 2022.
12. CC was initially placed with her maternal grandmother and her husband. This Placement continued following the making of interim care orders. Although the grandparents were not able to provide long-term care for CC, at that stage they expressed commitment to caring for CC during the course of the care proceedings. In March 2023, CC expressed concerns about living with her grandparents and said she did not feel safe returning to their care. An emergency foster Placement was identified

and CC remained there for six days whilst an alternative Placement was identified. On 13 March 2023, following an introductory period, CC moved to a new foster Placement. This Placement came to an end following an incident which happened in the street between CC and some of CC's school peers. That appears to have resulted in one of CC's school peers kicking a car door that then closed on the foster parent's leg. CC later received a threatening message which the foster parent felt was also directed at her.

13. On 21 April 2023, CC moved to a further foster Placement. This carer shared her concerns with Local Authority staff about the high level of care and support she felt that CC needed and ultimately gave notice to end the Placement on 17 May 2023, citing the high level of care and supervision that she felt that CC needed in daily tasks. The foster placement came to an end on 2 June 2023 when CC moved to another emergency foster carer pending identification of something more suitable.
14. Following considerable reflection and internal discussion, the Local Authority decided that a residential placement would be more appropriate for CC and looked for a placement that would provide a package of support to promote positive mental health, education, and a more therapeutic and nurturing approach. It was hoped that such a package would help CC understand her vulnerabilities and promote existing family relationships.
15. The Local Authority decided that the Placement would be appropriate for CC and she moved to the Placement on 14 June 2023. The Placement is located in a rural area, which is a very different environment for CC since she has spent all of her life to date in an urban environment. The Placement is operated by Cambian Group PLC and is registered with Ofsted. I have not been provided with any Ofsted reports but assume that there are no substantial regulatory issues concerning this Placement.
16. The Placement has capacity for 14 girls and provides education for its residents on site. The local Authority's final care plan in the care proceedings is for CC to remain at the Placement where the Local Authority hopes CC will experience stability, consistency of care, therapeutic support and the opportunity to complete her GCSE's in the summer of 2024. Unfortunately, the evidence makes it very clear that CC is hugely resistant to staying at the Placement and has repeatedly said that she does not want to remain there. She has expressed her continuing opposition to staying at the Placement in a variety of ways and, I have no doubt, feels that she is effectively imprisoned there against her will.
17. The social worker summed up her concerns about CC as follows:

“CC is a vulnerable young person who has experienced periods where the care she has received has not been good enough throughout her childhood. She has experienced parental substance misuse, unstable parental mental health and a lack of routine and boundaries. CC was cared for by several different members of her extended family, when her mother has been unable to meet her needs or has been serving a prison sentence. Sadly, CC's extended family do not wish to care for her for the remainder of her minority. Her three siblings are all being cared for by family members with CC being the only sibling cared for by the Local Authority, this will no doubt further impact on her emotional wellbeing, sense of belonging and feelings of rejection. CC is vulnerable to exploitation; she struggles to identify risk in relationships and finds it difficult to maintain friendships. CC need support to develop age-appropriate self-care

skills and her current ability is indicative of her early life experiences. To summarise, CC very much needs to continue to settle at the Placement so that she is able to receive the support and stability she needs to address her experiences.”

18. I observe that, whilst this evidence is helpful, it only set out the Local Authority’s concerns at a high level of generality. Concerns of this nature could be echoed in a very large number of other cases where teenage girls end up in care and thus it does not explain a great deal about the particular risks in CC’s case. However, in the vast majority of other cases, the relevant local authority does not make an application for a DOLS order. I was thus concerned to identify what, on the Local Authority’s case, made CC’s case different to other cases and what features were relied upon by the Local Authority to make CC’s case distinctive and thus justify the application for the DOLS order. The Local Authority responded by saying that it was not any one feature of her case itself, but the combination of features put together which showed that CC was at such significant risks that the Local Authority felt that it could justify this application for a DOLS order. To a large extent the Local Authority relied upon and adopted the risk assessment produced by the Placement staff and the history of events in the short time CC has been at the Placement, and submitted that these together justified the court making the DOLS order.

The Placement’s Risk Assessment

19. Once CC had arrived at the Placement the staff conducted a risk assessment. The risks were divided into Major, High, Medium and Low. No “major” risks were identified. The lack of any identified major risk, of itself, appears to me to be of some significance.
20. A single “High” risk was identified, namely “CSE” which stands for “Child Sexual Exploitation”. The introduction to the risk assessment referred to CC having reported that she was sexually assaulted in 2022 and there is a reference to CC having been assaulted by “another young person” in the Local Authority’s Position Statement. However, there was very limited reference to the detail of this incident in the evidence in the case. I thus cannot assess the extent to which this incident has any continuing significance.
21. The main evidence relied upon by the Local Authority to show that CC is at risk of being subjected to CSE is that CC has exchanged nude photographs of herself over social media with someone she claims to be her boyfriend, and also that he sent a photo of his penis in response. CC is not prepared to identify this young person. CC is entitled under article 8 ECHR to a private life and is thus entitled to keep that information private, albeit it can make the risk assessment process more difficult for Cambian and the Local Authority. It is, however, legitimate to ask whether, absent any further indicators, these exchanges of pictures provide any proper evidential basis for saying that CC is at a “high” risk of CSE.
22. It may be important to define what is properly meant by CSE. In 2017 the Department of Education published a Guide to Child Sexual Exploitation. It defined CSE as follows:
- “It occurs where an individual or group takes advantage of an imbalance of power to coerce, manipulate or deceive a child or young person under the age of 18 into sexual activity (a) in exchange for something the victim needs or wants, and/or (b) for the*

financial advantage or increased status of the perpetrator or facilitator. The victim may have been sexually exploited even if the sexual activity appears consensual. Child sexual exploitation does not always involve physical contact; it can also occur through the use of technology”.

23. There is no evidence to suggest that CC was coerced, manipulated or deceived into sending pictures or receiving them. As explained below, on one occasion she did not solicit the picture and blocked the sender, which does not appear consistent with the type of relationship that CSE seeks to identify. The Statutory Guidance provided the following helpful indicators for those with responsibilities for young people to help them to identify when CSE is likely to be occurring. These indicators were described as follows:

- “• *Acquisition of money, clothes, mobile phones etc without plausible explanation;*
- *Gang-association and/or isolation from peers/social networks;*
- *Exclusion or unexplained absences from school, college or work;*
- *Leaving home/care without explanation and persistently going missing or returning late;*
- *Excessive receipt of texts/phone calls;*
- *Returning home under the influence of drugs/alcohol;*
- *Inappropriate sexualised behaviour for age/sexually transmitted infections;*
- *Evidence of/suspicious of physical or sexual assault;*
- *Relationships with controlling or significantly older individuals or groups;*
- *Multiple callers (unknown adults or peers);*
- *Frequenting areas known for sex work;*
- *Concerning use of internet or other social media;*
- *Increasing secretiveness around behaviours; and*
- *Self-harm or significant changes in emotional well-being”*

24. It appears clear from the above definition and the list of indicators that the concept of CSE is a very long way away from a young person consensually exploring their own sexual identity with other young people. All parties here agreed that young people, regardless as to their level of vulnerability, have some need to explore their sexual identity. It seems to me that, in doing so, it is almost inevitable that many young people will make decisions that they may later regret, do things that others might consider foolish or risky or otherwise engage in conduct which mature adults may look upon with either distaste or disapproval. Whilst I fully acknowledge that CSE is an extremely serious risk for vulnerable young people, there is a danger that the concept is misunderstood to the extent that any consensual exploration by a young person of their

sexual identity can be sought to be closed down on the basis that it might expose the young person to the risk of CSE. I recognise that those supporting young people in care have to tread a fine line between allowing young people the same freedoms as all other young people and taking action to prevent CSE. Treading this fine line can be problematic, particularly where a young person has vulnerabilities, but it does not appear to me to be legitimate to treat every piece of evidence that a young person may be sexually inquisitive or even sexually active as being evidence of CSE. That is not what the above Guidance provides and is why the above list of evidence indicators is so useful in helping adults with caring responsibilities being able to identify when a child may be (and by implication may not be) at any serious level of risk from CSE.

25. The primary incident relied upon by the Local Authority relates to an incident where CC shared images of herself with an unidentified “boyfriend” and received an unexpected picture in return. The notes made about that incident are as follows:

“[The support worker] was with CC in her room and sat on her bed and CC was showing me her art book with all her beautiful art work in, as CC was showing me this her phone went off beside us both and it was snapchat, CC opened this snapchat and it was a picture of a Penis, and CC said “what the hell” and showed me, CC quickly come off the picture and it disappeared, this is when I said “why have you got that on your phone and who is that, CC then said “this boyfriend requested me and I accepted it” I said that she shouldn’t accepted random people back and that she needs to delete this person now. In which she did as I witnessed.

Phone check completed.

Snapchat deleted

Check in with CC”

26. Assuming that is an accurate note, this appears to have been an isolated incidence where CC shared what she received on her phone with staff and reacted appropriately to advice. Bearing in mind the indicators set out above, I find it difficult to conclude that this incident amounts to any real evidence of CC being at high risk of CSE. Sending or receiving such pictures to someone CC perceives to be her boyfriend may well be distasteful and even unwise, but it is not necessarily, without more, evidence of CSE.
27. The second incident relied upon by the local authority is when CC returned from a weekend visit and is said to have had a “hickey” which I understand to refer to a “love bite” on her neck. CC disputed that this was a love bite and said that it was a burn from hair straighteners. I have seen no photos of this “injury” and so it is hard to assess but, even assuming that it was a love bite, that appears to me to be a very long way away from the type of evidence that would normally indicate that a child was a victim of CSE.
28. I accept, of course, that any vulnerable 15 year old girl who wants to explore her own sexuality is potentially at risk of CSE. That may be a particular concern for those supervising children in care. However, in my judgment there is insufficient evidence in this case that CC is at any greater risk from CSE than 15 year old girls generally and certainly no more than the vast majority of other children in care.

29. I seriously question whether staff at the Placement and at the Local Authority can have properly come to the conclusion that CC's vulnerabilities mean that she was at any serious level of risk of CSE, because it seems to me that the time that she would be exposed to by far the highest level of risk would be when she returned to her family or foster carers for unsupervised weekends in London. I pressed counsel for the Local Authority to explain how the Local Authority could simultaneously suggest that the risk of CC being exposed to CSE during the week in a rural area was so great that it justified depriving her of her of her liberty during Monday to Friday but also concluded that the risk she was exposed to CSE was so low that the Local Authority, in its role as a corporate parent, allowed CC to have unsupervised staying access with members of her family over the weekend. The same issue arises in respect of other risks and so I will look at those risks first and then consider the Local Authority's answer.
30. The second area of justification for the restrictions imposed on CC is based on a concern that CC has expressed a desire to leave the Placement. She does not want to be there, has absconded twice and has attempted make arrangements to leave on another occasion. However, as the Guardian has pointed out, CC has not strayed very far from the Placement and on one occasion called the police to transport her back. Whatever she has said to care staff, CC has not absconded from the Placement for any extended period of time or travelled back to London once she is outside the walls of the building. Further, on the occasions on which she has absconded, she has stayed in the local area and not engaged in activities which have caused her harm.
31. I accept that it is challenging for a Placement operator to manage a child who plainly and consistently wants to leave the Placement. That situation is by far from unusual and the challenge is for care staff to persuade the young person that staying at the Placement will be of benefit to her. To date, staff at the Placement have failed to convince CC that it is in her interest to stay at the Placement and she remains consistent in her view that she does not wish to be there. Whilst that produces a challenge for Cambian staff, I cannot see that there is evidence that the risks to which CC has been exposed to date when she has briefly absconded come anywhere near justifying locking her into the Placement.
32. As there are other children in the Placement who have a fob and thus can leave the premises if they wish to do so, the approach of Cambian staff appears to be that the Placement operates on the basis that children have to earn the right not to be locked into the Placement. That, so it seems to me, puts the matter entirely the wrong way around because it starts with the position that the Placement is entitled to deprive a child of her liberty and that deprivation of liberty is only relaxed where the child has proved that she can be trusted not to abscond. I am concerned that such an approach means that a Placement operates in a similar way to the prison estate, where the default position is imprisonment and only those with earned privileges are entitled to be housed in conditions where they are not prevented from leaving the estate. For the reasons set out below, absent a lawful detention process, depriving a child of his or her liberty cannot be a default position and the right to liberty cannot become an earned privilege.
33. The next matter relied upon by the Local Authority is the fact that CC has been involved in confrontations in the past and may have upset people enough to threaten her with violence. The relevant log entry is as follows:

“I ... was in the Care team office and CC knocked on the door. I answered and CC said that she had a few calls from someone that they used to know, being quite threatening. She was on the phone to this person as we were speaking and I asked her to hang up the call. She said that they said they were going to come and find her in a silver Mercedes and stab her in the face. I reassured CC telling her that we would never let anyone come into the house and in this situation would call the police. I asked CC if they know where she is. She said no, they don't. The only person that knows where she is, is her best friend and that's it. I asked CC to block the number. She said she already has but they call using hidden caller ID.

She said that she can change the setting on her phone to block this too. I advised that she did that and let me know if she receives any more calls or messages. I also let her know that I will be escalating this to Lexi as a concern. CC was happy with this. Before she left CC showed me a few of the messages which read what she had told me. That they were going to come and find her in a silver Mercedes.

CC later returned to the care team office and informed me that she has now changed all of her social media. She was wondering whether she would be able to change her mobile number. She explained that her Grandad pays for her O2 contract which she wanted to keep. I explained that this may be a possibility if she called up O2 customer services but I wasn't entirely sure. I explained that this would have to be done by the person that is named on her contract however. She explained that she hasn't spoken to her Grandad for five months and didn't want to cause him hassle.

CC managed herself during this incident and showed great maturity. She returned to her room where she settled for the night with no concerns”

34. There is no clear evidence if a “silver Mercedes” ever turned up at the Placement or, if it did, who saw it and whether it was the same car as referred to in the above exchange. It is thus hard to know how this evidence can be used to justify a deprivation of liberty. However, the final sentence seems to me to be the most relevant, namely that whatever happened, Cambian staff concluded that CC had dealt with the matter in way that “showed great maturity”.
35. I therefore cannot see that this incident can be used to show that CC was inclined to put herself in a position of great risk. On the contrary, she appears to have reacted to an unpleasant situation by disclosing this to care staff and responding with maturity. However, if she was at any level of risk of violence due to people who she associated with prior to coming to the Placement, it must follow that the level of risk to which she is exposed would be far higher when she returned to her family and friends in London for the weekend as opposed to when she was in an isolated Placement in a rural area. If there was any substance to this point, the increased level of risk to which CC must be exposed when she returns to her home area at the weekend makes the decision of the Local Authority to allow her unsupervised overnight visits to relatives in London even harder to understand.
36. The next matter relied upon by the local authority is self-harm. There is some evidence that CC has been contemplating self-harm but the evidence to date does not disclose any serious level of self-harm. Further, the self-harm appears to have happened in the premises and not outside it and thus cannot logically be used as a justification for depriving CC of her liberty.

37. When pressed, the answer provided by the Local Authority to the inconsistency between their approaches to risk management for CC at the Placement during the week and during her unsupervised stays with her relatives at the weekend was illuminating. It was, in summary, that the Local Authority considered that it was important for CC to maintain contact with her family and that allowing her to have weekends with her foster parents and aunt was the best way to facilitate this, notwithstanding the increased risks. Whilst I fully accept that maintaining family contact is important, that does not provide any real answer to the inconsistency of approach. In my judgment, the Local Authority offered no real answer to the question as to why, if CC was at a real risk of CSE or at risk of violence from others or self-harm, there was no need to put any arrangements in place to protect CC from these risks over the weekends when the risks were far higher. I do not accept that any logical or proportionate risk analysis could properly conclude that the risks to CC from, in particular, CSE or violence from others meant that she needed to be deprived of her liberty during the week at the Placement but it was acceptable for her to be largely free to do as she wanted in London over the weekend.
38. One of the purposes of the court forensic process is to strip away illogical justifications and to lay bare the real reasons that decisions are taken. In this case, it seems to me that, after a little pressing, the real answer emerged as to why the Local Authority was so insistent on making, or at least continuing with, this application. The reason that the original application was made was because the Local Authority was concerned that CC was being deprived of her liberty as a result of arrangements made by the Local Authority from, at least, Monday to Friday when she was in the Placement. It was thus right for the Local Authority to make an application for that DOL to be authorised because confining CC in the Placement from Monday to Friday satisfied the “*objective element of a person's confinement to a certain limited place for a not negligible length of time*”: see *Storck v Germany* [2005] ECHR 406 at paragraph 127.
39. However, when the arrangements were made with Cambian which resulted in CC being deprived of her liberty, it may well be that no one at the Local Authority asked themselves whether it was justifiable to agree to arrangements which resulted in CC being deprived of her liberty during the week when the Local Authority had agreed that she should be largely free to do what she wanted when she returned to London at the weekends.
40. Once that difficulty emerged, it seemed to me that the Local Authority’s reasoning in seeking this order was as follows. First, the Local Authority had decided that the Placement was the most appropriate Placement for CC. Secondly, by the date of the hearing, Cambian appear to have said to the Local Authority they were only prepared to continue to accommodate CC if they could impose a regime of restrictions on her which locked her in the premises and enabled them to return her compulsorily to the Placement if she absconded. In other words, Cambian appear to have insisted that they needed a degree of control over CC which deprived her of her liberty as a condition of continuing the Placement.
41. That regime was commenced when CC arrived at the Placement on 14 June 2023, but this application was not made until 15 August 2023. That delay is unexplained but it appears clear that someone in the Local Authority must have realised that CC was being deprived of her liberty by the restrictions being imposed on her and that both Cambian and the Local Authority could only continue lawfully with this regime if the Local Authority obtained a DOLS order. Counsel for the Local Authority made it clear to me

that the Local Authority's expectation was that Cambian would only continue the Placement for CC at the Placement if a DOLS order was made. That ultimatum, which was not part of the evidence and only appeared as part of the Local Authority's submissions after the primary justifications fell away, appears to have only been made after the Local Authority made this application.

42. Given the unjustifiable inconsistencies between the approach taken by the Local Authority to the management of risks for CC at the weekend and during the week, I cannot accept that the Local Authority established an arguable case that the risks to CC's welfare justify a deprivation of liberty for her at the Placement. The evidence does not support that case for the reasons set out above.
43. Further, if that was the case, it is inconceivable that any responsible local authority would allow CC unsupervised staying access with relatives in London over the weekend. I thus cannot accept the submissions advanced by the Local Authority that the risks to CC's welfare objectively justify subjecting CC to a deprivation of liberty during the time when she is at the Placement. However, having accepted the Guardian's submissions on this point and rejecting the primary case advanced by the Local Authority, I still have to deal with the back-up case advanced by the Local Authority, which emerged in submissions, namely that the Local Authority was having to face an acute dilemma because it genuinely believed that the Placement was the most appropriate Placement for CC and, absent a DOLS order, that Placement would be lost.
44. It follows, in my judgment, the real issue in this case is whether it is justifiable for the court to make a deprivation of liberty order in a case where the risks to the child from not having restrictions in place have not been objectively justified but where the only real justification for the order is that the Placement is believed by the corporate parent to be in the best interests of the child and the Placement operator will not continue the Placement unless a DOLS order is in place.

The Law

45. Both the Local Authority and the Court are public authorities for the purpose of the Human Rights Act 1998 ("the HRA"). It follows that, as set out in section 6(1) HRA, it is unlawful for either the court or the Local Authority "to act in a way which is incompatible with a Convention right".
46. Article 5 ECHR is the relevant Convention Right in issue in this case. The material parts of article 5 provide:

"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...."
47. Children have the same right not to be deprived of their liberty as adults by state bodies. In this case parental responsibility is held jointly by the Local Authority as a result of the Interim Care Orders and by her mother. The Local Authority supports the

deprivation of CC's liberty under these arrangements and CC's mother opposes it. CC's Guardian also opposes the arrangements being enforced on CC.

48. CC is now aged 15 and no party has argued that she does not have the capacity to consent to the arrangements made by the Placement. If she had consented, there would be no deprivation of her liberty (see paragraph 74 of Storck). In Lincolnshire County Council v TGA & Ors [2022] EWHC 2323 (Fam) Lieven J decided that, where a child did not have capacity to make the decision for himself, it was within the “*zone of parental responsibility*” to be able to approve arrangements which deprived a child of his liberty. However, that principle would not apply here because CC can make her own decisions. There is a difficult issue as to the extent to which parents retain the power to make decisions on behalf of children who have capacity. That issue was explored by Lieven J in AB v CD & Ors [2021] EWHC 741 (Fam). In relation to medical treatment, Lieven J said “*The very essence of Gillick is, in my view, that a parent's right to consent or "determine" treatment cannot trump or overbear the decision of the child*”. In the *Lincolnshire* case Lieven J said that the same approach to parental responsibilities should be taken in relation to deprivation of liberty as in relation to medical treatment. I agree with both judgments. Thus, it seems to me, the Local Authority were right to bring this case on the basis that the court's approval was needed because, faced with objections from a 15 year old with capacity to make her own decisions, the Local Authority could not rely on having parental responsibility to justify depriving CC of her liberty. I thus accept that there is no proper consent in place and that, as the arrangements persist for the period from Monday to Friday, CC is being deprived of her liberty.
49. There is no serious dispute that CC is being detained at the Placement for the purposes of “*educational supervision*”, as that term is widely interpreted in the jurisprudence of the ECtHR. However, in order to be justifiable under article 5, the deprivation of liberty has to be proportionate and the order must be made by the court in the exercise of the proper principles of law.
50. The order sought by the Local Authority effectively turns the Placement into secure accommodation for CC. However, where children need secure accommodation, section 25 of the Children Act 1989 (“CA”) established a framework of checks, balances and oversight to balance the rights of such children and the need to protect them and others. Absent a DOL order, children's homes are entitled to impose restrictions on children's liberty but absent lawful consent, those restrictions cannot be so extensive that children are deprived of their liberty.
51. The Supreme Court has recently considered DOLS orders outside of section 25 Placements in Re T [2021] UKSC 35 [2022] AC 723 (“*Re T*”). *Re T* concerned the Placement of a child in an unregistered children's home but the case looked at the way the Court was entitled to use DOLS orders outside section 25 CA Placements more widely, including in Ofsted registered children's homes. As I understand matters, it is common ground that the Placement is not section 25 accommodation for at least two reasons. First, it is not secure accommodation approved by the Secretary of State as required by Regulation 3 of the Children (Secure Accommodation) Regulations 1991 (SI 1991/1505). Secondly, it is not accommodation which is “*designed for, or having as its primary purpose*” the restriction of liberty”: see In re C (Detention: Medical Treatment) [1997] 2 FLR 180, 193 and Lady Black in *Re T* at paragraph 133 because some children accommodated at the home are provided with a fob and thus, for them,

they can come and go. It follows that the Placement cannot be a section 25 secure Placement.

52. The core problem in *Re T* was identified by Lord Lloyd-Jones who asked what a judge should do where a child meets the section 25 criteria but there is no approved secure accommodation available. Lady Black said at paragraph 14 that “*Given the serious shortage of approved Placements, this is clearly a question of the greatest importance*”. Lady Black concludes at paragraph 141:

“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. I am mindful that the order that the Local Authority seeks would authorise CC being kept in conditions which mirror those of children who are kept in section 25 CA secure accommodation but without the statutory protective framework which exists for children kept in secure accommodation. In this case there is no evidence that the Local Authority ever considered placing CC in secure (i.e. section 25 CA compliant) accommodation. Indeed, the Local Authority advanced no submissions that CC would meet the criteria for secure accommodation under section 25 CA. That seems to me to have been the right approach because it is hard to see how that test under section 25 could be met for a child who has regular unsupervised weekend leave. I thus approach this case on the basis that CC’s circumstances do not meet the tests under section 25.

54. In *Re T* Lord Stephens emphasised at paragraph 170 that the use of the inherent jurisdiction was justified 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*” and said that there must be “*imperative considerations of necessity*” before the power was used. If that is the test that I am required to apply in this case then it cannot be satisfied. There is no “necessity” of imposing these restrictions on CC during the week when they are not imposed at the weekend.

55. In contrast to *Re T*, CC is accommodated in an Ofsted regulated placement, albeit not in secure accommodation. It is unclear to what extent Lord Stephen’s observations should be limited to a case where the child is being placed in an unregulated Placement. I accept that it is arguable that the “*imperative considerations of necessity*” test may not apply with its full vigour where the child is being placed in Ofsted registered accommodation, albeit not section 25 CA accommodation. It is therefore necessary to look carefully at the judgments to discern how the court should approach an application for a DOL order under the inherent jurisdiction where the child is being placed in Ofsted registered accommodation which is not section 25 CA approved accommodation.

56. The Supreme Court in *Re T* accepted that the proper starting point was that it is a misuse of the inherent jurisdiction to use it for a purpose which cuts across an existing statutory scheme. Lady Black explained that this the proper starting point where she said at paragraph 127:

“So, the appellant submits, it is wrong in law to use the inherent jurisdiction to authorise the Placements because that cuts across this statutory scheme, and the inherent jurisdiction must not be used where that is its effect. If support for this

proposition were needed, she refers the court to Attorney General v De Keyser's Royal Hotel Ltd [1920] AC 508, as well as other authorities, including authorities in the field of children law”.

57. The “statutory scheme” here is that established by section 25 CA which sets out the conditions which must be met before children can lawfully be held in secure accommodation. That limitation means that there may be substantial difficulties in seeking to use the inherent jurisdiction to authorise a child being kept in secure accommodation outside of section 25 accommodation because to do so would arguably “cut across the statutory scheme”. Those difficulties were recognised by Lady Black at paragraph 139 of her judgment where she says:

“There may, however, be Placements (perhaps more likely in the “primary purpose” category than the purpose-designed category) which can properly be said to be “secure accommodation” within the meaning of section 25, but which cannot be used as such because they are children's homes and have not been approved by the Secretary of State in accordance with regulation 3 of the 1991 Regulations (see para 47 above). The argument that the making of an order, under the inherent jurisdiction, authorising Placement in accommodation of this type, would cut unacceptably across the statutory scheme cannot be dismissed easily”.

58. Having recognised the practical difficulties of an acute shortage of section 25 CA accommodation, Lady Black says at paragraph 141 that *“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”.* But that logic would not apply to a case where the Local Authority cannot apply for an order under section 25 CA because the child does not come within the terms of that provision.
59. In this case, on the evidence before me at present, I have to reach the conclusion that the test in paragraph 141 of *Re T* is not met. The Local Authority have never, as far as I am aware, explored the option of section 25 accommodation for CC, even if the Local Authority were to have reached the view that she met the section 25 statutory criteria, which appears to me to be doubtful. Instead, they have identified what they felt was appropriate residential accommodation, namely the Placement, and having decided to place CC there, find themselves having to grapple with the difficulty that Cambian has said it was not prepared to continue the Placement unless the Local Authority sought and obtained a DOLS order allowing the provider to deprive CC of her liberty between Monday and Friday.
60. In those circumstances it seems to me to impermissible to authorise the deprivation of liberty under the inherent jurisdiction for the reason identified by Lady Black in the above passage, namely that to do so would cut unacceptably across the statutory scheme which is intended to operate to govern which categories of children can be placed in secure accommodation. It is one thing for a DOL order to be made for a child who satisfies the section 25 CA criteria but for whom no secure accommodation can be found. It is wholly different to make a DOL order for a child that does not satisfy the criteria and where no section 25 accommodation has ever been looked for. I accept that the only way that the Local Authority can lawfully make arrangements which deprive CC of her liberty is for the Court to make a DOL order exercising the inherent

jurisdiction, but as Lady Black acknowledges, that power should only be used if exercising the power does not cut across the statutory scheme under section 25 CA, and it plainly does here.

61. If a child does not meet the statutory criteria in section 25 CA, it does not seem to me to be appropriate for the court to use the inherent jurisdiction to put in place a legal framework which, for all practical purposes, places the child in secure accommodation because that expands the cohort of children with capacity who can lawfully be placed in secure accommodation beyond those identified by parliament. It is, of course, wholly different if the child lacks capacity for the reasons explained above. In my judgment, the statutory purpose of section 25 CA is to define the tests that should be met before a child can lawfully be placed in secure accommodation. It must cut across that statutory scheme for the court to sanction a deprivation of liberty if those tests are not met.
62. I can fully understand that, from the perspective of a placement provider, it is easier to manage the risks presented by a vulnerable young person if those running the children's home are able to lock the doors of the home and thus prevent the young person absconding and if they are able to impose other restrictions which cumulatively add up to a deprivation of the child's liberty. I can also understand that the children's home would be easier to manage with a system of earned privileges under which a key fob has to be "earned" by a degree of co-operation and commitment to the regime that the home's operator is seeking to establish. However, there are strict statutory tests that have to be fulfilled before a child can be lawfully detained in a secure (i.e. locked) accommodation and a set of oversight measures which exist to ensure that any deprivation of liberty is not extended for longer than is justified. It is not appropriate in my judgment to use the DOL regime to either lessen the conditions which have to be satisfied before a child can be placed in secure locked accommodation or to bypass the review systems.
63. CC does not want to be at the Placement and does not want to be subject to these restrictions. I have already indicated that I do not accept that the restrictions are objectively justified measured against the risks to CC from living without the restrictions, and the fact that she lives without the restrictions at the weekends. I do not accept that, even in the present market where there is an appalling shortage of regulated placements, it can be right for a provider to be able to insist that a child is deprived of their liberty as a condition of accepting or continuing to accommodate the child unless an objective analysis of the facts shows that (a) the child meets the conditions in section 25 CA and (b) the Local Authority has sought section 25 accommodation and it is not available or has good therapeutic reasons for not wishing to use section 25 accommodation for the particular child.
64. In any event, I also consider that the Local Authority have failed to establish a case that continuing to deprive CC of her liberty at the Placement is in her best interests. The problem in this case is that there is no evidence about what other options might be available for CC if she is not deprived of her liberty under the current arrangements. It seems entirely possible that, having read and considered this judgment, Cambrian will accept that it is not objectively justifiable for it to insist on operating a regime at the Placement which deprives CC of her liberty and thus it will continue the Placement without locking CC into the premises. That approach would be entirely consistent with its obligations as an Ofsted regulated provider of children's services. It is also possible that Cambrian will seek to terminate the Placement and the Local Authority will have

to look for an alternative placement for CC which has restrictions on her liberty but does not go so far as to involve depriving her of her liberty. It is unclear what other options may exist but I note that CC does not wish to stay at the Placement and, in coming to any view about her best interests, I have to take her views into account.

65. It follows that, at present, given the absence of evidence about the alternatives and CC's opposition to the Placement and the lack of objective justification for the restrictions on CC's liberty, I cannot reach the view that remaining under these restrictions is in CC's best interests.
66. I have therefore concluded for the reasons set out above that I will accept the submissions of the Guardian and the Mother and will not order any form of interim relief. It is, of course, for the Local Authority and Cambian to decide whether to continue to apply for a DOLS order in accordance with the directions I have made, or whether to discontinue this application.