Case No: LS020/S5077

Neutral Citation Number: [2002] EWHC 2278 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
LEEDS DISTRICT REGISTRY

Leeds Civil Hearing Centre
Coverdale House
13-15 East Parade, Leeds

Date: 5 November 2002

Before :

THE HONOURABLE MR JUSTICE MUNBY

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In the matter of the Inherent Jurisdiction
And in the matter of S (an adult patient)

Between :

Sheffield City Council	**Claimant**
- and -	
(1) S (by his litigation friend the Official Solicitor)	
(2) DS	**Defendants**

- -
- -

Ms Fenella Morris (instructed by the City Solicitor) for the Claimant (the local authority)
Ms Linda Cains (instructed by Zermansky & Partners) for the first defendant (S)
Mr Bernard Wallwork (instructed by Howells) for the second defendant DS (the father)

Hearing dates : 2-3 October 2002

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
The Honourable Mr Justice Munby

This judgment was handed down in private on 5 November 2002. The judge hereby gives leave for it to be reported under the title *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)*.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the patient and the other members of his family must be strictly preserved.

Mr Justice Munby:

1. This is a dispute – a very anxious and in some respects a highly-charged dispute – between a local authority and S's father, DS, as to where S should live. Prior to the events in May 2001 which precipitated the proceedings, S had always lived at home with DS.

2. S was born on 7 July 1983 and is thus, in law, an adult. Sadly he is, in reality, in many respects more like a child. He suffers from a chromosomal abnormality associated with partial growth hormone deficiency. As a result of his chromosomal abnormality he has both severe learning disabilities and some physical disabilities. Although he is generally healthy he appears particularly prone to chest infections, ear infections and upper respiratory tract infections. He has difficulties with mobility and coordination which lead to him having fairly frequent trips and falls with subsequent minor injuries. He can feed himself with a spoon but is doubly incontinent. He is an emotionally warm individual who seeks human contact and communication but has only limited understanding of his own emotional needs. He can recognise familiar people and is generally a sociable individual who shows little in the way of purposeful challenging behaviour. He has no understanding of abstract concepts and struggles to make any decisions that are not based concretely in the 'here and now'. He has some dozen or so Makaton symbols but no spoken words. He demonstrates through his communication the understanding of at most 24 discrete concepts.

3. A formal assessment of his capacity by Dr L (a well known Consultant Psychiatrist who specialises in learning disabilities) has not been challenged by anybody. Dr L's report dated 23 April 2002 shows that S functions at approximately the same developmental level as a two year old. It is plain, and indeed common ground between all parties, that S is not able to manage his property and affairs and that, applying the test laid down by Thorpe J in *In re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290 and approved by the Court of Appeal in *In re MB (Medical Treatment)* [1997] 2 FLR 426, he lacks the capacity to decide for himself where and with whom he should live. He is, accordingly, amenable to the court's inherent declaratory jurisdiction to grant relief governing the residence and day-to-day care of incapable adults.

4. This is, as it happens, a jurisdiction which I recently had occasion to analyse and describe at some length in *A v A Health Authority, In re J (A Child), R (S) v Secretary of State for the Home Department* [2002] EWHC 18 (Fam/Admin) [2002] Fam 213: see in particular at p 226A (paras [39]-[46]). I shall not repeat what I said there. It suffices for present purposes to emphasise only three points.

5. The first is that there is quite plainly here "a serious justiciable issue": see *In re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1 and *In re F (Adult: Court's Jurisdiction)* [2001] Fam 38.

6. The second is that the present case falls entirely within the confines of private law. There is not here, as there was in *A v A Health Authority*, any element of public law. Here, as in *In re F (Adult)*, and in contradistinction to *A v A Health Authority*, all the court is doing is to act as a surrogate decision-maker on behalf of S, deciding on his behalf whether he should live where the local authority is proposing, and in accommodation which it has chosen and is willing to provide, or with his father. The choice which the court has to make on S's behalf is, as in *In re F (Adult)*, between the accommodation "package" being offered by the local authority and the accommodation "package" being offered by S's father. The court is not being asked to require the local authority to do anything it is unwilling to do.

7. It follows from this, thirdly, that the governing consideration is S's welfare. The jurisdiction is exercised solely by reference to the incompetent adult's best interests. This involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, emotional and welfare considerations: *In re A (Male Sterilisation)* [2000] 1 FLR 549 and *In re S (Adult Patient: Sterilisation)* [2001] Fam 15. As Thorpe LJ said in the latter case, at p 30E:

> "In deciding what is best for the disabled patient the judge must have regard to the patient's welfare as the paramount consideration. That embraces issues far wider than the medical. Indeed it would be undesirable and probably impossible to set bounds to what is relevant to a welfare determination."

8. Evaluation of best interests is facilitated by use of the balance sheet suggested by Thorpe LJ in *In re A (Male Sterilisation)* [2000] 1 FLR 549 at p 560E:

> "There can be no doubt in my mind that the evaluation of best interests is akin to a welfare appraisal … Pending the enactment of a checklist or other statutory direction it seems to me that the first instance judge with the responsibility to make an evaluation of the best interests of a claimant lacking capacity should draw up a balance sheet. The first entry should be of any factor or factors of actual benefit … Then on the other sheet the judge should write any counterbalancing dis-benefits to the applicant ... Then the judge should enter on each sheet the potential gains and losses in each instance making some estimate of the extent of the possibility that the gain or loss might accrue. At the end of that exercise the judge should be better placed to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses. Obviously, only if the account is in relatively significant credit will the judge conclude that the application is likely to advance the best interests of the claimant."

9. None of this is controversial. Nor was it the subject of dispute between counsel, Ms Fenella Morris appearing for the local authority, Ms Linda Cains appearing for S and Mr Bernard Wallwork appearing for DS.

10. There are, however, two matters of principle which have arisen and which I must consider. They arise in circumstances where the relief as initially sought by the local authority included declarations that it was:

> "lawful, being in S's best interests, that he reside at accommodation secured for him by the [local authority] [and] that he have only supervised contact with [DS] the frequency, timing and location of such contact to be decided by the [local authority]."

11. Now that is relief which, on one view, and looking at the practicalities of the matter, would have delegated to the local authority the kind of decision-making powers and responsibility for S which, in the case of a child, the local authority would have enjoyed had the court made a care order under section 31 of the Children Act 1989. And that, moreover, where the considered view of Mr F, the very experienced social work expert jointly appointed to report by the local authority and by S's litigation friend, the Official Solicitor, is, as set out in his assessment dated 7 August 2002, that

> "in the main, [DS] has provided a good enough level of physical and emotional care for [S] … for the majority of the time, [DS] is able to look after his son [S] in ways which safeguard and promote his welfare".

12. In short, the State – public authorities – are promoting, in the case of the local authority, and, in the case of the court, are being invited to approve, a plan to remove a young incapacitated adult from the care of a parent who is more than willing to go on caring him for as he has for many, many, years and who, there is reason to suppose, may be making a reasonable job of that undoubtedly burdensome task. This, I should emphasise, is a task which DS has willingly shouldered out of love for his son.

13. In these circumstances two important issues of principles arise:

    i) In what circumstances should the parental responsibility (I use the phrase in the colloquial sense, and not in the technical sense in which it is used in section 3 of the 1989 Act) be superseded by the court exercising its inherent declaratory jurisdiction? In particular, is there, by analogy with sections 31(2) and 100(4)(b) of the 1989 Act, any threshold requirement to establish, before the State can intervene, either the risk of significant harm and/or parenting which falls short of the reasonable?

    ii) Is it permissible for the court to delegate to a third party – in a case such as this the local authority – what amounts to decision-making responsibility in relation to a mentally incapacitated adult?

14. The starting point, as I observed in *A v A Health Authority* at p 224E (paras [35]-[36]), are the well known principles:

i) that the High Court does not have (indeed has never had) parens patriae or other jurisdiction over the person of a mentally incapacitated adult – though, that said, as I pointed out at p 227D (para [45]) "for most practical purposes the declaratory jurisdiction in relation to incompetent adults is the same as that of a court exercising the parens patriae jurisdiction"; and

ii) that the parent or other relative of such an adult does not have any authority, qua parent or relative, to take decisions on his behalf.

15. The limited extent of the parental "right" in relation to an incompetent adult was emphasised by Butler-Sloss LJ in *In re D-R (Adult: Contact)* [1999] 1 FLR 1161 at p 1165E:

> "The starting-point must be that L is an adult, but an adult under a disability. If she were competent there would be no question of enforcing a relationship between her and her father. He would have a right to a relationship as far as she consented to it and no further. Since L is under a disability and is not in a position to consent, following the principles set out in the *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 line of cases, it becomes a question of—is it in her best interests to have contact with her father? If there was no conflict between the members of the family, it would be natural and desirable for L to have the love and support of those members of her family willing to give that to her. In the case where there is conflict, the best interests of an incompetent adult require the court to look at all the circumstances, which include the history and former relationship of the father and daughter, the current situation and the prospects for the future. There is, in my judgment, no presumption of the right to contact between a parent and an adult child, even one under a disability. But the relationship of father and daughter is clearly a relevant factor and may, in some cases, be a most important factor. That relationship must be weighed in the balance together with all the other relevant circumstances of each individual case."

16. That was said in the context of the submission (see at p 1164G) that the question of contact is governed by common law, that there was a right to a relationship between the father and his daughter which ought to be protected and that the effect of that right was to create a presumption that the father/daughter contact should be exercised.

17. I am, of course, bound by what Butler-Sloss LJ said but I would not in any event wish to demur in any way from anything she said. With respect I entirely agree with every word of it. There are, nonetheless, three things that can perhaps be added.

18. The first is this. Family life, whether in the colloquial sense or in the technical sense in which the phrase is used in article 8 of the European Convention for the Protection

of Human Rights and Fundamental Freedoms, does not come to an end when a child – even a fully competent child – reaches the age of majority. Most children maintain a close relationship with their parents and other relatives into and through adulthood. In the nature of things the relationship (by which I mean the relationship both in fact and in law) gradually changes over time as the child develops towards adulthood – see, for example, *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 – and then as the child becomes in the eyes of the law an adult and thereafter as the adult child increasingly emancipates himself from his parents. The mentally incapacitated child may never develop to the point where he is able to emancipate himself and will accordingly go on living in the parental household after as well as before reaching the age of majority. But many fully competent children continue to live in the parental home after – sometimes long after – they have reached the age of majority.

19. English law may deny to the parent of a mentally incapacitated child on and after his eighteenth birthday (just as it does in relation to his fully competent sibling) the surrogate decision-making powers that the parent was clothed with so long as his child was, in the eyes of the law, an infant (or, as one would now say, a minor or a child). But that is not to say that there is not, within the meaning of article 8, "family life" in the relationship enjoyed between a parent and his or her adult child, whether fully competent or mentally incapacitated. "Family life" continues, both as a matter of fact and in law, after a child has reached the age of majority and even after emancipation. I know of nothing in Convention jurisprudence to suggest the contrary.

20. The second thing is this. Parents who have been looking after mentally incapacitated children during their minority often continue to do so after those children have attained their majority. But the fact that such parents are no longer clothed with the surrogate decision-making powers they enjoyed during their child's minority, does not leave them legally powerless. The doctrine of necessity as explained by the House of Lords in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 and *R v Bournewood Community and Mental Health NHS Trust ex p L* [1999] 1 AC 458 gives them ample power to look after their child and to take the decisions on his behalf which he is unable to take for himself. And, save in relation to certain medical procedures falling within the 'special' category referred to in *In re F (Mental Patient)* and *Airedale NHS Trust v Bland* [1993] AC 789, there is no need for parents in this position to invoke the assistance of the court. The doctrine of necessity enables them not merely to assume the responsibility for the day to day care of their child, with all the routine decision-making which that entails, but also to decide, no doubt, where appropriate, in conjunction with suitable professional advisers, more important matters such as where their child should live, who he should see, what services offered by public authorities he should make use of, what medication he should take and what nursing, dental and medical treatment he should receive. Cases in the 'special' category apart, the court typically becomes involved only if disputes erupt between those seeking to care for the patient – for example, the disputes between the wife and the mistress which underlay the litigation in *In re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1 and *In re S (Hospital Patient: Foreign Curator)* [1996] Fam 23 or the disputes between the mother and the father which underlay in part the litigation in *A v A Health Authority* – or if a public authority, for example a local authority or a health

authority, seeks, as here and as in *In re F (Adult)*, to intervene and take control out of the hands of family carers.

21. It may be that, in strict legal theory, these rights, duties, powers, responsibilities and authority (I borrow a convenient phrase from section 3(1) of the 1989 Act) are vested in such a parent not qua parent but rather because the parent has, in the eyes of the law, reasonably and appropriately intervened in order to care for, or has assumed responsibility for the care of, someone unable to look after himself: see the discussion of principle by Lord Goff of Chieveley in *In re F (Mental Patient)*. But that is little more than a technicality. The practical and human reality, of course, is that the parents of a mentally incapacitated adult look after him not as some disinterested act of charity but precisely because they are his parents and because they are motivated by natural feelings of parental love and duty.

22. In this connection it is important also to bear in mind the point made by Lord Goff of Chieveley in *In re F (Mental Patient)* at p 76A:

> "officious intervention cannot be justified by the principle of necessity. So intervention cannot be justified when another more appropriate person is available and willing to act".

23. Where a parent has, as DS has in the present case, willingly shouldered the burden of looking after his mentally incapacitated son and wishes to go on doing so, he does not cease to be an appropriate person to do so merely because his son has now turned 18. Indeed, respect for the realities of the human condition rather than any mere regard for so-called parental right would surely suggest that in such a case, other things being equal, it is precisely the parent who is the "more appropriate person" and not some public authority, however well intentioned.

24. Although the words were uttered in a rather different context it is perhaps not inappropriate in this context to remember what Lord Templeman said in *In re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806 at p 812B:

> "The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered. Public authorities cannot improve on nature. Public authorities exercise a supervisory role and interfere to rescue a child when the parental tie is broken by abuse or separation."

25. I do not suggest that this statement of principle can simply be transported entire into that area of law with which I am here concerned. But, allowing always for the fact that a mentally incapacitated adult is neither in fact nor in law a child, the sentiments which underlie Lord Templeman's statement surely have a powerful resonance in a case such as this.

26. The third point is this. The submission in relation to a parent's contact with his mentally incapacitated adult daughter which Butler-Sloss LJ had to address in *In re D-R*, and, more to the point, her response to that submission, are not in reality very different from the corresponding submission and response which are to be found in *In re KD*. There the question arose in relation to a parent's claim to access to a child. Rejecting the submission (at p 827A) that "the starting point in every case should be that a parent has a right of access which should be given effect to by the court and curtailed and inhibited only if the court is satisfied that the exercise of the right will be positively inimical to the interests of the child", Lord Oliver of Aylmerton said at p 827D:

> "Whatever the position of the parent may be as a matter of law – and it matters not whether he or she is described as having a "right" in law or a "claim" by the law of nature or as a matter of common sense – it is perfectly clear that any "right" vested in him or her must yield to the dictates of the welfare of the child."

27. He continued (at p 827F):

> "As a general proposition a natural parent has a claim to access to his or her child to which the court will pay regard and it would not I think be inappropriate to describe such a claim as a "right." Equally, a normal assumption is … that a child will benefit from continued contact with his natural parent. But both the "right" and the assumption will always be displaced if the interests of the child indicate otherwise".

28. So although the legal analysis is very different, and although the source of the parental "right" is very different, there may not be so very much difference in the world of practical realities as cold legal theory might suggest between the situations vis-à-vis the parent who wishes to look after or have contact with a child who has not attained the age of majority and the parent who wishes to continue to look after or have contact with a mentally incapacitated adult.

29. Now this is all very well but Ms Morris, not surprisingly, pressed me with what are on any view the crucially important observations of Sedley LJ in *In re F (Adult)*. I must come to these in due course but it will be convenient if I first address the Strasbourg jurisprudence to which Ms Morris also helpfully directed my attention.

30. Article 8 protects "the right to respect for … private and family life". "Private life" is not the same as "family life" and the two may sometimes come into conflict. I need not further elaborate what is meant by "family life" but it is important for present purposes to understand what is embraced within the concept of "private life".

31. In *Niemietz v Germany* (1992) 16 EHRR 97 at p 111 (para [29]) the Court indicated that "private life" includes at least two elements. The first is the notion of "an "inner

circle" in which the individual may live his own personal life as he chooses"; the second is "the right to establish and develop relationships with other human beings." Applying *Niemietz*, the Court in *Botta v Italy* (1998) 26 EHRR 241 at p 257 (para [32]) said:

> "Private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings."

32. As the Court has long recognised – the principle goes back at least as far as *Marckx v Belgium* (1979) 2 EHRR 330 – the "respect" for private and family life which article 8 guarantees imposes on the State not merely the duty to abstain from inappropriate interference but also, in some cases, certain positive duties. The State may be obliged to take positive action to prevent or stop another *individual* from interfering with private life. As the Court put it in *Botta* at p 257 (para [33]):

> "While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves … In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual".

33. That, it should be noted, was, as Ms Morris pointed out, said in the context of a claim by a mentally incapacitated claimant (in the event unsuccessful) that Italy had failed to respect his private life.

34. Previously, in *Lopez-Ostra v Spain* (1994) 20 EHRR 277 at p 295 (para [51]) the Court, having referred to the "positive duty on the State … to take reasonable and appropriate measures to secure the applicant's rights under article 8", said that "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole".

35. *Niemietz* shows that private life includes the right of a person to define the "inner circle" in which he chooses to live his life, including in particular, as it seems to me, the right to choose those with whom he does *not* want to establish, develop or continue a relationship – in short the right to decide who is to be *excluded* from his "inner circle". Article 8's guarantee of respect for an individual's "private life" therefore embraces, at least in principle, *both* X's right to decide to establish and develop a relationship with Y (qualified, of course, by Y's right to decide that he does

not wish to establish a relationship with X) *and* X's right to decide not to establish or continue a relationship with Z.

36. This explains why, as I earlier mentioned, "private life" is not the same as "family life" and why, as I suggested, the two may sometimes come into conflict. It also explains in Convention terms Butler-Sloss LJ's observation, in the passage from *In re D-R* which I have already set out, that:

> "If she were competent there would be no question of enforcing a relationship between her and her father. He would have a right to a relationship as far as she consented to it and no further."

37. If a father and his adult daughter wish to enjoy the type of normal family relationship that the State is obliged by the article 8 guarantees of respect for each party's private and family life not to interfere with arbitrarily, then all well and good. But if for whatever reason, good or bad, reasonable or unreasonable, or if indeed for no reason at all, the daughter does not wish to have anything to do with her father, then he cannot impose himself upon her, whether by praying in aid his article 8 right to respect for family life or his article 8 right to respect for that part of his private life which entitles him in principle to establish and develop relationships with other human beings. His daughter can pray in aid against him her article 8 right to respect for that part of her private life which entitles her to decide who is to be excluded from her "inner circle" – and in that contest, because she is a competent adult, her article 8 rights must trump his.

38. This analysis points the way forward to an understanding of how analogous difficulties fall to be resolved where the issue arises as between a father and a mentally incapacitated son. The father cannot pray in aid as a trump card either his article 8 right to respect for family life or his article 8 right to respect for that part of his private life which entitles him in principle to establish and develop relationships with other human beings. His article 8 rights have to be weighed and assessed in the balance against the son's article 8 rights. In many cases there will be no conflict of any sort. Proper respect for the son's article 8 rights may point clearly in the direction of affording him the relationship with his father that his father seeks. But the circumstances may be such that a continuing relationship with his father is so detrimental to the son's interests as to outweigh both his father's right to a family life with him and his own interest in continuing a family life with his father – such that, were he a competent adult, the son would probably wish to exercise his article 8 to decide to exclude his father from his "inner circle". Or the circumstances may be such that a continuing relationship with his father imperils the son's ability to establish and develop relationships with other human beings.

39. How then are such conflicts to be resolved? The father cannot pray article 8 in aid as a trump card. On the contrary, and as *Botta* shows, the State, even in this sphere of relations between purely private individuals, may have positive obligations to adopt measures which will ensure effective respect for the son's private life. Thus the State, in the form of the local authority, may have a positive obligation to intervene, even at

the risk of detriment to the father's family life, if such intervention is necessary to ensure respect for the son's article 8 rights. And the State, in the form of the High Court, has a positive obligation to act in such a way as to ensure respect for those rights.

40. There is nothing at all surprising in this. The Crown as parens patriae has the duty and obligation to protect those unable to look after themselves: *A v A Health Authority* at p 223F (para [32]). As I said in *Re F, F v Lambeth London Borough Council* [2002] 1 FLR 217 at p 233 (para [41]):

> "Modern reference to the 'rights' of the citizen can sometimes lead one to overlook the equal importance of what was once very clearly understood as the 'duty' of the Crown to its subjects. Today the rights of the citizen are mirrored by the duty of the state. Expressed in the language of the new constitutional settlement, the parents and the boys are guaranteed by art 8 of the Convention their rights to respect for private and family life. By acceding to the Convention the state bound itself to secure these rights to the parents and to the boys. Moreover, since 2 October 2000 it has been the duty of every public authority (and for this purpose both Lambeth and this court are public authorities: see ss 6(1) and 6(3)(a) of the 1998 Act) not to act in a way which is incompatible with the citizen's Convention rights. In more traditional language it is the duty of the Crown as parens patriae to protect children against injury of whatever kind from whatever source: see *In re X* (*A Minor*) (*Wardship: Jurisdiction*) [1975] Fam 47 at 52 (reversed on other grounds [1975] Fam 47 at 56)."

41. That was said in the context of serious failings by a local authority in the discharge of its duties to two children who were in its care. But the same broad principles, as it seems to me, must apply in the case of mentally incapacitated adults.

42. If the rights of a father such as DS and his son conflict then domestic law, as we have seen, requires the conflict to be resolved by reference to the son's best interests. In domestic law the governing consideration is the son's welfare. So it is under the Convention. Strasbourg jurisprudence has long recognised that, in the final analysis, parental rights have to give way to the child's – that the case may be one of sufficiently pressing necessity as to justify, in the interests of the child's welfare, the supercession and assumption by the State of parental rights and responsibilities. The answer can be no different where the child, although now an adult, remains unemancipated because mentally incapacitated.

43. In *In re F (Adult)*, Sedley LJ, referring at p 57E to article 5 of the Convention, said this:

> "By paragraph (c) of article 5 a specific exception is made to permit the state to restrict the personal freedom of the persons

> of unsound mind—a class which, within limits, it is for each member state to define: see *Winterwerp v The Netherlands* (1979) 2 EHRR 387. The power is itself, however, subject to at least two major constraints: it must be in accordance with a procedure prescribed by law, and any such law must in turn accord the respect due under article 8 to private and family life.
>
> The first of these elements does not mean that the common law cannot grow or shape itself to changing social conditions and perceptions: see *SW v United Kingdom; CR v United Kingdom* (1995) 21 EHRR 363. It means that any such change must be principled and predictable. For the reasons set out in the two preceding judgments I consider that the development of the law which our decision represents passes both limbs of this test.
>
> The second element will be, in the light of this judgment, a matter to which the court that is to hear the substantive application for a declaration must have careful regard. But it should be clearly said now that it is T's welfare which will remain throughout the single issue. The family life for which article 8 requires respect is not a proprietary right vested in either parent or child: it is as much an interest of society as of individual family members, and its principal purpose, at least where there are children, must be the safety and welfare of the child. It needs to be remembered that the tabulated right is not to family life as such but to respect for it. The purpose, in my view, is to assure within proper limits the entitlement of individuals to the benefit of what is benign and positive in family life. It is not to allow other individuals, however closely related and well-intentioned, to create or perpetuate situations which jeopardise their welfare. As the European Court of Human Rights said in *Marckx v Belgium* (1979) 2 EHRR 330, 342, article 8(1):
>
> > "does not merely compel the state to abstain from ... interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life."
>
> In the present state of the law as it affects T, it is upon the court and the local authority that any such positive obligation comes to rest. One of the advantages of a declaratory remedy, and in particular of an interim declaration, is that the court itself can do much to close the so-called "*Bournewood* gap" in the protection of those without capacity: see [1999] 1 AC 458, 497, per Lord Steyn."

44. Both Dame Elizabeth Butler-Sloss P (at p 50G) and Thorpe LJ (at p 54D) expressly endorsed and adopted what Sedley LJ had said.

45. Sedley LJ's observations accord precisely with what one would expect in the light of cases such as *Niemietz* and *Botta*. In the final analysis, as Sedley LJ put the point, it is the mentally incapacitated adult's welfare which must remain *throughout* the *single* issue (emphasis added). The court's concern must be with *his* safety and welfare. Our domestic law has not seen fit in this area to impose on public authority, as it has in sections 31 and 100 of the 1989 Act, any threshold requirement to establish, before the State can intervene, either the risk of significant harm and/or parenting which falls short of the reasonable. There is nothing in the Convention to demand that it does and there is, in my judgment, no reason why the court should now incorporate such a requirement.

46. Mr Wallwork accepts that there is here no formal threshold as there would be if the local authority were seeking to take a child into care. He accepts that DS's article 8 rights do not give him a trump card, though they are, he asserts, a very important factor. But, he says, this common law jurisdiction should be informed, even if not bound, by the principles to be found, in a similar context, in sections 31(2) and 100(4)(b) of the 1989 Act. I can understand why Mr Wallwork makes that submission. But there are situations – and this, in my judgment, is one – where analogies, however plausible, may be a false and potentially misleading aid to correct understanding. This jurisdiction has to be exercised – and the decisions of those caring for persons in S's position have to be taken – at all times by reference to the mentally incapacitated person's welfare. His welfare is, as Thorpe LJ said, the paramount consideration. It is, as Sedley LJ said, throughout the single issue.

47. That said, the court can, and in my judgment should, have regard to the realities of the human condition and to the fundamentals on which our society is based. In our multi-cultural and pluralistic society the family takes many forms. There may be one, two, three or even more generations living together under the same roof. Some people choose to live on their own. People live together as couples, married or not, and with partners who may not always be of the opposite sex. Children live in households where their parents may be married or unmarried. They may be brought up by a single parent. Their parents may or may not be their natural parents. Their siblings may be only half-siblings or step-siblings. Some children are brought up by two parents of the same sex. The fact is that many adults and children, whether through choice or circumstance, live in families more or less removed from what until comparatively recently would have been recognised as the typical nuclear family. But – and this is the point – the family, whatever form it takes, is the bedrock of our society and the foundation of our way of life. And we all know how powerful the pull of the family is: how many children, after they have been in care, choose of their own accord to return to their often inadequate and unsatisfactory families as soon as they are able to; and how many adopted children strive to seek out, years or even decades later, the family they never knew.

48. I am not saying that there is in law any presumption that mentally incapacitated adults are better off with their families: often they will be; sometimes they will not be. But respect for our human condition, regard for the realities of our society and the common sense to which Lord Oliver of Aylmerton referred in *In re KD*, surely indicate that the starting point should be the normal assumption that mentally incapacitated adults will be better off if they live with a family rather than in an

institution – however benign and enlightened the institution may be, and however well integrated into the community – and that mentally incapacitated adults who have been looked after within their family will be better off if they continue to be looked after within the family rather than by the State.

49. We have to be conscious of the limited ability of public authorities to improve on nature. We need to be careful, as Mr Wallwork correctly cautions me, not to embark upon 'social engineering'. And I agree with him when he submits that we should not lightly interfere with family life. If the State – typically, as here, in the guise of a local authority – is to say that it is the more appropriate person to look after a mentally incapacitated adult than his own family, it assumes, as it seems to me, the burden – not the legal burden but the practical and evidential burden – of establishing that this is indeed so. And common sense surely indicates that the longer the family have looked after their mentally incapacitated relative without the State having perceived the need for its intervention the more carefully must any proposals for intervention be scrutinised and the more cautious the court should be before accepting too readily the assertion that the State can do better than the family. Other things being equal, the parent, if he is willing and able, is the most appropriate person to look after a mentally incapacitated adult; not some public authority, however well meaning and seemingly well equipped to do so. Moreover, the devoted parent who – like DS here – has spent years caring for a disabled child is likely to be much better able than any social worker, however skilled, or any judge, however compassionate, to 'read' his child, to understand his personality and to interpret the wishes and feelings which he lacks the ability to express. This is not to ignore or devalue the welfare principle; this common sense approach is in no way inconsistent with proper adherence to the unqualified principle that the welfare of the incapacitated person is, from beginning to end, the paramount consideration.

50. So much for the first issue of principle. Is there any objection to the court granting relief of the kind sought by the local authority? In my judgment there is none. The court has jurisdiction to grant whatever relief in declaratory form is necessary to safeguard and promote the incapable adult's welfare and interests. If the court thinks that his interests will best be served by a judicial identification of some third party as the most appropriate person to be responsible nor merely for his care but also for taking the kind of decisions to which I have already referred (see paragraph [20] above) then, in my judgment, there can be no objection whatever to the court so declaring. Indeed, were the court not to do so in an appropriate case, it would, as it seems to me, be failing in its duties under both the common law and the Convention. After all, to declare that some specified person who is, in the eyes of the court, the most appropriate person to assume responsibility for this aspect of a patient's care is also to be clothed with practical decision-making on behalf of the patient, is merely to state explicitly that he has those powers and responsibilities which would in any event be reposed in him by the doctrine of necessity. Moreover, some such mechanism is essential if those caring for the incapable are to allowed to get on with their task without the need for endless reference to the court – something which (cases in the 'special' category apart) would serve neither the public interest nor the interests of the mentally incapacitated.

51. So, subject always to being satisfied that this really is in the *best* interests of the mentally incapacitated person, the court has, and in my judgment always has had, power to declare that some specified person is to be, in relation to specified matters, what is, in effect, a surrogate decision-maker for the incapable adult.

52. Put so starkly the proposition may seem novel. But there is, I believe, authority to support it. Even were there not I would unhesitatingly come to the same conclusion. The inherent declaratory jurisdiction has developed considerably since the House of Lords gave judgment in *In re F (Mental Patient)* and in ways which few might have foreseen in 1989. It will, I do not doubt, continue to develop. It is right that it should. It probably must if the court is to meet its obligations under the Convention. Sedley LJ's judgment in *In re F (Adult)* points the way forward. This development in the jurisdiction – if in truth it be a development at all – comfortably meets both limbs of the test identified by Sedley LJ in the passage from his judgment which I have already quoted. And in this respect I take comfort, as did both the President (at p 49E) and Sedley LJ (at p 55D) in *In re F (Adult)*, from Lord Donaldson of Lymington MR's well known words in *In re F (Mental Patient)* at p 13D:

> "the common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill gaps is one of the most important duties of the judges."

53. But as I have said there is in any event, as it seems to me, authority to justify this aspect of the jurisdiction.

54. Orders in such terms are frequently made in cases involving children. Thus in the unreported case of *Re SLS* [2002] EWHC 6 (Fam), where a question arose as to the future treatment of a gravely brain-damaged baby who was in the care of a local authority, I made an order that the relevant NHS Trust:

> "be at liberty, notwithstanding any absence or refusal of consent by the [parents] or any absence of consent by the [local authority], to treat [SLS] in her best interests in accordance with the professional opinion and recommendations of Dr SM (or other consultant responsible for her care) … provided that (i) the [NHS Trust] shall so far as is reasonably practicable at all times first consult with the [parents] and the [local authority] (ii) nothing in this order shall authorise the withholding or withdrawal from SLS of either nutrition or hydration".

55. But similar orders have also been made in cases involved mentally incapacitated adults. In *Re R (Adult: Medical Treatment)* [1996] 2 FLR 99, a case involving an adult in a low awareness state, a question arose about the possible future administration or withdrawal of antibiotics. Sir Stephen Brown P said at p 108D:

> "The withholding in the future of the administration of antibiotics in the event of the patient developing a potentially life-threatening infection which would otherwise call for the administration of antibiotics is a decision which can only be taken at the time by the patient's responsible medical practitioners in the light of the prevailing circumstances. This requires a clinical judgment in the light of the prevailing circumstances."

56. Apparently accepting the submission (see at p 109C) that it was "appropriate for the court to make a declaration in terms which would not require a future further application to the court", the President made a declaration (see pp 109D, 109H) that:

> "it shall be lawful as being in the patient's best interests for the trust and the responsible medical practitioners having the responsibility at the time for the patient's treatment and care … to withhold the administration of antibiotics in the event of the patient developing a potentially life-threatening infection which would otherwise call for the administration of antibiotics but only if immediately prior to withholding the same:
>
> (a) the trust is so advised both by the general medical practitioner and by the consultant psychiatrist having the responsibility at the time for the patient's treatment and care; and
>
> (b) one or other or both of the parents first give their consent thereto."

57. He added (at p 109E):

> "The decision to withhold antibiotics in a given situation falls fairly and squarely within the clinical responsibility of the consultant treating the patient. I am quite satisfied on the evidence in this case that the consultant and the general practitioner having the responsibility for R's treatment do have R's best interests in mind. They are fully supported by the parents. I am accordingly satisfied that it would be in the best interests of R to make a declaration in these terms."

58. The inclusion in this declaration of the reference to parental consent was strongly criticised by Professor (now Sir) Ian Kennedy in a case-note in [1997] Med L Rev 104 at p 108:

> "It is now mother's milk to the medical lawyer that, in the case of an adult patient, no-one, not even the court, has authority to consent on behalf of the patient. What was the Official Solicitor doing then when he proposed to the court that [this] be included in the court's declaration … ? And what was the court doing in

> incorporating this proposal into the declaration which was granted? To insist on parental consent, as a matter of law, explicitly purports to recognise that the parents have a right in law to a say in the treatment of an adult, including a right of veto over future treatment options. This seems entirely inconsistent with the law as generally understood. It may be that, as a matter of good clinical practice and out of concern for their love of their adult child, it is crucial to involve the parents. But this is a matter of ethics, not law. The law vests no authority in them. By stipulating that they consent, Sir Stephen Brown P introduces unnecessary confusion into the law. There is no obvious reason."

59. Recognising that I may be prey to the well-known paternal inability to detect failings in his offspring (for it was I who appeared as counsel for the Official Solicitor in that case and who drafted the offending declaration), I have to say that I cannot agree with Professor Kennedy's criticisms. With all respect to the Professor, the President was not insisting on parental consent as a matter of law. He was, I venture to suggest, merely recognising that in the particular circumstances of that case the patient's parents and medical advisers shared between them the responsibility of looking after him and accordingly had vested in them, in circumstances where it was not necessary to refer the matter back to court, the decision-making powers and responsibilities to which I have already referred (see paragraph [50] above). Importantly, as we have seen, the President made it clear that a declaration in these terms was appropriate because – and, I would suggest, only because – it was "in the best interests of R to make a declaration in these terms."

60. Ms Morris has also referred me to the order made on 15 February 2002 by Miss Pamela Scriven QC (sitting as a Deputy High Court Judge) in the case of an adult patient called JS. That order, which provided by means of appropriate declaratory relief that JS was to be accommodated by a local authority at a specified address, also contained declaratory provisions regulating JS's contact with two members of his family, IS and ES: IS was to have unsupervised contact "subject to monitoring and review by" the local authority; ES was to have supervised contact "monitored and reviewed by the local authority" but unsupervised contact only "if, having regard to the quality of supervised contact and/or the outcome of an assessment of ES's mental state, the local authority considers that it is in JS's best interests". That, if I may say so, was an entirely appropriate form of order.

61. I return to the facts and, first, to the history of events leading up to the local authority's interventions on 22 January 2001, when S's name was placed on the Child Protection Register under the category of neglect, and then on 25 May 2001 when, following an incident on 23 May 2001, S was, with the agreement of DS, removed from home and placed in the voluntary care of the local authority.

62. S, as I have said, was born on 7 July 1983. His elder brother D was born on 31 October 1978. His parents finally separated in 1988 and subsequently divorced. In 1990 DS remarried. By that marriage he had a daughter, R, born on 7 September

1991. DS finally separated from his second wife in 1994. They were subsequently divorced. D left the family home in 1997. S has no contact with either D or his mother. His contact with R came to an end in the autumn of 2000. DS seems to have little if any contact with either D or R.

63. Throughout the whole of his life, until the events of 2001 to which I will come in due course, S has lived at home with and been cared for by his father – and, of course, whilst they were living at home with DS, also by his mother and his step-mother.

64. Included in the witness statements of the three social workers, Ms MT, Ms MD and Ms AE, whose evidence is before the court are three helpfully detailed chronologies of the local authority's involvement with S and his family. The first covers the period from 1984 (when the local authority first became involved) to 25 May 2001, the second from 25 May 2001 to 10 September 2001 and the third (slightly overlapping the second) from 3 September 2001 to 19 August 2002.

65. I interpolate to comment that the preparation of chronologies such as these (that is, chronologies of those events which are relevant from the social work rather than the purely forensic perspective – what might be called 'social work chronologies') is enormously useful. Often, the evidence of social workers in care cases is a sometimes repetitive and enormously lengthy mixture of fact, comment, opinion and plan. Social work chronologies have a number of advantages. They enable the basic historical facts to be isolated and recorded in a chronological sequence, cross-referenced to the relevant underlying documents on which they are based and constantly up-dated. This facilitates the work of social workers, providing for everyone who has to consult the social work files a chronological summary of much of the contents. It also facilitates the forensic process, providing, for example, an accessible quarry from which the facts relied upon to found 'threshold' can be hewn. They enable fact to be separated from comment and opinion. This facilitates the preparation of evidence in a form that is both more tightly focussed and more helpfully presented. Such social work chronologies, I venture to suggest, should contain in summary form the significant events in the child's (or incapacitated adult's) life, arranged in chronological order, each entry being identified both by date and by a unique serial number (to facilitate subsequent cross-referencing) and with cross-referenced annotations to the underlying documents.

66. For present purposes, as Mr Wallwork pointed out, these chronologies are as important for what they do *not* say as for what they do. They show, on the one hand, that for many years DS's relationship with the local authority has been tense and difficult to say the least. To that aspect of the matter I will return in due course. What, on the other hand, and very strikingly, they do *not* show – at any time prior to the period leading up to the Child Protection Conference on 22 January 2001 – is any real suggestion by the local authority (or indeed anyone else) that S should be looked after by anyone other than DS or anywhere other than at home.

67. As I pointed out during the course of the hearing, the chronologies record the holding of various formal meetings and reviews: for example (and focussing on more recent

events) statutory reviews on 4 November 1999 and 12 May 2000, a joint housing and social services meeting on 27 June 2000, a multi-professional meeting on 25 July 2000 and a professionals meeting on 14 September 2000. Now beyond recording the mere fact of the meetings having taken place neither the chronologies nor any of the local authority's evidence give any details of what was discussed or agreed at any of these meetings. Moreover, none of the records of any of these meetings – neither the reports which, no doubt, were presented to the meetings nor the minutes – have been produced for my consideration. The only such documents I have been shown are the report dated 17 January 2001 of the social worker, Ms MT, prepared for the Child Protection Conference on 22 January 2001, the minutes of that meeting, the report dated 31 May 2001 of another social worker, Ms MD, prepared for the Child Protection Conference on 1 June 2001, certain other documents which were before that meeting (including reports dated 25 May 2001 and 30 May 2001 respectively from the Detective Sergeant who interviewed DS on 25 May 2001 and of the consultant paediatrician, Dr B, who had examined S earlier the same day), part of the minutes of that meeting and the minutes of a core group meeting on 19 June 2001.

68. I do not in any way complain at that omission. But the obvious inference to be drawn, as I pointed out during argument, is that there is not to be found in any of these documents any material pre-dating the period leading up to the Child Protection Conference on 22 January 2001 that plainly or obviously supports the case now being made by the local authority.

69. The point does not in fact end there. DS brought to court with him various documents culled from his, by now no doubt extensive files, to which Mr Wallwork particularly directed my attention. I take them in chronological order:

i) A letter dated 10 June 1997 from Ms JS, the Head of the local authority's Children & Families Social Work Service, referring to a meeting of professionals which had taken place on 6 June 1997, contained this passage:

> "We reviewed the present position. It was stressed that your care of [S] is very good and you and he have a close relationship. It was felt that it is in [S's] best interest for him to be cared for at home. We are keen to support you in continuing to care for him. You will appreciate that our resources are limited and we cannot provide all the support you may ideally like … We are not able to allocate a social worker. Social workers are predominantly involved in assessment and the setting up of support packages. Once these arrangements are in place they have limited contact with families. The level of arrangements for [S] is agreed".

ii) The annual review for 1997/8 dated July 1998 from the class teacher at S's school contained nothing to suggest any problems beyond those inherent in his severe learning difficulties. S was said to have "settled well into his new class

group" and "this arrangement is working well". Also, he "enjoys generally good health and misses very little schooling".

iii) The Final Statement (Re-assessment) of Special educational Needs for S prepared by the local authority and dated 9 June 2000 said that S "is generally a happy and secure young man, he has a very supportive family and a continued close home/ school relationship is important." The only non-educational need identified was transport to and from school.

iv) The report dated 17 January 2001 and prepared by Ms MT for the Child Protection Conference on 22 January 2001 recorded of the late 1990s that:

> "Social Worker at that time felt that [S's] care by father was good. [S] was always well turned out for school and [DS] has maintained high material standards within the house."

70. Mr Wallwork also draws attention not merely to the views of Mr F which I have already quoted (see paragraph [11] above) but also to Dr L's recording in his report dated 23 April 2002 of what he was told by S's school:

> "School see [DS] as being a highly concerned parent who has sought the highest standard of care for his child. They commented on the high standard of physical care that [S] appeared to receive."

71. I have said that for many years DS's relationship with the local authority has been tense and difficult to say the least. A consistent theme throughout much of the history is repeated complaints by DS of the local authority's alleged failure to provide S and him with appropriate support and services. These have included, in particular, repeated complaints that the local authority has failed to provide S and DS with suitable housing, has failed to provide or pay for necessary adaptations to the property (for example, a walk-in shower for S, once he had got to the point where he was having difficulty using a bath), has failed to provide adequate respite care and has failed to protect S properly whilst at school or in respite care. The letter dated 10 June 1997 reflects the local authority's inability to provide DS with an allocated social worker.

72. As against that, an equally consistent theme is repeated instances, according to the local authority, of

i) DS seeking to have S taken into care (or, on occasions, threatening to put him in care) – see, for example, the events of 28 September 1989, 26 February 1990, 2 August 1993, 4 and 31 January 1994, 9 June 1994, 27 January 1995, 17 May 1995, 2 August 1995, 18 March 1996, 8 July 1996, 21 October 1996, 3 January 1997, 6 November 1997, 26 January 2000, 29 August 2000, 21

November 2000, 22 November 2000 and 18 December 2000 as recorded in the chronologies or other local authority documents;

ii) DS failing or refusing to avail himself of respite care when it was offered – see, for example, the events of 15 April 1987, 18 July 1995, 27 October 1995, 10 December 1995, 19 May 1997, 14 August 1998, 5 July 2000 and 23 August 2000 as recorded in the chronologies; and

iii) DS requesting re-housing but then turning down the properties offered: properties which, according to the local authority, were suitable for S were offered but rejected by DS, as the local authority would have it for spurious reasons, in February 1998, June 1998, July 2000 and February 2001.

73. The history as recorded by the local authority discloses repeated difficulties as between DS and other agencies. On a number of occasions the local authority's concerns about DS's mental health are noted. The local authority's perception, as expressed by Ms MT in her witness statement, is stark:

> "[DS] has a consistent method of dealing with authority figures which consists of bullying and threatening … When his wishes are not acceded to, long daily phone calls … are made to various paid professionals in turn. He regularly asks for services … When this resource is found, [DS] says he doesn't want it. This pattern has been consistent over the years. It must be stressed that whether it's in [S's] interest or not does not come into the equation as to whether a request is granted. At the forefront of the discussion is [DS's] needs … In these phone calls he can move from being hectoring, bullying to being tearful and asking for sympathy."

74. It is quite impossible for me to determine where the truth lies in relation to individual complaints and there is in any event absolutely no need for me to do so. But certain things are, in my judgment, clear:

i) The history of these complaints and disputes is long. Many of them display a remarkable consistency over time. Recognising that the local authority may well have fallen short on occasions not merely of what DS was demanding but of what any parent in his position would have wanted, and accepting that there may, accordingly, have been more or less substance in some of his complaints, it is quite impossible to accept that the picture has been for so long and so consistently as bad as DS would have me think. To a significant extent the cause of the seemingly endless disputes between DS and the local authority has been not, as he would have it, the local authority's unreasonable failure to provide him with appropriate support and services but rather the unrealistic and unreasonable demands which he has made on the local authority.

ii) DS has long been vocal in his criticism of the unwillingness and inability of the local authority and, indeed, of other agencies, to provide what he thinks his family is entitled to. He has on occasion taken his story to the local press. In the autumn of 1999 (an incident which, I note, is passed over in complete silence by the local authority in its chronologies and evidence) his solicitors wrote to the local authority threatening to commence proceedings with a view to compelling it to provide the social services, housing and educational services for which, apparently, DS had been pressing. He has on numerous occasions in his dealings with social workers and others displayed anger and sometimes adopted attitudes which they have found threatening. It may be that the picture as painted by Ms MT is unduly harsh – though I think it is in fact remarkably close to the reality – but the fact remains that DS has on any view of the matter made life extremely difficult for a whole series of professionals who have tried to help him and his son. The comments of S's headteacher as recorded by Mr F vividly illustrate how it is not only the local authority which has, from time to time, found great difficulty in working with DS.

iii) The reality as matters now stand is that any working relationship between DS and the local authority is going to be fraught with difficulty. There will, as it seems to me, be obvious difficulties in the local authority and DS working together with each other. I note that in his assessment Mr F records DS as saying of his relationship with the local authority, "I do not think it will improve." In his evidence DS disputes this and asserts that, on the contrary, he "would be delighted to work with Social Services". He also says that he wants his relationship with social services to improve and hopes it does. He claims to "feel much more enthusiastic about working with professionals" and "much more able to ask for help". I do not doubt DS's sincerity in saying this: but events over many years (and, indeed, more recently – see below) unhappily give me no reason at all to imagine that things will be any better in future than they have been in the past. The sad fact, in my judgment, is that they will not.

75. These comments, of course, need to be put in context. Ms MT's view, as we have seen, is that the pattern of DS's behaviour has been "consistent over the years". So it has been, as the local authority's chronologies and evidence so eloquently demonstrate. But – and this is an important point which bears repetition – notwithstanding all this, it was not until 2001 that the local authority first seriously suggested that S should be removed from DS and taken into care.

76. As can be seen from what I have already said, the year 2000 was marked by a number of occasions when there were difficulties in relation to respite care or when DS was talking of putting S into care. The year culminated in three incidents. According to the local authority, though DS gives a different version of events,

i) on 21 November 2000 DS brought S into the office to be left in the care of the local authority but then changed his mind;

ii) on 22 November 2000 DS threatened to leave S at the housing office; and

iii) on 18 December 2000 DS asked the duty officer to take over S's care, changing his mind as S was walking away with the social worker.

77. This last incident, whatever it was that actually took place, together with the local authority's concerns that S was not being bathed properly by DS and was being kept out of school, prompted the local authority to convene the Child Protection Conference which in the event was held on 22 January 2001.

78. In her report dated 17 January 2001 Ms MT provided the following risk assessment for S:

> "1 [S] currently is not receiving adequate physical care in terms of bathing.
>
> 2 He is locked in his bedroom at night to prevent him wandering.
>
> 3 He is being used by his father to gain accommodation of a type his father wants.
>
> 4 He is subjected to DS's moods which can be quite dramatic at times.
>
> 5 This is an isolated family with little or no input from neighbours or mother. Hence [S's] social life is restricted.
>
> 6 [DS] appears to have no insight as to how his behaviour could adversely affect [S].
>
> 7 [DS] is unable to work with Social Services Department and other agencies which prevents resources being appropriately applied. [DS] is unable to encourage independence in [S] in terms of consolidating achievements.
>
> 8 [S] is kept off school regularly when [DS] is angry with a department's decision."

79. Though there is a dispute (which I am in no position to resolve) as to who bore the responsibility for this state of affairs, it is in effect common ground that the reason why S was not being bathed was because of DS's assertion that it was impossible for him to get S into the bath and because of what he claimed was the local authority's failure to provide or pay for a walk-in shower.

80. Ms MT's recommendation was that:

> "While we can acknowledge that [DS] has carried out a stressful task single handed for many years, his current inability to accept services as [S] becomes adult is putting the young man at risk. [S] needs to be registered on grounds of emotional

> abuse. [S] needs to be bathed immediately and if father cannot do this, [S] will need community provision."

81. As recorded in the minutes, the view of the Child Protection Conference was that:

> "[DS] had an overwhelming desire to protect [S], which was taken beyond normal boundaries. As a result it was felt that [S's] development had been inhibited, although it had never been possible to assess his potential. Professionals were agreed that [S's] name should be referred to the Child Protection Register in the category of Neglect."

82. Following core group meetings on 5 February 2001 and 12 March 2001 S was de-registered at a case conference on 24 April 2001. Apparently the view was taken that some progress had been made and that there had been reasonable co-operation with DS.

83. On 23 May 2001 there took place the incident that precipitated the present proceedings. DS accepts, as he told the police when interviewed on 25 May 2001, that he had lost his temper with his son, slapped him on the face and pushed him. S fell and in doing so bumped his head and his hip. This was a serious assault, but the gravity of the incident is, perhaps, indicated by the fact that when he examined S on 25 May 2001 Dr B was prepared to accept DS's explanation that S's fall was accidental. DS says that the incident was out of character. He was under a great deal of pressure and stress at the time. They were in a hurry to get S ready for school and S was being uncooperative. The local authority points out that initially DS refused to allow S to be medically examined and refused to cooperate in any way, that he did not admit the assault until after he had been arrested by the police – hence his lying explanation to Dr B – that when subsequently interviewed both by a consultant psychiatrist, Dr K, and by Mr F, he tended to minimise what he had done (going so far as to deny to Mr F that he had ever said to the police what is recorded in the summary of the interview), and that according to the social worker, Ms MD, he has consistently refused to engage in discussing the incident.

84. Ms MD's note of her meeting with DS on 30 May 2001 is illuminating. Having set out his account to her of what had happened on 23 May 2001, she continued:

> "[DS] went into great detail about the strain he was under because of rehousing issues and how Social Services had not fulfilled their statutory duties … The meeting was extremely tense, as [DS] insisted on avoiding the question I put to him four times about what practical support could we provide to allow [S] and himself to live at home … [DS] said there were no practical solutions and he would not accept services coming in to carry out personal care for [S]. He said the only answer was (i) rehousing; (ii) rehousing … Any help offered would be inappropriate."

85. On 25 May 2001 S was taken by the local authority to a respite unit, RM, where he has remained ever since. On 1 June 2001 there was a Child Protection Conference and planning meeting. The recommendations of the meeting were that S should be placed on the At Risk Register under the physical assault category, that DS allow social services to put in place a care plan for S which he must comply and work with and not obstruct in any way, and that should he fail to do so, then a contingency plan should be in place to have S removed. The care plan which quickly emerged was for S to remain for the time being at RM. Soon after – on 7 July 2001 – S attained the age of 18. The present proceedings were begun by the local authority on 25 January 2002.

86. The conclusion of the Child Protection Conference on 1 June 2001 was that it was "unlikely" that the incident on 23 May 2001 was a 'one-off'. Indeed the view of Ms MD, the social worker who investigated matters at the time, was that DS had caused physical harm to S "on many other occasions". DS denies that. Ms Morris readily accepted in front of me that the only other incidents she could rely upon were some that DS had admitted to Mr F:

i) "occasionally" throwing a slipper at S which hit him in the stomach;

ii) on one occasion pressing S's head towards his food to encourage him to eat; and

iii) on another occasion "tapping" S on the knee with a walking stick.

87. The police, appropriately in my view, recommended against any prosecution of DS for what had happened on 23 May 2001. The belief of the investigating officers was that a prosecution would not be in the public interest.

88. Mr F's view, having considered all these matters in detail, is that DS has neither maliciously nor with premeditation hurt S either physically or emotionally. The incident on 23 May 2001, however, "must give rise to serious concerns". The other incidents "must be regarded as entirely inappropriate forms of parental action". It is, says Mr F, "likely that they are informed by [DS's] own unhelpful childhood experiences". Correctly identifying that the parent's ability to change behaviour is "an extremely important indicator", Mr F gives convincing reasons for saying that DS is not someone who will change. He continues:

> "I do not believe that [DS] has taken responsibility for the abuse. He has minimised the incidents and projected the responsibility for the state of affairs onto others, specially the Local Authority."

89. I agree. I say that having both read and considered the very considerable written materials in this case and, equally importantly, seen and heard both Mr F and DS giving oral evidence.

90. S, as I have said, was placed at RM on 25 May 2001, where he remains. Appropriate arrangements were put in place for regular contact between S and DS. The contact arrangements have unhappily been fraught with difficulty – see, for example, the events of 10 December 2001, 1 January 2002, 3 January 2002, 5 January 2002, 9 January 2002, 13 January 2002, 28 January 2002, 11 February 2002, 20 February 2002, 13 March 2002, 9 April 2002, 2 May 2002, 13 May 2002, 2 June 2002, 29 June 2002, 14 August 2002, 17 August 2002 and 19 August 2002 as recorded in the chronologies.

91. I need not go through these episodes in detail. There are certain common themes. DS has on various occasions cancelled contact visits or failed to attend. On other occasions he has threatened to cancel contact altogether, variously giving as his reasons that he could not afford it or that it was supervised. He refused to change the contact arrangements as requested by S's school so as to ensure that contact was not interfering with S's school work. He has even gone so far as to say that he will not have contact with S if he resides away from him. The local authority, as it seems to me with some justification, see DS as someone who would rather sacrifice contact with his son than display some flexibility with those responsible for him.

92. Contact itself has had its problems. The local authority points to occasions when DS has said during visits and in S's presence that he does not intend to come again. It is said that DS's tone of voice on such occasions has often been angry and such as to leave S feeling confused, anxious and unsettled.

93. The contact monitoring forms recording what has taken place at contact between DS and S since June 2001 occupy over 200 pages. I have not been taken systematically through all this material but the local authority points to what it says is a consistent theme, namely DS putting his own needs before the interests of S in achieving good quality contact. A sample:

i) 15 September 2001:

> "[DS] tended to talk to me more than to [S] (although the conversation was about [S] all the time."

ii) 23 October 2001:

> "Dad played with [S] and talked to him a bit. He complained to me mostly about all aspects of his situation with [S] ... Dad could complain less and interact with [S] more."

iii) 30 October 2001:

> "Dad played a bit but talked at me mostly, about his case."

iv) 6 November 2001:

> "Dad talked a bit to [S] but mainly complained to me … [S] appeared to enjoy himself whilst Dad read his reports and documents. These seemed to be of more interest … Dad seemed to flit between his paperwork and [S]."

v) 13 April 2002:

> "Dad informed me that he didn't like social services, or anyone involved with his son, advising him where he should go with him."

vi) 20 July 2002:

> "In contrast to the last contact I supervised, this one was very limited in communication between [DS] and his son, whereas the last one … there was lots of interaction … To be honest, it was a poor visit on the whole. It seemed that Dad was more concerned with his own health, due to his scare over the weekend [when he had had what he thought was heart attack], than [S's]. However, there were moments of communication and play."

94. The local authority also points to occasions when DS was more overtly using S, and his contact with S, as a "tool" in his disputes with others:

i) 30 October 2001:

> "Dad was talking about suspending contact to make his court date as arranged. His attitude seemed to be that he was attending contact to help with court, not to see his son."

ii) 10 November 2001:

> "[DS] said he would not be at Tuesdays visit because his past wishes had not been followed ... [DS] has a negative view towards the care [S] is getting."

95. As against that Mr Wallwork points to the many records of good contact. Again, a sample:

i) 23 October 2001 (cf paragraph [93(ii)] above):

> "Generally a good visit."

ii) 30 October 2001 (cf paragraphs [93(iii)] and [94(i)]):

> "Generally a good visit. [S] appeared to enjoy himself. He laughed quite a lot."

iii) 3 November 2001:

> "I thought the visit was positive for [S] & his father."

iv) 6 November 2001 (cf [93(iv)]):

> "Generally a good visit, which both parties appeared to enjoy."

v) 10 November 2001 (cf [94(ii)]):

> "I thought the visit was positive towards [S]."

vi) 13 April 2002 (cf [93(v)]):

> "[DS] communicated well with [S], gave him lots of eye contact, and participated in playing with various toys with him. He also put in place good guidance and boundaries in respect of [S's] earlier antics … and ensured [S] was safe throughout."

96. Moreover the local authority itself recognises that DS's regular contact with S at school has been, as described by the headmaster, "regular and useful".

97. So much for the history of events.

98. Dr K has produced a psychiatric report on DS dated 5 June 2002. He concluded that DS does not suffer either from a personality disorder or from any diagnosable psychiatric condition but that he has intermittently experienced mild or moderate depression. He suggests that DS is a man of limited coping capacity who at various times in recent years has reached the limits of his ability to cope. On the other hand he does not think that DS's symptoms would markedly impact upon or impair his capacity to look after his son. Dr K explains the incident on 23 May 2001 as resulting from a loss of temper through a sense of frustration. He attributes DS's attitude towards the local authority and other professionals to his personality, and not to any mental illness from which he is suffering. That being so, in Dr K's opinion, "it is likely that such attitudes will indeed continue in the future". His prognosis is that DS will continue to be vulnerable to episodes of low mood / mild depression, that his attitude and behaviour towards authority figures in the social services and health professions is likely to continue, that he is likely to continue to behave in a manner which others may see as 'manipulative', that his capacity to change or learn new ways of behaviour is quite limited and that the most likely pattern of behaviour in the future is that which has been seen over recent years – all this reflecting his personality and limited coping skills.

99. Mr F's assessment is a detailed, careful and compelling piece of work. Some important parts of it I have already referred to. He sees DS as having extremely concrete thinking and systems, to such an extent that they control and inform the majority of his lifestyle and living arrangements, and also as being extremely rigid. His general behaviour he sees as within the high passive / low assertive range. Using a self esteem checklist DS scored at the maximum of good self esteem. Mr F concluded:

> "Combined with his rigid and concrete thinking and systems, it is further indication that any change in behaviour, attitude, concepts and belief systems would not be achieved. In that, the way [DS] is now is the way he is always likely to be. [DS] appears to have constructed a personal world which is designed to keep him as personally safe as possible, to deal with difficulties which he encounters and to keep threat and perceived threat at arms length from him. He achieves this by refusing to accept any deviation from his planned and established systems."

100. Mr F summarised his conclusions in passages in his assessment which I should set out at length:

> "Whilst acknowledging that for the majority of the time, [DS] is able to look after his son [S] in ways which safeguard and promote his welfare, there is historical evidence that from time to time this places a level of pressure/stress on [DS] which has provoked unacceptable behaviour from him. There is evidence of one overt incident in May 2001, and a number of examples of inappropriate child care management, for example the use of a walking stick and slipper. …
>
> There is also evidence that [DS], in pursuing his disagreements with statutory organisations, for example, housing, social services and school, has used [S] as a *"lever"* in order to achieve his ends. For example a Child Protection Case Conference dated 22/01/01 at which [S] was registered under the category of Neglect, it is recorded that [DS] was refusing to bathe [S] because he had not been given a ground floor flat by the housing department. There is also a note on the social work file that on 18/12/00, [DS] asked the Local Authority to take care of [S] because disputes with them were ongoing.
>
> There is substantial evidence that when [S] was living with his father there were ongoing difficulties and disputes in respect of respite care arrangements, including allegations by [DS] about the care provided for [S] at [RM].
>
> Due to [DS's] inability to change, his rigid concepts, belief systems, thinking and behaviour, it is likely that disputes about respite care, care arrangements, the provision of services, and concerns about incidents whilst in respite care would continue.

> It is likely that from time to time, [DS] would use [S] as a vehicle to support his case and all of these are likely to have an impact on [S's] emotional well being and compromise the level of care provide for him.
>
> I believe that [S's] best interests would be served if he remained in accommodation provided by the local authority."

101. He concluded:

> "It is my opinion that [S's] best interests would not be served if he were to live on a full-time basis with his father. There is evidence that [S] has been used as a tool in disputes with the Local Authority and statutory agencies, that he has been a victim within these disputes and that if [DS] either encounters high levels of stress or feels emotionally unwell, [S] is at risk of harm.
>
> It is also my opinion that nothing prevents [S] from being looked after within a family setting. If the court decides that [S] should not return to the care of his father, I would urge the Local Authority to consider the notion that a family could be recruited to look after [S]. I believe that such a placement might serve [S's] long term best interests more appropriately. If such a placement were to be made in the future, I would expect the issue of contact with his father to remain a relevant part of his individual care programme."

102. He set out his reasons for concluding that RM is no longer a satisfactory placement for S and that there are now compelling reasons for S to move on as soon as possible and to a new placement at HC. HC would, in Mr F's opinion, provide a satisfactory home for S, safeguarding and promoting his physical and emotional and developmental needs.

103. I agree entirely with Dr K's and Mr F's professional appraisals of DS and with their prognoses of what the future is likely to hold. They accord entirely with my impressions of DS having not merely read all the materials in the case but having also had the opportunity of hearing him give oral evidence and of watching him both whilst giving evidence and whilst sitting in court throughout the proceedings.

104. DS's case is that, despite the lack of support he has received down the years from the local authority, he has coped admirably with S's care. Whilst some respite care was given, the local authority has never offered a package of daily support to help him cope with S's considerable care requirements. Until his removal last year S had lived with his father throughout his life. He should now be returned to his father's full time care. DS would welcome the local authority's involvement. He would invite the local authority to provide, and the local authority should provide, what Mr Wallwork called

a meaningful package of support to assist him in the day-to-day management and care of S.

105. Understandably Mr Wallwork places considerable reliance upon certain, as it seems to me important, observations of Mr F, the social work expert, in his assessment dated 7 August 2002:

> "Nothing prevents [S] from being looked after within a family setting. If the court decides that [S] should not return to the care of his father, I would urge the Local Authority to consider the notion that a family could be recruited to look after [S]. I believe that such a placement might serve [S's] long term best interests more appropriately."

106. The local authority has searched for but has been unable to find such a placement. Mr Wallwork submits – correctly as it seems to me – that a family placement otherwise than with DS is the remotest of possibilities. So, he submits, the best – in truth the only – prospect of S being able to enjoy the advantages of family life is by placement with his father. Implicit in this, as I understand it, is the further submission that even if DS's future care of S may be less than optimal, may indeed in some respects fall short of the care S would receive if cared for by the local authority, any shortcomings in that respect are sufficiently counter-balanced by the advantages to him of living in a family rather than an institutional setting as to justify his return to DS's care. Otherwise, says Mr Wallwork, S will be deprived of the benign and positive aspects of family life to which Sedley LJ referred in *In re F (Adult)*.

107. So, says Mr Wallwork, S's best interests require a return to the full-time care of his father together with an appropriate package of support from the local authority.

108. Moreover, according to DS, S has indicated to him, by his use of Makaton signs and by his behaviour, that he wishes to return "home".

109. This last point I can deal with shortly. I do not doubt the truthfulness of DS's account of what he has seen or the genuineness of his belief that he is faithfully passing on S's wishes and feelings. I accept also, of course, that S's wishes and feelings, insofar as they are capable of being identified, have to be taken into account and are an important part of the overall picture which I have to evaluate. But I am far from persuaded that the Makaton sign which DS believes is used by S as meaning "home", in the sense of DS's home, is in fact being used by S in that sense. The totality of the evidence I have heard on this topic from all the witnesses leaves me sceptical as to whether S's use of the sign may not equally be referable to his present local authority "home" or indeed to any other building with which he is familiar. Moreover, and in any event, this is a case in which, in all the circumstances, and not least bearing in mind the very low level at which he functions, it would, in my judgment, be very dangerous to attach any very significant weight to any views or wishes S may appear to be expressing.

110. At least equally significant in this context is the fact that, as the local authority reports – and there is much evidence to support it – S seems relaxed, happy and very settled in his current placement at RM, indeed that his presentation has improved markedly since his move there. Ms MT reports S as having appeared passive and under stimulated when she saw him at home with DS. Both Ms MD and Ms AE report him as becoming more confident, more independent and interacting more with everybody since he moved to RM. He has, says Ms AE, "made great strides" and "has a greater sense of himself". She adds that since leaving home he has "shown potential for developing skills which, I believe, he would not have been allowed to do had he still been living at home".

111. Even leaving wholly out of account his father's belief as to S's wishes, Mr Wallwork's case is plainly in many respects powerful and compelling. How does the local authority and how does the Official Solicitor – who fully supports the local authority's case – seek to make good the contrary case?

112. The local authority's case is that:

i) It is not in S's best interests to reside with his father DS at his home because (a) there is a risk of physical and emotional abuse of S should he reside with DS and (b) DS cannot work co-operatively with the local authority to provide an appropriate environment for S that will reduce his social isolation and allow him to develop to his full capacity.

ii) It is S's best interests that he should reside at HC, a specialist nursing home for young adults, but remain at RM until a place at HC is available – which the local authority believes will be quite shortly. Although RM is not suitable as a long-term placement for S, since it is a respite unit and for children rather than young adults, it is nevertheless more suitable for S in the interim than a return to DS's home. HC is a specialist unit, where S can continue the development he has shown since moving to RM and develop to his full potential, have plenty of contact with people of the same age, and take part in a wide variety of activities. (The local authority points out that, whereas DS has refused to visit it, S has visited HC on a number of occasions and clearly likes it there.)

iii) It is in S's best interests that he should continue to have contact with DS, however that contact should be supervised and not take place at DS's home. The frequency of contact should be at the local authority's discretion. It is proposed that it should be weekly.

113. In support of its case the local authority points to a number of factors:

i) DS's treatment of S, both physical and emotional: the episodes of physical ill-treatment which I have already described and the limited opportunities afforded S whilst at home to expand his social contacts and to develop his full potential.

ii) The improvements which have been noted in S since his removal to RM.

iii) The risk – indeed the likelihood – that as S grows and develops DS will face greater challenges and yet more difficulties in managing S's behaviour and that he will resort again to inappropriate methods of control.

iv) DS's personality and his history of difficult and on occasions aggressive behaviour, including an inappropriately high level of conflict with concerned professionals, coupled with his inability to change.

v) The inconsistency of DS's recourse to respite and other local authority services – services that were offered have on occasions been refused when it would have been better for S if they had been accepted.

vi) DS's inability to put S's needs before his own and his use of S on too many occasions, and at the expense of S's welfare, as a 'lever' or 'tool' in his disputes with the local authority.

114. All in all the local authority, supported in this as in other respects by both Mr F and the Official Solicitor, submits that S has a much better chance of developing to his full potential living at HC than continuing to live with DS who, however great his devotion to his son and however much he may have been able to cope whilst S was still only a child, is limited in what he can now offer him as a young adult. In fact, says the local authority, DS has already shown on too many occasions that, with the best will in the world, he simply cannot cope. So long as he lives at home with his father, says Ms Morris, S will not be able to enjoy to the fuller extent which will be possible if he moves to HC, all those things which together conduce to family life and private life in their true sense.

115. The Official Solicitor has made clear in his witness statement that he accepts and supports Mr F's recommendations as to where S should live. His reasoning is in substance the same as the local authority's. Summarised on his behalf by Ms Cains, his case is that it is not in S's best interests to live any longer with DS because of:

i) instances from time to time when the level of pressure on DS has provoked unacceptable behaviour by him towards his son;

ii) evidence that DS has used his son as a lever in pursuing disagreements with statutory authorities;

iii) substantial evidence of ongoing difficulties and disputes about respite care arrangements; and

iv) the likelihood that disputes about respite care, care arrangements, the provision of services and concerns about incidents in respite care would continue due to DS's inability to change and his rigid concepts, belief systems, thinking and behaviour – these factors, and the likelihood of S being used from time to time as a lever, would be likely to impact on his emotional wellbeing and compromise the level of care provided for him.

116. I agree with the local authority and the Official Solicitor. Insofar as their case is based on assertions of fact there is, I am quite satisfied, a mass of evidence – much but by no means all of which I have already mentioned – to support each and every one of their assertions. Insofar as their case is based on an evaluation of the present and concerns for the future, I agree with that evaluation and understand and fully share their concerns.

117. I do not doubt that DS has been motivated throughout by his love of and concern for S. I do not doubt that DS has striven to do what he believes is best for S. His devotion for S now and for so many years is palpable. It demands recognition and humble admiration. But the sad fact is that DS has buckled under the strain. That is not a criticism – many would have buckled long ago. Some of the time he can cope, but he cannot always cope. In the past, perhaps, he was able to cope for much of the time. But the evidence indicates that in recent years he has found it more, and more frequently, difficult to cope. These difficulties will, I believe, increase in future.

118. The fact is that, even making every allowance for all the positive features of the history to which Mr Wallwork has properly drawn my attention (see, for example, paragraphs [66]-[70], [75], [95] and [96] above), that history displays a number of what are on any view, as it seems to me, very concerning features of DS's relationship with S. I have in mind, in particular:

i) the events – going as far back as 1989 – referred to in paragraphs [72(i)], [72(ii)], [76] and [91] above;

ii) the incidents of physical ill-treatment referred to in paragraphs [83] and [86];

iii) the problems at contact referred to in paragraphs [92] - [94]; and

iv) the striking contrast between S as he presented when living at home and as he now presents since he began living at RM – see paragraph [110] above – which is, as it seems to me, clear evidence of the emotional starvation which S, no doubt unwittingly, suffered at home.

119. I accept Dr K's and Mr F's assessments of DS. He is not going to change. Those aspects of his personality identified by Dr K and Mr F – many of which were very obvious as he gave his evidence – must, as it seems to me, impair to a significant

extent his ability to weather the stresses with S and the storms with the local authority which I have no doubt would reoccur were S now to return home.

120. The fact is that DS has on too many occasions in the past used S as a lever in his many disputes with the local authority. Though I am sure this was never his intention, this has on occasions damaged S – see, for example, paragraph [92] above. The picture one derives from the contact records is mixed, and not altogether reassuring as to the relationship between DS and S. Quite apart from the incidents – few and not too serious – of physical ill-treatment it is, unhappily, all too clear that DS's care of his son has been emotionally confining and stultifying. S has not been able at home to develop socially and emotionally as well as he could or, I am satisfied, as well as he has done at RM and will do at HC.

121. DS says that the local authority's plans for S are draconian and disproportionate responses to one singular episode at an unusually stressful period in his (DS's) life. The element of risk in the event of rehabilitation, he submits, is minimal.

122. I do not agree. The proceedings may have been triggered by the events which took place on 23 May 2001 but the local authority's case is not based only on that, nor is it confined to concerns only for S's physical welfare. There *is* a risk to S's future physical well-being if he returns home. That risk on its own is, I suspect, fairly small – though far from trivial – and might be manageable if it were the only factor in play. But it is not. The much greater risk to S is of the avoidable and increasing emotional damage he will continue to suffer if he lives at home, socially isolated and not afforded the full opportunity he deserves to develop his potential. That may not have been as apparent before he was removed in May 2001 as it is now – which may go some way to explaining why there had not previously been any move to take S into care – but it is now, as I am satisfied, all too apparent.

123. I accept that S will suffer in some ways if he stays in institutional accommodation and moves to HC. He will no longer be cared for by DS, his father, who has looked after him all his life. He will no longer be living in his familiar home. He will no longer be living at home in a family – his family – but in an institution. These are significant losses that have to be put on one side of Thorpe LJ's balance sheet. But on the other side are the benefits which, I am satisfied, will accrue to S if I accede to the local authority's plans: the removal of the risk of physical ill-treatment; the enhancement in his emotional well-being; the improvement in his social life and the increased opportunities he will have not merely to develop his full potential but also to increase his social contacts and to engage in a wider range of activities than he would enjoy were he to return home; the greater stability and consistency in his life and in the provision of the various services that he needs. These various benefits are as much a part of the "private life" which article 8 guarantees to S as are the various other factors that I have to bring into the other side of the equation. Also to be brought into account is the fact that S is, as I have said, relaxed, happy and settled at RM, just as he will, I believe, be when he moves to HC.

124. Striking the balance I am satisfied that the sum of the gains to S if I accede to the local authority's plan significantly outweighs the sum of the losses. At the end of the day the question I have to ask is this: What does S's welfare require? Is S's welfare – in *all* its aspects, now and into the future – better served by him living at HC than returning home to live with his father? To that question there is, in my judgment, a clear answer: S's welfare is better served by him moving to HC than returning home to live with his father and by him, in the meantime, continuing to live at RM. As Mr F said in his oral evidence: there is a real risk of further significant harm to S if he goes back to live to his father. "I could not support the package – the package is not supportable … It would need monitoring all the time."

125. There remains the question of contact.

126. DS says that there should be unrestricted and unsupervised contact. I do not agree. There needs to be regular contact. As time passes, and as things settle down, I do not doubt that there can and should be both unsupervised and indeed staying contact. The arrangements for contact need to be flexible and will have to be allowed to develop gradually in the light of experience of S's new living arrangements.

127. Ms Morris has drafted a careful form of order reflecting what, she submits, is appropriate in the light of all the evidence I have heard. I agree with what she proposes. The order sets out both a suitable decision-making framework within which specific contact arrangements can be discussed and also the various factors to which, as it seems to me, the local authority and DS will need to have regard. I propose to make an order in these terms. Both the local authority and DS will also need to bear in mind very much what Mr F has said on the topic in his addendum report dated 22 September 2002.

128. I therefore propose to make an order in the following terms:

> "It is declared that:
>
> (1) S lacks the capacity to decide where he should reside.
>
> (2) S lacks the capacity to decide upon his contacts with others.
>
> (3) It is lawful, being in S's best interests, that he be accommodated by [the local authority] at [RM] until a placement is available for him at [HC] when it will be in his best interests to be accommodated at [HC].
>
> (4) It is lawful, being in S's best interests, that S have contact with [DS] save that it is in S's best interests that such contact should be supervised unless otherwise agreed in writing between [the local authority] and [DS] in accordance with the attached schedule.
>
> It is ordered that:

> 1 there be liberty to apply to any party to restore the matter for hearing on application supported by a witness statement to Munby J and on 7 days written notice to the other parties in the event that contact cannot be agreed between [the local authority] and [DS].
>
> 2 there be liberty to apply to any party generally, the hearing of any such application to be before Munby J if possible.
>
> 3 there be no order for costs save for detailed assessment of the costs of the publicly funded parties."

129. The Schedule will be in the following terms:

> "1 Weekly supervised contact should continue as at present until S moves to, and settles in at HC.
>
> 2 Once S moves to HC contact will begin to take place there rather than at the contact centre. The supervision will therefore have a less formal character.
>
> 3 It is not anticipated at this stage that the frequency of contact will have to be reduced while S settles in at HC, but the local authority may reduce the frequency of contact for a short period if it is believed that it will help S to settle in.
>
> 4 The local authority will keep the possibility of unsupervised contact between DS and S under review. The commencement of such contact will be considered after S has settled in at HC.
>
> 5 In considering whether and when unsupervised contact should commence the local authority will have regard to all the circumstances and in particular
>
> (a) DS's having learned, from a suitably skilled person approved by the local authority, techniques and strategies for managing S's behaviour;
>
> (b) DS having demonstrated his ability to engage fully with S during contact by, for example, not spending time during contact sessions talking to the supervisor about matters such as litigation or his views about S's care or his own health;
>
> (c) DS having demonstrated his commitment to S by not cancelling contact sessions late.
>
> (d) DS having demonstrated his ability to be co-operative about arrangements with S by, for example, if S could go on a outing on a contact day, accompanying S on the outing, or agreeing to contact on a different day.

6 Any unsupervised contact would be phased in gradually. It would initially take the form of a short time with DS at HC together with a short trip out and return, and progress from there.

7 Any unsupervised contact would take place only if there was a written agreement between DS and the local authority which included the following matters:

(a) no contact between S and [DS's brother];

(b) the adoption and consistent use of the behaviour management techniques learned as referred to above;

(c) the location and timing of contact;

(d) the social worker in the case meeting any girlfriend or partner or other person with whom DS proposed to spend time during contact.

8 If shorter periods of unsupervised contact went well for S, and DS complied with the terms of the written agreement, consideration would be given to periods of staying contact. Any such period of staying contact would initially be overnight for one night.

9 Review arrangements

(1) The local authority expects that S will have settled at HC within 3 months of having moved there. It will carry out a full review of S's case towards the end of that 3 month period to include a review of the arrangements for contact. At that review the local authority will consider, if it has not done so before, increasing contact between S and DS at HC, and the possibility of progress to unsupervised contact.

(2) Thereafter the whole of S's care will be reviewed formally annually, which will include a review of contact. However the arrangements for contact will be reviewed at least every three months until arrangements for contact that are stable and are acceptable to all parties have been arrived at.

(3) The local authority will have particular regard to the views of DS in deciding what contact would be in S's best interests."