Neutral Citation Number: [2023] EWHC 347 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Date: 01/02/2023

Before:

SIR ANDREW MCFARLANE
PRESIDENT OF THE FAMILY DIVISION

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Re S (Inherent Jurisdiction: Transgender Surgery Abroad)

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Mr Andrew Norton K.C. and Junior Counsel (instructed by **A Firm of Solicitors)**
for **Applicant local authority**
Mr Richard Jones & Ms Melissa Elsworth (instructed by **Payne Hicks Beach LLP)**
for **1st Respondent mother**
Ms Sharon Segal & Ms Niamh Daly (instructed by **Goodman Ray)**
for **2nd Respondent father**
Ms Deirdre Fottrell K.C. and Junior Counsel (instructed by **A Firm of Solicitors)** for **3rd Respondent – 'Sam'**

Hearing dates: 30th , 31st January and 1st February 2023

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Approved Judgment

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SIR ANDREW MCFARLANE.P

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

Sir Andrew McFarlane. P :

1. By an application made on 20 July 2022 a local authority applied for leave to invoke the inherent jurisdiction of the High Court in order to prevent a young person, Sam, who was then aged 15 years, from travelling to Country X in order to undergo surgery, namely a double mastectomy, there. Sam [not his real name] and his parents ['mother' and 'father'] were all born in, and remain citizens of, X, however the family have lived in England for many years and have the right to remain here. Sam, who is now aged 16, was assigned to the female gender at birth, but has lived socially as a boy for some years. He does not regard himself as a trans-sexual and has been referred to throughout these proceedings as 'he/him'.

2. The ability of a local authority to make an application under the inherent jurisdiction is strictly prescribed by Children Act 1989, s 100:

> **100.— Restrictions on use of wardship jurisdiction.**
>
> (1) Section 7 of the Family Law Reform Act 1969 (which gives the High Court power to place a ward of court in the care, or under the supervision, of a local authority) shall cease to have effect.
>
> (2) No court shall exercise the High Court's inherent jurisdiction with respect to children—
>
> > (a) so as to require a child to be placed in the care, or put under the supervision, of a local authority;
> > (b) so as to require a child to be accommodated by or on behalf of a local authority;
> > (c) so as to make a child who is the subject of a care order a ward of court; or
> > (d) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.
>
> (3) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.

> (4) The court may only grant leave if it is satisfied that—
>
> (a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and
>
> (b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.
>
> (5) This subsection applies to any order—
>
> (a) made otherwise than in the exercise of the court's inherent jurisdiction; and
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> (b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted).

3. The local authority application was heard before Judge A on 22 July 2022 as a matter of urgency as Sam and his parents were proposing to travel to X on 24 July so that Sam could undergo the operation. After a hearing attended by counsel for the local authority, a solicitor for Sam, a duty children's guardian, a lawyer from CAFCASS Legal and the parents in person, Judge A granted permission to the local authority to invoke the inherent jurisdiction. The judge ordered that Sam was not to undergo any gender reassignment surgery without the permission of the court and he was not to leave, or be removed from, the jurisdiction for the purpose of undergoing any surgery until further order. Detailed directions were given for the further progress of the proceedings.

4. After that first, short-notice, hearing in July 2022, the local authority has continued to prosecute its application for an order preventing Sam from travelling to X for surgery until he reaches the age of 18. The case was listed for a five day final hearing before me this week. On the first morning of the hearing the local authority, which only 5 days earlier had filed a 30 page Opening Statement presenting its case in strong terms, applied to withdraw the application on the basis that, on the evidence before the court, the authority could not discharge the burden of proving its case.

5. The local authority's withdrawal application is not opposed by counsel acting for the parents and for Sam. Indeed, the authority's change in stance has been greeted by the family with very considerable relief. There is no opposition from the children's guardian who, as Sam is competent to instruct his own legal team, acts alone. Those representing the family members have, however, made costs applications against the local authority. In the course of full submissions made by each represented party, some points of general importance, over and above the costs issue and with possible relevance to other cases, have been raised. The dual purpose of this judgment is therefore, firstly, to record and report these more general points and, secondly, to determine the issue of costs.

6. In order to establish the context, it is necessary to give some short detail of the proceedings. This will be undertaken in a manner that maximises the cloak of anonymity that must surround Sam and his parents. Sam's real identity and any of the granular facts in this case are of no relevance to the outside world. It has been 'excruciating' [his leading counsel's word] for Sam, who is a very private individual, to have his most personal details scrutinised by some 30 or more professionals over the past eight months. I will not therefore identify the local authority, any of the professionals (save for some counsel) or either of the two legal experts from Country X.

7. The final caveat to stress is that, as the application is being withdrawn, the court has not had to determine any of the substantive issues in the case. When, as I will, I may comment on some of the matters of general importance that have been raised, my words are no more than observations. It may be for courts in other cases to take up any points

of relevance and to determine them in the course of contested litigation and after full argument.

The progress of the proceedings

8. The local authority's application was supported at the first urgent hearing before Judge A by a statement from the allocated social worker. The statement is short, but contains a good deal of detail about Sam drawn from meetings with him and his parents. In order to trigger access to the inherent jurisdiction, a local authority must give grounds for reasonable belief that, if that access is denied, there are reasonable grounds for believing that the child is likely to suffer significant harm. On this topic the social work statement simply states that 'the local authority is extremely worried about [Sam's] physical and emotional welfare and wellbeing. This is on the basis that the proposed surgery which is due to take place in [Country X] on 26 July 2022 is unlawful and is likely to cause [Sam] serious physical and emotional harm.' Concern was expressed that the NHS had not been engaged and there were no plans for Sam's aftercare back in this country.

9. With remarkable speed, the father was able to identify an expert in the law of Country X who was also experienced in cases such as Sam's where clinicians had been prepared to undertake 'top surgery' on young people under the age of 18. A report from that expert, Mr T [random letter chosen], dated 27 July was produced, translated and filed with the court. In that report, Mr T described that undertaking top surgery in such circumstances was not expressly prohibited by the law of Country X and that the practice was seemingly tolerated in that surgery of this type was undertaken in cases of young people who were in the process of gender transition or confirmation.

10. At a further hearing on 29 July, Judge A, having indicated that the court was considering making an interim care order, made an order under CA 1989, s 37 directing the local authority to file a report on the question of whether the authority intended to apply for a care order.

11. The s 37 report, which is undated but appears to have been completed in August 2022, contains a detailed summary of the accounts given to the social worker by Sam and his parents of matters leading up to the decision to undergo surgery. The report gives the following accounts of the local authority's position:

> 'The local authority does not intend to apply for a care or supervision order at this time. The risk of significant harm that we were concerned about has currently been substantially reduced by our involvement, namely through the existing court order to prevent [Sam] having the operation. Currently the parents are engaging with us and have agreed to a Child in Need process which is positive. It is considered that applying for any further orders at this current time is unnecessary and to do [so] could be oppressive. The local authority does not feel that it is in [Sam's] best interests at this time and could cause more distress for [Sam] and his family.'

12. The description of the local authority position in the s 37 report is striking. CA 1989, s 100(4)(a) makes plain that access to the inherent jurisdiction is only available if the result that the local authority wishes to achieve cannot be gained by applying for an order that the authority is otherwise entitled to apply for under the statutory scheme. This is a basic tenet of the CA 1989 and should be well known to all lawyers who practice in this field. When measured against s 100(4), the s 37 report is legally incoherent by, firstly, contemplating that the local authority could apply for a care order but, for the time being, has decided not to do so, and, secondly, by relying upon the existing inherent jurisdiction order as obviating the need to apply for a care order. The latter point distorts the legal structure by turning it through 180 degrees. If the remedy

that a local authority seeks can be obtained by application for a order that is entitled to apply for then, by virtue of s 100(4)+(5), that is the procedural course that it must follow and the High Court will be barred from granting leave to apply for an order under the inherent jurisdiction. The fact, as this local authority has indicated, that the authority would prefer not to apply for a care order is of no relevance.

13. Can I make it plain that, by criticising the legal approach described in the s 37 report, I do not seek to criticise its author, who was a newly qualified social worker. My criticism is of the corporation, rather than any individual. Here the authority was embarked upon an unusual legal intervention, supported by solicitors and counsel. The responsibility of ensuring that the basic legal building blocks upon which the application was based were legally sound was a corporate one, and there was a duty to ensure that this was correctly set out within the s 37 process.

14. At a hearing before Judge A in October 2022 the parents were each represented by a full legal team, of two counsel and solicitors, all acting pro-bono due to the absence of Legal Aid for parents in inherent jurisdiction proceedings, save for the most impecunious parents, because of the application of a means test as well as a merits test. The local authority and Sam were also represented by a full team led, in each case, by leading counsel. At that hearing, Judge A heard an application by the M, F and Sam that the proceedings should be dismissed. By that time the court had received a substantial body of medical records tracking the various consultations and other interventions that the family had sought in the preceding months and years. In a change from the case that it had hitherto presented, the local authority moved its focus from the potential for 'serious harm to [Sam's] physical and emotional welfare and wellbeing' to the question of whether full and valid consent to the planned surgery had been given

by Sam and/or his parents. Having considered the evidence that was by then available, Judge A was persuaded that there remained significant gaps within that material and further disclosure or investigation was required.

15. On the second limb of the local authority case, namely that the planned surgery was probably unlawful in Country X, the court considered the report from Mr T. The judge, however, concluded that the question of legality remained ambiguous and unclear. She held that the instruction of an independent expert in the law of X was required and permission was therefore given for the instruction of Professor U [random letter].

16. On that basis, the M, F and Sam's application was refused and directions were given for a final hearing in December 2022. In the event the December hearing had to be adjourned and the matter was relisted before me this week.

The local authority's pre-hearing case

17. In the Opening Note prepared by leading counsel for the local authority, and dated 25 January [5 days before the hearing], the social services case is presented on the basis that there were two primary issues for determination by the court: (i) legality of the operation in Country X and (ii) the validity of consent. The bulk of the 30 page document is devoted to a detailed analysis of these two issues, to the exclusion of other factors which, on a proper approach to an application under CA 1989, s 100, one would have anticipated would be of prime importance. For example:

    a. The word 'harm' only appears on six occasions in this substantial document. Two of these references relate to the expert legal opinion and not to Sam. The remaining four references are to there being a balance of harm between, on the

one hand, allowing the surgery to proceed and, on the other, prohibiting it until age 18. The local authority document does not refer at any stage to there being a likelihood of Sam suffering significant harm.

b. In like manner, the word 'welfare' only appears on six occasions in the local authority document. Five of those relate to a description of the case-law or the approach to be adopted in law, and not directly to Sam. The sixth reference is at the commencement of a short concluding passage which seeks to balance the harm arising if the court were to continue its prohibition on surgery before age 18, against the harm of allowing surgery to take place.

c. There is no reference to the need to afford paramount consideration to Sam's welfare. No reference to the welfare checklist in CA 1989, s 1(3). Indeed there is no reference at all to the CA 1989 and in particular s 100.

18. The local authority case, as presented in this Opening Note, is in strong and uncompromising terms.

19. Over the weekend prior to the first day of the hearing, at my request, my clerk invited the parties to consider the following issues:

a. The basis upon which leave was granted to the local authority to make an application under CA 1989, s 100;
b. Whether, in the circumstances that are now known, CA 1989, s 100(4) is satisfied;
c. Whether the application made by the local authority engages s 100(2)(d).

The local authority application to withdraw

20. On the first morning of the final hearing, the court was informed that the local authority had decided not to proceed and would be asking the court's permission to withdraw its application. The court's permission is required under Family Procedure Rules 2010, r 29.4(2)

21. The most recent authority is *GC v A County Council and Others* [2020] EWCA Civ 848, [2020] 2 FLR 1151 in which the court described the approach to be taken and identified two distinct categories of application to withdraw. It is only necessary to deal with the first category as it is agreed by all parties that this is a category one case. About these cases the Court of Appeal said: 'In the first, [on an application for a care order] the local authority will be unable to satisfy the threshold criteria for making a care or supervision order under s 31(2) of the CA 1989. In such cases, the application must succeed.'

22. Leading counsel for the local authority, who has not appeared at any earlier hearings and who had taken on the case at short notice when the KC who had hitherto been instructed was unable to attend, gave the court a detailed explanation for the decision to apply for permission to withdraw their application. He submitted firmly that the application had been properly brought when it was issued in July 2022 and that the local authority had properly resisted the application for the case to be dismissed before Judge A in October. The position had now, however, been reached when counsel reported that the local authority recognised that the balance of the evidence indicated that the application should not be pursued and should be withdrawn. The local authority had

heeded the request made by the other parties that it should stand back and reflect on the evidence. Counsel drew attention to the fact that a good deal of detailed evidence had been filed during the past two weeks, including clarifying material from the two experts in the law of Country X, full statements from Sam and his parents and the assessment of the children's guardian. The final expert material and family statements had not been received until some 10 days before the hearing (including weekends), and the guardian's report only three working days before the hearing. This recent material had, said counsel, crystallised the local authority's approach to the twin issues of (a) legality and (b) consent.

23. Having reviewed all of the available material, the local authority had concluded that it could not now discharge the burden that is upon it to establish its case on either legality or consent. The application to withdraw was therefore being made under the first limb, namely that the authority was unable to prove its case.

24. With respect to legality, the local authority had concluded that it could not establish before this court that the procedure is prohibited in Country X. The evidence, at its highest, it was accepted, showed that it is not specifically prohibited and, in practice, does take place.

25. The issue of consent had plainly exercised the local authority a good deal. Initially, and for many months after the start of proceedings, the evidence suggested that the relevant medical consultations may have been short, but, as evidence had come in recently from Sam and his parents, and from the children's guardian, the gaps that had previously been identified had been filled and this had allowed the local authority to understand the nature of the consents that have been given. Having reflected on the issue, the local

authority had therefore concluded that it could not meet the burden of proving that Sam's and his parents' consents were inadequate.

26. Leading counsel urged this court to be cautious before being critical of the local authority. He placed reliance upon the full judgment given by Judge A in October who recorded that she had granted leave under s 100 on the basis that Sam, age 15, was about to be taken to Country X for elective surgery, which had potentially lifelong consequences, and which would not be undertaken in the UK on one so young. In July the information before the court, both as to the medical intervention and as to the law in the other country, was sparse. Whilst there was, by October, more information available, Judge A had concluded that proceedings under the inherent jurisdiction should continue to a final hearing. That outcome had been supported by the guardian.

Position of the other parties

27. Although the unexpected decision by the local authority to seek to withdraw its application was undoubtedly welcomed by Sam and his parents, their counsel wished to take time to consider their position and make a considered response. The case was therefore adjourned overnight and, on the second day, the court received written and oral submissions on behalf of Sam and both parents. There was, understandably, a unity of interest and a degree of crossover in these submissions, each of which was very critical of the local authority and sought orders for costs. I mean no disrespect to counsel by amalgamating the central points in the following summary:

    i. The recently received further expert and family evidence, together with the report of the guardian, did not, in reality, contain anything 'new'. The expert position was simply a re-statement of that which

had been available earlier. A chronology drawn from the previously available material prepared by the father's team was not new and will have been well known to the local authority, which had prepared its own lengthy chronology. The family evidence had been directed towards matters to do with the court process rather than the merits and the guardian's record of Sam's considered position was no more than a further presentation of his consistent position and was on all-fours with that given in the social worker's statement at the beginning of the case;

ii. At the very latest, the local authority should have reviewed its position and come to the decision to withdraw in November, at the time of preparation for the aborted final hearing in December, once the further material directed by Judge A had been filed and such 'gaps' as there may have been in the evidence had been filled;

iii. The reality is that it is the court's email on the eve of the hearing inviting that local authority to consider s 100 which has led to the application to withdraw;

iv. The making of this application and its prosecution over a period of in excess of 6 months has caused harm to Sam and to each of his parents. The impact on him has been 'excruciating' and has, in particular, detrimentally affected his schooling. The father's description of the effect that the local authority's intervention has had on Sam is one of devastation. The parents have described the court process as very frightening. The mother has been particularly focussed on the possibility that she might be sent to prison if court orders are

disobeyed. Both parents are now on medication to help them cope with the consequences of the litigation. The impact of these proceedings on this small family is likely to last into the long-term;

v. The local authority's focus on the validity of consent had not been a feature of its case in the early months and only appeared for the first time in October before becoming, as it did, one of the twin pillars of its case. The issue of consent was misconceived and ignored the clear evidence of the high level of Sam's and his parents' understanding that was recorded by the social worker in her first statement;

vi. The local authority has failed to have regard to the need to avoid delay;

vii. The provisions of CA 1989, s 100 should remain under review by the court throughout any proceedings for which leave to apply under the inherent jurisdiction has been given. The basic principles of CA 1989, s 1 apply in every case but have been ignored by the local authority in the present proceedings from the time of the first social work statement through to the preparation of its Opening Note;

viii. On the question of costs, the test is whether the local authority has behaved unreasonably;

ix. It was 'unreasonable' for the local authority not to review the decision to proceed at an earlier stage and it was particularly unreasonable only to do so on the morning of the first day of the final hearing.

28. The children's guardian does not oppose the withdrawal application.

29. In response to the submissions of the other parties, and in particular with respect to the costs applications, leading counsel for the local authority stressed that the test is one of

reasonableness. He prayed in aid the fact that on two occasions Judge A had held that the gateway in CA 1989, s 100(4) should be opened to permit the local authority to bring and then to proceed with an application under the inherent jurisdiction and had subsequently conducted a number of hearings. That important factor, and the fact that the application was at that time supported by the guardian indicated the reasonableness of the local authority position.

30. A second factor in support of the reasonableness of the local authority position is that in October Judge A plainly considered that the instruction of an expert in the foreign law was 'necessary'. Counsel was, however, unable to say anything in response to the court questioning why, if this was necessary and a central issue had always been legality, the local authority had not made an application to instruct an expert at any stage between July and October 2022.

31. Counsel pointed to the fact that a statement of the social worker made in November 2022 does contain a section headed 'welfare analysis'.

32. In response to an invitation to focus on why the local authority had not conducted the evaluation that has now taken place back in December prior to the planned final hearing, counsel submitted that the authority was entitled to ask further questions of the experts and this was sanctioned by the judge.

33. Save for agreeing, without argument, to reimburse the parents for the costs that they had incurred in originally instructing Mr T, the local authority strenuously resisted the applications for costs.

Applications by local authorities under CA 1989, s 100

34. The court has helpfully been referred to the judgment of Lady Black in *Re T* [2021] UKSC 35 which focusses on CA 1989, s 100 at paragraphs 118 and 119:

> 'Having started with prohibiting the use of the inherent jurisdiction to place the child in local authority care or under their supervision, it then prevents the court using the inherent jurisdiction to order the accommodation of a child by a local authority, and, of course, prevents it being used to put the local authority in a position to determine any question in connection with parental responsibility. This seems to me to be entirely consistent with the aim being to confine matters to the statutory scheme in Part IV of the Children Act 1989, the thinking being that a local authority needing the power to determine any question in connection with parental responsibility must seek it through the medium of a care order.
> 'It must also be borne in mind that Parliament made it very clear that it was not intended that the inherent jurisdiction should be entirely unavailable to local authorities, and that it appreciated that there could be cases in which it would be necessary to have recourse to it *because there was reason to believe that the child would otherwise be likely to suffer significant harm*. This is evident from sections 100(3) to (5). Like the express prohibitions in sections 100(1) and (2), the more general conditions imposed by subsections (3) to (5) are shaped to confine the local authority to orders otherwise available to them but building in a safety net where those other orders would not achieve the required result in a risky situation.' [emphasis added]

35. Before making the following brief observations as to the approach to be taken when a local authority has applied for leave to access the inherent jurisdiction for the protection of a child, I should again stress that what follows does not arise from contested proceedings and therefore should be seen as no more than informed commentary rather than any more authoritative statement of law or practice. It is, however, to be hoped that what is said here may be a helpful guide in future cases.

    a. Although the only direct reference to a need to evaluate 'reasonable grounds to believe that the child is likely to suffer significant harm' occurs in s 100(4) with respect to the initial stage when the court is considering whether to grant leave to apply under the inherent jurisdiction, the need to continue to have regard to whether there is a likelihood of significant harm must surely continue throughout the substantive proceedings and be, as Lady Black describes, a

requisite factor in determining whether to exercise that jurisdiction by granting the order sought by the local authority at a final hearing;

b. To hold otherwise would be:

    i. at odds with the central policy and structure of Part 4 of the 1989 Act;

    ii. allow a local authority to access the jurisdiction at a short urgent hearing on the basis of such 'reasonable grounds' where, at a later hearing, when more information is available, it is clear that no such reasonable grounds exist;

c. there is no indication that the test of 'likelihood of significant harm' in s 100 should be approached in a manner that differs in any way from the approach to the threshold criteria for future harm in s 31. In particular, whilst the court may undertake an analysis of the balance of harm as between two possible courses of action, the jurisdiction should only be exercised in favour of imposing a restriction on action that would otherwise be permitted where a likelihood of significant harm to the child is proved;

d. although issues of legality, consent and other important matters may be relevant to a court's ultimate decision, the child's welfare remains the paramount consideration under the inherent jurisdiction, just as it is under the 1989 Act itself. In common with all similar welfare decisions, what is required is a comprehensive and holistic review of all of the relevant factors before determining which outcome best meets the child's global welfare needs. In undertaking this task reference to the CA 1989, s 1(3) welfare checklist is likely to be helpful, albeit that it is not required by statute.

The withdrawal application

36. The local authority's request for leave to withdraw its application, and therefore bring these proceedings to a close, where it is accepted that it is not possible to prove the case, is in the first category of such cases. It is not opposed and must succeed. Little need therefore be said at this stage by the court other than to grant leave and order that any continuing orders in these proceedings should be discharged. In doing so, however, I wish expressly to endorse the stance taken by the local authority, albeit on the first morning of the hearing, in making such a radical change of course. The decision taken by Sam and his parents in favour of surgery was a complex one involving consideration of a range of sophisticated factors. In the circumstances of this case I would have needed a good deal of persuasion before holding that the plan for Sam to go abroad for chest surgery was likely to cause him significant harm, or that to do so was not in his best interests. Further, as is now accepted by the local authority, in a case of two parents who are conspicuously well intentioned, law abiding, loving and child focussed, and in a case where Sam is plainly an intelligent and thoughtful individual who is so well settled in his life as a young man, the prospect of the court concluding that there was some defect in their approach to consent was remote.

Costs

37. Finally, I turn to the applications for costs. They are put on a different basis as between the parents and Sam. The parents representation by experienced solicitors and two counsel has been undertaken on an entirely pro-bono basis. This professionally and personally generous activity has been of benefit both to the parents and to the overall process. Those involved are entitled to respect and gratitude for all that they have done over many hours and days during these past eight months. The fact that representation has been pro-bono does not prevent an application for costs being made, but the

recipient of any costs award will be to the relevant charity, in this case the Access to Justice Foundation [Legal Services Act 2007, s 194]. The judgment of the Supreme Court in *Re S (A Child)* [2015] UKSC 20 at paragraph 34 describes the approach to be taken, which is that the usual approach to costs in children's cases should apply. The relevant provisions are in Civil Procedure Rules, r 44.2(5), supported by the Supreme Court decision in *Re T* [2012] UKSC 36. It is agreed between counsel before the court that costs will only be awardable in the circumstances of this case if the court concludes that the local authority has acted unreasonably in its conduct of the proceedings.

38. Counsel for each parent limits their claim to the costs of this final hearing.

39. Counsel for Sam makes a conventional application for costs on behalf of her legally aided client. The test is the same, namely unreasonableness.

40. Having rehearsed the submissions on both sides, my conclusion on the question of unreasonableness can be stated shortly.

41. As will be apparent from observations that I have made throughout this judgment, I am afraid that the criticisms levied at the local authority's conduct of these proceedings are, in general, well made. It is a matter of particular concern that from the start of the case, and throughout, the authority's approach has lacked the necessary focus on the twin lode-stars of 'significant harm' and 'welfare'. Whilst cause for concern and a lack of information might have been responsible for an understandable lack of clarity and focus at the start of the process, by November, when the gaps in the evidence that Judge A had accepted existed had largely been filled, there is no indication that the local authority at that stage undertook the exercise that was apparently undertaken on Monday morning of this week. On the contrary, by then the local authority case had

seemingly lost any real connection with 'significant harm' and 'welfare', through its misplaced fixation on two relevant, but subordinate, factors in the case, namely 'consent' and 'legality'. The Opening Note filed for this hearing is proof enough that this is so, with only passing reference to significant harm and to welfare.

42. To proceed in the manner that I have described, when, as is now conceded, there is no evidence to establish a likelihood of significant harm or that to undertake the operation as planned is contrary to Sam's welfare, was unreasonable. For the reasons given by the other parties, I do not regard the content of the recently filed material from the experts and family to have significantly changed the landscape in this regard. It is plain that, by December, by focussing on consent and legality, to the exclusion of the required factors of significant harm and welfare, the local authority proceeded with the application when they should, as their action on Monday demonstrates, have pulled out.

43. That conclusion is sufficient to justify a costs order for all three claiming parties with respect to this final hearing. I merely go on to record that the other criticisms made, as I have listed them under paragraph 27 are, in my view, made out and go to support the general finding of unreasonableness with respect to this final stage of the court process.