Case No: B4/2011/2308

Neutral Citation Number: [2012] EWCA Civ 79
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
(THE HONOURABLE MRS JUSTICE THEIS)
COP 1191258T

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2012

Before :

LORD JUSTICE THORPE
LADY JUSTICE BLACK
and
LORD JUSTICE DAVIS

K — **Appellant**

- and -

LBX (1) — **Respondents**

- and -
L
By his litigation friend the Official Solicitor (2)
- and -
M (3)

Nick Armstrong (instructed by **Creighton & Partners**) for the **Appellant**
Hilton Harrop-Griffiths (instructed by **LBX Legal Department**) for R**espondent 1**
Victoria Butler-Cole (instructed by Steel & Shamash) for R**espondent 2**
Respondent 3 did not appear and was unrepresented

Hearing date: 19th December 2011

Judgment

LORD JUSTICE THORPE:

1. This appeal raises a short point of law arising out of the judgment of Theis J given on 20 July 2011. Permission to appeal was given by McFarlane LJ on 6 October 2011. He observed:-

> "the point of law raised in the Grounds of Appeal arises from an apparent conflict between the line of High Court/COP decisions which are at oDs with a developing line of cases at the same level, of which this is one".

2. The point is whether or not ECHR Art 8 respect for family life requires the court in determining issues under the inherent jurisdiction or the Mental Capacity Act 2005 to afford a priority to placement of an incapacitated adult in their family or whether family life is simply one of "all the relevant circumstances" which under MCA 2005 S4 the court must consider.

3. For present purposes it is not necessary to set out the background facts in any great detail. A full exposition can be found in the judgment of Theis J below ([2011] EWHC 2419 (Fam)) and in a previous judgment of Baker J of 31st March 2010 relating to L ([2010] EWHC 2422 (Cop)).

4. In short, the position was this. L was born on 21 December 1983, one of two sons of K. The other son (D) is 23 years old. L's mother disappeared when he was a baby. For a period of time he was looked after by his paternal aunt and other members of his paternal family initially in Trinidad; from around 1996 he was looked after by his aunt in the UK although having regular contact with K and D who had by then also moved to the UK. He attended a special needs school for a time. From around 2001 he lived in the UK with his father and brother: save that for a period of around five months in 2006-7 he was removed on the initiative of the local authority, following an alleged incident of violence. K has since expressed concern about the care which L received whilst he was in the care of the local authority for that time, particularly with regard to diet and hygiene. At all events L then returned to live with his father and brother in early 2007 and has been with them since. As found, L's family life at home with K and D was of significant benefit to him: the emotional attachments between the three were strong; and the quality of care he received was high. K has himself been fearful of any further separation from his son.

5. L is now aged 28. K has acknowledged that there is a requirement for a long term plan to move L into local authority arranged care, with a view to L's gaining greater independence of life. K has, however, been concerned that this should not proceed too quickly.

6. L has, as recorded by the judge, a diagnosis of mild mental retardation. His IQ has been assessed at 59.

7. There have been protracted proceedings relating to L, initially started by his aunt who had been particularly concerned about his return to his father's care in 2007. Numerous reports over the years have been obtained and there have been many reviews and court hearings. Amongst other things, concern had been expressed that L

was in an environment in which he could not articulate his own wishes, as opposed to what he perceived to be the wishes of his father.

8. During 2009 it was reported that L had progressed. One suggestion was that residential accommodation be identified for him: albeit it was reported that he remained happy living with K and D. The possibility of supported living was thereafter encouraged by the local authority. At the hearing before Baker J, the judge concluded that the balance of evidence favoured L remaining with his father (a position the aunt had strongly opposed): but Baker J went on to say that he "fully endorsed" the plan being put forward by the local authority and supported by other professionals – and, indeed, K himself at that time – that L should move to independent living if that could be achieved.

9. When the matter eventually came before Theis J, the main issue was whether it was in L's best interests to move to supported living accommodation on a trial basis. By this time a facility called the J placement had been identified. This was about 8 minutes by bus from the family home. It involves supported accommodation with staff on hand day and night. A key worker is available. It was proposed that L live in a flat there, with one other person. The judgment below sets out in further detail what the J Placement would provide L. Amongst other things, he would be supported with managing his accommodation and tenancy, paying bills, shopping, day to day routines, food preparation and so on. Support would also be aimed at helping him access new activities and employment and to manage relationships and establish day-to-day routines. K initially did not oppose such a move in principle; but he expressed a concern that such a move, even on a trial basis, was too soon. K also had concerns about contact. Ultimately, he objected to the proposed trial move: he thought that L was "being pressed too hard at the moment".

10. In the result, after a lengthy review of the evidence and arguments, Theis J stated that she came to the "clear conclusion" that L's best interests were met by the court authorising a trial period at the J placement.

11. Mr Armstrong, who has argued the appellant's case forcefully and skilfully directs his attack on a single sentence in paragraph 103 of the judgment to this effect:-

> "in my judgment, whilst the court must factor into the balancing exercise it has to undertake, the family life that L clearly has with K and his brother that should not be the starting point as submitted by Mr Armstrong."

12. Indeed Mr Armstrong stated that if that sentence had not appeared within the judgment he would not have appealed it. He accepts that the judge's discretionary conclusion was plainly within the generous ambit of her discretion.

13. The judge had identified the issues to be determined at the hearing before her as follows:-

> "(i) whether it is in L's best interest to move to supported living accommodation on a trial basis".

14. The judge's conclusion on that issue was that there should indeed be a limited trial, the outcome of which is to be reviewed at a hearing before her on 16th-17th February 2012. All the above shows that the question for our decision falls within a very narrow compass.

15. The relevant statutory provisions are contained in the Mental Capacity Act 2005. Section 1 establishes the principles. I draw attention to subsection(5):-

> "An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests."

16. There is no dispute that L lacks capacity within the definition of section 2.

17. In determining L's best interests the judge is directed by the checklist in section 4. Within that section I emphasise subsection(4):-

> "(4) he must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him."

18. The other relevant statutory provision is the Human Rights Act 1998 importing the ECHR. For the purposes of this appeal we are concerned only with Article 8: right to respect for private and family life. This provision crosses the borders of a number of specialisations within our civil law. All of us in this court are very familiar with the application of Article 8 (2):-

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

19. These words give rise to the familiar test of necessity and proportionality.

20. Mr Armstrong submits that the judge must not approach the section for best interests' evaluation until he has concluded that what is proposed would not amount to a violation of the incapacitated person's right to family life. Particularly is this so when it is demonstrated that the incapacitated person is enjoying an extant right to family life. By contrast, in the present case, he submitted the right to private life is only a future right and an extremely speculative one. Any family arrangement that is working should be left well alone, absent evidence of harm.

21. In support of these submissions Mr Armstrong first refers to the recent decision of *X and Y v Croatia* [2011] ECHR 5193/09. There he emphasised the court's judgment that divesting a person of legal capacity amounts to a serious interference with that person's private life.

22. More relevant to Mr Armstrong's submission is the decision of Munby J in the case of *re S* [2003] 1FLR 292. In paragraph 47 Munby J emphasised the diversity of family life in contemporary society. He then continued:-

> "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 Aylemerton 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.
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> 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 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."

23. Mr Armstrong submits that in this decision Munby J established a principle that there was to be no interference in the family life of an incapacitated person unless it could

be established that the court had taken as its starting point the careful application of the safeguard of Article 8.

24. Mr Armstrong submits that that principle has been applied in seven subsequent authorities of which he briefly cited *re MM* [2007] EWHC 2003(Fam), *re E*[2008] 1FLR 978, *LLBC v TG* [2009] 1FLR 414, *re SK* [2008] 2FLR 720, *re A* [2010] EWHC 978 (Fam) and *Hillingdon LBC v Neary* [2011] EWHC 1377.

25. In the above stream of authorities he particularly emphasised the words of Munby J in *MM* at paragraph 117:-

> "At the end of the day, the simple point, surely, is this: the quality of public care must be at least as good as that from which the child or vulnerable adult has been rescued. Indeed that sets the requirement too low. If the state is to justify removing children from their parents or vulnerable adults from their relatives, partners, friends or carers it can only be on the basis that the State is going to provide a better quality of care than that which they have hitherto been receiving: see *re F* [2002] 1 FLR 217 at para (43)."

26. He also emphasises paragraph 24 of the judgment of Peter Jackson J in the case of *Hillingdon LBC v Neary* where, having referred to Article 8, Peter Jackson J continued:-

> "The burden is always on the State to show than an incapacitated person's welfare cannot be sustained by living with and being looked after by his or her family, with or without outside support."

27. Mr Armstrong submits that in the present case Theis J erred in citing with approval the following passage from the judgment of Roderic Wood J in the unreported case of *LS*. The passage appears at the top of page 9 as follows:-

> "It does seem to me, with the greatest of respect to Munby J, that I should record that in my more recent experience of such cases it is very much the approach when dealing with incapacitated adults that the medical, educational and social authorities do their very best to nurture and facilitate any skills which the incapacitated adult may have to help them in moving, where possible, towards a greater degree of independence in the way they live their lives. Thus whilst in many cases the family may be the providers of care and nurture for such adults, there seems to me to be a philosophical and practical shift towards ensuring as greater degree of independence in living arrangements as is possible."

28. This passage is supported by Ms Butler-Cole for the Official Solicitor in paragraph 21 of her skeleton when she says:-

> "There is no 'starting point' or 'normal assumption' within current social care policy that learning disabled adults are better off placed with their families. The starting point, if there is one, is such that adults should be assisted to have the greatest control over their lives consistent with their disability, and to have the same opportunities as anyone else. This includes the opportunity to live independently as an adult rather than with one's family and the opportunity to live with one's family with appropriate support, according to the adult's wishes."

29. Mr Armstrong naturally criticises both the passage in the judgment of Roderic Wood J and the passage in the Official Solicitor's skeleton.

30. In my judgment it is unnecessary to enter any investigation of social care policy or whether there have been philosophical and practical shifts. Simply stated the principle for which Mr Armstrong contends is not made good by the authorities which he cites and is in any event altogether too crude. In practice, as in the present case, there may well be a conflict between the incapacitated person's right to family life and that person's right to private life. Nor is a tentative move towards supported accommodation necessarily a termination of, or a significant interference with, the incapacitated adult's family life. As in this case the family has every opportunity to be an essential contributor to the trial.

31. Whether in cases involving children or cases involving vulnerable adults principles and generalisation can rarely be stated since each case is so much fact dependent.

32. There is in my judgment an artificiality in debates as to whether some proposition is a presumption, a starting point or a cross-check.

33. The application of the welfare checklist in Children Act cases and the application of the best interest test in Mental Capacity Act cases have much in common and it is hardly surprising that the same judges exercise these judgments under both Statutes.

34. In Children Act proceedings the judge customarily applies the welfare checklist to determine whether or not the local authority case for a care order has been made good. If the judge concludes that it has then he must consider whether the removal of the child, an undoubted violation of the right to family life, is nevertheless necessary and proportionate. The decision of Munby J in *re S* upon which Mr Armstrong places such heavy reliance was a decision on the particular facts which contrast markedly with the facts considered by Roderic Wood J in the case of *re LS*.

35. Furthermore Munby J was exercising the inherent jurisdiction on 5 November 2002. The oft cited passage from the speech of Lord Templeman in *re KD* [1988] AC 806, [1988] 2 FLR 139 has resonated down the years in Children Act proceedings. It finds no place in section 4 of the Mental Capacity Act 2005. I conclude that the safe approach of the trial judge in Mental Capacity Act cases is to ascertain the best interests of the incapacitated adult on the application of the section 4 checklist. The judge should then ask whether the resulting conclusion amounts to a violation of Article 8 rights and whether that violation is nonetheless necessary and proportionate.

36. I have so far cited only a sentence from the judgment below. I would end by citing the entirety of the passage from which that sentence was extracted:-

> "102. What I can say, as I have already indicated to Mr Armstrong, is that despite the passage of time I am entirely satisfied that there remains in K and D, but in particular K, a palpable fear that what is being proposed will end up as a re-run of what happened in 2006 and 2007, when L lost contact with his family. On K and D's version of events, if correct, there remains a real sense of injustice about the decisions that were taken during that period and the gross interference in their family life. If their version of events is correct their position is very understandable and it should be factored in when considering their actions and decisions in this case. Having experienced such interference in their family life it is readily understandable why they fiercely guard against any further disruption and L's right to remain at the family home.
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> 103. However, the court's task is different and whilst acknowledging that factor, the court has to stand back and consider what is objectively in L's best interest. In my judgment, whilst the court must factor into the balancing exercise it has to undertake, the family life that L clearly has with K and his brother that should not be the starting point as submitted by Mr Armstrong. Each case is fact sensitive and requires the court to undertake the balancing exercise in reaching its decision as to what is in L's best interest. What the court has to do, as set out in subsection 4(4) of the Mental Capacity Act, is consider all the relevant circumstances when undertaking that exercise.
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> 104. I also bear in mind the Article 8 rights that are clearly engaged in this case that everyone, namely K, WS and D, have a right to respect for their private and family life, their home and their correspondence and that there should be no interference by a public authority with the exercise of those rights except in accordance with the law as necessary and proportionate.
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> 105. Having considered the written and oral evidence the detailed written and oral submissions, the relevant considerations in conducting the balancing exercise in my judgment can be summarised as follows:
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> 1. L's family life at home with K and D is a significant benefit to L. The standard of care he receives is very high and the emotional attachments and relationships very strong. Any interference with that will need to be justified as being proportionate.

2. L is borderline capacity. The improvements he has made, as the evidence demonstrates, during the course of these proceedings in being able to articulate his views and express his wishes they should be supported and built on if possible.

3. L's need and right to a private life, which includes steps to personal autonomy, need to be given weight.

4. Historically the evidence demonstrates L has not easily been effectively able to make decisions about things or choices in the abstract. He needs to experience them to enable him to make an informed choice. Tangible examples of this are the respite care at the A placement and his contact with his aunt.

5. Whilst historically he has expressed a wish to remain living at home, this must be looked at in the context of his understandable wish to have the approval of his father and to be seen as being a good son. On the evidence, it is more likely than not that he will have picked up what his father's views are about opposing the plans to move to supported accommodation. A vignette was provided by the evidence of Mr J about the father talking about little else than the issues raised by these proceedings. D referred to his evidence to pressures arising from these proceedings in the family home.

6. There is broad agreement about the need for L to live independently in due course. The issue is when and the timing for that.

7. The suggestion on behalf of K and D that L has the choice now to leave the family home if he wanted to fails, in my judgment, to properly recognise the reality of the position L finds himself, as described most graphically by his current advocate, Advocate B, whose evidence I accept.

8. The accommodation that has been identified at the J placement Lane is known to the Local Authority. The social work evidence is that it has a proven track record. It has detail of good and valuable support and is very close to the family home and the local area that L is familiar with."

37. That seems to me to be an impeccable direction and an excellent illustration of how a trial judge should approach the determination of a best interests issue when the Local Authority's proposal is met by a plea from the family that it amounts to an unnecessary and/or disproportionate violation of the Article 8 rights of the incapacitated adult.

38. For all those reasons I would dismiss this appeal.

LADY JUSTICE BLACK:

39. The issue that falls to be decided in this case is whether, in determining what is in the best interests of a person who lacks capacity, the judge is required to commence his decision making from a prescribed starting point which is not set out in the Mental Capacity Act 2005 ("the Act") but is said by Mr Armstrong to derive from Art 8 of the ECHR. The starting point for which he contends would have a special quality, raising it above a "mere factor or relevant circumstance" (see Grounds of Appeal §12 b). Its formulation has evolved over the course of the proceedings and is not therefore entirely straightforward to set out; I will come to it in paragraph 45 and 46 below.

40. Section 16 of the Act gives the court power to make decisions on behalf of those who lack capacity. The power is subject to the provisions of the Act and, in particular, to sections 1 and 4. Section 1 includes the requirement (section 1(5)) that a decision made for or on behalf of a person who lacks capacity must be made in the person's best interests. Section 4 sets out how the determination of what is in a person's best interests must be approached. Section 4(2) provides that the person making the determination must "consider all the relevant circumstances and, in particular, take …. steps" which are set out in following subsections. "Relevant circumstances" are defined by section 4(11) as those of which the person making the determination is aware and which it would be reasonable to regard as relevant.

41. The appellant's only complaint about the careful way in which Theis J went about her task of determining what was in L's best interests, in the course of which she examined all the relevant circumstances, is that she treated all the various factors as on a par (albeit having different weight in the particular circumstances of this case) rather than commencing her examination of them from his proposed starting point. It is notable that he has not sought to appeal against Theis J's actual decision, that is that there should be a trial placement of L, only against her reasoning. The appeal is therefore in the nature of a pre-emptive strike designed to establish, in advance of the final hearing in February 2012, what the appellant perceives to be an approach which will be more conducive to producing the result for which he thinks it likely he will then wish and which I have no doubt he presently believes to be very much in L's best interests.

42. Mr Armstrong argues that the approach for which he contends has a strong pedigree. It can be identified, he says, in the decision of Munby J (as he then was) in *Re S (Adult Patient)(Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam) and has been adopted in a number of decisions in the Family Division since then.

43. *Re S* was a decision made under the inherent jurisdiction, several years before the Act came into force. It is §48 and §49 (which can be found set out in Thorpe LJ's judgment at §14 above) of the judgment in *Re S* that Mr Armstrong identifies as encapsulating the correct principle and which he claims as the source of his "starting point".

44. At the other end of the line of authorities upon which the appellant relies is *Hillingdon LBC v Neary* [2011] EWHC 1377 (COP). That case concerned the lawfulness of the actions of a local authority which had kept a young man who had always lived at home before at a support unit in a misjudged attempt to do the best it could for him. Peter Jackson J's judgment includes the following passage at §24:

> "Decisions about incapacitated people must always be determined by their best interests, but the starting point is their right to respect for their family life where it exists. The burden is always on the State to show that an incapacitated person's welfare cannot be sustained by living with and being looked after by his or her family, with or without outside support."

45. The appellant's formulation of his starting point in his Grounds of Appeal can be seen to have been derived from r*e S*. The Grounds say that "the 'starting point' should be the maintenance of the existing family life arrangement" and argue that Theis J was wrong to reject the appellant's submission that "where there is established family life, with which a move would interfere, then Article 8 (and the common law) imposes not a legal burden but a practical and evidential one to show that the alternative placement would be better".

46. That formulation appears to be slightly different from the formulation which Theis J was invited to accept. She recorded Mr Armstrong's submission at §83 of her judgment as being that "the starting point in any assessment of best interests is that mentally incapacitated adults are better off with their family". Asked about that, Mr Armstrong said to us that he would be content with such a formulation but he did not need to go as far as that and argued only for the starting point in the Grounds. However, he then developed his position in argument so that the starting point became "the maintenance (absent good reason including harm to the vulnerable adult) of existing family and private life". One of the new features in this formulation was that it included private life when only family life had been mentioned before.

47. I am far from convinced that Munby J's decision in r*e S* did in fact establish a formal starting point such as the appellant seeks which would regulate the way in which a judge must approach the question of what is in the best interests of an incapacitated adult. In *re S*, Munby J was quite clear that he was *not* saying that there was in law any presumption that mentally incapacitated adults are better off with their families. As he said, sometimes they will be and sometimes they will not. He was careful not to suggest there was a legal burden on a local authority which seeks to change things but only "the practical and evidential burden". He stressed that none of what he said was intended to devalue the welfare principle and that the welfare of the incapacitated person is, from beginning to end, the paramount consideration. It is in this context that one must read his other remarks. He encapsulated what would be many people's natural reactions, which he describes with terms such as "common sense" and "the normal assumption", but made it clear that this was the position "[other] things being equal".

48. Munby J revisited the position subsequently in different circumstances in r*e MM (an adult)* [2007] EWHC 2003 (Fam) and r*e A* [2010] EWHC 978 (Fam) but to my mind nothing that he said there elevates his comments in r*e S* to a formal and rigid starting point.

49. Mr Armstrong invited our attention to a decision of Roderic Wood J, *D County Council v LS* [2009] EWHC 123 (Fam), suggesting that it was what Roderic Wood J said in his judgment that resulted in Theis J's erroneous approach. Under the heading *"Residence Approach", Roderic Wood J referred to what Munby J had said in* r*e MM* (in which he recalled his comments in r*e S*) and then said:

> "I respectfully agree with most of these observations, and have directed myself accordingly, subject to what follows.
>
> It does seem to me, with the greatest of respect to Munby J, that I should record that in my more recent experience of such cases it is very much the approach when dealing with incapacitated adults that the medical educational and social authorities do their very best to nurture and facilitate any skills which the incapacitated adult may have to help them in moving, where possible, towards a greater degree of independence in the way they live their lives. Thus, whilst in many cases the family may be the providers of care and nurture for such adults, there seems to me to be a philosophical and practical shift towards ensuring as great a degree of independence in living arrangements as is possible."

50. Mr Armstrong challenged what he described as "the normalisation agenda", that is to say intervention by professionals who promise to make the life of the incapacitated adult like other people's lives. He took us to material upon which he relied to call this approach into question and invited us to take account of the difficulty that there is in measuring the success or otherwise of such intervention in a particular case. It seemed to me that in some respects what he sought went further than a *starting point* of existing family life and was, in fact, a pre-determination that independent living would be *bound* to be less beneficial for a person such as L than living with his family. Such a strait-jacket would, in my judgment, be not only unhelpful but also contrary to the Act which obliges the judge to have regard to all the relevant circumstances.

51. Judges who try family cases of all types know how infinitely variable are the considerations that may need to be considered in determining what is in someone's best interests. The norms and values of society change over time, as do the ways available to attempt to meet people's needs. There can be no substitute for a careful analysis of the evidence in the particular case. Factual disputes have to be determined and the recommendations and opinions of professionals evaluated in order to arrive at a conclusion. This is the everyday work of those who try cases involving children and, increasingly, it is becoming a routine exercise for those who sit in the Court of Protection. I would not wish to impose upon that exercise a structure which is not contained within the Act which confers the various powers and duties and dictates how they should be exercised.

52. It is, of course, of great importance that regard should be had to Article 8 when making decisions on behalf of an adult who lacks capacity. Article 8 declares a right to respect for private and family life, home and correspondence. Courts and local authorities are both public authorities and must not interfere with the exercise of that right except as Article 8(2) provides. It does not require a prescribed starting point to achieve compliance with that.

53. Indeed, as the present case illustrates, a prescribed starting point (if drafted as Mr Armstrong originally had it) risks deflecting the decision maker's attention from one aspect of Article 8 (private life) by focussing his attention on another (family life). In its wider form, incorporating reference to both private and family life, there is a

danger that it contains within it an inherent conflict, for elements of private life, such as the right to personal development and the right to establish relationships with other human beings and the outside world, may not always be entirely compatible with existing family life and particularly not with family life in the sense of continuing to live within the existing family home.

54. For my part, I cannot fault the way in which Theis J approached her task. She accepted (§103) that in reaching its decision as to what was in L's best interests "the court must factor into the balancing exercise it has to undertake, the family life that L clearly has with K and his brother". She directed herself to take into account all the relevant circumstances as required by section 4(4) of the Act. She expressly bore in mind (§104) the Article 8 rights of L, his brother and K and that there should be no interference with the exercise of those rights except such as is in accordance with the law and is necessary and proportionate. When she listed the relevant considerations in the following paragraph (§105), she put L's family life at home with K and his brother at the top of the list as "a significant benefit to L" and expressly recognised that the standard of care he receives is very high and the emotional attachments and relationships very strong before again reminding herself that "[a]ny interference with that will need to be justified as being proportionate". Also included in her list was "L's need and right to a private life, which includes steps to personal autonomy". Reasoning her conclusion in §106, she continued to keep L's current family life in mind, commenting that the "inevitable interference" with it was justified and proportionate due to the proximity of his placement to the family home and the support offered and the flexibility in the regime for contact proposed. She continued also to have his private life in mind, saying that it was in his best interests for steps to be taken to enable him to achieve "as much personal autonomy as possible" and that he was of borderline capacity and "the court must seriously consider steps that would enable him to either regain capacity, or enable him to make informed choices and decisions". She also bore in mind, entirely appropriately, that all parties (K included) agreed that the goal should be to enable L to move towards independent living and the debate was only about when that should happen.

55. It is difficult to see what a starting point would have added to the careful process in which Theis J engaged. It is much easier to see how it may have given rise to a rigidity and complexity that would have detracted from her balancing of the various factors arising from L's individual circumstances.

56. Mr Armstrong's submissions were in part directed not at the exercise carried out by Theis J but at the spectre of well-meaning local authorities intruding into and disrupting the family and private lives of incapacitated adults. His submissions proceeded on the basis that a starting point would serve to ensure that social workers gave existing family life the weight that it should have, restraining them from intervening and also preventing litigation which itself is harmful. I am not persuaded that a starting point is required in order to achieve this. A balanced consideration of all the circumstances and attention to what is required by Article 8 is all that is required.

57. For all these reasons I would, like Thorpe LJ, dismiss the appeal.

LORD JUSTICE DAVIES:

58. If, in cases of this kind, all family court judges are to be required in law to set themselves a starting point then it ought to be one capable of reasonably clear definition. I found it disconcerting that Mr Armstrong, who was vigorously advocating the requirement of such a starting point, in argument advanced several different formulations of it. He disclaimed a simple starting point to the effect that "the family environment is best", albeit repeatedly asserting that extant family life was indeed inherently better. Theis J, at all events, in the court below recorded the starting point proposed by Mr Armstrong as being that in the assessment of best interests mentally incapacitated adults are better off with their family. That seems clear enough; but before us Mr Armstrong, when asked, disclaimed that too. Ultimately, as I noted him, he formulated the starting point as being "maintenance (absent good reason, including harm) of existing family and private life".

59. I also found it disconcerting, on the argument advanced, that the proposed starting point finds no reflection either in the structure or in the wording of the 2005 Act. Section 1 sets out principles generally applicable for the purposes of the Act. It is noteworthy that nothing corresponding to the suggested starting point is found there. In section 4, it is expressly provided, among other things, that the person making the determination of best interests must consider all the relevant circumstances: with a checklist of some of those then being given. That is amply sufficient to incorporate consideration of existing family and private life: and there is no obvious reason to gloss or promote such consideration into a "starting point".

60. At all events, those initial points made me wonder whether Mr Armstrong's argument could possibly be right: and, on consideration, I am convinced that it is wrong.

61. It was submitted by Mr Armstrong that if there were no such starting point then there would be a "charter for intervention" on the part of local authorities pursuing a "normalisation agenda" in the belief that "we are the ones who know best". I doubt if the rhetoric does justice to local authorities who frequently have very difficult decisions to make in very difficult circumstances. But the underlying flaw in this approach is that local authorities are not entitled or empowered to intervene arbitrarily: if they are to do so then they must do so for cause.

62. In my view, with respect, Mr Armstrong has in effect wrongly conflated the approach that is called for when Article 8 is engaged in this context with the approach that is to be applied when making an overall determination under the 2005 Act. The general approach under the 2005 Act is laid down in section 4, with the principles set out in section 1 also applying. To add to that a further legal starting point is not called for by the Act. Indeed to do so would in my view (to adopt the cautionary words of Sir Nicholas Wall P. in *RT v LT* ([2011] IFLR 894; [2010] EWHC 1910 (Fam) at para 50) give rise to an unnecessary complicating factor. In each case, in my view, the exercise should be a fact specific exercise; the evaluation of all the relevant circumstances and the exercise of the discretion is to be made by reference to the particular case. That was precisely the approach adopted by Theis J. She was right in her approach.

63. There will undoubtedly be many cases in this context where Article 8 considerations will be a very important factor. Where (as here) Article 8 is engaged and where (as here) there will be a potential interference with the right to family life which has to be

respected then the interference has to be justified: that is fundamental. But there is no need to move from that to the creation of a legal starting point for the whole 2005 Act exercise. On the contrary, the concerns that Mr Armstrong identifies are well capable of being catered for by a proper consideration of any Article 8 point arising in the section 4 appraisal. The points that need to be identified can, when identified, then be weighed appropriately. Where (as here) the family life is long standing, is existing and is of high quality, due weight needs to be given to that in assessing whether the proposed interference with the family life is justified and proportionate and in reaching the overall conclusion on best interests. Where (not this case) the family life has been short-lived or has been of very poor quality, less weight will be due to that in assessing whether the proposed interference with the family life is justified and proportionate and in reaching the overall conclusion on best interests.

64. In the present case, Theis J, whilst rejecting the proposition that there was a starting point of the kind advanced before her, in terms (in paragraph 103 of her judgment) stated that the court must factor into the balancing exercise the family life that L clearly had with his father and brother. She thus had regard to the status quo. She then expressly directed herself (in paragraph 104) that everyone in this case – not only L but also his father and brother – had a right to their family and private life and that there should be no interference by a public authority save in accordance with law and as was necessary and proportionate. In then weighing the factors, she in terms (in paragraph 105) found that L's family life at home was a "significant benefit" to him; that the standard of care he received was very high and the emotional attachments very strong; and that any interference with that needed to be justified as being proportionate. In expressing her "clear conclusion" in paragraph 106 that the best interests of L were met by authorising the trial move, in the course of her detailed reasons the judge in terms held that the inevitable interference with the family life L enjoyed was justified and proportionate due to the proximity of the J placement to the family home, the support offered and the flexibility in the contact regime proposed. (It will also be remembered that K, L's own father, had himself accepted that L should at some stage move to independent living. As to that the judge also held that to achieve that goal of independent living, and for L to make an informed choice, L needed to experience it.) Thus the judge took the family life into account and gave it due and proper weight, given the circumstances, in evaluating all the factors and reaching her overall conclusion. What, I ask rhetorically, is wrong with that? There is nothing wrong with that.

65. Mr Armstrong acknowledged in argument that there could be little between taking the starting point which he was advocating and regarding the Article 8 consideration as an extremely strong factor. That seems to me further to tell against the construct of a starting point in the first place. In fact, given the due weight Theis J here (rightly, on the facts) gave to the prospective interference with L's existing family life and to the need to justify such interference as proportionate it is not possible to think that she would or should have reached any different conclusion even if she had also formally set herself the proposed starting point. It is in fact a point of (strong) comment that it was not sought to be said that the judge's actual conclusion was not one open to her nor was it sought to have her order set aside or varied. If a judge has had regard to all relevant factors and duly weighed them, and reached a conclusion properly open to the judge, it seems to me then an entirely empty gesture to complain that there nevertheless should have been a starting-point adopted by the judge. That is a further

indication of the lack of need for any such starting point being required in every case of this kind.

66. In my view, overall it is neither desirable nor appropriate that there be set "presumptions" or "practical and evidential burdens" or something like that in undertaking the exercise required by the 2005 Act in an application of the present kind. The approach should not be mechanistic. The overall inquiry, after all, involves consideration as to what is in the best interests of the individual concerned: and the Act itself indicates how that task is to be approached.

67. Mr Armstrong placed emphasis on observations made by Munby J, as he then was, in the case of *Sheffield City Council v S* [2003] IFLR 292; [2002] EWHC 2280 (Fam) in particular at paragraphs 48 and 49, which approach, it seems, has sometimes been adopted in other cases. But first Munby J was talking in terms of the inherent jurisdiction, not of the 2005 Act. Second, Munby J emphasised that there was no starting presumption in law; and to the extent that he indicated that a parent, if willing and able, is the most appropriate person to look after a mentally incapacitated adult he significantly and importantly qualified that by the words "other things be equal." Moreover, it is necessary to keep in mind the statements of principle enunciated by Sedley LJ in *Re F* [2001] Fam 38 at pages 57-58 of his judgment (with which the other two members of the court agreed). As Ms Butler-Cole submitted in her written argument, family life is not necessarily an exclusively positive element of an individual's life.

68. I am not to be taken as saying that a judge would necessarily be positively wrong to set himself or herself a starting point, in any given case under the 2005 Act, of the kind advocated. Judges frequently and legitimately take starting points in many civil law contexts, as a matter of practicality, where the filed evidence may indicate a clear prima facie position. But what I do say is that there is no *legal* requirement to do so in cases such as this under the 2005 Act; the requirement in this regard is to consider, and give due weight to, all the relevant circumstances. Some of the relevant factors may not, on assessment, call for much weight to be accorded to them. Others – such as the family life consideration arising in this particular case – may require very great weight to be given to them. In the present case, Mr Armstrong, with respect, seriously understated the position when he said that Theis J treated the family life consideration as "merely another factor." It is of course true that she treated it, for the purposes of section 4(4), as one of the circumstances to be considered. But the point is that she then went on to give it considerable prominence, and rightly so.

69. It will be noted that Mr Armstrong's ultimate formulation of the starting-point also brings in reference to private life. That is a further complicating factor in so far as a starting point is argued for. It is no complicating factor at all, however, if one treats it – as in my view one should – as one of the potentially relevant circumstances to be appraised in accordance with section 4.

70. I can agree that in many contexts – most notably asylum and immigration – the prospective interference (where there is interference) with the right to private life may in a particular case be sought to be justified on grounds of necessity and proportionality on the same basis as a corresponding interference with the separate right to family life. But these things do not always run in tandem. The present case is an illustration. Potentially there will be a degree of interference with L's family life

on removing him to the J placement, even if on a controlled trial basis and even where – as here – directions for frequent contact are given. But so far as private life is concerned, the proposed move is with a view to *enhancing* L's private life and to assisting him towards independence as an adult. Thus Mr Armstrong's formulation of the starting point is capable of having an inherent tension within it.

71. Mr Armstrong asserted that existing family life will always trump future private life. I do not accept that as a general proposition. It depends, among other considerations, on the quality of the existing family life, the proposals being made and the prospects for the future. In any event, an aspect of the right to private life, requiring respect, is personal development: thus the present right embraces what may happen in the future. In *R(Razgar) v SSHD* [2004] 2AC 368; [2004] UKHL 27, Lord Bingham made these well known remarks at paragraph 9 of his judgment:

> "In *Pretty v United Kingdom* (2002) 35 EHRR 1, paragraph 61, the Court held the expression to cover "the physical and psychological integrity of a person" and went on to observe that "Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world." Elusive though the concept is, I think one must understand "private life" in article 8 as extending to those features which are integral to a person's identity or ability to function socially as a person."

That clearly is a highly relevant factor in the present case, and is capable of being a relevant factor in other such cases under the 2005 Act where the right to private life is or may be in issue. The observations of Roderic Wood J in his judgment in the case of *D (County Council) v LS* [2009] EWHC 123 (Fam) seem to me in a context such as the present to be apposite, since they are consistent with the requirement of respect for private life: albeit, of course, all ultimately depends on the circumstances of the individual case.

72. I can detect no fault of any kind in the judgment of Theis J. She took all relevant circumstances into account. She gave due and proper weight to those factors calling for due and proper weight. Accordingly, and in agreement with Thorpe LJ and Black LJ, I too would dismiss the appeal.

73. Perhaps needless to say, what the outcome will be at the next hearing, and whether or not L should continue to be accommodated away from his father's home, will need to be decided by reference to the circumstances as they are found to be at that time.