No. FD08P01624

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Thursday, 21st August 2008

Before:

MR. JUSTICE MUNBY

(**In Private**)

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B E T W E E N :

S

Claimant

- and -

S & Ors

Defendants

- - - - - - - - - - -

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MRS. U. SOOD appeared on behalf of the Claimant (the cousin of the child's mother)

MISS S. JEGARAJAH appeared on behalf of the First Defendant (the child's mother)

MR. R. KELLER appeared on behalf of the Secretary of State.

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J U D G M E N T

MR. JUSTICE MUNBY:

THESE JUDGMENTS WERE DELIVERED IN CHAMBERS BUT THE JUDGE HEREBY GIVES PERMISSION FOR THEM TO BE PUBLISHED

1 I have before me wardship proceedings commenced recently against the background of a failed asylum claim in which, despite the utmost endeavours of the family's legal representatives, every aspect of their claim and their application for reconsideration has failed and been rejected by a succession of tribunals. Most recently it was rejected by Blake J who refused permission in judicial review proceedings (CO/6818/2008) in an order which, having set out in some detail his observations about the case, described it as being "Totally without merit". Although he stopped short of providing that a renewal should not be a bar to removal, Blake J expressed his view of the demerits of the case by ordering the claimants to pay the costs and by abridging the time for renewal.

2 Nothing daunted, those promoting that litigation sought to persuade Blake J in effect to change his mind. That application came before Silber J who, in dismissing it, expressed his complete concurrence with Blake J's observations. Undaunted, an application for renewal was made. It was at that point in what by then was an already protracted history that wardship proceedings were begun by a relative – a cousin of the child's mother – in relation to a child who is a dependent of the asylum seeker mother.

3 The matter came before Roderic Wood J sitting as a vacation judge in the Family Division last week. He had the advantage of an appearance by counsel instructed by the Secretary of State for the Home Department. In the upshot he made two orders: one providing in substance for the hearing of the wardship proceedings by me today and the other providing in effect for the hearing by me today (immediately following the hearing of the wardship proceedings) of the renewed application for permission in CO/6818/2008. He was facilitated in the making of those orders by the fact that, as it happens, I am a judge nominated to sit in the Administrative Court and also by chance was sitting as a vacation judge in the Family Division this week.

4 Although this fact was not brought to my attention until the matter was opened before me this morning, the day after that a notice of discontinuance in the judicial review proceedings was filed. Accordingly, when the matter was opened before me this morning, in answer to a very specific question which I quite deliberately put to counsel, I was told that the only remaining matter was the wardship matter, there being no extant proceedings in the Administrative Court. In circumstances which will become readily intelligible

in a moment I expressed some scepticism as to the legitimacy in the circumstances of the wardship proceedings, it being the stance of the Secretary of State – whether justifiably or not but certainly understandable in the circumstances – that the wardship proceedings were in effect (if not in intention) merely a device for yet further preventing the Secretary of State from exercising her powers of removal.

5 I had to adjourn the matter at a point shortly before lunch in order to better understand precisely what the purpose of these wardship proceedings was and precisely what relief was being sought. I invited the claimant's counsel to draft the order which she was seeking. As it happened, I was unable to resume the hearing of this case at 2 o'clock because there was another even more pressing case involving a child which I had to deal with. It was, I confess, with some surprise when the case recommenced before me later in the afternoon that I was told that a fresh application for judicial review had been launched by the claimant, seeking to challenge in the Administrative Court not merely some of the matters which had given rise to the wardship proceedings, but also (as Mr Keller, on behalf of the Secretary of State, pointed out) seeking to revive allegations as to the legality of the child's detention which had formed part of the earlier judicial review proceedings (CO/6818/2008) whose fate I have already described. I can well understand why counsel for the claimant in all the circumstances took the view that the Administrative Court was a more appropriate forum than the Family Division to litigate the substance of the points which were of greatest concern to her client. In these circumstances the wardship now occupies a less central position in the wider scheme of things than it did at 1 o'clock this afternoon.

6 I have given directions for the future conduct of the judicial review proceedings which were commenced today (CO/7979/2008). I have also made an order – once it became apparent that the first defendant in the wardship proceedings was minded to commence yet further judicial review proceedings – requiring those proceedings (if they are to be pursued in such a way as to provide an obstacle to the Secretary of State's powers) to be commenced within a specified time.

7 Mr. Keller, having to respond without much warning to the existence of CO/7979/2008 and to the threat of the as yet unissued judicial review proceedings contemplated by the first defendant, was minded to argue that they were all abusive and should be struck out; in the alternative that I should make an order here and now that neither was to be a bar to the Secretary of State removing the family if otherwise entitled to do so. That seemed to me in all the circumstances, although I could well understand why the Secretary of State was minded to make such an application, to be an inappropriately

Draconian order to make, in effect *ex parte*. I therefore declined to make such an order, but on the basis – and this explains why I put the first defendant on terms as to the commencement of any further judicial review proceedings – that unless CO/7979/2008 and the new proceedings intended to be commenced by the first defendant are pursued in the one case, and in the other case commenced and pursued in strict accordance with the timetable I have set, then the pendency of those proceedings is not to operate as a bar to the removal of the family.

8 In these circumstances the Secretary of State could be forgiven for expressing the view (a view which whether well-founded or ill-founded is perfectly properly put before the court) that the wardship proceedings are themselves an abuse of the process, being calculated (in both senses of that word), to hold up impermissibly the Secretary of State's otherwise unfettered ability – as matters stand today – to remove the family. In riposte, it has been forcibly urged upon me, both by counsel for the claimant and by counsel for the first defendant in the wardship proceedings, that whatever may be the effect of the proceedings the motivation of those who have in fact been behind their commencement is not in any way abusive or improper. I have been told that included amongst the moving spirits are school teachers responsible for the boy's education. In short, it has been pressed upon me that whatever the Secretary of State's perception may be, and however enthusiastic other members of the family may be to encourage the commencement and continuation of the wardship proceedings, the wardship proceedings have been commenced for perfectly proper reasons by persons concerned and motivated solely and exclusively by regard for the welfare of the child.

9 I need not decide between those two very different perceptions of the underlying realities. I am entirely content – but I emphasise without making any such finding and without in any way precluding the Secretary of State, if it becomes appropriate on some future occasion, from pursuing the allegation that the proceedings are abusive – to proceed today on the basis, without so finding, that the proceedings have been commenced *bona fide* by persons motivated entirely by concern for the child's welfare. That does not, however, mean that they are in all the circumstances an appropriate invocation of the court's jurisdiction.

10 The child is currently in detention as a dependent of a failed asylum seeker awaiting administrative removal. That detention is prima facie lawful as being exercised by the Secretary of State in accordance with powers conferred upon her by the well known provisions in the Immigration Act 1971.

11 The complaints, as I understand it, are in outline:

(a) that the detention of the child is unlawful, through failure by the Secretary of State or her minions to comply with the procedural requirements of the Operations' Handbook;

(b) that because for a variety of reasons, so it is said, removal is not imminent, therefore on well-known authority detention is not justifiable; and

(c) that detention is in any event unjustified as being excessive and disproportionate in the circumstances.

As a separate matter of concern is a complaint about the conditions in which the child is being detained and, more particularly, about the adverse impact which his detention – so it is said – is having upon him. That matter, as I understand it, is relied upon primarily as a separate and discrete ground for saying that even if his detention would otherwise be lawful he should no longer be detained, on what one might compendiously call "welfare grounds", or alternatively that the conditions of his detention should be ameliorated so as to enhance his welfare.

12 Linked in with those, which as I understand it are the two primary bases of concern, is a complaint that despite what are said to have been repeated requests by the claimant's solicitor to the Secretary of State the child's medical records have not been produced so that there is difficulty in forming a correct, professionally based view of his condition. It is suggested that orders should be made directed to some expert assessment which will give everybody a better view as to his actual condition.

13 When the case was opened before me this morning the initial response to my question as to what precise form of relief was being sought in the wardship proceedings was that amongst the relief being sought was an order that the child should no longer be in detention but should be released, under the umbrella of wardship, into the care and control of a relative. On reflection, and wisely, because the claim was utterly misconceived, the claimant's counsel did not pursue that. The draft order which was presented to me after the short adjournment seeks in the first place a declaration that:

"The subject child's health is of concern and not being properly addressed within the circumstances of his detention."

Secondly, it seeks an order effectively providing for a psychological assessment of the child. The claim for orders for his release, or orders directly

bearing upon the circumstances of his detention, are orders which it is now proposed to seek from the Administrative Court within the umbrella of CO/7979/2008.

14 The wardship jurisdiction is theoretically without limit, but it is well recognised by long standing authority at the very highest level that whatever may be its theoretical ambit the jurisdiction is subject (in accordance with well known principle) to certain fundamental limitations on its proper exercise. One such limitation (and the one that is applicable in these circumstances) is that wardship may not be used in such a way as to – and it is as a matter of law ineffective to – prevent the exercise of statutory powers conferred by Parliament, whether upon a court or upon a Minister, whether upon a judicial body or upon an administrative body, as part of a statutory scheme which, upon its proper construction, is intended by Parliament to be exclusive and thereby, by implication, to oust the jurisdiction of the court.

15 I am not going to take up time rehearsing the well known authorities. It suffices to identify the two leading cases which deal with the matter as one of general principle: first the well known statement of Lord Scarman in *In re W (A Minor: Wardship Jurisdiction)* [1985] AC 791 at p 797 and secondly the equally well known statement of principle by Ward LJ in *In re Z (A Minor: Identification Restrictions on Publication)* [1997] Fam 1 at p 23. As Ward LJ points out in that case, the principle has many applications: one being that the wardship judge cannot interfere with the proper exercise by a local authority of its statutory functions under the care legislation and another (being the relevant one for present purposes) that the wardship judge cannot in the exercise of that jurisdiction interfere with the exercise by the Secretary of State for the Home Department of her powers in relation to matters of immigration and asylum.

16 In relation to that particular subject matter, which is the subject matter with which I am concerned today, the classic authority is the judgment of Russell LJ in *In re Mohammed Arif* [1968] Ch 643. The working out of these principles in the context of asylum and immigration, and specifically the working out of these principles in the analysis and explanation of the proper relationship between the Secretary of State, the Administrative Court and the Family Division is to be found in the judgment of Hoffman LJ (as he then was) in *R v Secretary of State to the Home Department (ex parte T)* [1994] Imm AR 368, [1995] 1 FLR 293, and more recently in my own judgment in *Re A (Care Proceedings: Asylum Seekers)* [2003] EWHC 1086 (Fam), [2003] 2 FLR 921.

17 Having identified the relevant authorities I do not take up time analysing them further. The simple fact of the matter is that the Family Division of the High Court of Justice cannot, even in the exercise of its inherent jurisdiction, make

orders which in any way impinge upon or prevent the exercise by the Secretary of State of powers lawfully conferred upon her in the context of immigration and asylum. Indeed, in strict law the mere fact that the child is a ward of court does not, as Hoffmann LJ explained in *ex parte T*, prevent the removal of that child from the jurisdiction if done by the Secretary of State in pursuance of her statutory powers. In practice, of course, the pendency of wardship proceedings usually persuades the Secretary of State to stay her hand, and therefore in practice – as we are all too well aware – the pendency of wardship proceedings tends to operate *de facto* as a brake upon the exercise by the Secretary of State of the powers which she would otherwise wish to exercise. As the authorities make clear it is important in these circumstances that the Family Division exercises its wardship powers with great care and circumspection and that it avoids its process being used for some impermissible purpose or in a way which impermissibly impacts upon the proper exercise by the Secretary of State of her powers.

18 That is one important principle in play in this situation. The other principle, which is the other aspect of the same fundamental principle, is that if it is sought to challenge the exercise by the Secretary of State of her statutory powers then the proper and, indeed, the only proper forum for such challenge is the Administrative Court in an application by way of judicial review and/or pursuant to the Human Rights Act 1998. It is fundamental that challenges to the exercise by public officials or public tribunals of statutory powers are matters of public law to be dealt with in the Administrative Court, which deals with matters of public law, and not to be dealt with in the Family Division, which exists, in the sense in which the phrase is used by administrative lawyers, to deal with private law cases and not public law cases.

19 It was no doubt recognition of that by the claimant's counsel that led to the issue this afternoon of CO/7979/2008 because, as will be appreciated, it is simply outside the lawful exercise of any power of a judge in the Family Division to make an order directed to the Secretary of State requiring the release from administrative detention of the dependent of a failed asylum seeker, just as it would be wholly outside my powers where I to purport to make an order requiring a ward of court to be discharged from a young offender institution because I differed from the view of the magistrates who, upon conviction, had sent that child to such a place. (In just the same way it would be outside my powers to order the discharge from the Army, or the discharge from Army custody, of a boy soldier who was made a ward of court.) Those are all matters within the exclusive statutory powers of the relevant officials. If the exercise by them of their powers is to be challenged then that is a matter for the Administrative Court not for the Family Division.

20 Since the child with whom I am concerned is at present in detention and, given the stated attitude of the Secretary of State, is going to remain in detention unless and until one or other of two things happens – either the making of an order by a judge in the Administrative Court that the child be released, or the child being removed by the Secretary of State from detention for the purposes of immediate removal to some foreign country – I have great difficulty in understanding any meaningful or useful way in which the court's protective arm in wardship can be of any practical use or benefit to this child. I cannot, by the exercise of my powers, procure his release. Nor, by parity of reasoning, can I by the exercise of my powers make any order as to the conditions in which he is detained. Those are all exclusively matters for the Administrative Court. Manifestly, there is no utility in the proceedings unless he remains in this country. Accordingly, it seems to me, on the face of it the wardship proceedings serve and can serve and will serve no useful purpose unless and until the point is reached (if ever) at which the child, either by decision of the Secretary of State or in consequence of a decision of the Administrative Court, is released from detention in circumstances where he is then at liberty in this country.

21 I can imagine that if that point is reached there might be utility in the wardship proceedings in circumstances where the only person with parental responsibility for him is herself in detention, and in circumstances where it might be suggested that it would be appropriate for the wardship court to regulate his care by relatives. I confess to considerable scepticism, however, as to whether even in those circumstances wardship would serve any useful purpose because, as I understand it, there are relatives more than willing and more than able to look after him in that happy event, and, moreover, able to look after him with the blessing of his mother. In other words, his care in the community if he is released from detention would not appear, as matters stand today, to require the assistance – let alone the protective assistance – of the wardship judge.

22 Be that as it may, it seems to me that unless and until the point is reached, if ever, when he is free from detention and it can be demonstrated at that stage that there is some need for wardship, there is not at present and as circumstances currently stand any obvious need for or benefit to be derived from wardship

23 Reverting to the form of order which I am invited to make, with all respect to counsel who drafted it, it seems to me that the proposed order serves only to reinforce what is in truth the inutility and the inappropriateness of the wardship proceedings as currently constituted and as currently proposed to be pursued and currently sought to be justified.

24 The declaration seems to me to be inappropriate for at least two quite separate reasons. First, declarations as a matter of general principle are to be granted in relation to defined legal issues, and in relation to specific matters of controversy. A declaration "that the subject child's health is of concern" seems to me to fall foul of that salutary principle. Be that as it may, the other reason is this: if one thinks about the implications of the declaration which is sought, namely that the child's health is of concern "and not being properly addressed within the circumstances of his detention", it is abundantly obvious that the purpose for which that declaration is being sought and the purpose for which – if it was granted – it would be used would be simply and solely to put pressure on the Secretary of State, it being asserted no doubt to the Secretary of State that here you have the considered view of the High Court, here you have the considered view of a judge of the Family Division, that the conditions in which this child is being kept are of concern and that his welfare is not being properly addressed. That seems to me, with all respect to counsel, to be a classic example of an abuse of the wardship process, the purpose not being directly to enhance the welfare of the child – the very form of declaration tacitly accepting that I cannot directly affect the welfare of the child – but intended to put pressure upon the Secretary of State as to the exercise by her of her powers. In other words it seems to me to be, insofar as it is properly a matter for judicial declaration or judgment at all, an attempt – ingenious but nonetheless inappropriate – to persuade the Family Division to embark upon an exercise which, if it is properly a matter for judicial determination (as it may be) is properly a matter for the Administrative Court and not the Family Division.

25 The other order, which is for the production of a psychiatric report, seems to me also to illustrate the inappropriateness of these proceedings. The irony, as I pointed out to counsel, is that the need for such an order arises only because of the existence of the wardship proceedings and because of the principle that you cannot examine a ward of court without the sanction of the wardship judge. If there is no wardship there is no obstacle to the obtaining of such a report, nor is there any need for judicial sanction absent wardship to obtain such a report. That is one ground of objection to the order being sought. A second ground of objection is that it is in truth directed to the entirely collateral and it might be thought inappropriate – if not indeed impermissible – object of using the process of the Family Division to gather evidence with a view to bolstering up a case being brought in the Administrative Court. If that material is needed as part of the process of the Administrative Court then the application is properly made to that court and not to this court. The third objection is this: presumably the psychologist or psychiatrist who is to produce the report is going to be required to interview the child. The child is in

detention and I have no power in this court to make any order which either directly or by necessary implication requires the Secretary of State to admit any person (whoever that person may be) to a place of detention. If the Secretary of State is not willing to co-operate in the process of a psychiatrist or psychologist interviewing and assessing a child in detention then the remedy is by some appropriate application to the Administrative Court, on the basis, so it might be said, that the Secretary of State is abusing her powers and is acting impermissibly. The wardship judge does not have any power to make an order requiring the Secretary of State to admit the psychologist or psychiatrist into the prison. In other words the order is, in reality, so far as the Secretary of State is concerned, merely exhortatory. And it is, for that very reason, inappropriate.

26 In my judgment these wardship proceedings, albeit commenced as I am prepared to assume with perfectly proper motives by persons concerned exclusively for the welfare of the child, are not, for the reasons I have sought to explain, currently serving any useful or indeed, in my judgment, any permissible purpose. Whatever the intention of those promoting them, they are in effect not merely serving no useful purpose; but if anything they are acting as a hindrance, even if only an indirect hindrance, to or discouragement upon the Secretary of State exercising her proper powers.

27 In the final analysis the claimant's argument was that even if the proceedings are not at the moment serving a useful purpose, the time may yet come in the fairly near future when they will serve such a purpose as and when the child is discharged from detention. I am not persuaded that this is any justification for keeping these proceedings alive at the moment. First of all, it assumes that the child will be discharged from detention and that is a matter for a different court in relation to which it would be wholly inappropriate for me to express any views or to make any assumptions. And secondly, as I have already pointed out, I am far from persuaded that even if the child is discharged the wardship will thereupon serve any useful or beneficial purpose.

28 Indeed, on one view, as I pointed out during the course of argument, it might be thought that the very last thing this family would want, if in fact the child is discharged from detention, is that the child's life should be regulated by a judge and that decisions in relation to the child's life should be taken by the judge. Moreover, as I also pointed out in the course of argument, if the child is a ward of court the decision as to whether the child should be litigating in the Administrative Court is, in the final analysis, a matter for the decision of the wardship judge, and the wardship judge, consistently with his obligation to act exclusively in the welfare interests of the child, would be fully within his rights in directing those promoting such proceedings forthwith to discontinue

them if he was persuaded that those proceedings were not serving a useful purposes assessed from the point of view of the child's welfare.

29 The reality I suspect – and this is not to cast any aspersions upon those who actually promoted the wardship proceedings, but looking to the wider family context – is that the enthusiasm of the family for the wardship proceedings will very quickly evaporate at the precise point at which the wardship proceedings might conceivably become legitimate and appropriate, namely, the point at which the child is removed from detention.

30 For all those reasons it seems to me that these wardship proceedings, despite the good faith of those who promote them, are not serving any legitimate or appropriate purpose.

30 At the end of the day a question which it is not irrelevant to consider is the question posed, albeit in a very different statutory context, by Waite LJ in *London Borough of Southwark v B* [1993] 2 FLR 559. The issue in that case was whether a local authority which had commenced care proceedings in the family court should be given permission to discontinue those proceedings. Giving the judgment of the Court of Appeal Waite LJ indicated that the correct approach was to ask the question: "Is there some solid advantage to the child to be derived from continuing the proceedings?" The context, as I say, is a very different context, but as my judgment in *Re A* indicates it is a not unhelpful question to pose in circumstances such as this. If one asks the question as of today: "Is there some solid advantage to this child to be derived from continuing these wardship proceedings?" the answer in my judgment is plainly and obviously "No, there is not."

31 For all those reasons I come unhesitatingly to the conclusion, which I have to confess was the conclusion which I had provisionally come to when I read the papers last night, that these wardship proceedings are no longer serving – if indeed they ever did serve, and in my judgment they never did serve – any useful or appropriate purpose.

32 In these circumstances I propose to make an order today bringing the wardship proceedings to an end, discharging the wardship, although for purely formal reasons the order which I make in the wardship proceedings discharging the wardship and bringing the wardship to an end will be the order containing the provisions imposing upon the first defendant in the wardship proceedings the requirement to issue any judicial review proceedings of the kind which have been indicated within the time I have specified.

33 So I will make two orders. One order which will be in CO/7979/2008 will give effect to the directions which I have previously indicated. The other order, which will be made in the wardship proceedings, will be an order which puts the first defendant in the wardship proceedings on terms as to the commencement of the judicial review proceedings and gives directions as to the proper conduct of those proceedings once commenced. But subject to that the order in the wardship proceedings will terminate those proceedings and discharge the wardship.

34 That does not, of course, preclude the commencement of wardship proceedings on some future occasion. I do not say that with the slightest note or intention of encouragement for, as I already indicated, at the very point at which it might become permissible to commence wardship proceedings I suspect one will have reached the point at which there will be no sensible purpose in commencing such proceedings. If the test is: "Is there some solid advantage to this child?" then for the reasons I have already given I am at present utterly unconvinced that there will be any solid advantage to this child in the commencement of any fresh wardship proceedings if and when (if ever) he is released from detention. Future events may falsify that and it is possible to conceive of circumstances where further proceedings at that stage in a family court might be appropriate. But the family needs to bear in mind that if it is said that this is a child who is in need of such protection from the court as to justify wardship proceedings the court might take the view that the appropriate mode of protection is not wardship proceedings but care proceedings – which is not necessarily something the family would necessarily welcome.

35 Be that as it may, I propose to make those two orders.

MR. KELLER: My Lord, there are two remaining matters. The first matter is this: your Lordship may not be surprised to hear that this is not the only case of which the Treasury Solicitors have conduct where parties are seeking to raise wardship to influence or impact upon the immigration process. For that reason, and I note that there is not a shorthand writer here ----

MR. JUSTICE MUNBY: It is all on tape.

MR. KELLER: I would seek an order that a transcript of the hearing, your judgment ----

MR. JUSTICE MUNBY: Judgment.

MR. KELLER: -- be prepared at public expense, that is the first point.

MR. JUSTICE MUNBY: I should have thought that was appropriate. It is a judgment given in the context of the wardship proceedings in Chambers, but it seems to me to be plainly a judgment which should be made publicly available albeit in anonymized form. I have not, as it happens, I think referred to any names at any stage throughout, so I will direct that a transcript of my judgment be prepared at public expense.

MR. KELLER: The second matter is I have an application for costs. The application, as we say at the outset in our grounds, was entirely misconceived and that is a position which your Lordship endorsed. The only reason these proceedings were taken ... because of, as it were, our issuing separate proceedings this afternoon. On that basis I would seek an order that the plaintiff do pay the costs of these proceedings to be assessed if not agreed.

MRS. SOOD: I am going to resist, my Lord.

MR. JUSTICE MUNBY: Mr. Keller, can we just put this context? Do you in fact have a figure?

MR. KELLER: I do not have a figure. (After a pause) I was taking instructions on a ball park basis, we imagine it is going to be in the order of, like I say, of £2,000 (?) – my attendance at two hearings and that of my instructing solicitor.

MR. JUSTICE MUNBY: Yes, Mrs. Sood, your client is publicly funded?

MRS. SOOD: And I also add to that, my Lord, that given your Lordship's comments on the *bona fides* at least, even without the findings of the motivation of the people behind, who alerted the relative to the concerns regarding the child, I say my Lord, that the decision that there is no solid advantage has grown upon this court and the people concerned within these proceedings.

MR. JUSTICE MUNBY: But, Mrs. Sood, I have the advantage (or the disadvantage) of being very familiar with this area of the law and I have to tell you quite plainly that the only respect in which my view of this matter has changed as a result of the argument is I have been persuaded that I should approach it on the basis that the intentions were *bona fide* and not abusive, because when I first read the papers last night I was quite satisfied that the proceedings were wholly inappropriate, but my provisional view that they were also abusive as being a plain attempt to steal a march. But, I have to say plainly, that on the basic question of whether there was merit in the proceedings, whether wardship was justified, my plain view when I first read

the papers was the view I ended up with, and that is not because I have a closed mind, the reason I am saying it is seemed to me pretty obvious this case was inappropriate.

MRS. SOOD: I only add to that not only the fact that the plaintiff is publicly funded, but there has been notice of an application. The Treasury Solicitors were served as appropriate. They did, of course, attend and oppose. Now, I bear in mind, my Lord, at least one of these hearings, which was last week, was not aborted by any deficiency on the part of the plaintiff, but the non-availability – I do not know whether your Lordship is aware – there was no court interpreter in attendance. We did in fact have to reschedule the hearing for today purely as a practical exercise, and my friend chose that wardship jurisdiction to make the application for the joinder, if you like, of the other application. Within these proceedings, both last week and this week, there have been useful achievements and I ask, my Lord, for you to bear in mind that without the proper notification to those concerned – any schedule of course we will supply – that there be no order for costs.

MR. KELLER: My Lord, I accept that the matter was adjourned because an interpreter was not there. I do not think I can blame my learned friend for that, plainly these are the types of risk of emergency litigation, that there can be unforeseen adjournments for unforeseen reasons. The plain fact of the matter is, whether or not in good faith, the whole application is misconceived and the Secretary of State should not, with the greatest respect, have to bear the costs of a misconceived application, they should rest with the claimant. I appreciate the claimant is legally assisted, and there is a usual form of words for an order, and that is the form of words that I would seek in a final order.

MR. JUSTICE MUNBY: Well, Mr. Keller, what I am going to say is this: the transcript which I am going to direct will in the first instance be a transcript of the judgment and the discussion on costs following the judgment and what I am saying at present, so the final transcript will include my observations in relation to costs.

MR. KELLER: My Lord, yes.

MR. JUSTICE MUNBY:

1 In relation to costs I am not going to make an order on this occasion but I spell out that there is no longer, if indeed there ever was, any excuse for people making inappropriate use of wardship. The matter was spelt out, as one might expect with his customary clarity, by Hoffmann LJ 13 years ago and, moreover, in a case which is not merely reported in the Immigration Appeal Reports; it is also reported in the Family Law Reports, so there is not the slightest excuse for family practitioners not to be fully aware of it.

2 There are then, on the immediate question of the use or abuse of wardship and family proceedings in an immigration or asylum context, two reported judgments of mine: one is *Re A* and the other is *R (Anton) v Secretary of State for the Home Department, Re Anton* [2004] EWHC 2730/2731 (Admin/Fam), [2005] 2 FLR 818. And I have an idea that there have been other judgments given recently by judges who sit both in the Family Division and in the Administrative Court which also bear upon the topic. All these judgments which I have mentioned are reported in the Family Law Reports, wherever else they may be reported, so there is absolutely no excuse for people not understanding these matters.

3 There is also – and I did not see the need to refer to them in the first part of my judgment – a number of judgments which, as it happens, I have given in a number of different contexts where people have sought to persuade me, impermissibly, that matters which are properly within the exclusive jurisdiction of the Administrative Court can be brought – I am tempted to use the phrase "dressed up" – as welfare issues to be litigated in the Family Division. One of those cases, which in fact is referred to in my judgment in *Re A*, is *A v A Health Authority* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213 and there are a number of other such cases. One which I mention for a specific purpose is *CF v Secretary of State for the Home Department* [2004] EWHC 111 (Fam), [2004] 2 FLR 517, where at para [24] I explicitly make the point that the introduction of the Human Rights Act does not collapse the fundamentally important distinction between private law and public law. Merely by bringing a claim under the Human Rights Act in relation to a matter which is properly the subject of the Administrative Court does not entitle one to dress it up as welfare proceedings in the Family Division. There are a number of other judgments to the same effect.

4 There seems to be dauntless enthusiasm by counsel – I am not referring to counsel before me in the present case – nevertheless to persist in misconceived attempts to persuade judges in the Family Division to deal with matters which, if they are properly justiciable at all, are matters for the Administrative Court.

5 There is no longer (if there ever was) any justification for any misunderstanding by practitioners about these matters, whether they be practitioners in the Administrative Court, whether they be practitioners in the Family Division, whether they see themselves as public lawyers, Human Rights Act lawyers, or family lawyers. It is well known to any judge sitting in the family courts and, in particular, to those of us who also sit in the Administrative Court, that there is a significant number of cases (by no means limited to the reported cases which I have mentioned) where wholly inappropriate attempts are made to use wardship proceedings, or care proceedings or other forms of family proceedings for collateral and impermissible purposes.

6 In the present case I am persuaded – I confess with a marked lack of enthusiasm – not to make the order for costs which the Treasury Solicitor perfectly understandably seeks. I do that for three reasons. One is that the claimant in the present case is publicly funded and no application is being made for any wasted costs order or order directed against the lawyers. Therefore in fact the order, were I to make it, would, barring the miraculous win of a substantial sum on the Lottery, be no more than a gesture devoid, almost certainly, of any significant financial benefit. The point which would be made by the making of such an order is perhaps better made by the trenchant judgment I am currently giving. Secondly, there is the point that, as I have accepted for the purpose of argument, although without making a finding to this effect, those who actually promoted this litigation were motivated by proper concerns. Had the case been one in which I was persuaded that it was an abusive application (abusive in the sense of being deliberately contrived as a means of obstructing the Secretary of State) my decision would almost certainly have been different. Thirdly, although this is perhaps no particular reason for taking a view which is probably more one of mercy than principle, it may be that there has not been previous warning in the terms in which I am currently giving it that in future cases of this sort orders for costs may be made.

7 The Secretary of State in the nature of things is a long term litigant. The Secretary of State in the nature of things is concerned with many hundreds of cases. So the Secretary of State's wider purposes and the wider public interest which the Secretary of State is anxious in this respect to enforce and uphold is probably, in the greater scheme of things, better served by my expressing views as to what is likely to happen on future occasions than by the empty gesture of ordering this particular insolvent claimant to make some modest payment of costs which it is likely will never, in fact, be enforceable. I am making these observations on the basis that the judgment, which I have already

ordered to be transcribed, will be transcribed so as to include these observations; and the judgments although made in chambers in the Family Division I will authorise to be released for publication albeit in anonymized form. So the Secretary of State will in those circumstances have what from her perspective she may see as the advantage of a judgment which, if it has not given her financial satisfaction on this occasion, may perhaps strengthen the armoury of those who represent her on future occasions.