Neutral Citation Number: [2007] EWHC 3096 (Fam)

Case No: FD07P00838

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2007

Before:

MR. JUSTICE RODERIC WOOD

Between:

The City of Westminster	Applicant
- and -	
IC	1st Respondent
(by his litigation friend the Official Solicitor)	
-and-	
KC	2nd Respondent
-and-	
NNC	3rd Respondent

Mr. Alex Verdan Q.C. (instructed by Creighton & Partners) for the **Local Authority**
Mr. Andrew Bagchi (instructed by Irwin Mitchell solicitors) for the **Protected Party**
Mr. Stephen Knafler (instructed by Bennett Wilkins) for the **Parents**

Hearing dates: 12th to 14th December 2007

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Approved Judgment

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

MR. JUSTICE RODERIC WOOD

This judgment is being handed down in private on 21 Dec. 2007. It consists of ..... pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

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

Mr. Justice Roderic Wood:

The Parties:

1. The claimant in these Part 8 proceedings under the CPR 1998 is the City of Westminster Social and Community Services Department (hereinafter referred to as the "applicant" or the "local authority").

2. The subject of the proceedings is IC. He is a "protected party" within the meaning of the CPR 1998 Part 21, Rule 21.1 (2). He has a severe learning disability, severe global developmental delay, and autism. He was born on 11th October 1981 and is accordingly 26 years old. He is represented in these proceedings by his Litigation Friend the Official Solicitor.

3. He is the first-born and much-loved son of KC (born on 3rd May 1956, who is accordingly 51 years old). KC was born in Bangladesh. He has dual British and Bangladeshi nationality. He came to live in this country in March 1968, and has, for the last 39 years, worked here, and following his marriage to NNC, raised his family here. His latest statement speaks of returning at some future date (possibly in four to six years) to Bangladesh to live out his retirement.

4. NNC, IC's mother, was born on 7th January 1963 and is thus approaching her 45th birthday. She too was born in Bangladesh, but following her marriage to KC in September 1980 she came to live with him in this country in 1981. She too has dual British and Bangladeshi nationality.

IC's Siblings:

5. IC has two sisters: SC, born on 19th October 1984, and JC born on 16th November 1986. Those two young women live at the family home with KC, NNC and IC.

6. JC has a twin brother FC who lives independently, is studying to be an accountant, and keeps in close contact with his family.

7. All of the children (although I shall revert to the topic of IC's abilities in this context) like their parents, are practicing members of the Muslim faith. They are all very much involved in their local Bangladeshi community. SC has contracted an arranged marriage consistent with her family's culture (the father telling the court that in the process of selecting a spouse, she rejected, with their consent, a number of candidates prior to selecting the man she married). Her younger sister and brother indicate that in due course they too consider it more likely than not that they will contract arranged marriages.

The Applicant's Rôle in IC's Life:

8. In the course of his life IC, and his family, have needed a high degree of help from the applicant's social services department, provided prior to his majority pursuant to the provisions of part III of the Children Act 1989, and its legislative predecessors, and following his majority by the Community Services Department pursuant to their obligations under a variety of different statutes to which I need not refer.

9. Amongst other services, they have arranged in recent times for his attendance at a Day Centre, and for up to 84 days per year respite care. It is unnecessary for me to set out at this stage a more detailed background save to record that the applicant asserts that over a period of many years there has, at times, been inadequate provision made by the family for the care of IC.

10. It came to their attention in October 2006 that, KC and NNC having returned to Bangladesh for the purposes of a holiday, although his siblings were ostensibly in charge of him, IC was being left for extensive periods with no supervision and no proper care. Enquiries by the applicant of the siblings suggested that they were all leading busy lives, and felt unable to undertake the full-time care of IC. Arrangements were made for him to be cared for in a residential setting, although at some stage, once his parents had returned to England, he went back into their care at the family home.

IC's Marriage:

11. On 16th November 2006 KC and NNC signed an "Agreement" with the applicant's Learning Disability Partnership. Although this passage is crossed through, part of paragraph 8 reads as follows:

> "However it is acknowledged that Mr. & Mrs. (C) have indicated that they wish (IC) to travel to Bangladesh to marry in April 2007"

12. This entry followed on the heels of a meeting between members of the applicant's relevant department and KC and NNC (who were assisted by an interpreter). At that meeting KC had asked what the view of the applicant would be in respect of IC marrying, and it was indicated by the Chair of that meeting that she did not believe that IC would have the legal capacity to marry, but would consider the matter and seek legal advice.

13. It came as something of a surprise to the applicant when they were informed by the solicitors for KC and NNC in a letter dated 2nd May 2007:

> "We are now instructed that (IC) was married in a Moslem ceremony which took place by telephone on or about 26th August 2006. (IC) did not travel to Bangladesh for the ceremony. We are instructed that (IC) is married within the Moslem religion".

The letter went on to name his bride (NK), indicate that she remained living in Bangladesh, but that it was the intention of the mother and father that an application would be made to the Home Office for IC's wife to travel to the United Kingdom to live with IC in the family home. There had been a number of meetings between KC, NNC and the social workers between the November discussions and this letter at which no reference had been made to this marriage.

14. This notification came after the issue by the applicant of their proceedings under CPR Part 8 on 23rd April 2007 which, on its face, indicated that the applicant would be making an application under the inherent jurisdiction of the High Court (Family Division) for:

> "A declaration as to the capacity of Mr. (IC) to marry. The local authority does not consider that Mr. (IC) has the mental capacity to marry."

15. That claim form also indicated that the applicant would be seeking declarations as to the capacity of IC to consent to circumcision (the applicant not considering that he had such capacity) and a declaration as to whether it would be in his best interests to be circumcised (the applicant not considering it to be so). These were sought in the light of the father's indication that he would wish IC to be circumcised, consistent with the practice of the Muslim community.

16. Although the letter to which I have referred in paragraph 13 suggests the date of the marriage was "on or about 26th August 2006" subsequent evidence filed by KC and NNC puts the date of that "ceremony" at the 3rd September 2006.

The Issues:

17. Against that brief background, aspects of which I shall develop in detail later, a variety of different orders shaping this litigation have been made over the intervening eight months, and in particular by Munby J. on 22nd November 2007 in the schedule to which, under the sub-heading "Schedule of Issues", he set out the issues as he believed them to be, and in paragraph 4a of the order said (in respect of the first stage of the hearing, namely the allocated dates of the 12th to 14th December) that:

> "The Court will consider the issues set out in the schedule to this order".

18. The list of those issues is as follows:

1. "Does IC have the mental capacity to consent to
   a) marriage
   b) sexual relations
   c) circumcision?

2. Is IC lawfully married
   a) in Sharia Law
   b) in Bangladesh

c) in English civil law?

3. If IC is lawfully married either in Sharia Law or in Bangladesh, is that marriage recognised in English Law?
   a) Does the "dual domicile" or "most real and substantial connection" principle apply?
   b) What are the consequences of a finding that either applies?
   c) Are any further proceedings necessary?

4. Does the Court have jurisdiction to prevent the family changing IC's domicile or taking him to live in Bangladesh?

5. Should the court refuse as a matter of principle to exercise its best interests jurisdiction in this case?

6. What is the correct test/ approach for establishing IC's best interests?

7. What, if any, further evidence/ procedures are appropriate?

8. What relief ought to be granted at this stage?

9. What is to be the ambit of the second stage of the hearing?"

19. At the invitation of Munby J. I have read two full volumes of factual material and expert witness statements going to some, if not all, of these issues. I was invited to read them de bene esse.

20. I have had one full volume of skeleton arguments provided by counsel, and four volumes of statutes, authorities, conventions, etc.

Matters Agreed:

21. IC does not have the mental capacity to litigate, to consent to marriage, to sexual relations, or to circumcision.

22. IC is lawfully married to his new wife (NK) in both Sharia law and Bangladesh Civil Law.

23. IC was born in England, has resided here for the majority of his life (1990 - 1996, and part of 1998 excepted), and is domiciled here.

24. IC's family are Hanafi Sunni Muslims, as is his wife (NK).

Issue 1: My Findings:

25. This section of the Judgment deals only with my findings in relation to the agreed matters set out above. In the light of the unanimity of view by the parties in relation

to the above issues, and the fact that I am in agreement with them, having directed myself as to the appropriate law, I do not propose to set out an overly detailed exegesis on the law, nor quote overly extensively from the factual material.

Capacity to Litigate:

26. The issue of capacity to litigate was considered in *Masterman –Lister v. Brutton and Co (No1)* [2003] 1 WLR 1511. Chadwick LJ said:

> "75. ... the test to be applied ... is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law--whether substantive or procedural--should require the interposition of a next friend or guardian ad litem ..."

> "79. ... a person should not be held unable to understand the information relevant to a decision if he can understand an explanation of that information in broad terms and simple language; and ... he should not be regarded as unable to make a rational decision merely because the decision which he does, in fact, make is a decision which would not be made by a person of ordinary prudence."

27. I recognise of course that capacity to litigate is issue-specific. Some issues are much simpler to understand than others, some require a complex consideration of philosophical and legal abstractions. This case is at the latter end of the spectrum.

28. There is overwhelming evidence from psychology reports, speech and language reports and, within these proceedings, a report by Dr. K (consultant psychiatrist) that A does not have the capacity to litigate, applying those tests, and is not able to instruct his solicitors in these proceedings. He "qualifies for the designation a patient under the CPR 1998 by reason of mental disorder, in this case in an arrested or incomplete development of the mind. He is incapable of managing and administering his property and affairs".

29. In so finding, Dr. K was taking account of IC's "extremely limited intellectual capacity" and formal psychometric testing which gives an indication of the severity of IC's intellectual impairment, a precise figure not being possible, but the totality of the material suggesting:

> "Nevertheless it may help the Court understand IC's level of learning disability when I say that in no area of his development does he currently show the skills that one would expect of an average three year old and in many areas functions substantially below this".

30. In so far as a layman can comment upon these issues, I accept the unchallenged evidence on this subject.

Capacity to Consent to Marriage:

31. There are two aspects to this question:

    i) Does IC understand the nature of the marriage contract?

    ii) Does IC understand the duties and responsibilities that normally attach to a marriage?

32. In the case of In the estate of Park, deceased, Park v Park [1954] P 112 at 127 Singleton LJ described:

> "The duties and responsibilities that normally attach to marriage can be summarised as follows: marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance".

Taking that to be a proper working definition (although I recognise of course that in some societies permitting polygamy the phrase "to the exclusion of all others" would be omitted), the evidence I have read, including that of Dr. K, would suggest the following:

i) IC simply has no understanding of the concept of a contract as representing a legally binding agreement between man and wife.

ii) He shows no ability to understand abstract concepts whether conveyed to him verbally or visually.

iii) He is capable only of making the most basic of decisions limited to concrete choices and based in the "here and now".

iv) His grasp "of temporal relationships is significantly impaired and it seems most unlikely that he will be able to grasp the concept that a decision made now would affect him for his long-term future".

v) IC does not appear to understand the difference between men and women. "The further abstraction into husband and wife is beyond his comprehension".

vi) IC has never shown any inclination towards wanting to form a relationship with another person (although the family suggest that he does discriminate in favour of his younger brother suggesting that their might, at some level, be a relationship between them).

vii) "… given the severity of his autism, he could not form an intimate relationship with another".

viii) As Dr. K notes:

> a) "IC has classic autism. Although not formally tested I have found no evidence that he is able to predict or explain the behaviour of others through an awareness of what they are thinking. This inability, commonly seen in autism, is independent of his degree of learning disability. Given the severity of both his learning disability and autism, I would view it as extremely unlikely that he would understand, even at a rudimentary level, the notion of '*mutual and reciprocal obligations'*." (C 142.)
>
> He also said:
>
> b) "Although many people with severe learning disability can enjoy other's company, the superimposed effect of autism is dramatic. IC's relationship with others is dominated by his autism. Although people at the very mild end of the autistic spectrum may be able to have successful relationships and this is only usually after many failed initial attempts and the developing of an understanding – insight as it were – into their condition. IC has no such capacity to self-reflect. He would not be able to contribute to a relationship based on '*society, comfort and assistance'* in the manner envisaged in constructing that statement. Furthermore, he would not be able to understand the concept of such a relationship being a contractually determined obligation." (C 142).

33. The totality of this unchallenged evidence leads me without hesitation to find that IC does not have the capacity to consent to marriage, the answer to the two questions posed in paragraph 31 above being in the negative.

Capacity to Consent to Sexual Relations:

34. In X City Council v MB, NB AND MAB 2006 2 FLR 968 Munby J said this as to a person's capacity to enter into sexual relations:-

> "Generally speaking, capacity to marry must include the capacity to consent to sexual relations. And the test of capacity to consent to sexual relations must for this purpose be the same in its essentials as that required by the criminal law. Therefore for present purposes the question comes to this. Does the person have sufficient knowledge and understanding of the nature and character – the *sexual* nature and character – of the act of sexual intercourse, and of the reasonably foreseeable consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it, the capacity to decide

> whether to give or withhold consent to sexual intercourse (and, where relevant, to communicate their choice to their spouse)?"

I adopt the same approach.

35. In considering this issue I have found it particularly helpful to turn to the report of Dr. K. He asks:

> "… whether he has the capacity to understand the nature and character of the act."

He directs himself in the light of authority (Re AB [2006] EWH C 168) that such knowledge 'does not need to be complete or sophisticated'.

36. He says this:

> a) "IC's IQ is likely to be significantly below 50. Generally speaking, the percentage of people who have the capacity to consent to sexual relations diminishes the lower the person's intellectual ability. It is commonly accepted that below an IQ of 50, it is highly unlikely that an individual is able to consent, though this still needs assessing on a case-by-case basis."
>
> b) "Even with education from professionals, I do not believe IC would be able to comprehend the nature of sex. Even an understanding of basic human anatomy is beyond his comprehension. For example, he has little understanding of gender differences (6.2.7). Although IC does appear to be having erections and masturbating, this awareness of some aspects of how his body functions is not equivalent to him having awareness of sexual relations."
>
> c) "Furthermore, I am of the opinion that IC would not be able to appreciate the character of the sexual act. The concepts that it may provide mutual pleasure, can lead to pregnancy and a child being born, and potentially risks transmission of disease are all outside his sphere of intellectual understanding. He therefore does not appreciate the consequences of sexual activity."
>
> d) "It would also be my opinion that IC would not be able to understand or predict the effect his actions would have on his partner. This would leave both him and any partner extremely vulnerable."
>
> e) "He does not understand the abstract concept of the 'rights of others'. Due to the nature and degree of his disability, he would not understand the right of his partner to choose whether or not to engage in sexual activity, and the nature of that sexual activity. It is my opinion that he does not have the ability to

> understand the nature of the sexual act, and therefore is not able to either give or withhold his consent." (C143 - 144).

37. Overall, he is quite clear that IC does not have the capacity to consent to sexual relations due to a combination of his severe learning disability and severe autism. I agree.

Capacity to Consent to Circumcision:

38. The test of capacity to consent to, or refuse, medical treatment has been laid down in a number of authorities. The necessary components can be summarised in the following way: the patient needs to comprehend and retain information material to the decision, and with particular reference to the likely consequences of having or not having the treatment in question. Using information to weigh in the balance is part of the process of the decision-making.

39. Again the totality of the evidence from all sources, and particularly from Dr. K, drives one to the inevitable conclusion that IC lacks any ability to consent to such a medical procedure.

40. Although the father regarded it as part of his duty to have his son circumcised consistent with his Muslim and cultural principles, and gives an explanation of why he did not have the operation carried out at a conventional age (either shortly following birth or at about the age of seven) he now does not press for this operation to be carried out on his son. I am left in considerable doubt as to whether or not he has withdrawn tactically from seeking such a procedure, or whether he no longer considers it to be necessary (subject to any later medical reason announcing the need for it) to have the procedure carried out at all.

Circumcision: Best Interests: Declaration:

41. In the light of that ambiguity, the applicant, supported by the Official Solicitor, seeks a declaration preventing the carrying out of such a procedure on IC.

42. Turning therefore, to the consideration of the evidence of the advantages and disadvantages of such a procedure, I have considered in particular the report of Mr. S, consultant urological surgeon, prepared in respect of these proceedings. Having described the physiology, broad policy in terms of the timing of such interventions, and the process if such a procedure is to be undertaken, he refers to a number of potential complications, some short-term and some longer-term.

43. The short-term includes bleeding which may be reactionary or secondary. Reactionary haemorrhaging following a circumcision does not represent a significant surgical concern. Secondary haemorrhaging "mainly relates to infection at the site of the operation, causing delayed lyses of blood clots". Such secondary haemorrhaging is rare, but would be alarming, and it would be necessary for the patient to know what to look for and how to apply pressure to stop the bleeding as well as to repair to the

nearest accident and emergency department. Such bleeding occurs in about 10% of cases.

44. There are the obvious complications of infection.

45. As to long-term complications there is the unavoidable alteration in the appearance of the external genitalia, and the unavoidable occurrence of hyper-sensitivity of the exposed and uncovered glans penis. "Depending on the personality of the adult male undergoing circumcision, the psychological and physical complications will vary in nature and extent".

46. There can be day-to-day complications in the form of penile discomfort with clothing, or in association with sexual activity in general, penetrative intercourse in particular.

47. In giving his clinical opinion, Mr. S notes that since the father's reasons for seeking circumcision are based on religious grounds, this operation could not be undertaken on the NHS.

48. Nor is any suggestion that a prophylactic circumcision is necessary, there being no history of infection etc. suggesting future risks.

49. Professor M (see below) makes it clear that it is not a religious requirement to have such an operation.

50. Dr. K has also considered this issue and drawn up a "balance sheet" of advantages and disadvantages of the carrying out of such an operation. I shall advert to some aspects of it, where not already covered, my consideration of the issue of capacity and the evidence of Mr. S. I share the view of Dr. K that such is IC's family's religious and cultural beliefs and values that it is probable that had IC the capacity he would have approved of the proposed operation. As earlier noted, it would not be possible to make him understand the nature and purpose of the intervention, given his capacity. He would have no way of knowing what the procedure would entail and could be traumatised by the procedure. NK apparently knows that IC is not circumcised, but this does not present a problem to her, even though it is culturally normative for men to be circumcised.

51. Dr. K writes of the likely psychological impact of such a procedure on someone who has a severe learning disability and who suffers from "the idiosyncratic nature of the autistic condition". As he has noted in other contexts, people with autism find change extremely difficult to cope with, and IC may become upset psychologically if his body is altered. He would certainly notice the alteration, both in appearance and sensation. He goes on to say: "How things look and feel are very important to people with autism".

52. Finally, although eschewing formal expertise on the subject, he says:

> "It is my understanding that circumcision is practised to demonstrate faith and submission to God. It would seem to me that in the absence of free will (as identified by lack of capacity), IC being circumcised when he has not consented and

> does not appreciate the significance of the act, lacks the conviction which is central to the act".

No-one takes issue with this assertion. I have taken it into account but do not regard it as a determinative feature.

53. The totality of the evidence powerfully suggest to me that this operation is wholly unnecessary on physical, social and religious grounds, and bearing in mind the intellectual impairments under which IC operates wholly inexplicable to him. I can see no circumstances (absent good medical reasons) in which I would authorise the carrying out of such a circumcision, and grant the declaration sought by the applicant.

Issue 2: Is IC's "Marriage" Lawful in Sharia Law and Bangladeshi Civil Law?

54. I have recorded above the unanimity of view that IC's marriage is lawful both in Sharia and in Bangladeshi civil law. The basis of this agreement is the expert opinion of Professor M (the distinguished Professor of South Asian Laws at the School of Oriental and African Studies London). I need only set out limited aspects of his conclusions, which again are unchallenged, and which I too accept.

55. Despite IC's incapacity to consent, a mentally incapable adult can contract a legally valid marriage under Islamic law. I need not set out the bulk of the conditions, but what is essential is that for these purposes IC has a guardian (a marriage guardian) who has full mental capacity, and who has the right to give his consent for his son's marriage, notwithstanding the incapacity of IC.

56. A further requirement is that the bride, in this case NK, was herself without disability, and consented freely. She is and she did.

57. The "marriage" needs to be contracted in an "Islamically accepted form, which in this case he finds it to have been, even though the bride, the Khazi officiating, many of her relatives as well as IC's relatives, in particular his father, were in Bangladesh, and IC was with his siblings and an Imam from a local mosque in London, there being speaker-phone communication between the two parties. This form of celebration of marriage (at the telephone) is increasingly common and accepted as entirely valid.

58. As Professor M says:

> "Overall, it appears to me that these marriage arrangements have been carefully made with the explicit overarching aim to be in the best interests of IC, whilst remaining in accordance with Islamic principles and practice".

In this context he is, in particular, referring to the avoidance of zina (sexual relations outwith marriage), and to provide "mental and physical comfort to both parties to the marriage". [N.B. This last justification in respect of mental comfort, highly relevant under Islamic law, is said by Dr. K and others to be of doubtful if any relevance to IC given his mental impairments and autism].

59. Irrespective of IC's ability or inability to consent, the father of IC (his marriage guardian) "may legitimately act in the best interests of his Ward to arrange, solemnise and contract a marriage for that individual which binds that individual and the spouse in all respects …..".

60. It is said that in the course of the marriage ceremony IC said the word "yes" in ostensible consent to his marriage, although his overall mental capacity should not be ignored, included within which is the possibility of coaching, or, more probably than not, echolalia from which he suffers, leading, depending on the phrasing of the question put to him, to such an answer. Irrespective of the status of that "yes" it is, in this case, the father's agreement to the marriage as the lawful marriage guardian of an incapacitated son which is sufficient under the provisions of traditional Islamic law to constitute an appropriate consent.

61. As to the validity under Bangladeshi civil law it is quite clear under the Moslem Personal Law (Shariat) Application Act 1937 and the Moslem Family Laws Ordinance 1961, and other relevant enactments, that Moslem Sharia law co-exists with modern statutory laws and where conflict exists between the two systems:

> "It was always the position in Pakistani law and remains the legal position in Bangladeshi law today that the traditional Moslem law as God-given law co-exists with, but ultimately prevails over, the statutory civil law".

He is thus in no doubt at all that, even though this marriage has not been registered – not an essential requirement to establish validity – it is a true and valid marriage under both systems.

Issue 2 Continued: Is IC Lawfully Married in English Civil Law?

62. Before considering that question I note that it was the more or less agreed position at the Bar that the lex locis celebrationis was Bangladesh. That agreement was based on a number of features including the presence of a Khazi, the presence of the bride and significant numbers of her family at that venue, which was the father's home in Bangladesh, the fact that the certificate of marriage was issued by that Khazi who also officiated at the ceremony, and to whom the respective consents (that of the wife, of IC's marriage guardian, and possibly of IC himself in the form of the word "yes") were all given. The dowry was paid over in Bangladesh, and effectively it is asserted the contract was carried out there. This is despite the presence in London of the groom, his siblings and an Imam. Furthermore it is suggested that in line with the long-standing commercial authority (Amin Rasheed Shipping Corporation v Kuwait Insurance Company [1984] 1 AC 50) it is up to the parties to elect the proper law of the contract, and insofar as their intention is discernable, it is suggested that had their choice been written down it would undoubtedly have been Bangladeshi which was to operate.

63. Whilst recognising that it could be argued that the celebration of marriage occurred in both countries, with possible jurisdictional complications arising from such a decision, the matter not being specifically the subject of Professor M's opinions, he

asserting that it is the essence of the contract that it is the offer and acceptance which are vital, and not specifically giving an opinion on the issue of the venue, I am inclined to accept the agreement of the Bar that it is more probable than not that the celebration of marriage occurred in Bangladesh, compliant as it was with all local religious and civil laws.

64. Under English law such a celebration of marriage here would not be lawful (whatever its religious status) being wholly in breach of the provisions of the Marriage Act 1949, and the Marriage Act 1994. I need not set out the precise requirements of the relevant sections of those Acts, suffice it to record that not one of them was complied with, and I accept the suggestion of Mr. B (counsel instructed on behalf of the Official Solicitor) that in reality "there is no evidence that any of the parties to the ceremony considered that the purpose of the ceremony was to create a marriage valid under English law".

Matters Not Agreed:

Issue 3: Since IC is Lawfully Married to NK under Sharia and Bangladeshi Civil Law, is that Marriage Recognised in English Law?

65. The schedule of issues suggested by Munby J. goes on to ask whether the "dual domicile" or "most real and substantial connection" principle applies. If either applies, what are the consequences? And finally he asks if further proceedings would be necessary.

66. This central issue has proved to be the knottiest part of the case for the parents' position in favour of recognition, and that of the applicant and Official Solicitor against recognition, are diametrically opposed in their interpretation of the law. In support of the parents' case, it is argued by Mr. K that "I should recognise the validity of the marriage which has taken place under the moral, cultural, legal and religious code to which the relevant parties adhere, and is recognised as appropriate and desirable in this case by the civilised nation of Bangladesh, and by millions of Moslems worldwide". That is a powerful call to arms.

IC's Domicile:

67. I have to begin by examining IC's domicile. As Mr. B pointed out on behalf of the Official Solicitor, the general principles on domicile are succinctly encapsulated in Dicey "The Conflict of Laws" 14th edition – 2006. I shall refer to the text hereafter simply as "Dicey". I am grateful to Mr. B whose skeleton argument on behalf of the Official Solicitor incorporated the necessary rules taken from Dicey, and commentary upon those rules with which I agree as hereafter set out.

"Rule 16 – para 6R 105 reads:

"Rule 16 – a person lacking mental capacity to make decisions as to his future permanent residence cannot acquire a domicile of choice and subject to the

exception hereinafter mentioned, retains, while lacking that capacity, the domicile he had when last having that capacity".

The exception mentioned provides **(para 6E-113)** that :

"the domicile of a person who never acquires……the mental capacity to make decisions as to his future permanent residence is determined, so long as he lacks that capacity, as if he continued to be a dependent child."

On the working assumption that IC lacks and lacked capacity to take a decision as to his future permanent residence it is necessary to consider what IC's domiciliary status would be if he were a dependent child.

Dicey Rule 15 (para 6R-090) indicates that:

"the domicile of a legitimate child, is during the lifetime of his father, the same as, and changes with the domicile of his father"

The learned editors of **Dicey** consider the rule to be "well settled" (**para 6-091**).

All of the rules combine to provide that:-

a) When IC was born he acquired the domicile of his father, KC;

b) On attaining the age of 16, by reason of his incapacity, he did not attain an independent domicile in his own right, but retained the domicile of his father, and it is his father's domicile which governs IC's domicile whether at the time of the marriage or today."

68. As Mr. B rightly points out, I should therefore consider the domicile of KC. He has dual nationality, and has lived in the U.K. since 1968, marrying here, his wife acquiring British Citizenship by virtue of that marriage. In his first statement he expressed a clear intention to continue living in the United Kingdom with IC. His more recent statement suggests that his plan, along with his wife, is to retire and move to live in Bangladesh within four to six years, or possibly even earlier, although a letter of 7th June 2007 from his solicitors stated (without varnish) "Regarding domicile, both Mr. and Mrs. C are British citizens and intend to continue to reside in the U.K.".

69. Domicile is essentially a matter of fact as interpreted within the framework of the existing law, but I believe it not inappropriate in this case simply to state that on the totality of the factual evidence presented to me (even recognising powerful connections between KC and NNC and their respective families in Bangladesh, their ownership of property there, their dual nationality, etc.) that their domicile of choice is currently the U.K., and thus no doubt they rightly conceded as much by letter. Properly in my judgment they also concede that IC's domicile and residence are currently in the U.K. Whilst I have no doubt that KC's domicile of origin was Bangladesh, after his arrival in England in 1968 he settled here, married and raised his family in this country, and thus acquired English domicile of choice on the basis of those facts coupled with what I find to be his intention to remain here permanently (or

even if that intention were only to qualify as "indefinitely" with the possibility of return at some unspecified date to Bangladesh).

70. It thus follows that IC's marriage on 3rd September 2006 took place when, as is conceded, IC was domiciled in England.

The Dual Domicile Doctrine:

71. The question therefore arises, where, as I have found, IC was domiciled in England at the date of his marriage, as to whether or not IC's "incapacity to consent to marry precludes recognition of the Bangladeshi marriage by an English Court".

72. In Dicey, Rule 67 (paragraph 17R – 054), the following appears:

> "As a general rule, capacity to marry is governed by the law of each party's antenuptial domicile …….
>
> ….a marriage is valid as regards capacity when each of the parties has according to the law of his or her antenuptial domicile, the capacity to marry the other."

As Mr. B Submitted:

> "In other words, if at the time of the marriage IC lacked the capacity to marry as determined by English Law – that being the law of the country of his antenuptial domicile -the English Court cannot uphold the marriage as a valid one."

73. In *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam), [2006] FLR 968, Munby J. refers to the applicability of the dual domicile rule in relation to capacity to marry, and goes on to refer to academic and judicial debate on the subject of the dual domicile rule. It is perhaps here helpful to set out three paragraphs from his Judgment:

> "**[33]** *Capacity* to marry, as contrasted with the *formal validity* of a marriage, is governed by the 'dual domicile' rule. As stated by Dicey & Morris, *The Conflict of Laws* (Sweet & Maxwell, 13th edition, 1999), vol. 2, r 68, and subject to certain exceptions, none of which is material for present purposes, the general rule is that 'capacity to marry is governed by the law of each party's antenuptial domicile'. This means that 'a marriage is valid as regards capacity when each of the parties has, according to the law of his or her domicile, the capacity to marry the other'. Conversely, 'a marriage is (normally) invalid when either of the parties lacks, according to the law of his or her antenuptial domicile, the capacity to marry the other'.
>
> **[34]** This rule has been the subject of much academic dispute and a certain amount of judicial debate: see the discussion in Dicey & Morris at paras. 17-055–17-069, in particular of Lord Simon of Glaisdale's observations in *Vervaeke v Smith (Messina and A-G intervening*) [1983] 1 AC 145, at 165–166

> and also of the various judgments in *Lawrence v Lawrence* [1985] Fam 106, [1985] FLR 1097. It has, for example, been suggested that a marriage which would otherwise be invalidated by the 'dual domicile' rule will be valid if the parties have capacity under the law of the country of the prospective matrimonial home – the law of the country of their intended matrimonial domicile – or under the law of the country with which the marriage has its most real and substantial connection. There is no need for me to enter into this debate, for whichever of the three proposed rules applies, the result in this case is the same. For in this case, and in many such cases, England is not merely the country of MAB's domicile. It would also be the country of the intended matrimonial domicile and the country with which any proposed marriage would have its most real and substantial connection.
>
> **[35]** The one thing which in my judgment is quite clear, and has been ever since the decisions of the House of Lords in *Brook v Brook* (1861) 9 HLC 193 and the Court of Appeal in *Sottomayor v De Barros* (1877) 3 PD 1, is that capacity to marry, in contrast with formal validity, is not governed by the *lex loci celebrationis*. So it is neither here nor there that a marriage celebrated in Pakistan might be recognised as valid in that country. The short point is that MAB's incapacity to marry in the eyes of English law means that no marriage entered into by him, either in this country or abroad, will be recognised in English law. And if it is not recognised in English law it will not be recognised by English public authorities"."

[N.B. The reference in paragraph 32 to the 13th edition of Dicey, volume 2, Rule 68 corresponds in the 14th edition to Rule 67 cited above.]

The Dual Domicile Doctrine: History:

74. The traceable origin begins with the case of *Brook and Brook* [1861] 9 HLC 193. Lord Campbell said:

> "… if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated" (Page 207).

N.B.: it should be noted that until 1971 a marriage entered into where one party lacked capacity to consent was deemed void not voidable.

75. The rule was re-affirmed in a Court of Appeal case: *Sottomayor v De Barros* [1877] 3PD 1. In the course of that case Cotton LJ. said:

> "The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been

> constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile."

76. In *Sottomayor v De Barros* (number 2) [1879] PD 94 Sir Gorell Barnes P said this:

> "All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign State when they work injustice to its own subjects ….."

Although this particular decision has been criticised in, for example, Dicey as being overly Anglo-Centric, the above statement of principle, reflecting a position on public policy, remains, in my judgment, persuasive, whilst of course requiring a rigorous analysis of the facts and law relevant to the individual case.

"Quintessential Validity":

77. In *Vervaeke v Smith* [1982] 2 AER 144, in rejecting a petition for nullity, Lord Simon, in contemplating cases where an English court had to consider a conflict between the personal law of England and the personal law of another State, examined issues of capacity and consent, and regarded them as being issues of "quintessential validity". Having considered the test of dual domicile, he said:

> "I venture to propose two other possible choices of the law to adjudge this sort of quintessential validity: first, the lex loci celebrationis; and, second and to my mind preferably, the law of the territory with which the marriage has the most real and substantial connection.
>
> The lex loci celebrationis has the authority of the frequently cited passage from the opinion of Lord Brougham in *Warrender v Warrender* (1835) 2 Cl & Fin 488 at 530, 6 ER 1239 at 1254:
>
> > *'... the question always must be, Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract.'*
>
> And in *Berthiaume v Dastous* [1930] AC 79 at 83, [1929] All ER Rep 111 at 114 Viscount Dunedin, delivering the judgment of the Privy Council, said (albeit going wider than the issue, which related to formalities, demanded):
>
> > *'If there is one question better settled than any other in international law, it is that as regards marriage--putting aside the question of capacity--locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all the world over ... '*
>
> The second test is the application to choice of law of the criterion which your Lordships proposed in *Indyka v Indyka* [1967] 2 All ER 689, [1969] 1 AC 33 in considering recognition of the jurisdiction of a foreign divorce court. This criterion of a real and substantial connection seems to me to be useful and

> relevant in considering the choice of law for testing, if not all questions of essential validity, at least the question of the sort of quintessential validity in issue in this appeal, the question which law's public policy should determine the validity of the marriage. The territorial law with which a marriage has the most real and substantial connection will often be the law of the prospective matrimonial home; this was the law favoured to govern all questions of essential validity by *Cheshire*, and by Lord Greene MR (Somervell LJ concurring) in *De Reneville v De Reneville* [1948] 1 All ER 56 at 61-62, [1948] P 100 at 114. The test of the most real and substantial connection may obviate some of the objections to the test of the prospective matrimonial home, e.g. that the latter gives no guidance where no matrimonial home is clearly indicated or, as here, no cohabitation at all is proposed. Undoubtedly, in the instant case, England was the territory with which the marriage had the most real and substantial connection: the ceremony was in England, the 'husband' was of English domicile and British nationality, the 'wife' was to assume British nationality and take advantage of it, and she was to become permanently resident in England. There was indeed no other territorial law with which the marriage had any real or substantial connection.
>
> If, as I think, our choice-of-law rule (whether Lord Brougham's or the extension of the *Indyka* principle) indicates English law as determinant of the validity of this marriage, it provides a potent reason for preferring the legally recognised English public policy and thus for refusing recognition to the Belgian judgment based on a contrary public policy." [Emphasis supplied].

The Test: Discussion:

78. In the skeleton arguments and oral submissions made to me competing claims were made in support of the above tests, for example Mr. B suggesting the "real or substantial connection" test was not the law, the case of Brook (see above) not having been over-ruled, the observations of Lord Simon in Vervaeke being obiter, and it being suggested that, in any event, Lord Simon had not considered the historical development of the dual domicile rule since the case of Brook and its underlying rationale. For the parents, Mr. K relies on the submission that the marriage took place in Bangladesh, was valid in law in Bangladesh, which was the country with which the contract of marriage had the most real and substantial connection. He suggests that the "connection test" is the ordinary test applicable to personal contracts (the proper law of the contract as it is sometimes called). He further submits that the "real and substantial connection test" applies when the application of the dual domicile rule would be unjust, and submits that here it would be unjust because the "marriage's most real and substantial connection is with the mother country". He further submits that the cases said to prove the existence of the dual domicile rule do not suggest that even if it is an appropriate test it is an exhaustive test, that the relevant cases espousing it are equally explicable as examples of the most real and substantial connection test, etc. I should make it clear that he does not seek to strike down the dual domicile rule, merely to avoid its potential consequences in this case (although see below for his argument which suggests that even if that is the appropriate test, this marriage should nevertheless be recognised).

79. Whilst not seeking to evade my responsibilities to consider, and where appropriate resolve, questions of this kind, I, like Munby J. in *X City Council v MB, MB and MAB* (see above) do not need "to enter into this debate, for whichever of the three proposed rules applies, the result in this case is the same".

80. In order to test that view it is necessary to set out a number of facts which I find on the basis of the agreed evidence.

It is agreed that NK is domiciled and resident in Bangladesh, and that IC is domiciled and resident in England.

It is agreed that NK has the capacity to enter into a valid marriage, having the ability to consent on her own behalf, as well as her marriage consenting on her behalf, which is in fact what happened. IC demonstrably, has no capacity to enter into a marriage in England.

81. Accepting, as I have done, that this marriage more likely than not took place in Bangladesh, I must immediately add that one should not confuse the celebration of the marriage with the actuality of married life, even where all the legal formalities and the majority of the religious and cultural ceremonies took place in Bangladesh.

82. It has always been the parents' desire (subject to the recently raised issue of the return of the parents to Bangladesh in due course) that they wish to remain living here, with IC and, if she is permitted entry following her application to the Home Office for a spousal visa, NK. It is suggested that with or without a sexual relationship within the marriage (at least in this country and it is asserted also in Bangladesh) NK will ultimately become the main carer for IC, and she is content so to do. Her own recent statement makes it clear that she would wish to live with IC and carry out that role, and eschews, if necessary, sexual consort with her husband, and any desire for children within the marriage. In so recording I have of course to bear in mind that one of the main reasons the father was anxious for IC to marry was for the avoidance of zina, and the provision within marriage of sexual consort, consistent with his Moslem principles. NK also entered the marriage on that basis, and it is only in the light of their becoming aware that sexual relations between IC and NK (if they occurred in this country) could or would amount to a criminal offence (see below), that they have said no such relations would take place.

83. It thus seems to me that, subject to the argument I shall consider below, under i) the dual domicile test, ii) the matrimonial home test, and iii) the real and substantial connection test, the answer in this case is going to be the same, namely that I would need to consider the validity of the marriage in relation to IC's capacity to consent in English Law.

Validity of IC's Marriage Under English Law:

84. Mr. K, for the parents, argues that even if his submissions as to the application of the dual domicile rule are rejected and the court considers the case under that test as opposed to his preferred options, then the marriage nevertheless survives as a valid marriage under English law. His submission is under-pinned by what he submits

(rightly) is long-standing public policy to uphold the validity of a marriage celebrated abroad where that marriage is valid in the country in which it was celebrated where at all possible. Such a submission of course must acknowledge, as Mr. K does, that there are occasions when such a marriage cannot be recognised in England, for example where to do so would be repugnant to public policy.

85. He submits that I should be extremely slow to so categorise a marriage recognised under Sharia and Bangladeshi State law. He points for example to the case of *Cheni v Cheni* [1965] 1 P 85 at 99 where Sir Jocelyn Simon P says this:

> "If domestic public policy were the test, it seems to me that the arguments on behalf of the husband, founded on such inferences as one can draw from the scope of the English criminal law prevail. Moreover, they weigh with me when I come to apply what I believe to be the true test, namely, whether the marriage is so offensive to the conscience of the English court that it should refuse to recognise and give effect to the proper foreign law. In deciding that question the court will seek to exercise commonsense, good manners, and a reasonable tolerance. In my view it would be altogether too queasy a judicial conscience which would recoil from a marriage acceptable to many peoples of deep religious convictions, lofty ethical standards and high civilisation. Nor do I think that I am bound to consider such marriages merely as a generality."

86. Mr. K points also to the case of *Aksionair-Noye Obschestvo A.M. Luther v James Sagor & Co.* [1921] KBD 532 at 558, where Scrutton LJ. in considering such issues in the context of contractual claims, and having referred to a particular case the name and citation for which I need not give, says:

> "The latter decision, in which English Courts refused to recognise a contract validly made in France on the ground that it was contrary to English principles of morality, is adversely criticised by Mr. Dicey (8), who treats it as a mistaken application on the sound principle that English Courts will not enforce foreign contracts, valid where made, where the Court deems the contract to be in contravention of some essential principle of justice and morality. But it appears a serious breach of international comity, if a State is recognised as a sovereign independent State, to postulate that its legislation is 'contrary to essential principles of justice and morality.' Such an allegation might well with a susceptible foreign government become a casus beli; and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a State which their Sovereign has recognised."

87. He also refers to cases such as *Apt v Apt* [1948] P 83 at 87 and *Metropolitan Church of Bessarabia v Moldova,* 13th December 2001, application number 45701/99, paragraphs 114-119, the latter authority considering, at length aspects of Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950

(hereinafter referred to as the "Convention"). It is unnecessary for me here to set out in extenso the passages upon which he relies, for it may be taken as a given that I shall be on guard against the State's potential intrusion into, and the family's right to respect for, the freedoms conferred by Articles 8, 9 and 12 of the Convention, 8 and 9 of course being subject to the provisos set out in paragraph 2 of each Article. Before proceeding, I set out the terms of each Article in full.

88. Article 8 of the Convention reads as follows:

i) Everyone has the right to respect for his private and family life, his home and his correspondence.

ii) 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 well-being 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.

89. Article 9 - Freedom of thought, conscience and religion, reads:

i) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

ii) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

90. Article 12 – Right to marry, reads:

i) Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

91. Although Mr. K's arguments in relation to Article 12 are addressed in the context of his submission that it would be unjust to apply the dual domicile rule, I have considered the points he makes as set out in the following lengthy quotation from his skeleton argument, and as modestly amplified in oral submissions, as being of general applicability to Article 12 issues;

i) "It would also be unjust to apply the dual domicile rule because that would be a disproportionate interference with IC's Article 12 right to marry. In the context of Article 12, state regulation must not *impair* the very essence of the right[1]: Rees v United Kingdom, 9 EHRR 56, paragraph 50; Goodwin v UK (2002) 35 EHRR 18, paragraphs 97 – 103; BL v UK (2006) 42 EHRR 11 paragraphs 34 – 41. Further, measures *affecting* the essence of the right must be proportionate: F v Switzerland (1987) 21/1986/119/168, see paragraph 40; Selim v Cyprus (2001) Application no. 47293/99; R&F v UK 28th November

2006, 00035748/05. If the application of the dual domicile rule voids the marriage then it *impairs* the very essence of the right to marry (and is disproportionate). If (as the family contend) the application of the dual domicile rule makes the marriage voidable, then that disproportionately *affects* the essence of the right, as (a) the connection test is a rational alternative test, which is not excluded by domestic law and which does not result in a marriage being declared lawful in breach of an absolute statutory prohibition; (b) it is not necessary to interfere with the validity of IC's marriage in order to protect him from serious, irremediable harm in breach of his Convention rights.

ii) Although marriage is specifically dealt with in Article 12, in assessing proportionality, it is necessary to read the Convention as a whole and take into account whether there is a disproportionate interference with the family's Article 8 and 9 rights."

92. I have directed myself in terms of his exhortation in paragraph 91 (ii) quoted above, and having considered carefully the case law to which he has directed me. I once again do not consider it necessary to set out in extenso lengthy quotations from those judgments. In considering his submissions I have of course taken account of the final phrase of Article 12 ("according to the national laws governing the exercise of this right"), as well as the terms of paragraph 2 of each of Articles 8 and 9 of the Convention.

93. Mr. B submits that the general principles relevant in my conduct of this analysis are that I should apply the definitions here set out:

> "1) 'in accordance with the law' (the law relied upon must not grant an unfettered discretion, must be formulated with sufficient precision to enable the citizen to regulate his conduct and for him to foresee to a degree that is reasonable in the circumstances the consequences which a given action may entail, and must be adequately accessible);
>
> 2) 'serves a legitimate aim' (the State must identify the objective of its interference with the individual's right and show that the reason for the interference is a proper one);"
>
> 3) 'is necessary in a democratic society' (the State must clearly demonstrate the need for the interference, that the interference is fair, and that it is proportionate to the need), and
>
> 4) 'is not discriminatory '(discrimination occurs where the distinction has no objective or reasonable justification, and there is no reasonable relationship of proportionality between the means employed and the aims sought to be pursued)."

94. I further appreciate that in following these principles, the European Court of Human Rights jurisprudence affords an appropriate margin of appreciation to the national authorities as set out in the case of *B and L v United Kingdom* [2005] (Application no. 36536/02):

> "Article 12 expressly provides for regulation of marriage by national law and given the sensitive moral choices concerned and the importance to be attached to the protection of children and the fostering of secure family environments, this court must not rush to substitute its own judgment in place of the authorities that are best placed to assess and respond to the needs of society"

In respect of this last quotation in the case I am considering I substitute for the word "children" the words "incapacitated adults".

95. The overall weight of authority, and the structure of the Convention itself, especially the qualifying phrase in Article 12, persuade me that the suggested definitions of Mr. B are correct and I so direct myself.

Section 12 (C) of The Matrimonial Causes Act 1973:

96. At the heart of Mr. K's submissions on this aspect of the case is his analysis of Section 12 (c) of the Matrimonial Causes act 1973 and its consequences. Section 12 is headed "Grounds on which a marriage is voidable", and applies to marriages celebrated after 31st July 1971. Such marriages "shall be voidable on the following grounds only, that is to say –

> "(c) That either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;"

97. I need not set out the terms of Section 13 of the Act, which in some instances inhibits the right to bring proceedings belatedly, or at all, under Section 12.

98. Mr. K argues that since a marriage involving one spouse who cannot consent because of unsoundness of mind is voidable, and therefore valid until a decree is pronounced, it must, as a matter of law and logic, follow that the spouse so affected by mental unsoundness of mind was nevertheless capable in law of consenting to the marriage in the first place. He thus draws a distinction between "legal validity" (presumed in such a case) and "mental capacity" as defined over many years.

99. He points for judicial endorsement of this view to the case of In Re Roberts Deceased, Roberts v Roberts, [1978] 1 WLR 653 et seq. The case concerned whether or not the deceased's will, having favoured the claimant, was set aside by the contracting of a marriage by the deceased when of allegedly unsound mind pursuant to the Wills Act 1837. I need not set out extensive passages of the judgment, contenting myself for these purposes with a passage from the judgment of Buckley LJ at 660 F - H which reads as follows:

> "To describe any contract as voidable indicates that it is capable of being rendered void, but this imports that until that occurs the contract is in existence. If one considers section 12 of the Act of 1973, it is clear that the first two grounds of

> avoidability there referred to in paragraphs (a) and (b) could not operate until after the marriage and the marriage clearly could not be void ab initio on either of these grounds. It seems to me to be clear that the word "voidable" is being used in section12 in the sense indicated by Lord Greene M.R. in the passage which I have cited. Avoidance of the marriage may become barred under section 13. If it becomes barred the marriage will be unassailably valid. This must also import on the one hand, or the barring of the possibility of annulment on the other, the marriage contract is in existence."

The judgment of Buckley LJ. was agreed with by Goff LJ. as he then was.

100. In considering his submissions, I need not impugn the decision of such a, if I may respectfully say so, distinguished constitution of the Court of Appeal. I shall give my reasons in due course, but before so doing it is appropriate to consider an authority (the subject of a submission by Mr. K that it was decided *per incuriam* by Munby J.) namely Sheffield City Council v E and Another [2005] Fam. 326 et seq. After an extensive review of the authorities, he said at paragraph 141:

> "(i) The question is *not* whether E has capacity to marry X rather than Y. The question is *not* (being specific) whether E has capacity to marry S. The relevant question is whether E has capacity to marry. If she does, it is not necessary to show that she also has capacity to take care of her own person and property.
>
> (ii) The question of whether E has capacity to marry is quite distinct from the question of whether E is wise to marry: either wise to marry at all, or wise to marry X rather than Y, or wise to marry S.
>
> (iii) In relation to her marriage the only question for the court is whether E has capacity to marry. The court has no jurisdiction to consider whether it is in E's best interests to marry or to marry S. The court is concerned with E's capacity to marry. It is not concerned with the wisdom of her marriage in general or her marriage to S in particular.
>
> (iv) In relation to the question of whether E has capacity to marry the law remains today as it was set out by Singleton LJ in ***In the Estate of Park, deceased, Park v Park*** **[1954] P 112 at 127**:
>
> (v)More specifically, it is not enough that someone appreciates that he or she is taking part in a marriage ceremony or understand its words.
>
> (vi) He or she must understand the nature of the marriage contract.
>
> (vii) This means that he or she must be mentally capable of understanding the duties and responsibilities that normally attach to marriage.
>
> (viii) That said, the contract of marriage is in essence a simple one, which does not require a high degree of intelligence to comprehend. The contract of

marriage can readily be understood by anyone of normal intelligence.

(ix) There are thus, in essence, two aspects to the inquiry whether someone has capacity to marry: (1) Does he or she understand the nature of the marriage contract? (2) Does he or she understand the duties and responsibilities that normally attach to marriage?

(x) The duties and responsibilities that normally attach to marriage can be summarised as follows: marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance."

101. Mr. K's attack on this decision as decided *per incuriam* comes from his analysis of paragraphs 100 and 101 of that judgment which I here set out:

100) "But the doctrine of necessity has and can have no operation in relation to marriage. An adult either has capacity to marry or he does not. If he does, then, at least in relation to that issue, the Family Division cannot exercise its inherent declaratory jurisdiction, because it is fundamental that this jurisdiction can be exercised only in relation to those who lack the relevant capacity. But if he does not have capacity to marry then that is that. No court – neither the High Court of Justice nor the Court of Protection – has any jurisdiction to supply consent to marriage on behalf of an adult who lacks the capacity to give consent himself. If an adult lacks the capacity to marry he cannot marry. <u>And if, none the less, he purports to marry, the validity of the "marriage" can be challenged in the usual way.</u> And if an adult lacks the capacity to marry, a purported "marriage" is no better than it would otherwise be merely because the Family Division has granted a declaration that it is in that person's best interests to marry or even if it has granted a declaration (I adapt the form of declaration used in 'residence' and 'contact' cases) that 'it is lawful, as being in his best interests, for him to marry X.

101) "The distinction is really very simple. There cannot be a valid marriage in the absence of consent. That rule is absolute and unqualified. On the other hand there can be circumstances ion which, consistently with the doctrine of necessity, medical treatment can be administered notwithstanding the absence of consent. It follows that although it is proper fore the Family Division, once incapacity has been established, to inquire into such questions as to whether it is in an adults best interests to have a surgical

> operation, or whether it is in his best interests to live here rather than there, there is simply no purpose in the Family Division even embarking upon an investigation of whether or not it is in his best interests to marry. The lawfulness of surgical treatment depends either upon consent or, where the doctrine of necessity applies, upon best interests. The lawfulness of a marriage depends exclusively upon consent. Best interests are neither here nor there. So it would be a purposeless exercise in futility for the Family Division even to embark upon an investigation of whether or not it is in an adult's best interests to marry at all or to marry X". (Emphasis supplied).

102. Mr. K submits that Munby J. has effectively ignored the import of the parliamentary decision to make marriages where no valid consent is given voidable not void, as exemplified in the decision of Roberts (see above), and has effectively ignored in their totality, the provisions of sections 11 and 12 of the Matrimonial Causes Act 1973.

103. I cannot accept his invitation to designate this authority as decided per incuriam, for, in my judgment, the words in paragraph 100 ["and if, nonetheless, he purports to marry, the validity of the 'marriage' can be challenged in the usual way"] can bear no other meaning than an implicit reference to section 12(c) of the 1973 Act.

Discussion:

104. In considering "mental unsoundness of mind" and one of its corollaries (inability to consent to the marriage contract) there is a wide spectrum of conditions encompassed in the phrase "mental unsoundness of mind". In some cases, largely I suspect those in the contemplation of the draughtsman of section 12 (c) of the 1973 Act, would be a party to a marriage who, whether guilefully or innocently, was not manifesting any obvious sign of mental disorder or incapacity. At the other end of the spectrum would be a party to a marriage obviously manifesting such incapacity (IC sadly being an example). One only has to ask oneself the question: would a registrar conducting a ceremony of marriage, upon seeing and hearing IC, contemplate proceeding with the ceremony? IC demonstrably has no mental capacity to consent to the contract of marriage, and it would, in my judgment, be repugnant to public policy, in those circumstances, to proceed with such a ceremony, if one were arranged, or recognize it as valid had it unaccountably taken place.

105. I ask myself whether the marriage in fact contracted by IC and NK in Bangladesh should, for public policy reasons, be recognised as valid or not? The answer seems to me to be obvious, and whilst intending no criticism whatsoever of the religious and cultural beliefs and structures which consider this marriage so contracted to be lawful in Bangladesh, I must, and do, approach the matter on the basis of English law as I interpret it.

106. The clear intention of Parliament over many generations of legislation has been to protect vulnerable members of society including minor children and those suffering from unsoundness of mind. I would be failing in my responsibility to IC if I did not afford him the same right as is accorded to others suffering a disability, even

respecting as I do the right of other religions and cultures to address matters differently.

107. In coming to these conclusions I have considered many factors, not least the provisions of the Sexual Offences Act 2003, which would, on the face of it, make any attempt at penetrative intercourse with a person who did not consent, a criminal offence if the act were committed in this country. It was the intention of this family, prior to them being advised of the potential for the carrying out of criminal offences under this Act, to take IC to Bangladesh for a trial period of the marriage, and parts of the documentation recited their (then) proposals for the gentle encouragement of sexual activity between husband and wife, a position they now eschew. Although I have adverted to this Act and this issue, it should not be thought that it has been determinative in my decision-making, for I well recognise that marriage encompasses the possibility of many choices by the participants, including the choice of sexual abstinence.

108. I thus propose to make the declaration sought by the applicant and the official solicitor that the "marriage" of IC to NK on or about 3rd September 2006 is not valid under English law.

109. It follows, in my judgment, that since there was no "marriage" possible between IC and NK in English law, there is no marriage in respect of which a decree of nullity may be sought pursuant to the provisions of section 12 of the Matrimonial Causes Act 1973.

Issue 4: Does the Court have jurisdiction to prevent the family changing IC's domicile or taking him to live in Bangladesh?

Changing Domicile:

110. I have earlier set out the relevant principles applicable to IC, namely that by virtue of his incapacity, he cannot have a domicile of his own, albeit he has attained 16 years. He therefore, has domicile dependent upon that of his father, KC. This court has no power to regulate his domicile.

111. Mr. B, on behalf of the Official Solicitor, directs my attention to a report of the Law Commission and the Scottish Law Commission on the subject of private international law and the law of domicile (Law Com No. 168) 1987. In the section headed "Domicile and Mental Incapacity" to be found in paragraph 6 of that report are a number of criticisms of the existing law, and the potentially capricious effects of the dependent domicile in a world where re-location to any part of the globe is potentially possible, and in fact undertaken by significant numbers. This part of the document goes on in paragraphs 6.5 to 6.12 to discuss reform proposals, including at paragraph 6.12 a discussion of a suggestion made during the consultation process that "the place of residence of a mentally disordered person determined by a court should be conclusive as to his closest connection". The respective Commissions were not convinced of the merits of such a rule, for the reasons fully set out in that sub-paragraph which I need not repeat here. It is therefore, perhaps no surprise to find that no such provision found its place in the Mental Capacity Act 2005.

112. In his written submissions, Mr. B puts forward a suggested approach to this issue. It reads:

> "A better application of the law may be:-
>
> (a) that upon attaining the age of 16 the Court in the exercise of its inherent jurisdiction may declare that the domicile of a mentally incapacitated person is other than the domicile of dependency;
>
> (b) thereafter, the Court may, in the exercise of its power to make declarations, make declarations as to status and best interests, including the right to permit P to emigrate and to change his domicile accordingly."

113. I do no more than set out these submissions which have been placed before me, I suspect, not for any observations I may make as to their desirability or otherwise, but as the proposed platform for further lobbying by, or submission to, a higher court by the Official Solicitor.

Living in Bangladesh:

114. Despite my findings on domicile set out above, I have no doubt at all that this court has the power to make declarations (consistent with the terms of section 15 of the Mental Capacity Act 2005), and, where it considers it appropriate, to make orders and/or appoint a deputy with powers to make decisions on behalf of a patient in relation to a variety of specified matters (section 16 of that Act). The specified issues are set out in section 17 of the Act and include deciding where a patient is to live (section 17 (1) (a)).

115. The Act came onto force on 1st October 2007, and these proceedings were issued long before that date. Thus I must consider the transitional provisions, but before so doing, it is worth recording that the Code of Practice in respect of the Mental Capacity Act 2005 (issued by the Lord Chancellor on 23rd April 2007 in accordance with sections 42 and 43 of the Act), notes at paragraph 4.33:

> "The Act's new definition of capacity is in line with the existing common law tests, and the Act does not replace them. When cases come before the court on the above issues, judges can adopt the new definition if they think it is appropriate. The Act will apply to all other cases relating to financial, healthcare or welfare decisions." [The guidance of course does not have statutory force].

116. As to the transitional provisions, Mental Capacity (Transitional and Consequential Provisions) Order, England & Wales SI [2007] number 1898 contains extensive provisions none of which would inhibit the common law or statutory powers of this court (or the Court of Protection) to make declarations and/or orders in respect of the affairs of IC.

117. Mr. B has drawn my attention to a number of authorities which consider the ambit, and the principles in respect of the exercise, of the inherent jurisdiction in relation to mentally incapacitated adults. See, for example, *Re: F (Adult Court's Jurisdiction)* [2000] 2 FLR 512, *Re: PS (An Adult)* [2007] EWHC 623 (decision of Munby J.), *Re: M (An Adult)* [2007] EWHC 2003 (a further decision of Munby J.) and *MVB, A & S (by the Official Solicitor)* [2006] 1 FLR 117 (a decision of Sumner J.).

118. It is necessary only to quote one passage from the Judgment of Munby J. in *Re: PS (An Adult)* (see above) to summarise the position established by authority. He says this:

> "12. I do not take up time re-tracing the history and development of the inherent declaratory jurisdiction with respect to adults since its rediscovery by the House of Lords in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1. It suffices to refer to the account in ***Re SA (Vulnerable Adult with Capacity: Marriage)*** [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, at paras [38]-[43]. I merely repeat what I said in that case at para [37]:
>
> *"It is now clear … that the court exercises what is, in substance and reality, a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established parens patriae or wardship jurisdictions in relation to children. The court exercises a 'protective jurisdiction' in relation to vulnerable adults just as it does in relation to wards of court."*
>
> I added at para [45]:
>
> *"the court can regulate everything that conduces to the incompetent adult's welfare and happiness."*
>
> 13. Consistently with this view of the jurisdiction (and as demonstrated by *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, *M v B, A and S (by the Official Solicitor)* [2005] EWHC 1681 (Fam), [2006] 1 FLR 117, *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, and *St Helens Borough Council v PE* [2006] EWHC 3460 (Fam)) there is no doubt that the court has jurisdiction to grant whatever relief in declaratory form is necessary to safeguard and promote the vulnerable adult's welfare and interests, just as there is also no doubt that the court has a wide and largely unfettered jurisdiction to grant appropriate injunctive relief. More generally, as I went on to observe in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, at paras [96]-[97]:
>
> "It is elementary that the court exercises its powers by reference to the incompetent adult's best interests … The particular form

> of order will, naturally, depend upon the particular circumstances of the case."
>
> 14. There is no doubt that since its rediscovery by the House of Lords the inherent jurisdiction has evolved, that it continues to evolve and that it must indeed continue to evolve if the court is properly to comply with its obligations under, for example, Articles 5 and 8 of the Convention: see *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, at para [52]. As Dame Elizabeth Butler-Sloss P said in *Re Local Authority (Inquiry: Restraint on Publication)* [2003] EWHC 2746 (Fam), [2004] 1 FLR 541, at para [96], in an important passage to which Mr. O'Brien appropriately drew attention:
>
> "It is a flexible remedy and adaptable to ensure the protection of a person who is under a disability … Until there is legislation passed which will protect and oversee the welfare of those under a permanent disability the courts have a duty to continue, as Lord Donaldson of Lymington MR said in In re F (Mental Patient: Sterilisation), to use the common law as the great safety net to fill gaps where it is clearly necessary to do so."
>
> Singer J made precisely the same point when he said in *Re SK (Proposed Plaintiff) (an Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, at para [8], that the jurisdiction is "sufficiently flexible … to evolve in accordance with social needs and social values."
>
> 15. I said much the same thing in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, at para [45], where I expressed the view that:
>
> "New problems will generate new demands and produce new remedies"
>
> adding at para [84] that:
>
> "Just as there are, in theory, no limits to the court's powers when exercising the wardship jurisdiction I suspect that there are, in theory, few if any limits to the court's powers when exercising the inherent jurisdiction in relation to adults.'" [Paragraphs 12 – 15.]

119. I respectfully agree with the observations of Munby J., and, where it is necessary, lawful and proportionate I consider that this court can exercise its inherent jurisdiction in relation to mentally incapacitated adults alongside, as appropriate, the Mental Capacity Act 2005. Consistent with long-standing principle, the terms of the statute must be looked to first to see what Parliament has considered to be the appropriate statutory code, and the exercise of the inherent jurisdiction should not be deployed so

as to undermine the will of Parliament as expressed in the Statute or any supplementary regulatory framework.

120. When considering the issue of the court's powers (either under the 2005 Act or under the inherent jurisdiction) to inhibit the removal of IC from the jurisdiction, and thus to intrude upon the Article 8 rights which he has, and which his parents and siblings also have, under the Convention it is my judgment that this court should be extremely cautious before making an order the effect of which is to inhibit, or at times prohibit (when they return to Bangladesh either temporarily or permanently) the enjoyment of family life and the continuance of his residence with them, but is not prevented from so doing where the circumstances demand it for the protection of the vulnerable.

121. It is the submission of Mr. K that the Mental Capacity Act 2005 provides a statutory code of such a comprehensive and complex nature that it has impliedly negated the inherent jurisdiction of the High Court as exercised under common law. He submits that if there is a gap in the legislation, the common law should not step in to fill it. No part of the 2005 Act deals with the issue of preventing the mentally incapacitated person from leaving a country. I have already given my view on that passage of the Guidance issued pursuant to the provisions of sections 43 and 44 of the Act, and that in my judgment, save where to do so would be demonstrably inconsistent with the will of Parliament, the inherent jurisdiction remains alive, in appropriate cases, to meet circumstances unmet by the scope of the legislation. That is not, to state the obvious, an invitation to a court so to do unless it is lawful, necessary and proportionate so to do.

122. Returning to the issue of the ambit of the power in section 17 (1) (a) [deciding where IC is to live] Mr. K submits that this power does not permit a judge to prevent a patient from leaving the country (inferentially in due course), for to make such an order (albeit subject to review from time-to-time) as to where an adult should live is inferentially inconsistent with the lack of power to determine domicile. This is a submission with which the authors of the 14th edition of Dicey (paragraph 6-108) are in tentative agreement.

123. The scope of the jurisdiction is further referred to in Part 2 of schedule 3 to the 2005 Act, and in particular paragraph 7. I for one, in considering paragraph 7 of that schedule see no wording which, of itself, restricts in terms of the duration of an order the powers of the court. Paragraph 7 reads as follows:

> "(1) The court may exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to:-
>
> a) an adult habitually resident in England and Wales,
>
> b) an adult's property in England and Wales,
>
> c) an adult present in England and Wales or who has property there if the matter is urgent, or
>
> d) an adult present in England and Wales, if a protective measure which is temporary and

> limited in its effect to England and Wales is proposed in relation to him.
>
> (2) An adult present in England and Wales is to be treated for the purposes of this paragraph as habitually resident there if:-
>
> a) his habitual residence cannot be ascertained,
>
> b) he is a refugee, or
>
> c) he has been displaced as a result of disturbance in the country of his habitual residence."

124. Thus the 2005 Act both provides for the possibility of intrusion of this kind, and specifically gives the court powers in relation to residence. There is no restriction, expressed or implied, upon the power to determine that issue for the period of incapacity. I therefore decline (respectfully) to find the tentative disagreement with this position expressed in Dicey (see above) persuasive.

Issue 6: What is the correct test/approach for establishing IC's best interests?

125. In turning to the 6th issue suggested by Munby J. it should not be thought that I had overlooked issue 5 to which I shall return later.

126. In his written submissions, as amplified orally, Mr. K asks the following question:

> "How are 'best interests' to be evaluated in a case such as this, when the laws and cultural perspective of the State conflict with the religious, cultural, legal and moral principles of the civilized culture to which citizens of dual nationality, and minority ethnicity, reasonably adhere? "

127. There is common cause at the Bar that 'best interests' may first be considered in the light of the statutory criteria set out in section 4 of the Mental Capacity Act 2005. This provision reads:

> "**4 Best interests**
>
> (1) In determining for the purposes of this Act what is in a person's best interests,
>
> the person making the determination must not make it merely on the basis of -
>
> (a) the person's age or appearance, or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(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.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

> (a) are exercisable under a lasting power of attorney, or
>
> (b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.
>
> (9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does
>
> or decides is in the best interests of the person concerned."

128. Section 4 (6) repays particular attention. It is of course the case that IC has not orally or in writing expressed any wishes and feelings historically or currently. He is, in reality, as earlier noted from the report of Dr. K, incapable of expressing choices. But section 4 (6) (b) enjoins me to consider the beliefs and values which would be likely to influence IC's decision if he had capacity, and sub-paragraph (c) enjoins me to consider the other factors which he would be likely to consider if he were able to do so.

129. There has been some consideration in the case papers as to whether or not IC could technically be designated a Moslem, given his intellectual impairment. Leaving that to one side as an issue I do not need to determine, but proceeding as required by the terms of section 4 (6) of the 2005 Act, it seems to me beyond question, given the family from which he comes, their history, and their continuing adherence to their religious beliefs, and in so far as is practicable in England, the traditions of their culture, as well as taking account of the strong ties they still have with Bangladesh, and the customs of their family and society, that I can assume IC, growing up in the heart of such a family, and as the first-born, would be powerfully influenced by those factors, and would more likely than not behave consistently with them, and make choices accordingly. I proceed on that basis.

130. Mr. K says that it is appropriate to adopt (subject to two codas) the best interests test set out in the decision of Mr. Justice Munby in *Local Authority X v MM (By Her Litigation Friend, The Official Solicitor) and KM*, [2007] EWHC 2003 (Fam) handed down on 21st August 2007 (see paragraphs 110 – 119 inclusive, only the last five of which I set out):

> "Now all that was said in the context of a consideration of the concept of "significant harm" as that phrase is used in section 31(2) of the Children Act 1989, and I recognise of course (see *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, at paras [45]-[46]) that there is no corresponding threshold for the exercise of the inherent jurisdiction in relation to vulnerable adults. But as *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, itself shows, the inherent jurisdiction is animated by the principles expounded by Lord Templeman and Lord Oliver of Aylmerton in *Re KD*. As I said in *Re S* at para [48]:

> "I am not saying that there is in law any presumption that mentally incapacitated adults are better off with their families: often they will be; sometimes they will not be. But respect for our human condition, regard for the realities of our society and the common sense to which Lord Oliver of Aylmerton referred in *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."

We have to be conscious of the limited ability of public authorities to improve on nature. We need to be careful not to embark upon 'social engineering'. And 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 her own partner or 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 a vulnerable adult's partner, family or carer have looked after her 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 partner, family or carer.

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, F v Lambeth London Borough Council* [2002] 1 FLR 217 at para [43].

The fact is that in this type of case the court is exercising an essentially *protective* jurisdiction. The court should intervene only where there is a need to protect a vulnerable adult from abuse or the real possibility of abuse: see *Re K, A Local Authority v N and others* [2005] EWHC 2956 (Fam), [2007] 1 FLR 399, at paras [90]-[92], and *X City Council v MB, NB and MAB (by his litigation friend the Official Solicitor)* [2006] EWHC 168 (Fam), [2006] 2 FLR 968, at para [27]. The

> jurisdiction is to be invoked if, but only if, there is a demonstrated need to protect a vulnerable adult. And the court must be careful to ensure that in rescuing a vulnerable adult from one type of abuse it does not expose her to the risk of treatment at the hands of the State which, however well intentioned, can itself end up being abusive of her dignity, her happiness and indeed of her human rights. That said, the law must always be astute to protect the weak and helpless, not least in circumstances where, as often happens in such cases, the very people they need to be protected from are their own relatives, partners or friends: *NS v MI* [2006] EWHC 1646 (Fam), [2007] 1 FLR 444, at para [8].
>
> There is one final point to be made. The court, as I have said, is entitled to intervene to protect a vulnerable adult from the risk of future harm – the risk of future abuse or future exploitation – so long as there is a real possibility, rather than a merely fanciful risk, of such harm. But the court must adopt a pragmatic, common sense and robust approach to the identification, evaluation and management of perceived risk."

131. In support of his codas, Mr. K asserts that Munby J. in this case did not fully and properly reflect the "proportionality" test, and one should always ask as coda one whether a lesser intrusion would satisfy the need. I reject this criticism, the totality of the Judgment and paragraphs 110 to 119 in particular clearly, and in my respectful judgment, fully reflect the necessity of the test of proportionality, and adopt an appropriate approach to it.

132. Mr. K's second suggested coda to the formulation of Munby J. is to require, in this case, that the "Moslem component" should be examined with care. In other words that should this court be satisfied that where a protective regime has been put in place by IC's family to promote his best interests, and that protective regime reflects a principled approach to promoting IC's best interests, and is endorsed by the religious, cultural, legal and moral principles of a civilized society to which the family reasonably adheres, it should be rare indeed for the court to prohibit that regime and require another. There would have to be, says Mr. K., a plain case of abuse. It seems to me that this coda is being put forward as a suggested 'trump card'. Neither the statute nor the common law permit in such cases a 'trump card'. I do, however, recognise that this may be a submission that applying the principle of comity I should investigate no further.

133. The submissions of Mr. B and Mr. V Q.C. for the local authority were that all the court had to do was carry out the analysis required by Munby J. without the additional gloss, for it is implicit in the formulation by Munby J. that all aspects of the case should be taken into account, and in particular the proposals of the family to continue to raise IC.

134. I agree with the submissions of the applicant and Official Solicitor in this respect, and it does not seem to me that a proper reading of Munby J. in the above paragraphs (and of his Judgment as a whole) in any way undermines the necessity for a proportionate

analysis of the factual background including, by inference, what Mr. K referred to as the "Moslem component".

Issue 5: Should the court refuse, as a matter of principle, to exercise its best-interests jurisdiction in this case?

135. In his written submissions, Mr. K makes the following point:

> "In any event, the conventional approach does not go far enough in this case. The court has a discretion as to relief, whether under its inherent jurisdiction or s 15 of the Act. It should not exercise that discretion, so as to override protective arrangements made by the family in IC's best interests, in accordance with the religious, cultural, legal and ethical code of the civilised society to which they reasonably adhere in matters of personal law, unless it is convincingly proven that the step is in accordance with the law and *necessary* in a democratic (that is, pluralistic) society in order to protect IC from serious, irremediable harm, amounting to a breach of his Convention rights: *R (Daly) v SSHD* [2001] UKHL 26, [2001] 2 AC 532, paragraphs 25 – 27; *Olsson v Sweden*, 24th March 1988, Application No. 10465/83; *MM v Local Authority X* [2007] EWHC 2003 Fam, paragraphs 106 -8, 118; see the Article 9 cases; *MAB X City Council v MB, NB, MAB* [2006] EWHC 168 Fam."

I do not find it necessary to further set out in extenso the passages referred to by Mr. K.

136. His factual submissions in the context of the above quotation assert that:

> "Objectively, it is highly likely that IC's care situation will be improved when NK joins the family. Neither the Council nor the Official Solicitor have taken the trouble to investigate, but there is no evidence, and no reason to suppose, that IC will be distressed by NK caring for him. A caring relationship (which may involve a partnership with the Council) only has advantages for IC. The one consideration potentially going the other way is sex. However, there can and will be no sex in the UK unless and until it is explicitly established that it will be lawful or tolerated by the prosecuting authorities. There will be no sex in Bangladesh, if it causes IC distress. Sex with IC is not important to NK. The risk of distress is, plainly, a manageable risk: *MM v Local Authority X* [2007] EWHC 2003 Fam, paragraphs 117 – 120.
>
> The evidence against the family is speculative, weak, partial and incomplete. In any event, at its highest, and taken at face value, the evidence against the family does not establish that it

> is proportionate to destroy IC's marriage and prevent IC and NK living together, either in the UK or Bangladesh i.e. the evidence, even at face value, does not prove that the relief sought is in accordance with the law and *necessary* in a democratic (that is, pluralistic) society in order to protect IC from serious, irremediable harm, amounting to a breach of his Convention rights. Accordingly, the best interests issues should be dismissed at this stage."

137. Before considering these submissions further it is necessary to turn to some aspects of the evidence arrayed against the family. There are question marks over the nature and quality of the personal care IC received when he was in Bangladesh between 1990 and 1996, and again in 1998. In respect of the former period, the family made two approaches to the applicant for help in funding the return of IC to this jurisdiction, query ostensibly on the basis of their own worries about the nature of care he was receiving. The applicant looks also at the more recent history of the inadequate personal care, when given, and periods of associated abandonment of IC by his siblings whilst his parents were in Bangladesh (2006). The applicant and Official Solicitor further point to the long period of observation by the local authority of neglect of his hygiene and care of his clothing, toe nails etc, and repeated lack of provision of money for him to purchase food and/or pay for outings from the day centre which he was attending. There is also a suggestion that he is under-stimulated mentally when he is at home. This assertion is not explained sufficiently in the reports for me to understand the gravamen of the complaint. Further issues are raised in relation to how the allowances received either by him directly, or by others as his carers, are being used, and certainly the papers suggest that he has no bank account of his own, but one only has to ask oneself whether a bank would open one for him; in reality, the money appears to be funneled into his sister's account, but this on its face appears to be a pragmatic resolution of the difficulty, and an alternative to opening an account where another adult is officially the trustee of his money.

138. In addition to these matters, the applicant and Official Solicitor raise concerns (primarily based on the evidence of Dr. K) as to the response of IC to a change of country (leaving aside the burden of a long journey) his introduction to what, for him, will be a completely new culture and society, and even more acutely the introduction to him of a "wife" (irrespective of whether or not attempts are made to consummate the "marriage" sexually). In the light of his history, and his learning difficulties overlaid with autism, with all the attendant problems in relation to capacity to sustain change, and to understand new relationships, and the possibility of significantly adverse reactions to such changes/relationships, the applicant local authority would oppose, at this stage, even a temporary removal from the jurisdiction. I have asked myself, as I asked counsel in the course of exchanges during submissions, what further evidence might be available to this court for the hearing currently listed for 4th to 6th March 2008? One of the crucial discriminators of best interests is how IC would respond to all of these changes, and yet I am invited to prevent him from going.

139. Mr. K further asserts in support of stopping the proceedings at this point that this is a relatively affluent family returning to a civilized land. He submits that the lack of medical facilities and psychiatric services equivalent to those on offer here is no bar to such a return. It is said on behalf of the family that this court should not be

entertaining any minute comparison between the two societies, and should not treat the provision of services which, in all likelihood, will be at a lower level than those on offer here as a bar to return unless the provision was so low as to be in danger of breaching IC's rights under the 1950 Convention.

140. In this context see, for example, the speeches of the House of Lords Judicial Committee in *N v Secretary of State for The Home Department (Terence Higgins Trust Intervening)* [2005] 2AC 296 et seq, dealing as it did with issues of the facilities available in two jurisdictions for medical treatment of an adult who had HIV, and the case of *Bensaid v The U.K.* (Application number 44599/98) the judgment of the European Court of Human Rights being issued on 6th May 2001, the case concerning a schizophrenic suffering from a psychotic illness who claimed that Articles 3, 8 and 13 of the Convention were engaged when the United Kingdom sought his expulsion to Algeria. Despite the comparative lack of medical/psychiatric services in the land to which the individual was to be returned as illustrated by both cases, the two courts decided that there would be no breach of the Convention rights of the applicants in those cases if they were returned to, respectively, Uganda and Algeria. Thus, says Mr. K, I need not entertain any detailed investigation of the comparative services on offer (a position with which, for entirely pragmatic reasons, the local authority agree, they confirming their view that it is more likely than not that irrespective of the conditions in the State of Bangladesh, the provisions of both medical and psychiatric services in this country, as well as social services provision, is likely to be higher).

141. The one area of Mr. K's submissions which seem to me to run counter to the general thrust set out above is in venturing his criticism of the applicant and the Official Solicitor, and their asserted pre-judgment of the outcome of the case, when he says that neither of them has assessed "whether the family is receiving sufficient support, or whether NK would be an appropriate carer". This powerfully suggests to me that he regards it as a lacuna in the case, despite his reliance, elsewhere in his submissions, on the probity of NK, and the confidence I can repose in her in the light of her written statement.

142. In my judgment it is appropriate to answer the question posed in issue number five in the negative. How can I, exercising this jurisdiction, and in the light of the common law tests, and/or in the light of the tests for best interests referred to in section 4 of the 2005 act, possibly be doing my duty to IC were I to abdicate that duty "as a matter of principle"? The operative principle being comity, and the respect which I should afford, wherever possible, to the lawful institutions (used in its widest sense) of a foreign country. Given the conflicting views of the family as against those of the applicant (supported by the Official Solicitor), and bearing mind the issues raised by Dr. K in his supplementary report where he addresses, amongst other issues, the question of risk to both IC and NK in the event of sexual relations occurring within marriage, and further bearing in mind the difference between the two societies on the question of how best to assist this vulnerable young man, it does not seem to me that, at this stage, I can come to any final conclusions. Comity is a powerful consideration, but, using the expression I have used above in a different context, it is not a "trump card", nor is it an absolute, and the invocation of the word does not require a court to rein in all further enquiries in appropriate cases. Although I have paid high regard to his familial religious and cultural heritage, IC has lived for three quarters of his life in this country, having been born here. He, like any other citizen, is entitled to a

rigorous assessment of his circumstances, particularly so in the light of the fundamentally different approach adopted within each culture to the proper arrangements for the care of a vulnerable, mentally incapacitated adult. It is for those reasons that I consider this enquiry should proceed.

Issue 7: What, if any, further evidence/procedures are appropriate?

Issue 9: What is to be the ambit of the second stage of the hearing?

143. I have considered these two issues as one.

144. During the hearing I asked Mr. V Q.C. what further directions the applicant local authority sought. He declined to answer until the Official Solicitor had given it further consideration and discussions at the Bar were concluded. I permitted this. As for the Official Solicitor, as may be noted from paragraph 109 of his report, he considered that the court would be assisted by further evidence from the family as to the facilities which may be provided for IC in Bangladesh should he move there, his home there, support there, and the family's approach to the marriage with NK, and whether or not the family would encourage the development, however discreetly and gently undertaken of, the sexual relationship between husband and wife. It is worth setting out in detail what the Official Solicitor says in paragraph 109:

> "I would invite the court to give directions for the investigation of IC's best interests in light of his parents' wish to take him to Bangladesh for the purpose of a 'trial' marriage with NK. Pending such investigation I have not arrived at a concluded view. I set out below however some preliminary considerations:
>
> (1) The issue is whether the court can and should grant relief to stop IC becoming involved in a marital relationship which he does not understand, to which he has not consented, and which may be emotionally damaging to him.
>
> (2) I note that the expert evidence is that if IC and NK were to live together in Bangladesh, their relationship would be lawful, but it would remain the case that IC would be exposed to the risk or actuality of a sexual relationship to which, on the evidence, he lacks capacity to consent.
>
> (3) Professor M has indicated that it would be in IC's best interests as a Muslim to be married in order to prevent 'zina' (sexual relations outside of marriage). The available evidence indicates however that IC has never experienced intimate sexual activity, nor shown any inclination to form a sexual relationship whether within or without marriage.
>
> (4) Irrespective of whether he resides with extended family in Bangladesh, such a move would represent a

significant disruption of IC's established routines and a significant change in his circumstances. Moreover it would deprive him and his family of the professional support and services which the local authority and primary care trust presently provide.

(5) IC would experience a change of primary carer, in that responsibility for meeting his care needs would shift to NK. It is unclear what experience, if any, NK has of meeting the needs of a person in IC's position. I also note from the statement of Patricia Wilkins, that NK already has responsibility for the care of IC's paternal grandmother, who suffers from Alzheimer's, and who also lives in the family home in Bangladesh.

(6) Although KC states in his most recent statement (paragraph 21) "*Mrs C and I have come to an understanding that we are parents of a person with a disability,"* the evidence of the claimant, including the statement of Ms Meek-Orr dated 6 November 2007, indicates that KC and NNC still do not appear to fully appreciate or accept IC's level of disability. In his first statement, for example, KC expressed a belief that IC *"understands that he has a bride and that she is special to him"* (paragraph 29) although there is no other evidence to support this. I note that KC acknowledges in his statement dated 19 November 2007 (paragraph 32) a need to work together with professionals in IC's best interests:

"I have read the Local Authority evidence and I appreciate that we need to work together more closely with social services . . . My family and I have developed a positive relationship with the care worker Maria who started in August and have found her input helpful."

I also note however that it is the claimant's evidence (Ms Meek-Orr's statement of 6 November 2007) that KC and NNC have not attended strategy meetings arranged for 26 July 2007 and 1 August 2007 to discuss concerns about IC's care, or the monthly Circle of Support Meetings subsequently arranged to provide an opportunity for regular feedback and problem solving. The family has accepted home care support with IC, which has led to a perceived improvement in his presentation, although the carers have expressed concern about the lack of clean clothes for IC. Ms Meek-Orr records that there are also concerns that IC still arrives at the respite facility he attends every other weekend without clothing, toiletries or money for his stay. The local authority therefore continues to have concerns about the family's ability to meet IC's needs in this country even with professional support and assistance.

(7) Although the evidence in this regard is sparse, it appears that if IC moves to Bangladesh, the responsibility for

> meeting his needs would rest almost wholly with his family. IC's parents have not indicated that any professional support or assistance would be available to the family or to IC; nor is it clear to what extent the extended family (other than NK) understand and/or are willing and able to meet IC's needs. I note, for example, that NK's father when asked (question 17) at the interview at the British High Commission in Dhaka "*Does Irad have the mental capacity to marry*?" replied "*25 years*". Similarly when asked (question 21) "*What age do you think his mental functioning facilities are*?" NK's father responded "*25 years*".
>
> (8) Although KC states that the situation in Bangladesh has improved, it appears that the health provision and support for adults with severe learning disabilities unfortunately remains limited. The country profile of Bangladesh on the website of the Foreign and Commonwealth Office (www.fco.gov.uk) for example states:
>
> *"Local clinics and hospitals are generally of a poor standard. There are no adequate psychiatric services in Bangladesh."*
>
> (9) When IC last resided for a significant period of time in Bangladesh (April 1992-October 1996) he suffered a number of serious health concerns. The local authority was in fact approached by KC for financial assistance in arranging IC's return to this country as he reported that he and NNC were concerned about IC's ongoing health problems, sickness, vomiting, and about his sister and mother's ability to provide adequate care for him (see paragraph 59, statement of Ms M-O dated 6 November 2007). When IC did return to this country in 1996 he was diagnosed as suffering from, and required treatment for, rheumatic fever.
>
> (10) KC has identified a number of general benefits to IC of living in Bangladesh, indicating that the climate is good (although NNC expressed concern to Dr K about whether IC would cope with the hot weather), that the country is becoming economically more stable, and that there are facilities for IC to enjoy, and beautiful countryside nearby.
>
> (11) IC's parents believe that it is in IC's best interests to continue to live with, and be cared for by his family, when they are no longer able to care for him, and that the route to ensuring this is to give IC and NK the opportunity to live together to see if they can successfully establish a married relationship."

145. Paragraph 109 (1) to (3) all relate specifically to the marital relationship with NK, and in particular any sexual component of it. It is suggested, on the basis of the reports of Dr. K, particularly his second of 9th November 2007, that there is a risk of harm to IC (and inferentially to NK) both of them being considered vulnerable in this context by

Dr. K. Although the evidence of Dr. K, is itself at times speculative as to the nature and extent of the risks, it raises matters which cannot be dismissed without testing.

146. Paragraph 109 (4) presupposes a permanent re-location by IC, for it refers to depriving him and his family of the professional support and services which the applicant and the Primary Care Trust currently provide. Whilst of course the applicant authority is extensively involved in the care of IC, it is not altogether clear to me the nature and extent of the interventions by the Primary Care Trust, save in so far as one can predict that periodically it may be necessary to review his progress by a psychologist (presumably falling under the authority of the Primary Care Trust) and the provision of standard medical services in the event of ill-health.

147. As to paragraph 109 (5) it is submitted by the Official Solicitor (and as noted above this view received some support from, surprisingly, the parents) little information is known of NK and her experience of meeting the needs of someone in IC's position. Furthermore, NK already has the responsibility for the care of IC's paternal grandmother, a 90 year-old living in the proposed home of IC, suffering from Alzheimer's disease, and wheel-chair bound. Is the overall responsibility for the grandmother and IC going to be too great?

148. As to paragraph 109 (6) it is suggested that the evidence of KC and NNC falls short of a full appreciation, or acceptance of the level, of IC's disability, even taking account of the fact, which the parents do, of the enormous difficulty any parent of an handicapped child will face in coming to terms with their child's disabilities and consequential difficulties. The need for help for IC as perceived by them should clearly be tested.

149. Paragraph 109 (7) highlights the lacuna in the evidence of professional support or assistance available to the family, a matter which I have addressed above.

150. Paragraph 109 (8) – It is accepted is more likely to be accurate than not, although in the context of a breach of IC's human rights, I have considered this issue elsewhere, and I agree with the submission of Mr. K that a lesser standard of such care in comparison that on offer here is not, of itself, a reason for not permitting IC to live in Bangladesh if it involves no breach of his Convention rights under the 1950 Convention.

151. As to paragraph 109 (9) I have again considered this elsewhere, and the evidence is sketchy, and essentially reported by the parents who were anxious to bring IC back to this jurisdiction (preferably at the expense of the applicant local authority). It is undoubtedly the case that in 1996 he was suffering from, and required treatment for, rheumatic fever. For my part, I would doubt that the evidence in relation to this period is of itself sufficient to permit a court to prevent IC moving to Bangladesh.

152. I have no comment to make in respect of paragraph 109 (10) and (11).

Conclusions on Issues 7 & 9:

153. There should be a best interests hearing on the allocated dates of 4th to 6th March 2008. I have, in the preceding paragraphs, when considering paragraph 109 of the Official Solicitor's report, identified areas where the evidence needs testing.

154. However, as a pre-cursor, it seems to me (as anticipated in exchanges with counsel at this hearing) that there was, to some extent, uncertainty about the nature and range of services which the applicant felt were essential for the proper care of this vulnerable adult. The local authority must set out their case as to what is required and why it is required, and the consequences of failure to provide it. It is only then that the parents will really know the case they have to meet as to the provision of services, or the absence of necessity to provide them, should IC either spend extensive periods of time in Bangladesh, or possibly even return there permanently, either when his parents retire, or before if it is determined on his behalf that it would be preferable.

155. I should emphasise that I do not regard it as necessary for there to be a minute examination of the comparative services for the reasons already given. Without disrespect to the services on offer in Bangladesh, I shall make a working assumption that they are probably of a higher order in this country. This is in part, of course, because as I understand it, the condition of autism has itself not been particularly well understood or catered for until recently, and partly because it my understanding from this case (and others) that recourse is made for care of the vulnerable to the family, and only in last resort to the State and its services.

156. I have no doubt, given the matters raised in paragraph 109 (1 to 3) of the Official Solicitor's report that Dr. K should give evidence and his reports tested as to their conclusions and weight.

157. A further directions hearing has already been fixed for 24th January before me. At that hearing if there is any application for the instruction of further experts all the usual, requirements prevail, and there should be CV's, costings, lead times, and draft letters of instruction provided to me. I will determine any disputed issues at that hearing, but I would expect the parties to have considered matters very carefully, not only with their own teams but with each others before that hearing.

158. The family's proposed circumstances, and particularly those of IC, and NK's ability to care for him whilst also caring for an elderly infirm adult should be addressed by the family. It is highly desirable that the applicant and the Official Solicitor set out (as they did for Dr. K in his supplementary report) a list of the topics/questions they would wish her to be asked. This is not a case where I would expect either the applicant or the Official Solicitor adventitiously to trade on the absence of NK as a live witness, and as much information as they consider relevant must be garnered, or at least they must provide the framework within which it can be. The parents would not of course be limited to responding solely to those questions, but may elicit such further evidence as they consider necessary and appropriate.

159. Further, all parties should carefully consider the time estimate, and whether three days will in fact be sufficient. Meanwhile, draft declarations consistent with those indicated in this Judgment should be provided to me for prior consideration.

160. For the avoidance of doubt the injunctive relief granted by McFarlane J. to the applicant on 4th May 2007 prohibiting the Second and Third Respondents whether by themselves or by their servants and agents from:

a) removing or causing the removal of their son IC from the jurisdiction of England and Wales;

b) organising or arranging any civil solemnization (in this country or any other country) of the purported telephonic Moslem marriage that they say took place in August 2006;

c) applying for any passports or international travel documents for IC;

d) organising or arranging a circumcision of IC;

Those orders are to remain in full force and effect until varied or discharged.

161. I shall consider any further declarations/orders on 24th January 2008.

That is My Judgment: