

The following is the Judgement in what has become in some circles to be known as the

“East Sussex Case”.

It is presented here in its entirety with no changes made at all.

Highlighted areas are what I found to be of particular interest. However, read on their own may present a tainted view of the judgement. Therefore, all 61 pages should be read in full to give a clearer picture of events.

Gavin Wright

The Queen

(On the Application of (1) A (2) B (By their Litigation Friend the
Official Solicitor) (3) X (4) Y)

v.

East Sussex County Council,
The Disability Rights Commission
CO/4843/2001

High Court of Justice Queens
Bench Division Administrative Court

QBD (Admin Ct)

Before: The Honourable Mr Justice Munby

Tuesday 18th February, 2003

Representation

Miss Alison Foster QC (instructed by Mackintosh Duncan) for the
claimants A and B.

Mr Murray Hunt (instructed by Leigh Day & Co) for the claimants
X and Y.

Ms Beverley Lang QC and Ms Jenni Richards (instructed by the
Director of Legal and Community Services) for the defendant.

Mr David Wolfe (instructed by the Disability Rights Commission)
for the interested party.

JUDGMENT

Introduction

1. A and B are sisters, born in 1976 and 1980, who are thus now 26 and 22 years old respectively. They both suffer from profound physical and learning disabilities and accordingly appear in the proceedings by their litigation friend the Official Solicitor. They have always lived in the family home, which has to an extent been specially adapted and equipped for them and where they are looked after on a full time basis by their mother, X, and their stepfather, Y.
2. East Sussex County Council ("ESCC") is the relevant local authority owing duties to A and B, in particular under [section 29 of the National Assistance Act 1948](#), [section 2 of the Chronically Sick and Disabled Persons Act 1970](#) and [section 47 of the National Health Service and Community Care Act 1990](#).
3. Both A and B suffer from greatly impaired mobility. Even the simplest physical movement, for example, getting out of bed or getting into the bath, requires them to be moved and lifted by their carers. Central to all the disputes which have blighted this family's life for so many years now is a fundamental difference of view between X and Y, on the one side, and ESCC, on the other side, as to whether and to what extent this moving and lifting should be done manually, as X and Y would prefer in some instances, or, as ESCC would have it, using appropriate equipment.

The litigation

4. Largely because of this acute difference of view, the care package provided by ESCC during the late 1990s came under stress. On 29 February 2000 proceedings for judicial review (CO/740/2000) were commenced by A, B, X and Y against ESCC in relation to what was alleged to be the on-going failure of ESCC properly to perform its statutory duties. Those proceedings were compromised by a consent order made on 21 July 2000.
5. Unhappily that did not resolve the continuing differences of view and on 29 November 2001 further proceedings for judicial review (CO/4843/2001) were commenced against ESCC. On this occasion the Disability Rights Commission ("the DRC") was added as an interested party. Permission was granted by Richards J on 20 December 2001. He directed that the matter was to be heard before a nominated judge of the Family Division.

6. On 19 February 2002 ESCC commenced proceedings under CPR Part 8 in the Family Division, seeking to invoke the court's inherent declaratory jurisdiction in relation to incapacitated adults: see [A v A Health Authority \[2002\] EWHC 18 \(Fam/Admin\)](#), [\[2002\] Fam 213](#) and [Re S \(Adult Patient\) \(Inherent Jurisdiction: Family Life\) \[2002\] EWHC 2278 \(Fam\)](#), [\[2003\] 1 FLR 292](#).

7. Both sets of proceedings came before me on 5 March 2002 when I gave directions, including directions that both matters were to be listed together, that all further applications were to be made either to me or to Wilson J (we being at that time the only judges who were both nominated judges of the Administrative Court and judges of the Family Division), and that the two matters were to be heard by Wilson J starting on 11 June 2002. In fact on 31 May 2002 (neither Wilson J nor I then being available) further directions were given by Richards J, the effect of which was to limit the hearing before Wilson J in June 2002 to the determination of certain specified issues. Wilson J heard the matter in accordance with Richards J's directions over four days from 11-14 June 2002. The elaborate order which he made on 14 June 2002 included directions for the further hearing of the remaining issues. In accordance with those directions the two matters came on for hearing before me on 29 October 2002.

8. All parties were agreed that I should first try two discrete issues:

- i) The first issue ("the user independent trust issue") is whether care staff may lawfully be provided to the family by ESCC by means of a vehicle known as a 'user independent trust'. This raises a short but important point of pure law.
- ii) The second issue ("the manual handling issue") concerns the legality of what is said to be ESCC's policy of not permitting care staff to lift A and B manually. This is a much more complicated issue, raising, on one view of the matter, difficult questions of law (by which I mean domestic law, human rights law and European Community law), of policy and of fact.

9. The trial of these two issues alone lasted six days. At the conclusion of the hearing on 11 November 2002 I reserved judgment, having made an order regulating, amongst other things, the interim arrangements that were to be put in place pending the handing down of my judgment and, thereafter, pending the further hearing which will almost certainly be necessary whatever my decision on the first two issues.

10. In the event it was convenient for me to give separate

judgments on these two issues. I gave judgment on the user independent trust issue on 17 December 2002: R (ota A, B, X and Y) v East Sussex County Council [2002] EWHC 2771 (Admin). I now (10 February 2003) give judgment on the manual handling issue.

The manual handling issue

11. In accordance with the consent order of 21 July 2000 care needs assessments and care plans for A and B were prepared by an independent social worker, Chris Wall, of Personal Care Consultants Ltd. His initial reports had been dated 23 May 2000. They were reviewed and updated in further reports dated 29 June 2001. As part of that process a manual handling operations risk assessment of A and B was prepared by Elizabeth Hardy of Personal Care Consultants Ltd. She is an occupational therapist and manual handling facilitator. Her reports are dated 9 June 2000. Another occupational therapist, May Mills, also of Personal Care Consultants Ltd prepared manual handling risk assessments and proposed action plans for A and B dated 17 October 2000 and, as revised, 24 November 2000. Yet another occupational therapist, Lorna Couldrick, who is employed by ESCC as the training and development officer for the physical disabilities and sensory impairment service, prepared reports, which included recommendations for certain adaptations of X and Y's house, dated 20 July 2001, 7 August 2001 and 9 October 2001.

12. In the meantime, on 28 September 2001, ESCC had produced its social care assessments and care plans for A and B. Those plans were based in part on ESCC's 'Safety Code of Practice: Manual Handling' as reissued in January 1999. This remained unchanged until June 2002.

13. The current proceedings were issued, as I have said, on 29 November 2001. Amongst the relief sought was an order quashing the assessments and care plans dated 28 September 2001, a declaration that what was described as "the Council's blanket "no manual lifting" policy" is unlawful, and a mandatory order compelling ESCC to arrange the provision of community care services to A and B in accordance with Mr Wall's care plans dated 23 May 2000 as updated on 29 June 2001. Part of the claimants' case was that ESCC had failed to comply with certain undertakings it had given as embodied in the earlier consent order.

14. A mass of evidence was filed both in relation to these proceedings and, later, in relation to the declaratory best interests proceedings which, as I have said, were issued on 19 February 2002. Included amongst this material were a number of statements by Diets Verschuren, employed by ESCC as operations manager for learning disabilities assessment and adult reviewing, statements by John Price, employed by ESCC as staff care manager in the corporate personnel department with responsibility for health and safety advice, statements by X and Y, and a number of statements by witnesses on behalf of the DRC. I do not propose even to summarise let alone to attempt to analyse this vast mass of material. Suffice it to say that it examines, from a variety of viewpoints and often in enormous detail, the history of this sad dispute, the problems faced by A and B, the suggested means by which those problems can best be addressed, in particular the problems surrounding the manual handling issue, the appropriateness or otherwise of ESCC's care plans and the legality or otherwise of ESCC's manual handling policies.

15. In particular it should be noted that the DRC unequivocally associated itself with the claimants' case that ESCC's manual handling policies were, as applied to A and B, "unlawful and unjustifiable", essentially on the basis that they improperly failed to take into account the needs of the disabled people involved.

16. An important witness statement by Lorna Couldrick dated 7 June 2002, read in conjunction with her report dated 7 August 2001, identified a number of what have been referred to as "unresolved lifts", that is, certain lifts in relation to which opinion remained divided. I shall return to this topic below.

17. I was also shown a psychiatric report on A and B prepared by Dr Tony Holland, a consultant psychiatrist in learning disabilities, dated 30 May 2002, an independent social work report on A and B prepared by Stewart Sinclair and dated 31 May 2002 and a statement by the Official Solicitor dated 10 June 2002.

18. Mr Price's third statement dated 7 June 2002 had attached to it ESCC's ' Safety Code of Practice: Manual Handling' as revised in June 2002, so it was said, "to make it clear that the Council does not operate a blanket no lifting policy." Although that document went some of the way it did not go the full way to meeting either the claimants' or DRC's concerns. Accordingly, during the course of the hearing which commenced before Wilson J on 11 June 2002, it was further revised in consultation

with the DRC and on 14 June 2002 ESCC adopted a revised 'Safety Code of Practice: Manual Handling'.

19. On 14 June 2002 Wilson J made an order which, after reciting that ESCC had adopted its new policy without accepting that its previous policies did impose a blanket prohibition on manual lifting and that the DRC, without prejudice to its contention that the former policy was unlawful, agreed that the revised policy "is lawful and represents good practice", provided so far as is material for present purposes that an independent manual handling adviser was to be appointed "to prepare a written handling protocol in respect of all lifts including each of the unresolved lifts". The order went on in paragraphs 13(d) and (e) to specify how the manual handling adviser was to proceed and, in paragraph 13(f), to specify the lifting regime that was to be operated for A and B until the written protocol had been provided.

20. Pursuant to Wilson J's order, Mary-Jayne Bosley was appointed on 26 July 2002 to act as the independent handling adviser. She has carried out extensive investigations, observing the routines of A and B's daily lives both inside and outside the house and consulting closely with X and Y. On 20 September 2002 she witnessed an incident when B began to slide through the bottom of the sling on one of the hoists whilst she was being hoisted into the bath. The hoisting had to stop and B had to be lifted manually both into and out of the bath. Although Mrs Bosley was not there to witness it, there was another incident on 26 September 2002 when B slipped under the water whilst being bathed.

21. Mrs Bosley produced preliminary Manual Handling Reports on A and B in late August 2002. Her witness statements are dated 30 September 2002 and 22 October 2002. Exhibited to the first are Draft Handling Protocols for both A and B prepared by her on or about 10 September 2002. She says that they should be considered dynamic, requiring frequent review. It is also to be noted that they precede important assessments of A and B which Mrs Bosley undertook on 12 September 2002, when A and B went swimming, and on 20 September 2002, when the bathing incident took place.

22. Each of the parties has filed further evidence. Once again I do not propose to analyse it, save to note that included amongst this material were witness statements by Pat Alexander, a qualified physiotherapist with a post graduate certificate in back care management, providing what she described as a "report on

the law and practice of manual handling" on behalf of ESCC.

The issue

23. The DRC, as we have seen, accepted before Wilson J in June 2002 that ESCC's revised 'Safety Code of Practice: Manual Handling' as adopted on 14 June 2002 is lawful and representative of good practice. Before me Mr Wolfe on behalf of the DRC accepted that the Code is, *ex facie*, lawful. That was not challenged by either Miss Foster on behalf of A and B or Mr Hunt on behalf of X and Y and was, of course, asserted by Ms Lang on behalf of ESCC. Having now had the benefit of very extensive argument as to the relevant principles I have no hesitation in agreeing with Mr Wolfe. ESCC's Code as adopted on 14 June 2002 is lawful -- by which I mean that the general policy and approach it proclaims is compatible with all relevant requirements of both domestic and human rights law. That is not, of course, to say that some other policy might not equally be lawful, for it is of the nature of the problem that a number of different policies may all be lawful; but it is enough to say that, in my judgment, this policy is plainly lawful.

24. The real dispute has therefore shifted since the hearing before Wilson J began on 11 June 2002. Before me the dispute was not as to the lawfulness of ESCC's general policy as enshrined in the Code: rather the dispute was as to the lawfulness of the application of that policy to the specific circumstances of A and B's care and, related to that, the lawfulness of the draft protocols prepared by Mrs Bosley.

25. As the argument proceeded before me it became apparent that the manual handling issue relates to a number of different types of 'lift' which it is convenient to identify at this stage:

- i) First, there are the lifts which take place as part of A and B's normal daily routine within the house. Included within this group are most of the "unresolved lifts" referred to in Wilson J's order and identified in Ms Couldrick's report and witness statement: these include, for example, turning A from prone to supine, transferring A from her bed to a changing trolley, transferring A from the changing table to a standing frame, transferring B from the floor, where she sleeps, onto a changing trolley, and transferring both A and B into their wheelchairs.
- ii) Secondly, there are lifts which would normally take place as part of A and B's normal daily routine within the house but which are hindered either by the kinds of incidents which took place on

20 and 26 September 2002 or by A or B becoming distressed or even refusing to be moved in the usual way.

iii) Thirdly, there are lifts which would normally take place as part of A and B's normal daily routine within the house but which may have to take place in abnormal situations, for example if there has been a power cut making it impossible to use one of the hoists or in the event of a fire or other emergency.

iv) Finally, there are those lifts associated with A and B's life outside the house. Their disabilities mean that, inevitably, they live a very circumscribed life both inside and outside the house, but three activities which, it is clear from the evidence, are of great importance to them are going shopping with X and Y, going swimming and, on occasions, going horse-riding. Activities such as this at present involve a number of manual lifts reflecting, for example, the fact that the swimming pool they regularly use is not equipped with hoists and that changing their incontinence pads when they go shopping has to be done in places where there is no appropriate equipment.

26. Now the simple fact is, though this is absolutely no criticism of her, that Mrs Bosley has not yet produced protocols covering all of these lifts. In that sense the work which Wilson J envisaged would have been completed by the time the case came back to me remains in significant part incomplete. Moreover, and as I have already pointed out, the existing draft protocols were prepared before a number of the assessments and incidents to which I have referred took place and they may in any event need clarification and elaboration in the light of matters referred to in Mrs Bosley's subsequent witness statements.

27. In this situation it seems to me that there is not much point in my subjecting what are after all only draft, incomplete and, as Mrs Bosley puts it, dynamic protocols to intensive scrutiny. Better, at this stage, that I address the matters of general principle identified in counsel's submissions and give ESCC and Mrs Bosley such further assistance as circumstances allow so that Mrs Bosley can finish the task on which she is currently engaged. It is when that task is complete that the claimants can, if they wish, challenge the legality of what Mrs Bosley has done or of what, in the light of Mrs Bosley's work, is proposed to be done by ESCC.

28. This approach may seem unhelpful but it will, in the long run, enable the court to focus, if the need arises, on what will by then have emerged as the real issues. It also reflects the vitally important fact, which many of the submissions I have listened to

have tended to overlook or to downplay, that in the final analysis it is for ESCC, assisted by Mrs Bosley, to make the appropriate assessments and produce the appropriate protocols. It is not a matter for the court: indeed the court would be trespassing on ESCC's functions were it to do so. I must return to the point below, but here I merely observe that the court's function in this type of dispute is one of review: it is not the function of the court itself to come to a decision on the merits.

29. To the elucidation of matters of general principle I accordingly now turn.

The statutory setting

30. The manual handling issue arises in the context of the duties owed by ESCC to A and B under the 1948, 1970 and 1990 Acts. As I explained in paras [11]-[16] of my earlier judgment, ESCC has the *power* under the 1948 Act and is under a *duty* pursuant to both the 1948 Act and the 1970 Act to "make arrangements" to provide A and B with services, facilities and support of the relevant kind.

31. It is common ground that, given A and B's greatly impaired mobility, the "arrangements" which have to be made for them under the 1948 and 1970 Acts involve a very significant amount of moving and lifting of A and B by their carers -- that is, at present, by carers who are employees of ESCC. This part of the arrangements accordingly brings into play another statutory scheme to which I must now turn.

Domestic law -- the statutory framework

32. The Health and Safety at Work etc Act 1974 imposes certain duties on employers. So far as material for present purposes [section 2](#) provides as follows:

"(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

(2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular --

(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health; ...

(c) the provision of such information, instruction, training and

supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees."

33. [Section 3\(1\)](#) provides that:

"It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."

34. The various regulations made under the 1974 Act include The Manual Handling Operations Regulations 1992, SI 1992 No 2793, and The Management of Health and Safety at Work Regulations 1999, SI 1999 No 3242.

35. The detailed provisions of domestic law reflect in major part Council Directive 89/391 of 12 June 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work (the "Framework Directive"), and Council Directive 90/269 of 29 May 1990, on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (the Fourth Individual Directive made under the Framework Directive). I need not set out the relevant provisions: I can go straight to the various domestic regulations that implement them.

36. It is convenient to take the 1999 Regulations first. The following are the regulations which are relevant for present purposes:

"3

(1) Every employer shall make a suitable and sufficient assessment of--

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions ...

4 Where an employer implements any preventive and protective measures he shall do so on the basis of the principles specified in Schedule 1 to these Regulations.

5

(1) Every employer shall make and give effect to such arrangements as are appropriate, having regard to the nature of his activities and the size of his undertaking, for the effective planning, organisation, control, monitoring and review of the

preventive and protective measures ...

12

(1) Every employer and every self-employed person shall ensure that the employer of any employees from an outside undertaking who are working in his undertaking is provided with

comprehensible information on ...

(a) the risks to those employees' health and safety arising out of or in connection with the conduct by that first-mentioned employer or by that self-employed person of his undertaking; and

(b) the measures taken by that first-mentioned employer or by that self-employed person in compliance with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions ... in so far as the said requirements and prohibitions relate to those employees ...

13

(1) Every employer shall, in entrusting tasks to his employees, take into account their capabilities as regards health and safety

...

14

(1) Every employee shall use any machinery, equipment, dangerous substance, transport equipment, means of production or safety device provided to him by his employer in accordance both with any training in the use of the equipment concerned which has been received by him and the instructions respecting that use which have been provided to him by the said employer in compliance with the requirements and prohibitions imposed upon that employer by or under the relevant statutory provisions

..."

37. Schedule 1 is in the following terms:

"General principles of prevention (This Schedule specifies the general principles of prevention set out in Article 6(2) of Council Directive 89/391/EEC)

(a) avoiding risks;

(b) evaluating the risks which cannot be avoided;

(c) combating the risks at source;

(d) adapting the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;

(e) adapting to technical progress;

(f) replacing the dangerous by the non-dangerous or the less dangerous;

(g) developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment;

(h) giving collective protective measures priority over individual protective measures; and

(i) giving appropriate instructions to employees."

38. It is important, however, to note regulation 22(1) which provides that:

"Breach of a duty imposed by these Regulations shall not confer a right of action in any civil proceedings."

39. So much for the general scheme. I turn now to the particular provisions with which I am directly concerned, the 1992 Regulations. These, it is to be noted, contain no provision corresponding to regulation 22(1) of the 1999 Regulations. It is clear that an action will lie for breach of the statutory duties imposed by the 1992 Regulations.

40. The key provision is regulation 4(1), but to understand it one has to bear in mind that regulation 2(1) defines "manual handling operations" as meaning:

"any transporting or supporting of a load (including the lifting, putting down, pushing, pulling, carrying or moving thereof) by hand or by bodily force."

41. Regulation 2(1) defines "load" as including "any person and any animal". Thus it can be seen that the 1992 Regulations apply not merely to the manual handling of electrical goods by a warehouseman in an electrical goods shop but also to the manual handling of an animal carcass by a slaughterman in an abattoir and to the manual handling by a careworker of incapacitated patients such as A and B.

42. Regulation 4(1) provides, so far as material for present purposes, as follows:

"Each employer shall--

(a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or

(b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured--

(i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are

specified in the corresponding entry in column 2 of that Schedule,

(ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable, and

(iii) take appropriate steps to provide any of those employees who are undertaking any such manual handling operations with general indications and, where it is reasonably practicable to do so, precise information on--

(aa) the weight of each load, and

(bb) the heaviest side of any load whose centre of gravity is not positioned centrally."

43. I need not read Schedule 1 (which reflects the provisions of Annex 1 to Council Directive 90/269) nor regulation 4(2).

Regulation 4(3) provides that:

"In determining for the purposes of this regulation whether manual handling operations at work involve a risk of injury and in determining the appropriate steps to reduce that risk regard shall be had in particular to--

(a) the physical suitability of the employee to carry out the operations;

(b) the clothing, footwear or other personal effects he is wearing;

(c) his knowledge and training;

(d) the results of any relevant risk assessment carried out pursuant to regulation 3 of the Management of Health and Safety at Work Regulations 1999;

(e) whether the employee is within a group of employees identified by that assessment as being especially at risk; and

(f) the results of any health surveillance provided pursuant to regulation 6 of the Management of Health and Safety Regulations 1999."

44. The 1992 Regulations are explained at length both in the Explanatory Note that accompanies them and in the Health and Safety Executive's booklet 'Manual Handling, Manual Handling Operations Regulations 1992: Guidance on Regulations' (L23). I need not refer to either save to say that I was referred in particular to paragraphs 23, 42, 71, 72 and 153 of the Explanatory Note and to paragraphs 7 and 10 and Appendix 1, paragraphs 2, 7 and 8 of the booklet.

45. As the booklet helpfully makes clear, both in paragraph 7 and in Appendix 1, the 1992 Regulations establish a clear hierarchy of measures for safety during manual handling:

- i) Regulation 4(1)(a): avoid hazardous manual handling operations so far as is reasonably practicable -- this, the booklet suggests, may be done by redesigning the task to avoid moving the load or by automating or mechanising the process.
- ii) Regulation 4(1)(b)(i): make a suitable and sufficient assessment of any hazardous manual handling operations that cannot be avoided.
- iii) Regulation 4(1)(b)(ii): reduce the risk of injury from those operations so far as is reasonably practicable -- the booklet suggests that particular consideration should be given to the provision of mechanical assistance but where this is not reasonably practicable then other improvements to the task, the load and the working environment should be explored.
- iv) Regulation 4(1)(b)(iii): at the same time provide employees with suitable information and training.

46. I have also been taken to a number of other publications concerned more particularly with the application of the 1992 Regulations to the moving and lifting of human loads, that is, people. I was referred in particular, and in some instances in great detail, to:

- i) The fourth edition of 'The Guide to the Handling of Patients: Introducing a safer handling policy' published in July 1997 by the National Back Pain Association in collaboration with the Royal College of Nursing, together with a supplement published in February 1998.
- ii) 'Partnership in the Manual Handling of Patients: a Joint Statement by the Chartered Society of Physiotherapy, the College of Occupational Therapists and the Royal College of Nursing' published in the September 1997 issue of the British Journal of Occupational Therapy.
- iii) The second edition of 'Manual handling in the health services' published in 1998 by the Health and Safety Executive.
- iv) 'Safer Handling of People in the Community' published in 1999 by BackCare, the National Organisation for Healthy Backs (formerly the National Back Pain Association).
- v) 'Handling home care: Achieving safe, efficient and positive outcomes for care workers and clients' published in 2001 by the Health and Safety Executive (HSG225).

47. In the particular context with which I am concerned -- the handling of incapacitated people in their own homes -- it is the last of these which, as it seems to me, provides the most up to date and relevant guidance.

Domestic law -- the case-law

48. I was referred to a number of authorities relevant to the operation of the 1992 Regulations. Without exception they are all cases of actions for damages for personal injury. It is convenient to take them in chronological order.

49. The first is [Edwards v National Coal Board \[1949\] 1 KB 704](#) where the Court of Appeal had to consider the meaning of the phrase "reasonably practicable" in section 102 of the Coal Mines Act 1911. Asquith LJ at p 712 said this:

"The onus was on the defendants to establish that it was not reasonably practicable in this case for them to have prevented a breach of s 49. The construction placed by Lord Atkin on the words "reasonably practicable" in [Coltress Iron Co v Sharp \[1938\] AC 90](#), 94, seems to me, with respect, right. "Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them -- the risk being insignificant in relation to the sacrifice -- the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident. The questions he has to answer are: (a) What measures are necessary and sufficient to prevent any breach of s 49? (b) Are these measures reasonably practicable?"

50. The next case is [Koonjul v Thameslink Healthcare Services \[2000\] PIQR P123](#), where a care assistant who hurt her back when attempting to move a bed failed in a claim based on alleged breach of regulation 4 of the 1992 Regulations. Her appeal to the Court of Appeal was dismissed. Hale LJ said this at P126 (paras [10]-[13]):

"[10] For my part, I am quite prepared to accept [that] to bring the case within the obligations of regulation 4 ... there must be a real risk, a foreseeable possibility of injury; certainly nothing approaching a probability. I am also prepared to accept that, in making an assessment of whether there is such a risk of injury, the employer is not entitled to assume that all his employees will on all occasions behave with full and proper concern for their own safety. I accept that the purpose of regulations such as these is indeed to place upon employers obligations to look after

their employees' safety which they might not otherwise have.

[11] However, in making such assessments there has to be an element of realism. As the guidance on the regulations points out, in appendix 1 at paragraph 3:

"... a full assessment of every manual handling operation could be a major undertaking and might involve wasted effort."

[12] It then goes on to give numerical guidelines for the purpose of providing "an initial filter which can help to identify those manual handling operations deserving more detailed examination."

[13] It also seems to me clear that the question of what does involve a risk of injury must be context-based. One is therefore looking at this particular operation in the context of this particular place of employment and also the particular employees involved. In this case, we have a small residential home with a small number of employees. But those employees were carrying out what may be regarded as everyday tasks, and this particular employee had been carrying out such tasks for a very long time indeed. The employer in seeking to assess the risks is entitled to take that into account."

51. She continued at P127 (para [16]):

"For my part, I am prepared to assume that some risk could be envisaged from such an operation, albeit with the reservations already expressed. However, when it comes to whether or not there was a breach of the regulations, it seems to me that in the particular circumstances of the case there was no such breach. The first obligation is to avoid the need for employees to undertake such operations, as far as reasonably practicable. In this case, it is alleged that the bed did not need to be against the wall and has since been moved away from the wall. But the purpose of having the bed against the wall was to save children from risk of harm through falling out of bed, and it seems to me that if there are children resident in the home for whom that is a risk, it is entirely appropriate that such beds should be against the wall and it is therefore not right to expect the employer to have the beds away from the wall in every circumstance."

52. I draw attention to the test as being one of "real risk", that one has to have regard to the "context", looking to "the particular circumstances of the case" and the "particular employees involved" and that an "element of realism" is called for in making assessments under Regulation 4.

53. The next case, the decision at first instance in *Young v Consignia* [2001] All ER (D) 480, adds nothing to the

jurisprudence, so I can pass on to the decision of the [Court of Appeal in Alsop v Sheffield City Council \[2002\] EWCA Civ 429](#), where a refuse collector failed in a claim based on regulation 4 for injuries he suffered to his back when pulling a wheelie bin up a slope. Agreeing with Mantell LJ in dismissing the appeal, Kennedy LJ said at para [10]:

"Regulation 4(1)(b) applies not to all manual handling activities at work but only to those which involve a risk of the employees being injured. That was made clear in the case of Koonjul ... **The risk has to be real, a foreseeable risk of injury, although not anything approaching a probability. In deciding whether or not such a risk exists the employer is entitled to have regard to the experience of the employee said to be at risk.**"

54. The next case, also a decision of the [Court of Appeal, is King v Sussex Ambulance NHS Trust \[2002\] EWCA Civ 953](#). There an ambulancemen who had injured his back whilst helping his colleague, Mr Criddle, to carry an elderly patient down the stairs of his cottage succeeded at first instance in a claim, based on regulation 4, to the effect that the fire brigade should have been called to remove the upstairs window and lift the patient out on a crane. On appeal to the Court of Appeal the defendant's appeal was allowed and the judgment was set aside. Hale LJ said, paras [12]-[13]:

"[12] The appellant challenges the judge's finding that the ethos of the service was to discourage use of the fire brigade. There is nothing wrong in regarding it as a last resort, provided that it is available when appropriate. The evidence was that this option had always been available and was not discouraged. Crews were trained to consider it. Indeed Mr Criddle did do so but rejected it. Mr Layhe, the supervisor who gave evidence, would have done the same had he been on duty and consulted that day.

[13] It would have been rejected because it was not appropriate. The judge did not consider whether or not it would have been so. **'Appropriate' must mean something more than a theoretical possibility. It has to be judged against the circumstances of the case.** This was not a particularly heavy patient although it was an awkward lift. He needed a response within an hour. Using the fire brigade takes a long time, may distress the patient, and is medically unsuitable for some. There was nothing to suggest that it was even possible, let alone suitable, in this case."

55. She continued, para [18]:

"... In my view there is no liability ... There was nothing to

suggest that calling the fire brigade would have been an appropriate measure in this case, whether to avoid the need to carry the patient downstairs or to reduce the risk of injury in doing so. The evidence was that it is rarely used because it has to be carefully planned, takes a long time and distresses the patient. This was not an emergency call but it was urgent. We know nothing of what the response either of the patient and his wife or the fire brigade would have been. There may be some situations in which a call for help is indeed the appropriate solution. This will depend upon the magnitude of the problem, the urgency of the case, and the actual or likely response of the patient or his carers and the fire brigade itself. But there was nothing to justify such a finding here. Nor has the claimant shown that giving this possibility more emphasis in training or more anxious consideration on the day would have avoided the claimant's injuries."

56. These passages bring out three important points: that the method to be adopted when lifting or moving a person should be "appropriate ... judged against the circumstances of the case", that what is appropriate is not merely that which is theoretically possible, and that appropriateness has to be assessed having regard, inter alia, to "the urgency of the case" and to not merely the medical needs but also the wishes and feelings of the patient ("the actual or likely response of the patient or his carers").

57. Hale LJ then turned to consider the alternatively pleaded case in negligence. I am not directly concerned with that but certain of her observations in paras [22]-[24] are nonetheless relevant:

"[22] ... there is a further dimension which is particularly applicable to the statutory services. As Denning LJ put it in [Watt v Hertfordshire County Council \[1954\] 1 WLR 835](#) at p 838:

"It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: **you must balance the risk against the end to be achieved.** If this accident had occurred in a commercial enterprise without any emergency there could be no doubt that the servant would succeed. But the commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking considerable risk ... I quite agree that fire engines, ambulances and doctors' cars should not shoot past the traffic lights when they show a red light. That is because the risk is too great to warrant the incurring of the danger. **It is always a question of**

balancing the risk against the end."

[23] The problem in a case such as this is that the ambulance service owe a duty of care to the members of the public who have called for their help: see [Kent v Griffiths \[2001\] QB 36](#). This can result in liability for failing to attend to a patient within a reasonable time. The service do not have the option available to a commercial enterprise of refusing to take the job. If a removal firm cannot remove furniture from a house without exposing its employees to unacceptable risk then it can and should refuse to do the job. The ambulance service cannot and should not do that. But that does not mean that they can expose their employees to unacceptable risk. The employers have the same duty to be efficient and up-to-date and careful of their employees' safety as anyone else. It does mean that what is reasonable may have to be judged in the light of the service's duties to the public and the resources available to it to perform those duties: as Colman J put it in [Walker v Northumberland County Council \[1995\] 1 All ER 737](#), at p:

"The practicability of remedial measures must clearly take into account the resources and facilities at the disposal of the person or body owing the duty of care and the purpose of the activity giving rise to the risk of injury."

[24] One returns, therefore, to balancing the various considerations. The risk to the employees in this case was not negligible. It was considerable both in the likelihood of its occurring and in the seriousness of the harm which might be suffered if it did. As Mr Goddard put it, there was a risk of a career-ending injury, which indeed happened here. As Mr Hayne put it, the activity was clearly hazardous. Against that, it was of considerable social utility. The Service did not have a choice but to respond to the patient's needs. Those needs were urgent but not an emergency. The Service had limited resources, not so much in financial but in equipment terms, with which to respond. The problem therefore remains of what could reasonably have been done to respond to those needs without putting the crew at risk. In this case there was no evidence of anything that the employer could have done to prevent the risk and no suggestion other than calling upon a third party to do the job for them. If calling the fire brigade was not appropriate or reasonably practicable for the purpose of the Directive or the Regulations it cannot be lack of reasonable care to fail to do so."

58. I have set out these passages in full because any attempt at more selective quotation might be misleading. **But putting it**

shortly, what Hale LJ was saying, as I understand it, is that an employee whose job is to lift people (the ambulance man) may have to accept a greater degree of risk than one who is employed to move inanimate objects (the furniture remover) and that what is reasonable (and, I would add, practicable) has to be evaluated having regard to the social utility of the operation and a public authority's duties to the public and to the particular member of the public who has called for the authority's help. At the same time one has to recognise, of course, that none of this can justify exposing an employee to what Hale LJ referred to as "unacceptable risk".

59. The next case is another decision of the [Court of Appeal, O'Neill v DSG Retail Ltd \[2002\] EWCA Civ 1139](#), a case involving a claim by a warehouse manager who injured his back whilst carrying a microwave oven. The Court of Appeal reversed the trial judge and gave judgment for the claimant. In the course of giving the leading judgment Nelson J said this, para [56]: "There must be 'a real risk, a foreseeable possibility of injury; certainly nothing approaching a probability'. When assessing risk the employer must take into account that his employees will not on all occasions behave with full and proper concern for their own safety and the particular operation being carried out in the context of the particular place of work and the particular employee must be considered. Such consideration does not involve examining the precise detailed circumstances of what occurred in each accident, as if that were the case, the regulations might not apply in cases where an employee had acted negligently. This would restrict the application of the Regulations unduly. Schedule 1 of the Regulations clearly poses questions relating to the task to be performed generally. This reinforces the view that it is the particular task which is to be considered, in the context of where it is to be performed and the particular employee who is to perform it. These questions all go to the nature of the task and the risks involved in how it is likely to be performed rather than the precise detail of how it is in fact performed."

60. He added this comment, paras [61], [64]: "[61] ... Had [the expert] considered that this was a case where the task should have been undertaken without any manual handling at all I have no doubt that he would have said so in his report. He did not. It is entirely clear from his report and the evidence which was given at the trial that his view was this was a task which inevitably involved some manual handling, even if

mechanical aids had been provided and used. The main thrust of his report was that this was a case where the principal failure of the Respondent was the failure to provide proper training for the manual handling which had to be carried out ...

[64] ... The task was clearly one which required manual handling at least in part, and the evidence before the Judge was sufficient for her to come to that conclusion. In my view therefore the point did not arise, but in any event the Judge was perfectly entitled to deal with it and find implicitly that there was no breach of Regulation 4(1)(a)."

61. Chadwick LJ said this, paras [87]-[88]:

"[87] Regulation 4(1) ... imposes on an employer a duty (a) so far as is reasonably practicable, to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured or (b), where it is not reasonably practical to avoid that need -- (ii) to take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably possible.

[88] It is plain that the two limbs of that duty are complementary, but mutually exclusive. It is plain, also, for the reasons set out by Mr Justice Nelson, that this is not a case in which the appellant could, or can now, rely on regulation 4(1)(a). It could not be said that it was reasonably practicable for the employer to avoid the need for the appellant, a warehouse manager at a Curry's superstore, to undertake any manual handling operations which involved the risk of his being injured. Some manual handling operations involving the risk of injury were an inherent feature in what the appellant was employed to do. The relevant duty under the 1992 Regulations in the present case was that imposed by regulation 4(1)(b)(ii). The employer was required to take appropriate steps to reduce the risk of injury to the lowest level reasonably practical."

62. This last passage is particularly significant. There may be situations where *some* manual handling is an inherent feature in what the employee is employed to do. Miss Foster, Mr Hunt and Mr Wolfe submit that an obvious example of such a case is where, as here, someone is employed to care for a person -- a human being -- who suffers all the disabilities of people in the situation in which A and B find themselves. I agree.

63. In the present case there is a truly astonishing mass of material filed with the court which charts and records in enormous detail -- in relentless and remorseless detail -- the

problems faced by A and B and their carers X and Y, the details of their daily routines, the precise details of virtually every 'lift' that occurs during the day, and the various views which have been expressed not merely by X and Y but also by a wide range of other people as to how each of these 'lifts' can and should appropriately be achieved. I do not propose even to summarise let alone to analyse this almost unmanageable mass of material. It suffices to say that in the present case, in my judgment, *some* manual handling is on any view an inherent -- an inescapable -- feature of the very task for which those who care for A and B are employed.

64. Accordingly, as Chadwick LJ explained, it cannot be said that it is reasonably practicable for ESCC to avoid the need for their employees to undertake any manual handling of A and B. The duty of ESCC is, as he put it, to take appropriate steps to reduce the risk of injury to the lowest level reasonably practicable, having regard, I would add, to all those factors mentioned by Hale LJ in *Koonjul* and *King* to which I have drawn attention.

65. The final decision is that of Simon J in [Knott v Newham Healthcare NHS Trust \[2002\] EWHC 2091 \(QB\)](#), a case where a hospital nurse received very substantial damages for injuries to her back caused by having to move patients. Her case was that the lack of appropriate lifting equipment meant that the defendant was effectively operating a policy of moving patients manually, and that this was unsafe and contrary to the 1992 Regulations. Simon J found the defendant to be in breach of its duties under regulation 4(1), holding (para [30]) that there were "real risks of injury inherent in the Drag lift", which was the method of moving patients habitually used in the Beckton Ward of the hospital where the claimant worked. In coming to this conclusion the judge applied the law as stated by Asquith LJ in *Edwards* and by Hale LJ in *Koonjul*. His conclusion (para [35]) was that:

"I find the Defendant did not operate an appropriate system for lifting patients in the Beckton Ward. I also find that no real steps were taken to reduce the risk of injury to their employees to the lowest level reasonably practicable in the relevant period; and that, so far as Beckton Ward was concerned, there was no adequate response to the 1992 Regulations."

66. *Knott* is a stark reminder of the realities. The risks faced by those employed in the caring professions if they lift patients manually are graphically illustrated by what Simon J said in paras [60]-[68]. I need not set out the relevant passages in full. I

draw attention only to the salient passages:

"The Claimant suffered serious and painful injuries: a disc prolapse ... with compression/lesion of the conus. The Claimant has suffered and continues to suffer from low back pain, particularly when sitting. Her evidence before me was interrupted so as to enable her to take breaks. She also suffered from sensory disturbance in the sacral segments, loss of feeling in the vagina and loss of orgasmic sensation, bladder dysfunction causing incontinence, and anal sphincter difficulties causing some faecal incontinence ... She is continually aware of her back and suffers from pain, and occasional painful spasms, on her left side. She has aching in the middle of her back from the early afternoon and takes painkillers and Diazepam to prevent muscle spasm. During her monthly periods she takes Dextromeramide for severe pain, is bed bound and has an in-dwelling catheter. She cannot lie down flat and is unable to have children ... She has sleeping difficulties. She also suffers from depression, although this pre-existed her injuries. Her injury has placed considerable strain on her marriage. Socially she has lost confidence since her injury, finds herself bored with her life, unable to drive and incapable of cooking and other chores around the house ... The Claimant ... has suffered a loss of role and self esteem as a result of her injury ... her inability to continue nursing as a vocation represents a loss of congenial employment."

The legal framework -- human rights law

67. Thus the position in purely domestic law.

68. I have, however, been referred to two different Human Rights instruments: the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the Charter of Fundamental Rights of the European Union, proclaimed at Nice in December 2000 ("the Charter").

69. These are, as it seems to me, important sources of possible obligations both owed to and enforceable by A and B and also, let me emphasise, owed to and enforceable by their carers.

70. The most relevant provisions of the Convention are article 2 (which protects the "right to life"), article 3 (which, without qualification or exception, prohibits "torture or ... inhuman or degrading treatment or punishment") and article 8 (which, subject to the well-known exceptions in article 8(2), guarantees the "right to respect for ... private and family life").

71. The relevant provisions of the Charter are articles 1, 3(1), 4, 7, 20, 21(1), 26, 31(1) and 52(1) which provide in relevant part that:

"1 Human dignity is inviolable. It must be respected and protected.

3

(1) Everyone has the right to respect for his or her physical and mental integrity.

4 No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

7 Everyone has the right to respect for his or her private and family life, home and communications.

20 Everyone is equal before the law.

21

(1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

26 The Union recognises and respects the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

31

(1) Every worker has the right to working conditions which respect his or her health, safety and dignity.

52

(1) Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

72. Counsel have also pointed to the references in the preamble

of the Convention to the Universal Declaration of Human Rights, article 1 of which proclaims that:

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

73. The Convention is, of course, now part of our domestic law by reason of the Human Rights Act 1998. The Charter is not at present legally binding in our domestic law and is therefore not a source of law in the strict sense. But it can, in my judgment, properly be consulted insofar as it proclaims, reaffirms or elucidates the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the Convention.

74. This approach is, I think, consistent with the approach adopted in relation to the Charter by Advocate General Jacobs in his opinion in Case C- 270/99P, *Z v European Parliament* para [40], by Advocate General Tizzano in his opinion in [Case C- 173/99, R \(ota the Broadcasting, Entertainment, Cinematographic and Theatre Union\) v Secretary of State for Trade and Industry](#) [2001] All ER (EC) 647, paras [27]-[28], and by Maurice Kay J in [R \(ota Robertson\) v City of Wakefield Metropolitan Council](#) [2001] EWHC Admin 915, para [38]. It is in fact the approach which I myself adopted in *R (ota Howard League for Penal Reform) v The Secretary of State for the Home Department* [2002] EWHC 2497 (Admin), [2003] 1 FLR xxx, para [52].

75. I return to the Convention and first to article 8.

76. In [Niemietz v Germany](#) (1992) 16 EHRR 97 at p 111 (para [29]) the Court indicated that "private life" includes at least two elements. The first is the notion of "an 'inner circle' in which the individual may live his own personal life as he chooses"; the second is "the right to establish and develop relationships with other human beings."

77. Applying *Niemietz*, the Court in [Botta v Italy](#) (1998) 26 EHRR 241 at p 257 (para [32]) said:

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

78. The principle identified in *Botta* is expressly recognised in article 3(1) of the Charter, which proclaims "the right to respect

for ... physical and mental integrity".

79. As the Court has long recognised -- the principle goes back at least as far as *Marckx v Belgium* (1979) 2 EHRR 330 -- the "respect" for private and family life which article 8 guarantees imposes on the State not merely the duty to abstain from inappropriate interference but also, in some cases, certain positive duties. This is explained in the penetrating analysis by Hale LJ in [Re W and B, Re W \(Care Plan\) \[2001\] EWCA Civ 757, \[2001\] 2 FLR 582](#) at 603-605 (paras [55]-[60]). Her observations are not affected by the subsequent decision of the [House of Lords on appeal sub nom In re S \(Minors\) \(Care Order: Implementation of Care Plan\) \[2002\] 2 AC 291](#).

80. Moreover, in order to comply with its obligations under article 8, the State may be obliged to take positive action to prevent or stop another *individual* from interfering with private life. As the Court put it in *Botta* at 257 (para [33]):

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

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

82. The same principles apply in relation to article 3 of the Convention. [A v United Kingdom \(1998\) 27 EHRR 611](#) involved the severe beating on more than one occasion of a nine year old child by his stepfather with a garden cane in circumstances which the Court held (para [21]) reached the level of severity prohibited by article 3. The Court continued at 629 (para [22]): "It remains to be determined whether the State should be held responsible, under Article 3, for the beating of the applicant by his stepfather. The Court considers that the obligation on the

High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity."

83. The same point was emphasised by the Court in *Z v United Kingdom* (2001) 34 EHRR 97 at 131 (para [73]):

"The Court re-iterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. **These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.**"

84. I emphasise the reference to "vulnerable persons".

85. In *Botta*, as we have seen, the Court identified a person's "physical and psychological integrity" as being part of the private life protected by article 8 and which the State may in principle be under an obligation to take positive steps to protect. In the present type of case this "physical and psychological integrity" embraces, though it is not of course confined to, two particularly important concepts which for the purposes of proper analysis it is desirable to distinguish and consider separately.

86. The first is human dignity. True it is that the phrase is not used in the Convention but it is surely immanent in article 8, indeed in almost every one of the Convention's provisions. The recognition and protection of human dignity is one of the core values -- in truth *the* core value -- of our society and, indeed, of all the societies which are part of the European family of nations and which have embraced the principles of the Convention. It is a core value of the common law, long pre-dating the Convention

and the Charter. The invocation of the dignity of the patient in the form of declaration habitually used when the court is exercising its inherent declaratory jurisdiction in relation to the gravely ill or dying is not some meaningless incantation designed to comfort the living or to assuage the consciences of those involved in making life and death decisions: it is a solemn affirmation of the law's and of society's recognition of our humanity and of human dignity as something fundamental. Not surprisingly, human dignity is extolled in article 1 of the Charter, just as it is in article 1 of the Universal Declaration. And the latter's call to us to "act towards one another in a spirit of brotherhood" is nothing new. It reflects the fourth Earl of Chesterfield's injunction, "Do as you would be done by" and, for the Christian, the biblical call (Matthew ch 7, v 12): "all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets".

87. Dignity interests are also, of course, at the core of the rights protected by article 3. Whether a particular set of circumstances constitutes "inhuman or degrading treatment" is a matter of fact and degree. As the Court said in [A v United Kingdom \(1998\) 27 EHRR 611](#) at 629 (para [20]):

"The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim."

88. The Court elaborated these general principles in *Price v United Kingdom* (2001) 34 EHRR 1285 at 1292 (para [24]):

"The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. In considering whether treatment is "degrading" within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3."

89. After all, and as the facts of *Price* itself vividly illustrate (see below), thoughtless, uncaring and uncharitable actions can be

quite as damaging and distressing to the victim as the vicious, wilful or malicious.

90. I should also refer to Keenan v United Kingdom (2001) 33 EHRR 913 at 963 (para [110]) where the Court had earlier observed:

"It is relevant in the context of the present application to recall also that the authorities are under an obligation to protect the health of persons deprived of liberty. The lack of appropriate medical treatment may amount to treatment contrary to Article 3. In particular, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment."

91. Price involved a four-limb-deficient thalidomide victim with numerous health problems including defective kidneys, who had been committed to prison for contempt of court in the course of civil proceedings. A breach of article 3 was established. The Court said at 1294 (para [30]):

"There is no evidence in this case of any positive intention to humiliate or debase the applicant. However, the Court considers that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3."

92. The separate opinion of Judge Greve is important. Agreeing that there had been a violation of the applicant's rights under article 3 she added this at 1296:

"It is obvious that restraining any non-disabled person to *the applicant's level of ability to move and assist herself*, for even a limited period of time, would amount to inhuman and degrading treatment -- possibly torture. In a civilised country like the United Kingdom, society considers it not only appropriate but a basic humane concern to try to ameliorate and compensate for the disabilities faced by a person in the applicant's situation. In my opinion, these compensatory measures come to form part of the disabled person's bodily integrity. It follows that, for example, to prevent the applicant, who lacks both ordinary legs and arms, from bringing with her the battery charger to her wheelchair when she is sent to prison for one week, or to leave her in unsuitable sleeping conditions so that she has to endure pain

and cold -- the latter to the extent that eventually a doctor had to be called -- is in my opinion a violation of the applicant's right to bodily integrity. Other episodes in the prison amount to the same.

The applicant's disabilities are not hidden or easily overlooked. It requires no special qualification, *only a minimum of ordinary human empathy*, to appreciate her situation and to understand that to avoid unnecessary hardship -- that is, hardship not implicit in the imprisonment of an able-bodied person -- she has to be treated differently from other people because her situation is significantly different."

93. This brings out the enhanced degree of protection which may be called for when the human dignity at stake is that of someone who is, as A and B are in the present case, so disabled as to be critically dependent on the help of others for even the simplest and most basic tasks of day to day living. In order to avoid discriminating against the disabled -- something prohibited by article 21(1) of the Charter -- one may, as Judge Greve recognised, need to treat the disabled differently precisely because their situation is significantly different from that of the able-bodied. Moreover, the positive obligation of the State to take reasonable and appropriate measures to secure the rights of the disabled under article 8 of the Convention (and, I would add, under articles 1, 3(1), 7 and 26 of the Charter) and, in particular, the positive obligation of the State to secure their essential human dignity, calls for human empathy and humane concern as society, in Judge Greve's words, seeks to try to ameliorate and *compensate* for the disabilities faced by persons in A and B's situation (my emphasis).

94. So the demands of human dignity fall to be evaluated in the particular context -- not merely of place but also of time. And in this context one needs to bear in mind the point made by Lord Hoffmann in [Birmingham City Council v Oakley \[2001\] 1 AC 617](#) at 631G:

"The concept of cruelty is the same today as it was when the Bill of Rights 1688 (1 Will & Mary, sess 2, c 2) forbade the infliction of "cruel and unusual punishments" (section 10). But changes in social standards mean that punishments which would not have been regarded as cruel in 1688 will be so regarded today."

95. As Lord Hoffmann said, "The content may change but the concept remains the same", reflecting Professor Ronald Dworkin's distinction between the "concept" which does not change and changing "conceptions of the concept": see [R \(ota](#)

[Smeaton on behalf of the Society for the protection of unborn children\) v Secretary of State for Health \[2002\] EWHC 610 \(Admin\), \[2002\] 2 FLR 146](#) at 226 (paras [324]-[325]).

96. Thus I entirely agree with the authors of *Clayton & Tomlinson*, *The Law of Human Rights*, when in the course of considering the case-law on article 3 they say at p 387 (para 8.15) that:

"as the protection of human rights improves, standards are becoming stricter and some of [the] earlier decisions may need to be reassessed."

97. In this context they draw attention to [Selmouni v France \(2000\) 29 EHRR 403](#) where the Court at 442 (para [101]) said that:

"having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions", the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."

98. So increasingly high standards are required. The concept of human dignity may be the same as ever, but the practical standards which require to be met are not. Changes in social standards demand better provision for the disabled if their human dignity is not to be impaired.

99. The other important concept embraced in the "physical and psychological integrity" protected by article 8 is the right of the disabled to participate in the life of the community and to have what has been described (see below) as "access to essential economic and social activities and to an appropriate range of recreational and cultural activities". This is matched by the positive obligation of the State to take appropriate measures designed to ensure to the greatest extent feasible that a disabled person is not "so circumscribed and so isolated as to be deprived of the possibility of developing his personality".

100. This aspect of article 8 appears from *Botta* itself, where the claim was brought by a physically disabled man who went on holiday to a seaside resort but was unable to gain access to a private beach and the sea because they were not equipped with disabled facilities. As the Court explained at 255 (para [27]):

"The applicant complained, firstly, of impairment of his private life and the development of his personality resulting from the Italian State's failure to take appropriate measures to remedy the omissions imputable to the private bathing establishments of Lido degli Estensi (Comacchio), namely the lack of lavatories and ramps providing access to the sea for the use of disabled people. He relied on Article 8 of the Convention ... The applicant asserted that he was unable to enjoy a normal social life which would enable him to participate in the life of the community and to exercise essential rights, such as his non-pecuniary personal rights, not because of interference by the State but on account of its failure to discharge its positive obligations to adopt measures and to monitor compliance with domestic provisions relating to private beaches."

101. The Court dismissed the complaint, but the grounds on which it did so are revealing (at 257 paras [34]-[35]):

"[34] The Court has held that a State has obligations of this type where it has found a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life ...

[35] In the instant case, however, the right asserted by Mr Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life."

102. I have also been referred to the opinion of the Commission in Botta and, in particular, to the concurring opinion of, amongst others, Mr N Bratza (as he then was) at 250-252. His opinion, if I may say so, is important and merits quotation at some length:

"As the majority have recalled, although "the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities", thereby imposing primarily negative obligations on the Contracting States, this provision may nonetheless, in certain cases, impose on those States positive obligations inherent in an effective respect for private life. These positive obligations "may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves".

We believe this to be the case. Such positive obligations may exceptionally arise in the case of the handicapped in order to

ensure that they are not deprived of the possibility of developing social relations with others and thereby developing their own personalities. In this regard, the Commission observes that there is no water-tight division separating the sphere of social and economic rights from the field covered by the Convention.

In the case of the physically handicapped, the abovementioned positive obligations require appropriate measures to be taken, to the greatest extent feasible, to ensure that they have access to essential economic and social activities and to an appropriate range of recreational and cultural activities. The precise aim and nature of the measures undertaken may vary from place to place, and according to the priorities of facilitating access to sanitary facilities, footpaths, transport, entrances to buildings, historical sites, areas of natural beauty and areas of recreational use. In the case of the mentally handicapped, the measures would necessarily be different. This is an area in which a wide discretion must inevitably be accorded to the national authorities. Nevertheless, the crucial factor is the extent to which a particular individual is so circumscribed and so isolated as to be deprived of the possibility of developing his personality.

In the present case, the Italian State adopted Law No. 13 of 9 January 1989 some three years before Recommendation No. R (92) 6 was adopted by the Committee of Ministers of the Council of Europe. Based on that Law, a decree was adopted on 14 June 1989 governing the facilities to be provided by persons running bathing establishments.

In 1990 and 1991, the applicant sought to gain access to the bathing establishments at Lido degli Estensi, but the abovementioned facilities had not yet been provided. Instead, he was permitted to use his private vehicle to obtain access to a public beach with no facilities. It appears that since then matters have improved in that a toilet and changing-hut for handicapped persons have been provided. However, no specially designed access-way enabling disabled persons to gain access to the beach and the sea has been provided.

However, in our view, this last omission in one specified place in Italy does not suffice to conclude that the respondent Government is in violation of the positive obligations under Article 8 of the Convention. The question of whether there has been a violation of the applicant's right to effective enjoyment of his right to develop social relations with others and to develop his own personality cannot depend on occasional lapses from the ideal recommended by Recommendation No. R (92) 6 of the

Committee of Ministers or the norms laid down in domestic law. There is nothing to indicate that the applicant's life as a whole is so circumscribed and isolated that the occasional inconveniences and troubles he suffered in 1990 and 1991 amounted to a violation of his private life. Having regard to the margin of discretion which a State must enjoy in the field of positive obligations, and to the "progressive" nature of the measures required in this sphere, it follows that there has been no interference with the applicant's right to respect for his private life."

103. The principle which one thus sees articulated in *Botta* is expressly recognised in article 26 of the Charter, with its reference to "the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community". I shall return in due course to consider the significance of this point in the circumstances of the present case.

104. Ms Lang disputes that article 8 can have any application in the present context. Alternatively, she says, any rights that A and B may have under article 8 necessarily take effect subject to the corresponding rights of their carers. Whilst I readily accept the second of these two propositions I cannot accept the first.

105. In support of her submissions Ms Lang referred me to the interesting analysis of these issues in *Simor & Emmerson's* Human Rights Practice. Recognising the breadth of the notion of private life articulated in cases such as *Niemietz* and *Botta*, the authors comment at para 8.005:

"However, not every act or measure which may be said to affect adversely the physical or moral integrity of a person necessarily gives rise to an interference with private life. The severity of the adverse effects for the individual's moral or physical integrity will determine whether the treatment is sufficiently serious to fall within the scope of Article 8."

106. I have no quarrel with that. They continue in para 8.006: "In *X v Iceland* (1976) 5 DR 86 however, the Commission expressed the view that the concept of 'private life' could not be extended indefinitely:

[T]he Commission cannot, however, accept that the protection afforded by Article 8 ... extends to relationships of the individual with his entire immediate surroundings, in so far as they do not involve human relationships and notwithstanding the desire of the individual to keep such relationships with?? the private

sphere."

Moreover, private life rights are narrower when they come into contact with the public sphere or where they come into conflict with other protected interests."

107. In *X v Iceland* the asserted right was to keep a dog as a pet. The claim was dismissed. In the view of the Commission the right to keep a dog did not pertain to the sphere of private life of the owner because:

"the keeping of dogs is by the very nature of that animal necessarily associated with certain interferences with the life of others and even with public life."

108. Ms Lang referred me in this context to the decision of the Commission in [Bruggemann and Scheuten v Federal Republic of Germany \(1977\) 3 EHRR 244](#), an abortion case, where at 252 (paras [55]-[56]) the Commission said this:

"[55] The right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality ...

[56] However, there are limits to the personal sphere. While a large proportion of the law existing in a given State has some immediate or remote effect on the individual's possibility of developing his personality by doing what he wants to do, not all of these can be considered to constitute an interference with private life in the sense of Article 8 of the Convention. In fact, as the earlier jurisprudence of the Commission has already shown, the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life or into close connection with other protected interests."

109. Here, says Ms Lang, the "other protected interests" include those of the carers.

110. Ms Lang also referred me to the further passage at para 8.018 where the authors say:

"Laws adopted for the protection of individuals' safety will not necessarily affect private life. Thus the introduction of compulsory safety belts in cars was held not to give rise to an issue under Article 8".

111. That is a reference to *X v Belgium* (1979) 18 DR 255 where at 257 the Commission said this:

"though it is true that much legislation has immediate or remote effects on the individual's capacity to develop his personality by exercising an activity not subject to control by the authorities, nonetheless, this legislation cannot be considered as a whole as

infringing the right to private life within the meaning of Article 8 of the Convention.

In the Commission's opinion this is the case with regard to numerous measures which the authorities decide to take to protect the public from various dangers and as a consequence protect society against the harm which they involve.

This for example is the position with regard to the safety appliances which are compulsory for industrial undertakings and the obligation to use subways in the stations or pedestrian crossings and numerous other measures of individual or collective protection adopted in the public interest.

The compulsory wearing of safety belts by the drivers and passengers of motor-vehicles ... is a measure of this type. In the Commission's opinion they in no way affect a person's "private life", however broadly this expression is interpreted.

The present application is therefore outside the scope of Article 8 of the Convention".

112. Ms Lang understandably emphasises the basis upon which the claim was rejected: not because there was an interference with private life which was justifiable under Article 8(2) but because Article 8 was not implicated at all.

113. I have no quarrel with the decisions in *X v Iceland*, *Bruggemann and X v Belgium* but they all arose in contexts very different indeed from that with which I am concerned. They do not assist me and they do not, in my judgment, assist Ms Lang. The authorities I have previously referred to, *Botta and Price* in particular, demonstrate quite clearly in my judgment that in the kind of situation with which I am faced in the present case A and B's rights under article 8 are certainly engaged and that, in principle, their rights under article 3 and even under article 2 may also be engaged.

114. Article 8 is engaged in two distinct respects: first, it protects what I have referred to as A and B's dignity interests; secondly, it protects their right to participate in the life of the community and to have access to an appropriate range of recreational and cultural activities. Article 3 might well be engaged, for example, in circumstances where the consequences of failing to lift A or B manually might result in them remaining sitting in bodily waste or on the lavatory for hours, unable to be moved. Article 2 could be engaged, for example, not merely in the obvious case of the building they are in catching fire but also if they slipped under the water in the bath and could be saved only by being lifted out.

115. Thus I agree with Miss Foster, Mr Hunt and Mr Wolfe when

they emphasise the importance of A and B's dignity and assert the engagement in this connection of their rights under both article 8 and article 3. But this emphasis upon A and B's dignity and their rights under the Convention needs to be put in context. There are, as it seems to me, two other aspects of the matter that have to be brought into the equation.

116. In the first place, and as Ms Lang correctly points out, whilst A and B's rights under articles 2 and 3 may be absolute and unqualified, their rights under article 8 necessarily take effect subject to the corresponding rights of their carers. If A and B have dignity and other interests protected by article 8 (and, for that matter, by the Charter) then so too in principle do their carers. The fact that the carers are involved because they are being paid to provide a professional service is, as it seems to me, neither here nor there. In Niemietz at para [29] the Court stated that there is no reason in principle why the 'private life' protected by article 8 "should be taken to exclude activities of a professional or business nature". And article 31(1) of the Charter proclaims that every worker has the right to working conditions which "respect his or her health, safety and dignity", an objective to which Council Directives 89/391 and 90/269 (from which the 1992 Regulations derive) are, of course, directed. The facts of Knott as I have already set out them out serve to emphasise the centrality in this context of the article 8 and article 31(1) rights of the carers. The damage in that case to the claimant's "physical and psychological integrity", health, safety and dignity due to the defendant's breach of Regulation 4 was gross and obvious.

117. I do not want there to be any misunderstanding. I am not to be taken as asserting that human rights law is to be transported entire into employment law or into the law of health and safety at work. That is a very large issue of some importance. It is not before me and is for another day. All I am saying is that, as article 8(2) itself recognises, insofar as A and B seek to rely upon those aspects of their rights under article 8 that are here in issue, and particularly insofar as they seek to rely upon the State's positive obligations to them under article 8, there is a fair balance to be struck. And in striking that balance one has to have regard not merely to A and B's rights and the general interests of the community as a whole but also to the corresponding rights of their carers.

118. Claims under article 8 are necessarily affected when the individual brings his own private life into contact or close connection with other protected interests. Now that is precisely

what A and B are doing when they assert that public authority -- ESCC -- and employees of a public authority -- their carers -- are under a duty to provide them with domestic care of the most personal and intimate nature. I simply do not see how in this almost uniquely personal context persons in A and B's situation can seek to rely upon the rights afforded to them by article 8 without allowing that their carers have, at least in some respects, corresponding rights which have to be brought into the equation. If article 8 protects A and B's physical and psychological integrity -- and it plainly does -- then equally article 8(2) must, as against A and B, protect their carers' physical and psychological integrity. And if article 8 protects A and B's dignity rights -- and in my judgment it does -- then equally article 8(2) must protect their carers' dignity rights.

119. The other aspect of the matter which, in my judgment, is of considerable importance relates to what is meant by dignity in this context. Much of the debate with ESCC and much of the argument which has been addressed to me has proceeded on the scarcely articulated but nonetheless pervasive assumption that manual handling is dignified whereas mechanical handling is undignified, in other words that A and B's dignity interests are served by manual handling but are not served if equipment is used. This, as it seems to me, is a highly questionable, in truth a dangerous and misleading, assumption. I say so for two reasons.

120. I recognise of course that the compassion of the carer is itself a vital aspect of our humanity and dignity and that at a very deep level of our instinctive feelings we value and need the caring touch of the human hand. That no doubt is one of the reasons why the nobility of compassionate carers as different in their ways as Florence Nightingale, Leonard Cheshire and Mother Teresa resonates so strongly with us. It underlies the most savage of A.W.N. Pugin's *Contrasts*, his comparison of the compassionate care of the medieval monastery and the cruel heartlessness of the early modern workhouse. Even those who do not believe in any God know that a human being is more than a machine consisting of a few rather basic chemicals operated by electric currents controlled by some animalistic equivalent of a computer located in the skull -- and that, no doubt, is why we have an instinctive and intuitive preference for the touch of the human hand rather than the assistance of a machine. As disabled persons or invalids our instinctive preference is to be fed by a nurse with a spoon rather than through a naso-gastric or gastrostomy tube.

121. But, and this is the first point, insistence on the use of dignified means cannot be allowed to obstruct more important ends. On occasions our very humanity and dignity may itself demand that we be subjected to a certain amount -- sometimes a very great deal -- of indignity. Dignified ends may sometimes demand the use of undignified means. The immediate dignity of a person trapped in a blazing building is probably the very last thing on his mind or in the mind of the fireman who bundles him undignified out of the window to save his life. And one thinks of the gross violence and indignity of the methods necessarily used by the crash team in its desperate efforts to save life in the Accident and Emergency Department. But this does not mean that means must be allowed to triumph over ends. There is a balance to be held -- and it is often a very difficult balance to strike. It is difficult enough to balance the utility or possible futility of means against the utility or possible futility of ends: it is all the more difficult when one has to assess in addition the dignity or possible indignity of the means against the end in view. Modern medical law and ethics illustrate the excruciating difficulty we often have in achieving the right balance between using undignified means in striving to achieve dignified ends.

122. The other point is this. One must guard against jumping too readily to the conclusion that manual handling is necessarily more dignified than the use of equipment. A disabled person or invalid may prefer manual handling by a relative or friend to the use of a hoist but at the same time prefer a hoist to manual handling by a stranger or a paid carer. The independently minded but physically disabled person might prefer to hoist himself up from his bath or chair rather than to be assisted even by his devoted wife. Dignity in the narrow context in which it has been used during much of the argument in this case is in truth part of a much wider concept of dignity, part of a complicated equation including such elusive concepts as, for example, (feelings of) independence and access to the world and to others. Hoisting is not inherently undignified, let alone inherently inhuman or degrading. I agree with Ms Lang that certain forms of manual lift, for example the drag lift, may in certain circumstances be less dignified than hoisting. Hoisting can facilitate dignity, comfort, safety and independence. It all depends on the context.

A framework of principles

123. It is time now to attempt to draw all this together and to articulate a framework of principles for the interpretation and application of regulation 4 of the 1992 Regulations. In large measure, though with some important differences (for I cannot follow them to the limits of their arguments), what follows is based on the careful analyses prepared by Miss Foster and Mr Wolfe, for whose assistance in this as in other respects I am much indebted.

124. At the outset I must stress two things:

i) First, I am concerned here only with the particular context of care workers and personal assistants supporting disabled people in their own homes, where adaptations are possible. This is a context in which a small number of care workers or personal assistants work with the disabled person, can be trained for that very specific task and can build up relationships with, and knowledge of, the individual disabled person involved. In other contexts a somewhat different approach may be appropriate. This is, par excellence, an area of the law where "context is everything".

ii) Secondly, what follows is not intended to be exhaustive of all the principles in play: in that sense it is intended to be descriptive rather than prescriptive, illustrative rather than definitive.

125. In what follows I shall for the sake of simplicity use the word "lift" in place of the statutory phrase "manual handling operation".

126. A: The general approach:

i) **Regulation 4 bites only on hazardous lifts**, that is, those that involve a risk of injury to the care worker. For a lift to be hazardous there must be, in the sense in which the words were used by Hale LJ in *Koonjul*, a real risk of injury. Appropriately in the light of the evidence the parties accept that the lifts with which I am concerned in the present case are all hazardous.

ii) In relation to hazardous lifts, regulation 4 establishes a clear hierarchy of safety measures: (a) avoid hazardous lifts so far as is reasonable practicable; (b) having made a suitable and sufficient assessment of any hazardous lifts that cannot be avoided, reduce the risk of injury from those lifts so far as is reasonably practicable. **It is to be emphasised that this is *not* a 'no risk' regime or a 'risk elimination' regime, nor is there an absolute prohibition on hazardous lifting: it is a 'risk reduction' or 'risk minimisation' regime.** There is no absolute requirement to make the situation absolutely "safe" for workers. The employer's obligation is to avoid or minimise the risk so far as reasonably practicable.

iii) It follows that the task for the employer is to: (a) assess the lifts that are to be undertaken; (b) decide whether there is a real risk of injury; and (c) if there is such a risk (that is, if the lift is "hazardous") undertake an assessment, applying his mind to possible ways of avoiding or minimising the risk. The essential task here is to decide whether it is "reasonably practicable" either to avoid or, as the case may be, to minimise the risk.

127. B: Reasonable practicability and the needs of the disabled:

i) Reasonable practicability is to be assessed on the basis of the 'cost-benefit' analysis described by Asquith LJ in *Edwards* but taking into account the needs of the disabled person and giving effect to their Convention (and Charter) rights in the 'cost-benefit' analysis.

ii) Thus the statutory regime is one which aims to avoid hazardous manual lifting so far as that is reasonably practicable and commensurate with the best interests of the disabled person, their dignity and the promotion of their independence and their Convention rights; but which also recognises (in relation to *both* risk avoidance *and* risk minimisation) that the needs of the disabled person *may* mean that it is not reasonably practicable to avoid a particular risk or to reduce it as much as might otherwise be appropriate.

128. C: Assessing reasonable practicability:

i) In assessing reasonable practicability the approach is as follows:

a) the **possible methods** of avoiding or minimising the risk must be considered (in practice the only alternative to manual lifting in a case such as this is likely to be a hoist);

b) the **context** -- the frequency and duration of the manoeuvres -- must be considered: the assessment must be based on the pattern of lifting over a period (typically a day), not on an individual lift basis -- a particular lift might be done manually if done only once a day but not if required frequently during the day;

c) the **risks to the employee** in question associated with each of the possible methods must be assessed: there must be an analysis of (1) the **likelihood** of any injury to the employee, and (2) the **severity** of any injury to the employee;

d) the **impact upon the disabled person**, physical, emotional, psychological or social, of each of the possible methods of avoiding manual lifting must be examined: there must be an analysis of:

i) the physical and mental personality and characteristics of the

- person and their personality -- this necessarily includes the nature and degree of disablement;
- ii) the wishes and feelings of the disabled person: any evinced negative reaction in the nature of dislike, reluctance, fear, refusal or other manifestation of negative attitude is relevant, though not of course determinative;
 - iii) the effect upon the disabled person's dignity and rights, including in particular their rights (protected by article 8) to physical and psychological integrity, to respect for their privacy, to develop their personality and to go out into the community and meet others and their right (protected by article 3) to be free from inhuman or degrading treatment.
- ii) These considerations will necessarily involve assessing the impact upon the disabled person of carrying out a manoeuvre other than a manual lift in terms of considerations of personal dignity or the amount of respect afforded to their persons, their quality of life generally -- their ability to spend their time in activities other than merely performing bodily functions -- and, importantly, matters such as their access to the community.
- iii) The assessment must be focussed on the particular circumstances of the individual case. Just as context is everything, so the *individual* assessment is all. Thus, for example:
- a) the assessment must take into account the *particular* disabled person's personal physical and mental characteristics, be 'user focussed' and 'user led' and should be part of the wider care-planning process for that particular individual;
 - b) there must be an assessment of the particular disabled person's autonomy interests;
 - c) the assessment must be based on the particular workers involved (not workers in the abstract);
 - d) the assessment must be based on the pattern of lifting in the particular case.

129. D: The balancing exercise:

- i) When the assessment of the "impact" on both the carer and the disabled person of the range of alternatives has been made (assuming there is a range), the employer must balance the two impact assessments one against the other.
- ii) As Miss Foster correctly concedes, this is not a situation in which the disabled person's rights 'trump' those of the carer, though equally, I should emphasise, the carer's rights do not 'trump' those of the disabled person. So the conflict between the competing interests has to be resolved by the device which is

conventionally, if sometimes unhelpfully, referred to as a balancing exercise. (Unhelpful because often, and the present is just such a case, the essential task is to evaluate -- balance -- what are in truth incommensurables: see the comments of Lord Wilberforce in [Science Research Council v Nasse \[1980\] AC 1028](#) at 1067D and of Lord Hoffmann in [In re B \(A Minor\) \(Adoption Order: Nationality\) \[1999\] 2 AC 136](#) at 141F.)

iii) Though in the present context the starting point for this balancing exercise is, no doubt, Asquith LJ's analysis in *Edwards*, the exercise is now, of course, informed by the Convention. Within the context of article 8, the balance between conflicting or competing rights is to be resolved by inquiring of each claimant whether the interference with his right required if the other claimant's right is to be respected is such as to be "necessary in a democratic society ... for the protection of ... the rights and freedoms of" the other. And well-known Convention jurisprudence adopts the concept of proportionality (which, it may be noted, is referred to expressly in article 52(1) of the Charter) as the appropriate tool for resolving this question.

iv) Local policies and individual assessments must draw on *relevant* guidance. The most up to date and appropriate guidance in this context is HSG225. Guidance prepared for other circumstances, such as the RCN guidance, which is focussed primarily, though not exclusively, on nurses in hospitals, is not necessarily an entirely safe guide in this context.

130. E: The assessment:

i) Once the balance has been struck, if it comes down in favour of manual handling, then the employer must make appropriate assessments and take all appropriate steps to minimise the risks that exist.

ii) The assessment must be properly documented and lead to clear protocols which cover *all* situations, including foreseeable emergencies and, in the case of patients such as A and B, events such as episodes of spasm and distress which might arise. As I have already remarked, in the present case this has not yet been done: Mrs Bosley's draft protocols are incomplete.

131. I emphasise that it is the employer who is responsible for assessing and evaluating the risks and other factors that have to be fed into the balancing exercise and for providing the carer with protocols for use in the kinds of situation, including emergencies, that might arise. There will of course come a point where the protocols cannot be too prescriptive and where they will have to indicate that it is for the carer to decide how to act in

a particular situation, for example, of emergency or if A or B are evincing distress or showing signs of resistance. Necessarily these matters involve questions of sensitivity and judgment on the part of the carers, but that is the nature of the task.

132. I have said that the assessment must take account of the disabled person's wishes, feelings and preferences. How are these to be ascertained?

133. In a case where the disabled person is, by reason of their disability, prevented, whether completely or in part, from communicating their wishes and feelings it will be necessary for the assessors to facilitate the ascertainment of the person's wishes and feelings, so far as they may be deduced, by whatever means, including seeking and receiving advice -- **advice, not instructions** -- from appropriate interested persons such as X and Y involved in the care of the disabled person.

134. Good practice, Miss Foster suggests, would indicate, and I am inclined to agree that:

i) A rough "dictionary" should be drawn up, stating what the closest carers (in a case such as this, parents and family, here X and Y) understand by the various non verbal communications, based on their intimate long term experience of the person. Thus with familiarisation and "interpretation" the carers can accustom themselves to the variety of feelings and modes of expression and learn to recognise what is being communicated.

ii) Where the relatives are present with the carers and an occasion of "interpretation" arises, great weight must be accorded to the relatives' "translation".

iii) As I commented in [Re S \[2003\] 1 FLR 292](#) at 306 (para [49]): "the devoted parent who ... has spent years caring for a disabled child is likely to be much better able than any social worker, however skilled, or any judge, however compassionate, to 'read' his child, to understand his personality and to interpret the wishes and feelings which he lacks the ability to express."

iv) That said, in the final analysis the task of deciding whether, in truth, there is a refusal or fear or other negative reaction to being lifted must, as Miss Foster properly concedes, fall on the carer, for the duty to act within the framework given by the employer falls upon the employee. Were the patient not incapacitated, there could be no suggestion that the relative's views are other than a factor to be considered. Because of the lack of capacity and the extraordinary circumstances in a case such as this, the views of the relatives are of very great importance, but they are not determinative.

135. I would add in this context that all these matters form a proper part of any detailed protocol under the 1992 Regulations, given the special circumstances of the severely disabled and incapacitated. And the protocol must be particular enough to be operated without the relative present, since part of the purpose of packages of this kind is to afford respite care to home carers such as X and Y.

How is the balance to be struck?

136. Much the most difficult part of the present exercise is in deciding how the balance to which I have referred is to be struck in a case such as this.

137. There are, says Miss Foster, special factors that inform the answer to the question 'How is the balance to be struck?' in a case such as this. These special factors weigh heavily, she suggests, in favour of the disabled person who requires to be lifted. Miss Foster relies upon two matters in particular.

138. First, she says, a disabled person is, purely by reason of their impairment, likely to be heavily constrained in their ability to enjoy what life has to offer. Anything which impacts upon what remains to such a person of the pleasure of life is commensurately important. Thus the impact of taking away what might be the one opportunity for real relaxation at home (bathing) or for physical enjoyment in the community (swimming) is hard to overestimate. As Miss Foster pointed out, this particular feature is recognised in that part of her judgment in Price where Judge Greve says:

"In a civilised country like the United Kingdom, society considers it not only appropriate but a basic humane concern to try to ameliorate and compensate for the disabilities faced by a person in the applicant's situation. In my opinion, these compensatory measures come to form part of the disabled person's bodily integrity."

139. For these reasons, says Miss Foster, matters of dignity and respect weigh heavily with people who are already shut out from much -- indeed in the case of A and B from most -- of what is available to the vast majority.

140. Secondly, she says, the nature of the task undertaken by the carers is so important in terms of the value that society puts upon it that it justifies allowing extra risks to be taken by the person performing the task. As Miss Foster points out, this issue was touched on, albeit in the context of their discussion of the

law of negligence, by Hale and Buxton LJJ in King. I have already set out the relevant passages in paras [22]-[23] of Hale LJ's judgment. The topic is also discussed by Buxton LJ at paras [34]-[50] in a passage of great force and subtlety which cannot sensibly be subjected to partial quotation but which is too long to set out in full. But it seems to me, as Miss Foster submitted, that the entire discussion is premised on the proposition that **some jobs in the public interest require the taking of unusual risks because of the value society puts upon the task.** As I have already commented, what Hale LJ was saying, as I understand it, is that an employee whose job is to lift people (the ambulance man) may have to accept a greater degree of risk than one who is employed to move inanimate objects (the furniture remover) and that what is reasonable (and, I would add, practicable) has to be evaluated having regard to the social utility of the operation and a public authority's duties to the public and to the particular member of the public who has called for the authority's help.

141. Miss Foster submits that in the context of a case such as the one which I am considering this weights the scale in favour of the disabled person: policy, she says, requires that in certain situations -- and this, she says, is one -- paid professionals take, and are expected to take, extraordinary risks. **Public policy, she submits, would support a construction of the 1992 Regulations in a manner that reflects the fact that for certain professionals running risks is the consequence of the job they undertake: firemen and ambulance men are the obvious cases but, she says, if not in the same category care workers are in a similar group.**

142. In support of this submission, Miss Foster suggested that those who are expected by society to run these enhanced risks are compensated financially for doing so. I say nothing about the remuneration of the emergency services -- a topic which is currently a matter of acute political controversy -- but the suggestion, for example, that nurses and others in the caring professions are additionally remunerated to compensate them for running such risks is, I have to say, unenriched by common sense. Nor is the point improved by suggesting that such people will be compensated if the risk materialises in circumstances where inadequate steps were taken to protect them: this simply begs the question. There was also a hint in some of the submissions I heard that those who choose to take employment in jobs that expose them to enhanced risks are presumably content to accept those risks. I reject any such suggestion. After

all, arguments of that kind would justify sending boys up chimneys or women down coal-mines.

143. On the basis of arguments such as this Miss Foster submitted that if A or B were to evince *measurable* distress, refusal, reluctance or some other response indicative of *resistance* to the use of a hoist or other non-manual procedure, or if one of their Convention rights were to be *measurably impaired*, then it would be appropriate to lift them manually unless there was a *very high risk* to the carer of a *very serious injury*.

144. Indeed, she went so far as to submit that where refusal, measurable reluctance or distress is detected a carer must not hoist. Likewise where there is a risk of damage to bodily integrity -- the example she gave was of hurt from a rough sling. She said that **the only circumstances where a carer is entitled to hoist a person against their will or in face of resistance is in cases of necessity, that is, she said, where there is a threat to life or an imminent risk of very serious harm.**

145. She summarised this part of her case by submitting that in the context of a significantly disabled person and a care assistant a very high duty of care is owed to the disabled person. It is, she said, referring to articles 3 and 2 of the Convention, obvious that **it is never reasonably practicable to degrade or act inhumanly because of a risk to your back, or to fail to save a life because of a risk to your back; but, she said, it is also never reasonably practicable to impair the remaining article 8 rights enjoyed by such people unless there is a very high risk of very serious injury to the carer.**

146. Similar arguments were pressed by Mr Hunt and Mr Wolfe.

147. I can go much of the way with Miss Foster but I cannot go the whole distance she would have me travel.

148. With the first of her two points -- the enhanced weight which is properly to be attached to the article 8 rights of those who through disability are already deprived of so much of what makes life enjoyable and enriching for the majority -- I have no difficulty. It is, for the very reasons articulated by Judge Greve, a compelling argument. The claims of the disabled and the obligations of the State to give effect to their article 8 rights in the ways identified by Judge Greve in her separate opinion in Price and by Mr Bratza in his concurring opinion in Botta -- analyses with each of which I entirely agree -- are powerful indeed. I agree, therefore, that A and B's article 8 rights weigh heavily in the balance.

149. But in relation to her second point -- the risks that carers are to be assumed to accept -- Miss Foster, in my judgment, goes too far. I can put the point quite baldly. There may be no duty to rescue unless the rescuer is employed and paid to do so, but even the paid rescuer is not required to play the hero, much as we may applaud the heroism so often displayed, for example, by members of the emergency services. The bible may teach us (St John ch 15, v 13) that "Greater love hath no man than this, that a man lay down his life for his friends", but a secular society is not entitled to call from its servants for devotion beyond the call of duty. Civil society has to balance the dignity of the patient against the dignity of the carer and can only do so by reference to the standards of the average human being. I accept, of course, that the dignity of the carer is not confined only to the physical, to matters of health and safety: the compassion of the carer is itself, as I have said, an aspect of our humanity and dignity. Our society expects much from nurses and others in the caring professions. But **civil society cannot expect of its nurses, care assistants and others in similar positions, the abnegation and self-sacrifice of a Mother Teresa.** And that, as it seems to me, is really where this part of Miss Foster's submissions seems to be leading. The fact is, as I have already commented, that **none of this can justify exposing an employee to what Hale LJ referred to in King as "unacceptable risk".**

150. So Miss Foster goes too far in asserting that any measurable impairment of A and B's rights precludes hoisting or other non-manual means unless the risks to the carer are very high. Likewise she goes too far in saying that save in cases of necessity -- emergency or the like -- A and B must not be hoisted if they are showing signs of resistance.

151. But **equally, as it seems to me, Mrs Bosley goes too far in the other direction when she suggests in her first witness statement that manual lifting is permissible only if the particular lift cannot be carried out using a hoist** (that is, is physically impossible) or in exceptional circumstances, that is, she says, in the case of a prolonged power failure, fire or other life threatening occurrence.

152. Miss Foster's formulation attaches too much weight to the claims of the disabled person: Mrs Bosley's too much weight to the claims of the carer. A and B's article 8 rights weigh heavily in the balance: more heavily, in my judgment, than ESCC and Mrs Bosley accept; but not so heavily as Miss Foster would have me accept.

Striking the balance

153. It is in the first place for ESCC to formulate its manual handling policy and to make the appropriate assessments in relation to A and B. Neither of those is a matter for the court. What the court can and should do is to assist ESCC by identifying the relevant legal principles.

154. I have already discussed the law at some length. At this point I should summarise its application in the context of the particular problems that A and B face and the various lifts which I have previously referred to as being in issue.

i) The situation is one in which some manual handling at least is an inherent -- an inescapable -- feature of the very task for which those who care for A and B are employed. Thus it is simply not reasonably practicable for ESCC to avoid the need for their employees to undertake manual handling of A and B altogether.

ii) A lifting policy is most unlikely to be lawful which either on its face or in its application:

a) imposes a blanket proscription of all manual lifting, or

b) imposes a blanket proscription of manual lifting save in circumstances where life is in issue, or

c) imposes a blanket proscription of manual lifting save where any other means are a physical impossibility.

iii) In the case of hazardous lifts, manual lifting will probably be the exception *but*

iv) The fact that a hazardous lift *can* be performed by hoisting does not mean that it *must* be performed by hoisting *and*

v) There may be circumstances where a disabled person's needs are such that it is not reasonably practicable for a hazardous lift to be carried out by hoisting, so that manual lifting is required.

vi) Where the health and safety of the disabled person would otherwise be under threat, manual lifts which might otherwise not be acceptable may be required.

vii) All lifts required for maintaining the client's dignity, comfort and quality of life *must* be performed somehow (by exceptional manual lifting if necessary, for example where there is prolonged resistance or great and obvious distress).

viii) There are certain circumstances where the carer would be obliged to lift A and B manually. They are probably essentially the cases that are obvious 999 situations of necessity where the risk to the person of not being lifted is patently an overriding

factor that would trump the carer's ordinary health and safety concerns.

ix) In the case of the lifts which take place as part of A and B's normal daily routine within the house one would expect that the balance would come down in most instances against manual handling and in favour of using hoists.

x) But even in relation to lifts which would normally be carried out using hoists it is likely to be unlawful for carers, for example in the kinds of incidents which took place on 20 and 26 September 2002 or if A or B become distressed or refuse to be moved in the usual way, to:

a) allow them to remain sitting in the bath for any really appreciable time without lifting them out, or

b) leave them sitting on the lavatory for a long time, or

c) leave them in a chair or elsewhere with the risk that bedsores will develop, or

d) fail to pick them up if they fall and remain lying -- particularly in a public place, or

e) leave them sitting in bodily waste for any appreciable time.

xi) A and B's rights to participate in the life of the community and to have access to an appropriate range of recreational and cultural activities are so important that a significant amount of manual handling may be required. Thus it is likely to be unlawful for a carer:

a) to fail to take them out of the house (for example for a swim) merely because a power cut means that the hoist is not working, or

b) to restrict the time available for access to such activities as shopping, swimming and horse-riding because manual lifting would otherwise be required, or

c) to fail to take them swimming one or twice a week because the swimming baths do not have a hoist, or

d) to fail to take them shopping because changing their incontinence pads requires manually lifting them.

155. This list is not necessarily exhaustive.

The role of the court

156. I have commented on the vast and almost unmanageable mass of the evidence and other materials I have been asked to consider. But this is merely a manifestation of a deeper and more serious problem.

157. Although the context is very different, and the technical

issues which the present proceedings raise are, on one view, wholly different, I have to confess to having during the course of argument in this case felt the same sense of unease that was expressed by Lord Mustill in [Airedale NHS Trust v Bland \[1993\] AC 789](#) at 886F-890E. Lord Mustill's concern in Bland was that in considering, in the context of declaratory proceedings in the Family Division, the criminality of acts or omissions as yet only in contemplation, the civil courts had, as he put it at 888E, "embarked on a kind of proleptic criminal trial" without (see at 886F) having given very much attention to "the role of the court ... the nature of the function which the court is being called upon to perform". As he commented at 888C: "everyone concerned has pressed ahead without I believe having analysed at all closely just what it is the court is being required to do."

158. In the same way I have at times during the argument in this case felt that I was embarked upon a kind of proleptic trial in the Queen's Bench Division of a personal injury action, and an action, moreover, being conducted in the absence of and without any participation by the claimant carer. Put plainly, I felt at times that singularly little thought had been given to identifying precisely what the task was upon which I was supposed to be engaged.

159. This is not a case like *Re S*, where I was not being asked to impose on a local authority any burden which it was unwilling to assume and where, accordingly, the matter lay entirely within the field of private law. This is a case, like *A v A Health Authority*, where, in the final analysis, the claimants are seeking the assistance of the court in thrusting upon ESCC -- a public authority -- a burden which it is unwilling to assume. I do not propose to repeat here the analysis which I undertook in *A v A Health Authority*, but as I there explained such a case raises issues of public law to be determined, whether in the Family Division or in the Administrative Court, by reference to the appropriate principles of public law. Other aspects of this litigation may raise issues of private law, to be determined by reference to the usual Family Division criterion of best interests, but the manual handling issue comes before the court in the final analysis, and notwithstanding the important human rights arguments, as a matter raising issues of public law.

160. Now this has two important corollaries: first, that the primary decision maker is ESCC and not the court; and, secondly, that the court's function, notwithstanding the important human rights

aspects of the case, is essentially one of review -- review of ESCC's decision, whatever it may -- rather than one of primary judicial decision making.

161. The simple fact is, and nothing in either the Convention or the Charter gets away from this, that it is ESCC, and not the court -- neither the Family Division nor the Administrative Court -- which has been given by Parliament the task of exercising the powers and duties conferred by the 1948, 1970 and 1990 Acts. In just the same way, it is ESCC as the employer, and not the court, which has the primary task of making and drawing up the assessments required by the 1992 Regulations. It is not the task of the court to make and draw up the necessary assessments. That is a task for ESCC. Nor, in my judgment, is that essential distinction between the respective functions of the public authority and the court in a case such as this to be avoided, as it were, by one of the parties seeking anticipatory declaratory relief in a situation where, if the court is to be asked to consider the detailed specifics of the problem, it can only sensibly do so in the context of an action in which the carers are joined as parties.

162. It is, in any event, a task for which the court -- even the Family Division or the Administrative Court -- is singularly ill-suited. One has only to consider, for example, the detail to be found in the Royal College of Nursing's 'Guide to the Handling of Patients' or in the Health and Safety Executive's HSG225, to appreciate that the making and drafting of the kind of assessments called for in a case such as this is simply outside the competence and expertise of the court.

163. At times during the argument I almost felt as if I was being asked to write, in the guise of giving a judgment, a textbook or manual on the law and practice of manual handling. This is not the function of the court. As I had occasion to remark in the Howard League case at para [140]:

"The Administrative Court nowadays has to deal with many issues which even in the comparatively recent past would not have troubled the courts at all and which would probably have been thought by many to be simply non-justiciable. That is an entirely wholesome development. But making every allowance for this, the fact remains that the courts -- including the Administrative Court -- exist to resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires on controversies in the Academy. Nor is it the task of a judge when sitting judicially -- even in the Administrative Court -- to set out to write a textbook or practice manual or to give

advisory opinions."

164. As I went on to comment in the same case at para [184], it is no function of the court -- not even the Administrative Court -- to give advisory opinions on questions raised in the abstract. The proper application of the law can only be determined in the context of a particular factual situation, decided on the facts of a concrete case. Here, as in so many other areas where law and social policy intersect, "context is everything". And, fundamentally, it is in the first place for ESCC and not for the court to evaluate that context.

165. In the present case, as I have already remarked, ESCC has not in fact completed the process of making and drawing up the necessary assessments. In this situation the present application is, in a very real sense, premature. It is not for me to tell ESCC how to go about a task which Parliament has said is a matter for it and not for me. I have gone as far as I sensibly and properly can at this stage in attempting to set out the relevant legal principles by which ESCC must be guided as it goes about its task. I am conscious that I have not gone as far, or been as specific, as some of those before me would have wished. But my reticence is deliberate. Were I to go any further than I have I would not merely be usurping a function which properly belongs to ESCC: I would be embarking upon a task for which I do not believe that any judge is suited.

166. The proper way forward -- and this is provided for in the order that I made on 25 November 2002 -- is for ESCC to complete, with Mrs Bosley's assistance, and applying the principles which I have sought to explain, the task upon which it is currently engaged. If the completed assessments and protocols which emerge from that process are not acceptable, either to A and B or to X and Y, then their remedy is a challenge by way of judicial review. I have provided for that in paragraphs 14 and 15 of my order. That challenge will not be confined to arguments based on 'Wednesbury' irrationality, for particularly in the present context, with its strong human rights element, the heightened degree of scrutiny considered in [R \(Daly\) v Secretary of State for the Home Department \[2001\] UKHL 26, \[2001\] 2 AC 532](#) may well be appropriate.

167. I am very conscious that at this point I am embarking upon matters which may yet form the subject of future litigation, but since the issue was touched on in the course of argument, and having been referred to the most important authority on the point, it may assist if I dwell, albeit briefly, on it.

168. The issue relates to the extent to which the Court, in reviewing the decision of the initial decision-maker -- here ESCC -- should defer to that decision. On this important issue there is much recent learning. Taking the most important decisions in chronological sequence there is the decision of the [Court of Appeal in R \(Mahmood\) v Secretary of State for the Home Department \[2000\] 1 WLR 840](#), the decision of the [House of Lords in R \(Daly\) v Secretary of State for the Home Department \[2001\] UKHL 26, \[2001\] 2 AC 532](#), the decision of the [Divisional Court in Gough v Chief Constable of the Derbyshire Constabulary \[2001\] EWHC Admin 554, \[2002\] QB 459](#), the decision of the [Court of Appeal in Samaroo v Secretary of State for the Home Department \[2001\] EWCA Civ 1139, \[2002\] INLR 55](#), the decision of the [Court of Appeal in R \(P\) v Secretary of State for the Home Department \[2001\] EWCA Civ 1151, \[2001\] 1 WLR 2002](#), the decision of the [Court of Appeal in International Transport Roth GmbH v Secretary of State for the Home Department \[2002\] EWCA Civ 158, \[2002\] 3 WLR 344](#), and the decision of the Court of Appeal, dismissing the appeal from the decision of the [Divisional Court, in Gough v Chief Constable of the Derbyshire Constabulary \[2002\] EWCA Civ 351, \[2002\] QB 1213](#).

169. Here the starting point is the well-known passage in the speech of Lord Hope of Craighead in [R v Director of Public Prosecutions ex p Kebilene \[2000\] 2 AC 326](#) at 380-381. In a passage headed "The discretionary area of judgment", Lord Hope said this:

"This brings me to another matter on which there was a consensus between counsel and which, I believe, needs now to be judicially recognised. The doctrine of 'margin of appreciation' is a familiar part of the jurisprudence of the European Court of Human Rights. The European Court has acknowledged that, by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed to evaluate local needs and conditions than an international court ... This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues

arising within their own countries. But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The question which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.

In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that this is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention ... It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection."

170. In *Gough*, Laws LJ, following his own earlier observations in *Mahmood* at para [33], said at 500D (para [72]) that:

"it is plain on European and domestic authority alike that, when in any given case the court's duty is to decide whether a legislative measure or administrative decision is in truth proportionate to the aim in view, the judge does not stand in the shoes of the first decision maker and retake the decision for himself on the merits. Rather he will exercise a secondary judgment, there being a margin of discretion in the original decision maker which the court respects: indeed the court confers it."

171. Dyson LJ said much the same thing in *Samaroo*. After a detailed analysis of *Mahmood* and *Daly*, he concluded (para [35]):

"Accordingly, the function of the court in a case such as this is to decide whether the Secretary of State has struck the balance fairly between the conflicting interests of Mr Samaroo's right to respect for his family life on the one hand and the prevention of crime and disorder on the other. In reaching its decision, the court must recognise and allow to the Secretary of State a discretionary area of judgment. In considering the particular factors to which the court will have regard in deciding to what

extent (if at all) to defer to the opinion of the Secretary of State, I have been assisted by the discussion at paragraph 3.26 of Human Rights Law and Practice (1999), of which Lord Lester of Herne Hill QC and David Pannick QC are the general editors. They identify the following factors: (a) The nature of the Convention right: is the right absolute or (as in the case of Article 8) does it require a balance to be struck? The court is less likely to defer to the opinion of the decision-maker in the former case than the latter; (b) The extent to which the issues require consideration of social, economic or political factors. The court will usually accord considerable deference in such cases because it is not expert in the realm of policy-making, nor should it be because it is not democratically elected or accountable; (c) The extent to which the court has special expertise, for example in relation to criminal matters; (d) Where the rights claimed are of especial importance, a "high degree of constitutional protection" will be appropriate. The European Court of Human Rights has recognised as being of especial importance rights to freedom of expression and access to the courts."

172. He added (para [36]):

"In my judgment, in a case such as this, the court should undoubtedly give a significant margin of discretion to the decision of the Secretary of State. The Convention right engaged is not absolute. The right to respect for family life is not regarded as a right which requires a high degree of constitutional protection. It is true that the issues are not technical as economic and social issues often are. But the court does not have expertise in judging how effective a deterrent is a policy of deporting foreign nationals who have been convicted of serious drug trafficking offences once they have served their sentences."

173. Finally (para [39]) he said this:

"In my judgment, it is not incumbent on the Secretary of State to prove that the withholding of a deportation order in any particular case would seriously undermine his policy of deterring crime and disorder. That would be to ask the impossible. Proof is not required. The subject matter is such that proof is usually impossible. What is required is that the Secretary of State justify a derogation from a Convention right, and that the justification be "convincingly established": [Barthold v Germany \(1985\) 7 EHRR 383](#), 403. In asking whether the justification has been convincingly established, the domestic court (as indeed the court in Strasbourg) should consider the matter in a realistic manner, and always keep in mind that the decision-maker is entitled to a

significant margin of discretion. The Secretary of State must show that he has struck a fair balance between the individual's right to respect for family life and the prevention of crime and disorder. How much weight he gives to each factor will be the subject of careful scrutiny by the court. The court will interfere with the weight accorded by the decision-maker if, despite an allowance for the appropriate margin of discretion, it concludes that the weight accorded was unfair and unreasonable. In this respect, the level of scrutiny is undoubtedly more intense than it is when a decision is subject to review on traditional *Wednesday* grounds, where the court usually refuses to examine the weight accorded by the decision-maker to the various relevant factors."

174. Much the same approach was adopted by Laws LJ in *Roth* at paras [83]-[87] in a passage which, albeit in a dissenting judgment, seems to me nonetheless to reflect the law.

175. I might add that this approach is entirely consistent with the approach adopted by Newman J in *The Queen (ota C and ors) v Brent, Kensington and Chelsea and Westminster Mental Health NHS Trust* [2002] EWHC 181 (Admin), a case to which I was also referred. That case involved the proposed closure of Harefield Lodge, a residential unit occupied by the claimants, all of whom were adults with mental disorders, so that it could be refurbished as a rehabilitation unit for acute patients from another hospital. The closure was challenged on various grounds, one being alleged breach of the claimants' rights under article 8.

176. In relation to that Newman J said (paras [38]-[40]):

"[38] ... for many patients like the claimants accommodation provided by a health authority frequently constitutes their only home. Article 8 includes "a person's physical and psychological integrity" (*Botta v Italy* (1998) 26 EHRR 24). In my judgment it is plain that a health authority having the responsibility for the long term care of mental patients and their placement in appropriate accommodation are required to act compatibly with Article 8. [39] I accept the submission that Article 8(1) protects both substantive and procedural rights. In consequence the Trust, in accordance with the principle of proportionality, had to strike a fair balance between the interference with the claimants' Convention's rights in connection with Harefield Lodge and the requirements of other patients for whom the Trust is responsible and to involve the claimants in the process of making the decision so that it was sensitive to the needs of the claimants. In striking the balance consideration of the claimants' rights

necessarily required considerable weight to be given to the claimants' clinical needs. In my judgment the necessary consequence of the engagement of Article 8(1) in circumstances such as these is that the claimants' rights are inextricably bound up with the primary obligation to provide medical care from which the provision of a home arises. The proposed changes are considered by the Trust to be desirable for the benefit of the claimants and have been reached in accordance with the Trust's duty to provide for the claimants.

[40] The decision to refurbish Harefield Lodge when implemented will confer benefits on other members of the community to whom the Trust owes a duty and who enjoy rights and freedoms which the Trust must respect. The Trust has carried out assessments and has involved the claimants in discussion about their future placements. Further assessments and discussions will have to be carried out. I have considered all the material in this case with great care. I am entirely satisfied that the Trust has acted throughout, honestly, reasonably and in an attempt to provide suitable accommodation and a suitable package of care for each of the claimants."

177. Plainly, in a case such as this, there is a margin of appreciation and the court must afford some degree of deference to ESCC's assessments. I say no more at this stage. Precisely what degree of deference is called for in this context, and whether there is some difference in the approach to be adopted by the Administrative Court, if the assessments prepared by ESCC are sought to be challenged by A and B and their family, or by the Queen's Bench Division, were some future carer to bring an action for personal injuries caused by an alleged breach of the 1992 Regulations, are questions of some difficulty which may yet arise for decision at some future stage of this litigation and on which, therefore, I propose to express no views at this stage.

The Drc

178. There is one final matter I ought to refer to: the role in this litigation of the DRC.

179. The DRC is established under and in accordance with the [Disability Rights Commission Act 1999, section 2\(1\)\(c\)](#) of which imposes on the DRC the duty:

"to take such steps as it considers appropriate with a view to encouraging good practice in the treatment of disabled persons".

180. [Section 7](#) of the 1999 Act empowers the DRC to provide assistance to applicants in certain types of proceedings; but it has no application to proceedings of the kind that I am concerned with.

181. Mr Wolfe very properly referred me to [McNicol v Balfour Beatty Rail Maintenance \[2002\] EWCA Civ 1074](#), a case in which the DRC appeared by counsel in the Court of Appeal to make representations on an appeal by a litigant in person from the Employment Appeal Tribunal. Mummery LJ said this (para [28]): "I would add this general observation. Although I recognise that the DRC, established by the Disability Rights Commission Act 1999, has important statutory duties to work towards the elimination of disability discrimination, to promote equal opportunities for disabled persons, to take steps to encourage good practice in the treatment of disabled persons and to keep under review the working of the 1995 Act, those duties do not entitle the DRC, as such, to make representations to a tribunal or court in cases to which it is not a party. It is only in exceptional circumstances that a tribunal or court will consider it appropriate to receive representations from the DRC."

182. I do not of course dissent from any of that. However it is right for me to say that in this case I have been greatly assisted by the DRC and its counsel, Mr Wolfe. There will be, if only occasionally, cases in which a body like the DRC can assist the Administrative Court. In the final analysis it must be for the court itself to decide whether in the particular case such assistance should be accepted.

183. In [In re Northern Ireland Human Rights Commission \[2002\] UKHL 25, where the House of Lords](#) had to consider a somewhat similar issue in relation to the Northern Ireland Human Rights Commission set up by [section 68 of the Northern Ireland Act 1998](#), Lord Slynn of Hadley said this (para [25]): "The final decision lies with the court which can allow or refuse the Commission's application to intervene, invite or not ask for help from the Commission as *amicus curiae*. The provision that the Commission shall promote understanding of human rights law has thus to be read in this context subject to the court's control of its procedure. If the court wants or is willing to have such submissions the Commission has the capacity to make them as part of the function of promoting the understanding of human rights law, particularly if reference has to be made to some of the many decisions of the European Court of Human Rights. I am not troubled by the floodgates argument. The

Commission must exercise caution in deciding whether a case is important enough to justify intervention or assistance; and whether there is a risk of particular parties or one party feeling that it is unfair that the Commission should come down on one side rather than the other in the legal argument. It is in the end for the court to decide these matters. The courts will only allow or invite assistance when they feel it necessary or helpful; with increasing knowledge particularly of cases in the European Court of Human Rights they may find it less necessary but this capacity to give assistance to the court is potentially valuable in achieving the purpose of the legislation. In my view the existence of that capacity is reasonably incidental to its main express powers."

184. Lord Woolf said this (para [32]):

"The practice of allowing third persons to intervene in proceedings brought by and against other persons which do not directly involve the person seeking to intervene has become more common in recent years but it is still a relatively a rare event. The intervention is always subject to the control of the court and whether the third person is allowed by the court to intervene is usually dependent upon the court's judgment as to whether the interests of justice will be promoted by allowing the intervention. Frequently the answer will depend upon whether the intervention will assist the court itself to perform the role upon which it is engaged. The court has always to balance the benefits which are to be derived from the intervention as against the inconvenience, delay and expense which an intervention by a third person can cause to the existing parties."

185. In the present case the balance came down in favour of permitting the DRC to participate.

186. I should add that during the course of argument there was some debate as to the extent to which the provisions of the Sex Discrimination Act 1975 might impact adversely upon ESCC's ability to advertise for carers with particular strength or stamina: see [sections 7\(2\)\(a\) and \(e\)](#) of the Act. At the end of the day nothing turns on the point and it is, I think, better in all the circumstances that I say nothing on this topic.

187. Likewise there is no need for me to consider, and in all the circumstances I think it would be unhelpful if I were to express any considered views on, a number of matters that were canvassed, on occasions at some length, during the course of argument. Accordingly I propose to say nothing about where the responsibility may lie for the present unhappy state of affairs, about whether or not the earlier versions of ESCC's Code were

lawful or unlawful, about the allegations that ESCC failed to comply in certain respects both with the consent order of 21 July 2000 and with Wilson J's order of 14 June 2002, or about the meaning and effect of Wilson J's order. All I should say is this. It would be a travesty to suggest that the entire responsibility for this very saddening state of affairs lies at ESCC's door. I suspect that in certain respects their handling of an almost uniquely difficult case can be criticised, but for much of the time ESCC and its officers seem to me to have gone out of their way to try and help this family. Legitimate differences of opinion on matters as complex as those I have had to consider should not be treated as anything more sinister. The other point is this. I am sure that all that Wilson J was trying to do by his order of 14 June 2002 was to establish, on a fair but pragmatic basis, a sensible set of interim arrangements to hold the ring pending what at that time he imagined would be the final hearing before me. In these circumstances the search for some enunciation of legal principle in his order -- he delivered no reasoned judgment -- is bound to be fruitless.

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