Case No: CO/1806/2002

Neutral Citation Number: [2002] EWHC 2497 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 29 November 2002

Before :

THE HONOURABLE MR JUSTICE MUNBY

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Between :

The Queen (on the application of THE HOWARD LEAGUE FOR PENAL REFORM)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and -	
DEPARTMENT OF HEALTH	**Interested party**

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(Transcript of the Handed Down Judgment of
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Mr Ian Wise (instructed by the claimant's legal officer Michael Grewcock) for the claimant
Ms Eleanor Grey (instructed by the Treasury Solicitor) for the defendant
The interested party filed evidence but was neither present nor represented

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Judgment
As Approved by the Court

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Mr Justice Munby:

Introduction

1. These proceedings raise important questions as to the duties owed by the State to the children – young people under the age of 18 – whom it detains.

2. The proceedings have been brought by The Howard League for Penal Reform whose history and credentials need no introduction. It undoubtedly is, as it claims to be, the leading non-governmental organisation in this country concerned with penal issues and policy. Here I need only to note that in the last decade or so it has had a particular focus on children and young people in the criminal justice system.

3. It is not disputed by the defendant that the Howard League has a "sufficient interest" in the matter so as to give it locus to make the current application: *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement Ltd* [1995] 1 WLR 386 and *R v Somerset County Council ex p Dixon* [1998] Env LR 111.

Children detained by the State

4. I am not concerned with those children whom the State detains for the purposes of psychiatric or other medical treatment, either in accordance with the provisions of the Mental Health Act 1983 or pursuant to its parens patriae powers (as to which see *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180). Nor am I concerned with those children detained within the care system.

5. I am concerned only with those children detained within the criminal justice system. Such children are accommodated in one or other of three different types of institutions:

   i) secure units (LASSUs) run by local authorities: these accommodate children between the ages of 10 and 17;

   ii) young offender institutions for juveniles (YOIs) run by the Prison Service: these accommodate children between the ages of 15 and 17; and

   iii) secure training centres (STCs) operated by private sector companies under contracts managed by the Youth Justice Board (YJB), which was established under the Crime and Disorder Act 1998: these accommodate children between the ages of 12 and 14.

6. There are, in England and Wales, 28 LASSUs, 18 YOIs for children (14 for boys and 4 for girls – these latter being in fact separate young offender units within female adult prisons) and 3 STCs.

7. Children arrive in LASSUs either via the criminal justice system (cf *Re G (Secure Accommodation Order)* [2001] 1 FLR 884) or via the care system (as to which see section 25 of the Children Act 1989). Children arrive in YOIs and STCs exclusively via the criminal justice system, either on remand pending trial or after conviction in the criminal courts. The allocation of children detained within the criminal justice system has since April 2000 been the responsibility of the YJB.

Young offender institutions for juveniles (YOIs)

8. I am concerned only with children in YOIs.

9. YOIs are regulated by the Prison Act 1952 and by The Young Offender Institution Rules 2000, SI 2000 No 3371, made by the Secretary of State for the Home Department in pursuance of powers conferred on him by section 47 of the 1952 Act.

10. There are at present some 3,000 children in YOIs. Somewhere in the region of 1,000 are aged either 15 or 16. The rest are aged 17. They are, on any view, vulnerable and needy children. Disproportionately they come from chaotic backgrounds. Many have suffered abuse or neglect. The view of the Howard League is that they need help, protection and support if future offending is to be prevented.

11. Statistics gathered by the Howard League from a variety of governmental and non-governmental sources in the period 1997-2000 paint a deeply disturbing picture of the YOI population. Over half of the children in YOIs have been in care. Significant percentages report having suffered or experienced abuse of a violent, sexual or emotional nature. A very large percentage have run away from home at some time or another. Very significant percentages were not living with either parent prior to coming into custody and were either homeless or living in insecure accommodation. Over half were not attending school, either because they had been permanently excluded or because of long-term non-attendance. Over three-quarters had no educational qualifications. Two-thirds of those who could be employed were in fact unemployed. Many reported problems relating to drug or alcohol use. Many had a history of treatment for mental health problems. Disturbingly high percentages had considered or even attempted suicide.

12. Thus the YOI population as it arrives into the criminal justice system. The Howard League identifies four problems in particular affecting children inside YOIs:

    i) bullying, on a very large scale;

ii) drug use, on a very significant scale;

iii) self-harming by a significant minority of inmates (there were 944 recorded incidents of self-harm in YOIs between 1998-1999); and

iv) suicidal thoughts and, in a few cases, suicidal attempts.

The legal framework – domestic law

13. Central to the issues I have to determine is the proper relationship between two pieces of legislation serving social purposes which are neither the same nor necessarily easy to reconcile: the Prison Act 1952 and the Children Act 1989. I shall return in due course to consider the 1952 Act and the regulations made under it. But it will assist to place the controversies before me in their proper context if I first briefly summarise the provisions of the 1989 Act so far as they are relevant for present purposes.

Domestic law – the Children Act 1989

14. The 1989 Act consists of Parts I to XII. Part I is introductory. Part II, headed "Orders with respect to children in family proceedings", relates to what family lawyers conventionally call private law proceedings. It is not relevant for present purposes.

15. Parts III, IV and V relate to the functions, powers, duties and responsibilities of local authorities, including in respect of what family lawyers conventionally call public law proceedings.

16. Central to the matters in issue before me are Part III, headed "Local authority support for children and families", and Part V, headed "Protection of children". Two provisions in particular are important.

17. The first, in Part III, is section 17(1)(a) which, complemented by Part I of Schedule 2 to the Act, imposes on every local authority

> "the general duty … to safeguard and promote the welfare of children within their area who are in need".

18. Section 17(10) provides that for the purposes of the Act:

> "a child shall be taken to be in need if –
>
> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard

> of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
>
> (c) he is disabled".

19. Section 17(11) defines "development" as meaning "physical, intellectual, emotional, social or behavioural development" and "health" as meaning "physical or mental health".

20. Section 17 requires to be read together with sections 20(1) and 20(4), which provide that:

> "(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –
>
> (a) there being no person who has parental responsibility for him;
>
> (b) his being lost or having been abandoned; or
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.
>
> (4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare."

21. The other important provision, in Part V, is section 47(1)(b), which provides that:

> "Where a local authority … have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm, the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare."

22. I should also refer to section 46(1) which provides that:

> "Where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm, he may –

> (a) remove the child to suitable accommodation and keep him there; or
>
> (b) take such steps as are reasonable to ensure that the child's removal from any hospital, or other place, in which he is then being accommodated is prevented."

23. "Harm" for these purposes (see section 105(1)) has the same meaning as in section 31(9), which provides that:

> ""harm" means ill-treatment or the impairment of health or development;
>
> "development" means physical, intellectual, emotional, social or behavioural development;
>
> "health" means physical or mental health; and
>
> "ill-treatment" includes sexual abuse and forms of ill-treatment which are not physical."

24. Section 31(10), which also applies for these purposes, provides that:

> "Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child."

25. Statutory guidance has been issued from time to assist local authorities in the performance of their functions under the 1989 Act, including in particular their functions under Part III and Part V. The most important current guidance is to be found in *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, issued in 1999 by the Department of Health, the Home Office and the Department of Education and Employment, and in *Framework for the Assessment of Children in Need and their Families*, issued in March 2000 by the same three Departments.

26. Parts VI, VII, VIII, IX, X and XII of the 1989 Act relate to, and in certain respects regulate, various institutional and other settings in which children may be found: community homes provided by local authorities (Part VI), voluntary homes and other accommodation provided by voluntary organisations (Part VII), registered children's homes (Part VIII), children in private fostering arrangements (Part IX), children in the care of child minders or in day care (Part X), children accommodated by health authorities or local education authorities or in residential care homes, nursing homes or mental nursing homes (Part XII, sections 85-86) and children accommodated in independent schools (Part XII, sections 87-87B). Since 1 April 2002 these arrangements have been superseded in part by the provisions of the Care Standards

Act 2000, which applies (see the definition in section 1) to all children's homes, that is, subject to certain exceptions, to all establishments which provide care and accommodation wholly or mainly for children.

27. Part XI of the 1989 Act confers certain supervisory functions and powers on the Secretary of State, that is, the Secretary of State for Health. Part XII contains, in addition to the matters I have already mentioned, certain miscellaneous and general provisions.

28. A survey of the 1989 Act brings out a number of important points:

i) From beginning to end there is not, so far as I am aware, a single reference to YOIs, to the Prison Service or to the Secretary of State for the Home Department.

ii) Specifically, YOIs are not amongst the many types of institution referred to in and regulated by Parts VI, VII, VIII, IX, X and XII of the 1989 Act or, for that matter, by the 2000 Act. Indeed, regulation 3(1)(f) of The Children's Homes Regulations 2001, SI 2001 No 3967, made pursuant to powers conferred by the 2000 Act, expressly *excepts* from being a children's home for the purpose of the 2000 Act "any institution provided for young offenders under or by virtue of section 43(1) of the Prison Act 1952". So, whilst a LASSU is, as such, within the 2000 Act, a YOI is not – nor, for that matter, is a STC.

iii) Moreover, the 1989 Act is not expressed as conferring or imposing any functions, powers, duties or responsibilities on either the Prison Service or the Secretary of State for the Home Department.

iv) The 1989 Act pointedly *excludes* both the Prison Service and the Secretary of State for the Home Department from those who, in certain circumstances, are required to co-operate with or assist a local authority, and from those whom a local authority has to consult with, in the course of carrying out its functions, powers, duties and responsibilities under the 1989 Act. See, for example, the list of those in section 27(3) whose co-operation can be called for by a local authority exercising its functions under Part III of the Act, the list of those in section 47(11) whose assistance can be called for by a local authority making enquiries under section 47, and the list of those in paragraph 1A(3) of Schedule 2 to the Act whom the local authority is required to consult when preparing its children's services plan. The latter list is particularly interesting, because, whilst it includes a number of important 'players' in the criminal justice system – the local chief constable and the local probation committee – it does *not* include any representative of any local YOI.

v) On the other hand, there is nothing in the 1989 Act which expressly excludes, either from the class of children to whom a local authority owes duties under section 17 or from the class of children to whom it owes duties under section 47, those of the children "within their area" (the words used in section 17(1)(a)) or "in their area" (the words used in section 47(1)(a)) who are for the time being incarcerated in a YOI.

29. In relation to this last matter I observe that in para 6.5 of *Working Together to Safeguard Children* the point is made, in the context of a discussion of 'Child protection in specific circumstances', that:

> "There are a number of essential safeguards which should be observed in *all* settings in which children live away from home, including foster care, residential care, private fostering, health settings, residential schools, prisons, *young offenders institutions* and secure units." (emphasis added)

30. Amongst these safeguards are that:

> "children feel valued and respected and their self-esteem is promoted …
>
> staff … are trained in all aspects of safeguarding children; alert to children's vulnerabilities and risks of harm; and knowledgeable about how to implement child protection procedures."

31. In the light of the matters which have been canvassed in front of me there is one other aspect of the 1989 Act to which I should at this stage draw attention, namely the express provisions it contains for the promotion of children's welfare.

32. Section 1(1)(a) provides that:

> "When a court determines any question with respect to … the upbringing of a child … the child's welfare shall be the court's paramount consideration."

33. It will be noted that section 1(1)(a) applies only where a question of "upbringing" is being determined. There is much learning on this which there is no need for me to explore here. It is, however, worth noting, as Ms Grey pointed out, that section 1(1)(a) does *not* apply where the court is considering, in accordance with section 25 of the Act, whether a child should be kept in a LASSU: see *In re M (A Minor) (Secure Accommodation Order)* [1995] Fam 108.

34. As is well known, section 1(1)(a) of the 1989 Act is the lineal successor of section 1 of the Guardianship of Minors Act 1971, itself the lineal successor of section 1 of the

Guardianship of Infants Act 1925. But the principle now to be found in section 1(1)(a) is not merely statutory. It is a common-law or equitable principle which long ante-dates the 1925 Act: see *Re McGrath (Infants)* [1893] 1 Ch 143, *F v F* [1902] 1 Ch 688 and *Ward v Laverty and Another* [1925] AC 101.

35. Local authorities, in contrast, are under no common-law or equitable duty to promote children's welfare. Nor are they under any general statutory duty to do so. There is, in the 1989 Act, no general principle applicable to local authorities similar to that in section 1(1)(a) which binds the courts nor, indeed, similar to that in section 6 of the Adoption Act 1976 which binds local authorities when exercising their functions in relation to adoption.

36. The 1989 Act simply contains a number of specific duties that arise in certain specific contexts. Examples are:

i) the local authority's duty under section 17(1)(a) to "safeguard and promote the welfare of children within their area who are in need";

ii) the local authority's duty under section 22(3)(a) to "safeguard and promote" the welfare of any child who is in their care or provided with accommodation by them;

iii) the local authority's duty under paragraph 4(1) of Schedule 2 to "take reasonable steps, through the provision of services under Part III of this Act, to prevent children within their area suffering ill-treatment or neglect."

37. Finally, in this context, I should draw attention to section 87(1) of the 1989 Act, which provides that:

> "It shall be the duty of –
>
> (a) the proprietor of any independent school which provides accommodation for any child; and
>
> (b) any person who is not the proprietor of such a school but who is responsible for conducting it,
>
> to safeguard and promote the child's welfare."

38. This shows that, even within the four corners of the 1989 Act, Parliament was perfectly capable of legislating, when it felt it appropriate, so as to impose such duties on persons other than local authorities. It chose to do so in relation to independent boarding schools. It is noteworthy that it did not choose to do so in relation to YOIs. The Provost and Headmaster of Eton College are under a statutory duty to safeguard and promote their pupil's welfare; the Governor of HM YOI Huntercombe is not.

Domestic law – the Prison Act 1952

39. So much for the 1989 Act. What of the 1952 Act?

40. The 1952 Act gives the Secretary of State for the Home Department general control over prisons and YOIs. More important are the 2000 Rules. Two provisions are relevant. Rule 3 sets out what are called the aims and general principles of YOIs:

> "(1) The aim of a young offender institution shall be to help offenders to prepare for their return to the outside community.
>
> (2) The aim mentioned in paragraph (1) shall be achieved, in particular, by –
>
> (a) providing a programme of activities, including education, training and work designed to assist offenders to acquire or develop personal responsibility, self-discipline, physical fitness, interests and skills and to obtain suitable employment after release;
>
> (b) fostering links between the offender and the outside community; and
>
> (c) co-operating with the services responsible for the offender's supervision after release."

41. Rule 42 provides inter alia that:

> "(1) The governor shall encourage links between the young offender institution and the community by taking steps to establish and maintain relations with suitable persons and agencies outside the institution.
>
> (2) The governor shall ensure that special attention is paid to the maintenance of such relations between an inmate and his family as seem desirable in the best interests of both."

42. There is no reference anywhere in either the 1952 Act or the 2000 Rules to the 1989 Act.

43. It is also to be noted that there is lacking both from the 1952 Act and from the 2000 Rules any 'welfare' provision corresponding in any way to those to be found in sections 17(1)(a), 22(3)(a) and 87(1) of the 1989 Act and in paragraph 4(1) of Schedule 2 to the 1989 Act.

The legal framework – human rights law

44. Thus the position in purely domestic law.

45. I have, however, been referred to three different Human Rights instruments: the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), the United Nations' Convention on the Rights of the Child, 1989 ("the UN Convention"), and the Charter of Fundamental Rights of the European Union, proclaimed at Nice in December 2000 ("the European Charter").

46. These are, as it seems to me, and Ms Grey did not demur, important sources of possible obligations both owed to and enforceable by children in YOIs.

47. The most relevant provisions of the European Convention are 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").

48. The relevant provisions of the UN Convention are articles 3 and 37. Particularly important for present purposes are articles 3.1 and 37(c). Article 3.1 provides that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

49. Article 37(c) provides in relevant part that:

> "States parties shall ensure that … Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so".

50. The relevant provisions of the European Charter are articles 24.1 and 24.2 which, based on the UN Convention, provide in relevant part that:

> "Children shall have the right to such protection and care as is necessary for their well-being … In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

51. The European Convention is, of course, now part of our domestic law by reason of the Human Rights Act 1998. Neither the UN Convention nor the European Charter is at present legally binding in our domestic law and they are therefore not sources of law in the strict sense. But both can, in my judgment, properly be consulted insofar as they proclaim, reaffirm or elucidate 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 European Convention.

52. This approach is, I think, consistent with the approach adopted, in relation to the UN Convention, by Lord Hope of Craighead in *R v Secretary of State for the Home Department ex p Venables* [1998] AC 407 at 530C, by Sedley J in *R v Accrington Youth Court ex p Flood* [1998] 1 WLR 156, by Thorpe LJ in *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473 at 487 (para [38]) and by Lord Phillips of Worth Matravers MR in *R (P) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002 at 2028 (para [85]). It is also consistent with the approach adopted, in relation to the European 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].

53. In *Botta v Italy* (1998) 26 EHRR 241 at 257 (para [32]) the Court 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."

54. 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.

55. 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".

56. 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".

57. The engagement of article 3 in the prison context has been considered by the Court in a number of recent cases: *Keenan v United Kingdom* (2001) 33 EHRR 913, *Peers v Greece* (2001) 33 EHRR 1192 and *Price v United Kingdom* (2001) 34 EHRR 1285. I can take the general principles from *Price* 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."

58. In *Keenan* at 963 (para [110]) 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."

59. In *Peers* at 1218 (paras [74]-[75]) the Court said:

> "[T]he Court considers that in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, the Court notes that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.
>
> Indeed, in the present case, the fact remains that the competent authorities have taken no steps to improve the objectively unacceptable conditions of the applicant's detention … The Court is not convinced by the Government's allegation that these conditions have not affected the applicant in a manner incompatible with Article 3. On the contrary, the Court is of the opinion that the prison conditions complained of diminished the applicant's human dignity and arose in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. In sum, the Court considers that the conditions of the applicant's detention … amounted to degrading treatment within the meaning of Article 3 of the Convention."

60. *A v United Kingdom* (1998) 27 EHRR 611 did not involve prisons but the severe beating of a nine year old child by his stepfather with a garden cane. At 629 (para [22]) the Court said:

> "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."

61. Interestingly, the Court referred in this connection to article 37 of the UN Convention.

62. 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."

63. Now the significance of all this in the prison context, and particularly in respect of children in YOIs, will be apparent.

64. This is not the occasion, and a judicial determination is not the appropriate place, to embark upon a general analysis or discussion of the application of human rights law in the prison or YOI setting. But a number of general principles which are relevant for present purposes can be teased out of the materials to which I have been referred. What follows is intended to be merely indicative and descriptive, not exhaustive or definitive.

65. In the first place, articles 3 and 8 of the European Convention protect children in YOIs from those actions by members of the Prison Service which constitute inhuman or degrading treatment or punishment or which impact adversely and disproportionately on the child's physical or psychological integrity.

66. Secondly, however, articles 3 and 8 of the European Convention, read in the light of articles 3 and 37 of the UN Convention and article 24 of the European Charter, impose on the Prison Service *positive* obligations to take reasonable and appropriate measures designed to ensure that:

    i) children in YOIs are treated, both by members of the Prison Service and by fellow inmates, with humanity, with respect for their inherent dignity and personal integrity as human beings, and not in such a way as to humiliate or debase them;

    ii) children in YOIs are not subjected to torture or to inhuman or degrading treatment or punishment by fellow inmates or to other behaviour by fellow inmates which impacts adversely and disproportionately on their physical or psychological integrity.

67. Such measures must strike a fair balance between the competing interests of the particular child and the general interests of the community as a whole (including the other inmates of the YOI) but always having regard:

    i) first, to the principle that the best interests of the child are at all times a primary consideration,

    ii) secondly, to the inherent vulnerability of children in a YOI and,

    iii) thirdly, to the need for the State – the Prison Service – to take effective deterrent steps to prevent, and to provide children in YOIs with effective protection from, ill-treatment (whether at the hands of Prison Service staff or of other inmates) of which the Prison Service has or ought to have knowledge.

68. In short, human rights law imposes on the Prison Service enforceable obligations, that is, obligations enforceable by or on behalf of children in YOIs:

    i) to have regard to the 'welfare' principle encapsulated in the UN Convention and the European Charter; and

    ii) to take effective steps to protect children in YOIs from any ill-treatment, whether at the hands of Prison Service staff *or of other inmates*, of the type which engages either article 3 or article 8 of the European Convention.

69. In this connection it is to be borne in mind that, quite apart from any other remedies which there may be arising out of the State's – the Prison Service's – failure to meet its human rights obligations, sections 7 and 8 of the Human Rights Act 1998 enable a victim to bring a free-standing action in the High Court. In the case of a claimant who is a child, such a claim is appropriately brought in the Family Division: see *Re W and B, Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582 at 608-609 (paras [71]-[76]), *R (P) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002 at 2036 (paras [118], [120]) and *C v Bury Metropolitan Borough Council* [2002] EWHC 1438 (Fam), [2002] 2 FLR 868 at 882 (paras [55]-[56]).

<u>The background to the proceedings</u>

70. The background to these proceedings reflects two areas of concern shared by a number of people and bodies including, in particular, the Howard League and the former Chief Inspector of Prisons, General Sir David Ramsbotham:

    i) the conditions in which children are kept in YOIs; and

ii) the seemingly limited applicability to YOIs of the Children Act 1989.

71. In both respects one of the major concerns of the Howard League is its perception (a) that children in LASSUs are significantly better protected in law and better treated in practice than children in YOIs and (b) that children in LASSUs are less exposed to and better protected from the kinds of harmful behaviour, both self-inflicted and inflicted by others, to which, in the Howard League's view, children in YOIs are all too frequently exposed.

72. I have been shown a large amount of material on both matters but there is no need for me to analyse it in great detail. I merely set out the salient points, focussing in large measure on the published views of Her Majesty's successive Chief Inspectors of Prisons, Sir David Ramsbotham and Anne Owers.

The Howard League's concerns: conditions in YOIs

73. Sir David Ramsbotham was HM Chief Inspector of Prisons from December 1995 to July 2001. He has made a witness statement supporting the Howard League's application. It is dated 3 May 2002.

74. Sir David's first inspection was of HMP Holloway. He described it (*Annual Report of HM Chief Inspector of Prisons for England & Wales 1999-2000* p 6) as a "traumatic experience". He continued (ibid, p 8):

> "On asking the … question about who was responsible for young offenders, … I was staggered to be told that this … was left to individual Area Managers. It was then that I learned that the provisions of the Children Act were held not to apply in prisons. Even if this right was suspended while undergoing a sentence, I could see no possible justification for it not applying to those on remand, who, in the eyes of the law, are innocent until proved guilty. From that moment I became so concerned at the appallingly low standards of treatment and conditions for young offenders generally – with a few shining exceptions – that I felt compelled to make a primary recommendation that all children should be removed from the care of the Prison Service, which was an adult service, and clearly based all that it did for and with prisoners on the needs of adult males."

75. That is a reference to the recommendation which he made in paragraph 2.21 of *Young Prisoners: A Thematic Review by HM Chief Inspector of Prisons for England and Wales*, published in October 1997:

> "I am convinced that no child, regardless of gender, should be held in Prison Service establishments."

76. He added (paragraph 4.38):

> "All establishments holding children should be linked to their local Area Child Protections Committee, in order that they can develop appropriate protocols, and multi-agency approaches, to working with young people who have been physically, sexually or emotionally abused."

77. Sir David picks up the story in his witness statement:

> "I instantly arranged for a social services inspector to take part on our next and all subsequent inspections of institutions holding juveniles. On that first inspection of Onley YOI, the social services inspector told me that had that part of the institution holding juveniles been within local authority control, and therefore governed by the provisions of the Children Act 1989, it would have been closed down due to the paucity of the regime."

78. At about the same time as Sir David published his *Thematic Review* in October 1997, Sir William Utting published *People Like Us: The Report of the Review of the Safeguards for Children living away from Home*. These two reports had a dramatic effect. They led to the issue, on 29 July 1999, of *Prison Service Order 4950: Regimes for Prisoners Under 18 Years Old* and then, in April 2000, of the Youth Justice Board's (YJB's) *National Standards for Youth Justice*. These marked a sea-change in official and Prison Service thinking about YOIs and about the care of children in the criminal justice system.

79. *PSO 4950* is a long and detailed document. According to the foreword by the Director General, Martin Narey, it "encapsulates the new approach the Prison Service is to take in our custody and care of under 18 year olds." He says: "the real challenge will be to make real differences." Paragraph 1.2 recognises that *PSO 4950* has been informed by the criticisms made by Sir David Ramsbotham and Sir William Utting. Paragraph 1.3 is unequivocal:

> "The intention, in executing the warrant of the court and in helping to prevent reoffending, is to reflect clearly the principles and good practice required by the Children Act 1989."

80. Paragraph 3.1.4 reads as follows:

> "The Children Act 1989, does not apply to under 18 year olds in prison establishments. However, we are required to reflect the standards imposed by the Act through delegated legislation and Codes of Practice. The central tenet of the Act is the principle that safeguarding a child's welfare is of paramount

importance so that when decisions are made about a child, the primary consideration must be what is best to safeguard their welfare. We have a responsibility to ensure that the welfare of each young person in our custody is safeguarded. But we also have a responsibility to safeguard the welfare of all the young people in the establishment and to maintain a safe environment for staff and for visitors. These considerations, and that of safeguarding the public by executing the warrant of the court, must be born in mind when determining how the welfare of the individual is best safeguarded. The principles and standards set by the Children Act and its regulations are reflected in the emphasis this PSO places upon the importance of:

(i) the role of staff and their rigorous selection, training, management and support;

(ii) enabling the development of the individual young person;

(iii) maintaining safety and security; and,

(iv) preventing reoffending.

Helping to prevent offending by the young people in our establishments helps safeguard their welfare and the public interest. More specifically, governors are required to introduce arrangements to protect young people from significant harm adapted from those required by the Children Act."

81. Paragraph 3.2.2 specifies that Governors of YOIs "must" write and publish a "statement of purpose for their establishment" which "must … reflect the principles and spirit of the Children Act 1989".

82. Paragraph 4.4.1 specifies this:

> "Objective: To establish, maintain and improve arrangements which implement the best practices outlined in … 'Working Together', the purpose of which is to optimise inter-agency co-operation in the interests of preventing offending."

83. Paragraph 4.4.2 specifies a number of "mandatory requirements":

> "Governors must ensure that staff of all agencies and services whose duties involve them in working in, with or for the young people in our care are enabled to discharge those duties effectively with the support and assistance of the establishment's staff.

> Governors must make formal arrangements with the most appropriate agencies for the provision of specialist throughcare services …
>
> The arrangements Governors must make to enhance inter-agency co-operation most importantly concern good working relationships between their staff and those of all other agencies which work with young people in custody and after their release. Careful consideration must also be given to the physical and operational arrangements for facilitating good relations, which include the suitability of visiting accommodation and times."

84. Paragraph 4.4.3 refers to "the prominent role Social Service Departments have" and calls for "swift and effective exchange of information between community health and social services". Paragraph 6.6.2 contains a mandatory requirement that:

> "Governors must develop a network of contacts with a range of outside agencies whose skills and experience can helpfully contribute to the work of the establishment."

85. *PSO 4950* includes at Annex B1 a *Child Protection Protocol* and at Annex B3 a *Child Protection Policy*. These were revised on 8 January 2002. Annex B1:

> "provides the basis upon which Governors must establish in consultation with their local Area Child Protection Committees (ACPCs) additional arrangements for protecting under 18 year olds from suffering or being likely to suffer significant harm" – that is, as the Annex makes clear, significant harm within the meaning of section 47 of the Children Act 1989.

86. Paragraph 5 of that part of Annex B1 which relates to ACPCs makes clear that:

> "Ultimately Governors decide whether matters will be referred to the police and social services and are answerable for discharging their duty of care."

87. Paragraph 5 of that part of Annex B1 which relates to the local establishment's own child protection policy states that:

> "A s 47 enquiry may identify a need for an Initial Child Protection Conference to devise and agree a plan to protect the young person, taking into account his or her status as a lawfully remanded or sentenced individual. The Governor or his or her representative … will attend and agree the plan and timetable for its implementation and review. The plan could include

> moving the alleged victim to a different establishment … but only if this was considered absolutely necessary."

88. Annex B3 is an outline Child Protection Policy intended to be used as a template upon which individual establishments will base the detail of their own arrangements. I need not go into detail. It envisages that Governors of YOIs will seek advice from the local Social Services Department, that in appropriate circumstances the local Child Protection Procedures will be invoked and that "where doubt exists then advice should be sought from the Local Authority Social Services Department". It provides that

> "If the Duty Governor believes that the young person may be suffering, or may be at risk of suffering significant harm, then the concerns should always be referred to the local authority SSD via the procedure agreed with the local ACPC."

89. Annex B3 also provides that:

> "If the local SSD has reasonable cause to suspect a child is suffering or is likely to suffer significant harm, a strategy discussion … must take place between the locally agreed contacts within 24 hours of the decision being made to hold the strategy discussion. The strategy discussion will decide whether a s 47 enquiry should be initiated by the local SSD or by another local authority SSD."

90. Annex B3 plainly contemplates that the "SSD Team Manager or above" will chair any strategy discussion or any formal strategy meeting which subsequently takes place.

91. Under the Crime and Disorder Act 1998 the local authority has a duty to ensure that there is a Youth Offending Team (YOT) in place. YOTs, which are multi-agency, have the responsibility for co-ordinating or delivering the provision of local youth justice services and helping to implement the Youth Justice Plan. The YJB has developed an assessment profile, ASSET, for use with all youth offenders who enter and leave the criminal justice system. The YJB's *National Standards for Youth Justice* specify the form of the ASSET profile and the procedure for completing it. They provide for the ASSET assessment to be undertaken by a YOT member. The ASSET assessment should be completed by the YOT before the child's court appearance. The YJB also specifies the procedures, including the procedures for assessment, on reception of a child into a YOI. For this purpose the YJB has developed a series of T forms. One, called T1:V, is completed within one hour's arrival of the child in a YOI and is a vulnerability assessment of whether the child, inter alia, is at risk of self-harm or suicide, is a potential victim, or a risk to others. Vulnerability is described for this purpose as "susceptibility to significant physical, sexual, emotional harm or distress."

92. The YJB's own evidence, as contained in the witness statement of its Chief Executive, Mark Perfect, makes clear that ASSET is not designed for section 17 assessments. It also acknowledges that

> "the implementation of ASSET has presented a challenge for youth justice practitioners, and its full potential for informing intervention plans and service planning has yet to be fully realised ... Evidence from the field suggests that completion rates for all stages of ASSET are still variable".

93. *PSO 4950* needs to be read in conjunction with *Framework for the Assessment of Children in Need and their Families*, issued, as I have said, in March 2000 by a number of departments including the Home Office. Paragraphs 5.66 – 5.68 deal with YOTs. Paragraph 5.68 points out that:

> "It will be important for YOTs completing ASSET to liaise within social services departments about young people with whom social services have had or have contact ... assessments undertaken by YOTs will be an important source of knowledge if the young person continues to be worked with as a child in need under the Children Act 1989".

94. Paragraph 5.80 reads as follows:

> "The Prison Service has a duty to safeguard the welfare of those children aged under 18 in its custody. From 1 April 2000, all Prison Service Establishments in the new under 18 estate are required to appoint a child protection co-ordinator; and to establish, in consultation with local ACPCs, arrangements for acting on allegations or concerns that a young person may have suffered, or is at risk of suffering significant harm. A s 47 enquiry and core assessment is undertaken concurrently drawing on knowledge of the Assessment Framework."

95. There can be no doubt that, between them, *PS 4950*, the *National Standards* and *Framework for Assessment* mark a revolution in official attitudes within the Prison Service to the treatment of children in YOIs. The policy which they embody is a revolutionary break with the past, driven in significant measure by the recommendations of Sir David Ramsbotham and Sir William Utting and, I do not doubt, at least in part by a recognition of the imperative need to meet the standards mandated since October 2000 by the Human Rights Act 1998.

96. And, as Sir David would be the first to accept, this sea-change in official attitudes and policy has also been marked by tremendous changes on the ground. The *Annual Report of HM Chief Inspector of Prisons for England & Wales 1999-2000* was Sir David's final report as Chief Inspector. He took the opportunity, he tells us (p 2), to reflect on his five years as Chief Inspector and to draw conclusions. He continued:

> "As a generalisation I believe that prisons – and therefore the treatment of and conditions for prisoners – are in a much better state than they were five years ago … The treatment of juveniles is, in general, unrecognisable better than it was, following the introduction of the Youth Justice Board".

97. Having referred to the changes introduced in April 2000 he added this comment (p 9):

> "As ever, however, delivery does not always match published intention, and I have reported on some areas of concern in individual reports".

98. He added (p 9):

> "Children are made worse by the experience of imprisonment unless trained staffs are able to so supervise and occupy them that the bullying and harassment that they inflict on each other are prevented. The emphasis on Child Protection procedures should be not so much on children being molested by staff … but on protecting them from bullying and intimidation by peers when staff are not present. The worst examples of this are reflected in establishments where verbal intimidation is practised by shouting from cells, and physical bullying takes place in unsupervised places such as showers and recesses on landings. It is essential that all parts of establishments holding children … are made safe, so that the ravages of bullying and intimidation cannot be wrought."

99. Drawing attention (p 10) to "the inconsistency in treatment and conditions in different establishments", he contrasted those YOIs which, he said, "have produced excellent examples for others to follow" with "the horrors that we found" at certain other YOIs. But he was, he said (p 11), "optimistic about improvements to the treatment of and conditions for juveniles, because of the direction given by the YJB".

100. I have been shown extracts from the reports of six unannounced and nine announced inspections of YOIs holding children carried out by HM Chief Inspector of Prisons between May 2000 and March 2002: nine by Sir David Ramsbotham and six by his successor Anne Owers.

101. As might be imagined these vary dramatically. Many are heartwarming. Thus:

    i) HM YOI Lancaster Farms (May 2000): "the high quality treatment of young prisoners continues … outcomes … are well above the standard of those in many other YOIs".

ii) HM YOI Castington (May 2000): “a good and promising report”.

iii) HM YOI Portland (December 2000): “a great deal has happened in the year since our last inspection … , particularly in the juvenile wings, led by an inspirational Principal Officer … the juvenile wings … are amongst the best regimes that we have seen anywhere in the country”.

iv) HM YOI Wetherby (March 2001): “much that is good … which reflects considerable credit on the motivation and work of the Governor and staff.”

v) HM YOI Brinsford (May 2001): “Nothing has given me and my team as much pleasure as returning a year later to find a totally changed atmosphere, in which relationships between an increasingly competent and confident staff, and safer and better cared for young prisoners, had been transformed.”

vi) HM YOI Stoke Heath (May 2001): “remarkable improvement in the treatment of and conditions for prisoners … the whole approach to juveniles had been completely revised with staff taking a real interest”.

102. In others the picture was darker, sometimes much darker.

103. HM YOI Feltham A (the part of Feltham YOI which holds children) was inspected in October 2000. Sir David Ramsbotham reported (*Report on an unannounced Inspection of HMYOI and RC Feltham, 23-26 October 2000*, March 2001, Preface p 3) that, although he could report “considerable progress in developing sound foundations on which a suitable regime … can be provided and delivered”, nonetheless “much still remained to be done to provide a proper environment for unconvicted and convicted children held in Feltham A”. Feltham A was inspected again in January 2002 (*Report on a full announced Inspection of HMYOI Feltham, 14-23 January 2002*, August 2002). There were improvements: “Feltham A was a safer environment for children … than when we last inspected and there were reasons to be optimistic that it would become increasingly so.” But the Healthy Prison Summary contained (paragraphs HPS15 and HPS19) these disturbing observations:

> “We were particularly concerned, however, that child protection systems were not in place and that there was no child protection log. Furthermore, there were no links between the establishment and Hounslow Area Child Protection Committee. … A new strategy and written procedures on anti-bullying were embryonic and we could see no evidence as yet of them having an effect around the establishment. A few bullies had been identified but there was a noticeable absence of intervention programmes.”

104. HMP Holloway was inspected in December 2000 (*Report on an unannounced follow-up Inspection of HMP Holloway, 11-15 December 2000*, March 2001). Sir David Ramsbotham did not mince his words (Preface pp 7-8)

> "I must condemn, in the strongest terms that I can, the continued practice of holding unsentenced children with sentenced adults … The stupidity of putting impressionable children in dormitories with hardened criminals is beyond my comprehension. Common sense, never mind the law, should dictate that this is wholly inappropriate, and I am surprised that the Prison Service has not taken action to eliminate the practice, without attention having to be drawn to it in an inspection report."

105. HMP and YOI New Hall was inspected in January 2001 (*Report on an unannounced follow-up Inspection of HMP and YOI New Hall, 8-10 January 2001*, February 2001). Again, Sir David's observations make uncomfortable reading. Commenting (Preface p 1) that "this report … contains yet more repetition of items that I have been reporting on and recommending over the past five years, that are still in need of urgent managerial attention", he continued (Preface pp 4-5):

> "I am very concerned at the continued lack of implementation of the policy for the treatment and conditions of juveniles as detailed in PSO 4950. … There are no policies in place regarding Child Protection Procedures, nor is there any training in them for managers and staffs. Despite earlier recommendations, there are still no Social Workers to look after the interests of children. … All these are things that would have been demanded by a Regulator, and all that I am able to do is recommend, which I do again, as strongly as I am able."

106. HMP and YOI Brockhill was inspected by Sir David's successor in November 2001 (*Report on an unannounced Inspection of HMP and YOI Brockhill, 12-15 November 2001*, May 2002). The Introduction to this report (pp 3-4) is profoundly disturbing:

> "This report … describes a prison which was at a particularly low point in its history. Many of the basic building blocks of a decent, safe and purposeful regime were not present. There was no clear senior management ownership of suicide prevention nor anti-bullying strategy. Both suicide and bullying were critical issues for the prison. Nor were there effective child protection procedures, though the prison held some very vulnerable girls. … this is the second women's establishment that we have recently inspected, without warning, which fell far short of the standards that we, the Prison Service and most importantly the women and girls require. … Both prisons were struggling to cope with a volatile mixture of women, young adults and girls, many of them with histories of substance

> misuse, self-harm, abuse and mental illness. Both were continuing to hold girls (in spite of assurances that they would be removed from prisons) with huge needs and demands, which the prison could not meet, but which drew scarce resources away from other prisoners, including the young adults with whom they were held."

107. HM YOI Werrington was inspected in March 2002 (*Report on a full announced Inspection of HM YOI Werrington, 11-15 March 2002*, August 2002). This YOI was described as having "some of the best relationships between staff and young people that we have seen anywhere in the juvenile estate. There was a strong child-centred ethos, with informal and appropriate relationships [and] some high levels of caring and sensitivity to the needs of the young people, and many examples of staff engaging positively and proactively with young people". But paragraph HPS16 of the Healthy Prison Summary says this:

> "Three years ago Werrington had had the most developed Child Protection procedures of any Prison Service establishments. In the intervening period, these had fallen away badly and the child protection log was poorly maintained ... **Effective child protection procedures urgently require to be re-established.**" (emphasis in original)

108. Two of the reports I have seen are even bleaker. HM YOI Onley was inspected again – cf, paragraph [77] above – in July 2001 (*Report of a full announced Inspection of HM YOI/RC Onley, 9-13 July 2001*, December 2001). Things seem not to have improved much since 1996. In the Preface to her report the Chief Inspector wrote:

> "Overall, we felt that Onley was a long way from providing a safe environment for all its young people; indeed for some vulnerable children we did not believe that it would have met the requirements of the Children Act. There were also no proper child protection procedures in place."

109. The executive summary contained the following comments (paragraphs ES5-ES8):

> "ES5 … We found a number of key issues which needed to be addressed without delay to ensure that Onley can provide, properly and safely, for the needs of the children and young people in its care.
>
> ES6 The most pressing issue was that of child protection. Onley had not successfully embraced the different elements of child protection, nor did we feel that staff fully understood all the essential elements. The aspect of child protection most frequently ignored, and significantly so at Onley, was that of historic child abuse. Staff should be trained and alert to the possibilities that young people may wish or be prepared to

disclose such information about their past life experiences. This situation needs careful and sensitive handling by skilled professionals and all staff need to realise that disclosures of this nature can take place at any time.

ES7 Onley had attempted to take account of the second element of child protection, namely the management of an individual's vulnerability in the establishment. This included dealing with anti-bullying, suicide and self-harm and assaults. However, we were by no means satisfied with the effectiveness of these policies. The level of assaults was very disturbing and the use of control and restraint techniques alarmingly frequent. We received a high number of complaints from young prisoners that they felt intimidated by staff, and in particular that they were being bullied and subjected to a range of informal and illegal punishments. In an inspection lasting only a few days it was not possible to validate such allegations but these complaints were expressed right across the establishment.

ES8 Although as a Prison Service Young Offender Institution Onley is not subject in law to the 1989 Children Act, it is bound by the Act's main principle that the welfare of the child is paramount. If a child is seen to be at risk of significant harm when judged against a child in another environment, it is possible for a range of public bodies to seek an emergency protection order, enabling that young person to be removed from his or her current environment. We saw a number of individuals for whom this course of action could well apply."

110. Paragraph 2.11 of the report contains this:

"Even more disturbingly, young prisoners who spent many hours travelling in cellular vehicles were not given the opportunity to go to the toilet and were instead offered a property bag, which some were desperate enough to use. Whilst acknowledging that this was beyond the control of the prison, this was degrading and totally unacceptable treatment. **We recommend that the Prison Service investigates these allegations and take action to ensure that escort contractors provide appropriate comfort breaks.**" (emphasis in original)

111. Finally, HM YOI Huntercombe, which was inspected in October 2001 (*Report on a full announced Inspection of HM YOI Huntercombe, 15-19 October 2001*, March 2002). The Preface refers (p 5) to "an environment that we believe would not be considered safe in a residential setting governed by the Children Act. It should be equally unacceptable in a prison setting." Paragraph ES2 of the executive summary reads as follows:

> "As we have reported in other establishments holding juveniles, arrangements for transporting young people form court to institution were far from satisfactory, with many being held in the escort vehicles for too long without the opportunity for toilet breaks. It is unacceptable that young people were reduced to urinating in property bags."

112. That is elaborated in paragraph 1.01 of the report:

> "This resulted in young people having stressful journeys without stops for food or toilet breaks. Once again it was confirmed to us that young people were offered **property bags in which to urinate during these tortuous journeys. This was degrading and offensive treatment of young people and should cease immediately.**" (emphasis in original)

113. Paragraph ES4 of the executive summary records this impression:

> "Overall, inspectors felt that the conditions for those newly arrived in the prison increased the risk of suicide and self-harm, and would not have satisfied the requirements in the Children Act, had they applied to children held outside a prison setting."

114. Paragraphs 1.34 – 1.35 of the report contain this damning indictment:

> "1.34 The Prison Service has accepted that the principles of the Children Act 1989 should be acknowledged for the children in its care. It has not gone so far as to acknowledge the primary principle that the welfare of the child shall be paramount.
>
> 1.35 In spite of the excellent work being carried out by committed staff it is our judgement that a social worker conducting a section 47 Children Act investigation into the living circumstances of a young person under the age of 18, upon discovering the environment as described above, might well conclude that he was at risk of suffering significant harm in accordance with the definition within the Children Act, as far as his emotional, physical and developmental needs were concerned and might well be successful in an application to have him removed, were he not in Prison service custody."

115. So far as concerns the Inspectorate I conclude with *Safeguarding Children: A joint Chief Inspectors' Report on Arrangements to Safeguard Children*, prepared by, amongst others, the Chief Inspector of Social Services and Her Majesty's Chief Inspector of Prisons. It was published in October 2002. Paragraphs 8.1 – 8.10 read as follows:

“8.1 We identified the safeguarding of young people in Young Offender Institutions (YOIs) as a major concern. Previous inspections have highlighted the very serious nature of the risks many young people face in these institutions and the extent of self-harming behaviour. This contrasts with the reported good quality of care and protection of young people, including young offenders placed in secure accommodation provided by social services (see Chapter 7).

8.2 At the time of this inspection, there were no arrangements in place for the inspection of the Youth Justice Service (YJS) or the Youth Offending Teams (YOTs). This constrained what we could accomplish. We arranged for HMI Prisons inspectors to read YOT files in six areas, and we visited three YOIs. We also explored the links between YOTs, YOIs and Area Child Protection Committees (ACPCs).

8.3 We found the welfare needs of young people who commit offences were not being adequately addressed by those services responsible for their welfare. There were no national minimum standards for the work of YOTs, and there was no regular inspection of their work. They were operating largely in isolation from other services in most areas.

8.4 *Her Majesty’s Inspector of Prisons* (HMI Prisons) has over recent years regularly reported in the strongest terms about conditions within YOIs. *The Inspectorate Annual Report for 1999-2000* described the very serious levels of bullying taking place amongst young people in YOIs and concluded that the emphasis of child protection procedures in YOIs should be on protecting young people from bullying. It is primarily bullying that leads many young people to consider and attempt suicide within these institutions.

8.5 Some of the findings about the young people detained in YOIs illustrate the level of vulnerability:

- nearly 50 percent of the children in YOIs have been, or still are, in local authority care, but many have lost contact with social services;
- most children in YOIs have a very fractured education experience and very significant learning needs and problems;
- many children have immense family difficulties; and
- many young people are discharged without anywhere to live.

8.6 An analysis of surveys undertaken of young people in YOIs revealed that 24 per cent reported incidents of assault by other young people, 14 per cent reported they felt unsafe some of the time, and six per cent felt unsafe often. These figures confirm the findings of the Chief Inspector of Prisons that there were very serious levels of bullying and assault in many of these institutions, and in one establishment the regime was such that fears for safety and of bullying put most of the population of young people at risk of harm. In one YOI, there were over 700 reported incidents of injuries to young people over an eight-month period.

8.7 The 1999-2000 Annual Report also identified the most serious concerns about the welfare of girls and young women aged 15 to 18 years held in custody. There is no specialist provision for them, resulting in their being held in adult prisons alongside adult prisoners. Some younger girls were placed in the antenatal unit, not because they were pregnant but because there was nowhere else to place them. Within the same unit there were psychiatrically disturbed and psychotic women who also were not pregnant.

8.8 Yet we found that there were very few referrals under the local child protection procedures being made to social services within the areas we inspected, and could not be confident of the response to safeguard these young people.

8.9 In contrast to the provision of council secure accommodation, the principles and requirements of the Children Act are not automatically applied to YOIs and other prison establishments. In one YOI, not all policies and procedures to safeguard young people were in place. Arrangements for responding to and investigating complaints by young people were not satisfactory, and in one YOI, there were two staff suspended following allegations of assaults on young people that had not been resolved after many months.

8.10 The major threat to young people is not from the staff: where there were concerns about staff behaviour, these were generally responded to promptly. There was, however, a high level of violence between young people."

116. The joint Inspectors' conclusions were set out in paragraphs 8.19 – 8.22:

"8.19 Young people in YOIs still face the gravest risks to their welfare, and this includes those children and young people who experience the greatest harm from bullying, intimidation and self-harming behaviour.

> 8.20 The work of the YOTs was detached from other services, and there was only limited evidence that they were addressing safeguarding issues. The focus of their work with young offenders was almost exclusively on their offending behaviour, and did not adequately address assessing their needs for protection and safeguarding.
>
> 8.21 In only one area was the work of the YOT integrated into the work of the ACPC: they were not even represented on ACPCs in most areas. Similarly, ACPCs were not engaging with the welfare of young people in YOIs.
>
> 8.22 We concluded that ACPCs need to make a major commitment to the welfare of young offenders who are receiving services from YOTs and particularly those in YOIs. We also concluded that there needs to be a comprehensive inspection of YOIs and their working relationships with ACPCs."

117. Earlier this year the Children's Society published Barry Goldson, *Vulnerable Inside: Children in secure and penal settings*. At pp 136-138, the author gives his impression of the realities of assessment in YOIs:

> "Prison personnel and NRRI staff" – this latter being a reference to the National Remand Review Initiative of the Children's Society – "are the frontline practitioners charged with the responsibility of assessing children's vulnerabilities at, or shortly after, their arrival at prison; and they simply do not have access to the basic information they need. The required documentation rarely arrives at the prison on time (if at all). On the few occasions when it does arrive, it is frequently incomplete, and it is not necessarily held in the part of the prison where it would be most useful. This raises concerns and casts serious doubt over the quality of assessments routinely carried out on vulnerable children. Too often, prison personnel and NRRI staff have little more than 'gut reaction', instinct and the benefit of previous experience to draw on. The situation is made worse by an unsuitable physical environment, together with the crude, mechanistic, hurried and inexpertly executed nature of the reception assessment process itself. … The picture is clear. The reception, and so-called 'vulnerability assessment' process, is like a cattle market. Children are herded into crowded and unsuitable prison reception areas and processed with indecent haste. The circumstances do not allow for anything else. Despite the best individual efforts, late arrival, excessive numbers, limited space and institutional imperatives produce inhumane procedures."

118. Sir David Ramsbotham's view as set out in his witness statement is this:

> "Fundamental is the failure of prisons to be able to put the welfare of the young people at the centre of the operation of the institution. Instead, there is an over emphasis on meeting budgets, administrative requirements and concern for management structures. The children are not treated as individuals with differing needs but all treated the same. So, for instance too few staff recognise that whilst one 15 year old may be operating at a normal developmental level for his or her age, the next is operating at the developmental level of a ten year old. There is little or no understanding by many staff of what that means and no facilities or resources to deal with that situation. This fundamental failure provides the back-drop for concern over a number of specific areas."

The Howard League's concern – the applicability to YOIs of the Children Act 1989

119. As has been seen, Sir David was alerted to the Children Act issue early on. In *Young Prisoners: A Thematic Review by HM Chief Inspector of Prisons for England and Wales*, published in October 1997, he said this (paragraph 2.09):

> "In society the interests of children are protected by the Children Act 1989. This necessary protection is denied to children once they are in the care of the Prison Service. This cannot be right."

120. He continued in paragraph 2.24:

> "Recently legal advice as to whether the provisions of the Children Act 1989 apply to children under the age of 18 in Prison Service custody has been sought. In the opinion of Council (sic), while it is prudent for the Prison Service to ensure that the conditions in which they are held are satisfactory under the Act, it does not, in terms, apply to juveniles 'detained under powers conferred by the Prisons Act 1952, by reason of being convicted of a criminal offence or remanded in custody'. This opinion has not, as yet, been tested by judicial review, **but I recommend that the application of the Children Act 1989 be reviewed, particularly with such large increase in the numbers of children being held in Prison Service custody since the Act was passed in 1989 … the application of the Children Act 1989 to those detained in Prison Service establishments should be examined, to confirm whether or not any change to the provisions of the Act is warranted."** (emphasis in original)

121. At about the same time Sir William Utting in *People Like Us: The Report of the Review of the Safeguards for Children living away from Home* said (paragraphs 5.13-5.14):

> "5.13 The Review understands that the Children Act does not apply to children convicted or remanded in prison service establishments because the regulations governing penal institutions supervene in that as in other respects. The Rules governing Young Offender Institutions incorporate a number of provisions for the safety and security of inmates: limiting, for example, the use of force by prison officers, excluding the use of restraints for children under 17, and making disciplinary offences of fighting, stealing and threatening or abusive behaviour. These fall short in total of what the Children Act seeks to ensure for children under the age of 18. Indeed, the term 'welfare' is likely to receive a much narrower interpretation in a penal setting than the comprehensive meaning derived from the effect of the Children Act. The Review recommends that the regulations governing provision in the penal system for children under the age of 18 should incorporate and give effect to the principles of the Children Act in promoting and safeguarding the welfare of children. Allegations of abuse or other harm should be investigated by the police and social service as they would be in other institutions.
>
> 5.14 Indeed, it seems important to the Review – as a matter of public policy – that the Prison Service adopts the explicit aim of safeguarding and promoting the welfare of children as the basis for its approach to rehabilitating young offenders. These young people represent varying degrees of danger to the rest of us, and their arrival in the penal system provides one of the last chances of turning their lives round before they become a permanent and threatening deadweight on the community. The investment needed in education, health care, social skills and employment training is likely to be justified only by a comprehensive commitment to welfare as well as to containment."

122. I pick up the story from Sir David's witness statement:

> "A compromise seemed possible when Norman Warner, at the time policy adviser to the Home Secretary, assured me that the principles of the Children Act 1989 would be made to apply in spirit and then at the next opportunity amendments would be introduced to make the Act explicitly applicable. Martin Narey, the Director-General of the Prison Service, introducing new instructions for the treatment of juveniles in Prison Service

> custody, declared in writing that the principles of the Act would apply.
>
> I decided to accept this compromise while monitoring the application of the principles during every inspection of an establishment holding juveniles. I acknowledged that taking the Home Secretary to court could have been an embarrassment. What seemed to be important at the time was that protections and ethos outlined in the Children Act were being taken on board and changes were to be made. I was given the impression that it was one of the first things the Youth Justice Board would do. However, despite there being several opportunities to introduce an explicit statutory duty on the Prison Service to be bound by the Children Act, it has not been done. It has been a huge disappointment to me that no legislative change has taken place."

123. The result, as we have seen, was *PSO 4950*. But as Sir David says, there has been no legislation. He concludes:

> "The provision of a legal duty on the Prison Service to adopt the ethos, protections and obligations of the Children Act 1989 would make an enormous beneficial difference to the practical running of its institutions for juveniles…
>
> Applying just the spirit of the Act will never work effectively. The Prison Service does not have a good history of implementing changes that do not carry a legal duty. For instance, the Government promised to implement many of the proposals made in the white paper, *Custody, Care and Justice*, published in 1991 following the riots at HMP Strangeways and elsewhere. However, only two of the twelve priorities were actually implemented – an end to slopping out and improved security. In my years as Chief Inspector of Prisons, I recommended the adoption of 2,800 examples of good practice service wide. Only 70 were taken up.
>
> The seriousness of the Prison Service commitment to implement the spirit of the Children Act can be questioned by the fact that there is no Director of Juveniles. Instead, the person responsible for running the juvenile estate, the Juvenile Operational Manager reports to the Director of Resettlement and is therefore a relatively junior member of the senior management team. The top management tier of the Prison Service is the Prison Board which includes the Minster for Prisons and the Director General. Below the Director General is the Deputy Director General. Below him are eight Directors including two responsible for security. It is my view that only if someone at the level of Director was made responsible for

> juveniles could one be confident that a declaration to implement the spirit of the Children Act could be counted upon. This is because someone could be held directly accountable if it did not happen. As it stands, there is too much scope for blame being passed on to more junior personnel…
>
> Nevertheless, despite there having been no legislative change, I remain of the opinion that the Children Act 1989 does and should apply to children in prison, particularly those who have not yet been sentenced. In my time as HM Inspector of Prisons, I was never shown any evidence that the Children Act did not or should not apply to these children other than the fact that neither prisons nor the Prison Service were specifically mentioned in the Act, but neither was exclusion nor Crown immunity. I remain of the view that the Prison Service's stated policy that the Children Act does not apply to young people is due to administrative rather than any principled considerations."

The issues in the proceedings

124. As I have already pointed out, these proceedings reflect two areas of concern shared by a number of people and bodies including, in particular, the Howard League and the former Chief Inspector of Prisons, Sir David Ramsbotham: the conditions in which children are kept in YOIs, and the seemingly limited applicability to YOIs of the Children Act 1989.

125. I have already set out at some length the views of the Inspectorate including, in particular, the views, both official and private, of Sir David Ramsbotham. It may be convenient to record at this point that I have also had extensive evidence in the form of witness statements prepared on behalf of the Howard League by its Director, Frances Crook, by its Assistant Director, Frances Russell, by its Policy Officer, Charlotte Day, by the Youth Justice Programme Manager of the Children's Society, Sharon Moore, and by a highly experienced social work manager and practitioner, Maggy Read. The Secretary of State for the Home Department has filed witness statements by Jeremy Whittle, of the Effective Practice Team, Juvenile Operational Management Group, in HM Prison Service, by Mark Perfect, the Chief Executive of the YJB, and by Michael Leadbetter, the Director of Social Services for Essex County Council and President of the Association of Directors of Social Services. Finally there is a witness statement from Giles Denham, Deputy Director and Head of Policy of the directorate of the Department of Health with responsibility for social care services for children and older people.

126. This material is of absorbing interest and has greatly assisted me in understanding both the factual background to the present proceedings and the issues which have arisen. But I do not need to examine it in any detail. It suffices to say that, properly understood, it indicates that there are various different strands in the Howard League's

concerns which, in the interests of clarity, it is necessary to distinguish and to consider separately.

127. There are, as it seems to me, seven separate issues which require to be considered:

i) The first, and major, controversy is as to the extent to which, if at all, the Children Act 1989 applies to YOIs or (and this is not at all the same thing) applies to children in YOIs.

ii) Allied to this is a discrete point arising out of the Howard League's assertion that the first sentence of paragraph 3.1.4 of *PSO 4950* is wrong in law in stating that "The Children Act 1989, does not apply to under 18 year olds in prison establishments."

iii) The third matter relates to the *policy* of the Prison Service as set out in *PSO 4950*. Is that policy satisfactory? Does it comply with domestic law, in particular with the Children Act 1989? Does it adequately meet the Prison Service's obligations under human rights law?

iv) The fourth issue relates to the *implementation* on the ground of the policy in *PSO 4950*. Is the policy in fact being implemented as it should be and according to its own terms? Or are the human rights of children in YOIs being violated?

v) The fifth issue arises out of the suggestion that the Children Act 1989 ought to be amended, either so as to make it apply to YOIs or, at least, so as to impose on the Prison Service an express statutory duty to promote the welfare of children in YOIs.

vi) Allied to this is the assertion that the standards required to be met in LASSUs should also be (required to be) met in YOIs.

vii) The final issue arises out of the view, strongly expressed, for example, by Ms Read, that child protection work in YOIs should be "led by local authorities and other agencies such as the NSPCC who are experienced in this work", that the Prison Service must become "fully integrated into the Child Protection system" and that local authorities need to allocate more time and resources to children in YOIs.

128. I shall deal with each of these in turn. But I must make it clear at the outset that not all these issues are properly justiciable or properly justiciable within the present proceedings.

Issue (i) – Does the Children Act 1989 apply to YOIs or to children in YOIs?

129. If I may be forgiven for saying so, the debate on this centrally important issue has not always been carried on with sufficient attention to the precise formulation of the propositions being asserted by the one side or disputed by the other side which, as it seems to me, is essential if the true issues are to be correctly identified and determined.

130. The proposition that the Children Act 1989 applies to children in YOIs is not the same as the proposition that the Act applies to the Prison Service or to YOIs. Indeed, the proposition that the Act can apply to children in YOIs – which in my judgment is a correct, if abbreviated, statement of the law – is quite consistent with the – equally correct – proposition that the Act does not apply as such either to the Prison Service or to YOIs.

131. There was a certain amount of debate before me as to whether, and if so to what extent, there was in fact misunderstanding of the true position on the part of local authorities. I do not think it particularly matters for present purposes but the evidence suggests that there may be misunderstanding. Thus, whereas four local authorities (Dorset County Council, Leeds City Council, Northumberland County Council and South Gloucestershire Council) wrote in response to letters sent by the Howard League in October 2001 in terms indicating that they understood their duties under section 47 of the Children Act 1989 as extending in principle to children in YOIs, the London Borough of Hounslow had issued a Press Release on 13 August 1999 relating to Feltham YOI which said:

> "Our understanding of the legal situation is that we do not have jurisdiction to intervene at Feltham Young Offenders.
>
> We are currently discussing a possible protocol with the Prison Service which might allow us to be 'invited in' to give support to young people there where appropriate."

132. The materials I have been shown do not indicate how that particular issue was resolved, though the report of the inspection of Feltham A YOI in January 2002 to which I have already referred (see paragraph [103] above) suggests that all is not well there.

133. In this connection I should mention the evidence of Sharon Moore relating to the Children's Society's work on various projects in YOIs. She tells me that since the introduction of *PSO 4950* in July 1999 the Children's Society has itself made twelve child protection referrals – section 47 referrals – of children in YOIs to local authorities, that is, in each case, to both the child's 'home' local authority and the local authority for the area where the YOI was situated. Her experience was that

> "the response of the local authority varied considerably … the majority of the local authorities did not complete Section 47 enquiries and in some cases no response was received at all. Several local authorities advised us that as the Children Act 1989 did not apply they did not have a duty to conduct such enquiries."

134. Be all that as it may (and I am simply not in a position to make any findings on matters, peripheral to the central issues before me, on which the evidence was both incomplete and understandably left largely unexplored before me) the legal position is, in my judgment, perfectly straight-forward.

135. As I have already remarked, a survey of the 1989 Act brings out a number of important points:

   i) There is no reference in the 1989 Act to YOIs, to the Prison Service or to the Secretary of State for the Home Department.

   ii) YOIs are not amongst the types of institution referred to in and regulated by the 1989 Act or the 2000 Act.

   iii) The 1989 Act is not expressed as conferring or imposing any functions, powers, duties or responsibilities on either the Prison Service or the Secretary of State for the Home Department.

   iv) The 1989 Act *excludes* both the Prison Service and the Secretary of State for the Home Department from those who, in certain circumstances, are required to co-operate with or assist a local authority, and from those whom a local authority has to consult with, in the course of carrying out its functions, powers, duties and responsibilities under the 1989 Act.

   v) There is nothing in the 1989 Act which expressly excludes, either from the class of children to whom a local authority owes duties under section 17 or from the class of children to whom it owes duties under section 47, those of the children "within their area" or "in their area" who are for the time being incarcerated in a YOI.

136. In these circumstances the law can, as it seems to me, be summarised in the following general propositions:

   i) The Children Act 1989 does not confer or impose any functions, powers, duties, responsibilities or obligations on either the Prison Service (or any of its staff) or the Secretary of State for the Home Department.

ii) In that sense the Act does *not* apply as such either to the Prison Service or to YOIs.

iii) *But* the duties which a local authority would otherwise owe to a child either under section 17 or under section 47 of the Act do not cease to be owed merely because the child is currently detained in a YOI.

iv) In that sense the Act *does* apply to children in YOIs.

v) *However,* a local authority's functions, powers, duties and responsibilities under the Act, and specifically under sections 17 and 47 of the Act, take effect and operate *subject to the necessary requirements of imprisonment*.

137. Propositions (i)-(iv) need no elaboration.

138. I should, however, add a few comments in relation to proposition (v). They are certainly not intended to be exhaustive. This is neither the occasion nor the place for any extended discussion of a topic that is probably capable of Parkinsonian elaboration. I agree with Mr Denham when he says that how the requirements of imprisonment affect the operation of the Children Act 1989 is a complex matter, dependent in part upon the circumstances of each particular case.

139. I agree also with the Department of Health when it expresses the opinion – which I entirely share – that it would not be appropriate for me to embark upon a general review of how the Children Act 1989 applies in respect of children in YOIs. As Mr Denham truly says, there are two reasons for this:

i) First, this is not a matter which the court should be asked to address in the abstract. The application of the 1989 Act can only be determined in the context of a particular factual situation. No actual case is the subject of the present proceedings. Here, as in so many other areas where law and social policy intersect, "context is everything".

ii) Secondly, any attempt to give a comprehensive statement of how the Children Act 1989 applies in respect of children in YOIs is likely – indeed, I would go so far as to say, is absolutely bound – to overlook something material, making the statement at best incomplete and at worst misleading or simply wrong.

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.

141. In these circumstances I shall confine myself to just four points.

142. The first point is this. Subject of course to full compliance with the Human Rights Act 1998, the primary obligation of the Secretary of State is to manage the prison estate for juveniles in accordance with his duties under the Prison Act 1952 and the rules and policies made thereunder, including The Young Offender Institution Rules 2000. So, if the Governor of a YOI was to consider, for example, that assistance to a local authority was inconsistent with his obligations to manage his YOI in accordance with the Prison Act, the 2000 Rules and other applicable policy instruments, including the Human Rights Act 1998, he would be entitled – indeed obliged – to refuse such assistance. Neither the Governor nor the Secretary of State for the Home Department can lawfully abdicate their responsibility – for it is their responsibility, not the responsibility of the local authority – for the management of a YOI and its inmates.

143. The second is this. Even a judge of the Family Division exercising the inherent parens patriae or wardship jurisdiction is severely limited in what he can do in relation to a child who is detained in a YOI. This is because, as Lord Scarman said in *In re W (A Minor) (Wardship: Jurisdiction)* [1985] AC 791 at 797C:

> "The High Court cannot exercise its powers, however wide they may be, so as to interfere on the merits in an area of concern entrusted by Parliament to another public authority."

144. As Ward LJ said in *In re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1 at 23A:

> "The wardship or inherent jurisdiction of the court to cast its cloak of protection over minors whose interests are at risk of harm is unlimited in theory though in practice the judges who exercise the jurisdiction have created classes of cases in which the court will not exercise its powers. An obvious class is where Parliament has entrusted the exercise of competing discretion to another, for example (a) the local authority as in *A v Liverpool City Council* [1982] AC 363; (b) the immigration authorities as in *In re Mohamed Arif (An Infant)* [1968] Ch 643 and *In re A (A Minor) (Wardship: Immigration)* [1992] 1 FLR 427; (c) another court of competent jurisdiction as in *In re R (Wardship: Restrictions on Publication*) [1994] Fam 254."

145. *Re T* [1994] Imm AR 368, to which Ms Grey referred me, is another example of the operation of this principle in the context of asylum. Another well-known example of

the same principle is *In re JS (A Minor) (Wardship: Boy Soldier)* [1990] Fam 182, where the court struck out wardship proceedings in respect of a child who had enlisted in the British Army and was therefore subject to military law and under the control of the military authorities.

146. Now if the powers of the Secretary of State for Defence in relation to a child who is a soldier cannot properly be overridden by a wardship judge, and if the powers of the Secretary of State for the Home Department in relation to a child who is subject to immigration control are similarly not to be overridden by a wardship judge, then the same quite obviously must apply to the powers of the Secretary of State for the Home Department in relation to a child who is lawfully detained in a YOI.

147. The point is elementary and hardly novel. As Russell LJ said in *In re Mohamed Arif (An Infant)* [1968] Ch 643 at 662D:

> "It is, however, quite obvious that there are circumstances in which control over the person of a ward is not committed or referred to the judge but is by the law of England committed or referred to another agency or person. As a simple illustration, it could not be contended that the judge would have any jurisdiction to order that a criminal ward be transferred from place of detention A to place of detention B, however much the medical evidence before the judge suggested that the ward would be in better health at place of detention B. The reason is that the jurisdiction of the judge over the person of the ward is necessarily restricted by the fact that the law has given that aspect of control over the ward's person exclusively to another agency. Similarly, the judge would have no right to complain of or countermand a lawful posting overseas of a ward who was in the armed forces. The law refers the military control of the ward to the military authorities. Similarly, any lawful deportation order affecting a ward must be outside the normal position which I have mentioned already, that a ward must not leave the jurisdiction without permission of the judge; indeed, it would override any existing express order of the judge in the wardship proceedings that the infant was not to depart from the jurisdiction ... The wardship of infants, in my judgment, has not and could not in law have any effect on the powers and duties of the immigration authorities so as to hamper them in any way in removing the infants from the jurisdiction under the Act of 1962."

148. Now a local authority, absent express statutory powers to do so, can hardly be in any better position than the High Court to override or interfere with the exercise by the Secretary of State for the Home Department or the Prison Service of the duties and powers conferred on them in relation to a child lawfully detained in a YOI. So, for example, as Mr Wise on behalf of the Howard League properly accepts, a local

authority could not, in the purported exercise of its powers under the Children Act 1989, remove a child from a YOI and place it in local authority accommodation. Nor, for example, could a constable in the purported exercise of his powers under section 46 of the Act remove a child from a YOI and take him to a place of safety.

149. The third point arises out of the statutory definition in section 17(10) of the Children Act 1989 of a "child in need". As the Court of Appeal pointed out in *R (P) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002 at 2031 (paras [95], [97]):

> "the distinguishing feature of a "child in need" for this purpose is not that he has needs – all children have needs which others must supply until they are old enough to look after themselves – but that those needs will not be properly be met without the provision of local authority social services. … The local social services authority do not have the duty, or even the power, to make a global assessment of a child's needs, still less to determine what would be in the best interests of any individual child. The authority have the duty to assess the child's need for their own services".

150. Thus the circumstances in which a local authority will be required to exercise its powers under section 17 in relation to a child detained in a YOI – the situation under section 47 is, of course, quite different – may in the very nature of things be comparatively limited. In the light of the disturbing evidence which I have already summarised as to the nature of the problems afflicting the YOI population, I do not doubt that very large numbers indeed of the children in YOIs are, in one sense of the phrase, "children in need" – indeed, children in desperate need. It does not follow, however, that they are, in the statutory sense, children whose "needs will not be properly be met without the provision of local authority social services".

151. The fourth point arises out of the important observations of Hale LJ in *Re W and B, Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582 at 605 (para [60]). Having referred to the positive obligations of the State under article 8 of the European Convention she continued:

> "This cannot mean that all failures in implementing the care plan are a breach of this positive obligation towards the child. Only the fundamental failure to make good that which has been taken away could possibly qualify. Even that is limited by what is reasonable and appropriate. *Local social services authorities have many demands upon their resources.* (Small unitary authorities like Torbay may find it harder to cope with the comparatively rare difficult care case than will a larger county authority such as Bedfordshire.) *They may not be able to do what they would like to do for every child in their care.* This is one powerful reason why courts must hesitate to make care

> orders unless satisfied that this is indeed the best option for the child. Even in a well-resourced authority with a wide range of good facilities, courts should beware a rosy-tinted view of what can be achieved." (emphasis added)

152. Now that was said in the context of a discussion of a local authority's positive obligations under article 8 in respect of a child committed to its care under a care order made pursuant to section 31 of the 1989 Act. But the position must be – is – a fortiori in relation to a local authority's functions under sections 17 and 47.

153. At this point I should refer to what Mr Leadbetter said in his evidence. He accepted that in practice young offenders are rarely assessed pursuant to section 17, though section 47 investigations are undertaken "from time to time". His view was that local authorities do not lack the necessary powers, whether under the Children Act 1989 or otherwise. He said that local authorities would in principle regard young offenders as being subject to sections 17 and 47, but accepted that "it may well be, however, that some lack the motivation or resources to exercise their powers". He said that he did not believe that *PSO 4950* "has any material effect on the way in which SSDs discharge their duties". His overall view appears to have been that:

> "The failure of SSDs" – social services departments – "to become involved with young offenders is not a question of unwillingness on behalf of SSDs but simply a reflection of the prioritisation of resources."

154. In *R (ota SR) v Nottingham Magistrates' Court* [2001] EWHC Admin 802, (2001) 166 JP 132 at 161 (para [100]), Brooke LJ quoted, without any expression of reservation or dissent, a note in agreed terms which had been prepared by counsel in that case (one of them, as it happens, Mr Wise):

> "By its own terms, the Children Act 1989 does not apply directly to the Prison Service (see *R(P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151 at [90]–[91]. However, under section 17(1) of the Act it is the general duty of every local authority "to safeguard and promote the welfare of children within their area who are in need". Section 17(10) defines the circumstances in which a child shall be taken to be in need, if
>
> (a) he is unlikely to achieve or maintain, or have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, without the provision of such services…

These obligations of the relevant local authority in whose area a YOI or prison is located apply with respect to children kept in that YOI or prison (see [2001] EWCA Civ 1151 at [97] and [100]-[101]. Thus, it is at least possible that if the relevant local authority is in a position to provide better specialist services than the Prison Service itself could provide (eg with respect to psychological services) the local authority will come under a duty to assess the need of a child in a YOI for such services and provide them.

But in deciding what positive obligations a local authority may have with respect to the provision of services by it, it is entitled (indeed bound) to take into account the limitations upon its resources and other claims upon them: see *In re W & B (Children)* [2001] EWCA Civ 757 at [60] and section 17(2) of the Children Act.

Further, as to the Prison Service itself, it is relevant to note (a) that it has a legal obligation to safeguard the well-being of children in its care, by virtue of section 6(1) of the HRA and ECHR Article 8; and (b) that the Youth Justice Board has a service level agreement with each YOI, the terms of which are also incorporated in Prison Service Order ("PSO") 4950, which requires Governors to adopt practices 'which reflect clearly the principles and good practice required by the Children Act'.

The Youth Justice Board also monitors compliance with PSO 4950 at each YOI, in addition to the inspection arrangements by HM Inspectorate of Prisons. Particular matters addressed in the PSO include, for example, role of staff, selection of staff, staff training, reception into custody, introduction of a personal officer system, involvement of family, supervising officer and outside agencies, dealing with grievances and investigations, education and sentence planning. National Standards for Youth Justice issued by the Youth Justice Board on behalf of the Home Secretary in April 2000 also contain requirements of both the Prison Service and Youth Offending Teams in planning and reviewing interventions."

155. Neither Mr Wise nor Ms Grey suggested that that note, within the inevitable limits of summary and compression, was anything other than a correct statement of law. I agree.

156. I agree also with the point made by the Secretary of State for the Home Department in his detailed grounds of defence to the Howard League's claim, that, prima facie, there is nothing unreasonable or unlawful about a local authority taking the view that, whilst a child is in a YOI, his or her needs for services would (at least ordinarily) be adequately met by the facilities provided by the Prison Service.

Issue (ii) – Is paragraph 3.1.4 of *PSO 4950* erroneous in law?

157. In the light of the preceding analysis I can take this point shortly.

158. Ms Grey argued, correctly, that the allegedly offending sentence has to be fairly construed both in the context of the historical events leading up to the publication of *PSO 4950* and in the context of paragraph 3.1.4 read as a whole. She points out that *PSO 4950* is addressed to staff and members of the Prison Service and not, for example, to local authorities or social workers. (So it is, but it is also, and quite properly, generally available to the public.) She submitted that, approached in this way, the sentence was unexceptionable. I do not agree.

159. Nothing turns on the fact that the sentence occurs in a document which, in the sense in which the phrase was explained in *R (P) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002 at 2014 (para [35]), has no legal status. Not does it matter whether one chooses to characterise *PSO 4950* as being in relevant part a statement of Prison Service policy for use by its staff or a statement by the Prison Service to its staff of what it conceives the law to be. Ms Grey properly accepted that if the relevant sentence is erroneous in point of law then I have jurisdiction so to declare. In my judgment it is, and I propose so to declare.

160. The offending sentence is at the very beginning of paragraph 3.1.4. It states, starkly, that the Children Act "does not apply to under 18 year olds in prison establishments". That, as I have already sought to demonstrate – see paragraphs [135]-[136] above – is simply not so, at least not when said, as here, in such uncompromising and unqualified terms. As a statement of law – and this is what it is – the sentence, in my judgment, is simply wrong.

161. The fact is that although, as I have said, the Act as such does not apply to the Prison Service or to YOIs, it *does* apply to children in YOIs, at least in the sense that the duties which a local authority would otherwise owe to a child either under section 17 or under section 47 of the Act do not cease to be owed merely because the child is currently detained in a YOI. But the offending sentence, even when read in the context of paragraph 3.1.4 taken as a whole, does not contemplate even this. There are, I do not doubt, many simple ways in which the offending sentence could be re-written so as to be wholly unexceptionable. But, as it stands, it is in my judgment not merely misleading but also wrong.

Issue (iii) – Is the *policy* in *PSO 4950* satisfactory?

162. I can take this matter very shortly because, with the sole exception of the first sentence of paragraph 3.1.4, no criticism was in the event directed by the Howard League to any part of the policy embodied in *PSO 4950*.

163. It is not for a judge to say whether *policy* on a matter as complex and technical as this is satisfactory. And, no doubt, any policy, even one which has been as carefully and conscientiously crafted as *PSO 4950* so obviously has been, is always capable of refinement and improvement in the light of experience.

164. But what I can say, and, as it seems to me, ought to say, is that so far as I can see, with the sole exception of the first sentence of paragraph 3.1.4, *PSO 4950* complies with domestic law, in particular with the Children Act 1989, and more than adequately meets the Prison Service's obligations under human rights law. I should add that, so far as I can see, *PSO 4950* also meets in every respect the imperatives to be found in *Working Together* and in *Framework for Assessment*.

165. That puts the point in somewhat antiseptic language. If I may say so, the Prison Service is to be congratulated for *PSO 4950*. It marks, as I have said, a revolution in official attitudes and a revolutionary break with the past. Its aspirations are noble. Humanity and regard for the dignity of the children in YOIs shines through on every page. *If* its policies, plans, protocols and procedures can be implemented as its authors hope and intend then children in YOIs will have small cause for complaint. The Home Secretary who in July 1910 made the famous speech with which Sir David Ramsbotham introduced his final report (*Annual Report of HM Chief Inspector of Prisons for England & Wales 1999-2000*, p 1) could I believe have no cause for complaint about anything to be found in *PSO 4950*. On the contrary, *PSO 4950* is, as it seems to me, an eloquent and compassionate – even passionate – attempt to give effect to those noble sentiments of which Mr Churchill spoke so movingly when addressing the House of Commons almost a century ago. As a *policy* there can be – there are – no serious complaints about *PSO 4950*.

Issue (iv) – Is the policy in *PSO 4950* being *implemented* in a satisfactory manner?

166. But when one passes to the question of whether this policy is being *implemented* in a satisfactory manner, the picture is much bleaker.

167. As Sir David Ramsbotham has been the first to recognise, much has been done to improve matters since *PSO 4950* was introduced. Much work has been done to develop and promote a particular and idealistic agenda to rescue children in YOIs from the failings of the old regime and to involve local authorities more centrally in Child Protection and related issues. There is a large and significant agenda for change, involving many actors both inside and outside the Prison Service. Things are, as Sir David put it, "unrecognisably better". Much needed to be done to improve the situation. Much has been done. Much is being done. *But* much still needs to be done.

168. Many of the reports of inspections of YOIs, as I have observed, are heartwarming. Some – too many – are anything but.

169. The picture painted by the joint Chief Inspectors' *Safeguarding Children* and by the Chief Inspector of Prisons' reports on the YOIs which I have highlighted in paragraphs [103]-[114] above is profoundly disturbing. As the joint Chief Inspectors say in paragraph 1.28 of *Safeguarding Children*:

> "HMI Prisons inspectors have highlighted the very serious risks to the welfare of young people held in Young Offender Institutions (YOIs). Although young people in YOIs are amongst those at highest risk of serious harm, their safeguarding had not been addressed in most areas."

170. The depressing and worrying themes which emerge, sometimes repeatedly, can be summarised as follows:

i) The Child Protection policies laid down in *PSO 4950* are not being implemented as they should be: paragraph 8.9 of *Safeguarding Children*; YOI Feltham A (paragraph [103]); YOI New Hall (paragraph [105]); YOI Brockhill (paragraph [106]); YOI Werrington (paragraph [107] – particularly disturbing because things seem to have gone badly downhill in what had previously been a 'flagship' YOI); YOI Onley (paragraph [109]).

ii) There are deficiencies in the operation of YOTs: paragraphs 8.2, 8.3, 8.20, 8.21 of *Safeguarding Children*.

iii) There are often no or inadequate links with local ACPCs, inadequate commitment by ACPCs and low levels of referrals to local authorities: paragraphs 8.8, 8.21, 8.22 of *Safeguarding Children*; YOI Feltham A (paragraph [103]).

iv) Bullying, self-harming and suicide remain serious and in some instances untackled problems: paragraphs 8.1, 8.4, 8.6, 8.10, 8.19 of *Safeguarding Children*; YOI Feltham A (paragraph [103]); YOI Brockhill (paragraph [106]); YOI Onley (paragraph [109]); YOI Huntercombe (paragraph [113]).

v) There are still institutions which in the view of the Chief Inspector do not meet Children Act standards: YOI Onley (paragraphs [77], [108], [109]); YOI Huntercombe (paragraphs [111], [113], 114]).

vi) There is degrading, offensive and "totally unacceptable" treatment of children being transported from court to YOIs: YOI Onley (paragraph [110]); YOI Huntercombe (paragraphs [111], [112]).

171. The Chief Inspector's reports on YOI Onley and YOI Huntercombe are damning indictments of these institutions. I am in no position to assess how well-founded the

Chief Inspector's findings and appraisals are in relation to these two institutions, for in the nature of things I have heard no evidence on the subject. All I have are the reports to which I have referred. But it is shaming that the Chief Inspector should feel obliged to say what she has in relation to institutions inspected well after the introduction of *PSO 4950* and, indeed, after the coming into force of the Human Rights Act 1998.

172. *Safeguarding Children* and the Chief Inspector's reports on YOI Onley and YOI Huntercombe shame us all. They ought to be – I hope they are – matters of the very greatest concern to the Prison Service, to the Secretary of State for the Home Department and, indeed, to society at large. For these are things being done to children by the State – by all of us – in circumstances where the State appears to be failing, and in some instances failing very badly, in its duties to vulnerable and damaged children.

173. If it really be the case, as the Chief Inspector of Prisons appears to think, that there are YOIs which are simply not matching up to what the Children Act 1989 would otherwise require, if it really be the case that children are still being subjected to the degrading, offensive and totally unacceptable treatment described and excoriated by the Chief Inspector – and Ms Grey, on instructions, was not able to confirm that these practices had been stopped – then it can only be a matter of time, as it seems to me, before an action is brought under the Human Rights Act 1998 by or on behalf of a child detained in a YOI and in circumstances where, to judge from what the Chief Inspector is saying, such an action will very likely succeed.

174. These are matters which are eminently justiciable, either in proceedings for judicial review in the Administrative Court or by a free-standing action in the Family Division under the Human Rights Act 1998. The only reason I say no more about them is that I do not have before me any concrete claim brought by or on behalf of any particular child.

175. These are not matters in relation to which any specific relief is sought. But I cannot help thinking that, within the context of the other matters in relation to which specific relief is sought, the Howard League has performed a most useful service in bringing to public attention matters which, on the face of it, ought to shock the conscience of every citizen.

Issue (v) – Ought the Children Act 1989 to be amended?

176. This is simply not a justiciable issue. It is not suggested that the Children Act 1989 is incompatible with the European Convention. In terms of policy, as I have already said, *PSO 4950* more than adequately meets the Prison Service's obligations under human rights law. Accordingly the question of whether or not the Children Act 1989 should be amended, as Sir David Ramsbotham for one thinks it should, is a matter of policy for consideration (if they think fit) by Ministers. Ultimately it is a matter for Parliament. It would be quite wrong for me to express any views at all on the matter. I decline to do so.

Issue (vi) – Should the standards required to be met in LASSUs also be required in YOIs?

177. Whether the *policy* regulating the standards required to be met in YOIs is lawful and compliant with human rights law is a justiciable issue and one on which I have already given judgment. Whether the *implementation* of that policy in any particular case is lawful and compliant with human rights law is also a justiciable issue – but one to be decided on the facts of a concrete case and not in the abstract.

178. But beyond that the issue here sought to be canvassed is no more justiciable than the previous one. The matter is one of policy for Ministers and Parliament. It would be quite wrong for me to express any views at all on the matter. I decline to do so.

Issue (vii) – Should local authorities have a greater role in relation to children in YOIs?

179. Insofar as this raises questions of policy the issue is non-justiciable and I decline to express any views on the matter.

180. Insofar as what lies behind this is the suggestion that the non-involvement of local authorities as remarked upon, for instance, in *Safeguarding Children* may give rise in certain circumstances to actionable breaches of statutory duty under the Children Act 1989 or actionable breaches of human rights law, then such a claim would, in principle, be justiciable – but only in properly constituted proceedings to which the relevant local authorities were parties.

181. No local authority has been joined in the proceedings which are currently before me. And, as I have already observed, no actual case involving either an identified child in an identified YOI or an identified local authority is the subject of the present proceedings. In the circumstances it would be inappropriate, and indeed unhelpful, for me to express any views as to how such a case might be decided, were one to be brought to court.

One final point

182. Before leaving the case there is one final point I must mention.

183. Part of the Howard League's case (though no part of the relief sought in its original Form N461) has been that local authorities have a "right of access" to children in YOIs. Its case has from time to time been put in different terms. In a letter dated 20 June 2002 it claimed that "local authorities should have an unimpeded right of access". In September 2002 it was being asserted that "social services staff … are free to have free and unencumbered access to their clients, such access being subject to safety considerations". Finally, Mr Wise indicated that he was seeking a declaration in the following terms:

> "The Secretary of State is obliged to allow local authority staff reasonable access to detained children within their area in order to carry out [their Children Act duties], the said obligations being subject to necessary security and safety considerations."

184. This is not, in my judgment, a topic on which there is any need for me to express any views. Nor would it be desirable for me to do so:

i) The question is raised entirely in the abstract. I am not presented with any case in which a social worker has been refused or hindered in obtaining access to a child in a YOI. I repeat in this context the comments I made in paragraphs [138]-[140] above.

ii) There is simply no evidence that the Prison Service or Governors of YOIs prevent or hinder local authorities from obtaining access to children in YOIs. Mr Leadbetter says in his witness statement that he is not aware of any YOI preventing social workers from undertaking their statutory duties. On the contrary, and as Ms Grey points out, *PSO 4950* is replete with procedures, protocols and requirements designed to ensure that there is proper inter-agency working between YOIs and local authorities (see paragraphs [80]-[90] above). Indeed *PSO 4950* addresses the question of access: see, in particular, the mandatory requirements in paragraph 4.4.2 of *PSO 4950* set out in paragraph [83] above. So the question upon which I am asked to rule is not merely abstract but entirely hypothetical. It is no function of the court – not even the Administrative Court – to give advisory opinions.

iii) Proper consideration of the question would necessitate a careful analysis, no doubt to be undertaken in the light of the European Convention, of several provisions in the 2000 Rules: see, for example, Rules 9, 10, 11, 16, 42 and 74-77. Indeed, Mr Wise sought to argue that the social worker's right of access to a client in a YOI was just as much a "fundamental right" as the journalist's right of access which was recognised in *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115. I say nothing about that submission. The exercise is much better undertaken in the context of some particular factual situation.

<u>Conclusions</u>

185. I can, accordingly, briefly summarise my conclusions as follows:

i) The Children Act 1989 does not confer or impose any functions, powers, duties, responsibilities or obligations on either the Prison Service (or any of its staff) or the Secretary of State for the Home Department.

ii) In that sense the Act does *not* apply as such either to the Prison Service or to YOIs.

iii) *But* the duties which a local authority would otherwise owe to a child either under section 17 or under section 47 of the Act do not cease to be owed merely because the child is currently detained in a YOI.

iv) In that sense the Act *does* apply to children in YOIs.

v) *However,* a local authority's functions, powers, duties and responsibilities under the Act, and specifically under sections 17 and 47 of the Act, take effect and operate *subject to the necessary requirements of imprisonment*.

vi) The statement in paragraph 3.1.4 of *PSO 4950* that "The Children Act 1989 does not apply to under 18 year olds in prison establishments" is wrong in law.

vii) With the sole exception of the first sentence of paragraph 3.1.4, the *policy* as set out in *PSO 4950*

a) complies with domestic law, in particular with the Children Act 1989,

b) more than adequately meets the Prison Service's obligations under human rights law and

c) also meets in every respect the imperatives to be found in *Working Together* and in *Framework for Assessment*.

viii) There is, however, serious cause for concern as to whether this policy is yet being *implemented* in a satisfactory manner throughout the whole of the Prison Service juvenile estate. The Joint Chief Inspectors' report *Safeguarding Children* and various reports by the Chief Inspector of Prisons of inspections of specific YOIs indicate that the State appears to be failing, and in some instances failing very badly, in its duties to vulnerable and damaged children in YOIs. There is material in these reports suggesting that some of these failings may be such as to give rise to actionable breaches of applicable human rights law.

<u>Order</u>

186. Subject to any further submissions that counsel may wish to make I propose to grant a declaration in the following terms:

"IT IS DECLARED THAT:

(1) The Children Act 1989 ("the Act") does not confer any functions or powers or impose any duties, responsibilities or obligations upon either the Secretary of State for the Home Department or the Prison Service (or any of its staff or employees).

(2) The Act applies to children in Prison Service establishments (including Young Offender Institutions) subject to the necessary requirements of imprisonment.

(3) Accordingly, the functions, powers, duties, responsibilities and obligations conferred or imposed on local authorities by the Act (and, in particular, by sections 17 and 47 of the Act) do not cease to arise merely because a child is in a Young Offender Institution or other Prison Service establishment; however such functions, powers, duties, responsibilities and obligations take effect and operate subject to the necessary requirements of imprisonment.

(4) The statement in paragraph 3.1.4 of *Prison Service Order 4950: Regimes for Prisoners Under 18 Years Old* that "The Children Act 1989 does not apply to under 18 year olds in prison establishments" is wrong in law."

187. There is, in the circumstances, no need for me to grant any further relief. The Prison Service can, I am sure, be relied upon to make whatever amendments to paragraph 3.1.4 of *PSO 4950* are required to give effect to this judgment.

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MR JUSTICE MUNBY: In this matter, for the reasons set out in the judgment which has already been supplied in draft to the parties, and copies of the approved version of which will be handed down in a moment or two, I propose, subject to further submissions of counsel, to grant declaratory relief in favour of the claimant in the terms set out in paragraph 186 of the judgment. Mr Wise, Ms Grey, as you will both appreciate, the form of declaratory relief which I propose, although it is in large measure modelled on, it does not in all respects follow, anybody's draft. Does anybody have any further submissions to make on the form of the declaration?

MR WISE: No, my Lord.

MS GREY: No, my Lord.

MR JUSTICE MUNBY: And do I take it that leaving aside the question of costs, the only relief which is therefore sought is the declaration in the form of my judgment?

MR WISE: Yes, my Lord.

MR JUSTICE MUNBY: Very well. I will grant a declaration in the terms set out in paragraph 186 of the judgment.

MR WISE: I am much obliged, my Lord. That leaves the question of costs. Clearly the general rule is that costs follow the event, and may I seek an order that my clients' costs be paid by the defendants, my Lord?

MR JUSTICE MUNBY: Yes, Ms Grey.

MS GREY: My Lord, firstly, may I say that we welcome this judgment and that as your Lordship is aware, the Prison Service has throughout the course of this litigation indicated that it fully agrees that the principles of the Children Act should be applied to children within the juvenile estate. Equally, it has always recognised that local authorities continue to owe duties to detained children. My Lord, we welcome the assistance that this judgment will give in enabling co-operation between the Prison Services and other agencies with responsibilities to children's welfare, as it does provide clarification of the rights and duties of each, and the inter-relationship between the Children Act and the regulations concerning young offenders. My Lord, as an indication of how seriously the Prison Service takes this litigation, your Lordship may wish to note that Mr Marishell(?), who is the head of Children's Safeguards, and Mr Whittle, who is the head of Policy Development in Children's Safeguards, have, of course, been present in this court throughout, they are sitting behind me. My Lord, turning more explicitly to the issue of costs. This challenge was not about the factual shortcomings within the Young Offenders' Prison Estate, to which we took a realist view, but in the context of lawfulness of our policy. First, my Lord, in response to my learned friend's application, on ordinary principles we would be entitled to the costs of the

challenge to the contents of Annex B to PS0 4950 which was dropped, your Lordship will recall, without any notification to the defendant at the court itself. It was said under that that the policy failed to make adequate provision to allow the authorities to carry out their duties under section 17 and 47. My Lord, I appreciate that the costs of that are not easily isolated or teased out, but at page 402, this was my detailed defence and I do not think it is necessary to take you to but your Lordship has the reference if necessary, we tried to tease out the various and varied strands in this argument, and much of the evidence of Mr Whittle and Mr Perfect on vulnerability, risks assessments, on assets, the role of yachts and inter-agency working, was directed at meeting that case. On the opposite side, much of the Howard League evidence, and I take for instance the evidence of Maggy Read as an example of this, was directed at this issue and/or even broader areas or issues of practice within YOIs. But, my Lord, if an issue between the parties had been confined to the short point of legal principle on the first sentence --

MR JUSTICE MUNBY: In a lot of them there has been no evidence at all.

MS GREY: Quite, my Lord. One pointer, one possible approach, and I take it at its extreme, one possible approach would have been for the claimant to have pointed at the note in Re SR and to have simply said to the defendant: amend your policy in the light of that agreed position without going to any further evidence. So, my Lord, this leads on to the second point which is that at all stages in this litigation both the arguments and the evidence have ranged far more widely than the narrow point of whether the duties owed under the Children Act applied within YOIs. Your Lordship, you will recall, has had to draw out seven separate issues that fell to be considered within this litigation: that is paragraph 127 of your Lordship's judgment.

MR JUSTICE MUNBY: Yes.

MS GREY: My Lord, the legal analysis that we set out in our summary defence, in our detailed defence and in our skeleton has been, we would respectfully submit, upheld by the

court. Crucially, as I said at the outset, we simply never denied that the duties owed under the Act by bodies such as local authorities continue to apply to children in YOIs. My Lord, I would respectfully submit --

MR JUSTICE MUNBY: Well, Ms Grey, that stance would be more convincing if it were not for the fact that the Home Office -- perhaps I should say the Prison Service -- with what in retrospect might be thought to be a certain degree of stubbornness, held against the claimant in the event either one failed, that the Home Office's published policy on this particular point was bad in law.

I appreciate that it is only one sentence out of a very long document, and I appreciate, certainly in respect of that one sentence, I have made, appropriately it seems to me, various observations about that document which I suspect will be music to the ears of those who sit behind you. The reality is that this matter only came into court because at a point when the parties were separated by a hair's breadth, the parties were unable to reach agreement on the appropriate form of public statement or effect of declaratory relief, and the stumbling point was, as I recall, the point on which the Home Office or the Prison Service was not prepared to bend, and, in the final analysis, Mr Wise has succeeded.

MS GREY: My Lord, two points: firstly, if your Lordship recollects, the draft declaration that is being put forward by the Howard League at that stage, it went substantially further than a declaration that the one sentence was wrong because on the back of that it sought to draw out various points about unencumbered re-access, about place of safety orders, and also did not make the crucial recognition of the impact of the necessary requirements of imprisonment, but your Lordship has by contrast recognised in the declarations that the court has granted, your Lordship will recollect the terms of that draft; it is on page 665 of the bundle. My Lord, in response, and as I said in submission to your Lordship, we did not seek, with respect, to defend the terms of that one sentence in any last-ditch sense. What we were concerned to do, my Lord, was to clarify what the scope of the legal obligations was, because

it has been extremely difficult in this case to achieve a recognition or common understanding of what the law actually was. Therefore, it is very difficult for the defendant to agree to strike down one sentence without potentially providing costs of (inaudible) unless there is clear agreement as to what one puts in its place.

MR JUSTICE MUNBY: In a sense, the strongest point in your favour, and it arises in two different ways, is that I believe, correctly in my judgment, I have teased out seven different issues in this litigation. I think I am also right in saying that the identification of those seven issues is something which appears for the first time in the judgment. That, in a sense, reflects the rather, dare I say it, undisciplined way in which the claimant has taken the lead and the defendant following on. The evidence has ranged far and wide, but that you can fairly say is more the responsibility of the claimant than the defendant. I suppose what you can say is of those seven issues that I have identified, five, six and seven, which took up a certain amount of evidence, I, in effect, said was simply non-justiciable, and that issue number four, which took up a large part of the evidence, was not, in fact, an issue in relation to which any relief was being sought.

MS GREY: My Lord, I have sought to make that point by putting, I hope in temperate terms rather than intemperate ones, points as to the very wide nature of issues that were put before this court by the Howard League, and the way in which it has been difficult to clarify as a result, the scope of their case. My Lord, therefore, we say that the defence of the first sentence of 3.1.4 has to be put in the context of the fact that we were concerned to clarify the alternative shape of any legal duties accepted in its place. That was difficult because of the repeated confusion between the statements that the Act applies to prisons and the Act applies to children in prisons.

MR JUSTICE MUNBY: Throughout the claimant's litigation, there are two areas of confusion. One confusion to what the Act says and does, and to, as some people would say, whether the Act ought to be extended, and to a certain amount of evidence whether the matter

was plainly non-justiciable. The other area of confusion is the one of lack of clarity and the lack of understanding of the distinction between whether that applied to the institution or whether it applied to the children in the institution.

MS GREY: Your Lordship will recollect the letter that we wrote in response to the Howard League when they said: our sticking point is this one sentence, and its conclusion when we tried to sidestep the debating of the sentence by saying: look, if we have an agreed formulation, a public formulation of the policy, then that can be referred to on either side and, furthermore, we can then consider issuing further guidance to our staff, taking account of all the consultation processes that are required before doing that. That was not a narrow minded: we will not budge on the terms of the sentence. It was, however, a necessary response to one of the features of this claim, which was not unarguable, as to the confusion of the wide variety of issues that have been canvassed within it. My Lord, particularly when one picks up the first point I made as to the issue that was dropped in its entirety by the Howard League, bearing in mind that any attempt to define issue costs is likely to lead to protracted difficulties in assessment and a further waste of time and costs, we would respectfully submit that the correct order would be no order as to costs. If your Lordship is minded to make some costs --

MR JUSTICE MUNBY: There are two separate points. One is whether in all the circumstances there should be no order as to costs; that has nothing to do with the difficulty of allocating costs for different issues. The separate question would be: if costs should follow separate issues, is that a practicable method, and assuming it is practicable at all, which of the two alternative methods should be adopted? A broad brush, across the board percentage order for costs or separate costs orders in relation to different issues, leaving it to the facts and the judge to tax the costs of each issue.

MS GREY: If we go back to the various issues that your Lordship identified, we would respectfully submit that, without going through a crude attempt to identify winners and losers,

we were either substantially successful on all but the issue on the offending sentence, or your Lordship ruled that the issues were not justiciable at all. So if we went down the issues costs, my Lord, that would result in a large number of issues being ones in which costs were ordered in our favour.

MR JUSTICE MUNBY: Issue number one -- it may be a fair view of looking at issue number one that there were real problems here of understanding the section as to how the rule applied, and there was a genuine need and a public interest in having those matters clarified; that was issue number one.

MS GREY: My Lord, that in itself would not give rise to a costs order in any party's favour.

MR JUSTICE MUNBY: Save this, that it leads on to issue number two which is the one you lost and the Howard League won. So it might be thought that issues one and two are issues -- if I am doing it issue by issue, in relation to which they can say, taking a broad view, they won and you have lost. Issue number three, which is the one which they abandoned on an issues basis, you could say the claimant who brings a claim and then throws his hand in before the court carries lethal consequences. Issue number four -- I will come back to number four in a moment. Five, six and seven were all, in effect, non-justiciable.

MS GREY: My Lord, it is relevant to note on those that the Howard League prepared evidence --

MR JUSTICE MUNBY: But there was a lot of evidence.

MS GREY: So what we are being asked to do is to pay the cost of the evidence that went to the non-justiciable issues.

MR JUSTICE MUNBY: On the other hand, the bulk of the evidence in favour of five, six and seven was primarily there for number four. Now, the trouble with number four is this: True, it is that they sought no leave in relation to number four, but it does seem to me, and this was not written with any view of costs at all in mind, its significance only became apparent to me when I began to think about the question of costs. What I said at

paragraph 175 does seem to me to have certain possible implications, and I appreciate it cuts both ways on the questions of costs. This is issue number four and issue number four is, of course, the question, assuming the policy is lawful, is it being properly implemented in my eyes? And, Ms Grey, I did not have to tell you that I have expressed highly critical views and views of very great concern on that topic in paragraphs 166 onwards. In paragraph 175, I say these are not matters in relation to which any specific relief is sought. Now you can rely on that as saying: why should I not have costs? But I cannot help thinking that in the context of the other matters in relation to which specific relief is sought, the Howard League has performed a most useful service in bringing to the public's attention, matters which on the face of it ought to shock the conscience of every citizen. Now, in a sense, you can pray in aid the first bit of that paragraph and Mr Wise the second bit. Issue four is really where all the evidence came in.

MS GREY: My Lord, I would say that it also went very directly to the issue that was dropped by number three, which was the policy, because that demanded from us the response that said: you cannot look at that policy. There are other things happening within the juvenile estate which go to the complaints that we made. Furthermore, my Lord, whilst recognising the force of what your Lordship has said at paragraph 175, one has to ask questions as to whether or not this sort of point sounds (inaudible). This is a matter where, really, one can draw a number of issues to public attention in a variety of forum, and it is not generally the point of litigation to recognise and to mark our way on the costs order, this use of what, after all, was publicly available information.

MR JUSTICE MUNBY: The reality, I suspect, and you may say that even if this is not in a proper litigation sense, is not the kind of conduct which should merit an order for costs. The reality in this case is, I suspect, and I am saying this so Mr Wise can address me on it if he wishes to, that the claimant had two objectives. One was the entirely legitimate and appropriate objective of clarifying a matter of legal security. The other, which in a sense it

might be said was piggy-backing along on the back of that, was, it might be said, the forensically less appropriate objective of using a public court as a forum for making campaign points.

MS GREY: My Lord, I do not need to respond to that directly. What I do say is that to the extent that your Lordship has expressed a view on paragraph 175, that is not, I would respectfully submit, a proper ground for making an order for costs against the defendant.

MR JUSTICE MUNBY: What do you say the order for costs should be? You say no order as to costs?

MS GREY: My Lord, the primary submission, no order as to costs. Failing that, my Lord, the reality is that any attempt, and I am being unbowed and pragmatic about this, to distinguish on issue costs is likely to cause protracted argument and difficulty in taxation.

MR JUSTICE MUNBY: If there is an order it has to be a percentage, has it?

MS GREY: It should be a percentage. My Lord, bearing in mind all the points I have made, in particular as to the difficulty of defining the legal scope of the argument and, therefore, the difficult of defining an alternative to the sentence, in particular when, my Lord, we explained the historical context and within that historical context, as your Lordship accepted, it was an inoffensive statement, the difficulty was in knowing the extent to which that was challenged as a proposition because of the reliance upon the evidence of Sir David Ramsbotham and the other supporting witnesses of this line of argument. So, my Lord, that being so, we would respectively submit that our fall-back position, which would be a percentage or a proportion, would be that your Lordship should make a fairly small percentage of the costs of the Howard League payable by the defendant. My Lord, unless I can assist you any further? Perhaps I should just make one short point which is really by way of pre-emption since I will not have a further reply, and I make it only because this was a point that was relied upon by my learned friend in arguments over adjournment, so I raise it with that background, that is the issue of impecuniosity. It is often said that NGOs have hard

earned resources and they are therefore in need --

MR JUSTICE MUNBY: I have already expressed views publicly on that topic in a reported judgment. If impecuniosity is to be relied upon it seems to me there has to be an evidential basis for it. I am not conscious that any such material is being put before me this afternoon.

MS GREY: My Lord, I would have submitted it is not a proper ground and that there are countervailing arguments to be put forward on behalf of the Prison Service, so I will leave it there.

MR JUSTICE MUNBY: Indeed. Ms Grey, if that matter is raised, I will allow you to make a reply to it.

MS GREY: I am grateful. Unless I can assist you any further, those are my submissions.

MR WISE: I will pick up the last point my learned friend makes, my Lord, that of impecuniosity. Those who instruct me entered this litigation knowing the costs liabilities and knowing that if they lost that they would have been subject, at least potentially, to a full costs order, and that was clearly in their mind before proceedings were issued. If your Lordship's judgment had gone the other way, I have no doubt at all that the defendants would have been seeking a full costs order against my clients. My clients are in no different position to any other litigants in that sense, my Lord. Your Lordship put his finger on the pulse when he said that prior to coming into court there were negotiations that brought the parties within a hair's breadth of our being together, and your Lordship has seen that it was the Howard League that made the proposals to settle. It was the initiative from our side to come to a sensible resolution of this dispute. Clearly conduct is a relevant matter when considering costs. When one looks at the correspondence and the proposed terms of settlement that your Lordship will recall having been taken to, it is crystal clear that the sticking point was the terms of the paragraph in PSO 4950.

MR JUSTICE MUNBY: That was one sticking point, but, as I recall, the final version of the form of order which you were seeking before the hearing before me started was a version

which included relief, declarations, call them what you will, in relation to access to prison. As I recall, in pretty uncompromising terms and in circumstances as you will appreciate, that remaining a live issue to the end of the hearing, I have, in effect, refused to grant any relief on the basis that the issue is, at present, abstract and hypothetical and if it is to be litigated at all should be litigated in the context of a concrete case.

MR WISE: That is correct, my Lord. However, your Lordship has in mind the initial proposals that were put forward some weeks before we came before your Lordship in court. There was an exchange of correspondence that then took place, and it was clear that it was the terms of the PSO that was the sticking point. If your Lordship recalls, the issue of access of social workers to children in prison was not an issue that was pleaded in the claim form, nor was it an issue that was raised --

MR JUSTICE MUNBY: Mr Wise, that is a very dangerous point to make because if I simply have regard to what is pleaded in the claim form, a very, very, very large part of this is not in the claim form, and I think I am right in saying that from beginning to end the only specific claim from the claim form that was not abandoned, was a pure point of law going to the legality or otherwise of what I call the offending sentence. That was a pure point of law. All right, in the light of Ms Grey's submission that it had to be put in its historical context, a limited amount of evidence would be relevant in order to put it in its historical context, but if that is the only issue in the case, then one certainly does not need three lever arch files of evidence and supplementary material.

MR WISE: In response to that, my Lord, if one goes back to the claim form, it is replicated in the skeleton argument that I put before your Lordship in the way in which I opened the case, there were two issues that were raised. One was the point of construction that your Lordship found in our favour, and the other was the operation of the policy itself; so it was those two points.

MR JUSTICE MUNBY: The second of those two points was effectively abandoned, if not

at the very beginning then very early to the beginning of the hearing.

MR WISE: It was abandoned, my Lord. It was felt it was not necessary to pursue it. Nevertheless, to understand the primary point, and what has always been the primary point, and again, if one goes back to the correspondence in the few weeks prior to the hearing taking place, it was this primary point that was the sticking point, if one goes back to that to understand fully and properly, as your Lordship has done, the way in which the Children Act impacts upon this group of children; those under 18 in Prison Service establishments, it is essential to understand the background to that, and it is essential to understand the policy and the workings of both the Prison Service and the Social Service Departments, and how services are provided for children in those establishments.

MR JUSTICE MUNBY: I simply do not accept that, Mr Wise. In order to understand law as is laid down by the Children Act, you do not have to understand the policy of either the Prison Service or the local authority, that is putting the cart before the horse.

MS GREY: If it is that simple, my Lord, then it was open to the defendants to have agreed with us prior to the hearing, as we asked them to do, that the policy was unlawful. Of course, your Lordship will recall that they denied it was a policy at all. They merely said it was a statement of the law, and that, with respect to the defendants, was a sleight of hand which was an attempt to avoid the hard-edged decision, and it is that hard-edged decision that your Lordship has been asked to finally adjudicate on.

MR JUSTICE MUNBY: The simple fact, Mr Wise, is in order to understand the actual background, the factual background has to be understood and the side issues running to it. All I would have needed was an agreed two-page summary following the lines of what is, in fact, the first 10 paragraphs of my judgment. Then, what I am sure you would not have had too much difficulty in producing, a fairly short agreed historical summary of the effect of the policy. The genesis of the policy was to be found in the very heart of Sir David Ramsbotham's article: if your Lordship is interested please read Ramsbotham pages this, this

and this, and article pages that, that and that. Here is the policy, please decide the issue. The fact is, as my judgment showed, all one has to do is to go through the Children Act.

MR WISE: That could certainly be one way of approaching it, my Lord, and, of course, hindsight is a very precise science in all of these matters and it is very rare, in any litigation, that one could say afterwards that every page in every document was essential for the trial to take place.

MR JUSTICE MUNBY: I can certainly say it was always my experience that the case in which I appeared before the court was infinitely clearer after I had heard the judge's judgment, than it had been as I stood up in the court and prepared my skeleton argument.

MR WISE: If I may say so, my Lord, that, I think, everybody in court would say applies to the present case and we are all grateful for the clarification that your Lordship has given. When one considers your Lordship's judgment which, I think, is 186 paragraphs long, it has been necessary to go into great detail to understand the relevant issues, and your Lordship identified a number of issues, sub-issues, if you like, from primary issues that were raised by the claimant. Many of those were neither pleaded nor argued, but were teased out of the evidence. I do not criticise your Lordship for doing that, that is a perfectly helpful way of proceeding but, nevertheless, they were teased out of the evidence that was presented to the court to enable the court to have a full understanding of the background and the relevant issues. My learned friend returned to an issue that she raised in the hearing itself and that is --

MR JUSTICE MUNBY: Mr Wise, just before you move on to that, plainly I have made my own selection of the material from the supplementary bundle which you and Ms Grey helpfully provided to me after the hearing concluded, but I think I am right in saying that overwhelmingly, the bulk of the material which is otherwise set out in my judgment, is material to which I have been specifically taken during the course of argument. I did not, obviously, make use in my judgment of every piece of evidence that you provided and there

were some additional paragraphs to which, obviously, I made reference, but I think you will find that the overwhelming part of the evidential material and quotations which are set out in my judgment, are those to which I was taken to by counsel during the course of argument, and that, although I put it neutrally, I was taken to those passages initially by you, and in very large measure when Ms Grey was doing a competent exercise, her approach was: well, if your Lordship is being taken to this topic then you want to be reading this paragraph as well as that paragraph. I quite understand, Mr Wise, but the fact is, for example, that at a very early stage at the hearing you took me to a lot of very important and very illuminating material on the nature of the prison population in YOIs, the social problems which children in YOIs suffer from, and so forth. There is simply no way that that evidence was required to be analysed in order to answer the purely legal question which arose on issues one and two.

MR WISE: We would say that it was important, my Lord, for this point, that it was important to understand the vulnerability of this group of young children, and although it is patently obvious to us all now having trawled through those documents, that was something that was not fully understood before the documents were put together. The purpose of it is, therefore, so that there is an understanding of the importance of the issue that is raised. It is, indeed, a very important issue as to whether the Children Act applies to children within YOIs and other Prison Service establishments. The focus of that and the importance of that is because of the particular needs and vulnerabilities of those children. We would say it was very proper to draw the court's attention to that. We attempted to draw your Lordship to primary documents that presented a fair and objective picture. It is very easy to say on one's feet that this is a vulnerable group of children, without having support for that statement. It is not good enough just to make a subjective statement, one needed to be more specific. We would say that it was useful information and clearly has informed your Lordship's judgment. In that sense it was justified in being put into court, which perhaps brings us to the point that my learned friend made which, I think, touched upon the advisory judgment issue that, I

think, was mentioned in the hearing as well. To use my learned friend's phrase "a forum for campaigning points", this was not a not a forum for campaigning points --

MR JUSTICE MUNBY: No, I think that was my phrase, not Ms Grey's.

MR WISE: I apologise to my learned friend if that is the case. If your Lordship was of the view that this was an academic argument that was best made outside of the court --

MR JUSTICE MUNBY: No. What I was saying was that there were very important issues which on any view required to be litigated, but those were issues, once you have abandoned the policy, those were the issues dealing with matters of law which of their nature would have required either no evidence or very limited evidence and, therefore, if those very important issues had been the ones that were concentrated on, the volume of the material and, therefore, the time and expense of the pre-trial preparation and the length of hearing would, I suspect, have been somewhat shorter. My comment, which is only, as it were, a paraphrase or corollary of what I said in my judgment to the effect that three of the seven issues were just non-justiciable, goes to a number of the topics which, in a sense, as I suggested a moment or two ago, piggy-backed along on the back of the legal issues. Ms Grey's point -- she tries to say that such is the bulk of the material that should not be before the court and such was the narrowness of the evidence in relation to that which was before the court, there should be no award for costs at all. The real thrust of her point is that on any basis, so she was saying, and there is some force to this, a significant bulk of the material and, therefore, a significant proportion of the costs, was directed to matters which did not, in fact, form the subsequent claim for relief. Some of which were non-justiciable and some of which, it might be thought, were matters which were being looked at -- I understand their being quoted in one sense -- brought before the court for the purposes of public education and public information. My point is not that that is an improper use of the court's functions, but that once you stray beyond the proper role of the court, and I accepted in my judgment that it may be that this court has a wider role than other divisions of the High Court, and as I said in my judgment,

this court, no doubt, today takes a broader view of its role. My point, and I think this is also Ms Grey's point although she has put it slightly differently, is that once one strays over that imperceptible boundary, it is not a question of misusing the court's process, but you are embarking on an exercise which may have costs implications.

MR WISE: One understands that point entirely, my Lord, and it is a perfectly sensible approach, however, whilst appearing good in the abstract, when one actually looks at the index to the bundle and then considers what material was there, there is very little that would not have otherwise have been there. My learned friend identified the statement of Maggy Read, and it may well be that that was unnecessary; that is seven pages out of the bundles. I do not think your Lordship has an index to the bundle to hand but obviously the preliminary claim form that is a (inaudible) extracts from the Children Act were necessary, then there was the case, ex parte Sims(?), which your Lordship was taken to, then we have Frances Crook's statements, and your Lordship will see that that is a relevant statement, there was a potential issue as to standing.

MR JUSTICE MUNBY: The first statement related exclusively to the question of standing.

MR WISE: And that was put in at the very outset, my Lord. It may well have been an issue, but as it happens it was not run by the defendants but nevertheless --

MR JUSTICE MUNBY: The simple fact is that the vast bulk of both the evidence and the materials which were used as exhibits to witness statements or otherwise evidential purposes, were not necessary in order to grapple with the only matters on which you both succeeded -- on which you sought relief and succeeded.

MR WISE: Yes. If one can just continue with at least a broad brush approach rather than go down every document that was in the bundles, the PSO and annexes were over 100 pages, my Lord. They had to be in the bundles by any understanding of the issues. It was perfectly appropriate. There are odd pages that on reflection, when one looks at them, may not be appropriate. One page from the Orchard Lodge Management of Difficult Behaviour -- your

Lordship was not even taken to that. Then there were some letters from prison officers and so on. There were a number of letters from local authorities, again, although appearing in quite a few documents, they were 20 pages in all. Then in the second bundle, this was the defendant's evidence, there was an acknowledgment of service, their response, an executive summary of the Onley report; that was 12 pages, Silber J's order, detailed defence, witness statement of Jeremy Whittle, of course that was the defendant's evidence, and so on. So on analysis, when one comes down to it, we would say, looking at it with broad brush figures, it would appear that well over 80 per cent of the bundles were indeed relevant to the issues before the court. There is always in these cases some documents that are extraneous, but if one errs on the side of caution, one would tend to put in a letter or a document rather than leave it out. There is a difficult balance for lawyers to strike in preparation.

MR JUSTICE MUNBY: The fact is, and it is not the first time that I have said this, this case is a good example of a major problem we now have to deal with, that there is no form of case management, conference pretrial review. There is no real point in current Administrative Court procedure where, save for a wholly exceptional case, the court is able to exercise any kind of control over what the issues are, what the material is, and the consequences. As I say this is not the first time I have experienced this, the consequences are if you want to get outside the kind of routine day-to-day Administrative Court affairs, you not infrequently end up in this kind of situation with lack of clarity as to what the issues are, lack of clarity as to what the evidential issues are, and a public body understandably taking a view that it has to consider the evidence which has been put in because if it does not, assumptions may be drawn against it and it may be criticised.

MR WISE: That is correct, my Lord.

MR JUSTICE MUNBY: But I cannot help thinking that if the procedure in this court had gone -- went as a matter of general practice in the way in which it is supposed to, that is to the Queens Bench Division and then the Family Division, the complaints about the bundle would

not arise because the court itself would have taken (inaudible) and would have required the parties to say: what are the issues? And give directions for the evidence.

MR WISE: The old oral permission hearings very often, of course, served that purpose, my Lord. We only rarely have those hearings now in court and, of course, that is the balance between the administrative convenience and the consequences of not having them.

MR JUSTICE MUNBY: It does throw upon the parties in a way in which is not thrown upon in the parties in courts which have active judicial case management -- an obligation can be discriminating by the material they put in. Being realistic, once the claimants start putting in wide-ranging evidence, whose significance and relevance to the key issues is not initially apparent, one runs a very real risk, and I think this is such a case, of the defendant feeling compelled to ask (inaudible) for fear it will turn up on the day and then be criticised for not.

MR WISE: That certainly is a risk, my Lord. We endeavour to clarify the issues in correspondence a few weeks before the hearing, and my learned friend says, presumably by reference to that exchange, that the defendants did not seek to defendant the offending sentence in the PSO; that simply is not correct, my Lord, they did seek to defend that sentence. They refused to accept the inevitable consequence and on analysis, clearly, we were right and they were wrong. My learned friend went on to say that they did not seek to defend the sentence, but they sought clarification. If a defendant refuses to recognise what was staring them in the face and then seeks clarification, then clearly they should bear the cost consequences of that.

MR JUSTICE MUNBY: Of that issue.

MS GREY: That issue was the stumbling block. Your Lordship identified --

MR JUSTICE MUNBY: No, the stumbling block on their side and the stumbling block on your side, or the other way round, was your insistence at that stage on having some kind of recognition of your stance on access.

MR WISE: My Lord, no. Can I take your Lordship to the correspondence because that was

put in as part of the negotiations of the settlement, my Lord. It was a proposed consent order. It was put to the other side for their comments or for their agreement, and that was stonewalled. It was the issue on which -- can I take your Lordship to -- it may be helpful to look at this because we need to look at the actual words rather than what is recalled. Does your Lordship have the small bundle that come to you towards the end of the hearing?

MR JUSTICE MUNBY: No, Mr Wise, that simply will not do. I dealt with this in paragraph 183 of the judgment. On 20 June, you were asserting an unimpeded right of access. In September, you were asserting free and unencumbered access subject to safety considerations.

MR WISE: That is correct.

MR JUSTICE MUNBY: That claim was persisted with through to the bitter end, and I set out in that paragraph the eventual form of relief which you were seeking. That was relief that you were seeking down to the end of the hearing and beyond. It was remained as a head of relief in the very helpful draft order which you sent to me after the hearing, and on that issue you have failed, because for reasons I set out in paragraph 184, the issue, as formulated, and notwithstanding this mountain of evidence, was an issue raised entirely in the abstract. It was not in the abstract entirely hypothetical. Indeed, I pointed out that the evidence rather tends to suggest that it was a non-point because despite this wealth of evidence, no point was single (inaudible) of impeded access, and I made some fairly pungent comments about the function of the court. That is the point which was being taken with vigour throughout and, in particular, it was being taken at the time of the aborted attempt to settle the thing.

MR WISE: It was taken at the outset of the attempt to settle; that was the plain from the papers. It was not an issue that was in the skeleton argument. If your Lordship recalls, during the course of the hearing, your Lordship, quite properly, investigated the consequences of the Children Act applying to children in YOIs, and that was an issue that was necessarily thrown up, and it was at that point that the point arose again. That was not a point that was

in my skeleton argument, my Lord, or in my initial submissions.

MR JUSTICE MUNBY: My recollection is that it arose at a fairly early stage in the hearing when I asked you, point-blank, what was the relief you were seeking. Your answer to that question was that you were seeking relief from it in this respect.

MR WISE: I do not recall that exchange, my Lord. Can I then, to make the point good, and this is the final point on this particular issue, there is a letter that was sent in this exchange that we are referring to, it has just been passed up to me from behind, I think it was in the papers, but can I just read this. It is a letter dated 17 October, clearly in the run up and while I had been concentrating on the issues. This is a letter from the legal offices of the Howard League to the Treasury Solicitor. What it says in conclusion, the final paragraph:

"While we remain able to resolve this matter by agreement we cannot agree to any settlement that does not recognise the statement that the Children Act 1989 does not apply to under 18 year-olds in prison establishments ... is wrong in law. Given that you appear to accept the statement is wrong in law, we would invite you to reconsider your response ... "

It is that issue that was the focus, my Lord. That was not, as I understand it --

MS GREY: It was, my Lord. It was responded to at page 680 of the bundle.

MR WISE: I am obliged to my learned friend. She is quite correct. There is a response dated 24 October, I will pass it up to your Lordship if you do not have it to hand.

MR JUSTICE MUNBY: What is the thrust of the response?

MR WISE: It commences thus, my Lord:

"We are disappointed that you continue to focus on the short sentence in paragraph 3.1.4 ... "

MR JUSTICE MUNBY: It is that letter, I remember, yes.

MR WISE: " ... choosing to ignore the context in which the statement is made". It goes on that it will create confusion if this statement is set aside.

"Are we able to assume from your letter that your only objections to the revised draft consent order [that was clearly the response to it] is the absence of a statement that the

PSO was wrong in law. In our view, such a statement would be neither correct nor helpful."

MS GREY: Could my learned friend read on, please?

MR WISE: Should I pass it up to your Lordship, it is a long letter.

MR JUSTICE MUNBY: I recall the letter very well, but I do not recall every line of it.

MS GREY: My learned friend was referring to the penultimate paragraph on the first page.

MR JUSTICE MUNBY: My very clear impression, Mr Wise, when I say that I mean my very clear impression having, as you will appreciate, fawned over this material in very considerable detail and with great care, normally during the hearing while I was writing my judgment, and it is not an impression that has, in any way, shifted thus far this afternoon, is that the parties did come extremely close to settling, that in the event they did not, and it might be said that neither party particularly covered themselves in glory, and that whatever it was that prevented there being a final meeting of minds was not all on one side, but the idea, Mr Wise, that the only reason the matter broke down was because of the stance of the Prison Service on the offending sentence seems to me to be something which goes beyond anything which one can fairly read into the --

MR WISE: I can tell your Lordship unequivocally that that was the case. We took the initiative of trying to settle this case. We focussed on this particular point as being a point that needed resolution.

MR JUSTICE MUNBY: As I recall, the Home Office specifically asked you at one stage in the correspondence whether it really was the case that you were demanding a right of access, and that letter was either not answered or was answered with a letter saying: yes, that is what we are asking.

MR WISE: I do not recall that detail, my Lord.

MR JUSTICE MUNBY: The simple fact is that from beginning to end of the hearing in front of me, that was part of the relief you were seeking.

MR WISE: Your Lordship has been, of course, considering this exchange prior to the

hearing, and, in our submission, it is crystal clear that it was that point that was the sticking point. We took the initiative and clearly conducted, prior to litigation, issues which your Lordship shall have regard to when considering costs. The consequences, of course, of their failure to accept what we would say is now clearly the correct approach that we push forward, is that the defendant should pay the costs. My learned friend's fall-back position was that a percentage costs order should be made. We strongly submit that it should be a full costs order, but if your Lordship is not with me on that, then one turns to consider what an appropriate proportion would be in this case. If one looks at the way in which the case was pleaded, both in the claim form and the skeleton, and it is perhaps more useful to look at my submissions rather than the claim form. Your Lordship will recall that those submissions were extensive, they went to 23 pages. There was an issue that was not pursued. Those 23 pages were 54 paragraphs, my Lord. That also included a reply to my learned friend's skeleton so, in some respects, that is a skeleton and a written reply as well. Within those 54 paragraphs, there is one paragraph, paragraph 50 --

MR JUSTICE MUNBY: Your point, I think, is that if you count up the pages which I actually crossed out when you told me that you were not pursuing the attack on the legality of the policy apart from the offending sentence, that it amounts to about a page --

MR WISE: It is not even a page, it is one paragraph which is less than a page. Most of the submissions were, as your Lordship identified, background material to give the court an understanding of the relevant -- what we would say were the relevant matters. Your Lordship may think that that was over-extended and we went into too much detail on that, but nevertheless, that was there before your Lordship. We have said why we thought that it was important for the court to have the details as to the nature of the young offender population; we would submit that that was perfectly proper. We took your Lordship to a number of Sir David Ramsbotham's reports, again, we would say that that was perfectly proper and helpful to the court in understanding the way in which young people --

MR JUSTICE MUNBY: Let me just ask a specific question: what evidential relevance did either, what I call the two damning reports, Onley and Huntercombe, what evidential relevance do either of those reports have to any issue of law going to the applicability of the Children Act or the lawfulness of the offending sentence?

MR WISE: Simply this, my Lord: the defence put forward by the defendants was, essentially, that it did not matter whether this sentence was wrong, that the spirit of the Children Act was applied, it infected all the PSO 4950, and your Lordship found that it did. The purpose of drawing your Lordship's attention to Onley, Huntercombe, Sir David Ramsbotham and these other documents was to show the court that in practice, as your Lordship has recognised, the spirit of the Children Act is not applied to either Onley or Huntercombe as evidenced by those particular reports.

MR JUSTICE MUNBY: Precisely, My Wise, that is my point and that is not the matter in relation to which you sought any relief.

MR WISE: No, my Lord. Given that all relief in this court is discretionary, and declaratory relief especially so, given that, as we say, the relief is discretionary, if the defendants had been able to satisfy the judge hearing this case that regardless of the offending sentence, that the principles and practice, or whatever the phrase is in the PSO, of the Children Act, is properly applied in all the YOIs, that there is no problem and, therefore, it is a purely sterile debate, it has no relevance to the children on the ground, then there was a real danger, we would say, a real possibility, that the court would have declined to have offered or have made any discretionary relief. That must be therefore correct to be able to counter the points that are made on behalf of the defendant. It was that point that was made continually in the correspondence immediately prior to the hearing.

MR JUSTICE MUNBY: It is a very ingenious argument Mr Wise, but it was your camp who set the ball rolling.

MR WISE: It was but, of course, we had to respond to that as well, and regardless of what

was in the permission bundle, one focuses on what was before the court at the final hearing. We would say it was quite necessary to deal with that at the final hearing, and, on analysis, when one looks at the index of the bundle and with hindsight looks back at whether there was any extraneous material, whilst it is readily accepted that there are some documents that the court could have done without, the vast majority, the overwhelming majority of the papers were properly before the court and were necessary for a full understanding --

MR JUSTICE MUNBY: So you say that there should either be an order for costs in favour of the Howard League, full stop, or, if it is a percentage, you say it should be a very high percentage?

MR WISE: Certainly a very high percentage, My Lord. If one returns to the point that I was arguing moments ago, in terms of number crunching, if I can put it that way, 1 paragraph out of 54 was not pursued -- it must be a 90 per cent, or thereabouts, costs order.

MR JUSTICE MUNBY: That is using your skeleton as the appropriate mechanism for quantifying the percentage. If one uses the bulk of the evidence which, in a sense, is one of the mechanisms Ms Grey was invited to use, if one uses the bulk of the evidence as the appropriate mechanism for calculation, you get precisely the same percentage the other way round, because the points on which you ran and succeeded were points of law which required, if they required evidence at all, 10 or 15 pages rather than 600 or whatever it was.

MR WISE: We would say not, my Lord. The PSO itself was over a hundred pages long; that simply is not a sustainable approach. Save for the statement of Maggy Read and, one concedes, odd letters and odd documents, we would say that the vast majority of papers, if not all of them, were properly before the court. Returning to the point, we would say it was necessary to look at the detail of that policy in order to understand properly the underlying issues that this case has thrown up. It clearly has thrown up very important issues as your Lordship has recognised. Your Lordship said a few moments ago that the Howard League had performed a public function or, I forget what the phrase was, in bringing this action. "A

useful service in bringing to the public's attention", is the way your Lordship put it in the judgment.

MR JUSTICE MUNBY: Yes, Mr Wise, but, this is the point I made earlier when I had to deal with questions of costs, those organisations which choose to come into this court for the purpose of making a point or getting a point before the public, may be acting legitimately but they cannot be expected to escape the normal costs consequences if the litigation ends up in a particular way.

MR WISE: This litigation has ended up, of course, in my client's favour, my Lord. We were prepared, as your Lordship has seen, to settle essentially on the terms that your Lordship has finally determined. So in those circumstances, we say this is a clear case where the costs should be borne by the defendants. I have laboured the point, my Lord, perhaps I have gone on for too long.

MR JUSTICE MUNBY: No, thank you very much, Mr Wise.

MS GREY: My Lord, will you allow me to hand up one letter because it is relevant to my learned friend's response to you. Your Lordship put to him that he and his clients had been insisting on an unimpeded right of access and he said he had no recollection of that. I think it is right, therefore, to refer your Lordship to page 621 of bundle 2. If I simply hand up the letter that would be quicker. It is the culmination of an exchange of correspondence. There are actually four letters, but the last one at 621, I simply hand it in, my Lord, without attempting to make any submissions.

MR JUSTICE MUNBY: Yes.

MR WISE: I do not recall that letter, my Lord, I do not have it in court. The point I was making was --

MR JUSTICE MUNBY: It is precisely the letter which I gave to you all when I made the observation that I did before. The simple fact, Mr Wise, and there is no getting away from this, is that your clients raised, in the most unequivocal terms, in correspondence during the

period of negotiation, a claim to unimpeded access; that is a fact. It is equally a fact that when at quite an early stage in the hearing I asked you what relief you were seeking, amongst the relief which you then formulated was a claim for declaratory relief in relation to that. That is a matter which you pursued throughout and, indeed, I think I am right in saying, a declaration in relation to that matter was included in the draft that you very helpfully sent me after the hearing had concluded. So the fact is, at least from June of this year down to the moment I was invited to give judgment, it was part of the relief which was being pressed for by the Howard League, and it is relief which, for the reasons set out in my judgment, I declined to grant.

MR WISE: That was one of a number of issues we raised, my Lord. There was very little time -- I think the hearing took a full two days if I recall. It did not occupy the court for a considerable time. There may have been an hour at the outside on that particular issue, my Lord.

MR JUSTICE MUNBY: This case, as anyone who has read my judgment will appreciate, is somewhat unusual in its forensic contents. In part, that is a consequence of what has, it seemed to me on this case and on previous occasions, the unfortunate fact that case management as practised in other divisions of the High Court, is not yet an integral part of practice in the Administrative Court. The parties, therefore, very much have the burden thrown on them of deciding how they prepare their case, what evidence to adduce and so on and so forth. That throws on the parties and throws on the claimant in particular, an obligation to exercise care and discrimination in the selection of issues and the adducing of evidence in support of those issues. Time was when the courts only comparatively rarely made costs orders reflecting success or failure on individual issues. That somewhat relaxed approach, as had been made clear by a number of decisions of the court, is no longer acceptable in the post Woolf era and, as it so happens, I had occasion last year to observe that this court is no different from any other division of the High Court, and that claimants who

raise a multiplicity of issues and succeed on only some, must recognise that they expose themselves to the very real risk of not recovering the whole of their costs, so much by way of general observation. The present case is, as I have said, unusual in its forensic shape.

Early on, during the course of the hearing, I had to ask Mr Wise on behalf of the claimant precisely what the relief was he was seeking because that was not something that was immediately obvious if one read not merely the N461 and the grounds, but also the very voluminous evidence and the skeleton argument. As matters developed, it seemed to me that there were, as I set out in paragraph 107 in my judgment, seven different issues which arose. The first three of those were points of law. They did not, of their nature, require voluminous evidence. Allowing for the fact, as fact it was, that they were points of law which if they had been properly argued and fairly decided, required some elucidation of the factual background, a comparatively modest volume of evidence would more than have sufficed to set out the historical background and surrounding circumstances in which those legal issues fell to be determined. Certainly the proper resolution of those issues would not, in my judgment, despite everything that Mr Wise has said to try and persuade me to the contrary, have required that volume of evidence and other material which, in they event, I was shown. I have said there were three issues which raised matters of law: the third of those issues was, in the event, abandoned at the beginning of the hearing, although only at the beginning of the hearing. The fourth issue was, in principle, a justiciable issue. It was, as my judgment makes clear, an issue of the very greatest gravity upon which, as it happens, I have felt appropriate and indeed necessary to express views strongly critical of the Prison Service. However, as my judgment makes clear, that was not, in fact, an issue on which from beginning to end any relief was sought by the claimant. It was, in truth, an issue raised in the abstract. An issue which, as I pointed out in my judgment, more appropriately requires to be dealt with on the concrete facts of an individual case.

The remaining three issues, in my judgment, were, in essence, matters of policy, and for that

very reason, non-justiciable in this court. Without condescending to a minute analysis of the evidence, and an attempt to calculate how much of the evidence was and how much of the evidence was not fairly needed in order to deal with the matters of law, it does seem to me on any reasonable view, despite everything said to me by Mr Wise in seeking to persuade me to the contrary, that a substantial volume of the evidence and other materials in the case, of transcending interest and importance although it may have been, not least in relation to the fourth issue, was evidence that it was not reasonably necessary to have adduced in order to pursue those matters in relation to which the claimant was both seeking leave and was, in the event, successful. It goes without saying that to the precise extent that such evidence and other materials were not reasonably necessary, significant costs must have been incurred, both in the preparation of that evidence on the one side, in terms of the valuation and analysis of that evidence and the preparation of the other side, and in terms of the prolongation of the hearing.

As against all that, the fact of the matter is that the claimant has brought before the court matters of the very greatest public importance. The claimant has brought before the court a major issue of law as to which there has been, at least to some extent, controversy in the past, namely, the applicability of the Children Act 1989 to Young Offender Institutions and to children incarcerated in Young Offender Institutions. The fact remains, although I do not accept that this was the only reason why the negotiations between the parties to compromise this matter ultimately proved unsuccessful, the fact is that on that highly important issue, the defendant, for whatever reason, was not willing in the course of negotiations to make the concession required to satisfy what turned out, in the light of my judgment, to be the justifiable complaints of the claimant. On that issue the claimant has succeeded.

Ms Grey, on behalf of the defendant, submits that in all the circumstances the appropriate order is that there be no order as to costs. Mr Wise, for his part, on behalf of the claimant, says that the claimant should have the entirety of his costs. Perhaps, not altogether

surprisingly, because so often disputes as to costs produce that clarity of forensic (inaudible) with which we are all so familiar, I do not agree either with Ms Grey or Mr Wise.

This is a case which, in my judgment, the claimant is entitled to recover part of its costs but not the whole of its costs. The reason why I say it is entitled to recover some and not all of its costs is that the claimant has, despite opposition mounted until the end of the hearing, succeeded on significant and important parts of its claim. On the other hand, it has failed on part of its claim. Part of that failure being its abandonment of part of its case on the first day of the hearing, and moreover, it has, in the way in which I have already mentioned, adduced more evidence and, therefore, incurred more costs than was reasonably necessary. On the other hand, the claimant has failed on certain issues and has inappropriately, in relation to those issues, succeeded in overburdening the court with evidence. It is not pragmatically convenient to make an order for costs related to individual issues. That would merely condemn the parties to the slow torture of an exceedingly complicated and long-drawn-out taxation of costs before a taxing judge. This is a case in which, as indeed both Mr Wise and Ms Grey accept, if there is to be a partial order for costs, that should be expressed in terms of a percentage rather than in terms of separate orders for costs in relation to separate issues. Inevitably, there can be no mathematical or scientific basis for saying that X per cent is the right figure and Y per cent is the wrong figure. Inevitably, whatever percentage or figure one comes to is a figure which, in part, reflects an evaluation of the various factors and, in part, reflects an evaluation, necessarily imprecise, of the extent to which particular factors do or do not find present in the pounds, shillings and pence column of the bill of costs.

Doing the best I can, having regard to all the matters pressed upon me both by Ms Grey and by Mr Wise, having regard, in particular, to the specific matters aspect of litigation which I have already mentioned, and doing my best against my general knowledge of this litigation to assess the impact of those various elements against the overall bill of costs, I have come to the conclusion that the defendant should pay the claimant 50 per cent of the claimant's costs

of these proceedings. Accordingly, Mr Wise, what I propose to do is to make an order, subject to any further submissions, containing declarations in the form set out in my judgment, and in addition to that, I will simply order that the defendant is to pay the claimant 50 per cent of the claimant's costs of these proceedings.

MR WISE: A detailed assessment, my Lord?

MR JUSTICE MUNBY: Yes.

MR WISE: I am much obliged.

MR JUSTICE MUNBY: Is there anything else?

MS GREY: No, my Lord.

MR JUSTICE MUNBY: Thank you very much.