Neutral Citation Number: 2010 EWHC 196 [Admin]

Case No: COP 11705153

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9th February 2010

Before:

MR JUSTICE MCFARLANE

Between:

The London Borough of Enfield — **Applicant**

- and -

SA [1]
(by her litigation friend, the Official Solicitor)

FA [2]

KA [3] — **Respondents**

Mr H Harrop-Griffiths (instructed by **the Borough Solicitors**) for the **Applicant**
Mr Andrew Bagchi (instructed by **Irwin Mitchell**) for the **1st Respondent**
Mr John Reddish (instructed by **Anthony Louca**) for the **2nd and 3rd Respondents**

Hearing dates: 7, 8 and 9 December 2009 and 15 January 2010

Approved Judgment

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

.....

THE HONOURABLE MR JUSTICE McFARLANE

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

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

Mr Justice McFarlane:

1. SA was born on 6 June 1979 and is now aged 30 years. She suffers from a degenerative brain disorder and epilepsy, in consequence of which she has a significant learning disability and exhibits challenging behaviour. SA's father, FA, is aged 72 and her mother, KA, is aged 69. Until recent times SA lived entirely with her parents. On 29 April 2009 the London Borough of Enfield, which is the local authority for the area in which SA lives, issued these proceedings in the Court of Protection and on 13 May an order was granted following a without notice application by the local authority authorising the authority to remove SA from the family home. In essence the local authority alleges that these elderly parents are unable to cope with their adult daughter's challenging behaviour and at times they have been physically abusive to her. In addition it is alleged that the parents were in the process of arranging to have SA married to a gentleman in Bangladesh. It is asserted that SA lacks capacity to determine key aspects of her residence and care. Declarations are therefore sought under Part One of the Mental Capacity Act 2005 both as to her capacity to make decisions and, if she lacks capacity, where her best interests lie. The present hearing has been a fact-finding hearing to determine whether any of the allegations of abusive parenting are established.

2. During the course of the hearing the following matters of procedure and law have been raised, apparently for the first time in the new Court of Protection jurisdiction established under the MCA 2005:

   a) Whether hearsay evidence is admissible in Court of Protection proceedings?

   b) If hearsay evidence in general is admissible, is hearsay evidence emanating from a witness who is, by reason of mental disability, not competent as a witness admissible in Court of Protection proceedings?

   c) Where the subject of Court of Protection proceedings has been interviewed by police in an 'Achieving Best Evidence' interview are the fact of that interview and a copy of the DVD recording of it matters to be disclosed to the parties and the court?

   d) Where police propose to interview a person who is the subject of pending incapacity/best interest proceedings in the Court of Protection ('P'), are the police and/or applicant local authority under a duty to disclose the proposal to the court and parties in the Court of Protection and how is the issue of P's capacity to consent to the interview to be addressed?

3. In order to set these matters of law and procedure in context, I propose to give a summary of the chronological history.

Background

4. In 1985 SK and her family (she is one of 7 children) moved from their home in Bangladesh to take up residence in the UK. Shortly after their arrival, when SA was six years old, a diagnosis of Leukodystrophy was given to the degenerative brain

disorder from which she suffers. That diagnosis remains in place today. In an assessment carried out for the purposes of these proceedings by Dr KX it was reported that, whilst no formal measure of intellectual ability such as an IQ test, had been carried out, it was possible to estimate from SA's clinical presentation and her history that she is functioning within the bracket of between 50 and 69, which is typically associated with Mild Learning Disabilities.

5. In his statement to the court the father describes how he and his wife have devoted their lives to SA and have worked in partnership with the local authority for many years. He describes how, as SA has grown older, her behaviour has become more challenging. Latterly, whilst in their care, SA was being attended by professional carers three times a day, seven days a week.

6. From about 2002 onwards SA has been attending a local day centre. The parents also claim that at times overnight respite care has been attempted, but they report that on each occasion SA has failed to settle and they have had to bring her back home. The suggestion that SA has had respite care prior to April 2009 is not accepted by the local authority.

7. On 21 April 2009 SA was seen, together with her parents, at her local GP surgery by Dr TV. The GPs note of this consultation includes the following:

> 'During consultation, when asked whether the family had plans for SK to live independently to the family in a special home where she could be supported, the father said this would be "dangerous" for her and she could have more fits. He said the family has plans to get her married. Although nothing is arranged at present, they have found a family in Bangladesh who have agreed to their son marrying SA. The family met SA five years ago and "knows she is sick". The boy is making arrangements to come to England. When I asked SA whether she wants to get married she said "no" twice and the third time "I don't know". The father said she had told her mother she wanted to get married.'

8. The local authority's application in the Court of Protection was issued on 29 April 2009 in the light of the social workers developing concern that SA was the victim of physical abuse at home and, also, that there were plans for her to be married.

9. At a without notice hearing on 13 May 2009, Hogg J made orders authorising SA's immediate removal from the family home. At the first on notice hearing on the 20th May, Coleridge J gave directions and made orders permitting SA's continued residence away from the family home but provided for supervised contact to take place with her parents on no fewer than three occasions each week. Amongst the directions made at that hearing was one requiring the local authority "to make standard disclosure by 4pm on the 3rd June 2009 of SA's social care records compiled since 1 January 2003." The terms of this direction are plainly relevant to the arguments about disclosure to which I will turn in due course.

10. The arrangements for SA's interim care were varied at a hearing before Charles J in June and provided for SA to continue to reside in local authority accommodation each weekend, but to live with her parents during the week.

Capacity

11. In a report dated 8 November 2009 Dr KX advised as follows with regard to SA's capacity:

    i) she lacks capacity to litigate;

    ii) she does not have the capacity to decide where she should reside, who should provide her with care, where that care should be and with whom she should have contact;

    iii) she does not currently have capacity to consent to sexual relationships or marriage;

    iv) her cognitive limitations are permanent and although with maturation, education and training some improvement in knowledge and functioning may be expected, Dr KX does not believe that any improvement could be of such a degree that she would in future acquire capacity in relation to each of these areas, save with the possible exception of sexual relationships and marriage.

12. A matter which is of relevance to the issue of hearsay evidence is Dr KX's opinion as to SA's competence as a witness:

> 'In my opinion SA is not competent to act as a witness. The level of intellectual and social impairment would interfere significantly with an understanding of the oath and the whole process. Moreover, it is my view that her competency as a witness is not likely to be affected by any ' special measures' [for example as may be available to a witness under the Youth Justice and Criminal Evidence Act 1999]'.

13. The issue of capacity will ultimately be a matter for the final hearing. No issue is, however, taken at this stage with the interim declarations relating to capacity that are currently in force.

The Factual Allegations

14. The local authority chronology produced in these proceedings, which runs from 2004 onwards, records regular reports of SA assaulting care workers, falling, being seen with bruises on various parts of her body and making complaints of injuries being caused by care workers or members of her family. The records show that SA, who is a 30-year-old woman of robust build, on occasion may lose her balance and fall or experience an epileptic fit which in turn leads to falls. The record shows an increase in reported incidents either of complaint by SA and/or observations of injury in recent years (3 in 2007, 5 in 2008 and 13 in 2009).

15. From that chronology the local authority has produced a schedule dated 19 June 2009 setting out some 38 allegations of fact which they seek to establish at this hearing. These allegations can be summarised under the following headings:

    a) assault on SA by her father and mother;

    b) parental failure to keep SA safe from sustaining physical injury;

c) parental failure to cooperate with the caring agencies; and

d) parental plans to marry SA to a gentleman in Bangladesh.

There are 11 allegations of assault and all, save for one, arise from reported remarks made by SA to one or other of the professionals. The one exception relates to an allegation that SA was struck in the mouth by her father causing a cut to her lip on 12 February 2009, the allegation relies upon eyewitness evidence of two care workers who were in the home and remarks made the following day by SA to two social workers.

16. Originally the local authority sought to rely upon occasions where bruising or other similar marks of injury were observed on SA, with or without there being any accompanying reported allegation from SA, as proof of assault by her parents. At the start of the hearing the local authority conceded that it was not possible to connect any particular observed bruising with any individual incident or allegation. It is plain from the professional and family evidence that SA is prone to sustaining bruises in the ordinary course of her life in entirely accidental circumstances. It would therefore be impossible to conclude that any particular bruise was caused by ill-treatment without more evidence as to its origin.

17. It follows that, save for the incident on the 12th February 2009, the evidence relied upon by the local authority to prove physical ill-treatment relates entirely to what SA is reported to have said to professionals. It is therefore necessary to consider the status of hearsay evidence in general in Court of Protection proceedings and, secondly, the approach to such evidence, if it is admissible at all, where the primary source is, as here, a person who is not a competent witness by reason of mental infirmity or lack of understanding.

Hearsay evidence in Court of Protection proceedings

18. The Court of Protection is a creature of statute being established under the Mental Capacity Act 2005 and the Court of Protection Rules 2007. It is of note that neither the 2005 Act nor the 2007 Rules directly refer to hearsay evidence (see paragraph 24 and following below). This is in contrast to the regimes for civil proceedings and for family proceedings, which each have express statutory provisions concerning the admissibility of hearsay evidence. In order to set the scene, I therefore propose to describe in brief terms the position in these other two jurisdictions.

(a) Hearsay in civil proceedings

19. The Civil Procedure Act 1997, s 1 provides that the Civil Procedure Rules (currently the CPR 1998) govern the practice and procedure to be followed in the Court of Appeal (civil division), the High Court and county courts. Proceedings before the Court of Protection are expressly excluded from the application of the CPR 1998 by rule 2.1(2). Under COPR 2007, r 9 the CPR 1998 apply in any court of Protection case which is not expressly provided for by the Court of Protection Rules.

20. Whilst the CPR 1998 do not apply to the Court of Protection, it is instructive to note the express provision that is made for hearsay evidence. CPR 1998, Part 33 concerns hearsay and makes a number of express provisions which facilitate the Civil Evidence

Act 1995. Under the CPR and the 1995 Act, 'hearsay' is defined as 'a statement made otherwise than by a person while giving oral evidence in proceedings which is tendered as evidence of the matters stated' [CEA 1995, s 1(2); CPR 1998, r 31.1].

21. Under CEA 1995, s 1(1) 'in civil proceedings evidence shall not be excluded on the ground that it is hearsay'. 'Civil proceedings' are defined by s 11 as meaning 'civil proceedings before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement of the parties'. The 1995 Act establishes a process requiring formal notice of an intention to adduce hearsay evidence (s 2), describes the process by which the weight, if any, that may attach to a piece of hearsay is to be evaluated (s 4) and makes provision for issues of competence and credibility (s 5). With respect to this latter aspect, s 5 is in these terms:

> 'Hearsay evidence shall not be admitted in civil proceedings if or to the extent that it is shown to consist of, or to be proved by means of, a statement by a person who at the time he made the statement was not competent as a witness. For this purpose "not competent as a witness" means suffering from such mental or physical infirmity, or lack of understanding, as would render a person incompetent as a witness in civil proceedings; but a child shall be treated as competent as a witness if he satisfies the requirements of section 96(2)(a) and (b) of the Children Act 1989 (conditions for reception of unsworn evidence of child).'

22. In general, the basic test for competence in civil proceedings is whether the witness is capable of understanding the nature of an oath and of giving rational testimony (*Phipson on Evidence* 16th Edn, para 9-08) and a person's competence may be affected by a mental or intellectual impairment. It is Dr KX's opinion (see paragraph 12 above) that SA is not competent to give evidence. That opinion has not been challenged during the present hearing and is therefore accepted as a basis for this judgment.

(b) Hearsay in family proceedings

23. In relation to family proceedings, it is the hearsay evidence of children which is the subject of express statutory provision. The following provisions are of relevance:

a) The Children (Admissibility of Hearsay Evidence) Order 1993 which provides that evidence given in family proceedings in connection with the upbringing, maintenance or welfare of a child will be admissible notwithstanding any rule of law relating to hearsay. The 1993 Order is itself made under an express statutory provision (CA 1989, s 96(3)) empowering the Lord Chancellor to make provision for the admission of evidence which would otherwise by inadmissible under any rule of law relating to hearsay;

b) The Civil Evidence Act 1995;

c) A court hearing proceedings under the Children Act 1989 may also take account of:

i) any statement contained in, or arising from, the report of a children's guardian or welfare reporter (CA 1989, ss 7(4), 41(11) + 42(2));

ii) a copy of a record (or part of a record) of, or held by, a local authority produced to the court by a children's guardian as admissible evidence in support of any matter referred to in the guardian's report (CA 1989, s 42(2)).

(c) Hearsay in the Court of Protection

24. The express provision regarding hearsay that is made within the statutory scheme for both civil and family proceedings is in stark contrast to the MCA 2005 and the COPR 2007, which make absolutely no express reference to hearsay. MCA 2005, s 51(1) gives power to make 'Court of Protection Rules' and s 51(2) provides that the rules may make provision, inter alia, 'as to what may be received as evidence (whether or not admissible apart from the rules) and the manner in which it is to be presented' (s 51(2)(i)). The relevant rules are in COPR 2007, Part 14 and rule 95 provides that:

> 'The court may –
>
> (a) control the evidence by giving directions as to:
>
> (i) the issues on which it requires evidence;
>
> (ii) the nature of the evidence which it requires to decide those issues; and
>
> (iii) the way in which the evidence is to be placed before the court;
>
> (b) use its power under this rule to exclude evidence that would otherwise be admissible;
>
> (c) allow or limit cross-examination; and
>
> (d) admit such evidence, whether written or oral, as it thinks fit.'

25. It is of note that COPR 2007, r 95(a)-(c) are in almost exactly the same terms as CPR 1998, r 32.1(1)-(3). There is, however, no comparable provision in the CPR to r 95(d). Mr Harrop-Griffiths for the local authority submits that r 95(d) should be construed in wide terms as being the procedural gateway through which the Court of Protection can permit the admission of hearsay evidence. Whilst the plain meaning of the words in r 95(d) may be sufficiently wide to include the admission of hearsay evidence, the words in r 95(d), when set against the detailed and express provision for hearsay evidence applicable to civil and family jurisdictions, would seem to be rather slender and imprecise procedural shoulders to bear the task in hand.

26. Mr Reddish for the parents makes an equally bold submission, but in the contrary direction, to the effect that:

a) The COPR do not specifically provide for the admission of hearsay evidence;

b) The general law of evidence applies and, under CEA 1995, s 5, the hearsay evidence of SA is inadmissible due to her lack of competence as a witness;

c) COPR, r 95(d) cannot possibly be construed as authorising the court to admit evidence which is, as a matter of law, inadmissible.

27. For the Official Solicitor, Mr Bagchi submits that prima facie the CEA 1995 applies to Court of Protection proceedings as it does to all civil proceedings. SA's lack of competence as a witness (which, as Mr Bagchi observes, is likely to be a common feature of many Court of Protection cases) arguably precludes the admission of any of her statements as hearsay evidence. If the Court of Protection cannot admit into evidence what a patient ('P') says as proof of fact, then, it is submitted, this is an undesirable outcome and one that is likely to be contrary to the 'overriding objective' to deal with a case justly, which expressly includes 'ensuring that P's interests and position are properly considered' (COPR 2007, r 3(1) + (3)(b)).

28. In looking for a way forward which meets the overriding objective, the Official Solicitor draws attention to the wide and flexible terms in which COPR 2007, r 95(d) is cast. He, too, draws attention to the fact that subsection (d) is an additional provision over and above the otherwise identical scheme of CPR 1998, r 32.1 and submits that effect should be given to this additional and widely drawn power. The Official Solicitor therefore submits that evidence, including hearsay evidence from P, can be admitted by the Court of Protection in exercise of its discretion under rule 95(d) having regard, and subject to, the overriding objective to deal with the case justly.

29. Drawing these various matters together, I conclude, first of all, that proceedings in the Court of Protection under the MCA 2005 must fall within the wide definition of 'civil proceedings' under the CEA 1995, s 11 (see paragraph 21 above); they are civil proceedings before a tribunal to which the strict rules of evidence apply. The application of the strict rules of evidence is demonstrated by COPR 2007, Part 14 which makes detailed provision as to evidential matters within the context of, and by reference to, the ordinary law of evidence (for example the power to 'exclude evidence that would otherwise be admissible' r 95(b)).

30. On that basis the CEA 1995 applies to proceedings in the Court of Protection and hearsay evidence will be admissible in accordance with the provisions of that Act.

31. The difficulty faced in the present case, and it will be a difficulty which in varying degrees will be faced in the majority of capacity and best interest cases under MCA 2005, Part 1, is that 'P' is unlikely to be a competent witness and therefore the wording of CEA 1995, s 5, which is in strict terms ('hearsay evidence shall not be admitted'), must preclude the admission of hearsay factual evidence which originally emanates from P. On that basis, in the absence of any express relaxation of the clear embargo imposed by s 5, it must follow that reports of SA's complaints are not admissible as evidence of the matters about which she has complained under the CEA 1995.

32. Despite that finding, are hearsay statements from P nevertheless admissible under COPR 2007? By way of a precursor, I am driven to observe that if Parliament had intended hearsay evidence from P, who is not otherwise a competent witness, to be admissible then it would have been of assistance for that intention to be expressly set out in statutory form (as for example in family cases by the Children (Admissibility of Hearsay) Order 1993). In the event, the entire force and focus of any consideration of the point is confined to the interpretation of COPR 2007, r 95(d) which gives the court power to 'admit such evidence, whether written or oral, as it thinks fit'.

33. In construing r 95(d) the court must, in my view, have a clear regard to the purpose for which the entire jurisdiction under MCA 2005, Part 1 is established. At the risk of being trite, this is the 'Court of Protection' a primary purpose of which must be to provide protection for those who lack the capacity to protect themselves. It would seem counter-intuitive if, as a matter of law, the Court of Protection was incapable of receiving as potential factual evidence reports of what a person, who may qualify for and need protection, may have from time to time complained about.

34. More specifically, it is necessary when considering whether the power under r 95(d) is sufficiently wide to permit the admission of hearsay evidence which is otherwise excluded by CEA 1995, s 5, to have regard to 'the principles' of the legislation set out in MCA 2005, s 1 and, in particular, s 1(5) which provides that 'an act done,. or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests'.

35. A further factor is the novel nature of r 95(d), appearing as it does as an additional power of the Court of Protection over and above the otherwise effectively identical provisions of CPR, r 32.1. This court has been given an additional and widely drawn power to 'admit such evidence ... as it thinks fit'. Just as the wording of CEA 1995, s 5 is plain in excluding hearsay from a witness who is not competent, the wording of r 95(d) in plain words gives the court a wide discretion to admit evidence. If, as I have held, the strict rules of evidence apply to the Court of Protection, then evidential material will either be admissible or inadmissible under that law. In those circumstances, unless r 95(d) is intended to give the court power to admit evidence which would otherwise be inadmissible under the strict law of evidence, it would render otiose the deliberate introduction of the additional sub-rule.

36. Against that background, and despite the lack of any express reference to hearsay evidence, I hold that COPR 2007, r 95(d) gives the Court of Protection power to admit hearsay evidence which originates from a person who is not competent as a witness and which would otherwise be inadmissible under CEA 1995, s 5. Admissibility is one thing, and the weight to be attached to any particular piece of hearsay evidence will be a matter for specific evaluation in each individual case. Within that evaluation, the fact that the individual from who the evidence originates is not a competent witness will no doubt be an important factor, just as it is, in a different context, when the family court has to evaluate what has been said by a very young child.

'Achieving Best Evidence' interview with SA

37. Given the emphasis placed by the local authority on what SA had said about ill-treatment at the hands of her parents, at the close of the local authority's final

submissions I asked whether any thought had been given to conducting an 'Achieving Best Evidence' ["ABE"] interview with her. The local authority's counsel confirmed that thought had indeed been given to conducting such an interview and he went on to confirm that one had actually taken place on the 23 June 2009. On that occasion SA had been interviewed in the "sensory room" at the day centre by a woman police officer with one of the centre workers also present. Counsel confirmed that the local authority legal department had a copy of a DVD recording of the interview which, if the court directed, could be disclosed.

38. The fact that there had been any interview of SA by the police was a revelation to the parents, and the court. The Official Solicitor was informed after the event on 29 June 2009, although the Local Authority felt unable to disclose a copy of the interview having signed a police disclaimer not to disclose it to any other party. The local authority submitted that there was no general duty on them to have disclosed material upon which they did not intend to rely and, as they were not going to rely upon the content of the recording, the authority had not been obliged to inform the other parties or the court of its existence.

Matters of law and practice arising from the holding of the ABE interview and the subsequent failure to disclose it:

39. Albeit at the 11th (or more accurately 13th) hour, the existence of the interview has now been disclosed and all parties and the court have now viewed the DVD footage. I will set out observations about, and an evaluation of, this material when I come to consider the evidence as a whole, but at this stage it is right to record the court's concern that this state of affairs could have arisen in the first place. Two principal questions arise:

a) given that the interview was conducted with a young woman who is said to lack capacity in relation to many important decisions, and given that the interview took place after proceedings were on foot regarding that young person in the Court of Protection, on what basis did the police and the local authority consider that they had either SA's consent or some other authority that permitted them to conduct this interview?

b) is the local authority correct in asserting that they were under no duty to disclose to the court or the other parties that the interview had taken place and that a copy of the DVD recording of it was available?

What authority did the police have to interview SA?

40. Through counsel, the local authority has explained that the police first indicated an intention to interview SA at a meeting on the 31st March 2009. Thereafter in June the police made arrangements with the team manager of the social work learning disability team for an interview to take place at the day centre on the 23rd June. The police officer, Detective Constable S, has apparently told that the local authority that SA 'consented to the interview'. No further information has been provided on this point. The community support team leader, DS, who sat in on the interview has no knowledge of any express 'consent' being sought or given, but does describe the

introductory stages of the process whereby SA was introduced to the officer, shown the camera and confirmed that she was happy to speak with her and be filmed.

41. The current edition of 'Achieving Best Evidence' contains a substantial section (Part 3) dealing specifically with interviewing vulnerable adult witnesses. Paragraphs 3.42 to 3.53 set out in detail issues relating to obtaining the consent of such an interviewee. Paragraphs 3.44, 45 (in part) and 46 state:

> **3.44** Obtaining consent for a video-recorded interview may raise difficulties with regard to some groups of vulnerable witnesses, such as those with a learning disability or a mental disorder. In these circumstances, it is important to take account of the principles set out in the Mental Capacity Act 2005 and the Code of Practice that accompanies it.
>
> **3.45** Briefly, the Mental Capacity Act applies to anyone over 16 who lacks mental capacity and a 'decision' needs to be made. A 'decision' covers a wide range of matters and would include consent for a video-recorded interview. ...
> **3.46** If, following an assessment (the extent of which depends on the circumstances), it is concluded that lack of capacity is an issue, actions should be taken in the 'best interests' of the witness. As far as is reasonably ascertainable, when considering the person's best interests particular account should be taken of the matters set out in Box 3.1.

42. Boxes 3.1 and 3.2 of ABE then purport to offer a summary of the 'best interests' provisions in MCA 2005, s 4 (erroneously in Box 3.1 attributing these to s 1(6)).

43. Paragraph 3.48 then provides:

> **3.48** The scope of the consultation with others involved in the care, welfare and treatment of the person lacking capacity very much depends on the nature of the decision and the time available in the circumstances; this means taking account of the urgency of the case and the time at which it arises.

44. Although it is not expressly spelled out, the assumption behind this section of ABE is that, at the end of the process of evaluation, consultation and consideration it will be the interviewer (normally a police officer) who will determine whether or not

    a) a particular individual lacks capacity to consent to be interviewed, and, if so,

    b) whether it is in their best interests to be interviewed in any event.

45. It is neither necessary nor appropriate for this court to embark upon a root and branch critique of this part of ABE. For the purpose of determining its relevance and application to the decision to interview SA in June 2009, I do however make the following observations:

i) These proceedings, in which the local authority allege and it has been unchallenged that SA lacks capacity to make any major decision concerning her care and who she has contact with, were commenced on 29th April 2009 and have been, since 13th May, continuously assigned for hearing before a High Court judge;

ii) If it is correct that the police officer considered that SA 'consented to be interviewed' then that officer must have assessed SA as having capacity to so consent. On the evidence that is currently available to the court it is difficult to understand how the officer could have come to that conclusion;

iii) If, as seems to be the case, the Detective Constable had not met SA on any previous occasion, and the encounter between them commenced at the beginning of the session that has been recorded on DVD, then there is no indication that the officer conducted any form of assessment of SA's capacity to consent;

iv) Given the police approach to the interview, which is that they were proceeding on the basis of SA's consent, the question of whether or not it was in SA's 'best interests' to be interviewed would not have arisen;

v) Irrespective of the police approach, the local authority had its own, well informed, view of SA's capacity and had issued these proceedings. There is no indication that the social workers took any step to question or direct the police intervention towards the questions of consent, capacity or best interests;

vi) Reference is made in ABE paragraph 3.48 to the availability of time, or lack of it, in any given case for 'consultation with others'. The need in mid June 2009 to interview SA was in no manner urgent. The idea of an interview had been mooted by the police three months earlier and by the time of the interview SA was in a protected residential arrangement, yet no apparent consultation (or at least none that this court has been told about) took place on the issues of consent, capacity and best interests.

46. The list of short points in the previous paragraph makes no reference to what seems to me to be the obvious difficulty arising from the decision to undertake this interview, which is that SA was by then the subject of on-going proceedings in the Court of Protection. In the absence of an absolutely pressing emergency (and given the availability of a High Court judge every single day of the year to deal urgently at any time of the day or night with an application, I use the phrase 'absolutely pressing' in an extreme sense) where there are extant Court of Protection proceedings relating to an individual's capacity and best interests, any question of whether or not that individual is to be the subject of an ABE interview must be raised with the court and be subject to direction from a judge. Where the substance of the interview may relate, as here, to allegations that another party to the proceedings (or someone closely connected to a party) has harmed the interviewee then there will be good grounds for the matter being raised, at least initially, without notice to that party. In every case, however, notice should be given to the Official Solicitor or any other person who acts as P's litigation friend.

47. The local authority has submitted that where the applicant social services department and the litigation friend are agreed that P has capacity to consent ,then there is no role for the court to direct whether or not an ABE interview should take place. This is not a matter that falls for decision here, but for my part where in pending proceedings, notwithstanding the applicant and litigation friend having a favourable view on capacity to consent, the proposal is for the interview to take place without the knowledge of another party to the proceedings it will nevertheless at least be wise if not necessary for the court to be informed of the situation.

Was the local authority under a duty to disclose the existence of the ABE interview?

48. In this case the local authority were involved in the working with the police in planning the ABE interview that took place on 23rd June 2009 and they were provided with a copy of the DVD record of it soon thereafter. The local authority decided not to rely upon the content of the ABE interview and therefore considered that they were under no duty either to disclose the fact that the interview had taken place or the fact that they had a copy of the resulting DVD. The existence of the interview only came to the knowledge of the parents and the court in consequence of a question from the court during closing submissions. The local authority continue to submit that they have acted in accordance with the rules governing Court of Protection proceedings and that they were under no duty to disclose this information/material. Are they correct in that submission?

49. COPR 2007, Part 16 contains provisions relating to disclosure. COPR, r 133(1) provides that 'the court may either on its own initiative or on the application of a party make an order to give general or specific disclosure'. By r 133(2) 'general disclosure requires a party to disclose:

a) the documents on which he relies; and

b) the documents which –

i) adversely affect his own case;

ii) adversely affect another party's case; or

iii) support another party's case.'

50. 'Specific disclosure' is defined by r 133(3) as an order requiring a party to 'do one or more of the following things:

a) disclose documents or classes of documents specified in the order;

b) carry out a search to the extent stated in the order; or

c) disclose any document located as a result of that search.'

51. COPR, r 135 provides that where the court has made an order for general or specific disclosure, then any party to whom the order applies is placed under a continuing duty to provide such disclosure until the proceedings are concluded. Rules 136 to 138 provide for the inspection of any documents that are disclosed, disclosure under the

COPR being simply the act of a party disclosing that a document exists or has existed (COPR 2007, r 132).

52. Finally COPR, r 139 provides for the consequence of failure to disclose a document or to permit inspection in these terms: 'a party may not rely upon any document which he fails to disclose or in respect of which he fails to permit inspection unless the court permits.'

53. In the present case at a hearing on 20th May 2009 an order was made requiring the local authority "to make standard disclosure by 4pm on the 3rd June 2009 of SA's social care records compiled since 1 January 2003." The term 'standard disclosure' does not appear in the COPR 2007 but is a term used in the CPR 1998 and defined in CPR, r 31.6 in exactly the same terms as those defining 'general disclosure' in COPR, r 133(2). The direction given on 20th May is however confusing in that, whilst referring to 'standard disclosure' it is in fact an order for specific disclosure limited to social care records from January 2003 onwards.

54. The order of May 2009 required disclosure of the social care records by 3rd June 2009, which was, of course, a date prior to the ABE interview on 23rd June. The local authority was, as it accepts, under an ongoing duty to provide social care records until the conclusion of the proceedings. The authority claims that it has discharged its duty and has disclosed the social care records which cover the period of the ABE interview. The interview is not, however, apparently referred to in any of those notes.

55. On the basis of that brief description of the rules, directions and actions of the local authority, it would seem that in this case they have provided the disclosure that was required of them, yet the result, from the perspective of a judge who is embedded in the procedure and culture of child protection proceedings under the Children Act 1989, is totally unacceptable. In a fact-finding process, where the case is largely based upon what a vulnerable adult ('P') has said and the aim of the court in due course is to make orders to meet P's best interests, how can it be appropriate, fair to the interests of all parties (but particularly P) or in any way acceptable for the applicant local authority to take part in arranging a formal ABE interview of P and subsequently take possession of a DVD recording of the interview yet be under no duty to inform the other parties or the court that that is the case?

56. The position in family proceedings is that 'it is a duty owed to the court both by the parties and by their legal representatives to give full and frank disclosure in ancillary relief applications and also in all matters in respect of children' [*Practice Direction: Case Management* [1995] 1 FLR 456]. If these were proceedings relating to children, then there is absolutely no doubt that the local authority, under the duty to give 'full and frank disclosure', would have been required to inform the parties and the court of the occurrence of the interview and to disclose the DVD record (subject to the court's power to limit or control disclosure on a case specific basis). Given that the aim of protection is common between child protection proceedings under CA 1989, Part 4 and proceedings such as the present which aim to investigate allegations of harm to P and, if necessary, protect her, how can it be a requirement in one process for the applicant to disclose the existence of an ABE interview, yet not a requirement, absent of an express order from the court?

57. The apparent difference in the approach to disclosure as between the family courts and the Court of Protection may well arise from the fact that the rules for the latter are based upon ordinary civil litigation with the expectation that disclosure will be based on whether documents 'adversely affect [a party's] own case' or 'support another party's case' (COPR, r 133(2)(b)) whereas the approach of the family court is that there is a duty to give *the court* all relevant material.

58. There can, in my view, be no justification for there being a difference of this degree on the issue of disclosure between the family court and the Court of Protection in fact finding cases of this type where really the process and the issues are essentially identical whether the vulnerable complainant is a young child or an incapacitated adult. For the future in such cases in the Court of Protection it would seem to be justified for the court to make an order for 'specific disclosure' under COPR 2007, r 133(3) requiring all parties to give 'full and frank disclosure' of all relevant material. If such a direction had been made in the present case, the local authority would have been under a duty to disclose the DVD of the ABE interview, and any other records relating to it, once they came into their possession.

Evaluation of the ABE interview

59. The ABE interview of SA runs for just over one hour. It took place in the 'sensory room' at the day centre which is therefore a location with which SA was entirely familiar. In an early section the police officer investigates whether or not SA understands the difference between 'truth' and 'a lie' by asking SA about a number of very straight forward scenarios. On a number of occasions SA gave the incorrect response. At the end of that section, it was not at all apparent that SA had any understanding about the difference between truth and lies.

60. SA demonstrates throughout the interview a very pleasing smile and a sunny attitude, save for one or two short periods when she became upset by her understanding of what was being discussed. She seemingly engaged in and was interested by the conversation with the officer. The officer attempted a number of tactics to bring the discussion round to anything that may be troubling SA by saying that staff were 'worried' about her and were 'worried that you may be sad'. At this latter suggestion, SA became upset and said 'I want to go home'. She was then asked, 'who has made you sad?' to which SA gave the name 'L', who is another user of the day centre. The officer asked 'does mummy make you sad?', to which the reply was 'I think about mum and dad: I want to go home'; SA then began to cry, but was quickly distracted and she cheered up.

61. Later, after a further attempt to discuss if she was 'sad', SA replied 'I like my mum and dad', she became upset again and asked for her parents to come to the centre so that she could see them. When asked if SA remembered telling staff that her family hurt her, SA replied 'no' and that it was 'not true'.

62. On another occasion SA volunteered that her mother made her feel 'sad' 'because I want to see her'. The only person that SA identified as causing her to feel scared or who had hurt her was 'L'. The officer then said, 'what about your family do they hit you', to which SA firmly replied 'no', the officer then asked 'never, ever?' and the reply once again was a firm 'no'. The officer then asked 'who in your family hit you?' to which SA responded 'no one'.

63. In general it is clear that this interview provides no positive evidence at all to support the allegation that SA has been assaulted by her parents. Indeed, the opposite is demonstrated by the consistency of SA's answers and her repeated requests to go home or to see her parents. Given the opening session on truth and lies, it is doubtful whether any reliance could be placed on what SA might say during the interview itself, whether it is positive or negative regarding her parents. At times the officer's questioning unhelpfully contained direct suggestions about SA being hit by her parents, but in the event SA responded with firm denials.

64. I found the content of the ABE interview to be helpful and illuminating as to SA's personality and presentation. It is not material upon which the LA wish to rely, but it nevertheless provides important information to the court and enables some direct observation of SA's general demeanour.

Drama Therapist's evidence

65. AJ is a freelance drama therapist who has worked with SA at the day centre since February 2007 and sees SA once a week for a 30 minute session. AJ reports that over time SA has begun to make 'disclosures' about 'feeling unsafe and frightened in her home environment' and has complained on a number of occasions about being hit at home. In her statement of 31st August 2009, AJ sets out a number of detailed examples of encounters with SA which support the concerns that she raises.

66. When AJ gave oral evidence the court was impressed by the obvious care and concern that she demonstrated towards SA and about the various worrying allegations that SA had made to her over the past two years. Despite this positive impression of AJ as a concerned professional, I consider that there is a real need for caution when evaluating the evidential quality of her contribution to the case. AJ's statement, which runs to 12 paragraphs, describes nine separate occasions when SA has said and/or demonstrated matters which may suggest that she is being physically harmed in her parents home. AJ's statement is the only information that the court has been given about AJ's extensive work with SA. AJ explained that she keeps weekly session notes of the half-hour spent each week with SA. None of these notes have been produced. In particular the notes of the nine or so sessions referred to in the statement have not been disclosed and it is therefore not possible to establish the context in which SA may have said or demonstrated the matters which are now reported. AJ explained that the notes for each session are "extensive". If something of particular concern has arisen then she will compile an "alerter form" which is passed on to social services. AJ explained that the first draft of her court statement was drawn up by the local authority solicitor who will have had the alerter forms and, she presumed, her session notes. She then checked the draft statement against her notes. On a rough estimate AJ must've conducted some 120 sessions with SA, yet all the court has been given is a list of some edited extracts drawn from nine of these sessions.

67. The court having raised the question of AJ's notes during submissions, enquiries were made and the court was subsequently informed that, whilst AJ's notes were in the possession of the local authority, AJ objected to their disclosure. In the event no party pressed the disclosure and the matter has therefore proceeded on the basis, at the express invitation of the local authority, that the court must evaluate AJ's contribution on the material that has been disclosed.

68. When looking at evidence from a witness who is engaged in providing therapy to an individual who then, during the course of the therapeutic relationship, makes statements which are then produced as evidence of the truth, the words of Butler-Sloss LJ in *Re D (Child Abuse: Interviews)* [1998] 2 FLR 10 must be borne in mind:

> 'It is essential to distinguish between interviewing the child to ascertain the facts and interviewing to provide the child with help to unburden her worries. The therapeutic interview would seem to me to be generally unsuited to use as part of the court evidence, although there may be rare cases in which it is necessary to use it.'

69. Often the therapist will alert others to matters of concern arising from the therapeutic interview and the child or vulnerable person may then be subject to an interview aimed at the forensic process – as indeed happened here with the ABE interview. In the event the ABE interview did not provide any evidence to support the local authority case and thus reliance is made on the original statements made to AJ. I do not regard AJ's reports as being inadmissible or to be automatically of no weight, but I do have regard to the observations of Butler-Sloss LJ and the reasons behind them, in being cautious as to the amount of weight that can be attached to the material that originates from the drama therapy sessions.

70. Whilst in no manner doubting the accuracy of the information that has been reported by AJ, the court must also be careful in the evaluation of this material in the absence of the ability to see it in the context of SA's presentation in the course of these sessions as a whole or even the particular sessions upon which reliance is now placed. An example of the potential for there to be an unbalanced presentation of the total picture was demonstrated at the end of AJ's evidence. Given the content of her witness statement, which records entirely negative reports of SA speaking about her parents, I asked whether she ever said anything positive about them. AJ replied, "she clearly loves her family and talks fondly about her mother and father. But at the same time she says she is hurt and frightened and does not want to be at home".

12th February 2009

71. In relation to the 12th February, PE, who has been one of SA's carers since October 2008 reported as follows in her statement of 16 August:

> 'On 12 February 2009 at about 5.10pm I was providing personal care for SA. My colleague RA was also working with me that day. We had been asked to get SA ready for prayers with her father. RA saw SA go into her father's room for prayers, and also heard him shouting at her. I also heard the shouting from the room and was present when SA came out of her father's room. SA was crying and there was blood on her lip. SA's mother came out of her room and took SA to the kitchen where we were not allowed to go other than at meal time.'

72. In a subsequent statement dated 30 November, PE states that, whilst she did not make a written entry about this incident in the "communication book", she "reported to Ms G in a hand written note dated 12 February 2009". A copy of the note is exhibited to the statement. It is dated 12 February 2009 and reads (in full):

'When I went into SA house I found her to be in an aggressive mood. She was hitting out at me and RA around our face. RA tried to get SA to stop. Mrs A overheard and came to assist us. Mr A then came and told us that when she starts like this we should restrain her by holding her wrists. SA calmed down and we managed to give her her personal care. Then Mr A asked us to get her ready to pray. SA then went into her father's room. RA was writing the report book and I went into the bathroom to wash my hands, RA then called me as she had heard a noise like slapping and SA crying and shouting. Mrs A ran into the husband's bedroom and was talking to Mr A in their own language. Mrs A then put her hands on SA to get her out of the bedroom. SA was crying and blood was on her mouth. I tried to comfort her then Mrs A took her to the kitchen. She then asked us to leave. I phoned the on-call officer to report the incident.

I said to SA are you all right. She said "no". Mrs A then said "quick" to SA.'

73. During her oral evidence PE was shown the note set out above. She was clear that the handwriting was not hers and that it was a record of her account written down by a police officer. She confirmed that the note had not been made on the 12th February; she believed that it had been prepared some time (possibly weeks) later. PE did not seem able to explain why her own statement to the court described this note in very different terms. In re-examination PE explained that she had written three or four reports about this incident and was not confident which one of those the document in the court bundle was. The court has not been shown any other reports written by PE about this incident, it is therefore not possible to compare the accounts that she has given in her evidence with those documents.

74. When asked about the concluding three short sentences in the note starting with "I said to SA are you all right", PE explained that that conversation had occurred the following day and in the course of it SA said "she hit me". This latter evidence, given for the first time in final questions on behalf of the Official Solictior was, only went to further confuse PE's account and reduce the court's confidence in her ability as a witness.

75. In relation to the incident itself, PE confirmed that she did not herself hear any slapping. RA had told her that she had heard slapping, but, the court was told RA is now abroad and unavailable to give evidence. There is no statement or other form of written account by RA of this incident, thus the only evidence to the effect that RA heard anything comes from PE reporting what RA said at the time.

76. Whilst PE was undoubtedly doing her best to assist the court, I did not regard her as a particularly astute or reliable witness. The fact that neither she nor RA made any contemporaneous written record of the event must reduce the court's ability to rely upon the detail within her account. Matters are not assisted by the fact that RA, who is the only witness to the sound of slapping, and who could corroborate PE's account has made no contribution to the evidence before the court.

77. Later that evening two social workers visited the family home to check on SA. They did not make a close examination of her and did not notice any injury to her lips.

78. SA's father's account is that once in his room SA did not want to pray and insisted upon going to her mother and he simply took his daughter out of the room and let her go to her mother. He denied that there was any shouting and denied that he had ever hit any of his children. He also denied that SA had any injury to her lip. He does, however accept that SA was crying when in his room and, in her evidence, the mother describes SA as sobbing.

79. On 13 February AM, a support worker at the day centre, reports seeing 'a small cut on the inside of SA's lip and saw the scratch mark on her left eye'. He states that when asked how the injury occurred, SA told him that her father had hit her on the mouth and she made an action with her closed hand to emphasise this.

80. On the same day, HA, a community support worker at the day centre reports SA telling her that 'her father had punched her on the mouth, and slapped her and tried to kill her the night before'. She also noticed that SA had a split lower lip.

81. In her oral evidence HA explained that the workers at the day centre are under instruction not to be on their own with SA as SA does on occasions state that a worker has hurt her even if that is not the case. The practice of the workers is to report what SA may say, rather than judge whether or not it is true.

82. Subsequently, on 20th April PE alleges that the father told her to withdraw her report about seeing blood on SA's lip. When challenged on this during her oral evidence, PE altered her account to one in which the father said "did you see blood on SA's lip?". PE confirmed that she did indeed see blood (although not very much) on the lip and that was why she made the report.

83. The evidence about the incident on the 12th February is of a different quality to the other evidence of assault which rests almost if not entirely upon SA's reported complaints. It is possible to make some positive findings based upon the evidence that I have now summarised. The findings are on the balance of probability and are as follows:

a) SA was physically challenging to the two workers in the early stage of their visit whilst they sought to deliver personal care to her. It is possible that some physical interaction (either in contact with the workers or an object) took place at this stage which could account in due course for the injury to SA's lip;

b) Despite the reservations that I have about PE's accuracy as a witness, I accept the evidence of PE that while she was in her father's room for prayer, SA was shouting;

c) There is no reliable evidence that a slap was heard during SA's time in the father's room;

d) SA did sustain a cut to her lip during the course of that evening and before the two workers left the home. This was observed by PE and was the reason that she and RA reported the incident to the emergency team. The cut was also witnessed the following day by two professionals;

e) The father was a witness who gave fairly fluent and appropriate evidence. His account differed markedly from that of PE and in terms he described her evidence as lies. In general terms, as I shall describe later, I found the evidence of both parents to be wholly unrealistic in describing a life with no problems in terms of SA's behaviour when in their care. SA presents significant challenges to all others who seek to give her care, she is a young woman with many good and endearing qualities, but caring for her presents problems because of her unpredictable, physical and vigorous behaviour. In short terms I simply did not believe either of the parents when they denied that there were any problems with SA either on this day or at all;

f) I therefore find that the father is not telling the truth when he denies that there was any shouting while SA was in his room and denies that there was a cut;

g) For reasons that I will rehearse in more detail, I am unable to attach sufficient weight to SA's complaint that she was hit by her father to support a finding that this was indeed the case;

h) Whilst it is open to the court to look to the finding made at (f) to the effect that the father has lied about two significant matters as potentially proof of the truth of the allegation that he hit SA, I consider that there may be a number of explanations other than his guilt (for example cultural matters or a fear arising from his understanding of these proceedings which has led him to deny absolutely anything that might suggest difficulty in caring for SA);

i) It is possible that during the shouting that took place in his room, the father (as the two workers had had to do but a short time earlier) had to restrain SA in some manner and that during this process her lip became injured;

j) I therefore find that the cut lip occurred on that evening, but do not find it possible to hold on the balance of probability that it was caused by a blow from the father.

Recent developments

84. It is of note that on 6 July SA's respite care placement ended because her carers were concerned that they could not keep her safe from falling, in particular as a result of running down the stairs. The carer also reported that SA exhibited some challenging behaviour in the form of kicking, beating and slapping. As a result of this SA moved on 10th July to accommodation in a residential home known as YG.

85. In August staff at the day centre noticed bruising on SA's arms soon after she arrived from YG. SA alleged that a member of staff at YG had assaulted her. Contact was made with YG who reported that SA had had two seizures that morning. Whilst this matter was investigated SA's accommodation was switched to a local residential home. The member of staff that SA had identified as her assailant at YG was interviewed and explained that that morning SA had had two fits (one of which was a

drop fit and the other a shaking fit). The staff member demonstrated how she had tried to stop SA from falling, by holding her. The local authority investigation concluded that SA had not been hit on this occasion and may have sustained bruising as a result of being held by the carer who was trying to prevent SA from falling.

86. ET, who was the worker who carried out the investigation into the allegation of assault by a worker at YG, gave oral evidence and explained that over a long period SA has made several allegations of violence against her parents. If an allegation is made, a strategy meeting takes place and an investigation follows during which the workers will visit the parents who will deny any assault. They then go back to SA and, said ET, SA not infrequently fails to repeat the original allegation and, instead, says something different. She told the court that these investigations are normally, therefore, inconclusive. In questioning on behalf of the Official Solicitor, ET confirmed that every such investigation over the years had been inconclusive save that relating to 12 February 2009 as on that occasion there were witnesses to the event.

87. In ET's court statement she describes heavy bruising to SA's body on 20 April 2009. When asked how the bruising had happened SA did not make any allegation and the local authority concluded that there was therefore no basis for taking this matter further. The importance of this evidence, which is seemingly typical of a number of the matters relied upon by the local authority, is that, despite the conclusion that there was no basis for any further investigation, the fact that there was bruising to SA's body is nevertheless one of the allegations specifically made and relied upon by the local authority at this hearing.

88. ET was asked more generally about SA's reliability and she was taken to a note made by the Official Solicitor of a conversation with two workers at the day centre. One of the workers noted that SA can be manipulative and gave the example that in the previous week SA was crying and had said that her sister had died. The worker had found SA's presentation to be 'very believable' and she had had to check with other staff whether or not it was true that the sister had died. In the event, happily, the sister had not died but had departed on a trip to Mecca. The worker also explained that SA "might lie, make things up or display crocodile tears to obtain attention". ET confirmed that this description accorded with her own view.

89. ET, in balancing her account, explained that, whilst SA may say things that are found to be untrue, on other occasions she gives accounts that are obviously true, for example describing what she has done during the day at the centre. ET then said "she is not completely unreliable" (ET's emphasis). ET, rightly, advised that what SA says needs to be taken into consideration. In her view if an event happens SA will simply remember who was there and will say just that. This makes it difficult to interpret what she says; for example if she falls and X is there, SA will say something that suggests X has hurt her when this is not in fact the case. This is the reason that the day centre insist upon two staff members being present at any time.

90. A further account in the paperwork which is of note comes in the report of Dr KX where part of a telephone conversation with DS, who is employed at the day centre and is known SA for a considerable time is recorded as follows:

> 'With regards to her challenging behaviour DS told me that she often tries to hit people (typically staff, rarely other clients). This happens

> without any obvious reason and takes the form of slapping, pinching, punching, pushing, digging her nails, kicking. I asked about the frequency of such behaviour and was told that it happens every day, but one to one support helps prevent this.'

91. The father's oral evidence was to the effect that, whilst SA does become aggressive on occasions when the workers are providing personal care to her, she has never been aggressive with him. He said that he had never had to be angry with her and had never told her off. He said that it was only very rarely that he has had to hold SA when she is having a fit. Although he is reported as describing her behaviour as "challenging", this related to eating and diet and not to hurt physical behaviour.

92. The mother's evidence was more limited than that of her husband, but she too assured the court that 'it is never difficult to look after SA', although she can be angry and aggressive with the carers 'if the carers are bad towards her'. Again, in a similar vein to her husband, she denied that there were any problems in caring for SA and even maintained that she had never seen her husband catch hold of SA if she was in a fit: 'he is male and she is female' was the response to that question.

Allegations of physical assault: conclusions

93. I have already held that it is not possible to find on the balance of probability that the father assaulted SA on the 12th February causing her to have a split lip. The ten remaining allegations of physical assault rely entirely upon reports of complaints made over the past two years by SA (given that the local authority rightly do not seek to attribute individual observed bruising to any allegation of assault). The following four allegations are examples of the list of ten:

9/3/07	SA told Dr V that FA had kicked her and told SC that FA had hit her and that KA had hit her on the head with a wooden spoon.
24/6/08	SA told AJ that FA hits her when they pray together.
17/3/09	SA told AJ that her mother had punched her on her right shoulder.
18/5/09	SA told Dr A that FA kicked and strangled her.

94. The fact that SA has said the various things that are attributed to her in the local authority schedule is not something which is contested by the parents and I have no difficulty in finding that she has indeed said what is reported by the various professionals. Secondly, as I have described, I conclude that this is evidence which it is proper for me to admit under the discretion established by COPR 2007, r 95(d). It is hearsay evidence, admitted for the purpose of establishing the truth of what SA has from time to time complained about. It is hearsay evidence from a person who is not herself competent to be a witness due to her intellectual and social impairment which, on the only expert evidence available, 'would interfere significantly with an understanding of the oath and the whole process' (per Dr KX).

95. Given that I have decided that this evidence is admissible, the focus shifts to determining what weight, if any, is to be given to it. In undertaking that task regard must be had to CEA 1995, s 4:

> **Considerations relevant to weighing of hearsay evidence**
>
> (1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
>
> (2) Regard may be had, in particular, to the following—
>
> (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
>
> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
>
> (c) whether the evidence involves multiple hearsay;
>
> (d) whether any person involved had any motive to conceal or misrepresent matters;
>
> (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
>
> (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

96. Of these factors, and in general terms, the fact that this is not multiple hearsay and that SA had no express motive to conceal or misrepresent matters are matters to be put in favour of giving credence to the material, as is the absence of any suggestion that SA has deliberately attempted to prevent the proper evaluation of its weight.

97. These ten complaints of assault require careful and serious consideration coming as they do from a vulnerable young woman who may be complaining of abusive treatment and, if the allegations are true, she may well require protection from any further abuse. Throughout the hearing and the period since then during which I have prepared this judgment, I have been keen to identify pointers one way or the other as to the weight which may be attached to what SA has said. Having now concluded that exercise I am clear in my view that the evidence as a whole leads to only one conclusion, namely that very little weight can be attached to this list of allegations and the evidential value of them is substantially below the standard required to support a finding of assault against the parents. In brief, and by reference to the analysis of the evidence that I have already conducted, my reasons are as follows:

a) The very aspects of SA's intellectual functioning which render her incapable of being a witness must seriously compromise the ability of the court to rely upon hearsay accounts of what she has said as being proof of the substance of what she alleges. Whilst I have held that COPR, r 95(d) gives this court a discretion to admit her allegations as hearsay evidence in a manner that is impermissible in other civil

proceedings by virtue of CEA 1995, s 5, the policy considerations that underpin s 5 remain valid considerations when apportioning weight to this material;

b) SA's presentation during the ABE interview, and in particular her responses to questions about 'truth and lies', would seem to support the conclusion that she would not be capable of understanding the task of giving evidence;

c) The local authority records are peppered with other allegations made by SA against professionals which are accepted by the local authority as not being reliable reports;

d) None of these 10 allegations is corroborated in any material particular;

e) For the reasons given at paragraph 66 onwards I approach with caution the selective account of what AJ reports that SA has said to her during the many hours of therapy that she has undertaken and, whilst respecting AJ's informed professional concern about what she has heard from SA, I consider that the need for caution reduces the evidential value of these allegations;

f) I found ET's evidence to be particularly insightful and helpful in gaining a view of SA's overall veracity in these matters. ET knows SA well and has been involved in evaluating allegations that she has made (some of which are now found in the local authority schedule);

g) Within ET's evidence her account of the investigation of SA's detailed allegation against the worker at YG and of the day centre worker being told by SA that her sister had died, were particularly telling and put into context ET's overall view which was that 'SA is not *completely* unreliable';

h) The ABE interview was an opportunity for SA to report matters which concerned or worried her. Other than complaining about the behaviour of 'L', she made no complaints of being hurt by anyone. So far as her parents were concerned she spoke and reacted in a manner that demonstrated positive feelings towards them;

i) It is for these reasons that I have also felt unable to rely upon what SA has said about the cut to her lip in February 2009.

98. It follows that I do not find that any of the allegations of physical assault made by the local authority against the parents have been proved.

Allegations of parental failure to keep SA safe

99. The allegations that the parents failed to keep SA safe in their home have effectively not been pursued at this hearing, in so far as they go outside the allegations of assault. The reason for this seems plain. SA is at times physically vigorous wherever she is, whether at home or in professional care. She sustains bruises and other injuries as a

result. The local authority accept that they cannot attribute any particular bruise to any particular incident. Since the proceedings began, and the schedule of allegations was drawn up, the very good respite foster carers have had to withdraw from caring for SA because they considered that she was putting herself at risk of harm (and was being harmed) by her physical behaviour in their home.

100. In the circumstances, it seems to me to be impossible to single the parents out in his regard and make negative findings about SA's safety in their home, which has been her home for some 30 years, when she is at much the same risk wherever she is because of her challenging behaviour.

Parental failure to cooperate with professionals

101. There is evidence that the parents have lied to the court about a number of matters and have also sought to paint an improbably rosy picture of life at home with SA and their care of her. The father's evidence about there being no shouting on the 12th February is but one example.

102. In addition, as I am about to explain, I find that the allegations about making arrangements to have SA married are proved. A consequence of that finding is that the parents, and principally the father, have lied to the court about that issue.

103. On the basis of those findings the general allegation of parental failure to cooperate with the local authority and others is made out. It will be a matter for the next stage of this process to investigate why that should be and, more importantly, what the prospects are for a change in the working relationship between the family and the professionals for the future.

Alleged arrangement to marry SA

104. At paragraph 7 I have set out in full the note made by Dr TV immediately following a consultation with SA and her parents on 21 April 2009. In oral evidence Dr TV confirmed that the conversation she had with the father was in English. She confirmed the accuracy of her note (which was typed up as soon as the family had left her room) and explained that it was the father who brought up the subject of marriage and then proceeded to give the information contained in the note.

105. The father's evidence on this point is that the GP has misunderstood him. He claims that he did not say any of the specific matters in relation to marriage recorded by the doctor. Instead he recalls that there was a general conversation about marriage and the parents' general hope to see all their children settled.

106. In his oral evidence FA explained that SA was sick and that it is a very dangerous thing to do, and is against Islam, to marry a sick person. He also asked, rhetorically, "who would accept her?". He said that the topic of marriage had arisen in discussion with Dr TV and he said "there is no way we can get her married".

107. I regarded Dr TV as a good, careful witness. She gives a detailed account of the information given to her which just cannot fit with the general conversation described by the father. I have no hesitation in excepting Dr TV's evidence with regard to this

conversation and therefore find that the father did indeed tell her that the family were in the process of arranging a marriage between SA and a gentleman in Bangladesh.

108. In this context SC, who is the manager of the day centre, reports that on 24th March the father brought a renewal of passport application for SA to the centre and asked her to sign and witness the form and photographs. In the event SC was unable to do this, but during the conversation SA's father told her that they needed a passport because the family was going on holiday to Bangladesh. Although challenged in cross examination, she remained clear that it was Bangladesh to which reference was made.

109. The father's evidence is the passport was needed because the family planned to let SA go with her sister to Mecca. He was plain that there was no planned trip to Bangladesh.

110. As with the evidence of Dr TV, I have no doubt that SC is giving an accurate account of what was said to her and that Bangladesh was definitely the destination that the father said was intended for SA if a passport was issued. I make that finding both on the basis that I regarded SC as a reliable professional witness, but also because I am clear that the father has lied about what was said to Dr TV (given her clear note), has lied about SA's behaviour on 12th February and has at every turn given an exaggerated and effectively dishonest account of his care of SA. He is not a reliable witness and is prone to deny matters if they are against his perception of his interest. Finally, given the finding that I have made about the conversation with Dr TV, the proposal of a trip to Bangladesh is entirely in keeping with the plan described to the doctor.

111. I therefore find as a fact that the parents did have a plan for SA to be married to a gentleman in Bangladesh and that the father was engaged in submitting a passport application for SA in order to put that plan into action.

112. In the context of SA's general vulnerability this is a serious finding. It will be a matter for the judge at the next stage of these proceedings to determine what steps are needed to protect SA in this regard, but I note that the father in evidence has effectively conceded that it would not be in SA's best interests to be married and, indeed, would be contrary to the Islamic faith even to contemplate such a thing.

Judicial continuity

113. Finally, it is necessary to record that the fact-finding process which is now concluded has been listed before me, whereas the 'best interests' hearing fixed to follow it has been listed before Mrs Justice Pauffley. The explanation given by the court office for this unsatisfactory state of affairs is that the order setting up the two hearings did not specify that the same judge should be booked for both hearings and as these are not Children Act proceedings there is no standing direction that judicial continuity should be a priority. Whilst I accept the factual accuracy of the explanation given, it is difficult to determine any difference between a case in the Court of Protection and public law child protection proceedings where there is a split hearing as in this case. Whilst all parties are agreed that it is now impossible to rearrange the listing of this case so that it comes back before me in a timescale that in any manner meets SA's needs, with the consequence that the current best interests listing remains before Pauffley J, for the future it would seem impossible to hold otherwise than that the

decision of the House of Lords in *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35 applies to Court of Protection cases and that once findings of fact have been made the case is part heard and the trial should not resume before a different judge.

[Judgment ends]