Mental Health Act Guardianship and the Protection of Children

*Ralph Sandland**

Re F (Mental Health Act: Guardianship) [2000] 1 FLR 192, CA

Court of Appeal (30th September 1999). Evans, Thorpe, and Mummery LJJ. Judgment of the Court given by Thorpe LJ.

Introduction

This case arose as a spin-off from what on the face of it was a relatively straightforward application for care orders, made by the Social Services Department of the London Borough of Hackney ('LBH'), in respect of eight siblings. The case is of interest to mental health lawyers by reason of the attempt of LBH to use creatively elements of the Mental Health Act 1983 ('the 1983 Act') regime to plug apparent gaps in the powers available to local authorities and the courts in the Children Act 1989. This entailed the court's consideration of various provisions of the 1983 Act, as they relate to persons with learning difficulties. This case will also be of interest to family lawyers, as the boundary between family law and mental health law, such as it is, was also considered by the Court of Appeal. Moreover, it is worth remembering that the backdrop to all judicial activity in the field of mental health law at present is the on-going root-and-branch reform of this area of law. As will be discussed below, this case adds to a growing number that highlight deficiencies in the operation of the current regime as it applies to adults with learning difficulties. Finally, although there is little direct discussion to be found in the law report of the judgment of the Court of Appeal, this case raises broader issues of human rights; a topic that none can afford to ignore in light of the Human Rights Act 1998.

The Facts

The appeal concerned the plans proposed by LBH in respect of T, the eldest of eight children born to the F family between 1981 and 1992. All eight had been the subject of Emergency Protection Orders (EPOs) made on 11 November 1998. The F children were taken from their home and placed in various local authority accommodation. T, along with two of her sisters, was placed in a specialist children's home. This was intended by LBH as a first step to the seeking of full care orders. The basis for the intervention of LBH was claimed neglect of the F children by their parents, and the particular claim that the F children were exposed by their parents to adults 'prone to sexual abuse or exploitation of children' in the words of Thorpe LJ[1]. The care order hearing was pending at the time of the instant case. The Court of Appeal was therefore confronted with allegations rather than proof of inadequate parenting.

* *Ralph Sandland, Senior Lecturer, School of Law, University of Nottingham.*

1 *[2000] 1 FLR 192 at 193 D-E. All subsequent references will be to this report unless specified.*

An EPO lasts for a maximum of eight days in the first instance[2], renewable for one further period of seven days[3]. Eight days after the EPOs had first been made, interim care orders were made in respect of the seven youngest children of the family. However, in the intervening period T had passed her seventeenth birthday and so could not be made subject to a care order[4]. In her case, therefore, the EPO was renewed for a further seven days. Thereafter, the order lapsed, although T remained in local authority accommodation on a voluntary basis. During that time she was examined by a consultant paediatrician, who formed the view that she had experienced sexual intercourse. Some two months later, T's parents announced that they wished for T to return home. As T was being 'voluntarily accommodated' by LBH, s.20(8) Children Act 1989 provides that persons with parental responsibility 'may at any time remove the child'. There is no requirement that notice be given.

T also wished to return to live in the family home. LBH was concerned that T would again be exposed to the risks that had prompted their initial intervention. As T could not be made subject to a care order, LBH felt that it had to seek another mechanism to ensure her protection. Of the options open to it (discussed further below), it chose to seek a Guardianship Order under s.7 of the 1983 Act, on the grounds that T was 'mentally impaired' within the meaning of that Act, having a 'mental age' assessed at between five and eight years of age, and that it was necessary for her welfare and protection.

An order under s.7 of the 1983 Act cannot be made without the consent of the 'Nearest Relative' of the person to be made subject to the order[5]. In the present case that person was Mr. F, T's father, who would not give his consent. However, there is provision[6] for the substitution of the Nearest Relative on grounds, *inter alia*, that that person 'objects unreasonably' to the guardianship application or has objected 'without regard to the welfare of the patient'. Shoreditch county court had, on the application of LBH, made an order under s.29 of the 1983 Act, by which Mr. F had been replaced by a LBH social services department officer as Nearest Relative. A Guardianship Order had then been made by LBH.

Mr. F appealed, challenging the decision of the county court to displace him as Nearest Relative. A narrow reading of the case, therefore, would deem the issues to be the interpretation of the powers given to the county court by s.29 of the 1983 Act and, tangentially, the circumstances in which an order under s.7 of the Act is appropriately made. However, as Thorpe LJ noted, 'the real issues in the case surround the neglect, abuse and protection of children'[7]; and the desire to attend to these issues drew the Court of Appeal into a consideration of a broader legal terrain than might have been the case had a narrower construction of the case been adopted.

Judgment

The Court of Appeal allowed the appeal, holding that Mr. F could not be said to have been objecting unreasonably to the making of the guardianship order as this was not a suitable case for the making of such an order.

The court reached that relatively straightforward conclusion by a rather less straightforward reasoning process. The issues in this case are strung together like a daisychain: whether Mr. F could

2 *Children Act, 1989, s.45(1).*
3 *Children Act, 1989, s.45(5).*
4 *Children Act, 1989, s.31(3).*
5 *Mental Health Act 1983, s.11(4).*
6 *In s.29 of the 1983 Act.*
7 *At 193 C.*

be said to have objected unreasonably to the guardianship application depended on whether it could be said that the guardianship order had been appropriately sought and made. This in turn depended not only on whether the requirements for the making of such an order had been satisfied, but also on whether there was a more appropriate alternative course of action open to LBH.

The Construction of 'Mental Impairment'

The court dealt first with the construction of the relevant words of the 1983 Act. 'Mental impairment' for the purposes of the 1983 Act, including its provisions relating to guardianship orders, is defined in s.1(2) as

> A state of arrested or incomplete development of mind (not amounting to severe mental impairment) which includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned

As Thorpe LJ discussed at some length, the reason for the association of the fact of mental impairment with abnormally aggressive or seriously irresponsible behaviour that s.1(2) makes, is to exclude from the ambit of the legislation all but 'the small group to whom we wished it to apply'[8], that is, mentally impaired persons 'for whom detention in prison should be avoided,[9].

Applying this approach, the court decided that T's desire to return home should not be construed as 'seriously irresponsible', notwithstanding that LBH had concerns that this would expose T to risk. In the view of the court, this was a judgment that to a considerable extent turned on the facts of the case. The court decided that LBH's concerns related to a household of ten, rather than one of three, and that there was considerably less risk of neglect if T were the only child of the family living at home[10]. It also noted that the vast majority of children who are received into local authority care return home by the age of eighteen, so that it could not be said that T's desire was seriously irresponsible by comparison with that of other young people in her situation. Indeed, it was 'natural'[11]. Finally it was pointed out that two of the four incidents cited by LHB as evidence of risk to T occurred at school, which she continued to attend whilst living in the children's home[12]. Preventing her from returning home would not reduce her exposure to these risks.

The Choice between Guardianship and Wardship

Having decided that T's desire to return home could not be labelled as 'seriously irresponsible' and so did not fall within the scope of Part II of the 1983 Act, the court then turned to consider the alternative course of action in this situation. It was held that, rather than looking to the Mental Health Act, those in the position of LBH should invite the court to give leave to invoke the inherent jurisdiction of the High Court, under the procedure found in s.100(3) Children Act 1989. This would have the effect of making T a ward of court. The court noted a number of advantages that this mechanism has over the use of guardianship.

8 *Lord Elton, introducing these words into the Mental Health (Amendment) Bill, the forerunner of the 1983 Act, on 19th January 1982.*

9 *Ibid.*

10 *At 198 D-E.*

11 *At 198 C.*

12 *At 198 G-H.*

First, a court operating under the inherent jurisdiction 'would have ensured [T's] continuing protection in the exercise of its almost unlimited powers'[13]. The Guardianship regime, by contrast, has since the coming into force of the Mental Health (Amendment) Act 1982[14], operated a circumscribed 'essential powers' approach, which had been introduced purposefully to reform the extremely wide and vaguely defined powers which a guardian enjoyed under the Mental Health Act 1959. Under the existing law, a guardian has three powers: to specify where the person subject to the order shall live; to require that person to attend specified places for the receipt of medical treatment, occupation, education or training; and to require that access to the person subject to the order be given be given to any doctor, approved social worker or other specified person[15]. In the view of the court these powers are simply not designed to be flexible enough to deal with all the welfare and protection issues that may arise in the case of a young person like T.

Secondly, by extension, the court pointed out that the guardianship regime is not a child-centred jurisdiction[16]. Indeed, guardianship is only available for persons aged sixteen and over[17]. Wardship by contrast is exclusively concerned with the protection and furtherance of the best interests of the child. Had T been made a ward of court, she would have been represented by the Official Solicitor, who would have carried out an independent inquiry into the situation, and have provided the court with a report of that inquiry[18]. The Official Solicitor could also have provided independent legal representation for T in court[19]. In the Guardianship regime, by contrast, r 12(3)(b), Civil Procedure Rules 1998 specifically provides that the person to be made subject to a guardianship order shall not be made a respondent in a disputed s.29 application. The court held that 'T would have been advantaged by that aspect of the wardship jurisdiction', whilst the situation under the Mental Health Act 'seems a comparatively impoverished alternative'[20].

Finally, the court noted, had wardship been invoked it would have been possible for one judge to consider the interests of all eight children together in consolidated proceedings, whereas the choice of guardianship had channeled T away from her siblings[21]. Taking all these points together, the court concluded that guardianship was in any case less suitable than wardship as a mechanism to best protect the interests of a young person such as T.

Commentary

On one view, seemingly the view of the Court of Appeal, this is a case that turned on its own facts. On the question of the preferability of wardship over guardianship, the court underscored the fact that 'Clearly each case must depend on its particular facts and we would not wish to be taken as offering any general guideline'[22]. And by way of conclusion, the court again stated that 'we wish to emphasise that we have reached our conclusions on the special facts of a difficult and unusual case'[23]. Yet the fact is that this judgment does impact at the level of 'policy', and does so in a number of ways.

13 *At 193 H.*
14 *Later consolidated into the Mental Health Act 1983.*
15 *Mental Health Act 1983, s.8(1).*
16 *At 199 G.*
17 *Mental Health Act 1983, s.7(1).*
18 *At 193 H.*
19 *At 199 D.*
20 *At 199 F.*
21 *At 199 F-G.*
22 *At 198 E.*
23 *At 200 D-E.*

First, the judgment does make clear that an important element of the distinction between wardship and guardianship is that between a child-centred and an adult-centred regime. Guardianship is posited on the policy of minimum interference with the rights of the individual. Wardship is based on the much broader concept of the welfare of the child. It will be rare indeed that, when there is a choice between the two (that is when the person who is to be the subject of the order is aged sixteen or seventeen), guardianship will be the preferable option. It is not surprising that the Court of Appeal, when presented with a choice, expressed such a preference, as in this it follows earlier decisions of the court, which also have preferred to construct older children as children rather than as adults[24]. Of course, wardship was only invoked in this case because of the limitation placed on the availability of care orders by s.31(3) Children Act. But although the powers of a court exercising the wardship jurisdiction are greater than those available to a local authority over a child in care[25], nothing turns on this in the present context, since a care order shares many of the advantages of wardship by comparison with guardianship.

Secondly, it provides confirmation that 'abnormally aggressive or seriously irresponsible conduct', which features in the definition not just of 'mental impairment', but also of 'severe mental impairment' and 'psychopathic disorder' in s.1(2) of the 1983 Act, is to be construed narrowly. It is interesting to note, first, that the court emphasised that those found to be seriously irresponsible became liable not only to guardianship but also to civil confinement[26]; and, second, that in arriving at its conclusion the court focused not on the words themselves, but on the intention behind them. For the fact is that, although this form of words was selected, according to Lord Elton 'after a long dictionary search and a good deal of discussion'[27], their meaning is not transparent. This is because 'abnormal aggression' and 'serious irresponsibility' are more moral-political than medical concepts, and so their meaning will always contain a considerable subjective element. They are in fact words upon which meaning is *imposed* by the reader.

The real significance of the decision of the court on this point, then, is that by turning to the, highly contextualised, intention of the framers in 'giving meaning' to this phrase, the court reaffirmed civil libertarianism over paternalism in the use of guardianship, turning its back on the opportunity to start a process which may have extended the scope of guardianship considerably. It would not have involved any particular corruption of the English language to hold that T was exhibiting 'seriously irresponsible conduct' in returning to live in a home at which she was at real risk of sexual abuse and neglect. It would, however, have involved a muddying of the ethos behind the scheme. And who could say where, if T's conduct fell on the 'seriously irresponsible' side of the line, that line would be drawn in future cases?

We know, from the case of *R v Hall* (1988) 86 Cr App R 159 (CA) that both 'severe mental impairment' and 'mental impairment' are to be assessed in the context of the Sexual Offences Act 1956 by reference to normally developed persons. Although there is some uncertainty regarding the transferability of this decision into the context of the interpretation of the 1983 Act[28], *Hall* nevertheless seems to suggest that 'abnormally aggressive or seriously irresponsible conduct'

24 *Re R (A Minor) (Wardship: Consent To Treatment) [1991] 3 WLR 592; Re W (A Minor) (Medical Treatment: Court's Jurisdiction) [1992] 3 WLR 758.*

25 *For example, s.34, Children Act 1989 limits the restrictions that a local authority can place on contact between a child in care and his or her parents and other defined carers. An authority can, however, seek the permission of a court to prevent contact.*

26 *At 198 B-C.*

27 *Lord Elton, op cit, cited by Thorpe LJ at 197 C-D*

28 *See P.Bartlett and R. Sandland, (1999) Mental Health Law Policy and Practice, London: Blackstones Press, pp 27-29.*

should be defined in the same way. And on one level this is what the Court of Appeal proceeds to do, holding essentially that T's desire to return home is 'natural'; that is, normal; that is, not sufficiently distinct from normally developed young persons. But for the court, it was in any case 'simply inapt'[29] to construe T's conduct as falling within the s.1(2) definition; and this is a statement about the underlying policy of the 1983 Act, rather than about the particular facts of the case. In the sense that this view is not dictated or governed by legal rules, it is an extra-legal judgment: the judge as citizen or as politician but not as lawyer.

This should not be taken to imply, however, an argument that the Court of Appeal adopted the 'wrong' policy. It seems unarguable that the 'essential powers' approach is unsuitable to meet the needs of a person such as T. For instance, the court noted in passing that LBH had placed restrictions on contact between T and her parents, purportedly under the powers given by the guardianship order, which in the court's view were of doubtful legality[30]. The point was incidental to the appeal and so perhaps understated by the court. But it is clear: there is no provision in the powers given by s.8(1) of the 1983 Act to place limitations on those with whom the person subject to the order may have contact. On the other hand, it may be suggested that the Court of Appeal was so closely focused on the intention behind the guardianship scheme that it failed to consider how a guardian is actually able in practice to control contact between the person subject to the order and others. In *Cambridgeshire County Council v R (An Adult)* [1995] 1 FLR 50 (FD), which involved a situation broadly comparable to that of T in the instant case[31], Hale J. took the view that 'Guardianship would ... give the [local] authority the greater part of what they seek'[32]. In Hale J.'s view this would allow the authority to dictate where R would live and this, combined with the general right to control access to private property, could in practice regulate contact between R and her family. This view may be problematic for other reasons[33], but it does make the point that the Court of Appeal's explanation of guardianship as nothing more than the three powers specified in s.8(1) of the 1983 Act may capture the technical position but is rather further away from what will often be the realities of the situation.

That the Court of Appeal took a rigorously civil libertarian approach to the interpretation of the 1983 Act does not of course mean that it was indifferent to the arguments in favour of paternalism or protectionism. Rather, for the court it was an issue concerning appropriate mechanisms. As far as children are concerned, the regime established under the Children Act 1989 and related legislation, supplemented by the inherent jurisdiction, is the appropriate forum for the implementation of protectionist concerns. For adults these mechanisms are not available. Instead, at present, all that exists is the inherent jurisdiction of the High Court to issue declarations as to the best interests of an adult lacking competency to take his or her own decisions. This was of course a live issue in this case as T, having passed her seventeenth birthday shortly after the making of the initial EPOs, was rapidly approaching her eighteenth birthday by the time of the appeal, at which time the wardship jurisdiction would no longer be available.

29 *At 198 E.*

30 *At 198 G-H.*

31 *like T, R, a young woman of twenty-one, having mild learning difficulties, lived away from her family in local authority accommodation having been taken into care. Also like T she had expressed a wish to return to live in the family home, whereas the local authority wished to prevent contact between R and members of her family, including her father who had been convicted of a serious sexual offence against her.*

32 *[1995] 1 FLR 50 at 55E.*

33 *Namely that there may well have been no 'seriously irresponsible conduct' on the part of R, as that phrase was explained by the Court of Appeal in the present case, thus excluding her, like T, from the ambit of guardianship.*

The court declined to embark on a comparison between the powers available under guardianship and that which is possible by way of the issuance of a best interests declaration[34]. It did, however, express a 'wish to see the Family Division judge given wider powers to deal with the welfare of adult patients where that cannot be fully achievable under the provisions of the Mental Health Act 1983'[35]. Family Division judges have in fact proven fairly ready to develop the use of the mechanism of the declaration since the landmark decision of the House of Lords in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (sub.nom. *F v West Berkshire HA* [1989] 2 All ER 545). In that case, as is well known, the House held that a Family Division judge might properly issue a declaration that a proposed course of action, in respect of the medical treatment of an adult patient who lacks the capacity to take his or her own decisions and protect his or her own best interests, is lawful. In explaining the concept of 'best interests', Lord Goff with the concurrence of other member of the House, used the seemingly broad phrase 'life, health or well-being'[36]. But it has generally been assumed that the jurisdiction is of limited effect. The Court of Appeal in the present case referred to two High Court decisions, *Re C (Mental Patient: Contact)* [1993] 1 FLR 940 (FD) and *Cambridgeshire County Council v R (An Adult)* (above). In the former of these, it was held that where an adult child with learning difficulties lived with one parent, and that parent was refusing access to the absent parent, the High Court could, in the best interests of the young person in question, grant access by way of declaration. This was on the basis that access to one's parents is a common law right and hence infringement is unlawful and therefore properly the subject of a declaration. But in the latter case, as discussed above, the issue was not access but the prevention of contact between an adult woman with learning difficulties and members of her family. Re C was distinguished as the prevention of contact is not the protection of a common law right but the infringement of one, namely the right to freedom of association. Hale J. took the view that the power to issue declarations was in effect only a power to state the strict legal position[37], which did not extend to permitting the infringement of common law rights. As such, as the Court of Appeal seemed to accept, the mechanism of the best interests declaration would not be able to prevent contact between T and her parents, or prevent T returning home, in the instant case. If this is correct, then on her attaining adulthood, the law would be able to offer T no protection in this regard.

There are three points that can be made here. First, in lamenting the limitations of the mechanism of the best interests declaration, the Court of Appeal in this case adds its voice to what has become a virtual collective mantra for all those with an interest in this area of law and social policy. As is well known, the process to reform this area of law began in the late 1980s following the decision in *F v West Berks*. It has threatened to produce legislation on a couple of occasions in the 1990s. The situation at present, likely to continue until after the next general election at the earliest, is that the government accepts the need for reform but is unable to pledge the necessary parliamentary time[38]. Until legislation is forthcoming - the courts have stated on numerous occasions from the F case onwards that the changes required are beyond their jurisdiction to deliver - they will no doubt continue to identify gaps in the coverage of the protection offered to persons like T.

The second point, however, is that perhaps in the meantime more creative use could be made of the existing law. Little was said in this regard by the Court of Appeal in the present case. But it

34 *At 199G-200A.*

35 *At 200 D-E.*

36 *[1990] 2 A.C. 1 at 76.*

37 *[1995] 1 FLR 50 at 52 F-G.*

38 *Lord Chancellor's Department (1999) Making Decisions: The Government's proposals for making decisions on behalf of mentally incapacitated adults, London: Lord Chancellor's Department. www.open.gov.uk/lcd/family/mdecisions*

would also have been interesting to see how the court would have responded, for example, to an argument that the common law right of access between parent and child was never absolute at common law[39], and therefore it is possible to **declare**, in an appropriate fact situation, that the common law position is that the right is not exercisable[40], on the basis that its exercise is contrary to the best interests of the person concerned[41].

In *Cambridgeshire* Hale J. also discussed the relevance of the law relating to harassment. At that time, it was at least arguable that there was no tort of harassment, the latest decision at that time being that of the Court of Appeal in *Khorasandjian v Bush* [1993] QB 727 (CA). But since *Cambridgeshire* was decided the Court of Appeal in *Burris v Azadani* has stated that there is a tort of harassment; or at least that the High Court should be prepared to invoke its inherent jurisdiction to issue an injunction to prevent an activity that is not tortious if, on balancing the needs and interests of those concerned 'the court recognises a need to protect the legitimate interests of those who have invoked the jurisdiction'[42]. Perhaps this element of the inherent jurisdiction - to issue injunctions - could usefully be developed in the area of mental health as it seemingly has been in the area of family law[43]. It is worth noting that in *Cambridgeshire* Hale J. did not hold that the law of harassment is inapplicable, she merely noted that 'no one has sought to persuade'[44] her that it was applicable. But even if *Burris* turns out to be a questionable authority, there are still the mechanisms to regulate contact between adults that are contained in the Family Law Act 1996 and the Protection from Harassment Act 1997. This is not to deny that these statutes are aimed at a fairly narrow set of issues, but this does not mean that they could not usefully be employed in appropriate circumstances.

Moreover, this being the third point, if the Court of Appeal has shown itself willing to abandon the requirement that there need be an identifiable legal right that has been infringed before a Family Division judge acting under the authority of the inherent jurisdiction might properly issue an injunction placing limits on the rights of another party[45], then perhaps it is arguable that this might also enable the judge to issue a declaration as to best interests that does not defend an identifiable common law right, but which rather declares that a particular course of action is lawful as in the best interests of the person concerned, even where that infringes in some way the legal rights of

39 *As would be possible, for example, on the basis what was said by the House of Lords in Gillick v West Norfolk and Wisbech AHA [1986] AC 112 per Lord Scarman at 183: 'Parental rights clearly do exist, and they do not wholly disappear until the age of majority... But the common law has never treated such rights as sovereign or beyond review and control case.'*

40 *This argument was rejected by Hale J. in the Cambridgeshire case, [1995] 1 FLR 50 at 52 E-53 C.*

41 *In point of fact, T's situation continued to be litigated after her eighteenth birthday, with LBH seeking declarations from the High Court, that it would be lawful to keep T in LBH accommodation, and to prevent contact with her mother (her father having died shortly after the present appeal was heard). On the preliminary question, of whether the High Court has jurisdiction to grant declarations in regard to such matters, the Court of Appeal (In re F (adult patient), CA, case no. 2000/0094) answered in the affirmative, taking a very broad view of the legitimate scope of declaratory relief. This important decision is the subject of a case note in this Journal at p196.*

42 *Per Lord Bingham, M.R., [1995] 4 ALL ER 802 at 807.*

43 *J. Conaghan [1996] 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' 16(3) OJLS 407 has argued that reliance on Burris should be cautious, because the decision goes so clearly against the accepted wisdom that the inherent jurisdiction can only operate by way of an injunction to prevent the infringement of an identifiable legal right.*

44 *[1995] 1 FLR 50 at 52 H.*

45 *In Burris, the defendant had been made subject to an injunction preventing him from approaching within a specified distance from the complainant's home, thus limiting his legal right to use a public road. The defendant was found to have breached the terms of the injunction and imprisoned for contempt of court. On appeal, the Court of Appeal upheld the terms of the injunction.*

that person or some third party. After all, no legal right is absolute, and the power to issue declarations and to issue injunctions are both merely part of a broad raft of powers that comprise the inherent jurisdiction[46]. Perhaps a greater willingness to issue injunctions under the authority of *Burris*[47] would be a useful development in the protection of persons lacking capacity. The inherent jurisdiction seems to operate with a very broad definition of 'harassment', similar to that of 'molestation' in the Family Law Act 1996, which is 'any conduct which could be properly regarded as such a degree of harassment as to call for the intervention of the court'[48]. This may not be the strongest argument in legal terms, but I for one would like to have seen it put to the Court of Appeal in this case.

Finally, it is worth pointing out that the court chose to 'express no view'[49] in respect of the submission of council for Mr.F, that the situation whereby a person in T's position is prevented from representation before a court hearing an application to displace her Nearest Relative amounts to a breach of her human rights. The law report does not disclose which particular right or rights were mentioned. It may well have been Art 6.1 of the Convention[50], which provides that 'In determination of his civil rights and obligations... everyone is entitled to a fair and public hearing'. Art 6 is one of those convention rights incorporated into domestic law by s.1 Human Rights Act, 1998. It is not, however, clear that it would be able to assist a person in T's position. Art 6.3 gives those charged with a criminal offence with rights, **inter alia**, to defend him- or herself and to examine witnesses. Although there is no corresponding positive right in relation to civil proceedings, it is likely that a similar right of audience is inherent in the generally applicable requirement for 'a fair and public hearing'. The attitude of the European Court of Human Rights has been that Art 6.1 should not be construed restrictively[51], but it is not clear whether this means that the protection offered by Art 6 extends to those who are not a party to the proceedings in question. Technically, s.29 proceedings do not determine the civil rights of the person subject to, or intended to be subject to, the order under the 1983 Act. There is scope for arguing that in practice this may be the case, but even so there are of course mechanisms - at present the mental health review tribunal system - that are available to a person detained under the 1983 Act which clearly are designed to be determinative of the extent of civil freedom enjoyed by the person subject to the order, and at which representation is a right. On the other hand, the decision of the county court in this case, to make the s.29 order, did have, as an immediate consequence, the making of an order under s.7, In reality, therefore, T's interests were all but directly before the court, and it does seem at least arguable on the basis of *Moreira de Azevedo* that that is enough to bring a person in her position within Art.6. In future, of course, it will not be so easy for the courts to avoid addressing such arguments.

46 *Again, readers are referred to the decision of the Court of Appeal in the sequel to the case presently under discussion, see fn.41, above, which addresses directly arguments along these lines and see p196 of the Journal.*

47 *In fact, as it is most often contact with family members that is at issue, the powers in Family Law Act to issue 'non-molestation orders' would often be available, and here it is clear that there need be no infringement of an identifiable legal right.*

48 *Horner v Horner [1982] 4 F.L.R. 50 at 51 Ormrod L.J., but see also C v C (Non-Molestation Order: Jurisdiction] [1998] 1 FLR 554 (CA).*

49 *At 199 F.*

50 *Arts 5 and 8 of the Convention (concerning the rights to security of the person and regard for family life), were to be discussed by Sedley LJ in the later proceedings relating to F (see fn. 41, above) in the context of declaratory relief.*

51 *Moreira de Azevedo v Portugal (1990) 13 EHRR 721.*

Concluding Comments

In one sense, the Court of Appeal was quite right to say that this is an unusual case, which turns on its own facts. The choice between guardianship and wardship can only arise in respect of young people who are 'mentally disordered' in one of the four ways required by s.7(1) of the 1983 Act, and who are of seventeen years of age. For those younger than seventeen, a care order rather than wardship is the appropriate option, and for those younger than sixteen guardianship is not available. For those older than seventeen, neither wardship nor a care order is possible.

So it is fair to say that this is a factually unusual case which has forced us to look at familiar legal provisions from an unfamiliar angle. But in so doing, as this note has shown, the facts of this case have acted so as to provide an insight into various broader policy questions, allowing the Court of Appeal to specify in some detail why it is that wardship should have been preferred to guardianship on these facts. The message is that the Court of Appeal is not prepared to allow the extension of the guardianship regime on grounds of beneficence, any further than was, in the court's view, intended by the framers of the legislation. But as this note has also shown, this case leaves questions unanswered and options unexplored. For now, whether there could be an increased role for the law of harassment in this area; whether the inherent declaratory powers of the High Court have been developed to the fullest extent possible; and whether human rights law is set to make a marked impact on mental health law and policy, are questions that still await an answer.