"C" v The Secretary of State for Health [0037]

Protection of Children Act Tribunal
Date of hearing 28th, 29th January 2002

-before-

His Honour Judge David Pearl
(President)
Mr Peter George
Mrs Margaret Williams

DECISION

1. The applicant, referred to in this decision as "C" as a result of Orders made by the Tribunal under Regulations 24 and 33 of the Tribunal Regulations, appeals against the decision of the Secretary of State for Health to include his name on the list of people considered unsuitable to work with children. He was placed on the Consultancy Service Index in February 1997 in a temporary capacity, he was confirmed on that index in March 1998 and his name remained on this list immediately before the commencement of the Protection of Children Act 1999. He was transferred onto the statutory list on 2nd October 2000 by virtue of s. 1(2)(b) of the Protection of Children Act 1999. His appeal to the Protection of Children Act Tribunal 1999 was lodged on 4th January 2001.
2. He was represented at the appeal by Mr J Crosfill of Counsel instructed by Burton Marsden Douglas, Solicitors. The Respondent was represented by Mr P Coppel of Counsel.
3. The appeal is brought under s. 4(1)(a) of the Protection of Children Act 1999. Section 4(3) sets out the statutory framework for the consideration of the appeal by the Tribunal as follows:

> "If on an appeal…under this section the Tribunal is not satisfied of either of the following, namely –
> (a) that the individual was guilty of misconduct (whether or not in the course of his duties) which harmed a child or placed a child at risk of harm; and
> (b) that the individual is unsuitable to work with children,
>
> the Tribunal shall allow the appeal or determine the issue in the individual's favour and (in either case) direct his removal from the list; otherwise it shall dismiss the appeal or direct the individual's inclusion in the list."

4. The word "harm" (s 12(1) of the Act) has the same meaning as in s 31 of the Children Act 1989. "Harm" is defined in the Children Act 1989 as "ill-treatment or the impairment of health or development". "Development" is then defined as "physical, intellectual, emotional, social or behavioural development." Health means physical or mental health. Importantly "ill-treatment" includes sexual abuse and forms of ill-treatment which are not physical.
5. Mr Coppel submitted that the nature and purpose of the list is to prevent a person from practising a particular line of employment and that it exists in order to install confidence in the system of child care and to provide parents and others with a measure of assurance. The list is designed to protect children from risk of harm. Whilst not disagreeing with this overview of the nature and purpose of the list, we agree with Mr Crosfill when he urged upon us the need to consider the question of balance. This point is highlighted by Hale LJ in R v Secretary of State for Health exparte C [2000]EWCA 49 where, when commenting on the Index, she says:

> "Underlying this issue is the balance to be struck between two important interests. One is the interest of any individual in safeguarding his reputation and livelihood against the serious interference which inclusion on anything like an official 'blacklist' may entail. The other is the interest of children living away from home, and the interest of the community which seeks to safeguard its vulnerable members, in effective protection from abuse and neglect and other risks to which they are subject…"

6. [See also the judgment of Newman J in R v Worcester County Council, Secretary of State for the Department of Health exparte "S.W." [2000] EWHC Admin 392, where the Judge said "Assuming as I do that the consequence of being included on the Index is to interfere with employment, I see no ground for concluding the Index is, as it stands, disproportionate to the objective to be obtained. The Convention requires a balance to be struck. The authorities are to be accorded a discretionary area of judgment."]

7. The appeal by "C" is opposed by the Respondent because:

> (a) A girl made allegations that "C" had sex with her against her will whilst she was resident in a children's home where he was employed and also whilst she was fostered by him at his home.
> (b) Some of "C"'s own children told the authorities that he had mistreated them when they were young.

8. Mr Coppel submitted that there will be occasions when proof of past misconduct (s 4(3)(a)) will be all that is required to make a finding that the individual is unsuitable to work with children (s 4(3)(b)). We agree with Mr Coppel on this submission. Thus on the facts of this case, if we are satisfied, by the appropriate standard of proof, as to both of (a) and (b) or (a) alone in paragraph 7 above, then it would inevitably follow that the finding in relation to s 4(3)(a) [misconduct] would mean that "C" would be unsuitable to work with children and thus s 4(3)(b) would be satisfied. It is our view however that a finding in favour of the Respondent in relation to paragraph 7 (b) above alone would not by itself result, without more, in an inevitable finding for the Respondent on s 4(3)(b).

9. We must state at the outset of this decision, as recognised by both Counsel, that we are placed in the extremely difficult position of having to assess a volume of evidence without the benefit of live evidence from either "C" or the girl referred to in paragraph 7(a) above (whom we shall call "S1"). We saw two video recordings of interviews dated 05.01.1995 by a police officer. The first video is of "C"'s child "M" who was 9 at that time. The second video is of "C"'s step-son "J" who was 13 at that time. We were told that there had been a third interview, this time with "C"'s step-daughter "S2" but that this video had been destroyed. The only live witness we heard was Mrs Sarah Donlan who was Area Commissioner of Children's Services for Kent County Council but who has now retired. She gave evidence of the enquiry that had taken place in 1995 of "C", of the interview that had taken place at that time with "S1", and of the subsequent disciplinary proceedings against "C". The interview had been conducted by a Mr David Marshall, who was an independent consultant. Mrs Donlan did not herself speak to "S1", "J","S2" or any of the other children. Aside from Mrs Donlan, the evidence we must consider is not evidence that has been tested before us by cross examination.
10. **The burden of proof:** It is common ground that s 4 of the Act places the burden of proof on the Respondent. We approach an analysis of the evidence therefore bearing in mind that it is the Respondent whom must discharge the burden.
11. **Standard of Proof:** Both Mr Crosfill and Mr Coppel addressed us on the standard that we should apply. We were referred to Re H and ors [1996] 1 All ER 1 where Lord Nicholls stated:

> "Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability…The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability…the

inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred."

12. Lord Hoffman in Secretary of State v Rehman [2002] 1 All ER 122 at 141 said much the same:

> "It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that he was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has…behaved in some…reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."

13. It is in the context of the proper standard of proof that we must apply, that Mr Crosfill draws our attention to deficiencies in the evidence before us and how English courts have been reluctant to rely in other situations on such evidence. Thus in commenting on "S1"'s witness statement obtained for these proceedings, Mr Crosfill criticised the statement because in certain paragraphs, and in particular the one defining her understanding of rape, it uses language that has clearly been placed into her mouth by lawyers. He referred us to the decision of the Court of Appeal in Alex Lawrie Factors Ltd v Morgan and others (5th July 1999) where Brooke LJ said:

> "The case is a very good warning of the grave dangers which may occur when lawyers put into witnesses' mouths, in the affidavits which they settle for them, a sophisticated legal argument which in effect represents the lawyers' arguments in the case to which the witnesses themselves would not be readily able to speak if cross-examined on their affidavits."

14. We bear these observations in mind when we weigh the witness statements made in this case, not only of course by "S1" but also by the appellant and by his two "character" witnesses.
15. We were referred to a shipping case "The Ferdinand Retzlaff" [1972] Lloyd's Law Reports 120 where Brandon J, in that context, commented on the importance of matters being proved by oral evidence. In the context of the case before him, the Judge remarked that seriously disputed central issues should be tried on oral evidence, given on oath and capable of being tested by cross-examination. These remarks reflect of course the importance of assessing and weighing the evidence on the basis of how the evidence has been obtained, whether this evidence represents the best evidence available to the Tribunal and if not, why it is that it is the only evidence available.
16. Mr Crosfill referred us to 3 European authorities; Kostovski v Netherlands [1989] 12 E.H.R.R.434; Unterpertinger v Austria [1986] 13 E.H.R.R.175; and Windisch v Austria [1990] 13 E.H.R.R. 281. All of these cases concerned criminal proceedings, and in each of these cases the European Court of Human Rights held there to be breaches of Article 6(3)(d) of the ECHR. We are not dealing here with a person charged with a criminal offence, and our obligations under the Human Rights Act 1998 s 6 is to comply with the slightly less specific provisions contained in Article 6(1) of the ECHR. Thus, in determination of "C"'s "civil rights" he is entitled to a fair…hearing…by an independent and impartial tribunal established by law. We do not consider that the lack of an opportunity to test "S1"'s evidence by cross examination deprives "C" of a fair hearing.
17. Mr Crosfill referred us to a case involving breach of prison discipline, R v Board of Visitors of Hull Prison, exparte St Germain [1979] 1 WLR 1401. This case, like the European cases, involved a serious loss of liberty, and it is understandable that the court held that the rules of natural justice required that there should be opportunity of calling evidence that was likely to assist in establishing the vital facts at issue. That case is very different to the issue before us and we do not obtain any significant assistance from it, except in so far as to say that we assess "S1"'s evidence, as indeed the evidence of "C" himself, bearing in mind the fact that it has not been tested by cross examination.
18. **Background:** "C" is an unqualified social worker. He commenced working in a local authority community home in 1981. We shall refer to the home as "Z". "S1" became a resident there. "S1" was 16 at that time. "S1" was fostered by "C" and his then wife whom we shall call "M2" between 4th February 1983 and 27th May 1983. She went for a short while to another residential home and then on 13th July 1983 she moved back to "Z". It seems that "S1" returned to her parents on 6th February 1984. In 1986 "S1" became ill and she was admitted to hospital. She had contact there with a social worker who made contemporaneous notes of what she was told. Eight years later, in 1994, "S1" saw a counsellor and as a result of what "S1" told that person, the local authority was contacted and an investigation took place. Two consultants were appointed. The first consultant, Mr Marshall, was asked to look into the allegations and to interview "S1". The second consultant, Mrs Ralphs, was charged with examining the social work files of "S1" and to report to the local authority on its contents. No interviews by either of the consultants took place with "C", with

"M2", with any of the children, or with any of the staff of "Z". It is right to mention that the superintendent of "Z" at the appropriate time was a Mr Detheridge, who has signed a witness statement on behalf of "C" for the present proceedings. Having received the reports from Mr Marshall and Mrs Ralphs, a decision was taken to place "C" on special leave.

19. Whilst this investigation was taking place, further complaints about "C" reached the local authority. Some of these complaints concerned allegations by former partners. These are not matters that we heard any evidence on in these present proceedings and are not relevant to our decision. However there were allegations of physical abuse by "C" of "J" and "S2" his step-children. A multi-agency Child Protection Case Conference took place on 19th January 1995.

20. A Disciplinary hearing took place on 11th and 12th May 1995. It seems that the Disciplinary hearing had before it the Report from Mr Marshall in relation to the allegations relating to "S1" and the minutes of the Case Conference in relation to the allegations surrounding the treatment of "J" and "S2". The Tribunal also considered notes of a case conference concerning "C's" eldest son "F" in 1978. "C" gave evidence denying all the allegations. The Tribunal found the case in relation to "S1"'s allegations proved, and concluded further that the results of the child protection investigation were such that there could be no trust or confidence in "C" as an employee dealing with young people and that that loss of trust and confidence amounted to some other substantial reason for dismissal. The Disciplinary Tribunal concluded that "C" should be dismissed. "C" exercised his right of appeal. The appeal was heard on 30th June 1995 and 14th July 1995 by a panel of members. It upheld the sanction of summary dismissal.

21. "C" then instituted proceedings before the Industrial Tribunal. The Industrial Tribunal dismissed his complaint of unfair dismissal by a decision sent to the parties on 17th April 1996. His subsequent appeal to the Employment Appeal Tribunal was dismissed at a preliminary stage (EAT/566/96: His Honour Judge J Altman, Chairman).

22. Further proceedings arose as a result of judicial review of the decision to place his name on the Consultancy index. Mr Justice Richards dismissed his application in December 1998 and the appeal to the Court of Appeal was dismissed on 21st February 2000 (R v Secretary of State for Health exparte "C" [2000] EWCA Civ 49).

23. We have been able to read decisions of the Industrial Tribunal, the Employment Appeal Tribunal, and of course the Court of Appeal in the judicial review proceedings.

24. **The evidence relating to the allegations made by "S1":** In her witness statement dated and signed on the 17th July 2001, "S1" states that a sexual assault occurred for the first time as follows:

> "We went to this club and I was drinking, he was buying me halves of lager, and I remember getting very tiddly and coming out of the club. I went to get in the front seat of the car, but he led me round and opened the back seat and said, "get in there". I thought he was just meaning, "go to sleep", because I think I said I felt sick or something. I got in and he followed me. The next minute he was pulling my trousers off and getting on top of me and doing what he wanted to do – raping me. I was drunk and totally shocked. I couldn't comprehend what was going on, just totally shocked and scared. I was very tiddly but aware of what he was doing to me. When he finished what he was doing he just said, "get in the front now then". So I just got in the front seat and he drove home as if nothing had happened."

25. She then explains that the following morning whilst "C"'s wife "M2" was upstairs, she walked into the kitchen and "C" was standing there and he tried to kiss her as if it was the normal thing to do. She says that she clearly remembers the incident in the car as the first incident, that she was abused on other occasions whilst she was fostered but that she has blocked these incidents from her memory over time and with the help of counselling.

26. She does refer to another incident in paragraph 14 of her witness statement. This occurred after she had returned to "Z" and "C" asked her to baby sit. She alleges that she was raped on that occasion.

27. The third incident she refers to also was when she was back at "Z". She states as follows:

> "…I was messed up and angry and was getting into trouble. One of these occasions was when I went out one night with this girl. We sneaked out, we weren't supposed to. We both got some drink from the local village and just got drunk and came back to "Z". There was an emergency block for kids coming in at night time. It was used so that kids coming in at night time did not disturb the rest of the children. I was put over there and I think the other girl was sent over there as well in a different room. I was alone in the room and I just remember "C" coming in and he did it again. He raped me again he didn't say anything he just did it."

28. Mr Coppel addressed us on the difficulties "S1" had in giving evidence before the Tribunal, and the reasons why, in the end, it was decided that she would not be called as a witness. He was fully aware that her absence placed the Tribunal in difficulty when assessing her version of events.

Nonetheless, he submitted to us that there were three clear instances of non-consensual sexual intercourse and that she had no particular reason to fabricate this story then or now. He said also that there was no significant inconsistency in the account she described in her witness statement in 2001 with the account she gave during the investigations in 1994 and the conversation with the social worker in 1986.

29. "C" has denied these allegations throughout. In paragraph 52 of his witness statement he says:

> "I reject completely that I slept with her ("S1") or forced her to have sexual intercourse with me. This is completely untrue and I deny this totally. I have no recollection and deny the suggestion that the following morning I tried to kiss "S1" as if it were a normal thing to do. This is entirely untrue and made up. The whole recollection of events and notion is bizarre.
>
> I deny that the sexual intercourse and rape incident ever took place and I also deny that there were other occasions."

30. This is similar to the statement he placed before the Disciplinary hearing in 1995:

> "The accusations that I had a sexual relationship with "S1" some 12 years ago whilst she was a client in my care is totally false and not a shred of evidence exists to support the allegations."

31. He explains in his witness statement for these proceedings that the procedures in "Z" would not have enabled him to have gone to the Emergency Unit and stay there with "S1" let alone force himself on her.

32. "C"'s description of the procedures in "Z" is supported by the witness statement of Mr Detheridge who was the superintendent of "Z" at that time. On a first reading of Mr Detheridge's statement, there is some indication of an independent account of the personalities and events back in 1983. However, his evidence may not be totally independent. "S1" indicated that Mr Detheridge fostered "C" when "C" was a child and that he gave "C" his first job. (See the notes made by the Social Worker when "S" was in hospital in 1986: Appendix 3 to Mrs Ralphs' Report on 29.10.1994). That is Mr Coppel's understanding of the situation although Mr Crosfil on behalf of "C" said that there was no formal fostering. We heard no direct evidence on the matter, and it would be inappropriate to speculate on the relationship between "C" and Mr Detheridge. In any event, Mr Detheridge was the superintendent at that time and his description of the procedures in force, which have not been challenged, give some credence to the view expressed by him that her allegation of the incident in "Z" as entirely unlikely and improbable.

33. Mr Detheridge paints a picture of a very disturbed young child. He says at paragraph 26:

> "I remember "S1" to be a particularly plausible, intelligent, articulate but extremely manipulative young lady. She was capable of extremes of truculent, spiteful and aggressive behaviour should charm and persuasion fail to achieve her ends. I recall one incident she deliberately pinched her face to produce bruising and used the injury to accuse Staff of physical mistreatment."

34. Further on in his statement he says:

> "I regarded "S1" as particularly disturbed, confused and prone to extremes of behaviour. It was my view that her ability to distinguish between fact and fantasy was doubtful at times…I have no doubt in my mind that she has made up the allegations against "C" and I do not believe that they took place."

35. We have examined the evidence that is available to us to see whether the Respondent has discharged the burden on him to show that it is more likely than not that the sexual abuse by "C" on "S1" took place. Our conclusion is that the Respondent has not discharged the burden for the following reasons.

- "C"'s and Mr Detheridge's description of "S1" in 1982/83 is backed up by the Summary of the Case Notes attached as Appendix 1 to Mrs Ralph's Report. There is a note dated 20.9.82 saying that "she seemed to be developing a pattern of violent aggressive behaviour, drinking, disputing with the police and then being locked up in a cell." There is a further note dated 5.10.82 that her behaviour caused considerable concern, very provocative, confrontational and that she was engaging in self-mutilation. On 1.11.82 a teacher at "Z" suggests "one wonders if there are experiences yet undisclosed." Interestingly there is another note from a social worker dated 9.11.82 that suggests that "S1" told her in confidence "a secret she had told no one else." These entries of course all predate the placement with "C", and there is a clear indication that all was not well.
- When one looks at the notes during the critical period of the placement, there is an entry "no hint of anything sinister" (8.3.83-12.3.83). The description of the breakdown of the placement provides no hint whatsoever of any suspicion that there is a sexual relationship of any kind between "S1" and "C".

- In May/June 1986 "S1" was treated in hospital and it appears that she kept a diary at that time. This is described in appendix 3 of Mrs Ralph's Report as a "tragic record of her unhappiness." Mrs Ralphs says that "S1" refers to sexual experiences with members of her family but none of her diary entries refer to sexual experiences with "C". Although not actually corroborative of "C"'s position, the absence of allegations about "C" is certainly not supportive of the Respondent's position.
- The notes taken by the social worker in 1986 about the relationship with "C" refers to sexual intercourse first in the car, and then every Sunday for five or six weeks, and then the incidents when she was asked to babysit and then the incident when she back at "Z". In her report to Mrs Donlan in October 1994, Mrs Ralphs expresses the opinion that the writer of the notes in 1986 expressed no doubt about "S1"'s truthfulness and that she, Mrs Ralphs, "having considered the context,..am led to believe these statements are true." Mrs Ralphs provides no reason for her view that "these statements are true". Indeed, her references to her interviews with other people involved raise serious doubts in our mind as to the appropriateness of her conclusion. Thus, she interviewed a Mr Colin Sykes , Principal Social Worker. He remembered "S1" quite well, and visited her when she was in "Z". He remembered nothing that would suggest sexual abuse. Mrs Ralphs concluded:

  > "In the light of today's knowledge, it seems clear that "S1" was an abused child who exhibited many of the symptoms associated with emotional neglect and sexual abuse. There is no evidence in the child care file to implicate "C", but it appears that "S1" did disclose his abusive behaviour in 1986. It would be helpful if the writer of the mental health case notes could be traced."

  (Mrs Donlan told us in her evidence that efforts had been made to contact the social worker concerned, but that unfortunately she is no longer alive.)

  The evidence summarised by Mrs Ralphs suggests to us that there is a likelihood of abuse, but this abuse seems to have been present prior to the placement with "C".
- Mr Marshall interviewed "S1" in 1994 on two occasions. The description by "S1" to Mr Marshall of the incident in the car is slightly different to the description in her witness statement. However it is, as Mr Crosfill agrees, broadly consistent. Mr Marshall looked at the question of corroboration in paragraph 5 of the Report. However, there is no corroboration of the events described by "S1", and there is nothing in the Report identifying corroboration.
- The Management Statement of Case was prepared by Mrs Donlan. Mrs Donlan told us in evidence that she had not read the file herself and that she placed her faith in Mrs Ralph to summarise the notes. She had not interviewed "S1" or "C". Mrs Donlan was not able to help us to any extent.

36. **The second basis for opposition to the appeal:** We now consider the second basis of the Department's opposition to the appeal; namely that some of "C"'s children told the authorities that he had ill-treated them when they were young. "J2"'s video record from 1995 has disappeared, but we did view the video of "M" and "J".
37. "M" was nine at the time and he is "C"'s son. He described an incident with "S2".

    > "..well he used to like to "S2" he used to pick her up by the legs and like drop her. And when she cried he used to put a cushion against her face to stop her."

38. "M" said that he didn't think "C" was being rough but that "C" thought it was a joke, that "S2" laughed at first but then cried.
39. "M" also said that his father had picked up "J" by his ears at a Butlin's holiday camp, that "J" thought it was funny at first, but that he ("M") knew it was going to hurt.
40. "M" came over in the video as a thoughtful nine year old who was anxious not to criticise his father, but that he felt that perhaps his father treated "S2" and "J" differently from himself. Interviews with children are always of course extremely difficult and care must be taken. Overall, we felt that the interview with "M" was conducted with the care required. However, in relation to the "different treatment", there is an indication of suggestive questioning. The questioner asked the direct question "Did you get any different treatment than "S2"", to which the reply eventually was "Well like dad was nice to me but like a bit horrible to her."
41. Mr Coppel accepts that the interview with "M" does not demonstrate anything that by itself can stand close scrutiny, but he relies on the interview with "J". "J" was 13 when he was interviewed, and he describes four serious incidents: being locked in the bathroom for a long period of time, being forced to eat seaweed, being poked in the eye, and being picked up by the scruff of the neck. Mr Coppel submitted that these incidents suggest that "C" is a man with a personality that is wholly unsuitable to work with children. He submitted further that these are repeated incidents.
42. We were referred also to the minutes of a Case Protection Conference held on 19th January 1995, where reference is made to an interview with "S2" by Mr Dixon, a Social Worker in November

1994. It seems that there is an allegation that "C" hung "S2" over the edge of a ferry when she was four years old; that he had tried to smother "J2" with a cushion on one occasion after she and "M" had had an argument; and that he used to poke her in the face with his finger.

43. "C" deals with the allegations in his witness statement. He accepts that he picked up "J2" by the ankles but says that this would have been a matter of horseplay and he would have been laughing because he was playing around with the children. He does not accept that any physical abuse or violence took place with "S2" and he has no detailed recollection of the incidents that are mentioned.

44. His explanation of "J" being locked in the bathroom is that he thinks it may well have been the case that "J" was left in the bathroom after excrement was smeared on the walls and he believes what would have happened is that "J" would have been asked to remain in the bathroom until he had cleaned the walls.

45. The seaweed incident is referred to in paragraph 11 of his statement, and is put down to horseplay. He said that they were on the beach and he told "J" that if he poured sand down his back he would make him eat seaweed. He says that it is possible that he chased him and pretended to force him to eat seaweed.

46. He said that he has no recollection of picking up "J" in the way "J" suggested. It is possible that he poked "J" in the eye when "J" and another of "C"'s children "O" had been fighting. This would have been accidental. He said that he resorted to smacking "J" only once, at the Butlin's holiday when he was being particularly unruly, and he states that he has never smacked "S2".

47. The evidence before us about the matters with respect to the children is less than satisfactory. We have looked carefully at the video interviews, the notes of the Case Conference in 1995 and indeed an earlier Case Conference concerning "C"'s son "F" in 1978. On one reading there are examples here of excessive horseplay, some evidence that perhaps begins to hint of over zealous discipline, and some suggestion that he treated his step children differently to his own children.

48. It is important to remember that the statutory test relates to "misconduct which harmed a child or placed a child at risk of harm". The suggestion that "S2" was held upside down over the side of a ferry when she was very small obviously falls into that category. However, this allegation is denied by "C". Given the paucity of the evidence on this allegation, we conclude that the Respondent has been unable to discharge the burden on a balance of probability that that incident happened.

49. In Re CB and JB [1998] 2 WLR 211, submitted to us by Mr Crosfill, Wall J made the following observation when considering care proceedings:

> "Care proceedings are concerned with child protection. You cannot protect a child by exposing him to risk. Assessment of risk has to be based on findings of fact sufficient to give rise to the risk."

Like care proceedings, s 4(3)(b) is concerned with the assessment of risk, and like care proceedings it must be an assessment based on findings of fact. Findings can only be based on evidence and we must not speculate. That would be unfair to all those involved. The incidents are explained by "C" as horseplay and the reasonable disciplining of children that he described as at times being unruly. In relation to the allegations relating to the children, we have only the evidence of "J" that what is alleged to have occurred "harmed a child or placed a child at risk of harm." However, when "J" was asked whether he had ever to go to the doctor's because of something "C" did to him, he replied "No" and that his Mum thought "C" was only joking. The evidence that he is guilty of misconduct is simply not there.

50. We conclude that the Respondent, on the evidence we have carefully considered, has been unable to satisfy us on a balance of probability that "C" was guilty of misconduct which harmed a child or placed a child at risk of harm.

The Decision of the Tribunal for the reasons set out above is:

(1) the appeal of "C" is allowed
(2) we direct "C"'s removal from the list kept by the Secretary of State of individuals who are considered unsuitable to work with children.

His Honour Judge David Pearl (President)
Mr Peter George
Mrs Margaret Williams

Dated this 5th day of February 2002.