Neutral Citation Number: [2025] EWCA Civ 1011

Case No: CA-2025-000653

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Mr Justice Hayden
[2025] EWHC 439 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2025

Before:

SIR ANDREW MCFARLANE, PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE BAKER
and
LORD JUSTICE ARNOLD

- -

Re S (Wardship: Removal to Ghana)

- -

Between:

S (through his Litigation Friend, James Alexander Netto)	**Appellant**
-and-	
The Father (1)	**Respondents**
The Mother (2)	
ICFLPP (Intervenor) (1)	**Intervenors**
ALC (Intervenor) (2)	

- -

Deirdre Fottrell KC, Rob George KC and Andrew Powell (instructed by **The International Family Law Group**) for the **Appellant**
Rebecca Foulkes and Charlotte Baker (instructed by **Dawson Cornwell**) for the **First Respondent**
Rebecca Foulkes and Charlotte Baker (instructed by **Dawson Cornwell**) for the **Second Respondent**
Charles Hale KC, Harry Langford and Naomi Hart (instructed by **Hunters Solicitors**) for the **First Intervenor**
Lorraine Cavanagh KC and Daniel Currie (instructed by **McAlister Family Law**) for the **Second Intervenor**

Hearing date: 12th June 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 29th July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Sir Andrew McFarlane P:

1. This appeal is brought by S, who is now 14 years old. In March 2024, S was taken by his parents, together with an older sibling, from their home in England to visit relatives in the Republic of Ghana. After a short time, S' parents and sibling returned to the UK, leaving S in Ghana in the care of other family members and enrolled him in a boarding school there. S' parents took his passport with them back to the UK, leaving him, effectively, stranded in Ghana.

2. With the assistance of solicitors in London, who accepted his direct instruction, in September 2024 S issued wardship proceedings in the High Court seeking orders requiring his parents to repatriate him to the UK from Ghana. Following a three-day hearing, Hayden J handed down judgment on 27 February 2025 refusing S' application and discharging the wardship ([2025] EWHC 439 (Fam)). On 12 June, we heard S' appeal, for which permission had been granted by King LJ. At the conclusion of the appeal hearing we announced our decision which was that the appeal would be allowed. We directed that the wardship should be reinstated and the case be remitted for re-hearing before another judge of the Family Division. This judgment contains my reasons for that determination.

Factual Background

3. Hayden J's judgment contains a detailed account of the factual background at paragraphs 4 to 11.

4. In summary, S, who was born in 2010 in England, holds both British and Ghanaian citizenship. He is the youngest of three siblings. His parents, originally from Ghana, moved to the UK in the early 2000s. During 2023 and early 2024, S' parents became increasingly concerned for his safety as a result of an apparent developing disinterest in school and an increasing number of incidents which indicated to them that S was becoming involved in the gang culture which was prevalent in the area in which the family lived.

5. Hayden J heard evidence from S' father. He measured that evidence against NSPCC guidance on 'Criminal Exploitation and Gangs', which he found to be a helpful and forensically useful document. S did not give evidence or otherwise directly engage in the hearing, but in written statements he sought to explain away the seriousness of some of the behaviour that had been of concern to his parents. Hayden J nevertheless accepted the evidence of a social worker that a 'striking number' of the signs and behaviours cited in the NSPCC guidance could be identified in the evidence of S' behaviour in the period prior to his removal to Ghana. The judge 'broadly adopt[ed the social worker's] identification of the factual matrix' and he listed some 21 individual findings of fact [paragraph 27]. These can be summarised as follows:

    a) Deteriorating behaviour at school and poor school attendance: increasingly being recorded as late, a 2-day internal exclusion in 2023 for fighting, incomplete homework on multiple dates in 2023/24 and investigation for possession of an expensive jacket;

    b) At home his parents struggled to manage S' behaviour, especially his anger and defiance, which became more aggressive in 2024. Physical

force was reportedly used by both sides during conflicts. S often had angry outbursts, swore, slammed doors, and was aggressive. His parents were distressed when S stayed out late or was unreachable. S would lie to his parents and sneak out at night, often misleading them about his whereabouts.

c) S's behaviour was influenced by peer pressure and a desire to fit in. S was described as withdrawn and sullen at school, which was uncharacteristic.

d) In July 2023 there was a GP referral to children's services after S alleged physical discipline by his mother.

e) In November 2023, S punched his father to avoid going to school and, later that month, the parents called police when S had not returned home by 11pm.

f) In February 2024, S returned home with a swollen eyebrow after being punched by a peer. He downplayed the incident, but it aligned with earlier concerns about peer intimidation.

g) In March 2024, S stayed out until 1:30am and was unreachable on his phone during that time. The parents reported that he had become secretive and dishonest about his whereabouts and possessions.

h) S received an iPhone 11 (apparently from a friend) and his parents could not control its use. Conflicting accounts given by S about the phone's ownership suggested dishonesty. He was then found with a second phone and refused to disclose its source.

i) In March 2024, S was accused of stealing phones and advertising them on social media. His parents found troubling social media messages suggesting involvement in theft.

j) In July 2024 (after S had gone to Ghana), police reported that S had obtained an indecent image from a girl which he then shared with others.

k) In August 2024, the parents, who had before the move to Ghana found videos and photographs on S' phone showing S and friends with knives, found a hidden kitchen knife at their home.

l) S shared his bank account details with a stranger and participated in suspicious money transfers. Messages suggested involvement in fraudulent activity (S' explanation was inconsistent and deemed unreliable by the court).

6. Once in Ghana, S was enrolled in a British-curriculum boarding school in Accra in April 2024. He later left the school and received online tutoring. In August 2024, S moved to live with an aunt in another part of Ghana and in October he moved again to an uncle in yet another location where he attended a local school. In September 2025 he is due to have a further change of school.

The judgment

7. After an account of the factual background, Hayden J set out 'the legal framework' from paragraph 12 of his judgment. He held that S was and remained habitually resident in the UK, that he had been duped into going to Ghana and he had gone to great efforts to secure his own return. Nobody disputed that S was a '*Gillick* competent' young person and that 'accordingly, resolution of his application requires his own views to be factored into a best interests decision relating to his welfare'. In that context, the judge correctly referred to Article 12 of the United Nations Convention on the Rights of the Child ['UNCRC'] requiring the views of a child who is capable of forming his own views being given due weight in accordance with his age and maturity, together with similar requirements arising from the European Convention on Human Rights, Art 8 ['ECHR']. The UNCRC is not part of our domestic law, but its terms, at least in this regard, are to be taken as relevant to the requirements of the ECHR, which is incorporated into domestic law by the Human Rights Act 1998. The judge directly quoted from the important decision of *Mabon v Mabon* [2005] 1 FLR 1011, which emphasised the need for a keener appreciation of a child's autonomy in decisions about future arrangements for their care.

8. The judge then moved on to describe 'the central and critical role of parents in the upbringing of children and decision-making in their lives'. He did so by explaining the concept of 'parental responsibility' introduced by the Children Act 1989 ['CA 1989'], before referring to four cases: *KD* [1988] 1 AC 806; *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2025; *Re Ashya King* [2014] EWHC 2964 (Fam); *Re E (A Child) (Medical Treatment)* [2016] EWHC 2267 (Fam). In the first two of those cases, Lord Templeman and Hedley J respectively emphasised the central role of parents in decision making. At the end of his judgment, Hayden J expressly referred to the following words of Lord Templeman:

> 'The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered. Public authorities cannot improve on nature.'

In the fourth case Sir James Munby P observed that 'judges do not necessarily know best' and that usually a child's long-term carers are much better placed to decide what should happen to their child.

9. The judge's quotation in the following terms from the decision of Baker J (as he then was) in the third case, *Re Ashya King*, however, requires some clarification:

> "…the State – whether it be the court, or any other public authority – has no business interfering with the exercise of parental responsibility unless the child is suffering or is likely to suffer significant harm as a result of the care given to the child not being what it would be reasonable to expect a parent to give."

The *Ashya King* case concerned the statutory threshold criteria in CA 1989, s 31 which must be met before a court has jurisdiction to make a public law order under Part 4 of that Act, and in the passage quoted, Baker J should be taken to be doing no more than describing the import of those criteria, as was made clear by this court in the judgment

of McFarlane LJ in *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates* [2017] EWCA Civ 410:

> '[104] My primary conclusion, therefore, on looking at *Re King*, is that Baker J's words provide no basis for saying that he was holding that any test based on significant harm is to be applied to cases relating to the medical treatment of children. Even if I am wrong in holding as I do, and Baker J was purporting to set out such a test, a one-sentence statement in the course of a short judicial endorsement of a consent order where no point of law had been in issue, no authority had been cited, and where the judge makes no attempt to justify such a radical development of, or departure from, previous, long-established authority, provides the very weakest of bases for Mr Gordon's weighty submissions.
>
> [105] If, contrary to my primary reading, Baker J did intend to state, where a parent puts forward a viable option for treatment, that the High Court only has jurisdiction to interfere with a parent's choice of that medical treatment if the child is likely to suffer significant harm as a result, then, in my view, such a statement has no foundation as a matter of law, is contrary to established authority and is therefore plainly in error.'

10. Save for the quotation from *Re Ashya King* itself, there is no indication in his judgment that Hayden J imported a 'significant harm' test into his determination of the issues in the present case and his reference to that case seems to have been no more than a further illustration of the general theme as to the central role that a parent with parental responsibility has in determining the upbringing of their child.

11. Finally, in terms of his description of the 'legal framework', the judge set out the restrictions on the use of the wardship jurisdiction contained in CA 1989, s 100 before observing that 'overuse of the High Court's inherent jurisdiction requires vigilant patrol' with s 100(2) prohibiting the use of that jurisdiction to place a child in care or under the supervision of a local authority.

12. The judge then 'turn[ed] to the welfare analysis' under the heading 'The Best Interests Decision' from paragraph 22 to paragraph 43. This analysis included an extensive section in which the findings of fact, accepting and endorsing the parents' concerns, to which I have already referred, were made. The judge concluded that he was 'satisfied that S was involved in criminal activity and in or on the periphery of gang culture'. He rejected S' attempts to play down his behaviour as being entirely implausible and a reflection of S' immaturity.

13. The court had a report from the relevant local authority social services department, filed under CA 1989, s 37, in which the author stated that S' involvement with gangs had exposed him to significant harm and:

> 'It is also believed that emotional harm or physical harm may be suffered by [S] at this time if he is to return to the UK. Therefore, for now I disagree with [S] wanting to return to the UK …'

14. The social worker gave oral evidence in which he remained 'clearly of the view that it was in S' best interests to remain in Ghana'. Whilst the social worker's evaluation closely mirrored that of the parents, the judge was satisfied that it had been arrived at

independently. Given criticism of the judgment made by the appellant, it is important to quote the judge's further observation at paragraph 32:

> 'However, I do consider the [s 37] report focuses, heavily, on the appropriateness of the exercise of parental responsibility in the decision to move S to Ghana. As I have explained in my outline of the legal framework, the decision here is wider than that and requires a broader analysis of S' best interests.'

15. Whilst understanding their motivation, the judge was critical of the parents moving S to Ghana, holding that 'their actions jeopardised their son's happiness and emotional wellbeing.' The judge recorded that the impact on S had been very distressing for him and that his communications with his father provided 'clear and palpable evidence of his distress'. Although S had not directly engaged in the court process the judge was 'acutely conscious of his unhappiness.'

16. In November 2024, Hayden J had adjourned the case because the court had not been given any coherent plan for S' care and accommodation in the event that he returned to the UK in circumstances where S' mother remained implacably opposed to this return to the family home, and where the local authority did not consider that the criteria for social work intervention had been met. In any event, the judge considered that there was every prospect that S might abscond if placed in foster care away from his home area. S' father had proposed finding alternative rented accommodation to which he would move with S, but the judge did not consider that that option had been sufficiently thought through at the time of the November hearing.

17. By the time of the final hearing in February 2025, it is apparent that little had changed to terms of plans for S' care in the event of a return.

18. In those circumstances, Ms Fottrell KC, for S, suggested to Hayden J that there should be a further adjournment together with a renewed direction to the local authority under CA 1989, s 37 to provide a review of the options and an updated welfare analysis. Hayden J, after analysing the legal context in which a s 37 direction may be made, rejected that option and there is no challenge to that decision on appeal. It does, however, remain the case that the court proceeded to determine the ultimate welfare issue of whether or not S should return to the UK without having any formulated plan for his care were he to do so. Indeed, the judge concluded that 'given that the objective of the s 37 report would be to identify cogent and realistic welfare options, any return prior to the conclusion of the report would, to my mind, be premature.'

19. As he moved towards the conclusion of his judgment, Hayden J again stressed that he was not, or not only, auditing the parents' exercise of parental responsibility:

> 'There can be little doubt that the parents' exercise of parental responsibility was lawful. Ms Foulkes [counsel for the father] submits that I should decide whether an interference with such lawful exercise can be justified. For the reasons discussed above and because I am exercising the inherent jurisdictional powers of the High Court under wardship, I consider the investigation is broader than that. I must look at S' welfare interests in the round.'

20. After confirming that the court did not have any viable option for S' care should he return to England, the judge concluded his analysis as follows:

> '42. There can be no doubt that S's move to Ghana has been a big cultural shock to him, one which was unexpected and for which he was unprepared. Life for him there is very different, he baulks at some of its inconveniences, especially the power outages. However, it is also important to remember that Ghana is an important facet of S's own cultural identity. His extended family in Ghana have gone to great lengths to claim him as their own and to help him to settle in whatever way they can. For reasons that strike me as entirely understandable, S may not always have been gracious in acknowledging the help he has received. S's experiences in Ghana will generate in him a greater understanding of his own identity and that of his family. As is clear from my analysis of the evidence above, I consider that S is at real risk of suffering greater harm in returning to the UK than if he were to remain in Ghana. I recognise that this is, in many ways, both a sobering and rather depressing conclusion.
>
> 43. What S requires, at present, is the support and love of his family whilst he navigates the challenges of adolescence. Though it is perhaps counterintuitive, I consider that he is best placed to receive and absorb this support whilst living in Ghana. He has regular contact with his father and family, not only by video contact, but by visits too. S has educational opportunities that he can choose to take up and expand. He is away from, what I consider are, the malign influences of the young men he has surrounded himself with. His extended family are able to support him and promote his security, alongside his parents.'

21. Having, thus, made his welfare determination, the judge concluded his judgment at paragraph 44:

> '44. Though I deprecate the parents' deception in getting S to Ghana, I have no doubt that he would not have gone willingly. I recognise that they felt that they had no choice and that the greater risk of harm would be for him to remain in the United Kingdom. The decision falls within what I regard as the generous ambit of parental decision taking, in which the State has no dominion. Accordingly, though the parents require no encomium from me, I hope it is of some comfort to them that, having heard all the evidence, I share their view of where their son's best interests lie. The observations of Lord Templeman (see para. 17 above) remain apposite, some 37 years later.'

22. The order, against which S now appeals with permission, discharged the wardship and refused his application for an order requiring his summary return from Ghana.

The Appeal

23. The principal parties to the appeal were S and his parents. In addition, the court had the benefit of written submissions on behalf of two interveners: the International Centre for Family Law Policy and Practice ('ICFLPP') and the Association of Lawyers for Children ('ALC').

24. Ms Deirdre Fottrell KC, leading counsel for S, primarily submitted that the judge had conflated an evaluation of whether, as a matter of law, the parents had been entitled to act as they had done by taking their son to Ghana, with the court's own responsibility of determining the future care arrangements for S by affording paramount consideration to the boy's welfare.

25. In making good that submission, Ms Fottrell stressed the degree to which S had been psychologically and emotionally harmed by the traumatic episode in which he was tricked by his parents into going to Ghana and then stranded there by them. She stressed that harm from that event was continuing, and had been compounded by his move through three different placements and, so far, three different schools. He is an English, inner-city, teenager. He considers himself to be culturally displaced and wants to be back in his home environment. He misses his siblings and wider family in England. Ms Fottrell said that S remains highly disturbed and is desperate to return to England, yet his not able to achieve this by himself.

26. In circumstances where the judge, despite his overall endorsement of the parents' actions, had been critical of the way that they had deceived their son and had held that this had 'jeopardised their son's happiness and emotional wellbeing', Ms Fottrell submitted that he should have gone on to hold that for the parents to act in that way had been contrary to their child's welfare. She submitted that the parents' actions should have been seen as comprehensively altering S' life as a teenager to a very significant degree by removing him from the only world which he had known up until that point throughout his life. For them to do so, without any consultation with their son, was a major and traumatic breach of his trust in them.

27. Ms Fottrell asserted that, at the final hearing, it was not for S, as a child, to put forward definite plans for his care back in England. In the absence of any such plan before the court, it was incumbent upon the judge, in the exercise of parental responsibility for his ward, to obtain further information either by renewing the s 37 direction to the local authority, or by directing either the local authority or CAFCASS to prepare a welfare report under CA 1989, s 7 and/or by directing that evidence be filed by S' aunt in England (who had been indicated as possibly providing a home for S, but about whom the court knew very little). Whilst the judge's decision not to commission a further s 37 report was not a specific ground of appeal, Ms Fottrell relies upon it as part of a more general criticism of the judge for proceeding to make a final determination at a time when all of the possible options for S' care back in England had not been properly investigated.

28. Summarising her primary case (under grounds 1 and 4), Ms Fottrell submitted that the judge had reached a conclusion that the parents' decision fell within the ambit of their parental responsibility. Consequently, he did not then properly or fully engage with the various options available for S' care and finally that he did not properly engage in an analysis of the child's best interests.

29. Ms Fottrell then moved on to focus, more specifically, on the judge's purported welfare analysis. In particular, she was critical of the degree to which the judge had considered the element of 'harm' under the 'welfare checklist' in CA 1989, s 1(3)(e). It is not S' case that the judge should have slavishly looked at each element of the checklist, but, in a case which so clearly turned on balancing the potential for harm back in England against harm if S remained against his will in Ghana, it was necessary for the judge to look at both sides of that balance. Whilst the judgment contains a detailed and thorough exposition of the harmful factors at play in S' life before removal, Ms Fottrell submitted that the judge had ignored or sanitised the negative aspects, as S sees them, of S' current life in Ghana.

30. Paragraph 42 (reproduced at 20 above) is the only place where the judge looks at S' life in Ghana, and Ms Fottrell contrasts what is said there (for example S probably baulking at some of its inconveniences) with S' clear account in his statement in which he describes being in Ghana as 'living in hell':

> 'I want to say, right from the very beginning, that I am really, really struggling in Ghana. I hate it here; there is no other way to describe this, but I feel like I am living in hell. I really do not think I deserve this, and I want to come home, back to England, as soon as possible.'

Further, it is the case that the judgment does not contain any reference to harm to S, either potential or actual, from being taken to Ghana, being forced to remain there, and, if that were the outcome, having to remain there because the court had decided that that should be so.

31. Grounds of appeal 2 and 3 focus upon S' degree of maturity, the acceptance that he was *Gillick* competent and the degree to which the judge took account of his wishes and feelings. In relation to this aspect, the appeal hearing was drawn into consideration of the degree to which the decision in *Gillick* is relevant to a non-medical case. I propose to discuss this discrete topic briefly at a later stage.

32. Although it was still pursued, Ms Fottrell's oral submissions did not focus upon the final ground of appeal (ground 5) challenging the judge's findings of fact.

33. The appeal was opposed by S' parents. For the father, Ms Rebecca Foulkes, had to concede that the judgment did not have a section identifying any continuing harm being suffered by S in Ghana and that the judge did not make any reference to S' continuing emotional distress at being separated from his siblings and his country of birth. She was, however, able to point to paragraph 5 where the judge records that S was 'outraged' by his parents' actions and to paragraph 32 where his desire to return to the UK is said to be 'unabated'.

34. The court took Ms Foulkes to a statement filed by S in November 2024 in which he gave a detailed account of his life in Ghana. That statement, in particular, described how he was then living alone with his paternal grandmother and uncle. Although he spoke occasionally to his adult cousins, he said that he did not mix with anyone else and had not spoken directly with anyone of his own age in Ghana for a long time. He said that he did not go out, stayed inside and felt very lonely. He summed matters up by saying, 'I won't lie, I absolutely hate it here'. Ms Foulkes was asked where the judge placed these factors in the welfare balance. She responded that the judge had regarded the risks to S of returning to England as being of enormous significance, including a risk to life. The judge was aware of the evidence on the other side of the balance about S' unhappiness with life in Ghana but, in terms of harm, it was of a different order to the risks in play were he to return to England.

Discussion and conclusion

(i) The role of a parent's exercise of parental responsibility in wardship

35. The central task for a judge in wardship is to determine the future arrangements for the ward's care by affording paramount consideration to the young person's welfare, as

required by CA 1989, s 1(1), and as has been the case long before any statutory requirement (for example, *Re Callaghan* (1885) 28 Ch D 186[1]). Whilst the views of a ward's parents may be part of the evidence in the case, and may be relevant to the welfare exercise, as a matter of law they cannot have any impact upon the judge's task in determining the outcome in accordance with CA 1989, s 1. There is only room for one principle in this context, and that principle is that the child's welfare must be afforded paramount consideration. There is no parallel or competing principle that the wardship court may only intervene if the parents have in some manner exceeded the ambit of their parental responsibility, or have come to a decision which the court holds to be wrong.

36. Whilst the judge in the present case was at pains to stress that he was conducting his own evaluation of best interests and welfare (paragraphs 22, 32 and 40), he nevertheless did undertake the exercise of analysing the parental decision and then determining that they had been acting lawfully (paragraph 40).

37. For my part, I accept that this most experienced Family judge did not go so far as Ms Fottrell submits that he did by abdicating from the need to make his own welfare evaluation on the basis that the parents were entitled to make the decision and had already made it. I am however concerned that, by undertaking an audit of the parents' discharge of their parental responsibility, as he did, and by merging that exercise so closely with his own welfare evaluation, the judge may have fallen into error so that he came to view 'welfare' through the lens adopted by the parents, rather than by making his own entirely independent evaluation.

38. Parental decision-making and the child's welfare are intertwined within the judgment to such a degree that, despite the judge's clear assertions that he is conducting his own evaluation, the two issues became conflated. An example is to be found in the final paragraph (44), where the judge states that the parental decision 'falls within what I regard as the generous ambit of parental decision taking, in which the State has no dominion' and 'the observations of Lord Templeman remain apposite, some 37 years later'. It is not clear whether this paragraph is a free-standing postscript to the judgment or, as Ms Fottrell submitted, part of the judge's analysis and determination. If, as is the case, in wardship the court is required to afford paramount consideration to welfare, then the degree to which the judge referred to matters which were therefore not relevant, concerning the lawfulness of the parental decision or that 'public authorities cannot improve on nature', is of concern.

39. It is unnecessary to decide this point because, as I will explain shortly, I have reluctantly come to the conclusion that the judge fell into error, in any event, in conducting his own welfare analysis. It is sufficient to say that it may well be that error resulted from inadvertently coming to see the issues in the case from the parents' perspective.

(ii) Gillick competence

40. Although the impact of the decision in *Gillick v West Norfolk and Wisbech AHA* [1986] AC 115 (HL) featured prominently in the submissions of the two interveners, the points made there were not developed by the parties to the appeal during the oral hearing. There was, however, some discussion on the direct relevance of a child being said to be

[1] See *Wards of Court and the Inherent Jurisdiction* (Prof Rob George) [2025], para 3.6.

'*Gillick* competent' in proceedings which do not relate to medical treatment. It may therefore be helpful to offer some short observations in that regard.

41. In the present case, Hayden J recorded that

> 'nobody has disputed that S is a '*Gillick competent*' young person and that, accordingly, resolution of his application requires his own views to be factored into a best interests decision relating to his welfare.'

42. In their skeleton argument for S, counsel had put forward five 'key propositions', the fifth of which was:

> 'To override the wishes and feelings of a *Gillick* competent young person, there must be clear and compelling reasons for so doing. Parental responsibility does not trump that obligation on the Court, once the Court is seised of a welfare decision in respect of the young person.'

43. In their skeleton argument on behalf of the father, Ms Foulkes and Ms Charlotte Baker submitted:

> 'It is wrong in law to assert that achieving *Gillick*-competence serves to narrow parental responsibility in relation to all and/or significant areas relating to a young person's welfare, and in addition, that there must be clear and compelling reasons to override the wishes and feelings of a *Gillick*-competent young person (see the "fifth proposition" in S's skeleton argument). As is explored further below, the ratio in *Gillick v West Norfolk and Wisbech Area Health Authority & Anr* is limited to medical treatment and, although it is oft referred to in family proceedings as a shorthand to describe (a) the rationality and strength of a young person's feelings; and/or (b) their capacity to participate in litigation and competence to instruct their own solicitors, it is not of wider application as a principle of law.'

44. In her oral submissions, Ms Fottrell asserted that *Gillick* was of fundamental importance in this case. She challenged Ms Foulkes' submission that it was not relevant, as CA 1989, s 1, the welfare checklist and case law were all informed by *Gillick* and stressed the need to give due weight to 'wishes and feelings'. Ms Foulkes maintained the position that *Gillick* applied directly to medical cases and that it was difficult to see how it might apply to non-medical decisions. Following further research over the short adjournment, Ms Fottrell drew attention to a *Re S (Parent as Child: Adoption: Consent)* [2017] EWHC 2729 (Fam), in which Cobb J (as he then was) considered the ability of a parent, who was still herself a child, to give valid consent to the adoption of her own child. Cobb J clearly considered that *Gillick* competence was a relevant factor in that situation, albeit that the decision in focus did not relate to medical treatment. He summarised the approach to be taken as follows:

> '… it is agreed by all parties that in order to be satisfied that a child is able to make a *Gillick*-competent decision (ie has 'sufficient understanding and intelligence to enable him or her to understand fully what is proposed': see Lord Scarman in *Gillick*, above), the child should be of sufficient intelligence and maturity to:
>
> > (i) Understand the nature and implications of the decision and the process of implementing that decision.

(ii) Understand the implications of not pursuing the decision.

(iii) Retain the information long enough for the decision making process to take place.

(iv) Weigh up the information and arrive at a decision.

(v) Communicate that decision.'

45. Having considered the issue during the hearing and since, I am clear that Ms Foulkes is correct that, in terms of its legal impact, the decision in *Gillick* is limited to the ability of a young person to give autonomous valid consent to medical treatment. The purpose of the decision is to offer clarity for the benefit of medical practitioners who require valid consent for a proposed procedure. Lord Scarman was plain in limiting the context of the principle:

> 'I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law.'

46. It is also right that, over time, the phrase '*Gillick* competent' has been used more loosely to describe the age and maturity of young people who are seen as being capable of making informed decisions as to their future in a range of situations wholly unconnected with medical treatment. An example of this is the use of the phrase by Cobb J in *Re S*, but, it must be stressed, that *Re S*, whilst not concerning consent to medical treatment, was specifically focused upon the capacity of a the 'child' in that case to give valid *consent* to adoption. Cobb J was not referring to, or deploying, the concept of *Gillick* competence in the course of making a CA 1989, s 1 determination as to the child's welfare – which is the situation in the present case.

47. By the close of submissions, Ms Fottrell did not seek to go beyond the position described in the previous paragraph. In the circumstances, it is right to proceed in the present case on the basis that the characterisation of S as being *Gillick* competent has no direct legal impact in a case which does not concern the evaluation of his ability to give or to withhold valid consent to medical treatment. In the context of this case, '*Gillick* competent' is no more, nor no less, than a convenient label to indicate that S has sufficient maturity and understanding to form his own view as to where he may live. His 'wishes and feelings' are matters that the court is specifically required to take into account by CA 1989, s 1(3)(a). They are to be considered 'in the light of his age and understanding'. The fact that all parties before the judge accepted that S was *Gillick* competent was a factor that should have been given appropriate weight by the court in its overall welfare evaluation. The wishes and feelings of a young person who is so regarded are likely to attract more weight, and, depending on the issue in question and the circumstances of the case, in some cases significantly more weight, than that attaching to the wishes and feelings of a younger or less mature child. But, as a matter of law, it is wrong to assert, as the appellant's 'fifth proposition' asserted, that the wishes and feelings of a *Gillick* competent young person can only be overridden if the court finds clear and compelling reasons for doing so. As with each of the other

elements in any holistic welfare balance, all will turn on the weight that is attributed to each of the relevant factors.

(iii) The judge's welfare evaluation

48. The judge's welfare analysis fully engaged with the risk of future harm were S to return to England and, in particular, if he were to return to live in or near his home area. My reasons for holding, as I do, that the exercise was nevertheless flawed relate to:

    a) the decision to make a final determination at a time when the court did not have any firm or viable plan for S' care in England, although there were possible options that had yet to be investigated;

    b) the degree to which the judge 'heard' and took account of S' wishes and feelings;

    c) in contrast to his detailed description of the potential for harm if S were to return to England, the apparent failure of the judge to evaluate and take account of the potential for harm to S as a result of his parents' actions and, in the future, if he is required to remain in Ghana.

I propose to take each of these three points briefly in turn.

49. In November 2024, the judge had adjourned the proceedings in order to obtain more information on possible options for S' care in England. Yet, by the time the case came back before him in February, there had been little or no progress in clarifying those options, save that it was by then clear that local authority foster care would not be available. The father's offer to move into separate accommodation with S remained simply an idea rather than a firm plan. The prospect of S moving to live with an aunt had, at least so far as evidence before the court is concerned, not progressed at all and remained a 'known-unknown'. There was thus no 'Plan A', let alone a Plan B or C, for S' care in England for the court to consider. Why, if the court had been justified in adjourning the proceedings in November in order to obtain more information, was it necessary to conclude matters with a final order in February, when the looked-for information still remained outstanding?

50. The judge was correct in his analysis rejecting Ms Fottrell's suggestion that the court should direct the local authority to file a further s 37 report. But, if more welfare related information were needed, using s 37 was not the only option. The court could have directed the local authority to file an ordinary welfare report on placement options under CA 1989, s 7. It could have directed the parents and/or the aunt to file statements about the possibility of S being placed with her.

51. By making a final determination at the February hearing, when key information remained outstanding, and when it was not necessary to do so for any other reason, the court adopted a course which was almost bound to lead to S' application being refused. In contrast to most other forms of civil litigation, where the court will passively react to the evidence that each party may file, in wardship the court itself has parental responsibility for its ward and that responsibility carries with it a positive duty to obtain further evidence or information if, in the interests of the ward, that is needed. If, after further investigation, it remained the case that there was indeed no viable plan for S to

be cared for safely in England, then the outcome of the proceedings might be clear, but, in my view, it was premature for the court to come to a final decision in February.

52. Turning to the second area of concern, it is clear that the judge engaged fully with the parents, particularly the father, and the view that they had formed that S was involved in, or at least on the edges of, gangs and criminal activity. He made findings of fact which mirrored the parents' concerns and he evaluated the risk of harm to S if he were to return to England as being of a high order. Conversely, it is much harder to identify the degree to which the judge engaged with S and his wishes and feelings. To an extent, the court's ability to connect with S was limited by a number of factors: S did not wish to engage with the court proceedings directly, he did not give evidence or wish to communicate with the judge in any way other than to file statements through his lawyers. In addition, whilst the court had the s 37 report, the account of S' wishes and feelings in that document is limited to one WhatsApp call made in October 2024.

53. Despite understanding the filters that were in place between them, the court did have a clear account from S in his statements of his experience of being taken to Ghana and left there, his experiences in Ghana since that time and his strong desire to return to England. It is, unfortunately, difficult to reconcile the account given by S in his statements with the judge's description of the position at paragraph 42 of the judgment. The fact that S was desperately unhappy in Ghana and fervently wanted to return to England was, in part, what the case was all about. It was why this resourceful young person had made contact with London solicitors and launched his own wardship proceedings. Whilst that side of the case obviously fell to be balanced against the risk of harm should his wishes be fulfilled, it was incumbent upon the judge to 'hear' S clearly and to demonstrate that he had put the boy's strongly held wishes and feelings properly in the balance; indeed, the judge had expressly advised himself that S' acknowledged '*Gillick* competence' in this matter required his views to be factored into the welfare analysis. As Ms Foulkes' concession demonstrated it is, regrettably, not possible to identify from the judgment that the judge did so.

54. The third area of concern is that the judge failed to identify sufficiently any harm, or risk of harm, to S arising from his experience of being taken to Ghana and left there, and/or arising in the future if the court were to refuse his application for a return order. The judge did hold that the impact of these experiences on S had been very distressing for him, and that the move to Ghana had been a big cultural shock to the boy. The description of life in Ghana in paragraph 42, however, waters down S' account to one where he is said to baulk 'at some of its inconveniences', with the judge filling the rest of the paragraph with apparent positive aspects for the boy arising from his time there. At no stage does the judge evaluate whether there has been, or might be, harm to S arising from these events, or from a further enforced stay in Ghana if the application were refused.

55. The need to balance the undoubted harm arising from the judge's findings about life in England, on the one hand, against the wishes and feelings of this capacitous 14 year old boy, together with any harm or risk of harm arising from a further stay in Ghana, on the other, was essentially what this case was about. Ms Foulkes is correct in stressing that the judge found that S was at risk of suffering 'greater harm' if returned to the UK, but such a conclusion could only be sound if it were preceded by sufficient evaluation of harm arising from a continued enforced stay in Ghana.

56. Despite the obvious care and empathy that the judge brought to bear on this difficult decision, I am persuaded that, for the reasons that I have now given, the balancing exercise was one-sided to a degree that compromised the essential validity of the evaluation because insufficient consideration was given to the factors that needed to be weighed on the other side. On that basis, coupled with the conclusion that it was premature to make a final decision when the was a need for further investigation of options for care in England, I concluded that the appeal must be allowed.

(iv) A Rehearing

57. As a result, the matter must be reheard and, as I have indicated, we have directed that the case should be returned to the Family Division for hearing before a different judge. That hearing is to be conducted on the basis that the findings of fact as to S' life in England stand. The appellant's challenge to those findings had no prospect of success on appeal, and was not actively pursued before this court. On the material before him, supported as it was by the NSPCC guidance and by the professional opinion of the social worker, the judge's factual findings as to life in England were entirely justified.

58. Against that background, it is necessary to make clear that it will be open to the judge who must now re-determine the best interests decision to come to the same conclusion as Hayden J did once full and proper consideration has been given to the countervailing factors that stand in favour of granting the application. This appeal has been allowed because of concern about the process of evaluation, rather than the conclusion.

Lord Justice Baker:

59. I agree.

Lord Justice Arnold:

60. I also agree.