Neutral Citation Number: [2011] EWHC 1127 (Admin)

Case No: CO/12757/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
27/05/2011

B e f o r e :

M R JUSTICE CHARLES

Between:

(1) DL	
(2) ML	**Claimants**
- and -	
London Borough of Newham	**Defendant**
- and -	
Secretary of State for Education	**Interested Party**

R de Mello and Gina Allwood (instructed by Bhatia Best Solicitors) for the Claimants
Hilton Harrup – Griffiths (instructed by the local authority) for the Defendant
Samantha Broadfoot (instructed by TSol) for the Interested Party

Hearing dates: 4th, 5th 6th April 2011

HTML VERSION OF JUDGMENT

Charles J :

Overview and summary of my conclusions

1. K was placed by the Defendant with the Claimants with a view to his adoption by them. In these proceedings for judicial review the Claimants challenge:

   i) the decision of the Defendant to give them a notice under s. 35(2) of the Adoption and Children Act 2002 (the 2002 Act), the effect of which was to require them to return K to the Defendant, and

   ii) the decision of the Defendant not to return K to their day to day care with a view to his adoption by them.

The Claimants' ultimate aim is to adopt K.

2. The Claimants assert that:

   i) either s. 35(2) of the 2002 Act is incompatible with Articles 6 and 8 of the Convention, or to avoid that incompatibility, words should be read into it, pursuant to s. 3 of the Human Rights Act 1998 (the HRA 1998) to ensure that once a child has been placed for adoption, he cannot be removed from the prospective adopters:

      a) other than pursuant to an order of the court (which, if such words are read in would be the Family court exercising jurisdiction under the 2002 Act), or

      b) without the prospective adopters being able to obtain from that court an order preventing such a removal,

      and further or alternatively

   ii) the two decisions of the Defendant breach both procedural and substantive parts of the Article 8 rights of the Claimants and K.

3. It is accepted that Article 8 is engaged and, at the heart of the arguments on incompatibility and construction based on s. 3 HRA 1998, is the Claimants' assertion that unless the issues relating to the removal of K from, and the refusal to return K to, their day to day care is determined by a court exercising jurisdiction under the 2002 Act their Article 8 rights (and those of K) will not have been determined by an independent and impartial tribunal.

4. It is common ground that the starting point for this argument exists because, in my view correctly, it is agreed that, absent the addition of words pursuant to s. 3 HRA 1998, the 2002 Act does not give jurisdiction for a challenge to, or an appeal from, the decisions of the Defendant relating to the termination of K's placement for adoption with the Claimants.

5. It follows that, any such challenge has to be based on either or both the court's jurisdiction:

   i) relating to the review of the decisions of public authorities, and

   ii) under ss. 6, 7 and 8 of the HRA 1998, and thus an assertion that the Defendant has breached the Claimants' Convention rights.

   At the heart of the arguments, are the propositions that the determination of the relevant issues founding the decisions involve and necessitate:

      a) the determination of factual disputes, and

      b) the application of the welfare test set by s. 1 of the 2002 Act,

   and, in exercising those jurisdictions, the court cannot resolve such factual issues, apply such a test and so provide an adequate remedy.

6. I reject those arguments, and thus the Claimants' challenge based on incompatibility and the application of s. 3 HRA 1998 for the following reasons:

   i) adoption agencies (here the Defendant) in making the relevant decisions must apply s. 1 of the 2002 Act,

   ii) they are public authorities, and so must also not act in breach of Convention rights,

iii) the statutory scheme, regulations and supporting guidance, have proper regard to points (i) and (ii) in both a substantive and procedural sense,

iv) the review jurisdiction can therefore provide remedies if the adoption agency fails to take that statutory test and Convention rights into account,

v) the possibility of there being a breach of Article 8 rights does not found the contention that the relevant legislation is incompatible,

vi) Article 6 relates to civil rights and obligations. The civil rights focused on in argument were the Article 8 rights of the Claimants and K. But the placement of K with the Claimants gave them parental responsibility for him and I have proceeded on the basis that the Claimants have other civil rights and that the decisions they challenge have an impact on those civil rights. This approach is analogous to that taken in *Re S; Re W* (see below) to the Article 8 and other civil rights of birth parents and their child,

vii) recent decisions of the House of Lords and the Supreme Court have decided that the court is the decision maker on whether or not a Convention right has been breached and, in reaching that decision, the court can if it is appropriate to do so, determine disputed issues of fact. In my judgment, this applies whether the issue of whether there has been such a breach of a Convention right arises in judicial review proceedings, in other proceedings issued in reliance on ss. 6 and 7 of the HRA 1998, or in existing private law proceedings,

viii) in my judgment, in the circumstances of this case that fact finding jurisdiction and ability has the consequence that the court can (and if appropriate) will determine the relevant disputed facts for the purposes of determining the impact of the decisions of the Defendant local authority on the Claimants' other civil rights,

ix) alternatively, in my judgment the intensity of a *Daly* review of such decisions is sufficient to satisfy Article 6 in respect of such other civil rights, and

x) in proceedings for judicial review and/or proceedings issued under ss. 6 and 7 HRA 1998 the court can grant interim relief to stay the operation of a s. 35(2) notice, and thus the return of a child to an adoption agency and with it the termination of the parental responsibility of a prospective adopter with whom a child is placed for adoption, and thus ensure that at a final hearing it can grant an effective remedy.

7. So, in my judgment, the Claimants' arguments on incompatibility and the need to add words to s. 35 of the 2002 Act to render it compatible with Convention rights fail.

8. It is clearly established that Article 8 confers rights (a) to a fair procedure and (b) substantive rights after (and whether or not) such a procedure has been carried out.

9. In my judgment, the Claimants have established that the Defendant:

   i) acted in breach of (a) the procedural rights conferred by Article 8, and (b) the common law principle that a decision maker should act fairly, and

   ii) failed to take into account a relevant factor.

10. Recent cases in the House of Lords and the Supreme Court provide authority for the view that in some cases such procedural breaches should not give rise to an order that the decision maker is to reconsider its decision if (a) the court decides that it should determine whether the relevant decision has resulted in a substantive breach of the relevant Convention rights, and (b) the court determines that it has not. But those cases do not relate to a dynamic situation and, in particular, to the placement of a child.

11. I have concluded that at this stage I should not determine whether the decisions under challenge breached the substantive rights conferred of the Claimants (and K) by Article 8, and their other civil rights, but should (a) quash those decisions and the decision to revoke the match between the Claimants and K, (b) stay the original decisions to match and place K with the Claimants, and (c) direct the Defendant to reconsider, in the present circumstances, whether pursuant to its duties and powers under the existing placement order K should be returned to live with the Claimants with a view to his adoption by them.

Background

Introduction

12. In November 2007, a care order and a placement order was made in respect of K who was born in 2006. He was then aged one. As the making of the placement order shows the care plan was for adoption. He is a mixed race child.

13. Also and coincidentally in November 2007, the Claimants who are married were approved as prospective adopters. DL (the male Claimant) is white and ML (the female Claimant) is black. They are in their forties and have been married for about 14 years.

14. In March 2009, the Defendant's Adoption Panel recommended that K be placed with the Claimants for adoption, and this was done in early April 2009 on the basis that the Defendant and the Claimants would share parental responsibility. This placement triggered the reviewing process governed by Part 6 of the Adoption Agencies Regulations 2005 (the 2005 Regulations) and statutory Guidance relating to it (and other matters) (the 2005 Guidance). This review process, together with other communications between, amongst others, the Claimants, the Defendant, the local authority for the town in which the Claimants lived (Xtown), and the police informed the Defendant of a number of matters to which I will return.

15. In the light of such matters, in August 2010, the Defendant instructed an independent social worker (Ms K) to conduct a home visit and assessment of the placement. She was instructed to address the following issues (amongst others):

> " Assess and evaluate the adoptive parents' understanding of the nature of their relationship with their neighbours and the impact on K's physical and emotional well-being
>
> Assess and evaluate K's understanding of what has been going on between his prospective adoptive parents, their neighbours and the involvement of the Police
>
> Assess the nature and quality of attachment between K and either of his prospective adoptive parents
>
> Explore issues raised in respect of hygiene
>
> Has K suffered emotional or physical harm, or neglect whilst in the [Claimants'] care "

Unsurprisingly, these issues reflect matters that prompted the decision to instruct Ms K, and they reflect matters that had been known to the Defendant and social workers (and others) in Xtown for some time.

16. Ms K was instructed to carry out her assessment over three days and she visited the Claimants on two days. There is some contradiction in the papers as to whether this was on 19th and 20th, or 20th and 21st August 2010. Shortly before that date the Claimants had moved from Xtown to another town (Ytown). Initially, they moved to the home of DL's mother and then to council accommodation (where they were visited by Ms K). Ms K showed them a

copy of the list of issues which she had been instructed to consider and it seems that this was referred to as her letter of instruction. What was shown to the Claimants did not include any background information, and I was told that a letter of instruction setting that out was never sent to Ms K.

17. On her first visit Ms K spoke to the Claimants and DL's mother and on her second one she saw K alone for a short time in his bedroom.

18. Ms K was not feeling well and so was not able to complete her three day assessment and report.

19. On 24th August 2010, the Defendant hand delivered a notice (the s. 35(2) notice) to the Claimants under s. 35(2) of the Adoption and Children Act 2002 (the 2002 Act). The effect of that notice was that the Claimants were required to return K to the care of the Defendant within seven days, and thus by no later than 31st August 2010.

20. The letter giving notice included the following:

> " The Local Authority has made this difficult decision to give you this notice as the Local Authority is no longer satisfied that K's welfare is best served by a placement with you for adoption and his welfare throughout his life is the Local Authorities (sic) paramount consideration.
>
> - We acknowledge that K was placed with you on the 1st April 2009 and that he has continued to reside with you since
> - That K had appeared to have settled well and doing well at the Nursery Placement
> - We note that you are yet to notify the London Borough of Newham of an adoption application being lodged successfully with the Court
>
> The London Borough of Newham is very concerned about the following issues regarding K's welfare:
>
> - DL has been reported on several occasions in 2009 to have been heard shouting or yelling at K
> - Concerns have arisen around the standard of hygiene within the home and K's sleeping environment
> - Detrimental effect on K's exposure to conflict between yourselves and neighbours in Xtown which have included physical violence and verbal arguments
> - Poor relationship between yourselves and other professionals who have sufficient interest in K's welfare. K has been exposed to arguments between yourselves and some professionals
> - The Local Authority is very concerned about the detrimental effect of the instability brought about by recent changes of addresses facilitated by the conflict between you and your neighbours in Xtown
> - Your lack of insight into the effect of the various conflict on K's overall development
>
> The Local Authority is of the view that K has suffered significant harm and (sic) likely to be exposed to further significant harm as a result of the aforementioned issues and if he continues to remain in your care. "

21. As I will explain later:

i) this does not set out all of the reasons why the Defendant served the notice without any prior warning to, or further discussion of the matters so listed with, the Claimants, and

ii) in particular, and deliberately, it makes no mention of assertions of corporal punishment of K by DL, or of domestic violence between the Claimants that the Defendant was informed by Ms K she had been told about by K.

22. Indeed, before serving that notice the Defendant had made a without notice application for an Emergency Protection Order on 23rd August 2010 that was refused on the basis that the assertions Ms K said were made to her by K a few days earlier did not warrant the making of such an order.

23. On 27th August 2010, the Claimants submitted an application for the adoption of K. They had attempted to do this earlier and it appears that, up to about 20th July 2010, the Defendant thought that such an application had been made and accepted by the court. But such application had been refused by the court because K's original birth certificate had not been provided with it. The Claimants had made attempts to obtain that certificate from the Defendant. These were not successful and in the end they got one themselves.

24. On 2nd September 2010, the Claimants returned K to the Defendant. The Claimants assert that they did not return him by 31st August 2010 because they had been advised, and thought, that their application for adoption had the result that they did not have to do so. The Defendant now accepts that this was their state of mind. But, at the time, the Defendant was of the view that the Claimants were deliberately refusing to return K, and so it obtained a recovery order and procured that the fact that they were seeking his recovery was given coverage in the media. On reading this, the Claimants (through ML attending with K at a police station on 2nd September 2010) returned K.

25. On 3rd September 2010, a County Court judge dismissed the Claimants' application for an adoption order. That dismissal has not been appealed.

26. On the return of K, a decision to carry out or continue an investigation under s. 47 Children Act 1989 was made or confirmed, and this approach was confirmed at later meetings. In the course of, or parallel to, that investigation:

    i) K was medically examined on 3rd September 2010. He was found to be in good health, there were no concerns about his growth and development and there was no medical evidence that could be relied on to support a conclusion that he had been the subject of physical chastisement, and

    ii) on 15th September 2010, it was recommended that a s. 47 investigation be carried out by the police in respect of the allegations of physical chastisement.

27. At a professionals' meeting on 21st September 2010:

    i) it was decided that K's case should be taken back to the Adoption Panel on 5th October 2010 to rescind the match with the Claimants. This was done and the match was rescinded on that day,

    ii) the refusal of a request for contact between K and ML was confirmed,

    iii) it was decided that continued attempts should be made to try and recover K's things from the Claimants,

    iv) it was decided that continued attempts should be made to talk to the Claimants about how they could assist K with closure regarding his placement with him.

28. So, on 21st September 2010, the Defendant was working on the basis, and so had effectively decided, that K would not be returned to the Claimants and, as appears later in this judgment,

it is apparent that this was its position at the hearing on 3rd September 2010 when the Claimants' adoption application was dismissed.

29. On 27th October 2010, after K had been seen by a police officer she advised that although K's verbal communication was clear he did not focus and switched subjects and it would not be possible to arrange any form of interview with him.

30. On 10th November 2010, the Claimants' solicitors wrote to the Defendant requesting them to reconsider its decision. This was the judicial review protocol letter in respect of the decision to serve the s. 35(2) notice, and by that letter the Defendant was also requested to return K to the Claimants.

31. The Defendant responded on 22nd November 2010. By then, Ms K had written her report, dated 1st October 2010 (and there is an earlier report which was provided on 23rd August 2010) and, as mentioned above:

    i) it had been decided that K should not be interviewed, and

    ii) his medical examination had given no cause for concern.

32. By this response, the Defendant provided a chronology between November 2007 and September 2010. This shows that all of the concerns set out in the notice dated 24th August 2010 relate to issues that had been known about for some time before Ms K's visit. Indeed, the Defendant recognised this in its letter of 22nd November 2010 and, by it, also asserted, amongst other things, that:

> " Your letter also states that your client made numerous requests for birth certificates to be provided and that London Borough of Newham failed provide the same. My instructions are that this is incorrect as birth certificates were provided to your clients as well as the placement order although they were slightly delayed and there were some technical difficulties in that regard. However, if on receipt, your clients wish to have further documentary evidence in support of their application then I would have expected them to have requested the same almost immediately. The initial application was not lodged and until August 2010 some 16 months later when in fact K had been placed with them since 1 April 2009, which the authority considered to be unreasonable.
>
> You state in your letter that the only reason why you feel that the authority commissioned the assessment was due to the racially motivated allegation made by individuals living within the Xtown area. This is not true as the authorities (sic) letter of 24th of August 2010, made is (sic) abundantly clear as to why K was requested to be returned to the authorities (sic) care which were:
>
> 1. The authority had reason to believe that DL had been reported on several occasions during 2009 to have been heard shouting or yelling at K.
>
> 2. That concerns have arisen around the standard of hygiene within the home and K's sleeping environment.
>
> 3. That it would have been detrimental to K's welfare to be exposed to conflict between your clients and their neighbours.
>
> It was in fact issues (1) and (2) above which raised serious concerns with the authority well before the commissioning of the ISW assessment. Whilst the issue (3) above was equally concerning to the authority more weight was placed on the risk of harm to the child. Having said that I understand that the authority made extensive efforts to resolve the outstanding issues with your client which included the offer of relocation expenses. However, the paramount interest for the authority was to

safeguard the child and to ensure that K was not exposed to any further risk of harm including witnessing violence and verbal arguments between adults.

In that regard the authority commissioned Ms K to undertake an assessment on 17 August 2010. A letter of instruction is duly enclosed with this letter for your background reading which was provided to your client in advance of the assessment. As part of the process the ISW questioned K separately at which point K made a very disturbing disclosure which meant that immediate action had to be taken to safeguard the child's interest. Due to the sensitivity of the information this was not discussed or disclosed to your client in case K faced any reprisal from them.

In essence the information which the authority was privy to (via the ISA) was as follows:

" *During my meeting with the child on his own I asked him what happens when he is naughty he told me that he is "daddy" smacks him on the bottom when I pressed for better confirmation he was quite clear it was his "father" not his "mother" who used his hand and removed his trousers. He was consistent with these answers when the question was repeated during our interview. He also referred to the fact that both his "parents" hit one another* "

Accordingly I duly enclose the assessment of the ISW for your attention.

Following the above disclosure, notice was given to your client on 24 August 2010 with seven day's notice to return the child to the authority's care. However, they were ill advised by their Solicitors and chose to abscond with the child.

The authority submits that it acted lawfully, reasonably and proportionately at all times in this case. K was subject to a Placement Order to London Borough of Newham and placed with your clients on the understanding that they will be making the adoption application. Following a series of ongoing concerns in relation to the case of K, the ISW assessment was instructed who requested urgent safeguarding measures to be put in. The assessment was not completed but a report has been produced which does not recommend the return of K to your clients.

The authority had a care and a placement order and in the absence of any adoption application from your client they acted as the corporate parents for K and gave notice to remove the child."

33. Pausing there:

i) this letter indicates that it was the disclosure to the ISW (Ms K), and her view that urgent safeguarding measures were required, that against the background of matters reflected in the s. 35(2) notice, prompted the making of the without notice application for an EPO and then the giving of the s. 35(2) notice, and

ii) this letter does not address the point that the Claimants had moved from Xtown.

34. The letter of 22nd November 2010 does not expressly address the request for K's return to the care of the Claimants but it conveys the clear message that the Defendant had decided not to do so. In line with this, in its Detailed Grounds of Defence the Defendant relies on the letter of 22nd November 2010 as giving its full reasons for its decisions.

35. The letter of 22nd November 2010, and the minutes of the meeting on 21st September 2010, make no reference to any offer of, or of any discussion as to whether, the Claimants should be given an opportunity at a meeting, or by some other means, to address:

    i) the allegations that Ms K had reported K to have made to her and which prompted the without notice application for an EPO, and the giving of the s. 35(2) notice,

    ii) the other matters that had caused the Defendant to serve the s. 35(2) notice, and

    iii) the request that K should be returned to the care of the Claimants and thus all the factors relating to that.

36. Also, the evidence put in by the Defendant:

    i) does not refer to any consideration or discussion of whether any such meeting or process should take place, to enable the Claimants to address those allegations and/or the other matters that had caused the Defendant to serve the s. 35(2) notice and to decide not to return K to the care of the Claimants; apart from an account of an exchange between the Claimants and Action for Children reported to the meeting on 21st September that the Claimants kept saying that "they will keep on fighting" and that the meeting felt that they had still not accepted K's removal, and

    ii) set out any reasons why the Defendant then thought, or now asserts that it was not appropriate or necessary to give the Claimants such an opportunity before they decided not to return K to them.

    I pause to comment that although I accept that there were some attempts to discuss matters with the Claimants and they were hostile, it cannot be said, and indeed it was not said, that the Defendant made any attempt to discuss its reasons for serving the s. 35(2) notice and/or deciding to end the match and not to return K to the Claimants so as to enable them to comment and express their views on such reasons.

37. In this context it is relevant to remember that:

    i) K had been placed with the Claimants with a view to adoption for about 17 months, and thus from the age of 2 years 11 months to 4 years 4 months,

    ii) over that period, he had been visited regularly by the allocated social worker, local social workers and others (and these visits had increased during 2010) and, although other concerns were raised and K was spoken to on his own, no allegation of or concern relating to physical chastisement of K, or violence between the Claimants, was raised before the visit of Ms K,

    iii) the ISW had not been able to complete her report. She had only seen K briefly alone and it is not clear how she introduced the topic of domestic violence and chastisement,

    iv) the police had indicated that an "obtaining best evidence interview" with K should not take place,

    v) K's medical examination, on the day after he was returned, showed he was physically well cared for and provided no evidence of physical chastisement, and

    vi) the other matters relied on by the Defendant had been known for some time.

    Also it is relevant to remember and to consider the above and, in the light of the general history, other relevant problems and decision making relating to K's placement.

38. The proceedings for judicial review were issued in December 2010. In the statement of grounds, the decisions challenged are (1) the decision dated 24th August 2010 to give the s. 35(2) notice, and (2) the decision dated 22nd November refusing to return K to the care of the Claimants.

39. K is now in foster care, with the foster carer who had been looking after him before his placement with the Claimants, and the Defendant has refused to allow any contact between him and either of the Claimants.

The Defendant's evidence

40. Sadly, I have to record that the evidence put in by the Defendant and its disclosure fell well below the standards that the court and the Claimants are entitled to expect. During the hearing, this was recognised by the Defendant who provided further disclosure of obviously relevant documents and further statements from the decision making Team Manager (Mr J) and the allocated social worker.

41. This filled a number of gaps, and provided a much better explanation of the decision making process and reasoning of the Defendant.

42. I was told that part of the problem for the deficiencies was the electronic storage of records and the legal department's access to them. As I said in court, in my judgment, it is not fair on the social worker or appropriate to place on him the obligation of extracting all relevant material. He is not trained for this and the exercise should be carried out or supervised and checked by a lawyer (or other suitably trained and experienced person) by reference to the issues in the case.

43. I confine myself to three obviously relevant failures:

i) the initial report of Ms K was not disclosed,

ii) the without notice application for the EPO, and the note taken of the hearing of that application, were not disclosed and when they were they did not support the allegations made in the Grounds of Defence, and in Mr J's statement, that the application was refused on the basis that the Defendant should serve a s. 35(2) notice, and

iii) it is difficult to extract and understand the reasoning of the Defendant from its initial evidence and disclosure.

General history, problems and decision making relating to K's placement

44. Divergent accounts are given by the parties which raise issues of fact that I cannot determine on the written evidence. However, a basic and common theme is that there is a history of allegations relating to racial harassment and aggression concerning the Claimants. There is no dispute that such incidents occurred but an unresolved issue is whether, as the Claimants assert, they are victims and the subject of false allegations, or whether they (and in particular DL) are aggressors. However, the common ground that such incidents took place demonstrates that K was at risk of witnessing, and indeed must have witnessed, some of the incidents, was at risk of being physically harmed by them or further such incidents (although there is no evidence that he was) and was at risk of being emotionally harmed by them and further such incidents.

45. The Defendant asserts, and I accept, (a) that it informed the Claimants on a number of occasions that unless they moved from Xtown the Defendant would not support an application for adoption, and (b) that on a number of visits by the allocated social worker, the Claimants said that they were worried that he had come to remove K. I accept these assertions because they are in line with the Claimants' account and effectively common ground on the papers.

46. There is a fairly wide ranging dispute concerning whether and, if so, when the Claimants should move, and as to the support and advice given, or which should have been given, to them about this. The Claimants owned their home in Xtown, and issues arose as to how it could be sold to best advantage, whether it should be let and what financial and other assistance the Claimants should have concerning this.

47. Whether the Claimants were victims or aggressors (or sometimes one and sometimes the other) the incidents of harassment and aggression clearly carried risks for K which could be solved or ameliorated by a move, particularly if, as they assert, the Claimants were simply innocent victims. But, it was not until DL was required to move as a condition of his bail, after he was charged with an assault, that such a move took place in July 2010. DL denies the charge and asserts that it is based on a false allegation.

48. After DL had to leave Xtown as a condition of his bail ML and K remained in Xtown. But by the end of the July 2010 they too had moved, initially to the house of DL's mother where their accommodation was more cramped than in Xtown. Then, in August 2010, they moved to council accommodation.

49. It is also clear that there have been considerable problems in the relationships between (a) the Claimants and (b) social workers employed by the Defendant and in Xtown, the police and others. At the heart of these problems is the issue whether as the Claimants assert they were innocent victims of harassment and aggression and that this is not accepted, or was reasonably perceived by the Claimants not to have been accepted, by the representatives of public bodies. It is also clear that these problems, and the Claimants' views as to their treatment, have led to difficult and sometimes heated discussions that have been witnessed by K.

50. Allegations, which the Claimants deny, of DL (and perhaps ML) shouting at K were raised in 2009.

51. There is a fairly constant theme in the Defendant's records that K's relationship with ML was a warm and loving one whereas, and in contrast, his relationship with DL was perceived to be more distant.

52. Allegations, which the Claimants deny, concerning acts of harassment and violence by DL to children (aged 15 and 11) were also known to the Defendants. The Claimants asserted that an alleged assault by DL on an 11 year old in 1997 was dismissed and that DL obtained damages from the police of £15,000 in respect of this, which they gave to charity. But, and to my mind surprisingly, they have not provided documentary evidence of this and they have not been rigorously chased for such confirmation. (As mentioned during the hearing in my view the existence of this evidence needs to be followed up).

53. Some concerns were also expressed early on by the Defendant on the state of the Claimants' home in Xtown.

54. All of the above were well known at the time of, and some are addressed in a social work review dated 10 December 2009, written by a social worker employed at Xtown, which also contains information relating to problems and difficult behaviour displayed by K on and after placement. This review however also includes the following:

> " Following the strategy meeting Newham undertook their own investigation into these allegations [which were allegations of racial harassment and an attempted assault by DL on a young person whilst giving chase] and it is understood are satisfied that K continue to be well cared for should remain with the family but would like to explore the possibility of a family moving from their current home because of the concerns they have about the level of conflict in the neighbourhood.

As an agency there are concerns about the lack of communication progress investigating the allegations made against [the Claimants] between New, as the placing authority and Xtown as the responsible safeguarding agency. There is concern that this is a family living under considerable pressure as a result of these allegations still remaining unresolved and that all the agencies involved need to move quickly to resolve what is an increasingly complex situation.

Despite the immense strain of recent months [the Claimants] have endeavoured to remain calm and consistent ever they are fully aware of the potential impact on K . He continues to identify with ML his primary attachment figure who responds to his needs in very nurturing manner. K appears relaxed and confident when interacting with [the Claimants] and will look to either parent for comfort. Both adoptive parents respond readily to K and are very pleased with his progress "

55. Mr J indicates in his statements, and I accept because it is effectively mirrored in the Claimants' evidence and is supported by contemporaneous records, that by June 2010 the perception of the social workers and others in Xtown was one of escalating problems relating to the situation within the Claimants' household and concerns that they had regarding the impact that this may be having on K's future welfare.

56. For example, in early June 2010, Mr J was informed of assessments that:

    i) both DL and ML present as being intensely focused on their perception that they are being discriminated against both by their local community and by the agencies in Xtown. They described it as being both individual and institutionalised racism,

    ii) DL and ML have a high level of mistrust which appears to manifest itself in continual confrontation with both members of the community and professionals from the agencies, and

    iii) it would appear that they are locked in a bitter dispute with neighbours and agencies with the result that they are failing to consider the need to protect K, or to consider the impact of their behaviour and views on his emotional development.

57. Clearly, this presented a worrying picture from the viewpoint of K's welfare. The picture so painted as to this conflict is effectively common ground, but the reasons for it and its impact and potential impact on K are disputed.

58. Mr J records that, at a meeting held on 17th June 2010, a plan of support with increased monitoring was put in place pending the matter being put in court, on the basis of a view that the situation could not be allowed to continue and that the matter needed to be put before a court as a matter of urgency to ensure K's welfare. It was explained to me that, the reference to the court is to the court that would hear the Claimants' application for an adoption order which the Defendant then thought had been successfully made.

59. In early July 2010, DL was arrested and bailed to his mother's address in Ytown. A report of a visit to DL after this records that:

    i) she said that the police had kicked in the door when arresting DL and assaulted him but there were no signs of the door having been kicked in,

    ii) the house appeared grubby and unkempt, the bin was overflowing and hygiene was poor, and

    iii) unsurprisingly, there was concern that K was living in a situation where police were visiting regularly, violence and verbal abuse appeared to be the norm and the Claimants were not able to protect K from the emotional impact this may have on him.

60. On 13th July 2010 an Interim Service Manager at Xtown wrote to the Defendant setting out some of the history and escalating concerns and asserting (amongst other things):

> " The Police and Safer Neighbourhood Teams were so concerned about the potential volatility of the situation that they are prepared to visit Newham to raise their concerns formally. [The Claimants] have been offered and Acceptable Behaviour Contract but they have refused to sign it. Given the continued incidents. The SNT intend to apply for and Anti Social Behaviour Order
>
> I am now writing to express my concern that despite repeated representations to members of your service regarding the welfare of this child, no apparent action has been taken by you to address the situation. We are now in the position of treating this as a formal safeguarding matter and are initiating enquiries under section 47 CA89."

61. At a professionals' meeting held on 15th July 2010 convened by Xtown social services it was agreed, amongst other things, that K would need to be removed within the next two weeks by application to the court. Also, and as a consequence of increased visits and concerns and the recommendations of a planning meeting held on 17th July 2010, it was decided that an independent social worker be commissioned to look at the Claimants' family circumstances and whether they were able to provide a safe environment for K.

62. On the papers, it is unclear whether this assessment was intended (a) to gather further information before reaching a decision, or (b) to seek confirmation of a decision that had already been made to oppose an adoption order. In any event, at that time:

    i) the Defendant's view was that its opposition to adoption and any ending of the placement would be addressed in its Rule 29 report, in the adoption application, and therefore

    ii) the Defendant was not of the view that urgent action to remove K from the care of the Claimants was warranted.

63. As I have mentioned:

    i) on 20th July 2010 it was clarified that an adoption application had not yet been successfully made, and

    ii) around that time, ML and K joined DL in Ytown at his mother's home.

64. So by the time of a visit to the Claimants and K in Ytown on 21st July 2010, as a result of which it was reported it was not felt that a Police Protection Order was required but that the situation must be closely monitored until a full parenting assessment, two changes had occurred in that the Defendant was aware that there was no existing adoption application and that the Claimants and K had moved from Xtown.

65. After the move to Ytown:

    i) K was seen at his paternal grandmother's by the allocated social worker and a representative of Action for Children when the Claimants were out, and they recorded some concern about his sleeping on a camp bed in a curtained off area under the stairs, and later

    ii) on 10th August there was a placement visit to the new council accommodation, about 10 minutes walk from DL's mother's home, when K and both Claimants were present. The notes of this meeting record that

        a) K was difficult to understand and appeared to say what comes into his mind and is a poor conversational listener,

b) they had registered with a GP and taken K to local kids play centre and that he had made friends with some children who live near DL's mother,

c) the Claimants were pleased with the new flat and they were mildly optimistic that they would get help from an organisation called Stop Hate UK about selling and getting their belongings from their home in Xtown, and

d) Ytown is stated to be a busy seaside town with a visibly high elderly population and small ethnic minority.

66. Ytown is therefore correctly recognised as being very different from Xtown and, although the move seems to have been prompted by DL's bail conditions, it had resulted in the Claimants and Y being in a very different environment and away from the neighbours and others with whom they were in conflict in Xtown. This move rendered issues concerning the state of the home in Xtown and with DL's mother (unless repeated or mirrored in the new flat in Ytown), a matter of history. Also, and importantly, it provided, as the Defendant had been advising for some time, a potential solution to the incidents of racial harassment and aggression and their "fall out".

67. The move therefore triggered a need for a fresh consideration of the concerns and problems in Xtown. No incident of harassment or aggression, or any similar incident, is reported to have occurred after the move to Ytown.

68. Until the report from Ms K on 23rd August 2010 there is no suggestion in the papers, or the statements, that the Defendant was of the view that was an urgent need to review the question whether K should remain with the Claimants, or the service of a s. 35 notice. Rather, and although the position of the Defendant probably remained that it would not, or probably would not, support an adoption application when made, it was awaiting the results of the assessment by Ms K, and was monitoring the situation in the changed circumstances and environment.

69. In his second statement, provided during the hearing, Mr J confirmed that Ms K was not given a letter of instruction because there had been some delay in commissioning her assessment and in its place she was provided with a list of issues to address and some background papers.

70. Ms K reported by a short email, sent at 9:05 on 23rd August 2010, in which she dates her visits as being over the week end 20/21 August and she says:

> " Following the work that I was able to complete as a matter of urgency I need to bring to your attention the following:
>
> During my meeting with the child on his own I asked him what happens when he is naughty he told me that his "daddy" smacks him on the bottom when I pressed for better confirmation he was quite clear it was his "father" not his "mother" who used his hand and removed his trousers. He was consistent with these answers when the question was repeated during our interview. He also referred to the fact that both his "parents" hit one another.
>
> In these circumstances please advise me what immediate action you intend to take. My concern is that if this information is put to the couple in my opinion the child will be put at risk from the possible reaction "

71. A series of discussions ensued within the Defendant to discuss this information, the history and the recent visits and reports. Further information was sought from Ms K on the telephone, and she is recorded as having advised that in her view the child was not at immediate risk but felt that if the parents were challenged about the disclosure made by K it would be of great concern. The local police in Ytown ruled out a Police Protection Order and it was decided that

the Defendant should make a without notice application for an Emergency Protection Order (EPO). Notes of the management meeting record that:

> "following the information given by [Ms K] the decision was that K needs to be removed to-day"

72. The hearing of the application for an EPO started at 6.30 pm and was concluded at 8.50 pm on 23rd August 2010. An email timed at 10.20 pm from Ms K attached her attendance notes which she dated as relating to Friday 19 and 20 August 2010. So it seems that these notes were not available when the decision to apply for the EPO was made or during the hearing.

73. CAFCASS sent a team manager to the hearing, she was represented and did not support the making of an EPO on the evidence provided. The magistrates agreed, and the note of the hearing, provided by the solicitor who represented the Defendant, records that the Chairman said that if the Defendant had concerns "they should firm up their evidence and put it together in a measured case".

74. For reasons it does not explain, the Defendant decided against that course (even though Ms K's view seems to have been that the child was not in immediate danger unless the Claimants were challenged about the disclosure) and decided to:

    i) hand deliver the s. 35(2) notice, which was done on 24th August 2010,

    ii) omit from it any mention of what Ms K had reported K to have said, and

    iii) to set out in that letter reasons for giving the notice that in large measure related to historical matters that, both prior to and after the move from Xtown, had not caused the Defendant to take steps to bring about the immediate or urgent removal of K from the Claimants.

75. As mentioned earlier, K was returned on 2nd September 2010. At a hearing on 3rd September 2010 attended by representatives of the Claimants, Mr J and the same solicitor who had applied for the EPO on behalf of the Defendant, the Claimants' application to adopt was dismissed. The note of that hearing (provided during the hearing before me) records that the Defendant had no intention of placing K with the Claimants. This is a clear indication that by that date the Defendant had made its mind up on the question whether K should be returned to the Claimants.

76. The note also indicates that the judge was given a history of events from the application for an EPO, of that hearing and the hearing for a Recovery Order and the incidents of the week. But it is not clear what documents he was shown. The reasons for the decision to dismiss (rather than an option raised with him to adjourn) are not set out in the note, or elsewhere, but the note records that the judge thought that his court was not the correct one for the Claimants to challenge the actions of the Defendant, and that if they wished to bring judicial review that would be a matter for them to consider at a later date.

77. I pause to record that counsel for the Defendant sought to rely on what was revealed in the evidence of this hearing to support a submission that what happened there gave the Claimants notice of the disclosures Ms K had reported that K had made to her and thus a reasonable and fair opportunity to comment on and to challenge them and the decisions to give the notice and end the placement. I reject that submission because what was said at that hearing is not adequately covered by the evidence and, in particular, it is not suggested in the evidence that at the time it was asserted that it should (or that it was intended that it would) cover this purpose. In my view, to be effective as a means of providing a fair opportunity to the Claimants to comment on, or challenge, decisions of the Defendant it would have had to have been made clear by the Defendant that this was one of the reasons for it giving the Claimants' representatives information and that it was inviting comments and why it was doing so.

The relevant statutory framework

The 2002 Act, and the 2005 Regulations and Guidance

78. Section 35 of the 2002 Act forms part of a framework governing the placement of children for adoption by local authorities and other adoption agencies. Here, the Defendant local authority was the adoption agency,

79. Section 35 of the 2002 Act must be read in the context of the other obligations and responsibilities of local authorities to children laid down in the Children Act 1989 ("the 1989 Act") and the 2005 Regulations read with the 2005 Guidance.

80. Section 1(2) of the 2002 Act provides that:

> "The paramount consideration of the court or adoption agency [in "coming to a decision relating to the adoption of a child"] must be the child's welfare, throughout his life",

and section 1(6) provides that

> "The court or adoption agency must always consider the whole range of powers available to it in the child's case (whether under this Act or the 1989 Act); and the court must not make any order under this Act unless it considers that making the order would be better for the child than not doing so".

The ECtHR in Strasbourg has similarly held that where there is any clash between the interest of the parents and the interests of the child, the latter prevail: *Yousef v Netherlands* [2002] 36 EHRR 20 at paragraph 66.

81. A care order is made on the basis of a care plan. Here, the care plan was for adoption and at the same time as the court made the care order it also made a "placement order" under section 21 of the 2002 Act, which provides as follows (with my emphasis):

> "(1) A placement order is an order made by the court **authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the authority.**
>
> (2) The court may not make a placement order in respect of a child unless—
>
> (a) **the child is subject to a care order**,
>
> (b) the court is satisfied that the conditions in section 31(2) of the 1989 Act (conditions for making a care order) are met, or
>
> (c) the child has no parent or guardian.
>
> (3) ----------

82. Section 18(3) of the 2002 Act provides that a child who is placed or is authorised to be placed for adoption by a local authority is looked after by that authority under the provisions of Part 3 of the Children Act 1989.

83. Section 25 of the 2002 Act, provides that where a placement order is in force the adoption agency has parental responsibility for the child, that when a child is placed with prospective adopters parental responsibility is given to them, but that the adoption agency may determine that their parental responsibility is to be restricted to the extent specified, in the determination.

Here the parental responsibility of the Claimants was so limited in respect of changing K's name, taking him abroad for more than 3 months and significant medical treatment.

84. I pause to record that, in my view, the giving of this parental responsibility is an important factor in determining whether and when family life exists, or is established, between prospective adopters and the child placed with them.

85. Section 29 of the 2002 Act provides:

> "(1) Where a placement order is made in respect of a child and either the child is:
>
> (a) subject to a care order; or
>
> (b) the court makes a care order at the same time
>
> the care order does not have effect at any time when the placement order is in force "

In my judgment, that reference to "the care order" is to the care order that was in existence when, or made at the same time as, the placement order is made. It is therefore one based on the satisfaction of the threshold criteria set by s. 31 Children Act 1989 in respect of the care of the child at the date of the application for it, or the relevant earlier intervention by the local authority. So it is based on past harm or risk of harm that occurred before any placement for adoption pursuant to the placement order. As mentioned earlier, this suspension of the care order does not mean that the child ceases to be a looked after child (see again s. 18(3) of the 2002 Act).

86. Section 29 of the 2002 Act, goes on to prohibit the making of a number of orders whilst a placement order is in force but the making of Emergency Protection Orders (EPOs) and Care Orders (which include interim care orders) are not so prohibited.

87. On and after the making of a placement order the court can make orders for contact: see ss. 26 and 27 of the 2002 Act.

88. The court can revoke a placement order: see section 24 of the 2002 Act. If the Court makes such an order and determines that the child is not to remain with the prospective adopters, they must return the child to the local authority within the period specified by the Court and a failure to do so constitutes a criminal offence: see section 34(3) of the 2002 Act. In a case where an earlier care order exists, revocation of the placement order will re-activate the care order (s. 29(1) of the 2002 Act) and thus the duties and role of the local authority named in the care order.

89. Once K was placed for adoption, a reviewing process governed by Part 6 of the 2005 Regulations applied. Regulation 37 requires that an Independent Reviewing Officer be appointed. Regulation 36 lays down the minimum number of reviews and visit requirements in relation to the child placed with prospective adopters, and provides (with my emphasis):

> "(3) The adoption agency [local authority] must carry out a review of the child's case—"
>
> (a) not more than 4 weeks after the date on which the child is placed for adoption ("the first review");
>
> (b) not more than 3 months after the first review; and
>
> (c) thereafter not more than 6 months after the date of the previous review,

unless the child is returned to the agency by the prospective adopter or an adoption order is made.

(4) The adoption agency must—

(a) ensure that the child and the prospective adopter are visited within one week of the placement and thereafter **at least once a week until the first review and thereafter at such frequency as the agency decides** at each review;

(b) ensure that written reports are made of such visits; and

(c) provide such advice and assistance to the prospective adopter as the agency considers necessary.

(5) When carrying out a review the adoption agency must consider each of the matters set out in paragraph (6) and must, so far as is reasonably practicable, ascertain the views of—

(a) the child, having regard to his age and understanding;

(b) if the child is placed for adoption, the prospective adopter; and

(c) any other person the agency considers relevant,

in relation to such of the matters set out in paragraph (6) as the agency considers appropriate.

(6) The matters referred to in paragraph (5) are—

(a**) whether the adoption agency remains satisfied that the child should be placed for adoption**;

(b) **the child's needs, welfare and development, and whether any changes need to be made to meet his needs or assist his development**;

(c) the existing arrangements for contact, and whether they should continue or be altered;

(d) . . . **the arrangements in relation to the exercise of parental responsibility for the child, and whether they should continue or be altered**;

(e) [where the child is placed for adoption] the arrangements for the provision of adoption support services for the adoptive family and whether there should be any re-assessment of the need for those services;

(f) **in consultation with the appropriate agencies, the arrangements for assessing and meeting the child's health care and educational needs**;

....

(8) The adoption agency must, so far as is reasonably practicable, **notify**—

(a) the child, where the agency considers he is of sufficient age and understanding;

(b) the prospective adopter; and

(c) any other person whom the agency considers relevant,

of . . . any decision taken by the agency in consequence of that review.

(9) The adoption agency must ensure that—

(a) the information obtained in the course of a review or visit in respect of a child's case including the views expressed by the child;

(b) the details of the proceedings of any meeting arranged by the agency to consider any aspect of the review of the case; and

(c) **details of any decision made in the course of or as a result of the review,**

are recorded in writing and placed on the child's case record.

(10) **Where the child is returned to the adoption agency in accordance with section 35(1) or (2) of the Act, the agency must conduct a review of the child's case no earlier than 28 days, or later than 42 days, after the date on which the child is returned to the agency and when carrying out that review the agency must consider the matters set out in paragraph (6)(a), (b), (c) and (f).**"

90. Part 5 of the 2005 Guidance, which relates to and explains the duties of an adoption agency when it places a child for adoption and reviews the child's case, provides (with my emphasis):

"21. **The agency should provide written information about how it intends to review a child's case and this should be given to the prospective adopter,** the child where the agency considers the child is of sufficient age and understanding, and to any other person the agency considers relevant, such as the child's parent or guardian

26. Where the placement disrupts and the child is returned to the agency in accordance with section 35(1) or (2) of the Act, AAR 36.10 requires the agency to review the child case no earlier than 28 days and no later than 42 days after the date on which the child is returned. **Where a placement disrupts the agency should provide support and counselling for the child and the prospective adopter before formally reviewing the case within the specified period.**

27. When carrying out this review the agency is also required by AAR 36.10 to consider:

- **whether the agency remains satisfied that the child should be placed for adoption**
- the child's needs, welfare and development, and whether any changes need to be made to meet the child's needs or assist their development
- the existing arrangements for contact, and whether they should continue or be altered
- in consultation with the appropriate agencies, the arrangements for assessing in meeting the child health care and educational needs.

28. **The agency should also consider its own decisions and actions in the case.**"

91. So, during the placement period prior to adoption, pursuant to the 2005 Regulations and Guidance (and its general duties to the child) the relevant local authority is under a continuing

obligation to review the position of the child, to notify the prospective adopters of any concerns regarding the child and to record its reviews and decisions.

92. Prospective adopters (or a prospective adopter) who are looking after a child under a placement order may apply to the court for an adoption order (see ss. 49 to 51 of the 2002 Act; s. 50 (adoption by a couple applied in this case). Section 46 of the 2002 Act, provides that an adoption order is an order *made by the court* giving parental responsibility for a child to the adopters or adopter.

93. An adoption order therefore brings about an important change of status for the child and his adopters because parental responsibility for the child passes entirely to the adopter or adopters, and the birth parents are no longer legally recognised as the child's parents – they are "former parents" – and the local authority no longer has parental responsibility.

94. A number of conditions have to be satisfied before an adoption order can be made. Sections 42, 43 and 47 of the 2002 Act provide (with my emphasis) that:

> "42 (1) An application for an adoption order may not be made unless—
>
> (a) if subsection (2) applies, the condition in that subsection is met,
>
> (b) if that subsection does not apply, the condition in whichever is applicable of subsections (3) to (5) applies.
>
> (2) If—
>
> (a) **the child was placed for adoption with the applicant or applicants by an adoption agency or in pursuance of an order of the High Court,** or
>
> (b) the applicant is a parent of the child,
>
> **the condition is that the child must have had his home with the applicant or, in the case of an application by a couple, with one or both of them at all times during the period of ten weeks preceding the application.**
>
> (3) ----------
>
> (4) ----------
>
> (5) ----------
>
> (6) ----------
>
> (7) An adoption order may not be made unless the court is satisfied that sufficient opportunities to see the child with the applicant or, in the case of an application by a couple, both of them together in the home environment have been given—
>
> (a) where the child was placed for adoption with the applicant or applicants by an adoption agency, to that agency,
>
> (b) in any other case, to the local authority within whose area the home is.
>
> (8) ----------
>
> 43 Where an application for an adoption order **relates to a child placed for adoption by an adoption agency, the agency must—**

(a) submit to the court a report on the suitability of the applicants and on any other matters relevant to the operation of section 1, and

(b) assist the court in any manner the court directs.

47(1) An adoption order may not be made if the child has a parent or guardian unless one of the following three conditions is met; but this section is subject to section 52 (parental etc. consent).

(2) ----------

(3) ----------

(4) The second condition is that—

(a) the child has been placed for adoption by an adoption agency with the prospective adopters in whose favour the order is proposed to be made,

(b) either—

(i) the child was placed for adoption with the consent of each parent or guardian and the consent of the mother was given when the child was at least six weeks old, or

(ii) the child was placed for adoption under a placement order, and

(c) no parent or guardian opposes the making of the adoption order.

(5) A parent or guardian may not oppose the making of an adoption order under the second condition without the court's leave.

(6) ----------

95. The local authority is given a power to require the return of a child placed with prospective adopters. This is provided for in section 35 of the 2002 Act which provides, with my emphasis:

"35 Return of child in other cases"

(1) Where a child is placed for adoption by an adoption agency and the prospective adopters give notice to the agency of their wish to return the child, the agency must—

(a) receive the child from the prospective adopters before the end of the period of seven days beginning with the giving of the notice, and

(b) give notice to any parent or guardian of the child of the prospective adopters' wish to return the child.

(2) Where a child is placed for adoption by an adoption agency, and the agency—

(a) is of the opinion that the child should not remain with the prospective adopters, and

(b) gives notice to them of its opinion,

the prospective adopters must, not later than the end of the period of seven days beginning with the giving of the notice, return the child to the agency.

(3) If the agency gives notice under subsection (2)(b), it must give notice to any parent or guardian of the child of the obligation to return the child to the agency.

(4) A prospective adopter who fails to comply with subsection (2) is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both.

96. However, where the prospective adopters have made an application to adopt the child section 35 further provides (with my emphasis):

"(5) Where—"

(a) an adoption agency gives notice under subsection (2) in respect of a child,

(b) **before the notice was given, an application for an adoption order** (including a Scottish or Northern Irish adoption order), special guardianship order or residence order, or for leave to apply for a special guardianship order or residence order, **was made in respect of the child,** and

(c) the application (and, in a case where leave is given on an application to apply for a special guardianship order or residence order, the application for the order) has not been disposed of,

prospective adopters are not required by virtue of the notice to return the child to the agency unless the court so orders."

97. Accordingly, a change occurs when prospective adopters have applied for an adoption order, because after that the child will only be able to be removed from them pursuant to an order of the Family Court, and as in my view that is a decision relating to the adoption of the child, in exercising that jurisdiction s. 1 of the 2002 Act applies.

Articles 6, 8 and 13

98. These provide

"Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. .....

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Human Rights Act 1998

99. The most relevant sections are:

"1. The Convention Rights

(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in

(a) Articles 2 to 12 and 14 of the Convention ----------

(b) ----------

(c) ----------

as read with Articles 16 to 18 of the Convention.

3. Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section

(a) applies to primary legislation and subordinate legislation whenever enacted; ----------

4. Declaration of incompatibility

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) ----------

(4) ----------

(5) ----------

(6) A declaration under this section ("a declaration of incompatibility")

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

6. Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes

(a) a court or tribunal,

(b) ----------

(4) ----------

(5) ----------

(6) "An act" includes a failure to act ----------

(7) Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, all

(b) rely on the Convention right all rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act. ----------

(8) Judicial remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) some lawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) ---------- "

Authorities

The approach to the application of s. 3 HRA 1998

100. This is made clear by Lord Nicholls in his speech in *Ghaidan v Godin – Mendoza* [2004] UKHL 30, [2004] 2 AC 557 where he said:

"*Section 3 of the Human Rights Act 1998*

25. ----------

26. Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention.

27. Unfortunately, in making this provision for the interpretation of legislation, section 3 itself is not free from ambiguity. Section 3 is open to more than one interpretation. The difficulty lies in the word 'possible'. Section 3(1), read in conjunction with section 3(2) and section 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which 'possibility' is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships' House, are still cautiously feeling their way forward as experience in the application of section 3 gradually accumulates.

28. ----------.

29. ---------- It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning. http://www.bailii.org/uk/cases/UKHL/2001/25.htmlhttp://www.bailii.org/uk/cases/UKHL/2001/25.htmlhttp://www.bailii.org/uk/cases/UKHL/2001/25.html----------

30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

31. ---------- once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. ----------

32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively.

But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. ----------

101. So there are two steps:

i) the consideration of what Parliament has provided by the 2002 Act, to determine whether it is compatible with Convention rights, and if it is not

ii) the application of s. 3 HRA, which enables words to be added to or removed from unambiguous statutory language to make it compatible provided that such alteration does not "run against the grain of the 2002 Act".

Re S: Re W [2002] UKHL 10, [2002] 2 AC 291

102. This case has a central part to play in the arguments advanced in this case as it covers (a) the relevant statutory roles of the court and local authorities, and (b) the impact of, and the approach to be taken in respect of, Convention and other civil rights having regard to those statutory roles.

The respective statutory roles

103. In *Re S; Re W* the House of Lords identified and confirmed the nature and extent of the respective roles of the court and the local authority when a care is made. After a final care order is made Parliament has provided that the Family courts are not empowered to intervene in the way in which local authorities discharge their parental responsibilities (e.g. in respect of placement).

104. *Re S; ReW* was not concerned with adoption and thus the role of an adoption agency during the period of a placement order and thus during the period that a care order is not in effect or the impact of the jurisdiction and role of the court in making placement orders and adoption orders, but as appears later, it is nonetheless important authority in respect of the statutory roles of the court and a local authority acting as the adoption agency.

Convention rights and other civil rights

105. Challenges to, and the potential for challenges to, decisions that Parliament has provided are to be made by local authorities and which affect the Convention and civil rights of children and their parents were addressed in *Re S; Re W*. The following passages in the speech of Lord Nicholls, with my emphasis, are of particular relevance here:

"*Sections 7 and 8 of the Human Rights Act*

45. Sections 7 and 8 of the Human Rights Act have conferred extended powers on the courts. Section 6 makes it unlawful for a public authority to act in a way which is

incompatible with a Convention right. Section 7 enables victims of conduct made unlawful by section 6 to bring court proceedings against the public authority in question. Section 8 spells out, in wide terms, the relief a court may grant in those proceedings. The court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. Thus, if a local authority conducts itself in a manner which infringes the article 8 rights of a parent or child, the court may grant appropriate relief on the application of a victim of the unlawful act.

46. This new statutory power has already been exercised. In *In re M* (29 June 2001, unreported) ---------- Holman J set aside the decision. The decision making process was unfair by not involving the parents to a degree sufficient to provide their interests with the requisite protection. In so ordering Holman J was proceeding squarely within the extended jurisdiction conferred by sections 7 and 8. ----------

47. ----------

48. ----------

49. Section 7 envisages proceedings, brought by a person who is or would be a victim, against a public authority which has acted or is proposing to act unlawfully. The question whether the authority has acted unlawfully, or is proposing to do so, is a matter to be decided in the proceedings. Relief can be given against the authority only in respect of an act, or a proposed act, of the authority which the court finds is or would be unlawful. For this purpose an act includes a failure to act. --------

Compatibility and article 8

53. The essential purpose of this article is to protect individuals against arbitrary interference by public authorities. In addition to this negative obligation there are positive obligations inherent in an effective concept of 'respect' for family life ----------

54. Clearly, if matters go seriously awry, the manner in which a local authority discharges its parental responsibilities to a child in its care may violate the rights of the child or his parents under this article. The local authority's intervention in the life of the child, justified at the outset when the care order was made, may cease to be justifiable under article 8(2). ----------

55. Further, the local authority's decision making process **must be conducted fairly and so as to afford due respect to the interests protected by article 8. For instance, the parents should be involved to a degree which is sufficient to provide adequate protection for their interests**: *W v United Kingdom* (1987) 10 EHRR 29, 49-50, paragraphs 62-64.

56. **However, the possibility that something may go wrong with the local authority's discharge of its parental responsibilities or its decision making processes, and that this would be a violation of article 8 so far as the child or parent is concerned, does not mean that the legislation itself is incompatible, or inconsistent, with article 8**. The Children Act imposes on a local authority looking after a child the duty to safeguard and promote the child's welfare. Before making any decision with respect to such a child the authority must, so far as reasonably practicable, ascertain the wishes and feelings of the child and his parents: section 22. Section 26 provides for periodic case reviews by the authority, including obtaining the views of parents and children. One of the required reviews is that every six months the local authority must actively consider whether it should apply to the court for a discharge of the care order: see the Review of Children's Cases Regulations 1991 (SI 1991 No. 895). Every local authority must also establish a procedure for considering representations, including complaints, made to it by any child who is being looked

after by it, or by his parents, about the discharge by the authority of its parental responsibilities for the child.

57. If an authority duly carries out these statutory duties, in the ordinary course there should be no question of infringement by the local authority of the article 8 rights of the child or his parents. **Questions of infringement are only likely to arise if a local authority fails properly to discharge its statutory responsibilities. Infringement which then occurs is not brought about, in any meaningful sense, by the Children Act. Quite the reverse. Far from the infringement being compelled, or even countenanced, by the provisions of the Children Act, the infringement flows from the local authority's failure to comply with its obligations under the Act. True, it is the Children Act which entrusts responsibility for the child's care to the local authority. But that is not inconsistent with article 8. Local authorities are responsible public authorities, with considerable experience in this field. Entrusting a local authority with the sole responsibility for a child's care, once the 'significant harm' threshold has been established, is not of itself an infringement of article 8. There is no suggestion in the Strasbourg jurisprudence that absence of court supervision of a local authority's discharge of its parental responsibilities is itself an infringement of article 8.**

58. **Where, then, is the inconsistency which is alleged to exist? As I understand it, the principal contention is that the incompatibility lies in the absence from the Children Act of an adequate remedy if a local authority fails to discharge its parental responsibilities properly and, as a direct result, the rights of the child or his parents under article 8 are violated.** The Children Act authorises the state to interfere with family life. The Act empowers courts to make care orders whose effect is to entrust the care of children to a public authority. **But the selfsame Act, while conferring these wide powers of interference in family life, omits to provide any sufficient remedy, by way of a mechanism for controlling an erring local authority's conduct, if things go seriously wrong with the authority's care of the child. It is only to be expected, the submission runs, that there will be occasions when the conduct of a local authority falls short of the appropriate standards. An Act which authorises state interference but makes no provision for external control when the body entrusted with parental responsibility fails in its responsibilities is not compatible with article 8.** ----------.

59. **In my view this line of argument is misconceived. Failure by the state to provide an effective remedy for a violation of article 8 is not itself a violation of article 8. This is self-evident**. So, even if the Children Act does fail to provide an adequate remedy, the Act is not for that reason incompatible with article 8. This is the short and conclusive answer to this point.

60. However, I should elaborate a little further. In Convention terms, failure to provide an effective remedy for infringement of a right set out in the Convention is an infringement of article 13. But article 13 is not a Convention right as defined in section 1(1) of the Human Rights Act. So legislation which fails to provide an effective remedy for infringement of article 8 is not, for that reason, incompatible with a Convention right within the meaning of the Human Rights Act.

61. Where, then, does that leave the matter so far as English law is concerned? The domestic counterpart to article 13 is sections 7 and 8 of the Human Rights Act, read in conjunction with section 6. This domestic counterpart to article 13 takes a different form from article 13 itself. Unlike article 13, which declares a right ('Everyone whose rights … are violated shall have an effective remedy'), sections 7 and 8 provide a remedy. Article 13 guarantees the availability at the national level of an effective remedy to enforce the substance of Convention rights. **Sections 7 and 8 seek to provide that remedy in this country. The object of these sections is to provide**

in English law the very remedy article 13 declares is the entitlement of everyone whose rights are violated.

62. Thus, if a local authority fails to discharge its parental responsibilities properly, and in consequence the rights of the parents under article 8 are violated, the parents may, as a longstop, bring proceedings against the authority under section 7. ----------

63. In the ordinary course a parent ought to be able to obtain effective relief, by one or other of these means, against an authority whose mishandling of a child in its care has violated a parent's article 8 rights. More difficult is the case, to which Thorpe LJ drew attention in paragraph 34, where there is no parent able and willing to become involved. In this type of case the article 8 rights of a young child may be violated by a local authority without anyone outside the local authority becoming aware of the violation. In practice, such a child may not always have an effective remedy.

64. I shall return to this problem at a later stage. **For present purposes it is sufficient to say that, for the reason I have given, the failure to provide a young child with an effective remedy in this situation does not mean that the Children Act is incompatible with article 8: failure to provide a remedy for a breach of article 8 is not itself a breach of article 8.**

Compatibility and article 6

65. The position regarding article 6(1) is more complicated. ----------

66. The starting point here is to note that article 6(1) applies only to disputes ('contestations') over (civil) rights and obligations which, at least arguably, are recognised under domestic law. Article 6(1) does not itself guarantee any particular content for civil rights and obligations in the substantive law of contracting states ----------

67. ----------

68. ----------

69. Thus, when considering the application of article 6(1) to children in care, the European Court of Human Rights focuses on the rights under domestic law which are then enjoyed by the parents or the child. If the impugned decision significantly affects rights retained by the parents or the child after the child has been taken into care, article 6(1) may well be relevant. It is otherwise if the decision has no such effect.

70. I pause to note one consequence of this limitation on the scope of article 6(1). Since article 6(1) is concerned only with the protection of rights found in domestic law, a right conferred by the Convention itself does not as such qualify. Under the Convention, article 13 is the guarantee of an effective remedy for breach of a Convention right, not article 6(1). Article 6(1) is concerned with the protection of other rights of individuals. Thus, a right guaranteed by article 8 is not in itself a civil right within the meaning of article 6(1).

71. **Although a right guaranteed by article 8 is not *in itself* a civil right within the meaning of article 6(1), the Human Rights Act has now transformed the position in this country. By virtue of the Human Rights Act article 8 rights are now part of the civil rights of parents and children for the purposes of article 6(1). This is because now, under section 6 of the Act, it is unlawful for a public authority to act inconsistently with article 8.**

72. **I have already noted that, apart from the difficulty concerning young children, the court remedies provided by sections 7 and 8 should ordinarily provide effective relief for an infringement of article 8 rights.** I need therefore say nothing further on this aspect of the application of article 6(1). I can confine my attention to the application of article 6(1) to *other* civil rights and obligations of parents and children.

73. ----------

74. ---------- the jurisprudence of the European Court of Human Rights has drawn back from holding that article 6(1) requires that all administrative decisions should be susceptible of, in effect, substantive appeal to a court, with the court substituting its views for the decision made by the administrator. Article 6(1) is not so crude or, I might add, so unrealistic. Article 6(1) is more discerning in its requirements. The extent of judicial control required depends on the subject matter of the decision and the extent to which this lends itself to judicial decision.----------

75. **This principle, that the required degree of judicial control varies according to the subject matter of the impugned decision, is important in the context of the Children Act, to which I can now turn**. There is no difficulty about the making of a care order. The effect of a care order is to endow a local authority with parental responsibility for a child. Accordingly, the making of a care order affects the 'civil rights' of the parents. The making of a care order affects their rights as parents, and article 6(1) applies. In this regard English law, expressed in the Children Act, accords with the requirements of article 6(1). A care order is made by the court, in proceedings to which the parents are parties.

76. ----------

77. The position regarding decisions taken by the local authority on the care of a child while a care order is in force is not quite so straightforward. By law a parent has rights, duties, powers and responsibilities in relation to a child. This is recognised in the definition of parental responsibility in the Children Act, section 3(1). Under the Children Act the parental responsibility of a parent does not cease when a care order is made. **The subject matter of decisions made by a local authority acting under its statutory powers while a care order is in force range widely, from the trivial to matters of fundamental importance to parents and children. Hence the extent to which decisions by an authority affect the private law rights of parents and children also varies widely. Some affect the continuing parental responsibility of a parent, others do not.**

78. Decisions on the day to day care of a child are towards the latter edge of this range. In the ordinary course disputes about such decisions attract the requirements of article 6(1), if at all, only to an attenuated extent. The *parents'* rights in respect of the control of the day to day care of the child were decided by the making of the care order and the grant of parental responsibility to the local authority. Nor do such decisions involve the determination of the civil rights of the *child*. The upbringing of a child normally and inevitably requires that those with parental responsibility for the child exercise care and control over the child and make decisions regarding where the child shall live and how the child's life shall be regulated: see *Nielsen v Denmark* (1988) 11 EHRR 175, 191, paragraph 61. I see no reason to doubt that, in so far as article 6(1) requires judicial control of such decisions, this requirement is satisfied in this country by the availability of judicial review.

79. **Other decisions made by a local authority may vitally affect the parent-child relationship. Decisions about access are an example, for which the Children Act makes provision for the involvement of the court. But there are other important decisions for which the Children Act makes no provision for court intervention. A decision by a local authority under section 33(3)(b) that a parent**

shall not meet certain of his parental responsibilities for the child may, depending on the facts, be an instance. More generally, it is notable that when a care order is made questions of a most fundamental nature regarding the child's future may remain still to be decided by the local authority; for example, whether rehabilitation is still a realistic possibility. Consistently with the Strasbourg jurisprudence such decisions attract a high degree of judicial control. It must be doubtful whether judicial review will always meet this standard, even if the review is conducted with the heightened scrutiny discussed in *R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622.

80. Any shortcoming here is not, strictly, made good by sections 7 and 8 of the Human Rights Act. As already noted, section 8 enables the court to grant relief only in respect of conduct of a public authority made unlawful by section 6. For the present purpose the relevant public authority is the court itself. In failing to provide a hearing as guaranteed by article 6(1) the court is not acting unlawfully for the purposes of section 6. The court is simply giving effect to the Children Act: see section 6(2)(a) of the Human Rights Act. The court has no power to act otherwise. Section 6 is not the source of any such power. Section 6 is prohibitory, not enabling.

81. I hasten to add an important practical qualification. Although any shortcoming here is not strictly made good by sections 7 and 8, it is difficult to visualise a shortcoming which would have any substantial practical content. It is not easy to think of an instance in this particular field where the civil rights of parents or children, protected by article 6(1), are more extensive than their article 8 rights. Their article 8 rights have the protection accorded in domestic law by sections 7 and 8. In practice this article 8 protection would, in the present context, seem to cover much the same ground as article 6(1). So any shortcoming is likely to be more theoretical than real.

82. I must note also a difficulty of another type. This concerns the position of young children who have no parent or guardian able and willing to become involved in questioning a care decision made by a local authority. This is an instance of a perennial problem affecting children. A parent may abuse a child. The law may provide a panoply of remedies. But this avails nothing if the problem remains hidden. Depending on the facts, situations of this type may give rise to difficulties with Convention rights. The Convention is intended to guarantee rights which are practical and effective. This is particularly so with the right of access to the courts, in view of the prominent place held in a democratic society by the right to a fair trial: see *Airey v Ireland* (1979) 2 EHRR 305, 314, paragraph 24. The guarantee provided by article 6(1) can hardly be said to be satisfied in the case of a young child who, in practice, has no way of initiating judicial review proceedings to challenge a local authority's decision affecting his civil rights. (In such a case, as already noted, the young child would also lack means of initiating section 7 proceedings to protect his article 8 rights.)

83. **My conclusion is that in these respects circumstances might perhaps arise when English law would not satisfy the requirements of article 6(1) regarding some child care decisions made by local authorities. In one or other of the circumstances mentioned above the article 6 rights of a child or parent are capable of being infringed.**

84. I come to the next and final step. This is to consider whether the existence of possible infringements in these circumstances means that the Children Act is incompatible with article 6(1).

85. Here again, the position is not straightforward. The Convention violation now under consideration consists of a failure to provide access to a court as guaranteed by article 6(1). The absence of such provision means that English law may be incompatible with article 6(1). The United Kingdom may be in breach of its treaty

obligations regarding this article. **But the absence of such provision from a particular statute does not, in itself, mean that the statute is incompatible with article 6(1). Rather, this signifies at most the existence of a lacuna in the statute.**

86. This is the position so far as the failure to comply with article 6(1) lies in the absence of effective machinery for protecting the civil rights of young children who have no parent or guardian able and willing to act for them. In such cases there is a statutory lacuna, not a statutory incompatibility.

87. The matter may stand differently regarding the inability, of parents and children alike, to challenge in court care decisions, however fundamental, made by a local authority while a care order is in force. This matter may stand differently because, judicial review apart, the opportunity to challenge such decisions in court would be in conflict with the scheme of the Children Act. This gives rise to yet another issue: whether inconsistency with a basic principle of a statute, as distinct from inconsistency with express provisions within the statute, gives rise to incompatibility for the purpose of section 4.

88. This issue does not call for decision on these appeals. I prefer to leave it open, for two reasons. ----------"

Relevant developments in the approach taken by the court to determining whether there has been a breach of a Convention right

106. A problem identified in *Re S; Re W* related to the approach taken to a review of, or challenge to the decision of, a public authority that was said to have infringed a civil right (which includes a Convention right). The point made by Lord Nicholls is that if that approach is limited it may be that Article 6 (and Article 13 which is not a Convention right) is breached (see in particular paragraph 83 of his speech; which was at the heart of the Claimants' argument in this case).

107. This problem has now been addressed in later cases. In particular, I was referred to *R(SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 and *Manchester City Council v Pinnock* [2010] UKSC, [20101] 3 WLR 1441. These, and other, cases decide and make it clear that:

i) it is the court who decides whether or not a claimant's Convention rights have been broken, and

ii) in doing so it can, if necessary, resolve any relevant disputes of fact.

108. The following passages from those three cases, with my emphasis, are of particular relevance:

i) *Denbigh*. At paragraphs 29 to 32 of his speech Lord Bingham said:

"29. I am persuaded that the Court of Appeal's approach to this procedural question was mistaken, for three main reasons. First, the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg. ---------- **But the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated. In considering the exercise of discretion by a national authority the court may**

consider whether the applicant had a fair opportunity to put his case, and to challenge an adverse decision, the aspect addressed by the court in the passage from its judgment in *Chapman* quoted above. But the House has been referred to no case in which the Strasbourg Court has found a violation of Convention right on the strength of failure by a national authority to follow the sort of reasoning process laid down by the Court of Appeal. This pragmatic approach is fully reflected in the 1998 Act. **The unlawfulness proscribed by section 6(1) is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning, and action may be brought under section 7(1) only by a person who is a victim of an unlawful act.**

30. **Secondly, it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting.** The inadequacy of that approach was exposed in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, para 138, **and the new approach required under the 1998 Act was described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, paras 25-28, in terms which have never to my knowledge been questioned. There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time (*Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816, paras 62-67). Proportionality must be judged objectively, by the court (*Williamson*, above, para 51)**. As Davies observed in his article cited above, "The retreat to procedure is of course a way of avoiding difficult questions". But it is in my view clear that the court must confront these questions, however difficult. The school's action cannot properly be condemned as disproportionate, with an acknowledgement that on reconsideration the same action could very well be maintained and properly so.

31. ----------

32. It is therefore necessary to consider the proportionality of the school's interference with the respondent's right to manifest her religious belief by wearing the jilbab to the school."

ii) In *Belfast City Council,* Lord Hoffman at paragraph 15, Lord Rodger at paragraphs 21 and 27, Baroness Hale at paragraphs 31 and 37, Lord Mance at paragraph 44 and Lord Neuberger at paragraphs 88 and 90 said:

"15. **As Lord Bingham noted, some Convention rights may have a procedural content; most obviously article 6, but other rights as well. In such cases, a procedural impropriety may be a denial of a Convention right**. Thus in *Hatton v United Kingdom* (2003) 37 EHRR 28, an article 8 case, the ECHR **considered not only the effect on the applicant's private life but whether he had had a fair opportunity to put his case. In such cases, however, the question is still whether there has actually been a violation of the applicant's Convention rights and not whether the decision-maker properly considered the question of whether his rights would be violated or not.**

21. **Defects in procedure are, of course, very often a good reason for quashing a decision and requiring the relevant body to reconsider it**. In its Order 53 statement the applicant mentioned various concerns about the procedure which the Council had adopted, **but it did not suggest that any procedural failing had given rise to a breach of article 10. So far as article 10 was concerned, the applicant relied on the effects of the refusal of a licence: it meant that the applicant could not sell its books etc in its shop in Gresham Street in Belfast and such a**

restriction was unnecessary for the protection of morals in a democratic society.

27. In this case the Council did not weigh the competing human rights and other considerations in that way. So, when deciding whether their refusal of a licence interfered disproportionately with the applicant's right to freedom of expression, **the court had to go about its task without that particular kind of assistance.** ----------

31. **The first, and most straightforward, question is who decides whether or not a claimant's Convention rights have been infringed. The answer is that it is the court before which the issue is raised. The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account**. ----------

37. But this is not a case in which the legislation itself attempts to strike that balance. The legislation leaves it to the local authority to do so in each individual case. **So the court has to decide whether the authority has violated the convention rights.** ---------- the court has no alternative but to strike the balance for itself, giving due weight to the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be.

44. ---------- **The court's role is to assess for itself the proportionality of the decision-maker's decision**: *R (SB) v. Governors of Denbigh High School [2006] UKHL 15*, [2007] 1 AC 100. ----------

88. In that case [*Denbigh*] ---------- my noble and learned friend Lord Hoffmann said this:

"68. …In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But Art. 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under Art.9 (2)?..."

Article 9 is very similar to Article 10, both in the nature of the topic with which it is concerned (freedom of thought, conscience and religion, a substantive right), and in the way it is structured (in two parts, the first of which is concerned with identifying the right, and the second of which is concerned with permitted restrictions on the right).

90. In my view, therefore, the contention advanced by Mr Larkin QC, on behalf of the respondent (which was accepted by the Court of Appeal), namely that, because Article 10 is engaged, **the Council's decision was irretrievably flawed because it failed to take the respondent's Article 10 rights into account when considering the Application, is incorrect. The right issue to be considered, and which is to be determined by the court, is whether, in all the circumstances of this case, the Council's decision to refuse the Application infringed the respondent's Article 10 rights.**

iii) In *Pinnock* Lord Phillips at paragraphs 18, 19, 45 and 49 said:

"The issues which arise on this appeal

18. ---------- **Mr Pinnock wished to challenge the factual basis on which the Council had decided to seek possession and the Panel had decided to uphold the decision. He also contended that the making of an order for possession would violate his article 8 Convention rights.**

19. Judge Holman concluded that his role in this case was, as he put it, at para 60, "limited to conducting a conventional judicial review" of the Council's decision to bring the possession proceedings, and that his remit did not extend to "resolv[ing] factual disputes". In particular, he could not entertain any argument based on article 8. Having accepted that he could review the Council's decision to bring and maintain the possession claim on normal judicial review principles, the Judge concluded that the Council's decision to prosecute the claim was rational. He accordingly made an outright order for possession.

Conclusion on the first issue

45. From these cases, it is clear that the following propositions are now well established in the jurisprudence of the EurCtHR:

(a) Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end ----------

(b) **A judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (i e, one which does not permit the court to make its own assessment of the facts in an appropriate case) is inadequate as it is not appropriate for resolving sensitive factual issues**: *Connors v UK* *(2005) 40 EHRR 9*, para 92; *McCann v UK* (2008) 47 EHRR 40, para 53; *Kay v UK* (App no 37341/06), [2010] ECHR 1322, paras 72-73.

(c) Where the measure includes proceedings involving more than one stage, it is the proceedings as a whole which must be considered in order to see if article 8 has been complied with: *Zehentner v Austria* (App no 20082/02), para 54.

(d) **If the court concludes that it would be disproportionate** to evict a person from his home notwithstanding the fact that he has no domestic right to remain there, **it would be unlawful to evict him so long as the conclusion obtains – for example, for a specified period, or until a specified event occurs,** or a particular condition is satisfied.

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49. ---------- **Therefore, if our law is to be compatible with article 8,** where a court is asked to make an order for possession of a person's home at the suit of a local authority, **the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact.**"

The ability of a court to suspend the operation of a s. 35(2) notice

109. The section is drafted in a way that means that once the notice is given the consequences (including the criminal offence if the child is not returned) follow. So a further act of the adoption agency in respect of the return is not required and there is a potential problem relating to the court, by interim injunction authorising, or effectively authorising, a criminal offence.

110. But the language of the section provides that the return must be within 7 days of the giving of the notice and therefore, in my view, the court can give effective relief by staying the effect of the notice and thus the obligation to return the child and thereby the termination of the parental responsibility given on the placement. Usually, a stay is directed to proceedings. But, in my view, counsel for the Secretary of State was right to submit, in reliance on the cases noted in paragraph 20.1.5 of Fordham Judicial Review Handbook 5th edition and paragraphs 8-01 to 8-07 Administrative Court: Practice and Procedure, that effective interim relief in respect of a s. 35(2) notice could be given by the grant of a stay. In my view, as submitted, that interim remedy is available to ensure that an effective remedy can be granted at trial on a challenge to a decision to give a s. 35(2) notice on the basis that it is unlawful and flawed and so should be quashed. Also, the researches on behalf of the Secretary of State show that the provisions now in s.35 of the 2002 Act are not new as an equivalent existed in s. 30 of the Adoption Act 1976 and it appears from the judgment of Scott Baker J in *R v Devon County Council* [1997] 3 FCR 411 at 415A that in that case, as a result of applications to the court, the relevant child remained with the prospective adopters pending an expedited hearing of their application for judicial review, which succeeded and the decision of the local authority to remove the child by giving the notice was quashed and the local authority had to reconsider it.

111. Naturally, the court may refuse to grant such interim relief, or refuse to do so on conditions (e.g. that the local authority will consider returning the child and/or on the basis that there will be contact pursuant to s. 26 of the 2002 Act or by agreement pending determination of the challenge to the s. 3592) notice).

Return of the child placed for adoption in circumstances of urgency and/or without raising the relevant risk with the prospective adopters or notifying them that a removal is sought. The application for an EPO that was made in this case and the possibility of applying for an interim care order when a placement order has been made

112. Section 35(2) provides for a return within 7 days and therefore is not suitable in circumstances where a more urgent return is warranted. The 7 day period (albeit backed by a criminal sanction) is also an indication that the notice will generally be given after the problems that found the decisions that the child should be returned have been raised and discussed with the prospective adopters. Such discussions which might give them alternatives, namely to seek interim relief to restrain the giving of the notice, or to alter its effect by issuing an adoption application.

113. In my view, where an urgent return or one without notice is warranted the correct course is to apply (as the Defendant did) for an EPO, or an interim care order. The care order that is suspended by s. 29 of the 2002 Act is based on historical harm and not the trigger to any such application and applications for an EPO and a further care order (which includes an interim care order) are not excluded by s. 29 of the 2002 Act.

114. In my view, if and when a child is removed under an EPO this will bring an end to the placement and thus, in my view, not only to the parental responsibility of the prospective adopters, but also to their ability to make an application for an adoption order because then the child will not have had his home with the prospective adopters at all times during the period of 10 weeks prior to such an application. So, normally the limited period for which an EPO can be granted will not necessitate an application for an interim care order. Further, I recognise that once a child is returned pursuant to an interim care order, or an EPO, those orders will become redundant and not be renewed because the placement order (that followed the original care order) will remain effective. But, in my view, this does not mean that they are not available and appropriate remedies to protect and promote the welfare of a child placed for adoption by removing him from that placement.

115. This available and in my view appropriate approach to urgent or without notice cases has two effects:

i) it means that the Family court is involved and so it is only when a s. 35(2) notice is given before an application for adoption is made that the Family court is not involved on a removal of the child from the prospective adopters, and

ii) it shows and confirms that the scheme of the 2002 Act and the 2005 Regulations and Guidance is one that envisages that the normal (if not inevitable) position will be that the reasons for a removal as a result of the giving of a s. 35(2) notice will be discussed with the prospective adopters before that notice is given (which as I have already mentioned may enable them to "head off" the effect of a s. 35(2) notice).

The adoption application that was made in this case.

116. The Claimants were able to apply for an adoption order during the 7 days allowed for the return of K by the s. 35(2) notice. But, this did not mean that they did not have to return K. At least arguably, they could have pursued their adoption application by appealing its dismissal by the County Court. But, and notwithstanding the power of the court to order contact, the continuation of that application even if K was having extended contact with the Claimants would have produced a difficult and unsatisfactory platform for its consideration. So, in my view such an appeal was not an alternative remedy that precluded this judicial review and the Claimants now have no real prospect of being given an extension of time to appeal the dismissal of that application.

Application of the above in this case

Comment on the scheme and effect of the 2002 Act

117. *Re S; Re W* was not concerned with adoption, and thus the complication that only the Family courts can make placement and adoption orders. But, in my view correctly, it was common ground (and indeed a starting point of the Claimants' arguments based on incompatibility and s. 3 HRA 1998) that, subject to the addition of words applying s. 3 HRA 1998, the structure and effect of the 2002 Act (like the Children Act 1989):

i) divides and identifies the respective roles and jurisdiction of local authorities and the Family courts, and

ii) provides that, between the making of a placement order and an application for adoption, the Family courts are not empowered to intervene under the 2002 Act or the Children Act 1989 (except where such jurisdiction is expressly given) in the way in which local authorities and adoption agencies exercise their parental responsibilities, and thus here, in respect of the giving of the s. 35(2) notice and the decision not to return K to the Claimants.

118. So, absent the addition of words in reliance on s. 3 HRA 1998, the Claimants' challenge to the decisions of the Defendant that are the subject matter of these proceedings has to be based on either or both the principles of administrative (public) law, or Convention rights and thus ss. 6, 7 and 8 of the HRA 1998.

119. So, important aspects and effects of the statutory scheme, where a care order and a placement order have been made (different considerations can apply as to the choice of placement if it is with the consent of the parents: see s. 19(1) and (2) of the 2002 Act) are:

i) as a result of the making by the court of the care order and the placement order (which suspends the former) Parliament has made the local authority the decision maker on, and responsible for, issues relating to (a) the placement of a child for adoption (as to which the choice of placement is one for the local authority to make), and (b) the review of such a placement, but

ii) after such placement and review, it is the court and not the local authority that is the public authority that is responsible for making an adoption order, and/or revoking a placement order,

iii) placement gives the prospective adopters parental responsibility,

iv) in my view, this parental responsibility ends with the return of the child to the adoption agency,

v) placement does not give a right to adopt and there is no Convention right to adopt (see *Frette vFrance* (2004) 38 EHRR 21, at paragraph 32),

vi) within the process, provisions are made for bringing an end to a placement for adoption by (a) the prospective adopters, (b) the local authority and (c) the court,

vii) the prospective adopters make the application for adoption, and

viii) once an application for an adoption order is made the prospective adopters have the added protection that the child can only be removed from their care by order of the court, whereas before that the 2002 Act provides that the child is to be returned by them if the local authority serve a s. 35(2) notice.

120. In short, orders of the court start and end the process of adoption but, during the process, Parliament has made the local authority (adoption agency) the statutory decision maker on placement and its termination up to the time that an application for an adoption order is made.

121. I do not accept that that is an arbitrary or strange divide. Rather it seems to me that it fits naturally with the process envisaged by the 2002 Act after a placement order is made. This is because:

i) it is clear that the decision on placement pursuant to a placement order is given to the adoption agency,

ii) placing of a child for adoption with prospective adopters does not guarantee that an adoption order will subsequently be made but starts the process of review and assessment whilst the child has his home with the prospective adopters, which is necessary to inform the prospective adopters, the adoption agency and the court as and when an application for an adoption order is made,

iii) the placement carries with it the need to give the prospective adopters parental responsibility so that on a day to day basis they can properly care for the child and be assessed and consider their own position, pending (and after) an application for an adoption order is made, and

iv) the making of an application for adoption is a natural point to make a change concerning the removal of a child placed for adoption because it is the trigger for the re-involvement of the court in the process of adoption.

The application of Article 8 and thus the civil rights it gives

122. It was common ground that Article 8 was engaged. I agree and I also agree that:

i) the Claimants and K enjoyed a family life together, and

ii) it is not necessary to consider whether this arose on placement because of the grant of parental responsibility and the commitment of the prospective adopters, or only after the enjoyment for some time of their life together after placement.

As to (ii) I pause to record that, in contrast to the position when an adoption order is made, the parental responsibility given on placement is shared with, and can be restricted by, the

adoption agency. But, I accept and acknowledge that it should be remembered that (a) the giving of such parental responsibility imposes duties and responsibilities on the prospective adopters and gives them a status and relationship with the child, and (b) a placement with a view to adoption, and thus the creation of a new family for the child, is based on a significant commitment by the prospective adopters.

123. Further, at this stage, in my view it is also not necessary for me to determine whether Article 8, and thus the civil rights of the Claimants, were engaged because either:

i) the private life of the Claimants was engaged, or

ii) by analogy to *R (Wright) v Sec of State for Health* [2009] UKHL 3, [2009] 2 WLR 267 they had a right to establish relationships, or because the removal of K creates a stigma, or a significant hurdle to them being to adopt another child, or

iii) s. 35(2) rendered them liable to a criminal prosecution if they did not return K or the giving of the notice was based on an allegation of battery.

Other civil rights

124. In *Re S: Re W* Lord Nicholls proceeds on the basis that parents and children have civil rights in addition to their Article 8 rights. Indeed, in paragraph 72 of his speech he moves on to consider other civil rights based on the relationship between birth parents and their child and paragraphs 75 to 83 thereof are directed to a potential breach of Article 6 in connection with the determination of such rights (rather than Article 8 rights).

125. The importance of the existence of such additional civil rights is important in the consideration of Article 6, as is the point that the access to and powers of a court or tribunal that is required to comply with Article 6 depends on the nature and quality of the relevant decision and decision making process (see for example *Wright* at paragraph 23). So, I shall return to these points later.

Incompatibility and s 3 HRA by reference to Article 8

126. In my judgment, the approach and decision in *Re S: Re W* has the consequence that there is no incompatibility with Article 8.

127. The Defendant local authority in exercising its powers and performing its duties under the 2002 Act is bound, as a public authority, to act in accordance with both the procedural and substantive elements of Article 8. This is not precluded by 2002 Act. Indeed, in my view, compliance with Article 8 is promoted by the duties imposed on local authorities (as such and as adoption agencies) by the 2002 Act and both the 2005 Regulations and Guidance.

128. As Lord Nicholls explains and decides, the possibility or fact that a public authority may act in breach of Article 8 does not found the conclusion that the relevant legislation is incompatible (see in particular the emphasised parts of paragraphs 55 to 61 of the speech of Lord Nicholls cited above).

Incompatibility and s. 3 HRA by reference to Article 6

129. In line with the arguments in *Re S: Re W* the central argument of the Claimants was directed to an alleged incompatibility with Article 6. The argument was based on the points that the 2002 Act does not include a provision to the effect that:

i) the obligation to return a child placed for adoption during the period between placement and the making of an application for an adoption only arises if the court so orders, or alternatively

ii) the prospective adopters can challenge or appeal the decision of the adoption agency by an application to the court and thereby seek an order from the court (a) that they do not have to return the child, and (b) that has the effect that they are not committing an offence by not returning the child.

The essential point in the argument is that the Claimants assert that the absence of a provision in the 2002 Act enabling the Family court (i.e. the court referred to therein) to control and be the effective decision maker on such a return is incompatible with Article 6 because the decision affects their civil rights and is not being made by an independent and impartial tribunal.

130. So:

i) a key stating point for the argument were paragraphs 79 and 83 of the speech of Lord Nicholls, and

ii) a central issue was the extent and nature of the jurisdiction of, and thus the approach that can be taken by, the court in the proceedings available to the Claimants to challenge the s. 35(2) notice, and to prevent it having the effect that unless the child was returned in 7 days they would be committing a criminal offence.

131. The focus of the argument before me was that the civil rights that were engaged and fell for determination were the Article 8 rights of the Claimants and K. In my view, the development in the cases since *Re S; Re W* referred to above means that:

i) the court in these proceedings (and other proceedings available to the Claimants absent the addition of words to s. 35 of the 2002 Act) is the decision maker on whether there has been a breach of a Convention right, and thus here of Article 8, and

ii) in determining that issue the court can decide disputes of fact, if it is appropriate for it to do so.

So, in the context of the alleged breach of Article 8, the Claimants' argument that they cannot obtain, on a merits basis from an independent and impartial tribunal, a decision on whether their Article 8 rights (and those of K) have been breached, is wrong.

132. However, the development in the cases I have referred to is directed to a breach of Convention rights (and in particular to decisions on proportionality) and not to breaches of other civil rights.

133. So questions arise whether, as the Claimants asserted, they have other civil rights and, if so, whether, absent a reading in of words, the 2002 Act is incompatible with Article 6 in respect of the determination of those other civil rights.

134. It was not argued that the Claimants (and K) do not have relevant civil rights in addition to their Article 8 rights and I proceed on the basis that:

i) the challenged decisions of the Defendant affect, and indeed if effective put an end to, civil rights of the Claimants and K arising from the placement and, in particular, to the parental responsibility it gave to the Claimants and the relationship between them and the child that was so created, and

ii) if effective, the challenged decisions had an impact on the ability of the Claimants to pursue an application to adopt K and may well prejudice, or cause problems in respect of, their chances of adopting another child.

135. But, in my view, whatever their extent and description, the other civil rights of prospective adopters (and children placed for adoption) that are engaged in the context of s. 35(2) of the 2002 Act, are so entwined with the Article 8 rights that are engaged on a placement for adoption that any facts that need to be determined in respect of a claim based on them would also be relevant to the determination of a claim based on Article 8, with the results that:

i) on all determinations of the Claimants' relevant civil rights the court could and would, if it was appropriate to do so, determine the relevant disputed facts, and

ii) the Defendant would be bound by that determination and so, if necessary, it would have to reconsider its decision in light of those findings.

In this context, the duty of the court itself not to act in breach of the Claimants' Convention rights is relevant because, in my view, it means that the Claimants could not successfully argue that the court should ignore Article 8 and deal only with the alleged breaches of their other civil rights caused by the decisions (albeit that it seems inevitable that if the Claimants are right on that there would also be a breach of their Article 8 rights and those of K) as a basis for asserting that the court cannot determine relevant issues of fact, and therefore there is a breach of Article 6.

136. It is also very difficult to see how either:

i) a decision on Article 8 (given the weight to be given to the welfare of the child in its application) could be different to one in respect of the other civil rights that are engaged, whether or not s. 1 of the 2002 Act applied to its determination, or

ii) it would be appropriate to decide facts to determine the Article 8 claim, but the claim based on other civil rights, or vice versa (e.g. here the disputes as to whether the child had been the victim of corporal punishment or there had been domestic violence)

137. Alternatively, in my judgment the nature of the other civil rights that are engaged is such that a *Daly* review would satisfy Article 6. In reaching that conclusion I acknowledge:

i) the importance of (a) the parental responsibility given to prospective adopters, (b) their relationship with and commitment to the child (and vice versa), and thus (c) their significant interest in being able to seek an adoption order, and

ii) that a court order is required from the Family court for both an urgent (and any without notice) removal of a child from prospective adopters and any such removal after an application for an adoption order has been made.

But, in my view, those factors arise in the context of a situation in which:

a) there is no right to adopt and so which is tenuous,

b) there is, as is recognised by the 2005 Regulations and Guidance, a need for review so as to inform (i) the support or non-support by the adoption agency for an adoption, and (ii) the court on that application,

c) there may well be a need for quick decisions to be made by the adoption agency on the continued placement of the child,

d) the timeframe for the child will often by a short one, and

e) the position, and parental responsibility, of prospective adopters is significantly different to those of birth parents. Indeed, and in particular, the issue relating to

prospective adopters is whether they should have full parental responsibility and thus the child should have a new family,

with the consequence that, in my view, whilst a child is placed for adoption, and in particular before an application for adoption is made, the situation of prospective adopters (and the placed child) is equivalent to those in which Lord Nicholls indicated that a *Daly* review would satisfy Article 6.

138. Finally, as I have already explained in my view the reading in of words into s. 35 of the 2002 Act is not necessary to enable the court:

i) to grant an interim stay of the operation of, and thus the consequences of, a s. 35(2) notice given before the prospective adopters make an application for adoption, and thereby

ii) ensuring that at trial the court can grant an effective remedy.

Conclusion

139. It is not necessary, or appropriate, to read into s. 35 of the 2002 Act the words suggested by the Claimants (or other words) to render it compatible with Articles 6 and 8 (or indeed Article 13, which is not a Convention right).

The alleged procedural breaches of Article 8 and the common law principles of fairness

140. Hindsight is of course a wonderful thing. But, in my view, by not giving the Claimants a full and informed opportunity to address the reasons why the Defendant decided to give the s. 35(2) notice and, in particular, the trigger to its service namely, the report of Ms K's interview with K and her views, the Defendant failed to act fairly and acted in breach of the procedural requirements of Article 8.

141. Normally, a decision to give a s. 35(2) notice will follow consultation and discussion and, therefore it will incorporate a decision not to return the child to the prospective adopters with a view to adoption, with the result that any attempt to make a distinction between the two decisions would be more artificial than real. But, in the circumstances of this case, I have concluded that the course of action adopted by the Defendant, and the reasons for it, had the consequence that the procedural requirements and the common law duty of fairness required it to adopt a two stage process and to make a separate decision following the return of K as to whether or not he would be returned to the Claimants. This flows from:

i) the reason for giving the notice without including within it, or prior discussion with the Claimants of, the trigger reasons for the notice (namely the contents of the report from Ms K and the view that to raise it with the Claimants whilst K remained in their care would put him at risk),

ii) the fact that that reason (good or bad) ceased to exist on return,

iii) the return did not mean that the Defendant could or should not replace K with the Claimants, and had the result that the advantages and disadvantages of that could be considered and discussed free from the risk of harm that had prompted the course of action taken by the Defendant, and

iv) the basic point that fairness required that the Claimants be given a full and fair opportunity to address all the reasons for the termination of K's placement with them.

142. I agree with the noted views of the magistrates who heard the without notice application for the EPO that the evidence provided, which was essentially the report of Ms K's

conversation with K and her views that K would be at risk if the matter was raised with the Claimants whilst he remained in their care, was not sufficient, as it stood, to warrant the making of an EPO and thus a without notice removal of K.

143. I also agree with their noted view that, before any such need could be shown to exist, the detail and reliability of Ms K's report needed to be checked. In that exercise, the weight that could be put on what K was reported to have said and its impact would have to be assessed in the light of the matters referred to in paragraph 37 hereof (that were then known). But, I add, that it can have come as no surprise to the Defendant (a) that the medical examination of K showed no signs for concern or of chastisement and confirmed that there were no problems with K's physical development, or (b) that the police would conclude that an interview of K would serve no useful purpose.

144. Pausing there, in my view procedural fairness required a review by the Defendant of the risk it had relied on to obtain an EPO but had failed to establish to the satisfaction of the magistrates before it took the course it did.

145. Further, even if such a review had led to the view that a s. 35(2) notice should be served in the manner that it was, to my mind that review would have highlighted and confirmed that fairness required that the Defendant adopted a two stage process that gave the Claimants a full and informed opportunity, after K was returned pursuant to the s. 35(2) notice, to address the reasons for giving the notice before any decision was made that K would not be returned to the Claimants and their match with him should be revoked. Not least, this is because in line with the observations of the magistrates the review would have highlighted that:

i) the Claimants may have things to say about Ms K's report and that these, and the move to Ytown, should be considered before any decision not to return K to the Claimants was made, and so

ii) procedural fairness required a two stage process.

146. If such a two stage process had been adopted, it may have resulted in an adjournment rather than a dismissal of the adoption application, but as indicated earlier, in my view that is now water under the bridge.

147. In my view, as soon as the issue whether, at an appropriate time in the chosen process, the Claimants should be given an opportunity to address all the Defendant's reasons for ending the placement is considered, it is clear that the answer is that:

i) fairness requires that they should be, and in particular that

ii) fairness here, required not only that the Claimants should be given a full and fair opportunity to address with the Defendant,

a) what Ms K had reported, and

b) the impact of the move from Xtown

but that also there should be a careful assessment or re-assessment by the Defendant, against the background of the case, of those matters and the Claimants' comments on them.

148. It seems from the evidence before me that not only do the Claimants dispute the truth and reliability of what Ms K reports K to have told her, but also that she has accurately reported what he said. As to this, DL asserts that he heard the conversation, but does not say what he heard, and on Ms K's account he was not at the home when it took place. As

mentioned during the hearing, this divergence merits further investigation as to the reliability of the competing accounts.

Failure to have regard to relevant factors

149. Further, on the evidence I have concluded that the Defendant failed to take into account the impact of the move from Xtown to Ytown, albeit that the move was caused by DL's bail conditions, rather than because of the desirability of removing K from the hostile environment and problems in Xtown.

Pausing there

150. In my judgment, on those two grounds the Claimants' challenge succeeds and the normal and natural relief granted by the court would lead to orders that required the Defendant to reconsider whether K should be placed with the Claimants with a view to his adoption by them.

Substantive breach of the Claimants' civil rights and remedy

151. A decision either way on substantive breach could have an impact on remedy. However, in my view, a decision as to whether there was such a breach in 2010 cannot be determinative as to what should happen now, and thus on whether the court should refuse to grant any remedy or should make a mandatory order (which are possible results flowing from divergent findings as to whether there was a substantive breach). This is because matters have moved on since K was returned to the Defendant and his foster carer and, in my view, this is relevant (a) to what, if any, remedy apart from one leading to reconsideration by the Defendant should be granted now, and (b) to any reconsideration by the Defendant.

152. I have little or no updating information. For example, I do not have information on which any properly informed view on the impact on K of a return to the Claimants could be based (although I comment that, in my view, the instructions on which the third paragraph of the history set out in a report dated 30th March 2011 from a child psychotherapist I was shown needs revisiting), or on the prospects of another adoptive placement being found for K.

153. So, I propose to grant the relief set out in paragraph 11 and, as mentioned there, not to consider whether there was a breach of the Claimants' substantive rights.

154. I acknowledge that the issue as to whether the court considers that there was such a breach could be relevant to the new decision, or to found a claim in damages in respect of the old decisions. But the latter is not urgent and my reasoning and conclusion on substantive breach could influence the new decision, or make it difficult for me to deal with a challenge to it.

155. I however comment that in both contexts, the court would be at liberty to adopt its own reasoning by reference, for example, to the common ground set out earlier in this judgment, and the risks of harm it created for K, leaving aside what he is reported to have said to Ms K. And, in my view, such reasoning would have to have regard to the impact of the move to Ytown on the advantages and disadvantages of the possible choices.

156. Also, I comment that in reaching its new decision the Defendant will have to address:

i) procedural fairness (and this should also be addressed in the directions given when this judgment is handed down for the July hearing that has been provisionally listed), and

ii) the issues as to what matters it puts on one side, what matters it treats as disputed allegations and what matters it treats as facts.

As to (ii), in my view, the points made in paragraph 137 hereof found a strong argument that, in contrast to the position relating to the establishment of threshold and risk before a public authority can intervene in the lives of parents and their children, it will often not be appropriate to determine issues of disputed fact relating to the day to day care given by prospective adopters.

157. This argument may need to be considered on a challenge to a further decision relating to the placement of K with the Claimants. In respect of any such challenge, on a *Daly* review and/or a full merits review the issue will arise as to whether the decision maker (whether the Defendant or the court) should proceed on the basis of allegations (recognising that they are disputed), or whether it has to reach a conclusion, and thus in the case of the court a finding, on factual disputes.