Re F (A Child) [2008] EWCA Civ 439

Case No: B4/2008/0322

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BRIGHTON COUNTY COURT
HER HONOUR JUDGE COATES
HB07Z00163

Royal Courts of Justice
Strand, London, WC2A 2LL

01/05/2008

B e f o r e :

LORD JUSTICE THORPE
LORD JUSTICE WALL
and
LORD JUSTICE WILSON

Between:

IN THE MATTER OF F (A CHILD)

Mr S Cobb QC & Miss M Hancock (instructed by Messrs Lawson Lewis & Co) for the Father.
Miss J Briggs (instructed by East Sussex CC Legal Services) for the Local Authority
Miss G Buckley (instructed by Hillman Smart & Spicer) for the Mother.
Hearing dates: 19th March 2008

HTML VERSION OF JUDGMENT

Lord Justice Thorpe:

1. This appeal raises a short point as to the construction of Section 24 of the Adoption and Children Act 2002. Before citing the section and defining the alternative constructions contended for I will establish the relevant background.

2. J-L F was born on the 11th June 2006. Her parents had had a casual relationship and initially MC was not aware that he was her father.

3. The East Sussex County Council issued care proceedings on the 22nd November 2006. MC (hereinafter the appellant) was not served with these proceedings and was initially unaware of them. However the following spring the local authority asked for his cooperation in DNA tests. In May 2007 the results showed the appellant to be J-L's father.

4. The local authority did not join him in the care proceedings and he did not himself seek any involvement in those proceedings or in J-L's life. At the time J-L resided with her mother in a mother and baby placement. In June her mother left the placement but J-L remained, with daily contact visits. In July the local authority adoption panel recommended adoption.

5. On the 30th July the appellant was served with the proceedings. In that month he was hospitalised following a heart attack and took no part when, on the 17th August, the county council obtained care and placement orders and J-L moved to foster parents. Nothing material occurred in the remaining months of the year 2007.

6. However January 2008 was an eventful month. The appellant learned from his mother that adoption plans for J-L were well advanced. (Indeed, unknown to him, J-L was matched for placement at an adoption meeting on the 9th January). He was galvanised and on the 10th January consulted solicitors who on the same day sought, and were immediately granted, public funding. Also on that day the appellant's solicitor informed the local authority of her instructions by telephone and sought information as to J-L's progress towards adoption. She was informed that J-L had not been placed but had been to a matching panel on the previous day. On the following day the application for leave to apply to revoke the placement order was filed at the Brighton County Court. Due to regrettable staff shortages in the county court the application was not fully processed until the 21st January, when notices of a hearing on 30th January were sent to the parties. The application was supported by a statement from the appellant explaining the relief that he sought.

7. Despite the appellant's emerging challenge, on 14th January the council decision maker ratified the panel's decision of 9th January and on the 15th January the potential adopters met J-L for the first time.

8. No doubt because the telephone request for information had gone unanswered, the appellant's solicitor faxed to the council a highly significant letter in the mid-afternoon of 17th January. I reproduce the letter in full:-

> "**BY URGENT FAX: 01273 481900**
>
> **URGENT ATTENTION OF**
>
> Dear Sirs
>
> **J-L F D.O.B. 11.06.06**
>
> We are instructed by M C, J-L's father.
>
> We understand a Placement Order was made in the Brighton County Court on 17 August 2007. We have been instructed by Mr C to apply to the Court for leave to revoke the Placement Order on the basis that his circumstances have changed since the Order was made.

> We have checked with the Court who inform us that the application has now been issued but, due to the fact that the Adoption clerk is away, may not be served until Monday. We have requested permission to abridge time for service of the Application.
>
> In the meantime, we refer you to the Adoption and Children Act 2002 s24(5) and would you please confirm by return of fax that J-L has not yet been placed since we understand she went to Matching Panel early last week.
>
> Yours faithfully"

9. In due course I will consider what was the council's dutiful reaction to these enquiries.

10. On the 23rd January the council, according to Miss Briggs, who appears for them on the appeal and who represented the council on 30th January, convened an informal meeting to agree their strategy as the principal respondent to the application listed for hearing on the 30th. We have no minutes to show who attended, what was considered, and what was decided. Miss Briggs says that since the council is respondent to an appeal and not a judicial review application, it was not incumbent on the council to enlighten us. I do not find that position satisfactory. The judge below was strongly critical of the council. If the council elects not to explain and justify, it has both no prospect of shifting the judge's criticisms and also the risk that we will be more trenchant in condemnation. All we were told by Miss Briggs was that both the legal department and the adoption department attended, that consideration was given to Section 24 but whether consideration was also given to the guidance given by my lord, Wilson LJ, in *Re: M. & L., Warwickshire v M.* [2007] EWCA Civ 1084 she could not say. Her instructing solicitor had not been responsible for legal advice since that responsibility had been elevated to a higher level in the legal department.

11. What was in fact decided at that meeting can readily be inferred from the council's subsequent conduct. No evidence was filed in response to the appellant's statement. J-L was placed with the prospective adopters on 29th January and on 30th January Miss Briggs simply submitted on the council's instructions that the terms of Section 24 (2) (b) removed the court's jurisdiction to grant leave. The judge reluctantly upheld that unattractive submission but granted permission to appeal. The principal issue for us is whether the judge was right or wrong to uphold the council's submission on the meaning and effect of Section 24.

12. That this appellant has suffered a manifest injustice can hardly be disputed. That others may suffer similarly in future is an evident risk. Can justice be done to the appellant by this court and can others be safeguarded in the future by a liberal construction of Section 24? That is the first question that I will address in my conclusions. If the answer is negative then Mr Cobb QC for the appellant invites us to consider safeguards to reduce the risk of future injustice.

13. I have so far recorded only what the council did. I will now consider what it should have done and the alternative options open to it in response to the appellant's attempt to offer belatedly an upbringing for J-L by a biological parent.

14. The first duty on the council was to respond promptly and openly to the entirely legitimate requests for information. The failure to respond to the final paragraph of the letter of the 17th January was in my judgment a particularly serious breach of the council's duty. With the advantage of hindsight it can be said that the final paragraph should have sought an undertaking from the council not to place J-L prior to the determination of the appellant's application for permission. A refusal, or even silence, would have triggered an application to the court for an injunction. However there is plainly enough spelt out in that final paragraph to demonstrate that the writer was

seeking reassurance six days after the filing of the application and thirteen days before its return. The council's failure to answer that letter and the subsequent placement on the eve of the hearing give rise to the clearest inference that the council was out to gain its ends by means more foul than fair. There are many who assert that councils have a secret agenda to establish a high score of children that they have placed for adoption. When such suspicions are rife a history such as this only serves to fuel public distrust in the good faith of public authority.

15. No doubt the council would say that throughout they were motivated to achieve the best for J-L. Certainly the court had sanctioned adoption for J-L some five months earlier. However that was at a time when there was no member of the birth family offering J-L a future. A balanced promotion of welfare required at the least an investigation of what the appellant had to offer and whether adoption remained the better choice. To deny the appellant was also to deny the child the chance.

16. Not only did the council owe a duty to the appellant and to the child but also, in my judgment, to the prospective adopters. Once the appellant put himself forward and sought the revocation of the placement order, to press forward on the road to placement without warning the prospective adopters that their legitimate expectations might never be realised was an abuse of their trust.

17. No doubt the council would say that such information which they possessed as to the appellant's circumstances and history compelled a value judgment that what he had to offer could never match what the prospective adopters offered. The process that the appellant had commenced well accommodated such a judgement. The council had only to file their statements, to seek an expedited hearing of the application for leave and, if leave were granted, themselves to apply for leave to place pending the determination of the application for revocation.

18. In conclusion in my judgment the council's plain duty, particularly having ignored the legitimate requests for information, was to defer J-L's placement, if only for thirty-six hours, to enable the judge to exercise her jurisdiction on the issues raised by the appellant's application.

19. I come now to the essential question in the appeal. Section 24 of the Children and Adoption Act 2002 provides:-

> "(1) The court may revoke a placement order on the application of any person.
>
> (2) But an application may not be made by a person other than the child or the local authority authorised by the order to place the child for adoption unless—
>
> (a) the court has given leave to apply, and
>
> (b) the child is not placed for adoption by the authority.
>
> (3) The court cannot give leave under (2)(a) unless satisfied that there has been a change in circumstances since the order was made.
>
> (4) If the court determines, on an application for an adoption order, not to make the order, it may revoke any placement order in respect of the child.
>
> (5) Where—

> (a) an application for the revocation of a placement order has been made and has not been disposed of, and
>
> (b) the child is not placed for adoption by the authority,
>
> the child may not without the court's leave be placed for adoption under the order."

20. Miss Briggs contends, and Judge Coates found, that the words of the Section are plain on their face. In the interaction of sub-sections 2 and 5 Parliament plainly intended that protection should be given to the applicant for revocation and not for the applicant for leave to apply to revoke.

21. Mr Cobb's contrary argument is skilfully presented in his written skeleton of the 28th February. In paragraph 18 he analyses the central questions in the appeal as: (a) whether the words of Section 24(5) can be interpreted to include the application for leave to make the application: and (b) whether those words should be so interpreted in order to give effect to the Convention Rights of the applicant both to a fair hearing and to family life.

22. In paragraph 19 Mr Cobb acknowledges that the judgment of my lord, Wilson LJ, in *Re: M. & L., Warwickshire v M.* is against him. My lord at paragraph 14 said:-

> "Section 24(5) of the Act provides that, where an application for the revocation of a placement order has been made and has not been disposed of, the child may not be placed for adoption without the court's leave. Notwithstanding submissions on behalf of the mother to the contrary, the judge held that there was nothing, whether in that or elsewhere, which precluded a placement without leave while an application for leave to apply for revocation was pending. I agree with the judge; and in this court the mother does not argue to the contrary."

23. Mr Cobb submits that these words are not binding on us as my lord's observations were obiter and the point was not argued in this court. So in support of his paragraph 18(a) submission Mr Cobb submits that the legislative objective was to ensure that once the court is seised of a proper process there should be no opportunity for a local authority to disempower the court, preventing it from exercising its discretion to determine whether or not a profounder investigation of the case for revocation is required. The liberal construction would not impede the resolution of a child's future since the local authority would be free to seek an expedited determination of an unmeritorious application and the judge could dismiss such an application at the first appointment on the written evidence filed.

24. Although this submission has some practical attraction I cannot accept it given the clarity and precision of the statutory language. Had Parliament intended the objective suggested by Mr Cobb then Section 24(5) would read:

> "where- (a) an application for the revocation of a placement order or an application for leave to apply has been made and has not been disposed of,"

or words to that effect.

25. In support of his submission under paragraph 18(b) of his skeleton Mr Cobb relies upon Section 3 of the Human Rights Act 1998 which requires the courts to read and

give effect to primary legislation in a manner which is compatible with Convention Rights, so far as it is possible to do so. He submits that the court's obligation under Section 3 requires, or at least permits, reading in the words that would have the effect of protecting the applicant parent from the date of filing of the application for leave rather from the date of the filing of the revocation application following the grant of leave.

26. To do otherwise would be to deprive the appellant of his Article 6 right to a fair trial of his application for leave. The right to a fair trial is not confined to the purely judicial part of the proceedings and the right is absolute.

27. Mr Cobb further submits that the extended construction of Section 24(5) is also necessary to preserve the appellant's right to private and family life under Article 8. At a minimum a father's case to provide long term care for his child must be fully investigated and weighed. A construction that denies him, and his daughter, any reconsideration of the plan for placement balanced against his late - found commitment, breaches Article 8 rights and Section 3 requires the construction of Section 24(5) to prevent that breach.

28. With some hesitation, I would uphold Mr Cobb's submission under paragraph 18(b) of his skeleton and allow the appeal. The consequential order is not without difficulty. Clearly I would set aside the order of Judge Coates and direct that the father's application for leave be remitted to her for her decision. What to do with the placement is more difficult. Sensibly Mr Cobb does not suggest that J-L should be returned to the foster carers with whom she was content between 17th August 2007 and 29th January 2008. Rather he seeks a declaration that the placement of 29th January 2008 was a placement other than a placement for adoption. That would leave the legal consequence of the placement to await Judge Coates' determination of the appellant's application for leave.

29. The position that I have taken makes it unnecessary for me to consider safeguards in the detail that my lords propose. I cannot believe much in the efficacy of safeguards given that I do not see what sanction there could be for breach. Furthermore this appeal seems to illustrate what little regard is paid to guidance given by this court. In the same paragraph 14 of my lord, Wilson LJ's, judgment in *Re: M. & L., Warwickshire v M.* he went on to say:-

> "The judge went on to observe, however, that, were an application for leave to have been issued but not to have been disposed of, it would normally be good practice for a local authority either to agree not to place the child until its disposal or at least to agree to give notice, say of 14 days, to the applicant of any proposed placement. In this regard I also agree with him. Given such notice, the applicant might perhaps be able either to take steps to challenge the lawfulness of the decision to place at that juncture or, probably more easily, to seek an expedited hearing of the application for leave, from which might flow, in the fine, developing tradition of collaboration between local authorities and courts, a short further agreed moratorium on placement until the hearing."

30. Had East Sussex County Council followed that guidance the costs of the hearing on the 30th January and the costs of this appeal would have been avoided, not to mention the possible costs of further proceedings in the Administrative Court.

Lord Justice Wall:

Introduction

31. In my judgment, this appeal has to be dismissed. I say at once, however, that I reach this conclusion with regret, not because I think the judge was anything but right, nor because I see any ECHR or other defect in the Adoption and Children Act 2002 (the 2002 Act) but because of the conduct of the Adoption Agency in the case, aka the East Sussex County Council.

32. I have, of course, had the opportunity to read in draft the judgment of Thorpe LJ, which concludes that it is open to this court, in reliance on section 3 of the Human Rights Act 1998 (HRA 1998), to read into section 24(5) of the 2002 Act words which, as he puts it in paragraph 25 of his judgment, "would have the effect of protecting the applicant parent from the date of the filing of the application for leave rather (than) from the date of the filing of the revocation application following the grant of leave".

33. In my judgment, such an exercise is impermissible both for the reasons which I will endeavour to set out later, and for the reasons Thorpe LJ himself gives in paragraph 24 of his judgment. The words of the section are clear and unambiguous. They are capable of only one meaning. The words "an application for the revocation of a placement order" in section 24(5) (a) of the 2002 Act means just that: they do not mean, and in my judgment, cannot be read as also meaning; "an application for leave to apply for the revocation of a placement order".

34. Furthermore, as this judgment will attempt to demonstrate, section 24 of the 2002 Act, properly applied and implemented, is HRA 1998 and ECHR compliant. What has happened in this case is that there has been a travesty of good practice which the 2002 Act happens to permit. In my judgment, the answer to this case is not to allow the appeal, but for this court to ensure, in so far as it can, that the conduct of this local authority is not repeated elsewhere.

35. I share Thorpe LJ's scepticism about the scant regard afforded to the judgments of this court. It is for this reason that, with the President's agreement, I propose the distribution of these judgments set out in paragraph 45 below.

36. Furthermore, as I hope to demonstrate later, any local authority / adoption agency seeking to repeat this authority's behaviour will almost certainly find itself the subject of an application for judicial review. That is not something, I hope, that most local authorities / adoption agencies would relish, particularly if any placement of a child was found by the Administrative Court to be unlawful.

The conduct of the local authority / adoption agency in this case

37. In argument, a number of adjectives were used to describe the conduct of the local authority / adoption agency (henceforth "the agency") in this case. Over the period during which this judgment has been reserved, I have re-read the papers and reflected on the agency's conduct. In the event, I have come to the conclusion that the only word I can use to describe it is "disgraceful". That is not a word I use lightly.

38. During the course of argument, we gave counsel for the agency every opportunity to defend and justify its conduct. In my judgment, she not only failed to do so: worse, she did not appear to think the exercise necessary. On her argument, the agency was acting within the letter of the 2002 Act, and in the best interests of the child. Although she acknowledged that aspects of the agency's conduct were likely to be criticised, her attitude came across, to me at least, as – in effect – so what? If the 2002 Act permitted the agency to do what it did, why was the manner in which it did it relevant?

39. In my judgment, the conduct of the agency in this case demonstrates a profound if not total misunderstanding of its functions under the 2002 Act. Moreover – and this I find particularly dispiriting - it provides useful ammunition for those who criticise the Family Justice System for administering "secret" justice, and who attack social

workers as a group for their arrogance and the manner in which they abuse their functions by both removing children from their parents unlawfully, and by stifling legitimate parental responses.

40. In my judgment, the attacks made on the Family Justice System are, for the most part, tendentious and ignorant. I am equally confident that most social workers are conscientious, over-worked professionals who lack the resources to do their jobs as they would like. However, the social work profession must be aware of, and address, the criticisms which are made of it. In particular, it seems to me, the social work profession, as a profession, should be made aware of and shun the conduct demonstrated by the East Sussex County Council in this case.

41. Parliament has given the social work profession wide powers. They must not abuse them. Social workers must also remember that, charged as they are under the Children Act 1989 and under the 2002 Act with promoting the best interests of children, the ultimate arbiter of what is in the best interests of the child is the court. This is not judicial empire-building: it is the division of responsibility which Parliament has laid down. It must be respected.

42. In my judgment, counsel for the agency demonstrated another profound misunderstanding of the position when, during the course of argument, she submitted that the conduct of the agency in the instant case could not be compared with the criticisms levelled at local authorities for removing children from their families in the context of care proceedings. I profoundly disagree with her.

43. There is no more emotive subject for most parents than the adoption of their children by strangers: it is even more emotive than their child being taken into care. It may be obvious to social workers – and indeed to the court – that adoption by strangers is the right option for a particular child. It may well not be so obvious to that child's parents. However, in my experience, parents, even the most abusive, have a sense of justice; and provided the process has been fair, they will recognise and understand that they have been heard, that they have fought the case and that they have not succeeded. They will, on the whole, accept that the judge, who must, of course, give reasons for his or her decision, has taken a different view from that which they have advanced, and that they have – in short – lost.

44. In my judgment, therefore, a fair process is essential. Justice must not only be done but be seen to be done. This is even more important in cases involving children, which are heard in private. In the instant case, the agency, I am satisfied, quite deliberately set out to prevent the father from being heard. No other inference can be drawn from its conduct. The fact that its workers may have genuinely believed that in so doing they were acting in the best interests of the child concerned is, in my judgment, at best irrelevant and at worst dangerous. The conduct of the agency in the instant case was an abuse of power, and wholly unacceptable.

45. I am entirely satisfied that, although - for the reasons set out below - the father in the instant case has no remedy in this court, the practice followed by the agency in this case is unacceptable and must not be repeated. I will explain what I think the practice ought to be, and what ought to have happened in this case, later in this judgment. At this point, what I propose is that copies of our judgments in this case should be sent by Email not only to the President of the Family Division and to all the Designated Family Judges for onward transmission to the members of the judiciary who hear adoption proceedings, but also to the British Agency for Adoption and Fostering (BAAF) and to every adoption agency in England and Wales. This is a matter which I have discussed with the President (who has seen this judgment in draft) and with which he is in agreement.

46. It was, to my mind, deeply ironic that on the day this case was argued in this court – a hearing, like every other, open to the public and the press – the newspapers were

filled with details of the judgment of Bennett J in the *McCartney* case, and that there was an almost total absence of any press representation in this court. In my judgment, with all respect to Bennett J's excellent judgment in that case, the issues raised in this appeal are far more important. I add only, by way of introduction, that what follows is not an exercise in "local authority bashing": it is a further endeavour to get across the message that bad practice is unacceptable in Family Justice, particularly when it relates to the welfare of children and where the consequence is that parents are denied the right to have their cases heard.

The argument for the appellant

47. Before addressing what should henceforth be good practice amongst adoption agencies, I need to address the points of law raised by Mr. Stephen Cobb QC for the appellant in this court. In paragraph 18 his most helpful skeleton argument, Mr. Cobb identified three questions as central to the appeal. These were:-

> "(1) whether the wording in section 24(5) of the 2002 Act, namely: "an application for the revocation of a placement order has been made" *can* be interpreted to include the application for leave to make the application;
>
> (2) whether the wording of section 24(5) *should* be interpreted in this way so as to give effect to the Convention Rights of the applicant to a fair hearing, and to family life; and
>
> (3) if not, whether section 24(5) is incompatible with the ECHR, and if so, whether a declaration to that effect should be made."

48. In my judgment, the answer to the first question is plainly "no", and that answer effectively disposes of the appeal. The answer to the second question is also "no", but as posed by Mr. Cobb begs the more important question – which he puts third, namely whether or not section 24(5) of the 2002 Act is what I will call in shorthand Human Rights Act 1998 (HRA 1998) compliant. In my judgment it is, and therefore no question of a declaration under HRA 1998 section 3 arises.

49. Mr Cobb began by acknowledging that in what he called *Re M and L, Warwickshire v. M*, [2007] EWCA Civ 1084, now reported as *Re M (children) (placement order)* [2007] 3 FCR 681 and which I will call the *Warwickshire* case, Wilson LJ (with whom the other two members of this court, Thorpe and Dyson LJJ, agreed) had considered the provisions of section 24(5) of the 2002 Act, and had said (at paragraph 14):-

> "Section 24(5) of the Act provides that, where an application for the revocation of a placement order has been made and has not been disposed of, the child may not be placed for adoption without the court's leave. Notwithstanding submissions on behalf of the mother to the contrary, the judge held that there was nothing, whether in that subsection or elsewhere, which precluded a placement without leave while an application for leave to apply for revocation was pending. I agree with the judge; and in this court the mother does not argue to the contrary. The judge went on to observe, however, that, were an application for leave to have been issued but not to have been disposed of, it would normally be good practice for a local authority either to agree not to place the child until its disposal or at least to agree to give notice, say of 14 days, to the applicant of any proposed placement. In this regard I also agree with him. Given such notice, the applicant might perhaps be able either to take steps to challenge the lawfulness of the decision to place at that juncture or, probably more easily, to seek an expedited hearing of the application for

> leave, from which might flow, in the fine, developing tradition of collaboration between local authorities and courts, a short further agreed moratorium on placement until the hearing."

50. Mr Cobb pointed out, correctly in my view, that Wilson LJ's observations were, strictly speaking, *obiter* in that the critical question for this court in the *Warwickshire* case was whether or not the circuit judge had been right to hold that, once a parent who was applying for leave to apply to revoke a placement order under section 24(2) of the 2002 Act had established a change in circumstances, there was no discretion in the court to refuse to grant the parent leave to make the application. This court found that the judge had been wrong so to hold, with the consequence that he had not exercised the discretion which this court held him to have had. By agreement, this court then went onto exercise the discretion, and to refuse the mother's application for leave.

51. *Obiter* though the observations of this court in the *Warwickshire* case may have been, Mr. Cobb realistically recognised that they did not presage well for the remainder of his argument. He therefore sought to wheel on a heavier gun in the form of a passage from the dissenting speech by Baroness Hale of Richmond in *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, [2007] 1 WLR 1910 (*Seal*), a case concerning the proper interpretation of section 139 of the Mental Health Act (MHA 1983), which, in broad terms, grants a substantial measure of protection from civil and criminal proceedings to those exercising their powers under MHA 1983, and which, in particular, provides by section 139(2) that "no civil proceedings shall be brought against any person in any court in respect of such act without the leave of the High Court". At paragraph 41, her Ladyship had said:-

> "I approach the task of construing section 139(2), therefore, on the basis that Parliament, by enacting the procedural requirement to obtain leave, did not intend the result to be that a claimant might be deprived of access to the courts, unless there is express language or necessary implication to the contrary. If there is no express language, there will be no necessary implication unless the legislative purpose cannot be achieved in any other way. Procedural requirements are there to serve the ends of justice, not to defeat them. It does not serve the ends of justice for a claimant to be deprived of a meritorious claim because of a procedural failure which does no substantial injustice to the defendant."

52. Mr. Cobb argued that *Seal*, albeit in a different context, demonstrated the court's approach to statutory interpretation in a situation where apparently clear words may be construed as importing a different legislative intention where to do otherwise would be to cause injustice. Mr Cobb then posed the rhetorical question: surely, it could not be right for a local authority to be able 'stymie' (the word used by the judge) the *bona fide* application of a parent for leave to apply for a revocation of placement order? Mr. Cobb submitted that when the court process was invoked by a parent in good faith (as it was here), a local authority should not be able to 'disempower' the court, and render impotent its discretionary rights, in this way.

53. Mr. Cobb submitted that the objective of section 24(5) of the 2002 Act was to ensure that when the court was seised of proper process, no step should be taken which would have the effect of depriving the court of the jurisdiction to exercise its powers. The statutory provision was, he argued, designed, inter alia, to prevent a local authority from taking a pre-emptive step such as the one taken by the agency in the instant case once a court process had commenced.

54. Mr Cobb submitted that a local authority / agency was protected in such circumstances from tactical manoeuvring on the part of a parent applicant. He argued that, at the point at which an application for leave is being considered, the local

authority could (a) oppose the application, and (b) react by simultaneously applying for leave to place the child for adoption.

55. In the instant case, he argued, the local authority had the opportunity on 30 January 2008 either to resist the father's application for leave, or itself make an application for leave under section 24(5) to place the child for adoption in any event. Moreover, in order to minimise delay in any case, and to facilitate efficient decision-making, the court could, exercising its wide judicial discretion, consider the application for leave to apply for an order revoking the placement order on a reasonably limited evidential basis: see the now classic observations of Butler-Sloss LJ in *Re B (Minors) (Contact)* [1994] 2 FLR 1 at 5 (*Re B*).

56. On the Human Rights issue, Mr. Cobb reminded us of section 3 of HRA 1998. He submitted that as part of the process of interpreting legislation in a manner compatible with Convention rights, we could "read in" words to a statutory provision in order to protect them. Thus we should prefer the wider construction of section 24(5) of the 2002 Act as advanced on behalf of the appellant; and we should read into section 24(5) the words "or an application for leave to apply to revoke a placement order".

57. Mr. Cobb sought to support this argument by reference to the decision of Munby J in *Re Webster; Norfolk County Council v Webster and Others* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146, in which the judge had read section 97(4) of the 1989 Act as permitting the court to dispense with the prohibition on publication in section 97(2) if rights under the Convention required such dispensation. He relied in particular on paragraph 58 of Munby J's judgment, in which the judge had said:-

> "…In other words, the statutory phrase "if ….. the welfare of the child requires it", should be read as a non-exhaustive expression of the terms on which the discretion can be exercised, so that the power is exercisable not merely if the welfare for the child requires it, but wherever it was required to give effect, as required by the Convention, to the rights of others. This is a process of construction which in my judgment comfortably satisfies the criteria identified in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, and which is therefore required by section 3."

58. Mr. Cobb submitted that the father in the instant case has clear rights under ECHR Article 6 to a fair trial, and that at the point at which he made his application for leave he was entitled to a fair trial. By the time of the hearing of his application (only a matter of days later) he was denied a fair trial or, indeed, any consideration of his application on the merits by the agency's actions. At issue, Mr. Cobb submitted, was the right of access to the court, one of the most fundamental principles of the rule of law upon which our democracy is based. In this context, Mr. Cobb referred us to paragraph 57 of the well known decision of the European Court of Human Rights in *Ashingdane v United Kingdom* (1985) 7 EHRR 528, which I do not need to set out.

59. Mr Cobb accepted that adoption agencies obviously did not wish to be fettered in relation to the exercise of their powers under the 2002 Act by the launch of unmeritorious claims for leave by parents. However, they neither deserved nor should be afforded protection from meritorious claims. If that was Parliament's intention, or, indeed, the effect of what Parliament had enacted, it was an irrational and disproportionate interference in the father's ECHR right to access to justice.

60. Mr. Cobb also relied on the father's ECHR Article 8 rights. If the legislation fell to be interpreted in the manner set out by the judge, the father would be denied his right to respect for his private and family life. Mr Cobb pointed out that in ***Re*** *L and H (Residential Assessment)* [2007] EWCA Civ, [2007] 1 FLR 1370, this court had held that ECHR Articles 6 and 8, and the underlying philosophy of the 1989 Act, required

that a case be fully investigated and that all the relevant evidence necessary should be in place before children were permanently removed from their natural families and placed for adoption with strangers.

61. Mr Cobb submitted, accordingly, that we should allow the appeal and give the father leave to apply to revoke the placement order under section 24(2) (a) of the 2002 Act. Alternatively, we should give a direction that the father's application for leave to apply to revoke the placement order be listed before the judge for determination on its merits. If necessary, and for the avoidance of doubt, we should direct that the local authority should not be given leave to place the child for adoption pursuant to section 24(5). This need not, he submitted, involve a physical change of placement.

Discussion

62. I have set out Mr. Cobb's argument in detail, because I have considerable sympathy for it on the facts of this particular case. I am, however, unable to accept it. In my judgment, deeply unattractive as the agency's position is, the judge was right, and, as I have already stated, the appeal has to be dismissed.

63. In my judgment, Wilson LJ's judgment in the *Warwickshire* case accurately states the law. Section 24 of the 2002 Act is, moreover, in my judgment HRA 1998 compliant. We cannot read in the words Mr. Cobb invites us to read in, and no question of a declaration of incompatibility arises. I will endeavour to explain why I take that view.

64. The first point, it seems to me, is that section 24 has to be read in the context of the overall scheme of the 2002 Act. The 2002 Act reformed the law of adoption. In section 21, it introduced the new concept of the placement order, which is defined in section 21(1) as "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". The circumstances in which the court is entitled to make a placement order are set out in section 21(2) and (3). Section 21(4) sets out the duration of placement orders.

65. Section 22 sets out the circumstances in which a local authority is required to apply for a placement order and section 23 sets out the very limited circumstances in which the court is empowered to vary such an order. Section 25 provides that when a placement order is in force, parental responsibility is given to the adoption agency concerned and to any prospective adopters with whom the child is placed. By section 25(4) the adoption agency which has parental responsibility "may determine that the parental responsibility of any parent or guardian, or of prospective adopters, is to be restricted to the extent specified in the determination".

66. Under section 52(1) the court is empowered to dispense with the consent of a parent to the child being placed for adoption, and the effect of the dispensation is that the parent in question cannot oppose the making of an adoption order without first obtaining the leave of the court (section 47(5)).

67. This, in my judgment, is the context in which section 24 of the 2002 Act falls to be considered. Mr. Cobb accepted, as he had to, that Parliament had the right to limit the class of persons entitled to apply for the revocation of placement orders. He also (rightly in my judgment) accepted that the imposition of the leave filter in section 24(2) was legitimate, and did not constitute a breach of either ECHR Articles 6 or 8.

68. Once it is accepted, as it has to be, that section 24(2) of the 2002 Act is HRA 1998 compliant, it seems to me evident that Parliament has drawn a very clear line between an application for leave to apply for the revocation of a placement order, and the substantive application to revoke. Equally, no criticism was, or could be made of

Parliament's insertion of the "change in circumstances" criterion in section 24(3). Section 24(4) is not here in point.

69. Against this background, it seems to me to be quite impermissible, either as a canon of construction, or as an exercise under section 3 of HRA 1998 to read the words "or an application for leave to apply for the revocation of a placement order" into section 24(5). The two are quite distinct, and Parliament, in my judgment, clearly intended that section 24(5) should only apply where a substantive application for the revocation of a placement order had been made – in other words, the applicant had got over the leave hurdle, and was making a substantive application which, consequent upon the grant of leave, would be likely to have been perceived as having a real prospect of success.

70. In addition, it seems to me that if Parliament had intended to include applications for leave to apply for revocation orders in section 24(5) it would have said so. It has not, and in my judgment, given the plain terms of section 24(2) it is both impermissible and impossible to read section 24(5) as Mr. Cobb would have us do.

71. Equally, in my judgment, 24(5) is HRA 1998 compliant. The sub-section does not deprive a parent in the position of the father in this case of access to the court. What it does is require him to make the application before the child is placed for adoption. This, in my judgment, is consistent with the overall framework of the 2002 Act.

72. The 2002 Act reformed the law of adoption. It is not, I think, controversial to say that the 2002 Act had four main objectives. The first was to simplify the process. The second was to enable a crucial element of the decision making process to be undertaken at an earlier stage. The third was to shift the emphasis to a concentration on the welfare of the child; and the fourth was to avoid delay. Thus, in the same way that good practice in planning for the future of children within the care system discourages parents and relatives from putting themselves forward at the last moment to care for a child, the 2002 Act seeks to facilitate the adoption process once the critical stages of care and placement orders - court proceedings in which parents are entitled fully to participate and in which the relevant decisions are taken by a judge - have been passed.

73. In the instant case, there can be and has been no criticism either of the original care order or the original placement order, both made on 17 August 2007. As is apparent from his statement prepared for this appeal, the father was aware of the care proceedings. He was invited to undergo, and underwent, DNA testing which established his paternity of the child. He was then asked by the local authority in writing whether he wished to become involved in the care proceedings. He made the decision not to become involved for the reasons he explains in paragraph 3 of his statement. It was only in early January 2008 when the father learned that the agency was close to finding an adoptive home that he was spurred into action and consulted solicitors.

74. Time is of the essence for children in the position of the child in this case. Section 1(2) of the 1989 Act, as is well known, enunciates the general principle that any delay determining the question of a child's upbringing is likely to prejudice the child's welfare. There is an equivalent provision in section 1(3) of the 2002 Act. It follows that those charged with implementing the decisions which have already been taken in relation to the child's welfare are entitled to act without delay in implementing the plan for the child – in this case adoption - which has been approved by the court.

75. None of this is to excuse the conduct of the agency in this particular case. What it demonstrates, however, in my judgment, is that in section 24 of the 2002 Act, Parliament has struck a proper balance between the rights and duties of the respective parties which include the agency, the prospective adopters, the child's parents and the child herself. It is plainly undesirable on the one hand that well-

thought out and appropriate plans for a child should be delayed by last minute, unmeritorious applications to revoke placement orders made by parents determined to frustrate the process. It is, however, equally undesirable, in cases where there has been a change in circumstances, for a plan for stranger adoption to be implemented willy-nilly when that plan may, genuinely, no longer serve the best interests of the child.

76. The fact that section 24(5) in this case has not worked as it should have done had good practice been followed is not, in my judgment, a reason for declaring it HRA 1998 incompatible or otherwise as breaching the father's ECHR rights. Nor is it a reason for construing it as Mr Cobb would have us do.

77. Finally, it is very clear to me that good practice would have avoided the unsatisfactory nature of the order made by the judge. It is, therefore, to good practice that I now turn.

Good practice

78. I find it very dispiriting, some 16 and a half years after the implementation of the Children Act 1989 and some time after the implementation of the 2002 Act, that this court is still having to remind local authorities of the basic principles underlying the legislation. This is by no means the first time that this court has been critical of the conduct of a local authority although, speaking for myself, the behaviour of the agency in the instant case is about the worst I have ever encountered in a career now spanning nearly 40 years.

79. The first point about which the social workers and the agency's lawyers in the instant case need to be reminded is that when dealing with parents, however inadequate or abusive, they are dealing with human beings who have both feelings and rights. I do not propose to identify any of the individual social workers in the present case by name. In my judgment, the failings demonstrated in this case are in principle failings of management. The social workers in question appear, in my judgment, not only to have been inadequately managed; they do not appear to have been properly trained. Worse than that, they do not appear to see the need for good management. It is, I think, the arrogance of the agency's behaviour in this case which is its most shocking aspect.

80. In saying this, I am prepared to work on the premise that all the members of the agency genuinely believed that what they were doing was in the best interests of the child. I am equally prepared to assume, contrary to the father's case, that his proposed application to revoke the placement order is hopeless, and would stand no prospect of success. In my judgment, however, these two factors, as I have already indicated, do not make matters any better – if anything, they make them worse. Any system can cope with compliant recipients or recipients who take no action and do not stand up for their rights. Social workers should be trained to deal with and treat properly those who are often irrational and offensive, although neither accusation can be levelled at the father or his solicitors in this case.

81. I also wish to make it clear that the suggestions which I make in this judgment as representing good practice are, in my view, very basic. Nothing I am going to propose will make excessive or unreasonable demands on hard pressed and inadequately funded agencies: nothing which follows expects the social workers in question to behave in anything other than a simple, straightforward and appropriate fashion.

82. I deal, of course, with the facts as they are. The father wished to make a very late application for leave to apply to revoke the placement order. He went to solicitors. On Thursday 10 January 2008, those solicitors spoke to the local authority. They told the local authority that they had been instructed and sought information about the

progress of the child being matched and placed with prospective adopters. So the local authority was on notice on 10 January that an application was in the offing.

83. The child had in fact been to panel on 9 January 2008 and was on the same day matched with her prospective adopters. No criticism can be made of either event, unless it be that the father's solicitors were not informed of the facts when they telephoned on 10 January. We do not, however, have any evidence as to the identity or state of knowledge of the person to whom the solicitor spoke.

84. On the following day, Friday 11 January, the father's solicitors attempted to issue the father's application for leave to apply to revoke the placement order. Staff shortages at the court meant that the issuing of the process was delayed until a date on or before 17 January 2008.

85. We now know that on 14 January 2008, the local authority's deputy director of children's services ratified the decision to place the child with the couple approved by the adoption panel on 9 January, and that a first introductory meeting between the prospective adopters and the child was held on the following day, 15 January 2008. The document from the agency states that "It was proposed on this date that a Review of the Introductions would take place on 23 January, with a proposed placement day of 29 January 2008 if all was going well". We now also know, from a document headed "Introductions Chart" produced by the agency that meetings between the prospective adopters and the child were proposed for every day between 15 January and placement on 29 January 2008.

86. Up until 17 January 2008, I am prepared to give the agency the benefit of the doubt. All it had was the telephone call of 10 January. However, the situation changed radically on Thursday, 17 January, when the father's solicitors sent a letter, by facsimile, marked in emboldened capital letters for the urgent attention of a named individual. I appreciate that Thorpe LJ has already set this letter out, but it bears repetition, and I propose to cite it in full. The fact that it was sent by facsimile enables us to be certain that it was despatched at 15:42 on 17 January. It was one page in length and took 51 seconds to send. We can thus be sure that it was received by the local authority at about 15:43 on the same afternoon. The letter reads:-

> **"BY URGENT FAX** *(number given)*
>
> **URGENT ATTENTION OF** *(named individual)*
>
> Dear Sirs,
>
> *(Child's name and date of birth given)*
>
> We are instructed by *(the father's name) (the child's)* father.
>
> We understand a placement order was made in the *(named)* County Court on 17 August 2007. We have been instructed by *(the father)* to apply to the court for leave to revoke the placement order on the basis that his circumstances have changed since the order was made.
>
> We have checked with the court who inform us that the application has now been issued but, due to the fact that the Adoption clerk is away, may not be served until Monday *(21 January)*. We have requested permission to abridge time for service of the application.
>
> In the meantime, we refer you to the Adoption and Children Act 2002. section 24(5) and would you please confirm by return of fax that *(the*

> *child)* has not yet been placed since we understand she went to Matching Panel early last week."

87. There was no reply of any kind to that letter. Counsel for the agency was either unable or unwilling to offer any explanation for the total failure to reply, but in my judgment, given the agency's subsequent behaviour, only two inferences, both adverse to the agency, can properly be drawn from that failure. They are; (1) that the agency did not wish to give the father or his solicitors any information; and (2) it wished, as the judge found, to "scupper" or "stymie" any application which the father made to the court. These two inferences are, in my judgment, irresistible. Indeed, there is no alternative explanation. Certainly counsel for the agency did not proffer any alternative.

88. Both the agency and the recipient of the letter of 17 January must understand that the failure to answer the letter was not merely discourteous and thoroughly bad practice, but that it can only be seen as a deliberate attempt to keep the father in the dark, so that the agency could proceed to place the child and thus prevent the father from making an application to the court under section 24(2) of the 2002 Act. It is this conduct in particular on the part of the agency which leads me to categorise its conduct overall as disgraceful.

89. That these are the only inferences to be drawn is demonstrated by the agency's subsequent conduct. There was no communication with the father or his solicitors. The father's application was finally issued by the court on Monday 21 January. At the hearing of the appeal before us, the solicitors for the agency did not have their file in court (another elementary example of bad practice). We learned, however, from the mother's counsel that a notice of hearing, bearing the court's stamp, was issued by the county court on 21 January, giving the return date for the father's application as 30 January 2008 at 10.00am. That was received by the mother two days later, and it is reasonable to assume, in the absence of any evidence to the contrary, that it was likewise received by the agency on 23 January 2008.

90. On 23 January 2008, without communicating with the father or his advisors, and with full knowledge that the father's application was due to be heard on 30 January, there was a "review meeting" at the home of the prospective adopters. The brief note available to us reads:-

> "It was agreed at this review that everything was going extremely well and therefore *(the child)* would move to the prospective adopters as proposed at the Introduction Meeting held on 15 January 2008."

91. Mr. Cobb makes the point that we have no minutes of the meeting on 23 January. This is one of my perpetual complaints about local authorities which frequently fail to minute important decisions. Accordingly, amongst the many things which we do not know in this case is what the prospective adopters were told. What is, however, clear beyond peradventure is that the agency deliberately chose to place the child for adoption on 29 January 2008, some 24 hours before the hearing of the father's application, thereby enabling it to attend the hearing and tell the judge; (1) that she was powerless to intervene, given the terms of section 24(5) of the 2002 Act; and (2) the agency was acting within the letter of the Statute; and (3) however "unattractive" its case, there was nothing the judge could do about it.

92. As is apparent from the earlier part of this judgment, I am of the opinion that the actions of the agency did indeed frustrate the hearing of the father's application, and that, as a matter of law, the county court was rendered impotent to interfere. In this court, it seemed to me that the agency was unrepentant. It expected to be criticised for failing to respond to the letter of 17 January: that apart, it had done nothing wrong.

93. As I have already explained, I am constrained to agree that, as a matter of law, the father, on the facts of this case as they currently present themselves cannot pursue an application under section 24(2) of the 2002 Act. For this reason, I am compelled, reluctantly, to the view that the appeal must be dismissed. But I regard that as only the first stage in the matter. I am satisfied that the disgraceful conduct of the agency in this case is an example of the worst kind of sharp practice – an accusation to which counsel for the local authority demurred. She did not, however, provide any material which would enable this court to reach a different conclusion. I therefore repeat, such conduct is disgraceful, and must not be repeated.

94. The first, and obvious point is that if this kind of disgraceful conduct is repeated in another case, the likelihood is that the agency's decision to place the child would be the subject of an application for judicial review. Speaking for myself, I can see no reason why the Administrative Court should not declare unlawful a decision such as that taken by the agency in the instant case. If it did so, it would quash the decision to place the child for adoption. It could then give directions for the hearing of the father's application under section 24(2) in the county court, and restrain the agency, by injunction, from placing the child for adoption pending the determination of that application.

95. This process would not necessarily involve the child being moved in the interim. In *R v Derbyshire County Council, ex parte T* [1990] Fam. 164, this court upheld the decision of Swinton Thomas J to grant *certiorari* (as it then was) to quash the decision of a local authority to move a child to prospective adopters without informing the child's parents and in an attempt to prevent them making an application to the court for the revocation of a freeing order previously made in relation to the child. Although the case proceeded, of course, under the 1976 Act, a pivotal finding in relation to the child's placement was that what mattered was the status, and not the identity, of the child's carers. I therefore see judicial review as a fruitful field for parents if this agency's behaviour is repeated in other cases.

96. Do local authorities and adoption agencies really want to go down this route? Apart from the cost and the delay, how can such an outcome possibly be said to be in the interests of the children concerned? And what has happened to information sharing, and co-operation?

What should have happened in the instant case.

97. In my judgment, one of two things should have happened. Firstly, although this is not intended as a criticism, the letter from the father's solicitors on dated 17 January should have contained an additional paragraph along the following lines:-

> "We invite you to give an undertaking that you will take no steps to place *(the child)* with prospective adopters pending the hearing of our client's application. If that undertaking is not received by 10.00 am on 18 January, we shall apply without notice in the first instance to the county court for an order in those terms."

98. At the hearing of this appeal, we had some debate about the jurisdiction of the court to grant such an injunction. This is not a subject on which I, like Wilson LJ, whose judgment I have also read in draft, entertain any doubts. I am satisfied that the county court has such jurisdiction and would, moreover, have exercised it as a temporary, holding measure, until both sides could be before the court. The judge would either then have given directions for a swift hearing, or resolved the matter summarily. But even if there had been a summary adjudication against the father, he would have been heard.

99. What should have happened in the alternative is; (1) that the agency should have replied promptly to the letter of 17 January; and (2) that it should have explained that its plans were at an advanced stage of preparation and, indeed, about to be implemented. It could then itself have applied to the court, on short notice, for leave to place the child for adoption under section 24(5) of the 2002 Act.

100. Either way, there would have been a hearing on the merits. It might have been very short. Mr. Cobb realistically accepted that the judge would have had a very broad discretion to deal with the matter summarily if necessary - see *Re B* to which reference was made earlier in this judgment. If the case had gone against him, the father would have lost. But he would have been heard. The court would have made the decision, and justice would have both been done and been seen to be done.

101. Local authorities and adoption agencies must understand that it is the court which is in control, and which has been given by Parliament the responsibility for making these decisions. The courts are not a rubber stamp for local authority / agency actions, however, reprehensible.

102. In paragraph 14 of his judgment in the *Warwickshire* case, Wilson LJ emphasised the need for good practice to supplement the 2002 Act. I wholeheartedly agree with him. I hope that this judgment makes crystal clear not only what that good practice should be in relation to section 24(5) of the 2002 Act but **why** good practice is so important. It is for this reason that I propose widespread dissemination of our judgments in this case. Any local authority falling below the standards of good practice, and indulging in the shoddy behaviour demonstrated by the East Sussex County Council in the instant case can expect not only severe judicial displeasure, and applications for judicial review: it is also likely that any repetition of the disgraceful behaviour identified in this case will be visited by orders for costs.

103. With all these reservations, I would, nonetheless, and with reluctance, dismiss this appeal. To the father I would only say that he has done a public service by exposing the local authority's disgraceful conduct to the public gaze, and I hope that this is some small consolation to him for the fact that, as the law stands, he had to fail in this court.

Lord Justice Wilson:

104. I agree with the judgment of Wall LJ in every respect.

105. On 1 November 2007, in the *Warwickshire* case cited above, I referred at [44], then in passing but in relation to the precise point now raised by this appeal, to "the fine, developing tradition of collaboration between local authorities and courts". I acknowledge that, in the light of the conduct of East Sussex on 29 January 2008, my words appear to ring hollow. But in this court, at any rate on full appeal, we tend to see the exceptional cases. The present case is best described, as by Wall LJ, at [44] above, in terms of "abuse of power" on the part of East Sussex.

106. With respect to Thorpe LJ, I cannot accept his analysis of the law set out in [21] to [28] above. I do not understand Mr Cobb even to argue for such an analysis. At [47] above Wall LJ has quoted Mr Cobb's central argument. It is, per Mr Cobb's (a), whether the terms of s.24(5)(a) of the Act of 2002 ("the Act") *can*, and, per Mr Cobb's (b), whether, in the light of the appellant's Convention rights, its terms *should*, be so interpreted as to refer to "an application for the revocation of a placement order *or an application for leave to make such an application …*"

107. I understand Mr Cobb's argument to be conjunctive, viz. that, if the subsection *can* be so interpreted, then, in the light of the appellant's Convention rights, it *should* be so interpreted. Thorpe LJ has treated it as being disjunctive, viz.

that, even if (which Thorpe LJ has concluded to be the case) the subsection *cannot* be so interpreted, nevertheless, in the light of the Convention rights, it *should* be so interpreted. If Mr Cobb indeed argues disjunctively, then, in my view, his argument is erroneous. Section 3 of the Human Rights Act 1998 requires only that "so far as it is possible to do so" legislation must be given an effect compatible with Convention Rights. If it "*can*", the court "*should*". Otherwise, however, it has to enter another realm, viz. that of a declaration of incompatibility. In the event Mr Cobb did not at the hearing invite us to enter it; nor indeed had the appellant given the requisite notice to the Crown.

108. The terminology of s.24(1) of the Act shows that Parliament had at the forefront of its mind the difference between an application for revocation of a placement order and an application for leave to apply for revocation. Thus, when in s.24 (5) it provided for a prohibition on the child's placement without leave, it is of crucial significance that it provided for the prohibition to apply where an "application for the revocation … has not been disposed of …" and did not there include reference to the situation in which there had been no disposal of an application for leave. Section 3(1) of the Act of 1998 "does not give power to the judges to overrule decisions which the language of the statute shows to have been taken on the very point at issue by the legislator": per Lord Hope of Craighead in *R v. Lambert* [2002] 2 AC 545, at [79].

109. A placement order authorises the local authority to place the child for adoption (s.21 (1) of the Act) but, where there is an aspiration to secure the order's revocation, it is sensible that, at some stage of the enquiry into possible revocation, a brake should arise upon placement without leave. But at what stage? It is easy to understand why Parliament favoured the stage at which the aspirant for revocation makes, or issues, his application for revocation, namely the stage by which, in the event that he has needed it under s.24 (2) (a) of the Act, leave has been given to him. For such is the stage when, on preliminary consideration, the court has determined not only that there has been a change in circumstances since the placement order was made but also that in the light of all the circumstances, including the welfare of the child and its prospect of success, it is appropriate for the application for revocation to be made. In my view it is logical that, at the point when the light turns green to permit the applicant to proceed to make his application for revocation and when he proceeds accordingly, it should turn red against the local authority's ability to proceed to place the child without leave.

110. Any rule of this sort, wherever it be drawn, will throw up hard cases, of which the appellant's is certainly one. Mr Cobb submits that the prohibition on placement without leave should be so drawn as to take effect at the point of issue of the application for leave rather than of the application for revocation. But take then a situation in which on Monday a solicitor informs the local authority that his client intends to apply for leave to apply for revocation; in which on Wednesday the application for leave is issued; and in which meanwhile, on Tuesday, the local authority have cynically placed the child. Even were it to be so drawn as to take effect at the point for which Mr Cobb contends, the rule would not prohibit such a placement.

111. But the harsh effects of the rule can be surmounted. For, in agreement with Thorpe LJ at [14] as well as with Wall LJ at [98] above, I consider that jurisdiction is conferred upon the county court by s.38 of the County Courts Act 1984 (and upon the High Court by s.37 of the Supreme Court Act 1981) to enjoin a local authority from placing a child for adoption even if authorised to do so by a subsisting placement order; that such an injunction can be sought, no doubt on a very temporary basis, even without notice to the local authority; and that it can be sought at any time after issue of the application for leave or even prior to its issue provided that an undertaking is given to issue it immediately. The appellant's solicitors have represented him well and could not have foreseen that East Sussex would abuse

their power. With the benefit of hindsight, however, they should have reacted to the failure of East Sussex to respond to the letter dated 17 January 2008 by seeking such an injunction, in the first instance without notice.

112. It can therefore be seen that the effect of s.24 (5), as Wall LJ and I construe it, is less dramatic than it might at first appear. Following issue of the substantive application for revocation and pending its disposal, the onus is on the local authority to seek leave to place the child. Prior to issue thereof, the onus is on the applicant for leave (or the proposed such applicant) to seek an injunction against the child's placement. Mr Cobb objects that the applicant will usually lack sufficient information about the local authority's programme for the child to be able to judge whether to seek the injunction. But, as I have indicated, a local authority's refusal to impart such information promptly may well of itself justify at least a temporary injunction.

113. I have explained why, even had I considered the construction of s.24(5) favoured by Wall LJ and myself to be incompatible with the appellant's Convention rights, I would not regard it is as possible to read and to give effect to the subsection so as to make it compatible with them. Like Wall LJ, however, I do not regard the construction as incompatible with his Convention rights. In his argument Mr Cobb concentrates primarily on Article 6. For, although he also refers to the appellant's rights under Article 8, he accepts that the child's rights under Article 8, namely to respect for her life in an adoptive home which, pursuant to the placement order made five months earlier, East Sussex had actively been arranging for her, might be a significant counterweight. In relation to Article 6 he cites the judgment of the European Court of Human Rights in *Ashingdane v. UK* (1985) 7 EHRR 528, at [57], as follows:-

> "Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access … by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals … Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired."

The essence of the appellant's entitlement to a fair hearing in relation to the child's placement for adoption was that he should have had, as he did, a full opportunity to participate in the proceedings which led to the making of the placement order on 17 August 2007. Thereafter and until placement the law furnished him with the right to seek leave to apply for its revocation; and I cannot accept that the law's failure to provide that a prohibition against placement without leave should be an automatic consequence of the issue of his application for leave (as opposed to its provision to him of an opportunity to apply for such prohibition) was other than a permissible limitation upon his right of access to the court at that stage. The application for leave made by this appellant, however poor its prospects, was made *bona fide* out of concern to offer the child a home with a biological parent and of a sensation that such was action which a responsible father should take. Applications for leave by other parents might however be made *mala fide*, in order simply to thwart the plan for adoption made by the local authority and endorsed by the court. If the automatic consequence of the mere issue of their applications for leave were to be a prohibition against placement without leave, they would be able to arrest, at any rate temporarily, a long-arranged placement for which the children had been fully prepared and which should in their interests proceed without hitch. Thus, while in the present case East Sussex have misused the law, as it stands, in order to thwart the appellant's proper

approach to the court, an applicant could misuse the law, if it stood otherwise, in order to thwart a local authority's proper plans for the child.

114. Were Mr Cobb's suggested construction of s.24(5) of the Act to be correct, the placement of the child by East Sussex on 29 January 2008 would thereby be rendered unlawful. But, in providing that a substantive application for revocation cannot be made unless the child is not placed for adoption, s.24(2)(b) of the Act would still present a difficulty. For, very properly, the appellant does not suggest that it would be in the child's interests to be ordered to move back to her previous foster home pending the judge's determination of the merits of his application for leave. In his skeleton argument Mr Cobb suggested that the court might declare the present placement to be a foster placement; but it is unlikely, and at least unclear, that the legal pre-conditions exist for a valid foster placement of the child in that home. In oral argument Mr Cobb swiftly accepted the suggestion of Thorpe LJ that the court might preferably declare that the placement was "other than a placement for adoption". In [28] above Thorpe LJ has endorsed that approach and has observed that it would leave the legal consequence of the placement to await the judge's determination of the application for leave. The nature of that consequence in the event that leave were granted is, with respect, not entirely clear to me. Had I been persuaded by Mr Cobb to read the words into s.24(5)(a) of the Act which he commends, I might have been emboldened to resolve this residual difficulty by reading the word "lawfully" into s.24(2)(b). The result would be that the second pre-requisite for the ability of a person other than the child or the local authority to make a substantive application for revocation would be that "the child is not *lawfully* placed for adoption …" But this hypothetical discussion serves only to highlight the difficulties attendant upon Mr Cobb's argument.

115. What this case illumines is the need for this court to develop and effectively to disseminate principles of good practice in relation to the interface between applications or proposed applications for leave to apply for revocation, on the one hand, and the child's placement, on the other; and for professionals, in particular local authorities, to accept that they should act in accordance with them. In the *Warwickshire* case I began, in passing, to develop such principles. In his judgment in the present case Wall LJ has further developed them along lines with which I entirely associate myself; and he has expressed himself with a trenchancy wholly apt to the misconduct of East Sussex on 29 January 2008 and to the tone of defiance which has marred their presentation to both courts.