[2010] EWCA Civ 421

Case No: B4/2010/0232

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE LIVERPOOL COUNTY COURT
HIS HONOUR JUDGE DODDS
LOWER COURT NO: LV09C01827

Royal Courts of Justice
Strand, London, WC2A 2LL

22/04/2010

B e f o r e :

LORD JUSTICE WILSON
and
MRS JUSTICE BARON

RE S (MINORS)

Mr Kevin Reade (instructed by Brighouses, Southport) appeared for the mother.
Miss Mary Compton-Rickett (instructed by their legal department) appeared on behalf of the local authority.
The father appeared in person.
Miss Samantha Hillas (instructed by Bell Lamb Joynson, Liverpool) appeared for the children by their Children's Guardian.
Hearing date: 29 March 2010

HTML VERSION OF JUDGMENT

Lord Justice Wilson:

1. On 29 March 2010 Mrs Justice Baron and I heard an application by a mother for permission to appeal against – at this stage I will use a word which is deliberately unfocussed – the "removal" of her two children into short-term foster care on 23 December 2009. The children have remained in such care to date. On 11 March 2010, sitting alone, I had directed that we should hear the mother's application for permission on 29 March, on notice to the other parties, and on the basis that, were permission granted, the substantive appeal would follow forthwith. At that earlier hearing the mother appeared in person; and I expressed a plea to the Legal Services Commission that it might restore her public funding, which had been in place in the lower court. I am grateful to the Commission for having acceded to my plea. The result was that, at the hearing before us on 29 March, the mother was represented by her former solicitors and by Mr Reade, who had not previously represented her. The father, who appeared before us in person, supported the proposed appeal. The local authority and the Children's Guardian, both represented by counsel, opposed it. In the event, at the end of the hearing, we announced our decision: namely that the mother should be granted permission to appeal; that the appeal should be allowed; and that the question whether the children should remain in short-term foster care or be returned to the care of the mother, should be considered by a full judge of the High Court, Family Division, in the Royal Courts of Justice on 6 and 7 May 2010. We reserved our judgments; and what follows represents my reasons for having subscribed to the orders which we made.

2. The appeal comes from the Liverpool County Court, in which complex care proceedings have been on foot in relation not only to the two children but also to three half-siblings. Since November 2009 the proceedings have been conducted by His Honour Judge Dodds.

3. My unfocussed reference in [1] above to the mother's appeal against the "removal" of the children betrays a technical conundrum. From 25 August 2009 until 23 December 2009 the two children were subject to a series of interim care orders made upon plans that they should continue to live with the mother. While such remained the plans, the mother had no objection to the interim care orders. But, at a hearing before HHJ Dodds on 23 December 2009, the

local authority amended their interim care plans referable to the two children to the effect that they be at once removed into short-term foster care. The amended plans were not put in writing until January 2010 but were communicated orally by the local authority to HHJ Dodds at that hearing; and he gave a short judgment by which he endorsed them. On that date he did not make fresh interim care orders. The interim care orders in force on that date had been made by him on 4 December 2009 and they were renewed, pursuant to the postal system, on 31 December 2009; indeed thereafter they have been further renewed to date pursuant thereto. The conundrum is whether, in seeking to protest to this court about the removal of the children, the mother should be appealing against the interim care orders dated 4 December 2009 or even perhaps the interim care orders now in force in relation to the children; or whether, rather, she should be appealing against the judge's judgment dated 23 December, albeit that it did not lead to any orders. While they hold an interim care order over a child, the local authority have power to remove the child from the mother or from any other person caring for the child, irrespective of any endorsement on the part of a judge of their changed plans for the child. It is thus arguable that it was not the judge's judgment dated 23 December which led to the removal of the children into care. When we asked Miss Compton-Rickett, who appeared before us on behalf of the local authority whether, had the judge on 23 December not endorsed the amended care plans, the local authority would in any event have proceeded to remove the children from the mother, she politely responded that it was a hypothetical question to which she could not give a definite answer. In our private discussions, however, Baron J has persuaded me that reality is better served by treating the mother as appealing against the judge's judgment dated 23 December. Although this court usually hears an appeal against an *order* rather than a *judgment*, it has specific power, under CPR 52.10(2)(a), to set aside or vary not only an *order* but also a *judgment* made or given by the lower court; and, when we hear an appeal against findings of fact made by a judge at a bespoke interim hearing of care proceedings at which no particular order has been made, we are of course considering whether to set aside not an order but a judgment or part thereof. The fact is that, as responsible professionals, local authorities always hesitate long and hard before declining to adjust their plans for a child in their care so as to accord with the views of the court; and, however problematical its play in many circumstances, the trump card is, ultimately, in the hands of the court in that it can discharge the care order, interim or otherwise, from which the local authority derive their power. I therefore consider the present proceedings to be an appeal by the mother against the judgment of HHJ Dodds dated 23 December 2009.

4. The two children are B, a girl, who was born on 16 March 2005 and is thus now aged five, and, J, a boy who was born on 24 July 2009 and is thus now aged nine months. The mother is a Romanian citizen and is aged 23. The father is a British citizen and is aged 58.

5. The three half-siblings are the children of the father by another Romanian woman, now aged 25 and to whom I will refer as "the other mother". Her children by the father are a boy now aged nine, a girl now aged six and another girl now aged five. The father was first married to an English woman in 1969 and, of that marriage, there were four children. That marriage ended long ago. More recently the father married the other mother but later they were divorced. The father is presently married to the mother but she has issued proceedings for divorce against him.

6. Over 13 days in November 2009 HHJ Dodds conducted a fact-finding hearing. His long and detailed judgment dated 27 November 2009 will be the foundation of all such future work on this case as the professionals will conduct. In vivid detail and arresting terminology the judge described how, in Romania, the father had begun a relationship with the other mother, when she was aged 15; had married her eight days after her 16th birthday; had brought her and their eldest child to England; had later developed a relationship with the mother, when she was aged 17; and had, for the following five years, at times lived together with both mothers (and their growing number of children), partly in England and partly in Romania, and at other times lived either with one mother or with the other. The fact-finding hearing was an enquiry into allegations of the utmost seriousness against the father: it related not only to his apparent subjection of the two Romanian mothers and their children to a chaotic, abusive and dysfunctional lifestyle but also (and in particular) to a complaint on behalf of one of the daughters of his first marriage, of course now adult, that, when she was aged between seven and 13, he had perpetrated gross acts of sexual abuse upon her. In the event the judge found her complaint proved. I have seldom encountered more serious and damning findings than

those made by the judge against the father on 27 November. He described him as a shocking, violent, selfish bully and a sexual predator, who had devoted a lifetime to wrongdoing; and he found that the father's infidelity, disloyalty, selfishness and hypocrisy knew no bounds. A second application before me on 11 March 2010 was an application by the father, then also appearing in person, for permission to appeal against many of the judge's findings of fact. I refused him permission to appeal, with the result that those findings are now incapable of challenge. It is now therefore a given in the case that at present the father constitutes a grave danger towards children and that, were the mother to bring the two children into contact with him or to be unable to protect herself and them from his attentions, they would be at grave risk of abuse. As I will explain, the basis of the decision of the local authority on 23 December to amend their care plans for the children, and of the judge's endorsement of their plans, was a concern that the mother was either unwilling or unable to exclude the father from her life with the two children. I will have with care to analyse the grounds, such as they were, for that concern.

7. What criticism did the judge make of the mother in his fact-finding judgment dated 27 November 2009? The local authority have never disputed that the mother is devoted to the two children, has a good relationship with them and, in principle, is able to care for their physical and emotional needs. The judge did criticise the mother, and indeed the other mother; but his criticisms of them were more muted. The judge found that, in effect, the mothers regarded the father as their escape route from poverty in Romania; that they were apologists for him; that they were partly responsible for the chaotic lifestyle of their children by putting their own ambitions to escape from Romania first; and that they had joined with the father in resisting the attempts, in particular by Lancashire County Council in whose area the family had lived prior to February 2009, to investigate the circumstances of the children. Back on 4 November 2009 the judge had, following a separate hearing, endorsed the changed care plans of the local authority to remove the three children from the *other* mother into short-term foster care, where they have remained; and it is clear that, at the end of the fact-finding judgment on 27 November, a big question-mark remained against whether the (appellant) mother remained so emotionally tangled with the father that she would be unwilling, or unable, to pursue a life with the children from which the father would definitely be absent.

8. In the immediate aftermath of delivery of the judgment on 27 November 2009 the local authority and the guardian were reasonably encouraged about the mother's apparent determination to have no further dealings with the father. At the end of the hearing, when the judge made an injunction against the father's contact with the two children, the mother asked for, and was granted, an extension of it in order to prohibit his contact even with herself alone, for example by telephone. The mother also agreed forthwith to move into a refuge which the local authority had found: the mother had been living with the two children in the matrimonial home in Southport and, although the father had been excluded from it and was prohibited from returning to it or approaching within 100 metres of it, the local authority took the view that, until other permanent accommodation for the mother with the children could be found of the location of which the father would be unaware, the children would be safe from his attentions only if they moved out of the home. Their concerns in this regard were fortified when, after the hearing, they arrived back at the home with the mother in order to help her to remove herself and the children to the refuge: for in the home was a note to the mother from the father, apparently delivered while the hearing had been in progress, to the effect that, were the case to go against him, the mother should not give up on him; that he would appeal; and that he would buy her a telephone card with which to keep in touch with him in a manner which could not be traced.

9. On that same day, 27 November 2009, the mother with the children duly moved into the refuge. The local authority were not as quick as the mother had hoped in finding them alternative accommodation. She was worried that, because the refuge was some way away from her school, B was no longer attending it and missing all the pre-Christmas festivities to which she had been looking forward. Although she was receiving child benefit for the children, the mother also had difficulty in accessing other state benefits. She became extremely restive at the refuge and in particular dreaded the thought of spending Christmas with the children there, without significant funds. She began to tell the local authority that she intended to return to the home.

10. By letters dated 11 December 2009 to the local authority and to the judge, the mother's solicitors explained that she was extremely unhappy in the refuge; that, although there had been apparent breaches on the part of the father of some of the injunctions made against him, the local authority had curiously not issued committal proceedings against him; and that they had not yet identified alternative accommodation for her and the children. The local authority responded, promptly, to the effect that they *were* seeking alternative accommodation for them and that they *would* issue proceedings for the father's committal.

11. During the next two days the mother repeated that she insisted upon returning, with the children, to the home. The local authority were concerned about the return but did not seek to prohibit it. They did not tell her that, were she to return to the home, they would amend their care plans in order to remove the children from her. On the contrary they notified the police of the danger to the children if they were again to be resident in that home; and they resolved themselves to make spot checks of the situation there. They also resolved to change the locks, although in fact they never did so. On 17 December they actively facilitated the mother's return with the children to the home in that they provided the necessary transport for them.

12. The local authority duly issued an application for the father's committal to prison for alleged breaches of the judge's injunctions. One of the alleged breaches was his sending to the mother the letter which had been found in the home on 27 November. Unsurprisingly the father's case was to be that that letter was written and delivered prior to the making of the injunctions. Apparently his case was to be that, while he and the mother were in court on 27 November, his own mother had delivered his letter to the home. So the father resolved that his mother would be a witness in his defence against the application for committal.

13. The local authority's application for the father's committal was listed for directions before HHJ Dodds on 23 December 2009. The father, however, seems to have understood that the judge might hear evidence at that hearing in respect of the committal. Such seems to have been the context in which his mother, who lives in Manchester, spent the night of 22/23 December in the home of the mother with the children in Southport. It is said to have been more practicable for the father's mother to travel to court in Liverpool from Southport rather than from Manchester. But the circumstances in which it was arranged that the father's mother should spend the night with the mother and the children in the home are not entirely clear. It appears to be the mother's case that the father's mother telephoned her and asked her whether she could stay there that night. There was, of course, no injunction against communication between the mother and the father's mother. It appears also to have been the father's case that his mother travelled by train from Manchester to Southport and that, while he collected his mother by car from Southport railway station and drove her near to the home, he caused his mother to get out of his car just outside the 100 metres exclusion zone for which the judge had provided, with the result that he was allegedly not in breach of the injunction. At all events, when that night the local authority did one of their spot checks on the mother's home and found the father's mother there, they were very concerned.

14. It follows that, prior to 23 December, no one expected the hearing on that day to be an occasion at which the local authority would put before the judge amended interim care plans for the immediate removal of the children from the mother, still less that it would be an occasion at which he would endorse any such plans. Nevertheless such is what the hearing on 23 December became.

15. In the corridor of the court prior to the hearing on 23 December it became clear to the local authority that there was an aspiration on the part both of the father and of the mother to secure some relaxation of the injunction granted to the mother against all communication between the two of them, even otherwise than in the presence of the children. It seems that it was probably the father who first expressed the aspiration and that the mother then subscribed to it. At all events the mother accepts that, in the corridor, her lawyers did indeed indicate an aspiration on her part to secure some relaxation of the injunction: her case is that, without intending to expose either of the children to any form of communication with the father, she wished herself to communicate with him in order to discuss matters in relation to the tenancy of the home, to their finances (in which respect her continuing failure to access state benefits was allegedly causing her grave problems) and to their divorce.

16. Counsel for the local authority and for the guardian told us that, when on 23 December they heard that the mother was aspiring to secure some relaxation of the injunction against her communication with the father, it was – for their clients – the last straw. As Miss Compton-Rickett explained to us, there had been the letter which the father had caused to be left for the mother; there had been the mother's insistence upon a return to the home; there had been the stay of the father's mother in the home during the preceding night; and then, finally, there was the suggestion that the injunction should be relaxed. A vivid spectre of the father's malign presence around the children is thereby said to have arisen in the mind of the local authority and the guardian.

17. I have considerable sympathy for the position in which HHJ Dodds found himself on 23 December. It was the court's last working day prior to Christmas and he appears to have had a very heavy list. He had no advance notice at all of the profoundly serious proposal which was to be presented to him. More importantly, however, the mother herself had no advance notice of it.

18. The case was mentioned to the judge briefly in the morning and again briefly at 3:10pm. The substantive hearing began at about 4:10pm and concluded at about 5:30pm. Unfortunately, because of the speed with which, on 11 March, I directed that this matter should be heard, there proved to be no time to bespeak an official transcript of the proceedings on that day, nor even of the judge's brief judgment. A professional note of his judgment was, however, taken and has been approved by him; nevertheless it is not as satisfactory as an approved transcript of the judgment and, in my experience, it can be unfair to a trial judge for this court to work only from a note of his judgment, however well taken and even following his approval of it.

19. Counsel before us were agreed about what, in summary, was said to the judge on 23 December when the case was first mentioned to him in the morning. The local authority told him that they were extremely concerned to have heard that the mother aspired to secure some relaxation of the injunction against her communication with the father. The judge thereupon indicated that, were she to wish to retain the care of the children, she should think most carefully about continuing to press for any such relaxation.

20. When the matter was again mentioned to the judge at about 3:10pm, counsel for the mother indicated that she continued to aspire to secure some relaxation of the injunction in order to address with the father pressing financial and other practical issues. He tried to persuade the judge that there was nothing in the mother's continued stance which should cause concern that there was any prospect of her exposure of the children to the father. Probably because of the demands of other cases listed before the judge, the matter was adjourned for yet another hour.

21. The local authority seem to have made it quite clear to the mother in the corridor of the court on 23 December that, were she even to continue to ask the judge to relax the injunction against communication with the father, they would forthwith use their power under the interim care orders to remove the children into short-term foster care and would invite the judge to endorse amended plans to that effect. There is no doubt that, at any rate in the corridor of the court, there was also considerable discussion about whether, as the local authority in the alternative proposed to her, the mother, with the children, would be prepared, on a short-term basis and albeit over Christmas, to return to the refuge, as being a place safe from the father's malign attentions. There is, however, a conflict, which we were quite unable to resolve, as to the mother's reaction to the alternatives of returning to the refuge or suffering the removal of her children. It may be that, having received legal advice, the mother considered that, in all the circumstances, the judge would not in the end require her to choose between such unpalatable alternatives. The fact is, however, that, no *evidence* of any sort was given on behalf of the local authority to the judge at any stage on 23 December; and no possibility of a return to the refuge was ever canvassed, from whatever quarter, before the judge at the substantive hearing which ultimately began, whether in the course of the evidence then given (such as it was) or of submission. In this court we received conflicting instructions, namely those given to Mr Reade by the mother that she indicated to the local authority in the corridor that, rather than suffer the removal of the children from her, she would return to the refuge and, by contrast, those given to Miss Compton-Rickett by the local

authority that, when the alternatives were put to the mother in the corridor, she indicated that, rather than return to the refuge, she would suffer the removal of the children from her.

22. At all events the agreed fact is that, when the substantive hearing began, counsel for the mother indicated that she was withdrawing her aspiration to persuade the judge in any way to relax the injunction against her communication with the father. Such withdrawal was what the judge had, in the morning, indicated to be the price of retaining the care of her children.

23. But matters did not develop in the way which, in my view reasonably, the mother expected. The local authority told the judge that the mother's withdrawal of her aspiration to secure relaxation of the injunction had come too late; that they were not persuaded that her withdrawal of it was other than tactical; and that they remained so concerned about her resolve to protect the children from the attentions of the father that they proposed, there and then, to take the children into short-term foster care.

24. We are told that, at the hearing between 4:10pm and 5:30pm, oral evidence was given to the judge by the father, the mother and the guardian; and that the mother gave evidence for between 15 and 20 minutes, including cross-examination delivered to her on behalf of the local authority and of the guardian. The mother sought to explain to the judge her previous aspiration to secure relaxation of the injunction in order to discuss practical matters with the father. She also appears to have suggested that she wished, with the children, to return at some stage to live in Romania; and no doubt her suggestion in that regard raised real doubts in the minds of many of her audience, including the judge, about whether, if ever permitted to live with the children in Romania, the mother would have the will or capacity to resist the continuing attentions of the father.

25. The relevant part of the approved note of the judge's judgment reads as follows:

> "[The father] has … made an application to relax the injunction orders; quite how much notice of that was given is not known. He wants to discuss with [the mother and the other mother] property matters, the marriage, [the matrimonial home] and tax credits. [The mother and the other mother] support that view and have asked me to reconsider the injunction orders.
> The paternal grandmother attended [the matrimonial home] yesterday. I did not believe a word of [the father's] evidence … [He] says he collected his mother when she arrived at Southport station; it was beyond belief that she travelled [to Southport] herself. [The father] collected [his mother] as a witness today. [The father] is not telling the truth and is orchestrating control again. Within 24 hours of his mother's arrival at [the home], the mother's strength of mind has crumbled.
> What a demonstration of [the mother's] vulnerability! The local authority say they can no longer trust her and there is a risk to the infant children. Strong injunctions were in place: only the most powerful [of injunctions] were sufficient to protect. I find it tragic but all too predictable. [The mother's] standpoint is the thin end of the wedge: there would be one breach after the other. One step would be to discharge the interim care order. Were I to do so, it would be said I had taken leave of my senses in the face of the most shocking evidence over three weeks. [In his] determination to go against the court, the wishes of the local authority and the advice of the guardian, [the father] shows his true colours: he wishes to be in charge, in control. Tragically he is the author of the change in [the mother]. He is the author of his own downfall and now [that of the mother]. The local authority and guardian no longer trust her. By her actions and words today and her refusal to recognise the outcome [of the fact-finding hearing], her repeated refusal of actions to protect, [the mother] is blind to the reality of the history and findings and is a vulnerable target. She is showing extreme myopia today. I have placed the children in the care of the local authority. Far from disagreeing with the local authority, I agree with them; they will implement the redrawn care plan today."

26. While the judge was delivering judgment, the children were in another room in the precincts of the court, together with the father's mother. Following the hearing the mother was invited to say goodbye to the children, whereupon they were taken to the short-term foster home which the local authority had identified that day. Most regrettably the mother, in a state of extreme confusion and distress, there and then dispensed with the services of her lawyers. On 29 December 2009 she took a home-made Appellant's Notice to the Liverpool County Court,

where, of course, it was not able to be issued; it was ultimately issued in this court only on 2 February 2010. The history might well have been different if, at the conclusion of the hearing, the mother had not dispensed with the services of her lawyers and if, from the county court that evening, they had telephoned this court and asked for urgent relief pursuant to the advice given by this court in *Re A (a child) (residence order)* [2007] EWCA Civ 899, [2008] 1 FCR 599, at [27]. They might not have obtained an immediate prohibition against removal but they would probably have obtained a hearing in this court in the days immediately after Christmas, at which would have been conducted the enquiry which, no less than three months later, it fell to Baron J and me to conduct.

27. At the hearing on 23 December the local authority had not placed before the judge any proposals for the mother's contact with the children. Nor had the guardian raised the subject. We are told only that, at the end of the hearing, the judge invited the local authority and the mother's solicitors to agree the level of her contact with them. Of course that suggestion in effect conferred complete discretion upon the local authority in relation to contact, at any rate until such time as an application by the mother for contact under s.34(3) of the Children Act 1989 might be issued and heard. In the event the mother had no contact with the children over Christmas; but we must not forget the substantial difficulties which confront a local authority in supervising contact over Christmas. She was first allowed contact with the children on 30 December 2009, whereupon a pattern of contact began, under which, at a family centre, the mother had periods of contact with J for most of each Monday and most of each Tuesday, to which periods B was brought, after school, to join in the final one and a half hours. But a gap of six days, from Tuesday to Monday, is very substantial in relation to contact between a mother and a baby then aged only five months. We were told that in March even the mother's contact with J was reduced to that final one and a half hours, namely between about 4:00pm and 5:30pm, when B was also able to be present. Mr Reade's instructions from the mother were that the explanation given to her for the reduction was that the local authority were moving towards an adoptive placement for the children. Without the presence in court of the newly allocated worker, Miss Compton-Rickett was unable either to confirm or to deny the accuracy of the mother's instructions to Mr Reade.

28. At the hearing we asked to see the amended interim care plans which, so we had been told, had been drafted in January 2010. There were no copies in court so they were faxed to us from the local authority's offices. It appears that they had been drawn in a hurry and that no one had even read them carefully. For example they stated that the mother supported the proposed plans: that statement must have been carried forward from the care plans in operation prior to 23 December.

29. Recognising, by the end of the hearing on 23 December, that there was no continuing justification for the injunction against communication between the father and the mother, the judge discharged it. On any view there has been a degree of communication between them since that time. The mother makes no secret of the fact that the father helped her to prepare her grounds of appeal; and when both of them appeared before me, unrepresented, on 11 March, they presented as a couple even though, of course, I was unable to discern the extent of their relationship. In considering whether it would be safe, and more broadly in their interests, for the children to return to the care of the mother, no doubt in tightly controlled circumstances if at all, the High Court judge on 6 and 7 May will need to probe the extent of their continuing relationship in some depth.

30. Having already acknowledged the difficulties which faced the judge on 23 December, I am driven to say that the circumstances in which, with his endorsement, the children were removed from the mother that day were in law entirely unacceptable; and, although Mr Reade did not cast his argument under the ECHR, the removal in my view represented a clear infringement of the rights of the children and the mother under Articles 6 and 8 of the Convention. I will draw my concerns into seven propositions.

31. First, no adequate notice of the proposed removal was given to the mother. I accept that there are rare circumstances in which the welfare of the children demands removal without notice; but they did not exist in the present case. When she went to court that day, the mother had no inkling of any plan to remove the children from her. Yes, the local authority were concerned about her return to the home but in the end they had facilitated it and had not thereupon sought to alter their care plans. I appreciate that, according to the local authority, the last straw was piled upon the back of the camel only on the day of the hearing, namely when the

mother expressed an aspiration to secure relaxation of the injunction against her communication with the father. But there was time for amended care plans to be drawn; and there was certainly the opportunity, in my view the necessity, for the local authority to put their new plans to the court through the evidence of their social worker or team manager. Such would have afforded counsel for the mother an opportunity in cross-examination to probe, and to try to demonstrate the insubstantiality of, the grounds for the new plans. In a sentence, the case for immediate removal was neither formulated nor communicated to the mother in a proper manner: see *Re G (Care: Challenge to Local Authority's Decision)*, [2003] EWHC 551, [2003] 2 FLR 42, per Munby J at [45] .

32. Second, perhaps as a result of the failure to formulate the case, the grounds for the change of the care plans do not appear – to me – to have demonstrated that the safety of the children demanded immediate separation from the mother: see *Re LA (Care: Chronic Neglect)* [2009] EWCA Civ 822, [2010] 1 FLR 80, per Thorpe LJ at [7]. It was rightly accepted that it was imperative to protect the children from any exposure to the father. The mother's return home, however understandable; her willingness to allow the father's mother to stay with her the preceding night; and, of course, her expression of wish to be allowed to communicate with him again, albeit (so she said) only on practical matters: all these no doubt rightly raised the index of concern. The facts were, however, albeit not noticed by the judge in his short judgment, that no breach of the injunctions had been found to have been perpetrated by the mother; that no breach of them had even been alleged against her; and that, for that matter, no breach of the injunctions had been found to have been perpetrated even by the father.

33. Third, with respect to him, the judge was party to a wholesale misrepresentation to the mother. He had indicated to her in the morning that, unless she withdrew her aspiration to secure relaxation of the injunction, the children might well be removed from her. Ultimately she did withdraw her aspiration to secure relaxation of the injunction; but the children were removed from her. For the local authority to maintain that the mother's delay, perhaps of about four hours, in withdrawing her aspiration indicated that the withdrawal was not genuine seems to me an inadequate basis for discarding the representation which had been made to her. Indeed, even prior to her change of position, the mother was only indicating that she proposed to try to *persuade the judge* that it was reasonable to relax the injunction: had she continued to try to persuade him but failed to do so, there was no substantial ground for concluding that she would permit, let alone cause, a breach of it.

34. Fourth, the judge's short judgment reflected no proper balancing of the pros and cons of leaving the children in the mother's care. To the charge that his short judgment is focussed primarily upon the mother (see his references to her myopia and in particular to her downfall), the judge would reasonably respond that implicit in every part of the judgment was the need to protect the children from the father. But, surely, a proper balance of the factors required him to note that J was only five months old; that the local authority had never questioned the mother's physical capacity to care for the children; that both of them were well and happy; that B was progressing well at school; that there was a very close bond between the children and the mother; and that (so we were told) neither of the children had ever spent a night away from the mother prior to that date.

35. Fifth, there was no discussion of one obvious way in which the children might be protected from the father without their removal from the mother: namely by a return to the refuge. This possibility had been extensively discussed in the corridor but was not mentioned in court. If it deserved extensive discussion in the corridor, it deserved discussion in court. Perhaps the mother's counsel deserves criticism for not having raised a return to the refuge as a possibility: no doubt he was aware of her extreme reluctance to return to the refuge and he may well have considered that the suggestion of a return to the refuge would weaken his primary case that the children should be allowed to continue to live with her in the home. Nevertheless, in retrospect, it is highly regrettable that from no quarter was this possibility canvassed in court.

36. Sixth, the judge was wrong to survey the local authority's changed plans without considering a crucial feature of them, namely the amount of contact with the children which they proposed to afford to the mother. It was essential that the strong bond between the mother and the children should be maintained and fostered through contact, which, in the light of J's age, needed to be very frequent; it was wrong for the judge to leave arrangements for contact to the discretion of the local authority and wrong for the guardian to remain silent in that regard.

37. And seventh (being alternative to my second proposition), if and to the extent that the removal of the children on that afternoon *was* necessary in order to protect them from the father, the judge should, at least, by further directions, have recognised the summary nature of the enquiry which was all that he had been able to conduct that afternoon. He should have directed that, as a matter of extreme urgency, a further hearing should take place, preferably before himself, as soon as possible after Christmas, at which the local authority should put their case properly, the mother should have a fair opportunity to challenge it and he, the judge, should himself have time properly to consider the merits and demerits of altered care plans with profound ramifications for the future of the children.

Mrs Justice Baron:

38. The reasons given by Wilson LJ for his subscription to the orders which we made on 29 March 2010 mirror my own reasons for having subscribed to them.