Re X Council v B & Ors [2004] EWHC 2015 (Fam)

Case No: LA03C00014

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
LIVERPOOL DISTRICT REGISTRY
(In Private)

Royal Courts of Justice
Strand, London, WC2A 2LL

16 August 2004

B e f o r e :

THE HONOURABLE MR JUSTICE MUNBY

Between:

In the Matter of the B children X Council	**Applicant**
- and -	
B and others	**Respondents**

Mr Ernest Ryder QC and Ms Alison Woodward for the local authority
Ms Margaret de Haas QC and Ms Frances Heaton for the mother
Ms Jane Cross for the father
Ms Gail Owen for the eldest child D
Ms Eleanor Hamilton QC and Mr Adam Wilson for the younger children J and W
Ms Julia Cheetham for the maternal grandparents
Hearing dates : 1 and 20 October 2003 and 3 November 2003
Ms Alison Woodward for the local authority
Ms Frances Heaton for the mother
Ms Jane Cross for the father
Mr Adam Wilson for the younger children J and W
Hearing date : 13 May 2004

HTML VERSION OF JUDGMENT

Mr Justice Munby :

1. These are care proceedings relating to three brothers: D born on 19 November 1987, J born on 20 April 1992 and W born on 1 February 1998. They have an older sister N who was born on 18 February 1985.

2. The family has been known to the local authority and has had extensive involvement with social services since 1988. In recent years the family has endured significant levels of stress and distress. N is seriously ill with an incurable disease which is usually terminal. D has experienced behavioural problems and has been diagnosed as suffering from attention deficit disorder and conduct disorder. J has been diagnosed as suffering from chronic motor or vocal

tic disorder. By the time the proceedings commenced in January 2003 it was the local authority's case that, although the stresses in the family will have contributed to the quality of the parents' care of the children, D and J had suffered significant emotional harm and all three children were likely to suffer significant physical and emotional harm by reason of the parents', and in particular the mother's, extreme and histrionic reaction to family events: for example, their inappropriate management of medication, their recurring failure to seek and follow up appropriate medical advice, their decisions to disengage from medical services and failure to engage with offers of behavioural therapies, and the mother's inability to give accurate information regarding the children's symptoms and medication – the local authority suggested that she was exaggerating or even fabricating the children's symptoms.

3. The parents deny, and have always denied, all the allegations made by the local authority, save that they (and D) acknowledge the significance of the effect that N's circumstances has had upon the family.

4. I must return in due course to describe the events of late 2002 and early 2003 in a little more detail, but for the moment it suffices to record that a strategy meeting was held on 15 November 2002 and that on 16 January 2003 a pre-arranged joint visit was made by two social workers to the family home. According to the local authority the mother refused to discuss the matter, demanded that the social workers leave and said "over my dead body" at the suggestion that the children be taken into local authority foster care. This crisis, as it was perceived by the local authority, precipitated the proceedings.

5. The proceedings were commenced by an application for emergency protection orders ("EPOs") in relation to all four children issued the same day, 16 January 2003. EPOs in respect of the four children, to last until 24 January 2003, were made by the family proceedings court ("FPC") at an ex parte hearing on 17 January 2003. N refused to be placed in care but D agreed and was placed, together with J and W, with emergency foster carers the same day, 17 January 2003. N remained at home being looked after by her parents. On 20 January 2003 the parents applied for the discharge of the EPOs. The same day the local authority applied for care orders in respect of D, J and W. At a hearing in the FPC on 21 January 2003 the parents agreed to withdraw their application to discharge the EPOs. Interim care orders for 28 days in respect of D, J and W were made by consent and the proceedings were transferred by the FPC to the care centre. On 23 January 2003 the proceedings were transferred by the Circuit Judge to the High Court. On 28 January 2003 a children's guardian was appointed. On 31 January 2003 Bennett J gave directions including, importantly, a direction that the matter was to be listed for a contested interim care order hearing on 11 March 2003. On 28 February 2003 the three children were placed with their maternal grandparents; that, as I understand it, obviated the need for the contested interim care order hearing. On 16 April 2003, due to her worsening condition, N was admitted to the relevant NHS trust, where she remains permanently accommodated (having been detained since 6 May 2003 in accordance with section 3 of the Mental Health Act 1983). On 26 June 2003, and against the wishes of the local authority, D returned to the care of his parents. By then he was, of course, 15½ years old and there was probably little in practical terms that the local authority could do. Since then the proceedings in substance have continued only in respect of J and W.

6. In accordance with previous case management directions an experts' meeting took place on 15 September 2003, and an advocates' meeting (by video link) on 23 September 2003, preparatory to a directions hearing which took place (also by video link) before me on 1 October 2003. I conducted a further hearing (again by video link) on 20 October 2003. The final hearing took place on 3 November 2003. It had been fixed to last for 12 days; in the event it took less than a day. The case was not, of course, subject to the Protocol (see *Practice Direction (Care Cases: Judicial Continuity and Judicial Case Management)* [2003] 2 FLR 719), which came into force only on the day of the final hearing, but it was conducted in its latter stages very much in accordance with the spirit of the Protocol. A lengthy final hearing was avoided, very largely as a result of what turned out to be the productive meetings first of the experts and then of the advocates. Very significant amounts of time, and substantial amounts of public money, were saved by the use of video conferencing facilities.

7. By the date of the hearing on 20 October 2003 all the parties and the experts were agreed that the best interests of the children would be safeguarded by their return to the care of their parents, that is, in D's case, the continuation of the status quo. It was also clear that such a decision would accord with the wishes and feelings of the children. The experts recommended that a package of protective steps was necessary that would include an agreed key social worker for the family, identified medical personnel (GPs and specialists) to be involved in all treatment decisions, prescriptions, reviews and correspondence about the same, and a psychological assessment for J to consider ending his Prozac medication. The local authority was additionally recommending a protocol for the administration of all medication for each child and agreements relating to education and the sharing of information between education, health care and social care agencies. The detailed terms of a 'contract' had been agreed between the parents and the local authority with the involvement of health service bodies and the relevant education resources.

8. There was, nonetheless, no agreement between the parents and the local authority either as to the existence of the threshold facts or as to the need for full care orders:

   i) The local authority's case was that there should be care orders in respect of J and W and that if the rehabilitation and protection packages were successful the parents would be encouraged to apply for the discharge of the orders in due course. So far as D was concerned, bearing in mind that he was independently seeking his own medical advice and would be 16 shortly after the final hearing, the local authority was content, if the younger children were protected by care orders, to seek no order in respect of D.

   ii) The parents' case was that if the court was to find the threshold proved and/or was to decide that orders were necessary they would have been adjudged to be abusers and therefore would not put themselves forward as carers, preferring the maternal grandparents to exercise that care in their stead.

9. Out of this seemingly irreconcilable conflict a possible compromise nonetheless emerged. Accordingly, the issue of principle for determination at the hearing on 20 October 2003 was whether exceptionally, in the circumstance that everyone agreed that the children should return home, the management of the rehabilitation should be achieved by the continuation of the interim care orders which had been in place since January 2003.

10. The local authority's case before me on 20 October 2003 was compellingly deployed by Mr Ernest Ryder QC (as he then was) and Ms Alison Woodward, for whose assistance I am most grateful. In summary they sought to persuade me that it was right, and in each of the children's best interests, to work in partnership with the family in circumstances where all were agreed that rehabilitation of the children home was the best option and where agreement had been reached as to a preventative or protective package that accorded with the advice of the experts. The local authority preferred this course to the pursuit of the threshold facts that it asserted (and which the experts, according to Mr Ryder, in part or in whole agreed) but which would reduce any prospect of partnership and rehabilitation to no more than a very remote possibility. It was emphasised that the local authority would not have considered such a course were it not for the experts' confirmation that their assessment of the nature and extent of the risk the children faced was not dependent upon any findings the court might make. Hence the determination of precise threshold facts was not, Mr Ryder said, a pre-requisite to the good care planning that all parties were able to agree.

11. Mr Ryder and Ms Woodward elaborated these arguments in their skeleton argument. They submitted that, having regard to the disputed issues of fact in the case and the agreed rehabilitation plan, an interim care order was a proportionate intervention in the lives of the children and their parents because:

    i) the children would be properly protected by an interim order;

ii) in light of the agreement of the experts, the court was not inhibited in the performance of its judicial task so as to require all necessary evidence to be put before it as a prelude to decision making; and

iii) an interim order provided for a period of planned and purposeful delay.

It was for the court, they said, to decide in the exercise of its discretion whether the point had been reached at which it should withdraw from exercising control over the children and pass that responsibility to the parents or the local authority.

12. I was referred to various authorities (*C v Solihull Metropolitan Borough Council* [1993] 1 FLR 290, *Hounslow London Borough Council v A* [1993] 1 FLR 703, *Buckinghamshire County Council v M* [1994] 2 FLR 506, *Re L (Sexual Abuse: Standard of Proof)* [1996] 1 FLR 116, *Re CH (Care or Interim Care Order)* [1998] 1 FLR 402, *Re R (Care Proceedings: Adjournment)* [1998] 2 FLR 390, *Re Z and A (Contact: Supervision Order)* [2000] 2 FLR 406 and *Re S (Minors) (Care Order: Implementation of Care Plan); Re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10, [2002] 1 FLR 815) said to be supportive of, or at least consistent with, these submissions and with the further submissions that:

i) The court should always be slow to make a full care order which placed the responsibility for a child with the local authority where the child would be properly protected by an interim order and the delay was planned and purposeful.

ii) Although delay is ordinarily inimicable to the welfare of a child, planned and purposeful delay may be beneficial. Some uncertainties relating to a care plan may be suitable for immediate resolution by the court disposing of the care order application; other uncertainties could and should be resolved during a limited period of planned and purposeful delay before the court proceeds to a final determination. Delay for the purpose of ascertaining the success of an agreed rehabilitation plan is a proper delay.

iii) Although it would be an artificial use of the power to make interim care orders where the court is in a position finally to dispose of the application for care orders, it is for the court to decide in the exercise of its discretion when the point has been reached at which it should withdraw from exercising control over a child and pass responsibility to the local authority.

iv) Return of a child unconditionally to the parents might abdicate responsibility when matters were still too uncertain for the court to be confident of their ability to exercise that care. Likewise to make a care order could equally involve an abdication of the court's responsibility to the local authority at a time when a care order might still be inappropriate.

v) In the present case it was appropriate to make interim rather than final care orders to ensure that the local authority would bring the case back to court if the proposed arrangements failed – with the result that the court rather than the local authority would be making the medium to long term decisions about the children.

vi) If the court determined the issues of fact so as to find the threshold proved, it would be constrained to make care orders, with the inevitable result that rehabilitation would be frustrated, despite the agreed evidence that it should occur, and/or that the children would take matters into their own hands without any adequate control or the protection of the court. Although where the court is in a position to make care orders it is not an abdication but is acting in accordance with the intention of the legislation for it to do so, in the present case practical realities indicated that the court was not in a position to make care orders.

vii) In the present case, in contrast to *Re CH*, neither the compromise nor the expert evidence was deficient. Indeed, further enquiry might cause more harm than good.

13. The parents made it clear that they did not agree the threshold facts but would agree to the return of their children under the court's control and with interim care orders remaining in

place until the court was satisfied that its supervision was no longer necessary. The maternal grandparents supported the proposed interim arrangements, as did the guardian acting for J and W. So far as he was concerned, D did not want there to be any continuing orders or proceedings relating to him. He wished there to be an end to the process. He was doing his GCSEs next year and did not want to be involved any longer.

14. I had no hesitation in accepting Mr Ryder's cogent and compelling submissions. In the admittedly unusual circumstances of this case, to have embarked upon a fact-finding hearing would not merely have been completely counter-productive; it would quite plainly have been detrimental to the children's best interests. I readily acknowledge that in the vast majority of cases it is best that the truth should out, whatever it may turn out to be. And the court must be careful not to allow itself to be deterred from doing what is right by parental posturing. But the simple reality which confronted the local authority and the court on 20 October 2003, given what I am satisfied was the parents' utter determination to stick to their stated position, was that to have proceeded with a threshold finding would have made it impossible to proceed with the rehabilitation of the children to their parents that *everyone* agreed was in the circumstances so very much in the children's best interests. Given that no-one was demanding a threshold hearing, and given that the children's best interests demanded that there should not be a threshold hearing, I had no hesitation in endorsing the compromise put before me by Mr Ryder.

15. Accordingly on 20 October 2003 I made interim care orders in respect of J and W. I discharged the existing interim care order in respect of D and directed that there should be "no order" upon the local authority's application for a care order in relation to him. My order was expressed to be made on the basis that:

> "(1) The parties agree that the children J and W should be rehabilitated home and that D should remain at home, each in the care of their parents, but that the process of rehabilitation and the monitoring of the care plans and the arrangements should so far as J and W are concerned be under the protection and control of the court by interim care orders.
>
> (2) The experts agree with the process of rehabilitation provided protective arrangements are in place.
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> (3) An agreement relating to protective arrangements for the children has been signed by the parties prior to the hearing today.
>
> (4) Neither parent agrees any of the threshold facts contended for by the local authority.
>
> (5) The court approves in principle of the agreement to rehabilitate J and W to the care of their parents and for the court to retain control over their care in order to safeguard their welfare by renewable interim care orders for a period not exceeding 12 months and subject to review in 6 months from today.
>
> (6) The children J and W can move from their maternal grandparents' care to that of their parents as soon as the parents and grandparents might agree without further approval of the court being required."

16. The final hearing came on before me, largely as a matter of formality, on 3 November 2003. By then, and in accordance with the order I had made on 20 October 2003, J and W had already returned home. I made a further order, adjourning the applications and providing for a regime of continuing interim care orders (renewable by consent upon written application) during the intervening period until a review hearing to take place in April 2004. In the event that hearing took place on 13 May 2004.

17. The local authority now seeks to withdraw its application for care orders. The local authority's view is that the children's rehabilitation to their parents has been successful. The children present as happy and settled and no concerns have been raised since their return home, whether by the social worker, by the children's schools or by medical professionals. The key social worker has visited and found the parents to be very welcoming and co-operative. The local authority is satisfied that the parents have acted appropriately since the children returned home, that they have co-operated with professionals, and that there is no further need for care orders. It submits that the continuation of the proceedings would accordingly serve no "solid purpose". Indeed, the local authority's view is that the making of any further orders would be not merely unnecessary but unduly intrusive. Moreover, it recognises that, given the parents' stance if the court were to find threshold proved, adverse findings as to the threshold criteria may have a detrimental effect on the welfare of the children. It makes clear, however, that it seeks to withdraw its application because it is satisfied that no order is required following the successful rehabilitation of the children. It maintains, however, that there were at the time the proceedings were issued reasonable grounds to believe that the threshold criteria were met. Nonetheless it seeks to persuade me that it is right, and in each of the children's best interests, for me to give it leave to withdraw its applications for care orders.

18. The local authority submits that the proper order for me to make is an order giving them permission to withdraw the proceedings rather than "no order". Ms Woodward points to *Re F (A Minor) (Care Order: Withdrawal of Application)* [1993] 2 FLR 9 at pp 11 and 13 as authority for the proposition that the making of "no order" would necessitate the continuation of the proceedings and a judicial consideration of the whole case, including the threshold criteria. I express no views on that. I am content to proceed, as is everyone else, on the basis that the local authority is seeking leave to withdraw its applications for care orders.

19. As Ms Woodward points out the application is governed by rule 4.5 of the Family Proceedings Rules 1991. I need not set out the rule, but I think I should set out the well-known passage from the judgment of Waite LJ in *London Borough of Southwark v B* [1993] 2 FLR 559 at p 573 which indicates how the court's discretionary jurisdiction is to be exercised:

> "The paramount consideration for any court dealing with a r 4.5 application is … the question whether the withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned. It is not to be assumed, when determining that question, that every child who is made the subject of care proceedings derives an automatic advantage from having them continued. There is no advantage to any child in being maintained as the subject of proceedings that have become redundant in purpose or ineffective in result. It is a matter of looking at each case to see whether there is some solid advantage to the child to be derived from continuing the proceedings."

20. Ms Woodward submits that the use of a series of interim care orders under which the rehabilitation of the children has been successfully effected, and under which the parents have co-operated fully with the key social worker, the schools and medical professionals, has enabled the local authority to conclude that further orders are unnecessary. There is, she says, no "solid advantage" to the children in continuing the proceedings. On the contrary, she accepts that the continuation of the proceedings might very well be detrimental to the welfare of the children, not least in relation to the continuation of statutory visits, LAC reviews, and so on, but also because of the potentially damaging effect on the parents, and consequently the children, of potentially adverse and damaging threshold findings.

21. The guardian supports the local authority's application.

22. The parents remain firmly of the view that the threshold criteria are not met and that there were never any grounds for intervention by the local authority. They do not accept that the children have been "rehabilitated" to their care, whether successfully or not. The children did not need to be rehabilitated; they have merely been returned – of course successfully – to a loving family from whom they should never have been removed in the first place. But the

parents are prepared to consent to the local authority's application, so long as their position is recorded in any order I make.

23. I have no hesitation in agreeing that the proceedings are not serving any useful purpose and that, whatever may have been the position previously, both the local authority and the court should now disengage and leave the parents alone to bring up their children.

24. Accordingly, on 13 May 2004 I made an order giving the local authority leave to withdraw its applications for care orders in relation to J and W. The order set out the basis upon which it was being made:

> "UPON IT BEING RECORDED that the Applicant Local Authority maintains:
>
> (i) that there were reasonable grounds to believe that the threshold criteria were met at the initiation of protective measures, and
>
> (ii) that it was appropriate to issue proceedings,
>
> BUT that it is satisfied that no order is now necessary following the successful rehabilitation of the children to the parents' care
>
> AND UPON IT BEING FURTHER RECORDED that the First Respondent mother and the Second Respondent father maintain their position as follows (this being the basis upon which they agree to the withdrawal of the Local Authority's application):
>
> (i) They have never accepted that there were reasonable grounds for intervention by way of Emergency Protection Orders and subsequent Care Proceedings;
>
> (ii) There has never been a judicial determination of this matter, save that an Emergency Protection Order was granted, and that was based purely on opinion and not fact;
>
> (iii) They assert that the Local Authority has only ever relied upon opinions which were unsound in any event, and that there was no evidence in support of such opinions;
>
> (iv) They do not accept that the Emergency Protection Orders were justified and they await judgement in respect of the same;
>
> (v) They contend that the proceedings and their effect have been:
>
> (a) an abuse of process, and
>
> (b) abusive to the family, and continue to be so;
>
> (vi) They therefore believe that the Care Proceedings must be brought to a swift resolution
>
> AND UPON all parties agreeing to the Local Authority's application to withdraw."

25. The result is that no-one will ever know what the outcome would have been had there been a contested threshold hearing. On one view that is less than satisfactory. But I have no doubt that the actual outcome – by which I refer both to the orders I made on 20 October 2003 and 3 November 2003 and to the further order I have now made – is plainly in the best interests of the children. There are occasions – rare perhaps, but this is one of them – where however desirable the pursuit of the truth may usually be it has to give way to a child's true best

interests. There are situations, and this is one, where issues are best left unresolved by the judicial process and best consigned to whatever resolution may eventually emerge within the privacy of the family.

26. I express no views as to what the outcome might have been had there been a threshold hearing. There is no need for me to do so and it would not be right. But in fairness to the local authority – and in saying this I do no injustice to the parents – I think I ought to make clear that there was prima facie evidence to support at least some of the local authority's concerns. Whether that evidence would have survived a contested hearing unscathed I do not know. I should also make clear that I was satisfied when I made the interim care orders that there were, within the meaning of section 38 of the Children Act 1989, reasonable grounds for believing that some at least of the local authority's concerns were made out.

27. There are two other matters I must deal with. The first is this. The care plans for the two younger children, J and W, provided, as I have said, for their rehabilitation to the parents. In the form in which they were presented to me on 1 October 2003 each care plan contained the following paragraph:

> "Should a situation arise where the local authority believes that [the child] can only be protected outside the parental home first consideration will always be given to placing him with his maternal grandparents. The local authority will endeavour to give the parents at least 24 hours notice of the removal of [the child] unless the situation is deemed to be an emergency."

The draft contract between the parents and the local authority which was an integral part of the plan likewise provided that:

> "Should it be necessary to move the children from the family home first consideration will be given to placing them with the maternal grandparents and notice of our intention will be given wherever possible."

28. I pointed out to Mr Ryder that this approach failed, as it seemed to me, to accord with the principles as I had set them out in *Re G (Care: Challenge to Local Authority's Decision)* [2003] EWHC 551 (Fam), [2003] 2 FLR 42. Very properly Mr Ryder did not demur, and when revised care plans for J and W were put before me at the next hearing on 20 October 2003 the offending paragraph had been revised:

> "Should a situation arise where the local authority believes that [the child] can only be protected outside the parental home first consideration will always be given to placing him with his maternal grandparents. If the local authority decides that [the child] should be removed from his parents' care, for whatever reason, the matter will be put before the court for determination."

Very similar words appeared in the revised draft contract.

29. I make no apology for repeating what I said in *Re G* at paras [43]-[45]:

> "[43] The fact that a local authority has parental responsibility for children pursuant to s 33(3)(a) of the Children Act 1989 does not entitle it to take decisions about those children without reference to, or over the heads of, the children's parents. A local authority, even if clothed with the authority of a care order, is not entitled to make significant changes in the care plan, or to change the arrangements under which the children are living, let alone to remove the children from home if they are living with their parents, without properly involving the parents in the decision-making process and without giving the parents a proper opportunity to make their case before a decision is made. After all, the fact that the local authority also has parental responsibility does not deprive the parents of their parental responsibility.

> [44] A local authority can lawfully exercise parental responsibility for a child only in a manner consistent with the substantive and procedural requirements of Art 8. There is nothing in s 33(3)(b) of the Children Act 1989 that entitles a local authority to act in breach of Art 8. On the contrary, s 6(1) of the Human Rights Act 1998 requires a local authority to exercise its powers under both s 33(3)(a) and s 33(3)(b) of the Children Act 1989 in a manner consistent with both the substantive and the procedural requirements of Art 8.
>
> [45] In a case such as this, a local authority, before it can properly arrive at a decision to remove children from their parents, must tell the parents (preferably in writing) precisely what it is proposing to do. It must spell out (again in writing) the reasons why it is proposing to do so. It must spell out precisely (in writing) the factual matters it is relying on. It must give the parents a proper opportunity to answer (either orally and/or in writing as the parents wish) the allegations being made against them. And it must give the parents a proper opportunity (orally and/or in writing as they wish) to make representations as to why the local authority should not take the threatened steps. In short, the local authority must involve the parents properly in the decision-making process. In particular, the parents (together with their representatives if they wish to be assisted) should normally be given the opportunity to attend at, and address, any critical meeting at which crucial decisions are to be made."

30. I acknowledged at para [58] that of course

> "There may be occasions of emergency or extreme urgency when, for one reason or another, it is not possible for a local authority to involve parents as fully in the decision-making process as would normally be appropriate. Circumstances necessarily change cases."

But I went on to comment that "I would expect such cases to be rare."

31. Whilst the revised documents probably went further than the law requires in stipulating for prior judicial sanction to any proposed removal, the original drafts, in my judgment, were not acceptable. I draw attention to this matter, yet again, because it is one of fundamental importance. It would seem that not all local authorities have yet appreciated the imperative demands of the Human Rights Act 1998 or yet adjusted their day to day practices to meet those demands.

32. The other issue touches on highly important matters of principle and practice. It relates to the EPOs obtained on 17 January 2003.

33. This is a topic which I touched on in *Re M (Care Proceedings: Judicial Review)* [2003] EWHC 850 (Admin), [2003] 2 FLR 171, but the present case raises a number of points of real concern – real concern, that is, not just to the parents but also to the court – that necessitates a rather fuller analysis. For reasons which if not obvious will shortly become apparent, judges of the Family Division rarely if ever have occasion to consider this jurisdiction. The present case offers an important and timely opportunity to do so.

34. An EPO, summarily removing a child from his parents, is a terrible and drastic remedy. The European Court of Human Rights has rightly stressed (see *P, C and S v United Kingdom* (2002) 35 EHRR 31, [2002] 2 FLR 631, paras [116], [131] and [133]) that such an order is a "draconian" and "extremely harsh" measure, requiring "exceptional justification" and "extraordinarily compelling reasons". That case involved, as did my own decision in *Re M*, the removal of a new-born baby, whilst the present case involved the removal of older children. But although the circumstances and some of the sequelae may be different the principles are surely the same. After all, the child of 5 or 10 who, as in the present case, is suddenly removed from the parents with whom he has lived all his life is exposed to something the new-born baby is mercifully spared: being suddenly wrenched away in frightening – perhaps terrifying – circumstances from everything he has known and loved and taken away by people

and placed with other people who, however caring and compassionate they may be, are in all probability total strangers.

35. Of course, and as I acknowledged in *Re M* (see at para [40]),

> "as the Strasbourg court itself recognised, and as, unhappily, we know all too well, there are cases where the need for such highly intrusive emergency intervention is imperatively demanded".

In a number of cases the Strasbourg court has recognised that the emergency removal of children under an EPO (or its equivalent) is in principle entirely compatible with the Convention and, moreover, that there may be cases where an ex parte (without notice) application is justified: see generally *K and T v Finland* (2000) 31 EHRR 18, [2000] 2 FLR 79, [2000] ECHR 174, (2001) 36 EHRR 18, [2001] 2 FLR 707, [2001] ECHR 465 , *P, C and S v United Kingdom* (2002) 35 EHRR 31, [2002] 2 FLR 631, [2002] ECHR 604, *Venema v The Netherlands* [2003] 1 FLR 552,[2002] ECHR 823, *Covezzi and Morselli v Italy* (2003) 38 EHRR 28, [2003] ECHR 235 and *Haase v Germany* [2004] 2 FLR 39, [2004] ECHR 142 . But however compelling the case for intervention may be, both the local authority which seeks an EPO and the justices in the FPC who grant such an order assume a heavy burden of responsibility.

36. The inevitable consequences inherent in the grant of any EPO are exacerbated by a number of what I venture to suggest are not entirely satisfactory features of the statutory scheme laid down in the Children Act 1989 and the relevant rules:

i) An EPO can be made initially for a period of 8 days and extended for a further period of 7 days: sections 45(1), 45(5) and 45(6) of the Act.

ii) The application for an EPO and the EPO itself are only required to be served on the parents within 48 hours *after* the EPO has been made: rules 4(4)(ii) and 21(8)(b) of the Family Proceedings Courts (Children Act 1989) Rules 1991 (cf rule 4(4)(ii) of the Family Proceedings Rules 1991).

iii) There is no appeal against either the making or the extension of an EPO: sections 45(10)(a) and 45(10(b).

iv) No application for the discharge of an EPO can be heard until 72 hours after the EPO was made: section 45(9).

v) There is no appeal against the refusal to discharge an EPO: section 45(10)(c).

vi) A parent who was present (even though unrepresented) at the original hearing cannot apply to have the EPO discharged: section 45(11)(a).

vii) Where a child subject to an EPO has been returned by the local authority to his parent in accordance with section 44(10), the local authority, whilst the EPO remains in force, may again remove the child – and without any form of judicial intervention – if it appears to the local authority that "a change in the circumstances of the case makes it necessary … to do so": section 44(12).

37. So far as the child is concerned there is the further problem arising out of the current difficulties with CAFCASS, which mean that too many children do not have the benefit of a children's guardian either at the time the EPO is made or, thereafter, when the child (or a children's guardian) might wish to make an application under section 45(8)(a) for the discharge of the EPO.

38. Whether the matter be viewed from the perspective of the child or the parent, it is not immediately obvious how some of this is altogether compatible with the increasingly rigorous approach to Article 8 of the Convention now being adopted by the Strasbourg court. The statutory scheme means that a child can be removed from a parent for up to 15 days without there being any right of appeal; that a child can be removed by an ex parte (without notice) EPO and without any written or oral reasons having to be given for 2 days; and that no steps to set aside even an ex parte EPO can be taken for 3 days. I note in this connection that in *Covezzi and Morselli v Italy* the court, although it does not appear to have treated the absence of any appeal against an EPO as ipso facto amounting to a breach of the Convention, did hold (see at paras [132]-[139]) that in all the circumstances, including the fact that there was no right of appeal, there had been a breach of Article 8.

39. Long before the enactment of the Human Rights Act 1998 the absence of any right of appeal had been criticised: see the comments of Douglas Brown J in *Essex County Council v F* [1993] 1 FLR 847 and of Johnson J in *Re P (Emergency Protection Order)* [1996] 1 FLR 482. Johnson J said that "consideration should be given to providing a mechanism for review", adding that "that mechanism would have to be one which could be operated very quickly." Douglas Brown J suggested that judicial review might lie if the FPC had acted unreasonably.

40. There is now quite a long line of cases showing that judicial review is not normally an appropriate remedy in cases where emergency protection or care proceedings are either threatened or on foot: see *Re C (Adoption: Religious Observance)* [2002] 1 FLR 1119, *Re L (Care Proceedings: Human Rights Claims)* [2003] EWHC 665 (Fam), [2003] 2 FLR 160, *Re M (Care: Proceedings: Judicial Review)* [2003] EWHC 850 (Admin), [2003] 2 FLR 171, and *Re S (Habeas Corpus); S v Haringey London Borough Council* [2003] EWHC 2734 (Admin), [2004] 1 FLR 590, all of which were approved by the Court of Appeal in *Re V (Care Proceedings: Human Rights Claims)* [2004] EWCA Civ 54, [2004] 1 FLR 944. But each of those cases proceeded on the assumption that the FPC (or the Family Division on an appeal from the FPC) would be able to do full justice to the parties within the EPO or care proceedings. Here, by contrast, the Family Division is powerless to act. It is by no means obvious to me that judicial review would not lie, in an appropriate case, to correct error or injustice. The cases to which I have referred should not, as it seems to me, be read as necessarily precluding such an application in an appropriate case. There are, after all, other family law contexts in which the absence of any effective right of appeal has prompted the court to acknowledge that judicial review is or may be an appropriate remedy: see Cazalet J's observations in *T v Child Support Agency* [1998] 1 WLR 144 and my own judgments in *R (Marsh) v Lincoln District Magistrates' Court* [2003] EWHC 956 (Admin) and *Re L, L v P and CSA* [2003] EWHC 1682 (Fam). As I said in *Marsh* at para [50], speaking of the Administrative Court:

> "It is the historic and vital function of this court when exercising its supervisory jurisdiction over Justices to ensure, if not that justice is done, at the very least that demonstrated injustice is not allowed to continue uncorrected."

41. That said, there is no need for me to express any concluded view on a matter, not argued out in front of me, which is really one for another day. So I say no more about it, save to emphasise one rather obvious point. These lacunae in the statutory scheme make it all the more important that both the local authority and the justices in the FPC approach every application for an EPO with an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the Convention rights of both the child and the parents.

42. I turn, therefore to the Convention. Pointing to the long line of Strasbourg jurisprudence on the topic, the Court of Appeal has repeatedly emphasised that any intervention under Part IV or Part V of the Act must be proportionate to the legitimate aim of protecting the welfare and interests of the child. As Hale LJ (as she then was) said in *Re O (Supervision Order)* [2001] EWCA Civ 16, [2001] 1 FLR 923, at para [28], "proportionality … is the key." The interference with family life which the exercise of such powers necessarily entails can only be justified by what she referred to in *Re C and B (Care Order: Future Harm)* [2001] 1 FLR 611 at para [34] as "the overriding necessity of the interests of the child." More recently, in *Re B (Care:*

Interference with Family Life) [2003] EWCA Civ 786, [2003] 2 FLR 813, Thorpe LJ at para [34] said that:

> "where the application is for a care order empowering the local authority to remove a child or children from the family, the judge in modern times may not make such an order without considering the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 Art 8 rights of the adult members of the family and of the children of the family. Accordingly he must not sanction such an interference with family life unless he is satisfied that that is both necessary and proportionate and that no other less radical form of order would achieve the essential end of promoting the welfare of the children."

43. That last observation reflects the well-established principle, derived from section 1(5) of the Act, read in conjunction with section 1(3)(g), that, particularly in the context of public law proceedings, the court should adopt a 'non-interventionist' or 'least interventionist' approach. As Johnson J said in *B v B (A Minor) (Residence Order)* [1992] 2 FLR 327 at p 328:

> "It is inherent to the philosophy underlying the Children Act 1989 that Parliament has decreed that the State, whether in the guise of a local authority or the court, shall not intervene in the life of children and their families unless it is necessary to do so".

Hale J (as she then was) elaborated this in *Re O (Care or Supervision Order)* [1996] 2 FLR 755 at p 760:

> "the court should begin with a preference for the less interventionist rather than the more interventionist approach. This should be considered to be in the better interests of the children … unless there are cogent reasons to the contrary."

In *Oxfordshire County Council v L (Care or Supervision Order)* [1998] 1 FLR 70 at p 74 she said that:

> "one should approach these cases on the basis that the less Draconian order was likely to be better for the child than the more Draconian or interventionist one."

The same principle applies whether, as in those cases, the choice is between making a supervision order or a care order or, as in *Re K (Supervision Orders)* [1999] 2 FLR 303, between a supervision order and no order at all or, I would add, between an EPO and a child assessment order ("CAO") under section 43.

44. All the more so, of course, in the context of an interim care order or EPO when there have as yet been no adverse findings against the parent. As Thorpe LJ said in *Re H (a child) (interim care order)* [2002] EWCA Civ 1932, [2003] 1 FCR 350, at para [39]:

> " … the Articles 6 and 8 rights of the parents required the judge to abstain from premature determination of their case for the future beyond the final fixture, unless the welfare of the child demanded it. In effect, since removal from these lifelong parents to foster parents would be deeply traumatic for the child, and of course open to further upset should the parents' case ultimately succeed, that separation was only to be contemplated if B's safety demanded immediate separation."

He then went on (para [40]) to consider whether the evidence was sufficient to "sustain the submission that separation was essential to secure B's safety", concluding that it was not.

45. All this, of course, mirrors the Strasbourg jurisprudence, which for present purposes can best be summarised by what the court has very recently said in *Haase v Germany* at paras [90]-[95]:

"[90] … it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to taking the child into public care, was carried out prior to implementation of such a measure.

[91] Furthermore, the taking of a new-born baby into public care at the moment of its birth is an extremely harsh measure. There must be extraordinarily compelling reasons before a baby can be physically removed from its mother, against her will, immediately after birth as a consequence of a procedure in which neither she nor her partner has been involved.

[92] Following any removal into care, a stricter scrutiny is called for in respect of any further limitations by the authorities, for example on restrictions on parental rights and access, and on any legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed.

[93] The taking into care of a child should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit, and any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and child. In this regard a fair balance has to be struck between the interests of the child remaining in care and those of the parent in being reunited with the child. In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development.

[94] Whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8. The Court must therefore determine whether, having regard to the circumstances of the case and notably the importance of the decisions to be taken, the applicants have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests.

[95] The Court accepts that when action has to be taken to protect a child in an emergency, it may not always be possible, because of the urgency of the situation, to associate in the decision-making process those having custody of the child. Nor may it even be desirable, even if possible, to do so if those having custody of the child are seen as the source of an immediate threat to the child, since giving them prior warning would be liable to deprive the measure of its effectiveness. The Court must however be satisfied that the national authorities were entitled to consider that there existed circumstances justifying the abrupt removal of the child from the care of its parents without any prior contact or consultation. In particular, it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to the removal of the child from its family, was carried out prior to the implementation of a care measure. The fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents; there must exist other circumstances pointing to the "necessity" for such an interference with the parents' right under Article 8 to enjoy a family life with their child."

The court added at para [99]:

" … before public authorities have recourse to emergency measures in such delicate issues as care orders, the imminent danger should be actually established. It is true

> that in obvious cases of danger no involvement of the parents is called for. However, if it is still possible to hear the parents of the children and to discuss with them the necessity of the measure, there should be no room for an emergency action, in particular when, like in the present case, the danger had already existed for a long period."

46. I draw particular attention to the court's reference to the test as being one of "necessity" and also to the requirement that "imminent danger" must be "actually established". I also draw attention to the court's statement (para [93]) that:

> "The taking into care of a child should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit, and any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and child"

This derives from what the court had earlier said in *Johansen v Norway* (1996) 23 EHRR 33, a case where the court had to consider a permanent placement with a view to adoption. At para [78] it said:

> "These measures were particularly far-reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests"

47. Moreover in this as in other contexts Article 8 imposes *positive* obligations on the State – here on the local authority. As the court had earlier said in *Hokkanen v Finland* (1994) 19 EHRR 139 at para [55]:

> "The essential object of Art 8 is to protect the individual against arbitrary interference by the public authorities. There may in addition be positive obligations inherent in an effective 'respect' for family life. Whilst the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition, the applicable principles are similar …. In previous cases dealing with issues relating to the compulsory taking of children into public care and the implementation of care measures, the Court has consistently held that Art 8 includes a right for the parent to have measures taken with a view to his or her being reunited with the child and an obligation for the national authorities to take such action."

48. And in acknowledging the State's – the local authority's – positive obligations we must also give effect to the long recognised principle (see *Johansen v Norway* at para [88] and *Haase v Germany* at para [54]) that in cases such as this:

> "there is a duty to exercise exceptional diligence in view of the risk that the passage of time may result in a de facto determination of the matter"

49. What does this mean in the context of an EPO? The statutory scheme to be found in sections 43-45 of the Act provides a number of clues. It provides both the local authority and the FPC with a carefully calibrated hierarchy of means by which the State's response to a child's perceived needs can be met. I do not propose to embark upon an exhaustive exegesis but I do wish to draw attention to the following features of the statutory scheme:

i) Section 44(1) identifies two grounds upon which an EPO removing a child from his parent can be made on the application of a local authority: (1) that enquiries being made by the local authority under section 47(1)(b) are being frustrated (section 44(1)(b)); and (2) that there is reasonable cause to believe that the child is likely to suffer significant harm if not removed to accommodation provided by the local authority (section 44(1)(a)(i)). If the real purpose of the local authority's application is to enable it to have the child assessed then consideration

should be given to whether that objective cannot equally effectively, and more proportionately, be achieved by an application for, or by the making of, a CAO. Any order must provide for the least interventionist solution consistent with the preservation of the child's immediate safety

ii) Section 45(1) provides that an EPO "shall have effect for such period, not exceeding eight days, as may be specified in the order." I suspect that all too often EPOs are made unthinkingly or automatically for the maximum period of 8 days. That is simply not acceptable. No EPO should be made for any longer than is absolutely necessary to protect the child. Where the EPO is made on an ex parte (without notice) application very careful consideration should be given to the need to ensure that the initial order is made for the shortest possible period commensurate with the preservation of the child's immediate safety. If all this means that FPCs have to rearrange their sitting patterns, then so be it. The period for which a child is to be removed must be determined – indeed, consistently with the Convention it can lawfully only be determined – by reference to the needs of the child and having regard to the rights of the parents. Such fundamental matters are not to be regulated by the non-availability of courts or judges.

iii) Exactly the same principles apply to any application under section 45(4) for an extension of an EPO.

iv) Although an EPO confers on the local authority both parental responsibility (see section 44(4)(c)) and the right to remove the child at any time to accommodation provided by the local authority (section 44(4)(b)(i)), the local authority's exercise of these powers is strictly limited. Section 44(5)(b) provides that the local authority may exercise its parental responsibility only in such manner "as is reasonably required to safeguard or promote the welfare of the child". Section 44(5)(a) provides that the local authority shall exercise its power of removal under section 44(4)(b)(i) "only … in order to safeguard the welfare of the child." These are real and important limitations. The local authority must, in particular, apply its mind very carefully to whether removal is essential in order to secure the child's immediate safety. The mere fact that the local authority has obtained an EPO is not of itself enough. The FPC decides whether to make an EPO. But the local authority decides whether to remove. Section 44(5) requires a process within the local authority whereby there is a further consideration of the action to be taken *after* the EPO has been obtained. No procedure is specified, and I accept of course that it is sufficient if the social worker considers the point before removing the child. That said, it would obviously be prudent for local authorities to have in place procedures to ensure both that the required decision making actually takes place and that it is appropriately documented. For, as *P, C and S v United Kingdom* shows (see below), the Strasbourg court is concerned about the process of decision making *after* the EPO has been obtained. In particular, it is concerned to ensure that the local authority, even after it has obtained an EPO, considers less drastic alternatives to emergency removal. As the court said in *Haase v Germany* at para [101]:

> "it [is] incumbent on the competent national authorities to examine whether some less intrusive interference into family life, at such a critical point in the lives of the parents and child, [is] not possible."

Failure to comply with this requirement may expose the local authority to claims that it has acted unlawfully, notwithstanding the EPO. It has even been suggested, though I express no views on the point, that removal without having first considered alternative ways of safeguarding the child, and therefore in breach of section 44(5), would not merely be ultra vires but also expose the local authority to an action on behalf of the child for false imprisonment.

v) Sections 44(10)(a) and 44(11)(a) impose on the local authority a mandatory (it "shall") obligation to return a child who it has removed under section 44(4)(b)(i) to the parent from whom the child was removed if "it appears to [the local authority] that it is safe for the child to be returned." This imposes on the local authority a duty – a continuing duty – to keep the case under review day by day so as to ensure that parent and child are separated for no longer than is necessary to secure the child's safety. I refer in this connection to what the

court said in *Hokkanen v Finland* at para [55], in *Johansen v Norway* at paras [78] and [88] and in *Haase v Germany* at paras [54] and [93] (quoted above).

vi) Section 44(13) requires the local authority, subject only to any direction given by the FPC under section 44(6), to allow a child who is subject to an EPO "reasonable contact" with his parents. In relation to contact I repeat what I said in *Re M* at para [44]:

> "If a baby is to be removed from his mother, one would normally expect arrangements to be made by the local authority to facilitate contact on a regular and generous basis. It is a dreadful thing to take a baby away from his mother: dreadful for the mother, dreadful for the father and dreadful for the baby. If the State, in the guise of a local authority, seeks to intervene so drastically in a family's life – and at a time when, ex hypothesi, its case against the parents has not yet even been established – then the very least the State can do is to make generous arrangements for contact. And those arrangements must be driven by the needs of the family, not stunted by lack of resources. Typically, if this is what the parents want, one will be looking to contact most days of the week and for lengthy periods. And local authorities must be sensitive to the wishes of a mother who wants to breast-feed and must make suitable arrangements to enable her to do so – and when I say breast-feed I mean just that, I do not mean merely bottle-feeding expressed breast milk. Nothing less will meet the imperative demands of the European Convention. Contact two or three times a week for a couple of hours a time is simply not enough if parents reasonably want more."

I draw attention also to what the court said in *Haase v Germany* at para [101]:

> " … the removal of the new-born baby from the hospital was an extremely harsh measure. It was a step which was traumatic for the mother and placed her own physical and mental health under a strain, and it deprived the new-born baby of close contact with its natural mother and, as pointed out by the applicants, of the advantages of breast-feeding. The removal also deprived the father of being close to his daughter after the birth."

I emphasise: arrangements for contact must be driven by the needs of the family, not stunted by lack of resources. And I reiterate what the court said in *Haase v Germany* at para [92]:

> "Following any removal into care, a stricter scrutiny is called for in respect of any further limitations by the authorities, for example … restrictions on parental … access".

50. I wish to emphasise in particular the points I have made in paragraph (iv) above. Their importance is highlighted by *P, C and S v United Kingdom*, where the court criticised the manner in which a local authority implemented the EPO – it separated the child from the mother at birth – because it had not been shown that supervision of the mother and child in hospital would not have sufficed to protect the child from harm. There was a breach of Article 8 because the child was removed in circumstances where the local authority, although it had properly obtained an EPO, could not justify the steps it had taken *after* the order had been made. The court said:

> "[130] In the circumstances, the court considers that the decision to obtain the emergency protection order after S's birth may be regarded as having been necessary in a democratic society to safeguard the health and rights of the child. The local authority had to be able to take appropriate steps to ensure that no harm came to the baby and, at the very least, to take the legal power to prevent C or any other relative removing the baby with a view to foiling the local authority's actions, and thereby placing the baby at risk.

> [131] It has nonetheless given consideration as to the manner of implementation of the order, namely, the steps taken under the authority of the order …
>
> [132] The reasons put forward by the Government for removing the baby from the hospital, rather than leaving her with her mother or father under supervision, are that the hospital staff stated that they could not assure the child's safety and alleged tensions with the family. No details or documentary substantiation of this assertion are provided. P, who had undergone a caesarean section and was suffering the after-effects of blood loss and high blood pressure, was, at least in the first days after the birth, confined to bed. Once she had left the hospital, she was permitted to have supervised contact visits with S. It is not apparent to the court why it was not at all possible for S to remain in the hospital and to spend at least some time with her mother under supervision. Even on the assumption that P might be a risk to the baby, her capacity and opportunity for causing harm immediately after the birth must be regarded as limited, considerably more limited than once she was discharged. Furthermore, on the information available to the authorities at that stage, P's manifestation of the syndrome, sometimes known as MSBP, indicated a prevalence for exaggerating symptoms of ill-health in her children and that she had gone so far as to use laxatives to induce diarrhoea. Though the harm which such conduct poses to a child, particularly if continued over a long period of time cannot be underestimated, there was in the present case no suspicion of life-threatening conduct. This made the risk to be guarded against more manageable and it has not been shown that supervision could not have provided adequate protection against this risk, as was the case in the many contact visits over the months leading up to the care proceedings when both parents were allowed to feed the baby.
>
> [133] The court concludes that the draconian step of removing S from her mother shortly after birth was not supported by relevant and sufficient reasons and that it cannot be regarded as having been necessary in a democratic society for the purpose of safeguarding S. There has therefore been, in that respect, a breach of the applicant parents' rights under Art 8 of the Convention."

The court made the same point again in *Haase v Germany* at paras [92]-[93] (quoted above).

51. So much for matters of substance. What of procedure? I begin with what I said in *Re M* at para [44]:

> "The evidence in support of the application for such an order must be full, detailed, precise and compelling. Unparticularised generalities will not suffice. The sources of hearsay evidence must be identified. Expressions of opinion must be supported by detailed evidence and properly articulated reasoning.
>
> Save in wholly exceptional cases, parents must be given adequate prior notice of the date, time and place of any application by a local authority for either an emergency protection order or an interim care order. They must also be given proper notice of the evidence the local authority is relying upon."

52. Where the application for an EPO is made ex parte (without notice) the burden on the local authority is even heavier. In the first place, the local authority must make out a compelling case for applying without first giving the parents notice. As I have already observed, the Strasbourg court accepts that there may be situations justifying an ex parte application. Thus in *P, C and S v United Kingdom* the court specifically held (para [127]) that the local authority could not be criticised for using the ex parte procedure, and in *Covezzi and Morselli v Italy* the challenge failed even though the application had been made without notification to the parents. But in *Venema v The Netherlands*, where the order was made without notification to the parents, and without there having been any discussion with the parents, this lack of involvement was held (see paras [98]-99]) to have been a breach of Article 8, the parents having been presented with "a fait accomplis without sufficient justification". Likewise in *Haase v Germany*, where there had been an ex parte application, the court held (see paras

[96]-[105]) that there had in all the circumstances been a breach of Article 8. In particular it held (at para [99]) that there had been no urgency as to justify the making of an ex parte order.

53. An ex parte application will normally be appropriate only if the case is genuinely one of emergency or other great urgency – and even then it should normally be possible to give some kind of albeit informal notice – or if there are compelling reasons to believe that the child's welfare will be compromised if the parents are alerted in advance to what is going on. As the court said in *Venema v The Netherlands* at paras [92]-[93]:

> "[92] It is essential that a parent be placed in a position where he or she may obtain access to information which is relied on by the authorities in taking measures of protective care or in taking decisions relevant to the care and custody of a child. Otherwise, the parent will be unable to participate effectively in the decision-making process or put forward in a fair or adequate manner those matters militating in favour of his or her ability to provide the child with proper care and protection.
>
> [93] The court accepts that when action has to be taken to protect a child in an emergency, it may not always be possible, because of the urgency of the situation, to associate in the decision-making process those having custody of the child. Nor, as the Government point out, may it even be desirable, even if possible, to do so if those having custody of the child are seen as the source of an immediate threat to the child, since giving them prior warning would be liable to deprive the measure of its effectiveness. The court must however be satisfied that the national authorities were entitled to consider that there existed circumstances justifying the abrupt removal of the child from the care of its parents without any prior contact or consultation. In particular, it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to the removal of the child from its family, was carried out prior to the implementation of a care measure."

54. Secondly, the evidential burden on the local authority is even heavier if the application is made ex parte. I need not repeat here what I have previously said on this topic in *Re W (Ex Parte Orders)* [2000] 2 FLR 927, in *Kelly v BBC* [2001] 1 FLR 197 and in *Re S (Ex Parte Orders)* [2001] 1 FLR 308. In the latter case at pp 314, 320, I summarised the general principle as follows:

> "The burden on those who apply for ex parte relief is … a heavy one … Those who seek relief ex parte are under a duty to make the fullest and most candid and frank disclosure of all the relevant circumstances known to them. This duty is not confined to the material facts: it extends to all relevant matters, whether of fact or of law. The principle is as applicable in the Family Division as elsewhere."

As I had previously made clear in *Kelly* at p 239, these principles are as applicable to cases involving children as to any other type of case. Indeed, and for reasons that hardly need elaborating, they might be thought to be particularly applicable, and the need for meticulous compliance to be all the more pressing, in the context of relief as draconian as an ex parte EPO.

55. Thirdly, there is the problem presented by the ex parte application made otherwise than on the basis of wholly written evidence. There is, of course, nothing objectionable as such in that, for section 45(7)(b) permits the FPC to hear oral evidence. But it is important that those who are not present should nonetheless be able to know what oral evidence and other materials have been put before the FPC. Otherwise their ability to apply under section 45(8) for the discharge of the EPO may be compromised. As I said in *Re S* at p 320:

> "It is an elementary principle of natural justice that a judge cannot be shown evidence or other persuasive material in an ex parte application on the basis that it is not at a

> later stage to be revealed to the respondent. The respondent must have an opportunity to see the material which was deployed against him at the ex parte hearing and an opportunity, if he wishes to apply for the discharge or variation of the [order] either on the return day or earlier, to submit evidence in answer and, in any event, to make submissions about the applicant's evidence.
>
> It follows that those who obtain ex parte … relief are under an obligation to bring to the attention of the respondent, and at the earliest practicable opportunity, the evidential and other persuasive materials on the basis of which the ex parte [order] was granted."

It is therefore particularly important that FPCs comply meticulously with the mandatory requirements of rules 20, 21(5) and 21(6) of the Family Proceedings Courts (Children Act 1989) Rules 1991. The FPC must "keep a note of the substance of the oral evidence" and must also record in writing not merely its reasons but also any findings of fact.

56. Finally, I draw attention to some other points that I made in *Re S* at p 322:

> "Persons injuncted ex parte are entitled to be given, if they ask, proper information as to what happened at the hearing and to be told, if they ask, (i) exactly what documents, bundles or other evidential materials were lodged with the court either before or during the course of the hearing and (ii) what legal authorities were cited to the judge.
>
> The applicant's legal representatives should respond forthwith to any reasonable request from the respondent or his legal representatives either for copies of the materials read by the judge or for information about what took place at the hearing.
>
> Given this, it would be prudent for those acting for the applicant in such a case to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide."

I see no reason why, mutatis mutandis, exactly the same principles should not apply in the case of an ex parte application for an EPO. The mere fact that the FPC is under the obligations imposed by rules 21(5), 21(6) and 21(8), is no reason why the local authority should not immediately, on request, inform the parents of exactly what has gone on in their absence.

57. The matters I have just been considering are so important that it may be convenient if I here summarise the most important points:

i) An EPO, summarily removing a child from his parents, is a "draconian" and "extremely harsh" measure, requiring "exceptional justification" and "extraordinarily compelling reasons". Such an order should not be made unless the FPC is satisfied that it is both necessary and proportionate and that no other less radical form of order will achieve the essential end of promoting the welfare of the child. Separation is only to be contemplated if immediate separation is essential to secure the child's safety; "imminent danger" must be "actually established".

ii) Both the local authority which seeks and the FPC which makes an EPO assume a heavy burden of responsibility. It is important that both the local authority and the FPC approach every application for an EPO with an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the Convention rights of both the child and the parents.

iii) Any order must provide for the least interventionist solution consistent with the preservation of the child's immediate safety.

iv) If the real purpose of the local authority's application is to enable it to have the child assessed then consideration should be given to whether that objective cannot equally effectively, and more proportionately, be achieved by an application for, or by the making of, a CAO under section 43 of the Act.

v) No EPO should be made for any longer than is absolutely necessary to protect the child. Where the EPO is made on an ex parte (without notice) application very careful consideration should be given to the need to ensure that the initial order is made for the shortest possible period commensurate with the preservation of the child's immediate safety.

vi) The evidence in support of the application for an EPO must be full, detailed, precise and compelling. Unparticularised generalities will not suffice. The sources of hearsay evidence must be identified. Expressions of opinion must be supported by detailed evidence and properly articulated reasoning.

vii) Save in wholly exceptional cases, parents must be given adequate prior notice of the date, time and place of any application by a local authority for an EPO. They must also be given proper notice of the evidence the local authority is relying upon.

viii) Where the application for an EPO is made ex parte the local authority must make out a compelling case for applying without first giving the parents notice. An ex parte application will normally be appropriate only if the case is genuinely one of emergency or other great urgency – and even then it should normally be possible to give some kind of albeit informal notice to the parents – or if there are compelling reasons to believe that the child's welfare will be compromised if the parents are alerted in advance to what is going on.

ix) The evidential burden on the local authority is even heavier if the application is made ex parte. Those who seek relief ex parte are under a duty to make the fullest and most candid and frank disclosure of all the relevant circumstances known to them. This duty is not confined to the material facts: it extends to all relevant matters, whether of fact or of law.

x) Section 45(7)(b) permits the FPC to hear oral evidence. But it is important that those who are not present should nonetheless be able to know what oral evidence and other materials have been put before the FPC. It is therefore particularly important that the FPC complies meticulously with the mandatory requirements of rules 20, 21(5) and 21(6) of the Family Proceedings Courts (Children Act 1989) Rules 1991. The FPC must "keep a note of the substance of the oral evidence" and must also record in writing not merely its reasons but also any findings of fact.

xi) The mere fact that the FPC is under the obligations imposed by rules 21(5), 21(6) and 21(8), is no reason why the local authority should not immediately, on request, inform the parents of exactly what has gone on in their absence. Parents against whom an EPO is made ex parte are entitled to be given, if they ask, proper information as to what happened at the hearing and to be told, if they ask, (i) exactly what documents, bundles or other evidential materials were lodged with the FPC either before or during the course of the hearing and (ii) what legal authorities were cited to the FPC. The local authority's legal representatives should respond forthwith to any reasonable request from the parents or their legal representatives either for copies of the materials read by the FPC or for information about what took place at the hearing. It will therefore be prudent for those acting for the local authority in such a case to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide.

xii) Section 44(5)(b) provides that the local authority may exercise its parental responsibility only in such manner "as is reasonably required to safeguard or promote the welfare of the child". Section 44(5)(a) provides that the local authority shall exercise its power of removal under section 44(4)(b)(i) "only … in order to safeguard the welfare of the child." The local authority must apply its mind very carefully to whether removal is essential in order to secure the child's immediate safety. The mere fact that the local authority has obtained an EPO is not

of itself enough. The FPC decides whether to make an EPO. But the local authority decides whether to remove. The local authority, even after it has obtained an EPO, is under an obligation to consider less drastic alternatives to emergency removal. Section 44(5) requires a process within the local authority whereby there is a further consideration of the action to be taken after the EPO has been obtained. Though no procedure is specified, it will obviously be prudent for local authorities to have in place procedures to ensure both that the required decision making actually takes place and that it is appropriately documented.

xiii) Consistently with the local authority's positive obligation under Article 8 to take appropriate action to reunite parent and child, sections 44(10)(a) and 44(11)(a) impose on the local authority a mandatory obligation to return a child who it has removed under section 44(4)(b)(i) to the parent from whom the child was removed if "it appears to [the local authority] that it is safe for the child to be returned." This imposes on the local authority a continuing duty to keep the case under review day by day so as to ensure that parent and child are separated for no longer than is necessary to secure the child's safety. In this, as in other respects, the local authority is under a duty to exercise exceptional diligence.

xiv) Section 44(13) requires the local authority, subject only to any direction given by the FPC under section 44(6), to allow a child who is subject to an EPO "reasonable contact" with his parents. Arrangements for contact must be driven by the needs of the family, not stunted by lack of resources.

58. It is against this background that I return to consider the circumstances in which the EPOs were obtained in the present case on 17 January 2003. The account which follows is based in part on the materials that were available to me at the hearing on 3 November 2003 and in part on detailed written submissions dated 8 December 2003 prepared by Mr Ryder and Ms Woodward in response to a number of questions that I had raised during that hearing.

59. As I have already mentioned, there was a strategy meeting on 15 November 2002. The conclusion was that a thorough assessment of all the children was required to determine (a) a true picture of their 'illnesses', (b) the appropriate management of any diagnosed illnesses and (c) the emotional health of the children. On 2 December 2002 a social worker, Ms G, was allocated to D, J and W (N already had a social worker, Ms R). A child protection conference was arranged for 20 January 2003.

60. Between 15 November 2002 and 8 January 2003, and in fact probably by a case management meeting on 12 December 2002, a plan had been formulated that the children would be assessed by a section 47 enquiry with additional specialist advice provided by toxicological testing and a paediatric overview. It was intended that this be put to the parents at the child protection conference in the hope that they would co-operate. In accordance with the local authority's procedures, it was not at that stage intended that the mother should be confronted with this plan prior to the child protection conference. On 7 January 2003 a Consultant Paediatrician, Dr W, was asked orally for advice and agreed to perform the toxicology tests on the children and to undertake an overview of the medical records. It was intended that Dr W's overview should be subject to an independent forensic review by another Consultant Paediatrician, Dr S, who agreed to undertake that work by April/May 2003. (In the event that task was undertaken not by Dr S but by Dr D.)

61. On 8 January 2003 there was a social work meeting involving representatives of all the social work teams then involved. It was agreed to meet with the mother to discuss a recommendation to be made to the child protection conference that the children be assessed away from the influence of their parents. It is recorded that if this recommendation was blocked or refused (by mother) consideration would be given to initiating care proceedings.

62. On 16 January 2003 there was a brief meeting between Ms G and Ms R and the mother at the maternal grandmother's house. It was at this meeting that, as I have already mentioned, the mother, according to the local authority, refused to discuss the matter, demanded that the social workers leave and said "over my dead body" at the suggestion that the children be taken into local authority foster care. According to Ms G the mother was extremely angry.

63. Following that, and later the same day, the local authority, as I have said, applied for EPOs. The Form C11 made clear that the application was on the ground referred to in section 44(1)(a)(i) of the Act, that is that there was reasonable cause to believe that the children were likely to suffer significant harm if they were not removed to accommodation provided by the local authority. The Form C11 indicated that a direction was also being sought for the examination of the children in accordance with section 44(6)(b).

64. The application came before the FPC on the next day, Friday 17 January 2003. The written material before the FPC consisted of a report about N which had been prepared by Ms R on 16 January 2003 for the child protection conference on 20 January 2003, the chronology in relation to N which was attached to that report, and a statement by Ms G dated 17 January 2003. That was a short document. It summarised the local authority's opinion as being that

> "the children are at risk of significant harm by virtue of the care currently afforded to them. A thorough assessment of the children is required and past attempts at such suggest that this will not be possible whilst the children are in the care of either parent."

65. Ms G's statement drew attention to concerns expressed by their school about the mother's negativity towards J and W, her lack of any praise or encouragement and the fact that she was said to look "disappointed" when the school had something good to say about her children. That picture stands in contrast with the more measured picture of the mother painted by D's school in a report dated 16 January 2003 which unhappily was not placed before the FPC – Mr Ryder told me on express instructions that it was not available at the time of the hearing. The school said that it had not noted any concerns regarding D's welfare since his admission in June 2001. Mother was reported as being very pleased with D's performance at school, as always contacting the school when there were any concerns over D's behaviour at home and as having attended most reviews and praised D on those occasions for any progress he had made.

66. The FPC heard oral evidence from both Ms R and Ms G. I have not seen the FPC's note of that evidence, although I have seen the FPC's reasons for its decision, but Mr Ryder in his written submissions gave me the following account:

> "[Ms R] gave oral evidence to the magistrates that the plan for [N] was a residential assessment at … There was no alternative and available facility that was nearer. [N] would be free to make her own decision about whether to go there.
>
> [Ms G] gave oral evidence that the plan for the boys was that they would be collected from school and taken to the hospital to be examined by Dr [W]. The magistrates were told that would be a full medical and toxicology tests (as was intended). Dr [W] would also undertake an overview of the medical records that would be reviewed by Dr [S] (without needing to examine the children further) and that that process would take until April or May 2003.
>
> The magistrates asked how long the placements would last and were told by [Ms G] that they would be for as long as was necessary, that an interim care order would be applied for on the next Friday and that the [local authority] intended then to await the outcome of the assessments, ie the broader plan of assessment and paediatric overview was overtly dealt with in evidence."

67. The FPC made an order in the terms sought by the local authority at 2.15pm, granting the local authority EPOs until 24 January 2003 and directing that the children be medically examined and assessed. Provision was made for a review hearing to take place on the following Tuesday, 21 January 2003. The FPC's written reasons for its decision contain this important passage:

> "It is vital for the children's wellbeing that medical conditions are stabilised and the only way to achieve this would be for the children to be fully assessed without intervention or hindrance of their parents … There is a very real possibility that if [the mother] knew that the children were to be assessed she would administer medication to obscure the findings of the clinicians. On this basis we find reasonable cause to believe that the children are likely to suffer significant harm if an order is not made to enable their removal for the purpose of examination and assessment. We understand that following an order the 3 younger children will be collected from school and taken to … Hospital for a full medical examination and toxicology tests by Consultant Paediatrician Dr [W]."

68. After the EPOs had been obtained the boys were collected from school and taken to the hospital where they were seen by Dr W. On arrival Dr W took blood and urine samples. Notwithstanding what the FPC had been told, no further examination of any of the children was undertaken. Mr Ryder tells me that Dr W does not recall why no other examination was undertaken save that he was impressed by the care given by D to W; Ms G recalls that by then it was late and the boys were experiencing a level of distress and it was decided not to undertake a more full medical examination. It was intended that Dr W would obtain the children's medical records to undertake the paediatric overview. In the meantime Dr W sent the samples for toxicology testing and the three boys were placed with emergency foster carers.

69. On 20 January 2003 the child protection conference took place. The parents chose not to attend but were represented by their solicitor. The conference had the report prepared by Ms R, the report from D's school and a report by Ms G dated 20 January 2003. It was decided, unanimously in the case of J and W and by a majority in the case of D, that the boys' names should be placed on the child protection register under the category of likelihood of physical abuse.

70. Also on 20 January 2003, as I have said, the parents applied for the discharge of the EPOs and the local authority applied for care orders in respect of D, J and W. However, when the matter came back before the FPC the following day, on 21 January 2003, the parents withdrew their application and consented to the making of ICOs but only until 18 February 2003. The FPC's reasons recorded that contact between the boys and their parents was taking place twice a week for 1½ hours, although the local authority was attempting to make arrangements for a third session each week. The FPC also recorded that there was no CAFCASS report, explaining:

> "A Guardian was applied for on 17th January but has not yet been appointed. CAFCASS appointed [a solicitor] yesterday evening to represent the children but he has not yet had opportunity to see the children."

A guardian was not in fact appointed until 28 January 2003, and even then the appointment was subject to the proviso that the guardian would not be in a position to commence his enquiries until the early part of the following month.

71. On 31 January 2003, the same day as the hearing before Bennett J, Mr C became the boys' key-worker. A statement by Mr C dated 24 February 2003, filed in anticipation of the contested interim care order hearing due to take place on 11 March 2003, indicates that as early as 13 February 2003 he had "clearly identified" that the maternal grandparents were able to care for the boys on a temporary basis – a matter that he discussed with senior management on 18 February 2003. Eventually on 28 February 2003 as I have said the boys were in fact placed with their grandparents.

72. Thus, in essentials, the picture as it was presented to me on 3 November 2003. There were several disquieting features of what appeared to have happened and the information then to hand posed almost as many questions as it answered. My concerns, reflecting in part concerns that were also articulated in particular by Ms Margaret de Haas QC (as she then was) and Ms Frances Heaton on behalf of the mother, by Ms Jane Cross on behalf of the

father and Ms Eleanor Hamilton QC and Mr Adam Wilson on behalf of J and W, related in particular to the following matters:

i) the fact that the application to the FPC on 17 January 2003 was made ex parte;

ii) the fact that the local authority sought, and the FPC granted, EPOs rather than CAOs;

iii) the fact that the children were removed from their parents and put in foster-care;

iv) the delay in approaching the maternal grandparents and the further delay thereafter in placing the children with them;

v) the seeming inadequacy of the contact and heavy-handedness with which it had been supervised; and

vi) the delay in appointment of a guardian.

73. Readily acceding to my invitation, Mr Ryder and Ms Woodward subsequently provided the detailed written submissions dated 8 December 2003 to which I have already referred. Those submissions, reflecting their express instructions, were commendably frank and realistic, but the poverty of the explanations provided in certain critical respects served only to underscore my original concerns.

74. The delay in the appointment of the guardian is not of course a matter for which the local authority bears any responsibility at all. Nor, of course, does any blame attach to the guardian personally. Mr Ryder told me that at that time there was a 10 day delay; in the present case in fact it took 11 days, and even then, as we have seen, the guardian was not able to start work immediately. That is simply unacceptable. Whatever delay may have to be tolerated in 'ordinary' care cases – and too often there are still unacceptable delays –, a delay even of 'only' 10 days is wholly unacceptable in the context of an EPO case where removal is contemplated. In such cases a guardian must be appointed immediately upon issue of the proceedings.

75. I turn to the matters in relation to which the local authority does have responsibility.

76. Mr Ryder sought to justify the fact that the application was made ex parte on the basis that it was reasonably suspected that this was a fabricated illness case and that the local authority believed that there was an immediate risk arising from the possibility that mother would administer medication to the children thereby thwarting the very purpose of the proposed medical examinations and testing. He told me that one of the social workers had left the mother at the meeting on 16 January 2003 with copies of both Ms R's report for the forthcoming child protection conference and the very detailed chronology in relation to N prepared by Ms R to which I have already referred. He also told me that the team leader who took the decision to apply for EPOs without notice to the parents did so because she genuinely believed that, having notice of the material in these documents, there was a real possibility that the mother would administer medication to obscure the findings of the clinicians. It was not feasible to engage the parents in an alternative strategy involving their lawyers since, as far as the local authority was aware, the parents were not legally represented prior to the EPOs being obtained.

77. I agree that this one was one of those unusual and exceptional cases in which it was proper for the local authority to apply ex parte, without notice to the parents, and appropriate for the FPC to grant ex parte relief. On the information available on 17 January 2003 there were, I accept, compelling reasons to believe that the children's welfare would be compromised if the parents were alerted in advance to what was going on. There was, therefore, no objection to the fact that the local authority's application was made ex parte. But I do have concerns about what seems to me to have been the inadequacy of the local authority's supporting evidence.

78. Although Ms R's statement about N was very detailed, Ms G's statement in support of the application in relation to D, J and W was very short and, as we have seen, had to be supplemented by her oral evidence. Her statement was not merely short – and brevity, after all, can often be a virtue – it simply did not grapple adequately with some of the relevant issues.

79. There were three key issues for the FPC:

    i) Was an ex parte application justified?

    ii) Was this a case for EPOs rather than CAOs? – and related to this, Was this a case where the local authority needed to share parental responsibility?

    iii) Even if EPOs were justified, Was this a case justifying the removal of the children into foster care?

    Each of those issues should have been addressed clearly and distinctly in the evidence. In very large measure they were not. Moreover, and to the extent that the matter proceeded before the FPC on the basis of oral evidence, a proper note of the hearing, and of the evidence in particular, should have been prepared by the local authority and made available to the parents. That was not done. Mr Ryder acknowledged that any reasons given for an ex parte process should have been reduced to writing and filed and served as soon as possible. By implication he accepted that there had been failings in this respect.

80. I appreciate that the application was made at very short notice and that there was only limited time in which to put together the local authority's evidence. But this was a family which had been known to the local authority for a very long time and it would have been perfectly feasible to prepare the appropriate evidence in time for the hearing. I do not wish to criticise Ms G, who is a social worker not a lawyer. Responsibility for these matters – the proper presentation of cases in court – lies with management and the legal department. But the point is an important one and I hope that lessons will be learnt – and not just by this local authority. And the importance of the point, if I may draw attention to the obvious, extends beyond the purely evidential aspect. The inadequacy of the local authority's evidence reflected, as we shall see, what seems to me to have been the inadequacy of the local authority's analysis of the case, and this in turn fed through into what equally seems to me to have been a failure by all concerned at the hearing on 17 January 2003 to address, as separate matters, the three key issues I have referred to. The point is elementary, but perhaps bears repetition: the very discipline of having to reduce one's thinking, one's analysis, one's opinion, and the reasons for one's opinion, to paper immeasurably improves the quality of what emerges.

81. I turn now to the related questions of whether this was a case which required either the making of EPOs or the removal of the children into foster care. Here the position is much less satisfactory and the outcome much more concerning.

82. Mr Ryder sought to explain the local authority's reason for removing the children as follows:

> "Mother was refusing to give her consent to the medical examination of the boys. It was also realised that mother was in possession of a detailed summary of various professionals' concerns (the case conference chronology) and that she would have the opportunity to interfere with an objective analysis of the boys' medication and in the process subject the children to a risk of significant harm … The local authority had an initial plan as follows: (a) for the children to be tested and examined and (b) for the children to be medically assessed away from home. The local authority decided that the former needed an EPO. It was expected that the need for that to extend beyond 72 hours would be challenged"

Explaining why the children were placed with foster carers after the initial reason for the EPOs had been satisfied, Mr Ryder said:

"The use of foster carers was intended to be short term: while toxicology results were awaited and to enable family members to be assessed as foster carers."

83. Describing the decision-making process that occurred after the EPOs had been granted – that is, the decision-making process required having regard to section 44(5) of the Act – Mr Ryder said:

> "The local authority had an initial plan as follows: (a) for the children to be tested and examined and (b) for the children to be medically assessed away from home. The local authority decided that the former needed an EPO. It was expected that the need for that to extend beyond 72 hours would be challenged at the hearing specially set-up to hear a discharge application. The longer term assessment involved Dr [W] who reported on the 19th February 2003 and an overview (initially Dr [S] who was not agreed to by the parents and was substituted for by Dr [D]) which was not expected before April/May.
>
> The EPO was not challenged and neither was the application for ICOs (again a specific hearing was identified but not used for this purpose: 11th/12th March 2003). On appointment and thereafter, the Guardian neither advised nor challenged the appropriateness of the assessment process away from home.
>
> On placement with the foster carers, [J] said he usually took double the prescribed dose of medication (prozac) which increased the immediate concern and was thought to contra-indicate a return home. The importance of accurate toxicology results was reinforced.
>
> It was the new social worker, [Mr C], who was of the firm view that the process of assessment of [the maternal grandparents] to enable them to look after the children should be expedited. Mr [C] arranged for the care of the children by their grandparents as soon as he could after his own appointment. He had the benefit of the accurate toxicology from … "

84. Mr Ryder makes the entirely fair point that:

> "The EPO was made for 7 days. The magistrates specifically anticipated that the parents would seek to discharge the order after 72 hours and therefore listed a discharge application for the following Tuesday (the 21st January 2003) which was a day when a family court does not normally sit and special arrangements had to be made.
>
> In the event, the parents' representative asked to withdraw their application for a discharge of the EPO on the Tuesday and that was granted. The focus of the discharge hearing became the complexity of the background, the need for overview advice and the need to transfer the case as soon as possible."

But as Mr Ryder himself very frankly and fairly acknowledged, the question is not whether there was an early opportunity for the parents to overturn the order that had been made but the proportionality and manner of the removal of the children in the first place. He accepts that, with the benefit of hindsight, things might perhaps have been better handled.

85. I have set out the local authority's explanations at length because, if I may be forgiven for saying so, they reveal both the poverty of the local authority's reasoning and what seems to have been the inadequacy of its decision-making processes. This was, as matters appeared on 17 January 2003, an appropriate case for medical examinations (including toxicology tests) and assessments of the children. It was moreover, as the FPC appropriately accepted, a case in which there appeared to be a real risk that the mother might interfere with the process. I accept, therefore, that this was a case in which CAOs were appropriate and possibly, though I am not so sure, even EPOs – these on the basis that the local authority

may have needed to have parental responsibility to ensure that the medical examinations and tests proceeded without any hitches. (However, even if EPOs were appropriate, it is not at all obvious why there was any need for EPOs to be granted for more than 24 or possibly 48 hours; the medical tests and examinations had already been arranged for the same afternoon.) But it is far from clear to me that there was any justification for the removal of the children into foster care. After all, and as Ms G's oral evidence had made clear, it was not contemplated that there would be any need to examine the children further after they had been examined and tested by Dr W on 17 January 2003. The further assessment was to be based, as Ms G explained it to the FPC, on an overview of the medical records by Dr W and a review by Dr S.

86. Part of the problem, I suspect, is that the local authority had not really thought through and properly analysed the case before it got to court on 17 January 2003. Moreover, it seems to have failed to address itself adequately – either then or later – to the requirements of section 44(5). That in turn seems to have fed through into its seeming failure adequately to address itself to the requirements of section 44(10). I was not surprised to hear Ms Hamilton asking rhetorically at the hearing on 3 November 2003 whether the local authority had even applied its mind to section 44(10). Explaining the seeming delay in placing the children with the maternal grandparents, Mr Ryder said that there had been a proposal that the father would be assessed as a sole carer, but he withdrew from that proposal on 4 February 2003. "Thereafter", as Mr Ryder puts it, the grandparents were approved. That, I have to say, does not seem to me to have been good enough, for it took, as I have said, until 28 February 2003 for the children to be placed with the grandparents. Even assuming that it had been appropriate to remove the children in the first place, there seems, despite Mr C's endeavours, to have been lacking an appropriate sense of urgency. Both the overall delay from 17 January to 28 February 2003 and the later period of delay from 13 to 28 February 2003 are concerning. Can it really be said that the local authority exercised the exceptional diligence called for by Article 8?

87. The distress for both the children and their parents resulting from their separation during this period was only exacerbated by the limited amount of contact that was afforded and the manner in which it was supervised.

88. Mr Ryder explained that contact was limited to three 1½ hour sessions a week because "this was the maximum level of supervised contact that local authority resources could provide until the grandparents were approved as carers." That, I am afraid, is simply not good enough. I repeat: arrangements for contact must be driven by the needs of the family, not stunted by lack of resources. If the State in the guise of a local authority is to interfere as drastically with family life as it does when it separates a child from its parents before it has even established the grounds for seeking a final care order then it must provide and facilitate appropriate contact. Too often one hears of cases where the contact offered is something of the order of two or three times a week for 1½ or 2 hours a time. Indeed, I hear it so often that it seems almost to be a rule of thumb. There will, of course, be cases where that is the appropriate frequency and duration of contact, but there will be many – I repeat, many – cases where it is not adequate and where, I fear, what is being offered is provided not because it is genuinely believed to be appropriate but because that is the most that a hard-pressed and under-resourced local authority can cope with. That is unacceptable.

89. Explaining why the parents' bags were searched in front of the children during contact Mr Ryder told me:

> "There is a standard security practice at contact centres similar to that on entry to a court building. Not all persons attending will have good intentions. The search should never have been in front of children and this was stopped immediately it became known (it is thought by the 31st January 2003)."

Explaining why the conversations between the children and their parents had been monitored during contact and in such an interventionist way he said:

> "Contact was used to help assess family relationships and supervision did therefore extend to conversations. Again, [Mr C] intervened on his appointment to reduce the level of supervision which he thought was inappropriate."

Mr Ryder explained that the maternal grandparents were subjected to similar restrictions on contact for the same reasons and because they had not at that stage been approved as carers.

90. I need say no more. Supervision was appropriate, but the local authority correctly accepts that some of what happened should not have been allowed to occur.

91. I return to the most concerning aspect of the matter: the removal of the children into foster care. As matters turned out these were issues that, insofar as they were explored at all – and in one sense, of course, they were peripheral to the matters with which I was directly concerned –, had to be explored in the absence of any oral evidence. There are various factual disputes that I am in no position to resolve. But I should nonetheless draw attention to what both the parents and the children have to say about the events of January 2003.

92. The father in a statement he made in February 2003 says that he was "shocked, surprised and horrified at what the local authority have done and the manner in which they issued proceedings and sought an initial order behind our backs." Ms Cross on his behalf referred to his feelings of fear, anger and frustration. The mother in a statement she made in October 2003 says that "the boys suffered considerably for the first few weeks after they were removed". She also says:

> "I … do not feel that I could cope with the stresses and strain of having to permanently look over my shoulder. If the boys were returned home under a final care order I would remain permanently anxious for them and my biggest nightmare would be that the local authority would turn up one day and remove the children."

D in a statement which he wrote out himself in October 2003 indicates that he was told so little beforehand that when he was taken by social services to the hospital on 17 January 2003 he thought it was because something had happened either to his parents or to N. He describes how after leaving the hospital he and his younger brothers were separated, only being reunited later that night, and how distressing J and W found it being in foster-care, crying for their mum and dad. J in a statement he made in October 2003 describes the events of January 2003 as being a "horrible and frightening experience" for himself and W. He says he is "very angry" with social services "and will never forgive them".

93. None of this evidence was tested in cross-examination and I merely record it without necessarily accepting its accuracy in all respects. But it underscores what is, after all, a very obvious point. The summary removal of children from their parents in circumstances such as this is bound to be traumatic for all concerned. It needs to be handled with great care and sensitivity. Otherwise lasting damage may be done, both to the children and to their parents. And heavy-handedness is likely to be totally counter-productive, making it impossible for parents and local authority to 'work together' productively in future. In the present case the consequence of the events of January 2003 was that the mother, as I was told on 3 November 2003, was not willing to agree to any order which did not provide for ongoing judicial monitoring.