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**“WHILE YOU WERE SLEEPING,”
AN UPDATE ON DEVELOPMENTS IN
CHILDREN’S LAW
(MAY 2005/MAY 2006)**

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CARE PROCEEDINGS

1. REMOVAL INTO CARE

Re W (Removal into Care [2005] 2 FLR 1022

5 year old twins subject to Care Orders (Final). Care Plans endorsed by the Court had envisaged placement at home. Parents told of intended departure from the plan to remove the children and thereupon issued an application to discharge the Care Orders. Local Authority issued a Freeing Application in response, Applications were then adjourned. Parents then sought an Injunction under the Human Rights Act 1998 seeking the children's return. The Judge of first instance dismissed both the parents' Applications and adjourned the Local Authority's Freeing Application pending a Guardian's report.

As part of his reasoning the Judge had concluded that Regulation 11(1) of the Placement of Children with Parents Regs 1991 obliged the Local Authority to terminate placement as "no longer promoting or safeguarding the children's interests" for the purposes of s.6(2) of the HRA 1998. On this point the Judge granted permission to appeal on a point of law. The Court of Appeal (Thorpe and Wall LJ) held the Judge had erred in elevating Reg.11(1) of the Placement Regs to the status of primary legislation for the purposes of s.6 of the HRA. Local Authority was obliged to have regard to the Convention of both the parents and children in its dealings with them. Removal of the children from the parents was manifestly a breach of those convention rights but could be justified if it was a legitimate proportionate course of action in the circumstances which, in view of the deterioration of the situation at home, had been justified.

NB: The "obligation of those who assert a breach of Article 6 or Article 8 Rights is to act swiftly".

"In the case of *Re P (Adoption: Breach of Care Plan) [2004] 2 FLR 1109* this Court concluded that European Convention Rights which might have been successfully asserted at an early stage had effectively evaporated as a consequence of significant delay

" with the huge advantage of hindsight, it is clear to me that the remedies of the parents elect (Application to Discharge) was quite simply the wrong remedy. There was nothing in the history ...to render an Application for Discharge of the Care Orders either plausible or arguable".

Thorpe LJ at [para 50]

"What the parents essentially needed was a challenge to the lawfulness of the Local Authority's decision to remove. The Appropriate challenge was the Application for an Injunction under the Human Rights Act. Had that been issued at the time of the Application to Discharge, given the misgivings which the Judge expressed at that stage, there is a possibility, indeed perhaps a probability, that it would have succeeded at least on a short term basis until the Court could investigate further".

“If there is a lesson to be learned from this litigation, it is that parents in similar circumstances must issue the Human Rights Act challenge at the earliest possible opportunity, it should be issued prior to the removal of the children and not as a reaction to it. The obligation on the Local Authority to involve and consult with the parents and the obligation on them to give due notice to the parents of intention to remove, give the parents just such an opportunity”.

“If it is not taken in advance of removal as a protective measure, it is simply that much harder to succeed given that the children will have suffered the experience of removal and would have been placed in some neutral environment”.

2. **EMERGENCY PROTECTION ORDERS**

Re X (Emergency Protection Orders) [2006] EWAC 510. McFarlane J set out good practice guidance in this case relating to Emergency Protection Orders. Supplementing the guidance in **X Council-v-B [2005] 1 FLR 3** with two requirements:

- (i) The Appeal hearing should be tape recorded (held, of course, in the Family Proceedings Court);
- (ii) That a full account of the proceedings should be provided to parents, regardless of whether that information had been requested or not.

X Council-v-B Emergency Protection Orders [2005] 1 FLR 341

Munby J emphasised that Local Authorities should in every Application for an Emergency Protection Order, impress upon the Justices the extreme gravity of the relief being sought and the need for scrupulous regard to the Human Rights of this child and of the parents (see para 41).

The evidence in support of an EPO should be full and compelling, an ex-parte Application should only be justified in circumstances of real emergency, a proper note had to be taken of the proceedings in accordance with the Rules, the EPO should not be made for any longer than absolutely necessary.

Langley-v-Liverpool City Council [2006] 1 FLR 342

The parents had four children, aged between 2 months and 9 years old. The parents and all but one of the children were profoundly deaf. In addition, the father had been registered blind for some years and no longer had a valid driving licence. The three older children were on the Child Protection Register, in part because the father, notwithstanding repeated warnings, persisted in driving the children in the family car. It had been agreed at a child protection conference that care proceedings would be instigated, but that the children would remain with the parents. Some weeks later the father drove the mother and the three older children from Liverpool to the Royal School of the Deaf at Derby, so that two of the children could be assessed. In response, the local authority applied for, and was granted, an emergency protection order (EPO), giving the local authority parental responsibility and

authorising removal of the children. Two of the children were still in Derby being assessed, and the EPO was executed in respect of them on the following day, but on the day the EPO was granted the local authority attempted to execute it in relation to the third child at the family's home. They were unable to do so, apparently because the father had taken the remaining children out for another drive. The local authority requested police assistance to find the missing child. That evening, the police found the family at home, and, having confirmed with the local authority that the child was to be taken into care, removed the child into the care of foster parents out of hours. After an extension of the EPO, an interim care order was made in respect of all four children. A Judge held that the removal of the third child was unlawful, as once an EPO had been granted the only possible authority for the police to attend in order to assist was a warrant under the Children Act 1989 (the Act), s.48(9). The police case that the removal was sanctioned under the police power to remove and accommodate children in cases of emergency, under s.46, was rejected. The Judge further held that the Council had acted in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Article 8, in that they should have sought a prohibited steps order prohibiting the father from driving, rather than obtaining the more drastic EPO. However, he did not consider that the police were liable for a breach of human rights, as the police response had not been disproportionate in the circumstances. The parents and the child appealed against the ruling that the police had not breached their Article 8 rights; the local authority and the police appealed against the findings of liability.

C.A. Held:

- (i) s.46 (Police Power to Remove) could be exercised even when EPO was in force;
- (ii) Although the police had jurisdiction to remove the child under s.46, there had been no compelling reasons for doing so given the EPO: the removal had therefore been unlawful. The Local Authority could and should have executed the EPO out of hours in a situation of emergency. The police officer should have checked with the Local Authority whether they could execute the EPO, if they were unable to do so for some time, he might then have been justified in removing the child under s.46.
- (iii) The action of the police in removing the child had been unlawful and therefore obviously "not in accordance with the law". The police could therefore not contend that the removal was proportionate etc (see para 53).
- (iv) The decision to seek an EPO had not breached the family's Article 8 and was a reasonable and proportionate response to the situation, according a reasonable measure of deference or latitude to the Local Authority.
- (v) The Local Authority had played a major part in securing the unlawful removal of a child by the police and was therefore liable with the police to the parents and the child for unlawful removal.

3. **THRESHOLD CRITERIA AND FACT FINDING HEARINGS**

Re K [2005] EWCA Civ .1226

A child (infant) admitted to hospital with severe brain injuries. The Judge found that the child had been deliberately asphyxiated by one or other of his parents. The Judge dismissed the care proceedings in relating to X's older brother. The Judge considered that his sibling Y was not at risk as a result of

what had happened to X. The Court of Appeal held allowing the Appeal, there had to be exceptional circumstances for a Judge to subsequently decide that the threshold criteria had not been satisfied in relation to a sibling in a case involving life-threatening injuries.

A County Council-v-DP,RS, BS (by the children's Guardian) [2005] 2 FLR 1031

Even where no public law Order contemplated it was not unlawful to conduct a full hearing of the factual evidence. It is a question for the Court's discretion. Though the parties may agree that the proceedings should be withdrawn, the Family Proceedings Rules 1992 Rule 4.5(4) give the Court complete discretion. The Court should not be "a neutered stamp" (McFarlane J)

Factors determining whether a Fact Finding hearing should be conducted are identified as:-

- (i) Interest of child (relevant not paramount);
- (ii) The time the investigation would take;
- (iii) Cost to Public Funds;
- (iv) The evidential result;
- (v) The necessity of the investigation;
- (vi) Relevance of potential result to future care plans of the child concerned;
- (vii) The likely impact of the findings on the parties;
- (viii) Prospects of a fair hearing;

Re K (Non-accidental Injuries: Perpetrator, New Evidence) [2005] 1 FLR 285.

Following the final hearing in which Care Orders and subsequent Freeing Orders were made, the mother separated from the father and made new statements implicating the paternal grandmother. She appealed against the Final Orders and sought leave to adduce fresh evidence. The Court of Appeal allowing the Appeal, admitted the fresh evidence and directed a new Fact Finding Hearing.

- (i) Public interest to identify perpetrator serious injury;
- (ii) Children have a right to know who injured them and why;
- (iii) The mere fact that Freeing Orders had been made could not deprive the Court of the capacity to re-hear the perpetrator issue (the child had not been placed);
- (iv) Sufficient that fresh evidence might reasonably lead to a hearing which might exclude the mother as a possible perpetrator;
- (v) Delay important, but has to be balanced against powerful factors of public interest.

A County Council-v-A mother, a father and X YZ by their Children's Guardian [2005] 2 FLR 129

- (i) Munchausen Syndrome by Proxy should be a label consigned to the history books. The expression 'Fictitious and Induced Illness (by proxy)' should be used and then only as a factual description of a series of events or behaviour which should be set out.
- (ii) In a complex case, an inter-disciplinary strategy planning meeting ought to be held to identify the more reliable elements of the available histories to provide a more informed basis or "diagnosis".

- (iii) Findings of Fact must be based on all of the available materials, not just on scientific or medical materials, no matter how cogent they may seem to be in isolation
- (iv) Forensic medical practice should mirror clinical medical practice and wherever possible forensic practitioner should rely upon the primary material.

Re N (Sexual Abuse Allegations: Professionals not abiding by Findings of Fact) [2005] 2 FLR 340

At a Fact Finding Hearing the Court found that there was no sexual abuse and directed a hospital team to work with the family to facilitate contact. The hospital team remained of the view that there had probably been sexual abuse despite the findings. The Court issued a warning that agencies assisting the Court to resolve contact problems should not lose sight of the Court's responsibility for taking decisions.

4. **CONTACT TO CHILDREN IN CARE**

Kirklees MBC-v-S (Contact to New Born Babies) [2006] 1 FLR 333

An Order for daily contact to a child in foster care where supervision by the Local Authority was required was exceptionally unusual. No "principle" that very young baby should have daily contact with their mother, from whom they had been removed. Not possible to ignore resource implications. Each case to be looked at on its own particular merits with welfare of child paramount, so as to determine "reasonable or appropriate" level of contact under s.34 Children Act (see paras 30-35). This was an appeal to Bodey J from the Family Proceedings Court who held that an Order facilitating daily contact (including Saturdays and Sundays) was not outside the discretion invested in the Family Proceedings Court, it was an Interim Order intended to run for only a number of weeks, the Justices had considered all the relevant factors and made very clear findings. Not possible to say they were "plainly wrong".

5. **DISCLOSURE OF CONFIDENTIAL INFORMATION**

Brent LBC-v-N (Foster Carers) and P (By her Guardian) [2006] 1 FLR 310

While there is a general obligation on Local Authorities to share relevant information relating to children in their care with parents of those children in the particular circumstances of this case the Local Authority was not obliged to inform the child's parents that the foster carer with whom the child was living was HIV positive. There was no ongoing litigation to which this information was relevant, it was not information that would be taken into account by a Court. The interests of the parents to receive such information had to be balanced against the right of the foster carer to respect his private life and against the duty of confidentiality owed to him by the Local Authority. Where the risk to the child was negligible, serious reasons were needed to justify disclosure where this was opposed. None had been established.

6. **EXPERT EVIDENCE**

W-v-Oldham M.B.C. [2006] 1FLR 543

Per Wall LJ

- “(i) Cases in which certain medical evidence became pivotal, for example, non-accidental head injury or pathologically “unascertained infant death”, and in which such evidence was, by its nature, difficult to challenge in the absence of further expert opinion, the Court should be slow to decline an application for a second expert. The only expert in the case capable of assessing the MR scan was the radiologist and the apparent medical consensus on which the Judge relied depended upon the analysis of that expert being correct.
- (ii) It is important to remember that a second opinion does not necessarily mean additional litigation and substantial additional litigation costs. If a second opinion confirms the first, my experience is that the issues in the case addressed by the two experts are likely to be radically reduced, if not eliminated.
- (iii) A blanket approach which precludes treating clinicians from becoming jointly instructed witnesses in respect of children they have treated, runs the risk of the Court being deprived of expertise and excellence in those cases where the children have been fortunate enough to have encountered clinically one of the diminishing number of doctors who are also ready and willing to participate in the forensic process. At the same time, however, the fact that an important opinion is being expressed by an expert who has clinical involvement seems to me to provide an additional argument for a second opinion if one is called for by the parents;
- (iv) The Guardian has a pro-active role to play in ensuring all appropriate evidence is assembled. Accordingly, if a Guardian takes the view that a second opinion sought by parents is properly necessary to achieve justice, he or she should not hesitate to say so, the relationship between the Guardian and her solicitor needs to be “intellectually rigorous”.

Per curium:

Whilst not wishing to encourage interlocutory appeals case against Case Management decisions, if a second opinion on a critical medical issue is thought to be necessary, it is essential that if the Judge has refused permission to appeal, an Application for Permission to Appeal is made to the Appeal Court at the earliest opportunity. Any such application should be marked urgent (see para 33).

7. **s.38(6) APPLICATIONS**

Re G (Interim Care Order: Residential Assessment) [2004] 1 FLR 876
(Court of Appeal: Butler-Sloss P, Thorpe and Latham LJJ)

Appeal from Johnson J who held that he did not have jurisdiction under s.38(6) to make a further Order for therapeutic assessment at the Cassel Hospital or alternatively that if he did, he would not have exercised his discretion to do so.

The Court of Appeal held allowing the Appeal and granting an Order under

s.38(6), an assessment to enable the Court to obtain the information it needed to present its decision was to likely to contain the provision of a variety of service support and treatment with or without accommodation, reiterating the purposive construction of the House of Lords in *Re C* [1997] 1 FLR 1.

Appealed to the House of Lords ***Kent County Council-v-G and Others***
[2005] UK HL 68, [2006] 1 FLR 601

The House of Lords considered the provisions of s.38(6) again.

- (i) The Court should resist the temptation to postpone making its final decision until any uncertainties have been resolved, if such accords conflicted with the division of responsibilities between Court and Local Authorities and with the general principle that delay was not in the best interest of a child.
- (ii) The purpose of s.38(6) was to ensure that the Court was in control of the evidence. The purposes of the subsection were to enable the Court to obtain the information it needed and to control the information gathering activities of others. The Court had power under s.38(6) to direct an examination or assessment of the child, including where appropriate, her relationship with her parents, the risk that her parents may present to her and the ways in which those risks may be avoided or managed. The principle focus of the assessment must be the child. Any services which were provided must be ancillary to the aim of obtaining the necessary information to make a decision. The Court had no power under s.38(6) to ensure the provision of services beyond this either for the child or her family. At para 65 Baroness Hale:

“A fortiori, the purpose of s.38(6) cannot be to ensure the provision of services, either for the child or his family. There is nothing in the 1989 Act which empowers the Court hearing care proceedings to order the provision of specific services for anyone. To imply such a power into s.38(6) will be quite contrary to the division of responsibility which was “the cardinal principle” of the 1989 Act ...”.

Para 66:

“I appreciate, of course, that it is not always possible to draw a hard and fast line between information gathering and service providing, some information can only be gathered through the provision of services. It may be necessary to observe the parents looking after the child at close quarters for a short period in order to assess the quality of the child’s attachment to the parent, the degree to which the parents have bonded with the child, the current parenting skills of the parents and their capacity to learn and develop. That is the sort of residential assessment which was involved in Re C (A Minor) Interim Care Order Residential Assessment”.

Looking at the legislative history of s.38(6) and s.38(7) Baroness Hale concludes that:

“The principle objective of these sections was to ensure that children should not be subjected to repeated medical examinations or repeated interviews solely for evidential purposes.”

8. **FUNDING OF RESIDENTIAL ASSESSMENTS**

Lambeth LBC-v-F [2005] Fam Law 592 EWA C776

(Ryder J considered who should pay for s.38(6) assessments). The costs of a residential assessment could be apportioned between the parties, rather than being borne automatically by the Local Authority which had brought the care proceedings.

See also:

Calderdale MBC-v-S and the Legal Services Commission [2005], 2 FLR 751

Bodey J suggested the facts which should influence the allocation of the costs of a s.38(6) Assessment:

- (i) The Court has to exercise its discretion and apportion the relevant costs fairly and reasonably, bearing in mind all the circumstances;
- (ii) In exercising its discretion the Court will have regard to the reasonableness of how the Local Authority conducted the information gathering process and with what degree of competence and thoroughness;
- (iii) There may be cases where the Local Authority have done little preparation or have prepared poorly, the Court should use its experience and “feel” for this;
- (iv) The Court will have regard to the extent to which the report in question goes merely to satisfy the threshold criteria, the state intervention in helping the Court decide on overall disposal;
- (v) The type of expert concerned is also relevant. Treating experts are more likely to be paid for by the Local Authority;

- (vi) The costs of a jointly commissioned report will generally speaking be shared in the same way as each party has an interest in having confidence in the integrity of the report.

9. **LSC REVISED FUNDING CODE AUGUST 2005**

This was largely the LSC's response to the decision of Ryder J in Lambeth seeking to achieve the result contended for in that case by changing its rules. The Funding Code indicates that the LSC will not meet the costs of treatment, therapy or training as part of any assessment. This has obvious and clear relevance for residential assessments.

10. **APPLICATIONS TO DISCHARGE CARE ORDERS**

NP-v-(i) South Gloucestershire County Council;

(ii) MLC (A Child by his Guardian ad Litem) [2005] EWCA Civ. 1329

The Independent, November 16th 2005

The Judge hearing an application under the Children Act 1989 s.39 to discharge a Final Care Order did not have the jurisdiction, if he decides to discharge it, to substitute an Interim Care Order. If the Court was minded to discharge the Care Order the only Children Act 1989 Part IV Order it could substitute was a Supervision Order. In the absence of evidence that it was in the child's best interest to discharge the Care Order, the Order remained. S.39(4) of the 1989 Act plainly defined and limited the Court's jurisdiction. Also, it was equally clear that the Court could not give a direction under s.37 of the Act in an Application to Discharge a Care Order as the Court was plainly not deciding that it might be appropriate to make a Care Order in relation to the child.

11. **APPEALS – LACK OF REASONS**

Re G (A Child): Care Proceedings: Placement for Adoption [2006] 1 FLR

47

The process of reasoning by which the trial Judge had arrived at the essential finding of fact was not clear. In such an important matter as the permanent removal of a child from her family, fairness, not least to the child, demanded more clarity than given. The case remitted for re-hearing.

12. **ADOPTION**

Re R (Care: Plan for Adoption: Best Interest [2006] 1 FLR 483

In scrutinising a Care Plan for adoption before making a Final Care Order, the Court had to be satisfied not only that adoption was in the best interest of the child but that the Local Authority was capable of delivering on its Care Plan. In general terms, in order to establish this the Local Authority would have had to held a "Best Interest Panel" and to ratify the Panel's decision. If that had not happened the Court would be unable to satisfy itself that the Social Worker who put forward the Care Plan could in fact deliver on it in the future.

As a general rule the decision about the actual matching of a child to adopters was one for the Local Authority in the execution of its Care Plan rather than a decision for the Court. Only in exceptional circumstances would the Court be justified in asking for information about the match, as well as confirmation

that adoption was in the best interest of the child. (See Hedley J paras 15-17)

Re R (Adoption: Contact [2006] 1 FLR 373

A 17 year old young woman who had been responsible for the primary care of her 4 year old half sibling was supporting an Adoption Order. The adopters were agreeable to contact but contact was reduced below that originally agreed. In the first instance the Judge refused leave to apply for a Contact Order. The Court of Appeal held when considering an application for a Contact Order within adoption proceedings, designed to continue after the Adoption Order had been made, the Court would have regard to the fact that Contact Orders in adoption proceedings were unusual. Neither the Children Act 1989 s.10(9) nor the surrounding caselaw prohibits a broad assessment of the merits of a particular application, what was prohibited was the determination of an application on the “no reasonable prospects of success” criterion. (See Wall LJ para 46)

Though the first instance Judge had not explicitly analysed s.10(9), an appropriate application of the section led to the conclusion that the nature of this application was unlikely to result in an Order for Contact in the interests of the child and that an Order might well be, in any event, inappropriate. Given the risk of disruption to the child posed by the application, the Judge entitled to refuse leave.

13. **CARE PROCEEDINGS – HUMAN RIGHTS**

Westminster City Council-v-(1)RA,(2)B,(3)S by their Children’s Guardian
[2005] 2 FLR 1309

The key point of Children Act 1989 Guidance and Regulations, Volume 1(1991) para 3.10 was that families should be able to participate in the decision making processes and needed to be kept informed of decisions, the reasons behind them and their consequences. The Local Authority has kept the mother informed of its plans in respect of her children and was justified in considering that her attitude was one of acceptance, the failure to involve her in a multi-disciplinary case conference prior to applying for an Interim Care Order was not procedurally unfair. Although the multi-disciplinary conference was only held the day after the issue of the proceedings, the mother had expressed her acceptance of the Local Authority’s plans shortly beforehand. It was held that there was no procedural unfairness prior to the care proceedings to support the allegations of breach of mother’s right under Article 8 of the Convention, nor any irregularity in the conduct of the care proceedings.

14. **PRIVATE LAW**

Mabon-v-Mabon [2005] 2 FLR 1011

Rule 9.2(a) of the Family Proceedings Rules 1991 (providing for separate representation for the child) held to be sufficiently widely framed to meet the UK’s obligations under Article 12 of the United Nations Convention on the Rights of the Child 1989 (a child’s right to express his views freely) and the child’s right to family life (under ECHR 1950 Article 8).

The Judge at first instance had refused to grant separate representation to children aged 17, 15 and 13. Held by the Court of Appeal to be plainly wrong. “It was unthinkable to exclude young men of such ability and maturity from knowledge of and participation in legal proceedings affecting them so fundamentally” (see Thorpe LJ paras 23 and 24).

The case also provided “a timely opportunity to recognise the growing acknowledgement of the autonomy and consequential rights of children, both nationally and internationally. The Courts must, in the case of articulate teenagers, accept that the rights to freedom of expression and participation outweigh the paternalistic judgment of welfare. “Welfare” remains relevant in testing this efficiency of a child’s understanding. If direct participation would pose an obvious risk of harm to the child arising out of the nature of the continuing proceedings, and if a child was incapable of comprehending that risk, then the Judge was entitled to find that sufficient understanding had not been demonstrated. Judges should however be equally alive “to the risk of emotional harm that might arise from denying the child knowledge of and participation in the proceedings” (see Thorpe LJ para 28).

Re B(A Child) [2006]

The Court of Appeal held the first instance Judge had been wrong not to allow the papers to be disclosed to the National Youth Advocacy Service in order to ascertain whether the child should be separately represented by them in proceedings. The Judge had not given real weight to the possibility that a child, properly advised, might want to have contact with her father.

15. **s.91(14) CHILDREN ACT 1989**

Re W (Children) [2006] 26.04.06 Court of Appeal (Wall LJ, Morris K LJ)
unreported

The Court held that it was inappropriate for an Order to be made under the Children Act 1989 s.91(14) where a Joint Residence Order had been made and there was substantial contact between the children and both parents. Problems could arise that require judicial intervention particularly in circumstances where the parents were unable to communicate with each other. “As a matter of policy a Judge should adopt a ‘hands-on’ approach so that if either party had difficulty with any aspect of the arrangements, they could go to the Judge for further guidance”. (The children’s time was divided equally between F and M).

16. **CONTACT/SPECIFIC ISSUE**

Re A (Contact: Risk of Violence) [2006] 1 FLR 283

Black J gave practice guidance for Fact Finding Hearings concerning domestic violence:-

- (i) The Court requires best possible evidence;
- (ii) Full statements by the parties should identify the facts which were in issue between them and therefore needed proof;
- (iii) Schedules of the allegations and responses to them, almost akin to pleadings and most useful in tabular form, would assist in achieving clarity;
- (iv) Where firsthand evidence is available either from a witness or in documentary form it should be presented;
- (v) Attention always has to be given to the issue of evidence that might be corroborative or alternatively give rise to doubt about important allegations. It is normally sensible to give some thought to whether the police had records of reports of domestic incidents and whether there might be material police witnesses, just as consideration should be given to whether there might be medical evidence to corroborate an assertion that a particular assault had taken place and caused injuries.

Suss-v-Germany [2006] 1 FLR 522

The decision of the first instance Court refusing the Applicant access to his daughter held to amount to an interference with his right to respect for family life as guaranteed by Article 8(1) of the ECHR. The interference was, however, in accordance with the law and had the legitimate aim of protecting the “health and morals and the rights and freedoms of the child”. The Court also noted that the margin of appreciation enjoyed by states was narrower in relation to contact disputes than in relation to questions of custody. Article 8 required a fair balance to be struck between the interests of the child and those of the parent. In striking such a balance, particular importance was to be attached to the bests interest of the child, which depending on their nature and seriousness, might override those of the parent. In the circumstances of this case, the National Court’s decision to suspend the Applicant’s access could be taken to have been made in the child’s best interests which, due to its serious

nature had to override the Applicant's interest. The Court also emphasised (again) (1) that the Applicant had been given ample opportunity to make statements to the Court both in person and through Counsel. (2) The Applicant has been placed in a position enabling him to put forward all arguments in favour of obtaining access to his child. (3) It was for the National Court to assess the evidence before them and in assessing whether contact was in the child's best interest domestic Courts relied on extensive information. There was no indication that the Applicant's doubts as to the lack of competence of the expert advising the Appeal Court were objectively justified. The fact that that expert had not explored the Applicant's relationship with the child in the course of direct contact between them could not be considered arbitrary because the child had refused to meet her father. The Appeal Court had not overstepped the margin of appreciation when deciding that it had not been necessary to question the mother and child in person again.

Re C (A Child) [2006] EWCA Civ. 235

On the father's Application for increased contact and a shared Residence Order the Judge had failed to give any reasons for departing from the recommendations of the CAFCASS Officer. The CAFCASS report supplemented by oral evidence, had clearly stated that the child would benefit if contact was increased. The Judge was also held to be wrong in his assessment of the recent authorities in relation to joint residence. The whole tenor of recent authorities have been to liberate trial Judge to elect a regime of shared residency if the circumstances and reality supported that conclusion (A-v-A Shared Residence [2004] 1 FLR 1195)

NB: The Court of Appeal exercised its independent discretion and made the increased Contact Order and Shared Residence Order that ought to have been made by the Judge.

Re C P (A Child) [2006] 24.01.06. Unreported Court of Appeal Thorpe LJ, Wall LJ, Coleridge J

The Court of Appeal held no unfairness to a father where the Judge made a final decision and no Order for Contact at a hearing listed as a Directions hearing. The Judge had a wide discretion over how proceedings should be conducted and if he reached a conclusion that the proceedings could go no further, he had not only the right but the duty to bring the proceedings to an end. (The Judge's decision had been largely based on the child's resistance to contact which was based on her own view of letters and text sent to her by the father)

NB: The parties were legally represented and the hearing lasted over 1 hour.

Re G (A Child) [2006] EWCA Civ. 348 (31.01.06)

In this case a father had been refused direct contact with his daughter, the Court of first instance was held to be wrong to refuse to direct that the CAFCASS Officer meet with the child to discuss contact issues as there was an obligation on the Courts to pursue all possible avenues towards the resumption of direct contact. (See Re S (A Child) (Contact: Promoting Relationship with absent parent) [2004] 1 FLR 1279).

Re D (Contact and PR: Lesbian Mothers and known father)(No.2) [2006]

EWHC Civ. 372 (06.04.06)

The Respondent women who were in a same sex relationship had wanted to bring up a child together. They advertised for a man to father a child. F provided his services. F had expected to be directly involved in D's life with a role similar to that of an absent father through divorce. The Respondent women had intended only that he compliment their primary care of the child by frequent visits and a loving interest. Question of whether PR would be in the child's interest had caused the Court anxiety. A particular concern was the potential threat to the stability of the child's immediate family from "interference" by the father. On the other hand was the "status" aspect of parental responsibility. Case law indicated that it was not appropriate to refuse to grant it because of fear of misuse which would more properly be controlled by orders under the Children Act 1989 s.8, PR was granted subject to conditions that the father would not visit or contact the child's school or contact any health professional involved with his care without prior written consent of the Respondents. The child's home was with the Respondents and the father expressly recognised that they were her day-to-day parents and that he had no role to play in her day-to-day care. However, he was to be kept informed of all major decisions taken by the Respondents in relation to the child. He would be recognised as a parent by the grant of parental responsibility but it would be a parent of a very different type. The Order was drafted to show the paramount position of the family comprising the two mothers and the child

G-v-(1) CW,(2)G Children [2006] EWCA Civ. 372 (06.04.06)

Non-biological mother of children conceived during a same sex partnership granted primary care of children in circumstances where the biological mother had breached a Court Order prohibiting relocation and there was a real risk that she would marginalise the non-biological mother's role in the children's lives if granted residency.

The old principles of the decisions in **J & C [1970] AC 668 and Re KD[1988] AC 806** that the natural bond between a parent and a child was a fact of very great importance in a welfare determination were not propositions that could be generally extended to the circumstances of this case. Those cases were decided at an earlier time when judicial attitudes to homosexual parenting were very different. The principle had been limited in its application to cases in which the dispute was between parents and non-parents. In the eyes of the child, the natural parent might well be a non-biological parent who, by long settled care had become the child's psychological parent.

17. **RELOCATION AND IMMIGRATION**

Re B (A Minor) [2005] EWHC 1473 Fam (President)

Although the Court is able to invoke its wardship jurisdiction or powers under the Children Act 1989 in respect of a person liable to deportation, it was not feasible or appropriate on the facts of this case and the Court could not allow itself to be used as a means of influencing the decision of the Secretary of State in the absence of genuine dispute concerning the child. R-v-Secretary of State for the Home Department ex parte T [1995] 1 FLR 293 applied.

H-v-F (Refusal of Leave to Remove a Child from the Jurisdiction) [2005] EWHC 2705

It was held not in the best interests of the child to remove him from the jurisdiction and relocate in Jamaica given the mother's practical plans for

removal were ill-conceived and unacceptable as a basis upon which the Court could countenance allowing permanent removal from the jurisdiction. There would be no advantage to the child other than being with his mother and the consequences for him in relation to his father would be considerable, bearing in mind the child's close bond with the father. The mother's proposals were held to be genuine and not based on a desire to terminate or unwarrantably reduce contact to the father, but the proposals were unrealistic and utterly speculative in terms of income and benefit to her family.

18. **HAGUE CONVENTION**

Hunter-v-Morrow (Abduction: Rights of Custody) [2005] 2 FLR 1119 (Court of Appeal)

The Hague Convention was “a living instrument to be interpreted and applied as necessary to keep pace with social and other trends”. Questions involving the construction or interpretation of an article of the Convention were to be answered according to the International jurisprudence of the contrasting states and not simply according to the law of one particular jurisdiction”.

(See Thorpe LJ para 29).

“The issue in this case is whether or not the father exercised rights of custody immediately prior to removal from New Zealand. That question had to be distinguished from the separate question of whether the rights enjoyed by the father under the New Zealand Domestic Law amounted to rights of custody within the autonomous meaning of the Hague Convention. It was the task of the Court to apply the English perception of the autonomous law of the convention. According to that perception, simple contact arrangements did not constitute “rights of custody” and the removal had therefore not been wrongful. A Declaration under Article 15 of the Hague Convention was persuasive but not binding upon the Court which had sought it. That concession had been made by the father’s Counsel in New Zealand”

(Thorpe LJ para 27).

Re J (A Child) (Child returned abroad: Convention Rights) HL [2005] 2 FLR 802

When considering whether a child ought to be returned to his home country for a decision to be made as to his future residence, the fact that the family laws and procedures of that country were different from those of the UK was a relevant consideration but the extent of its relevance depended on the facts of the particular case. At para 32 Baroness Hale states:

“The most one can say ... is the Judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. The case against his doing so has to be made. The weight to be given to that proposition will vary enormously from case to case. What may be best for him in the long run may be different from what would be best for him in the short run. It should not be assumed in this or any other case that allowing a child to remain here whilst his future is

decided here, inevitably means that he will remain here forever”

At paragraph 33,

“one important variable... is the degree of connection of the child with each country. This is not to apply what has become the technical concept of habitual residence but to ask in a common sense way with which country the child has the closest connection. What is his “home” country. Factors such as his nationality, where he has lived for most of life, his first language, his race or ethnicity, his religion, his culture and his education so far will all come into this...another closely related factor will be the length of time he has spent in each country. Uprooting a child from one environment and bringing him to a completely unfamiliar one, especially if this has been done clandestinely, may well not be in his best interest”.

19. **PUBLICITY**

Re Z(Shared Parenting Plan: Publicity [2006] 1 FLR 405)

Order made by consent as to shared parenting of a child after a long history of extremely acrimonious proceedings where the father of a 6 year old child had served a sentence of imprisonment for his abduction. The question of the continuation of the Non-publicity Injunction was raised. The father wanted it to be lifted in its entirety, the Guardian wished it to continue as it stood, the mother was content with a degree of publicity provided that the child was not identified. The Judge articulated the balance between freedom of expression under Article 10 the child’s right to respect for her private life under Article 8. The Judge ordered that the Injunction should continue until the child reached the age of 18 in order to safeguard her interest under Article 8 but delivered the Judgment in open court (protecting the identity of the child, leaving the father free to use the Judgment as he wished and thus safeguarding his interest under Article 10).

Re H (Freeing Orders: Publicity) [2005] EWCA Civ. 1325

Thorpe LJ considered that the case provided a strong argument for those who take the view that any Circuit and Family Judge hearing Care and Adoption proceedings should, as a matter of routine, deliver Judgment in an anonymised form in open Court.:

“In my judgment it also provides a strong argument for Judges in cases which are controversial, or which have attracted media attention, preparing a short written summary of their conclusions and their reasons which can be made publicly available when the Judgment is delivered. Cases involving children are currently heard in private in order to protect the anonymity of the children concerned, however, the exclusion of the public from Family Courts and the lack of knowledge about what happens in them, easily lead to accusations of “secret justice. Moreover, Judges are communicating carefully reasoned Judgments and not sand bites. Thus even when a Judgment is published, it is likely to be read in its entirety only by lawyers. In my Judgment, therefore, if Judges wish to avoid misunderstandings about Judgments in controversial cases, they should consider

preparing short summaries of their reasons which can either be read out or distributed in Court when the full Judgment is given or handed down. This is not designed either to devalue the Judgment or in any way to be a substitute for it. It needs, however, to be borne in mind that a journalist who gets a substantial Judgment at 10.30 in the morning and has to write piece about it against a short deadline, cannot be expected to absorb and reproduce every nuance of it in such a short period of time (in this case publicity in the national and local press had largely promoted the idea that children who had been removed from their parents because of the parents' level of intelligence)".

Re BBC-v-Rochdale [2005] EWHC 2862

This case arose from the Judgment of Mr Justice Douglas-Brown in Wardship proceedings concluded on the 7th March 1991 in the case known as the Rochdale Satanic Abuse Case. (Judgment is reported **Rochdale-v-MBC A [1991] 2 FLR 192**. The issue before the Court was whether continuing protection should be afforded to two Social Workers whose identities were not revealed in Court Judgment delivered in open Court. The anonymity was said to be for the protection of the children concerned. The former wards now involved in litigation against Rochdale MBC had been approached by the BBC with a view to making a programme about their experiences. The Local Authority and two Social Workers protected by the Injunctions agreed with the BBC to assist them in preparing their programme. Two remaining issues were:

- (a) Whether the two Social Workers could be named in the documentary; and
- (b) Whether video footage which included the images of the Social Workers as well as the children could be broadcast.

The Judge held that the Court would have to be convinced of a pressing social need for the restrictions upon freedom of expression.

"I recognise that there are clear distinctions to be drawn between the administration of criminal justice and family justice but just as there are differences so there are certain minimum protections and expectations that ought to be common to both. Reflecting this particularly against the background of frequently expressed concerns about secrecy in the family division, there is increasing recognition of the need to permit greater openness in family cases".

The Judge quoted Thorpe L J in **Re W (Care Proceedings: Witness Anonymity [2003] 1 FLR 329 paragraph 13)**:

"Social Workers up and down the country, day in day out are on the receiving end of threats of violence and sometimes actual violence from adults who are engaged in bitterly contested public law cases...Social Workers must regard this as a professional hazard".

Ryder J concluded:

“There is no longer any interest of a particular child or children generally in retaining the anonymity of X & Y Social Workers, the justification for the original anonymity ruling no longer exists. The evidence filed in support of the application does not convincingly establish a pressing social need for the restraint asked for. That restraint would, in my judgment, be a disproportionate interference for the Article 10 right. An issue of principle was raised on behalf of X & Y that their reasonable expectation of privacy cannot now be overturned without significant prejudice to them to the extent that so long after the original bounds conducted by Douglas Brown J they cannot now get a fair hearing. It is said that this Court cannot do justice to the balance of the delay since the original hearing so that these proceedings are unfair. It is true that in 1991 X & Y were confronted with a difficult case in a markedly different environment to today. In 1991 the Court’s Judgment was that the interests of the children demanded that X & Y’s identities were withheld and X & Y now say that that deprives them of the protection of explaining themselves in public whether they would have chosen to be named then had they been given a choice is impossible to know but it is true that the passage of time has allowed them to build careers and to pursue their professional and personal lives, a balance struck in 1991 and this Court has been vigilant not to try and recast that balance in order to make its decision on these applications... there is a separate balance to be conducted today.”

20. **EDUCATION/RELIGION**

Ali-v-Lord Grey School Head Teacher and Governors [2006] UK HL 14

The ECHR 1950 Protocol, Article 2, did not confer a right to be educated at a particular school but rather conferred a right not to be denied access to a general level of educational provision available in member states. On the evidence in the case, a pupil had not been excluded from school education in breach of his Convention rights in circumstances where he had chosen not to take up the school’s invitation to attend a meeting to re-admit him to the school, nor its offer to provide work from home and to arrange alternative tuition.

Lord Bingham:

“The test as always under the convention is a highly pragmatic one, to be applied to the specific facts of the case: had the authorities of the state acted so as to deny a pupil effective access to such educational facilities as the state provides for such pupils. The question is, whether between the relevant dates the school denied the Respondent effective access to educational facilities in this country. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds unless, in the ordinary way, there is no alternative source of state education open to the pupil”.

R (Begum)-v-Denbigh High School Head Teacher and Governors [2006]
UK HL 15 (22.03.06)

The school’s refusal to allow the pupils to wear a Jilbab at school did not interfere with her rights under the ECHR 1950 to manifest her religion and even if it DID, the school’s decision was objectively justified under Article 9(2). The Shalwar Kameeze and not the Jilbab had been worn by the Respondent’s elder sister throughout her time at school and by the Respondent for her first two years without objection. It was of course open to the Respondent as she grew older to modify her belief and she did so against a background of free and informed consent by her and her family. It is also clear that there were 3 schools in the areas at which the wearing of the Jilbab was permitted. Baroness Hale dissenting on the issue of whether there had been an interference with the child’s right to manifest her religion nonetheless concluded that the interference was justified:

“It is not all surprising to find an adolescent making different moral judgments from those of their parents. It is part of growing up. The fact that they are not yet fully adult may help to justify interference with the choices they have made. It cannot be assumed as it can with adults that these choices are the product of a fully developed individual autonomy, but it may still count as an interference. I am in no doubt that the interference was justified. It had the legitimate aim of protecting the rights and freedoms of others, the question is whether it was proportionate. This is a difficult and delicate question in this case and it would be in the case of many similar manifestations of a religious belief. In deciding how far to go in accommodating religious requirements the dress code at school has to accommodate complex considerations ... social cohesion is promoted by the uniform elements of shirt, tie and jumper and the requirement that all outer garments be in the school colour. Both cultural and religious diversities are respected by allowing girls to wear either a skirt, trousers or the Shalwar Kameeze and by allowing those who wish to do so to wear the Hijab. This was indeed a thoughtful and proportionate response to reconciling the complexities of the situation. This is demonstrated by the fact that girls have subsequently expressed

their concern that if the Jilbrab were to be allowed, they would face pressure to adopt it, even though they do not wish to do so. Here is the evidence which supports the justification.”

Family Proceedings Rules

A person specified in the first column of the following table may communicate to a person listed in the second column such information as is specified in the third column for the purpose or purposes specified in the fourth column.

Communication of information without permission of the court

<i>Communicated by</i>	<i>To</i>	<i>Information</i>	<i>Purpose</i>
A party	A lay adviser or a McKenzie Friend	Any information relating to the proceedings	To enable the party to obtain advice or assistance in relation to the proceedings.
A party	The party's spouse, cohabitant or close family member	as above	For the purpose of confidential discussions enabling the party to receive support from his spouse, cohabitant or close family member.
A party	A health care professional or a person or body		To enable the party or child of the party to obtain health care or

	person or body providing counselling services for children or families	as above	obtain health care or counselling.
A party or any person lawfully in receipt of information	The Children's Commissioner or the Children's Commissioner for Wales	as above	To refer an issue affecting the interests of children to the Children's Commissioner or the Children's Commissioner for Wales.
A party or a legal representative	A mediator	as above	For the purpose of mediation in relation to the proceedings.
A party, any person lawfully in receipt of information or a proper officer	A person or body conducting an approved research project	as above	For the purpose of an approved research project.
A party, a legal representative or a professional legal adviser	A person or body responsible for investigating or determining complaints in relation to legal representatives or professional legal advisers	as above as above	For the purposes of making a complaint or the investigation or determination of a complaint in relation to a legal representative or a professional legal adviser.

A legal representative or a professional legal adviser	A person or body assessing quality assurance systems		To enable the legal representative or professional legal adviser to obtain a quality assurance assessment.
A legal representative or a professional legal adviser	An accreditation body	Any information relating to the proceedings providing that it does not, or is not likely to, identify any person involved in the proceedings	To enable the legal representative or professional legal adviser to obtain accreditation.
A party	An elected representative or peer	The text or summary of the whole or part of a judgment given in the proceedings	To enable the elected representative or peer to give advice, investigate any complaint or raise any question of policy or procedure.
A party	The General Medical Council	As above	For the purpose of making a complaint to the General Medical Council.
A party	A police officer	as above	For the purpose of a criminal investigation.
A party or any person lawfully in receipt of information	A member of the Crown Prosecution Service		To enable the Crown Prosecution Service to discharge its functions under any enactment.

11th May 2006