Coventry City Council v PGO & Ors [2011] EWCA Civ 729

Case No: B4/2011/0655

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COVENTRY COUNTY COURT
HIS HONOUR JUDGE BELLAMY
LOWER COURT NO: CV11C00130

Royal Courts of Justice
Strand, London, WC2A 2LL

22/06/2011

B e f o r e :

LORD NEUBERGER, MASTER OF THE ROLLS
LORD WILSON
and
DAME JANET SMITH

Between:

COVENTRY CITY COUNCIL	**Appellants**
- and –	
PGO and FEO	**First and Second Respondents**
- and -	
CW	**Third Respondent**
- and -	
RB	**Fourth Respondent**
- and -	
LB and CB (by their Children's Guardian)	**Fifth and Sixth Respondents**

Miss Frances Judd QC and Mr Mark Higgins (instructed by the Council's Legal Services) appeared for the Appellants, the local authority.
Mr Alistair MacDonald QC and Ms Theresa McCormack (instructed by Button Legal LLP, Coventry) appeared for the First and Second Respondents, the foster parents.
Miss Elizabeth McGrath (instructed by Kundert Solicitors, Coventry) appeared for the Third Respondent, the mother.
The Fourth Respondent, the father, did not appear.
Mr Robin Arwel Lewis (instructed by Varley Hibbs LLP, Coventry) appeared for the Fifth and Sixth Respondents, the children, by their Children's Guardian.
Hearing date: 18 April 2011

HTML VERSION OF JUDGMENT

Lord Wilson:

A: THE TWO QUESTIONS

1. (a) When short-term foster parents suddenly give notice of intention to adopt their foster child and thus wish to prevent the local authority's imminent removal of him from their home into the home of prospective adopters pursuant to a placement order, does a county court judge have jurisdiction to make an injunction against the local authority's removal of him and, if so, what considerations inform the exercise of such jurisdiction?

Such is the main question posed by this appeal.

(b) Is a child "placed" for adoption when an adoption agency ratifies the match between a child and prospective adopters and when thereafter he first meets them or is he "placed" for adoption only when he subsequently begins to live with them?

Such is the subsidiary question posed by this appeal.

B: INTRODUCTION

2. On 14 March 2011, in the Coventry County Court, His Honour Judge Bellamy made an injunction against Coventry City Council ("Coventry") not to remove two children from the care and control of foster parents until 22 May 2011 (being the earliest date upon which it would be open to them to make an application for adoption orders referable to the children) and, in the event that such an application was made on that date, until its determination.

3. With the permission of the judge, Coventry appeal against the judge's injunction. They also seek to appeal against another order made by him on the same date, in respect of which he did not permit an appeal. This other order was to adjourn until a further hearing before him on 15 June 2011 an application made by the foster parents for leave to apply to revoke the placement orders referable to the children, which, together with full care orders, he had made in favour of Coventry on 18 June 2010.

4. The two children are L, a boy, who was born on 17 November 2008 and is thus now aged two, and C, a girl, who was born on 28 October 2009 and is thus now aged one. Their parents, who appear to continue to live together, are, through no fault of their own, unable to care adequately for either of them. L has lived with the foster parents since he was aged two months; and C has lived with them since birth. A third child was born to the parents in December 2010 and is in the care of other foster parents; the foster parents of L and C have expressed interest in also adopting him.

5. The judge's orders made on Monday 14 March 2011 were reflective of a careful, reserved judgment which he then handed down and which he had composed, with his customary assiduity, over the prior weekend following a hearing on Friday 11 March 2011. Unfortunately the hearing was able to be listed only for two hours; and it was too short to enable the judge to receive oral evidence in relation to an important issue of fact raised between Coventry and the foster parents which I will identify in [14] below. Indeed the various issues of law, some of which have now fallen away, carried a complexity which deserved fuller submissions from the advocates than the length of the hearing allowed. Miss Judd QC, who appears before us on behalf of Coventry, (unlike Mr MacDonald QC, who appears before us on behalf of the foster parents) appeared before the judge on 11 March and, perhaps on behalf of all the advocates

who then appeared, she accepts before us that, in retrospect, the degree of assistance given to the judge was less than optimal.

6. The mother has met the foster parents, likes them and admires the care which they have given to the children. Before the judge, by counsel, she supported their application for an injunction in restraint of removal from them; and she supports their opposition to the appeal. By a solicitor, the father also supported their application; and, while he properly takes no active part in this appeal, I assume that he also supports their opposition to it. The stance taken by the Children's Guardian before the judge was clearly influential. The guardian who had represented the children in the care and placement proceedings in 2010 had left Cafcass; in such circumstances a fresh Cafcass guardian was appointed to represent them in the present proceedings. By the date of the hearing on 11 March she had been in post only for 16 days and had met the foster parents and the children only once. At all events, by counsel, she firmly supported the application of the foster parents for an injunction and she firmly supports their opposition to the appeal.

C: THE ADOPTERS

7. In the judgment in June 2010 by which he made the care and placement orders, and in judgments at interim hearings prior thereto, the judge had been critical of Coventry's lack of firm planning for the children's future. In his judgment on 14 March 2011 he summarised it as having been dilatory and lack-lustre; and he proceeded to add criticism of their delay in arranging for the placement of the children for adoption following his investment of them in June 2010 with the authority to place them. Although he fell into error in saying that it was as late as February (rather than on 19 January 2011) that Coventry's adoption panel had approved the match of the children with the prospective adopters (whom, for convenience and without disrespect to the foster parents, I will describe as the adopters), Miss Judd, with the frankness typical of her, accepts before us that the judge's criticisms of Coventry are fair.

8. On 15 February 2011, in the foster home, the children first met the prospective adopters. Later that day the adopters and the foster mother attended a meeting arranged by Coventry. The adopters reported that the children's initial introduction to them had gone very well; and the foster mother did not dissent. Thereafter until 23 February the adopters, at least one of whom had taken a week's leave from work, saw the children daily: first again in the foster home; then including a trip out with the children in the presence of the foster parents; then including a trip out with them otherwise than in the presence of the foster parents; and then in their own home.

9. On 21 February 2011, prior to their again taking the children to their home for the day, the adopters attended a meeting. The foster mother also attended it. Coventry's adoption team manager asked the foster mother and the adopters for reports on the success of the programme of introductions. The foster mother, who, three days earlier, had privately told Coventry of concerns that the children were unsettled, told the meeting that they were beginning to feel more comfortable with the adopters. The adopters reported that in their view the introductions had been successful and had proceeded better than they had expected. The link worker for the foster parents reported that, over all, the introductions had been very positive. It was accepted on all sides that the final part of the programme should be implemented; and the foster mother, as well as the adopters, signed a written agreement to that effect. The final part of the programme was that

(a) the adopters should take the children home for that day;

(b) they should do the same on 22 February, albeit for longer; and

(c) at 10:00am on 23 February they should collect the children from the foster home in the presence of the link worker and take them to live with them.

10. I must avoid describing 23 February 2011 as the date of the intended "placement" of the children with the adopters. I must avoid doing so because, at [41] to [44] below, I will address an argument put before us by Miss Judd to the effect that the "placement" of the children had occurred at an earlier stage.

11. Thus the programme of introductions proceeded, as planned, on 21 and 22 February 2011. At about 4:00pm on 22 February a social worker from the Looked After Children's team visited the adopters' home and made a highly positive assessment in terms which I will set out in [51] below. Everything then seemed ready for the final movement of the children into the home of the adopters at 10:00am on the following day.

12. At 5:00pm on 22 February 2011, however, Coventry were notified that, earlier that afternoon, the foster parents, by solicitors, had made two sets of applications (which, for the sake of simplicity, I will describe in the singular, namely as two applications) to the court, namely for adoption orders in relation to both children and for revocation of the placement orders in relation to them, and that, without notice, a judge had directed that the applications should initially be considered at a hearing, on notice, on the following morning. It later transpired that the foster parents had been seeking legal advice in this regard since 16 February 2011, i.e. five days prior to the foster mother's written re-affirmation of the programme for removal of the children to the home of the adopters.

13. Notwithstanding their previous shortcomings in relation to the children's case, Coventry have behaved with total propriety since notification of the foster parents' applications. They halted the movement of the children into the home of the adopters on 23 February 2011. Instead they attended the hearing that morning and, albeit very reluctantly, agreed not to remove the children until the conclusion of a fuller hearing which, in the event, proved to be that conducted by Judge Bellamy as late as 11 March. Coventry also agreed not to "increase" the amount of time spent by the children with the adopters in the interim. Shocked and distressed, the adopters considered, probably wisely, that it might be less confusing for the children if they suspended all contact with them during the interim, which had at first been expected to be less than a fortnight. In the event, after putting them to bed in the home of the foster parents on 22 February, the adopters were never to see the children again.

D: <u>THE FOSTER PARENTS</u>

14. The important issue of fact between Coventry and the foster parents to which I referred in [5] above relates to the stance taken by the foster parents prior to 22 February 2011 in relation to their possible adoption of the children. In short Coventry's case is that, from early in 2010, the foster parents occasionally discussed their possible adoption of the children with the social workers but that on each occasion they soon intimated a decision not to pursue it. The case of the foster parents, by contrast, is that early in 2010 a social worker told them that they would not be suitable as adopters of the children; that Coventry never asked them whether they wished to be assessed as possible adopters of them; that, had Coventry so asked them, they would have responded in the affirmative; and that they never intimated a decision not to pursue the possibility of adopting them.

15. It was not practicable for the judge to seek to resolve the above issue at the hearing on 11 March 2011. But he might have chosen to note that contemporaneous records compiled by Coventry appear to corroborate their case to a significant extent. Thus

(a) following a discussion with the foster parents on 19 January 2010 about their possible adoption of the children, the social worker then allocated to the children noted that she had advised them that, if they wished to proceed with the idea, they needed to "let [her] know asap and put it in writing";

(b) the social worker noted that on 10 February 2010 the foster mother had told her that, partly in the light of the mother's knowledge of their address and her wish to continue to have

contact with the children, she and the foster father "had carefully considered about the adoption and do not wish to proceed";

(c) the chair of a meeting attended by the foster mother on 29 June 2010 noted its upshot as having been that the foster parents were again considering whether to seek to adopt the children, that the foster mother had been given a leaflet about adoption, that they would need to make a decision about it and that, if they decided to proceed, they would need to be the subject of an assessment;

(d) following a further meeting on 7 July 2010 (or, rather, alleged meeting in that the foster mother says that it did not take place), a social worker noted that the foster mother had said that they had decided that they would be unable to proceed with the possible adoption of the children;

(e) on 23 September 2010, according to her note, a social worker freshly allocated to the children made her first visit to the foster home and was told by the foster mother that she had originally wanted to adopt the children but that, following discussions with the previous worker, she had changed her mind;

(f) on 19 October 2010, according to a note made by her link worker, the foster mother told her that she had previously wanted to adopt the children but that, for financial reasons, the foster father did not consider that they could do so; and

(g) on 13 January 2011, according to another note made by the link worker, the foster mother told her that she did not wish to adopt the children, that she knew that they had to move on but that it would be painful for her and the family.

16. Coventry have, however, recently located – and disclosed – a note which indicates, somewhat in accordance with the case of the foster parents, that at a very early stage the social worker then allocated to the children had expressed doubts to them about their chance of successfully applying to adopt the children. Although either Coventry's case or that of the foster parents in relation to the issue may be correct, it may well be that the truth lies somewhere between them, namely that, while Coventry always harboured – and sometimes expressed – doubts about the suitability of the foster parents to adopt the children, they afforded to them at the appropriate time much more of an opportunity to put forward their candidacy as adopters, and indeed that the decision of the foster parents not to do so was much more conscious, voluntary and reasoned, than the latter now concede.

E: THE APPLICATION FOR ADOPTION ORDERS

17. At the hearing on 11 March 2011 the primary request of the foster parents was for an interim injunction against Coventry's removal of the children from them. But they needed a peg on which to hang their request. "An interlocutory injunction, like any other interim order, is intended to be of temporary duration, dependent on the institution and progress of some proceedings for substantive relief": *Fourie v. Le Roux* [2007] UKHL 1, [2007] 1 WLR 320, per Lord Scott at [32]. Thus the foster parents had issued the applications both for adoption orders and for revocation of the placement orders, either of which, so they contended, provided the necessary peg. The problem was that neither peg could be accounted secure.

18. There was one hurdle which the application of the foster parents for adoption orders could surmount. It related to the conditions set by s.42 of the Adoption and Children Act 2002 ("the Act of 2002") to the effect that a child must have lived with proposed adopters for specified periods before they make their application for an adoption order. Although leave to apply can be granted to foster parents in any event under s.42(6), s. 42(4) provides:

> "If the applicants are local authority foster parents, the condition is that the child must have had his home with the applicants at all times during the period of one year preceding the application."

The foster parents satisfied the condition set by the subsection and had no need to seek leave under subsection (6).

19. But there was another hurdle which the application of the foster parents for adoption orders could not surmount. It related to the requirement in s.44 of the Act of 2002 that those who wish to adopt a child not placed *for adoption* with them by an adoption agency must have given to the local authority a notice of intention to adopt. Insofar as material, the section provides:

> "(3) The notice must be given not more than two years, or less than three months, before the date on which the application for the adoption order is made.
>
> …
>
> (5) On receipt of a notice of intention to adopt, the local authority must arrange for the investigation of the matter and submit to the court a report of the investigation."

20. For the purposes of the Act of 2002 s.144(1) defines "notice" as a notice in writing. Otherwise, however, the Act prescribes no form for a notice of intention to adopt. Thus the judge was correct to treat the invalid application of the foster parents for adoption orders, made on 22 February 2011, as a valid notice of intention to adopt. The result was that he could confidently anticipate that three months after its date, namely on 22 May 2011, the foster parents would make a valid application for adoption orders. But such had indeed to be a fresh application and the judge was also correct to dismiss the existing application rather than to adjourn it until after 22 May.

F: <u>THE JUDGE'S JURISDICTION TO MAKE THE INJUNCTION</u>

21. I draw nearer to the heart of this appeal when I turn to consider whether the facts that the foster parents had issued a notice of intention to adopt on 22 February 2011 and would be able to apply for adoption orders on 22 May entitled the judge on 14 March to make an injunction in restraint of the children's removal.

22. Of course, had the Act of 2002 itself provided that the issue of a notice of intention to adopt by foster parents precluded the local authority's removal of a child from them, the matter would have been clear-cut and an injunction would have been no more than confirmatory. But all we find in s.44 itself is that, by subsection (5) set out in [19] above, receipt of a notice casts on the local authority an obligation both to arrange for the investigation of the matter and to submit a report of it to the court: one cannot read into that provision an obligation not to exercise a power of removal which would otherwise exist.

23. In the event, however, the matter is put beyond doubt by one of two sections of the Act of 2002 which in my view hold the key to the proper despatch of the substantive appeal. It is s.38 of the Act, to which the judge did not refer. It provides:

> "(1) This section applies if the child's home is with local authority foster parents.
>
> …
>
> (4) If …
>
> (a) the child has had his home with the foster parents at all times during the period of one year ending with the removal, and
>
> (b) the foster parents have given notice of intention to adopt,
>
> the following persons may remove the child.

(5) They are –

…

(c) a local authority … in the exercise of a power conferred by any enactment, other than section 20(8) of the [Children Act 1989]."

If a placement order has been made in favour of a local authority, their power to remove a child from the home of foster parents is conferred not by s.20(8) of the Act of 1989 but by the conjunction of s.3(1) of that Act and of s.25(2) of the Act of 2002.

24. Thus s.38 of the Act of 2002 expressly caters for the present situation: notwithstanding the service by foster parents of a notice of intention to adopt, the local authority retain their power to remove the child from their home, whether to the home of other foster parents or, in the event of their also having authority to place him for adoption, to the home of prospective adopters.

25. By his injunction the judge was overriding the power conferred upon the local authority by s.38 – without acknowledging that he was doing so.

26. The other of the sections of the Act of 2002 which hold the key to the proper despatch of the appeal is s.21, to which, again, the judge did not refer. Subsection (1) provides:

"A placement order is an order made by the court authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the authority."

The subsection therefore expressly confers upon the local authority a power not only to place the child for adoption but also to choose the identity of those with whom to place him.

27. There was nothing in the circumstances of the present case to engage any statutory erosion of Coventry's powers under s.21. By his injunction the judge was overriding their powers thereunder – without acknowledging that he was doing so.

28. It was in the above circumstances that Miss Judd had submitted to the judge that any challenge by the foster parents to Coventry's exercise of their powers under ss. 21 and 38 of the Act of 2002 should not only be determined by reference to public law principles of irrationality and proportionality but also be brought in the Administrative Court of the Queen's Bench Division by way of judicial review. The judge rejected both limbs of her submission. My view is that he should have rejected only the latter.

29. In support of his conclusion that he had jurisdiction to entertain the application for an injunction, the judge relied on Rules 118 and 119 of the Family Procedure (Adoption) Rules 2005, S.I. 2005 No. 2795, ("the Rules of 2005"), which, with effect from 6 April 2011, were replaced in what for present purposes can be described as similar terms by Rules 20.2 and 20.3 of the Family Procedure Rules 2010. Rules 118 and 119 provided:

"**Order for interim injunction**

118.—(1) The court may grant an interim injunction.

(2) Paragraph (1) does not limit any other power which the court may have to grant an injunction.

(3) The court may grant an interim injunction whether or not there has been an application.

Time when an order for an interim injunction may be made

119.—(1) An order for an interim injunction may be made at any time, including—

(a) before proceedings are started …

(Rule 19 provides that proceedings are started when the court issues an application form.)

(2) However—

(a) paragraph (1) is subject to any rule, practice direction or other enactment which provides otherwise; and

(b) the court may grant an interim injunction before an application has been made only if—

(i) the matter is urgent; or

(ii) it is otherwise desirable to do so in the interests of justice.

(3) Where the court grants an interim injunction before an application has been commenced, it may give directions requiring an application to be commenced."

30. I confess that the words of paras (1) and (2) of Rule 118 appear to suggest that they conferred a free-standing jurisdiction upon a court in proceedings under the Act of 2002 to grant an interim injunction. But it is clear that the source of the jurisdiction of the High Court to grant an injunction is s.37 of the Senior Courts Act 1981 and of the county court to do so is s.38 of the County Courts Act 1984 (see the White Book, 2011, Vol 1, 25.1.1) and that the Rules of 2005 did no more than to put the flesh apt to proceedings under the Act of 2002 upon the bones of the jurisdiction to be found in the statutes.

31. In this regard I refer to the decision of this court in *Re F (Placement Order)* [2008] EWCA Civ 439, [2008] 2 FLR 550. Such is the notorious case in which, aware that they were doing so on the eve of the hearing of the father's application for leave to apply to revoke the placement order, East Sussex County Council exercised their power to place the child for adoption and thereby defeated his application by virtue of s.24(2) of the Act of 2002. All three members of the court observed, *obiter*, that the county court would have had jurisdiction to restrain the placement by injunction: per Thorpe LJ at [14], Wall LJ at [98] and myself at [111]. I there said as follows:

> "… I consider that jurisdiction is conferred upon the county court by s 38 of the County Courts Act 1984 (and upon the High Court by s 37 of the Supreme Court Act 1981) to enjoin a local authority from placing a child for adoption even if authorised to do so by a subsisting placement order; that such an injunction can be sought, no doubt on a very temporary basis, even without notice to the local authority; and that it can be sought at any time after issue of the application for leave or even prior to its issue provided that an undertaking is given to issue it immediately."

None of us proceeded to address the principles by which the county court should determine such an application for an injunction in restraint of placement. But in considering a situation, such as that then before the court, in which a local authority had already effected the placement (in order, so he concluded at [87], to "scupper" the application for leave fixed for hearing on the following day) Wall LJ made the following valuable observations at [94]:

> "… if this kind of disgraceful conduct is repeated in another case, the likelihood is that the agency's decision to place the child would be the subject of an application for

judicial review. Speaking for myself, I can see no reason why the Administrative Court should not declare unlawful a decision such as that taken by the agency in the instant case. If it did so, it would quash the decision to place the child for adoption. It could then give directions for the hearing of the father's application under s 24(2) in the county court, and restrain the agency, by injunction, from placing the child for adoption pending the determination of that application."

32. There is no reason in principle why a county court which has jurisdiction to make an injunction in restraint of placement pending the hearing of an application for leave to apply to revoke the placement order should lack jurisdiction to do so pending the hearing of an application for an adoption order. The only possible problem is temporal. An application for leave to apply to revoke can be made at any time and, if not already made at the time when the injunction is made, can be required to be made forthwith. The ability to make an application for an adoption order, by contrast, is subject to the requirement of prior notice set out in s.44(3) of the Act of 2002. In the present case the judge made the injunction almost ten weeks before the foster parents could make their application. Can the long-established jurisdiction to grant an injunction in aid of prospective proceedings extend to a delay of that length? In my view, for three reasons, the answer is yes. First, although the application for adoption orders could be made only on 22 May, the formal step preliminary thereto, mandated by statute, had been taken on 22 February 2011. Second, Rule 119 of the Rules of 2005, set out at [29] above, explained the jurisdiction, in the context of proceedings under the Act of 2002, as being only that the court may grant an injunction "before proceedings are started", provided only that "the matter is urgent" or that "it is otherwise desirable to do so in the interests of justice". Third, in that the foster parents would have been able on 22 February 2011 to invite the Administrative Court, even without notice, to make an injunction in restraint of Coventry's threatened placement of the children, it is but a small step to conclude that the county court in Coventry, to which is attached a specialist family judge such as Judge Bellamy, had an analogous jurisdiction even at that early stage – provided, of course, that the principles apt to the exercise of the jurisdiction were to be the same in both courts.

33. So Judge Bellamy had jurisdiction to make the injunction.

G: THE PRINCIPLES APT TO THE EXERCISE OF THE JUDGE'S JURISDICTION

34. The judge resolved to exercise his jurisdiction by reference to the principles set out in the decision of this court in *Re A; Coventry City Council v. CC and A* [2007] EWCA Civ 1383, [2008] 1 FLR 959. The foster mother of a baby promptly indicated a wish to adopt her. Following four months of assessment Coventry informed her that, for reasons which she wished to challenge, her adoption of the baby would be unsuitable. Three days prior to so informing her, Coventry had matched the baby with prospective adopters and had resolved to move her into their home within the following three weeks. In that the baby had not had her home with her for as long as one year, the foster mother needed leave to apply for an adoption order under s.42(6) of the Act of 2002, whereupon, pursuant to s.44(4), she would be able to give notice of intention to adopt. Coventry accepted – so no consideration was given to the extent of the court's powers in the event that they had not done so – that, were leave granted to the foster mother, they would not remove the baby from her pending the determination of the proposed application for an adoption order. The focus of the judgments was on the criterion for the grant of leave under s.42(6). The court concluded that such was a discretionary decision in which the welfare of the child, while not paramount, was a relevant consideration, as were the prospects of success of the proposed application and the likely delay consequent upon grant, all of which were linked; and that, by reference to such a criterion, leave should have been granted to the foster mother.

35. Impressed with the fact that the grant of leave in *Re A* had halted the removal of the baby from the foster mother, Judge Bellamy concluded that in the present case he should apply the criterion there identified. Mr MacDonald, unlike Mr Arwel Lewis on behalf of the guardian, concedes before us that in this regard the judge fell into error. In *Re A* the fact that the grant of leave would halt the baby's removal arose by Coventry's concession, which, in the light of the foster mother's early request to adopt and her immediate and arguable attempt to

challenge the negative assessment, was properly made. The criterion is inapt to the grant of an injunction in restraint of removal of a child from the foster home. In particular it fails to recognise that such an injunction represents an interference with the exercise of powers expressly conferred upon local authorities by ss. 21 and 38 of the Act of 2002 – being a feature to which the judge made no reference.

36. It is the submission of Mr MacDonald that the criteria which the judge should have applied to his clients' application for an injunction are those set out in the decision of the House of Lords in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396; and that, had he done so, he would, as he did, have made the injunction. In my view, however, the application, albeit able to be made to the county court as much as to the Administrative Court, represented a challenge of a public law character to the proposed exercise of Coventry's powers and thus that its determination should allow for that important feature. Doubt as to the full application of the criteria in *American Cyanamid* to public law proceedings was swiftly raised by Lord Denning MR in *Smith v. Inner London Education Authority* [1978] 1 All ER 411 at 418e. And in *R v. MAFF ex p Monsanto* [1999] QB 1161 the Divisional Court of the Queen's Bench Division stated at 1172F:

> "In our judgment, although *American Cyanamid* principles are to be applied in the present case, this must be in the context of the public law questions to which the judicial review proceedings give rise. Such proceedings are, generally speaking, intended to provide swift relief against abuse of executive power."

37. Perhaps the nature of public law proceedings is too varied to have permitted any authoritative reformulation of the principles applicable to them. At all events I consider that, in determining whether to make the injunction, the judge should have posed to himself, and have sought to answer, an initial question as follows:

(a) Is there a real prospect that the foster parents will establish that Coventry's decision to remove the children from them notwithstanding that they now wish to adopt them is, by reference to public law principles, irrational, disproportionate or otherwise unlawful or is otherwise in breach of their rights, or those of the adopters or, in this context overarchingly, of those of the children, under Article 8 of the ECHR?

If the judge's answer to question (a) had been negative, he should have refused to grant the injunction. But if, and only if, his answer to the question had been affirmative, he should have proceeded to address further questions which, without even purporting to be prescriptive, I suggest might have run along the following lines:

(b) Have the foster parents brought the proceedings with reasonable promptness and, if not, how does their delay affect whether an injunction would now serve the interests of the children?

(c) Although in form an application only for an interim injunction, might any injunction be likely to continue (or to be continued) for a substantial period of time and, if so, with what likely consequences?

(d) Might any injunction jeopardise the candidacy of the proposed adopters?

(e) But would the consequence of a refusal of an injunction be to disable the foster parents from applying to adopt the children?

(f) Is the status quo in the present case that the children are living with the foster parents or is it that they are virtually at the end of an agreed programme of removal into the home of the adopters and so would an injunction therefore more properly be regarded as preserving, or as disrupting, the status quo?

(g) Does the issue whether to grant the injunction affect any aspect of the welfare of the children not addressed by answers to the above questions?

38. The judge's answer to question (a) at [37] above should have been negative with the result that questions along the lines of (b) to (g) would not have arisen. The circumstances were that the preparations for the removal of the children into the home of the adopters had reached their penultimate stage and that, irrespective of the surrounding circumstances, the foster parents had for in excess of one year failed to put themselves forward as prospective adopters and indeed, even up to 21 February 2011, had continued actively to concur in the decision to remove the children. In such circumstances there was no real prospect that Coventry's decision to proceed with the removal notwithstanding their sudden notice of intention to adopt could be established to be irrational, disproportionate or otherwise unlawful at common law or in breach of any person's rights under Article 8.

39. So the judge should not have made the injunction.

H: THE APPLICATION FOR REVOCATION OF THE PLACEMENT ORDERS

40. The application of the foster parents for revocation of the placement orders was the alternative peg on which they sought to hang their application for an injunction. It was swiftly realised that, by virtue of s.24(2)(a) of the Act of 2002, they needed leave to make the application for revocation and so their application was treated as being only for leave. In the event the judge did not use the application for leave as his peg for granting the injunction and he adjourned it until the hearing on 15 June 2011. The foster parents do not contend that he was wrong to do so. It is Coventry who wish, if permitted, to contend that the application for leave ought to have been dismissed rather than adjourned. At first sight this would seem to be a trivial distraction from the important issues already addressed and an inapt subject for appeal. But, distraction though it is, Coventry's main argument on this point, rejected by the judge, deserves our attention and indeed raises the subsidiary question.

41. The argument is that by 22 February 2011 Coventry had already "placed" the children for adoption with the adopters, with the result that, by virtue of s.24(2)(b) of the Act of 2002, it was then too late for the foster parents to apply to revoke the placement order and thus to seek leave to do so.

42. The foundation of the argument is the decision of Coulson J in *R(W) v. Brent LBC* [2010] EWHC 175, [2010] 1 FLR 1914. The judge refused a mother's application for judicial review of Brent's decision to place a child with adopters pursuant to a placement order. The chronology was that:

(a) on 3 August 2009 Brent's adoption and permanency panel approved the match of the child with prospective adopters;

(b) on or before 17 August 2009 Brent ratified the decision to place the child with them;

(c) on 17 August 2009 the child first met the adopters;

(d) introductory meetings continued for the next four days;

(e) on 21 August 2009 the mother's solicitor notified Brent that she proposed to apply for leave to revoke the placement order; and

(f) on 24 August 2009, unaware of the notification, the social workers caused the child to move to live with the adopters.

The judge held that the child had been placed with the adopters on 17 August 2009 and so any application for leave to revoke made by the mother on 21 August 2009 would have been

too late. He held, at [29], that the placement had occurred on 17 August because such was the date "when all the relevant legal formalities had been concluded *and* the introductions process began". He had observed, at [28], that:

> "… the introductions process is not a process that takes place *before* the child in question has been placed for adoption: it is the first step in the relationship between the child and the prospective adopters *after* the child has been 'placed for adoption' by the authority."

43. Coulson J was right to note that the placement of a child for adoption is not defined in the Act of 2002. Section 18(5) merely says:

> "References in this Act (apart from this section) to an adoption agency placing a child for adoption –
>
> (a) are to its placing a child for adoption with prospective adopters, and
>
> (b) include, where it has placed a child with any persons (whether under this Act or not), leaving the child with them as prospective adopters;"

In my view, however, the words in (b) provide support for the proposition that a child is placed with prospective adopters only when he begins to live with them: for an adoption agency cannot 'leave' a child with persons as prospective adopters before he has begun to live with them. Coulson J reached his opposite conclusion mainly by reference to the decision of this court in *Re S (Placement Order: Revocation)* [2008] EWCA Civ 1333, [2009] 1 FLR 503. The decision was that a circuit judge had been wrong to hold that a child placed with foster parents who were actively considering whether to apply to adopt him had been placed with them for adoption. Inevitably Thorpe LJ stressed, at [8] and [9], that the child could not be placed with the foster carers for adoption until the local authority had approved the match of the child with them and had resolved to leave him with them in their fresh capacity as prospective adopters. Since the child was living with them, the court did not focus on the need for a child to have begun to live with proposed adopters before he can be said to have been "placed" with them. But I do not share Coulson J's interpretation of the remarks of Thorpe LJ as indicating that a local authority's resolution to place a child with identified adopters itself effects that placement.

44. I hold that a child is not "placed" for adoption until he begins to live with the proposed adopters or, if he is already living with them in their capacity as foster carers, when the adoption agency formally allows him to continue to live with them in their fresh capacity as prospective adopters. In my view such is the natural construction of the verb "place", which the Shorter Oxford English Dictionary defines as "put or set in a particular place, position or situation". It is thus a construction which, in the usual case in which the child is not already living with the proposed adopters, requires straightforward reference to a readily discernible fact, namely whether he has begun to live with them. The construction of Coulson J seems to me, by contrast, to make identification of the date of placement more difficult; and to the first meeting between the adopters and the child he attaches a significance which I find hard to justify in logic. Regulation 35(2) of the Adoption Agencies Regulations 2005, S.I. 2005 No. 389, requires an adoption agency to send to a prospective adopter with whom it has decided to place a child an "adoption placement plan", which, by para 3 of Schedule 5, must identify the "[d]ate on which it is proposed to place the child for adoption with the prospective adopter". On the plan sent to the adopters in the present case Coventry duly identified 23 February 2011 as "PLACEMENT DAY" and I consider that they were correct to do so.

45. Even if unable to defeat the application for leave to apply for revocation by reference to their argument that by 22 February 2011 they had already placed the children with the adopters, Coventry nevertheless assert that the proposed application adds nothing of value for the foster parents to their proposed application for adoption orders and so should have been dismissed rather than adjourned. There is force in the assertion but it would have been a

strong thing for the judge in effect to strike out the application and he was entitled in his discretion not to do so. I would grant Coventry permission to appeal against the judge's adjournment of the application but would then dismiss that appeal. The court would thereby invest itself with the authority to overrule the decision of Coulson J in the *Brent* case.

I: DEVELOPMENTS FOLLOWING THE HEARING

46. One of the judge's supplementary orders on 14 March 2011 was to permit the parties to instruct Miss Lilley, an independent social work consultant, to make a Form F assessment of the suitability of the foster parents to adopt the children. Two days after the hearing before it on 18 April 2011 this court informed the parties that it was of the view that the judge had been wrong to grant the injunction in restraint of removal but that whether, more than a month later, this court should set it aside depended on application of the correct criteria to the facts at the date of its decision. In that regard the court invited the parties to make submissions as to whether it should wait for, and should then admit into evidence, Miss Lilley's report, then due to be filed within less than three weeks. Following the receipt of submissions, the court decided on balance to wait for, and then to admit into evidence, Miss Lilley's report.

47. In the event Miss Lilley felt able to file only an interim report, albeit duly dated 9 May 2011. It was immediately sent to this court, together with submissions about its significance.

48. The upshot of Miss Lilley's report was that she considered herself not yet able to make a recommendation about the suitability – or otherwise – of the foster parents to adopt the children. She noted that since 2004 the foster parents had fostered 23 children, apparently successfully, and that L and C were well settled in their home and were clearly attached to them. But she had provisional concerns about

    (a) the foster father's criminal record when a young man, including an offence of violence;

    (b) disputed allegations of domestic violence recently made against him by his former partner, being the mother of three children by him;

    (c) his long-standing loss of contact with those children;

    (d) an assessment, albeit under appeal, raised against him by the Child Support Agency in the sum of £23,000 referable to his liability to support them; and

    (e) the overall financial insecurity of the foster home.

    So Miss Lilley's interim report was equivocal.

49. On 11 May 2011 the court was informed of another, dramatic, development: it was that, on (as it now knows) 4 May, the adopters had withdrawn their candidacy to adopt the children. Inevitably Coventry had thereupon decided not to remove the children from the foster parents at least until after receipt of Miss Lilley's final report.

50. In these circumstances I consider that we should allow the appeal against the injunction in restraint of removal and should set it aside. It was made by application of the wrong criteria and, had the right criteria been applied, it should not have been made. There is nothing in subsequent developments to lead us to leave it in being. On 22 May 2011 the foster parents became entitled to apply for adoption orders in respect of the children. Prior thereto they had properly undertaken to this court not to make any such application until the determination of this appeal. But now that, today, we determine it, they are free to make it and they will no doubt do so at once. I consider, subject to argument, that we should entrust the proposed application to Judge Bellamy but should urge him to determine it with all reasonable expedition and of course in the light, among other material, of Miss Lilley's reports and of the views of Coventry and, if appointed, of the guardian. Until its determination the children will no doubt be allowed to remain living with the foster parents.

J: POSTSCRIPT

51. Irrespective of whether the court will allow the foster parents to become the children's adopters, the history of this case gives rise to profound concern. Immediately after the social worker's visit to the adopters' home on 22 February 2011, which took place about one hour before Coventry were notified of the applications of the foster parents, she made the following note:

> "statutory visit to both children at adoptive placement. Both children were very relaxed and happy. [C] was half asleep on adoptive mother's lap and [L] running around playing with toys and playing in particular with adoptive father. [L] calling adopters Mummy and Daddy. Adopters said the children now have all their toys and the introductions have progressed positively with a definite and visible bond developing. The children's bedrooms are ready and we had a discussion about bedtime routines. The adopters will gradually introduce a story at bedtime as currently [L] watches tv till he falls asleep. Adopters very excited by the placement and the house full of cards and well wishes from friends and family. Very positive visit, plan progressing well."

52. The sudden and in the event permanent halting of the ultimate movement of the children into the adopters' home on the following day must have been damaging to the children although perhaps their very young age will have protected them from a degree of the confusion to which it would otherwise have subjected them. But, for the adopters, the situation has been, to use the guardian's own word, dreadful. Although this court was quick to direct expedition of the hearing of the appeal, it should, in retrospect, have insisted upon hearing it within days, rather than within weeks, of the judge's order. By the date of the hearing of the appeal the intensive preparations made in February 2011 for the movement of the children to the adopters had lost their value. At all events I wish to record my deep sympathy for the adopters in relation to the emotional shock which the legal developments occurring from 22 February 2011 onwards caused to them. The continuing stress ultimately – and understandably – proved intolerable for them, with the result that they withdrew their candidacy. I earnestly hope that they proceed to a successful adoption of other children and that this case will not have a chilling effect on the confidence with which prospective adopters in general put themselves forward in relation to children who are in foster care and subject to placement orders. At least our judgments will have demonstrated how rare it will be for an injunction in restraint of removal properly to be granted in circumstances analogous to the present.

53. In a postscript to his judgment Judge Bellamy suggested that local authorities should take a variety of steps, which he specified, in order that, as soon as a placement order is made, it should become clear whether the foster parents of the child subject to the order wished to put themselves forward as his prospective adopters. I believe, with respect, that such is a more complicated subject than, to us lawyers, at first appears. Foster parents, particularly short-term foster parents, and adopters have entirely different roles; and the appraisals which local authorities conduct before approving persons as adopters and as foster carers respectively are of an entirely different nature, extent and perhaps even intensity. It may be far from helpful to foster parents to dangle before all of them – on a routine basis – the possibility, whether realistic or more probably otherwise, that they might be accepted as the optimum adopters of the child. It may undermine the need for them to accept that in all likelihood the child will be moving away from their home and thus to fashion a relationship with him on that limited basis. I suggest that this is a subject fit for the consideration of the Children in Safeguarding Proceedings committee of the Family Justice Council, to which we might usefully send a copy of our judgments.

Dame Janet Smith:

54. I agree.

Lord Neuberger:

55. I also agree.