



Report focus

This paper considers court decisions relevant to the removal of newborns from their parents at birth or shortly afterwards.

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Born into care: case law review



About this review

This report considers judgments from the higher courts over the period 2008–2018 which are relevant to the removal of newborns from their parents at birth or shortly afterwards.

One aim of the report is to provide information to professionals (lawyers, social workers, health professionals) involved in making decisions as to whether a newborn should be removed, about the legal framework and its application in court in order to assist that decision-making process.

This paper is linked to *Born into care: newborns in care proceedings in England (2018)* and *Born into care: newborns and infants in care proceedings in Wales (2019)*, published by the Nuffield Family Justice Observatory, which looked for the first time at the number of newborns subject to care proceedings in England and Wales, using population-level data held by Cafcass. The number of newborns subject to proceedings prompted considerations and questions about, among other things, practice in relation to pre-birth assessments and removal at birth and the legal framework and court decision making in such cases. A separate paper will report on a rapid evidence review of practice in relation to pre-birth assessments and removal at birth, while this paper focuses on court decisions.

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About the Nuffield Family Justice Observatory

The Nuffield Family Justice Observatory (Nuffield FJO) supports better outcomes for children in the family justice system in England and Wales by improving the use of data and research evidence in decision-making. We do this by:

- Supporting the analysis of national data and linking data from different sources to better understand the experience of children and families in the family justice system.

- Researching issues facing children and families and collaborating with others to bring about change in practice.
- Enabling decision-makers to access the latest data and research evidence.

Central to the Nuffield FJO's operation is a data partnership with the Centre for Child and Family Justice Research at Lancaster University and the SAIL Databank at Swansea University.

The Nuffield FJO has been established by the Nuffield Foundation, an independent charitable trust with a mission to advice social well-being. The Foundation funds research that informs social policy, primarily in Education, Welfare, and Justice. It also funds student programmes for young people to develop skills and confidence in quantitative and scientific methods. The Nuffield Foundation is the founder and co-funder of the Ada Lovelace Institute and the Nuffield Council on Bioethics.

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1. Introduction

Newborn babies are vulnerable and for some, their safety may require their immediate separation from their parents. This paper considers court decisions relevant to the removal of newborns from their parents at birth or shortly afterwards. For the purposes of this paper 'newborn' refers to infants aged less than seven days and infants refers to children aged less than one year.

The review of cases was carried out to enhance understanding about:

- What the law requires courts to consider in deciding whether to order the removal of a newborn from their parents.
- What case law suggests courts should consider when applying the legal framework in such cases.

One aim of the paper is to provide information to professionals (lawyers, social workers, health professionals) involved in making decisions as to whether a newborn should be removed, about the legal framework and its application in court in order to assist that decision-making process. Another is to inform the further research into legal intervention and/or removal at birth which is following on from the Born into Care study.

The cases included in this paper are ones where judgments have been published and the process of selection is described in more detail in the next section. This paper is focused on the law and how it is applied in court, it is not focused on pre-birth assessment practice or local authority practice in general in working with pregnant mothers or newborns. Drawing information from reported cases inevitably presents a very partial picture of practice in relation to removal of newborns because only a small proportion of cases which go into court are reported and those which reach the higher courts are likely to have involved contested actions or decisions. Providing this is kept in mind, the detail included in the judgments discussed in this paper give us an insight into the issues facing families, local authorities, health services and the courts in cases involving the safeguarding of newborns.

2. Methodology

The focus of this review was on reported cases from the higher courts where a newborn child was removed at birth or shortly afterwards. The reason for focusing on judgments from the Supreme Court or the Court of Appeal is because decisions of these courts are binding on lower courts. Decisions made in the Family Division of the High Court have been included as well as some Family Court decisions because they raised issues of principle or practice in the pre-birth period.

The time period for the review was the 10-year period 2008 to 2018, although three earlier cases were also included because they were widely cited and impacted on decision making in the 10-year period covered. Similarly, some cases which did not involve the removal of a newborn or infant in the first weeks of life were included in the review because they are leading cases establishing or clarifying a point of law relevant to decision making about all children including newborns.

Cases were identified in the following ways:

- A search of The British and Irish Legal Information Institute (BAILII) website <https://www.bailii.org/> database for England and Wales with the terms “newborn” and “removed at birth”.
- A search of the library of Westlaw, using the keywords 'care proceedings' and the occurrence of 'new-born'.
- Following up cases cited in other Judgements.

Altogether 28 relevant cases were identified¹ including two Supreme Court Cases; one case in the European Court of Human Rights; 11 Court of Appeal cases; two cases in the High Court (Judicial Review); one case decided under the High Court Inherent Jurisdiction; three cases decided in the Family Division of the High Court; and eight cases in the Family Court.

¹ Listed in the Appendix.

3. The legal framework

The following quotes from the judgement of Baroness Hale in *Williams and Another v LB Hackney [2018] UKSC* very clearly set out the legal position : “ No local authority have the right or the power to remove a child from a parent who is looking after the child and wants to go on doing so” and “ ...if the state is to intervene compulsorily in family life, it must seek legal authority to do so”².

No legal action in relation to a child can be started until the child is born but the legislation is phrased in such a way that legal action can commence immediately after the birth.

The law in relation to removing children from their parents is the same whether the child is newborn or older. The relevant legislation for England and Wales is the Children Act 1989 which sets out the grounds on which a court order can be made, or other intervention can take place, and the duties and powers of local authorities when and if intervention does take place.

Children may be removed from their parents in the following ways:

Removal by the police exercising their powers to remove children into police protection (s.46 Children Act 1989)

The police can exercise their powers under s.46 of 1989 Act if they have reasonable cause to believe that the child would otherwise suffer significant harm. They can exercise this power by either removing a child, or preventing a child’s removal from somewhere, for example hospital. It is the power to prevent removal from hospital that is most likely to be used in cases concerning newborns. Children can only be kept in police protection for a maximum of 72 hours and the police have to notify the relevant local authority and the child’s parents that they have exercised their powers. In most cases the local authority will apply to the court for an Emergency Protection Order (EPO) before the end of 72 hours, unless it is no longer necessary to protect the child.

Removal under an Emergency Protection Order (EPO) (s.44 CA 1989)

An application for an EPO is made to the Family Court and the application can be made by anyone, but normally the application is made by a local authority. The court can make an EPO if it considers that there is reasonable cause to suspect that the child is likely to suffer significant harm if he or she is not removed from his or her parents or does not remain in the place where he or she is currently being accommodated, for example in hospital. An EPO initially lasts for a maximum of eight days, although it can be extended for a further seven days. Local authorities acquire parental responsibility for the child while the order is in force, which they share with the parents. The parents should be given one days’ notice of the hearing of the EPO application³ although local authorities can ask the court to agree to hear

² From paragraphs 38 and 51 of *Williams and Another v LB Hackney [2018] UKSC*

³ Practice Direction 12C, Family Procedure Rules

the case without the parents being given any notice if they believe that giving notice will lead to harm being caused to the child.

Removal under an Interim Care Order (ICO) (s.38 CA 1989)

An application for an interim care order (ICO) can be made at the start of care proceedings and the court can make an ICO if it is satisfied that there are reasonable grounds for believing that the child is suffering or is likely to suffer significant harm because the care given by his or her parents would be unlikely to be what it would be reasonable to expect for that child (s.38 1989 Act). The court must also consider the welfare checklist and be satisfied that making the order would be better for the child than making no order at all or making an alternative interim order (s.1 1989 Act). Case law has established further issues which the court needs to bear in mind which are discussed later. Under an ICO the local authority acquires parental responsibility for the child which they share with the parent, but the effect of the order is that the local authority can control parents' exercise of their parental responsibility. Under an ICO local authorities must fulfil all the duties in relation to looked after children that are set out in the legislation. The court can specify how long the interim order should last for, and ICOs can be extended if necessary, but will come to end when the proceedings end. Local authorities should give the parents three days' notice of the hearing of the ICO application, but they can ask the court to agree to give a shorter period of notice if there is a need for urgency. If the court makes an ICO the child will usually be removed from the parents and either placed with foster carers or with relatives or family friends. Sometimes the child will be placed at home under an ICO.

Removal under a Care Order (s.31 Children Act 1989)

At the final hearing of care proceedings, the court will firstly decide whether the 'threshold criteria' (s. 31(2) Children Act 1989) for making a care order have been established, which are that the child is suffering or is likely to suffer significant harm and that this is due to the care by the parents not being what it would be reasonable to expect for that child. If the threshold criteria are established then the court's decision about which order to make will be governed by the welfare principle set out in section 1 of the 1989 Act, which establishes that the child's welfare is paramount, and that in making any decision about the child's upbringing factors to consider will include the range of orders that are available and which order, if any, would be best for the child and be the most proportionate response to the circumstances⁴. In some cases, the court will decide that the child should return to, or remain with, his or her parents, and in such circumstances the court may decide to make no order, or it may make a supervision order, requiring the local authority to 'advise, assist and befriend' the child. A supervision order will initially last for one year (or less) but can be extended for up to three years. It is also open to the court to make a care order providing that is in accordance with the welfare test and is proportionate. If it is decided that the child should be removed from his or her parents, the court may decide that the child should live with relatives or family friends under a special guardianship order (SGO), child arrangement order or a care order. If there are no family members or friends able to care for the child, then a care order will be made and if the local authority plan is that the child should be

⁴ Section 1(3)(g) &(5) Children Act 1989; Article 8, Human Rights Act 1998

adopted, the court, having made a care order, may also make a placement order (PO), which allows the local authority to place the child with prospective adopters.

Delegation of parental responsibility by parents to a local authority

Parents may agree to delegate their parental responsibility to the local authority so that the local authority provides accommodation for the child, either in foster care or with relatives or family friends. This voluntary arrangement is covered by section 20 of the Children Act 1989 in England and by section 76 of the Social Services and Well-being (Wales) Act 2014 in Wales. Where children are in care as a result of such a voluntary arrangement between the local authority and the parents the local authority does not acquire parental responsibility (as they do under an ICO or care order) but must provide accommodation for the child and comply with all the duties they have towards looked after children. The voluntary nature of the arrangement is emphasised by the fact that a local authority cannot provide accommodation in this way if anyone with parental responsibility for the child objects, and any person with parental responsibility can at any time remove the child from accommodation⁵. The voluntary nature of these arrangements emphasises one of the key principles underpinning the Children Act, the importance of local authorities working in partnership with parents where possible. Accommodation under s.20 or s.76 is very clearly part of the range of services that local authorities must provide in order to support children being brought up within their families providing this is in accordance with their welfare. It is also possible to make use of this voluntary arrangement where there are child protection concerns in relation to the child.

Human Rights and Children's Rights

Underpinning all local authority activity and court processes in relation to children are the principles contained in the European Convention on Human Rights (ECHR) now incorporated into UK law in the Human Rights Act 1998, and the principles contained in the United Nations Convention on the Rights of the Child (UNCRC) 1989⁶. In relation to the rights set out in the ECHR/Human Rights Act 1998, the two most relevant to the removal of infants from their parents are Article 6, the right to a fair trial and Article 8, the right to respect for a private and family life. The latter right is a qualified right, in that a public authority may interfere with this right if this is necessary for the protection of others and the interference is proportionate, which means when it is appropriate and no more than necessary to address the problem that has led to the interference. Public bodies such as local authorities can be challenged, by both parents and children, if they act in a way which interferes with these rights and courts need to take the rights and freedoms into consideration when making decisions.

⁵ Subsections (7) and (8) of section 20 Children Act 1989 and subsections (4) and (5) of section 76 Social Services and Well-being (Wales) Act 2014.

⁶ The UNCRC has not been incorporated into English legislation in the same way as the ECHR through the HRA 1998 but is nonetheless binding on the UK government. In Wales, the Social Services and Well-being (Wales) Act 2014, specifically requires anyone exercising any functions under the legislation to take account of the UNCRC.

4. Policy background

Although no legal action under the Children Act 1989 can be started until a child has been born, where there are child protection concerns assessments of the parents and child protection procedures can and do take place before the birth of the child. Statutory guidance on practice in relation to safeguarding children⁷ gives no detail about practice relating to pre-birth assessments or child protection processes pre-birth, save to recognise that a child protection conference may be held pre-birth. Statutory guidance to local authorities in relation to pre-proceedings and court processes⁸ also lacks any detail about good practice in relation to pre-birth activity save for noting that the formal pre-proceedings process provides a framework for social work interventions with parents prior to the birth. This formal process starts once the local authority have in principle agreed that the grounds, or threshold, for proceedings exist and that they are likely to issue proceedings if the situation does not change. At this point the local authority must send the parents a letter setting out their concerns and warning parents that they intend to go to court if the situation does not improve. In the absence of national guidance, local areas have developed their own policies and procedures for pre-birth assessments and for child protection activity and work with parents pre proceedings. As a result, practice and procedures vary from area to area⁹.

⁷ HM Government (2018) *Working Together to Safeguard Children: A guide to interagency working to safeguard and promote the welfare of children*. DfE www.gov.uk/government/publications

⁸ Department for Education (2014) *Court Orders and Pre-proceedings: For Local Authorities*. DfE www.gov.uk/government/publications

⁹ Lushey c, Barlow J, Rayns G and Ward H (2017) *Assessing Parental Capacity when there Concerns about an Unborn Child: Pre-Birth Assessment Guidance and Practice in England*. Child Abuse Review. <https://doi.org/10.1002/car.2496>

5. Case law

Case law demonstrates how the courts apply and interpret the relevant legislation. Cases decided in the Supreme Court and Court of Appeal are binding on the lower levels of court and reported decisions from lower levels of court can be persuasive and may be taken into account in subsequent cases. The following sections group the reported cases included in the review under the relevant legal point, or points, that the judgement considers, with the last section focusing on comments about pre-birth practice by children's social care and health staff contained in some judgements. Detail about the case, as described in the reported judgement, is given in order to assist understanding about the rationale of the judgement. The sections are:

- The use of voluntary accommodation
- Emergency protection orders
- Interim care orders
- Significant harm and likely significant harm
- Final orders – proportionality, timescales, orders when children go home, family placements or adoption
- Practice issues – judgements which commented on local authority practice prior to the birth

The use of voluntary accommodation of children by a local authority immediately after birth¹⁰

Three cases included here considered whether the local authority was acting lawfully when it provided newborn babies with accommodation immediately after birth. Also included is a recent Supreme Court case which looked at the use of s.20 and reviewed the decisions made in the earlier three cases. The judgments discuss the appropriate use of s.20 and consider the application of Articles 6 and 8 of the Human Rights Act 1998.

R(G) v Nottingham City Council [2008] EWHC 152 (Admin) concerned a mother who was 18 when she had her first baby. She had been in local authority care herself and at the time of the baby's birth was a care leaver entitled to support from the local authority. The judgment was given within Judicial Review proceedings which were heard in the High Court, where the mother was challenging the local authority actions in removing the baby from her shortly after the birth. The mother was described by the Judge as having 'deep-seated and long-standing' problems, which included drug and alcohol misuse and self-harm. The local authority held a child protection conference a month before the baby was born and recommended that the mother and her baby should be separated at birth, with the baby placed on a ward away from the mother until foster carers could be found. The local authority evidence was that a social worker had shared the details of the plan with the mother and that they believed the mother had agreed to the plan or at least had not raised an objection to it. When the baby was born, in the early hours of the morning, the midwife told the mother she was removing her baby in accordance with the local authority plan and

¹⁰ S.20 Children Act 1989 and s.76 The Social Services and Well-being (Wales) Act 2014. All these cases concern s.20 but the principles apply equally to s.76.

again the mother raised no objection. The local authority maintained that as a result the baby had been accommodated under s.20. The mother denied that she had agreed to the separation and said she had frequently objected to the plan.

The Judge did not accept that there was sufficient evidence that the mother had agreed to the removal of her baby. In particular, the Judge was critical of the assumption that her lack of objection immediately following the birth was a sign of agreement:

'The idea that this mother in this situation – physically and emotionally weakened and distressed by events – can sensibly be said to have given consent to the removal of her baby verges, in my judgment, on the unreal...' The Judge was critical of managers in both the local authority and the relevant NHS Trust in allowing the removal of the baby to occur in this way. The Judge also found, and this was accepted by the local authority, that the removal of the baby immediately after the birth without a court order or other lawful authority and without the mother's consent was a breach of the mother's rights under Article 8. Following this judgement, which was given very shortly after the baby was born, the local authority initiated care proceedings and an ICO was granted, authorising the removal of the baby.

In *Re CA (A baby) [2012] EWHC 2190* the mother had had a disruptive childhood and adolescence and had significant learning difficulties. She had had three previous children removed who had been placed for adoption. The mother did not conceal her pregnancy and the judgment refers to 'much pre-planning' being carried out by the local authority, which resulted in the local authority deciding that the baby should be removed at birth. The mother was told about the plan and she had not objected to it, but nor had she given agreement. She was admitted to hospital in an emergency before the due date because of complications. She consented to life-sustaining surgery, which enabled the baby to be born well and healthy and subsequently she consented to being given morphine for the pain she was in. The local authority plan was to issue care proceedings and to apply for an ICO to remove the baby immediately following the birth. There was no evidence that the mother was wishing to discharge herself or her baby immediately after the birth, and the mother was in any event in no fit state to leave hospital. The social worker believed the child was safe in hospital, but her managers instructed her to obtain the mother's agreement to the immediate removal of the child under s.20, pending the start of proceedings. The mother twice refused to meet the social worker after the birth and was supported by the hospital in this. The mother finally agreed to see the social worker later that day and did agree to her child being removed. Subsequently the local authority issued care proceedings as planned. The care proceedings were heard in the High Court and it was ultimately decided that the parents could not care for their child and a placement order was made, although it was emphasised that the mother had never harmed her children and did want to be a good mother. In the course of these proceedings, the actions of the local authority in removing the child under s.20 were challenged as being in breach of both the mother and the child's rights to protection from interference with their private and family life (Article 8) and this challenge was accepted by the Local Authority. The grounds were that consent to s.20 should not have been sought immediately after the birth while the mother was in recovery from surgery and that removal was not a proportionate response to the risks that existed at the time. The Judge went on to give some guidance on the use of s.20 in these circumstances. The points made were:

- The use of s.20 must not be compulsion in disguise
- The parents must have the requisite capacity to give consent and the Judge doubted whether this was the case for a mother who had been given morphine after life-saving surgery
- Even where there is capacity, it is essential that consent is properly informed. In this case, the mother was never told that if she refused to consent then the baby would stay with her in hospital until care proceedings commenced.

Re H (A Child: Breach of Convention Rights: Damages) [2014] EWFC 38 concerned parents who both had learning disabilities and had grown up in care. They had had no previous children. The local authority had not carried out any pre-birth assessments because the mother had, in their view, concealed her pregnancy, although she said she had not known she was pregnant. The baby was born prematurely in a poor state of health and was placed on life support. The hospital notified the local authority one week after the birth because of their concerns about the baby's health and the parents' ability to meet the baby's needs because of their learning disabilities. The local authority, after rapidly assessing the situation decided that the baby should be removed and obtained the reluctant agreement of the parents to the baby being placed with foster carers with whom the mother had once lived when she herself was in care. Nearly one year later, during which time the parents had clearly expressed a wish to care for the baby themselves, a change of social worker resulted in a cognitive assessment of the parents, the commencement of care proceedings and the baby being placed with her parents in a residential assessment setting. The findings of this assessment were positive, and the proceedings concluded with a Supervision Order and the baby returning home to her parents. It was found by the court and accepted by the local authority that the local authority had been in breach of the Article 6 and 8 rights of both the parents and the child on the basis that they:

- Failed to issue proceedings in a timely manner.
- Failed to involve the parents in the decision-making process.
- Should not have sought the parents' consent to removal in the way that they did.
- Failed to provide the parents with appropriate information on the consequences of agreeing to removal under s.20.
- Placed insufficient weight on the parents' wish to care for their child.
- Significantly delayed assessing the parents' capacity to parent.

The Supreme Court of England and Wales has looked in detail at the use of s.20 ¹¹in *Williams and another (Appellants) v London Borough of Hackney [2018] UKSC 37*. Although this case did not concern a newborn, the judgment reviewed a number of earlier cases involving the use of s.20, including those described above. The *Williams* case provides a helpful overview of the background to s.20 and the key legal issues that should be borne in mind in any situation where s.20 (or s.76 in Wales) is relied on, including removal at birth. The *Williams* judgement questioned the focus on informed consent raised by the Judges in the three cases above but did confirm the findings that the local authorities had acted

¹¹ Although this case, and the other cases in this section, concerns s.20 1989 Act, the principles apply equally to s.76 2014 Act

contrary to Article 8 because of the lack of clarity about whether the parents had voluntarily delegated their parental responsibility.

The key points from these cases are:

- Section 20 (s.76) is a voluntary delegation of parental responsibility by parents.
- The delegation must be real and voluntary and the best way of ensuring this is to give parents full information about their rights under this section.
- Given the voluntary nature of the arrangement, it follows that the delegation should not be compulsion in disguise
- Assuming voluntary delegation immediately after a difficult birth simply because there is no objection would risk removal being unlawful.
- If parents request the return of their child, the local authority must comply and if the local authority think the child will suffer significant harm if returned, they should apply for an EPO or commence care proceedings.
- Section 20 is 'a service to parents in need of help with the care of their children' (*Williams para 20*).
- Section 20 can be used immediately after birth, 'rushing unnecessarily into compulsory procedures when there is still scope for a partnership approach may escalate matters in a way which makes reuniting the family more rather than less difficult' (*Williams para 34*).
- There are no restrictions on the length of time that a child can be in s.20 accommodation but the local authority must comply with all the duties imposed on it in relation to the placement and planning for looked after children.

Emergency Protection Orders

As noted earlier, an application for an EPO is one way in which the removal of a newborn could be authorised, but case law indicates that EPOs should be used sparingly. The importance of attention to Articles 6 and 8 of the ECHR is very clear in judgments about EPOs. The two cases below fall outside the time period for this review but are included because they are frequently cited. A case often referred to in later judgements, *P, C and S v. UK [2002] 2 FLR 631*, was a challenge heard in the European Court of Human Rights (ECHR), by parents relying on Article 8. The European Court said:

"... the taking of a new-born baby into public care at the moment of its birth is an extremely harsh measure. There must be extraordinarily compelling reasons before a baby can be physically removed from its mother, against her will, immediately after birth as a consequence of a procedure in which neither she nor her partner has been involved". (para 116)

This case involved the baby being removed under an EPO and the subsequent care proceedings ending with a care order, which was followed by an application to 'free' the child for adoption¹². The parents argued that the EPO had been a breach of their Article 8 rights.

¹² This was prior to the introduction of placement orders, which would be the equivalent today

The local authority had taken action in this case after being alerted to the mother's pregnancy by relevant authorities in the USA, where the mother had had a previous child removed from her care because of Munchausen's Syndrome by proxy (Factitious Disorder by proxy). The mother had also been convicted of child abuse. The mother had now remarried. The pre-birth assessment carried out by the local authority, which included an assessment of the mother by a psychiatrist, indicated that the parents did not accept the earlier child has been harmed by the mother and this led the local authority to decide that the baby should be removed at birth because of the risk of significant harm from the mother.

The baby was born by caesarean section, earlier than anticipated, and an EPO without notice was immediately applied for and granted, and the baby removed the same day. The European Court decided that, given all the evidence available at the time of the birth, the application for and granting of an EPO was a justified interference with the parents' rights to a family life, but it also decided that the actual removal of the baby immediately after the birth was a disproportionate response and to that extent the parents' Article 8 rights had been breached. This was because the mother was clearly physically unable to leave the hospital at that time, there had been no threat to remove the baby, and it would have been possible for the baby to have been kept safely in hospital and in contact with her mother for a period of time.

This judgment, particularly the comments about the emergency removal of a newborn baby, are referred to in the leading case of *X Council v B (Emergency Protection Orders) [2004] EWHC 2015 (Fam)*. This case did not concern newborns or infants but was a case where Sir James Munby, former President of the Family Division carried out a detailed review of the statutory provisions for EPOs, the impact of Articles 6 and 8 and previous case decisions on EPOs, including decisions from the European Court. In summarising the key points from this wide-ranging review, the Judge said:

'An EPO, summarily removing a child from his parents, is a "draconian" and "extremely harsh" measure, requiring "exceptional justification" and "extraordinarily compelling reasons". Such an order should not be made unless the [court] is satisfied that it is both necessary and proportionate and that no other less radical form of order will achieve the essential end of promoting the welfare of the child. Separation is only to be contemplated if immediate separation is essential to secure the child's safety; "imminent danger" must be "actually established".' (para 57)

He went on to stress importance of 'detailed' and 'compelling' evidence, and of giving parents notice of the application except in 'wholly exceptional' cases.

Key points

- Separation of a baby from parents at birth under an EPO should only be contemplated if immediate separation is essential to secure the child's safety
- Even where an EPO is a proportionate response the actual timing of the removal should also be proportionate, so if a baby is safe in hospital and the mother is not in a position to discharge herself with the baby, immediate removal may not be proportionate.

Interim Care Orders (ICOs)

An ICO can be made once the local authority have issued care proceedings. If a local authority is concerned that the baby is likely to suffer significant harm if left in care of his or parents, the local authority may well apply for an ICO when they issue care proceedings, although they might also consider an interim supervision order or interim child arrangement order in favour of a relative or friend.

The grounds for an ICO are set out in the section above on the legal background. There are a number of key cases that set precedents and give guidance on the factors to consider when dealing with an application for an ICO. None of these cases concerned the removal of a newborn baby but the general guidance given is useful in understanding the court's approach. *K & H (Children) [2006] EWCA Civ 1898*¹³ confirmed earlier decisions: the removal of children from their parents at this interim stage should not be sanctioned unless the child's safety requires protection. Subsequently, *L-A (Children) [2009] EWCA 822* reviewed previous decisions about ICOs and established that the separation of a child from his or her parents should only be ordered by an interim care order if the child's safety 'demands immediate separation' or 'interim protection'. At this early stage in proceedings an application for an ICO should be limited to immediate issues and should not prejudge the outcome at the end of proceedings.

Two cases *Re B (A Child) [2009] EWCA Civ 1254* and *Re GR (Children) & others [2010] EWCA Civ 871* confirm that if the court is satisfied that conditions for the ICO exist, then it must also consider the no order principle, the impact of delay, the welfare checklist, and proportionality. These cases emphasised that an ICO is a 'holding position' pending a full hearing. The point was also made in these two cases that safety includes emotional safety or psychological welfare.

Re L [2013] EWCA Civ 489 concerned the removal of a newborn from a mother who was in prison when she had the baby, serving a three-year sentence for burglary. She had had two previous children removed because of her chaotic drug use and relationships with violent men. The mother was offered a place in a prison mother and baby unit. The local authority argued that there was little evidence of the mother's capacity to change and as a result this child should be removed at birth and found permanent, alternative carers without delay. The local authority relied in part on the fact that although the mother had responded well to treatment while in a residential setting with her second child, she had subsequently returned to the father of the child, which had resulted in this second child being removed. This third baby was removed aged 3 days, apparently with the mother's consent although this was later contested. The local authority started proceedings two months later and applied for an ICO, which was opposed by the mother. The Family Court granted an ICO, acknowledging there was no threat to the child's physical safety, but deciding that there was a threat to the child's emotional safety given that it might be decided at the end of the proceedings that the baby should be permanently removed from the mother.

¹³ This 2006 case is included because it is one which is cited in many subsequent judgements.

The Court of Appeal overturned the ICO. It found that there was no likelihood of danger to the baby's physical or emotional safety in the prison. The judgment stressed that an ICO was a holding position and should not 'second guess' the outcome of proceedings, given that the evidence was unlikely to be complete at the stage of an interim hearing. The Court of Appeal also considered the fact that the baby had been with foster carers for two months, practically since birth, and recognised that moving the baby back to the mother would be a disruption. However the Court of Appeal noted that if the mother was to have the best chance of caring for her child in the long term then she needed the opportunity to get to know her baby and to bond with him, and the once a month contact that the local authority had arranged would not be sufficient for her to build up a relationship with him.

Key points on ICOs

- Removal of a child under an ICO should only be sanctioned if the child's safety 'demands immediate separation'.
- Safety includes emotional safety or psychological welfare.
- The ICO is a holding position and should not prejudge the possible outcome of the case.
- Linked to the above, an ICO should not create a situation which makes one outcome more likely than another.
- The above point has implications for decisions about contact, which are particularly important when the child concerned is a new baby.
- If the grounds for an ICO exist the court must also consider the welfare checklist, no order principle and issues of proportionality.

Significant harm and likely significant harm.

The grounds for making an EPO, ICO or full care order all include evidence of, or reasonable belief, that the child is suffering or is likely to suffer significant harm. The inclusion of 'likely to suffer' means that any of these orders can potentially be established immediately after the child's birth if there is evidence of likelihood that the child will suffer significant harm, even where there is no evidence of actual harm (ss.44, 38 and 31(2) CA 1989).

In cases of removal at birth the evidence of likely significant harm will usually come from the evidence that older children in the family had experienced significant harm, or the likelihood of it, or from evidence about the behaviour or physical or mental health of one or both parents prior to the birth. Depending on the evidence being relied on, and how long ago the issues being relied on took place, the local authority's reliance on past factors may be challenged, as discussed later.

Re B (A Child) [2013] UKSC 33 is a decision of the Supreme Court and is a leading case on the interpretation of the threshold criteria for a care order in s. 31 Children Act 1989, as well as being a leading authority on 'proportionate responses' in final orders (discussed later). The case was an appeal by parents against the making of a care order with a view to the adoption of their child, who had been removed from them at birth. The facts of the case were particularly extreme. The mother (M) had been sexually abused by her stepfather from the

age of 15 onwards, which over the years resulted in seven pregnancies which had all been terminated. When M was 20 her own mother left home, but M remained with her stepfather and nine years later gave birth to a child (T). It was acknowledged that the stepfather was violent, dishonest and dominating and that M was dominated by him. M herself was convicted of fraud when T was four years old and was sentenced to two years in prison and further two years for attempting to pervert the course of justice by making allegations against the investigating police officer. When she came out of prison M did not return to her stepfather or her daughter, T. M met the father of her second child (F) and became pregnant. M applied for a residence order in relation to (T) which led to her history being revealed and to T being taken into care. Her second child (A) was removed shortly after her birth under an ICO and placed with foster carers. A's father had four other children who were living with their mother and had spent overall 15 years of his adult life in prison and had previously been addicted to crack cocaine. At the time of the care proceedings, A's father had no recent convictions and was no longer misusing class A drugs.

The care proceedings took just over two years to reach a conclusion and during that time the parents had had contact five times a week for one and a half hours. The case was heard in the Supreme Court one year after the making of the care order, during which time there had also been a hearing in the Court of Appeal. During this appeal period, the parents had contact three times a week for one and a half hours. There was no disagreement that the parents had attended all contact sessions; had put a considerable amount of effort into making contact a success; they were devoted to their daughter and each of them had a warm and loving relationship with her and had given her 'child centred love and affection in spades' (*para 16 Re B*).

The task for the five Judges of the Supreme Court was to decide, among other things, whether to uphold the decision of the Judge hearing the care proceedings that the threshold criteria of likely significant harm relating to the parents' care had been established. They did uphold this, although Lady Hale was hesitant in doing so. The basis on which the likelihood of significant harm was established arose from a concern that the parents' hostility to professionals would lead them to be uncooperative and obstructive in the future and given the level of support all experts agreed would be necessary in the immediate future, this would put A at risk of significant harm. There was also concern at the possibility the child might suffer harm from the mother's somatisation disorder. All the Judges apart from Lady Hale accepted the evidence that the mother was dishonest, manipulative, hostile and incapable of cooperating with professionals. Lady Hale pointed to evidence that the parents had cooperated well with some professionals. Lady Hale also accepted the parents' case that they were hostile to other professionals because of the way in which they had been treated, which included the initial assumption by professionals that M was lying about her experiences at the hands of her stepfather. Lady Hale also noted that T had not been harmed by M because of M's somatisation behaviour. Lady Hale expressed 'the gravest doubts' that the harm which was feared was of sufficient significance or likelihood to justify a finding that the threshold criteria was crossed, but she accepted that she had not had the benefit of 20 days of hearing evidence, unlike the Judge who had heard the care proceedings. Lady Hale gave helpful guidance for lower courts on the issue of the threshold criteria, which was accepted by all the Supreme Court Judges, as follows:

- ' (1) The court's task is not to improve on nature or even to secure that every child has a happy and fulfilled life, but to be satisfied that the statutory threshold has been crossed.*
- (2) When deciding whether the threshold is crossed the court should identify, as precisely as possible, the nature of the harm which the child is suffering or is likely to suffer. This is particularly important where the child has not yet suffered any, or any significant, harm and where the harm which is feared is the impairment of intellectual, emotional, social or behavioural development.*
- (3) Significant harm is harm which is "considerable, noteworthy or important". The court should identify why and in what respects the harm is significant. Again, this may be particularly important where the harm in question is the impairment of intellectual, emotional, social or behavioural development which has not yet happened.*
- (4) The harm has to be attributable to a lack, or likely lack, of reasonable parental care, not simply to the characters and personalities of both the child and her parents. So once again, the court should identify the respects in which parental care is falling, or is likely to fall, short of what it would be reasonable to expect.*
- (5) Finally, where harm has not yet been suffered, the court must consider the degree of likelihood that it will be suffered in the future. This will entail considering the degree of likelihood that the parents' future behaviour will amount to a lack of reasonable parental care. It will also entail considering the relationship between the significance of the harm feared and the likelihood that it will occur. Simply to state that there is a "risk" is not enough. The court has to be satisfied, by relevant and sufficient evidence, that the harm is likely.'*
- (para 193)*

A more recent case, not involving an infant, where issues in relation to the nature of the evidence required to demonstrate significant harm arose was *Re S and HS [2018] EWCA Civ 1282*. This case stressed the importance of specifying the category of harm and indicating why it is or is likely to be significant as well as providing the evidence that establishes this, in other words the causation. If findings made in previous proceedings are being relied on, then it should be explained why they are still relevant at the start of the new proceedings.

In *Re X (A child: care order) [2017] EWFC B83* the threshold of likely significant harm was very clearly linked to evidence from previous proceedings, although there had been no finding of fact in those proceedings. This couple had two previous children removed, one following injury at 2 months and the other removed at birth. This baby was also removed at birth. The cause of injuries to their first child had never been established but it had been found in the earlier proceedings that the likelihood was that they were caused by one of the parents. The parents had never admitted responsibility for the injuries. The issue here was whether significant harm was likely because of what had happened in the past. Although the judgment in this case is sympathetic to the parents, noting that they loved their child, had been fully engaged in all the assessments and were willing to attend therapy and groups that would help them, it was found that this third child would be likely to suffer significant harm if returned to his parents. The Judge noted that the risk of harm *'flows from the traumas which happened to the parents when they themselves were young. We are all the people we are because of what has happened to us throughout our lives and these parents are no different.'*

In Re A (Application for Care and Placement Order: Local Authority Failings) [2015] EWFC 11 the Judge was critical of the evidence being relied on by the local authority to establish that the baby would be likely to suffer significant harm if returned to the father. The local authority were seeking a care order and placement order so that the baby could be adopted. This case concerned a baby removed from his mother who was in prison serving a sentence for a sexual offence against a minor and fraud. Prior to the baby's birth, the local authority carried out an initial assessment of the father, who was still in a relationship with the mother at the time, as a potential interim carer but the assessment was negative. The baby was accommodated shortly after birth under s.20 and placed with foster carers. The local authority carried out further assessments of the father and grandparents, which were negative. The local authority was ready to issue care proceedings four months after the baby's birth but delayed a further four months before issuing proceedings. It is not clear from the Judgement what the reason for this was.

The Judge was critical of this delay on the part of the local authority and what the judge described as their failure to address the changed circumstances by the time of the care proceedings. These changes were that the mother was out of prison but had separated from the father who was now seeking to be the sole carer for his child. The local authority argued that the baby was likely to suffer significant harm because the father 'lacked honesty with professionals', 'is immature and lacks insight of issues of importance'. The Judge identified a number of problems with the local authority's evidence supporting their concern about the father and decided that much of the evidence was unfounded. In addition the Judge was critical of the local authority argument that the father would not be able to instil proper values in his son, because the father, now aged 25, had, in the social worker's view, failed to appreciate the seriousness of being cautioned at the age of 17 for sexual intercourse on one occasion with a girl aged 13, in particular that he had failed to acknowledge that his behaviour was 'immoral'. As a result of deficiencies in the local authority's evidence and having heard the father give evidence, the Judge decided that there was a lack of evidence that the father presented a risk to his baby son which would give rise to a real possibility of the baby suffering significant harm. The case referred to a number of previous judgments which had established that just because parents were eccentric or difficult or unpleasant was not a reason to remove their children. The Judge quoted from the judgement of Lady Hale in the case of *Re B (above Re B (A Child)) [2013] UKSC 33*:

"We are all frail human beings, with our fair share of unattractive character traits, which sometimes manifest themselves in bad behaviours which may be copied by our children. But the State does not and cannot take away the children of all the people who commit crimes, who abuse alcohol or drugs, who suffer from physical or mental illnesses or disabilities, or who espouse antisocial political or religious beliefs." (para 143 of Re B)

The Judge went on to say:

'I can accept that the father may not be the best of parents, he may be a less than suitable role model, but that is not enough to justify a care order let alone adoption. We must guard against the risk of social engineering, and that, in my judgment is what, in truth, I would be doing if I was to remove A permanently from his father's care.' (para 96)

Re A (A Child) [2016] EWFC B101 is another example of the court having to decide the likelihood of significant harm on the basis of a mother's past history. This was a case concerning a baby who had been removed at birth. The mother had a low IQ and a reading age of 7. She had experienced chronic abuse in her own childhood and suffered from clinical depression and anger difficulties. In three separate sets of family proceedings the mother had lost the care of seven of her previous children, three of whom had been placed with their fathers and four of whom had been placed for adoption. Four years on from the last set of proceedings the mother, who was in a new relationship, became pregnant again. The father was out of the country at the time of the birth, waiting for his application for a visa to join his wife to be approved. The local authority completed a pre-birth assessment and decided to remove the baby at birth and commence care proceedings. The baby was placed with foster carers, initially under s.20 and then under an ICO, with the mother having contact four times per week. The local authority was concerned about the mother's parenting history and considered that the options for the baby were: reunification with both parents once the father was back in the country; care by the father on his own; or permanence outside the family. The Judge argued that it was unfair to 'write off' the mother on the basis of her 'historic track record'. The court had a duty to the child to consider any change in circumstances, without disregarding important background information. The issue now was the mother's ability to care for one child, not four. The Judge had to balance the mother's vulnerability, lack of confidence and intellectual limitations against the fact that her medical depression was intermittent and that the mother had a great desire to succeed as a mother. The Judge stated:

'For every indication pointing in one possible direction, there is another pointing in a contrary direction. The benchmark for the measurement of parental capability and behaviour (as indicated by the President) is a wide one. There are cases where the Local Authority fails to discharge the burden and where it cannot be established to the Court's satisfaction that the line of unacceptable future care either will or may be crossed, and this (I conclude) is one such case.'

The Judge did however find that the threshold of the likelihood of significant harm had been established, which is surprising given the point made above that the line 'of unacceptable future care' not being crossed, but in then moving on to consider the no order principle and proportionality the Judge decided that the separation of the mother from the child was not a proportionate response and made a supervision order for one year. It was clear that the Judge also had in mind the level of support that would be available to the mother, noting *that, because the mother lived in Wales, the Social Work and Well-Being (Wales) Act 2014* placed a stronger duty on the local authority to respond to the needs of the children in their area, than the duty under s.17 of the Children Act 1989¹⁴.

In *Re W (A Child) [2012] EWCA Civ 1828* the recent history of the family was the reason for the local authority's immediate removal of a couple's fourth child (S) on the basis of likely significant harm. S was born just 3 weeks after the mother's three older children had been made subject to care and placement orders. The mother was diagnosed as suffering from a personality disorder and the older children were removed because of evidence of significant

¹⁴ See sections 5, 6 and 15(2) Social Services and Well-being (Wales) Act 2014

harm as a result of physical and emotional neglect. S was removed shortly after birth under an ICO and placed with foster carers. The Judge who heard the proceedings in relation to S was the same Judge who had heard the proceedings in relation to the older children. The Judge noted the changes both parents had been able to make during the course of the proceedings relating to S, which had taken time to reach a final hearing. The Judge was critical of the local authority's approach to the conduct of the case and their behaviour towards the parents, but found the threshold for an order made out and, given the only alternatives were return to the parents or permanent removal, he had made care and placement orders in relation to the baby. The Court of Appeal accepted that the case was finely balanced. The threshold of likely significant harm had been established but the changes the parents had made and the mother's engagement with therapy were positives which needed to be considered when deciding on what order to make. The judge who heard the case in the Family Court had demonstrated that these factors had been considered. As a result, the Court of Appeal felt that it would not be possible to say that the Judge had been plainly wrong in the decision he had made, so the appeal was dismissed.

Key points on significant harm and likely significant harm

- The court should identify the nature of the harm the child has suffered or is likely to suffer.
- The court should identify in what respects the harm is significant.
- The harm has to be attributable to a lack or likely lack of reasonable parental care and the court should identify the respects in which parental care is falling short.
- In relation to all three points above there must be evidence to support the court's findings.
- Where the harm feared is the impairment of intellectual, emotional, social or behavioural development then clear evidence about why it is likely, and why it would be significant is particularly important.
- Unattractive character traits or behaviour of parents is not a ground for state intervention, unless it leads to significant harm to the child.
- If the harm has not yet been suffered, the court has to be satisfied by relevant and sufficient evidence that the harm is **likely**.
- The parents' own histories or experiences of older children in the family may provide the evidence supporting a likelihood of significant harm, but changes in circumstances will be taken in account, if not in relation to the threshold of significant harm, then in relation to the decision about which order, if any, to make.
- The court can take into consideration the support available to parents when deciding on which order to make.

Factors to consider when making final orders

In those cases where the local authority are seeking the permanent removal of the baby from his or her parents the court will, as in all care cases, need to be satisfied that the grounds for making a care order have been proved and will then need to consider what, if any, order should be made. The welfare principle in section 1 of the 1989 Act means that in making this decision the court has to consider the child's welfare (there is a checklist for this) and whether another order, or no order, might be better than the one sought by the local

authority and Article 8 of the Human Rights Act means that the court must also consider whether the order is proportionate, given the circumstances of the case. This means that the full range of possible orders and placements should be considered and when cases concern babies the orders in consideration are likely to be a return to parents under a Supervision Order, a placement with family or friends under a Special Guardianship Order (SGO) or Child Arrangement Order, or a Care Order followed by a Placement Order as a preparation for a subsequent Adoption Order. The cases discussed below provide examples of the courts applying the welfare principle and proportionality in considering final orders.

What order to make if a child is staying at home

In *Re H (A Child: Hair Strand Testing) [2017] EWFC 64* the baby was living at home with the mother at the end of proceedings, it was agreed by all the parties that the baby should stay at home, but there was concern that the mother might relapse into misusing drugs. The issue for the court to decide was whether there should be a care order in relation to this baby or a supervision order because of the concerns. This Family Court case is included because of recent research indicating a disparity in different family justice regions in relation to the use of care orders when children are living at home¹⁵. The mother was a care leaver and had a long history of poly drug misuse. She had relapsed after being in rehab, had led a chaotic life and been an unreliable parent. Her oldest child was living under an SGO with grandparents. Two subsequent children had been made the subject of care and placement orders and adoption proceedings were underway in relation to them. The mother had been engaging with substance misuse services during the care proceedings in relation to these two children. She became pregnant with her fourth child shortly after the previous care proceedings ended. During her pregnancy she cooperated fully with health services, the local authority and drug treatment services. Some professionals working with her thought she should be allowed to keep her baby, but the results of hair strand tests led the local authority to decide that the risk of relapse was too great. The baby was removed under an ICO shortly after birth and the local authority plan was that the baby should be adopted. Two months later, further expert evidence in relation to the hair strand test led the court to replace the ICO with an interim supervision order, under which the baby returned to her mother's care and mother and baby lived for a time with a family friend and then alone together throughout the remainder of the proceedings. Hair strand tests indicated a low level of cocaine use during the period of her pregnancy, and although the mother denied using cocaine during this time the judge found that there was evidence of low-level cocaine use during pregnancy but was not satisfied that there was any evidence of use of cocaine since baby's birth, although there was a risk of further use. In deciding which order to make the judge discussed the relative merits of a care order at home, which was the order that the local authority was seeking, as opposed to a supervision order, which was being sought by the mother and the Guardian. The judge said that either order might be appropriate and there were advantages and disadvantages to each. In relation to the facts of this case, the judge found that there were potential disadvantages in the local authority sharing parental responsibility with the mother because there had been a high turnover of social workers

¹⁵ Harwin J, Alrouh B, Bedston S, & Broadhurst K (2018) Care Demand and Regional Variability in England 2010/11-2016/17. Centre for Child and Family Justice Research, University of Lancaster <https://www.cfi-lancaster.org.uk/publications?page=2>

during the case; consultation with the mother had been poor and care planning 'suboptimal'. The judge also found that the mother's self-confidence was more likely to be built-up if she no longer had to share parental responsibility with the local authority. In terms of support services, the judge could see no benefits from making a care order as the local authority had confirmed they would be the same regardless of the order made. Interestingly the judge made no comment about whether proportionality was an issue when weighing up a supervision order against a care order at home. A supervision order for 12 months was made.

Key points

- Parents can change despite a poor prognosis.
- When children are placed at home at the end of proceedings the court may consider the level of support available when deciding on what order would be best for the child.

Proportionality and purposeful delay

The case of *Re P (A Child)*[2018] EWCA Civ 1483, confirmed that in cases where a mother has shown capacity to change during care proceedings following the removal of a baby at birth, it can be appropriate to extend proceedings beyond 26 weeks to test whether that change can be sustained, rather than moving too swiftly to make a final order. In this case the mother had a troubled background, had been in care and had suffered long term from alcohol addiction, beginning when she was 13 years old. She had convictions for assault which were connected to her drinking and had received treatment under an alcohol treatment order imposed as a sentence by the criminal court. The mother had recovered but then relapsed. Her older child had been the subject of care proceedings which had concluded with this child being placed with grandparents. The new baby was removed at birth, with a plan for adoption. As the local authority was not planning to return the child to the mother, she was not offered any support. The mother sought support for herself, completed treatment and also accessed recovery support. At the time of the final hearing in the care proceedings the mother had been abstinent for 13 months. Expert evidence indicated that the mother was now able to acknowledge the impact her drinking had had on her first child, and she also accepted that she had deceived professionals in the past, and these factors, coupled with her abstinence, gave promising indications of the mother's capacity to change. The mother was seeking an adjournment of the proceedings for a further period of six months, as expert evidence suggested that if she remained abstinent during this further period the chances of her relapsing were substantially reduced. The baby was well settled in a foster home, and there were very positive reports of the mother's contact with her child, which was taking place four times a week.

The Judge at first instance concluded that the risk of 'further damage' to the baby's attachment needs meant that it would be wrong to allow an adjournment for 6 months. The judge made a care order and then a placement order. The mother appealed and by the time the appeal was heard, a further 6 months had passed, and the mother was still abstinent from alcohol. The Court of Appeal found that:

- The Judge hearing the care proceedings had placed too much emphasis on the history and had not paid enough attention to the 'significant progress' made by the mother, both in relation to sobriety but also in relation to insight.
- There was no evidence that the baby had suffered damage to her attachment needs; on the contrary, the Children's Guardian had observed the baby to be well attached to the foster carer and therefore able to make secure attachments in the future.
- The Judge at first instance had failed to take account of the good quality contact that the mother was having with the child.

The Court of Appeal was critical of the Judge for assuming that the outcome of the proceedings, after an adjournment of 6 months, would inevitably be a decision to make a care order and, in contrast, concluded that there was sufficient prospect of the court being able to decide that the baby could return to the mother. The Appeal Judges also found that the decision at the end of the case to make a placement order was not proportionate, on the basis that it was hard to see how the baby's welfare 'required' the severing of her relationship with her mother at that point. The care and placement orders were overturned and replaced with an ICO so the Family Court could reconsider the final order. The other issue raised by this case is the lack of support provided to the mother by the local authority, which is discussed in the section on practice.

Key points

- The history is relevant but must be seen within context of the current situation.
- The period of 26 weeks can be extended where there is evidence that parents may well be able to sustain change, but a longer period is needed to test that out.
- Where there is evidence that change may be sustained by parents and where the child is developing healthily and with good attachments, a decision to make a care order and placement order could be contrary to the principles of proportionality in Article 8.

Welfare principle, what factors can be considered

Two cases, both called *Re T - Re T (A child) (Early Permanence Placement) [2015] EWCA Civ 983* and *Re T (A Child: early permanence or kinship carers) [2017] EWFC B43*- but heard two years apart highlighted the potential pitfalls in the foster to adopt scheme¹⁶. Under this scheme, people who have been approved as prospective adoptive parents can be temporarily treated as foster parents to allow a baby to be placed with them at the start of care proceedings, so before the court has decided whether the grounds for a care order have been proved. This course of action would normally be followed where the local authority were clear that there was no likelihood that the baby would be able to return home, and where there were no members of the wider family able to care for the child. The cases below dealt with the issue of whether it was appropriate to compare relatives with foster to adopt carers when deciding which order to make at the end of care proceedings.

¹⁶ Care Planning, Placement and Case Review (England) Regulations 2010, Reg 25A and DfE (2013) Statutory Guidance on Adoption

In *T (A child) (Early Permanence Placement) [2015] EWCA Civ 983* the baby was placed with foster to adopt carers under s.20 when aged 1 day. The carers had already been identified before the baby was born, as the mother had agreed to relinquish her baby. Care proceedings were started and one month later the identity of the father was established via DNA testing. The father then put his parents forward as potential carers. The local authority carried out a viability and then a full assessment of the grandparents which was positive. At that point the local authority told the foster to adopt carers that the care plan had been changed to placement with the paternal grandparents under an SGO. The Judge then joined the foster to adopt carers and the grandparents as parties to the care proceedings. The Judge joined the foster to adopt carers on the basis that they were approved as potential adopters, the baby had been with them for 6 months and there was evidence that the baby was attached to them. The father appealed against the foster to adopt carers being joined to the care proceedings. The Court of Appeal upheld the appeal on the basis that it was wrong for foster to adopt carers to be joined to care proceedings simply because the child had been with them for a period of time. The Judge had failed to give sufficient weight to earlier cases which had emphasised the primacy of family placements, and that it was not appropriate for the court to be weighing up the merits of the foster to adopt adopters against the grandparents in circumstances where adoption was not the issue being decided in the care proceedings and was not the order being sought by any of the parties.

In *Re T (A Child: early permanence or kinship carers) [2017] EWFC B43* T's parents were homeless and chaotic drug users. T was born withdrawing from drugs. An older sibling of T's had been removed previously and placed with an aunt. T was removed shortly after his birth and placed with foster to adopt carers when he was discharged from hospital. This was despite the fact that while T was still in hospital and only 10 days old, and before the ICO was granted, a paternal aunt had emailed the social worker and offered to care for T. During the care proceedings there was a positive viability and a full assessment of this aunt and her partner. There was no dispute that the threshold for making an order had been established but the local authority argued that T should stay with his foster to adopt carers and be adopted as the carers could better meet his emotional needs. The Judge reminded herself that in care proceedings the court is limited to considering whether, in principle, adoption would be justified. The consideration should not involve an assessment of the merits of particular prospective adopters. In addition, the Judge should be considering T's welfare needs throughout his life. The Judge made a further ICO with view to T moving to the aunt and uncle, and the aunt and uncle applying for SGO in due course.

Re B and E (children) [2015] EWFC B203, a Family Court case, is an example of a case where placement with a permanent carer was preferred over that of a placement with a relative. E was born during proceedings concerning B, who was 14 months older than E. E was removed at birth and placed with the same foster carer who was looking after B. Previous children of both parents had been removed because of neglect arising from alcohol misuse, domestic abuse and the mother's mental health problems. During the care proceedings an aunt was identified who lived in Belgium, she was assessed but it was considered that she had no real appreciation of the impact a move would have on B and E. The Judge decided that the best option for the children would be to remain with their current foster carer under a care order, because this carer was willing to facilitate contact with the birth parents and siblings of B and E and would consider making a future application for an adoption order.

Key points

- In care proceedings the court is limited to considering whether adoption would be justified in principle, is it 'necessary' and proportionate, it should not be weighing up the merits of prospective adopters against family members who wished to care for the child and who had received a positive assessment.
- In some cases, a stranger placement might be preferred over a family placement, in this particular case because of the greater possibility for contact between the children, their parents and their siblings.

Proportionality and adoption

Re B (A Child) [2013] UKSC 33, the Supreme Court case, discussed already in relation to threshold, also considered the issue of proportionality in relation to the final order made. In that case it was clear that if a Care Order were made then the plan was that the child should be adopted. All of the Supreme Court Judges were clear that adoption against the wishes of the parents should '*only be contemplated as a last resort- when all else fails*' (para 104) and that only in a case of necessity will the decision to make a care order where the plan is adoption be proportionate. They pointed to previous decisions of the ECHR on Article 8 challenges as well as to the relevant legislation in England and Wales¹⁷, and to the principles of the UNCRC¹⁸ in support of this. Four of the Judges decided that the Judge in the lower court was right to decide that adoption was the only option available, and thus a proportionate decision, because of the evidence that the parents had not, and would not be able to, cooperate with professionals and this would be essential to ensure the support they needed if they were to assume care of their child. Lady Hale, who had accepted the evidence that there were reasons why the parents had been uncooperative with professionals, disagreed, concluding:

'In all the circumstances, I take the view that it has not been sufficiently demonstrated that it is necessary to bring the relationship between A and her parents to an end. In the circumstances of this case, it cannot be said that "nothing else will do" when nothing else has been tried. The harm that is feared is subtle and long term. It may never happen. There are numerous possible protective factors in addition to the work of social services. There is a need for some protective work, but precisely what that might entail, and how the parents might engage with it, has not yet been properly examined.' (para 223)

However, given the majority of Supreme Court Judges approved the making of the original care order, the appeal by the parents did not succeed.

In cases where the local authority plan is that the child should be adopted, they may make an application for a Placement Order¹⁹ while care proceedings are ongoing and the court then deals with that application if a Care Order is made. A Placement Order can only be

¹⁷ S.52(1)(b) Adoption and Children Act 2002

¹⁸ Articles 7 and 9

¹⁹ Section 21 Adoption and Children Act 2002

made if the child has been made the subject of a Care Order and the court is satisfied that the parent's consent should be dispensed with. The grounds with dispensing for consent are that the court is satisfied that the welfare of the child requires the court to dispense with consent²⁰.

The issue of proportionality in relation to the making of a Care Order and Placement Order has been raised in a number of cases but one which received considerable attention was the case of *Re B-S (Children) [2013] EWCA Civ 1146*. This case did not concern the removal of an infant at birth but is included because it is a widely cited case, and, like *Re B*, considers the issue of proportionality of final orders and reviews the relevant legislation governing such decisions. The issue the Court of Appeal was considering in *Re B-S* was a mother's appeal against a refusal to allow her to oppose the adoption of her children. As a result, the judgment considers proportionality in relation to orders in adoption proceedings as well as in relation to care proceedings.

The judgment in *Re B-S* reiterated the messages from *Re B* about adoption without consent:

'The language used in Re B is striking. Different words and phrases are used, but the message is clear. Orders contemplating non-consensual adoption – care orders with a plan for adoption, placement orders and adoption orders – are "a very extreme thing, a last resort", only to be made where "nothing else will do", where "no other course [is] possible in [the child's] interests", they are "the most extreme option", a "last resort – when all else fails", to be made "only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do": see Re B paras 74, 76, 77, 82, 104, 130, 135, 145, 198, 215.' [para 22]

The judgment goes on to draw out three key points from the Supreme Court decision in *Re B*:

- *"First (Re B paras 77, 104), although the child's interests in an adoption case are paramount, the court must never lose sight of the fact that those interests include being brought up by the natural family, ideally by the natural parents, or at least one of them, unless the overriding requirements of the child's welfare make that not possible"*[para 26 *Re B-S*];
- *"Second (Re B para 77), as required by section 1(3)(g) of the 1989 Act and section 1(6) of the 2002 Act, the court "must" consider all the options before coming to a decision. As Lady Hale said (para 198) it is "necessary to explore and attempt alternative solutions".* [para 27 *re B-S*];
- *"Third (Re B para 105), the court's assessment of the parents' ability to discharge their responsibilities towards the child must take into account the assistance and support which the authorities would offer. So "before making an adoption order ... the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support."* [para 28 *Re B-S*].

²⁰ Section 52 (1)(b) Adoption and Children Act 2002

The judgment in *Re B-S* was critical of local authority evidence in support of a Placement Order which did not spell out why adoption was necessary and why other options were not available or appropriate in any particular case. The judgment was also critical of judgments in care proceedings which did not explain how the Judge hearing the case had come to the conclusion that adoption was the only possibility.

If a Placement Order is made this authorises the local authority to place the child with prospective adopters. If a parent wishes to challenge a Placement Order they first have to apply to the court for leave to do this and the court will only grant leave if there has been a change in circumstances and, if there has been such a change, then the court must consider whether granting leave would be in the interests of the welfare of the child²¹. However, once a child has been placed for adoption a parent can no longer apply for leave to revoke the Placement Order²². Instead they must wait until the prospective adopters have lodged an application for adoption and then they may seek leave to apply to oppose the adoption. Such an application faces the same two stage test as applying to for leave to revoke a placement order – there must have been a change in circumstances and it must be in the interests of the welfare of the child to give the parent leave to oppose²³.

In *Re B-S* the mother was able to show changed circumstances but the Court of Appeal dismissed her appeal on the basis that the Judge hearing the application for leave to oppose had been right to find that it would not be in the children's long term welfare to grant the mother leave to oppose. This was because the children were still showing signs of the impact of the significant harm they had experienced in their mother's care and were settled in their prospective adoptive home.

In *Re P (A child) [2018] EWCA Civ 1483* the Court of Appeal was also considering an appeal by a mother against the refusal of leave to allow her to oppose the adoption of her child. The child had been removed at birth and placed with foster carers, who had subsequently been approved as adopters for that child. The birth mother had been abused and neglected as a child and then sexually abused whilst in care. She had unpredictable behaviour and outbursts of violence and following a sentence of life imprisonment for arson, and subsequent release on licence, had been recalled to prison on a number of occasions. The mother had her first baby at aged 14 years. Her first four children were removed from her care. F was her fifth child, who was removed under an EPO a day after his birth. When he was 9 months old he was made subject to care and placement orders. The foster carer he was placed with at birth was approved as a prospective adoptive parent. The mother sought leave to appeal against the Placement Order, but this was refused. Four months later the mother applied for leave to oppose the adoption of F, and when this was refused, she appealed to the Court of Appeal. The grounds of the appeal were that she had managed to turn her life around and the evidence for this was that she had been able to retain care of her youngest child (R), who was only a year younger than F and had been born after F had been made subject to care and placement orders. The mother's appeal was unsuccessful because the Court of Appeal were satisfied that the Family Court Judge's refusal to allow

²¹ S. 24(3) and S.1 Adoption and Children Act 2002

²² S.24(2)(b) Adoption and Children Act 2002

²³ S.47 (7) and S. 1 Adoption and Children Act 2002

her to oppose the adoption was the right decision at the time. The Court of Appeal agreed with the Judge that at the time of the mother's application it was impossible to tell whether she would be able to make the changes necessary to keep her 6th child, and that even if it was shown that she could do this, and taking into account the issue of proportionality, the welfare test would lead to a decision that F should stay in his current placement. Factors relevant to this decision were the fact that F had spent all 19 months of his life with his prospective adopters, the mother was in the early stages of being a parent to R and making changes to her life and was insufficiently aware of how difficult it might be to parent two young children.

An interesting aspect of this case were the changes that flowed from the proceedings relating to R being heard before a different Judge to the one who had heard the proceedings in relation to all the mother's previous children. The new Judge directed a clinical psychologist to review all the previous reports prepared on the mother, to see what therapeutic or psychiatric support might help the mother break the cycle of repeat removals of her children. The psychologist recommended that the mother needed a supportive, professional 'friend' who could then organise a team of professionals around the mother that she could trust. This plan was supported by the social worker and the guardian and was put into action and, at the time of the appeal, had succeeded to the extent that the plan was that the youngest child would live with the mother under a care order.

Key points:

- Adoption against the wishes of the parents should only be contemplated as a last resort, when all else fails, only to be considered when nothing else will do.
- Section 1(3)(g) of Children Act 1989 and section 1(4) of the Adoption and Children Act 2002 require the court to consider all the available options when deciding what order to make.
- The court's assessment of the parents' ability to discharge their responsibilities towards the child must take into account the assistance and support which the authorities would offer.
- Although the child's interests in an adoption case are paramount, the court must never lose sight of the fact that those interests include being brought up by the natural family unless this would not be in the interests of the child's welfare.
- If parents wish to apply for leave to revoke a Placement Order, or oppose an adoption application, they will have to prove not only that there has been a change in their circumstances but that the revocation, or opportunity to oppose the adoption would be in the interests of the welfare of the child.

Other issues

Pre-birth assessment and planning

In the cases below, Judges were critical of the local authority approach in the pre-birth period and made some specific recommendations for improvements in practice. In *A Council v M* [2014] EWFC B158 the mother's own history and the removal of her first child two years before the birth of her second led the local authority to plan for the removal

of this second child shortly after birth. The mother had experienced sexual and emotional abuse as a child, been in care in a number of different foster homes from the age of 13 years and had learning difficulties. Her first child was removed on the grounds of neglect and made the subject of a placement order. The mother was 23 years old when she had her second child. In this case the local authority was criticised by the Judge for immediately deciding the child should be removed at birth and placed for adoption with her half-sibling. The Judge commented that 'this is not a case where it was remotely appropriate for the Local Authority to have written off the mother in this way.' The Local Authority's position throughout the proceedings was that the baby should be removed permanently from her mother, although in fact mother and baby were together for the first 9 months of the baby's life, mainly in a mother and baby foster placement, so assessments could be carried out. The judge ultimately decided that the mother was unable to care for her baby and granted a placement order. He was however critical of the way the Local Authority and health partners had failed to follow their own pre-birth protocol. The Judge quotes the Local Authority pre-birth protocol in full, which provides for midwives to refer cases to social care in weeks 12-16 of pregnancy so that an initial assessment can begin. The protocol sets out the steps to be taken thereafter, including the completion of a full assessment between weeks 21-25 and an initial child protection conference by week 28 at the latest with a full birth plan by 32 weeks. In this case, mindful of the mother's circumstances and the removal of her first child, the midwife had made a referral when the mother was 10 weeks pregnant. The local authority told the midwifery service that the referral had been made too early and they should refer again at a later date. This subsequent referral was made some 6 months later, only 4 weeks before the baby was born. The Judge expressed astonishment that a vulnerable mother should have fallen off the radar in this way and suggested there should be an urgent review of the pre-birth process. The Judge also expressed concern that it had been identified some years before that the mother needed therapy, to help her deal with the consequences of emotional and sexual abuse in childhood, but this had not been made available to her. The Judge noted that in cases such as this every effort should be made to ensure that a mother, or pregnant woman, can access the therapy they needed as early as possible.

In *Nottingham City Council v LM and others* [2016] EWHC 11 (Fam) the baby was removed from the mother under an ICO, 11 days after the birth. The Judge was critical of the local authority because it had failed to follow the plan it had drawn up during the pre-birth period. The parents in this case were both misusing drugs and there were concerns about domestic abuse. Their older child (B) was living with the maternal grandparents under s.20. The local authority carried out a pre-birth assessment and concluded that the situation in relation to substance misuse and domestic abuse had not changed, that care proceedings should be started once the baby was born and that the baby should be removed at birth. The parents wished to oppose this plan. In the event the baby was born on a Saturday and the Local Authority were informed of the birth by the hospital on the following Monday. The local authority did not issue proceedings until 10 days later applying for an urgent application for an interim care order to be heard on that day. The papers were served on the parents, their solicitors and the guardian at midday that day. The application was heard, and an ICO granted, but there was insufficient time for a contested hearing which was listed for a later date. The Judge was concerned that this infringed the parents' Article 6 rights to a fair hearing as there had been an unnecessary delay given the local authority plan to remove the child. The Judge said:

'I am in no doubt that the parents in this case have been done a great dis-service by this local authority. It may well be that the outcome would have been the same whatever the length of notice that they and their respective legal advisors had had of this application; that is not the point. It is all a question of perceived and procedural fairness.

The actions of this local authority, in issuing an application for an interim care order so late in the day, have resulted in an initial hearing before the court which, I very much regret, is procedurally unfair to the parents. Of equal importance, it is unfair to the children's guardian who was only appointed on the morning of the issue of this application.' (paras 36 and 37).

The Judge went on to give guidance to Local Authorities in cases where there had been pre-birth planning, where the plan was removal, and the parents wished to contest this.

a) The birth plan should have been rigorously adhered to by all social work practitioners and managers and by the local authority's legal department;

b) A risk assessment of the mother and the father should have been commenced immediately upon the social workers being made aware of the mother's pregnancy. The assessment should have been completed at least 4 weeks before the mother's expected date for delivery. The assessment should then have been updated to take account of relevant events immediately pre and post delivery which could potentially affect the initial conclusions on risk and care planning for the unborn child;

c) The assessment should have been disclosed, forthwith upon initial completion, to the parents and, if instructed, to their solicitors to give them an opportunity, if necessary, to challenge the assessment of risk and the proposed care plan;

d) The social work team should have provided all relevant documentation, necessary for the legal department to issue care proceedings and the application for an interim care order, no less than 7 days before the expected date of delivery. The legal department must issue the application on the day of birth and, in any event, no later than 24 hours after birth (or as the case may be, the date on which the local authority is notified of the birth);

e) Immediately upon issue, if not before, the local authority's solicitors should have served the applications and supporting documents on the parents and, if instructed, upon their respective solicitors.

f) Immediately upon issue, the local authority should have sought from the court an initial hearing date, on the best time estimate that its solicitors could have provided. (para 33)

There were also practice points raised in *Re P (A Child) [2018] EWCA Civ 1483*, discussed earlier in relation to final orders. The criticism here was in relation to lack of any support offered to the mother during her pregnancy because the local authority plan was that the child should be removed at birth. Such an approach could potentially be in breach of Article

8²⁴. In addition, the Court of Appeal 'expressed regret' that although the mother had appealed speedily against care and placement orders, the local authority had not updated their assessment of the mother and had reduced her contact with her baby from four days a week to once a week.

The case of *R (WB) and (W) v Secretary of State for Justice [2014] EWHC 1696 (Admin)* raises issues about the assessment by local authorities of pregnant women who are in prison, although the criticism here was directed at the prison authorities. This case was a successful application for judicial review against the decision of prison authorities to refuse a mother a place in a Mother and Baby Unit (MBU) on the basis that the prison policies and procedures were in breach of Article 8. The mother, aged 26, was in prison awaiting trial for the attempted murder of her partner. She had no previous convictions. The mother was four months pregnant when she went into custody. Her older child went to live with a cousin. The mother was Polish and spoke very little English. The pregnancy support officer in the prison contacted the local authority early on, asking them to carry out an assessment as the mother wanted to apply for a place in an MBU. The Local Authority only started the assessment three months after the mother had gone into prison, and less than a month before the Prison Board met to consider the mother's application to go into the MBU. The local authority opposed the placement in the MBU because of a lack of certainty about the future, and concerns about domestic abuse and excessive drinking in the mother's previous relationship, which was denied by the mother. The local authority provided a written report for the Prison Board, on the day of the hearing, saying they opposed the placement in the MBU. The report raised concerns about the mother's parenting capacity but was not a parenting assessment. This was the first notice the mother had that the local authority was opposing her application and she had a limited period of time to read the report with the help of an interpreter. The mother was not given an opportunity to have anyone with her when she appeared in front of the Board, who refused her application for a place in the MBU. Following this the baby was removed at birth with the mother's consent but was placed with foster carers and not with a relative as the mother had wanted. The High Court took the view that the prison authorities had allowed the case to drift unnecessarily and should have obtained a proper parenting assessment of the mother from the local authority before making their decision and because of this there had been a wrongful interference with the mother's Article 8 rights. The decision of the Board was overturned, and they were required to obtain a parenting assessment from the local authority and to reconsider their decision.

The potential for a breach of a parent's rights under Article 8 was the issue under consideration in *Bury MBC v D [2009] EWHC 446 (Fam)*. In this case the local authority took the unusual step of making an application to the High Court before the baby was born. This was done under the inherent jurisdiction of the High Court to declare that in appropriate circumstances some future course of action is either lawful or unlawful. The mother concerned was at the time in prison and was in labour. She had already made one suicide attempt. She had had a previous child removed in care proceedings a year earlier. The mother was in prison because on a contact visit to this child the mother had blindfolded her child, held her on the floor and threatened her with her knife. She had said that her children would be better off dead than in the care of the local authority. The local authority was

²⁴ Soares De Melo c. Portugal (Application No. 72850/14), February 2016

seeking a declaration by the High Court that, in the exceptional circumstances of this case, they were entitled to apply for an EPO without notifying the mother that they were going to do this or informing her of their plan for permanent removal. Given the circumstances, the High Court approved this course of action.

Key points:

- Local authority and health authorities should follow pre-birth protocols where they exist.
- Every effort should be made to ensure that women can access the therapy they need, particularly where the need has been identified in proceedings in which an earlier child has been removed.
- Pre-birth assessments should be begun as soon as possible to ensure that they are completed before the due date.
- There should be full and timely disclosure of all pre-birth assessments and other information to the parents and their legal representatives if they have them.
- If the local authority is planning an application to the court immediately after the birth, then they should have all the documentation prepared in advance.
- Even where the local authority plan is that the baby should be adopted, the mother should be offered support to make necessary changes in her life as part of the pre-birth assessment process.
- When a pregnant woman is in prison an early assessment is important in order to inform any decision about whether the mother to be can be offered a place in a prison mother and baby unit.

6. Conclusion

This review has included 28 cases, 20 of which concerned the removal of infants and of those 20:

- Eight cases began with removal under s.20.
- Eight began with an application for an ICO.
- Two began with an application for an EPO.
- In one case it was not clear on what basis the removal had taken place.
- In one case the local authority had applied to the High Court before the baby was born.

The facts described in the judgments demonstrate why the local authority was concerned about the safety of an infant even where, in some cases, no previous children had been removed from the family. In 16 out of the 20 cases where babies were removed shortly after birth previous children had been removed.

The histories described in the judgments highlight the vulnerability of the parents involved who themselves have often experienced serious abuse and neglect in childhood. Many of the judgments express compassion for the parents and a recognition of the impact on them of their own difficult and often traumatic histories and in some cases the judgments express concern, and at times frustration, that not enough had been done to help the parents come to terms with their past experiences or to support them to achieve change. There are also examples in these cases of parents who do achieve change despite long histories of serious problems and the previous removal of children.

These cases highlight the pain and stress for all involved in cases where a baby is removed at birth. Many cases demonstrate the effectiveness of the current legal framework in protecting children but some of the cases show how poor practice, for example failure to follow due process, or poor understanding of the legal framework can lead to injustice and unfairness. The Supreme Court and Court of Appeal cases which review the legislation and previous case decisions provide important and helpful guidance to all practitioners about the interpretation and implementation of the legal framework. All the cases demonstrate a need for an improved and more co-ordinated response to 'removal at birth' and for more attention to be paid to addressing the impact of complex trauma evident in so many of the parents who experience recurrent care proceedings.

7. Appendix

List of cases included:

1. Williams and Another v LB Hackney [2018] UKSC
2. Re S and HS [2018] EWCA Civ 1282
3. Re P (A child) [2018] EWCA Civ 1483
4. Re X (A child: care order) [2017] EWFC B83 Bailii -
5. Re H (A Child: Hair Strand Testing) [2017] EWFC 64
6. Re T (A Child: early permanence or kinship carers) [2017] EWFC B43
7. Re Nottingham City Council v LM and others [2016] EWHC 11
8. Re A (A Child) [2016] EWFC B101
9. Re A (Application for Care and Placement Order: Local Authority Failings) [2015] EWFC 11
10. Re B and E (children) [2015] EWFC B203
11. Re P (A Child) [2015] EWCA Civ 777
12. T (A child) (Early Permanence Placement) [2015] EWCA Civ 983
13. A Council v M [2014] EWFC B158
14. In re H (f: Damages [2014] EWFC 38,
15. R (WB) and (W) v Secretary of State for Justice [2014] EWHC 1696 (Admin)
16. Re B-S (Children) [2013] EWCA Civ 1146
17. Re B (A Child) [2013] UKSC 33
18. Re L [2013] EWCA Civ 489
19. Re W (A Child) [2012] EWCA Civ 1828
20. Re CA (A Baby) [2012] EWHC 2190 (Fam)
21. Re GR (Children) & others : [2010] EWCA Civ 871
22. L-A (Children) [2009] EWCA 822
23. Bury MBC v D [2009] High Court -inherent jurisdiction
24. Re B (A Child) [2009] EWCA Civ 1254
25. R (G) v Nottingham City Council [2008] EWHC 152 (Admin) and Re G (A child) [2008] EWCA
26. K & H (Children) [2006] EWCA Civ 1898
27. X Council v B (Emergency Protection Orders) [2004] EWHC 2015 (Fam)
28. CASE OF P. C. AND S. v. THE UNITED KINGDOM 16 July 2002

8. Glossary

Judge at first instance – judge who heard the original proceedings

ECHR – European Court of Human Rights

UKSC – UK Supreme Court

EWCA – Court of Appeal

EWHC – High Court

EWFC – Family Court

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