Neutral Citation Number: [2009] EWCA Civ 41

Case No: B4/2008/1963

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE – FAMILY DIVISION
CHARLES J on 21st July 2008
FD07PO2518

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2009

Before :

LORD JUSTICE THORPE
LORD JUSTICE WALL
and
LORD JUSTICE MOORE-BICK

- -

Between :

LOCAL AUTHORITY	**Appellant**
- and -	
Department of Children, Schools and Families	**1st Respondent**
and	
CAFCASS Legal	**2nd Respondent**

A (A Child)

- -
- -

Anthony Hayden QC and Ruth Cabeza (instructed by Corporate Legal Services) for the Appellant
Martin Chamberlain and Anna Burne (instructed by **Treasury Solicitors**) for the 1st Respondent
Malcolm Chisholm (instructed by **CAFCASS Legal)** for the **2nd Respondent**

Hearing date: 2nd December 2008

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Judgment

Lord Justice Wall:

Introduction

1. IA (as I shall call her) was born on 31 August 2006. She is in the care of the London Borough of Haringey (the local authority), as are her two brothers born respectively in 2002 and 2003. Her parents agree that she cannot return to live with them. However, she has a paternal uncle and aunt (Mr and Mrs N) who live in the United States of America, and who are willing to adopt her.

2. The local authority would like to assess Mr. and Mrs N as prospective adopters for IA. But Mr and Mrs N are unable to come to England for the 10 weeks specified in section 84(4) of the Adoption and Children Act 2002 (the 2002 Act). So as a first step, the local authority applied to the judge for his approval of its proposal to arrange for IA to live with Mr and Mrs N on an extended visit pursuant to paragraph 19 of Schedule 2 to the Children Act 1989 (the 1989 Act).

3. In a reserved judgment handed down on 21 July 2008 (and for specific reasons which he articulated fully and carefully) Charles J sitting in the Family Division of the High Court in London refused the local authority's application under the 1989 Act. He also declined to make a declaration sought by the local authority to the following effect, namely that:-

> "there is no legal bar to the court taking into account any period spent by IA at the home of Mr and Mrs N (her paternal aunt and uncle) in the United States of America when considering whether or not Mr and Mrs N had met the condition laid out in section 84(4) of the Adoption and Children Act 2002 that 'an application for an order under this section may not be made unless at all times during the preceding ten weeks the child's home was with the applicant or, in the case of an application by two people, both of them".

4. The judge also adjourned generally an application by the local authority for a placement order under section 21 of the 2002 Act in relation to IA and directed that if an application to restore it was not made by 21 July 2009, it should stand dismissed. We are not directly concerned with that part of his order on this appeal. Charles J's judgment [2008] EWHC 1722 (Fam) is now reported as ***Haringey London Borough Council v. MA, JN, IA*** at [2008] 2 FLR 1857.

5. The other parties to the proceedings before the judge were IA's parents (MA and JN) and her guardian (all of whom made common cause with the local authority and none of whom, as a consequence, was represented before us). However, the Department for Children Schools and Families (the Department) had been given leave to intervene by the judge, and appeared by counsel both before him and in this court. In addition to a detailed skeleton argument, the Department put in a respondent's notice, which sought to uphold the judge's order for different or additional reasons. Finally, CAFCASS Legal instructed an advocate to the court, who likewise appeared by counsel both before the judge and in this court. I am grateful to all counsel for their full and careful arguments.

6. Perhaps the single most important question raised by this appeal is that identified in paragraph 3 above; namely whether, in an overseas adoption, a child's "home" with

prospective adopter(s) during the period of 10 weeks immediately prior to the making of an order for parental responsibility under section 84(1) of the 2002 Act has to be in England and Wales (the Department's view) or whether it can be with the prospective adopters, wherever they happen to be living (the view of the local authority). This is, by common consent, a question of statutory construction.

The facts

7. I can do no better than to take these from paragraphs 6 to 9 of the judge's judgment:-

> 6. When the care order was made (in relation to IA) in January 2007 the plan was for adoption. The family put forward several family members as potential adopters and the only ones considered viable are a paternal uncle and aunt who live in the USA (Mr and Mrs N) with their five children. If the child is not adopted by them she would have to be placed outside the family. It is thought that it would be relatively easy to find appropriate non-family adopters for her in this country. A tension therefore arises between the potential advantages of a family placement and the time table for the child.
>
> 7. The prospects of it being concluded that the child's welfare would be best promoted throughout her childhood by her being adopted by Mr and Mrs N are thought to be good. However the local authority is of the opinion, in my view correctly, that at present it does not have sufficient information to reach a properly informed view on this.
>
> 8. Naturally the local authority do not wish to continue the process of investigating whether such an adoption should be supported if this cannot be done lawfully and/or practically having regard to the legal requirements and the child's time table.
>
> 9. As will be apparent from what I have said some investigations have been carried out by the local authority and its counterpart in the USA. These form the basis for the view of the local authority, which I share, that on welfare grounds the possibility of the child being adopted by Mr and Mrs N in the USA should be further investigated and assessed.

8. In my judgment, the manner in which the judge analysed the position in paragraph 9 of his judgment is significant. My reasons for taking this view will, I think, become apparent when I have set out the local authority's care plan and the relevant statutory provisions. At the moment, however, I note simply that the local authority is currently acting as a local authority, not as an adoption agency. It has a care order in relation to IA, and thus shares parental responsibility for her with her parents; however, no placement order relating to IA has been made.

The local authority's care plan

9. The local authority's care plan, upon which the care order was made, is set out by the judge in detail in paragraph 10 of his judgment. I propose to repeat it in full.

10. The process, or steps, proposed by the local authority are as follows:

(1) Step 1

(a) Mrs N travels to the United Kingdom for introductions and to observe the child's routine in her current foster placement. Mrs N and her husband are presented to the fostering panel as foster carers for the child. (If this does not occur before the child travels, she will initially be placed under Regulation 38 of the Fostering Services Regulations 2002 (FSR 2002)).

(b) The child travels to the USA with Mrs N, her present foster carer and social worker for a holiday placement with Mrs N and her family. Further introductions take place with the family and the child within 1-2 weeks, after which the present foster carer will return. The social worker will remain for a period of 4 weeks and then return to England.

(c) The child remains with the N family for a maximum 90 days (as permitted by a temporary visitor visa to the USA).

(d) Whilst in the USA the social worker will commence assessment pursuant to Regulation 31(2)(d) of the Adoption Agencies Regulations 2005 (AAR 2005) and section 43 of the 2002 Act. A Looked After Child (LAC) Review will take place four weeks after the child is so placed with the N family in the USA.

(e) So at this stage the most relevant statutory provisions are sections 22 and 23 of the 1989 Act and section 43 of the 2002 Act, and the most relevant Regulations are the Fostering Services Regulations 2002 (FSR 2002) and the Adoption Agencies Regulations 2005 (AAR 2005).

(2) Step 2

(a) The social worker sends the 'adoption placement report' pursuant to Regulation 31(2) (d) AAR 2005 to Mrs N and her family 10 working days in advance of the proposed Adoption and Permanency Panel. The social worker completes the child's permanency report (to include a summary of possibilities for placement of the child within this country) and an assessment of whether adoption by Mr and Mrs N is in the child's best interests pursuant to Regulation 38 of the Adoption with a Foreign Element Regulations 2005 (AFER 2005).

(b) The child returns to England. If the report favours adoption by Mr and Mrs N they come with her for approval as adoptive parents and matching with the child. Mr N would be unable to stay for longer than approximately two weeks due to his work commitments, but Mrs N (and her youngest child) could stay longer. The four older children would not be able to come here for any longer than Mr N, if they could come at all.

(c) If it is then thought necessary and appropriate the local authority will pursue its adjourned application for a placement order pursuant to Section 18 of the 2002 Act.

(d) Pursuant to Regulation 44 of AFER 2005 the local authority's Adoption and Permanency Panel will consider the following documents: Article 15 report received from USA authority; the local authority's observations on that report; the child's permanency report; other such documents as required by Regulation 17(2) of the AAR 2005.

(e) At this stage the most relevant statutory provisions are again sections 22 and 23 of the 1989 Act and section 43 of the 2002 Act, and the most relevant Regulations are the Fostering Services Regulations 2002 (FSR 2002), the Adoption Agencies Regulations 2005 (AAR 2005) and the Adoption with a Foreign Element Regulations 2005 (AFER 2005). The Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption is also relevant.

(3) Step 3

(a) If panel recommends approval and matching, the local authority will notify the Department for Children, Schools and Families (Reg 40 AFER 2005) and will prepare a report in accordance with Article 16 (Reg 46 AFER 2005) to forward to the Department for Children, Schools and Families as the relevant Central Authority. The local authority will also provide details to the Department of Health in respect of any placement order or consent provided by the birth parents.

(b) Mrs N will provide written confirmation that she will travel with the child to the USA (Regulation 48(f) AFER 2005) and will request permission to travel with the child without her husband (the consent of both Central Authorities is required).

(c) The Department of Health will consider whether the appropriate steps have been met and if it agrees with the placement will refer the case to the Central Authority in the USA.

(d) Regulation 47 AFER 2005 sets out the requirements to take place before the child is placed for adoption including a requirement that the Central Authority in the USA will authorise the child to enter and reside permanently in the USA.

(e) Until such time as the requirements of Regulation 47 AFER 2005 are met and authority to place under the ACA 2002 is obtained, the child's placement with Mrs N remains under the fostering regulations.

(f) If and when those requirements are met and that authority is obtained (by court order or parental consent) the placement will become a placement for adoption.

> (g) At this stage the most relevant regulations are again AAR 2005 and AFER 2005. Again the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption is relevant.
>
> (4) Step 4
>
> (a) Mrs N and her husband will apply under s. 84 of the 2002 Act for parental responsibility. Regulation 48 of AFER 2005 applies.
>
> (b) If that is granted the local authority will arrange for good bye visits for the child and her family.
>
> (c) Subject to the court granting a parental responsibility order Mrs N will travel with the child to the USA and she and her husband will apply for a Convention Adoption within the USA.
>
> (d) At this stage the most relevant statutory provision is s. 84 of the 2002 Act and again AAR 2005, AFER 2005 and the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption are relevant.

10. I commend the care and detail of the local authority's planning, and its manifest desire to ensure that IA is fully and properly protected. I also note that what it plainly proposed, if all goes according to plan, is the adoption of IA by her paternal uncle and aunt in the United States of America. It is, I think, also significant, that, having set out the care plan, the judge adds:-

> 11. So, leaving aside the foreign element, what the local authority proposes mirrors what it would do in this country if it decided that there should be a placement with family members before and perhaps leading up to a placement for adoption with those family members. If this was a domestic case it was not argued that any of the steps starting with a placement for assessment and then one for adoption were, or would be unlawful or inappropriate in any way.

11. In paragraphs 12 and 13 of his judgment, the judge identifies the issues which arise under the 1989 and the 2002 Acts:-

> 12. At Step 1 the local authority has to obtain an order approving the removal of the child to the USA under Paragraph 19 of Schedule 2 to the Children Act. An issue arises as to whether that permission can lawfully be granted.
>
> 13. The local authority also seeks a declaration that there is no legal bar to the taking into account of the period the child so spends in the USA for the purpose of section. 84(4) of the 2002 Act. It does this to avoid the plan faltering because both Mr and Mrs N cannot remain in this country for 10 weeks and there are likely to be very real problems in Mrs N doing so because 4 of her children in the USA could not sensibly come with her to England for that period.

Why the judge refused relief

12. The judge himself was clear both: (1) that he would have granted permission on welfare grounds for IA to live in America, pursuant to paragraph 19 of Schedule 2 to the 1989 Act: and (2) that in the context of an adoption abroad, there was no legal bar to the taking into account of the period to be spent by IA in the USA under section 84(4) of the 2002 Act. However, he declined to make the orders sought, and in paragraphs 77 and 78 of his judgment explained his reasons as follows:

> 77. My main reasons are:-
>
> (1) this would create divergent authority at first instance and would run counter to the underlying assumption of the Court of Appeal in ***Re G*** [2008] EWCA Civ 105, (also reported as ***Re G (Adoption: Placement Outside Jurisdiction)*** [2008] 1 FLR 1484 and 1497),
>
> (2) it would therefore create uncertainty and confusion in an area which involves important questions of status and welfare, and so
>
> (3) if there is to be a decision that on the true construction of the relevant primary and secondary legislation that the plan proposed by the local authority is lawful it should be made by the Court of Appeal.
>
> 78. In addition it seems to me that a decision that what the local authority proposes is lawful would be likely to introduce a number of questions and issues in other cases which absent regulations would lead to (a) a domestic system governed in large measure by regulation, and (b) a system relating to some foreign adoptions governed by an incremental approach based on decisions of the court. In my view adoption is for good reasons an area that is governed by detailed regulations and there would be advantage in avoiding a piecemeal development through case law of the steps to be taken in respect of foreign adoptions.

13. It is, accordingly, against this background that I turn to examine the statutory material and the relevant authorities. Whilst I respect Charles J's proper caution, the ironic position with which the court was faced was that Mr. Anthony Hayden QC, for the appellant local authority, was able effectively to claim the judgment as his own, whilst Mr. Chamberlain, for the Department, who sought to uphold the judge's order, parted company with the judge on much of his reasoning.

The relevant statutory provisions.

14. I do not think it necessary to set out all of the provisions identified by the judge. The following, I think, are sufficient. I start with the 1989 Act. Section 1 is relevant but is, I think, too well known to warrant reproduction. The care order under Part IV of the 1989 Act in favour of the local authority gives it parental responsibility, which is defined in section 3(1) of the 1989 Act as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".

15. Under section 23(6) of the 1989 Act:

> (6) Subject to any regulations made by the Secretary of State for the purposes of this subsection, any local authority looking after a child shall make arrangements to enable him to live with—
>
> (b) a relative, friend or other person connected with him,
>
> unless that would not be reasonably practicable or consistent with his welfare.

16. I reproduce paragraph 19 of Schedule 2 to the 1989 Act in its current form in its entirety:-

> (1) A local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court.
>
> (2) A local authority may, with the approval of every person who has parental responsibility for the child arrange for, or assist in arranging for any other child looked after by them to live outside England and Wales.
>
> (3) The court shall not give its approval under sub-paragraph (1) unless it is satisfied that—
>
> (a) living outside England and Wales would be in the child's best interests;
>
> (b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;
>
> (c) the child has consented to living in that country; and
>
> (d) every person who has parental responsibility for the child has consented to his living in that country.
>
> (4) Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard sub-paragraph (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian, special guardian, or other suitable person.
>
> (5) Where a person whose consent is required by sub-paragraph (3)(d) fails to give his consent, the court may disregard that provision and give its approval if it is satisfied that that person—
>
> (a) cannot be found;
>
> (b) is incapable of consenting; or
>
> (c) is withholding his consent unreasonably.
>
> (6) Section 85 of the Adoption and Children Act 2002 (which imposes restrictions on taking children out of the United Kingdom) shall not apply in

the case of any child who is to live outside England and Wales with the approval of the court given under this paragraph.

(7) Where a court decides to give its approval under this paragraph it may order that its decision is not to have effect during the appeal period.

(8) In sub-paragraph (7) "the appeal period" means—

(a) where an appeal is made against the decision, the period between the making of the decision and the determination of the appeal; and

(b) otherwise, the period during which an appeal may be made against the decision.

(9) This paragraph does not apply to a local authority placing a child for adoption with prospective adopters.

The 2002 Act

17. The relevant sections of the 2002 Act are, I think, the following: -

1 Considerations applying to the exercise of powers

(1) This section applies whenever a court or adoption agency is coming to a decision relating to the adoption of a child.

(2) The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.

18. I do not, in the particular circumstances of this case, think it necessary to set out what has been described as the "enhanced" welfare checklist contained in section 1(4) of the 2002 Act, although it is relevant, and I have it well in mind.

19. A number of sections of the 2002 Act are applied to orders under section 84 by Regulation 11 of AFER 2005. For present purposes, I propose to set out only the following sections of the 2002 Act: -

42 Child to live with adopters before application

(7) An adoption order may not be made unless the court is satisfied that sufficient opportunities to see the child with the applicant or, in the case of an application by a couple, both of them together in the home environment have been given—

(a) where the child was placed for adoption with the applicant or applicants by an adoption agency, to that agency,

(b) in any other case, to the local authority within whose area the home is.

43 Reports where child placed by agency

Where an application for an adoption order relates to a child placed for adoption by an adoption agency, the agency must—

(a) submit to the court a report on the suitability of the applicants and on any other matters relevant to the operation of section 1, and

(b) assist the court in any manner the court directs.

44 Notice of intention to adopt

(1) This section applies where persons (referred to in this section as "proposed adopters") wish to adopt a child who is not placed for adoption with them by an adoption agency.

(2) An adoption order may not be made in respect of the child unless the proposed adopters have given notice to the appropriate local authority of their intention to apply for the adoption order (referred to in this Act as a "notice of intention to adopt").

20. Chapter 6 of the 2002 Act is entitled ADOPTIONS WITH A FOREIGN ELEMENT, and in the context of this case, the following sections are relevant:

84 Giving parental responsibility prior to adoption abroad

(1) The High Court may, on an application by persons who the court is satisfied intend to adopt a child under the law of a country or territory outside the British Islands, make an order giving parental responsibility for the child to them.

(2) An order under this section may not give parental responsibility to persons who the court is satisfied meet those requirements as to domicile, or habitual residence, in England and Wales which have to be met if an adoption order is to be made in favour of those persons.

(3) An order under this section may not be made unless any requirements prescribed by regulations are satisfied.

(4) An application for an order under this section may not be made unless at all times during the preceding ten weeks the child's home was with the applicant or, in the case of an application by two people, both of them.

(5) Section 46(2) to (4) has effect in relation to an order under this section as it has effect in relation to adoption orders.

(6) Regulations may provide for any provision of this Act which refers to adoption orders to apply, with or without modifications, to orders under this section.

(7) In this section, "regulations" means regulations made by the Secretary of State, after consultation with the Assembly.

85 Restriction on taking children out

(1) A child who—

(a) is a Commonwealth citizen, or

(b) is habitually resident in the United Kingdom,

must not be removed from the United Kingdom to a place outside the British Islands for the purpose of adoption unless the condition in subsection (2) is met.

(2) The condition is that—

(a) the prospective adopters have parental responsibility for the child by virtue of an order under section 84 ……

(3) Removing a child from the United Kingdom includes arranging to do so; and the circumstances in which a person arranges to remove a child from the United Kingdom include those where he—

(a) enters into an arrangement for the purpose of facilitating such a removal of the child,

(b) initiates or takes part in any negotiations of which the purpose is the conclusion of an arrangement within paragraph (a)

(c) causes another reason to take any step mentioned in paragraph (a) and (b)

An arrangement includes an agreement (whether or not enforceable).

(4) A person who removes a child from the United Kingdom in contravention of subsection (1) is guilty of an offence.

(5) A person is not guilty of an offence under subsection (4) of causing a person to take any step mentioned in paragraph (a) or (b) of subsection (3) unless it is proved that he knew or had reason to suspect that the step taken would contravene subsection (1).

But this subsection only applies if sufficient evidence is adduced to raise an issue as to whether the person had the knowledge or reason mentioned.

(6) A person guilty of an offence under this section is liable—

(a) on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both,

(b) on conviction on indictment, to imprisonment for a term not exceeding twelve months, or a fine, or both.

(7) In any proceedings under this section—

(a) a report by a British consular officer or a deposition made before a British consular officer and authenticated under the signature of that officer is admissible, upon proof that the officer or the deponent cannot be found in the United Kingdom, as evidence of the matters stated in it, and

(b) it is not necessary to prove the signature or official character of the person who appears to have signed any such report or deposition.

86 Power to modify sections 83 and 85

(2) Regulations may provide for section 85(1) to apply with modifications, or not to apply, if—

(a) the prospective adopters are parents, relatives or guardians of the child in question (or one of them is), or

(b) the prospective adopter is a partner of a parent of the child,

and any prescribed conditions are met.

(3) On the occasion of the first exercise of the power to make regulations under this section—

(a) the statutory instrument containing the regulations is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

87 Overseas adoptions

(1) In this Act, "overseas adoption"—

(a) means an adoption of a description specified in an order made by the Secretary of State, being a description of adoptions effected under the law of any country or territory outside the British Islands, but

(b) does not include a Convention adoption.

(2) Regulations may prescribe the requirements that ought to be met by an adoption of any description effected after the commencement of the regulations for it to be an overseas adoption for the purposes of this Act.

(3) At any time when such regulations have effect, the Secretary of State must exercise his powers under this section so as to secure that subsequently effected adoptions of any description are not overseas adoptions for the purposes of this Act if he considers that they are not likely within a reasonable time to meet the prescribed requirements.

(4) In this section references to this Act include the Adoption Act 1976 (the 1976 Act).

(5) An order under this section may contain provision as to the manner in which evidence of any overseas adoption may be given.

(6) In this section—

"adoption" means an adoption of a child or of a person who was a child at the time the adoption was applied for,

"regulations" means regulations made by the Secretary of State after consultation with the Assembly.

21. As is apparent, section 84(5) applies section 46(2) to (4). However, it seems to me that only part of section 46(2) is tangentially relevant. This reads -

> (2) The making of an adoption order operates to extinguish—
>
> (a) the parental responsibility which any person other than the adopters or adopter has for the adopted child immediately before the making of the order,
>
> (b) any order under the 1989 Act.

AFER 2005

22. The most significant Regulations are AFER 2005. Regulations 10 and 11 are material. Regulation 10 reads:-

> **Adoption with a Foreign Element Regulations 2005**
>
> **10 Requirements applicable in respect of giving parental responsibility prior to adoption abroad**
>
> The prescribed requirements for the purposes of section 84(3) of the Act (requirements to be satisfied prior to the making of an order) are that—
>
> (a) in the case of a child placed by an adoption agency, that agency has—
>
> (i) confirmed to the court that it has complied with the requirements imposed in accordance with Part 3 of the Agencies Regulations or corresponding Welsh provision;
>
> (ii) submitted to the court—
>
> (aa) the reports and information referred to in regulation 17(2) and (3) of the Agencies Regulations or corresponding Welsh provision;
>
> (bb) the recommendations made by the adoption panel in accordance with regulations 18 (placing child for adoption) and 33 (proposed placement) of the Agencies Regulations or corresponding Welsh provision;
>
> (cc) the adoption placement report prepared in accordance with regulation 31(2)(d) of the Agencies Regulations or corresponding Welsh provision;
>
> (dd) the reports of and information obtained in respect of the visits and reviews referred to in regulation 36 of the Agencies Regulations or corresponding Welsh provision; and
>
> (ee) the report referred to in section 43 of the Act as modified by regulation 11;

(b) in the case of a child placed by an adoption agency the relevant foreign authority has—

(i) confirmed in writing to that agency that the prospective adopter has been counselled and the legal implications of adoption have been explained to him;

(ii) prepared a report on the suitability of the prospective adopter to be an adoptive parent;

(iii) determined and confirmed in writing to that agency that he is eligible and suitable to adopt in the country or territory in which the adoption is to be effected; and

(iv) confirmed in writing to that agency that the child is or will be authorised to enter and reside permanently in that foreign country or territory; and

(c) in the case of a child placed by an adoption agency the prospective adopter has confirmed in writing to the adoption agency that he will accompany the child on taking him out of the United Kingdom and entering the country or territory where the adoption is to be effected, or in the case of a couple, the agency and relevant foreign authority have confirmed that it is necessary for only one of them to do so.

23. Regulation 11(1) of ***AFER*** reads: -

> The following provisions of the (2002) Act which refer to adoption orders shall apply to orders under section 84 as if in each place where the words "adoption order" appear there were substituted "order under section 84".

24. As I have already indicated, Regulation 11 identifies and incorporates into chapter 6 of the 2002 Act a number of sections of the Act which relate to domestic adoptions. I have set out those which are material at paragraph 19 above.

The authorities: Re G (a child) [2008] EWCA Civ 105 (Re G).

25. There is no decision of this court directly in point, although Mr. Chamberlain relied on what he described as the "underlying assumption" (the phrase also used by the judge in paragraph 77 of his judgment) in the case of ***Re G***. I will, accordingly, address this case first, although Mr. Chamberlain properly accepts that, for the purposes of this appeal, it is not binding on us.

26. In ***Re G*** the local authority's care plan was for the child to be adopted in America. The critical facts were that the prospective adoptive parents, Mr and Mrs C, had both come to England, and Mrs C had remained here, caring for the child throughout the 10 week period required by section 84(4) of the 2002 Act. Mr C had only been able to come for three weeks. It was common ground that there could be no adoption in England and Wales. The two questions for the judge, and for this court were, accordingly: (1) whether or not Mr C's limited stay was sufficient to satisfy the terms of section 84(4) of the 2002 Act, and (2) how Mrs C could escape from the apparent trap in which she found herself whereby it appeared that she could not obtain

an order for parental responsibility under section 84 until she had a visa for the child, whereas Regulation 10(b)(iv) of AFER and the American immigration authorities appeared to be saying that she could not obtain a visa until she had an order under section 84.

27. As will thus be immediately apparent, ***Re G*** deals with quite distinct issues from those which arise in the instant case. It was not, moreover, an exercise in statutory construction. No argument was addressed to this court on the meaning of section 84(4), in so far as that sub-section addressed the geographical location of Mrs C's home. As I have already stated, the critical feature of ***Re G*** was that both the judge and this court were dealing with prospective foreign adopters who had actually come to this country.

28. It is, no doubt, for this reason that Mr. Chamberlain relies on what he submits is the underlying assumption in ***Re G***, said to be expressed by this court in paragraph 19 of its judgment, where it commented: -

> Section 84 of the 2002 Act has attracted a great deal of criticism both from practitioners and the family judiciary on the basis that it operates as a significant disincentive to prospective adopters from abroad. Few people, it is argued, will have the capacity to interrupt their lives in order to provide a home for the child within this jurisdiction for the statutory period. There is, of course, the provision in section 86(2) of the 2002 Act which enables Parliament by Regulations to disapply section 85 if the prospective adopters are parents, relatives or guardian of the child in question (or one of them is). No such Regulations have, however, been made.

29. As a party to the decision in ***Re G***, however, I can, I think, say with some confidence: (1) that the question of whether or not the "home" identified in section 84(4) could be outside the jurisdiction was, for obvious reasons, simply not addressed in that case; (2) that the court's comments in paragraph 19 of its judgment are not only self-evidently obiter, but also simply reflect and repeat the criticisms of the sections in question which had been voiced by the judiciary and others; and (3) the case manifestly cannot be used as an aid to statutory construction, even if (something which, speaking for myself I do not accept) it proceeded on the "underlying assumption" identified by Mr. Chamberlain and the judge. To put the matter more crudely: if there was an "underlying assumption" in ***Re G***, there is nothing to stop this court in the instant appeal saying either that it was wrong, or that it does not assist on the question of statutory construction.

30. Equally, to anticipate Mr. Chamberlain's argument, whilst it is self-evidently the case that both sections 42(7)(a) and 84(4) contain provisions about the child's "home" and "home environment" with the prospective adopters, and the need for the domestic authorities in chapter 6 case to assess the relationship between the child and the prospective adopters, neither of these considerations, in my judgment, requires this court to construe either section 42(7)(a) or 84(4) as imposing a specific geographical limitation.

31. Speaking for myself, therefore, I do not gain any assistance on the point of statutory construction from ***Re G.***

Other authorities

32. A number of decisions at first instance fall to be considered. They are, in particular: (1) the decision of McFarlane J in ***H County Council v B and others*** (unreported). This has erroneously been given the neutral citation number [2004] EWHC (Fam) 3437, but was plainly decided on 20 December 2005, as the judge describes, some 10 days before the 2002 Act came into force; (2) that of Black J in ***ECC v M and others*** [2008] EWHC 332; (3) that of Sheldon J in ***Re Y (minors) (adoption: jurisdiction)*** [1986] 1 FLR 152 (***Re Y***); (4) that of Munby J in ***Re SL (Adoption: Home in jurisdiction)*** [2005] 1 FLR 118 (***Re SL***); and (5) that of Coleridge J in ***Plymouth City Council v CR and others*** (***Plymouth***) (unreported 13 June 2006).

33. Going firstly to McFarlane J's decision in ***H City Council v B and others***, it is, I think, noteworthy that the case was heard on 20 December 2005, at the very end of the Michaelmas term, and as I have already pointed out some 10 days before the 2002 Act was due to come into force on 30 December 2005. The "pressing difficulty" which the judge faced was, as he saw it, that sections 84 and 85 of the 2002 Act seemed "to restrict (the) ability of adoption agencies to place a child with prospective adopters abroad unless the prospective adopter or adopters have first of all had the child placed with them in some accommodation in England and Wales for 10 weeks."

34. McFarlane J considered and rejected on the facts orders under paragraph 19 of Schedule 2 to the 1989 Act, and section 28 of the 2002 Act. The latter did not feature in argument before us. Having given further consideration to the DfES Guidance, section 84 itself and the Regulations, the judge concluded that the wording of sections 84 and 85 was equivocal, but that the 10 week period had to be spent in England and Wales.

35. Apart from the obvious fact that ***H City Council v B and others*** is not binding on us, it is plain that McFarlane J (a) would have liked to have decided the case differently; and (b) did not have the benefit of the full argument which we have had in this court. It is, I think, also worth pointing out that Charles J did not agree with McFarlane J's conclusions.

36. Charles J placed some weight on the reasoning of Black J in ***ECC. v M and others***, and I need to look at this case in a greater degree of detail. Black J was dealing with two children aged 12 and 4, who were half-sisters and the subject of care proceedings. The local authority's preferred care plan was for the younger of the two children (S) to be adopted by her paternal relatives in the United States of America. The judge entirely supported the local authority's plan for S on welfare grounds, and spent some time in her judgment dealing with the objections to the plan voiced by S's mother. The latter, it should be said, was the only person who objected to the care plan for her child, even though she accepted that she could not care for S, and that a care order in favour of the local authority was appropriate.

37. The judge correctly ruled out an adoption of S in England and Wales, on the ground that the prospective adopters did not meet the domicile or residence conditions. She then turned to sections 84 and 85 of the 2002 Act. What caused the bar to close off the adoptive route was, it seems, the importation of section 42(7) into Chapter 6 by AFER. As Black J reported it:-

> 57. Where section 42(7)(b) applies therefore (i.e. in any case where the child has not been placed for adoption by an adoption agency), the adopters and the child will have to have a home in the area of an English/Welsh local authority in order that they can afford sufficient opportunities to that local authority to see them in the home environment together. This provision was enough to cause all parties to abandon further thought in this case of a section 84 order. Whilst I considered that they may well be right in that, I requested in my Draft Provisional Judgement that there be a little further research by counsel and some further submissions before a line was finally drawn under this possibility.

38. Two conclusions resulted from the further submissions received by Black J. The first was the judge's acceptance of Munby J's decision in ***Re SL*** that "the home referred to in the requirement for 10 weeks' residence need not be the same as the home referred to in the provisions requiring opportunities for "inspection"". Black J saw no reason why this reasoning should not apply to section 84 of the 2002 Act.

39. The second conclusion follows an extensive discussion by the judge of the meaning of the word "home". In paragraph 75 of her judgment, Black J analyses the categories of children excluded by sub-paragraphs (6) and (9) from paragraph 19 of Schedule 2 to the Children Act 1989 and identifies those caught by section 85(1) who are being "removed from the United Kingdom. for the purposes of adoption", and who are thus within that sub-section. This is what she says:

> The important provisions of paragraph 19 for the present purposes are sub-paragraphs (6) and (9). Paragraph 19(6) is concerned with children who would potentially be protected by s 85 of the 2002 Act. These are children who are being removed from the country "for the purpose of adoption". Paragraph 19(9) concerns children whom the local authority is "placing for adoption". If the local authority is placing a child for adoption, paragraph 19(9) provides that paragraph 19 does not apply. The existence of paragraph 19(6), which disapplies s 85 of the 2002 Act where a child is to live outside England and Wales with paragraph 19 approval of the court tells us that after you have excluded all those children whom the local authority is "placing for adoption" and to whom, by virtue of paragraph 19(9), paragraph 19 does not apply, there remains a category of children to whom paragraph 19 does apply who might come within the terms of s 85 i.e. children who are being removed from the country "for the purpose of adoption". If it were not so, there would be no need of paragraph 19(6). It follows that being removed from the country "for the purpose of adoption" and being placed for adoption are not precisely the same thing. Given that there can be little doubt that placing abroad for adoption is a species of removal for the purpose of adoption, placement for adoption must therefore necessarily be a narrower concept than removal for the purpose of adoption.

40. Black J's conclusion on this point, as I understand it, is two-fold. Firstly, the phrase "placed for adoption" is a term of art, with a clear and specified meaning. Secondly, paragraph 19(6) of Schedule 2 to the 1989 Act disapplies section 85 in relation to any child who otherwise falls within the paragraph. In ***ECC v M***, the child in question, S, was not being "placed for adoption" by being sent abroad, and Black J could thus

properly give her agreement to S spending time abroad pursuant to paragraph 19 of Schedule 2 to the 1989 Act. Charles J agreed with this reasoning, as do I.

The ***Plymouth*** case

41. Mr. Chamberlain did not dispute the correctness of Coleridge J's decision in the ***Plymouth*** case. I regard this as an entirely proper and appropriate concession, albeit one of some importance. I need, accordingly, to look at the decision in some detail.

42. In the ***Plymouth*** case, Coleridge J made an order under paragraph 19 of Schedule 2 in relation to M, a child aged 4. M was in the interim care of the local authority. There was no question of her being cared for by either of her parents. There was "almost no issue" for the judge to decide as to the short-and long-term plan for M's future. As the judge put it:-

> The proposal, if possible and suitable, is that, after a period of proper assessment, M should make her permanent home in Malta with her paternal first cousin and his wife and their children.
>
> It may be that within the legal framework there will be an adoption in Malta. At present this is far from clear or certain. There are a number of possible placements falling short of adoption. However, it is unlikely that there would be any opposition to the eventual legal arrangement when M goes to Malta permanently, if, following assessment, it is decided that the best way forward for M's best interests is adoption.

As in the instant case, it was not possible for M's paternal first cousin and his wife to come to England for the 10 week period envisaged by section 84.

43. Coleridge J cited and discussed both Schedule 2 to the 1989 Act and sections 84 to 86 of the 2002 Act, and after setting out the submissions made to him reached the following conclusions:

> 39. I am satisfied that in this situation that (sic) the child is not being considered to be sent abroad for adoption but adoption is simply one option in a whole range of possible options, no criminal offence is committed and there is no breach of sections 84 and 85 if an assessment is taking place prior to a final decision being reached.
>
> 40. In this case this is exactly what is proposed; the child is not being sent abroad either for the purposes of, or for, adoption but to assess the range of various options of which adoption is just one. Accordingly, I find in these circumstances the sections do not conflict.
>
> 41. I shall therefore make an order that the child can be removed for a period of up to four months under (Paragraph 19) and the detailed order will include an order for M's return subject to any later application for her to remain in Malta.

44. Thus, where the decision to send a child abroad is part of an inchoate care plan, in which adoption is but one of the possible options, the child is not being "removed for the purposes of adoption" contrary to section 85(1) of the 2002 Act. I did not

understand Mr. Chamberlain, for the Department, to dissent from this proposition, or to argue that the ***Plymouth*** case was wrongly decided by Coleridge J.

45. In my, judgment, however, the matter goes somewhat further than this. Arranging for a child "to live" outside England and Wales does not, on the basis of this concession, mean "to live permanently". As a matter of construction this must, I think, follow. Equally, the "home" to which the child goes is plainly the Applicant's home in the foreign jurisdiction. In my judgment, these pointers are all of assistance when it comes to the matter of statutory construction.

The Human Rights Act 1998 and the European Convention on Human Rights (ECHR)

46. I can take this part of the case very shortly, as I find myself in complete agreement with Mr. Chamberlain that IA's ECHR Article 8 rights are simply not engaged on the facts as they are presented to us. The local authority's (and the court's) duties to her arise under the 1989 Act and the 2002 Act. It seems to me that the both the domestic and the ECtHR authorities cited by Mr. Chamberlain make it clear that IA currently has no family life with Mr and Mrs. N, and that Article 8 is simply not engaged in the decision about whether or not she should be allowed to travel to America. If authority for these propositions is required, it is, I think, to be found in the decision of this court in ***R (on the application of Fawad Ahdadi) v Secretary of State for the Home Department*** [2005] EWCA Civ 1721.

The judge's approach

47. As I have already made clear, the judge was plainly of the view that, "leaving aside the foreign element" none of the steps proposed by the local authority – starting with a placement for assessment and then one for adoption – would be unlawful or inappropriate in any way in a domestic case. Moreover, as he correctly observed, the local authority's plan made it apparent that its underlying purpose was to enable Mr and Mrs N to obtain an adoption order in relation to IA in the United States of America.

48. The judge also recorded that although it was common ground there was no relevant parliamentary material which was admissible to assist in the construction of the relevant statutory provisions, there was parliamentary material (which was also shown to us) which, as Mr. Chamberlain submitted, clearly showed that:-

> (a) the understanding of those proposing amendments (to the 2002 Act) and of those responding, was that before an order under section 84 (of the 2002 Act) could be made the child has to live with the prospective adopters in this country for 10 weeks; and (b) the view was taken that this should not be changed by amendments to the 2002 Act.

49. At paragraph 27 of the judgment, the judge identified three areas of common ground: -

> i) a need to have provisions that help prevent child abduction and trafficking and to help to ensure that (a) secure attachments between children and their prospective adopters are made, and (b) placements do not break down, and thus

ii) a need for a rigorous investigation, proper safeguards and a properly informed decision before both a domestic adoption order is made in this country, and a parental responsibility order under section 84 of the ACA 2002 is made as a preliminary step to an adoption order (or permanent placement) abroad, and

iii) a need to take appropriate steps, and to comply with appropriate safeguards, to avoid a child being left adrift in a foreign country if a proposed adoption (or permanent placement) there does not take place.

None of this is, I think, contentious, and accords very much with the approach taken by this court in ***Re G.***

50. The judge was clearly of the view that the question relating to the powers of the local authority under paragraph 19 of Schedule 2 to the 1989 Act was to be answered in the local authority's favour. In paragraph 48 of his judgment, he said in terms:-

> in my judgment permission can lawfully be given for a local authority to arrange for a child to live outside the UK for the purposes of an investigation and assessment of whether adoption abroad by the persons with whom the child is to live would be the most appropriate welfare solution for that child throughout his or her childhood.

51. As to the section 84(4) question, the judge pointed out that section 84 was specifically directed to the making of a parental responsibility order in favour of a person or persons living abroad. He identified six reasons why, absent authority, he would not have reached the conclusion that the home referred to in section 84(4) had to be in England and Wales:-

i) It applies to prospective adopters whose home is abroad and the natural inference would be that the child would, or at least could, for the purposes of section 84(4) have his or her home with them where they lived and where the child would live if adopted.

ii) It is essentially a trigger provision to an application followed up by other provisions as to the making of a parental responsibility order with its consequences.

iii) Although it has similarities to ss. 42 (1) and (2) of the 2002 Act those sub-sections are not referred to in Regulation 11 of AFER 2005 and it is only section 42(7) that is so referred to.

iv) As a matter of language it does not say where the home has to be, when it easily could have done.

v) As Black J explains in ***ECC v M*** there are conceptual problems concerning what is or is not a home for particular purposes and a construction that enabled this pre-application period to be spent in the actual home of the applicants would avoid these problems. That

solution would equate with the domestic situation when the child would have been living with the applicants for an adoption order in their real home. Problems would remain in respect of the observation of the child and the adults abroad, but these could be overcome with inter-country co-operation.

vi) The regulations, which inevitably on a free standing basis have a domestic feel or centre of gravity, are incorporated without express adjustment by Regulations of AFER 2005 and by the expansion of particular sections to cover orders under section 84 of the 2002 Act by Regulations 11 and 55 of AFER 2005. In my view the Regulations are directory and not mandatory (see for example ***In re T (A Minor) (Adoption: Validity of Orders)*** [1986] Fam 160) and this, coupled with such methods of introduction of domestic regulations in respect of an adoption abroad, and the purposive and sensible approach to be taken to the application of the 2002 Act and the relevant regulations, favours a purposive and sensible approach that should have regard to the point that the relevant adoptive home of the child throughout his or her childhood will be abroad. Such an approach reduces the domestic feel of the regulations and means that they should be interpreted and fulfilled by considering how the decision makers are to be best informed on that basis.

52. Finally, in relation to section 42(7) the judge concluded: -

> The domestic authorities referred to by Black J, but not McFarlane J, ***Re Y*** and ***Re SL*** support the conclusion that for the purposes of section 42(7)(a) the home environment does not have to be in the area of the placing local authority. This supports the view that it does not have to be in this country when the proposed adoption is a foreign adoption. Also, as with section 84(4) (of the 2002 Act), the section, as modified to cover a section 84 order, does not expressly provide that the home environment must be in this country.
>
> I agree with the local authority that for these reasons, and for the reasons given in respect of section 84(4) (of the 2002Act), the home environment for the purposes of section 42(7)(a) (the 2002 Act) is not confined to one in this country.

The argument for the Department

53. For the Department, Mr. Chamberlain invited the Court to uphold the judge's order but to do so on the grounds that were advanced by the Department below. These were:-

> (1) that the proposed declaration would sanction a use of paragraph 19 of Schedule 2 which amounted, in effect, to making an adoptive placement abroad. However, unlike a placement for adoption made in accordance with the 2002 Act and the Adoption Agencies Regulations 2005, the proposed arrangement would not be subject to the procedural and reporting regime

applicable to placements for adoption in the United Kingdom. This was a regime which Parliament specifically required to be followed before an order under section 84 of the 2002 Act could be made and is a regime which is not realistically capable of implementation outside the United Kingdom.

(2) That the body of judicial criticism of the section 84(4) "10-week rule" far from strengthening its case as to the propriety of the proposed declaration, weakened it. That criticism was based on consistent jurisprudence to the effect that the 10-week period prescribed by section 84(4) must be spent in the UK.

(3) The existence of a power to disapply or modify the effect of section 85(1) is another factor indicating that Parliament was well aware that the strictness of the statutory regime may require attenuation. But the means by which that attenuation was to occur was by legislative process (subject to affirmative approval by Parliament itself). The court should be slow to disturb a construction which has been held and assumed to be correct by the grant of a declaration which would have the same effect as regulations under s. 86. The case against such a construction is particularly compelling given that it would in principle permit anyone (not just the narrow categories of potential adopters to which the section 86 power applies) to circumvent the procedural regime currently applicable to outbound inter-country adoptions.

(4) That Charles J was right to take the view that to grant the relief sought by the local authority would lead to the uncertainty and confusion which he identified in his judgment. The Department's construction, which avoided this confusion and uncertainty, should be preferred. Any attenuation of the 10 week rule can and should be achieved by regulations made under section 86, which the Department now intends to make, after public consultation (and subject to the Parliamentary procedure specified by section 86(3)).

54. As before the judge, Mr. Chamberlain made no submissions on the question where the best interests of IA lay. His submissions were confined to the issue of construction. Given the terms of sections 1 and 23(6) of the 1989 Act and section 1 of the 2002 Act, this had the consequence, in my judgment, that in so far as a purposive construction of the two Statutes require a consideration of welfare, this was an element which Mr. Chamberlain's submissions inevitably lacked.

55. The arguments summarised in paragraph 53 above were fully and skilfully developed by Mr. Chamberlain both in writing and in oral argument. I hope that I am not doing any injustice to Mr. Chamberlain's submissions if I summarise them by saying that in addition to the points on statutory construction, his submission was that Parliament had not only put in place a rigorous assessment procedure which has to be undertaken, but has also provided the means whereby amendment or reform should take place. This court, accordingly, should not interfere.

56. In relation in particular to section 42(7) of the 2002 Act, Mr. Chamberlain argued that section 42(7)(b) expressly required that there should be *"sufficient opportunities"* for the local authority in a non-agency case, *"within whose area the home is"* to *"see"*

the child with the applicant or the applicant couple *"in the home environment"*. Section 42(7)(a), he argued, similarly required that where a child had been placed for adoption by an adoption agency, a sufficient opportunity for observation be given to the adoption agency. Since section 42(7)(b) expressly tied the concept of the "home environment" where observation must be conducted to the "home" within the local authority's jurisdiction, Mr Chamberlain argued that, by extension, what was contemplated in all cases was assessment within the home located in the local authority's area.

57. So far as the Parliamentary material was concerned, Mr Chamberlain's argument was that whenever the relevant provisions had been considered in Parliament, the construction for which the Department argued had been favoured. Mr. Chamberlain referred us to a number of debates and submitted that the passages from Hansard which he cited to us demonstrated that, on each occasion, Parliament had given the matter careful consideration and had decided not to relax what it had taken to be the effect of the "ten week rule".

58. Mr Chamberlain also told us that the Department was in the process of drafting Regulations under section 86 of the 2002 Act with the aim of disapplying section 85(1) in a case where the prospective adopters are the parents, relatives or guardians of the child in question (or one of them is), but prescribing appropriate conditions. However, he added, the form of the Regulations raised a number of complex and difficult questions, on which there would need to be public consultation. I have to say that I did not find this consistent with his earlier submission that there was "no particular difficulty" in making Regulations under section 86.

Discussion

59. Having now carefully reflected on all the arguments addressed to us, I am in no doubt that I prefer the arguments advanced by the local authority. I also respectfully adopt the construction of sections 84(4) and 42(7) formulated by Charles J, together with the reasoning set out at paragraphs 51 and 52 above. In what follows I propose to deal primarily with the points of statutory construction which have weighed most with me.

60. Firstly, and most obviously, the word "home" in section 84(4) of the 2002 Act is not geographically defined. Parliament could, had it wished, have inserted words specifying precisely **where** the home should be – as, indeed, it has in section 42(7)(b) of the 2002 Act.

61. Secondly, as a matter of construction, the phrase "child's home was with the applicant" in my judgment fits far more readily with a home outside the jurisdiction if, indeed, that is where the prospective adopters' home truly is. Thus, in the instant case, Mr and Mrs N undoubtedly have their home in the United States of America. Quite clearly the statute envisages that it is possible for one or both of them to create a "home" for 10 weeks with IA in this country; but to my mind at least, it is both easier and more natural to think of Mr and Mrs N's "home" as being in America.

62. If, as a matter of statutory construction, the location of the "home" within section 84(4) is undefined, the reasons concluding that it must be in England and Wales become reasons of policy. And here, I have an immediate difficulty. The policy must, I think, be to give effect to the 1989 and the 2002 Acts. But it is immediately apparent

from (inter alia) the criticisms reflected by this court in its first judgment in ***Re G*** that a policy which militates **against** prospective adopters coming to England and Wales (as section 84(4) plainly does) equally works **against** the best interests of children (or at the very least may do so) by preventing them from being adopted by members of their families living abroad. Thus to take the instant case as a paradigm example, if IA cannot spend time with her uncle and aunt in America she cannot be adopted within her wider family and will have to be found prospective adopters within the United Kingdom who are strangers.

Section 42(7) of the 2002 Act

63. This seems to me the critical sub-section for current purposes. I have, of course, set out its terms at paragraph 19 above, and will not repeat them.

64. I accept, of course, that section 42(7)(b) means what it says, namely that "in any other case" (that is to say where a child has not been placed for adoption by an adoption agency) the "home environment in which "sufficient opportunities" to see the child must be given to "the local authority within whose area the home is". That is plainly a reference to a local authority within the United Kingdom, and equally plainly, in a section 42(7)(b) case the "home" has to be in the United Kingdom. So much is, I think, uncontroversial.

65. In does not, however, follow in my judgment that in a section 42(7)(a) case, the "home" has to be in England and Wales. Firstly, of course, the sub-section does not say so, when it plainly could. Secondly, as a matter of construction, I see no reason to import words of geographical limitation into section 42(7)(a). What the sub-section requires are: "sufficient opportunities" by the agency to see the child "in the home environment". As I have already stated, the more comfortable meaning for "home environment" in a foreign adoption is the adopters' home abroad.

66. Further, if one goes back to the local authority's care plan, which I have set out in full at paragraph 9 of this judgment, it will be seen from step 3(f) that it is not intended that IA's placement will become an adoptive placement until the terms of regulation 47 of AFER have been met. At that point, no doubt, the placement will be made, not by the local authority, but by the local authority in its capacity as an adoption agency. If necessary, the local authority (ibid, step 2(c)) will pursue its application for a placement order. Such an order would, of course, have the effect of bringing the care to an end and vesting parental responsibility in the adoption agency. This will, accordingly, on the evidence, be a section 42(7)(a) case.

67. Furthermore, I can see no reason in principle why the "opportunities to see the child" identified in section 42(7)(a) should not take place in America prior to the placement for adoption. Thus, when looking at section 42(7)(a), I see no difficulty as a matter of construction – provided the relevant workers do the work – why there should not, in this case, be a placement by an adoption agency, and both residence for the child and "sufficient opportunities" for the agency workers to observe the child with the adopters in their home environment in the United States of America.

Policy considerations

68. This leads, I think, to the principal plank underlying the Department's policy, namely that of child protection and, in particular, the need to protect children from abuse and exploitation by being sent abroad without adequate safeguards to ensure that they are not enslaved or otherwise abused.

69. Everybody working in the field recognises the need for regulation, and the corresponding need to avoid exploitation. It was common ground in this case, and was recognised as a given in ***Re G*** - see, for example, the judgment of the court at paragraph 29. Any policy which seeks to ensure that a child who is the subject of a foreign adoption enjoys the same protection as a child who is the subject of a domestic adoption is, clearly, rational and legitimate. However, in my judgment, it does not follow that a child necessarily receives a lesser degree of protection if he or she spends the 10 week period specified by section 84(4) in the prospective adopters' home abroad.

70. Put crudely, I simply do not accept the arguments advanced by Mr. Chamberlain on this point. For the reasons given by Black J in ***ECC v M***, IA is not being placed abroad for adoption. Furthermore, the level of protection afforded to her under the local authority's care plan will not be diminished by the fact that the "reporting regime" imposed by Chapter 6 of the 2002 Act is not being followed strictly along the lines of the Department's guidance, or by the fact that her prospective adoptive parents will not be required to come to England for a ten week period of assessment.

71. I revert to the local authority's care plan set out at paragraph 9 above. What is there envisaged is a chapter 6, 2002 Act foreign adoption in the United States of America. The only difference between such a process and the process for which the Department argues is that the local authority will be required to assess the child and the prospective adopters in their home abroad. If that is something which the local authority is willing and able to do, there must in my judgment be some compelling feature of the case which prevents it from lawfully doing so. I can find no such feature here.

72. Furthermore, it is plain that in order for IA to be adopted in the United States of America, it will be necessary for her adoptive parent(s) (1) to obtain parental responsibility for her under section 84 of the 2002 Act; and (2) to obtain an adoption order in the United States of America. The former order can only be made if the statutory criteria have been fulfilled, and will be made by a court, as will the American adoption order. By that time, moreover, on the local authority's care plan, the local authority will have become an adoption agency, and section 42(7)(b) will not apply. Any English court order will, moreover, be considered by a specialist English judge. Such judges, in my judgment, can be trusted to ensure that the safeguards required to protect the child are all in place. I see no reason to suppose that similar considerations will not apply in the United States of America.

73. I am therefore wholly satisfied both on construction and on policy grounds that section 84(4) of the 2002 Act does not require the period of 10 weeks referred to in that section to be spent in the United Kingdom.

The application under paragraph 19 of Schedule 2

74. This leads me to the second point in this appeal, namely the local authority's application under paragraph 19 of Schedule 2 to the 1989 Act. Here, quite properly, Mr. Chamberlain does not address the judge's conclusion that he would have granted the application on welfare grounds. What he says is that in reality this child is being placed for adoption and that accordingly the application both falls foul of paragraph 19 and is in reality within section 85 and it thus impermissible.

75. There are, it seems to me, two answers to this suggestion. Firstly, we have to look at the case as it presents itself on the facts. Mr. Chamberlain does not dispute that the ***Plymouth*** case was properly decided by Coleridge J. In that case, adoption was an objective, and one of several possible outcomes. The present case is not quite so clear cut, but nonetheless we are, I think, entitled to accept the way in which the local authority formulates the case in paragraph 9 above. This child is being sent abroad for assessment. The assessment may, of course, lead to adoption, but it may not.

76. Secondly, it is clear to me that IA is plainly not being placed for adoption under paragraph 19 of Schedule 2 to the 1989 Act. Once again, I respectfully adopt and rely upon the reasoning of Black J in ***ECC v M***.

77. In these circumstances, in my judgment, sending IA to live with her uncle and aunt in the United States of America is a legitimate use of paragraph 19 of Schedule 2, both as matter of law and on the facts. IA is not being "placed for adoption" within section 85. I would, accordingly, allow the appeal in this regard and give the permission which the judge would have given had he felt he could properly do so.

Parliamentary change v statutory construction

78. Mr. Chamberlain made the point that the local authority's construction of the Statutes would in principle permit ***anyone*** (his emphasis: not just the narrow categories of potential adopters to which the section 86 power applies) to circumvent the procedural regime currently applicable to domestic adoptions.

79. There are, it seems to me two principal answers to this point. The first is that children who are the subject of care proceedings will continue to have the protection both of the local authority's statutory duty towards them, and of the court. Such children will continue to be the subject of scrutiny by a specialist judiciary to whom Parliament has in any event entrusted decisions about their care.

80. Secondly, of course, the provisions of the 1989 and 2002 Acts will continue to apply. A breach of section 85 will continue to be criminal offence. There will, I imagine, always remain a minority of unscrupulous parents who will seek to export their children for gain. But such people are unlikely to be applying for permission to place their children with prospective adopters abroad. Neither construction of the statute seems to me to embrace this group.

81. I would also not want it to be thought that I had overlooked a point which Mr Chamberlain forcefully made, both in the respondent's notice and in oral argument. It was not only that the case against the local authority's construction was particularly compelling in the light of consistent Parliamentary interpretation, he argued, but also that adoption was governed by a detailed regulatory regime, for which the appropriate mechanism of attenuation and change lay the legislative process, which was built into

the statute. Since Parliament had kept to itself the mechanism for change, that is the mechanism which should be used.

82. I take the force of this argument, which in some cases would be compelling. However, in the instant case there are, in my judgment, equally compelling argument the other way. The first, of course, is that questions of statutory construction are for the courts, not for Parliament. I have already made the point that had Parliament intended by express words to have imposed a geographical limitation in section 84(4) of the 2002 Act, it could easily have done so.

83. Secondly, there is a powerful body of opinion which I share which rejects the policy advocated by the Department as working contrary to the interests of children.

84. Thirdly, I am satisfied that the best interests of children can be both promoted and protected within the construction of the statutes which I favour.

85. Fourthly and I am conscious that this is a repetition the Department's argument seems to me to ignore the fact that the children in question will be subject to orders made by courts charged by Parliament with the duties to promote welfare contained in both Acts. Furthermore, such orders will be made by specialist judges who, in my judgment, can safely be entrusted with the welfare of such children.

86. Finally, although this is not a critical consideration, I have to say that I was concerned about the manner in which the proposal for a period of assessment abroad was to be addressed in the forthcoming consultation to be undertaken by the Department. The issue was addressed in the following way:-

> whether there should be a requirement for a period (shorter than 10 weeks) to be spent in the UK so that there is at least a short period during which UK authorities can monitor the proposed placement directly in the UK before a child is sent abroad under the Regulations and, if so, what the appropriate period is.

87. Mr. Chamberlain submitted that this paragraph raised the question of the suitability of a child living abroad. We great respect to Mr. Chamberlain, I did not read it that way, nor, I think, would many members of the public.

88. I take the judge's point that it would be better for adoption, which is a statutory process, to be governed by Regulation rather than by a pragmatic, case by case approach. Once again, however, and without repeating all the arguments rehearsed above, it needs to be remembered that nothing in this decision alters the fact that the children who are the subject of the processes we are discussing will remain subject to court control, and that the decisions about them will continue to be made by specialist judges.

The argument from CAFCASS Legal

89. The fact that I have made no mention of the written arguments from CAFCASS legal does not, of course, mean that I have not taken them into account, nor does it mean that they were not useful. However, it was Mr. Chisholm's final remarks which I found most helpful.

90. Inevitably, Mr. Chisholm had taken a conservative, albeit sympathetic approach to the local authority's case. In his closing remarks, however, as I understood him, Mr. Chisholm argued that CAFCASS Legal would support the local authority's stance if it could be satisfied that the protection afforded by the legislation and the Regulations would apply. My understanding was that CAFCASS Legal had been so satisfied. Certainly, I am, and I did not understand Mr. Chisholm to argue to the contrary.

Outcome

91. I would accordingly, allow the appeal. I would approve the local authority's arrangements to place IA with her paternal aunt in the United States of America for whatever temporary period a visitor's visa can be obtained for her, and I would grant the declaration sought by the local authority and set out in paragraph 3.

Lord Justice Moore-Bick

92. I agree with Wall L.J. that this appeal should be allowed for the reasons he has given. Nonetheless, since the issues we have to decide are novel and the matter is of some importance, I propose to state my reasons in my own words as briefly as I can. In doing so, however, I gratefully adopt his description of the background to the appeal and his citation of the relevant legislation, which I shall not repeat.

93. In my view the judge was right when considering whether to grant the relief sought in this case to have regard to the care plan as a whole, and to ask himself whether there was any legal impediment to any of the four separate steps that he identified. If there was, and if the plan as a whole could not be implemented, it would not have been right to give permission for IA to be taken to the United States as envisaged by Step 1. The two steps in the plan that are open to challenge are Steps 1 and 4.

94. The first step in the plan involves the introduction of IA to Mrs N in this country and her subsequent removal to the United States in the company of Mrs N her present foster carer and her social worker in order to enable her to undertake what is described as a 'holiday placement' of up to three months with Mrs N and her family. Since the primary purpose of the placement is to assess the suitability of Mr and Mrs N as potential adoptive parents of IA, it is necessary to consider whether in the light of section 85 of the Adoption and Children Act 2002 ("the Act") the court can lawfully approve that element of the plan.

95. In my view the judge was right in holding that it can. Paragraph 19(1) of Schedule 2 to the Children Act 1989 allows a local authority, with the approval of the court, to arrange for a child in its care to live outside England and Wales. The paragraph is not directly concerned with adoption, but Parliament must have foreseen that in some circumstances the court might be asked to permit a child to live for a period outside England and Wales in circumstances in which adoption was being contemplated. Section 85 of the Act prohibits the removal of a child from the United Kingdom "for the purposes of adoption" unless the prospective adopters have obtained a parental responsibility order under section 84. The effect of paragraph 19(6) is to exclude the operation of section 85 altogether in relation to any child who is to live abroad with the approval of the court given under paragraph 19.

96. However, paragraph 19(9) provides that the paragraph as a whole does not apply to a local authority 'placing a child for adoption with prospective adopters', and Mr. Chamberlain for the Department for Children, Schools and Families ("the Department") submitted that to arrange for a child to go abroad for the purposes of a placement which has her eventual adoption as its ultimate aim amounts to placing the child for adoption within the meaning of that paragraph. The judge rejected that submission and I agree with Wall L.J. that he was right to do so.

97. Section 85(1) speaks of removing a child from the United Kingdom "for the purposes of adoption" and is therefore apt to cover any case in which the purpose of removal is to render the child amenable to the jurisdiction of a foreign country to enable adoption proceedings to be taken there. However, as Black J. pointed out in *ECC v M* [2008] EWHC 332 (Fam), there must be a category of cases which fall within the scope of paragraph 19(6) but not paragraph 19(9). It follows that not all cases in which a child is removed from the jurisdiction for the purposes of adoption involve placing for adoption. In *Plymouth City Council v CR* (unreported) Coleridge J. held that the court could give approval under paragraph 19 for a child to be sent to Malta in order to assess a wide range of possible options, one of which was adoption by relatives living there. He considered that she was therefore not being sent abroad for the purposes of adoption at all. In my view that was correct. Adoption abroad was not the primary purpose of removal, but only one of a range of options, each of which had to be evaluated before a decision was made. Certainly it could not be said that the child was being placed for adoption within the meaning of paragraph 19(9). None of the parties in the present appeal suggests that the case was wrongly decided.

98. The plan in the present case contemplates that IA will travel to the United States in order to assess one possible option for her future care, namely, adoption by Mr and Mrs N. It also contemplates that she will return to this country in any event, whatever the outcome of the visit and whether the assessment is in favour of or against adoption. That means that the court will retain control over the process and even if the assessment favours adoption, no adoption is contemplated otherwise than in accordance with the relevant statutory provisions. I do not think, therefore, that the removal of IA from this country to live for a period with Mr and Mrs N and their family as envisaged by Step 1 can be said to be removal for the purposes of adoption in anything but the loosest sense. In reality it is no more than temporary removal for purposes connected with a care plan in which adoption is the preferred but not the only possible outcome, so I doubt whether it falls within section 85 of the Act at all. Even if it does, however, it does not amount to placing a child for adoption with prospective adopters within the meaning of paragraph 19(9). Accordingly, the court can in my view lawfully give its approval to step 1. The problem, as the judge recognised, lies with step 4.

99. Step 4 involves an application by Mr and Mrs N under section 84 of the Act for an order giving them parental responsibility. Such an order is a prerequisite to their removal of IA since at that stage the only purpose of taking her to the United States will be to enable adoption proceedings to be taken there.

100. The material parts of section 84 provide as follows:

> "(1) The High Court may, on an application by persons who the court is satisfied intend to adopt a child under the law

> of a country or territory outside the British Islands, make an order giving parental responsibility for the child to them.
>
> (4) An application for an order under this section may not be made unless at all times during the preceding ten weeks the child's home was with the applicant or, in the case of an application by two people, both of them."

101. Since what is proposed is a foreign adoption, the Adoption with a Foreign Element Regulations ("AFER") 2005 apply. Regulation 11(1)(i) of AFER 2005 provides that section 42(7) of the Act is to apply to orders under section 84 as if for "adoption order" there were substituted "order under section 84". Accordingly, in the present case section 42(7) is to be applied as if it read as follows:

> "An order under section 84 may not be made unless the court is satisfied that sufficient opportunities to see the child with the applicant or, in the case of an application by a couple, both of them together in the home environment have been given—
>
> (a) where the child was placed for adoption with the applicant or applicants by an adoption agency, to that agency,
>
> (b) in any other case, to the local authority within whose area the home is."

102. The care plan in this case contemplates that IA will have her home for at least 10 weeks with Mr and Mrs N in the United States before a placement order is made. Two questions therefore arise for decision: (a) whether the period of ten weeks immediately preceding the application for an order under section 84 must follow any placement for adoption; and (b) whether the home environment to which section 42(7) refers must be in this country.

103. The judge held that a natural reading of section 84(4), taken in isolation, does not suggest that the applicants' home during the ten weeks preceding the application must have been in this country. I agree, particularly since the section as a whole is directed to applicants whose home is ordinarily abroad. The purpose of the provision is to enable the court to ascertain how the child and the applicants relate to each other in what, if an adoption were to take place, would be the normal home environment. No location is specified in the subsection and I agree that the more natural meaning is that the child must have had its home with the applicants in their normal place of residence, wherever that may be.

104. Mr. Chamberlain submitted that subsection (7) envisages direct assessment by the adoption agency or local authority of a kind that cannot be delegated to others. That may be, although it is not necessary to decide the question in this case. However, if that is the case, it raises problems of practicality rather than principle. In the present case the judge was satisfied that the proposed arrangements provided opportunities of seeing IA in the environment of Mr. and Mrs. N's home sufficient to satisfy the

requirements of the Act. That might not be so in every case, but each case has to be considered on its merits. I do not think that one can argue from the practical difficulties to the interpretation of the legislation as he sought to do.

105. Although he accepted that it was not binding on us, Mr. Chamberlain also placed a good deal of reliance on the assumption made by this court in *Re G* [2008] EWCA Civ 105 that section 84(4) requires the child to have made his home with the applicant in this country. It is true that in paragraph 19 of its judgment the court noted that section 84 had attracted criticism from various quarters on the grounds that few prospective adopters from abroad can provide a home for a child in this jurisdiction for the statutory period. To that extent it can be said that the court assumed that the section does impose such a requirement, but the issues in that case were very different and since Mr and Mrs G had in fact made a home for the child in this country, the question did not call for consideration. In my view the passage on which Mr. Chamberlain relied was little more than a passing observation. I therefore agree with Wall L.J. that section 84 does not provide an insuperable obstacle in this case.

106. Section 42 of the Act poses other difficulties, however. The section as a whole is directed to domestic adoptions and is concerned to ensure that the child has spent sufficient time living with the applicant in a home environment to enable the court to be satisfied that they are sufficiently well matched for the adoption to be likely to be successful. The period during which the child must have had his or her home with the applicant varies in accordance with the nature of the applicant. Only subsection (2)(a) is directed to the case where the child has been placed for adoption by an adoption agency or in pursuance of an order of the court.

107. The care plan in the present case envisages that IA will be placed for adoption by the local authority acting as an adoption agency, so if this were a domestic case it would fall within section 42(2)(a). Mr. Chamberlain submitted that sections 42(2) and 42(7) make it clear that the opportunity for assessment must occur *after* the child has been placed for adoption and that since section 42(7) applies equally to foreign adoptions the same must hold true for them. His argument was that the use of the expressions "[i]f the child *was* placed for adoption" in subsection (2)(a) and "where the child *was* placed for adoption" in subsection 7(a) contemplate that the assessment is to be undertaken during the period in which the child is placed for adoption and not before. If that is right, the plan in this case could not be implemented, because it is not possible for IA to be placed for adoption with Mr. and Mrs. N in the United States without an order under section 84.

108. In my view the language of these two subsections reflects an assumption, no doubt well-founded in most cases, that the assessment will have been carried out during the period of a placement for adoption, but I am not persuaded that the language was chosen in order to impose a requirement of that kind. Subsection (1) makes it clear that the section as a whole is directed to requirements that must be satisfied at the time an application for an adoption order is made and accordingly that is the perspective from which the section speaks. In a case falling within subsection (2)(a) a placement will by that time necessarily have been made and the use of the past tense simply reflects that fact. In my view neither the language of that subsection nor that of subsection (7) provides a sufficient basis for saying that the assessment can only take place during the period of that placement. I therefore agree with what the judge says in paragraph 82 of his judgment. In my view the period of ten weeks can include a

period both before and after the placement itself was made. In the present case, therefore, I am satisfied that in principle any period during which IA had her home with Mr. and Mrs. N is a period that can be taken into account when deciding whether at all times during the ten weeks preceding the application under section 84(1) her home was with them.

109. That leaves the question whether section 42(7) requires the home to be within the jurisdiction. As I have already observed, section 42 deals with a variety of situations. Those falling within subsections (3), (4) and (5) do not involve placements for adoption, but they are also subject to the requirements of subsection (7). In cases other than those in which the child has been placed for adoption by an adoption agency, the wording of subsection 7(b), with its reference to "the local authority within whose area the home is" makes it clear that the home must be within the jurisdiction, but I see no reason why the same restriction should apply where an adoption agency is involved. For the reasons given by Munby J. in *SL* [2004] EWHC 1283 (Fam), it is not necessary that the "home environment" to which reference is made in the opening lines of subsection (7), should refer to the home to which reference is subsequently made in (7)(b). I think the purpose of subsection (7)(b) is to ensure that where no adoption agency is involved, a local authority takes responsibility for carrying out the assessment that must be made before an adoption order is made. Since each local authority is responsible only for its own area it was necessary to impose that duty on the local authority for the area in which the home lies. Where an adoption agency is involved, there is no need for any similar provision. Accordingly, I do not think that once can infer from subsection (7) (b) that the home must be in the jurisdiction in any case falling outside its ambit.

110. Mr. Chamberlain pointed out that section 86 gives the Secretary of State power to make regulations with the approval of Parliament modifying section 85(1) in relation to prospective adopters who are parents, relatives or guardians of the child in question and submitted that it provides a sufficient indication that Parliament considered and decided upon the method by which any relaxation of that section should be effected. I fully accept that, but the present case is concerned with the meaning of the legislation as it currently stands, not with any relaxation of it. A stronger argument might be that, if the local authority's submissions are correct, persons other than those having a relationship to the child of the kind referred to in section 86(2) would be able to circumvent the statutory restriction by adopting the procedure envisaged in this case, which cannot have been what Parliament intended. However, if I am right in thinking that Step 1 of the plan does not involve any infringement of section 85(1), the point does not arise. Clearly, if regulations are made modifying the terms of that section in relation to relatives, they may be in a position, subject to whatever conditions may be imposed, to act in a way that does not ensure that the child remains subject to the effective jurisdiction of the court after leaving the jurisdiction. That is not what will happen in this case.

111. In the end it is necessary to ask oneself whether taken as a whole the legislation discloses an intention on the part of Parliament that prospective adopters living abroad should not be entitled to make an application for an order under section 84(1) unless they have provided a home for the child in this country for at least ten weeks prior to the application. It is accepted by the Department that there is no admissible Parliamentary material that bears on the question and the interpretation of the

legislation cannot be determined by any assumptions that may previously have been expressed about its effect. I agree with the views expressed by Wall L.J. concerning the policy considerations underlying the legislation and the safeguards that exist to protect children in cases of this kind. In my view the real safeguards in the present case are essentially the same as those which apply to domestic adoptions: the continuing control of the courts and the rigorous observance of the relevant regulations, including regulation 10 of the AFER 2005 Regulations. As the judge observed, in this case the local authority proposes to carry out the assessment itself, both in this country and in the United States. In another case, however, a question might arise as to the extent to which it would be proper to delegate any part of those functions. If it turns out that there are practical obstacles in the way of making proper assessments or producing the reports that are necessary to satisfy the court that the requirements of the legislation have been met, the court will not make an order under section 84. If there are no such obstacles, it is difficult to see why it would not be in the interests of the child to make an order and in my view the court is not prevented from doing so.

112. I agree with Wall L.J. for the reasons he gives that IA's rights under Article 8 of the European Convention on Human Rights are not engaged in this case.

113. For these reasons I would allow the appeal.

Lord Justice Thorpe

114. I agree with both judgments.