RE S (MINORS) (CARE ORDER: IMPLEMENTATION OF CARE PLAN); RE W (MINORS) (CARE ORDER: ADEQUACY OF CARE PLAN)
[2002] UKHL 10

House of Lords

Lord Nicholls of Birkenhead, Lord Mackay of Clashfern, Lord Browne-Wilkinson, Lord Mustill, Lord Hutton

14 March 2002

Care – Care plan – System of starring essential milestones in care plan – Increased use of interim care orders – Whether court had exceeded judicial jurisdiction

Human rights – Care – Care plan – System of starring essential milestones in care plan – Increased use of interim care orders – Whether necessary to ensure that Children Act was Convention compliant

In the first case, a full care order was made for two children on the basis of a care plan for eventual rehabilitation, which included a substantial package of support and treatment for the mother. The local authority failed to implement the care plan. In the second case, a care order in relation to two boys was under consideration because of the mother's serious mental health problems. Although the care plan was inchoate, and there was some concern about the local authority's future performance of its obligations under the plan, the judge held that he had no choice but to make a full care order. Both care orders were appealed, on the basis that, unless the interpretation and operation of the Children Act 1989 were modified, the 1989 Act was incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the Convention). The Court of Appeal dismissed the first appeal, but allowed the second, declaring that two adjustments in the construction and application of the 1989 Act were needed in order to avoid the risk of breaching Convention rights: (i) judges should have a wider discretion to make interim care orders, rather than final care orders; and (ii) the essential milestones of the care plan should be identified at trial, and elevated to starred status. A failure to achieve a starred milestone within a reasonable time would reactivate the interdisciplinary process which had contributed to the creation of the care plan and, at the minimum, the guardian would be informed of the failure. Either the local authority or the guardian would then have the right to apply to the court for further directions. The local authority appealed against the proposed 'adjustments', although not against the substantive orders. The first mother appealed the care order.

Held – allowing the local authority's appeal and dismissing the mother's appeal –

(1) Parliament had set out its clear intention in the Children Act 1989 that once a care order had been made, the responsibility for the child's care thereafter lay with the authority, not with the court, and the courts were not empowered to intervene. This division of responsibility was a cardinal principle of the Act. The introduction of a system which gave the court a supervisory role following the making of a care order went beyond the bounds of the court's judicial jurisdiction because it involved a substantial departure from one of the cardinal principles of the Act. Section 3 of the Human Rights Act 1998 required primary legislation to be read and given effect in a way compatible with Convention rights, so far as was possible, but the judicial innovation of starred milestones passed well beyond the boundary of interpretation, and would constitute amendment. The starring system could not be seen as a mere judicial remedy for victims of actual or proposed unlawful conduct by local authorities entrusted with the care of children, justified by ss 7 and 8 of the 1998 Act,

as the proposed system would impose obligations on authorities in circumstances where there had been no finding of unlawful conduct and, indeed, no breach or proposed breach of any Convention right (see paras [42], [43], [49]).

(2) The Children Act 1989 was not itself incompatible with or inconsistent with Art 8 of the Convention. Infringement of the right to respect for family and private life was only likely to arise if a local authority failed properly to discharge its responsibilities under the Children Act 1989; those responsibilities were not themselves an infringement of rights under Art 8. It might be that there was a failure to provide an effective remedy against local authority infringements of rights under Art 8, as while parents would have an effective remedy in the judicial review process, or through proceedings under s 7 of the Human Rights Act 1998, in practice a child with no parent to act for them might not always have such a remedy, but that was not in itself an infringement of Art 8. Under the Convention, failure to provide an effective remedy for infringement of a Convention right was an infringement of Art 13, but Art 13 was not a Convention right under the Human Rights Act 1998. Therefore, legislation which failed to provide an effective remedy for infringement of Art 8 was not, for that reason, incompatible with a Convention right within the meaning of the Human Rights Act 1998 (see paras [57], [59], [60], [63]).

(3) Circumstances might perhaps arise in which English law relating to some decisions by local authorities concerning care of children would not satisfy the requirements of Art 6(1), the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. The failure to provide access to a court as guaranteed by Art 6(1) meant that English law might be incompatible with Art 6(1), but the absence of such a provision from a particular statute did not mean that the statute itself was incompatible with Art 6(1). The absence in the Children Act 1989 of effective machinery for protecting the civil rights of young children with no parent or guardian was a statutory lacuna, not a statutory incompatibility. The inability of parents and children to challenge in court care decisions, however fundamental, made by a local authority while a care order was in force, was a different matter. Judicial review apart, the opportunity to challenge such decisions in court would be in conflict with the scheme of the 1989 Act. The issue of whether in this respect the Children Act 1989 was incompatible did not arise in this case, as the parties concerned had not lacked a court forum in which to express their concern at the lack of progress (see paras [83], [85], [86], [87], [88]).

(4) Interim care orders were not intended to be used as a means by which the court might continue to exercise a supervisory role over the local authority in cases in which it was in the best interests of a child that a care order should be made. Problems had arisen about how far courts should go in attempting to resolve uncertainties within care plans before making a care order. Where an uncertainty needed to be resolved before the court could decide whether it was in the best interests of the child to make a care order at all, the court should finally dispose of the matter only when the material facts were as clearly known as could be hoped. Some uncertainties relating to the details of the care plan were suitable for immediate resolution, in whole or in part, by the court in the course of disposing of the care order application; other uncertainties could and should be resolved before the court proceeded, during a limited period of 'planned and purposeful' delay. Frequently the uncertainties involved in a care plan could only be worked out after the making of an order. Despite all the inevitable uncertainties, when deciding to make a care order the court should normally have before it a care plan which was sufficiently firm and particularised for all concerned to have a reasonably clear picture of the likely way ahead for the child in the foreseeable future. The degree of firmness to be expected, as well as the amount of detail in the plan, would vary from case to case, but if the parents and the child's guardian were to have a fair and adequate opportunity to make representations to the court on whether a care order should be made, the care plan must be appropriately specific. The court must always maintain a proper balance between the need to satisfy itself about the appropriateness of the care plan and the

avoidance of over-zealous investigation into matters which were the responsibility of the local authority (see paras [90], [92], [93], [95], [97], [99], [102]).

Per curiam: the rejection of the Court of Appeal's initiative should not obscure the pressing need for Government to attend to the serious practical and legal problems which the starring system had been designed to address (see para [106]).

Statutory provisions considered

Children Act 1989, ss 1(2), 3(1), 9(1), 20, 22, 26, 31, 33, 34, 37, 38, 39, 84, 91(1), 100, Parts III, IV, XI

Human Rights Act 1998, ss 1(1), 3, 4, 6, 7, 8

Review of Children's Cases Regulations 1991 (SI 1991/895)

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Arts 6, 8, 13

Cases referred to in judgment

A v Liverpool City Council [1982] AC 363, [1981] 2 WLR 948, (1981) 2 FLR 222, [1981] 2 All ER 385, HL

Airey v Ireland (Application No 6289/73) (1979–80) 2 EHRR 305, ECHR

Alconbury Developments Ltd and Others, The Queen on the application of v Secretary of State for the Environment, Transport and the Regions; The Queen on the application of Holding & Barnes plc v Secretary of State for the Environment, Transport and the Regions; Secretary of State for the Environment, Transport and the Regions v Legal and General Assurance Society Ltd [2001] UKHL 23, [2001] 2 WLR 1389, sub nom *The Queen on the application of Holding and Barnes plc, Alconbury Developments Ltd and Others and Legal & General Assurance Society Ltd v Secretary of State for the Environment, Transport and Regions* [2001] UKHRR 728, sub nom *The Queen on the application of Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions and Other Cases* [2001] 2 All ER 929, HL

CH (Care or Interim Care Order), Re [1998] 1 FLR 402, CA

C v Solihull Metropolitan Borough Council [1993] 1 FLR 290, FD

Daly, The Queen on the application of v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532, [2001] 2 WLR 1622, sub nom *R v Secretary of State for the Home Department ex parte Daly* [2001] UKHRR 887, HL

F, Re; F v Lambeth London Borough Council [2002] 1 FLR 217, FD

Hokkanen v Finland (Application No 19823/92) (1995) 19 EHRR 139, [1996] 1 FLR 289, ECHR

Hounslow London Borough Council v A [1993] 1 WLR 291, [1993] 1 FLR 702, FD

J (Minors) (Care: Care Plan), Re [1994] 1 FLR 253, FD

Kent County Council v C [1993] Fam 57, [1992] 3 WLR 808, [1993] 1 FLR 308, [1993] 1 All ER 719, FD

L (Sexual Abuse: Standard of Proof), Re [1996] 1 FLR 116, CA

M (Care: Challenging Decisions by Local Authority), Re [2001] 2 FLR 1300, FD

McMichael v United Kingdom (Application No 16424/90) (1995) 20 EHRR 205, ECHR

Marckx v Belgium (Application No 6833/74) (1979–80) 2 EHRR 330, ECHR

Nielsen v Denmark (Application No 10929/84) (1989) 11 EHRR 175, ECHR

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595, [2002] QB 48, [2001] 3 WLR 183, sub nom *Donoghue v Poplar Housing and Regeneration Community Association Ltd* [2001] 2 FLR 284, CA

R (Care Proceedings: Adjournment), Re [1998] 2 FLR 390, CA

R v A (No 2) [2001] UKHL 25, [2002] 1 AC 45, [2001] 2 WLR 1546, [2001] 3 All ER 1, HL

R v Lambert [2001] UKHL 37, [2001] 3 WLR 206, HL

R v Stack [1986] 1 NZLR 257, NZ CA

Ringeisen v Austria (No 1) (Application No 2614/65) (1979–80) 1 EHRR 455, ECHR

S and D (Children: Powers of Court), Re [1995] 2 FLR 456, CA
T (A Minor) (Care Order: Conditions), Re [1994] 2 FLR 423, CA
TP and KM v United Kingdom (Application No 28945/95) [2001] 2 FLR 549, ECHR
W (A Minor) (Wardship: Jurisdiction), Re [1985] AC 791, [1985] 2 WLR 892, sub nom *Re W (A Minor) (Care Proceedings: Wardship)* [1985] FLR 879, sub nom *W and Others v Hertfordshire County Council* [1985] 2 All ER 301, HL
W and B, Re; Re W (Care Plan) [2001] EWCA Civ 757, [2001] 2 FLR 582, CA
W v United Kingdom (1988) 10 EHRR 29, ECHR

Cases cited but not referred to in judgment
B (Minors) (Termination of Contact: Paramount Consideration), Re [1993] Fam 301, [1993] 3 WLR 63, [1993] 3 All ER 542, sub nom *Re B (Minors) (Care: Contact: Local Authority's Plans)* [1993] 1 FLR 543, CA
Botta v Italy (1998) 26 EHRR 241, ECHR
Brown v Stott (Procurator Fiscal, Dunfermline) and Another [2001] 2 WLR 817, [2001] 2 All ER 97, sub nom *Procurator Fiscal, Dunfermline and Her Majesty's Advocate General for Scotland v Brown* [2001] UKHRR 333, PC
Johansen v Norway (1997) 23 EHRR 33, ECHR
K and T v Finland [2001] 2 FLR 707, ECHR
Keegan v Ireland (1994) 18 EHRR 342, ECHR
L (Interim Care Order: Power of Court), Re [1996] 2 FLR 742, CA
Maaouia v France (2001) 33 EHRR 42, ECHR
Manchester City Council v F, Note [1993] 1 FLR 419, FD
R v United Kingdom [1988] 2 FLR 445, (1987) 10 EHRR 74, ECHR
S and G v Italy [2000] 2 FLR 771, ECHR
Salesi v Italy (1998) 26 EHRR 187, ECHR
Scott v United Kingdom [2000] 1 FLR 958, ECHR
Simpson v United Kingdom (1989) 64 DR 188, EcomHR
T (Accommodation by Local Authority), Re [1995] 1 FLR 159, QBD
X and Y v The Netherlands (1985) 8 EHRR 235, ECHR

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Cur adv vult

LORD NICHOLLS OF BIRKENHEAD:
My Lords,
[1] These appeals concern the impact of the Human Rights Act 1998 on Parts III and IV of the Children Act 1989. The Court of Appeal (see *Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582) (Thorpe, Sedley and Hale LJJ) made, in the words of Thorpe LJ, two major adjustments and innovations in the construction and application of the Children Act 1989. The principal issue before your Lordships' House concerns the soundness of this judicial initiative.

The Torbay case

[2] The appeals concern four children, two in the Torbay case and two in the Bedfordshire case. The cases are factually unrelated. In the Torbay case the mother had three children: P, who is a boy born in August 1987, M, a boy born in January 1991, and J, a girl born in January 1992. The children are now 14, 11 and 10 years old. The appeal concerns the two younger children. The father of P, the eldest child, played no part in these proceedings. The mother met the father of M and J in 1987. They started to cohabit in 1989.

[3] Serious problems emerged in May 1999 when P ran away from home and refused to return. He said that his stepfather, namely, the father of M and J, had repeatedly beaten him and that he was afraid of him. Torbay Council arranged a foster placement. The father denied the charge and the mother supported him. They united to reject and isolate P. At a case conference held in November 1999 the father behaved appallingly. He was arrested for threatening behaviour, charged and subsequently sentenced to community service. This prompted Torbay Council to issue an application for a care order in respect of P and supervision orders in respect of M and J.

[4] In May 2000 P told a fuller story. He described how the father had buggered him on several occasions. A child protection investigation followed. Again the father denied the allegations. Again the mother supported him. M and J were then taken into care, pursuant to an emergency protection order of 7 June 2000, and placed in foster care. In July 2000 the mother and the father separated, apparently in order to strengthen the mother's case for the return of M and J. The paediatric examinations of the children were inconclusive. But an acknowledged expert in this field reported that the father presented an unacceptable risk to the children and that the mother was incapable of protecting them. He recommended therapy for her. At this stage the separation of the mother and father became permanent. The mother was then aged 36. The father was 31 years old.

[5] Torbay, the local authority, sought care orders in respect of all three children. Its care plan for P was that he should remain in foster care. The care plan for M and J was that an attempt should be made to rehabilitate them with their mother. After hearing much evidence, Her Honour Judge Sander, sitting at Plymouth County Court, made findings of fact on 1 November 2000. The father was found to have sexually abused P and beaten the children with a slipper. The mother had failed to protect the children. Both parents had emotionally abused the children, particularly by rejecting P.

[6] Everyone agreed there should be a care order in respect of P. There was contention over what order should be made regarding the two younger children. Discussions took place regarding the care plan for them. The mother and the children's guardian elicited assurances from Torbay on the package of support and treatment available to the family which was needed to make rehabilitation viable. Counsel for the mother, Miss Duthie, sought some guarantee of performance, or a safeguard in the event of breach. She submitted that a care order should not be made on the footing that all power and responsibility would pass to Torbay Council. This, she submitted, would constitute a breach of the human rights of the mother and the children. Such an order was neither necessary nor proportionate to the end to be achieved.

Based on previous experience, of which evidence was given, the mother was very sceptical about whether Torbay Council would carry out the care plan for M and J. The mother contended that interim care orders should be made. Torbay Council and the children's guardian sought final care orders.

[7] The judge made final care orders in respect of all three children on 1 November 2000. She expressed confidence that Torbay Council would implement the care plan.

[8] Unhappily, this confidence proved to be misplaced. There was, as the Court of Appeal accepted, a 'striking and fundamental' failure to implement the care plan regarding M and J. Most of the assurances given by the social workers, and accepted by the children's guardian and the judge, proved vain. The mother's principal complaints were as follows. The care plan envisaged reunification within 6–9 months. But in the 4½ months which had elapsed between the making of the care orders and the hearing of the appeal nothing had happened. The planned family therapy work had not taken place. A social worker was not provided to assist the mother. The Hillside Family Centre programme was not started until early in March 2001. The therapy proposed for the mother was not under way.

[9] The Court of Appeal observed that this 'sad history of potentially disastrous failure' fully vindicated the line taken by Miss Duthie at the trial. The Court of Appeal acquitted Torbay of bad faith. The most that could be said against the council was that at the trial it had too readily promised support for which the mother later proved to be ineligible. The principal cause of 'these serious failings' was a financial crisis within the unitary authority leading to substantial cuts in the social services budget.

[10] The mother's primary contention in the Court of Appeal was that the judge had erred in rejecting her contention that interim care orders, as distinct from final care orders, were the appropriate relief regarding M and J. Torbay and the children's guardian opposed this contention. They submitted that the mother's appeal should be dismissed. The children's guardian also sought directions for trial under s 7 of the Human Rights Act 1998 by a High Court judge to establish the nature and extent of Torbay's breaches, if any, of its duty to the children under s 6 of that Act.

The Bedfordshire case

[11] The Bedfordshire case concerns two boys: J, born in May 1989, and A, born in August 1991. They are now 12 and 10 years old. Their mother, now aged 38, is American. Their father, aged 46, is British. The parents met in the US and married in this country. Their children were born here. They have had a volatile relationship, separating and being reconciled on a number of occasions. They have spent significant periods living apart. Throughout their lives the children have had contact with their father. Until 6 September 1999 the children lived with their mother.

[12] At times, during much of the children's lives, there has been concern about their parents' ability to meet the children's needs. This has centred on the parents' relationship and the mother's mental health. In 1999 this anxiety deepened. The mother made allegations against the father. These were not substantiated. The mother's conduct deteriorated. There was concern about the children's emotional development, and the failure of the parents to acknowledge the extent of the problem.

[13] On 2 September 1999 Bedfordshire County Council applied for care orders. Pursuant to an emergency protection order and interim care orders, periodically renewed, the children were placed with foster-parents. Bedfordshire's final care plan was that the children should be placed with the maternal grandparents, with continuing direct contact with both parents. The grandparents lived in the US. They agreed to move to England to care for the children. The children were to remain in foster care until the grandparents moved here.

[14] The children's guardian also supported placement with the maternal grandparents. The final report of the guardian concluded that the parents had not made sufficient changes for the children to be returned safely to their care for the foreseeable future.

[15] The applications for care orders came before His Honour Judge Hamilton, sitting in Luton County Court, on 20 November 2000. He heard evidence over 9 days, and gave judgment on 11 December 2000. The judge concluded that the children were unable to return safely to the joint care of their parents: 'possibly, or even probably, it may be appropriate in 12 to 18 months, but not now'. All the parties agreed that the maternal grandparents would be suitable carers, although the evidence that they would be able to come here was 'exiguous in the extreme'. The judge described the care plan as inchoate, because of all the uncertainties involved. In addition to uncertainty about the grandparents' position, the uncertainties included the outcome of further assessment and therapy for the boys, the final outcome of marital work for the parents, and the possibility of improvements with the mother's personality trait. The judge made care orders for both children.

The outcome in the Court of Appeal

[16] The Court of Appeal heard appeals in both cases together. The parties' arguments were wide-ranging as, indeed, they were before your Lordships' House. The Secretary of State for Health was joined as a party because of claims for a declaration that ss 31, 33(3), 38 and 100 of the Children Act 1989 are incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the Convention).

[17] Stated shortly, the two innovations fashioned by the Court of Appeal were these. First, the court enunciated guidelines intended to give trial judges a wider discretion to make an interim care order, rather than a final care order. The second innovation was more radical. It concerns the position after the court has made a care order. The Court of Appeal propounded a new procedure, by which at the trial the essential milestones of a care plan would be identified and elevated to a 'starred status'. If a starred milestone was not achieved within a reasonable time after the date set at trial, the local authority was obliged to 'reactivate the interdisciplinary process that contributed to the creation of the care plan'. At the least the local authority must inform the child's guardian of the position. Either the guardian or the local authority would then have the right to apply to the court for further directions: see the judgment of Thorpe LJ (*Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582, paras [29] and [30]).

[18] The Court of Appeal regarded the outcome of the appeal in the *Torbay* case as finely balanced. The court declined to disturb the judge's

order. The court also dismissed the application by the children's guardian for directions for trial under s 7 of the Human Rights Act 1998. Progress had been sufficient to make referral to the High Court an unnecessary distraction from the main business of getting on with the care plan. An application for 'starring' of the care plan was referred to the judge.

[19] On 2 July 2001 Her Honour Judge Sander starred various items in the final care plan. She directed that Torbay Council was to provide a progress report to the children's guardian or, in the absence of the guardian, the court if a starred element was not achieved within 14 days of the specified dates. The House was told that the starred plan is working well and that the children's interests are now being met.

[20] As to the *Bedfordshire* case, the Court of Appeal held it was clear that the care plan was insufficiently mature and that His Honour Judge Hamilton had wanted more time to await developments. He had been constrained by the case-law to make the full care order. The judge should have insisted on more information before making the order, or on a report back if things did not turn out as expected. The court allowed the appeal in this case, replacing the care order with an interim care order and remitting the case to His Honour Judge Hamilton for his further consideration.

[21] Later developments in the *Bedfordshire* case should be mentioned briefly. Setting aside the care order had the unfortunate consequence of augmenting the uncertainty about the children's home for the near future. The maternal grandparents were reluctant to come to this country to care for the children unless a final care order was made. On 24 October 2001 His Honour Judge Hamilton made a final care order with the consent of the children's guardian, and without any opposition from the parents. This care order was not starred. The parents stated they will apply for the care order to be discharged if the children have not been reunited with them by October 2003.

[22] Before your Lordships' House the Secretary of State for Health and Bedfordshire Council appealed against the reasoning of the Court of Appeal on its two innovations, not against the substantive orders made. In the *Torbay* case the mother of the children appealed against the order made by the Court of Appeal. Torbay Council supported the appeal of the Secretary of State and Bedfordshire Council.

Starred milestones

[23] Two preliminary points can be made at the outset. First, a cardinal principle of the Children Act 1989 is that when the court makes a care order it becomes the duty of the local authority designated by the order to receive the child into its care while the order remains in force. So long as the care order is in force the authority has parental responsibility for the child. The authority also has power to decide the extent to which a parent of the child may meet his responsibility for him: s 33. An authority might, for instance, not permit parents to change the school of a child living at home. While a care order is in force the court's powers, under its inherent jurisdiction, are expressly excluded: s 100(2)(c) and (d). Further, the court may not make a contact order, a prohibited steps order or a specific issue order: s 9(1).

[24] There are limited exceptions to this principle of non-intervention by the court in the authority's discharge of its parental responsibility for a child in its care under a care order. The court retains jurisdiction to decide disputes

about contact with children in care: s 34 of the Children Act 1989. The court may discharge a care order, either on an application made for the purpose under s 39 or as a consequence of making a residence order (ss 9(1) and 91(1)). The High Court's judicial review jurisdiction also remains available.

[25] These exceptions do not detract significantly from the basic principle. The Children Act 1989 delineated the boundary of responsibility with complete clarity. Where a care order is made the responsibility for the child's care is with the authority rather than the court. The court retains no supervisory role, monitoring the authority's discharge of its responsibilities. That was the intention of Parliament.

[26] Consistently with this, in *Kent County Council v C* [1993] Fam 57, [1993] 1 FLR 308 Ewbank J decided that the court has no power to add to a care order a direction to the authority that the child's guardian ad litem should be allowed to have a continuing involvement, with a view to his applying to the court in due course if thought appropriate. In *Re T (A Minor) (Care Order: Conditions)* [1994] 2 FLR 423 the Court of Appeal rightly approved this decision and held that the court has no power to impose conditions in a care order. There the condition sought by the child's guardian was that the child should reside at home.

[27] This cardinal principle of the Children Act 1989 represented a change in the law. Before the Children Act 1989 came into operation the court, in exercise of its wardship jurisdiction, retained power in limited circumstances to give directions to a local authority regarding children in its care. The limits of this jurisdiction were considered by your Lordships' House in *A v Liverpool City Council* [1982] AC 363, (1981) 2 FLR 222 and *Re W (A Minor) (Wardship: Jurisdiction)* [1985] AC 791, sub nom *Re W (A Minor) (Care Proceedings: Wardship)* [1985] FLR 879. The change brought about by the Children Act 1989 gave effect to a policy decision on the appropriate division of responsibilities between the courts and local authorities. This was one of the matters widely discussed at the time. A report made to ministers by an inter-departmental working party *Review of Child Care Law* (September 1985) drew attention to some of the policy considerations. The particular strength of the courts lies in the resolution of disputes: its ability to hear all sides of a case, to decide issues of fact and law, and to make a firm decision on a particular issue at a particular time. But a court cannot have day-to-day responsibility for a child. The court cannot deliver the services which may best serve a child's needs. Unlike a local authority, a court does not have close, personal and continuing knowledge of the child. The court cannot respond with immediacy and informality to practical problems and changed circumstances as they arise. Supervision by the court would encourage 'drift' in decision making, a perennial problem in children cases. Nor does a court have the task of managing the financial and human resources available to a local authority for dealing with all children in need in its area. The authority must manage these resources in the best interests of all the children for whom it is responsible.

[28] The Children Act 1989, embodying what I have described as a cardinal principle, represents the assessment made by Parliament of the division of responsibility which would best promote the interests of children within the overall care system. The court operates as the gateway into care, and makes the necessary care order when the threshold conditions are

satisfied and the court considers a care order would be in the best interests of the child. That is the responsibility of the court. Thereafter the court has no continuing role in relation to the care order. Then it is the responsibility of the local authority to decide how the child should be cared for.

[29] My second preliminary point is this. The Children Act 1989 has now been in operation for 10 years. Over the last 6 years there has been a steady increase in the number of children looked after by local authorities in England and Wales. At present there are 36,400 children accommodated under care orders, compared with 28,500 in 1995, an increase of 27%. In addition local authorities provide accommodation for nearly 20,000 children under s 20 orders (children in need of accommodation). A decade's experience in the operation of the Children Act 1989, at a time of increasing demands on local authorities, has shown that there are occasions when, with the best will in the world, local authorities' discharge of their parental responsibilities has not been satisfactory. The system does not always work well. Shortages of money, of suitable trained staff and of suitable foster carers and prospective adopters for difficult children are among the reasons. There have been delays in placing children in accordance with their care plans, unsatisfactory breakdown rates and delays in finding substitute placements.

[30] But the problems are more deep-seated than shortage of resources. In November 1997 the Government published Sir William Utting's review of safeguards for children living away from home. Mr Frank Dobson, then Secretary of State for Health, summarised his reaction to the report:

> 'It covers the lives of children whose home circumstances were so bad that those in authority, to use the jargon, took them into care. The report reveals that in far too many cases not enough care was taken. Elementary safeguards were not in place or not enforced. Many children were harmed rather than helped. The review reveals that these failings were not just the fault of individuals – though individuals were at fault. It reveals the failure of a whole system.'

[31] In autumn 1998 the Government published its response to the children's safeguards review (Cm 4105) and launched its Quality Protects Programme, aimed at improving the public care system for children. Conferences have also been held, and many research studies undertaken, both private and public, on particular aspects of the problems. Some of the problems were discussed at the bi-annual President's Inter-disciplinary Conference on Family Law 1997, attended by judges, child psychiatrists, social workers, social services personnel and other experts. The proceedings of the conference were subsequently published in book form, *Divided Duties: Care Planning for Children within the Family Justice System* (Family Law, 1st edn, 1998). The sharpness of the divide between the court's powers before and after the making of a care order attracted criticism. The matters discussed included the need for a care plan to be open to review by the court in exceptional cases. One suggestion was that a court review could be triggered by failure to implement 'starred' key factors in the care plan within specified time-scales. The guardian ad litem would be the appropriate person to intervene.

[32] This was the source of the innovation which found expression in the judgments of the Court of Appeal in the present appeals. The House was informed by counsel that the starred milestones guidance given by the Court of Appeal was not canvassed in argument before the court. This guidance appeared for the first time in the judgments of the court.

[33] The jurisprudential route by which the Court of Appeal found itself able to bring about this development was primarily by recourse to s 3 of the Human Rights Act 1998. Hale LJ said in *Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582, paras [79]–[80]:

> 'Where elements of the care plan are so fundamental that there is a real risk of a breach of Convention rights if they are not fulfilled, and where there is some reason to fear that they may not be fulfilled, it must be justifiable *to read into the Children Act 1989* a power in the court to require a report on progress … the court would require a report, either to the court or to the guardian ad litem (in future to CAFCASS) who could then decide whether it was appropriate to return the case to court …
>
> [W]hen making a care order, the court is being asked to interfere in family life. If it perceives that the consequence of doing so will be to put at risk the Convention rights of either the parents or the child, the court *should be able* to impose this very limited requirement as a condition of its own interference.' (my emphasis)

Section 3 of the Human Rights Act

[34] The judgments in the Court of Appeal are a clear and forceful statement of the continuing existence of serious problems in this field. In the nature of things, courts are likely to see more of the cases which go wrong. But the view, widespread among family judges, is that all too often local authorities' discharge of their parental responsibilities falls short of an acceptable standard. A disturbing instance can be found in the recent case of *Re F; F v Lambeth London Borough Council* [2002] 1 FLR 217. Munby J said, at para [38] of his judgment, that the 'blunt truth is that in this case the State has failed these parents and these boys'.

[35] It is entirely understandable that the Court of Appeal should seek some means to alleviate these problems: some means by which the courts may assist children where care orders have been made but subsequently, for whatever reason, care plans have not been implemented as envisaged and, as a result, the welfare of the children is being prejudiced. This is entirely understandable. The courts, notably through their wardship jurisdiction, have long discharged an invaluable role in safeguarding the interests of children. But the question before the House is much more confined. The question is whether the courts have power to introduce into the working of the Children Act 1989 a range of rights and liabilities not sanctioned by Parliament.

[36] On this I have to say at once, respectfully but emphatically, that I part company with the Court of Appeal. I am unable to agree that the court's introduction of a 'starring system' can be justified as a legitimate exercise in interpretation of the Children Act 1989 in accordance with s 3 of the Human Rights Act 1998. Even if the Children Act 1989 is inconsistent with Art 6 or

8 of the Convention, which is a question I will consider later, s 3 does not in this case have the effect suggested by the Court of Appeal.

[37] Section 3(1) of the Human Rights Act 1998 provides:

> 'So far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with the Convention rights.'

This is a powerful tool whose use is obligatory. It is not an optional canon of construction. Nor is its use dependent on the existence of ambiguity. Further, the section applies retrospectively. So far as it is possible to do so, primary legislation 'must be read and given effect' to in a way which is compatible with Convention rights. This is forthright, uncompromising language.

[38] But the reach of this tool is not unlimited. Section 3 of the Human Rights Act 1998 is concerned with interpretation. This is apparent from the opening words of s 3(1): 'so far as it is possible to do so'. The side heading of the section is 'Interpretation of legislation'. Section 4 (power to make a declaration of incompatibility) and, indeed, s 3(2)(b) presuppose that not all provisions in primary legislation can be rendered Convention compliant by the application of s 3(1). The existence of this limit on the scope of s 3(1) has already been the subject of judicial confirmation, more than once: see, for instance, Lord Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, sub nom *Donoghue v Poplar Housing and Regeneration Community Association Ltd* [2001] 2 FLR 284, para [75] and Lord Hope of Craighead in *R v Lambert* [2001] UKHL 37, [2001] 3 WLR 206, paras [79]–[81].

[39] In applying s 3 courts must be ever mindful of this outer limit. The Human Rights Act 1998 reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.

[40] Up to this point there is no difficulty. The area of real difficulty lies in identifying the limits of interpretation in a particular case. This is not a novel problem. If anything, the problem is more acute today than in past times. Nowadays courts are more 'liberal' in the interpretation of all manner of documents. The greater the latitude with which courts construe documents, the less readily defined is the boundary. What one person regards as sensible, if robust, interpretation, another regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation. The boundary line may be crossed even though a limitation on Convention rights is not stated in express terms. Lord Steyn's observations in *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, para [44] are not to be read as meaning that a clear limitation on Convention rights in terms is the

only circumstance in which an interpretation incompatible with Convention rights may arise.

[41] I should add a further general observation in the light of what happened in the present case. Section 3 directs courts on how legislation shall, as far as possible, be interpreted. When a court, called upon to construe legislation, ascribes a meaning and effect to the legislation pursuant to its obligation under s 3, it is important the court should identify clearly the particular statutory provision or provisions whose interpretation leads to that result. Apart from all else, this should assist in ensuring the court does not inadvertently stray outside its interpretation jurisdiction.

[42] I return to the Children Act 1989. I have already noted, as a cardinal principle of the Act, that the courts are not empowered to intervene in the way local authorities discharge their parental responsibilities under final care orders. Parliament entrusted to local authorities, not the courts, the responsibility for looking after children who are the subject of care orders. To my mind the new starring system would depart substantially from this principle. Under the new system the court, when making a care order, is empowered to impose an obligation on an authority concerning the future care of the child. In future, the authority must submit a progress report, in circumstances identified by the court, either to the court or to the Children and Family Court Advisory and Support Service (CAFCASS). This is only the first step. The next step is that the court, when seised of what has happened after the care order was made, may then call for action. If it considers this necessary in the best interests of the child, the court may intervene and correct matters which are going wrong. In short, under the starring system the court will exercise a newly created supervisory function.

[43] In his judgment Thorpe LJ noted that the starring system 'seems to breach the fundamental boundary between the functions and responsibilities of the court and the local authority': see *Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582, para [31]. I agree. I consider this judicial innovation passes well beyond the boundary of interpretation. I can see no provision in the Children Act 1989 which lends itself to the interpretation that Parliament was thereby conferring this supervisory function on the court. No such provision was identified by the Court of Appeal. On the contrary, the starring system is inconsistent in an important respect with the scheme of the Children Act 1989. It would constitute amendment of the Children Act 1989, not its interpretation. It would have far-reaching practical ramifications for local authorities and their care of children. The starring system would not come free from additional administrative work and expense. It would be likely to have a material effect on authorities' allocation of scarce financial and other resources. This in turn would affect authorities' discharge of their responsibilities to other children. Moreover, the need to produce a formal report whenever a care plan is significantly departed from, and then await the outcome of any subsequent court proceedings, would affect the whole manner in which authorities discharge, and are able to discharge, their parental responsibilities.

[44] These are matters for decision by Parliament, not the courts. It is impossible for a court to attempt to evaluate these ramifications or assess what would be the views of Parliament if changes are needed. I echo the

wise words of Cooke P in the New Zealand case of *R v Stack* [1986] 1 NZLR 257, 261–262:

> 'It would amount to amending the Act by judicial legislation. In a sensitive and controversial field which the New Zealand Parliament may be said to have taken to itself, we do not consider that this court would be justified in such a course. If the Act is to be amended it should be done by Parliament after full consideration of the arguments of policy.'

In my view, in the present case the Court of Appeal exceeded the bounds of its judicial jurisdiction under s 3 in introducing this new scheme.

Sections 7 and 8 of the Human Rights Act

[45] Sections 7 and 8 of the Human Rights Act 1998 have conferred extended powers on the courts. Section 6 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 7 enables victims of conduct made unlawful by s 6 to bring court proceedings against the public authority in question. Section 8 spells out, in wide terms, the relief a court may grant in those proceedings. The court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. Thus, if a local authority conducts itself in a manner which infringes the Art 8 rights of a parent or child, the court may grant appropriate relief on the application of a victim of the unlawful act.

[46] This new statutory power has already been exercised. In *Re M (Care: Challenging Decisions by Local Authority)* [2001] 2 FLR 1300 a local authority reviewed its care plan for a child in its care. The authority finally ruled out any further prospect of the child returning to live with her mother or of ever going to live with her father. In proceedings brought by the parents Holman J set aside the decision. The decision-making process was unfair by not involving the parents to a degree sufficient to provide their interests with the requisite protection. In so ordering Holman J was proceeding squarely within the extended jurisdiction conferred by ss 7 and 8. The court applied the provisions of the Human Rights Act 1998 in the manner Parliament intended, there in respect of a breach of Art 8 of the Convention.

[47] In the present case the Court of Appeal seems to have placed some reliance on ss 7 and 8 for the extension of the court's powers envisaged by the starring system. Thorpe LJ said in his judgment *Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582, para [32]:

> 'The responsibility on the courts in the exercise of extended or additional powers is of course to ensure that they are used only to avoid or prevent the breach of an Art 6 or Art 8 right of one of the parties. If no actual or prospective breach of right is demonstrated the power does not arise.'

[48] I do not think ss 7 and 8 can be pressed as far as would be necessary if they were to bring the introduction of the starring system within their embrace. Sections 7 and 8 are to be given a generous interpretation, as befits their human rights purpose. But, despite the cautionary words of both

Thorpe and Hale LJJ in *Re W and B; Re W (Care Plan)*, the starring system goes much further than providing a judicial remedy to victims of actual or proposed unlawful conduct by local authorities entrusted with the care of children.

[49] Section 7 envisages proceedings, brought by a person who is or would be a victim, against a public authority which has acted or is proposing to act unlawfully. The question whether the authority has acted unlawfully, or is proposing to do so, is a matter to be decided in the proceedings. Relief can be given against the authority only in respect of an act, or a proposed act, of the authority which the court finds is or would be unlawful. For this purpose an act includes a failure to act. But the starring system would impose obligations on local authorities in circumstances when there has been no such finding and when, indeed, the authority has committed no breach of a Convention right and is not proposing to do so. Unless an authority is acting in bad faith, the possibility or prospect of non-fulfilment, for example, of a placement for a child cannot by itself be evidence that the authority is 'proposing' to act unlawfully contrary to s 6. Nor can the non-fulfilment of a starred event, when the obligation to report arises, necessarily be equated with a breach or threatened breach of a Convention right. Failure to adhere to a care plan may be due to a change in circumstances which, in the best interests of the child, calls for a variation from the care plan which was approved by the court.

Statutory incompatibility

[50] Thus far I have concluded that, even if there is incompatibility between the Children Act 1989 and Art 6 or 8 of the Convention, the introduction of the starring system is beyond the powers of the court under s 3 of the Human Rights Act 1998. Moreover, ss 7 and 8 of the Human Rights Act 1998 do not provide a legal basis for the introduction of this new system.

[51] The mother of the children in the *Torbay* case contended that if the Children Act 1989 does not permit the introduction of the starring system, the Act is incompatible with Arts 6 and 8. She claims to be a victim of an infringement of her rights under these two Articles. Save for the intervention of the Court of Appeal matters might well have gone even more seriously wrong. She seeks a declaration of incompatibility pursuant to s 4 of the Human Rights Act 1998. I now turn to consider whether the Children Act 1989 is incompatible with either of these Articles of the Convention. I start with Art 8.

Compatibility and Art 8

[52] Article 8 of the Convention provides:

> '1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for

the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[53] The essential purpose of this Article is to protect individuals against arbitrary interference by public authorities. In addition to this negative obligation there are positive obligations inherent in an effective concept of 'respect' for family life: see *Marckx v Belgium* (1979–80) 2 EHRR 330, para 31. In both contexts a fair balance has to be struck between the competing interests of the individual and the community as a whole: see *Hokkanen v Finland* (1995) 19 EHRR 139, [1996] 1 FLR 289, para 55.

[54] Clearly, if matters go seriously awry, the manner in which a local authority discharges its parental responsibilities to a child in its care may violate the rights of the child or his parents under this Article. The local authority's intervention in the life of the child, justified at the outset when the care order was made, may cease to be justifiable under Art 8(2). Sedley LJ pointed out that a care order from which no good is coming cannot sensibly be said to be pursuing a legitimate aim. A care order which keeps a child away from his family for purposes which, as time goes by, are not being realised will sooner or later become a disproportionate interference with the child's primary Art 8 rights: see *Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582, para [45].

[55] Further, the local authority's decision-making process must be conducted fairly and so as to afford due respect to the interests protected by Art 8. For instance, the parents should be involved to a degree which is sufficient to provide adequate protection for their interests: *W v United Kingdom* (1988) 10 EHRR 29, paras 62–64.

[56] However, the possibility that something may go wrong with the local authority's discharge of its parental responsibilities or its decision-making processes, and that this would be a violation of Art 8 so far as the child or parent is concerned, does not mean that the legislation itself is incompatible, or inconsistent, with Art 8. The Children Act 1989 imposes on a local authority looking after a child the duty to safeguard and promote the child's welfare. Before making any decision with respect to such a child the authority must, so far as reasonably practicable, ascertain the wishes and feelings of the child and his parents: s 22. Section 26 of the Children Act 1989 provides for periodic case reviews by the authority, including obtaining the views of parents and children. One of the required reviews is that every 6 months the local authority must actively consider whether it should apply to the court for a discharge of the care order: see the Review of Children's Cases Regulations 1991. Every local authority must also establish a procedure for considering representations, including complaints, made to it by any child who is being looked after by it, or by his parents, about the discharge by the authority of its parental responsibilities for the child.

[57] If an authority duly carries out these statutory duties, in the ordinary course there should be no question of infringement by the local authority of the Art 8 rights of the child or his parents. Questions of infringement are only likely to arise if a local authority fails properly to discharge its statutory responsibilities. Infringement which then occurs is not brought about, in any meaningful sense, by the Children Act 1989. Quite the reverse. Far from the infringement being compelled, or even countenanced, by the provisions of the Children Act 1989, the infringement flows from the local authority's

failure to comply with its obligations under the Act. True, it is the Children Act 1989 which entrusts responsibility for the child's care to the local authority. But that is not inconsistent with Art 8. Local authorities are responsible public authorities, with considerable experience in this field. Entrusting a local authority with the sole responsibility for a child's care, once the 'significant harm' threshold has been established, is not of itself an infringement of Art 8. There is no suggestion in the Strasbourg jurisprudence that absence of court supervision of a local authority's discharge of its parental responsibilities is itself an infringement of Art 8.

[58] Where, then, is the inconsistency which is alleged to exist? As I understand it, the principal contention is that the incompatibility lies in the absence from the Children Act 1989 of an adequate remedy if a local authority fails to discharge its parental responsibilities properly and, as a direct result, the rights of the child or his parents under Art 8 are violated. The Children Act 1989 authorises the State to interfere with family life. The Act empowers courts to make care orders whose effect is to entrust the care of children to a public authority. But the selfsame Act, while conferring these wide powers of interference in family life, omits to provide any sufficient remedy, by way of a mechanism for controlling an erring local authority's conduct, if things go seriously wrong with the authority's care of the child. It is only to be expected, the submission runs, that there will be occasions when the conduct of a local authority falls short of the appropriate standards. An Act which authorises State interference but makes no provision for external control when the body entrusted with parental responsibility fails in its responsibilities is not compatible with Art 8. The extensive supervisory functions and responsibilities conferred on the Secretary of State in Part XI of the Children Act 1989, including his default powers under s 84, are not sufficient in practice to provide an adequate and timely remedy in individual cases.

[59] In my view this line of argument is misconceived. Failure by the State to provide an effective remedy for a violation of Art 8 is not itself a violation of Art 8. This is self-evident. So, even if the Children Act 1989 does fail to provide an adequate remedy, the Act is not for that reason incompatible with Art 8. This is the short and conclusive answer to this point.

[60] However, I should elaborate a little further. In Convention terms, failure to provide an effective remedy for infringement of a right set out in the Convention is an infringement of Art 13. But Art 13 is not a Convention right as defined in s 1(1) of the Human Rights Act 1998. So legislation which fails to provide an effective remedy for infringement of Art 8 is not, for that reason, incompatible with a Convention right within the meaning of the Human Rights Act 1998.

[61] Where, then, does that leave the matter so far as English law is concerned? The domestic counterpart to Art 13 is ss 7 and 8 of the Human Rights Act 1998, read in conjunction with s 6. This domestic counterpart to Art 13 takes a different form from Art 13 itself. Unlike Art 13, which declares a right ('Everyone whose rights … are violated shall have an effective remedy'), ss 7 and 8 of the Human Rights Act 1998 provide a remedy. Article 13 guarantees the availability at the national level of an effective remedy to enforce the substance of Convention rights. Sections 7

and 8 seek to provide that remedy in this country. The object of these sections is to provide in English law the very remedy Art 13 declares is the entitlement of everyone whose rights are violated.

[62] Thus, if a local authority fails to discharge its parental responsibilities properly, and in consequence the rights of the parents under Art 8 are violated, the parents may, as a longstop, bring proceedings against the authority under s 7. I have already drawn attention to a case where this has happened. I say 'as a longstop', because other remedies, both of an administrative nature and by way of court proceedings, may also be available in the particular case. For instance, Bedfordshire Council has an independent visitor, a children's complaints officer and a children's rights officer. Sometimes court proceedings by way of judicial review of a decision of a local authority may be the appropriate way to proceed. In a suitable case an application for discharge of the care order is available. One would not expect proceedings to be launched under s 7 of the Human Rights Act 1998 until any other appropriate remedial routes have first been explored.

[63] In the ordinary course a parent ought to be able to obtain effective relief, by one or other of these means, against an authority whose mishandling of a child in its care has violated a parent's Art 8 rights. More difficult is the case, to which Thorpe LJ drew attention in *Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582, para [34], where there is no parent able and willing to become involved. In this type of case the Art 8 rights of a young child may be violated by a local authority without anyone outside the local authority becoming aware of the violation. In practice, such a child may not always have an effective remedy.

[64] I shall return to this problem at a later stage. For present purposes it is sufficient to say that, for the reason I have given, the failure to provide a young child with an effective remedy in this situation does not mean that the Children Act 1989 is incompatible with Art 8: failure to provide a remedy for a breach of Art 8 is not itself a breach of Art 8.

Compatibility and Art 6

[65] The position regarding Art 6(1) is more complicated. Article 6(1) provides:

> 'In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

[66] The starting point here is to note that Art 6(1) applies only to disputes (contestations) over (civil) rights and obligations which, at least arguably, are recognised under domestic law. Article 6(1) does not itself guarantee any particular content for civil rights and obligations in the substantive law of contracting States: see *W v United Kingdom* (1988) 10 EHRR 29, para 73. The European Court of Human Rights has recently reiterated this interpretation of Art 6(1), in *TP and KM v United Kingdom* [2001] 2 FLR 549, para 92.

[67] The case of *McMichael v United Kingdom* (1995) 20 EHRR 205 illustrates this limitation on the scope of Art 6(1). Under Scots law the natural father of a child born outside marriage did not automatically have parental rights in respect of the child. Since Mr McMichael had not taken

steps to obtain legal recognition of his status as a father, Art 6(1) had no application to his complaint that he had not been allowed to see the confidential reports submitted in the care proceedings.

[68] On the other side of the line is the well-known case of *W v United Kingdom* (1988) 10 EHRR 29, concerning parental rights of access. This case pre-dated the Children Act 1989. The European Court of Human Rights considered that a parental rights resolution did not extinguish all parental rights regarding access to a child in care. The court held that when a parent claimed access to his child the determination of a parental right was just as much in issue as when a parent applied for the discharge of a parental rights resolution or a care order. Accordingly, a substantial dispute over access fell within Art 6(1).

[69] Thus, when considering the application of Art 6(1) to children in care, the European Court of Human Rights focuses on the rights under domestic law which are then enjoyed by the parents or the child. If the impugned decision significantly affects rights retained by the parents or the child after the child has been taken into care, Art 6(1) may well be relevant. It is otherwise if the decision has no such effect.

[70] I pause to note one consequence of this limitation on the scope of Art 6(1). Since Art 6(1) is concerned only with the protection of rights found in domestic law, a right conferred by the Convention itself does not as such qualify. Under the Convention, Art 13 is the guarantee of an effective remedy for breach of a Convention right, not Art 6(1). Article 6(1) is concerned with the protection of other rights of individuals. Thus, a right guaranteed by Art 8 is not in itself a civil right within the meaning of Art 6(1).

[71] Although a right guaranteed by Art 8 is not *in itself* a civil right within the meaning of Art 6(1), the Human Rights Act 1998 has now transformed the position in this country. By virtue of the Human Rights Act 1998, Art 8 rights are now part of the civil rights of parents and children for the purposes of Art 6(1). This is because now, under s 6 of the Human Rights Act 1998, it is unlawful for a public authority to act inconsistently with Art 8.

[72] I have already noted that, apart from the difficulty concerning young children, the court remedies provided by ss 7 and 8 should ordinarily provide effective relief for an infringement of Art 8 rights. I need therefore say nothing further on this aspect of the application of Art 6(1). I can confine my attention to the application of Art 6(1) to *other* civil rights and obligations of parents and children.

[73] In this regard a further aspect of the phrase 'civil rights' should be noted. The Strasbourg case-law interprets this expression as directed essentially at rights which English law characterises as private law rights. This does not mean that administrative decisions by public authorities, characterised by English law as matters regulated by public law, are outside the scope of Art 6(1). The Strasbourg jurisprudence has brought such decisions within Art 6(1), on the basis that such decisions can determine or affect rights in private law: see, for instance, *Ringeisen v Austria (No 1)* (1979–80) 1 EHRR 455, para 94.

[74] In taking this step the jurisprudence of the European Court of Human Rights has drawn back from holding that Art 6(1) requires that all

administrative decisions should be susceptible of, in effect, substantive appeal to a court, with the court substituting its views for the decision made by the administrator. Article 6(1) is not so crude or, I might add, so unrealistic. Article 6(1) is more discerning in its requirements. The extent of judicial control required depends on the subject matter of the decision and the extent to which this lends itself to judicial decision. This area of the law has recently been discussed by Lord Hoffmann in *The Queen on the application of Alconbury Developments Ltd and Others v Secretary of State for the Environment, Transport and the Regions; The Queen on the application of Holding & Barnes plc v Secretary of State for the Environment, Transport and the Regions; Secretary of State for the Environment, Transport and the Regions v Legal and General Assurance Society Ltd* [2001] UKHL 23, [2001] 2 WLR 1389, paras [77]–[122].

[75] This principle, that the required degree of judicial control varies according to the subject matter of the impugned decision, is important in the context of the Children Act 1989, to which I can now turn. There is no difficulty about the making of a care order. The effect of a care order is to endow a local authority with parental responsibility for a child. Accordingly, the making of a care order affects the 'civil rights' of the parents. The making of a care order affects their rights as parents, and Art 6(1) applies. In this regard English law, expressed in the Children Act 1989, accords with the requirements of Art 6(1). A care order is made by the court, in proceedings to which the parents are parties.

[76] Likewise, the question whether a care order should be continued or discharged affects the parents' civil rights. Here also, the Children Act 1989 is in harmony with Art 6(1). Under the Act the parents may apply to the court for the discharge of the care order.

[77] The position regarding decisions taken by the local authority on the care of a child while a care order is in force is not quite so straightforward. By law a parent has rights, duties, powers and responsibilities in relation to a child. This is recognised in the definition of parental responsibility in the Children Act 1989, s 3(1). Under the Children Act 1989 the parental responsibility of a parent does not cease when a care order is made. The subject matter of decisions made by a local authority acting under its statutory powers while a care order is in force range widely, from the trivial to matters of fundamental importance to parents and children. Hence the extent to which decisions by an authority affect the private law rights of parents and children also varies widely. Some affect the continuing parental responsibility of a parent, others do not.

[78] Decisions on the day-to-day care of a child are towards the latter edge of this range. In the ordinary course disputes about such decisions attract the requirements of Art 6(1), if at all, only to an attenuated extent. The *parents'* rights in respect of the control of the day-to-day care of the child were decided by the making of the care order and the grant of parental responsibility to the local authority. Nor do such decisions involve the determination of the civil rights of the *child*. The upbringing of a child normally and inevitably requires that those with parental responsibility for the child exercise care and control over the child and make decisions regarding where the child shall live and how the child's life shall be regulated: see *Nielsen v Denmark* (1989) 11 EHRR 175, para 61. I see no reason to doubt that, insofar as Art 6(1) requires judicial control of such

decisions, this requirement is satisfied in this country by the availability of judicial review.

[79] Other decisions made by a local authority may vitally affect the parent–child relationship. Decisions about access are an example, for which the Children Act 1989 makes provision for the involvement of the court. But there are other important decisions for which the Children Act 1989 makes no provision for court intervention. A decision by a local authority under s 33(3)(b) of the Children Act 1989 that a parent shall not meet certain of his parental responsibilities for the child may, depending on the facts, be an instance. More generally, it is notable that when a care order is made questions of a most fundamental nature regarding the child's future may remain still to be decided by the local authority; for example, whether rehabilitation is still a realistic possibility. Consistently with the Strasbourg jurisprudence such decisions attract a high degree of judicial control. It must be doubtful whether judicial review will always meet this standard, even if the review is conducted with the heightened scrutiny discussed in *The Queen on the application of Daly v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.

[80] Any shortcoming here is not, strictly, made good by ss 7 and 8 of the Human Rights Act 1998. As already noted, s 8 enables the court to grant relief only in respect of conduct of a public authority made unlawful by s 6. For the present purpose the relevant public authority is the court itself. In failing to provide a hearing as guaranteed by Art 6(1) the court is not acting unlawfully for the purposes of s 6. The court is simply giving effect to the Children Act 1989: see s 6(2)(a) of the Human Rights Act 1998. The court has no power to act otherwise. Section 6 is not the source of any such power. Section 6 is prohibitory, not enabling.

[81] I hasten to add an important practical qualification. Although any shortcoming here is not strictly made good by ss 7 and 8, it is difficult to visualise a shortcoming which would have any substantial practical content. It is not easy to think of an instance in this particular field where the civil rights of parents or children, protected by Art 6(1), are more extensive than their Art 8 rights. Their Art 8 rights have the protection accorded in domestic law by ss 7 and 8. In practice this Art 8 protection would, in the present context, seem to cover much the same ground as Art 6(1). So any shortcoming is likely to be more theoretical than real.

[82] I must note also a difficulty of another type. This concerns the position of young children who have no parent or guardian able and willing to become involved in questioning a care decision made by a local authority. This is an instance of a perennial problem affecting children. A parent may abuse a child. The law may provide a panoply of remedies. But this avails nothing if the problem remains hidden. Depending on the facts, situations of this type may give rise to difficulties with Convention rights. The Convention is intended to guarantee rights which are practical and effective. This is particularly so with the right of access to the courts, in view of the prominent place held in a democratic society by the right to a fair trial: see *Airey v Ireland* (1979–80) 2 EHRR 305, para 24. The guarantee provided by Art 6(1) can hardly be said to be satisfied in the case of a young child who, in practice, has no way of initiating judicial review proceedings to challenge a local authority's decision affecting his civil rights. (In such a case, as

already noted, the young child would also lack means of initiating s 7 proceedings to protect his Art 8 rights.)

[83] My conclusion is that in these respects circumstances might perhaps arise when English law would not satisfy the requirements of Art 6(1) regarding some child care decisions made by local authorities. In one or other of the circumstances mentioned above the Art 6 rights of a child or parent are capable of being infringed.

[84] I come to the next and final step. This is to consider whether the existence of possible infringements in these circumstances means that the Children Act 1989 is incompatible with Art 6(1).

[85] Here again, the position is not straightforward. The Convention violation now under consideration consists of a failure to provide access to a court as guaranteed by Art 6(1). The absence of such provision means that English law may be incompatible with Art 6(1). The UK may be in breach of its Treaty obligations regarding this Article. But the absence of such provision from a particular statute does not, in itself, mean that the statute is incompatible with Art 6(1). Rather, this signifies at most the existence of a lacuna in the statute.

[86] This is the position so far as the failure to comply with Art 6(1) lies in the absence of effective machinery for protecting the civil rights of young children who have no parent or guardian able and willing to act for them. In such cases there is a statutory lacuna, not a statutory incompatibility.

[87] The matter may stand differently regarding the inability, of parents and children alike, to challenge in court care decisions, however fundamental, made by a local authority while a care order is in force. This matter may stand differently because, judicial review apart, the opportunity to challenge such decisions in court would be in conflict with the scheme of the Children Act 1989. This gives rise to yet another issue: whether inconsistency with a basic principle of a statute, as distinct from inconsistency with express provisions within the statute, gives rise to incompatibility for the purpose of s 4.

[88] This issue does not call for decision on these appeals. I prefer to leave it open, for two reasons. As already noted, this problem is theoretical rather than real, given the court remedies available for breach of Art 8 rights. Secondly, the issue does not need to be decided in the present case, for this reason. Even if conflict with the scheme of the Act constitutes incompatibility, the present case is not one where the House should make a declaration of incompatibility. Ordinarily the court will grant such relief only to a person who is a victim of an actual or proposed breach of a Convention right. In the *Torbay* case the essential problem was 'drift' in the local authority's implementation of the care plan. But in practice the mother did not lack a court forum in which to express her deep concern at the lack of progress. Her appeal enabled her to raise these matters in the Court of Appeal. The intervention of that court appears to have galvanised the local authority into taking the necessary action, if belatedly. I do not think there has been a violation of the mother's rights under Art 6(1).

Interim care orders

[89] I turn to the other 'revisionary application' of the Children Act 1989 adumbrated by the Court of Appeal. This concerns the extended use of interim care orders. The source of the court's power to make an interim care

order is s 38 of the Children Act 1989. The power exists when an application for a care order or a supervision order is adjourned (s 38(1)(a)) or the court has given a direction to a local authority under s 37 to undertake an investigation of a child's circumstances (s 38(1)(b)). Section 38 contains tight limits on the period for which an interim care order has effect: 8 weeks initially, thereafter 4 weeks. The circumstances in which an interim care order ceases to have effect include also the disposal of the application for a care order or a supervision order, in both s 38(1)(a) and s 38(1)(b) cases.

[90] From a reading of s 38 as a whole it is abundantly clear that the purpose of an interim care order, so far as presently material, is to enable the court to safeguard the welfare of a child until such time as the court is in a position to decide whether or not it is in the best interests of the child to make a care order. When that time arrives depends on the circumstances of the case and is a matter for the judgment of the trial judge. That is the general, guiding principle. The corollary to this principle is that an interim care order is not intended to be used as a means by which the court may continue to exercise a supervisory role over the local authority in cases where it is in the best interests of a child that a care order should be made.

[91] An interim care order, thus, is a temporary 'holding' measure. Inevitably, time is needed before an application for a care order is ready for decision. Several parties are usually involved: parents, the child's guardian, the local authority, perhaps others. Evidence has to be prepared, parents and other people interviewed, investigations may be required, assessments made, and the local authority must produce its care plan for the child in accordance with the guidance contained in local authority circular LAC(99)29 *Care Plans and Care Proceedings Under the Children Act 1989*. Although the Children Act 1989 itself makes no mention of a care plan, in practice this is a document of key importance. It enables the court and everyone else to know, and consider, the local authority's plans for the future of the child if a care order is made.

[92] When a local authority formulates a care plan in connection with an application for a care order, there are bound to be uncertainties. Even the basic shape of the future life of the child may be far from clear. Over the last 10 years problems have arisen about how far courts should go in attempting to resolve these uncertainties before making a care order and passing responsibility to the local authority. Once a final care order is made, the resolution of the uncertainties will be a matter for the authority, not the court.

[93] In terms of legal principle one type of uncertainty is straightforward. This is the case where the uncertainty needs to be resolved before the court can decide whether it is in the best interests of the child to make a care order at all. In *C v Solihull Metropolitan Borough Council* [1993] 1 FLR 290 the court could not decide whether a care order was in the best interests of a child, there a 'battered baby', without knowing the result of a parental assessment. Ward J made an appropriate interim order. In such a case the court should finally dispose of the matter only when the material facts are as clearly known as can be hoped. Booth J adopted a similar approach, for a similar reason, in *Hounslow London Borough Council v A* [1993] 1 WLR 291, [1993] 1 FLR 702.

[94] More difficult, as a matter of legal principle, are cases where it is obvious that a care order is in the best interests of the child but the immediate way ahead thereafter is unsatisfactorily obscure. These cases exemplify a problem, or a 'tension', inherent in the scheme of the Children Act 1989. What should the judge do when a care order is clearly in the best interests of the child but the judge does not approve of the care plan? This judicial dilemma was described by Balcombe LJ in *Re S and D (Children: Powers of Court)* [1995] 2 FLR 456, 464, perhaps rather too bleakly, as the judge having to choose between 'the lesser of two evils'.

[95] In this context there are sometimes uncertainties whose nature is such that they are suitable for immediate resolution, in whole or in part, by the court in the course of disposing of the care order application. The uncertainty may be of such a character that it can, and should, be resolved so far as possible before the court proceeds to make the care order. Then, a limited period of 'planned and purposeful' delay can readily be justified as the sensible and practical way to deal with an existing problem.

[96] An instance of this occurred in *Re CH (Care or Interim Care Order)* [1998] 1 FLR 402. In that case the mother had pleaded guilty to causing grievous bodily harm to the child. The judge was intensely worried by the sharp divergence of professional view on placement. The local authority cautiously favoured rehabilitation. The child's guardian ad litem believed adoption was the realistic way to promote the child's future welfare. The judge made the care order without hearing any expert evidence on the disputed issue. The local authority would itself obtain expert advice, and then reconsider the question of placement. The Court of Appeal (Kennedy and Thorpe LJJ) held that the fact that a care order was the inevitable outcome should not have deflected the judge from hearing expert evidence on this issue. Even if the issue could not be finally resolved before a care order was made, it was obviously sensible and desirable that, in the circumstances of the case, the local authority should have the benefit of the judge's observations on the point.

[97] Frequently the case is on the other side of this somewhat imprecise line. Frequently the uncertainties involved in a care plan will have to be worked out after a care order has been made and while the plan is being implemented. This was so in the case which is the locus classicus on this subject: *Re J (Minors) (Care: Care Plan)* [1994] 1 FLR 253. There the care plan envisaged placing the children in short-term foster placements for up to a year. Then a final decision would be made on whether to place the children permanently away from the mother. Rehabilitation was not ruled out if the mother showed herself amenable to treatment. Wall J said, at 265A:

> '… there are cases (of which this is one) in which the action which requires to be taken in the interests of children necessarily involves steps into the unknown … provided the court is satisfied that the local authority is alert to the difficulties which may arise in the execution of the care plan, the function of the court is not to seek to oversee the plan but to entrust its execution to the local authority.'

In that case the uncertain outcome of the treatment was a matter to be worked out after a care order was made, not before. The Court of Appeal decision in *Re L (Sexual Abuse: Standard of Proof)* [1996] 1 FLR 116 was

another case of this type: see Butler-Sloss LJ, at 125E–H. So also was the decision of the Court of Appeal in *Re R (Care Proceedings: Adjournment)* [1998] 2 FLR 390.

[98] These are all instances of cases where important issues of uncertainty were known to exist before a care order was made. Quite apart from known uncertainties, an element of future uncertainty is necessarily inherent in the very nature of a care plan. The best laid plans 'gang aft a-gley'. These are matters for decision by the local authority, if and when they arise. A local authority must always respond appropriately to changes, of varying degrees of predictability, which from time to time are bound to occur after a care order has been made and while the care plan is being implemented. No care plan can ever be regarded as set in stone.

[99] Despite all the inevitable uncertainties, when deciding whether to make a care order the court should normally have before it a care plan which is sufficiently firm and particularised for all concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future. The degree of firmness to be expected, as well as the amount of detail in the plan, will vary from case to case depending on how far the local authority can foresee what will be best for the child at that time. This is necessarily so. But making a care order is always a serious interference in the lives of the child and his parents. Although Art 8 contains no explicit procedural requirements, the decision-making process leading to a care order must be fair and such as to afford due respect to the interests safeguarded by Art 8: see *TP and KM v United Kingdom* [2001] 2 FLR 549, para 72. If the parents and the child's guardian are to have a fair and adequate opportunity to make representations to the court on whether a care order should be made, the care plan must be appropriately specific.

[100] Cases vary so widely that it is impossible to be more precise about the test to be applied by a court when deciding whether to continue interim relief rather than proceed to make a care order. It would be foolish to attempt to be more precise. One further general point may be noted. When postponing a decision on whether to make a care order a court will need to have in mind the general statutory principle that any delay in determining issues relating to a child's upbringing is likely to prejudice the child's welfare: s 1(2) of the Children Act 1989.

[101] In the Court of Appeal Thorpe LJ in *Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582, para [29], expressed the view that in certain circumstances the judge at the trial should have a 'wider discretion' to make an interim care order: 'where the care plan seems inchoate or where the passage of a relatively brief period seems bound to see the fulfilment of some event or process vital to planning and deciding the future'. In an appropriate case, a judge must be free to defer making a care order until he is satisfied that the way ahead 'is no longer obscured by an uncertainty that is neither inevitable nor chronic'.

[102] As I see it, the analysis I have set out above adheres faithfully to the scheme of the Children Act 1989 and conforms to the procedural requirements of Art 8 of the Convention. At the same time it affords trial judges the degree of flexibility Thorpe LJ is rightly concerned they should have. Whether this represents a small shift in emphasis from the existing case-law may be a moot point. What is more important is that, in the words

of Wall J in *Re J (Minors) (Care: Care Plan)* [1994] 1 FLR 253, 262, the court must always maintain a proper balance between the need to satisfy itself about the appropriateness of the care plan and the avoidance of 'over-zealous investigation into matters which are properly within the administrative discretion of the local authority'. This balance is a matter for the good sense of the tribunal, assisted by the advocates appearing before it.

The outcome of the appeals

[103] I would dismiss the appeal of the mother in the *Torbay* case. When rejecting the mother's submission that the appropriate order was an interim order, Her Honour Judge Sander regarded the care plan as clear. The work and therapy would take months. The outcome was neither known nor certain, but the children needed the security of not having further court proceedings hanging over them. I can see no basis for faulting the judge's decision to proceed to make a full care order at once.

[104] Nor do later events provide good reason for now discharging the care order and substituting an interim care order. That would be simply a means of enabling the courts to monitor Torbay Council's discharge of its parental responsibilities. Happily, however egregious the past failings of Torbay Council, the current position is that all seems to be going well.

[105] I would allow the appeals of the Secretary of State for Health and Bedfordshire Council so far as they have challenged the Court of Appeal's introduction of the starring system. Her Honour Judge Sander's 'starring' order dated 2 July 2001 should be set aside.

[106] I must finally make an observation of a general character. In this speech I have sought to explain my reasons for rejecting the Court of Appeal's initiative over starred milestones. I cannot stress too strongly that the rejection of this innovation on legal grounds must not obscure the pressing need for the Government to attend to the serious practical and legal problems identified by the Court of Appeal or mentioned by me. One of the questions needing urgent consideration is whether some degree of court supervision of local authorities' discharge of their parental responsibilities would bring about an overall improvement in the quality of child care provided by local authorities. Answering this question calls for a wider examination than can be undertaken by a court. The judgments of the Court of Appeal in the present case have performed a valuable service in highlighting the need for such an examination to be conducted without delay.

LORD MACKAY OF CLASHFERN:

My Lords,

[107] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead. I agree that these appeals should be allowed to the extent that he has proposed and with the reasons he has given.

[108] Since I had a part in the process of enacting the Children Act 1989 and in a public lecture I had suggested that the idea of starring stages of a care plan should be considered so that the court might have an opportunity of considering whether to intervene if the plan was not being carried out, I feel it appropriate to add some observations. At the start of the hearing I

invited counsel to say whether any party had any objection to my sitting and I was glad to be told on behalf of all parties they had no such objection.

[109] When the Children Act 1989 was enacted the UK was a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 although at that time the Convention was not incorporated into our domestic law. Accordingly the Act was framed in a way which took account of the terms of the Convention as then understood. For example, s 34 of the Children Act 1989 is a reflection of the requirement that a dispute relating to access is for decision by the court. In my opinion, the fundamental change brought about by the Act placing the responsibility for looking after children who are the subject of care orders squarely on the local authorities is not in any way incompatible with the Convention. In discharging its responsibility the local authority has the duty of respecting the Convention rights of the child and of each member of the child's family. If a dispute arises whether this duty has been breached in any particular case the person aggrieved can now invoke the court's jurisdiction to determine it, under s 7 of the Human Rights Act 1998, if no other route is available. I agree that insofar as there are rights conferred in our domestic law which are not Convention rights, there may be a lacuna but I doubt whether this involves any substantial content. If the duty is breached in respect of a child who has no person to raise the matter on his behalf, for example an orphan, an important question arises, to which I must now turn.

[110] Over the years since the Children Act 1989 took effect there have been far too many cases in which the system has failed children in care. Lord Nicholls of Birkenhead has referred to the then Secretary of State's response to Sir William Utting's report in November 1997 and the subsequent Quality Protects Programme. That there are still serious problems in this field is evident from the powerful statements in the Court of Appeal in the present case and the decision in *Re F; F v Lambeth London Borough Council* [2002] 1 FLR 217 to which my Lord has referred. It was strongly submitted by the guardians that the measures taken for example by Bedfordshire County Council, though welcome, were not sufficient to eliminate these problems.

[111] When I suggested that a starring system should be considered it was in order to address these problems generally rather than problems with human rights that I had in mind. Having had the benefit of the very clear and cogent arguments which have been advanced to your Lordships I consider that there is no guarantee that the system would identify only the cases with genuine problems or that all the cases with such problems would be identified. There is no necessary correlation between failure to meet dates predetermined as important at the time the care order is made and serious deficiency in the care provided to the child. The system would require resources and to the extent that it did not meet its aims these would be wasted.

[112] In agreeing that the appeal should succeed against the starring I would strongly urge that the Government and Parliament give urgent attention to the problems clearly described by the Court of Appeal and by my noble and learned friend so that we do not continue failing some of our most vulnerable children.

[113] As a practical matter I do not see how a child who has no person to raise the matter on his behalf can be protected from violation of his or her

human rights or the rights conferred on him or her by our domestic law, other than by reliance on an effective means by which others bring the violation to notice.

LORD BROWNE-WILKINSON:
My Lords,
[114] For the reasons given by my noble and learned friend, Lord Nicholls of Birkenhead with which I agree, I too would allow these appeals to the extent which he proposes.

LORD MUSTILL:
My Lords,
[115] For the reasons given by my noble and learned friend, Lord Nicholls of Birkenhead with which I agree, I too would allow these appeals to the extent which he proposes.

LORD HUTTON:
My Lords,
[116] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead. I agree with it and for the reasons which he gives I would make the orders which he proposes.

Appeal of mother dismissed; appeals of local authority and Secretary of State allowed; no order as to costs save for legal aid taxation.

Solicitors: *Hooper & Wollen* for the mother
Department of Health Solicitor for the Department of Health
Woollcombe Beer Watts for the guardian ad litem (in the case of *S*)
Local authority solicitor
Motley & Hope for the parents
Sharpe Pritchard acting as agents for Bedfordshire County Council
Borneo Linnells for the guardian ad litem (in the case of *W*)

PHILIPPA JOHNSON
Barrister