M v WESTMINSTER CITY COUNCIL

Family Division

Bush and Butler-Sloss JJ

10, 11 July 1984

Care proceedings – Application on ground that children's proper development being avoidably prevented or neglected – Evidence of neglect – Children in care under place of safety order and interim care orders – Being properly cared for – Whether court limited to finding neglect at date of hearing

Care proceedings – Children found to be in need of care – Appropriate order – Discretion of court – Local authority seeking care order but proposing to leave child in day-to-day care of mother – Whether wrong in law to make a care order

Care proceedings – Hearing – Submission of no case to answer – Whether party submitting no case should be put to his election – Desirability of hearing all the evidence

Procedure – Care proceedings – Submission of no case to answer – Whether party submitting no case should be put to his election – Desirability of hearing all the evidence

Procedure – Care proceedings – Power of court to find no case to answer – Circumstances in which that power should be exercised.

Section 1 of the Children and Young Persons Act 1969 makes provision for bringing care proceedings in a juvenile court. Section 1 (2) provides:

> 'If the court before which a child or young person is brought under this section is of opinion that any of the following conditions is satisfied with respect to him, that is to say –
> (*a*) his proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being illtreated. . ..'

Then follow other conditions in paras. (*b*) to (*f*). The conditions set out in paras. (*a*) to (*f*) are known as 'the primary conditions'. Subsection (2) continues:

> '. . . and also that he is in need of care or control which he is unlikely to receive unless the court makes an order under this section . . . the court may if it thinks fit make such an order.'

This is known as 'the secondary condition' or 'the care or control test'. The orders which the court may make are set out in s. 1(3) and include a supervision order and a care order.

The local authority applied for a care order in respect of twin girls who were just over a year old. The mother had associated with the father of the twins. Mr M, for a period of at least 3 years. She had a drink problem which had led to a number of convictions for drunkenness. Mr M also had a drink problem and had an erratic lifestyle and he had been violent and abusive to the mother. The mother had made allegations of assault leading to court proceedings but had always withdrawn them before the hearing. She had several times declared an intention to leave Mr M but had not done so. The care proceedings came before the juvenile court on 17 February 1984 and on the same day the mother had refused to give evidence against Mr M in another magistrates' court.

The mother had an older daughter, Z. Mr M was not Z's father but the mother was associating with him at the time of Z's birth in September 1981. In February 1982 the local authority brought care proceedings in respect of Z. At that hearing

the mother said she would give up drink and end her association with Mr M. A supervision order was made. Two weeks later the mother was drinking again and had left Z alone. In March 1982 a care order was made in respect of Z. After a short period the local authority returned Z to live with the mother but the care order remained in force.

So far as the twins were concerned, the evidence was that the drink problems of the mother and Mr M continued, that they had been arrested for drunkenness in November 1983 when the children had been left alone, that the children were present during violent scenes between the mother and Mr M, and that the parents showed a lack of reaction to the children in times of stress. A place of safety order was obtained on 29 November 1983 and, subsequently, interim care orders were made in respect of the twins until the care proceedings were heard on 17 February 1984. On 20 January 1984 the local authority returned the twins to the mother, the current interim care order remaining in force. The local authority stated that if the magistrates made a care order it was their intention that the twins would be placed with the mother.

At the end of the local authority's case, the solicitor for the children intimated that he proposed to call no evidence on behalf of the children. The solicitor for the mother sought to make a submission of no case to answer. The magistrates refused to allow that submission to be made because the mother was not a party to the proceedings and, further, because they held that if they allowed a submission to be made but rejected it the mother would have been unable to give or call evidence.

After all the evidence, including that given by and on behalf of the mother, had been given, the solicitor for the mother submitted that, having regard to the use of the present tense in s. 1(2) (*a*) of the 1969 Act (the child's 'proper development *is being* avoidably prevented or neglected'), the court must look at the situation at the date of the hearing; and as, in this case, the evidence showed that the mother had cared for the children well from 20 January until the hearing on 17 February, it could not be said that at the latter date their proper development was *then* being avoidably prevented or neglected. The magistrates rejected this submission and held that they should look at the position when the proceedings were started in the light of any subsequent relevant factors. The magistrates held that it was open to them to find that the condition under s. 1(2) (*a*), the primary condition, was made out notwithstanding that the mother was currently caring for the children satisfactorily. Further, the magistrates held that although the secondary condition (the care and control test) had to be decided on the situation at the date of the hearing, the facts allowed them to find that the twins were unlikely to receive the care they needed unless the court made an order. In all the circumstances, the magistrates were of opinion that, although the children were to be left with the mother, a supervision order would not provide sufficient motivation for the mother to provide adequate care for the twins and that a care order was appropriate.

The mother appealed by way of case stated.

Held – dismissing the appeal –

(1) In care proceedings the court should adopt the practice followed in matrimonial cases and exercise its power to dismiss the case at the conclusion of the complainant's case only in exceptional cases (see Note below). Therefore, although there was an inherent jurisdiction in a magistrates' court to control its proceedings in care cases and to allow such legal representation as was necessary in the interests of justice, it would not normally be appropriate for the parent, who was not a party, to submit no case to answer. Consequently, in the circumstances of this case, the magistrates were not wrong in law in refusing to allow the solicitor for the mother to submit that there was no case to answer.

R v Milton Keynes Justices [1979] 1 WLR 1962 and *R v Gravesham Juvenile Court* (1983) 4 FLR 312 followed. Observation of Scarman J in *Bond v Bond* [1967] P 39 adopted.

(2) If an advocate proposed to make a submission of no case to answer in care

proceedings, magistrates should be slow to exercise their discretion to require the advocate to elect whether he would call evidence or stand on his submission. It was preferable to hear all the evidence in such cases and it would rarely be appropriate to put an advocate to his election and thereby exclude evidence which might be material to the welfare of the child. (See Note below.)

(3) The use of the present tense in s. 1(2) (*a*) of the 1969 Act clearly prevented a court from making an order under the section merely for fear of future neglect or harm where there was nothing presently in the condition of the child whereby his proper development was being avoidably prevented or neglected. But if there was evidence of treatment or neglect adversely affecting the child, the mere fact that there had been a temporary respite in such treatment or neglect did not mean that the court must find that the condition under s. 1(2) (*a*) was not made out. The words 'is being' indicated a situation over a period of time sufficiently proximate to the date of the inquiry to indicate that it was a present and continuing set of circumstances and not mere history or possible future events. Whether the evidence satisfied this criterion was a matter of fact and degree. The magistrates' approach to this case, namely that they should look at the position when the proceedings were started and interpret it in the light of anything relevant that had happened since was an entirely proper one. There was ample evidence from which they could find that the condition in s. 1(2) (*a*) had been made out, notwithstanding that the children were being well cared for at the date of hearing.

F v Suffolk County Council (1981) 2 FLR 208 followed. *Essex County Council v TLR and KBR* (1979) 9 Fam. Law 15 explained (see Note below).

(4) Once the primary condition was proved (in this case the condition under s. 1(2) (*a*) of the 1969 Act), the court should consider all the circumstances of the case to determine whether the child was in need of care and control which he was unlikely to receive unless the court made an order under the section. In this case it was a relevant factor that the children had been properly cared for by the mother for 4 weeks prior to the hearing. It was also a relevant factor that there were facts from which the magistrates could properly find that the mother lacked insight and stability and that the existence of the interim care order had had the effect of ensuring that the mother gave proper care to the children. Therefore, the magistrates were entitled on the evidence to find that the secondary condition (the care and control test) was satisfied and, in the exercise of their discretion, to find that a care order should be made. It was not wrong in law to make a care order in a case where the local authority intended to leave the child (or children) in the day-to-day care of a parent. On the facts of this case there was nothing to indicate that the magistrates were wrong in exercising their discretion to make a care order.

Note

Finding no case to answer. In *Bond v Bond* [1967] P 39 Scarman J, giving the judgment of the court, said at p. 47G:

> '. . . there are very few matrimonial cases in which justice can be done without hearing both sides. Magistrates have the power to dismiss a complaint at the conclusion of a complainant's case, but it is a power to be exercised only in exceptional cases: for example, where no credence can be given to the complainant's evidence, or where it is crystal clear that the complainant has no case in law.'

Submission of no case to answer. For the discretion to put an advocate to his election when submitting no case to answer in a civil case see *Rayden on Divorce* 14th edn (1983), pp. 583/4 and 1277/8; *Pugh's Matrimonial Proceedings before Magistrates* 4th edn (1981), pp. 37/8; and *Stone's Justices' Manual* 1984 edn, pp. 449/ 450. See also r. 14(2) of the Magistrates' Courts Rules 1981 and note thereto at p. 6067 of *Stone.*

Essex County Council v TLR and KBR. The full report of this case at (1979) 143

JP 309 confirms the view taken by Bush and Butler-Sloss JJ of the facts and the basis of the decision.

Statutory provisions considered
Children and Young Persons Act 1969, s. 1

Cases referred to in judgments
Bond v Bond [1967] P 39; [1965] 2 WLR 1008; [1964] 3 All ER 346
Essex County Council v TLR and KBR (1979) 9 Fam Law 15[1]
F v Suffolk County Council (1981) 2 FLR 208
R v Gravesham Juvenile Court ex parte B (1983) 4 FLR 312
R v Milton Keynes Justices ex parte R [1979] 1 WLR 1062

APPEAL by way of case stated.

The mother of twin girls appealed by way of case stated from a decision of the Westminster North juvenile court remitting the children to the care of the Westminster City Council. The case as stated by the magistrates was as follows:

CASE

1. On 5 December 1983 notice under s. 1(2) (*a*) of the Children and Young Persons Act 1969 were issued by the respondent alleging that the following condition was satisfied in respect of each of the twin infants, that is to say: her proper development was being avoidably prevented or neglected or her health was being avoidably impaired or neglected or she was being ill-treated.

And it was further alleged that the infants were in need of care and control which they were unlikely to receive unless the court made an order under s. 1 of the said Act.
2. We heard the case on 17 February and found the following facts:

> A. The mother is the mother of the twins and of Z, a girl aged 2½. She also has some older children, not in her care.
> B. Z is the subject of a care order to Westminster City Council but is placed at home with her mother.
> C. The mother has for a long time had a drink problem and has been seen drunk by the police and by social workers. She has a number of convictions for drunkenness. She is being helped to overcome the problem with the drug Antibuse. She does not accept the extent of her problem and believes her resistance to drink to be stronger than it actually is.
> D. The mother has associated since before Z's birth with Mr M and he is the father of the twins. He has a problem with drink and possibly drugs. His life-style is erratic and he has been violent and abusive to the mother. Despite declaring her intention to part from him, the mother has on several occasions become reconciled with Mr M and has also withdrawn allegations that he has assaulted her. On the morning of our hearing, the mother refused to give evidence against him in a magistrates' court because a suspended sentence might have been activated against him if he had been found guilty.
> E. At the care hearing in respect of Z, the mother said she had given up drink and her relationship with Mr M. A supervision order was made on 15 February 1982. Two weeks later the mother was drinking again and left Z alone. A place of safety order was taken and further court proceedings resulted in the care order being made in respect of Z on 19 March 1982.

1 A full report of Essex County Council v TLR and KBR appears at (1979) 143 JP 309.

F. On 9 July 1983 the children were left alone at home.
G. On 27 June 1983 in the presence of Z, the mother, holding a bread knife and a vegetable peeler, taunted Mr M to fight. Neither of them heeded cries from the twins who were upstairs.
H. On 4 August 1983 the mother had been drinking. Mr M came in very angry, seized a hammer and broke up the kitchen table. Z was present and fell under the table but neither the mother nor Mr M went to her. Z was very frightened. The twins were in the pram nearby.
I. In November 1983 the mother took an overdose of drugs and was admitted to hospital.
J. On 29 November 1983 the mother and Mr M were both arrested for being drunk. The twins and Z had been left alone at their home.
K. A place of safety order was obtained. The mother visited the children regularly after the making of that order and voluntarily co-operated with her social worker.
L. On 21 December 1983 the mother obtained an injunction against Mr M. It was still in force when we heard the case on the 17 February.
M. Interim care orders were made in respect of the twins but they had been placed with the mother on 20 January 1984 and she was looking after them well.
N. If we found the case proved and made a care order, the council intended to place the twins with the mother.

3. It was contended on behalf of the mother that we should allow a submission to be made on her behalf, after hearing the local authority's evidence and hearing that no evidence was to be called for the children, that there was no case to answer.

It was further contended on her behalf at the end of all the evidence that we should look at the situation on the day we were hearing the case (and not when the proceedings were started) as to whether the two legs under s. 1 of the Children and Young Persons Act 1969 were proved. It was contended that the problem was not one which had arisen because of drink but because of Mr M, and that the mother had changed since the proceedings were started.

4. It was contended on behalf of the children after the evidence for the local authority had been given that they were parties to the proceedings and not the mother; and that their representative could not ethically make the submission the mother desired to be made. The representative submitted, however, that it was in the interest of the children that the mother be allowed to make her submission.

5. It was contended for the local authority that one could not merely look at the situation at the date of the hearing. One will not be able to say of a child cared for away from home on interim care orders that at that date he 'is being ill-treated'; one must therefore always look back to the date of the proceedings being started for the primary condition as if time were frozen.

6. We were of the opinion that:

A. It would be wrong to allow a submission of no case to answer to be made by someone who was not a party, when the relevant party was not prepared to make the submission. In any event, in our view there was a case to answer. We observe that had we allowed the submission to be made but rejected it, the mother would not have been able to give or call evidence.
B. At the end of the case, in deciding on the primary condition, we had to look at the position when the proceedings were started but were entitled to interpret it in the light of anything relevant which had happened since. The care and control test must be decided on the facts at the date of our hearing. In any event, the situation on the day of the hearing was in a state of confusion. Mr M had

been in custody until that very morning when the mother had refused to give evidence against him in the magistrates' court on the grounds that had he been found guilty a 2-year suspended sentence would have been activated.

C. Although Mr M caused or made worse many of the difficulties, we could not say that the mother's drinking was always due to him. In view of her past behaviour and the fact that on that very day she had refused to testify against him, we believed that she might well change her mind again and accept him back.

D. Although there was no medical evidence to say how the twins had been affected, the fact that they had been left alone, their presence during violence, the evidence of drink and the parents' lack of reaction to children at times of stress, led us to the inevitable conclusion that their proper development was avoidably being prevented or neglected.

E. The fact that the mother had coped well during a comparatively short period under an interim care order with court proceedings pending did not cause us to change our conclusion.

F. The care and control test was satisfied, notwithstanding that the mother had managed well during this short period and notwithstanding the council's expressed intention of leaving the twins with her if a care order was made. Unless the restraint of a court order was present, we were of opinion that the twins were unlikely to receive the care they needed. The mother lacked insight and stability. A supervision order would not provide sufficient motivation; this had been clearly shown in the case of Z, whose supervision order had broken down after only 2 weeks.

And accordingly we found the care proceedings proved and ordered that the children be placed in the care of the City of Westminster.

QUESTIONS

7. The questions for the opinion of the High Court are:

1. Were we wrong in law in refusing to allow the mother's solicitor to make a submission that a prima facie case had not been established at the conclusion of the evidence by the council and/or the children?

2. Were we wrong in law in deciding there was prima facie evidence that the primary condition under s. 1(2)(*a*) of the Children and Young Persons Act 1969 was satisfied, the condition being: 'the children's proper development is being avoidably prevented or neglected or their health is being avoidably impaired or neglected or they are being ill-treated'?

3. Were we wrong in law in deciding that the said primary condition was satisfied and finding that 'the children's proper development is being avoidably prevented or neglected or their health is being avoidably impaired or neglected or they are being ill-treated', when the children had been cared for by their mother in her home satisfactorily for a period prior to the hearing and the council intended to leave the children in their mother's care?

4. Were we wrong in law in deciding that the children were in need of care and control which they were unlikely to receive unless the court made a care order under s. 1(2) of the Children and Young Persons Act 1969 when the children had been cared for by their mother in her home satisfactorily for a period prior to the hearing and the council intended to leave the children in their mother's care?

5. Were we wrong in law in making a care order rather than a supervision order or no order when the children had been cared for by their mother in her home satisfactorily for a period prior to the hearing and the council intended to leave the children in their mother's care?

Jane Hoyal for the mother;
Barbara Slomnicka for the local authority;
Jane Drew for the guardian ad litem.

BUSH J:
I will ask Butler-Sloss J to deliver the first judgment.

BUTLER-SLOSS J:
This is an appeal by a case stated by the Inner London Area justices of the Westminster North juvenile court in respect of two children, twins, both girls, born on 3 April 1983. They are therefore now just over a year old. They have an elder sister, Z, who was born on 15 September 1981. The appellant is the mother of the children and those responding to the case stated are the local authority, in whose care the children are at the moment, and, indeed, the counsel on behalf of the children themselves who supports counsel for the local authority in all the submissions made including the fact that the care order should continue.

The short facts of this case are that the elder sister Z is the subject of a care order and has been placed at home with her mother. There are two other children, older, whose whereabouts are not relevant to this appeal. The mother has a drink problem which she has had over a number of years the extent of which she does not accept but has been making some efforts to overcome it. She has associated with the father of the twins, Mr M, since before the birth of their elder sister Z, of whom he is not the father. He has problems with drink, and possibly with drugs, with an erratic life-style whereby he has exhibited on occasions violence and abuse towards the mother. There have been declarations on the part of the mother on several occasions to part from the father but she has become reconciled on each occasion except the last. She has made and withdrawn allegations of assault which have been pursued to court proceedings, which have therefore not continued and, indeed, on the morning of the hearing before the justices on the 17 February 1984 she had refused to give evidence against him in a magistrates' court because a suspended sentence might have been activated against him if he had been found guilty.

The history of Z, which is relevant to the way in which the justices dealt with the children, is that there were care proceedings in February 1982. The mother said at that time she would give up drink and, indeed, that she would give up the father of the twins. There was a supervision order on 15 February 1982 but 2 weeks later the mother was found drinking and had left Z alone. After a place of safety order there was a care order made in respect of Z on 19 March 1982 and in due course she was returned to live with her mother.

So far as the twins are concerned, the evidence, briefly, in respect of their care was that between 1982 and 1983 on two occasions the children have been left entirely alone. On the second occasion, on 29 November 1983, the mother and father had been arrested by the police for being drunk and taken to the police station. There were also incidents of violence between the mother and father. On one occasion there were threats by the mother against the father in which she had a knife, and on another occasion when the mother was drunk the father seized a hammer and broke up the kitchen table. On each occasion the children were present in the house and I think on one of those occasions the twins were in the pram

nearby. Z certainly was involved in the incident at the table and she fell under it.

In November 1983 the mother took an overdose of drugs; and after the incident of 29 November, when the children had been left alone and they became aware at the police station that that had happened, there was a place of safety order and in due course the children were taken away. There was an injunction by the mother against the father which was in force at the time of the hearing before the justices. The mother regularly visited the children when they were in care and she has voluntarily co-operated with the social worker since the place of safety order. There have been interim care orders and the mother received the children back on 20 January 1984 while the interim care order continued. Evidence was accepted by the justices that from the moment that she received the children back until the date of the hearing, which was just under a month, she was looking after the children well. It was part of the evidence before the justices that, if a case under s. 1(2) (*a*) of the Children and Young Persons Act 1969 was proved, these children would remain with the mother for the time being even though the local authority was asking for a care order under s. 1(3) of the Children and Young Persons Act 1969.

On 17 February the justices found both parts of s. 1(2) proved, that is to say in the words of subs. (2) (*a*):

> '. . . his proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being illtreated. . . .'

They found in respect of each child that the child was in need of care and control which she was unlikely to receive unless the court made an order, and, in their discretion, under subs. (3), the justices made a care order.

The mother, who was represented by a solicitor at the hearing, asked for a case to be stated to this court and the justices have produced a case with five questions. If I may say so, for my part I take the view that this is a model of the way in which a case should be stated. It is clear, helpful, sufficiently ample but succinct in its conclusions and, indeed, in the questions which are before this court. I found the form and the style indeed of this case stated absolutely admirable.

The first question posed, which has in fact taken up the major part of the time of the court, particularly by way of the argument of the appellant mother, relates to the question as to whether the mother's solicitor ought to have been allowed to make a submission at the close of the evidence of the local authority and after the solicitor for the children had indicated that no evidence would be called on their behalf, that no case had been established. The magistrates refused to allow the mother's solicitor to make that submission at that stage and the mother thereafter gave and called evidence, and at the end of the case we have been informed, she having had the opportunity to cross-examine the local authority evidence and to call her own and give her own evidence, she was, through her solicitor, permitted to make two separate speeches: one on the law, as to whether the primary condition under s. 1(2)(*a*) and, indeed, the care or control requirement had been established; and, secondly, as to what should happen to the children under subs. (3) of the 1969 Act.

However, it is a primary matter of appeal to this court that this mother should have had the right, which has been amended in the observations made by counsel for the mother in reply to the other submissions, that there was a discretion in the justices, but, nevertheless, she should have been allowed to make the submission. She certainly put it to us in her first submissions that she should have the right to make a submission of no case.

The opportunity for the parent who is not a party in care proceedings in the juvenile court to be heard is to be found in r. 14B of the Magistrates' Courts (Children and Young Persons) Rules 1970 which says:

> '. . . the relevant infant's parent or guardian shall be entitled –
>
> (a) to meet any allegations made against him in the course of the proceedings by calling or giving evidence. . . .'

The second part is not relevant to this appeal.

This problem, if it be a problem, as to how far the parents' legal advisers may take part in the proceedings in the juvenile court where they are not parties, has been considered on two occasions in particular: first, in *R v Milton Keynes Justices ex parte R* [1979] 1 WLR 1062 which considered the question of cross-examination; secondly, in *R v Gravesham Juvenile Court ex parte B* (1983) 4 FLR 312. It is not necessary for me to refer further to the *Milton Keynes* case, but Forbes J in the *Gravesham Juvenile Court* case considered the various ways in which the magistrates ought to have been dealing with this sort of problem, and he followed what was said in the *Milton Keynes* case, that there was an inherent jurisdiction of a magistrates' court to control its own court and that they ought to allow such legal representation as was necessary to see that the interests of justice were properly served and that should be to the extent necessary to discharge the interests of justice and this might involve taking a full part in the proceedings or only a lesser part. There can be no doubt that the justices have a right to control their proceedings as they think best and that they should allow the parent, under r. 14B of the 1970 Rules, to give evidence and to call evidence and to cross-examine. It must be right – I understand it is the practice – that at the conclusion of the case the representative of the mother should have an opportunity to address the justices on all the matters that the justices have to consider and to allow, so far as necessary, the intervention by the parents' legal representative. That is a far cry from saying that at the conclusion of the case for the local authority the parent should have a right to make a submission of no case. I would, for my part, venture the general proposition that it would be preferable in most cases for a juvenile court to hear all the evidence before coming to a conclusion as to what is best for the children and whether or not the various matters which it is necessary for them to find have been proved, and other than in exceptional cases it would be undesirable to have a submission of no case half way through. I would draw an analogy with matrimonial proceedings where this was set out by Scarman J (as he then was) in the case of *Bond v Bond* [1967] P 39. The proposition set out by that distinguished judge would seem to me to be appropriate for juvenile courts and courts dealing with children.

The justices, in considering this problem, it has been suggested by counsel for the mother, did not exercise their discretion in considering

whether or not they should allow such a submission. Since I have already said that in my view it would only be in exceptional cases that they should exercise their discretion in this way, it may not be necessary to go further because I, for my part, do not consider this to be an exceptional case. But in para. 6A of the case stated the justices took the view – and I am quite satisfied they were exercising their discretion in taking this view – that it would be wrong for them to have a submission of no case made by someone who was not a party when the children's legal representative was not making a submission, and they took the view that they thought there was a case to answer; not that they had pre-judged the matter but they were concerned at what has been a fairly general practice in magistrates' courts of putting a party to election. If a submission of no case is made then a party may not have the opportunity to call evidence, and this was undoubtedly in the minds of the justices because they go on to say:

> 'We observe that had we allowed the submission to be made but rejected it, the mother would not have been able to give or call evidence.'

I am satisfied that they did consider all aspects of this problem. They had in their minds the problem of election. I would consider that they would have in this sort of case a discretion as to whether they put a party to election in a 'child' case. The general proposition that I have already put would avoid this particular problem because it must be preferable in general for the justices to hear everything before they come to a conclusion on the matters which they have to decide.

Therefore, my answer to the justices' question 1 is that they were not wrong in law in refusing to allow the mother's solicitor to make a submission that a prima facie case had not been established at the conclusion of the evidence by the council and/or the children.

Questions 2 and 3 raised similar matters. In question 2 the justices ask whether they were wrong in law in deciding that there was prima facie evidence that the primary condition was satisfied under s. 1(2) (*a*) of the 1969 Act (I have already read the relevant part of the section) and in question 3 they ask whether they were wrong in law in deciding that that was satisfied when the children had been cared for by their mother in her home satisfactorily for a period prior to the hearing and the council intended to leave the children in their mother's care. On the way in which this appeal has come before us this raises two separate matters, the first being of greater importance than the second because counsel for the mother in her very careful submissions to us has raised the question as to when the justices should consider that the proper development of the child is being avoidably prevented or neglected. Miss Hoyal submits that the time at which one must consider that is at the date of the hearing and it is not appropriate to look at any time prior to the date of the hearing, nor to any time subsequent to that date. This argument having been put to the justices in the lower court, they say in para. 6B of their opinion:

> 'At the end of the case, in deciding on the primary condition we had to look at the position when the proceedings were started but were entitled to interpret it in the light of anything relevant which had happened since.'

The date of the summons before the justices was, I believe, 5 December 1983 and at that particular date the children were in a nursery, having been removed from home on 29 November when the parents were arrested. The date at which the matter came to be considered by the justices was 17 February 1984. Counsel for the mother says that there must be a strict interpretation, one must look at the words 'is being avoidably prevented or neglected or is being avoidably impaired' as being at the date of the hearing and not at the time of the start of proceedings and she prays in aid a very brief report of a decision of the Divisional Court of the Queen's Bench, *Essex County Council v TLR and KBR* (1979) 9 Fam Law 15. This was a case under s. 1(2) (*a*) of the 1969 Act where it was held on appeal that the section of the Act was only concerned with presently existing events and not with future events, no matter how imminent those events might be. That was a case where the children had been placed with foster parents some 2 years before the father informed the local authority that he would like to take the children out of the care of the foster parents and take them to live with his new wife in Northern Ireland. I, for my part, have very little difficulty in finding that the facts of this case are such that it would be quite inappropriate to find that the primary condition under s. 1(2) (*a*) could be proved. There was no past and there was no present but there was concern for the future and, looked at in that way, I would, with the greatest respect, entirely agree with the decision of the Divisional Court of the Queen's Bench. This matter was further considered in the Queen's Bench Divisional Court in the case of *F v Suffolk County Council* (1981) 2 FLR 208 by McNeill J. He considered both paras. (*a*) and (*bb*) of s. 1(2) and considered the decision to which I have just referred of the *Essex County Council.* At p. 213D he said:

> 'The facts of the *Essex County Council* case were very far removed from those of the present case.' [I interpose to say very far removed from the case with which this court is dealing.] 'That was a case in which children . . . were fostered. . . .' [The judge dealt with that and then at letter E he said:] 'What the court has to consider, as I see it, is this: is there present avoidable neglect or prevention? That is the present tense application to those words. Is that something which is happening now, or it may be has happened, with the result that the proper development of the child is affected in those ways? The proper development of the child is a continuing process, past, present, and future and what the court has to look at, in my view, is the present conduct and its effect on the development of the child in the past, at the present time and at any rate in the foreseeable future. Development being a continuing matter, I do not think this section is intended to rule out of consideration either mental development or development in its broadest and continuing sense.'

With some possible qualification as to how far it would be in the foreseeable future, I respectfully entirely agree with that proposition of McNeill J in that case.

If Miss Hoyal, for the appellant, is right, then there will be virtually no cases under s. 1(2) (*c*) where the children have been removed from home in which it would be possible to find the primary condition in the subsection proved. One has only got to take the example of the very young child who

has been battered and who is then put in a foster home who has recovered from the injuries by the time the case is heard, there having been perhaps a number of adjournments in order, as Miss Slomnicka in her submissions to us points out, to wait for the criminal proceedings that may arise; such a child by the time he is in foster care and has recovered from his injuries, as, fortunately, very young children often do, would not be, on the analogy of Miss Hoyal for the appellant, conceivably within the ambit of 'is being avoidably prevented'. Or, indeed, one could have a situation, again with a very young child who, even 2 or 3 months before, had been taken away after a long course of fairly minor injuries and was placed with foster parents and it would be impossible to say of such a child that the development is being avoidably prevented as at the date of the hearing, because there may be great difficulty in saying, with a very young child, how far that could possibly arise. Miss Hoyal says, however illogical, the proper interpretation is not to look at the past or the future but expressly at the immediate present, that is to say the date of the hearing and the way to deal with it is to take a fresh place of safety order. It would of course have the result that since the primary condition must be fulfilled before the juvenile court can find a child is in need of care and control, which it is unlikely to receive unless the court makes an order, subs. (3) cannot arise and there could not be any sort of order contemplated, even a supervision order, under subs.(3).

For my part, I find it impossible to find that for the primary condition to be established the child's proper development can only be considered as being avoidably prevented at the time of the hearing. A child's development is a continuing process. The present must be relevant in the context of what has happened in the past and it becomes a matter of degree as to how far in the past you go. It must be as, indeed, counsel for the children has urged upon us, in the interests of the children themselves that one should look at the past and, since we are considering the development of the children, we must look to see what it is that we must look at. I take the view that this very restrictive approach, put forward with great enthusiasm by counsel for the appellant, is quite inappropriate to the way in which one should look at the proper development of a child. Therefore, the magistrates' approach to this case, whereby they said that you look at the position when the proceedings where started and are entitled to interpret it in the light of anything relevant which has happened since, was an entirely proper way for them to consider this matter, and it leaves out any problems there may be as to the future because it is clear from their case that they did not consider the future in respect of the primary condition.

It is right, it seems to me, looking at the primary conditions, that they should not be looked at as alternatives but looked at as a whole. I have no doubt, once one accepts the position that you are not restricted to the day of the hearing, that the magistrates had adequate evidence upon which they were entitled to find the primary conditions proved. Indeed, as I understand it, from her submissions in reply, counsel for the appellant accepts that position. But I would just say that by paras. 6B, C and D, these were all matters which were carefully set out by the justices. In particular, the fact that the children had been left alone, their presence during violence, the evidence of drink and the parents' lack of reaction to children at times of stress, led the justices to the inevitable conclusion that

their proper development was avoidably being prevented or neglected. If one adds to that, in paragraph 6B, the refusal of the mother to testify on the day of the hearing against the man whom, it seems to be clear, was not a very benign influence upon the family, with the possibility that she might change her mind again and accept him back, that had, at the very least, an element of confusion, an ambivalence of approach by the mother. Although raised by the justices, they do not put these matters into the balance in respect of the primary conditions. In my view, they would have been entitled to do so. The fact that the mother had the children at home with her for just under 4 weeks and was managing to look after them well under the very stringent conditions of a care order, where she would be well aware – it must be a matter of fact – that the children could be taken from her at any time, would not, in my view, detract from the approach of the justices that the evidence was available from which they could find the primary conditions and, indeed, as I have said, counsel for the appellant has not argued very strenuously against that part of the case. So to questions 2 and 3 the answer to each of them is no, the justices were not wrong in law on either of those points.

Question 4 deals with the secondary condition that the child is in need of care or control which he is unlikely to receive unless the court makes an order under this section. It is inevitable that the facts from which the justices must make their conclusions must to a considerable degree overlap with the facts from which conclusions are drawn for the primary conditions. The question that the justices asked on care and control was:

> 'Were we wrong in law in deciding that the children were in need of care and control which they were unlikely to receive unless the court made a care order under s. 1(2) of the Children and Young Persons Act 1969 when the children had been cared for by their mother in her home satisfactorily for a period prior to the hearing and the council intended to leave the children in their mother's care?'

It seems clear to me that one must, in considering a care or control condition, look at all the circumstances including the future and, indeed, including other aspects of the past. The justices took the view at para. 6B that the care and control test must be decided on the facts at the date of their hearing, that the situation was in a state of confusion because of the ambivalence of the mother concerning Mr M. They were concerned that she might well change her mind and have him back. They took the view that she had coped well during a comparatively short period under an interim care order with court proceedings pending, and they were, therefore, very well aware of the stringency of the order under which she was looking after the children and the marked effect one would expect that to have upon the mother. One cannot ignore the realities. The justices who sit in a juvenile court trying care proceedings would have a realistic approach as to the effect upon a mother of that sort of order, particularly in the run-up to the hearing which would decide what would happen to the children. I, for my part, see no reason to take a different view from the justices. They considered that under para. 6F where they stated:

> 'The care and control test was satisfied, notwithstanding that the

> mother had managed well during this short period and notwithstanding the council's expressed intention of leaving the twins with her if a care order was made. Unless the restraint of a court order was present, we were of opinion that the twins were unlikely to receive the care they needed. The mother lacked insight and stability.'

All of those are factors which they found from which they could infer a need of care and control which the child was unlikely to receive unless the court made an order. I take the view, for my part, that the answer to question 4 is no.

Coming lastly to question 5, which is:

> 'Were we wrong in law in making a care order rather than a supervision order or no order when the children had been cared for by their mother in her home satisfactorily for a period prior to the hearing and the council intended to leave the children in their mother's care?'

Under s. 1 (2), once the justices have come to a conclusion – as, for my part, I consider they were entitled to on the care and control test – the court, if it thinks fit, may make an order under subs. (3). No clearer indication of the discretion of justices could possibly be put forward. It is necessary, in my judgment, for counsel for the appellant to show that the justices were wrong in their exercise of their discretion, either that they were perverse, or that they left out of account matters which they should have taken into account, or that they took into account matters which they ought not to have taken into account. Counsel submits that it is inappropriate to make a care order where a child will remain in the care of the mother. There is nothing in the Children and Young Persons Act 1969 to say so. There is no decision that has been presented to us to say so. Perhaps of some interest under the Child Care Act 1980, s. 21(2), under the side-heading *Provision of Accommodation and Maintenance for Children in Care*, provides:

> 'Without prejudice to the generality of subs. (1) above . . . a local authority may allow a child in their care, either for a fixed period or until the local authority otherwise determine, to be under the charge and control of a parent, guardian, relative or friend.'

So it was clearly contemplated by Parliament that children could be the subject of care orders and remain in the day-to-day care of their own parents. The justices, in considering whether there should be no order, or a supervision order, or a care order, were, in my judgment, entitled to leave the child with the mother under the conditions of a care order. There is nothing that I for my part have heard over the course of these proceedings to lead me to any different view. Counsel for the local authority has said that it would be more normal in those circumstances for a child to be under a supervision order. That does not exclude occasions when it is more appropriate for the child to be under a care order but, nevertheless, remain at home. This is a matter specifically within the discretion of the justices, and in this particular case the justices had the opportunity to hear submissions from three solicitors – for the local authority, for the children and,

certainly, one from the mother – as to the way in which this matter should be dealt with.

The situation before the justices – with the degree of uncertainty, the ambivalence of the mother, the possibility of the return of Mr M, the mother's better behaviour while there was the care order, the interesting fact that there had been a supervision order for the elder child Z in 1982 and within a fortnight the mother was back at her old ways but that since there had been a care order in respect of Z and Z had remained at home, Z had been, it appears, more or less well cared for, there is no evidence to show that she had not – was that they had what one might call the track record of the mother on this particular matter. In their findings, having said under para. 6F that the mother lacked insight and stability and required the restraint of a court order, they considered the advisability of a supervision order and said it would not provide sufficient motivation; this had been clearly shown in the case of Z, whose supervision order had broken down after only 2 weeks. Clearly they were entitled, in considering the future, to take the matters relating to Z into account. In all the circumstances, I see no reason to find that they exercised their discretion in any way other than entirely properly and I see no reason for this court to interfere with that exercise of their discretion. The answer to question 5 of the case stated is no. Therefore, for my part, I would dismiss this appeal.

BUSH J:

I agree, but as we are told that this is an important case so far as those concerned with proceedings for care orders are concerned, I would add a few observations of my own.

Four main questions of law arise in this case stated:

1. Should the magistrates have allowed the solicitors for the parents to have submitted at the end of the case for the local authority that there was no case to answer, despite the fact that the solicitor representing the child did not feel that he could so submit?

2. It is said that there was no evidence justifying a finding that the first condition of s. 1(2) of the Children and Young Persons Act 1969, the condition in para (*a*), had been satisfied.

3. It is said that even if the first condition was satisfied then the second condition relating to care and control had not been satisfied.

4. It is said that if it was a case for care and control it was a case which in law should have resulted either in no order or a supervision order rather than a care order.

So far as the first question is concerned, in care proceedings in the juvenile court the parent is not a party to the proceedings but is, under r. 14B of the Magistrates' Courts (Children and Young Persons) Rules 1970, entitled to meet any allegations made against him in the course of the proceedings by calling or giving evidence. The rules as subsequently amended give power to cross-examine but in any event the justices before these rules had full power in the conduct of the affairs in their own court to permit the parents' solicitor to cross-examine witnesses called by the applicant so far as that cross-examine was a necessary ancillary to the right of the parent to meet a challenge against him by calling or giving evidence: *R v Milton Keynes Juvenile Court ex parte R* [1979] 1 WLR 1062 and see also *R v Gravesham Juvenile Court ex parte B* (1983) 4 FLR 312.

Miss Hoyal, for the mother, says that the right to submit no case to

answer is included in these powers and that that right should be available to the parent at the conclusion of the case for the child. In the present case the child's representative elected, as I have said, to call no evidence and would not join in the submission of no case to answer. So far as the mother's solicitor was concerned, he cross-examined, called evidence and addressed the court on all aspects of the case but was not allowed to submit that there was no case to answer. Although the procedure under the relevant Act with which the juvenile court is concerned is affected by the old criminal law approach, the submission of no case to answer is rarely appropriate. If it is proposed to be made, then the magistrates, as these are civil proceedings, may put the advocate to his election, that is that he would be warned that if he submits and fails then he is not entitled to call any further evidence. Having said that, it is rarely appropriate for the submission to be made in cases of this kind concerning children and if the submission is made despite that, the magistrates would no doubt pause long before putting the advocate to his election and thereby excluding evidence which might be material to the welfare of the child. Moreover, in my view it is not appropriate that the submission of no case should be allowed from a parent who is not a party to the proceedings or not representing the child.

The justices in their case stated at para. 6A, dealt with the argument in the way that Butler-Sloss J has read out. I cannot say they were wrong, and the answer to question 1: 'Were we wrong in law in refusing to allow the mother's solicitor to make a submission that a prima facie case had not been established at the conclusion of the evidence by the council and/or the children?' is 'No'.

As to the second matter, Butler-Sloss J has recited the findings of fact. On those facts Miss Hoyal argues that since the child at the time of the hearing was with the mother and had been well cared for from 20 January to 17 February, then there was no ground for saying that any of the requirements of s. 1(2)(*a*) had been proved because of the present tense used in the section. If the strict interpretation urged by Miss Hoyal were accepted, then there never could be a care order made, for example, in the case if a child who had recovered from the injury done to him and who was in the benign care of foster parents or a children's home. I cannot think that that was the intention of Parliament. It is clear, of course, that in using the present tense Parliament was expressly ruling out a care order because of fear of future harm where there was nothing presently in the condition or treatment of the child whereby his proper development was being avoidably prevented or neglected or his health avoidably impaired or neglected. This must be the basis of the decision in the Divisional Court in *Essex County Council v TLR and KBR* (1979) 9 Fam. Law 15 though, of course, the report we have for our purposes is wholly inadequate.

The development of a child is a continuing matter and encompasses the past, present and, to a certain extent, the future. The magistrates, in determining the primary condition, must have regard to the past treatment of the child as well as to the present. They must ask themselves on the day of the hearing: 'Are we satisfied, that his proper development is being avoidably prevented or neglected, or his health is being avoidably impaired or neglected?' They are not bound to answer the question in the negative if, for example, there has been a temporary respite in the condition or treatment of the child. In my view 'is being' is not temporal in the sense that it

means 'now', 'this minute'; it is descriptive of the child, that is the child must fall into the category mentioned in the section. If the words used had been different then different considerations would apply. 'Has been' would indicate some time in the past; 'will be' would indicate some time in the future; 'is being' would indicate a situation over a period, not now at this precise moment but over a period of time sufficiently proximate to the date of the inquiry to indicate that it is the present, not history and not the days to come. It is the description of a continuing set of circumstances which may not obtain on the particular day on which the matter is being considered but represents a category which the description of the child fits.

Whether the evidence available satisfies this criterion is a question of fact and degree. The magistrates dealt with it in their case at paras. 6B-D, and they dealt with it, in my view, perfectly adequately and did not mis-direct themselves. Butler-Sloss J has already referred to those paragraphs and I do not propose to repeat them. The questions that arise from this second part are questions 2 and 3 in the case, and the answer to question 2 'Were we wrong in law in deciding there was prima facie evidence', and so on, is 'No'; and the answer to question 3 'Were we wrong in law in deciding that the said primary condition was satisfied and finding that "the children's proper development is being avoidably prevented or neglected or their health is being avoidably impaired or neglected or they are being illtreated", when the children had been cared for by their mother in her home satisfactorily for a period prior to the hearing and the council intended to leave the children in their mother's care?' also is 'No'.

With regard to the third matter, when the magistrates came to the care and control condition, they had to ask themselves the question in the plain terms of the statute, namely 'Is the child in need of care and control which he is unlikely to receive unless the court makes an order under the section?' In considering this matter, clearly the magistrates can take into account the fact that the children have been properly cared for by the mother for a time, together with their assessment of the character of the mother and the likely course of events in the foreseeable future. This they did and expressed it in terms in the case at para. 6F in this way:

> 'The care and control test was satisfied, notwithstanding that the mother had managed well during this short period and notwithstanding the council's expressed intention of leaving the twins with her if a care order was made. Unless the restraint of a court order was present, we were of opinion that the twins were unlikely to receive the care they needed. The mother lacked insight and stability.'

So far as question 4 is concerned the answer to that is 'No'.

In relation to the fourth matter – having satisfied themselves that the children were in need of care and control, what order should the magistrates have made? – the conduct of the proceedings at this stage is governed by r. 20 of the Magistrates' Courts (Children and Young Persons) Rules 1970 and written reports can be and are usually received. Miss Hoyal says that a care order was too Draconian and that even a supervision order was not needed because the mother was presently co-operating. The magistrates, in their discretion, disagreed and, having, as I have read out, assessed the mother's character, said:

> 'A supervision order would not provide sufficient motivation; this has been clearly shown in the case of Z, whose supervision order had broken down after only 2 weeks.'

Clearly, such a finding does not exclude the idea of making no order because the magistrates have an absolute discretion because of the use of the words 'may if it thinks fit'. The magistrates have applied their minds to the correct principles and exercised their discretion in favour of a care order. It cannot be said that their decision is wholly wrong or that they have left out of account something they should have taken into account, or taken something into account that they should not. In law, if they felt that a care order, with the wider powers it gave to the local authority, was the proper order to make they had power to make it. Indeed, there is no proposition of law which prevents the local authority leaving the child with, or returning the child to, the parent for a trial period: see s. 21 of the Child Care Act 1980. The question is question 5 and I answer that also in the negative.

Tribute to the case stated has been made by Butler-Sloss J. I would like to echo that tribute. It is a model of a case stated in the way it is set out and in its recital of the facts found, and its recital of the principles of law upon which a decision was required.

The appeal will be dismissed.

Solictors: *Powell Magrath* for the mother;
T.F. Neville for the local authority;
Darlington & Parkinson for the guardian ad litem.

B.C.