Case No: B4/2009/2395

Neutral Citation Number: [2010] EWCA Civ 581
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE OXFORD COUNTY COURT
HIS HONOUR JUDGE CORRIE
17/2008 (Oxford County Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2010

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE MOSES
and
LORD JUSTICE MUNBY

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Between :

	OXFORDSHIRE COUNTY COUNCIL	**Appellant**
	- and -	
	(1) X (by the Official Solicitor as her guardian ad litem) **(2) Y** **(3) J (by her children's guardian)**	**Respondent**

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- -

Mr Gillon Cameron (instructed by **Oxford County Council**) for the Appellant
Mr John Vater (instructed by **Oxford Law Group**) for the First Respondent (the natural mother)
Mr Nicholas Davies (instructed by **Whetter Duckworth Fowler**) for the Second Respondent (the natural father)
Mr Michael Trueman (of **Truemans**) for the Third Respondent (the child)

Hearing date: 7 May 2010.

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Judgment**Lord Neuberger of Abbotsbury MR :**

1. This is the judgment of the court to which all its members have contributed.

2. This is an appeal (pursuant to permission granted by Wilson LJ on 21 December 2009) from an order made by His Honour Judge Corrie on 28 July 2009. The proceedings relate to a little girl, J, born in January 2007, who was the subject of an adoption order which had been

made by the same judge on 7 April 2009. The question which Judge Corrie had to determine at the hearing which is the subject of this appeal was whether, as the natural parents wished, there should be an order requiring the adoptive parents to provide them annually with a photograph of J; or whether, as the local authority, the adoptive parents and J's children's guardian contended, rather than the natural parents being supplied with a copy of the photograph, the adoptive parents should make the photograph available for viewing by the natural parents at the local authority's offices. Judge Corrie decided in favour of the natural parents.

3. The question may seem a very narrow one but it has to be remembered that, in the very delicate and sensitive context of adoption, issues such as this are profoundly important in human terms. The case also raises again the equally delicate question as to how far the court can or should go in imposing on adoptive parents obligations which they may be reluctant to assume voluntarily.

4. We refer for convenience and clarity to the adoptive parents, but it must be borne in mind throughout that the effect of the adoption order is that as a matter of law they are now, and were at the date of the hearing before Judge Corrie in July 2009, J's *parents*. Conversely, the natural parents are, as a matter of law, no longer her parents and have been stripped of their parental responsibility. Section 46(2)(a) of the Adoption and Children Act 2002 provides that:

> "The making of an adoption order operates to extinguish … the parental responsibility which any person other than the adopters … has for the adopted child immediately before the making of the order."

Section 67 of the 2002 Act relates to the 'Status conferred by adoption'. Section 67(1) provides, so far as material for present purposes, that:

> "An adopted person is to be treated in law as if born as the child of the adopters …"

Section 67(3)(b) provides so far as material that:

> "An adopted person … is to be treated in law … as not being the child of any person other than the adopters …"

And it is important to remember that this is not just some legal fiction. As Thorpe LJ said in *In re J (Adoption: Non-patrial)* [1998] INLR 424 at page 429, the result of adoption is "the creation of the psychological relationship of parent and child with all its far-reaching manifestations and consequences."

5. Given that by the date of the hearing in July 2009, J had been adopted, the jurisdiction Judge Corrie was exercising was no longer that conferred by the 2002 Act. In particular he was not exercising jurisdiction under either section 26 or section 46(6) of the 2002 Act, but rather that conferred by section 8 of the Children Act 1989. So much is clear from section 26(5) and is, of course, recognised in the authorities: see *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625, at paras [144], [154]. It follows from this that the relevant welfare 'checklist' which Judge Corrie had to apply was the checklist in section 1(3) of the 1989 Act and not that in section 1(4) of the 2002 Act: see section 1(4) of the 1989 Act and contrast section 1(7) of the 2002 Act.

6. What are the principles which, in relation to an adopted child, should guide the exercise of this jurisdiction? The overarching principle is, of course, that laid down in section 1(1) of the 1989 Act, re-stating a principle which has been part of the statute law since 1925, namely that "the child's welfare shall be the court's paramount consideration." However, the courts have long recognised that it will not usually be in the best interests of an adopted child to impose on her adoptive parents an obligation in relation to contact which they are unwilling to agree to. Indeed, the imposition of such an obligation is extremely unusual. In *In re C (A Minor) (Adoption Order: Conditions)* [1989] AC 1 at page 18, Lord Ackner said that:

> "No doubt the court will not, except in the most exceptional case, impose terms or conditions as to access to members of the child's natural family to which the adopting parents do not agree."

He explained:

> "To do so would be to create a potentially frictional situation which would be hardly likely to safeguard or promote the welfare of the child. Where no agreement is forthcoming the court will, with very rare exceptions, have to choose between making an adoption order without terms or conditions as to access, or to refuse to make such an order and seek to safeguard access through some other machinery, such as wardship. To do otherwise would be merely inviting future and almost immediate litigation."

7. In *Re T (Adoption: Contact)* [1995] 2 FLR 251, this court held that, as Butler-Sloss LJ put it (at page 255), the arrangements for contact should not be "imposed" upon the adoptive parents but should be "left to their good sense so that they could be trusted to do what they believe to be in the best interests of their daughter." She went on to indicate (at page 256) that the court could intervene in future and make an order if the adoptive parents were to behave unreasonably. In *Re T (Adopted Children: Contact)* [1995] 2 FLR 792, Balcombe LJ indicated (at page 798) that in that event the adoptive parents need not fear that their reasons when given would be subjected to what he called "critical legal analysis." He added:

> "The judges who hear family cases are well aware of the stresses and strains to which adopters … are subject and a simple explanation of their reasons in non-legal terms would usually be all that is necessary."

8. In *Re R (Adoption: Contact)* [2005] EWCA Civ 1128, [2006] 1 FLR 373, Wall LJ referred (at para [47]) to the fact that "matters have moved on very substantially since *Re C*" and (at para [48]) to the "clear change of thinking" demonstrated by the 2002 Act. His conclusion, nonetheless, was (para [45]) that "under the jurisprudence which has developed, contact orders in adoption proceedings are of themselves unusual." We read that as a reference to the position even where there is no opposition from the adoptive parents. He went on (para [49]) to consider the position where the adoptive parents do not agree:

> "the jurisprudence I think is clear. The imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual."

9. Wall LJ returned to the topic in *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625, referring (at para [146]) to what he had earlier said in *Re R*. We do not read the subsequent discussion by Wall LJ (at paras [147]-[154]) of the implications of sections 26, 27 and 46(6) of the 2002 Act as affecting the application of *Re R* in a case such as this, where the adoption order has already been made and where the application is accordingly being made under the 1989 Act.

10. It follows, in our judgment, that the task for Judge Corrie was to come to a decision applying the welfare 'checklist' in section 1(3) of the 1989 Act but always bearing in mind the jurisprudence as explained by Wall LJ in *Re R*.

11. At the hearing in July 2009 Judge Corrie had the benefit of position statements setting out the respective positions of the adoptive parents, of the Official Solicitor as guardian ad litem of the natural mother and of J's children's guardian. In their position statement, which it was said had been approved by them and set out their "clear view on this matter", the adoptive parents said this:

> "The parents have considered the birth father's application for contact and take the view that it would not be appropriate for either him or the birth mother to keep photos of the child. As J's parents they do not agree to this. This is a fundamental issue and a right which they assert as J's parents. Further, they are concerned about the child's whereabouts being discovered by the parents. In particular, they are concerned that due to the child's ethnic background, they are potentially easier to identify should, for

example, either of the birth parents put the pictures on the internet.

> … the parents feel that they have complied with and accepted the birth parents' requests and not contested them until now. They feel they have been particularly understanding of the birth mother's issues and as a consequence have not sought to accelerate the pace of these adoption proceedings, which have been lengthy. Having said that, the parents are concerned to note that it does not appear that either of the birth parents have engaged with the post-adoption services or that, in particular, the birth mother is addressing her mental health problems constructively. The parents also note that the birth parents have not taken all the opportunities for contact that have been offered to them in the past.
>
> Over and above that, the parents feel that now that the Adoption Order has been made, as those with sole parental responsibility in respect of J, it should be for them to determine what is in her best interests. The parents have not ruled out the possibility of letting the birth parents have photographs in the future but would first need to be sure it is J's best interest. Notably, they would want reassurances that the birth parents have engaged with the services mentioned above and completed any courses or therapy recommended by them. Put shortly, the Applicants wish their status as the parents of J to be respected and seen to be inviolable in order to give the very best chance for the adoption to be successful."

12. The Official Solicitor expressed the view that the proposal that the natural mother, X, should be able to view a photograph of J but not retain it was "unnecessarily harsh and restrictive." His position statement continued as follows (we extract the key passages):

> "There is no evidence at all to support the concern that X would take any steps to disrupt the adoptive placement … This is a placement that is supported by X … there is clear evidence over a number of years that X has taken no steps to locate the children …
>
> Any additional theoretical risk to the placement caused by retaining rather than viewing a photograph is minimal. X has already met the adopters … If X met the adopters and children by chance, she would recognise them in any event whether or not she had been allowed to retain photographs.
>
> The concern appears to be that X would use the photographs to trace J using the internet. There is no evidence to support this concern. X has explained to the Guardian the genuine reasons why she wishes to receive photographs. X wishes to have the

photographs to keep in a photograph album that she has made of her … children. X wishes to have further photographs of J to add to this album. She finds it reassuring to look at this album from time to time. She likes to be able show these photographs to her two elder children … who live with their father and with whom she has contact …

X … feels no hostility towards the adopters of J. She is pleased that they are able to care for J … X does, however, continue to feel extremely distressed by the actions taken by the social worker. X would find it unnecessarily intrusive to be watched by a social worker when viewing photographs of J. The Official Solicitor is concerned that this is a mechanism that would further distress X.

Concern had been expressed by the social worker about the unpredictable behaviour of X. Attached to this position statement is a letter from … X's current CPN, indicating his view that the provision of photographs may help X to adjust to her loss …

In relation to treatment, X has co-operated with the recommended treatment for some time now, at least for the past two years. X takes the medication that she is prescribed; she sees her CPN and consultant psychiatrist regularly … Insofar as co-operation with treatment should reasonably be a requirement for X to receive photographs, that requirement is already met.

So far as the Official Solicitor is aware, the natural father has always complied with his treatment …

The Official Solicitor considers it a great shame that the Adopters have been given such a negative view of X. J … was removed from X because she is ill. She has never done anything to deliberately harm any of the children and yet the Local Authority appears to have an unnecessarily harsh view of her.

The Official Solicitor submits that the refusal to retain an annual photograph of J is a disproportionate response by the Local Authority to any theoretical future risk."

13. J's children's guardian summarised her position as follows:

"The Guardian's position is that whilst she believes the risk of the birth parents retaining photographs to be lower than originally thought, she is extremely concerned by the effect on J's adoptive parents who of course are the only people who now have parental responsibility for J. The court, on making the adoption order, was satisfied that the adoptive parents could meet the needs of the child

> and make decisions as to what was in her best interests. They have indicated their position as to what they believe to be in J's best interests in so far as contact is concerned The Guardian's main concern is that J needs to be in a secure home where there is no risk of disruption. If the Adoptive parents are subject to stress and anxiety there is a real possibility this could affect J."

14. Unhappily there was no reference in any of these position statements to *Re R*. And a position statement prepared by the local authority for an earlier hearing, but which we understand was before Judge Corrie at the hearing in July 2009, although referring to *Re R*, unfortunately and inaccurately summarised the point as being that making a contact order when the adoptive parents were not in favour would be an "unusual" step to take. That seems to have been a reference to what Wall LJ had said in *Re R* at para [45]. The relevant citation should have been of what Wall LJ had said in para [47], namely that such an order would be "extremely unusual."

15. At the end of the hearing Judge Corrie gave an *ex tempore* judgment. It contains no reference to *Re R* or to any other authority. The Judge rightly observed (in paragraph 6) that some of the points raised on behalf of the natural mother were mother and not child focussed. He continued (in paragraph 8) as follows:

> "The Adoption and Children Act 2002 sets out in section 1 the criteria to be applied, and I have firmly in mind the paramountcy throughout this child's life of its interests and the vital, and I paraphrase, the vital importance that the security of the placement is neither threatened nor impinged. Included within that has to be the attitude and response of the adopters whose peace of mind and own stability and safety are of course central to that of the child or children, while bearing in mind that risks have to be assessed objectively. So that when Mr Cameron initially submitted that it was not a question of proving likelihood, he did not quite mean that there was no need for an assessment of the risk that the parents, either or both of them, might seek to contact the adoptive family, and clearly some sort of risk assessment has to be carried out. Again when he submitted that the adopters' wish must prevail I did not take him to mean that so much as that the adopters' wishes and their apprehensions and concerns must be scrutinised and given appropriate and, he submitted, considerable weight. What they say is that there should not be an order at all. If anything a preamble which would have the effect of an annual photograph being distributed to the parents, but only if the adopters were satisfied as to certain specific criteria including that the parents had taken a proper part in the letter box contact and that their mental health was stable and their compliance with medication and treatment full. I am quite prepared to accept their concerns and their

perceptions are genuine. There is no reason to think otherwise."

We emphasise the last two sentences.

16. Having thus directed himself as to the approach he should take, the judge then proceeded in paragraphs 9, 10 and 11 to rehearse, and as it seems to us to rehearse both fairly and accurately, the various submissions he had heard. Included amongst these was a submission on behalf of the natural father which he summarised as follows:

> "The parents have an Article 8 right to family life. They have by their own inability to look after the children been lawfully deprived of exercising those rights in full, as have the children been deprived of their right or what would otherwise be their right to a family life with their natural family. So the state has justifiably and proportionately intervened in making care and subsequent orders which have severely truncated if not in legal terms and as a matter of law obliterated the parents' rights. But it is difficult to see that the right has been completely obliterated. It has been severely truncated and parental responsibility and the rights and duties of parenthood have gone to others."

17. The judge set out his conclusion in paragraphs 11-12 as follows:

> "Reliance on the mother's defection with her young son many years ago in support of the risk about which the local authority, the guardian and the adopters are concerned seems to the court understandable but rather farfetched, and there is a clear picture here, reading the documents, of the local authority in perfectly good faith having played a part in inculcating in the adopters' minds the very fears which have been so helpfully articulated today by counsel. But really looking at the picture overall it seems to me that an essentially minor point has been allowed to assume far more significance than it really merits and fears have multiplied on themselves in a way which was not justified objectively as I have earlier indicated. In the absence of any indication that a preamble sanctioning an annual photograph for the parents to take away and add to the album, which is so clearly valuable to the mother, then there was no option but to seek an order. Considering not only section 1 of the Adoption Act 2002 but also by way of checking it the same section of the 1989 Act, I have identified the interest of the child in the natural parents maintaining an interest of which the child can be told when she is old enough. I have found that the risk on the evidence I have seen of the natural parents acting in the way which it is feared they might is a very small one, and it seems to the court that the parents do have some more than residual Article 8

rights which entitle them to something which, I repeat I am content to accept from the Official Solicitor, is a commonplace order and in practice an order is seldom necessary, and it is widespread for good reason.

It seems to me therefore that in these particular circumstances where an order sought an order should be made."

18. Mr Gillon Cameron, who appears before us on behalf of the local authority, as he did before Judge Corrie, identified four grounds of appeal in his appellant's notice (we take them in a rather different order from the way he sets them out):

i) First, Mr Cameron complains that, although he was referred to *Re R*, Judge Corrie failed to give sufficient weight to the wishes of the adoptive parents and accordingly failed to give proper consideration to the effect on J's welfare of making an order contrary to the adoptive parents' wishes. He makes the powerful point that, in making the order, the judge gave the adoptive parents the message, on the first occasion that their judgment in relation to J was required, that they were not supported.

ii) Second, and this is really the corollary of the first point, he complains that the judge attached too much weight to the wishes and welfare of the natural parents.

iii) Third, he complains that the judge improperly concluded that the provision of photographs to natural parents by adoptive parents was a standard practice, giving too much weight to the view of the Official Solicitor to this effect and insufficient weight to the views of the local authority and the children's guardian (who in the nature of things, he suggests, are likely to have greater experience than the Official Solicitor) that this was not standard practice.

iv) Fourth, he complains that the judge failed to give proper consideration to the paramountcy of J's welfare. Wrapped up in his submissions in support of this proposition are complaints that the judge failed to give proper consideration to a number of factors including:

a) the risk that the natural parents would seek to identify the placement;

b) the risk that, if the natural parents did seek to identify the placement, the opportunity to do so would be "drastically increased" by the provision to them of a photograph; according to Mr Cameron the judge virtually ignored what he says is the vast potential for disseminating and gathering information afforded by digitising a photograph and publishing it on the

internet, given the ubiquity of social networking sites, chatrooms, forums and blogs on the internet and the ease of uploading and downloading pictures;

c) the risk that if the placement was identified then the security of the placement would be threatened and undermined.

Complaint in this respect is also made that the judge was wrong to conclude that J would benefit from the provision of photographs to her natural parents and, moreover, that he failed to consider that if there was any such benefit it would equally accrue from the natural parents being able to view the photographs at the local authority's offices.

19. In his order giving permission to appeal, Wilson LJ identified three matters which he accepted were arguable:

i) First, that Judge Corrie did not remind himself that – for obvious reasons – it is unusual to saddle adoptive parents with an order contrary to their wishes.

ii) Second, that the modern facility to place a photograph on the internet transforms its utility as a vehicle for tracing a child.

iii) Third, that irrespective of the objective level of risk of discovery, the disturbing effect of the order on the adoptive parents and the consequential risk of emotional destabilisation in their household clearly outweighs the, query debateable, value to J of the natural parents having, rather than seeing, her annual photograph.

20. Helpfully, and as it seems to us appropriately, the respondents have adapted this framework for their submissions. The natural parents were each represented by counsel, the natural mother by Mr John Vater and the natural father by Mr Nicholas Davies, neither of whom had appeared below. The children's guardian was represented by Mr Michael Trueman who, like them, had not appeared before Judge Corrie.

21. Mr Trueman expresses the children's guardian's continuing concern that the natural parents could and indeed, as we read what she says, might wish to try to locate J using the photographs to do so. But he made clear that the guardian's real concern was the likely effect on the adoptive parents if an order such as this was *imposed* upon them.

22. Summarising their contentions shortly, both Mr Vater and Mr Davies dispute that Judge Corrie erred in law or in his approach. They submit that the judge's exercise of discretion was firmly founded in findings of fact which were open to him on the evidence before

him, that it cannot be characterised as 'plainly wrong' and that it is therefore not susceptible to successful challenge in this court: *G v G (Minors: Custody Appeal)* [1985] FLR 894. The case, they say, turns on its own facts.

23. We return to the first of the three issues identified by Wilson LJ.

24. Mr Vater, on behalf of the natural mother, submits that it is clear from paragraph 8 of the judgment that, whether or not he referred to them, Judge Corrie had both *Re R* and *Re P* well in mind. He summarises the Judge's approach as being that whilst he should give considerable weight to the wishes of the adoptive parents those wishes are not determinative. That, he submits, is an unimpeachable summary of the law. Mr Davies says much the same.

25. At one stage in his argument Mr Davies sought support for this contention from what Wall LJ said in *Re P*. He referred in this connection to para [149], where Wall LJ said that "it will be for the court, before making an adoption order, to decide, in accordance with s 46(6) of the 2002 Act, what ongoing contact [the separately adopted children] should have with each other", and then to para [151], where Wall LJ said that "it is the court which has the responsibility to make orders for contact if they are required in the interests of the two children." With respect we cannot agree. As we have already said, we do not read this part of Wall LJ's judgment in *Re P* as affecting the principle in *Re R* in a case such as this, where the adoption order has already been made and where the application is accordingly being made under the 1989 Act.

26. Of course, as a matter of law, the adoptive parents' wishes cannot be determinative or dispositive, but the fact that it is "extremely unusual" to make an order with which the adoptive parents are not in agreement, is simply not to be found stated or acknowledged anywhere in the judgment. And if that is what Judge Corrie had in mind, we cannot believe that he would have expressed himself, even in an *ex tempore* judgment, as in fact he did. To say, as the judge did, that the adoptive parents' wishes and concerns must be given "appropriate", even "considerable", weight is one thing. It is a significantly different thing to say that it would be "extremely unusual" not to give effect to the adoptive parents' refusal to agree.

27. In that respect, therefore, it seems to us that the judge fell into error. But this is only one aspect of what, in our judgment, was, with all respect to him, a more fundamental error by the judge.

28. Judge Corrie sought to assess the extent to which possession of photographs would create a risk that one or other of the natural parents might attempt to find J. The error of the judge lay in failing to appreciate the proper context in which he should have embarked upon such an assessment. The question for him was not whether provision of photographs would

create or increase such a risk. The essential question was whether the adoptive parents' fear of such a risk was unreasonable in the sense that it had no reasonable basis.

29. It is important to appreciate why that is the essential question. The judge was required to consider what was in the best interests of the child, as the paramount consideration, in accordance with section 1 of the 1989 Act. It is beyond argument that the welfare of so young a child in the early stages of her adoption depended upon the stability and security of her new parents, the adoptive parents. To undermine that stability by fuelling or failing to heed their fears that their daughter's natural parents might seek to trace her is to damage her welfare. Contrary to Mr Vater's argument in reply, there is no dichotomy between the fears of the adoptive parents, and their sense of security, and the welfare of their daughter.

30. The only relevance of a factual assessment by the judge of risk can be in relation to an assertion that the adoptive parents' fears have no basis and are, therefore, unreasonable. Unless the facts compel that conclusion, the mere fact that the judge takes a different view of the risk than that feared by the adoptive parents is no answer to their objection. In the present case the judge made no finding that their fears were unreasonable or unfounded; on the contrary, he described them as genuine and understandable. He merely reached a different conclusion as to whether the natural parents were likely to use the photographs to find J. Nor, it is important to note, did the judge find that there was no risk; on the contrary, he said that there is a risk, a view shared by the children's guardian, albeit that she thought the risk was low.

31. Thus in this case, absent any finding that there was no conceivable risk, the fear of the adoptive parents was the factor which ought to have compelled the conclusion that the natural parents should not be given the photographs. That is far from saying that the wishes of the adoptive parents are dispositive in every case. In any particular case different factors will determine the result. But in the instant case, there was no feature in the facts which was capable of outweighing the effect on the adoptive parents' sense of security and their consequential wish that photographs of J should not be handed over.

32. We are very conscious of what Lord Hoffmann said in *Piglowska v Piglowski* [1999] 1 WLR 1360 at page 1372 as to the approach which an appellate court should adopt when faced with the assertion that an experienced judge has fallen into error, especially when, as here, complaint is made about an *ex tempore* judgment. The judge's reasons, said Lord Hoffmann:

> "should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account … An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that

he misdirected himself."

33. We rather doubt that he had the assistance from the advocates who appeared before him which he was surely entitled to expect. But the fact remains, in our judgment, that, with all respect to him, Judge Corrie has indeed demonstrated by his own words the error which lies at the heart of this appeal. We should add that the judge's reference to section 1 of the 2002 Act rather than section 1 of the 1989 Act was also an error, though one without any discernible impact.

34. The fact that the judge may have erred in law does not, of course, entitle us without more ado to disregard either his findings of fact or the inferences he drew from them. For our part, despite everything pressed on us by Mr Cameron and despite the additional material put before us in relation to the impact of the internet when it comes to trying to find a child, we see no basis for interfering with the judge's findings of fact. Nor would we be inclined to differ radically from the judge's evaluation of, on the one hand, the destabilising effect of the order and, on the other hand, the value to J of the natural parents having her annual photograph, though we are inclined to think that he probably underestimated the former and overestimated the latter.

35. But all that, for the reasons we have already explained, is largely beside the point. Let us take things as the judge did, but applying what in our judgment was the proper approach. Where does that leave us? In our judgment, even accepting both the judge's findings of fact and his resulting evaluation of the various factors that have to be fed into the balance, the outcome, on a proper application of the jurisprudence summarised in *Re R*, must be, for the reasons we have given, that the application ought to have been dismissed.

36. It is a strong thing to impose on adoptive parents, it is "extremely unusual" to impose on adoptive parents, some obligation which they are unwilling voluntarily to assume, certainly where, as here, the adoption order has already been made. Was there a proper basis for taking that extremely unusual step? In our judgment there was not. The judge found that the adoptive parents were genuine when they expressed their concerns, so what was the justification for imposing on them something they conscientiously and reasonably objected to, particularly when, as we have seen, they say that they have not ruled out the possibility of letting the natural parents have photographs in the future? As we have said, they are not to be saddled with an order merely because a judge takes a different view. The adoptive parents are J's parents; the natural parents are not. The adoptive parents are the only people with parental responsibility for J. Why, unless the circumstances are unusual, indeed extremely unusual – and here, in our judgment, they are neither – should that responsibility be usurped by the court? We can see no good reason either on the facts or in law. On the contrary, there is much force in the point they make, that they wish their status as J's parents to be respected and seen to be inviolable – not for themselves but in order, as they see it, to give J the very best chance for the adoption to be successful.

37. Accordingly, as we announced at the conclusion of the hearing, this appeal must be allowed and the order made by Judge Corrie must be discharged.

38. We have been invited to include in our order a recital recording that the local authority "agree[s] to facilitate annual letterbox contact in the form of letters and cards together with the opportunity to view a recent photograph of the child." Whilst, consistently with this judgment, we would not have been prepared to include such a recital without the agreement of the relevant parties, we are in the circumstances content that it should be included.

39. There are three final matters we should mention.

40. Mr Cameron, as we have seen, challenged what, as he would have it, was Judge Corrie's too ready acceptance of what the Official Solicitor had said was the common practice of adoptive parents providing photographs. We are in no better position than was Judge Corrie to evaluate the differing views on this point of the Official Solicitor and the children's guardian. But the dispute, in our judgment, is largely beside the point. For surely what is relevant is not so much the frequency with which such arrangements are made without being embodied in any order of the court, or embodied in an order with the agreement of the adoptive parents, but rather the frequency with which such orders are imposed, as here, on unwilling adoptive parents – and that, one can be reasonably confident in asserting, is very far indeed from being commonplace.

41. The second matter is this. Both before Judge Corrie, and again before us, the natural father sought to rely upon what he says are the natural parents' rights under Article 8 of the Convention vis-à-vis J. And that argument, as we have seen, was accepted by Judge Corrie, who held that the natural parents have what he called more than residual Article 8 rights and rights which, moreover, he said entitled them to the order they sought.

42. Mr Davies sought before us to bolster the argument by referring to what Wall LJ had said in *Re P* at paras [119]-[124] as showing what he submitted is the correct approach to the natural parents' Article 8 right to family life in the context of adoption. But what Wall LJ was considering in *Re R* was the impact of Article 8 *before* an adoption order (or a placement order) is made, in other words, at a time when the natural parents, by reason of the fact that they are the natural parents, indubitably have rights under Article 8 which they can rely upon in seeking to resist the making of an adoption (or placement) order. So *Re R* provides no support for the very different proposition which Mr Davies seeks to deploy, namely that the Article 8 rights of the natural parents vis-à-vis their child survive the making of the adoption order and the removal of their parental responsibility.

43. Now given the effect of an adoption order as set out in sections 46 and 67 of the 2002 Act it is very far from obvious, to say the least, that the natural parents can thereafter have any

Article 8 rights at all vis-à-vis a child who is no longer their child. Mr Davies sought to meet that difficulty by pointing to the fact that, whatever the law may say, there is no getting away from the reality that the natural parents are, notwithstanding section 67, J's biological parents and, moreover, persons entitled to apply under section 10 of the 1989 Act for permission to apply for a contact order: see *Re T (Adopted Children: Contact)* [1995] 2 FLR 792. The point, however, has not been fully argued out before us and we therefore say no more about it, except to make clear that even if Judge Corrie was correct in assuming that the natural parents had Article 8 rights capable of being engaged in the application before him (and we do not assume, let alone decide, that they did), those rights would not, in our judgment, have sufficed to tip the balance in their favour.

44. Finally, there is one other matter we should mention. The natural mother and the natural father were each represented before us by counsel, who made written and oral submissions in support of the judge's decision. In addition, the local authority and the children's guardian were each represented by, respectively, counsel and a solicitor advocate, who made written and oral submissions attacking the judge's decision. As a result, two sets of full legal costs were incurred, all funded by public money, to support the case for and against the appeal.

45. We take this opportunity to emphasise in the strongest possible terms that it is only where it is clear that there is an unavoidable conflict of interest, as a matter of law, between two parties in the same interest that they should have separate legal representation, especially where public money is involved. The fact that the parties may have different factual points, or that one party's case may be seen as stronger than the other's, or that the parties' legal advisers may see the legal arguments or the prospects somewhat differently, are not good reasons for their incurring the expense and the court time of separate representation.

46. When it appears that a hearing may involve more than one set of legal representation to support the same outcome, very careful consideration should be given by legal advisers as to whether there really is a need for more than one legal representation. This case provides a good example, at least on the face of it. The fact that one natural parent may have seemed to have a stronger case on the facts than the other was no reason for separate representation. First, that does not of itself, in any event, mean that there was a conflict between the two parties. Secondly, on the facts, since provision of the photograph to one parent would quite probably have resulted in its provision to the other parent, there would have been no conflict in any event. As to the local authority and the guardian they too appear to have had no legal conflict, and, at least at first blush, it is not easy to see why they needed separate representation.

47. In our view, this is a point which should be borne in mind not merely by the legal advisers, but also by judges when awarding costs. While any decision on costs is primarily a matter for the judge hearing the matter, we would hope and expect that a judge who takes the view that legal representation was unnecessarily duplicated will at least consider allowing only one set of costs, when making an order which will potentially

impinge on the public purse in one form or another.

48. We accept, of course, that in some circumstances, it is unavoidable that two parties who support the same outcome have to be separately represented, because the conflict between them is, as a matter of law, such that they cannot be jointly represented. However, even in such cases, very careful consideration should be given to the question of whether both parties should be represented at the hearing by separate advocates. In many such cases, it should be possible for one of the parties to limit himself or herself to written representations.

49. We did not go into the question of the representation in this case in much detail at the hearing. Accordingly it would be unfair if what we have said was seen as any adverse comment on the lawyers involved in this particular appeal. Indeed, in fairness to all those involved we should record that, following the grant of permission to appeal, and having received an informal application from the local authority relating to the involvement of the children's guardian, Wilson LJ indicated that he was "not going to be prescriptive about whether the guardian should be represented" and was "going to leave the question to the good sense of the guardian and … her solicitors." And in response to a later informal application from the solicitors acting for the Official Solicitor he indicated that "if the Official Solicitor wishes the mother to be represented at the hearing, then I think that she should be."

50. For the future, however, we would expect publicly funded legal advisers to consider the need for separate representation very carefully, and judges to make appropriate costs orders where it is unnecessarily undertaken.