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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY ES FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF THE DECISIONS TAKEN BY A COMMUNITY HEALTH AND SOCIAL SERVICES TRUST ON 26 MAY 2006**

**AND IN THE MATTER OF DECISIONS TAKEN BY THE FAMILY PROCEEDINGS COURT SITTING AT BALLYMENA ON 26 MAY 2006 AND 31 MAY 2006**

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**GILLEN**

**[1] The judgment in this case is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them may be identified by name or location and that in particular ,the anonymity of the child and the adult members of her family must be strictly preserved**

**APPLICATION**

[2] These are applications by the mother and father of a child whom I shall identify as K born on 28 April 2006. They arise out of an Emergency Protection Order (EPO) made by the Family Proceedings Court sitting at Ballymena courthouse on 26 May 2006 and 31 May 2006. For the purposes of protecting the identity of the child K (now aged 1) I shall identify the first named applicant, the mother, as X and the second-named applicant, the father, as Y.

[3] As will be clear from the background that I shall shortly set out events have now moved on and it is no longer necessary for the applicants to challenge, as they initially did, the decision of the Family Proceedings Court. Rather the applicants now rely on the matter as one of public interest and seek:

(a) A declaration that the provisions of Article 64(9)(a) and 64(9)(b) of the Children (Northern Ireland) Order 1995 (the 1995 Order) are incompatible with Article 6 of the European Convention on Human Rights and Fundamental Freedoms("the Convention") in that the provisions leave an individual with no right of appeal against EPOs.

(b) A declaration that the provisions of Article 64(10) of the 1995 Order are incompatible with Articles 6 and 8 of the Convention as they deny an individual the right to apply to discharge an EPO in circumstances where the individual was present at the hearing at which the Order was made.

(c) A declaration that the provisions of Article 64(8) of the 1995 Order are incompatible with Articles 6 and 8 of the Convention as the Articles deny an individual the right to apply to discharge an EPO before the expiry of the period of 72 hours beginning with the making of the Order.

(d) A declaration that the provisions of Article 64(8), (9)(a), (9)(b) and (10) in totality are incompatible with Article 6 and 8 of the Convention.

**Background**

[4] Because of developments that occurred in this case since its inception, the factual matrix became less important than the discrete legal issue that arose under Articles 6 and 8 of the Convention . The background facts are as follows.

(1) A Health and Social Services Trust, which I do not propose to name, ("the Trust") had harboured concerns about the mother of the child who is the subject of this application since 2003 following the birth of twins to her. She had a history of mental health problems including self harm, suicide attempts, anxiety and depression coupled with drug and alcohol abuse. She had displayed an inability to cope with parenting her twins despite a high level of professional support. These two children had been freed for adoption in March 2006. The Trust had also entertained concerns about the father Y since 2001 fuelled by the belief that he was using heroin and had taken a number of overdoses. In March 2006 the as yet unborn child K was placed on the Child Protection Register. On 18 May 2006 a community midwife had contacted the Trust expressing concerns about X's mental health.

(2) On 23 May 2006, at the suggestion of C, a senior practitioner social worker of the Trust, X and Y had agreed to K staying overnight with her paternal grandparents. This had occurred after an incident when Y had telephoned the Trust to say that X had threatened to kill herself by cutting her throat.

(3) On 24 May 2006 K remained in the home of her paternal grandparents and X moved into their home with a view to her parenting K with the support and rest that she needed.

(4) On 26 May 2006 the PSNI attended the home of X and Y about 6.00 am after a domestic dispute between the couple had been reported. However when the PSNI arrived at their home, X had returned to the home of the paternal grandparents. When the police arrived at home of the grandparents, the grandmother was found to be intoxicated and incoherent.

(5) C, together with the PSNI and another social worker, visited the grandparents home at about 11.30 am on 26 May 2006. C deposed that she found the smell of alcohol to be overwhelming. She noticed the grandmother to be intoxicated, tripping over the stairs in her presence and she observed X to be dishevelled with tearstains down her face and cheek. X informed her that the grandparents had been drinking the night before, that she herself had consumed three to four vodka drinks the night before and she had left K in the sole care of the grandparents whilst she had returned to her own home when a dispute ensued.

(6) In explaining the risks to K, C discussed with X the option of K being accommodated by the Trust. She observed X to become very upset and although after a considerable period of time she stated she would agree to the Trust accommodating K, C entertained grave concerns about her capacity to give a full and valid agreement in light of her emotional state, presentation, demeanour and consumption of alcohol.

(7) The PSNI present on 26 May 2006 shared those concerns and took the child into police protection for 72 hours due to expire on Monday 29 May 2006.

(8) C met X in the company of a social worker and a PSNI officer about 1.30 pm on 26 May 2006. C then made contact with X's General Practitioner who agreed to visit her and alert the Trust's crisis response team. At this point it had not been possible to make contact with Y, the PSNI having been unable to elicit a response from him at his home address. However the evidence from the

Trust, disputed by Y, was that later in the day a social worker spoke with Y about the preceding events, advised him that K was in police protection and that the Trust intended seeking an EPO (this was to be the subject of dispute at the hearing).

(9) At 1.45 pm on the same date a facsimile was sent by the Directorate of Legal Services in the Trust to J J McNally & Company, solicitors, who represented X advising the firm that an EPO application was listed for hearing at Ballymena Family Proceedings Court at 3.00 pm that day.

(10) On 26 May 2006 accordingly the Family Proceedings Court granted leave for the EPO application to proceed on an ex parte basis. There was before this Court an affidavit from the Resident Magistrate, Mr Alcorn, in which he indicated that at that hearing on 26 May 2006, in order to deal with any issues arising under Article 6 of the Convention, he had enquired at the outset of the proceedings if the parents were aware of the application before the Family Proceedings Court. He was advised that the parents had been told of the application. Neither X nor Y were present or represented at the court. Mr Alcorn confirmed that he heard evidence of the history of the child and the family, and the facts surrounding the events of 26 May 2006 which I have already set out.

(11) Mr Alcorn went on to depose that he had considered the provisions of Article 3(3) of the 1995 Order as well as Article 8 of the Convention. He was satisfied that threshold set out in Article 63 of the 1995 Order was met in that case and he therefore granted an EPO for a period of 8 days until 3 June 2006. He considered that this was a necessary and proportionate response in the circumstances which had been described to him in evidence.

(12) The Resident Magistrate went on to depose that on 31 May 2006, the Trust brought an application for an extension of the EPO for a further 7 days. This application was on notice and was listed for an inter partes hearing before himself and two lay magistrates. The Trust, X and Y were all professionally represented. The court heard evidence from two witnesses for the Trust namely D, social worker and C as well as from the mother of the child. Y indicated that he would not be giving evidence. It emerged at the hearing that the parents had been advised of the original EPO on 26 May 2006 but had not been informed as to the venue for or time of the application. Having heard evidence of an assessment of the parents carried out by a consultant psychologist, details of the child protection care plan and the evidence of the mother, the court

> concluded that X could not manage the baby on her own and there was no evidence that the father could provide such care. Accordingly the court was satisfied that the threshold criteria as provided by Article 63 of the 1995 Order were satisfied. Once again the court considered the provisions of Article 3(3) of the 1995 Order and Article 8 of the Convention. The court therefore determined that the extension of the EPO for a further four days until 7 June 2006 was a proportionate and necessary response to safeguard the child's welfare. The court suggested to the Trust that it should bring forward its Looked After Child Review to consider the whole matter in the light of the evidence. The court took the view that this would allow time for the mother and baby placement to be explored. Arrangements for contact were explored.

[5] That now is all of historical significance only. In the events that subsequently unfolded, the child has now been placed with the mother and whilst Care Order proceedings are currently outstanding, no Interim Care Order is in place. Y seems to have disengaged. The consequence of these developments was that the applicants had, understandably in my view, determined not to proceed against the Trust any longer (indeed specific instructions had been received from the clients not to do so), but the issues of incompatibility were now the sole matters outstanding for determination by the court in the view of counsel on behalf of both applicants. Accordingly the only issues to be determined by the court were those arising out of the alleged incompatibility of Articles 6(8), (9) and (10) of the 1995 Order with Article 6 and 8 of the Convention. It is to these issues that I now turn

[6] The Salem Principle

It was the submission of Mr Maguire QC, who appeared on behalf of the intervening party the Department of Health and Social Services and Public Safety (the party served with the Notice of Incompatibility of Subordinate legislation pursuant to Order 121 rule 3A of the Rules of the Supreme Court (Northern Ireland) 1980) with Mr McMillen that the hearing of this case offended against the principles set out in R v. Secretary of State for Home Department ex. P Salem [1999] AC 450. In that case Lord Slyn enunciated the following well known principles:

> "My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the Sun Life case and Ainsbury v.

> Millington (and the reference to the latter in rule 42 of the Practice Directions applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private rights between the parties to the case.
>
> The discretion to hear disputes, even in the area of public law, must, however be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future".

[7] I am also conscious of the views expressed by Munby J in R (Smeaton) v Secretary of State for Health [2002] 2 FLR 146 at paragraph 22 where he said that the constitutional function of courts is to:

> "Resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires on controversies in the Academy, however intellectually interesting or jurisprudentially important the problem and however fierce the debate which may be raging in the ivory towers or amongst the dreaming spires".

[8] This matter was canvassed before Weatherup J at the leave stage in this matter. He concluded that the matter was of sufficient public interest to merit continuing. I share that view. Whilst there is no dissent between the parties in this case that the issues may well be now of academic importance, I consider that the importance of EPOs particularly in Family Proceedings Courts is such that inevitably the issues now raised will trouble magistrates in the future and that a determination is now required.

[9] Victim's status

A further preliminary matter raised by Mr Maguire was to the effect that neither parent in these proceedings could make a compatibility challenge as neither was a victim of any alleged incompatibility. Under Section 7 of the Human Rights Act 1998 "the 1998 Act" a person who claims that a public authority has acted in a way which is unlawful by Section 1(1) of the Act may only do so if he or she is a victim of the unlawful act. Under Section 7(7) a

person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that Act. The general approach taken by the Strasbourg Court is that a victim of a violation is a person directly affected by the impugned measure (see Buckley v United Kingdom [1996] 23 EHRR 101 at paras 56-59).

[10] Mr Maguire relied upon two authorities namely R (Hooper) v Secretary of State for Work and Pensions [2005] 1 WLR 1681 ("Hooper's case") and Lancashire CC v Taylor [2005] 1 WLR 2668 for the following propositions:

(a) A victim must be personally affected by any of the features of the legislation which he alleges are contrary to the Convention.

(b) A general connection is inadequate.

(c) Pressure groups or campaigning organisations acting in the public interest will therefore not be entitled to bring a claim for judicial review in their own name.

(d) In the instant case, Mr Maguire asserted that the impugned provisions of the 1995 Order did not directly affect either of the parents. For example he indicated that there had been no attempt to discharge the Order either under or contrary to the terms of Article 64(8) of the 1995 Order, they had not canvassed the possibility of making an appeal under Article 64(9) and there had been no attempt to avail of or circumvent Article 64(10). Mr Maguire urged that the affidavits of the applicants had been silent on these matters and he indicated that if they were to attract the status of victim hood, they would have had to have taken some positive steps such as requesting their solicitor to discharge the Order within the 72 hour period or take some other such step which was prevented by the provisions of Article 64(9) and 64(10).

[11] I was unattracted by these arguments on the facts of this case for the following reasons:

(1) Strasbourg jurisprudence is replete with authorities to the effect that it is not necessary for standing that the applicant has actually suffered the consequences of the alleged breach provided there is a risk of their being directly affected by it. (See Marckx v Belgium [1979] 2 EHRR 330)("Marckx").

(2) In Dudgeon v United Kingdom [1981] 4 EHRR 149 the victim's status was accorded to a homosexual male in relation to criminalisation of homosexual conduct in private between consenting males in

Northern Ireland notwithstanding that he had not yet been prosecuted for such an offence.

(3) The risk of being affected must be a real threat and not a theoretical possibility. Blackstone's 3rd Edition on the Human Rights Act published in 2003 at paragraph 5.3.1 refers to two such examples. In Marckx a challenge was made to legislation discriminating against children born out of wedlock who were held to be victims of that legislation. Secondly a litigant successfully persuaded the court that she was a victim of the ban on divorce in Ireland because of the consequences for certain family relationships in Johnston v Ireland [1986] 9 EHRR 203. The author refers to what he describes as "the most liberal interpretation of victim" in Open Door and Dublin Well Woman v Ireland [1992] 15 EHRR 244, where it was held that two abortion advice centres and two counsellors who offered abortion advice and women of child bearing age wishing to receive it, all had standing to challenge an injunction which was held to breach Article 10.

[12] I am unimpressed by the fact that no reference was made by either applicant party to bring proceedings under any of these impugned provisions in the 1995 Order. It would have appeared to them and to those advising them that it was a hopeless quest within the limited time available. What form could the challenge have taken before the expiration of the periods? One must bear in mind that these parents were complaining not only of a breach of their own rights but also the child's rights. There were therefore three potential victims here. I consider that all of them may well have been vulnerable and somewhat dysfunctional persons who would have readily been deflected by the absence of any statutory remedy during the periods set out in the impugned articles. All of them were clearly at risk of being directly affected and indeed were affected by the absence of any advice available to them to move more quickly than they did particularly in respect of Article 68(8). The risk of being affected was therefore a real threat and not a theoretical possibility. The court should be slow to penalise those who are least able to assert their rights in circumstances where even with the benefit of legal advice the prospect of taking remedial action on a Convention basis within three days must have seemed simply insuperable not only to them but also to their legal advisors.

[13] I consider therefore that both these applicants were victims within the terms of section 7(7) of the Act.

[14] The domestic legislation

The legislation dealing with Emergency Protection Orders (EPOs) is found in the Children (Northern Ireland) Order 1995 ("the 1995 Order"). Where relevant, the Order provides as follows:

"Orders for emergency protection of children

63(1) Where any person ("the applicant") applies to the court for an order to be made under this Article with respect to a child, the court may make the order if, but only if, it is satisfied that –

(a) there is reasonable cause to believe that the child is likely to suffer significant harm if –

(i) he is not removed to accommodation provided by or on behalf of the applicant, or

(ii) he does not remain in the place in which he is then being accommodated, or

(b) in the case of an application made by an authority –

(i) inquiries are being made with respect to the child under Article 66(1)(b); and

(ii) those inquiries are being frustrated by access to the child being unreasonably refused to a person authorised to seek access and the applicant has reasonable cause to believe that access to the child is required as a matter of urgency; or

(c) in the case of an application made by an authorised person –

(i) the applicant has reasonable cause to suspect that a child is suffering, or is likely to suffer, significant harm;

(ii) the applicant is making inquiries with respect to the child's welfare; and

(iii) those inquiries are being frustrated by access to the child being unreasonably refused to a person authorised to seek access and the applicant has reasonable cause to believe that access to the child is required as a matter of urgency.

…

(4) While an order under this Article (an "emergency protection order") is in force it –

(a) operates as a direction to any person who is in a position to do so to comply with any request to produce the child to the applicant;

(b) authorises –

(i) the removal of the child at any time to accommodation provided by or on behalf of the applicant and his being kept there; or

(ii) the prevention of the child's removal from any hospital, or other place, in which he was being accommodated immediately before the making of the order; and

(c) gives the applicant parental responsibility for the child.

(5) Where an emergency protection order is in force with respect to a child, the applicant –

(a) shall only exercise the power given by virtue of paragraph (4)(b) in order to safeguard the welfare of the child;

(b) shall take, and shall only take, such action in meeting his parental responsibility for the child as is reasonably required to safeguard or promote the welfare of the

child (having regard in particular to the duration of the orders); and

(c) shall comply with the requirements of any regulations made by the Department for the purposes of this paragraph.

(6) Where the court makes an emergency protection order, it may give such directions (if any) as it considers appropriate with respect to –

(a) the contact which is, or is not, to be allowed between the child and any named person;

(b) the medical or psychiatric examination or other assessment of the child.

(7) Where any direction is given under paragraph (6)(b), the child may, if he is of sufficient understanding to make an informed decision, refuse to submit to the examination or other assessment.

(8) A direction under (6)(a) may impose conditions and one under paragraph (6)(b) may be to the effect that there is to be –

(a) no such examination or assessment;

(b) no such examination or assessment unless the court directs otherwise.

(9) A direction under (6) may be –

(a) given when the emergency protection order is made or any time while it is in force; and

(b) varied at any time on the application of any person falling within any class of person prescribed by rules of court for the purposes of this paragraph.

….

(d) where an emergency protection order is in force with respect to a child and –

(i) the applicant has exercised the power given by paragraph (4)(b)(i) but it appears to him that it is safe for the child to be returned; or

(ii) the applicant has exercised the power given by paragraph (4)(b)(ii) but it appears to him that it is safe for the child to be removed from the place in question,

…

(h) he shall return the child or, (as the case may be) allow him to be removed.

(11) Where he is required by paragraph (10) to return the child the applicant shall –

(a) return him to the care of the person from whose care he was removed; or

(b) if that is not reasonably practicable, return him to the care of –

(i) a parent of his;

(ii) any person who is not a parent of his but who has parental responsibility for him; or

(iii) such other person as the applicant (with the agreement of the court) considers appropriate.

…

Duration of emergency protection orders and other supplementary provisions

64(1) An emergency protection order shall have effect for such period, not exceeding 8 days, as may be specified in the order.

(2) Where an emergency protection order is made with respect to a child who is being kept in police protection under Article 65, the period of 8 days mentioned in paragraph (1) shall begin with the first in which he was taken into police protection under that Article.

(3) Any person who –

(a) has parental responsibility for a child as a result of an emergency protection order; and

(b) is entitled to apply for a care order with respect to the child may apply to the court for the period during which the emergency protection order is to have effect to be extended.

(4) On an application under paragraph (3) the court may extend the period during which the order is to have effect by such period, not exceeding 7 days, as it thinks fit, but may do so only if it has reasonable cause to believe that the child concerned is likely to suffer significant harm if the order is not extended.

(5) An emergency protection order may only be extended once.

(6) Regardless of any statutory provision or rule of law which would otherwise prevent it from doing so, a court hearing an application for, or with respect to, an emergency protection order may take account of –

(a) any statement contained in any report made to the court in the course of, or in connection with, the hearings; or

(b) any evidence given during the hearing;

which is, in the opinion of the court, relevant to the application.

(7) Any of the following may apply to the court for an emergency protection order to be discharged –

(a) the child;

(b) a parent of his;

(c) any person who is not a parent of his but who has parental responsibility for him; or

(d) any person with whom he was living immediately before the making of the order.

…

(8) No application for the discharge of an emergency protection order shall be heard by the court before the expiry of the period of 72 hours beginning with the making of the order.

(9) No appeal may be made against –

(a) the making of, or refusal to make, an emergency protection order;

(b) the extension of, or refusal to extend, the period during which such an order is to have effect;

(c) the discharge of, or refusal to discharge, such an order; or

(d) the giving of, or refusal to give, any direction in connection with such an order.

(10) Paragraph (7) does not apply –

> (a) where the person who would otherwise be entitled to apply for the emergency protection order to be discharged –
>
> (i) was given notice (in accordance with rules of court) of the hearing at which the order was made; and
>
> (ii) was present at that hearing; or
>
> (b) to any emergency protection order the effective period of which has been extended under paragraph (4)."

Accordingly the effect of an EPO is to authorise the removal of the child. The court itself does not make the order of removal but authorises the applicant to decide whether such removal should occur. In making the order the court proceeds to give directions with respect to contact but even if it does not do so, the applicant for the order must allow reasonable contact with his parent or parents. The order itself may only last for up to a maximum of 8 days. One extension to a maximum of 7 further days is therefore permitted.

[15] The net result of the discharge provisions is that whilst an application for discharge can be made as soon as the order is made, the hearing of such an application for discharge cannot be heard until the expiry of 72 hours from the making of the order when the hearing had been an ex parte hearing where the parents had not be present and/or had not had notice of the hearing. No application for discharge is available to a person who had notice of and was present at the original hearing or where the EPO has been extended.

[16] There is also no right of appeal against the making or extension of the order.

[17] This case focuses on a challenge to the provisions of Article 64(8) (9) and (10).

[18] <u>The nature of Emergency Protection Orders</u>

Before embarking on a consideration of the competing arguments in this case arising out of the challenge to the compatibility of the impugned provisions with the Convention, it may be of assistance to consider the nature of EPOs.

[19] They were created to ensure that children could be protected without the Trusts obtaining Interim Care Orders. They were to be available more quickly and with somewhat different threshold criteria.

[20] Under Article 50(2) of the 1995 Order, a court may only make a care or a supervision order if it is satisfied both that the child is suffering or is likely to suffer significant harm and that the harm or likelihood of harm is attributable to the care given to the child or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him or the child is beyond parental control. The tests for an EPO in contrast is that only significant harm and the need either to remove the child or prevent removal is to be assessed.

[21] The very nature of EPOs creates a need to balance speed and justice in compulsory intervention for child protection by allowing applications to court on either a day's notice to the parents (and children) or, with leave, without notice, or on abridged notice. Allowing applications to be heard without notice enables an immediate response and one which does not alert the parents. This can reduce the risk to a child, for example where the parents might otherwise disappear, taking the child.

[22] The emergency order vests in the applicant for the order parental responsibility for the child named in the order. That parental responsibility, which is in addition to any parental responsibility vested in the child's parents or any other person before the order was made, is subject to the specific duties and restrictions set out in the 1995 Order.

[23] Article 3 of the 1995 Order applies to EPOs, and therefore the child's welfare remains the paramount consideration when deciding whether an order should be made. The court must not make an order unless doing so would be better for the child than making no order at all under Articles 3(1) and 3(5) of the 1995 Order.

[24] The statutory "checklist" found at Article 3(3) of the 1995 Order does not apply because an EPO does not fall within the definition of "family proceedings". Accordingly on such an application the court cannot make any other order. It must either make or refuse to make an emergency protection order.

[25] The strict rules of evidence do not apply on an application for an EPO (or in relation to any application concerning the order). The court can admit and take account of any oral evidence or any statement contained in any report made to the court, in the course of or in connection with the hearing if it considers it to be relevant to the application.

[26] The exceptional nature of EPOs has been the subject of comment in a number of cases.

[27] In Re C (and B) (Care Order: Future Harm) Hale LJ (as she then was) observed with regard to the criteria for EPOs under the comparable English jurisdiction of the Children Act 1989 at page 617 paragraph 19 as follows:

> "They (EPOs) require that there is a risk of significant harm to the child if the child is not removed or kept where the child is now. Such orders are intended to be made where there is an emergency and it can be shown that unless emergency action is taken the child will be at risk of significant harm during the period of the order."

[28] In X Council v B (Emergency Protection Orders) [2005] 1 FLR 341("the X Council case ") Munby J took the opportunity to make extensive observations on the EPO jurisdiction as a whole, particularly in light of the human rights of the children and the parents involved. That judgment contains an exhaustive review of relevant authorities. In that case children were taken into foster care under ex parte Emergency Protection Orders with the stated aim of arranging medical examinations without any risk of parental interference. It was eventually accepted that it was in the children's best interest to return to the parents. At paragraph 34 the judge said:

> "An EPO, summarily removing a child from his parents, is a terrible and drastic remedy. The European Court of Human Rights has rightly stressed (see P, C and S v United Kingdom [2002] 2 FLR 631 paras (116), (131) and (133) that such an order is a `draconian' and `extremely harsh' measure, requiring `exceptional justification' and `extraordinarily compelling reasons'."

[29] At paragraph 35 of the case, Munby J went on to state:

> "In a number of cases the Strasbourg Court has recognised that the emergency removal of children under an EPO (or its equivalent) is in principle entirely compatible with the Convention and, moreover, that there may be cases where an ex parte (without notice) application is justified: see generally K and T v Finland [2000] 31 EHRR 18, … P, C and S v United Kingdom [2002] 35 EHRR 31, Venema v The Netherlands [2003] 1 FLR 552, Covezzi and Morselli v Italy [2003] 38 EHRR 28 .. But however compelling the case for intervention may be, both the local authority which seeks an

EPO and the justices in the FPC who grants such an order assume a heavy burden of responsibility.

36. The inevitable consequences inherent in the grant of any EPO are exacerbated by a number of what I venture to suggest are not entirely satisfactory features of the statutory scheme laid down in the Children Act 1989 and the relevant rules:

(i) An EPO can be made initially for a period of 8 days and extended for a further period of 7 days …

(ii) The application for an EPO and the EPO itself are only required to be served on the parents within 48 hours after the EPO has been made …

(iii) There is no appeal against either the making or the extension of an EPO …

(iv) No application for the discharge of an EPO can be heard until 72 hours after the EPO was made …

(v) There is no appeal against the refusal to discharge an EPO …

(vi) A parent who was present (even though unrepresented) at the original hearing cannot apply to have the EPO discharged …

(vii) Where a child subject to an EPO has been returned by the local authority to his parent in accordance with section 44(10), the local authority, whilst the EPO remains in force, may again remove the child .. and without any form of judicial intervention .. if it appears to the local authority that a `change in the circumstances of the case makes it necessary … to do so'.

37. So far as the child is concerned there is a further problem arising out of the current difficulties with CAFCASS, which mean that too

> many children do not have the benefit of a children's guardian either at the time the EPO was made or thereafter, when the child (or a children's guardian) might wish to make an application under section 45(8)(a) for the discharge of the EPO.
>
> 38. Whether the matter be viewed from the perspective of the child or the parent, it is not immediately obvious how some of this is altogether compatible with the increasingly rigorous approach to Article 8 of the Convention now being adopted by Strasbourg Court. The statutory scheme means that a child can be removed from a parent for up to 15 days without there being any right of appeal; that a child can be removed by an ex parte (without notice) EPO and without any written or oral reasons having to be given for 2 days; and that no steps to set aside even an ex parte EPO can be taken for 3 days."

[30] Munby J went on to record that there was no need for him to express any concluded view on a matter which had not been argued out in front of him and which was for another day. However he did point out that these appeared to him to be lacunae in the statutory scheme and that that made it all the more important that both the local authority and the justices in FPC should approach every application for an EPO "with an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the Convention rights of both the child and the parents".

[31] I pause to observe at this stage that Munby J in X Council helpfully set out 14 points to assist justices hearing an EPO. They have been compendiously set out by Mr Meehan RM in his judgment in A Trust and M (Neutral Citation No (2005) NI Mag 4). The approach of Munby J has been further dilated upon by McFarlane J in Re X: Emergency Protection Order Neutral Citation No (2006) EWHC 510 (Fam)("the X case "). Since I was informed by counsel that the lower courts are seeking some measure of guidance on EPOs I shall return to these matters in order to collate them at the termination of this judgment so as to enable courts in Northern Ireland to have readily available in the local context a guidance to EPOs.

[32] Finally in this context I record that there is a long line of authority to the effect that judicial review is not normally an appropriate remedy in cases where emergency protection or care order proceedings are either threatened or on foot (see X Council case at paragraph 40). Neither is habeas corpus appropriate (see S v Haringey London Borough Council [2004] 1 FLR 590 which was approved by the Court of Appeal in Re V (Care Proceedings:

Human Rights Claims) [2004] 1 FLR 944. Of these matters, Munby J added in Re X Council at paragraph 40:

> "But each of those cases proceeded on the assumption that the FPC (or the Family Division on an appeal from the FPC) would be able to do full justice to the parties within the EPO or care proceedings. Here, by contrast, the Family Division is powerless to act. It is by no means obvious to me that judicial review would not lie in an appropriate case, to correct error or injustice. The cases to which I have referred should not, as it seems to me, be read as necessarily precluding such an application in an appropriate case. There are, after all, other family contexts in which the absence of any effective right of appeal has prompted the court to acknowledge that judicial review is or may be an appropriate remedy: see Cazalet J's observations in T v Child Support Agency [1998] 1 WLR 144 and my own judgments in R (Marsh) v Lincoln District Magistrates Court [2003] EWCH 956 (Admin) …".

**The law in other jurisdictions**

[33] I delayed the giving of judgment in this case to afford the parties an opportunity to consider certain research which I had caused to be carried out into similar provisions in other countries including Scotland, the Republic of Ireland . South Africa, New Zealand, Canada and Australia. Although all of those countries have sophisticated statutory child protection provisions which make provision for emergency orders to protect children involving the taking of children into a place of safety I was unable to ascertain through my own researches or the submissions of counsel, any instance where a provision similar to that of Article 64(8) of the 1995 Order had been enacted. Some illustrations will suffice.

[34] In Scotland Section 57 of the Children (Scotland) Act 1995 deals with measures for the emergency protection of children and provides for a sheriff making a child protection order in circumstances similar to that under which EPOs can be made under the 1995 Order in Northern Ireland. Section 59(2)and (3) provides that where a child has been removed by virtue of a child protection order ,the Principal Reporter shall arrange for "a children's hearing "to take place to determine if the order should continue on the second working day after the order is implemented . Section 60 provides for the duration, recall or variation of child protection orders. Section 60(7) provides:

> "An application to the sheriff to set aside or vary a child protection order made under Section 57 of this Act or a direction given under Section 58 of this Act or such an order or direction contained (whether with or without variation) under Section 59(4) of this Act, may be made by or on behalf of (*the Act then goes on to set out categories of persons not dissimilar from though not the same as the categories set out in Article 64(7) of the 1995 Order*).
>
> (8) An application under sub-section (7) above shall be made –
>
> (a) In relation to a child protection order made under Section 57 or a direction given under Section 58 of this Act before the commencement of a children's hearing arranged in accordance with Section 59(2) of this Act; and
>
> (b) in relation to such an order or direction continued (whether with or without variation) by virtue of sub-section (4) of the said Section 59 within two working days of such continuation, and any such application shall be determined within three working days of being made."

[35] In terms therefore the application to the sheriff to set aside or vary a child protection order can be made within two working days of its implementation ie before the holding of and obviating the need for an initial hearing, or within two working days of its continuation by an initial hearing. Sub-section (8) thus sets out strict time limits within which the application to the sheriff to set aside or vary the child protection order must be made. If it is not made within these times then it is incompetent later to make it. The application must be made either before the commencement of an initial hearing which is to be held on the second working day after implementation of the order in the circumstances described in Section 59(1) or if it was not made before then within two working days of the continuation of the order by the initial hearing. In either situation the sheriff must determine the application within three working days of its being made. If he has not determined the sub-section by then, the child protection order ceases to have effect under the terms of Section 60(2).

[36] In the Republic of Ireland section 13(1) of the Child Care Act 1991 makes provision for an emergency care order where there is reasonable cause to believe there is an immediate risk to the child .Whilst there is no express

provision for discharge, there is a right of appeal without restriction on the time for hearing

[37] In South Africa the provisions of the Child Care Act 1983 (due to be replaced by the Children's Act 2005) contains provisions for taking children into a place of safety but the legislation is silent on any further provision prohibiting access to courts thereafter.

[38] In New Zealand Part II of the Children, Young Persons and their Families Act 1989 addresses the care and protection of young persons. Sections 39, 40 and 42 make provision for removing children who are suffering or likely to suffer ill-treatment, abuse, neglect, depravation or harm. Where a child is removed by virtue of Sections 39, 40 or 42 the child must be brought before the Family Court not later than the fifth day after being removed whereupon the court will determine if the child should be released. Section 44 expressly provides the following:

> "(i) Where a child or young person is placed in the custody of "Chief Executive" pursuant to Section 39 or Section 40 or Section 42 of this Act, any parent or guardian or other person previously having the care of the child or the young person may apply to the court for the release of that child or young person, or for access to that child or young person while he or she is in the custody of the (Chief Executive) and the court may make any order that it is empowered to make under Section 46 of this Act.
>
> (ii) An application may be made under Sub-section (1) of this section at any time before the court or young person is released from the custody of the (Chief Executive) or is brought before the court in accordance with Section 45 of this Act."

[39] Canadian provincial and territorial legislation allows for the protection of children. For example Section 19 of the Child, Youth and Family Enhancement Act 2000 of Alberta allows for ex parte applications authorising apprehension by the authorities of a child who is at risk of serious harm. Provision is made for the hearing to take place thereafter before a court within ten days of the apprehension and two days notice of the hearing must be given. Thus there may well be a delay in the matter coming before the court well in excess of 72 hours. The Supreme Court has held that a four day delay to file an application for a child protection hearing and a seven day period for the return of the application in a case where authorities had seised a one day old child not to be beyond the needs of a constitutional balance between the needs for interim measures to protect children at risk of harm

and the requirement fro an expedited post apprehension hearing process in K.L.W v Winnipeg Child and Family Services [2000]2 SCR519. Nonetheless the legislation does not contain any provision expressly prohibiting access to the court at a period earlier than this and in any event the option of judicial review was also open to the parents before this court hearing .

[40] In Australia legislation governing all public law aspects falls to individual states and the territories to legislate. In Queensland the Child Protection Act 1999, in Victoria the Children, Youth and Families Act 2005, in New South Wales the Children and Young Persons (Care and Protection) Act 1998 and in the Australian Capital Territory the Children and Young Person Act 1999 all make provision for child protection orders in emergency circumstances. I am unaware of any provision that expressly excludes further access to the court thereafter for any period .

[41] The Convention framework and the principles to be applied

Article 6 and Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention") were the key Articles of the Convention under scrutiny in this case.

[42] Article 6(1) where relevant to this case, provides:

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

[43] Golder v United Kingdom [1979-1980] 1 EHRR 524("Golder's case") is clear Strasbourg authority for the proposition that it was inconceivable that Article 6(1) should have detailed procedural guarantees for civil cases without first having protected the right of access to a court. The right of access is therefore an inherent element in Article 6(1).

[44] On the other hand , at paragraph 38, the court stated:

> "The court considers, accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication."

[45] At paragraph 39 instances of the restrictions on the right were highlighted in the following terms:

> "The Government and the Commission have cited examples of regulations and especially of limitations, which are to be found in the National Law of States in matters of access to the courts, for instance, regulations to minors and persons of unsound mind."

[46] In Ashingdane v UK [1985] 7 EHRR 528("the Ashingdane case"), on the rights of compulsory mental patients to sue, the court said at paragraph 57:

> "Certainly the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implications since the right of access, `by its very nature calls for regulation by the State, regulation which may vary in the place according to the needs and resources and of individuals' (Golder v United Kingdom 1 EHRR 524 para 38) .. nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved".

[47] Article 8 of the Convention reads as follows:

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

> the protection of the rights and freedoms of others."

[48] Compulsory removal or retention in public care are clearly "interference by a public authority" with the rights of parents and children under Article 8(1). To be justified, such interferences must be in accordance with the law – for example the Children Order 1995 gives effect to a presumption in favour of parental care and contact-, be for a defined legitimate aims- which would include the protection of the welfare of a child - see Hendrix v Netherlands [1983] 5 EHRR 223- and be necessary in a democratic society).

[49] In Covezzi and Morsselli v Italy [2004] 38 EHRR 28 the European Court of Human Rights unanimously held that there had been no violation of Article 8 on account of the emergency care order made in respect of the applicant's children. At paragraph 108 the court said:

> "The court recalls that it has already been accepted that when an emergency care order has to be made, it may not always be possible, because of the urgency of the situation, to associate in the decision-making process those having custody of the child. Nor may it even be desirable, even if possible, to do so if those having custody of the child are seen as the source of an immediate threat to the child, since giving them prior warning would be liable to deprive the measure of its effectiveness. The court must however be satisfied that in the present case the national authorities were entitled to consider that there existed circumstances justifying the abrupt removal of the children from the care of the applicants without any prior contact or consultation. In particular, it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the applicants and the children as well as of the possible alternative to taking the children into public care, was carried out prior to the implementation of a care measure".

[50] Statutory Interpretation and Section 3 of the Human Rights Act 1998

[51] Where relevant to this matter the Human Rights Act 1998 ("HRA") provides as follows:

"3(1)So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section -

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

4(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied –

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation

> concerned prevents removal of the incompatibility,
>
> it may make a declaration of that incompatibility.

[52] Of the words in 3(1) "*so far as it is possible to do so* . . . subordinate legislation *must* be read and given effect in a way which is compatible with Convention rights", Lord Cook of Thordon said in R v Director of Public Prosecutions, ex p Kebilene [2002] 2 AC 326 at 373F that they amount to "a strong adjuration". The court must attempt to find a possible interpretation of the legislation which is compatible with Convention rights even though that may not be the natural or ordinary meaning. Accordingly if a provision is incompatible, the interpretative obligation must then be invoked so far as it is possible to do so to bring about a situation where the incompatibility no longer exists. I respectfully adopt the view expressed by the Right Honourable Lord Hope of Craighead in a lecture entitled "Interpretation and Declarations of Incompatibility" on 18 June 2002 where he said:

> "There appears to be no room here for the application of the de minimis principle".

[53] The overriding rule therefore , where compatibility is an issue, is as set out in Section 3(1) of HRA 1998. It requires the court to do all it possibly can to interpret legislation compatibly with the Convention, even if this means straining words beyond the ordinary and natural meaning of those words. It allows the court to alter the meaning of the words even if to do so will involve a departure from the meaning they were intended to have when the provision was enacted by Parliament. The limitations of this approach however are encapsulated by Lord Hope in R v A (No 2) [2001] 2 WLR 1546 at 1582 C-D when he said:

> "The rule of construction which Section 3 lays down is quite unlike any previous rule of interpretation. There is no need to identify an ambiguity or absurdity. Compatibility with Convention rights is the sole guiding principle. This is the paramount objective which the rule seeks to achieve. But the rule is only a rule of interpretation. It does not entitle the judges to act as legislators – the compatibility is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible. It seems to me that the same result must follow if they do so by necessary implication, as

this too is a means of identifying the plain intention of Parliament . . .".

[54] Ghaidan v Godin-Mendoza [2004] 2 AC 557("Ghaidan") is a leading case on the interpretation of statutes under section 3 of the HRA. Ghaidan and its predecessor case, Fitzpatrick v Sterling Housing Association [2001] 1 AC 27 both raised the question as to the rights of the surviving same sex partner of a tenant who had held a statutory tenancy under the Rent Act 1977. In both cases the deceased tenant and his partner had cohabited and shared a close and stable relationship for many years. The issue arose as to whether the survivor was entitled to succeed to his partner's statutory tenancy.

[55] At paragraph 30 of his judgment in Ghaidan , Lord Nicholls referred to the tension between competing aspects of section 3 of the HRA. On the one hand it would some times "require a court to depart from the unambiguous meaning the legislation would otherwise bear", and on the other hand it was still the statute and not the Convention rights directly that had to be read and given effect under section 3. At paragraph 31 Lord Nicholls said:

> "31. On this the first point to be considered is how far, when enacting section 3 Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the `interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may cause legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the Parliamentary draftsmen in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.
>
> 32. From this a conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a

> Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which changed the meaning of the enacted legislation so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is `possible', a court can modify the meaning, and hence the effect or primary and secondary legislation.
>
> 33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the court should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, `go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

[56] The concept of interpretations under section 3 being consistent with "the fundamental features of the statute" was addressed in the case of Re S (Minors) (Care Order: Implementation of Care Plan) [2002] 2 AC 29("Re S"). The House of Lords in that case overturned a section 3 interpretation of the Children Act 1989 given by the Court of Appeal primarily on the ground that it contradicted a series of provisions that restricted judicial supervision of care orders. Those restrictions together constituted a "fundamental feature" of the Children Act.

[57] In paragraph 43 of his judgment in Re S Lord Nicholls said:

> "In his judgment Thorpe LJ noted that the starring system `seems to breach the fundamental boundary between the functions and responsibilities of the court and the local authority' … I agree. I consider this judicial innovation passes well beyond the boundary of interpretation. I can see no provision in the Children Act which leads itself to the interpretation that Parliament was thereby conferring the supervisory function on the court. No such provision was identified by the Court of Appeal. On the contrary, the starring system is inconsistent in an important respect with the scheme of the Children Act. It would constitute amendment of the Children Act, not its interpretation. It would have far-reaching practical ramifications for local authorities and their care of children. The starring system would not come free from additional administrative work and expense. It would be likely to have a material affect on authorities' allocation of scarce financial and other resources. This in turn would affect authorities' discharge of their responsibilities to other children. Moreover, the need to produce a formal report whenever a care plan is significantly departed from, and then await the outcome of any subsequent court proceedings, would affect the whole manner in which authorities discharge, and are able to discharge their parental responsibilities.
>
> 44. These are matters for a decision by Parliament, not the courts. It is impossible for a court to attempt to evaluate these ramifications or assess what would be the views of Parliament if changes are needed."

[58] An example of how far the courts will develop this concept is perhaps found in R (on the application of Hammond) v Secretary of State for the Home Department [2006] 1 AER 219("Hammond's case"). This case involved an analysis of paragraph 11(1) of Sch 22 to the Criminal Justice Act 2003. The paragraph precluded the possibility of an oral hearing in circumstances where the Secretary of State was to refer cases involving minimum terms of imprisonment fixed by the Secretary of State to a judge of the High Court for a determination of the minimum term which the prisoner should serve. There could be cases in which justice required an oral hearing but paragraph 11(1) did not allow it. The House of Lords upheld the conclusion of a Divisional Court that the provision was incompatible with requirements of Article 6(1) of

the Convention but that paragraph 11(1) was to be read subject to and on condition that the High Court had the discretion to order an oral hearing where such hearing was required to comply with the prisoner's rights under Article 6(1) of the Convention. In order to achieve compatibility therefore, words may be read in by way of addition to those used by the legislature. Words may also be read out so as to remove from the provision a word or phrase that prevents it being read and given effect in a way that is compatible. Moreover words may be read down so as to give them a narrower construction than their ordinary meaning would bear. It also may be enough simply to say, without altering the words used but going to the length of translating them, how they are to be given effect in a way that is compatible. (See Brown v Stott [2000] JC 328, 355 B-C.)

[59] That this approach is a common one where courts are meeting with such legislation is illustrated by the interpretation in New Zealand of the New Zealand Bill of Rights Act 1990 which has an interpretative obligation which is similar to, but weaker than, Section 3 of the Human Rights Act 1998. The courts have taken an imaginative approach and read in procedural safeguards so as to be able to read an Act in a way which is compatible with human rights. Thus in Ministry of Transport v Noort [1992] 3 NZLR 260, the court implied a right to telephone a solicitor into a provision which conferred a power to breathalyse a driver.

[60] In King's application [2003] NILR 43 compatibility of secondary legislation in article 11 of Life Sentences (NI) Order 2001 (Secretary of State to certify tariff of life sentence prisoners) with article 6(1) (right to a fair trial by independent public hearing) was considered. The court found Article 11 to be incompatible but under s3 of the 1998 Act, it was read in a compatible manner by requiring the Secretary of State to accept the minimum term set by the judiciary. Nicholson LJ said at paragraph 33:

> "Having found that Article 11 is on ordinary principles of construction incompatible with Article 6(1) of the Convention, it is our duty to have recourse to Section 3(1) of the Human Rights Act."

At paragraph 41 he added:

> "In the unlikely event that the trial judge and the Lord Chief Justice make differing recommendations, the Secretary of State could have been faced with a choice which would involve a sentencing exercise. Accordingly we propose to read into Article 11 a restriction on the opinion of the Secretary of State which will require him to accept the minimum term set by the judiciary and the lower of the two

> minimum terms set by the judiciary and the lower of the two minimum terms, if faced with a choice. His counsel had seemed to us agreed. Taking this course we have striven "to find a possible interpretation compatible with Convention rights" as required by Section 3".

[61] A different outcome is found in R (on the application of Anderson) v Secretary of State for the Home Department [2003] 1 AC 837. In that case a seven member appellant committee of the House of Lords considered the Home Secretary's role in setting the minimum term for mandatory life sentences under Section 29 of the Criminal (Sentences) Act 1997. The House of Lords refused to apply section 3 of the 1998 Act so as to read section 29 of the 1997 Act as requiring the Home Secretary not to fix a minimum term in excess of the judicial recommendation. A declaration of incompatibility was made under Section 4 of the 1998 Act. In rejecting the proposed interpretative approach under section 3 of the 1998 Act Lord Steyn stated at paragraph 59:

> "It is impossible to follow this course. It would not be interpretation but interpolation inconsistent with the plain legislative intent to entrust the decision to the Home Secretary, who was intended to be free to follow or reject judicial advice. Section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute".

[62] I have been conscious of these authorities when considering my task in this instance .In particular I have striven to draw the line between interpretation and interpolation .I have approached this difficult case , at the appropriate stage, in the conviction that it is necessary to ascertain the fundamental features of the impugned provisions and thereafter to ascertain if they are, or can be made , compatible with the Convention articles under review .

Incompatibility and the Legislative Framework

[63] Section 21 of the 1998 act defines "subordinate legislation" as including any Order in Council other than certain specified exceptions. Subordinate legislation in Northern Ireland therefore includes all Orders in Council made pursuant to the NI Act 1974 or the NI Act 1998, whether made before or after the HRA 1998 was passed. Article 3(2)(b) makes it clear that the Act does not affect the validity, continuing operation or enforcement of any incompatible primary legislation. On the other hand the Act clearly contemplates that subordinate legislation which is incompatible with Convention rights may be quashed. That is the relief sought in this case.

**The Applicants' cases**

[64] Although the father was represented by Ms McGrenera QC with Ms McBride and the mother was represented by Ms Dinsmore QC with Ms Cunningham their approach was broadly similar and it permits me to conflate their submissions as follows:

[65] Articles 64(8), 64(9) and 64(10) are incompatible with Article 6 and 8 of the Convention and should be struck down either individually or collectively.

[66] Counsel relied upon the concerns expressed by Munby J in the X Council Case at paras 36-38 wherein he questioned whether similar provisions in the 1989 Act were altogether compatible with the rigorous approach to Article 8 of the Convention now being adopted by the Strasbourg Court.

[67] Counsel emphasised that at ex parte hearings, where the parents are not present or represented, the guardian ad litem also will not be present. Therefore there is neither independent protection afforded to the child nor external accountability to the court. The end result is that an EPO can be made for eight days with a possible extension of up to seven days purely on a one sided basis. Thus fifteen days can pass without any right of appeal.

[68] Even if judicial review is available, that form of relief is insufficient in terms of a remedy because it deals essentially with procedural aspects and not with the merits of the case. The very nature of EPO proceedings is such that almost invariably the issues will be fact driven rather than procedural considerations .

[69] The choice of 72 hours under Article 64(8) is a purely arbitrary choice. There is no logic or justification for choosing 72 hours rather than 24 hours or 48 hours .In any event a court might well be sympathetic to an application for a short adjournment in any particular instance where the Trust needed to focus attention on care rather than litigation .It should be the court who determines this rather than the blunt instrument of total statutory prohibition in every case.

[70] Ms McGrenera drew an analogy with the criminal jurisdiction where there is no question of access to justice being deferred for 72 hours. Why should the removal of a child be treated differently particularly when EPOS are often heard by lay magistrates in circumstances where experience shows the parents may well be amongst the most dysfunctional and ill equipped in our community ?

[71] Ms Dinsmore drew attention to the fact that the EPOs had been introduced to replace Place of Safety Orders following concerns expressed in the course of the review of child care law and the Cleveland Inquiry. The Place

of Safety Order could be granted by a single magistrate and lasted up to 28 days. It had become a common way of commencing care proceedings. EPOs were intended to alter that situation so that children could only be detained if an emergency arose and it was necessary for their immediate protection. Counsel argued however that an arbitrary reduction to a 3 day prohibition on court proceedings did not address the principle of a right to a court hearing. The existence of the prohibition on access to court whether it be for three days in the case of an ex parte proceeding or 8 days in the case of a inter-partes hearing, in circumstances where there is no right of appeal, amounted to a breach of the principle in Golders case in that the essence of the right to access was impaired. Whilst the protection of children was a legitimate aim, the means thus employed were wholly disproportionate.

[72] Ms Dinsmore argued that the provisions under Article 65 of the 1995 Order whereby the police have a power to take a child into police protection for up to 72 hours if a police officer has reasonable cause to believe that the child would otherwise suffer significant harm provides sufficient emergency protection without the additional measures deployed in the impugned provisions.

[73] Both Ms McGrenera and Ms Dinsmore strongly asserted that if the impugned provisions were prima facie incompatible with the Convention the approach adopted in the Hammond case was wholly inapposite in this case. Any attempt to read into the legislation a provision that a parent could apply to discharge within the proscribed offending time limits or a right to appeal would amount to placing a meaning on the clear wording of the legislation which was plainly unsustainable and which would amount to judicial legislation.

[74] Finally counsel drew attention to the fact that throughout the Commonwealth countries there is nothing equivalent to the 72 hour prohibition .Such a measure is thus wholly unprecedented .

**The Intervening Party's case**

[75] Mr Maguire made the following arguments:

[76] The legislature has struck the appropriate balance between on the one hand children's interests and the interests of other individuals. The legislature has conducted an inquiry into the issue and scrutinised the Bill carefully before enacting the legislation . The provisions in the 1995 legislation are precisely the same as those in the 1989 Act. The court should be slow to intervene where that balance has been struck.

[77] The general purpose of emergency protection legislation is quite clearly Convention compliant.

[78] Counsel urged the court to consider the overall pattern of the legislation. The genesis of the legislation under consideration arose out of the White Paper "The Law on Child Care and Family Services" published by the Secretary of State for Social Services in 1987. Paragraph 45 recorded:

> "Under existing statutory provisions any person may apply to a magistrate for removal of a child to a 'place of safety'. The 'place of safety' order is unsatisfactory in various ways: for example the grounds do not address the emergency nature of the need to remove the child. It is proposed to replace it by an 'Emergency Protection Order'."

Paragraph 46 continued:

> "A Place of Safety Order may last up to 28 days. The review proposed that an emergency protection order should last for eight days only, following the House of Commons Social Services Select Committee's proposal. This elicited widespread comment. After detailed examination it is accepted. The Government recognise that there is a need to keep to a practicable minimum the period that the child is detained during which there is no provision for challenge by the parent or child. During this period a local authority should normally have time to investigate the case, decide whether or not to initiate care proceedings and obtain sufficient evidence to enable the court to decide whether to make an interim care order. However there may be some occasions when the local authority are not ready to proceed. In exceptional circumstances the local authority will be permitted to apply for an extension of an emergency protection order for a further period of up to seven days to provide continued protection for the child. There will be on this occasion an opportunity for the parents or child to challenge the extension, such a challenge being based on the ground that there is no risk to the child which justifies an extension of the emergency protection order. Within 15 days it should always be possible for the court to decide the case for an interim care order."

[79] Counsel further drew my attention to the debate on the 1989 Act and the duration of emergency protection orders in Parliament. On 25 May 1989

Mr Mellor, then the Minister of State from the Department of Health ,said in the House of Commons :

> "The amendments concern the power in subsection (8) to make rules of court where the circumstances in which an application may be made to discharge an emergency protection order. We intend that when emergency protection orders are obtained on an ex-parte application, the child, parents and other persons specified in sub-section (8) should always be able to challenge the order after 72 hours. But in some cases – perhaps a small minority, because of the nature of the circumstances – an inter partes hearing of the emergency protection order application will be possible. The court may decide for example that there is not enough information to justify making an emergency protection order immediately on an ex parte application and adjourn the hearing for, say, 24 hours in order to hear the parents or other persons. Although, admittedly, atypical circumstances, it should not be necessary to allow interested persons a further opportunity to oppose the order after 72 hours. They will have had an opportunity to argue against the order being made in the firs place, and would be able to contest an application to extend the duration of the order if one were made under subsection (5) within, at most, 8 days. If the local authority or authorised person follows up with an application for an interim care order or interim supervision order, parents will be parties to the proceedings under the rules of the court to be made under Clause 68 and could challenge that application.
>
> Persons who participated in an inter partes hearing of an emergency protection order application should have ample opportunity, therefore, to challenge the proposals before the court without need for a further opportunity after 72 hours. Frequent returns to court could be unsettling for the child and increase the pressure of business on the courts, while preventing local authorities from making whatever arrangements they see as necessary for the future welfare of the child, which may or may not involve bringing proceedings for a care or supervision order."

[80] Mr Maguire urged that 72 hours was not a lengthy period. Moreover Article 64(8) was careful to make clear that the application could be made in less than three days though the matter would not be heard for 72 hours.

[81] Mr Maguire emphasised that there is no absolute right to access to courts pursuant to the Golder's case provided the restrictions on access do not impair the essential right in circumstances where there is a legitimate aim and the means are proportionate. He drew my attention to Rule 5 of the Magistrates' Courts (Children (NI) Order 1995) Rules 1996 which gives leave for an ex parte application and which permits the applicant "within 48 hours of the making of the application" to file a written copy of the application and serve same in the appropriate form. Counsel emphasised that the service was to be within 48 hours. Mr Maguire drew attention to the fact that in the aftermath of an ex parte application being granted, parents would in likelihood receive a substantial volume of information from the court and the authority who had sought the order. Parents themselves would need time to consider their position, obtain legal advice, decide which proofs were required and accordingly it would be very difficult for this to be done in practice within 72 hours. Counsel therefore urged that the 72 hour restraint merely reflected the realities of the matter and in practice acted as very little restraint upon the access to courts.

[82] Mr Maguire urged that the court should see the EPO scheme in its proper context. A number of close statutory protections were afforded by the legislation. These included a hearing before an independent court (contrast Article 65 which affords the police powers without invoking an independent court at that stage). In the event the application will usually be made on notice although sometimes ex parte applications will be necessary where the emergency of the circumstances demands it. Such orders will only be made where the court is satisfied there is reasonable cause to believe that the child is likely to suffer harm and where a searching enquiry has been entered into by the curt to ascertain if an ex parte application is justified . Article 63(4) merely authorises removal and does not require it. It is the authority who has obtained the order that must determine if it is necessary. That authorisation can only come into operation where it is necessary to safeguard the welfare of the child. The court itself may give directions about contact. Thereafter the terms of Article 63(10) and 63(11) are couched in mandatory terms for the return of the child to the parents where it appears safe to do so. Finally counsel drew my attention to the fact that the order cannot exceed eight days and in many instances will be shorter. In the present case it was four days in length. The application to extend must be on notice again before an independent tribunal with a limit on extension to seven days.

[83] Counsel also referred to the common law protections which exist in the context of emergency protection orders. He drew attention for example to

Munby J's checklist at paragraph 7 in the X Council case together with the additional protections adumbrated by McFarlane J in Re X.

[84] Dealing with Article 64(9), Mr Maguire argued that there is ample authority for the proposition that when provision is made for a full inter partes hearings, a failure to provide a right of appeal does not necessarily lead to a breach of Article 6 of the Convention. He drew my attention to the strength of this proposition by reference to a number of leading text books on judicial review.

[85] On the issue of the prohibition on return to court in Article 64(10) counsel urged that in circumstances where there already had been a hearing inter partes there was no need to have a further application to discharge within such a short period as 8 days ie the maximum length of an EPO in the first instance . The courts are custodians of fair proceedings and Parliament does not need to provide a checklist for this. Accordingly Article 64(9) and (10) are set in the context of a single fair hearing where in any event there is a limited lifespan for an emergency protection order. Once the order is made inter partes, the authority who receives the authorisation thereafter has duties to fulfil during the maximum eight day period.

[86] Finally Mr Maguire cautioned against reliance on other jurisdictions where understandably they have adopted different solutions to the vexed question of child protection and the manner of balancing the differing interests.

**Conclusions**

[87] I commence by recognising that the concept of emergency protection orders is Convention compliant. There clearly are cases where there is a need for such intrusive emergency intervention. The Strasbourg Court has approved of cases where an ex parte application procedure has been invoked (see T,C and S v United Kingdom (2002) 36 EHRR 31).

[88] The impugned provisions which are the subject of this application, are set in the statutory context of the 1995 Order where the interests of the child are paramount. That too is Convention compliant. In Hendriks v Netherlands (1983) 5 EHRR 223 the ECrtHR said:

> "Where, as in the present case, there is a serious conflict between the interests of the child and one of its parents which can only be resolved to the disadvantage of one of them, the interests of the child must, under Article 8(2) prevail."

[89] The underlying philosophy and policy of the legislation must therefore be kept in mind when interpreting the provisions relevant to EPOs.

[90] At this stage I pause to observe that I consider a court should be cautious before importing procedural protections developed in the context of criminal law into the child protection arena. The State's protective purpose in regard to children is clearly distinguishable from the State's punitive purpose in the criminal context. Therefore although counsel drew my attention to the absence of restrictions on access to justice in bail applications I have not drawn upon that analogy in determining this case.

[91] EPOs clearly contemplate an infringement of the rights of parents. The interests at stake in such cases are of the highest order given the impact that public action to separate parents and children may have on all of their lives. Physical removal of a child from parental care constitutes one of the most disruptive forms of intervention known to the law but at times it is necessary in order to protect children. Children are highly vulnerable. Society has an interest in protecting them from harm. The administration of justice and fair process must therefore reflect this fact .Where the protection of their interests diverges from the protection of parental rights to freedom from public intervention it is the interests of children which are paramount even within the ambit of the Convention . Conceptually this provides the valid policy justification for permitting ex parte applications where the situation poses a risk to a child's life and health by the delay and degree of notice sometimes associated with an inter partes hearing.

[92] Thus the Convention has been interpreted so as to recognise on the one hand the risk to children if intervention is prevented and the other hand the risk to their parents if it is allowed unfettered. The 1995 legislation in respect to EPOS has embraced the need to exercise a balance between intervention and the right to family privacy whilst leaving that balance in the hands of the Family Proceedings Court without a right of appeal.

[93] In this case it has been necessary to consider the delicate balance enacted in the 1995 legislation in the context of the Convention based right to access to justice. Although the United Kingdom has no written constitution, the courts have long recognised certain fundamental rights in the common law which pre-dates the HRA and Article 6 of the Convention. The right to unimpeded access to the courts has been such a right. Whilst the common law and the Convention have thus yielded up the same principle, Article 6(1) has now given a new perspective to that right.

[94] Golder's case is clear authority however for the proposition that the right of access to the courts is not absolute. The position is well summarised in Lester and Pannick "Human Rights Law and Practice" 2nd Edition at para 4.6.1 as follows:

> "Restrictions on the right of access to a court have also been allowed in relation to: vexatious litigants; minors; bankrupts; prisoners; a requirement for the payment of fines for abuse of process; reasonable time limits in respect of proceedings and rules relating to service; a requirement for payment of security for costs; in a criminal case, a practice whereby there is no hearing as to guilt or innocence (only as to sentence) where an accused pleads guilty at the beginning of his trial; and privilege available in defamation proceedings to protect freedom of expression."

[95] Article 64(8), is a clear restriction on the access to justice for 72 hours. A key component of the court's consideration is whether or not that limitation restricts or reduces the access left to the individual in such a way or to such an extent that the very essence of the right is impaired in the sense set out in Ghaidan's case , Ashingdane's case and Re S.

[96] The object of concern of Article 64(8) is tolerably clear. It is to ensure that the Trust is given time to investigate the matter fully and to decide what further action needs to be taken to protect the child. If there is evidence that the child will suffer significant harm, the Trust needs time to plan for the child and to prepare a case for an interim care order. Frequent returns to court can be unsettling for a child and increase the pressure of business on the courts. Support for such a textual analysis and construction of Article 64(8) is to be found in the helpful references in Hansard drawn to my intention by Mr Maguire during the course of the hearing.

[97] Mr Maguire properly drew detailed attention to the careful consideration that the Government had given to this legislation. I must be conscious of the need for judicial restraint on the grounds of both technical circumstance and democratic value where Parliament has enacted legislation .

[98] Moreover I recognise that the Convention is not a catechism for purists. It has been described as a living instrument which must be interpreted in light of present day conditions unfettered by doctrinal allegiances. The needs and resources of the community and of individuals must be taken into account in its interpretation.

[99] I am also persuaded that the rigorous scrutiny invoked by Munby J in the X Council case and McFarlane J in the X case will serve to dilute the attendant dangers in an ex parte hearing and materially increase the protection afforded to absent parents.

[100] I share the view of Munby J predicated in the X Council case that judicial review might well lie to correct error or injustice during the 72 hour impasse in a context where there is no effective right of appeal and where the court has done no more than authorise the Trust to take the child from the family to a place of safety.

[101] However notwithstanding these cautionary considerations I have come to the conclusion that Article 64(8) of the 1995 Order is incompatible with Article 6(1) and Article 8 of the Convention. I have determined that it is an unnecessary and disproportionate response to a self-evidently legitimate aim for protecting children. The effect is to remove for 72 hours the access to justice of parents in such a way and to such an extent that the very essence of the right is impaired for that period.

[102] In the area of child protection, it is important to address the child's interest in remaining with his or her parents if at all possible and the harm that may come to the child from precipitous and unnecessary interference. Removing children from their parents can have profound and lasting consequences for a child .It cries out for the closest judicial scrutiny even during a period as theoretically short as 72 hours.

[103] Equally so, the removal of a child from parents custody by a public body breaks the fundamental bond between parent and child which courts should only be countenanced as a very last resort .In circumstances where that decision has been taken after hearing only one possible version of events a court should be slow to yield up the right to redress a possible injustice even for 72 hours .

[104] That a parent's psychological integrity , sense of autonomy and dignity can be seriously affected by such a decision must fall within the ambit of the rights protected by Article 8(1)of the Convention. The enforced removal of a child by the State from a parent constitutes not merely one of the small shames and reversals of everyday life. On the contrary it can lend a social stigma to parents as being unfit in the eyes of the community and can be perhaps even harder to bear than the loss of personal liberty itself. Such a stain should not remain unalterable even for 72 hours if there is good reason to remove it. That the door of the court should remain firmly shut for 72 hours in such circumstances is apt to create a permanent and profound sense of social and legal injustice which is disproportionate to the mischief it seeks to address .

[105] Child protection authorities are human and are prone to err in their assessment of whether a child is in need of this degree of protection. They may intervene unnecessarily. Hence the need for close, probing and ongoing judicial scrutiny. Years of experience in determining cases in the Family Division serve to yield up the unhappy truth that there may be a tendency in

ex parte proceedings to defer to the Trust's assessment particularly when these cases are being dealt with largely by Lay Magistrates often at a late hour. There may also be a tendency in ex parte proceedings to defer to the Trust assessment of the situation given the individualised nature of such proceedings and the highly charged atmosphere generated by the prospect of children in peril. In such ex parte proceedings, neither the child nor the parent nor, importantly, a guardian ad litem will have made any input. The strict rules of evidence will not have applied(see paragraph 25 of this judgment). It is a situation rife with risk of injustice and such circumstances in my view create an imperative for swift redress should the circumstances so merit it.

[106] Optimally, overworked and under resourced social workers should have time and space to reflect on the next step without risk of further harassment. Nonetheless experience in both the Family and Judicial Review Divisions makes clear that a return to court to restate a case already made or to prepare more fully for an interim care order in practice is rarely a particularly exacting or intrusive exercise and to elevate it to a level which results in parents being deprived of access to justice is in my view a disproportionate approach to the task. Moreover it is the interests of the child which are paramount and not those of the Trust . The logistics of organising representation ,serving relevant notice and preparing the evidence will in most instances render the three day prohibition irrelevant for all practical purposes ,This is particularly the case where the prohibition applies only to the hearing and not to the application which can be made immediately. Usually therefore parents will be unable to organise a hearing within 72 hours. Even then the court may want further information before authorising a discharge .Accordingly it is difficult to see how the Trusts will be burdened by such hearings on anything other than the rarest of occasions .It is difficult therefore to see why this circumstance should be invoked to impede the fundamental principle of the right to have access to justice and easy to understand why it does not seem to have been employed elsewhere. On the other hand the removal of the prohibition would reinstate the continuing scrutiny of the court in those cases where an obvious injustice had occurred and where the evidence could be readily assembled.

[107] The availability of judicial review to challenge either the decision of the court or the subsequent decision of the Trust to invoke the power entrusted to it by the court, is in my view an inadequate substitute for the right to return to a hearing before the Family Proceedings Court. Where there may well still be a hotly disputed factual situation, judicial review does not seem to be the most appropriate forum for redress. Principle and pragmatism combine to emphasise that judicial review is a remedy of last resort. It is rarely an appropriate forum for resolution of disputes in the high octane atmosphere of emergency protection issues.

[108] 72 hours may be a lengthy period for parents to be deprived of custody of their child particularly when some issue might well arise requiring a resolution to which the parents would not necessarily consent. Whilst parental responsibility is still shared during that period, the absence of court proceedings could dilute the Article 6 requirement that parents must be involved closely in the decision-making process involving their child. There is undoubtedly an increasingly rigorous approach to Article 8 of the Convention now being adopted by the Strasbourg Court. There should be no impediment to participation in the decision-making process by parents albeit this may well be an area into which judicial review could more properly intrude should the need arise.

[109] The legislative practices in other jurisdictions are not consistent and, particularly where countries do not act under the spur of the Convention, are certainly not determinative of the issue in this case. Nonetheless the absence of similar draconian provision to that set out in Article 64(8) in many other countries which have been researched in this case and where child protection is a highly sophisticated concept serves to confirm my conclusion that access to justice – even of the transitory nature in the impugned provision – is regarded as sacrosanct even in jurisdictions which are not subject to the Convention and should only be denied in the most compelling of circumstances. For three days the Trust would be both the investigator and the adjudicator on the need to take a child from the parents to a place of safety subject only to what I consider in this context to be the inadequate remedy of judicial review. For up to two of those days, it might be that the EPO had not been served on the parents (see Rule 5 of the Magistrates' Courts (Children) (NI) Order 1995) Rules 1996) and there might be no written or oral reasons given to the parents for the decision having been taken. No appeal lies to remedy the situation . It is the Trust, having been authorised by the court, who will make the decision to take the child from the parents. That decision may not be seen as having been made on an impartial basis. Accordingly it is necessary that even for 72 hours there is available someone capable of acting judicially in balancing the interests of the State against those of the individual and that impartial arbiter be available to be satisfied that the Trust has reasonable grounds in the event of changing circumstances. The very presence of an independent judicial scrutiny during that period of 72 hours will also serve to ensure that the Child Protection agencies continue to act on reasonable and proper grounds conscious as they will be that the doors of the court are open to challenge them.

[110] Having come to these conclusions, I have then turned to consider whether or not I can find a possible interpretation of Article 64(8) which is compatible with the Convention rights even though that may not be the natural or ordinary meaning of the legislative wording .

[111] I am unable to invoke the approach adopted by the House of Lords in Hammond's case by reading in words which would permit the Family Proceedings Court to have a discretion to conduct a hearing during the 72 hour period prohibited by Article 64(8). Hammond's case was set in a different context where the Secretary of State had expressly conceded that in the event of the House of Lords holding the impugned provision to be incompatible it could then be read subject to the implied condition that the High Court Judge had a discretion to order an oral hearing. Moreover it seems to me that Lord Bingham (at paragraph 17 of Hammond's case) and Lord Rodger (at paragraph 30) made clear that this circumstance rendered it unnecessary for them to form an opinion as to whether the decision of the Divisional Court to so interpret the clause was sustainable.

[112] I consider to read down the impugned legislation so as to permit a hearing within the 72 hour prohibited period would be to cross the constitutional boundary between interpretation and interpolation inconsistent with the plain legislative intent of the 1995 Order. In applying the principles adumbrated by Lord Nicholls in Ghaidan's case and Re S I consider that such a step would be at odds with the fundamental features of the statute and inconsistent in an important respect with the plain meaning of the 1995 Order.

[113] The 1995 Order is "subordinate legislation" as defined in Section 21(1) of the 1998 Act. A declaration of incompatibility under Article 4 of the 1998 Act would not therefore be available as Section 4 applies to a provision of "primary legislation" or a provision of secondary legislation rendered irremovable by primary legislation. I have come to the conclusion that Article 64(8) of the 1995 Order is incompatible with the provisions of Articles 6 and 8 of the Convention. It cannot be read or given effect in a way which is compatible with the Convention rights pursuant to Section 3 of the Human Rights Act 1998.Whilst I recognise that the aim of the provision is a legitimate one –to ensure that the subject child is not unsettled and Trusts can make measured and considered arrangements for the child's care free from the pressure of court proceedings-I do not consider that a 72 hour prohibition on access to a court is a proportionate means to achieve that aim. To do so is to impair the very essence of the right of access to the court implicit in Article 6 of the Convention. The relief sought in the Order 53 application is for a declaration to this effect. I shall invite submissions from the parties before finalising the precise form of the appropriate order.

**Article 64(9)**

[114] I can deal with this matter in short compass. I do not find this provision to be incompatible with either Articles 6(1) or 8(2) of the Convention and I dismiss the applicants' claim in this regard.

[115] I have already considered in the context of the Children (Allocation of Proceedings) Order (Northern Ireland) 1996 in Re B and N (2002) NI 197 the issue of whether or not the lack of an appeal is incompatible with Article 6 of the Convention. In that case I concluded that Article 6(1) does not guarantee a right of appeal from a decision of a court whether in a criminal or non-criminal case.

[116] That conclusion follows the path well traced in such leading text books as Starmer "European Human Rights Law" at paragraph 13.74 and Lester and Pannick "Human Rights Law and Practice" 2nd Edition at paragraph 4.622. The latter states:

> "Article 6(1) does not guarantee a right of appeal from a decision of a court, whether in a criminal or a non-criminal case, which complies with the requirements of that article."

[117] Many statutes provide that some decisions shall be final. That provision Act operates as a bar to any appeal. It serves to preclude the Court of Appeal's jurisdiction "however expressed" (see the Supreme Court Act 1981, s. 18(1)(c)) if a statute states that the decision or order of some tribunal "shall be final" or "shall be final and conclusive". For all intents and purposes this is meant to mean that there is no appeal. That may not rule out judicial review and as I have already indicated I consider that may well be a right of judicial review in some limited circumstances arising out of the granting of EPOs.

[118] In coming to this conclusion I am conscious of the concerns raised by Munby J in the X Council case at paragraph 34 concerning the absence of an appeal as well the misgivings of Johnston J in Re P (Emergency Protection Order) (1996) 1 FLR 482 about the absence of any mechanism for review. Notwithstanding these concerns I am unpersuaded that the normal principle which does not guarantee a right of appeal under Article 6(1) should be rejected in this instance. The maximum length for an EPO is eight days and the short term nature of the relief persuades me that the underlying philosophy of the provision which is intended to promote a single fair hearing and not a multiplicity of hearings is sufficient to constitute a proportionate and necessary response to the legitimate aim of protecting the welfare of children. Provision is already made for applications to discharge where the Order has been made ex parte albeit not for 72 hours

**Article 64(10)**

[119] For similar reasons I have concluded that the absence of a right to seek a discharge order where there has already been an inter partes hearing is not incompatible with Article 6 of the Convention(see paragraph 113 above ).

If an extension of the EPO is sought after a maximum of 8 days then there is no reason why at an inter partes hearing that application cannot be opposed particularly if there has been a change of circumstance. An inter-partes hearing, where the parents are properly notified and attend the hearing either with or without representation, is sufficient to engage the parents in the decision-making process and provide them with access to justice. Many of the frailties that I have observed in the ex parte proceedings – where there is no opportunity for the evidence of the Trust to be disputed and where the court is hearing one side only – do not obtain in an inter-partes hearing. Each side will have had an opportunity to prepare its case and in particular the Trust will have had an opportunity to associate the parents with its thinking on the matter.

[120] I find Covezzi's case easily distinguishable from the instant case .In the former the applicants had been unable to play any role in the proceedings for over four months without a right to challenge the need for the care order or to express their opinions to judicial authority. Such a long period of time was not necessary to gather objective evidence. The length of delay that the process took, without the right to challenge the court order, led the court to conclude that there had been a breach of Article 8 of the Convention. I find no such lengthy period to be present in this instance under Article 64(10) . I am satisfied that the process of confining inter-partes proceedings to a single hearing within a very short period is a wholly proportionate response to a legitimate aim of ensuring that the welfare and health of the child is maintained. I therefore dismiss the applicant's claim in relation to Article 64(10) and I find nothing incompatible between this provision and the Convention.

## APPENDIX

[1] For the benefit of practitioners and courts hearing EPO applications , it may be helpful if I set out the approach to EPOs advocated by Munby J in the X Council case and by McFarlane J in the X case. I consider these exhortations should inform similar applications in this jurisdiction after making the appropriate adjustments for the different legislation.

[2] At paragraph 57 of the X Council case Munby J stated:

**"57.** The matters I have just been considering are so important that it may be convenient if I here summarize the most important points:

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

ii) Both the local authority which seeks and the FPC which makes an *EPO* assume a heavy burden of responsibility. It is important that both the local authority and the FPC approach every application for an EPO with an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the Convention rights of both the child and the parents.

iii) Any order must provide for the least interventionist solution consistent with the preservation of the child's immediate safety.

iv) If the real purpose of the local authority's application is to enable it to have the child assessed then consideration should be given to whether that objective cannot equally effectively, and more proportionately, be achieved by an application for, or by the making of a CAO(*Child Assessment Order)*undersection43oftheAct

v) No EPO should be made for any longer than is absolutely necessary to protect the child. Where the EPO is made on an ex parte (without notice) application very careful consideration should be given to the need to ensure that the initial order is made for the shortest possible period commensurate with the preservation of the child's immediate safety.

vi) The evidence in support of the application for an EPO must be full, detailed, precise and compelling. Unparticularised generalities will not suffice. The sources of hearsay evidence must be identified. Expressions of

opinion must be supported by detailed evidence and properly articulated reasoning.

vii) Save in wholly exceptional cases, parents must be given adequate prior notice of the date, time and place of any application by a local authority for an EPO. They must also be given proper notice of the evidence the local authority is relying upon.

viii) Where the application for an EPO is made ex parte the local authority must make out a compelling case for applying without first giving the parents notice. An ex parte application will normally be appropriate only if the case is genuinely one of emergency or other great urgency -- and even then it should normally be possible to give some kind of albeit informal notice to the parents or if there are compelling reasons to believe that the child's welfare will be compromised if the parents are alerted in advance to what is going on.

ix) The evidential burden on the local authority is even heavier if the application is made ex parte. Those who seek relief ex parte are under a duty to make the fullest and most candid and frank disclosure of all the relevant circumstances known to them. This duty is not confined to the material facts: it extends to all relevant matters, whether of fact or of law.

x) Section 45(7)(b) permits the FPC to hear oral evidence. But it is important that those who are not present should nonetheless be able to know what oral evidence and other materials have been put before the FPC. It is therefore particularly important that the FPC complies meticulously with the mandatory requirements of rules 20, 21(5) and 21(6) of the Family Proceedings Courts (Children Act 1989) Rules 1991 The FPC must "keep a note of the substance of the oral evidence" and must also record in writing not merely its reasons but also any findings of fact.

xi) The mere fact that the FPC is under the obligations imposed by rules 21(5). 21(6) and 21(8), is no reason why the local authority should not immediately, on request, inform the parents of exactly what has gone on in their absence. Parents against whom an EPO is made ex parte are entitled to be given, if they ask, proper information as to what happened at the hearing and to be told, if they ask, (i) exactly what documents, bundles or other evidential materials were lodged with the FPC either before or during the course of the hearing and (ii) what legal authorities were cited to the FPC. The local authority's legal representatives should respond forthwith to any reasonable request from the parents or their legal representatives either for copies of the materials read by the FPC or for information about what took place at the hearing. It will therefore be prudent for those acting for the local authority in such a case to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide.

xii) Section 44(5)(b) provides that the local authority may exercise its parental responsibility only in such manner "as is reasonably required to safeguard or promote the welfare of the child". Section 44(5)(a) provides that the local authority shall exercise its power of removal under section 44(4)(b)(i) "only in order to safeguard the welfare of the child." The local authority must apply its mind very carefully to whether removal is essential in order to secure the child's immediate safety. The mere fact that the local authority has obtained an EPO is not of itself enough. The FPC decides whether to make an EPO. But the local authority decides whether to remove. The local authority, even after it has obtained an EPO is under an obligation to consider less drastic alternatives to emergency removal. Section 44(5) requires a process within the local authority whereby there is a further consideration of the action to be taken after the EPO has been obtained. Though no procedure is specified, it will obviously be prudent for local authorities to have in place procedures to ensure both that the required decision making actually takes place and that it is appropriately documented.

xiii) Consistently with the local authority's positive obligation under Article 8 to take appropriate action to reunite parent and child, sections 44(10)(a) and 44(11)(a) impose on the local authority a mandatory obligation to return a child who it has removed under section 44(4)(b)(i) to the parent from whom the child was removed if "it appears to [the local authority] that it is safe for the child to be returned." This imposes on the local authority a continuing duty to keep the case under review day by day so as to ensure that parent and child are separated for no longer than is necessary to secure the child's safety. In this, as in other respects, the local authority is under a duty to exercise exceptional diligence.

xiv) Section 44(13) requires the local authority, subject only to any direction given by the FPC under section 44(6) , to allow a child who is subject to an EPO "reasonable contact" with his parents. Arrangements for contact must be driven by the needs of the family, not stunted by lack of resources. "

[3] McFarlane J at paragraph 101 of the X case added some further observations as follows:

"101. For ease of reference I will now draw together the observations I have made with some additional guidance:

a) The 14 key points made by Munby J in X *Council v B* should be copied and made available to the justices hearing an EPO on each and every occasion such an application is made;

b) It is the duty of the applicant for an EPO to ensure that the X *Council v B* guidance is brought to the courts attention of the bench;

c) Mere lack of information or a need for assessment can never of themselves establish the existence of a genuine emergency sufficient to justify an EPO. The proper course in such a case is to consider application for a Child Assessment Order or issuing s 31 proceedings and seeking the court's directions under s 38(6) for assessment;

d) Evidence given to the justices should come from the best available source. In most cases this will be from the social worker with direct knowledge of the case;

e) Where there has been a case conference with respect to the child, the most recent case conference minutes should be produced to the court;

f) Where the application is made without notice, if possible the applicant should be represented by a lawyer, whose duties will include ensuring that the court understands the legal criteria required both for an EPO and for an application without notice;

g) The applicant must ensure that as full a note as possible of the hearing is prepared and given to the child's parents at the earliest possible opportunity;

h) Unless it is impossible to do so, every without notice hearing should either be tape- recorded or be recorded in writing by a full note being taken by a dedicated note taker who has no other role (such as clerk) to play in the hearing;

i) When the matter is before the court at the first 'on notice' hearing, the court should ensure that the parents have received a copy of the clerk's notes of the EPO hearing together with a copy of any material submitted to the court and a copy of the justices' reasons;

j) Cases of emotional abuse will rarely, if ever, warrant an EPO, let alone an application without notice;

k) Cases of sexual abuse where the allegations are inchoate and non-specific, and where there is no evidence of immediate risk of harm to the child, will rarely warrant an EPO;

l) Cases of fabricated or induced illness, where there is no medical evidence of immediate risk of direct physical harm to the child, will rarely warrant an EPO;

m) Justices faced with an EPO application in a case of emotional abuse, non specific allegations of sexual abuse and/or fabricated or induced illness, should actively consider refusing the EPO application on the basis that the

local authority should then issue an application for an interim care order. Once an application for an ICO has been issued in such a case, it is likely that justices will consider that it should immediately be transferred up for determination by a county court or the High Court;

n) The requirement that justices give detailed findings and reasons applies as much to an EPO application as it does to any other application. In a case of urgency, the decision may be announced and the order made with the detailed reasons prepared thereafter;

o) Where an application is made without notice, there is a need for the court to determine whether or not the hearing should proceed on a without notice basis (and to give reasons for that decision) independently of any subsequent decision upon the substantive EPO application.