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Neutral Citation Number: [2007] EWCA Civ 2
Case No: B4/2006/1054

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MR JUSTICE HEDLEY
IN THE HIGH COURT OF JUSTICE FAMILY DIVISION
BS05C0009**

Royal Courts of Justice
Strand, London, WC2A 2LL
3rd Jan 2007

B e f o r e :

**LORD JUSTICE THORPE
LORD JUSTICE TUCKEY
and
LORD JUSTICE WILSON**

C (A Child)

**(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)**

**Mr R Tolson QC (instructed by Foster & Partners) for the Appellant
Mrs J Crowley QC & Miss E Hudson (instructed by South Gloucestershire County Council) for the Respondent**

HTML VERSION OF JUDGMENT

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Lord Justice Thorpe:

The Issue.

1. The single issue in this appeal is whether Hedley J was entitled to refuse the appellant damages in addition to his declaration that the respondent local authority had breached her human rights by deciding on 5th January 2005 to abandon the care plan for her rehabilitation with her only child without giving her an opportunity to participate in the decision making process.
2. The resolution of this issue requires a detailed examination of an extensive factual context.

The History.

3. The appellant is eighteen years of age and spent all but the first six years of her life in the care of the respondent local authority. The original care order was made on the ground that she had suffered neglect and abuse. The years in care were sadly unsettled as she moved through a series of foster placements, breakdowns regularly occurring as a consequence of her challenging behaviour.
4. On 14th January 2004 the appellant, then fourteen years of age, gave birth in Sheffield to her son C. C's father is AC whom the mother had met in the previous spring. He has played a not insignificant part in C's life. Indeed after C's removal from the appellant's care in January 2005 he was formally assessed as a possible future carer.
5. In Sheffield mother and baby were accommodated in a specialist unit. Their first separation occurred on the 15th March 2004. C was moved to a foster placement when he was seen to have bruising on his left knee. This first separation led to the issue of the first application, for a care order, issued a week after the separation.
6. However, thereafter the respondent sought to reunite mother and baby, engaging a specialist service in Devon, Families First.
7. The case came for final hearing before His Honour Judge Roach on the 14th December 2004. A care order by consent resulted after detailed negotiation of a lengthy care plan. In essence the respondent committed to continue to support the rehabilitation, delegating supervision and instruction to Families First. However the future work programme was demanding and the plan allowed the appellant six months to demonstrate that she had the capacity to parent C both independently and for the long term. The mother's trial was one half of the concurrent planning. At the same time preparatory steps towards adoption would be taken. The care plan envisaged C's removal both in circumstances of emergency and on the grounds of a general failure to progress. In the latter circumstances the care plan recorded that the appellant would be kept fully informed, would be clearly warned, and would be given the opportunity to mount a legal challenge.
8. The hopes and expectations that underlay the care plan proved short lived. Three days after the final hearing the mother moved to a new foster placement. Friction between the appellant and the foster mother quickly developed and escalated. On the 22nd December the team manager wrote a warning letter to the appellant following her behaviour during the course of a visit on the previous day. The appellant, in her anger, had sworn at the team manager and had pulled the seat on which C was sleeping violently towards her.
9. Immediately before the New Year weekend the mother was upset by a visit to C's father. When the professionals returned on the 4th January 2005, the first working day after the New Year holiday the foster placement was at breaking point. The appellant was threatening the foster mother and was refusing to continue with the assessment unless she were moved to Gloucester. On the following day the council held a management meeting at which it was decided to terminate the placement.
10. The separation was achieved on the 6th January whilst the mother was at a meeting at the offices of Families First. On being told of the removal the appellant was violently angry, assaulting one of the social workers and also the police who had been called for assistance. She refused to discuss future arrangements for contact and at the end of the meeting travelled to a foster placement found for her in Gloucester.
11. Later Hedley J was to hold: -

> "Given the circumstances reported to the local authority and their long term knowledge of Nina, I am satisfied that they were entitled to meet in her absence and, as a matter of emergency, to remove C

from her care."

12. However in the following paragraph of his judgment he held: -

> "There was a significant procedural breach of her rights when they went on in the same meeting to decide to abandon the care plan."

13. It was of course that breach that led him to make the declaration recorded above. Accordingly there must be a more profound investigation of the steps taken by the council to engage the mother in the decision making process on and immediately after the 4th January 2005. I will return to that crucial area of fact later in this judgment.

14. The second separation of mother and child led to the issue of the second application on the 7th March 2005. The mother sought the discharge of the care order and an order for contact. The council, having excluded AC as a potential carer, issued its application to free C for adoption on the 27th June. The mother's application came before His Honour Judge Rutherford on the 12th September. He delivered judgment on the 15th after a three day trial. At the outset of his judgment he identified the discharge application as the real, if not the only, issue for determination. The freeing application was not before the court. The mother's application for contact had not featured in the evidence and was adjourned generally. Judge Rutherford dismissed the mother's application on the simple ground that the care order had been fully justified on the 14th December 2004 and that nothing had changed in the interim to justify discharge.

15. The mother's counsel in her closing submissions invoked the mother's rights under Article 8 of the European Human Rights Convention suggesting that they had been breached by the council's decision and actions on and after the 5th January 2005. Judge Rutherford noted that she had not issued any proceedings under the Human Rights Act 1998 nor followed procedures required by the Family Proceedings Rules. He therefore concluded that the mother could not seek relief under the Act. He continued: -

> "…It would be – it seems to me – wholly unfair on the local authority, when the rules have not been complied with and that proper notice has not been given, and it is right to say that counsel for the local authority did her best, but was very much having to do it "on the hoof" it would be quite wrong of me to make any findings against the local authority of a breach of the European Convention on Human Rights and I do not propose to do so."

16. Nevertheless later in his judgment Judge Rutherford did criticize the local authority's management in January 2005 in four respects: -

> "(a) Failing to involve Mr Scott, the Families' First social worker
>
> (b) Failing to involve C's social worker in Gloucester
>
> (c) Going straight to the draconian intervention of removal
>
> (d) Beyond the emergency, abandoning rehabilitation without fuller trials and consultations."

17. On the 21st September 2005 permission to appeal the order of Judge Rutherford was sought and on the 12th October an application under the Human Rights Act 1998 was issued on behalf of the mother. It seems reasonable to assume that that issue was prompted by Judge Rutherford's observations and his guidance as to the rules governing a claim under the Act.

18. On the 3rd November 2005 this court refused the application for permission and transferred remaining issues to the High Court. They were of course the mother's application for contact, the local authority's freeing order application and the recently issued application under the Human Rights Act.

19. I have already cited passages from the judgment of Hedley J but it is worth recording the structure of his judgment. He recorded the proceedings before him in paragraphs 9 – 12 which I set out in full: -

> "Accordingly when the matter came before me, I had three effective distinct applications. First there was Nina's application under the 1998 Act whereby she sought injunctive relief compelling the local authority to place C with her under a rehabilitative care plan or for such further or other relief as the

court might think just. Secondly there was Nina's adjourned application for contact possibly to be used as an alternative vehicle for securing rehabilitation. Then there was the local authority's freeing application which by virtue of the transitional provisions in the Adoption & Children Act 2002 still fell to be determined under the Adoption Act 1976. C has not yet been matched or placed, though the search for a placement is well advanced and is unlikely to cause delay.

C remains subject to a care order and it therefore necessarily follows that the jurisdiction of the court under the Children Act 1989 to determine his future is limited to discharging the care order (whether by a further application under Section 39 or by making a residence order which by Section 9(1) would discharge a care order) or defining contact under Section 34(2) of the Act. In reality (as Judge Rutherford had already held) discharging the care order was unrealistic for even were C to be placed with Nina his welfare would require the continuance of a care order; rightly that application was not renewed. Whilst technically an order under Section 34(2) could be used both to defeat the freeing application and to advance rehabilitation, that would be to use those powers for purposes which they were not intended i.e. going significantly beyond contact.

It follows that the application under the 1998 Act assumes an unusual degree of significance in this case because it offers to Nina the only possible route to C's rehabilitation with her. It seems to me therefore that the court should start with this application. That involves two questions:

a) has there been a breach of Nina's or C's human rights by this local authority and,

b) if so, what remedy should the court grant?

The case advanced on behalf of Nina is that her rights were breached both in the decision to remove C from her care on 5th January 2005 and in the execution of that decision the following day. Moreover, it is said that that breach is continuing in that C's welfare would now require a placement with his mother and the local authority refuse to take that step thus perpetuating a breach of Article 8(1) of the E.C.H.R. without having any justification for so doing under Article 8(2). In my judgment the court should start with a factual examination of the events of January 2005."

20. In the following four paragraphs Hedley J stated so much of the facts as he deemed necessary to justify his conclusion that C's removal had been an essential step for any responsible local authority to have taken and his further judgment that there had been a significant procedural breach in reaching the decision to abandon rehabilitation without fuller consultation.

21. Hedley J then proceeded to pose the question, what should be the remedy. He continued, "It would seem sensible if at this stage the court should form a view on the question as to whether it is now in C's interest to be placed with his mother."

22. Having considered the relevant circumstances he concluded that it would not be in C's interest to attempt a further rehabilitation. At that point the mother's principal case failed. Hedley J then proceeded to consider what should be the mother's alternative remedy and concluded that just satisfaction would be achieved by a declaration without monetary compensation. Finally he turned to the mother's contact application, which he concluded should be subservient to C's placement, and gave his reasons for granting the local authority a freeing order.

23. Thus, broadly viewed, the local authority succeeded in their applications and the mother's only solace was the declaration.

24. On the 12th April the mother's application for permission to appeal the order of Hedley J was filed and a few days later application was made to Hedley J for the amplification of his reasons under the *English v Emery Reimbold* practice. His brief addendum judgment was given on the 26th June and on the 11th July permission to appeal was given only in respect of grounds 8 & 9. They read:-

    "In circumstances where he was not seeking the rehabilitation of the child to the mother the judge wrongly found that a declaration as to the breach of human rights suffered by the mother provided her with 'just satisfaction'. He should have held that an award of damages was necessary to afford just satisfaction within the meaning of section 8(3) of the Human Rights Act 1998 and, further, assessed the amount of such damages.

> In not awarding damages the Judge wrongly failed to take into account the principles applied by the European Court of Human Rights in relation to the award of compensation, contrary to section 8(5) of the Human Rights Act 1998."

25. That completes the essential history. By way of footnote I add that the application of Mr Tolson Q.C. for the mother under the *English v Emery Reimbold* practice did not seek any expansion of the judge's reasons for refusing monetary compensation. It is not necessary for me to refer to such expansion as Hedley J gave in response to Mr Tolson's detailed requests.

The Development of the Issue.

26. The issue raised by this appeal is not unimportant and it is therefore unfortunate that it was not advanced more comprehensively in the court below. The mother's first application to the court in reaction to the sad events of the 6th January 2005 was the application of the 7th March 2005. That was fated to fail since it was not in reality the care order but the care plan that she sought to challenge. There were two remedies available for a challenge to the care plan. The first was an application to the Administrative Court and the second an application under the Human Rights Act 1998. In either event an urgent application could have been mounted to a judge for an injunction restraining the local authority from proceeding further down the alternative track. As I have recorded a breach of the mother's Article 8 rights was not asserted until final submissions to Judge Rutherford. When the application under the Human Rights Act was advanced to Hedley J all the emphasis was upon the claim to injunctive relief which, if granted, would have reunited the mother with C. Mr Tolson frankly accepted that the alternative claim to damages, which would realistically only be pursued if the claim to injunctive relief failed, was not much focussed on during the course of the trial. That concession is amply borne out by Mr Tolson's closing written submissions to Hedley J. They extend to some sixty-three paragraphs, of which only five dealt with the claim to damages. In the paragraph introducing that claim Mr Tolson wrote: 'There is, of course, no case which provides a close comparable on quantum.' Nor had there been much evidence to the point. The mother's brief statement was all directed to the grounds upon which she sought C's return. So too was her oral evidence led by Mr Tolson. However Mrs Crowley Q.C., for the Council, did at the end of her cross examination ask the hypothetical question as to what the mother would have done had the council sought to involve her on the 5th January. This was the exchange: -

> "Q. If you had known, say on Wednesday you'd been told, look Nina, there are real problems going on here and we are going to have a meeting on Friday to decide whether or not we're going to take C away from you, but it looks like he's going to be taken away from you but we want to hear, we want to have a meeting; you can come to the meeting where the decision is going to be made. What would you have done between Wednesday and Friday do you think?
>
> A. Rang my solicitor.
>
> Q. You would in all probability have tried to get away with C wouldn't you?
>
> A. No.
>
> Q. Back to Gloucester where you wanted to be?
>
> A. No. Believe me, if I wanted to do that I would have done it. I would have tried it by now. I'm not that stupid.
>
> Q. You would have been furious wouldn't you?
>
> A. Yes.
>
> Q. Because you were furious.
>
> A. Yes.
>
> Q. You would have been furious wouldn't you, because you were furious on the Thursday when you knew that C was being taken?

A. Yes, but who wouldn't be?

Q. –when you knew that C was being taken.

A. Who wouldn't be?

Q. You were violent weren't you?

A. Yes I was, but who wouldn't be?

Q. It was predictable that that would be how you would react wasn't it?

A. I don't know."

27. In the result the full development of the appellant's case on the damages issue does not emerge until the skeleton argument of the 8th November 2006 for the purposes of the hearing of the appeal. The case is developed over some sixty-five paragraphs.

28. There is an additional deficiency in the determination of the issue in the court below. It seems clear that Hedley J did not have all the documentary evidence relating to the events of the first week of January 2005. At a late stage an unsigned and undated statement by the mother's solicitor was presented to the court. Some of the contemporary documents were exhibited. The statement appears in the trial bundle at pages 101 – 104. It seems that the exhibited documents were then paginated 105 – 111. Of that I cannot be sure because they are absent from the subsidiary bundle prepared for the appeal. During the course of argument my lord, Tuckey LJ, drew attention to a batch of documents at the end of tab 5 which were neither paginated nor indexed. They all relate to the material week and, together with some documents extracted from the appeal bundle, we manufactured a clip of documents amounting to eighteen pages. Neither counsel was able to remember which of these were before Hedley J. It is clear that they cannot all have been before him. However it seems more probable than not that Hedley J had letters from the local authority to Mr Foster of 6th and 7th January. I will return to the clip when I examine in more detail the events of that crucial week.

29. The history of the development of the single issue now before the court explains why Hedley J reasoned his conclusion so cursorily. He only said: -

> "I have no doubt that the mother is entitled to a declaration. I find damages more problematic; this is partly because of the lack of guidance as to quantum. The European jurisprudence suggests that reparation is secured by really quite modest awards. Partly, however, it is because I do not think that the concept of damages sits easily with the welfare jurisdiction of family law. In this case I have concluded that damages is not an apt remedy and that just satisfaction here can be made for this breach by a Declaration"

The Statute.

30. Before turning to counsel's submissions I will briefly record the relevant statutory material. We are here concerned with section 8(1)(3) and (4) of the Human Rights Act 1998 which are in the following terms: -

> "(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including – (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made
>
> (4) In determining – (a) whether to award damages, or (b) the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the

award of compensation under Article 41 of the Convention."

31. Thus section 8(4) takes us to Article 41 of the European Convention which is in the following terms: -

> "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

Submissions.

32. Mr Tolson's essential submission is that the judge was plainly wrong on both counts of his reasoning. The more extensive research that underlies his latest skeleton cites approximately a dozen decisions of the Strasbourg Court which illustrate the monetary bracket within which awards of damages have been made. These cases also illustrate that in terms of the Convention the concept of damages sits very easily where judicial or administrative authorities have breached adult human rights whilst in pursuit of child welfare. Ultimately Mr Tolson submits that there is no reported case in which the Strasbourg Court, having found a breach of Article 8 rights, has concluded that a Declaration alone provides just satisfaction and has denied monetary compensation to the person whose Article 8 rights have been breached. Mr Tolson concludes his submissions by suggesting that this court should make an award in the appellant's favour within the bracket of £15,000 - £20,000.

33. Mrs Crowley in her response characterises the breach as purely procedural. The breach was not the abandonment of the rehabilitation plan but doing so without giving the mother the proper opportunity to put her side of the argument. Thus the damages sought are for the failure to invite the mother to attend a meeting and make representations about future planning when the evidence indicates that, at the material time: -

> a) She would have been unlikely to have attended and
>
> b) Even had she done so the outcome was unlikely to have been any different.

34. Mr Tolson in reply rejects the local authority's presentation on the grounds that it ignores the fact that the breach resulted in a significant loss of opportunity for the mother. Mr Tolson was plainly at pains to establish a lost opportunity since, in the reported Strasbourg cases, a lost opportunity has been a major ingredient of the quantification of the damages.

The exercise of this Court's discretion.

35. In my judgment Mr Tolson's criticism of the judge's reasoning is well founded. But in so saying I do not mean to criticise. I understand the sense in which he suggested that the concept of damages was alien to the welfare jurisdiction of public law proceedings. Equally the paucity of guidance was a fair position for the judge to adopt since the issue of damages had been only lightly advanced in submissions. However it is plain that had Hedley J had the benefit of all the erudition contained in the skeletons for the appeal he would have explained his rejection of the claim much more fully and in very different terms. Accordingly this court must exercise its discretion afresh in the light of the authorities and other guidance that has emerged from Mr Tolson's more recent research.

36. With the arrival of the novel judicial responsibility that section 8 of the Human Rights Act 1998 created, a report, on a reference under section 3(1)(e) of the Law Commissions Act 1965, was presented to Parliament in October 2000 by the Law Commission. It offers comprehensive guidance on general principles before considering the court's approach to the award of damages for breach of each of the relevant Articles of the Convention. In the general section the report notes that the Strasbourg Court regularly holds that its own finding of a violation is sufficient just satisfaction. Then the report notes that the Strasbourg Court normally applies a strict causation test which bars the majority of claims for pecuniary loss. However the court has awarded pecuniary damages for loss of opportunity and illustrations under this head include child care cases such *H v UK* (1988) 13 EHRR 449.

37. The paragraphs of the report that particularly focus on the Strasbourg case law in relation to children taken into care are 6.159 and 6.160 which read as follows: -

> "In a number of cases, violations of Article 8 have been concerned with the taking of children into care by public authorities. In these cases, it is the manner of the decision, rather than the justification for the decision to place the children into care, which is the subject-matter of the dispute. For example, the Court has found violations of Article 8 on account of the undue length of proceedings, or for insufficient involvement of the parents in the decision-making process.

As has been noted, these cases seem to form a distinct category. The applicants, who are usually the parents of the children in question, have generally been successful in recovering substantial damages. In making such awards, the Strasbourg Court has acknowledged the considerable distress and in some cases the loss of opportunities suffered, and has shown a greater willingness to speculate than in other types of case. The Court has been prepared in some cases to compensate the applicant for a 'loss of relationship' with his or her child. Perhaps these features of the Court's treatment of the case-law in this area can be attributed to the importance of the right in question and the lasting impact that a decision to place children in care will have on both applicants and their children."

38. The present appeal falls solely within the category 'insufficient involvement of the parents in the decision-making process.' The authority cited in the footnote is *W v UK* (1987) 10 EHRR 29. Thus at the date of the report the authors identified *W v UK* as the clearest authority for the proposition. In the judgment of the court on the adjourned issue of damages, paragraph 10 summarises the effect of the principal judgment thus: -

    "The Court would recall in the first place that the principal judgment was in no way concerned with the justification for such matters as the taking into public care or the adoption of a child or the restriction or termination of the applicant's access to him. Violations were found solely on the following grounds: as regards Article 8, the applicant's insufficient involvement in the local authority's decisions to place S with long-term foster parents with a view to adoption (January or February 1980) and to terminate his and his wife's access to the child (April 1980), together, as a subsidiary point, with the length of the wardship proceedings (January to October 1981); and, as regards Article 6(1), the non-availability of a judicial remedy on the merits of the access."

39. For those violations the court awarded the applicant pecuniary damages of £12,000. That sum was adjudged necessary compensation for the three violations, although it is impossible to discern what proportion of the award compensated the applicant for insufficient involvement in the local authority's decisions. I note that the length of the proceedings was categorised as an Article 8 rather than an Article 6 violation.

40. Since the date of the Law Commission Report Mr Tolson cited only one other authority which compensated parents for Article 8 breaches including their non-involvement in the decision making process. It is the case of *Venema v The Netherlands* [2003] 1FLR 552. In that case a child was wrongly removed from her parents for a period of five months as a result of suspicion that the mother might be suffering from Munchausen's Syndrome by Proxy and harming her child. Throughout the ensuing professional processes there was a wholesale failure to consult the parents or to give them proper opportunity to dispel concerns by challenging the reliability, relevance or sufficiency of the information upon which the authorities were acting. For these violations damages of €15:000 were awarded to the applicant's jointly as compensation for the distress and anxiety resulting from feelings of frustration and injustice.

41. What then are the facts to which these authorities must be applied? I have already noted that there was precious little oral evidence from the appellant in relation to events during the crucial week. The evidence of the witnesses called by the council broadly established that the mother was threatening serious if not fatal harm to others and possibly to herself and C. In the circumstances it would have been dangerous to have given the mother notice of the removal or to involve her directly in planning.

42. It is therefore necessary to look with particular care at the communications between the local authority and Mr Foster, the mother's solicitor, between Tuesday 4th and Friday 7th January 2005. Before doing so I record that on the 4th January the council telephoned C's guardian to report the situation. On the following day a second telephone call informed the guardian of the council's intention to remove C on the following day.

43. Turning to the clip of written records Mrs McCarthy, of the local authority's legal department, on 4th January spoke to Mr Foster to tell him of the developing crisis and to invite him to attend a meeting of professionals on Friday 7th. Mrs McCarthy promised a chronology of recent events. This conversation clearly demonstrates a collaboration between the two lawyers to avert removal if possible. Mrs McCarthy's note ends with the sentence 'Paul said he would do his best.'

44. On the following day Mrs McCarthy rang again to inform him that social workers had decided to end the placement on the grounds that the appellant's care of C had deteriorated and she had made serious threats against the foster mother. In the circumstances it was not safe to wait until the meeting of the professionals on Friday. The note records Mr Foster's concerns and his willingness to go to Devon the following day either to discuss averting the removal or to help to ensure that the removal would be peaceful. On the same day Mrs McCarthy faxed him the

detailed chronology of events between 17th December and 4th January. She also offered him a telephone discussion with Janet Fraser, the relevant social worker, that afternoon.

45. An email between Mrs McCarthy and Mr Foster on the following day further illustrates what was essentially a collaborative relationship, Mrs McCarthy expressing her dissatisfaction that the social workers had moved the mother on the 17th December without informing her.

46. The email is amplified by an attendance note of a telephone call in which they re-evaluated the case in the light of the unexpected move of foster homes.

47. On the 6th Mrs McCarthy also wrote a formal letter to Mr Foster to inform him of the imminent removal, to enclose the chronology of recent events, to record the mother's retraction of co-operation with the assessment and to further enclose the social worker's warning letter to the mother of 22nd December and a report of a meeting between the mother and Mr Scott, the Families First social worker, on 4th January. The first two paragraphs of Mr Scott's note vividly record the mother's state of mind and emotion: -

> "Nina was ambivalent about continuing to care for C, stating almost immediately upon arrival that she had been considering "quitting". She believed that C's removal was likely if not inevitable, that she was powerless and that the LA's intention had always been for C to be adopted. Nothing could convince her otherwise. By "quitting" she was effectively short-circuiting (my words) the process.
>
> Nina made several global statements alluding to causing injury to anyone who tried to remove C from her care. She again directed a considerable amount of ire towards Janet Fraser, stating that she would "need a hospital bed". Nina also stated that anyone attempting to remove C would be "seriously hurt."

48. On the following day Mrs McCarthy wrote again to Mr Foster to inform him of the traumatic and violent circumstances surrounding C's removal and the mother's consequential refusal to have contact with C or to communicate with anyone from social services. The letter ends: -

> "I have been asked by my client department to write to ask for your assistance in speaking with Miss Palmer. Does she really not want to have any further contact with C? Is this just her initial reaction to the distressing recent events? We would be grateful for any input that you are able to give."

49. The letter was faxed to Mr Foster at 16:43. He acknowledged at 17:20 recording that he had a lengthy and helpful conversation with the social worker. He offered to speak to the mother if given her contact details. Mrs McCarthy's immediate email reply explained that she did not have details as it was uncertain where the mother was. The email concludes, "thank you for your continued assistance in very difficult circumstances."

Final Conclusions.

50. On those facts I now state my ultimate conclusions on the submissions and the issues. First I reject Mr Tolson's principal contention that his client is entitled to compensation for loss of opportunity. The concept has undoubtedly been successfully invokedHH, certainly in cases where children have been wrongfully removed in breach of the Article 8 rights of their parents. However this is a case of lawful removal. When pressed to identify the opportunity Mr Tolson could only rely on paragraph sixteen of the judgment below where Hedley J said this: -

> "Had proceedings been issued timeously (as they should have been) then in my view the highly probable outcome would have been the quashing of that decision and an order that the local authority should reconsider the whole matter in proper form. Had that happened it is difficult to say what the outcome would have been save that a re-affirmation of the original decision would have been distinctly probable, given the unlikelihood at that stage of Nina co-operating with the professionals, but not inevitable."

51. Mr Tolson then submits that the finding that the original decision would not inevitably have been confirmed is the opportunity lost. However the observation of Hedley J is upon a hypothesis, namely the timeous issue of proceedings. The evidence that is now available demonstrates: -

a) That the council gave Mr Foster every opportunity to issue a legal challenge

and

b) The appellant's circumstances and emotional state effectively precluded the option of an emergency application.

52. On the other hand I do not accept Mrs Crowley's submission that the Strasbourg decisions on Article 8 breaches are of no avail to the mother since this was essentially a breach of her Article 6 rights. As the case of *W v UK* seems to me to demonstrate some breaches can be categorised as Article 8 or Article 6 violations but in the present case the making of the care order on the 14th December 2004 effectively terminated the process of trial. The effect of making a care order is to vest power and responsibility in the local authority and to terminate public funding for the mother and the guardian. A failure to consult by a local authority in the shift from one track to the other in a concurrent planning case is essentially a breach of the parent's Article 8 rights.

53. Nor am I impressed by Mrs Crowley's reliance upon the mother's delay in issuing her application under the Human Rights Act. She was essentially seeking compensation for an historic injury and the breach as found by the judge was not a continuing breach.

54. However I am impressed by Mrs Crowley's submission that the breach was purely procedural. The breach was not the decision to proceed to adoption but the procedural failure in reaching that decision without consulting the mother. The evidence strongly suggests that the mother had not the capacity to participate at the material time.

55. I was puzzled at the council's failure to put in evidence and emphasise the communications between Mr Foster, Mrs McCarthy and Janet Fraser at the crucial time. I also wondered why the local authority had not cross- appealed to challenge Mr Justice Hedley's finding of "a significant procedural breach". Mrs Crowley reminded us that at the material time the mother was an extremely vulnerable sixteen year-old, a girl of considerable charm and ability and the professionals in the case felt that they too had been actors in a tragic development.

56. In this court we are nearly two years distant from the events of January 2005. We have contemporaneous documentary evidence that was not available to Hedley J. Knowing what I now know I would not myself label the council's procedural breach as "significant". It was a breach in the sense that things were not done according to the book. But sometimes circumstances either drive or at least mitigate a departure from best practice. Mr Scott's note is very telling. It demonstrates the breakdown in reality flowed from the mother's abandonment of the hugely difficult and demanding challenge presented to her on the 14th December.

57. Furthermore the evidence suggests to me that the mother's emotional outrage either preceded the removal or flowed from it. There is no evidence that exclusion from the decision making process was the cause of any independent or additional injury to the mother.

58. For all those reasons I would reach the same conclusion as Hedley J, albeit on different grounds. I conclude that in the circumstances of this case it is not necessary to afford to the mother any just satisfaction other than that resulting from the declaration finding a violation of her rights. Accordingly I would dismiss this appeal.

Lord Justice Tuckey:

59. I agree for the reasons given in both judgments that this appeal should be dismissed.

Lord Justice Wilson:

60. I also agree.

61. "I do not think", said Hedley J., "that the concept of damages sits easily with the welfare jurisdiction of family law". The instincts of most family lawyers will be likewise. But, by his conspicuously thorough and energetic submission, Mr Tolson has persuaded me that, as a result of the advent of the Human Rights Act 1998, such instincts are misplaced.

62. In determining whether to award damages for infringement by a public authority of a person's rights under the Convention of 1950 and, if so, the amount of the award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41: s. 8(4) of the Act, set out by Thorpe L.J. at [30] above. It had crossed my mind that the firm negative phraseology of s. 8(3) of the Act, also there set out, namely "No award of damages is to be made unless …", is a feature of our domestic law not reflected in the Convention itself, which might therefore place the decisions of the European Court at one remove from us. But any such idea is misconceived: for the difference between s. 8(3) of the Act and Article 41 of the Convention, set out at [31] above, is one of style rather than of substance. The kernel of both is that satisfaction to the person whose right has been infringed must be "just" and that, if but only if such be "necessary" in order to afford just satisfaction, an award of damages should be made. Indeed this court said in *Anufrijeva v. Southwark L.B.C.* [2004] QB 1124 at [57]:

> "Our approach to awarding damages in this jurisdiction should be no less liberal than those applied at Strasbourg or one of the purposes of the HRA will be defeated and claimants will still be put to the expense of having to go to Strasbourg to obtain satisfaction."

63. The court added at [65]:

> "Where there is no pecuniary loss involved, the question whether the other remedies that have been granted to a successful complainant are sufficient to vindicate the right that has been infringed, taking into account the complainant's own responsibility for what has occurred, should be decided without a close examination of the authorities or an extensive and prolonged examination of the facts. In many cases the seriousness of the maladministration and whether there is a need for damages should be capable of being ascertained by an examination of the correspondence and the witness statements."

64. In general the "principles" applied by the European Court, which we are thus enjoined to "take into account", are not clear or coherent: see *Anufrijeva* at [57] and [58]. What is clear, however, is that the European Court generally favours an award of damages in cases in which local authorities have infringed the right of parents under Article 8 to respect for their family life by shortcomings in the procedures by which they have taken children into care or kept them in care, whether temporarily or permanently: see the report of the Law Commission on "Damages Under The Human Rights Act 1998", Law Com No 266, Cm 4853, at [6.159] and [6.160], set out at [37] above. *W v. United Kingdom* (1987) 10 EHRR 29 and *R v. United Kingdom* (1987) 10 EHRR 74 are two of a batch of three cases (a fourth and a fifth being rather different) in which on 8 July 1987, i.e. prior to the coming into force of the Children Act 1989, the European Court held that determinations by our local authorities to take children into care, or to make their care of them permanent, infringed the rights of the parents under Article 8 by virtue of a failure to consult them in advance. On 9 June 1988, in supplemental judgments in *W* (1988) 13 EHRR 453 and in *R* (1988) 13 EHRR 457, the court awarded each of the two parents damages in the sums of £12000 and £8000 respectively. It held in each case that "one of the most fundamental rights" had been infringed and that the infringement had caused "some loss of real opportunities". It also held in the case of *W* that he had thereby suffered "mental anguish and distress" and in the case of *R* that she had thereby suffered "[serious distress] … frustration and helplessness".

65. In the present case the local authority were right to concentrate primarily upon seeking to persuade Hedley J. to favour their proposals for the future care of C. But, in relation to Mr Tolson's elaborate charge that in various respects they had infringed the mother's rights under Article 8, they were oddly supine. And, as Thorpe L.J. has observed at [55], they have not cross-appealed against the judge's declaration that, in the one respect which he identified, there was indeed an infringement. So this appeal proceeds on the basis that such an infringement took place; and, notwithstanding the material which we have studied, we must guard against paying only lip-service to the judge's conclusion in that regard. In a real sense every infringement is serious. Nevertheless there is a spectrum; and the authorities in the European Court such as *W* and *R* above and *Venema v. The Netherlands* [2003] 1 FLR 552 all show that, charged with considering the justice of the satisfaction to be afforded and the necessity or otherwise of making an award of damages in order to afford just satisfaction, the court must, albeit broadly, place the infringement upon the spectrum. Pre-occupied with what the parties agreed to be a far more important issue and given precious little assistance, particularly on behalf of the local authority, the trial judge failed, for the reasons given by Thorpe L.J. at [35], adequately to explain his refusal to award damages to the mother; and so it falls to us to conduct the requisite enquiry.

66. This, then, is my summary of the facts which we need to note in order broadly to place the infringement upon the spectrum:

> (a) In January 2005 the mother was aged only 16 and was herself in the care of the local authority. It behoved them to be punctilious in respecting her rights for it was clear that she would be likely to be unable effectively to assert them for herself.
>
> (b) At the hearing on 14 December 2004 it must have been clear to the mother, represented by solicitors and counsel, that adherence to the care plan then drawn, and endorsed by the court, represented the last chance for C to be rehabilitated with her. In the plan it was expressly stated that "if it became necessary to remove C from [her] care, an adoptive placement would be sought". It was also stated to be "envisaged that the placement [of mother and child] in the Torquay area will continue for 3 - 6 months".

(c) When visited by Mr Scott on 4 January 2005, the mother presented, in the terms of his note, as "fatalistic in the sense that the imminent removal of C was a fait accompli"; she told him that she had been considering "quitting" and that she would not continue to accept assessment in Torquay.

(d) On the same day Mrs McCarthy, the local authority's lawyer, informed Mr Foster, the mother's solicitor, of the gravely deteriorating relationship between the mother and the foster mother in Torquay. In the light of the finality of the care order, he was probably then without immediate public funding; but, in the finest tradition of solicitors who have recently represented parents (and children) in care proceedings, Mr Foster declined on that basis to wash his hands of the emergency.

(e) On 5 January, pursuant to a request by the social services department, Mrs McCarthy informed Mr Foster that, in the light in particular of the mother's threats towards the foster mother, including to "do her in", they considered that the placement had broken down and that C should be removed immediately.

(f) Later that day Ms Fraser, one of the local authority's team managers, also spoke to Mr Foster and explained why the local authority proposed to remove C from the mother's care on the following day. It was only in that conversation that it was made clear to Mr Foster that the anticipated move of the mother and C to the new foster home in Torquay had already taken place.

(g) On 6 January, by letter sent by fax, Mrs McCarthy formally informed Mr Foster that the local authority would on that day remove C from the mother and explained their reasons for so doing.

(h) On the same day, when told that C was being removed from her care, the mother brandished a wine bottle at another of the local authority's team managers; threatened to kill her; grabbed her hair; kicked her; and later tried to punch her.

(i) On 7 January 2005, by letter sent by fax, Mrs McCarthy told Mr Foster that C had been removed into separate foster care; that the mother had said that, had it become the local authority's intention to cause him to be adopted, she did not wish to have further contact with him; that she was refusing to speak to anyone in the social services department; and that the local authority were therefore asking for his assistance in speaking to the mother.

67. In my view the effect of the above is as follows:

(a) that on 14 December 2004 it was obvious to all, including the mother, that, were the local authority later to remove C from her care, the removal would, subject to the court's contrary order, be permanent;

(b) that the local authority believed that to invite the mother herself to a discussion on, or in the days or weeks after, 5 January 2005 about whether C's removal from her should be permanent was impracticable in the light of her uncooperative, aggressive and indeed violent attitude towards them;

(c) that they believed that instead, in order to safeguard her interests, it was sufficient, by about eight communications between 4 and 7 January, to inform the mother's solicitor about the development of the crisis, even though, as a result of the move of foster home in December 2004, he was initially unable to get into touch with her and so was dependent upon her getting into touch with him;

(d) that following the decision dated 5 January further proceedings in court in which the mother's voice would be heard, for example the application later issued by the local authority for an order that C be declared free for adoption, were inevitable; and

(e) that, as ultimately occurred when on 7 March she issued an application for discharge of the care order, it was open to the mother after 6 January, indeed more swiftly than in the event she did, to

issue proceedings for discharge of the order or for an injunction under the Act of 1998 by way of challenge to the local authority's decision not only to remove C from her but to proceed to a permanent alternative placement of him. It was also open to her, by Mr Foster, to ask the local authority to convene an urgent meeting at which she and he, or more probably just he, could make representations about C's permanent future.

68. The local authority were wrong not to invite the mother herself to attend a meeting with them in the days or weeks after 6 January 2005 and prior to their deciding that C's removal from her should be permanent. But their mitigation, which, by omission of reference to the full run of correspondence, they failed properly to draw to the trial judge's attention, is that in the belief that, at her age and in light of her aggressive refusal to engage in dialogue with them, the mother herself would not participate, constructively or at all, in such a meeting, they instead went to considerable lengths to keep her solicitor abreast of the unfolding events. Such is a feature not replicated in the cases of *W*, of *R* and of *Venema*, above, nor in any of the other decisions of the European Court to which Mr Tolson has, albeit in general terms, referred us.

69. On the spectrum of seriousness the infringement of human rights perpetrated by the local authority in the present case must, on any objective view, be seen to rank near to the low end.

70. One cannot say that the local authority's failure to invite the mother to a meeting prior to their reaching their decision that C should permanently be placed otherwise than in her care created a loss of "real opportunities" for her successfully to challenge it within the meaning of *W* and *R* above. The judge found – and it is unnecessary for us to go further – that it was "distinctly probable" that, even had they extended the invitation to her, they would have reached the same conclusion; but whatever their conclusion, it is a truism all too often – and curiously – forgotten that it is the court, to which, but for her disorganisation, the mother had ready access, which makes the crucial decision in these circumstances. Equally, as Thorpe L.J. has pointed out at [57] above, it is impossible, within all the strands of the mother's suffering at that time, to attribute any significant degree of anguish, distress, frustration or helplessness to the local authority's exclusion of her from the decision that C's removal be permanent rather than to their lawful removal of him from her. Indeed, as he has pointed out, the mother's experience of such emotions to some extent preceded both such actions on their part and indeed precipitated them.

71. The conclusion properly to be drawn from the above is that it is unnecessary to award the mother damages in order to afford her just satisfaction for the infringement of her right under Article 8. Thus it was not open to the judge to make such an award to her; and his refusal to do so is now seen to have been correct.