Neutral Citation Number: [2025] EWCA Civ 470

Case No: CA-2025-000311

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT YEOVIL
HH Judge Davis
TA25C50011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2025

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

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E (SECTION 37 DIRECTION)

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Olivia Pike (instructed by **Local Authority Solicitor**) for the **Appellant**
Alex Perry (instructed by **Daniells Family Law Limited**) for the **First Respondent**
Mark Calway (instructed by **Kevin Shearn Family Law Practice Ltd**) for the **Second Respondent**

Hearing date : 26 March 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE BAKER :

1. More than a third of a century has passed since the implementation of the Children Act 1989. In the intervening years, its provisions have been trawled over in numerous reported decisions. Yet occasionally a case raises a point which has apparently not arisen before. This is just such a case.

2. The appeal turns on the interpretation of sections 37(1) and 38(1)(b) of the Act. Section 37(1) provides:

> "Where, in any family proceedings in which a question arises with respect to the welfare of any child, it appears to the court that it may be appropriate for a care or supervision order to be made with respect to him, the court may direct the appropriate authority to undertake an investigation of the child's circumstances."

Section 38(1)(b) provides:

> "Where … the court gives a direction under section 37(1), the court may make an interim care order or interim supervision order with respect to the child concerned."

3. Put simply, the question arising on this appeal is: does the court's power under section 37(1) to direct a local authority to carry out an investigation into the child's circumstances, and the consequential power to make interim public law orders under section 38(1)(b), extend to any child about whom it becomes aware during the proceedings or only to a child who is the subject of the proceedings?

4. In this case, in the course of care proceedings involving an infant, the judge made a section 37 direction in respect of three other children, who were not the subject of the proceedings, and placed them under interim supervision orders. Following the hearing of an appeal brought by the local authority, we allowed the appeal and set the direction and orders aside. This judgment sets out my reasons for joining in that decision.

Background

5. The relevant background to this appeal can be summarised briefly.

6. The child who is the subject of the proceedings is a baby girl, E, born on 7 December 2024. Her mother, "M", is aged 21. Her father does not have parental responsibility for her and to date has not been involved in the proceedings.

7. The local authority was involved with M prior to the baby's birth and had a range of concerns arising from her lifestyle, excessive drinking and behaviour. Arrangements were made for M and E to move to a mother and baby foster placement. In January 2025, while waiting for the placement to become available, M arranged for E to stay at the home of M's sister – E's aunt, "A" – and her partner, "B", and their three children aged 4, 2 and 12 weeks. Social workers visited the property on several occasions and were concerned about the untidy, unhygienic and unsafe condition of the property.

8. In the event, on the day M and E were due to move to the mother and baby placement, M changed her mind and refused to go. On 27 January, the local authority started care proceedings, and at an urgent hearing on the same day HHJ Davis made an interim care order in respect of E and listed a case management hearing.

9. At the hearing, the judge expressed concern about the condition of A's property. He instructed M and her representatives to leave court and asked the local authority for information about their involvement with A and her family. No details of this exchange were included in the order drawn after the hearing and no transcript of that hearing has been produced. It seems clear, however, that in the course of exchanges with counsel, the judge said that he wanted the local authority to take steps to protect the three children. At the appeal hearing, we were told that at the hearing on 27 January the judge had informed the local authority and the guardian's solicitor that he would be considering section 37 at the next hearing and expected an urgent application to be listed if Cafcass was concerned about the children.

10. After the hearing, M and E moved to the planned placement, but after a few days M moved out, leaving E with the foster carer.

11. The case management hearing took place on 10 February 2025. A transcript of the hearing, and the subsequent hearing described below, has been prepared for the purposes of this appeal. At the case management hearing, the judge made further case management directions in the proceedings, including a parenting assessment, and approved an amended interim care plan providing for E to move to a different placement and defining the mother's interim contact.

12. At the end of the case management hearing, the guardian's solicitor informed the judge that she had been instructed to raise a further issue concerning A and her children, and to seek a s.37 investigation. At the judge's request, M and her counsel then withdrew from the court room. The guardian's solicitor informed the judge that she had been told that the conditions in A's house had not improved but, if anything, had got worse. She told him that there was an allegation of A accidentally hitting one of her children with a fishing rod, and a health visitor's report of faeces in the kitchen sink, fleabites on the children and concerns about domestic violence. She then added: "I am told that there is a gun in the house". The social work team manager who was present for the case management hearing informed the judge that she had no direct knowledge of A's children, who were being managed by a different team in the department, but confirmed that she had passed on to the guardian information she had read from the relevant files. Counsel for the local authority acknowledged that there were very high-level concerns and that it was said on behalf of the guardian that A's children were "linked to these proceedings". The judge then observed that "where there are any children, therefore, the section 37 jurisdiction applies". He asked the local authority's counsel to take instructions, adding that "clearly the section 37 threshold is met and I think the interim threshold for public law is met".

13. After a break, counsel informed the judge that her solicitors had confirmed that there was a record on the files of a health visitor seeing a gun at the property, that the police had undertaken a joint visit with social workers and had not seen a gun. The following exchange then took placed between local authority counsel and the judge:

> "Counsel: So the local authority say that they are responding to the concerns in a proportionate way. There was a strategy meeting last Thursday and there was a multi-agency discussion. They are going back to the police to check if there was a proper sweep of the home, but, on the joint visit, there was no evidence of firearms. They would accept the section 37. If it is directed, of course, they have to, but they are not issuing at this stage because they are working with the family, with A, to try and ensure her children's safety and there is a real concern that, if this report is directed within these proceedings -- issues about confidentiality because M is not aware of the extent of or I think may not be aware at all of domestic abuse in her sister's relationship, and certainly that is a concern that I would advocate on behalf of the local authority, that these are children really that are outside the ambit of these proceedings. I appreciate that their welfare has come to the fore of what we know about M and ----
>
> Judge: The local authority know what section 37 says, don't they?
>
> Counsel: Yes.
>
> Judge: They understand the basic principle of section 37.
>
> Counsel: They are looking to see whether a supervision or care order should be made in relation to these children, but they say that effectively, in this pre-proceedings stage in relation to A, they are not at the threshold to issue proceedings. They are working with her, with the safety plan, with the friend, multi-agencies involved. The police have been involved and are going to be asked to be involved again to double-check the status of the firearm that was seen by the health visitor, and they are looking to encourage and support A to make decisions whereby this violent relationship that she is beginning to disclose is ended. But we are in the hands of the court, so I accept that the court has the powers obviously to direct the report and to make the order that you have indicated you may well do."

14. The guardian's solicitor responded that the guardian was extremely concerned about A's three children and had instructed her to ask that an interim supervision order be made.

15. The judge then delivered a short judgment, which has also been transcribed. He recorded that, at the earlier hearing on 27 January, he had indicated to the local authority that he was anxious about the welfare of the three children, and had made it very clear that he would be enquiring about them because it seemed to him that "there was scope for public law proceedings to be considered". He summarised the latest concerns which had been reported to him that morning. He recorded the local authority's position that they could not stand in the way of a section 37 direction but that they opposed an interim supervision order because they were still working with the family.

16. The judge then said that "the law in respect of this sort of issue is straightforward and settled". He recited section 37(1) and added: "that is settled". He summarised the provisions of section 38(1)(b) and observed:

> "The information that I have received from the guardian clearly meets that threshold. A firearm, faeces, fleabites and accidental injury against the background of a mother who has engaged in a relationship that might be domestically abusive is, in my judgment, interim threshold open-and-shut."

17. The judgment then concluded as follows:

> "8. I have got to consider whether I should make an interim care order or an interim supervision order. This case, in my view, falls squarely within the interim supervision order bracket on the strict proviso that, within the next 24 hours, an urgent search of this property is undertaken to make sure that there is no firearm present. If a firearm were found to be present and not removed, that would be threshold, in my judgment, for an interim care order to be made to make sure that the local authority took on responsibility for making this property safe, but I am optimistic that the professionals will do their job and that will not be necessary.
>
> 9. I am going to give the local authority eight weeks to complete their section 37 report. The interim supervision order is made for the same period of time. The section 37 report is not to be disclosed to the mother in the main proceedings to maintain confidentiality. The guardian, of course, is automatically appointed in respect of the three children for the duration of my order, if my understanding of the rules concerned is correct and she can produce a position statement in advance of the hearing in eight weeks' time, which I will now try and set.
>
> 10. I should say that nothing that I am saying in this short ex tempore judgment should be perceived as being critical of the local authority. This social work team are very well respected in this court, but I am concerned about what I have heard and, at the end of the day, decision-making is a matter for me when it comes to Children Act matters and I am just doing what I think is correct to keep these children appropriately safe."

18. Following the hearing, an order was drawn on the standard case management form order 8.3 under the case number for the care proceedings concerning E. It named the parties as the local authority, M and E, by her children's guardian. Paragraph 1 of the order stated that there would be a hearing on 4 April 2025 before the judge "to review the s.37 report directed below". It ordered M and her representatives not to attend the hearing and stated that A and her partner B "are invited to attend this hearing". Paragraph 2 of the order stated that "it appears to the court that it may be appropriate for a care or supervision order" to be made in respect of the three children and directed the local authority to undertake an investigation into their circumstances under s.37. It directed that, if the local authority decided not to apply for a care or supervision order, they must by 4pm on 31 March 2025 file a report setting out their reasons for so deciding and any services or assistance they had provided or intended to provide to the children, any other action they had taken or proposed to take, and when they proposed to review the case. It further directed the local authority to send the report to A and B but not M or her solicitor. Under paragraph 3 of the order, the three children were "put under the supervision of" the local authority until 4 April. Under paragraphs 4 and 5, the children's guardian representing E was appointed as guardian for the three children and directed to file a position statement by 2 April.

19. Paragraphs 6 to 11 of the order contained recitals, including a summary of the information given to the guardian about the circumstances of the three children and that as a result the guardian had invited the court to direct a section 37 assessment "alongside a supervision order". The recitals continued:

> "9. The local authority did not stand in the way of a section 37 assessment, but opposed the making of a supervision order, on the basis that they are responding appropriately to the concerns and are working with A and her family.
>
> 10. The local authority expressed concerns relating to the making of orders concerning non-subject children in the absence of notice being given to their parents.
>
> 11. The court indicated a need for an urgent search of the property and for the local authority to confirm within 24 hours of the hearing that there was no firearm present in the house, failing which the matter would be returned to court for an urgent hearing.
>
> Other relevant matters
>
> 12. The court was concerned for the welfare of maternal cousins of the subject child and this order was made in relation to them in the absence of the mother and without notice to the parents of those children."

20. On 14 February 2025, the local authority filed a notice of appeal against the direction for the section 37 report and the interim supervision order. On 13 March, I granted permission to appeal.

The law: (1) statutory provisions

21. I have already set out the parts of sections 37(1) and 38(1) which are central to this appeal. I now set out more extensively the relevant statutory provisions.

22. Part I of the Children Act 1989 (sections 1 to 7) is headed "Introductory". As is well known, section 1(1) provides:

> "When a court determines any question with respect to—
>
> (a) the upbringing of a child; or
>
> (b) the administration of a child's property or the application of any income arising from it,
>
> the child's welfare shall be the court's paramount consideration."

23. Section 7(1) provides:

> "A court considering any question with respect to a child under this Act may—
>
> (a) ask an officer of [Cafcass] or a Welsh family proceedings officer or
>
> (b) ask a local authority to arrange for—
>
> (i) an officer of the authority; or
>
> (ii) such other person (other than an officer of [Cafcass] or a Welsh family proceedings officer**)** as the authority considers appropriate,
>
> to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report."

24. Part II of the 1989 Act (sections 8 to 16A) is headed "Orders with respect to children in family proceedings". Section 8(1) and (2) define the main orders made in private children proceedings – child arrangements orders, prohibited steps orders, specific issue orders – collectively known as "section 8 orders". Section 8(3) provides:

> "For the purposes of this Act "family proceedings" means any proceedings—
>
> (a) under the inherent jurisdiction of the High Court in relation to children; and
>
> (b) under the enactments mentioned in subsection (4)…."

Section 8(4) then lists a number of statutory provisions including Parts I, II and IV (but not Part V) of the Children Act 1989 and all or part of twelve other statutes.

25. Section 10 is headed "Power of court to make section 8 orders". The phrase in section 37 which is central to its interpretation – "any family proceedings in which a question arises with respect to the welfare of any child" – also appears in section 10(1), which provides:

> "In any family proceedings in which a question arises with respect to the welfare of any child, the court may make a section 8 order with respect to the child if—
>
> (a) an application for the order has been made by a person who—
>
> (i) is entitled to apply for a section 8 order with respect to the child; or
>
> (ii) has obtained the leave of the court to make the application; or
>
> (b) the court considers that the order should be made even though no such application has been made."

26. Part IV of the Act (sections 31 to 42) is headed "Care and Supervision". Section 31(1) and (2) provide:

> "(1) On the application of any local authority or authorised person, the court may make an order—
>
> (a) placing the child with respect to whom the application is made in the care of a designated local authority; or
>
> (b) putting him under the supervision of a designated local authority."
>
> (2) A court may only make a care order or supervision order if it is satisfied—
>
> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
>
> (b) that the harm, or likelihood of harm, is attributable to—
>
> (i) 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
>
> (ii) the child's being beyond parental control."

A children's guardian is not included in the list in section 31(9) of "authorised persons" for the purposes of section 31(1).

27. Section 35, headed "Supervision orders", provides:

> "(1) While a supervision order is in force it shall be the duty of the supervisor—
>
> (a) to advise, assist and befriend the supervised child;
>
> (b) to take such steps as are reasonably necessary to give effect to the order; and
>
> (c) where—
>
> (i) the order is not wholly complied with; or
>
> (ii) the supervisor considers that the order may no longer be necessary,
>
> to consider whether or not to apply to the court for its variation or discharge.
>
> (2) Parts I and II of Schedule 3 make further provision with respect to supervision orders."

28. Section 37 is headed "Powers of court in certain family proceedings". The following subsections are relevant to this appeal are as follow:

> "(1) Where, in any family proceedings in which a question arises with respect to the welfare of any child, it appears to the court that it may be appropriate for a care or supervision order to be made with respect to him, the court may direct the appropriate authority to undertake an investigation of the child's circumstances.
>
> (2) Where the court gives a direction under this section the local authority concerned shall, when undertaking the investigation, consider whether they should
>
> (a) apply for a care order or for a supervision order with respect to the child;
>
> (b) provide services or assistance for the child or his family; or
>
> (c) take any other actions with respect to the child.
>
> (3) Where a local authority undertake an investigation under this section, and decide not to apply for a care order or supervision order with respect to the child concerned, they shall inform the court of
>
> (a) their reasons for so deciding;
>
> (b) any service or assistance which they have provided, or intend to provide, for the child and his family, and

(c) any other action which they have taken, or propose to take, with respect to the child.

(4) The information shall be given to the court before the end of the period of eight weeks beginning with the date of the direction, unless the court otherwise directs."

29. Section 38 is headed "Interim orders". The provisions of the section relevant to this appeal are as follows:

"(1) Where

(a) in any proceedings on an application for a care order or supervision order, the proceedings are adjourned; or

(b) the court gives a direction under section 37(1),

the court may make an interim care order or interim supervision order with respect to the child concerned

(2) A court shall not make an interim care order or interim supervision order under this section unless it is satisfied that there are reasonable grounds for believing the circumstances with respect to the child are as mentioned in section 31(2).

….

(4) An interim order made under or by virtue of this section shall have effect for such period as may be specified in the order, but shall in any event cease to have effect on whichever of the following first occurs –

(a), (b) (*repealed)*

(c) in a case which falls within subsection (1)(a), the disposal of the application;

(d) in a case which falls within subsection (1)(b), the disposal of an application for a care order or supervision order made by the authority with respect to the child;

(da) in a case which falls within subsection (1)(b) and in which—

(i) no direction has been given under section 37(4), and

(ii) no application for a care order or supervision order has been made with respect to the child,

the expiry of the period of eight weeks beginning with the date on which the order is made;

> (e) in a case which falls within subsection (1)(b) and in which—
>
> (i) the court has given a direction under section 37(4), but
>
> (ii) no application for a care order or supervision order has been made with respect to the child,
>
> the expiry of the period fixed by that direction.
>
> ….
>
> (6) Where the court makes an interim care order, or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child; but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment.
>
> ….
>
> (10) Where a court makes an order under or by virtue of this section it shall, in determining the period for which the order is to be in force, consider whether any party who was, or might have been, opposed to the making of the order was in a position to argue his case against the order in full."

30. Section 39(1) and (2) provide that a care order or supervision order may be discharged by the court on the application of any person who has parental responsibility for the child or the child himself or herself or, in the case of a care order, the local authority designated by the order or, in the case of a supervision order, the supervisor.

31. The provisions relating to the appointment of a children's guardian to represent the child are set out in section 41, the relevant provisions being as follows:

> "(1) For the purpose of any specified proceedings, the court shall appoint an officer of the Service [i.e. Cafcass] or a Welsh family proceedings officer for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.
>
> …
>
> (6) In this section "specified proceedings" means any proceedings
>
> (a) on an application for a care order or supervision order;
>
> (b) in which the court has given a direction under section 37(1) and has made, or is considering whether to make, an interim care order;

…

(g) under Part V;

…."

32. Part V of the Act (sections 43 to 52), headed "Protection of Children", sets out various statutory powers to deal with urgent cases involving the safety and welfare of children. The most commonly exercised power is under in section 44, headed "Orders for emergency protection of children" ("EPOs"). Section 44(1) provides inter alia:

> "Where any person ("the applicant") applies to the court for an order to be made under this section 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 …."

Further provisions in section 45 illustrate the exceptional nature of EPOs. An EPO is a short-term order – the maximum duration is initially eight days but it may be extended for a further seven: section 45(1) and (4). Section 45(7) provides that:

> "Regardless of any enactment 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 hearing; or
>
> (b) any evidence given during the hearing,
>
> which is, in the opinion of the court, relevant to the application."

Under section 45(10), there is no right of appeal against an EPO.

33. Finally of relevance to this appeal, Schedule 3 to the Act makes further provision for supervision orders, some of which apply to interim supervision orders. These include, under paragraph 2, a provision that a supervision order may require the supervised child to comply with certain directions given from time to time by the supervisor, for example "to live at a place or places specified in the directions for a period or periods so specified". Under paragraph 3, with the consent of any responsible person, a supervision order may include "a requirement that he take all reasonable steps to ensure that the supervised child complies with any direction given by the supervisor under paragraph 2". For the purposes of the Schedule, "Responsible person" includes, under

paragraph 1, any person who has parental responsibility for the child and any other person with whom the child is living.

The Law: (2) Rules

34. Section 93 of the 1989 Act provided for rules of court to be made for giving effect to the Act. On the same date as the date on which the relevant provisions of the Act commenced – 14 October 1991 – the Family Proceedings Rules 1991 ("the 1991 Rules") came into force. Part IV of the 1991 Rules was headed "Proceedings under the Children Act 1989 Etc". In 2010, the 1991 Rules were replaced by the Family Procedure Rules 2010 (hereafter "FPR") which (with various amendments) remain in force today.

35. The FPR, and the previous 1991 Rules, contain provisions which, as explained below, I consider relevant to the question of statutory interpretation at issue on this appeal.

36. Part 12 of the FPR provides the rules governing all children proceedings save for certain specified proceedings in surrogacy and adoption cases. It applies to proceedings under Parts II, IV and V of the 1989 Act. FPR rule 12.17, headed "Investigation under section 37 of the 1989 Act", provides:

> "(1) This rule applies where a direction is given to an appropriate authority by the court under section 37(1) of the 1989 Act.
>
> (2) On giving the direction the court may adjourn the proceedings.
>
> (3) As soon as practicable after the direction is given the court will record the direction.
>
> (4) As soon as practicable after the direction is given the court officer will—
>
> (a) serve the direction on—
>
> (i) the parties to the proceedings in which the direction is given; and
>
> (ii) the appropriate authority where it is not a party;
>
> (b) serve any documentary evidence directed by the court on the appropriate authority.
>
> (5) Where a local authority informs the court of any of the matters set out in section 37(3)(a) to (c) of the 1989 Act it will do so in writing.
>
> (6) Unless the court directs otherwise, the court officer will serve a copy of any report to the court under section 37 of the 1989 Act on the parties.

> (Section 37 of the 1989 Act refers to the appropriate authority and section 37(5) of that Act sets out which authority should be named in a particular case.)"

37. Rule 4.26 of the 1991 Rules was in similar, though not identical, terms to rule 12.17 under the 2010 Rules. As originally introduced, rule 4.26 provided:

> "(1) This rule applies where a direction is given to an appropriate authority by the High Court or a county court under section 37(1).
>
> (2) On giving a direction the court shall adjourn the proceedings and the court or the proper officer shall record the direction in writing.
>
> (3) A copy of the direction recorded under paragraph (2) shall, as soon as practicable after the direction is given, be served by the proper officer on the parties to the proceedings in which the direction is given and, where the appropriate authority is not a party, on that authority.
>
> (4) When serving the copy of the direction on the appropriate authority the proper officer shall also serve copies of such of the documentary evidence which has been, or is to be, adduced in the proceedings as the court may direct.
>
> (5) Where a local authority informs the court of any of the matters set out in section 37(3)(a) to (c) it shall do so in writing."

38. Returning to Part 12 of the FPR, rule 12.3 identifies the parties to various proceedings under the 1989 Act. It provides that in proceedings for a care or supervision order under section 31, the respondents shall include "every person whom the applicant believes to have parental responsibility for the child" and that the child shall be a party in specified proceedings. No provision is made for parties in cases where a section 37 direction is made or an interim order under section 38 is made consequent to a direction under section 37.

39. FPR rule 12.16 permits applications to be made without notice in certain proceedings, namely proceedings for a section 8 order, emergency proceedings, and certain proceedings under the court's inherent jurisdiction: rule 12.16(1). "Emergency proceedings" are defined under rule 12.2 to include a number of proceedings including applications for EPOs, but not applications for interim care orders or interim supervision orders. Under Practice Direction 12C paragraph 2.1, the minimum notice period for service of an application for an interim order under section 38(1) is three days, although paragraph 2.2 provides that the court may extend or shorten the time period pursuant to its general case management powers in FPR rule 4.1(3)(a).

40. Part 16 of the FPR contains provisions governing the representation of children. Under rule 16.3(1), the court must appoint a children's guardian for a child who is the subject of specified proceedings, unless satisfied that it is not necessary to do so to safeguard the child's interests. Rule 16.4 deals with the appointment of a children's guardian in

proceedings not covered by rule 16.3(1). Such an appointment is required in proceedings where the child is an applicant or is made a party by virtue of a provision under the rules or a court order. There is no power to appoint a children's guardian in other circumstances. Rule 16.20(1) provides that a children's guardian appointed under rule 16.3 "is to act on behalf of the child upon the hearing of any application in [the] proceedings ….with the duty of safeguarding the interests of the child". In addition, rule 16.20(2) provides that "the children's guardian must also provide the court with such other assistance as it may require". Practice Direction 16A paragraph 6.6 identifies matters on which the guardian must advise the court which, in addition to specified matters relating to the child, include "any other matter on which the court seeks advice or on which the children's guardian considers that the court should be informed".

41. Part 22 of the FPR contains provisions about evidence. Rule 22.1(1) empowers the court to control the evidence by giving directions as to the issues on which it requires evidence, the nature of the evidence it requires to decide those issues, and the way the evidence is to be placed before the court. Rule 22.1(3) provides that the court "may permit a party to adduce evidence, or to seek to rely on a document, in respect of which that party has failed to comply with the requirements of this Part." Subject to those provisions which afford flexibility, the general principle is as set out in rule 22.2:

> "(1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved
>
> (a) at the final hearing, by their oral evidence; and
>
> (b) at any other hearing, by their evidence in writing.
>
> (2) The general rule does not apply –
>
> (a) to proceedings under Part 12 for secure accommodation orders, interim care orders or interim supervision orders; or
>
> (b) an enactment, any of these rules, a practice direction or a court order provides to the contrary.
>
> (Section 45(7) of the Children Act 1989 (emergency protection orders) is an example of an enactment which makes provision relating to the evidence that a court may take into account when hearing an application.)"

The law: (3) case law on section 37

42. Section 37 was a wholly new provision introduced by the 1989 Act. The first reported case in which a court gave comprehensive consideration to its terms was *Re CE (Section 37 Direction)* [1995] 1 FLR 26. At page 36H to 37A, Wall J, having set out the terms of the section, observed:

> "I draw three important strands from my recitation of s.37. The first is that a precondition of the making of the order under s.37

> is the fact that it has to appear to the court that it may in due course be appropriate for a care or supervision order to be made in relation to the child. The second is that the section lays down a specific timescale for the provision of the section 37 report. The third is that the s.37 report is an essentially interim measure: it is a means of assisting the court in its assessment of the options available for dealing with the child."

43. As the courts have also recognised, the court's powers under section 37 are limited. It cannot force the local authority to start proceedings, or extend the interim order beyond the period provided in section 34(4). As Wall J put it in a subsequent case, *CDM v CM and others* [2003] EWHC 1024 (Fam) at paragraph 123:

> "I cannot require the local authority to take proceedings. The limit of my power is to direct the authority to undertake an investigation of the children's circumstances."

44. In *Lambeth LBC v TK and KK* [2008] EWCA Civ 103, Wilson LJ said (at paragraph 28),

> "Apart from the need for it to appear to the court to be appropriate for a care order to be made, the terms of s.37 set three threshold requirements for the exercise of the power which it confers, namely that:
>
> (a) there is a "child";
>
> (b) there are family proceedings; and
>
> (c) a question arises therein with respect to her welfare."

45. In *Re K (Children)* [2012] EWCA Civ 1549, McFarlane LJ explained the purpose of s.37 in the following terms:

> "22. Under CA 1989, s 31(1) an application to place a child in care or to put him under local authority supervision may only be made by a local authority or an authorised person. The role of 'authorised person' is not relevant to these proceedings. The legal context within which s 37 therefore operates is that under the CA 1989, s 31(1) Parliament has entrusted to the local authority, and not to the court, the role of determining whether or not public law proceedings in relation to a child are to be issued.
>
> 23. CA 1989, s 37 provides a jurisdictional bridge between private law proceedings under Part 2 of the Act, in which a local authority normally plays no part, and the public law provisions in Part 4 ….
>
> 24. CA 1989, s 37(1) gives the court power to direct the appropriate local authority to investigate the child's circumstances. The authority must consider whether they should apply for a care or supervision order under s 31 with respect to

> the child (s 31(2)). If the authority decides to make a s 31 application then that application will be a public family law application under CA 1989, Part 4 and the bridge from the earlier private law proceedings provided by s 37 will have been traversed….
>
> 25. A significant facet of the s 37 bridge is that where a court directs that a report is to be provided under s 37 a limited jurisdiction is established by s 38 under which, depending on the facts of the case, the court may make an interim care order or interim supervision order....”

46. Neither counsel nor the court has been able to find any reported case in which a section 37 order was made in respect of a child who was not the subject of the proceedings before the court.

47. All these statutory provisions must be interpreted in the light of what has been called “the longstanding proposition of English childcare law that the aim must be to make the least interventionist possible order” (per Dame Siobhan Keegan in *Re H-W (Children)* [2022] UKSC 22 at paragraph 45).

The appeal

48. The grounds of appeal were somewhat diffuse and in granting permission I distilled them into the following two grounds:

(1) The judge was wrong in law to make an order under s.37(1) and/or an interim supervision order under s.38(1) of the Children Act 1989 in respect of three children who were not the subject children in the proceedings in which the orders were made, nor the children of any party to the proceedings.

(2) The judge was wrong in law to make the orders in respect of the three children under s.37(1) and/or an interim supervision order under s.38(1) of the Children Act 1989 without notice to their parents or allowing them the opportunity to make representations.

49. When granting permission to appeal, I added the following direction:

> “The automatic respondents to the appeal are the parties to the proceedings in which the orders were made i.e. the mother of the child E (born 7.1.25) and the child through her children’s guardian. The three children subject to the orders, and their parents, are not automatic respondents, but this Court would be likely to agree that they should be joined as respondents under CPR rule 52.1(3)(e)(ii) if an application was made for them to be joined. The appellant local authority is therefore directed to give full consideration to whether such an application should be made.”

50. The local authority duly made an application in those terms in respect of A and B who were then joined as parties to the appeal. They were not, however, granted public

funding to be represented on the appeal – presumably because the legal aid agency concluded that, as the three children were not the subject of the care proceedings, their parents would not be entitled to non-means-tested legal aid. In the event, A and B were neither present nor represented at the appeal hearing. The local authority's appeal was supported by counsel on behalf of M but opposed by the children's guardian.

51. At the outset of the appeal hearing, we were informed that since the hearing before the judge, the local authority had convened a child protection case conference, following which the three children had been placed on the child protection register, and that the authority had initiated the pre-proceedings process under the Public Law Outline with consideration to be given to filing care proceedings.

52. On behalf of the local authority, Ms Olivia Pike, who had not appeared at first instance and had not drafted the appeal grounds, submitted that the judge was wrong in law to make the orders under sections 37 and 38 in respect of the three children of A and B. She argued that section 37 requires the satisfaction of several conditions before the court may exercise its discretionary power: (a) that there is a child; (b) that there are family proceedings; (c) that a question arises therein with respect to the child's welfare; and (d) it appears to the court that it may be appropriate for a care or supervision order to be made with respect to him. In respect of (a) and (b), there has to be a connection between the "child" and the "family proceedings", to enable the court to exercise its power. Here, the three children of A and B were not the subject of the family proceedings, nor the children of the parties to those proceedings, nor in the care of any party to those proceedings. The parties to the proceedings did not otherwise hold parental responsibility for the children. The "family proceedings" before the court only concerned the children's cousin, E. In respect of (c), no "question" arose in the proceedings with respect to the three children's welfare. The information which came to the court's attention about their welfare was incidental to the family proceedings it was hearing. In short, Ms Pike submitted, the court made the orders in a legal vacuum.

53. Ms Pike submitted that the broad interpretation of section 37 adopted by the judge did not reflect Parliament's intention and was plainly wrong. Alternatively, if there was any ambiguity as to the meaning of the section, it should be resolved in accordance with s.3(1) of the Human Rights Act 1998, by interpreting it in a way that is compatible with ECHR rights. Since the effect of the judge's order plainly infringed the Article 6 and 8 rights of A, B and the three children, it followed that the court should resolve any ambiguity by preferring the narrow interpretation for which the local authority contended.

54. Under ground 2, Ms Pike submitted that, if the court was entitled to exercise its s.37(1) powers over the non-subject children, the judge had been wrong in law to make the orders under sections 37 and 38 without notice to A and B, or allowing them the opportunity to make representations. The powers to make an order without notice under FPR rule 12.16 extend to emergency protection orders but not interim care or supervision orders. Under FPR PD12C paragraph 2.1, the minimum notice period for service of an application for an interim order under section 38(1) is three days, although under paragraph 2.2 the court has the power to shorten the time period.

55. Although the rules make no provision for an ICO to be made without notice, Ms Pike very properly drew attention to the decision in *Re L (A Child)* [2013] EWCA Civ 179. In that case, this Court did not interfere with an interim care order made without notice

on the making of a section 37 direction. But the circumstances of that case had been very different. There had been long-running wardship proceedings involving the child who had been living with her grandparents in which the grandparents had been parties. At the date when the ICO was made without notice to the grandparents, the judge had been "justified in holding that this child's safety required immediate protection by means of compulsory removal from her home" and it was accepted by the grandparents' counsel that this could have been achieved under an EPO without notice. The technical challenge made on the grandparents' behalf was therefore described by McFarlane LJ (paragraph 74) as "arid".

56. Ms Pike relied on the observation of Ryder LJ in *Re K (Children)* [2014] EWCA Civ 1195 at paragraph 33 in a case in which this Court set aside interim care orders which had been made alongside a s. 37 (1) direction:

> "The procedural protections of notice and an opportunity to be heard apply to a jurisdiction that is available to the court of its own motion just as much as they do to a jurisdiction invoked on a party's application."

Ms Pike pointed to the strict requirements for making an EPO identified by Munby J in *X Council v B (Emergency Protection Orders)* [2004] 2510 (Fam) and McFarlane J in *Re X (A Child) (Emergency Protection Orders)* [2006] 510 (Fam) as indicative of the limited circumstances in which an order to protect a child can properly be made without notice to the child's parents.

57. Ms Pike identified a series of further features of the hearing and the order made which she characterised as procedural irregularities.

(1) The guardian had no locus to make an application for a s.37 direction or a s.38 interim order in respect of children whom she was not representing.

(2) There was no evidence before the court save for the original social worker's statement filed with the care application. There was no evidence from the social worker allocated to A and her family. The local authority was only afforded a brief opportunity during the hearing to obtain updating information.

(3) The next hearing date was listed some eight weeks later, depriving A and B of any opportunity to meaningfully engage with the process for a significant period of time.

(4) The return hearing listed on 4 April was within the umbrella of the proceedings concerning E, yet E's mother was directed not to attend.

(5) The appointment of the guardian to represent the three children was outside the rules because the proceedings did not fall within the definition of "specified proceedings" under s.41.

58. Ms Pike submitted that none of these significant procedural deficits were acknowledged by the judge, despite counsel for the local authority having expressed reservations about the fairness of the process. He failed to analyse the necessity of making public law orders, balance alternative options or assess the proportionality of his decision and, in the absence of a supervision order support plan or an indication from the local authority

as to how it would exercise a supervisory role, made the orders without any evidence as to how they would benefit the children.

59. Counsel for M attended the appeal hearing and supported the appeal in principle, although was not in a position to make substantive submissions.

60. The guardian was represented on the appeal by Mr Mark Calway instructed by the solicitor, Ms Goss, who had represented E via the guardian at the hearing before the judge. Mr Calway invited this Court to adopt a broader interpretation of section 37(1). He submitted that the word "any" before "child" in the section clearly allowed for the making of the direction in this case. It was Mr Calway's contention that this interpretation would be in line with the courts' approach to similar terminology used in related sections of the Act. There was no requirement for the child to be connected or related to the proceedings for the section to be applied. Had it been Parliament's intention to restrict section 37 directions in the way argued for by the local authority, then other words, such as "related", "connected" or "relevant" would have been inserted before "child", rather than "any". A "question" had arisen as to the welfare of A's children in the information put before the court. That information justified the court taking the discretionary decision that "it may be appropriate for a care or supervision order to be made". Once a section 37 direction has been made, the gateway opens for section 38(1)(b). In this case, the information provided to the court justified the court's discretionary determination that it had "reason to believe" that the threshold criteria under section 31(2) were satisfied.

61. Under ground 2, Mr Calway accepted that procedural fairness applies to cases in which the court exercises powers of its own motion. But he submitted that in this case the court was not making orders which led to any direct interference in the parental responsibility of A and B. It was not inappropriate for the guardian to raise concerns on 27 January and her intervention at the hearing on 19 February was in response to the comments made by the judge at the earlier hearing. Mr Calway conceded that it may have been preferable to have given notice to A and B after the earlier hearing, and also to list the matter for the next hearing sooner than eight weeks, but even taking those matters in account, the judge was acting within his discretion when making the orders in their absence.

62. In oral submissions, Mr Calway firmly defended the guardian and his instructing solicitor's actions. He referred to Cafcass guidance to guardians to be aware of connected children and to be aware in a safeguarding sense of what may be happening. The guardian had justifiable concerns which she raised with the judge at the first hearing and acted in accordance with his directions thereafter.

Discussion and conclusion

63. I fully share the judge's concerns about these three young children. The reports in the social worker's initial statement about conditions at A's house were very alarming and it was entirely understandable that he asked to be updated at the hearing on 10 February. As I observed during the hearing, Ms Goss and guardian also acted out of concern about what had been divulged about the circumstances of the three children. As noted above, the guardian's duties under FPR rule 16.20 and PD16A paragraph 6.6 extend to advising the court on such matters as the court may direct and about which the guardian

considers that the court should be informed. To that extent, the guardian here was acting in accordance with that duty.

64. But I conclude that in taking steps he thought necessary to protect the three children, the judge misunderstood the scope of s.37. Furthermore, in his anxiety about the three children, and placing them under interim supervision orders, he overlooked the need to ensure that the procedure he adopted was fair.

65. At first glance the interpretation of section 37 proposed by the guardian and adopted by the judge is tenable. But on closer scrutiny, I conclude that it is wrong, for the following reasons.

66. First, there is the language in the subsection. If one focuses only on the words "any child", one might conclude that the power extends to any child who comes to the court's attention during the proceedings. But it is necessary to look at the whole phrase – "any family proceedings in which a question arises with respect to the welfare of any child". In my view, that plainly means "proceedings in which a question arises for determination about the welfare of a child". It does not mean "proceedings in which the court becomes aware of a concern about the welfare of a child".

67. Whilst it is significant that since the implementation of the 1989 Act there has been no reported case in which a court has made an order under section 37 in respect of a child who was not the subject of the proceedings, that is not by itself decisive. Conceivably, there may be unreported cases in which this has happened. The fact that the judge in this case thought that the power extended to other children – and did not feel it necessary to address the possibility that it did not – suggests that it is at least possible that other judges and lawyers may have adopted the same interpretation in circumstances which did not lead to any reported judgment. But that is not how the provision has generally been understood.

68. The passages cited above from the judgments of Wall J in *Re CE (Section 37 Direction)*, Wilson LJ in *Lambeth LBC v TK and KK*, and McFarlane LJ in *Re K (Children)* all indicate that the purpose of a section 37 direction is to enable the court to obtain a report about the child who is the subject of the proceedings. It is, as Wall J said in *Re CE*, "a means of assisting the court in its assessment of the options available for dealing with the child".

69. The paradigm situation in which a section 37 report is ordered is in the course of proceedings about a child under Part II of the Act. In most proceedings, where the court concludes it needs information about the welfare of the subject child in order to decide whether to make orders under section 8(1), it orders a report under section 7. But when a judge becomes concerned that the child's circumstances are such that it may be appropriate for the child to be made subject to a public law order under section 31, he has the additional power to make the direction under section 37. Section 37 thereby provides, in the words of McFarlane LJ in *Re K (Children)*, "a jurisdictional bridge between private law proceedings under Part 2 of the Act, in which a local authority normally plays no part, and the public law provisions in Part 4". Where after completing the section 37 assessment the local authority decides to start proceedings under Part IV, the bridge will have been "traversed" and the range of options available for dealing with the child will be expanded to include care or supervision orders. Where the local authority has decided not to start proceedings under section 31, those orders will not be

available. But the report may still be of assistance to the judge considering the options for dealing with the child. It is for that reason that the information in the report must include not only the local authority's reasons for so deciding but also details of any service or assistance which they have provided, or intend to provide, for the child and his family and any other action which they have taken, or propose to take, with respect to the child: section 37(3).

70. Further support for this interpretation is provided in Hershman and McFarlane Children: Law and Practice at paragraph C1012 where the editors summarise the requirements for a direction under s.37(1) in these terms:

> "In order to give such a direction … the following conditions must be satisfied:
>
> - the proceedings must be 'family proceedings';
> - a question must arise in those proceedings with respect to the welfare of the child whose circumstances are to be investigated; and
> - the court must consider that it may be appropriate for a care or supervision order to be made with respect to *the* child" [emphasis added].

This is consistent with their summary (at paragraph B636) of the meaning of s.10(1)(b) in which, as noted above, the same phrase appears:

> "the court may therefore make any s 8 order, whether or not an application for such an order has been made, in any 'family proceedings' which are concerned with the welfare of the child."

71. Secondly, this interpretation is consistent with the underlying principles of the 1989 Act. The principal sources for the measures introduced in the Act were the interdepartmental working party report to ministers "Review of Child Care Law" (1985) and the Law Commission's report No 172, "Family Law: Review of Child Law, Guardianship and Custody" (1988). Appended to the latter report was a draft bill. Many of its clauses were incorporated with little material alteration in the bill put before Parliament and ultimately passed as the 1989 Act, including clauses which were in substantially the same terms as sections 37(1) and 38(1).

72. Prior to the 1989 Act, children could be placed in the care of a local authority via a number of routes. There were "more than twenty separate provisions leading to care under a court order with several different sets of criteria for the court to apply" (Review of Child Care Law, paragraph 2.4). The effect of the Act was to replace these provisions with a single route – the application by the local authority for a care or supervision order under section 31(1) – and a single set of threshold criteria under section 31(2). When a care order is made, the responsibility for implementing it rests with the local authority. The court's powers to interfere with that implementation are limited (for example, making orders relating to contact with children in care under section 34). The principal aims of the Act included clarifying the circumstances in which the State is

entitled to interfere with parental responsibility for a child, consistent with the right to respect for family life, and delineating the frontiers between the spheres of responsibility of the local authority and the Court. The power granted to the court under section 37 and the consequential power to make interim care or supervision orders under section 38 are therefore exceptions to the general principles and, consistent with those principles, they should be interpreted narrowly.

73. The provision under the Act which enables a court to take action to protect children in urgent situations is the EPO procedure under section 44. But, as illustrated by the cases cited by Ms Pike, the circumstances in which such an order can be made are exceptional. As Munby J observed in *X County Council v B*, supra, at paragraph 57(1):

> "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 [court] 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."

74. Finally, there is additional support from the rules. This issue was not fully canvassed during the hearing, but in my view both the relevant provisions in the 1991 Rules and their replacements in the FPR can properly be considered as an aid to interpretation in this case.

75. In *Hanlon v Law Society* [1981] AC 124, Lord Lowry, with whom the majority of the House of Lords agreed, set out the following principles (at pages 193-4):

> "(1) Subordinate legislation may be used in order to construe the parent Act, but only where power is given to amend the Act by regulations or where the meaning of the Act is ambiguous.
>
> (2) Regulations made under the Act provide a Parliamentary or administrative *contemporanea expositio* of the Act but do not decide or control its meaning: to allow this would be to substitute the rule-making authority for the judges as interpreter and would disregard the possibility that the regulation relied on was misconceived or ultra vires.
>
> (3) Regulations which are consistent with a certain interpretation of the Act tend to confirm that interpretation.
>
> (4) Where the Act provides a framework built on by contemporaneously prepared regulations, the latter may be a reliable guide to the meaning of the former.
>
> (5) The regulations are a clear guide, and may be decisive when they are made in pursuance of a power to modify the Act, particularly if they come into operation on the same day as the Act which they modify.

> (6) Clear guidance may also be obtained from regulations which are to have effect as if enacted in the parent Act."

76. As my Lord Underhill LJ pointed out during the hearing, the extent to which it is permissible to refer to statutory instruments to assist in interpreting primary legislation was recently addressed by the Supreme Court in *R (PACCAR Inc and others) v Competition Appeals Tribunal and others* [2023] UKSC 28, [2013] 1 WLR 2594. In *PACCAR*, the Supreme Court was concerned with the question whether a third party agreeing to fund a claimant's litigation in return for share of damages recovered while playing no part in conduct of litigation constituted an unenforceable "damages-based agreement". That turned in part on whether the third party funders were providing "claims management services" within the meaning of section 58AA(3) of the Courts and Legal Services Act 1990. In interpreting that phrase in the statute, the Supreme Court held it was permissible to have regard to the textual and contextual indicators from a statutory instrument enacted contemporaneously with the 2006 Act (the Compensation (Regulated Claims Management Services) Order 2006) but not to a statutory instrument passed some years later (the Damages-Based Agreements Regulations 2013).

77. In a judgment with which the majority of the Court agreed, Lord Sales, explaining why it was permissible to have regard to the 2006 Order, said (at paragraph 45:

> "Where the primary legislation and the subordinate legislation are drafted by or on the instructions of the same government department at about the same time, as would be normal in this type of case, it is reasonable to suppose that they are inspired by the same underlying objective and are intended to reflect a coherent position as understood at the time the primary legislation is presented to Parliament."

Lord Sales then referred to the passage in Lord Lowry's speech in *Hanlon v Law Society* cited above, and continued:

> "This point is strengthened where, as here, the subordinate legislation is broadly contemporaneous with the Act and is subject to review by the same elected Parliament which passed the Act according to the positive or the negative resolution procedure. This can provide grounds to infer that the Parliament which passed the Act regarded the subordinate legislation as in accordance with it and a fair reflection of it."

78. Applying that approach to the present case, in so far as there is any ambiguity in the meaning of section 37, it is plainly permissible to have regard to rule 4.26 of the 1991 Rules to assist in interpretation. Part 4 of the 1991 Rules were made pursuant to the powers in section 93 of the 1989 Act. The 1991 Rules were brought into force on the same day as the 1989 Act. Furthermore, in my view, as FPR rule 12.17 is substantially a re-enactment of rule 4.26, it too can be taken into account.

79. A number of features in these rules are either wholly inconsistent with, or at least not supportive of, the broad interpretation of section 37(1) proposed on behalf of the guardian. The rule provides for the direction to be served on the parties to the

proceedings in which the direction is given and the appropriate authority where it is not a party. There is no provision for service of the direction on any other person. The rule directs the local authority to serve the section 37 report on the parties to the proceedings (unless the court orders otherwise) but not on any other person. The fact that these rules do not make any provision for service of either the direction or the report on any other person indicates that the scheme of section 37 does not extend beyond the child who is subject to the proceedings. Similarly, the fact that the rule expressly provides that the court may adjourn the proceedings suggests that the section 37 scheme is focused on the child who is the subject of the proceedings. Notably, under the previous rules – rule 4.26 of the 1991 Rules – the original provision stated that on making a section 37 direction the court *must* adjourn the proceedings – a provision that makes no sense if the power under section 37 can be exercised in respect of a child who is not the subject of the proceedings. There is also no provision in the rules for service of the proceedings or an order under section 38(1)(b) on any person who is not a party to the proceedings.

80. If it was intended that the power in family proceedings to give a direction under section 37, and the consequential power under section 38(1)(b) to make an interim care or supervision order, should extend to children who are not the subject of the proceedings, there would have to be provision in the rules covering such an eventuality which complied with common law principles of fairness and with the provisions of ECHR, in particular Article 6 and the procedural requirements of Article 8. They would have to include provisions

(1) either (a) for the court to give notice of its intention to make the direction and interim order to those persons with parental responsibility for those children who are not already parties to the proceedings or (b) permitting the court to make the direction and order without notice to such persons;

(2) for service of the direction on those persons;

(3) for those persons to file evidence and make representations in response to the proposed direction and order, or apply to set aside the direction and order if made without notice;

(4) for the disclosure of evidence to such persons, and the non-disclosure of evidence about the children who are subject to the direction to those parties to the proceedings who have no connection with those children, and

(5) the service of the report on those persons with parental responsibility for those children.

The fact that the FPR, and the original 1991 Rules, are silent about these matters is a clear indication that their draftsman considered that the power in family proceedings to give a direction under section 37, and the consequential power under section 38(1)(b) to make an interim care or supervision order, do not extend to children who are not the subject of the proceedings.

81. For all of those reasons, I conclude the judge was not entitled to make the section 37 order in respect of the three children of A and B and that the appeal should therefore be allowed on ground 1.

82. As a postscript to ground 1, it should be noted that the identity of the child in respect of whose welfare a question arises in the proceedings will depend on the statutory provisions under which the proceedings are brought. In proceedings for orders under section 8 of the 1989 Act, the child will be the child of one or both of the parties to the proceedings. In other family proceedings, brought under one or other of the enactments listed in section 8(4), there may be other children in respect of whose welfare a question arises in the proceedings. We were not addressed on any of these enactments in the hearing. But one example may be proceedings for a non-molestation order under section 42 of the Family Law Act prohibiting the respondent from molesting a "relevant child", defined in section 62(2) as meaning

> "(a) any child who is living with or might reasonably be expected to live with either party to the proceedings;
>
> (b) any child in relation to whom an order under … the Adoption and Children Act 2002 or the Children Act 1989 is in question in the proceedings; and
>
> (c) any other child whose interests the court considers relevant."

I express no concluded view on how section 37, and the applicable regulations under FPR 12.17, would apply in such circumstances. The fact that a child other than the child of one or both of the parties to the proceedings may be regarded as a relevant child for the purposes of the 1996 Act does not undermine the interpretation of section 37 proposed in this judgment.

83. Further or alternatively, whether or not the court was entitled to make the section 37 order in respect of the three children, and place them under a supervision order, I accept the local authority's arguments under ground 2 that the procedure adopted in this case was unfair.

84. No notice was given to A or her partner that the court was considering making a section 37 direction and a consequential order under section 38(1). The cases in which an application in children's proceedings can be made without notice are defined in FPR rule 12.16. They do not include applications for orders under Part IV. In *Re L*, supra, McFarlane LJ rejected an argument that a judge had acted outside her powers by making a section 37 order coupled with an interim care order without notice to the child's mother. It is unclear to me whether the Court in that case was referred to the provisions of rule 12.16. But assuming that the decision in *Re L* is binding authority for the proposition that an interim order under section 38 can be made without notice, such a course should only be followed in exceptional circumstances.

85. So much is clear from a comparison with the procedure for making an EPO. The court has the power to make an EPO without notice. But that power must be exercised sparingly. As Munby J said in *X County Council v B* at paragraph 57(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."

The same approach is applicable when the court is considering whether to make an interim order under section 38 consequential to a direction under section 37. For the reasons set out above, I have concluded that there is no power to make such an order in respect of a child who was not the subject of the proceedings. But if there were such a power, save perhaps in wholly exceptional cases, the parents of that child would have to be given notice. In the present case, no circumstances have been identified to justify making the interim supervision order without notice to the parents. As a result, A or B had no opportunity to respond to the allegations raised by the guardian or make representations on the proposed orders.

86. Secondly, having decided to make an order without notice to A and B, the judge erred in failing to list the matter for an early hearing once notice had been given. In any circumstances in which a court feels it necessary to make an order without notice, there are strict requirements about making the order for a limited time and allowing the party against whom the order is made to make representations and seek to have the order varied or set aside. Contrary to the usual practice when an order is made without notice, the court here did not make the order for a limited period or fix the case for a further hearing when A and B could be present. The order would continue until the hearing 8 weeks later unless A and B applied under section 39 for it to be discharged.

87. Furthermore, as set out above, section 38(10) expressly required the judge, when determining the period for which an interim order under the section is to be in force, to consider whether any party who was, or might have been, opposed to the making of the order was in a position to argue his case against the order in full. Here A and B had no opportunity to argue the case at all. It seems from the transcript that there was no reference to this requirement at the hearing either by the advocates or by the judge.

88. Again, a comparison with the EPO procedure is instructive. As Munby J said in *X County Council v B* at paragraph 57(v);

> "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."

Having concluded that the circumstances warranted making an interim supervision order without notice to A and B, it was incumbent on the judge to direct a further hearing be listed promptly to give them an opportunity to make representations.

89. Thirdly, the judge made the orders largely on the basis of what he was told in court. As set out above, the general rule in FPR rule 22.2(1) that any fact which needs to be proved by the evidence of witnesses is to be proved by their oral or written evidence does not apply to proceedings for an interim care or supervision order, or where otherwise provided by an enactment, rule, practice direction or court order: rule 22.2(2). In this case, a statement had been filed before the first hearing on 27 January in which evidence was given about conditions at A's property. But there was no proper evidence about the matters raised orally by the guardian at the hearing on 10 February. The local

authority counsel responded to those matters by telling the judge what her instructing solicitor had read from the computerised social services records. That was an insufficient evidential basis on which to make an interim order under section 38(1).

90. Furthermore, the judgment contained no consideration of the legal principles to be applied when considering whether to make an interim care or supervision order. A court considering whether to make such an order must consider the factors in the welfare checklist in section 1(3) of the Act, and evaluate the proportionality of the proposed interference with Article 8 rights, having regard to the principle that the court must always adopt the least interventionist course consistent with the child's welfare. In this case, there was no analysis of these matters in the judgment.

91. Finally, the appointment of the guardian to represent the three children was ultra vires. It was not correct to say that the guardian was automatically appointed in respect of these children for the duration of the supervision order. The power to appoint a guardian is confined to (a) specified proceedings and (b) under FPR rule 16.4. Under s.41(6)(b), proceedings in which a court has given a direction under section 37(1) are only specified proceedings where the court "has made, or is considering whether to make, an interim care order". Once the judge decided to make an interim supervision order, the proceedings were not "specified". The purported appointment of the guardian was plainly not made under rule 16.4 because (1) the judge clearly thought he was making it following the section 37 direction and the interim supervision order, (2) the children had not been joined as parties to the proceedings, and (3) in my view could not conceivably have been joined as parties to these proceedings which concerned E.

92. These deficiencies in the procedure adopted in this case are not mitigated by the fact that the court only made an interim supervision order and not an interim care order. It is true that a supervision order is less interventionist than an interim care order, but that does not mean, as Mr Calway asserted, that the court was not making orders which led to any direct interference in parental responsibility. The making of any order under Part IV of the 1989 Act is an interference with parental responsibility. Furthermore, if the broader interpretation of section 37 contended for on behalf of the guardian were correct, it would have been open to the judge to make interim care orders or, if making interim supervision orders, to have imposed a direction under section 38(6) or under Schedule 3.

93. It is, of course, right that effective child protection requires untrammelled cooperation between all agencies. For that reason, where a judge in the course of proceedings becomes aware of circumstances which suggest that a child may be at risk of significant harm, he or she will consider taking appropriate steps to notify the relevant local authority. The judge here was rightly concerned about the three other children in the house. He was understandably anxious to know what steps the local authority was taking about them. Having considered representations from the parties to the proceedings, he would have been justified in allowing the disclosure of information from these proceedings to the social work team involved with the three children. But he was not, in my view, entitled in these proceedings to direct the local authority to carry out an investigation of the circumstances of the three children or to make them subject to interim orders under section 38.

94. It was for those reasons that I concluded that the appeal should be allowed and the section 37 direction and the interim supervision orders under section 38(1)(b) set aside.

LADY JUSTICE ELISABETH LAING

95. I agree**.**

LORD JUSTICE UNDERHILL

96. I also agree.