Neutral Citation Number: [2013] EWCA Civ 1177

Case No: B4/2013/1587

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BOURNEMOUTH & POOLE COUNTY COURT
His Honour Judge BOND

Case No: B4/2013/1598

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BRISTOL COUNTY COURT
His Honour Judge BARCLAY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 October 2013

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE GOLDRING
and
LORD JUSTICE ELIAS

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In the Matter of W (A Child)
In the Matter of H (Children)

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- -

Mr Anthony Hand (instructed by Legal and Democratic Services, Borough of Poole) for the respondent local authority (Re W)
The appellant parents in person (Re W)
Ms Charlotte Pitts (instructed by Legal Services, Bristol City Council) for the respondent local authority (Re H)
The appellant parents in person (Re H)

Hearing dates : 24 September 2013 (Re W) ; 26 September 2013 (Re H)

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Approved Judgment

Sir James Munby, President of the Family Division :

1. During the last week in September 2013 we heard two cases, one (Re W) an appeal and the other (Re H) an application for permission to appeal, arising from decisions of family judges refusing parents leave in accordance with section 47(5) of the Adoption and Children Act 2002 to oppose the making of adoption orders in relation to their children. Each case has, of course, to be determined on its own particular facts, but each raises very similar issues and each has to be determined in accordance with the recent decision of this court in *Re B-S (Children(* [2013] EWCA Civ 1146. Accordingly, although we heard the cases separately it is convenient and may be helpful if we give a single judgment dealing with both.

Re W – the facts

2. This case concerns a child, a girl, born in July 2011. There had been earlier proceedings in relation to her three older siblings which culminated in the making by His Honour Judge Bond in the Bournemouth & Poole County Court on 1 July 2011 of care and placement orders for all three of them. The reasons why he made those orders are explained in a long and careful judgment he handed down on 1 July 2011. The girl we are concerned with was born about three weeks later. Care proceedings were commenced on 2 August 2011. From 9 September 2011 she was accommodated by the local authority with the parents' agreement in accordance with section 20 of the Children Act 1989. The final hearing of the local authority's applications for care and placement orders took place in April 2012. On 11 April 2012 Judge Bond gave a judgment explaining why he was adjourning the case until 23 July 2012. He expressed various criticisms of the local authority. Having been referred to my judgment in *Re L (Care: Assessment: Fair Trial)* [2002] EWHC 1379 (Fam), [2002] 2 FLR 730, he concluded that the parents had not been fairly treated by the local authority. From the outset the local authority was fixed in its view that the appropriate outcome was adoption. It was, as Judge Bond put it, "static in its approach", it saw "no reason to take any action to assist the parents", it did not display the open mindedness of process required of it, its view that adoption was the proper course "should not have caused the local authority to adopt such an unhelpful and closed approach to the parents."

3. Following the adjourned hearing Judge Bond gave another long and careful judgment on 21 September 2012 explaining why he was making the care and placement orders sought by the local authority. The parents sought permission to appeal. The application came before me on 19 November 2012. I gave permission to appeal: *Re W (A Child)* [2012] EWCA Civ 1564. The appeal was dismissed by the full court (Pill and McFarlane LJJ) on 12 December 2012: *Re W (A Child)* [2012] EWCA Civ 1828.

4. The child was placed with prospective adopters on 19 November 2012. On 24 April 2013 the adoption application was issued. On 15 May 2013 the parents notified the court that they wished to oppose. The matter came before Judge Bond on 6 June 2013. He had before him two applications: the application for adoption and the parents' application under section 47(5) for leave to oppose. In accordance with directions made by His Honour Judge Meston QC on 15 May 2013, Judge Bond had a joint witness statement from the parents dated 30 May 2013, to which were attached various documents they were relying upon. Their application proceeded on the basis of the statement and submissions; there was no oral evidence. Judge Bond refused the

parents' application, for reasons he explained in an extempore judgment, and went on to make an adoption order. He refused the parents permission to appeal. Having been notified of the parents' intention to renew their application to this court, Judge Meston (in the absence of Judge Bond) made an order on 11 June 2013 that no arrangements for the celebratory event should be made without further direction of the court.

5. The parents, by then acting in person, filed their Appellant's Notice on 12 June 2013. Their argument was very clearly set out in a well argued skeleton argument dated 26 June 2013. Permission to appeal was granted on the papers by McFarlane LJ on 25 July 2013. Having referred to the decision of the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, and to the fact that the hearing in *Re B-S* had taken place on 22 July 2013, McFarlane LJ explained why he was giving permission:

> "Although judgment has yet to be given [in *Re B-S*], I consider that it is inevitable that the approach taken in the present case by HHJ Bond will require reconsideration in the light of *Re B* and the pending decision n *Re B-S*; this is particularly so in the present case because of the judge's finding that there had been a clear, and positive, change of circumstances since the placement order was made."

6. On 8 August 2013 the local authority filed a Respondent's Notice seeking to uphold Judge Bond's order on additional grounds.

Re H – the facts

7. This case concerns two children, a girl born in May 2009 and her younger brother born in September 2010, who, together with their two older siblings were removed from their parents' care on 6 January 2012. Care proceedings had been commenced in February 2011 and concluded on 11 May 2012 in the Bristol County Court with the making of care and placement orders by His Honour Judge Barclay in relation to all four children. His reasons were set out in a long and detailed judgment. There was no attempt to appeal against his orders. So far as concerns the two younger children, with whom alone we are concerned, the final contact with their parents was in August 2012. They were placed with prospective adoptive parents on 21 September 2012. Applications for adoption orders were made. The matter came before Judge Barclay on 29 April 2013. He had before him two applications: the applications for adoption and the parents' application under section 47(5) for leave to oppose. In accordance with directions he had made on 21 February 2013 Judge Barclay had witness statements from both parents. Their application proceeded on the basis of those statements and submissions; there was no oral evidence. Judge Barclay refused the parents' application, for reasons he explained in an extempore judgment, and went on to make adoption orders.

8. The parents, acting in person, filed an Appellant's Notice on 7 June 2013 seeking permission to appeal and an extension of time. It was supported by four short and succinct grounds of appeal. Their application was heard on 2 August 2013 by Black and Gloster LJJ. They directed the application to be listed for hearing before the full court with appeal to follow if permission granted. They gave the parents permission to amend their grounds of appeal to include an additional fifth ground.

9. The parents filed a clear and helpful skeleton argument addressing all five grounds. The local authority had filed a Respondent's Notice, one day late, on 22 August 2013, seeking to uphold Judge Barclay's order on the additional grounds set out in grounds of cross-appeal dated 3 September 2013 and seeking also an extension of time.

The appeals

10. Judgment in *Re B-S* was handed down on 17 September 2013. We had earlier alerted the parties in both cases that the hand down was imminent and invited them to file supplemental skeleton arguments if they wished. All did so.

11. Re W came on for hearing before us on 24 September 2013. The parents appeared in person and made oral submissions in addition to relying on the arguments set out in their original skeleton argument and a further skeleton argument filed on 23 September 2013. The local authority was represented by Mr Anthony Hand whose two skeleton arguments were dated 15 and 23 September 2013. At the end of the hearing we reserved judgment.

12. Re H came on for hearing before us two days later on 26 September 2013. The parents appeared in person and made oral submissions supplementing their original skeleton argument and a further skeleton argument filed on 16 September 2013. The local authority was represented by Ms Charlotte Pitts whose two skeleton arguments were dated 3 and 24 September 2013. At the end of the hearing we reserved judgment.

The law

13. The law is now to be found set out in *Re B-S*. In certain significant respects the authoritative guidance given in *Re B-S* about how judges must approach applications for leave to oppose under section 47(5) differs from that set out in the earlier decisions of this court in *Re W (Adoption: Set Aside and Leave to Oppose)* [2010] EWCA Civ 1535, [2011] 1 FLR 2153, and *Re C (A Child)* [2013] EWCA Civ 431. This obviously presents potential problems when, as here, appeals are brought in cases where the judgment was given before the decision in *Re B-S*.

14. These are the first two such cases to come before the full court. There are other similar cases fixed for hearing later this month. In each case the judgment under challenge was delivered before the decision in *Re B-S*. No doubt there are other similar cases in the pipeline. How is the Court of Appeal to deal with them?

15. For the future, that is where the judgment being challenged was given after the decision in *Re B-S*, judges at first instance will of course have that decision very much in mind. The Court of Appeal will expect, and be entitled to expect, that from now on judgments will reflect and give effect to the approach which *Re B-S* requires. Judgments that do not clearly do so are likely to be subject to anxious scrutiny and critical comment.

16. Plainly, in the case of judgments given before the decision in *Re B-S* the Court of Appeal must have regard to and make appropriate allowance for that fact. The focus must be on substance rather than form. Does the judge's approach as it appears from the judgment engage with the essence? Can it be said, on a fair reading of the

judgment taken as a whole – a fair and sensible reading, not a pedantic or nit-picking reading – that the judge has directed his mind to and has provided answers to the key questions?

17. Thus, for example, the mere fact that the judgment recites passages from the earlier authorities in which the phrases "exceptionally rare" or "stringent" appear will not, without more, mean that an appeal is likely to succeed. Nor, to take another example, will the mere fact that the judgment does not engage with matters referred to in paragraph 74 of *Re B-S*. What is crucial is the effect of the judgment read as a whole.

18. I have referred to the "essence" of what is required and to the key questions. What does this mean? What follows is not intended to alter anything that was said in *Re B-S*. My purpose is merely to get to the essence with a view to identifying what are likely to be the key questions which the Court of Appeal will have to consider in deciding whether a judgment given before the decision in *Re B-S* passes muster.

19. The judgment must make clear that the judge has the two stage process in mind. There are two questions (*Re B-S*, para 73): Has there been a change in circumstances? If the answer to the first question is no, that is the end of the matter. If the answer is yes, then the second question is, should leave to oppose be given?

20. In addressing the second question, the judge must first consider and evaluate the parent's ultimate prospects of success if given leave to oppose. The key issue here (*Re B-S*, para 59) is whether the parent's prospects of success are more than just fanciful, whether they have solidity. If the answer to that question is no, that will be the end of the matter. It would not merely be a waste of time and resources to allow a contested application in such circumstances; it would also give false hope to the parents and cause undue anxiety and concern to the prospective adopted parents. The reader of the judgment must be able to see that the judge has grappled with this issue and must be able to understand, at least in essentials, what the judge's view is and why the judge has come to his conclusion. The mere fact that the judge does not use the words "solid" or "solidity" will not, without more, mean that an appeal is likely to succeed, for example, if the judge uses language, whatever it may be, which shows that the parent fails to meet the test. So if a judge, as Parker J did in *Re B-S*, adopts McFarlane J's words (see *Re B-S*, para 58) and describes the prospect of parental success as being "entirely improbable" that will suffice, as indeed it did in *Re B-S* itself, always assuming that the judge's conclusion is adequately explained in the judgment.

21. In evaluating the parent's ultimate prospects of success if given leave to oppose, the judge has to remember that the child's welfare is paramount and must consider the child's welfare throughout his life. In evaluating what the child's welfare demands the judge will bear in mind what has happened in the past, the current state of affairs and what will or may happen in future. There will be cases, perhaps many cases, where, despite the change in circumstances, the demands of the child's welfare are such as to lead the judge to the conclusion that the parent's prospects of success lack solidity. *Re B-S* is a clear and telling example; so earlier was *Re C (A Child)* [2013] EWCA Civ 431.

22. If the parent is able to demonstrate solid prospects of success, the focus of the second stage of the process narrows very significantly. The court must ask whether the welfare of the child will be so adversely affected by an opposed, in contrast to an

unopposed, application that leave to oppose should be refused. This is unlikely to be the situation in most cases given that the court has, ex hypothesi, already concluded that the child's welfare might ultimately best be served by refusing to make an order for adoption. To repeat what I said in *Re B-S* (para 74(iii)):

> "Once he or she has got to the point of concluding that there has been a change of circumstances and that the parent has solid grounds for seeking leave, the judge must consider very carefully indeed whether the child's welfare really does necessitate the refusal of leave. The judge must keep at the forefront of his mind the teaching of *Re B*, in particular that adoption is the "last resort" and only permissible if "nothing else will do"."

23. It is surely a very strong thing to say to the child – and this, truth be told, is what is being said if the parent's application for leave to oppose is dismissed at this final stage of the process – that, despite your parent having a solid prospect of preventing you being adopted, you (the child) are nonetheless to be denied that possibility because we think that it is in your interests to prevent your parent even being allowed to try and make good that case.

24. I emphasise in this connection the important points I made in *Re B-S* (paras 74(viii), (ix)): that judges must be careful not to attach undue weight either to the short term consequences for the child if leave to oppose is given or to the argument that leave to oppose should be refused because of the adverse impact on the prospective adopters, and thus on the child, of their having to pursue a contested adoption application.

25. There is one final important matter that has to be borne in mind. The judge hearing a parent's application under section 47(5) for leave to oppose is concerned only with the first and second of the three stages identified by Thorpe LJ in *Re W (Adoption: Set Aside and Leave to Oppose)* [2010] EWCA Civ 1535, [2011] 1 FLR 2153, para 18 (see *Re B-S*, paras 55-56). The third stage arises at the final adoption hearing and only if the parent has been given leave to oppose. As Thorpe LJ described it, the parent's task at that stage is "to persuade the court at the opposed hearing to refuse the adoption order and to reverse the direction in which the child's life has travelled since the inception of the original public law care proceedings." That issue is relevant at the prior stage, when the court is considering whether or not to give leave to oppose under section 47(5), *only* insofar as it illuminates the nature of the ultimate issue in relation to which the parent has to be able to demonstrate the solid prospects of success necessary to justify the giving of leave.

<u>If the appeal is allowed</u>

26. In the event of the appeal against the refusal to give leave to oppose under section 47(5) being successful, two consequential questions arise.

27. The first relates to the form of order. Having set aside the judge's order refusing leave to oppose, should this court go on to give leave itself, or should that question be remitted for determination by the judge? If the proper outcome is clear on the papers, then it may be appropriate for this court to decide the issue. But if the matter is not clear then it must be remitted to the judge.

28. The other question arises only in cases such as those before us where an adoption order has been made. Should the adoption order be set aside? This question was considered but left unresolved in *Re C (A Child)* [2013] EWCA Civ 431, where the appeal against the judge's refusal to grant leave to oppose was dismissed. Here, for reasons which will become apparent when I come to explain why these appeals must both be allowed, we have to decide the point.

29. There is no doubt that the appellants have locus – status – to appeal against the adoption orders even though they were not parties to the proceedings at the time the orders were made: *Re C*, para 43. Recognising that the law sets a very high bar against any challenge to an adoption order if lawfully and properly made, the circumstances with which we are here faced demand as a necessary consequence of the appeals being allowed that the adoption orders be set aside. The point is short and simple. In each case the adoption order has been made on an application which, despite the protests of the parent, has proceeded unopposed and in circumstances where the necessary pre-requisite to that – the order dismissing the parent's application for leave to oppose the making of the adoption order – has been invalidated by the subsequent order of this court. The consequence, to adopt the words used by Butler-Sloss LJ in *Re K (Adoption and Wardship)* [1997] 2 FLR 221, 228, is that there has been "no proper hearing of the adoption application" and, moreover, in circumstances where, if the adoption order stands, there will be "fundamental injustice" not merely to the parent but also, we emphasise, to the child. It is a necessary corollary of the appeal against the judge's refusal to give leave to oppose the making of the adoption order being successful that the adoption order which followed must be set aside.

Future practice

30. It is profoundly unsatisfactory that an adoption order has to be set aside in circumstances where, even though the appeal has been allowed, the end result of the process may still be that the child is adopted. The judge to whom the matter is remitted may determine that leave to oppose should be refused or, if leave to oppose is granted, may at the end of an opposed hearing decide that adoption is in the child's best interests. The problem arises, of course, because of the practice in many courts of listing the parent's application for leave to oppose and the adoption application on the same day and, if the parent's application is dismissed, proceeding then and there to make the adoption order. This practice was criticised by McFarlane LJ in *Re B (A Child)* [2013] EWCA Civ 421. In that case, as in the cases before us, the judge had made an adoption order on the same day as she had dismissed the mother's application for leave to oppose under section 47(5). McFarlane LJ said (para 10):

> "That is not a step that should have been undertaken on that day. The judge should have postponed making the adoption order so that the mother had limited time to come to this court, if she wished to, to seek permission to appeal. I would therefore criticise the court in Chelmsford for not allowing a window of time between refusing permission to oppose and granting the adoption order."

He added, "That is a lesson for the future for other cases."

31. I agree with all of that. I can understand the pragmatic and very human (and humane) grounds on which judges have come to adopt the current practice, and I can see no reason why the *hearing* of the adoption application, if the judge thinks this appropriate, should not immediately follow the dismissal of the parent's application (see *Re B-S*, para 74(ix)). Nor do I see any problem if the judge then and there announces his decision that there should be an adoption order. The problem arises if the judge proceeds then and there to *make* the formal adoption order. For the future, judges should postpone *both* the making of the formal adoption order and the holding of the celebratory event until after the parent's time for applying to this court for permission to appeal has expired. (This will necessitate some adjustment to para 12 of President's Guidance: Listing Final Hearings in Adoption Cases, 3 October 2008, set out in the 2013 Family Court Practice, 2958. Until new Guidance is issued, para 12 of the existing Guidance should be applied in a manner consistent with this judgment.) It would also be prudent for judges, when dismissing an application under section 47(5), to ask the parent whether an appeal is proposed and, even if told that an appeal is not in mind, to make clear to the parent that the time for doing so is strictly limited.

Re W – the judgment

32. I return to the two cases before us, and first to Re W.

33. Judge Bond's judgment of 6 June 2013 sets out the facts and the submissions very clearly. He then turned to consider the law. Having previously noted that the test is a "stringent" one, he first recited large parts of paras 29-35 of Wall LJ's judgment in *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616, [2007] 2 FLR 1069, and then most of paras 17-20 and 27 of Thorpe LJ's judgment in *Re W (Adoption: Set Aside and Leave to Oppose)* [2010] EWCA Civ 1535, [2011] 1 FLR 2153. He continued:

> "I have come to the conclusion that on the evidence before me these parents have established a change in circumstances sufficient to open the door to the exercise of the court's discretionary jurisdiction … It does seem to me that these parents have, through the treatments that they have received and the courses they have undergone, changed their own situation and attitudes. They are in the process of bettering themselves."

In my judgment Judge Bond was fully entitled to arrive at that conclusion; indeed, it is not challenged by the local authority.

34. Judge Bond continued:

> "So, to that extent I accede to the parents' submissions. However, moving on to the next part of the exercise, I think it s much more difficult from the parents' point of view."

He noted that the child had been in her placement since November 2012. He went through the welfare checklist in section 1(4) of the Act, noting that in practical terms the child had moved to foster care from hospital and then to the adoptive placement, before concluding that the relationship that she has with her family is not one that weighs very strongly in the balance.

35. Judge Bond expressed his conclusion as follows:

> "Looking at the case overall and looking at the discretionary part of the exercise, I am not satisfied that it would be right to grant the permission required."

He then set out almost in full Coleridge J's judgment in *Re W (Adoption: Set Aside and Leave to Oppose)* [2010] EWCA Civ 1535, [2011] 1 FLR 2153, para 30 (see *Re B-S*, para 63), commenting that "these are sentiments with which I agree, having considerable sympathy for the parents in this case." He concluded as follows:

> "So, adapting that part of the judgment in *Re W* to the facts of this case, it seems to me that they are particularly apposite to the position in which these parents and the court finds itself today. For all these reasons I, therefore, reject the application for permission to oppose the making of an adoption order."

Re H – the judgment

36. Turning now to Re H, Judge Barclay's judgment of 29 April 2013 sketched out the background and then summarised in quite some detail the parents' case that there had been a change of circumstances and the evidence in support of that contention. He referred in particular to the evidence he had had from an expert, Dr Blagg, as referred to in his earlier judgment of 11 May 2012. He found that the mother "has done what she can in that regard", continuing "it is probably … a long way short of what Dr Blagg had in mind but she has done the very best she can." (The obstacle was the non-availability of the necessary therapy from the National Health Service and what for these parents was the, no doubt, prohibitive cost of £200 per hour if it was to be accessed privately.) He said he was "prepared to accept … that there has been some change in their circumstances."

37. He continued:

> "I am prepared for the sake of today's appointment to say that there has been a change of circumstances, but that is not the end of it because I then have to go on and say, in ordinary language, is it sensible for [the children] for me now to enable these arrangements to be unscrambled?
>
> The children have been placed with a view to adoption on 21st September 2012, they last saw their parents for a goodbye visit in August and from all I have read they have settled very well with their prospective adopters."

38. Having referred to the mother's resumption of contact after a gap of three years with an older child, Judge Barclay concluded as follows:

> "I have to consider what is in [the children's] best interests under the 2002 Act. However much intensity the parents bring to bear on their application, however much love they have for their children, the fact is that the two children were removed as

> long ago as January 2012. They last saw their parents in August of last year. They have been placed with a view to an adoption order being made on 21st September of last year and in those circumstances I am very sorry to say as far as [the parents] are concerned that even if there has been a change of circumstances, which I am prepared to accept there has been, I cannot grant leave to oppose the making of an adoption order … I am afraid it is not possible now, whatever changes the parents have made, to unscramble all these arrangements that have been made and in those circumstances I am afraid I must refuse the application for leave to oppose."

Discussion

39. It is convenient first to consider Re H.

40. In my judgment the appeal must be allowed. I can set out my reasons very shortly. The relevant parts of Judge Barclay's judgment are thin, very thin. It is not clear from what he tells us whether he ruled against the parents because he found that their prospects of success lacked solidity or because, although they had surmounted that hurdle, he found that their children's welfare nonetheless demanded that their application be dismissed. But the problems with the judgment are not confined to what it does not say. There are serious problems with the way in which Judge Barclay seems to have formulated the test. He twice described the issue as being whether it was "sensible" or "possible" to "unscramble" the arrangements that had been made for the children. Quite apart from the use of the words "sensible" and "possible" this is uncomfortably reminiscent of the question which arises only at the third stage. And "sensible" is simply not consistent with the stringent approach mandated by *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911: see *Re B-S*, para 22. At the end of the day it is really quite impossible to tell from his judgment whether Judge Barclay was directing himself to the key issues. Given the gravity of the issues here at stake, as in any application for leave to oppose under section 47(5), this means that we have no option but to allow the appeal. There is no way in which we can ourselves determine whether or not the parents should be given leave to oppose under section 47(5). The matter must be remitted to Judge Barclay to determine that issue.

41. Ms Pitts has done her best to persuade us that Judge Barclay's order can be sustained. She urges us to read the judgment under attack together with the earlier judgment of 11 May 2012. So, as it happens, do the parents, though the conclusions they invite us to draw are diametrically opposed to those Ms Pitts would have us accept. The local authority by its Respondent's Notice invites us to uphold the order on the basis that Judge Barclay was wrong to conclude that there had been a relevant change in the parents' circumstances. Despite Ms Pitts' best endeavours she has wholly failed in that task. There is simply no basis upon which we could properly reverse the judge's finding. On the contrary, and as Elias LJ pointed out during the hearing, a comparison of the two judgments surely demonstrates that there had been a significant change in the attitudes of both parents, quite apart from any changes there may have been in their domestic circumstances and the state of their home. So far as I can judge from the materials to which we have been taken, Judge Barclay was fully justified in

proceeding on the basis that there had been a change of circumstances. It is in relation to the subsequent stages of the necessary analysis that he fell into error.

42. Accordingly, although I would grant the local authority the extension of time it seeks in relation to the late service of its Respondent's Notice, it does not, at the end of the day, avail it. The parents should be given permission to appeal and the necessary extension of time. Their appeal must be allowed.

43. I turn to Re W.

44. Judge Bond's judgment is open to much less criticism. It is careful and detailed. Its failings, and they are few, are matters of omission rather than commission. The problem, when all is said and done, comes down to a single point. Did he rule against the parents because he found that their prospects of success lacked solidity or because, although they had surmounted that hurdle, he found that their children's welfare nonetheless demanded that their application be dismissed? My conclusion, after some anxious thought, is that the answer to that critical question is unclear and that, on this ground, we have no option but to allow the appeal. I have wondered whether Judge Bond's adoption of Coleridge J's reasoning in *Re W* might not provide the answer, for part of Coleridge J's language quoted by Judge Bond uses the phrase "entirely improbable" to describe the mother's prospects of success in that case. Was Judge Bond by the language he used intending to describe the parents' prospects of success in the same way in this case? It is possible, but in a case which raises such grave issues this is, I have concluded, too frail a foundation on which to base a confident conclusion. Accordingly, I am persuaded that we should allow the appeal. There is no way in which we can ourselves determine whether or not the parents should be given leave to oppose under section 47(5). The matter must be remitted to Judge Bond to determine that issue.

45. Mr Hand has said everything possible in an attempt to save the judgment. The Respondent's Notice does not assert, nor did he, that Judge Bond was not entitled to find that there had been a change of circumstance. What was said on behalf of the local authority, however, was that Judge Bond should have found, and that we should likewise find, that the parents' prospects of success lacked solidity. Despite Mr Hand's best endeavours he has wholly failed in that task. There is simply no basis upon which we could properly make findings additional to those set out by Judge Bond.

46. The parents' appeal must be allowed.

Conclusion

47. For these reasons, both of these appeals must be allowed. In Re W, where permission to appeal has already been given, we merely allow the appeal. In Re H, we give permission to appeal and allow the appeal. In each case the matter must be remitted to the judge to determine whether or not to give the parents leave to oppose under section 47(5).

48. So that there is no misunderstanding, I emphasise that the parents in both cases have a long way to go. All we have done is direct reconsideration of the preliminary question of whether or not they should have leave to oppose. It will be for the judge to decide

that question: he may give leave; he may refuse leave; that is a matter for him. Even if the judge decides to give leave to oppose, the parents may still fail at the third and final hurdle. That again is a matter for the judge. The parents have survived this battle and stand to fight another day; they may yet lose the war.

A final concern

49. In his judgment in Re H, Judge Barclay drew attention to the fact that although he had made an order on 8 April 2013 requiring the local authority to file and serve on the parents short position statements regarding each child and any objections to leave to oppose being granted, not less than five working days before the hearing, no such position statement had been filed. Unsurprisingly the parents complained that they had no way of knowing what the local authority's position was, save that there was a blanket objection to leave being granted. Ms Pitts went away to draft a position statement and the parents and their "experienced" representatives (Judge Barclay's word) were then given time – three quarters of an hour or so – to consider what the local authority was saying. Ms Pitts tells us that further time was not sought. Judge Barclay, as he tells us in his judgment, considered that they had had "sufficient" time.

50. That the parents and their representatives should have been put in this position is quite deplorable. It is, unhappily, symptomatic of a deeply rooted culture in the family courts which, however long established, will no longer be tolerated. It is something of which I complained almost thirteen years ago: see *Re S (Ex Parte Orders)* [2001] 1 FLR 308. Perhaps what I say as President will carry more weight than what I said when the junior puisne.

51. I refer to the slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders made by family courts. There is simply no excuse for this. Orders, including interlocutory orders, must be obeyed and complied with *to the letter* and *on time*. Too often they are not. They are not preferences, requests or mere indications; they are orders: see *Re W (A Child)* [2013] EWCA Civ 1227, para 74.

52. The law is clear. As Romer LJ said in *Hadkinson v Hadkinson* [1952] P 285, 288, in a passage endorsed by the Privy Council in *Isaacs v Robertson* [1985] AC 97, 101:

> "It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

For present purposes that principle applies as much to orders by way of interlocutory case management directions as to any other species of order. The court is entitled to expect – and from now on family courts will demand – strict compliance with all such orders. Non-compliance with orders should be expected to have and will usually have a consequence.

53. Let me spell it out. An order that something is to be done by 4 pm on Friday, is an order to do that thing by 4 pm on Friday, not by 4.21 pm on Friday let alone by 3.01

pm the following Monday or sometime later the following week. A person who finds himself unable to comply timeously with his obligations under an order should apply for an extension of time *before the time for compliance has expired*. It is simply not acceptable to put forward as an explanation for non-compliance with an order the burden of other work. If the time allowed for compliance with an order turns out to be inadequate the remedy is either to apply to the court for an extension of time or to pass the task to someone else who has available the time in which to do it.

54. Non-compliance with an order, any order, by anyone is bad enough. It is a particularly serious matter if the defaulter is a public body such as a local authority. And it is also a particularly serious matter if the order goes to something as vitally important as Judge Barclay's order did in this case: the right of a parent facing the permanent loss of their child to know what case is being mounted against them by a public authority.

55. The explanation put forward on behalf of Bristol City Council after we asked Ms Pitts what had happened was most unsatisfactory. The order was sent, appropriately, to the address the local authority had given on the application form, addressed by name to the social worker in the case. It was sent on 12 April 2013, a Friday. The local authority accepts that the envelope was delivered and signed for at that address on 15 April 2013, the following Monday. The order, it seems, was never seen by or drawn to the attention of the legal department. Ms Pitts, as she told us, knew nothing about it until she arrived at court on 29 April 2013. Investigations by the local authority have proved fruitless as to what happened to the order after it was signed for. I propose to state only what is obvious: local authorities must have systems in place to ensure that all those departments and officers who need to know are made immediately and properly aware of the existence, terms and effect of any order that has been served on the authority.

Lord Justice Goldring :

56. I agree.

Lord Justice Elias :

57. I agree.