

Case No: B1/2003/2570 & 2570A

Neutral Citation Number: [2004] EWCA Civ 515
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
HIS HONOUR JUDGE RODERIC WOOD QC
BMO1A 09526/9528/9529/9530

Royal Courts of Justice
Strand,
London, WC2A 2LL

Wednesday 28th April 2004

Before :

LORD JUSTICE THORPE
LORD JUSTICE NEUBERGER
and
MR JUSTICE GAGE

Between :

Mrs B
- and -
BIRMINGHAM CITY COUNCIL
Mr B
B (CHILDREN)
Mr & Mrs "A"

Applicant

1st Resp.
2nd Resp.
3rd/4th Resp.
5th Resp.

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

Mr A McFarlane QC & Miss A Chatterjee (instructed by Challinors Lyon & Clark) for the
Applicant/Appellant
Mr R McCarthy QC & Miss M Corbett (instructed by Birmingham CC Legal Services) for the Local
Authority
Mr A Hayden QC & Miss L Cavanagh (instructed by Fish & Co.,) for the 2nd Respondent
Mr M Keehan QC (instructed by Blair Allison) for the Guardian
Mr A Neaves (instructed by Anthony Collins & Co.,) for Mr & Mrs A

Judgment
As Approved by the Court

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Lord Justice Thorpe :

1. Mr Andrew McFarlane QC applies on behalf of Mrs B for permission to appeal an order of His Honour Judge Wood QC (now, of course, Roderic Wood J) sitting as a Deputy High Court Judge in this building on the 21st November 2003. Mr Anthony Hayden QC for the father seeks the same permission and an extension of time. Mr Roger McCarthy QC for the respondent local authority seeks permission to file a Respondent's Notice. Mr McFarlane's application was ordered to be listed with Appeal to follow if permission granted. Mr Hayden's application was subsequently ordered to be listed together with Mr McFarlane's, those orders being made on the 26th January and the 4th March 2004 respectively. Since the questions raised by these applications are fundamental and difficult, the hearing on 10th March was effectively treated as the hearing of an Appeal. Submissions of the highest quality were received from those Counsel as well as from Mr Michael Keehan QC for the Guardian ad litem.

The Facts

2. In barest outline, His Honour Judge Hamilton sitting in the Birmingham County Court made care orders in respect of four of the children of the parents, S born on the 31st December 1992, C born on the 14th November 1995, D born on the 11th June 1996, and T born on 30th July 1998. On the 20th December 2001 Judge Hamilton made orders freeing all four children for adoption. In the course of his reserved judgment Judge Hamilton carefully chronicled the disgraceful behaviour of the parents, during the course of which they traced their children in care and abducted them from school, inflicting violent injury on a foster carer. The parents have been punished for their crimes but it would be hard to find in the reports a public law case in which parents have resorted to such extremes of lawlessness and selfishness in attacking the intervention of a local authority and in reacting to child protection measures imposed by the Court.
3. Accordingly, in concluding that the parents were unreasonably withholding their consent to the freeing applications, Judge Hamilton observed:–

"The evidence shows that Mr and Mrs B have already made mayhem of the lives of their elder children and are likely to make mayhem of the lives of all of their children if they are given the opportunity to do so."
4. In contemplating the consequences of the freeing orders Judge Hamilton stated:

"It is sometimes argued that a freeing order exposes a child to a dangerous state of limbo, in which drift and delay can occur, because it extinguishes all other parental responsibility and leaves the local authority with sole parental responsibility. In this case, however, I see that sole parental responsibility as a positive advantage for these children. Mr and Mrs B are dedicated to exercising their parental responsibility (and the rights they claim with it) to meet their own needs without regard to the significant harm which they do or may do to their children. In these circumstances, the sooner their role in the lives of their children is terminated, the better for the sake of the children's welfare."
5. Given the history of past pursuit and abduction it is not surprising that the local authority in seeking the freeing orders, contemplated a placement out of the jurisdiction. Indeed, one of the witnesses for the local authority referred to that option during the course of her evidence,

and Mr Keehan tells us, on instructions from the guardian, that that plan was flagged up by counsel for the local submissions in her submissions. However, there is no doubt that it was the local authority's proposal and intention to place all four children together.

6. Subsequent to the December hearing the local authority duly identified prospective adopters in another jurisdiction, whom we refer to as Mr and Mrs A. On the 17th June 2002 the Adoption Panel approved the placement of all four children out of the jurisdiction with Mr and Mrs A. On the 3rd July the local authority wrote to Judge Hamilton's clerk asking for an urgent listing of an application for permission to place the children out of the jurisdiction. The application in form C1, being an application under the Children Act 1989, was filed on the 4th July. The papers were put before Judge Hamilton and he perceived that the application lodged under Schedule 2, paragraph 19(1) of the Children Act 1989 was misconceived, since the children were not children in care but children freed for adoption. Judge Hamilton went to considerable trouble in preparing an erudite note drawing the local authority's attention to relevant provisions of the Adoption Act 1976 and of the Adoption Rules. He pointed out that Section 56 created a criminal offence in placing a child outside the United Kingdom with a view to adoption unless authority had previously been obtained from the Court under Section 55. Judge Hamilton directed that his typed note should be sent to the local authority's solicitor:

"On the strict understanding that:

- i) I do not guarantee its accuracy or applicability and
- ii) she is free either to challenge its accuracy or its applicability."

7. Seemingly the local authority's reaction was simply to consider its position internally and to advise itself that the provisions of Sections 55 and 56 did not apply to a local authority acting as an adoption agency after the making of a freeing order, and that, accordingly, the placement with Mr and Mrs A could be implemented without further reference to the Court.

8. The placement was made on the 13th August 2002. Sadly it was only partially successful. S and D were removed on the 26th November 2002. In December 2002 D was placed with foster parents in the Birmingham area. In February 2003 S was also placed with foster carers in the Birmingham area. That left C and T with Mr and Mrs A, where they remain to this day. With skilful advocacy Mr McFarlane says that on the 26th of November the golden aim of the care plan (to keep the four together) was sacrificed. Thereafter, the local authority has abandoned the silver aim (to maintain long-term direct contact between the children if separately placed.)

9. Although the effect of the range of orders made by Judge Hamilton was to terminate Mr and Mrs B's contact with the four children as well as their parental responsibility for the four children, the Adoption Act 1976 leaves them with what Mr McFarlane describes as "a rump of remaining rights". By that he means the parents' right to notification under Section 19 of the Adoption Act 1976 and their right to apply under Section 20 for the revocation of the freeing orders in certain defined events. That enables me to summarise the two principal questions of law raised by this appeal:–

- iii) Was the placement with Mr and Mrs A on the 13th August 2002 an unlawful placement in breach of Section 56 of the Act?

- iv) If yes, are the circumstances defined by Section 20(i) of the Act satisfied to enable Mr and Mrs B to apply for the discharge of the freeing orders of 20th December 2001?
10. During the course of the appeal we were informed by Mr McCarthy that notification under Section 19 of the Act was prepared by the local authority and sent to the parents on the 19th August 2002, some six days after the children arrived with Mr and Mrs A.
11. On the 13th February 2003 the parents issued applications in the Birmingham County Court seeking the revocation of the orders of 21st December 2001 in reliance on Section 20 of the Act. The applications stated:–
- "The making of the order was made whilst the parents were in custody. The parents are now at home, and have a stable relationship and home.
 - The parents still believe the children have a close attachment to their natural parents and extended family network.
 - No information has been forthcoming from the local authority, and the parents are concerned about the well-being of the children."
12. In the end these applications were listed before His Honour Judge Wood and dismissed by him on 21st November 2003. In summary he concluded that Sections 55 and 56 of the Act did not apply to a local authority and that the placement of the children had been lawful under the terms of Schedule 2, paragraph 19(2) of the Children Act 1989. Accordingly he concluded that Mr and Mrs B had no right of application under Section 20(1) of the Adoption Act. However a different result was inevitable in relation to D and S, given the local authority had abandoned all attempts to place them for adoption and given that they are within the jurisdiction in foster care. Accordingly he directed that the discharge applications in relation to D and S should be listed before a Judge of the Division for trial. We were informed that that trial has been fixed for June 2004.
13. Despite the outcome on the 21st November Mr and Mrs A applied for an order under Section 55 of the Adoption Act 1976 giving them parental responsibility for C and T. The application was granted by Judge Wood in December 2003. During the course of the appeal we were furnished with a copy of his judgment. Mr Andrew Neeve, who has made helpful submissions on behalf of Mr and Mrs A, informed us that such an order was of assistance to the As in applying for an Adoption Order in their jurisdiction and it is their intention to pursue wholeheartedly the application which they issued on 31st December 2003. Mr Keehan's skeleton argument records that the guardian has visited C and T twice in the recent past. She is satisfied that they are thoroughly settled and attached and are anxious to be adopted by Mr and Mrs A as soon as possible.
14. Before turning to consider in detail the statutory material and its proper construction, it is helpful to set out that review in the context of wider policy considerations. First there can be no doubt that the Adoption Act 1976 does not provide a freestanding code. At various points it necessarily interacts with the Children Act 1989. That obvious proposition is reinforced by the decision in the House of Lords in *Re G (Adoption: Freeing Order)* [1997] 2FLR 202.
15. When a local authority intervenes in the life of a family in order to protect children a common route is to establish under the Children Act 1989 the Section 31 threshold which permits the Court in the exercise of its discretion to place the children in the care of the local authority.

At that point the local authority shares parental responsibility with the parents. Commonly on the making of the Care Order the Court also considers an application by the local authority for the termination under Section 34(4) of the Children Act 1989 of contact between the children and their parents. In many difficult cases the local authority then proceeds to apply for a freeing order under Section 18 of the Adoption Act 1976. In granting such an application the Court frequently dispenses with the consent of the parents on the grounds provided by Section 16 of the Adoption Act 1976, namely that it is being unreasonably withheld.. The effect of the freeing order is to vest parental responsibility solely in the local authority as the adoption agency with responsibility to achieve the placement for adoption. The Court has no function to supervise that final stage. The Court only resumes a function if the local authority fails to achieve its objective within the period of twelve months fixed by Parliament in legislating Section 20 of the Act.

16. However Mr McFarlane attractively argues that the Court has a supervisory function should the local authority opt for a placement out of the jurisdiction within that twelve-month period. He submits that a step so drastic, perhaps severing children from locality, friends, language, nationality and culture, should not be left to the unfettered discretion of the local authority. The Court has an essential supervisory role, established by Sections 55 and 56 of the Adoption Act 1976 which remain unbypassed by any provision of the Children Act 1989.
17. All Counsel agree that the statutory provisions that we will review are complex and uncomfortably drafted. All agree that inconsistencies and anomalies can readily be invented whether we accept Mr McFarlane's submissions or whether we reject them. However a stark consequence of the acceptance of Mr McFarlane's submissions is that Section 55 of the Adoption Act 1976, in conjunction with Section 13(1) would require the prospective foreign adopters to complete a period of twenty-six weeks' residence in this jurisdiction in order to succeed in their application for parental responsibility under Section 55. It would be hard to imagine a more unreasonable imposition on prospective foreign adopters contemplating, no doubt with a measure of trepidation, the responsibilities of adoption. If that be the legislative demand its effect would be to place upon the embryonic new family substantial stress at a time when it deserves every support.
18. Weighed against that factor an absence of judicial supervision of the decision to arrange a placement outside the jurisdiction seems of little comparative weight. The Court has weighed the proposals of the local authority at the trial of the freeing order application and in granting the order has deliberately vested sole parental responsibility in the adoption agency. A subsequent return to the Court might be described as needless and empty of real purpose.
19. Mr McFarlane's principal submission is that his client is entitled to the same review in respect of C as T and in respect of D and S. His reliance is upon S20(1) of the Adoption Act 1976 which provides:

"20(1) The former parent, at any time more than 12 months after the making of the order under S18 when –

- (a) no adoption order has been made in respect of the child, and
- (b) the child does not have his home with a person with whom he has been placed for adoption,

may apply to the court which made the order for a further order revoking it on the ground that he wishes to resume parental responsibility."

Mr McFarlane contends that his client's right to apply for parental responsibility matured on 20th December 2002 since by that date C and T had not been adopted or lawfully placed for adoption.

Mr McFarlane contends that S20 (1)(b) is to be construed as though the word "lawfully" had been written in before the word "placed".

20. Mr McFarlane's submission that the placement of C and T with Mr and Mrs A is an unlawful placement rests solely on the terms of S56 of the Adoption Act 1976, which, so far as is relevant, is in these terms:

"56(1) Except under the authority of an order under S55 . . . it shall not be lawful for any person to take or send a child who is a British subject . . . out of Great Britain to any place outside the United Kingdom, the Channel Islands and the Isle of Man with a view to the adoption of the child by any person not being a parent, guardian or relative of the child; and any person who takes or sends a child out of Great Britain to any place in contravention of this sub-section, or makes or takes part in any arrangements for placing a child with any person for that purpose, shall be guilty of an offence and liable on summary conviction to imprisonment not exceeding three months or to a fine not exceeding level 5 on the standard scale or to both."

21. S55 provides a mechanism for a person who is not domiciled in England and Wales to apply to the court for parental responsibility on the grounds that he intends to adopt the child under the law or within the country in which he is domiciled. However S55(2) states that the provisions of Part II relating to adoption orders shall apply to orders under this section as they apply in relation to adoption orders, with certain exceptions and with the extension from 13 to 26 weeks of the period of prior residence with the applicant required by S13 (1) (b) of the Act.
22. On these two sections Mr McFarlane's essential argument is that the local authority were guilty of a criminal offence in placing C and T with Mr and Mrs A since the As had not obtained prior authority from the court under S55.
23. That is Mr McFarlane's simple and attractive case. He supplements it by demolishing escape routes advanced by the local authority and adopted by the judge. The submission that the local authority is not "a person" within the meaning of S56 is easily demolished by reference to other parts of the Adoption Act 1976 and to the Interpretation Act 1978.
24. Next Mr McFarlane seeks to demonstrate that the relevant provisions of the Children Act 1989 do not exempt the local authority from compliance with S56. Provisions for placing children abroad are contained in paragraph 19 of Schedule 2 of the Children Act 1989. I cite only three sub-paragraphs as follows:-

"19(1) A local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court.

(2) A local authority may, with the approval of every person who has parental responsibility for the child, arrange for or assist in arranging for, any other child looked after by them to live outside England and Wales.

- (6) Section 56 of the Adoption Act 1976 (which requires authority for the taking or sending abroad for adoption of a child who is a British subject) shall not apply in the case of any child who is to live outside England and Wales with the approval of the court given under this paragraph."
25. Mr McFarlane rightly submits that, after the making of a freeing order, the local authority, acting as an adoption agency, accommodates the child under S22(1) of the Children Act 1989. The child is therefore not in care but is "a looked-after child" to whom the provisions of Part III of the Children Act 1989 apply. Accordingly he submits that the route provided by paragraph 19(1) and (6) was not available to the local authority (as, indeed, Judge Hamilton perceived). In relation to paragraph 19 Mr McFarlane's essential submission is that, whilst the local authority had the power under paragraph 19(2) to arrange for C and T to live abroad they could not arrange for their adoption abroad without either satisfying or breaching the provisions of Sections 55 and 56.
26. Mr McCarthy stresses that at its height S56 simply creates a summary criminal offence with a limitation period for prosecution of six months. It has not other legal consequence or effect. It certainly does not render unlawful an otherwise regular adoptive placement made in breach of S56. Mr McCarthy stresses that Sections 55 and 56 in identical form long precede the creation of freeing orders introduced by the Children Act 1975 and incorporated in the Adoption Act 1976. This legislative change created the statutory status of adoption agency and freeing applications could only be brought by such agencies. Adoption agencies have a wide range of powers and responsibilities and nothing in the Adoption Act 1976 or in the Adoption Agency Regulations signified that the Agency in the performance of its function was liable to prosecution under S56.
27. These then are the essential battle lines in the submissions. Mr Hayden essentially adopts and reinforces Mr McFarlane's submissions, whilst Mr Keehan adopts and reinforces Mr McCarthy's submissions.
28. The crucial question in the case is whether Mr McFarlane succeeds in his submission that S20(1)(b) is to be construed as restricted to lawful placement. I see no grounds for that construction. I would give the words their simple meaning. There can be no doubt that the public policy underlying the enactment of Sections 19 and 20 is to ensure that a child freed for adoption is secured in a new family within a reasonable period of time. The mischief at which these sections are aimed is drift, denying or deferring the compensation for the loss if its birth family to which the child is entitled. S20 is not enacted to ensure that a placement is lawful (in that it does not breach S11 or S56 of the Adoption Act 1976) but that it is a placement where the child has his home in preparation for the Adoption Order. Only in respect of a breach of S57 of the Adoption Act does S24(2) forbid the making of an Adoption Order.
29. Once that decision is reached the remaining areas of contention become academic. Whether or not the local authority or an individual within the authority acted in breach of S56 in placing C and T with Mr and Mrs A, the limitation period for prosecution has long since expired. However I am of the opinion that the local authority were not liable to prosecution under S56. I accept that Mr McFarlane's argument to the contrary is both attractive and persuasive. I recognise that his view of the law is shared by the Department of Health in their guidance on Inter-country Adoption (see paragraph 28 in chapter 12 and paragraph 7 in chapter 13 in the current edition published in May 2003). I accept that the Judge cannot be supported in his conclusion that the local authority was not "a person" within the meaning of S56. I accept that the provisions of paragraph 19(6) of the Children Act 1989 do not establish my conclusion. My conclusion rests on a need to make a sensible construction of S56 given the onerous preconditions demanded by S55 in conjunction with S13(1)(b).

30. Above all I would accept Mr McCarthy's fundamental submission: had parliament intended to criminalise the activity of an adoption agency in the exercise of its statutory powers and responsibilities, it would have so legislated explicitly. If there be ambiguity it is to be resolved in favour of the adoption agency.
31. Since the issues raised by these applications are complex and the consequences both for the parents and the local authority serious, I would grant all the applications before the Court but dismiss the resulting appeals.

Lord Justice Neuberger:

Introduction

32. This is an application for permission to appeal with the hearing of the appeal to follow immediately if the application is granted. The proposed appeal is against the summary dismissal by His Honour Judge Roderic Wood QC (as he then was) of an application by Mr and Mrs B to revoke freeing for adoption orders made in respect of two of their children, C and T. It raises points of some difficulty in relation to the Adoption Act 1976 ("the 1976 Act") and the Children Act 1989 ("the 1989 Act"). All references hereafter are to sections of the the 1976 Act, unless the contrary is indicated.
33. His Honour Judge Hamilton in the Birmingham County Court made care orders on the application of Birmingham City Council ("the council") in respect of four of the children of Mr Mr and Mrs B ("the parents"), namely S, now aged 11, C now aged 8, D now aged 7, and T and T now aged 5. On the 20th December 2001 Judge Hamilton made orders freeing all four children for adoption holding that the parents were unreasonably withholding their consent to the the freeing applications. Judge Hamilton said:
- "The evidence shows that Mr and Mrs B have already made mayhem of mayhem of the lives of their elder children and are likely to make mayhem of the lives of all of their children if they are given the opportunity to do so."
- He concluded that "the sooner [the parents'] role in the lives of their children is terminated, the the better for the sake of the children's welfare".
34. Given the history of the parents' behaviour, it is scarcely surprising that the Council was contemplating placing the children for adoption abroad. Indeed, one of the witnesses for the council referred to that possibility in her evidence, and we were informed that that possibility was mentioned to Judge Hamilton by the barrister appearing for the council on the application for for the freeing orders. However, as I understand it, there was no suggestion that this was the council's firm intention. Nor was Judge Hamilton told anything about any specific proposed adoptive parents.
35. Thereafter the council identified prospective adopters in another jurisdiction, namely Mr and Mrs Mrs A. On the 17th June 2002 the Adoption Panel approved the placement of all four children out out of the jurisdiction with Mr and Mrs A. On the 3rd July the council wrote to asking the court for court for an urgent listing of an application for permission to place the four children out of the jurisdiction. The application was made under the 1989 Act, and was filed on the 4th July. Judge Judge Hamilton considered that the application lodged under paragraph 19(1) of Schedule 2 to the the 1989 Act was misconceived, as the children were not in care but were freed for adoption. He He prepared a helpful note drawing the council's attention to the fact that Section 56 rendered it a

it a criminal offence to place a child outside the United Kingdom with a view to adoption without the prior authority of the Court under Section 55.

36. The council concluded that the provisions of Sections 55 and 56 did not apply to a local authority acting as an adoption agency after the making of a freeing order, and that the placement of the four children with Mr and Mrs A could therefore be implemented without any further application to the Court. That placement was made on 13th August 2002 and notified to the parents six days later.
37. The placement was only partially successful. S and D were removed on the 26th November 2002, and were then placed with foster parents in the Birmingham area. C and T remained with Mr and Mrs A, with whom they remain to this day.
38. On the 13th February 2003 the parents issued applications in the Birmingham County Court seeking the revocation of the orders of 21st December 2001 in relation to each of the four children, in reliance on Section 20.
39. Judge Wood (sitting as a Deputy High Court Judge) dismissed these applications on 21st November 2003 in relation to C and T. He was of the view that Sections 55 and 56 did not apply to a local authority – at least when it was acting as an adoption agency – and that the sending of the four children abroad for adoption had been lawful under the terms of paragraph 19(2) of Schedule 2 to the 1989 Act. Accordingly he decided that the parents had no rights under Section 20(1) in relation to C and T. However, as the council had abandoned its attempts to place D and S for adoption and had placed them in foster care, the judge was of the view that the s20 applications in relation to D and S were competent, and he gave directions for trial in relation to them.
40. Thereafter, Mr and Mrs A applied for an order under Section 55 giving them parental responsibility for C and T. That application was granted by Judge Wood on 5th December 2003. Mr Andrew Neaves, on behalf of Mr and Mrs A, told us that this order would help Mr and Mrs A in applying for an Adoption Order in their jurisdiction and that it is their intention to pursue such an application, which they issued on 31st December 2003, vigorously. We were also told that the guardian has visited C and T twice recently, and that she is satisfied that they are happily settled and are anxious to be adopted by Mr and Mrs A as soon as possible.
41. Mrs B seeks permission to appeal the order of Judge Wood of 21st November 2003. Mr B seeks permission for the same relief and an extension of time. The council seeks permission to file a Respondent's Notice.

The legal framework

42. In order to understand and deal with the arguments raised on this application it is necessary to have in mind a number of the provisions of the 1976 Act as well as paragraph 19 of Schedule 2 to the 1989 Act ("paragraph 19"). In this connection, it should be mentioned that both statutes have been amended by subsequent legislation in a number of respects. It should also be mentioned that of the two centrally relevant provisions in this appeal, one, s56 is to be repealed and re-enacted in a new form, and the other, paragraph 19, is to be amended, pursuant to the provisions of the Adoption and Children Act 2002.
43. Furthermore, it is clear that the 1976 Act should not be construed in isolation; it should be read together with the 1989 Act. That proposition is clearly established by the decision of the House of Lords in *Re G (Adoption: Freeing Order)* [1997] 2 FLR 202 – see especially per Lord Browne-Wilkinson at 209.

44. Part I of the 1976 Act is concerned with "the Adoption Service" and, by s1(1), it imposes on "every local authority" a duty "to establish and maintain within their area" a full adoption service. Section 1(4) provides that "a local authority × may be referred to as an adoption agency".

45. Section 6 provides:

"In reaching any decision relating to the adoption of a child a court or adoption agency shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding."

46. The only other section within Part I to which I should refer is s11, of which subsection (1) provides as follows:

"A person other than an adoption agency shall not make arrangements for the adoption of a child, or place a child for adoption, unless—

- (a) the proposed adopter is a relative of the child, or
- (b) he is acting in pursuance of an order of the High Court."

Section 11(3) provides that anyone who contravenes s11(1) "shall be guilty of an offence" and liable on conviction to a prison term of up to three months and/or a fine.

47. Part II of the 1976 Act is concerned with "Adoption Orders". Such an order is described in s12(1) as being "an order giving parental responsibility for a child to the adopters, made on their application by an authorised court" an expression defined in s62. Section 12(3) provides that the making of an adoption order "operates to extinguish × the parental responsibility which any person has for the child immediately before the making of the order".

48. Section 13 is headed "Child to live with adopters before order is made". Section 13(1) forbids the making of an adoption order unless the child concerned has "during the preceding 13 weeks had his home with the parents [for adoption] or one of them".

49. Section 16(1) provides that an adoption order cannot be made unless

- v) the child is "free for adoption" under s18 of the 1976 Act, and
- vi) the consent of each parent or guardian of the child is either freely given or dispensed with by the court on one or more of the grounds specified in s16(2).

50. Section 18 empowers the court to declare a child free for adoption provided, again, that the consent of each parent or guardian is either freely given, or dispensed with on one of the grounds referred to in s16(2). Section 18(5) provides that:

"On the making of an order under this section, parental responsibility for the child is given to the adoption agency and subsections (2) to (4)

of section 12 apply as if the order were an adoption order and the agency were the adopters."

Section 18(6) entitles any parent or guardian of the child to declare that he or she wishes to have no further involvement "in future questions concerning the adoption of the child". Sections 19 and 20 apply to a parent or guardian who does not so declare; such a person is referred to as a "former parent": see s19(1).

51. Section 19(2) provides that a former parent, who has not been previously informed by notice that an adoption order has been made in respect of the child, is entitled to receive from the adoption agency within 14 days of the anniversary of the making of a freeing order, a notice informing him or her:

- "(a) whether an adoption order has been made in respect of the child and (if not)
- (b) whether the child had his home with a person with whom he has been placed for adoption."

In a case where the notice states that s19(2)(a) is not satisfied but s19(2)(b) is satisfied, s19(3) requires the adoption agency concerned to give further notice to the parent if and when any adoption order is made or if and when the child ceases to have his home with the person with whom he has been placed for adoption.

52. Section 20(1) provides:

- "(i) The former parent, at any time more than 12 months after the making of the [freeing] order when—
 - (a) no adoption order has been made in respect of the child, and
 - (b) the child does not have his home with a person with whom he has been placed for adoption

may apply to the court which made the order for a further order revoking it on the ground that he wishes to resume parental responsibility."

53. Section 20(2) states:

"While the application is pending the adoption agency having parental responsibility shall not place the child for adoption without the leave of the court."

Section 20(3) provides that the revocation of a freeing order extinguishes the parental responsibility given to an adoption agency pursuant to s18(5) and returns such responsibility for the child to its mother (and, if she was married to him at the time of the child's birth, to the father).

54. Section 24 contains "Restrictions on Making Adoption Orders". Section 24(2) provides:

"The court shall not make an adoption order in relation to a child unless it is satisfied that the applicants have not, as respects the child, contravened section 57."

55. Part III of the 1976 Act is concerned with "Care And Protection Of Children Awaiting Adoption". The provisions of s30, which deals with "return of children placed for adoption by adoption agencies", should be noted. Subsection (1) provides:

"× [A]t any time after a child has been placed with any person in pursuance of arrangements made by an adoption agency for the adoption of the child by that person, and before an adoption order has been made on the application of that person in respect of the child –

- (a) that person may give notice to the agency of his intention not to give the child a home; or
- (b) the agency may cause notice to be given to that person of their intention not to allow the child to remain in his home."

In that event, by virtue of s30(3) the person referred to must, within seven days of that notice "cause the child to be returned to the agency, who shall receive the child".

56. Parts IV and V of the 1976 Act are respectively concerned with "Status of Adopted Children" and "Registration And Revocation Of Adoption Orders And Convention Adoptions".

57. I must refer to certain sections within Part VI of the 1976, headed "Miscellaneous and Supplemental". Section 55(1) is in these terms:

"Where on an application made in relation to a child by a person who is not domiciled in England or Wales or Scotland or Northern Ireland an authorised court is satisfied that he intends to adopt the child under the law of or within the country in which the applicant is domiciled, the court may, subject to the following provisions of this section, make an order giving him parental responsibility for the child."

Subsection (2) applies many of the provisions of Part II in relation to such a order. In particular, it applies s13(1), subject to an increase in the period from 13 weeks to 26 weeks.

58. Section 56(1) is in these terms:

"Except under the authority of an order under s55 × it shall not be lawful for any person to take or send a child who is a British subject × out of Great Britain to any place outside the United Kingdom, the Channel Islands and the Isle of Man with a view to the adoption of the child by any person ×; and any person who takes or sends a child out of Great Britain to any place in contravention of this section, or makes or takes part in any arrangement for placing a child with any person for that person, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months, or to a fine × or to both."

59. I should also refer to s57. Subsection (1) renders it unlawful "to make or give to any person any payment or reward" in connection with the adoption or proposed adoption of a child. Subsection

(2) provides that any person who contravenes subsection (1) is guilty of an offence and liable to a term of imprisonment of up to three months and/or a fine. Subsection (3) excludes from the ambit of s57 "any payment made by an adoption agency by a parent or guardian of a child or by a person who adopts or who proposes to adopt a child" in connection with expenses. Subsection (3A) also excludes certain other payments made by an adoption agency.

60. So far as the 1989 Act is concerned, its long title indicates that, among other things, its purposes include "to reform the law relating to children" and "to provide for local authority services for children in need and others". The only provision of the Act to which I need refer is paragraph 19, which is in Schedule 2, a schedule entitled "Local authority support for children and families".

61. Paragraph 19 is within Part II of the Schedule, which is headed "Children looked after by local authorities", and paragraph 19 itself is headed "Arrangements to assist children to live abroad". It is in the following terms:

- "(1) A local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court.
- (2) A local authority may, with the approval of every person who has parental responsibility for the child, arrange for, or assist in arranging for, any other child looked after by them to live outside England and Wales.
- (3) The court shall not give its approval under subparagraph (1) unless it is satisfied that—
 - (a) living outside England & Wales would be in the child's best interests;
 - (b) suitable arrangements have been, or will be, made for his reception and welfare ×
 - (c) the child has consented to living in that country;
 - (d) every person who has parental responsibility for that child has consented to his living in that country.
- (4) [This enables the court to disregard subparagraph (3)(c) in certain circumstances]
- (5) [This enables the court to over-ride subparagraph (3)(d) in certain circumstances]
- (6) Section 56 of the Adoption Act 1976 × shall not apply in the case of any child who is to live outside England & Wales with the approval of the court given under this paragraph."

Subparagraphs (7) and (8) are concerned with the effect of an appeal against an order made under paragraph 19(1).

The issues

62. By their application of 13th February 2003, the parents sought to revoke the freeing orders made in respect of C and T on 2nd December 2001. That application was made under s20. Accordingly, the parents had to establish that:

vii) "no adoption order [had] been made in respect of [either] child", and

viii) "[Neither] child [had] his [or her] home with the person with whom he [or she] has been placed for adoption".

63. It is clear that no adoption order had been made in respect of C or T, and the argument must therefore focus on whether either child had his or her home with "a person with whom he [or she] has been placed for adoption" within the meaning of s20(1)(b). On the face of it, the judge's conclusion that, with effect from 13th August 2002, C and T had had their "home" with Mr and Mrs A with whom they had "been placed for adoption" appears unassailable.

64. However, the argument advanced on behalf of the parents to the effect that this conclusion was wrong is based, in essence, on two propositions. They are as follows:

ix) the wide words of s56(1) mean that the council acted unlawfully when, without the authority or an order under s55, they placed C and T for adoption with Mr and Mrs A outside the United Kingdom; and

x) an unlawful placing for adoption is outside the ambit of s20(1)(b).

65. Clearly, in order to maintain their application under s20, the parents must succeed on both those propositions. The judge found against them on the first proposition, and therefore did not consider the second. I will consider the two propositions in turn, and will then consider a third issue, namely the effect of the s55 order made by the judge on 5th December 2003.

The first issue: did s56 render the placing of the children abroad unlawful?

66. Section 56(1) is expressed in very wide and unqualified terms. In particular, it renders it unlawful "*for any person*" to take or send a child outside the United Kingdom "with a view to the adoption of the child". The words "any person" are, at least in the absence of any express or implied provision to the contrary, clearly apt to extend to a local authority, whether acting as an adoption agency or otherwise, and whether the child is subject to a freeing order or not. Support for this view is to be found in the Interpretation Act 1978. Effectively re-enacting the Interpretation Act 1889 in this connection, s5 of, and Schedule 1 to, the Interpretation Act 1978 provide that "unless the contrary intention appears" the word "person" in any statute "includes a body of person corporate or unincorporate".

67. Further, if one looks elsewhere in the 1976 Act, it is impossible to resist the conclusion that, when referring to a "person" in the 1976 Act, the legislature intended the expression to extend to an adoption agency. Thus, s11(1) refers to "a person other than an adoption agency ×". Similarly, after prohibiting any payment by or to "any person" in connection with an adoption in subsection (1), subsections (3) and (3A) of s57 exclude payments by or to an adoption agency. These

provisions appear clearly to apply whether or not there is a freeing order in relation to any child involved.

68. It is also apparent from the provisions of paragraph 19(6) that, when enacting the 1989 Act, the legislature plainly considered that the provisions of s56 would extend to a local authority, although, I accept that that does not automatically mean that it must refer to a local authority when it is acting as an adoption agency. However, if the section applies to a local authority, it is hard to see on what basis it can be treated as disapplied where the local authority is acting as an adoption agency.
69. Guidance given by the Department of Health on "Inter-Country Adoptions" indicates that the Department takes the same view. In the current, May 2003, version, paragraph 28 of Chapter 12 and paragraph 7 of Chapter 13 both suggest that an application under s55 is necessary before there can be a placing for adoption abroad. However, although I would in no way wish to detract from the value of these very helpful guidelines, they cannot be relied on as an aid to statutory interpretation, as they properly acknowledge on their first page.
70. The contention that, by placing children for adoption abroad in this case, without the sanction of a court order, the council was nonetheless not in contravention of s56 is advanced by Mr Roger McCarthy QC, for Mrs A, on the basis that s56 should not be treated as applying to an adoption agency at least where there is a valid freeing order in existence in respect of the child placed abroad. In effect, this contention, which found favour with the judge, is based on the proposition that, reading the provisions of the 1976 Act as a whole, and together with paragraph 19, it is clear that, despite its wide and unqualified terms, s56 should not be read as applying to an adoption agency which places for adoption abroad children in respect of whom there is a freeing order.
71. Mr McCarthy relies primarily on paragraph 19(2) as being the source of a local authority's power to send the children abroad for adoption without the benefit of prior court approval. However, he also suggests that, in a case such as the present, an adoption agency is, in any event, impliedly excluded from the ambit of s56. Mr McCarthy further relies on what is said to be the anomalous and inconsistent result of an adoption agency being caught by s56 in relation to child in respect of whom there is a freeing order. In my view, the council's case is best considered by first addressing the anomaly argument, because, as I see it, the more anomalous the result of a particular construction, the less hard it is to reject it.
72. The argument based on anomaly is as follows. If the parents' construction of s56(1) is correct, an adoption agency could not send a "freed" child abroad for adoption unless an order is first obtained from the court under s55(1), and such an order can only be applied for by a person who is not domiciled in the United Kingdom and who intends to adopt the child. However, because 55(2) incorporates the provisions of s13(1) – with the substitution of 26 weeks for 13 weeks – the child has to have lived with the applicant for at least 26 weeks before the court can make the order. Accordingly, where prospective adopters live abroad, they would have to come and live in the United Kingdom for at least 26 weeks, so that the child in question could have his home with them for the requisite period, before an order could be made under s55. The child could not be sent abroad to live with the applicant for those 26 weeks before the order was made, because that would be a breach of s56.
73. I accept that this is a curious result. A requirement that prospective foreign adopters complete a period of twenty-six weeks' residence in this jurisdiction in order to succeed in their application for parental responsibility under Section 55 appears harsh and unrealistic.
74. The curiousness of this result is reinforced when one turns to paragraph 19. The combined effect of paragraphs 19(1) and (6) is that, where a child is in the care of a local authority, then the child

may be sent abroad, for instance for the purpose of living with prospective adoptive parents, without the serious impediment of those prospective adopters having to come to the United Kingdom for over 26 weeks. It would be odd if a placing abroad with a view to adoption was much easier to achieve in the case of a child in care than in the case of a child who is subject to a freeing order.

75. In these circumstances, the council's submission on construction is, as mentioned above, twofold. The first submission, which is not its primary case, although it logically comes first, is that there is an implicit exception from s56(1), to the extent that it does not apply to a case where the "person" is the local authority, acting as an adoption agency in connection with a "freed" child. The council's second, and principal, submission is that in such a case the adoption agency can rely upon paragraph 19(2), which effectively excludes s56(1).
76. As to the first submission, I consider that it would almost always require an express exclusion before it was possible to construe the words "any person" in a provision such as s56(1) in such a way as to exclude a particular class of person (in this case an adoption agency), generally or in particular circumstances (in this case the placing of a freed child). Although the attitude of the courts towards the interpretation of statutes can be said to have become more purposive in recent years, that does not justify a court rewriting a statute, simply because it thinks the legislature would have agreed with the rewriting had it directed its mind to the particular point. It seems to me illegitimate to read s56(1) as excluding a class of person in certain circumstances, simply because it appears likely that the legislature would have made provision for such an exception if that possibility had been raised.
77. Quite apart from anything else, it is, to say the least, quite possible that the legislature would not have simply unconditionally excluded an adoption agency in relation to a placing of a freed child from the ambit of s56. If the point had been considered, then it must be at least possible that there would have been a requirement that an adoption agency in such circumstances must obtain the prior leave of the court. After all, no domestic adoption of a "freed" child can be effected without an order if the court (see s12), and no child in care can be sent abroad for adoption by a local authority without the court's consent (see paragraph 19(1)). Although a local authority's proposals may have been considered by the court at the freeing order stage, they may not, at the time, have included a proposal – or even a suggestion – of placing the child concerned abroad for adoption, let alone any specific proposal to that effect. Indeed, the facts of this case may be said to establish that proposition.
78. The conclusion that s56(1) should be read in the way in which the parents contend, notwithstanding the council's anomaly argument receives support from two further factors. First, even if s56(1) is construed in the way that the council contends, foreign adopters face the problem identified above in every case save where the placing abroad of a "freed" child is effected by an adoption agency. In other words, the anomaly is not, as it were, disposed of by accepting the council's case on the construction of s56(1); it is merely excluded in certain circumstances. The fact that, on any view, the combined effect of ss55(1), (2) and 13(1) gives rise to an anomaly where foreign adopters are involved renders it more difficult for the council to make much of the fact that the anomaly has a particular consequence as a result of the parents' construction of s56. It is not that the anomaly is created by the parents' construction of s56: it is more that the existence of the anomaly is particularly marked in a case such as the present if that construction is correct.
79. Secondly, there is the decision in *Re M (a minor) (Adoption: removal from jurisdiction)* [1973] 1 All ER 852. In that case, Brandon J had to consider ss52 and 53 of the Adoption Act 1958 ("the 1958 Act"). Section 52(1) of the 1958 Act was, for present purposes, identical to s56(1) of the 1976 Act. Section 53 of the 1958 Act was somewhat similar to s55 of the 1976 Act. It envisaged a provisional adoption order being made in favour of a foreign applicant under the laws of the country in which he resided. Such an order could not be made in respect of a child unless that child had resided with the applicant for at least six months. The argument which had to be

considered was that s52 of the 1958 Act prevented the child from being permitted to leave the United Kingdom for the purpose of living for six months abroad with the applicant. Brandon J accepted that argument, saying this at 855:

"The purpose of s52 is plain. It is to prohibit absolutely the removal of a child who is a British subject from the British Islands with a view to its adoption, except under the authority of a provisional adoption order under s53 ×. [T]he court cannot properly, whatever the merits of the case from the point of view of the child's welfare, give the leave for removal which is sought, because to do so in the present state of affairs would involve a breach of s52 of the Act."

80. Accordingly, the anomaly upon which the council's case rests has been the subject of judicial consideration, and therefore the legislature cannot be taken to have been unaware of it when enacting the 1976 Act. Of course, I accept that the scheme of the 1976 Act, and in particular its provisions for freeing orders, is different from that of the 1958 Act. Accordingly, the decision and reasoning in *Re M* cannot be decisive. Nonetheless, it serves to underline the difficulty faced by the council's case, insofar as it seeks to rely on this anomaly for the purpose of implying an exception into the wide and unqualified words contained in s56(1) of the 1976 Act.

81. I turn, then, to the council's principal argument, which is based on paragraph 19(2), and which found favour with the judge. The submission is that the effect of paragraph 19(2) is that, provided two requirements are satisfied, a local authority can arrange for a child to be placed for adoption outside the United Kingdom without prior sanction from the court. The two requirements are that:

xi) the arrangement has "the approval of every person who has parental responsibility for the child"; and

xii) the child is "looked after by" the local authority.

Given that parental responsibility for a "freed" child rests solely with the adoption agency in light of s18(5), this would mean that s56 would be disapplied in the case of virtually every "freed" child.

82. Before turning to the practical results of this submission, it is in my judgment very difficult to sustain in the light of paragraphs 19(1) and 19(6). Paragraph 19(1) permits a local authority to arrange for a child in their care to live abroad, but only with the approval of the court. Paragraph 19(6), by expressly excluding the application of s56, plainly envisages that, in the absence of that paragraph, s56 would still apply in such a case. In those circumstances, I find it difficult to see how it can be said that s56 is also disapplied in relation to a paragraph 19(2) case by implication. If it was necessary expressly to disapply the requirement for a court order under s56 in a case where a court order is still required, namely under paragraph 19(1), it is illogical to conclude that the requirement for a court order under s56 is disapplied merely by implication, in a case where no court order is otherwise required, namely under paragraph 19(2).

83. A closer textual analysis of subparagraphs (1), (2) and (6) of paragraph 19 appears to me to reinforce that point. Paragraph 19(6) disapplies s56 in relation to a child whose living outside England and Wales is "with the approval of the court given under this paragraph". Those words take one back to paragraph 19(1), which refers to "the approval of the court". Paragraph 19(2) employs a very similar form of language, namely "with the approval of every person ×". I have great difficulty in accepting the notion that the legislature could have intended that the imposition of the requirement of "the approval of any person ×" in paragraph 19(2) impliedly disapplied the requirement of court approval under s56(1), when the legislature has expressly disapplied the

requirement of court sanction under s56(1) in a case where "the approval of the court given under this paragraph" is required.

84. Quite apart from this, the council's case based on paragraph 19 relies on the anomaly already discussed, but it appears to me that to read paragraph 19(2) as over-riding s56(1), as the council suggests, would itself lead to anomalies. A child is "looked after" by a local authority if he is:
- "(a) in their care; or
 - (b) provided with accommodation by the authority in the exercise of any function (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970 ×" – see s22(1) of the 1989 Act.
85. Accordingly, if the council's case as to the effect of paragraph 19(2) is correct, a local authority could arrange, without prior sanction from the court, for any child for whom they provide accommodation to be placed abroad for adoption with their parents' consent. In my judgment, bearing in mind the provisions of s11(1) and s56(1), it is very unlikely that such an intention could have been intended by the legislature.
86. Indeed, it goes further than this. The effect of paragraphs 19(1) and 19(6) is that a local authority can place for adoption abroad a child in their care only if they obtain the approval of the court, such approval being necessary under paragraph 19(1). Court approval would be required even if all those with parental responsibility for the child agreed. If paragraph 19(2) has the effect for which the council contends, however, it would mean that a local authority could place a child abroad for adoption without the approval of the court (albeit with the approval of all those with parental responsibility), in a case where the child was merely being provided with accommodation by the local authority. Such a contrasting result appears to me have been one that is very unlikely to have been intended.
87. Accordingly, this analysis of paragraph 19 appears to lead to the conclusion that, if the council's case based on paragraph 19(2) is correct, it would result in some anomalies. The anomaly argument does not therefore in my view assist the council, so far as it relies on paragraph 19.
88. Apart from the anomaly point, the judge thought that the policy behind s56 and paragraph 19 demonstrated that s56 was not intended "to criminalise an adoption agency". That, with respect appears to me to involve assertion rather than analysis. I share the judge's doubts as to whether the legislature would have intended that an adoption agency in the position of the council should be unable to send children such as C and T abroad for adoption without the proposed adopter first living in the United Kingdom for 26 weeks. However, for the reasons already given, that does not mean that one can interpret the plain language of s56(1) in such a way as to exclude an adoption agency from its ambit in relation to "freed" children, in light of paragraph 19. Indeed, as already mentioned, the contention that s56(1) extends to an adoption agency is, if anything, reinforced by the provisions of paragraph 19. The natural inference from that paragraph is that, if the judge's view of the policy is, in general, correct, then what the legislature would have intended is that an adoption agency should be able to place "freed" children abroad for adoption, subject only to the prior approval of the court. However no party to these proceedings has suggested (and I do not see how it could be suggested) that such a result can be properly extracted from the statutory provisions in light of the way in which they are expressed.
89. I have therefore reached the conclusion that, by sending C and T (and indeed, S and D) out of this country to be placed for adoption with Mr and Mrs A on 13th August 2002 without any prior sanction from the court, the council infringed s56(1). First, that is the natural interpretation of

s56(1). Secondly, that interpretation is supported by other provisions of the 1976 Act, as well as by the Interpretation Act 1978. Thirdly, consideration of the provisions of paragraph 19 supports that conclusion. Fourthly, although the interpretation can be said to result in an anomaly:

- xiii) it is an anomaly which is more generally inherent in the 1976 Act;
- xiv) it was an anomaly under the 1958 Act, to which attention had been drawn in *Re M* ;
- xv) the contrary conclusion would itself result in other anomalies.

90. Accordingly, by arranging for the four children to be placed for adoption abroad with Mr and Mrs A , the council acted unlawfully. However, I have no doubt whatever that the council was acting in what it believed to be the best interests of all four children, and, indeed, in what appears to me on the evidence to have been clearly in the best interests of C and T. As I have mentioned, Mr Michael Keehan QC, for the guardian says that she is quite satisfied that the placement of C and T with Mr and Mrs A has been very successful, and that C and T are anxious to be adopted by Mrs and Mrs A as soon as possible. It is with no regret that I note that the time for prosecuting the council or any of its employees for breach of s56(1) has long expired.

The second issue: is s20(1)(b) satisfied as the placements were unlawful?

91. The conclusion that the placing of C and T abroad with Mr and Mrs A was in breach of s56(1) requires me to address the second question, namely whether C and T have "been placed for adoption" within the meaning of s20(1)(b), given that their placement was unlawful pursuant to the provisions of s56(1). For the parents, Mr McFarlane and Mr Anthony Hayden QC contended that a child cannot be treated as "having been placed for adoption" within the meaning of that section if the placement was unlawful under s56(1). The contention has obvious attraction, but it must be considered by reference to the way in which ss20 and 56, and indeed other relevant provisions of the 1976 Act, are expressed and the consequences of the contention.
92. As a matter of ordinary language, C and T were "placed for adoption" with Mr & Mrs A on 13th August 2002, notwithstanding the fact that the placement was unlawful because it contravened s56(1). Indeed, as Mr McCarthy points out on behalf of the council, it is inherent in the parents' case on the first issue that the children were placed for adoption with Mr and Mrs A on 13th August 2002, because otherwise there would have been no breach of s56(1) which renders it unlawful to send a child abroad "with a view to the adoption of the child". There is a difference in language between the reference to a child who "has been placed for adoption", and the reference to a child taken or sent out of the country "with a view to [his] adoption", but they are concerned with the same concept. Accordingly, both as a matter of language, and in light of the terms of the very section upon which the parents' case is based, it appears to me that C and T have "been placed for adoption" with Mr and Mrs A notwithstanding the fact that the placement was illegal.
93. The point is reinforced when one turns to consider s30, which, as I have mentioned, deals with the rights and obligations of an adoption agency (and indeed a prospective adopter) in relation to the return of the child after he "has been placed with any person × for × adoption". It is unlikely that the legislature can have envisaged that the powers and duties bestowed and imposed upon adoption agencies (and prospective adopters) by s30 would not apply in a case where the placement was unlawful. The same point may be made as to the applicability of subsections (2) and (3) of s19 of the 1976 Act.

94. Accordingly, in my judgment, the parents' case requires the implication of lawfulness into s20(1)(b) of the 1976 Act. It is normally very difficult to imply a term into a statutory provision. However, in my opinion, an implied term to the effect that an express statutory condition can only be satisfied by an act which is lawful is rather easier to accept than most types of implied term. Nonetheless, as mentioned, it does appear that to accept the contention that s20(1)(b) of the 1976 Act requires the placing to be lawful would appear to throw up an inconsistency (which I accept is by no means necessarily fatal to the contention) between the reference to "placed for adoption" in that section, on the one hand, and, on the other hand, "placed for adoption" in s19(2) and (3) and "placed × for the adoption" in s30(1).
95. Furthermore, the 1976 Act does not in terms provide that a placement effected in breach of s56(1) is to be treated as ineffective. It merely provides that such a placement "shall not be lawful" and can lead to summary conviction of those involved. In that connection, there is a distinct and significant contrast between the express statutory consequences of a breach of s56 and those of a breach of s57 of the 1976 Act. As mentioned above, s24(2) prevents the court from making an adoption order where the applicant has contravened s57(1), in addition to the penal sanctions of s57(2). The fact that there is no provision equivalent to s24(2) in relation to a contravention of s56(1) tends, in my view, to provide significant support for the view advanced on behalf of the council, that the placing for adoption of a child in contravention of s56 does not mean that the child should not be treated as "placed for adoption" for the purpose of s20(1)(b).
96. In addition, while it is concerned with the same general idea of placing for adoption, the language of s56(1) is slightly different from that of s20(1)(b). As a result, it seems to me that they are concerned with slightly different things. Section s56(1) renders unlawful the act of sending or taking the child abroad for adoption, whereas s20(1)(b) is concerned whether the child has his home with the proposed adopters with whom he has been placed abroad. In other words, although the unlawful act of sending abroad will have resulted in the child having such a home, it cannot be said that the child having such a home – i.e. the actual state of affairs stipulated by s20(1)(b) – is itself unlawful by virtue of s56(1).
97. Some further support for the conclusion that a placing of a child is within s20(1)(b) can be satisfied although it resulted from a breach of s56(1) may be drawn from the reasoning of the Court of Appeal in *Re G (Adoption: illegal placement)* [1995] 1 FLR 403. At 406, Balcombe LJ described as accurate certain extracts he quoted from the head note in *Re Adoption Application (non-patril: breach of procedures)* [1993] 1 FLR 947 at 948. They included the following:

"[T]he court hearing an adoption application where there had been a proved breach of s11 was not prohibited from making an order notwithstanding the absence of a statutory dispensing and retrospective power. It must take the breach into account in considering whether public policy required that the order should be refused because of the applicants' criminal conduct ×."

Balcombe LJ went on to observe that the head note "accurately represents the decision of Douglas Brown J in what was a very careful and reserved judgment with which I wholly agree". Accordingly, the court is not precluded from making an adoption order notwithstanding that the arrangements for the proposed adoption, or the placing of the child for the proposed adoption, was in breach of s11 which, like s56 provides for criminal sanction in the event of its breach (For recent confirmation, see *Re C (Adoption: Legality)* [1999] 1 FLR 370 at 382 per Johnson J). I am far from suggesting that it follows from this as a matter of inexorable logic, that the parents' contention that s20(1)(b) is satisfied must be wrong, but it does appear to me that the reasoning in *Re G* and the similarities between ss11 and 56 tend to support the case of the local authority and the guardian on this issue.

98. Normally, it would be unattractive for a party to seek to rely on an unlawful act to enable him to contend that a statutory provision is satisfied. Indeed, in some circumstances such reliance might fall foul of the rule that a person cannot rely on his own wrong. However, in my judgment such considerations have little, indeed no, force in the present case. Section 6 emphasises that the primary concern in any case concerning adoption must be the welfare of the children. Further, any placing with which s20(1)(b) is concerned will be by an adoption agency; any unlawfulness in the placing is therefore virtually certain to be inadvertent, and the placing is certain to be intended for the benefit of the children. Further, the unlawful act will be that of the adoption agency who will not be seeking any benefit under s20: any benefit would primarily be for the children, and also, although fortuitously so far as the 1976 Act is concerned, for the adopters.
99. For the parents, Mr McFarlane contends that, if an unlawful placement falls within s20(1)(b), it would be inconsistent with the rights granted to former parents under that section. While I accept that former parent can be regarded as being granted rights under s20, the primary purpose of the section, like all other provisions of the 1976 Act, is to give rights and benefits to children – see s6. That point is underlined by the fact that, on a s20 application, the court can refuse to grant the former parents parental responsibility – see *Re G (Adoption – Freeing order)* [1996] 2 FLR 398 at 404.
100. I would also refer in this connection to the observations of Lord Browne-Wilkinson giving the only reasoned speech of the House of Lords in the same case. At [1997] 2 FLR 202 at 210, he described s20 as enabling a freeing order "to be revoked so as to restore the parent to his or her normal right and to ensure that the child does not remain in adoption limbo". The unlawful placing in the present case cannot be said to have resulted in C and T being in limbo. We were told by Mr Neaves that the only obstacle to Mr and Mrs A applying for adoption orders in respect of C and T in the courts of the country in which they live is the present application. That accords with the evidence we have seen. It also serves to emphasise that the placements of C and T, although unlawful by virtue of s56(1), have not resulted in C and T being in adoption limbo. On the contrary: if anything, it is these applications under s20 which have resulted in a limbo period.
101. Whilst these factors support the conclusion that, although the taking C and T abroad contravened s56, it nonetheless resulted in placings for adoption within s20(1)(b), I must address four factors which are said to point the other way. The first is the unattractiveness of an application being defeated because of the applicants' inability to satisfy a condition due to an unlawful act. To put the point another way, the parents have an obvious grievance if their rights under s20 are defeated because of the unlawful placing. To a considerable extent I believe that this factor is met by the points already raised. However, it is undoubtedly a factor which can be prayed in aid of the parents.
102. Secondly, there is the fact that if s20(1)(b) applies to a placing abroad in a case such as this, then such a placing can in practice lead to a child being the subject of a foreign adoption without its being considered by an English court – the very thing which s56 appears to be designed to avoid. Again, this factor is to some extent met by the points already made, although it has real force. Further, as mentioned, the court will have already approved the freeing order and its involvement would thereafter have only a limited purpose; indeed in the great majority of cases the greatest benefit of the court's involvement would only be to help concentrate the minds of the adoption agency and the adopters. However, that can be of help and significance in some cases.
103. The third factor is the policy implications of the conclusion that an unlawful placement is within s20(1)(b). In any case where the court concludes that a particular statutory condition is satisfied, even though the act which satisfies it is unlawful, consideration must, in my view, be given to the consequences of that conclusion, above all in the case of a statute concerned with children. Section 20(1)(b) can only apply to a child in respect of whom a freeing order has been made: see ss18(6), 19(1) and 20(1). Accordingly, the placing for adoption contemplated by s20(1)(b) is one which would be organised by an adoption agency, as is effectively recognised by the terms of

ss19(2)(b) and 20(2). Given the nature of adoption agencies, the individuals involved in running adoption agencies, and the statutory control over adoption agencies, it appears to me that the only circumstances in which such a placement would be unlawful could be attributable to an oversight. In those circumstances, it does not appear at all likely that my conclusion on the second issue would have any undesirable consequences. Indeed, it is fair to record that counsel for the parents did not suggest otherwise, either by reference to s20 or by reference to any other provision of the 1976 Act.

104. The fourth aspect is the contention made on behalf of the parents, and in particular by Mr Hayden on behalf of Mr B, that s20(1)(b) should not be construed in the way indicated, in light of the provisions of s3 of the Human Rights Act 1998. (In this connection, it is fair to say that the main thrust of his contention in relation to the 1998 Act was directed towards the incompatibility of paragraph 19(2), if it was to be interpreted in the way in which the local authority and the guardian submitted, but, in light of the way in which I have construed s56 and paragraph 19, that point does not arise).
105. In my view, there is nothing in this contention. It is not suggested that any other aspect of ss19 and 20 could in some way be in contravention of the human rights of the parents, or indeed of C and T. In other words, there is no challenge to the principle that the placing of children for adoption within 12 months of a freeing order should prevent the parents from applying for revocation of that order. In those circumstances, it seems to me that the mere fact that the placing contravened the provisions of s56 and, indeed, thereby gave rise to potential criminal liability, cannot somehow result in the provisions of s20 infringing human rights. After all, there would be no such question if, for instance, it had been specifically provided in s56(1) that a placing which contravened its terms should nonetheless be treated for the purposes of s20(1)(b), as an effective placing, which is the effect of the reasoning in this judgment.
106. The resolution of the second issue involves balancing the competing arguments set out above. I have come to the conclusion that the council's case is to be preferred. As a matter of policy, it is at least as consistent with the interests of children subject to freeing orders, given the purpose of s20 as described by Lord Browne-Wilkinson; indeed, as adoption agencies will always be involved in a placing contemplated by s20(1)(b), I believe that it is more consistent with their interests. As to the language used in s20(1)(b) and in other relevant parts of the 1976 Act, I am of the view that it is definitely more consistent with the council's argument than that of the parents.
107. My conclusion on this second issue renders it unnecessary to consider the third issue. Nonetheless, it is right that I should deal with it.

The third issue: the effect of the s55 order

108. If I had concluded that the contravention of s56 resulted in the placing of the children with Mr and Mrs A not satisfying s20(1)(b), the council's contention is that the effect of the order made by the judge on 5th December 2003 effectively defeated the parents' ability to rely on s20. This issue, like the first two issues, is not entirely easy to resolve.
109. One must start with the assumption that, contrary to my conclusion on the second issue, s20(1)(b) is to be treated as satisfied so long as the placing abroad of C and T with Mr and Mrs A does not have the sanction of the court. On this hypothesis, the judge should not have struck out the parents' s20 application on 21st November 2003, because, both when the s20 application was launched and as at the date of that judgment, the parents were able to satisfy s20(1)(b). However, runs the council's argument, the effect of the s55 order made by the judge on 5th December 2003 meant that, with effect from that date, the parents were unable to satisfy s20(1)(b), because, from that date, the placing abroad of C and T with Mr and Mrs A was with the sanction of the court.

110. In this connection, it is not suggested on behalf of the council, or indeed, on behalf of Mr and Mrs A, that the effect of the order of 5th December 2003 was retrospectively to validate the sending of C and T abroad. It is not possible to effect such a retrospective validation pursuant to s55: see the decision of this court in *Re G (Adoption: Illegal Placement)*, referred to above. Consequently, the effect of the s55 order was purely prospective.
111. As I understand it, the parents raise two arguments in answer to this contention. The first is that a s20 application is valid and effective provided that the applicants can satisfy s20(1)(a) and (b) at the date of the issue of the application: it is argued that the fact that they cannot do so at some point thereafter does not invalidate the application. Secondly, it is argued that it is not open to the court to make an order under s55 in circumstances where the children were sent abroad in breach of s56. I shall consider those two arguments in turn.
112. As to the first point, it is clear that an applicant must be able to satisfy s20(1)(a) and (b) at the time of the making of the application. That would seem clearly to follow from the wording of s20(1), and, if there is any doubt it must be put to rest by s20(2). It is by no means clear what the legislature intended to happen to such an application if, during its currency, an applicant becomes unable to satisfy s20(1)(a) or (b). However, I am of the view that in such a case, the application is liable to be struck out. Where a statute entitles a person to make an application to the court if certain conditions are fulfilled, and the conditions are, by their nature, capable of continuing, it must depend on the language, and on the purpose of the statutory provision, as to whether the conditions have to be satisfied throughout the duration of the application.
113. In the present case, little guidance can be derived from the actual wording of s20(1). However, it appears to me, essentially for three reasons, that ss20(1)(a) and (b) have to be satisfied throughout the duration of the application. First, the purpose of s20, as described by Lord Browne-Wilkinson in *Re G (Adoption – freezing order)* at 210 is, as I see it, primarily to ensure that the child does not remain in "adoption limbo", although it is also to give the former parents the opportunity to seek to reassert their former rights. Particularly in light of the provisions of s6, the protection of the child, and in particular the avoidance of adoption limbo, must, I think, be the primary purpose.
114. Accordingly, if, during the currency of the s20 application, a child is lawfully placed for adoption, or lawfully adopted, it would seem to me that the "safety net" of s20 would no longer be needed. The child would no longer be in "adoption limbo", and would not therefore need to be rescued through the operation of s20.
115. The second reason for my conclusion is based on s20(2). It ensures that, so long as there is a s20 application on foot, a child cannot be placed for adoption without the prior leave of the court. The purpose of that provision, presumably, is to ensure that, once the 12 months identified in s20(1) have passed since the freeing order was made, and the former parents make an application, it should not be open to the adoption agency to "trump" the s20 application, without the prior sanction of the court. Although it is true that such a placing could be ended in the event of the former parents' s20 application succeeding, it seems to me more likely that the reason for s20(2) is because such a placing would put an end to the s20 application. It is far more likely that the legislature would have envisaged the placing, which could lead to an adoption, putting an end to the s20 application, rather than the placing leaving the s20 application extant, with all the consequent uncertainties.
116. The third reason for my conclusion is also in part based on s20(2). If a placing is permitted under s20(2), it could result in an adoption application, which could be made as soon as 13 weeks after the placing: see s13(1). If the placing results in an adoption being ordered before the s20 application is heard, then it is fanciful to think that the s20 application could thereafter have any future at all. If, therefore, there is a possibility of s20(1)(a) becoming unsatisfied at some point after a s20 application is made, and this puts an end to the s20 application, that would suggest that the result of s20(1)(b) ceasing to be satisfied after a s20 application is made should similarly put an end to the s20 application.

117. I turn then to the second argument raised on behalf of the parents. It is that an order under s55 should not in fact have been made because s13(1), as varied and incorporated by s55(2), was satisfied by an unlawful act. In other words, it is said that, because a s55 order cannot be made in favour of a foreign adopter unless the child concerned has had his home with the prospective foreign adopter for at least 26 weeks, it is not open to the court to make a s55 order where the 26 weeks were spent abroad in breach of s56.
118. This argument is very similar to that raised by the parents on the second issue. However, in my view, it is weaker than the parents' argument on the second issue, essentially for three reasons. The first reason is that the condition in question which had to be satisfied before a s55 order is made is that, for the 26 weeks before the making of the order the child must have "had his home with the applicants ×". In other words, unlike s20(1)(b), there is merely a requirement of the child having had his home with the applicants, rather than his having had to have had his home "with a person with whom he has been placed for adoption". It seems to me rather easier to argue that there is an implied term that the "plac[ing] for adoption" in s20(1)(b) must be lawful in its origin, than it is to argue that the "home" referred to in s13(1) must be lawful. To put the point another way, it is easier to argue that there is an implied term that a placing for adoption must be lawful than it is to contend that a home must be lawful.
119. Secondly, the consequence of the conclusion that s20(1)(b) was satisfied notwithstanding the breach of s56, is that a foreign adoption order can be made notwithstanding that there has been a breach of English law, and notwithstanding the fact that the English court will not be come involved. On the other hand, when considering whether or not to make an order under s55, the court can take into account the fact that, although the child has had a home for 26 weeks with the proposed adopters, his placing in that home involved a contravention of s56. Thus, unlike the conclusion that s20(1)(b) can be satisfied by an unlawful placing, the conclusion that s13(1) can be so satisfied for the purpose of s55 does not mean that the English court is deprived of any jurisdiction. Indeed, when considering whether to make an order under s55, the court may well think it right to take into account any breach of s56 which may have occurred.
120. Thirdly, to uphold the parents' argument would seem to me to be inconsistent with the conclusions of Balcombe LJ in *Re G Adoption: Illegal Placement* cited above, and indeed with the observations of Johnson J in *Re S*.
121. I do not understand it to be suggested on behalf of the parents that the judge ought not to have made a s55 order in light of the particular facts of this case. Indeed, in light of the exceptional facts of this case, I am firmly of the view that if, as I believe to be the case, the judge had power to make a s55 order, he was right to have done so. On the unusual and strong facts of this case, I consider that a s55 order was plainly appropriate.

Conclusion

122. In these circumstances, I conclude that:
- xvi) The placing for adoption by the council of the two children with Mr and Mrs A outside the United Kingdom contravened s56, notwithstanding the freeing orders, and the provisions of paragraph 19(2).
 - xvii) Such a placing of the children was nonetheless an effective placing for adoption as a matter of fact for the purposes of s20(1)(b);
 - xviii) if that is wrong, then the s20 application must nonetheless fail in light of the s55 order made on 5th December 2003.

123. In the circumstances, albeit for reasons which are somewhat different from those given by the judge, I believe that he reached the right conclusion. The parents' s20 application in relation to C and T rightly stands dismissed. Therefore, while I would allow the application for permission to appeal, because the issues are not easy and of some significance, I would dismiss the appeal.

Mr Justice Gage :

124. I have had the advantage of reading in draft the judgments of Thorpe LJ and Neuberger LJ. I too agree that this appeal should be dismissed. I only add a few words of my own because, although I agree that the decision of the judge was correct, I reach that conclusion by a different route.
125. In my judgment it is impossible to read, as is argued by the local authority, section 56 as excluding a local authority whether acting as an adoption agency or in any other capacity. Like Neuberger LJ, I regard it as significant that section 11(1) contains the phrase "a person other than an adoption agency". Had Parliament intended to exclude a local authority and/or an adoption agency from liability for an offence under section 56(1) in my view it would have inserted a similar phrase in that section to the one in section 11(1).
126. The matter is, in my opinion, put beyond doubt by the application of section 5 and schedule 1 to the Interpretation Act 1978.
127. I also do not accept the submission that paragraph 19(2) of schedule 2 of the Children Act 1989 enables a local authority in certain circumstances to arrange for a child to be placed for adoption outside the United Kingdom without regard to section 56(1). The exclusion of section 56 made in paragraph 19(6) applies only to paragraph 19(1). It seems to me that it must follow that Parliament must have intended not to exclude paragraph 19(2) from the provisions of section 56.
128. Accordingly, I agree with Neuberger LJ that by placing C and T for adoption with Mr and Mrs A on 13 August 2002, outside the United Kingdom and without the prior sanction of the court, the local authority acted in breach of section 56(1). However I agree with both Thorpe LJ and Neuberger LJ that the placing of the children for adoption was nevertheless an effective placing. In reaching this conclusion I agree with the reasons expressed by Neuberger LJ in his judgment with which I agree and to which I have nothing to add.

Order: Appeal dismissed; order not to be perfected for 7 days.

(Order does not form part of the approved judgment)