Neutral Citation No. [2005] NIMag 4

Ref:	**Mag33**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered:	**07/12/05**

Petty Sessions District of Omagh

County Court Division of Fermanagh and Tyrone

A Trust

Applicant

AND

M

Respondent

(Emergency Protection Order)

Preliminary

1. An application for an Emergency Protection Order (an "EPO"), whereby children may be removed immediately from their home, is perhaps the most serious kind of application which any Magistrate may be called upon to decide. Not infrequently, and perhaps too often, they come before Lay Magistrates sitting out-of-hours and at home. In such circumstances, the process may entail two Social Workers, or perhaps only one, attending upon the Magistrate with no Clerk present. My impression is that there is normally no legal representative in attendance for the Trust and certainly no parents, nor any lawyers appearing for the parents and no-one to represent the child's wishes.

2. There is no right of appeal to any higher Court against the Magistrate's decision, save by way of possible Judicial Review proceedings (Essex County Council v F [1993] 1 FLR 847). If the Magistrate grants the order as sought, the situation cannot be challenged for a minimum of 72 hours (3 days). A party who was given notice and actually does attend the hearing of an EPO application cannot apply to have it discharged anyway. (Article 64(8) of The Children (Northern Ireland) Order 1995).

3. On Wednesday, 26th October I sat with Lay Magistrates Mr. David Moore and Mrs. Ruth McRoberts at Omagh Family Proceedings Court to hear an application to discharge just such an Order, granted the previous Thursday

evening by another Lay Magistrate. By then, the Trust had also made cross-application to have the EPO extended. The applications were first listed on Monday the 24th, but adjourned to the 26th, with pre-Trial directions on the 25th. In view of the Respondent's potential difficulties with comprehension (detailed later) I also directed on 26th October that her mother, Mrs. Mm, remain present with her at the Hearing.

4. All information which might tend to identify the family concerned has been removed from this text, in order to protect the rights of the family and of the children concerned. The judgment is being distributed on the strict understanding that in any report no person may be identified by name or location, other than as disclosed in this text, and in particular the anonymity of the children and the adult members of their family must be strictly preserved.

The history of events

5. At 3.50 pm on Thursday, 20th October 2005 a representative of the Directorate of Legal Services, acting for the Trust, telephoned the Duty Clerk at Dungannon Courthouse. The Clerk was informed that the Trust wanted to arrange for a Social Worker to attend before a Magistrate for the purposes of an EPO application in regard to a child A., who was located at the Social Services offices. There was a "History of neglect, father not to have contact with children but Trust have received information that father is caring for child." The Family Proceedings Court of that day having finished, the Clerk telephoned round in search of a Lay Magistrate who would be available. At the fourth contact number tried, a Lay Magistrate was secured. This was at 3.59 pm.

6. The foregoing details were entered up by the Duty Clerk upon a document entitled "Duty Clerk Log Sheet – Emergency Applications: Children Order." After the details I have just set out, the next section on that Form is headed "Granting of Leave". In this instance, it is ticked "Yes" and this is timed at 4.00 pm. It then goes on to provide details of where and when the application will come before the Lay Magistrate (5.00 pm at his home) and then records that the Directorate were informed of this by telephone at 4.05 pm. At 4.50 pm, the written Application, in Form C1, together with the Supplement in Form C8, as prepared by the Directorate, was faxed to Dungannon Courthouse.

7. Two Social Workers, Mr. X and his line manager and Acting Senior Social Worker Mrs. Y, duly attended at the Lay Magistrate's house and the hearing commenced there at 6.10 pm, finishing at 6.30 pm. It had not been practicable in the circumstances for the Duty Clerk to have the aforementioned paperwork delivered to the Magistrate's home and the Social Workers did not bring copies with them. The Lay Magistrate, according to his written record, took oral testimony from Mr. X. One assumes that this was on oath. I understand that the Directorate sometimes provide a Solicitor to attend with the Social Worker(s), but none was involved in this instance, nor, indeed, is representation

from the Directorate the norm for such emergency applications, so far as I am aware.

8. None of this is actually irregular. Art. 165, (d) and (h) of The Children (NI) Order 1995 ("the 1995 Order") empower the rule-making authorities to make provision for such procedures and Rule 5 of The Magistrates' Courts (Children (NI) Order 1995) Rules 1996, states;

> *Ex parte application*
> 5. - (1) An application for-
> (a) an Article 8 order;
> (b) an emergency protection order under Article 6'J;
> (c) an order or warrant under Article 67;
> (d) a recovery order under Article 69; or
> (e) a warrant under Article 178(2)
> may with the leave of the court be made ex parte and in which case Article 77(2) of the Magistrates' Courts (Northern Ireland) Order 1981 (civil proceedings to be upon complaint) and rule 4 shall not apply.
> (2) Where under paragraph (1) the leave of the court is granted the application may be made orally and the applicant shall within 48 hours of the making of the application-
> (a) file a written copy of the application in Form Cl together with such of Forms C6 to C17 as is appropriate; and
> (b) serve a copy of the application and any order on-
> (i) the parties;
> (ii) any person who has actual care of the child or had such care immediately prior to the making of the order; and
> (iii) in the case of an order or warrant referred to in paragraph (1)(b) or (c) on the Board or Trust in whose area the child lives or was found.
> (3) Where the court refuses to make an order on an ex parte application it may direct that the application be made inter partes.

9. The authority for a Lay Magistrate to deal with such a matter out of hours is, in effect, contained in Rule 2(5), as provided for in Art. 165(2)(a) of the 1995 Order.

10. The findings of fact were recorded by the Lay Magistrate as follows;

> 1. Children on CPR [Child Protection Register] (confirmed neglect/emotional abuse & potential physical abuse.)
> 2. Several Review Case Conferences held 2003 – 2005
> 3. Current status: potential physical abuse and emotional abuse.
> 4. Children have expressed fear of father.
> 5. Non-Molestation Orders unable to be served on elusive father.
> 6. Eight witness statements verifying father's presence in subject children's neighbourhood.
> 7. 19th October (8.20 p.m.) Social Worker recognised father at family home.

11. The Reasons for making the EPO were detailed as follows.

> (i) Reasonable cause to believe that subject children are at risk of potential physical abuse/emotional abuse.
> (ii) Subject children's paramount welfare requires a safe, secure environment
> (iii) Father's reluctance to co-operate with Social Services re remedial strategies to enhance subject children's welfare.
> (iv) Physical neglect evidence from poor standard of hygiene.
> (v) Domestic Violence between parents over several years.

12. The Lay Magistrate then made the following Directions, pursuant to the Order;

(a) Subject children to be removed to experienced foster carers immediately to prevent potential physical harm/emotional abuse.
(b) Placement details to be kept confidential.
(c) Any possible contact between father/mother with the girls to be supervised by the Trust.

13. All this came to pass because of an unannounced visit at A Terrace, the location of the family home, by Mr. X, the family's Social Worker, accompanied by another Social Worker, at about 8.00 o'clock on the evening of Wednesday, 19th October. On entering the area, they saw Mr. M sitting in the front of a Transit van in the vicinity of the family home. The Respondent, caught in the headlights of the Social Workers' car, recognised them and shouted the alarm to Mr. M, who promptly slammed shut the van door and climbed over the seats into the rear. Mr. X then got out and sought to speak to the Respondent, but she made off with her daughter B., while a relative, Q., blocked Mr. X's way. Ms. M, the Respondent, had proceeded into A Gardens and Q. kept Mr. X back for upwards of 5 minutes before letting him follow. When he eventually got there, he found the Respondent, her daughter B., Q's wife and their 2 children, the Respondent's mother and head-of-family Mrs. Mm, plus, briefly, L, a brother of the Respondent.

14. B., aged 6, was quite distressed, because she thought Mr. X was there to take her away. She looked fearful and did not want to talk to him. Mr. X tried to reassure her, to tell her that she was safe, that she was not going to be taken away (then), which merely goes to highlight the difficulties being created in that encounter.

15. In the ensuing conversation with the Respondent at A Gardens, she denied that her husband had been about at all. The two Social Workers withdrew and discussed an action plan. They decided not to return that evening. Mr. X told the Court on 26th October that this was in order not to cause undue distress to B. (her older sister A. was out at a party). They resolved to contact senior management in the morning. The panel was told that Mr. X also wanted to contact the family again, to see if there was any way they could advance matters without having to obtain a court order.

16. Several attempts were made to contact the family next day, Thursday, by telephone, without success. Mr. X then travelled to the family home in the afternoon, but no-one was there. Nonetheless, it was from there that he managed to raise the grandmother on his mobile. The family was in another town. Mr. X explained that an EPO would be sought, but wanted to know whether there was any way the family might agree that the children could be accommodated by the Trust until a Care Plan was evolved. The grandmother was adamant that there would be no consent to the children leaving home and the conversation was terminated by Mrs. Mm hanging up. Mr. X then returned to his office and began preparing his Preliminary Report. He requisitioned a copy of the latest Children Protection Case Conference, while line management set about booking a Magistrate.

17. After Mr. X had obtained his Order on the evening of 20th October, he tried to contact the family by mobile telephone, without success. The Police then attended with the Social Workers at the family home, but the children were not at the house. The family advised that they were at yet another town, at L's new house. The family declined to give a full address. The Respondent was not at the family home, while the grandmother was with the subject children. In those circumstances, it was decided to wait until the morning before renewing efforts to locate the children. (That, then, makes a second successive night when Social Services decided that there was no compelling reason to remove the subject children from the risk of significant harm.)

18. At some stage on Friday, 21st October, Ms. Marion Scott succeeded in making contact with Mr. X (she had experienced some difficulty in raising him by telephone). Ms. Scott was the Solicitor acting for the family, or, strictly speaking, for the Respondent Ms. M. We were not told the precise nature of Ms. Scott's conversations with Mr. X, but the latter was obviously made aware that the family had in fact contacted their Solicitor.

19. The Social Worker had already been out to the family home, with the Police, but no-one was present. The search had moved to the area of another town. When the family's Solicitor rang, she reported that the family had already been in to see her, but had meanwhile left. Social Services and Police tried to locate the children at a number of likely addresses, but to no avail. That afternoon, in telephone conversation with the grandmother, Mrs. Mm, they were informed that the children were by then back at her home.

20. Thus it was, on the afternoon of Friday, 21st October at 3.30 p.m., that Social Services attended the family home at A Terrace, with Police back up, to remove the subject children. Mr. X first endeavoured once again to persuade the family to agree to the children being received into voluntary care. That, I may say, seems to me to be an exercise not just otiose in the circumstances, but disrespectful. Mr. X held a Court Order, empowering the Trust to remove the children. The Trust had decided already to have resort to coercive action and had been thus authorised by a Lay Magistrate. The subject children were going to leave with Mr. X at the end of that encounter, come what may: he had the Police there to ensure as much. For him to engage the family with efforts on his part to achieve a history whereby, somehow, the children were then handed over voluntarily was merely to disrespect the family's position. At the very least, that should not have been proposed to the family in the absence of their legal representative. Of course, if he *had* secured the Respondent's agreement at that point, it would not then have been necessary for the Trust to return to Court with any application for a Care or Supervision Order for so long as the Respondent did not withdraw such consent. One doubts very much that this much was explained to the Respondent.

21. There were many members of the family present, we were told. On Mr. X's account, people were very distressed. The two little girls were crying. They already knew why he had come (notwithstanding what he had told B. just two

evenings past). The children clearly did not want to be taken away. In our view, it was quite inappropriate for the Social Worker to be talking at some length with the family about taking the two subject children away and, as it were, urging the family to agree to this while the children were in the vicinity. Mr. X described his confrontation with the family as tense, and aggressive toward Social Services; some were very aggressive, he reported. Mrs. Mm, grandmother to the subject children and head-of-family, turned calmer in time, more upset than aggressive at the notion of these girls being removed from not just their family but their entire culture as members of the travelling community.

22. This encounter went on for 15 to 20 minutes, before Mr. X received a call from his line manager, Mrs. Y, from outside the premises, urging him to conclude matters. A female Social Worker and female Police Officer moved in upon the children and, as gently as they could, with as little physical force as was necessary, brought them outside. There were then some difficulties at the car, in that the Respondent mother placed herself in the front passenger seat, signalling her determination to go with her daughters. Whilst the Police wanted to remove her, Mr. Todd wisely decided that it would be better for the girls if their mother could travel to the Social Services offices and take leave of her children there.

23. At the Contact Suite in Social Services offices, the situation was explained again to Ms. M. Whilst the children still did not wish to be parted from their mother, and whilst still emotional, they were not in quite the same heightened state as at the family home. There were hugs and kisses in the parting and earnest declarations from the children that they did not wish to go, as they were being led away from their mother.

24. Meanwhile, the Family Placement Team had been engaged early the previous day, Thursday, 20th October, to find a suitable foster placement. There are in fact no approved foster parents from within the travelling community within this Trust's area, and few at all within Northern Ireland. So far as any emergency placement was concerned, there was in fact no expectation that it would be within the travelling community.

25. From the time when the children were transferred to foster parents on Friday, 21st October, up to the Hearing of the Applications before the Family Proceedings Court on Wednesday, 26th October, the children had been afforded daily telephone contact with both their mother and their grandmother (Ms. M and Mrs. Mm, respectfully), with 1 hour direct contact between mother and children at the Social Services Dungannon office on Monday, 24th October and for one hour-plus on the following day. The children did not attend school on Monday – the school refused admission by reference to the difficulties which the children were undergoing. Mr. X accompanied them to school on the Tuesday.

26. On Tuesday, 25th October, the school intimated that they wished to make representations to senior Social Services management. Mr. X could tell us only that the school was concerned about the impact of these events upon the children. He was able to report that, normally, the subject children presented as very sociable at school, having good interaction with their peers. Their behaviour at school was consistently good, with no difficulties in class. The only major concern – and it was a consistent concern – was that of head lice. There were also difficulties about school attendance, registering at about 86%.

27. That said, Mr. X could not say what might be the nature of the representations which the school were so keen to make to senior Social Services management concerning the impact upon the children of their removal from their family; there had been no report to him that the children were now behaving any differently. For the panel's part, we would be most surprised if it should transpire that the children were taking these events in their stride.

Issues about the Paperwork

28. The text of Form C1 itself (Application for An Order) is found in Schedule 1 of The Magistrates' Courts (Children (Northern Ireland) Order 1995) Rules 1996. There are a series of itemized paragraphs, designed both to elicit the basic information required and, indeed, to limit what might otherwise be put upon a form being served upon the other party, especially with regard to the declared reasons for seeking the court's intervention, without leave of court. To that end, there are guidance notes incorporated onto the face of the statutory form. Thus, paragraph 3 appears as follows;

> **3 Other cases which concern the child(ren)**
>
> *If there have ever been, or there are pending, any court cases (including cases outside Northern Ireland) which concern*
> *•a child whose name you have put in paragraph 2*
> *•a full, half or step brother or sister of a child whose name you have put in paragraph 2*
> *•a person in this case who is or has been, involved in caring for a child whose name you have put in paragraph 2*
>
> *attach a copy of the relevant order and give*
> *•the name of the court*
> *•the name and panel address (if known) of the guardian ad litem, if appointed*
> *•the name and contact address (if known) of the solicitor appointed for the child(ren).*

29. Paragraph 3 of Form C1 as actually filed - though not put before the Lay Magistrate that evening - disclosed only as follows (as edited by me);

> "3**. Other Cases Which Concern the Child**
> A Residence Order was granted to Ms [M] in September 2002 indirect contact Direction.

A Non-Molestation Order was made on 6 June 2001 to Ms [M]."

30. It was a matter of some surprise to us that no mention should have been made of the previous history of Care proceedings in which these children had been involved, culminating in a Supervision Order on 19th February 2004, together with Orders of the same date prohibiting contact with their father until he had undergone a full risk assessment and requiring the children to reside with their grandmother at A Terrace. This of course also entailed omitting mention of the Guardian Ad Litem who had been involved.

31. These omissions (which were replicated in the paperwork dated 24th October, grounding the application for an extension of the EPO) arose because Mr. X had simply left out all reference to the Care proceedings in the designated place on his own form (notwithstanding the same guidance notes, as just quoted, being before him when preparing his paperwork). The papers which Mr. X filled in constituted the written instructions to the legal team at the Directorate of Legal Services in Belfast. Mr. X says that he did mention the Care proceedings to the Directorate Solicitor concerned and she concedes that he probably did. Nevertheless casual conversation is no adequate substitute for correct paperwork, as events here demonstrate.

32. Mr. X informed us that the reason why he did not put in details of the previous Supervision Order was because a Clerk in the Directorate had told him, in the course of telephone conversation earlier on 20th October, that they already had the old (Directorate) file out, concerning those proceedings. It had been retrieved only the previous week, dealing with a query which he had raised about the details which, in turn, appeared on the computer records. The computer records, to which Mr. X had access, purported to state that there were Supervision Orders granted on both 19th February 2004 and 19th February 2005, whereas the latter date was only the expiry date for the one Order.

33. This does not constitute good reason for not filling up the form properly. In addition, Mr. X was expected to enter the details of the Solicitors who had acted for the Respondent in those previous proceedings and details of the Guardian ad Litem (Mr. Sean Mulligan). Further, Mr. X's file contained a copy of the Supervision Order (bearing upon its face the court's own file reference). We find that it was Mr. X who had all this information before him, plus the notes to remind him what needed to be supplied on the designated Form to the Directorate, but who decided that it was not necessary to comply.

34. On 19th February 2004 the public law proceedings concluded with only a Supervision Order, not a Care Order. Apart from the limit on the duration of a Supervision Order (i.e., 12 months), the other critical difference is that the Trust is not afforded parental responsibility and cannot therefore simply remove the child from a placement without reverting to Court: and here they are, 20 months later, looking permission to do precisely that, *ex parte*. A Magistrate would be bound to look with very great care into why (s) he should withhold a hearing from the parents – and Guardian – when a full panel, after

detailed consideration of the children's circumstances in 2004, decided that a Care Order, which would vest precisely such power of removal in the Trust, was not necessary in order to prevent significant harm being occasioned to the subject children.

35. Mr. X has testified that he did mention the previous Care proceedings to the Lay Magistrate at the hearing of the *ex parte* application on 20th October, but the panel remains concerned that there is no mention of this in the Magistrate's list of findings.

36. The Trust's previous Court application had been for a full Care Order and on foot of a Care Plan which provided that, should the Trust find that Mr. M was in fact allowed contact without that risk assessment, the children, who were placed with their mother and grandmother, would be removed. At Court on 19th February 2004, we were reminded, the Guardian ad Litem, Mr. Sean Mulligan, had promoted the view that it was wrong in principle, and contrary to the pursuit of permanency, that children should be placed within the biological family while still having the prospect of removal into Care hanging over their heads. That was why matters had been resolved with agreement on a Supervision Order, expiring on 19th February 2005. That way, should the Trust ever want to remove the children, they would still have to make their case before a Court. And that, in turn, by my own recollection, was in a context whereby everybody involved had a fairly good idea that the Respondent might well be continuing to associate with her husband while she and her wider family denied as much. In his evidence to this Court, Mr. Sean Mulligan recalled Trust personnel also expressing such suspicions to him at the time.

37. In a decision-making process which is being heard, literally, behind closed doors, between just Social Workers and Lay Magistrate, it is important that the record makes it apparent that the Magistrate had before him, in the paperwork submitted or by oral testimony, all information deemed necessary to assist him reach a balanced conclusion. It is plain that the papers were significantly deficient in this instance. We are not satisfied that these deficiencies were adequately remedied by the oral testimony that evening.

The decision to proceed ex-parte

38. I have already detailed the layout of the Duty Clerk's document. It seems very much as though an affirmation by a Magistrate at the initial telephone enquiry that (s)he will see the Social Worker(s) is treated as a decision to grant leave to the Trust to bring such an application without notice to the other parties. If so, that would be an inadequate way to address the issue (especially since the first account given to the Duty Clerk was not a particularly accurate case history). In any event, the Lay Magistrate has not, at that point, undertaken the kind of enquiry which is necessary before properly determining that there needs to be such a serious derogation from this core feature of a fair hearing.

39. In practice, it is only when the Social Workers attends before him in one of these out-of-hours applications that a Magistrate can carry out the focused

enquiry as to whether it is really necessary, in the interests of the child's safety, to rule upon it without the parents being either present or represented and without the input of a Guardian ad Litem.

40. I would also suggest that consideration be given to amending the form which the Lay Magistrate completes – Form C18 - so that the reasons for granting leave may be expressly elicited.

41. The following features of the case history are relevant to a determination as to whether leave ought to have been granted;

(a) Mr. X says he found the children's father in the vicinity of their home the previous evening. He and his colleague determined that it was not inappropriate to leave the children in the care of the family for that night and for all the next day.

(b) Social Services had accumulated a string of written Statements, whereby it was known that Mr. M had been seen entering the family home as far back as 4th May 2005. He was seen entering the adjacent house on 17th June. He was reported to be living in a caravan at the back of that Terrace in August. No legal intervention, by way of a public law application, was initiated in response. It was recorded at a Case Conference in August that some doubt remained over the identification "…despite PSNI sightings". The nature of that doubt seemed to the panel to be questionable.

Nonetheless, a positive identification was made by the Social Worker, from photographs, on 12th September: it was indeed Mr. M whom the Social Worker saw at the house when leaving the Respondent mother back, after the Case Conference on 18th August. Subsequent to this identification, Police also reported moving Mr. M from a caravan at the rear of the Terrace, where he had been found drunk. On 5th October the Trust received a Statement from the Police detailing a conversation with Mr. M on 26th September , when he informed an officer that he was looking after the children while his wife was in Omagh and, indeed, that he had been living with his wife and children since his release from prison in 2004. In response, Trust senior management decided to have PSNI continue to monitor the situation, while Social Services would carry out spot checks. Mr. X visited the family (who always denied these sightings) and made them aware that such checks were likely to be in the evenings, around 8.00 pm. Thus it was that on 19th October (a full fortnight later) Mr. X saw Mr. M and his wife, Ms. M, together.

The plain fact is that for some months Social Services had perfectly sound evidence that Mr. M was back with the family and senior management determined that the risk of harm to the children did not thereby warrant a Court application.

When Mr. X saw what he did on 19th October, the Trust's case reached a new evidential level; that in no way increased the level of risk for the children. The risk, howsoever calibrated, was the same as it had been in May, June, August and September of that year – and most especially in light of the information received from the Police on 5th October.

(c) The Directorate had been engaged in this matter by the Trust since sometime in the morning of 20th October. That was a Thursday, the day of the weekly Family Proceedings Court at Omagh. The Directorate did not contact Dungannon Court until 3.50 pm. As it happened, I had already left by then.

Lay Magistrates who are asked to treat this kind of application out-of-hours should be particularly concerned to establish why it had not been possible to take it before the Resident Magistrate earlier in the day and, indeed, why it could not wait for the Resident Magistrate to return next morning. (I was to be sitting in Dungannon itself on 21st October).

Had it been I who had been asked to deal with the application, I would have recognized the case and remembered those earlier public law proceedings.

(d) Mr. X knew or ought to have known the identity of the Respondent mother's Solicitors. No effort was made by the Trust in all this time to notify the family as to just when the Application was being brought before a Magistrate, or to urge them to secure legal advice. No effort was made to contact the family's Solicitors, Francis J Madden & Co., to tell them of an appointment before a Magistrate, out of hours. This is the commonplace situation we continue to encounter and the practice needs to change, particularly with the incorporation of the European Convention on Human Rights into our domestic law, by virtue of The Human Rights Act 1998, with effect since October 2001.

The papers could and should have been passed to those Solicitors and they should have been appraised of the arrangements being made to hold a Hearing that evening. In the new Human Rights-based environment in which all public bodies now operate Trusts need to realize that if they seek anything so draconian as this on an *ex parte* basis it must be shown that all reasonable efforts have been made to involve any known legal representative on the parents' part unless it can be shown to be inappropriate for the parents to have knowledge of the proceedings prior to an order being obtained (which was not the case here).

(e) Mr. X asserted to us that the decision had been to seek an Emergency Protection Order *ex parte* in order to avoid notice being given, because the family might abscond. That assertion does not bear scrutiny.

In a Report signed off by both Mr. X and Mrs. Y on 25th October (and which likewise makes no allusion to the history of Care proceedings), one finds the following passage (which I have also edited, in order to preserve anonymity);

> 7. On 20th October 2005 the Trust Senior management was informed of the events of the previous night and decided to apply for an Emergency Protection Order as it was clear to the Trust that:
>   - Mr [M] was in the area
>   - That he had access to his children, contrary to the Court order of the 19th February 2004 granted at Omagh Family Proceedings Court by Miss Bagnall RM under Article 8 of the Children (NI) Order 1995 stating "THE COURT ORDERS THERE TO BE NO CONTACT BETWEEN MR. [M] AND THE CHILDREN UNTIL HE HAS COMPLETED A COMPREHENSIVE RISK ASSESSMENT TO THE SATISFACTION OF THE TRUST."
>   - that Ms [M] and the extended family were colluding with Mr [M] and thereby placing [A] and [B] at significant risk of harm.
> 8. The Trust visited [A] Terrace on 20th October 2005 to inform Ms [M] of their intention to apply for an Emergency Protection Order but found no one at home. The Trust then contacted Ms [M] and Mrs. [Mm] by telephone in an attempt to gain agreement that the Trust could accommodate the children. The family made it clear that no such agreement would be made stating that they would never agree to the children being taken into care of the Trust. They were advised of the Trust's intention to apply for an Emergency Protection Order.

(It is not clear why the Report asserts that Ms. Bagnall's order was made under Article 8 of the 1995 Order. Perhaps the misattribution merely reflects a limited grasp of the legal framework by the Social Workers. The order was in fact made under Article 53 and in the course of those previous public law proceedings; however, that is by-the-by.)

The Trust had in fact no real or sufficient concern about telling Ms M and the family on 20th October, prior to seeking an appointment through the Court Office, that they proposed to seek an Emergency Protection Order, whether by reference to a risk of absconding or otherwise. What Trusts still do not seem prepared to countenance is that the parents should be given details as to when that application might be heard, nor even any tip that legal advice should be obtained urgently.

In plain terms, it suits the Trust to "doorstep" families in such a situation, to see if a voluntary arrangement might be levered, under threat of Court action. Any agreement to have a child put into voluntary care is to the Trust's advantage, rather to the advantage of the parents – it saves the Trust having to put the case before an independent forum. Whether it be to the advantage of the children concerned is moot. Although it may be rationalized in such terms, this 11th hour approach in search of consensus has little to do with working in partnership. One of the most common complaints by parents who are persuaded to allow their children to enter

voluntary care is that the parents' understanding of what this entails and the duration of the arrangement proves to be false.

Parents who find themselves in these situations are often damaged and challenged individuals themselves, ill-equipped to deal with Social Workers. In her Report in the course of the previous public law proceedings and dated 30th November 2003, at pages 23 and 24,. Dr. Jennifer Galbraith, a Consultant Clinical Psychologist wrote;

> Ms [M] is a twenty-six year old woman whose current level of intellectual functioning falls within the Mild range of Learning Disability….
>
> On meeting Ms [M], her level of intellectual ability does not present immediately as an obvious problem, although to someone accustomed to working in that field, it is clear that she has some limitations. Ms [M]'s verbal skills are her strength and she can carry on a conversation without difficulty. However, those working with her should be cautious in interpreting her level of comprehension. She may not actually understand what is being discussed but can probably give the impression that she does.

In all the circumstances, it rather it seems as though Mr. X's tactics on 20th October were very much aimed at securing the removal of the children without having to come to Court at all. That may well be why Social Services were prepared to invest most of the day at that effort, rather than getting ahead with the Court application, within normal working hours.

(f) The family had no history of absconding. Most particularly, there was no absconding throughout the previous Care proceedings.

It should also be kept in mind that the risk of absconding is not of itself good reason to proceed *ex parte*: One must be satisfied that the subject children would be likely to suffer significant harm, should the family abscond.

42. Where a Magistrate finds upon enquiry that, as here, a Trust has made no efforts to give even informal notice to the parents or their solicitors then it should only be in the most compelling of cases – only in cases of real and most acute danger to the children - that (s)he should grant leave to have the matter proceed *ex parte*. Failing this, there is a real possibility that the Article 6 and Article 8 Convention rights to a fair trial and to private and family life will be found to have been breached in respect of both parents and children.

In addition, without arranging to hear the other side's account, there is a risk that material information will not be made known.

43. In Wallace v Kennedy [2003] NICA 25, which involved a non-molestation order granted *ex-parte*, the Court of Appeal, in the Judgment delivered by Carswell, LCJ (as he then was), first addressed the learned Magistrate's decision to afford an *ex parte* hearing and in terms which apply equally, in my view, to decisions by Magistrates to grant *ex parte* hearings in EPO applications;

> **[6] ….** We have no information about the circumstances of the case which influenced the court to make an *ex parte* order rather than direct a hearing on notice, and cannot express an opinion on the correctness of its decision to do so. We would only observe that Article 23(2) [of The Family Homes and Domestic Violence (Northern Ireland) Order 1998] spells out a number of circumstances to which the court should have regard in determining whether to make an order *ex parte,* in terms which appear to envisage that the court should be satisfied that there is an urgent need for an order to be made without notice to the respondent.

44. Any decision to grant leave to proceed *ex parte* must be taken with great care. The party seeking leave to proceed *ex parte* must positively satisfy the Magistrate that there is such urgent need. There ought to be written record of the Magistrate's reasons, should leave be granted.

45. In my judgment, this was not a case whereby, in all the circumstances, it was appropriate to grant leave to have this application heard *ex parte.*

The appointment of the Guardian ad Litem

46. Be all that as it may, and for the reasons he recorded, an EPO was granted by the Lay Magistrate that night. Unfortunately a Guardian ad Litem was not appointed at the same time, notwithstanding Article 60 of the 1995 Order.

47. Consideration should be given, in my view, to an amendment of the Lay Magistrate's Order Sheet, whereby there is contained an express clause, appointing a Guardian, so that it would take a positive decision by the Magistrate *not* to make the appointment.

48. Current practice also needs to be reviewed and the Clerk of Petty Sessions should cause express follow-up enquiries to be made from Dungannon next working day after an out-of-hours application has been arranged. If an EPO be found to have been granted but no Guardian ad Litem appointed, the matter should be brought to the attention of the Resident Magistrate immediately for rectification. At present, one is finding too often that the direction for the appointment of a Guardian is not being made until a further application, whether for an extension of the EPO or for a first Interim Care Order is listed.

The Duration of the EPO

49. Upon this EPO being granted, it was declared to run until 6.30 pm on Friday, 28th October, the maximum 8 days permitted for an initial order. The statutory enactments governing duration are contained in Article 64 of The Children (Northern Ireland) Order 1995, which, so far as relevant, provides;

> 64. - (1) An emergency protection order shall have effect for such period, not exceeding eight days, as may be specified in the order.
> (2) …...
> (3) Any person who-
> (a) has parental responsibility for a child as the result of an emergency protection order; and
> (b) is entitled to apply for a care order with respect to the child,
> may apply to the court for the period during which the emergency protection order is to have effect to be extended.

(4) On an application under paragraph (3) the court may extend the period during which the order is to have effect by such period, not exceeding seven days, as it thinks fit, but may do so only if it has reasonable cause to believe that the child concerned is likely to suffer significant harm if the order is not extended.
(5) An emergency protection order may only be extended once.
(6) ……
(7) Any of the following may apply to the court for an emergency protection order to be discharged-
(a) the child;
(b) a parent of his;
(c) any person who is not a parent of his but who has parental responsibility for him; or
(d) any person with whom he was living immediately before the making of the order.
(7A) ……
(8) No application for the discharge of an emergency protection order shall be heard by the court before the expiry of the period of 72 hours beginning with the making of the order.
(9) No appeal may be made against-
(a) the making of, or refusal to make, an emergency protection order;
(b) the extension of, or refusal to extend, the period during which such an order is to have effect;
(c) the discharge of, or refusal to discharge, such an order; or
(d) the giving of, or refusal to give, any direction in connection with such an order.
(10) Paragraph (7) does not apply-
(a) where the person who would otherwise be entitled to apply for the emergency protection order to be discharged-
(i) was given notice (in accordance with rules of court) of the hearing at which the order was made; and
(ii) was present at that hearing; or
(b) to any emergency protection order the effective period of which has been extended under paragraph (4).

(11) …….
(12) ……..

50. 8 days is set as the maximum, not the standard, for an EPO. A Magistrate has to consider carefully in each case just how long an emergency order of this kind needs to last, in the interests of the child. Where an order has been granted on an *ex parte* basis, it is especially important to consider how quickly one can cause the case to be taken back to a hearing at which both parents and Guardian ad Litem can be afforded an opportunity to make representations to the Court. This reflects much the same principles as were applied by the Northern Ireland Court of Appeal in Wallace v Kennedy, [2003] NICA 25.

51. It is true that Article 23 of The Family Homes and Domestic Violence (Northern Ireland) Order 1998 expressly provides that where the court has granted an order on an *ex-parte* basis;

> 23(3) ….. it shall afford the respondent an opportunity to make representations relating to the order as soon as just and convenient at a full hearing.

There is no comparable provision contained in either the 1995 Order, nor in The Magistrates' Courts (Children (NI) Order 1995) Rules (Northern Ireland)

1996. By the same token, in my judgment, the terms of Article 23(3) reflect a principle which should be taken to apply now in any circumstance where relief has been afforded on an *ex-parte* basis in the first instance. The Article 6 rights of the other party or parties (under the European Convention on Human Rights and Fundamental Freedoms) are engaged. If the decision to deny the other side the opportunity to state their case in a public hearing is to be treated as a proportionate balance between that legitimate expectation and a competing necessity to protect vulnerable persons, then it would have to be shown that the denial of the right to an *inter partes* hearing was for no longer than the circumstances required, in other words that it was proportionate.

52. In my view, the first two precepts laid down by the then Lord Chief Justice in Wallace v Kennedy for the guidance of magistrates courts in dealing with *ex parte* non molestation cases apply equally, *mutatis mutandis*, to EPO cases;

> **[15] We** would therefore offer the following guidance to magistrates' courts which are asked to make *ex parte* non-molestation orders:
> (a) The court should consider with some care whether the circumstances of the case justify the making of an order *ex parte* rather than directing that the matter be heard *inter partes* on short notice.
> (b) At the time of making the order the court should preferably fix a return date for the full hearing, specify that date in the order and limit the duration of the order to the date of the full hearing. The period of duration should be as short as reasonably possible…

53. In the present case (bearing in mind that the parties are barred-out from making any application to discharge during the first 3 days), the family's Solicitor, Ms. Scott, had to undertake exceptional and commendable efforts in order to have such an application before the Court on Monday, 24th October. (One might add that it was Ms. Scott who, upon her arrival on 24th October, promptly supplied the Court with copies of the previous orders and a selection of the Reports arising in the course of the earlier Care proceedings). As it happened, there was a Family Proceedings Court sitting at Omagh that day. There is normally a Family Proceedings Court in this County Court Division only on Thursdays, but there happened to be Family Proceedings Courts arranged at Omagh for Monday, Tuesday and Wednesday of the week next following this EPO, plus a fourth at Dungannon on the Thursday. That there were so many FPCs available in the following week was most likely not made known the Lay Magistrate in this case.

54. In my view, the EPO should not have been granted beyond the following Monday, or perhaps Tuesday at most. If that were an ordinary Adult List day, with a Resident Magistrate otherwise sitting alone, Court Service would arrange a full panel, convened as a Family Proceedings Court, to hear that particular case. In this respect one might add, for the avoidance of any doubt, that the 72-hour barring-out provision does not mean that an initial EPO has to be for

at least 3 days. It is only the intervening weekend which might make it seem so in this instance.

The Substantive Application

55. Article 63 of The Children (Northern Ireland) Order 1995 ("the 1995 Order") sets out the grounds for an Emergency Protection Order;

> *Orders for emergency protection of children*
> 63. - (1) Where any person ("the applicant") applies to the court for an order to be made under this Article with respect to a child, the court may make the order if, but only if, it is satisfied that-
> (a) there is reasonable cause to believe that the child is likely to suffer significant harm if-
> (i) he is not removed to accommodation provided by or on behalf of the applicant; or
> (ii) he does not remain in the place in which he is then being accommodated; or
> (b) in the case of an application made by an authority-
> (i) inquiries are being made with respect to the child under Article 66(1)(b); and
> (ii) those inquiries are being frustrated by access to the child being unreasonably refused to a person authorised to seek access and the applicant has reasonable cause to believe that access to the child is required as a matter of urgency; or
> (c) in the case of an application made by an authorised person-
> (i) the applicant has reasonable cause to suspect that a child is suffering, or is likely to suffer, significant harm;
> (ii) the applicant is making inquiries with respect to the child's welfare; and
> (iii) those inquiries are being frustrated by access to the child being unreasonably refused to a person authorised to seek access and the applicant has reasonable cause to believe that access to the child is required as a matter of urgency.

56. The declared basis for the Application in this case, as set out in the Form C8, was as found in Art. 63(1)(a)(i), namely that there was reasonable cause to believe that the children were likely to suffer significant harm if not removed to accommodation provided by or on behalf of the applicant.

57. The panel was fortunate to be able to hear from the Guardian ad Litem, Mr. Mulligan, on 26th October. It is most regrettable that he had only been appointed the previous day. Indeed, he had also been required to attend at High Court proceedings on the morning that this matter came before us for determination. Had matters proceeded as they ought, one would have had reason to expect that Mr. Mulligan would have met with the children over the weekend and could have put on record their views and their level of understanding as to what was happening to them and why. As matters stood, Mr. Mulligan was by necessity rather thrown back upon a general appraisal of the recent and dramatic turn of events.

58. The Guardian recalled that there had been differences between him and the Trust, in the closing stages of the previous public law proceedings involving these same children, in February 2004. The Trust had sought a Care Order, enabling them to remove the children at any time, even though it was also intended to place the children with their maternal grandmother. As already mentioned, Mr. Mulligan had felt that this did not sit easily with the concept of

permanency and would have left the children in a continuing state of uncertainty as to their ultimate placement.

59. The Trust, he recalled, did intend that, should it be established that Mr. M was having contact with the children, then they should be moved to approved foster carers, whereas Mr. Mulligan knew of very few such approved foster carers within the travelling community. He had felt that a placement outside the travelling community should be truly as a last resort. He believed that any such removal would require careful planning, including a careful assessment as to just what risk was involved for the children and also as to the mother's ability to protect them. In this regard, he did recall that Dr. Jennifer Galbraith, the Consultant Clinical Psychologist, had been concerned about the respondent mother's power to protect the children from physical or other abuse by the father. It was for all these reasons, as he recalled, that a compromise had been reached on 19th February 2004, whereby the matter was concluded with a Supervision Order, rather than a Care Order.

60. In this context the panel also noted that by the time of this latest crisis within the family, and as from that Child Protection Case Conference on 18th August, the categories of registration for the two subject children had been amended to read "Potential Physical Abuse and Potential Emotional Abuse", the first time the categorization had not included confirmed neglect or abuse since first registration on 27th February 2003. In addition, it had been noted at that Case Conference that "… this was the first time on two and a half years that an overall positive report had been submitted by Health Visiting Staff."

61. In the circumstances of his engagement this time round, and at such short notice, Mr. Mulligan was not able to comment upon the trauma which the Trust intervention entailed for the children, nor could he usefully comment at this time upon the Trust's decision to place the children outside the immediate family, since he did not know what efforts had been made to place them within the extended family. He agreed that contact with the respondent mother was very important in allowing the children a better understanding of their position and to alleviate distress. Further, if they were seeing their mother daily then this was a huge contributory factor in their assurance that their mother was safe. Conversely, he was "not fully convinced" that an Emergency Protection Order was proportionate.

62. He did not feel that the risk posed by Mr. M had been fully assessed, more particularly with reference to whether it represented an emergency. One would, he suggested, want to know whether Mr. M was still abusing alcohol [although Police information did suggest as much] and whether there were further and more recent incidents of domestic violence.

63. The Family Proceedings Court had occasion to study closely the dynamics within the family in 2003/4, in the course of the Care proceedings. I do not propose to set out the details at any great length, but certain salient features are evident;

(a) the subject children, now aged 9 and 6, have very strong attachment to both their mother and their maternal grandmother;
(b) the children also have strong attachments to their wider family network;
(c) the children would not engage with either Social Services or Guardian ad Litem: they were hostile and defensive. They exhibited a strong view that such people were alien to them;
(d) at the time of the final order in the previous proceedings, when they remained in the care of their grandmother and mother, the children's names were on the Child Protection Register under Confirmed Neglect, Confirmed Emotional Abuse, Potential Physical Abuse;
(e) The Guardian ad Litem in those proceedings had highlighted more than once how embedded these children were within their biological family and, equally, their culture as being of the travelling community.
(f) The Guardian had emphasized that, should it ever prove necessary to remove the children, this would require the most careful planning and would hopefully entail placing the children within the travelling community culture.
(g) Whereas the proceedings lasted some 11 months, with the threat of removal of the subject children constantly in the background, the family and the Respondent mother at no time sought to abscond.
(h) The Respondent mother never acknowledged the concerns of the Trust in the course of those proceedings.

63. It need hardly be said that the Lay Magistrate who dealt with this matter the previous Thursday evening did not have the advantages with which the full panel was proceeding the following week; he did not have papers concerning the previous Care proceedings, nor of course did he hear from a Guardian Ad Litem. We feel sure that had he known what is set out in paragraph 58 onward, above, he would not have granted the EPO. He had none of that precisely because he was hearing the matter *ex parte*. This simply goes to underscore how crucial it is to consider the application for leave to proceed *ex parte* with the greatest of care.

64. This case concerned children of significant age. In those circumstances, one must evaluate the Trust's application for their removal in the knowledge that such a step, if authorized, will occasion its own kind of harm for the children.

> An EPO, summarily removing a child from his parents, is a terrible and drastic remedy. The European Court of Human Rights has rightly stressed (see P, C and S v United Kingdom (2002) 35 EHRR 31, [2002] 2 FLR 631, at paras 116, 131, 133) that such an order is a 'draconian' and 'extremely harsh' measure, requiring 'exceptional justification' and 'extraordinarily compelling reasons'. That case involved, as did my own decision in Re M (Care Proceedings: Judicial Review), the removal of a newborn baby, whilst the present case involved the removal of older children. But although the circumstances and some of the sequelae may be different, the principles are surely the same. After all, the child of 5 or 10 who, as in the present case, is suddenly removed from the parents with whom he has lived all his life is exposed to something the newborn baby is mercifully spared: being suddenly wrenched away in frightening - perhaps terrifying - circumstances from

everything he has known and loved and taken away by people and placed with other people who, however caring and compassionate they may be, are, in all probability, total strangers.

(Per Munby, J in X Council v B (Emergency Protection Orders) [2004] EWHC 2015 (Fam), [2005] 1 FLR 341.

65. In granting the local authority leave to withdraw the application for Care Orders in X Council v B (Emergency Protection Orders) [2004] EWHC 2015 (Fam), [2005] 1 FLR 341, Munby, J. reviewed the manner in which the case had been pursued with the family and highlighted a number of concerns, more especially with reference to the Human Rights considerations. While it is to be noted that the Court held that an Emergency Protection Order was warranted on the facts, Munby, J nevertheless took the opportunity to set out a number of points with respect to the particular care required in dealing with such applications. Much of it, in my respectful view, ought to be deemed equally applicable to Northern Ireland case work;

[57] ….:

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

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

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

(iv) If the real purpose of the local authority's application is to enable it to have the child assessed then consideration should be given to whether that objective cannot equally effectively, and more proportionately, be achieved by an application for, or by the making of, a CAO under s. 43 of the Children Act 1989.

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

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

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

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

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

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

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

(xii) Section 44(5)(b) of the Children Act 1989 provides that the local authority may exercise its parental responsibility only in such manner 'as is reasonably required to safeguard or promote the welfare of the child'. Section 44(5)(a) provides that the local authority shall exercise its power of removal under s. 44(4)(b)(i) 'only ... in order to safeguard the welfare of the child'. The local authority must apply its mind very carefully to whether removal is essential in order to secure the child's immediate safety. The mere fact that the local authority has obtained an EPO is not of itself enough. The FPC decides whether to make an EPO. But the local authority decides whether to remove. The local authority, even after it has obtained an EPO, is under an obligation to consider less drastic alternatives to emergency removal. Section 44(5)

requires a process within the local authority whereby there is a further consideration of the action to be taken after the EPO has been obtained. Though no procedure is specified, it will obviously be prudent for local authorities to have in place procedures to ensure both that the required decision-making actually takes place and that it is appropriately documented.

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

(xiv) Section 44(13) of the Children Act 1989 requires the local authority, subject only to any direction given by the FPC under s. 44(6), to allow a child who is subject to an EPO 'reasonable contact' with his parents. Arrangements for contact must be driven by the needs of the family, not stunted by lack of resources.

66. To remove children may of itself to occasion significant harm and that this is a particularly material consideration in respect of older children or children with special needs, or from a distinctive cultural milieu.

67. Hershmann and McFarlane, *Children Law and Practice*, state the following

[332]–[342]
… In Re C and B (Care Order: Future Harm), [[2001] 1 FLR 611] Hale LJ was highly critical of the decision to remove a 10-month-old child from home when there was no evidence of immediate risk of harm and all the evidence was that he was doing well:

'I do not, of course, wish to suggest that there are no cases in which one should intervene now to prevent future harm, or that none of those cases may warrant immediate pre-emptive action before the case comes on for full hearing. But this was nowhere near a clear enough case of the former to warrant the latter. It was a classic example of a situation where the case for intervention should have been proved by a full hearing in court before the intervention took place, and not after.'

Hale LJ observed with regard to the CA 1989, s 44(1) criteria:

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

An EPO, summarily removing a child from his parents, is a 'terrible and drastic order' requiring 'exceptional justification' and 'extraordinarily compelling reasons'. Local authorities and courts should approach every application for an EPO with an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the human rights of both the child and the parents. [X Council v B (Emergency Protection Orders) [2004] EWHC 2015 (Fam); [2005] 1 FLR 341; Haringey LBC v C, E and another Intervening [2004] EWHC 2580 (Fam); [2005] 2 FLR 47.]

68. Elsewhere in their leading text, the same authors make clear that the concept of "significant harm" is both situational and cultural in character;

> [953]
> … The assessment of whether harm in a particular case is significant may involve the court considering whether, on an objective general view, the harm would be significant if it occurred to any child. Equally, it seems that the court must also consider the particular characteristics of the child concerned to determine whether harm, which may not be significant in the general context, is nevertheless significant in the case of the particular child. Some children may be more vulnerable to harm than others, hence the importance of concentrating upon the effect of the harm, which is the effect on the child concerned, rather than the particular actions which may have caused it.
>
> [954]–[955]
> Not all harm will be significant. Even if a court is satisfied, for example, that sexual abuse has occurred, it must consider whether the harm occasioned by the ill-treatment is significant. In a wardship case [Re B (A Minor) (Child Abuse: Custody) [1990] 2 FLR 317 at 322H; see also C v C (Child Abuse: Access) [1988] 1 FLR 462, [1988] Fam Law 254] under the pre-CA 1989 law, Ward J considered that there was 'a spectrum of abuse' and 'an index of harm'.
>
> The court may also consider the significance of the harm from a cultural, racial or social perspective. Harm which may be significant in some circumstances may not be significant in others.

69. The subject children have been exposed to risk of harm for several years past. The incident in which they expressed fear of their father, for example, goes back to before the Care proceedings in 2003. The significance of the harm to which they are allegedly exposed at present, within the family, has to be evaluated in that context; it would have to be carefully calibrated, or assessed, before it could properly or fairly be decided that it now warranted their removal.

70. In addition, these are children of the travelling community. The Guardian Ad Litem had previously cautioned, for reason with which I entirely agree, that to remove such children from their own particular culture is something which should only be as a last resort and only with the most careful planning, unless there is something truly exceptional which compels pre-emptive action for their protection. That was the other aspect of the case highlighted by the Respondent in her application to discharge; "My children are being moved to a [non-traveller] emergency foster placement".

71. The Trust was on notice from May last that, according to its own child-protection strategy, the possibility of having to seek authority to remove the subject children was in the offing. That became increasingly the case as more evidence emerged which suggested to the Trust that the father was being afforded covert contact. By 5th October, at the very latest, it is apparent that senior management was now directing proofs, in preparation for just such an application. At no time does the Trust ever appear to have addressed the question of the children's particular cultural identity, with regard to a suitable foster placement. The subject of placement would seem to have been given

attention for only a matter of hours on 20th October. In consequence, the Guardian's earlier admonitions were ignored by the Trust and there was no prospect of the children being placed with foster parents who shared their culture. That is another aspect of potential harm which has to be weighed in the balance when considering whether the children must be removed from their family setting.

72. For an emergency order to be obtained, then, there must be imminent risk of significant harm. The harm entailed must be capable of precise definition. In each case, one needs to know just what that harm might be. After all, one cannot properly conclude that a child must be removed from her family without more ado and on account of that harm without reasoning explicitly why the harm in question is so significant that draconian action is mandated. At the *inter partes* hearing on 26th October, counsel for the Trust was repeatedly asked to specify just what harm it was suggested might befall these children if they were returned home that evening. Although pressed repeatedly, the response was at every turn was nothing more than the general formulation – that they were likely to suffer significant harm if returned.

73. The Reasons for Applying, as set out by the Directorate, in the paperwork read as follows;

> The children's names are on the Child Protection Register since 27 February 2003. There is a history of neglect and domestic violence. Mr. [M] is not to have contact with the children. The Trust received information that since his release from prison Mr [M] has been in the area of the Family Home. The family denied that he was having any contact with the children.
> The PSN I informed the Trust that on 5th October 2005 that Mr [M] said he caring for the children on 26 September. The Trust's Senior Management instructed the Social Worker to complete a visit after normal working hours. During the spot check on 19 October 2005 Mr [M] was observed at the rear of the property. He was sitting in a white Transit Van. Mrs [M] was approaching the van. When the family saw the social worker Mr [M] hid in the back of the van and Mrs [M] ran with [B.] into the home of Mr & Mrs [Q.]. Mrs [Q.] is Mr [M]'s sister.
> The family initially refused entry to the Trust. All spoken to denied Mr [M]'s presence. On leaving it was clear that Mr [Q] and other family members were continuing to hide Mr [M] in the white Transit Van.
>
> Given the background to this case and the potential for further domestic violence the Trust feels that it is in the best interests of the children that the Court make Emergency Protection Orders in respect of both [A.] and [B.].
>
> In making this decision the Trust has also considered the mother's Article 8 Rights and also the Article 8 Rights of the child, but has balanced this with the perceived risks and, in order to achieve what the Trust believes to be in the child's best interests, feels that this intervention is necessary and proportionate to the concerns.

74. The Trust's case, at its height, was that on 19th October they had finally got incontrovertible evidence, to their satisfaction, that the Respondent mother continued to consort with the subject children's father and allowed him to have open-ended contact with them, notwithstanding a previous Court order that this should not take place until a risk assessment had been completed. Those assertions have yet to be adjudicated upon. The Trust is free to bring enforcement proceedings against Mr. M and/or others for breach of a previous

Court order. That does not constitute sufficient reason for breaking up a family. What is needed for that is clear evidence that, should the children be allowed to stay at home, whether on 20th or 26th October, they are likely to suffer significant harm between then and the hearing of an application for a Care Order or Supervision Order under due process and with all parties afforded the opportunity of attending.

75. The panel was unanimous in the view that the Trust had failed to make out such a case. Rather than grant the Trust's application to extend the EPO, we determined that the proper course was to grant the Respondent's application to discharge it and to direct that the children return to their residence, with their grandmother, pending further order.

Dated this 7th December, 2005

John I Meehan, RM