This judgment was given in private on 12th February 2013. It consists of 11 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Case No: FD13P00283

Neutral Citation Number: [2013] EWHC 235 (Fam)

IN THE HIGH COURT OF JUSTICE

**FAMILY DIVISION**

**IN THE MATTER OF THE HUMAN RIGHTS ACT 1998**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 12/02/2013

**Before** :

THE HON. MR. JUSTICE COBB

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**Between :**

|  |  |  |
| --- | --- | --- |
|  | **RCW** | Claimant |
|  | **- and -** |  |
|  | **A LOCAL AUTHORITY** | Defendant |

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**Robin Barda** (instructed by **Hudson & Co**) for the Claimant

**Lee Pearman** (instructed by **Local Authority Solicitor**) for the Defendant

Hearing dates: **8 February 2013**

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Judgment

**The Hon. Mr Justice Cobb :**

**Introduction:**

1. This is an unusual and troubling case, in which I have been asked to give urgent injunctive relief under section 7 Human Rights Act 1998.
2. RCW is the prospective adopter of a child SB, a baby girl aged just 1 year. SB was placed with RCW (under a placement order) in October 2012 by the local authority (which I shall refer to in this judgment as “LBX”). As an urgent application, appearing in the urgent applications court on 8 February 2013, RCW sought an injunction and other relief under the Human Rights Act 1998 to restrain LBX from removing SB from her care; RCW had given notice to LBX of her intention to seek such relief in the applications list (as was, in my judgment, appropriate).
3. A detailed statement in support of the application had been prepared on behalf of RCW, together with a number of supporting statements. LBX had also prepared and had filed with the court a witness statement from Mr M (consultant social worker). I heard detailed submissions from Mr Robin Barda on behalf of the Claimant, and Mr. Lee Pearman on behalf of the Defendant.
4. At the conclusion of the hearing I indicated that I would be granting RCW the essential relief which she seeks, and indicated that I would reserve judgment to a date early this week convenient to counsel. This judgment, delivered on 12 February, sets out the reasoning for my order.

**Background facts:**

1. On 3 February 2012 SB was born at 27 weeks gestation (weighing just 1 kg) at an NHS Hospital in London; almost immediately she was abandoned by her natural mother. SB spent many months in intensive care in the SCBU, receiving specialist nursing care before she could be discharged. She was named ‘S’ by the nurses on the ward. SB was born with a cleft palate, which will require surgical intervention in the near future. Upon her discharge from hospital she was placed in foster care for a period. LBX commenced care and placement order proceedings, and these were resolved without any material opposition at the Inner London Family Proceedings Court on 29 August 2012.
2. On or about 8 October 2012, SB was matched with RCW, a single woman who works as a project manager for the National Health Service. SB was placed with RCW some two weeks later. The placement appears on all accounts to have been an extremely successful one. According to Mr. M., SB “*settled well into RCW’s loving care and began to form a secure and loving attachment with her…*”.
3. Things then took an unexpected and wretched turn.
4. In late November/early December 2012, RCW began to notice a deterioration in her visual acuity. She saw an optometrist, who referred her to her local hospital. After a process of investigations, early in January 2013, she was diagnosed with a tumour on the brain. The tumour was pressing on the optic nerve, and this required urgent surgery.
5. By 4 January 2013, SB had had her home with RCW for 10 weeks; on this date it was therefore open to RCW to make an application for adoption (see section 42(2)(a) Adoption and Children Act 2002). In fact, on that very day, RCW went into hospital for the operation to remove the tumour from her brain. In haste, RCW made arrangements, which were comprehensive and detailed, for SB to be cared for in her own home by a cohort of friends who rallied round RCW; the friends were all familiar to SB. During RCW’s admission to hospital, which lasted just under three weeks, SB was a regular visitor to the ward; she attended at least every other day, accompanied by one of the friends.
6. The operative surgery was in one sense successful; the tumour, which was mercifully benign, was removed. Unfortunately the surgery has left RCW without sight. It is not yet known whether that loss of sight is temporary or permanent, and whether the optic nerve will recover from the trauma of the operation. RCW informs me through her witness statement that the “*sudden loss of sight … has initially been put down to shock and swelling of the optic nerve*”.
7. The witness statements filed by and on behalf of RCW make clear that since returning from hospital, RCW has been fully involved in the care of SB (feeding her and cuddling her), although, obviously, she has not been as engaged in some of the practical tasks as she had been prior to the operation. RCW lives in the area of local authority LBY. Although LBY offers RCW support, it appears that no integrated support package between LBX and LBY has been discussed, let alone implemented, in spite of requests from RCW for such intervention.
8. For reasons which become apparent when reviewing my reasoning, it is helpful to set out the chronology of events from the admission to hospital up to the court hearing:

|  |  |
| --- | --- |
| 4 January 2013 | RCW admitted to hospital |
| 8 January 2013 | Operation to remove the tumour |
| 18 January 2013 | LBX is informed by a friend of RCW that RCW had lost her sight |
| 22 January 2013 | LBX hold the first planning meeting in relation to the placement of SB; it starts to make plans for SB (which include a “parallel” plan – i.e. that SB should either remain with RCW or be placed with an alternative adoptive family (see Mr. M statement) |
| 24 January 2013 | RCW is discharged from hospital |
| 24 January 2013 | A social worker is waiting at RCW’s home at the time of her return from hospital; she makes some assessment (see below) |
| 25 January 2013 | Social worker visit (2) |
| 30 January 2013 | Social worker visit (3) |
| 30 January 2013 | LBX holds a second planning meeting; it reaches a conclusion that SB should be removed from the care of RCW |
| 30 January 2013 | A worker from LBX telephones RCW (after office hours) and informs her of this decision. RCW recalls that the LBX worker (unknown to her) had commented that the authority had “decided to move [SB] on” |
| 4 February 2013 | RCW’s solicitors write to LBX indicating RCW’s intention to apply for an adoption order; letter sent by fax (acknowledged on 6 February) |
| 4 February 2013 | LBX writes to RCW indicating intention to remove SB from RCW’s care |
| 5 February 2013 | a.m. RCW’s solicitor attends at the Principal Registry of the Family Division and lodges an application for adoption |
| 5 February 2013 | p.m. RCW receives the 4 February letter from LBX with its notice of their intention to remove SB from her care |
| 7 February 2013 | LBX writes to RCW’s solicitors re-stating its intention to remove SB on 12 February, and advising that RCW will be committing a criminal offence if she does not do so |
| 8 February 2013 | Application (on notice) in the Urgent Applications court before Cobb J for injunctive relief |

1. As to the chronology, I make the following observations:
	1. As indicated above, RCW was actually entitled to make her application for adoption on the day she was admitted to hospital for the operation, even though she did not do so;
	2. The only direct assessment undertaken by LBX of RCW and SB following the operation (certainly the only assessment relied on for present purposes) appears to have been on 24 January 2013, the very day when RCW was discharged from hospital after her operation. The social worker was waiting at RCW’s home as RCW returned from the hospital. The observation at that meeting is recorded as follows:

“at one point [SB] was given to [RCW ]to hold. After some time, [SB] appeared restless and attempted to be free. [RCW] turned [SB] towards her and [SB] tried to engage with [RCW]’s facial expressions, such as smiling. When these were not reciprocated [SB] began to bat RCW’s face with her hands. This interaction is a small indicator of the difficulties which [RCW] is most likely to face in her efforts to build an attachment with [SB]”

* 1. There is a possibility that RCW’s adoption application was actually issued by the Principal Registry before LBX effected notice of the intention to remove SB from RCW’s care.

**The law:**

1. SB is the subject of a placement order (section 21 ACA 2002) in favour of LBX, and under this order she was placed with RCW. This urgent application raises issues as to the interplay of section 35(2) and section 35(5) of the ACA 2002. Section 35(2) of the ACA 2002 provides that:

“Where a child is placed for adoption by an adoption agency, and the agency –

1. Is of the opinion that the child should not remain with the prospective adopters, and
2. gives notice to them of its opinion

The prospective adopters must, not later than the end of the period of seven days beginning with the giving of the notice, return the child to the agency”.

1. As indicated in the chronology above, by section 144(1) of the ACA 2002 “notice” means “notice in writing”. It follows that the telephone call from the worker at LBX to RCW on the evening of the 30 January 2013 cannot constitute relevant ‘notice.
2. Section 35(5) provides:

“Where –

1. an adoption agency gives notice under subsection (2) in respect of a child,
2. before the notice was given, an application for an adoption order … was made in respect of the child, and
3. the application (…) has not been disposed of

Prospective adopters are not required by virtue of the notice to return the child to the agency unless the court so orders.”

1. As to the basis for the injunctive relief, the claim is brought under section 6 Human Rights Act 1998 (which renders it unlawful for a public authority to act in a way which is incompatible with a Convention right), and under section 7 of the 1998 Act which provides that:

“A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –

1. Bring proceedings against the authority under this Act in the appropriate court or tribunal, or
2. Rely on the Convention right or rights concerned in any legal proceedings

But only if he is (or would be) a victim of the unlawful act.”

1. The section 7 application is brought under Part 8 of the Civil Procedure Rules 1998. LBX does not take issue with the jurisdiction for making the order sought, and rightly so. As a public authority, an adoption agency must not act in breach of European Convention rights.

**RCW’s case:**

1. In mounting the claim for urgent injunctive relief to prevent the removal of SB from her care, RCW asserts that
	1. She and SB are *prima face* entitled to the protection of section 35(5) because her application to adopt was “made” before she received notice of the intention to remove;
	2. Even if that statutory protection is not afforded to her, any removal under section 35(2) would infringe her (and SB’s) rights under article 8 ECHR. RCW and SB have established a home together; RCW regards SB as her daughter, and by all indications SB regards RCW as her mother. One of the witnesses whose statements I read referred to SB as “*finding her home*” once she is in RCW’s arms. It is argued forcefully that LBX has not ‘grasped’ this important point, or (if it has) it has attached no or no appropriate weight to it;
	3. RCW was not involved in (or invited to be involved in) any of the decision making of LBX; she has not had an opportunity to be heard, either fairly or at all, on the issue of the removal of SB from her care. She was unaware that the meeting on 30 January 2013 had been arranged for the authority to make the critical decision about the future placement of SB; on the contrary, she had been informed by the social worker that this would simply be a ‘review’ meeting. In these respects she contends that her rights under article 6 have been infringed. Although not referred to in argument before me, I have in mind what Munby J (as he then was) said in the case of L (Care: Assessment: Fair Trial), Re [2002] EWHC 1379 (Fam) [2002] 2 FLR 730, FD), when summarising the law by reference to domestic and European case law:

“*… the essential principle is clear. At the end of the day fairness is something to be assessed — whether for the purposes of Art 6(1) or Art 8 — having regard to “the particular circumstances of* this *case” (*Re M *— emphasis added). And one has to evaluate the process or the proceedings (as the case may be) “considered as a whole” (*Mantovanelli*), assessing matters “overall” (*Scott*) and “having regard to all circumstances” (*Buchberger*)*.

In this respect, I have also considered carefully the comments of Charles J in *DL and ML v Newham London Borough Council and Secretary of State for Education Intervening* [2011] EWHC 1127 (Admin) [2011] 2 FLR 1133; in that case, Charles J indicated that the scheme under section 35(2) envisaged that problems with a placement would have been raised and discussed with the prospective adopters before a notice under the 2002 Act is issued.

* 1. The removal of SB is in contravention of section 15 Equality Act 2010 (i.e. discrimination arising out of disability: “A treats B unfavourably because of something arising in consequence of B's disability”);
	2. RCW has made proper arrangements for SB’s care while in hospital and while she is recuperating and adjusting to her new situation. The recuperation and adjustment is still at an early stage; there is no evidence that SB’s care is actually being compromised; SB has been meeting her developmental milestones; RCW believes that she is closely bonded with SB (who she regards as her daughter);
	3. RCW has requested LBX and LBY for assessment and support; specifically she has been advised by the Royal National Institute for the Blind that there should be a care assessment for parenting. Her requests have not been taken up by either authority.
1. RCW emphasises that the prognosis for her long-term health is far from clear. There is no medical evidence before me either as to the specific cause of the visual impairment, or more pertinently the prognosis. Mr. Barda told me that in the last few days RCW had experienced some ‘flashes’ of light. I cannot assess the significance of this evidence or its implication for RCW’s recovery.
2. In this respect, it is notable that LBX has only made the most perfunctory of enquiries about RCW’s medical condition before reaching its decision; I was informed that LBX had received some limited information second-hand (from the consultant paediatrician on the adoption panel (Dr. J) who had apparently spoken with RCW’s treating team); the information which it had received (according to Mr Pearman) was that treating team “*could not give a view at this stage*” as to RCW’s condition or prognosis. Further enquiries were undertaken during the hearing, and I was later informed that Dr. J had been told that the treating team had concluded that “*it is impossible to say with certainty*” what the prognosis is for RCW to recover her sight.

**LBX’s case:**

1. LBX accept that if RCW has indeed “made” her application for an adoption order before she received the written notice of intention to remove, then section 35(5) applies, and it would not be entitled to remove SB.
2. On the merits of the application for an injunction to restrain removal, LBX fairly makes no criticism of RCW as a carer; Mr Pearman told me that LBX is sympathetic to RCW’s current situation.
3. In opposing the application, LBX places heavy emphasis on the importance of SB having the stability offered by a primary attachment figure. It was argued forcefully that RCW is no longer able to offer this primary attachment because she will, through force of circumstance, now be reliant on friends and supporters to provide key care for SB. In developing this point, Mr Pearman highlighted that SB had experienced a disrupted early life, with 3½ months in hospital and then 5 months in foster care before being moved to live with RCW. In the circumstances, he argued, it was vitally important that SB does not suffer further disruption; this would be avoided, he maintained, by moving SB now from her current home to another home. He argued that it is vitally important that SB forms a strong and secure emotional attachment to a primary care-giver now. He drew on the evidence of the observation from 24 January 2013 (extract above). Mr Pearman submitted that “*she [RCW] is unable to fulfil the role of primary caregiver because she does not have sight at present*”.
4. LBX expressed concern about the number of carers arranged to assist RCW; it was said on behalf of LBX in this application that “*[SB] has been cared for by various carers which has impacted negatively on her ability to emotionally attach*” (position statement §5), though it was not clear in what ways it was said that SB’s ability so to attach has been so impacted.
5. LBX maintains that SB urgently needs to move; it says that it can see “*no advantage*” for SB in waiting. LBX indicate that “*there should be no drift*” in making alternative plans for SB, and it has identified other adopters who are now in the wings waiting to care for SB. Inconsistent with the strong line it takes on ‘urgency’, LBX informed me that if it cannot exercise its right under section 35(2) to remove SB on Tuesday 12th February, it will not (“*on advice*”) apply for a court order under section 35(5) to remove SB from RCW; it will await the outcome of RCW’s adoption application.

**Conclusions.**

1. As outlined above, there is some uncertainty about the precise sequence of key events in the procedural history; specifically, it is unclear whether RCW’s application was indeed “made” before she received notice of LBX’s intention to remove SB. On the information presented to me, there is a *prima facie* case that by the time ‘notice was given’ to RCW by LBX she had already “*made an application*” for adoption in relation to SB. It is not necessary for me to determine whether ‘making’ an application refers (at the earliest) to the point when the application is lodged with the court (i.e. taken in by the court office for processing), or (at the latest) when the application is formally issued by the court (and given a court number etc). I would venture to suggest the former (provided that all of the paperwork is in proper order) given the unfairness which may result if the court is dilatory in processing the application.
2. If in fact RCW’s application was issued as soon as it had been lodged on the morning of the 5th February, there could be little doubt but that this would have preceded the notice, and LBX would not be entitled to remove SB without court order.
3. If this issue of timing had been the only basis on which this application for an injunction had been sought, I would have been minded to grant it – even for a short period – to allow the parties to establish the precise sequence of events (specifically whether RCW’s application had indeed been issued forthwith upon lodging with the court office). However, there is a much more substantial basis for the grant of the relief sought.
4. A decision to remove a child who has been placed with prospective adopters is a momentous one. It has to be a solidly welfare-based decision, and it must be reached fairly. LBX discussed its plans to remove SB from the care of RCW at two meetings referred to in the chronology above; the decision was made on 30 January 2013 and communicated to RCW shortly thereafter by telephone. I have not yet seen the minutes of the planning meetings at which the decision to remove SB was made (it has been indicated that Mr M’s notes can be made available forthwith, and they should be). But it is difficult to identify on what material LBX could truly contend that it had reached a proper welfare-based evaluation; there had been limited direct observation and assessment by that time, no apparent discussions with the friends and supporters, and little knowledge of RCW’s condition or, more pertinently, its likely prognosis.
5. I do not believe that RCW was invited to either of the meetings at which the future placement of SB was discussed (indeed, she was still in hospital at the time of the first meeting). There is nothing in the statements before me which indicates that RCW’s specific views about her ability to care for SB for the future, her support network, or the impact of her condition on her life were sought or obtained; it does not appear that RCW was given any opportunity to make representations at the meeting.
6. On the information before me I am satisfied that LBX failed to give RCW a full and informed opportunity to address its concerns about the future care arrangements for SB. In this respect, LBX had acted in breach of the procedural rights guaranteed by Article 8 and Article 6, and of the common law principle of fairness.
7. LBX’s difficulties in defending its decision on fairness grounds are substantially compounded by its acknowledgement that when reaching its decision to remove SB it did not know (and does not know) whether RCW’s visual impairment is temporary or permanent. If the disability proves to be temporary, and RCW is able to resume her life as she led it prior to 8 January 2013, LBX would have no basis for intervening in the care arrangements.
8. Over the last few days and weeks, RCW has had to absorb the devastating consequences of the brain tumour, and the consequences of the operation, in making adjustments to her own life, and to SB’s. In my judgment RCW has made entirely appropriate arrangements for SB’s care, at least in the short term, and, as LBX accepts, SB is and has been receiving good physical care. I am not satisfied, on the information before me, that simply by virtue of her visual impairment RCW is unable to give appropriate level of emotional care to SB (as LBX assert). Nor am I persuaded that it is contrary to SB’s emotional well-being for RCW’s friends to assist her in caring for SB in the weeks and months ahead; the enthusiasm and dedication of these friends (quite apart from their experience in looking after children) cannot be over-stated. Whether this is indeed the optimal long-term care arrangement for SB remains to be seen; it may well be that the employment of a single support carer or nanny to assist RCW may be a better option for SB. This is an issue which will surely need to be examined. I note that when placing SB with RCW, LBX knew that RCW was a single woman with a full-time job, and that nursery care was ultimately going to be part of SB’s wider care regime. Ironically, I note that when approving RCW as an adopter, the consultant social worker engaged by LBX to undertake the assessment had commented “*I was impressed with how seriously [RCW] had … [been] able to evidence the developments she had made in developing a more robust support system….. These included living in with [RCW] if there was a difficulty in [RCW] being able to meet the demands of day to day care for a child*.”
9. Visual impairment does not of itself disqualify an adult from being a capable loving parent. In my judgment, the ability for RCW to provide good emotional care for SB (probably with support) needs to be properly assessed. It was not fairly assessed on 24 January 2013 when the social worker visited RCW’s home so soon after RCW’s discharge from hospital. LBX can only point to one example (from the visit on that day) where they maintain that SB’s needs were not being met.
10. I do not accept that this observation necessarily supports the proposition that RCW is unable to meet SB’s needs; even if it did, it would be grossly unfair to make any judgment about the long-term ability of RCW to meet the needs of SB on the basis of an assessment made on the day on which RCW left hospital and returned home. One can only imagine the tumult of emotions which RCW must have been feeling on that day – joy and relief to be home and with SB; sickening anxiety and possibly despair at her new disability.
11. In my judgment, LBX’s decision to remove SB was reached on an incomplete assessment of the current situation, and in a manner which was unfair to RCW. I stop short of finding that the assumptions which the authority has made about parenting by a carer who is blind are discriminatory, but in ruling RCW out as a prospective carer so summarily, LBX has shown a worrying lack of enquiry into the condition or the potential for good care offered by a visually impaired parent.
12. Nowhere do I read in LBX’s evidence, nor did I hear from Mr. Pearman, any indication that LBX have given consideration to offering this placement practical and integrated support. This plainly needs to be addressed urgently, and will be the subject of directions which I propose to make within these proceedings.
13. For the reasons set out above, I have made the injunction order on 8 February 2013 in the terms sought.