

CFLQ

Case Commentary

Re C (A Child) (Adoption: Duty of Local Authority) – Welfare and the rights of the birth family in ‘fast track’ adoption cases

Re C (A Child) (Adoption: Duty of Local Authority)

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In Re C (A Child) (Adoption: Duty of Local Authority), the Court of Appeal had an opportunity to explore the relationship between parental interests and the paramountcy of child welfare in adoption decisions. This commentary critically examines the court’s reasoning, arguing that it utilised an unnecessarily narrow conception of welfare and gave undue weight to the interests of the child’s mother.

Introduction

A novel feature of the Adoption and Children Act 2002 is the concept of ‘fast track’ adoption.¹ Under section 19 of the Act, a local authority can place a child for adoption with the consent of a child’s parents (with parental responsibility)² or his or her guardian, without the need for a court order. This is indicative of the underlying policy of finding permanent homes for children who might otherwise drift through care.³

Another key feature of the legislation is that the welfare of the child to be adopted is made the paramount consideration in adoption decisions,⁴ ostensibly bringing English law into line with the United Nations Convention on the Rights of the Child (the UNCRC). This is a marked change from the old law, under which welfare was merely the *first* consideration.⁵ Reassuringly, it remains impossible to complete the entire adoption process without at some

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¹ This term has been adopted by the judiciary, with ‘evident approval’ according to Andrew Bainham (A. Bainham, ‘Arguments about Parentage’ [2008] CLJ 322, at p 350). See, eg *Re C (A Child) (Adoption: Duty of Local Authority)* [2007] EWCA Civ 1206, [2008] 1 FLR 1294 (*Re C*), at para [9] per Arden LJ.

² Adoption and Children Act 2002, s 52(6).

³ Secretary of State for Health, *Adoption: A New Approach*, Cm 5017 (2000).

⁴ Adoption and Children Act 2002, s 1(2).

⁵ Adoption Act 1976, s 6.

stage either obtaining parental consent or satisfying the threshold conditions for a care order.⁶ Nevertheless, the making of a final order under the new Act could violate what Elizabeth Cooke called the ‘central principle’ of UK child law that ‘a simple welfare test is ... inadequate to justify the compulsory removal of children from their parents’.⁷

A strict application of the welfare principle could preclude a court from considering the interests of the parents when making an adoption-related decision. One factor that might guard against such an approach is the explicit requirement that the court should consider the effect of ceasing to be a member of the birth family, and the child’s relationships with relatives, as aspects of the child’s welfare.⁸ This ‘extended meaning’ of welfare was also an innovation in the 2002 Act.⁹

Despite this, even before the Act was passed Sonia Harris-Short argued that the considerations relating to the birth family ‘must be mitigated through the framework of the welfare test and will thus only be relevant ... to the extent that they bear upon the child’s best interests’.¹⁰ She reluctantly concluded that, if the Act is to be applied properly, parental interests should be ignored unless they coincide with those of the child. The full impact of the Act, therefore, depends on the extent to which the child’s relationship with his or her parents is seen to bear on the overall assessment of welfare.

The fears of those advocating separate consideration of parental interests were shown to be well founded in *Re C (A Child) (Adoption: Duty of Local Authority)*.¹¹ In that case, the Court of Appeal took a very individualistic view of child welfare, at the expense of a child’s links with her biological father (who lacked parental responsibility) and with her grandparents. The case demonstrates the difficult relationship between welfare and the right to respect for a person’s private and family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention).

The following commentary summarises the decision in *Re C*, and analyses its implications. Its primary argument will be that the present law on adoption, as interpreted in *Re C*, can place too much power in the hands of the birth mother and too little in the hands of the unmarried father without parental responsibility.

The facts

A 19-year-old woman (hereafter called ‘M’) became pregnant with E after a one-night stand with F. She discovered the pregnancy at a late stage, and did not tell F about it. She also concealed it from her parents, colleagues, and employers, leading Thorpe LJ to describe the case as ‘extraordinary’.¹²

Upon E’s birth, M, who had a career, immediately made it clear that she wished E to be adopted because she felt unable to look after the child. She considered her own parents, from whom she was estranged, to be equally incapable of doing so because they were divorced and

⁶ J. Herring, *Family Law* (Pearson, 3rd edn, 2007), at p 651.

⁷ E. Cooke, ‘Dispensing with parental consent to adoption - a choice of welfare tests’ [1997] CFLQ 259, at p 263

⁸ Adoption and Children Act 2002, s 1(4)(c) and s 1(4)(f).

⁹ *Re C* [2007] EWCA Civ 1206, at para [18] per Arden LJ.

¹⁰ S. Harris-Short, ‘New Legislation: The Adoption And Children Bill – A Fast Track To Failure?’ [2001] CFLQ 405, at p 420.

¹¹ [2007] EWCA Civ 1206.

¹² *Ibid*, at para [63].

her father was remarried with teenage stepchildren. She also rejected the possibility that her siblings could provide care. M refused to identify F, but gave sufficient information for him to be identifiable, in all likelihood, if the local authority made independent enquiries.

M left the baby in hospital shortly after birth, and the surprised local authority personnel applied for a care order under Part IV of the Children Act 1989. Ultimately, that application was not pursued. But the authority also applied for guidance on whether they should approach E's extended family members, including her maternal grandparents and F (if he could be identified) with a view to finding a home within the family, despite M's wishes.

The judgment at first instance

In deciding the case under the 2002 Act, HHJ Taylor directed that the local authority were under a duty to gather 'as much information about the background of the extended family as they are able to do',¹³ which would include disclosing the existence of E to her extended maternal family and the putative father and his family, if he could be identified.

The judge was of the view that the 2002 Act heralded 'significant changes' in the approach to be taken.¹⁴ He held that section 1(4) of the Act, containing a checklist of factors to be considered in adoption decision-making, removed the discretion possessed by local authorities under the Adoption Act 1976 relating to the matter at hand. Moreover, the judge thought it obvious that E's interests would be served by placing her within the family if a suitable person came forward.

HHJ Taylor was heavily influenced by the modern realisation that many adopted children will eventually make enquiries about their biological parenthood, and said it would be 'cruel in the extreme' to prevent E from having knowledge about her background, even if the information was provided without M's consent or co-operation.¹⁵ He expressed hope that M would change her mind and assist the local authority, but gave the authority permission to make their own enquiries after 21 days.

The change of heart did not occur, since M appealed against the judge's ruling. By the time of the appeal hearing, the maternal grandparents had become aware of the birth of E after the local authority mistakenly invited them for an interview. The grandparents subsequently wrote to the authority offering to help in resolving the situation, but took no formal part in the proceedings.

The Court of Appeal's decision

The Court of Appeal allowed M's appeal. The court held that there was no duty to make the enquiries (or disclose the birth of a child) unless these were in the best interests of the child in question. Moreover, the enquiries were consistent with her best interests only if they 'genuinely further[ed] the prospect of finding a long-term carer for the child without delay'.¹⁶ That could not be said of this case, and so the court ordered that the guardian and the local authority should take no steps to identify F or inform him of E's birth, or to introduce the grandparents to E or assess them as prospective carers. In substance, the result was that M was permitted to put E up for adoption without even informing F of her existence,

¹³ Ibid, at para [2].

¹⁴ Ibid, at para [75].

¹⁵ Ibid, at para [11].

¹⁶ Ibid, at para [3].

and without either F or the grandparents playing a role in deciding her future.

The court began by asking whether the issue should be decided under the 2002 Act or the 1989 Act, opting for the former.¹⁷ There were then two substantive issues to be decided: whether the 2002 Act imposed a duty on local authorities or adoption agencies to make enquiries of a child's extended family about the possibility of their providing long-term care, and how the local authority (or the court as in this case) should exercise its discretion about contacting the birth family in the absence of a duty to do so.

The court's answers to these questions will be outlined before a thematic analysis of the decision is undertaken. While the judge's order related to the disclosure of information, Arden LJ opined that '[w]hat it was in substance about was whether the wider family and putative father must be given a role in questions as to E's future'.¹⁸ The case therefore addressed fundamental questions concerning the importance of biological relationships with children.

The appropriate legislative basis

The Court confirmed that the local authority should have initiated proceedings under the 2002 Act, which provided a similar mechanism for seeking directions,¹⁹ rather than applying for a care order under the Children Act 1989. This meant, *inter alia*, that the local authority was not required to ascertain the wishes and feelings of parents, relatives and others before making a decision in relation to a looked-after child under section 22(4) of the 1989 Act.²⁰ The lack of a consultation requirement was the dominant feature of the case.

Thorpe LJ was sympathetic to the local authority's reaction to M's near-abandonment of E, since none of the personnel involved had recently encountered such a situation. Indeed, it is well documented that adoptions involving babies given up by lone mothers are now rare.²¹ Thorpe LJ considered the application for a care order to be 'misjudged' nonetheless.²² He held that it was inappropriate to apply the threshold criteria in section 31 of the 1989 Act (which asks whether the child is suffering or is likely to suffer significant harm attributable to the care the child is receiving not being what it would be reasonable to expect a parent to give), since M did not propose to play any further part in E's life.²³ Moreover, he emphasised that care order applications were 'inherently contentious and frequently give rise to bitter litigation'.²⁴ This aspect of Thorpe LJ's reasoning is noteworthy since the courts have previously been willing, in certain circumstances, to grant care orders in respect of orphaned and abandoned children as a means of conferring parental responsibility on the local authority.²⁵

Arden LJ said that the Act under which the case was to be resolved did not affect the 'issues

¹⁷ *Ibid*, at paras [6] and [68].

¹⁸ *Ibid*, at para [4].

¹⁹ Family Proceedings (Adoption) Rules 2005 (SI 2005/2795), r 108.

²⁰ [2007] EWCA Civ 1206, at para [22].

²¹ See, eg Department of Health, *Prime Minister's Review of Adoption* (HMSO, 2000), at para [2.2].

²² [2007] EWCA Civ 1206, at para [65].

²³ *Ibid*, at para [65].

²⁴ *Ibid*, at para [65].

²⁵ See *Re SH (Care Order: Orphan)* [1995] 1 FLR 746 and *Re M (Care Order: Parental Responsibility)* [1996] 2 FLR 84.

of principle' involved.²⁶ Thorpe LJ, on the other hand, highlighted the effect of the decision to apply for a care order on the handling of the case. It led all the professionals involved (including a children's guardian appointed because of the care order application) to 'explore profoundly' the possibility of a placement with a parent or other close relatives.²⁷ This in turn diverted attention from the possibility of 'fast tracking' E's adoption under section 19 of the 2002 Act, which, due to M's consent, would have allowed the local authority to place almost immediately.²⁸

While Thorpe LJ was undoubtedly correct to say that the handling of the case did not suit its particular circumstances, and his reasoning is consistent with the primacy given by the Court to the 'no delay' principle, it is controversial to assume that a placement within the family should not be thoroughly investigated even if adoption by outsiders seems the most likely long-term prospect. This tension between biological ties and the efficient pursuit of permanence permeates the rest of the decision, and the 2002 Act itself.

Thorpe LJ's account of the respective consequences and suitability of each Act constitutes important, albeit disputable, guidance to local authorities faced with children left in hospital shortly after birth.

A duty to inform?

In deciding that there was no duty to inform F or the grandparents about E's birth, Arden LJ emphasised that s 1 of the 2002 Act was 'child-centred' and not 'mother-centred', with the welfare of the child as the paramount consideration.²⁹ Despite her express intentions, in due course it will be illustrated that the approach adopted by Arden LJ was in fact 'mother-centred'.

At this stage, it may be helpful to set out some relevant parts of section 1:

- (1) This section applies whenever a court or adoption agency is coming to a decision relating to the adoption of a child.
- (2) The paramount consideration ... must be the child's welfare, throughout his life.
- (3) The court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare.
- (4) The court or adoption agency must have regard to the following matters (among others)—...
- (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person ...
- (e) any harm ... which the child has suffered or is at risk of suffering,
- (f) the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—

²⁶ [2007] EWCA Civ 1206, at para [6].

²⁷ Ibid, at para [69].

²⁸ M's consent to adoption would not have been valid until 6 weeks after E's birth as a result of s 52(3) of the 2002 Act.

²⁹ [2007] EWCA 1206, at para [15].

- (i) the likelihood of any such relationship continuing and the value to the child of its doing so,
 - (ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
 - (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child ...
- (8) For the purposes of this section—
- (a) references to relationships are not confined to legal relationships,
 - (b) references to a relative, in relation to a child, include the child's mother and father.'

In Arden LJ's view, the court had a wide discretion in relation to the above factors and the weight to be given to them. The only aspect of welfare given priority by Parliament was that of preventing delay in resolving the case,³⁰ and the Act did not prioritise the birth family over the adoptive family simply because of their status. Thus, there could be no absolute duty to make the enquiries.³¹ In the Court of Appeal's view, the judge therefore misdirected himself in holding that s 1 *required* the local authority to make the enquiries in this case.

The court's finding that there was no absolute duty to make enquiries is justifiable, since such a duty would fetter the decision-maker's obvious discretion to an unacceptable extent. As we shall see, however, the court's restrictive approach did not end here.

An expectation of disclosure?

Arden LJ also rejected the submission of the children's guardian that there should be an 'expectation of disclosure' as a result of section 1(4)(c) and (f), which would require compelling reasons such as danger to the child's life in order to be overcome.³² While Arden LJ accepted that disclosure would be in the child's interests in many cases, in 'exceptional situations' such as this one it was appropriate for relatives, including a father, to remain ignorant of a child's birth at the time of the adoption.³³

While Arden LJ's assertion that disclosure would be appropriate in most cases is admirable, it is unclear that this case was 'exceptional' in any relevant sense. Admittedly, as discussed above, few mothers now give up their babies for adoption at birth, and the extent to which M managed to hide her pregnancy is notable. But the operative facts of the case might well constitute a typical scenario of a one-night stand where the mother, irrespective of the child's interests, does not disclose the resulting pregnancy to the father simply because she wants nothing further to do with him.

Exercising the discretion

As a result of the judge's error on the duty to inform, according to Thorpe LJ, M was denied 'the discretionary appraisal to which she was entitled', and the Court of Appeal would

³⁰ Adoption and Children Act 2002, s 1(3).

³¹ [2007] EWCA Civ 1206, at para [21].

³² *Ibid*, at para [23].

³³ *Ibid*, at para [24].

exercise the discretion afresh.³⁴ Arden LJ began by stating that every case should be decided on its own facts. E had already started to form bonds with her foster parents, and Arden LJ was anxious to avoid any further delay in the adoption process. She did not consider it likely that F would be able to provide care, although she did not detail the precise reasons for her conclusion, and noted that the grandparents had not offered to do so. Thorpe LJ agreed and was ‘in no doubt that E’s interest would be best served by a fast track placement for adoption’.³⁵

This decision could be seen as consistent with one of the fundamental aims of the 2002 Act, that of achieving permanence for those children who are not being cared for by their parents. Whether the conclusion is in fact compatible with the Act as interpreted in context, and whether the aim is a valid one for an adoption law, are both open to debate, especially given the resulting treatment of the birth family. While Arden LJ was of the view that her approach was consistent with Article 8 of the European Convention, this is highly questionable. Her approach is symptomatic of the uneasy relationships between Article 8 and the paramountcy principle on the one hand and protection of the interests of unmarried fathers on the other.

Significant issues

Having provided an outline of the basis for the court’s conclusion, the issues raised by the decision will be elucidated.

Differing conceptions of welfare

It is interesting to note the very different conclusions drawn by the two courts regarding the impact of paramountcy on the disclosure question. While the judge thought that the very introduction of paramountcy necessitated a broad factual inquiry, the Court of Appeal apparently took the view that section 1(2) restricted the circumstances in which such an inquiry would be required. Similarly, while the judge considered the gathering of information on E’s background to be a fundamental aspect of her future welfare, Arden LJ thought it of little importance compared to the overall objective of finding her a home.

While some commentators object to the paramountcy principle because of its failure to recognise independent parental interests, Herring has long argued that the conception of welfare should at least be relationship-based if paramountcy is retained.³⁶ The 2002 Act arguably promotes such an understanding through sections 1(4)(c) and 1(4)(f). In spite of this, the Court of Appeal reasserted a distinctly individualistic approach to the concept. It may be too much to say that Arden LJ displayed a lack of willingness to engage in the balancing exercise in respect of different aspects of welfare required under the new Act, but the judge at first instance was much more explicit in attempting to do so. This illustrates the problems that can be caused by loose statutory language in this context, even if discretion is seen to be important.

The applicability of ‘relatives’ provisions

Lawrence Collins LJ opined that a strict textual interpretation of subsection 4(f) might suggest that it applies only to those with whom the child has a relationship that ‘goes beyond

³⁴ Ibid, at para [78].

³⁵ Ibid, at para [81].

³⁶ J. Herring, ‘The Human Rights Act and The Welfare Principle In Family Law – Conflicting Or Complementary?’ [1999] CFLQ 11.

the mere status of a relative'.³⁷ All the judges, however, confirmed that F would not be barred from consideration simply because he did not know of E's birth. A mere biological link with the potential to become a social relationship was sufficient. The grandparents also fell within the definition of 'relatives'. This willingness to apply the subsection in the first place is to be welcomed, since it signals some recognition of the importance of biological ties. Nevertheless, it turned out to have little impact on the outcome of the case.

'No delay' vs the birth family

Despite agreeing on the applicability of section 1(4)(f), Arden LJ was adamant that this was not conclusive. While she accepted that consideration of the effects of ceasing to be a member of the birth family and of E's relationships with relatives, under subsections (4)(c) and (4)(f) respectively, was not an explicit requirement under the 1976 Act, she was of the view that Parliament had intentionally prioritised the 'no delay' principle above all other aspects of welfare. The decision-maker was not permitted to 'quarrel with that basic value judgment'.³⁸ So despite admitting that it was only to 'some degree likely' that delay would prejudice welfare in every situation,³⁹ and that sections 1(4)(c) and 1(4)(f) were 'particularly important' in the case at issue,⁴⁰ Arden LJ turned out to be remarkably willing to allow the 'no delay' principle to predominate in this particular case.

Arden LJ's conclusion on the relative importance of sections 1(3) and 1(4) is unfortunate. Section 1(3) contains relatively strong and imperative language, and the possible impact of delay is set apart from all the other factors. Even so, it could be argued that this drafting technique is simply an attempt to remind decision-makers that delays can be independent causes of prejudice to welfare, and that this will be important to bear in mind in all cases. This does not necessarily mean that delay should be given greater weight than all other potential causes of detriment to welfare in every case, and Arden LJ's approach may be unnecessarily formalistic.

Indeed, the very fact that section 1(4)(c) specifically requires consideration of the effect of ceasing to be a member of the birth family *throughout the child's life* suggests that detailed enquiries and carefully balanced decisions will often be necessary. In *Re P (Placement Orders: Parental Consent)*, Wall LJ pointed out that the use of this phrase in the 2002 Act emphasises that 'adoption, unlike other forms of order made under the 1989 Act, is something with lifelong implications'.⁴¹ He attached a great deal of importance to the extended welfare checklist in section 1(4) of the 2002 Act, albeit rejecting the idea that an enhanced welfare test, in contrast to a simple one, was to be applied in adoption cases.

In its consideration of the discretion to inform, the court in *Re C* did accept that the birth tie would be particularly important where the child was old enough to understand the situation or where there were ethnic, cultural or religious factors. Conversely, if a child has never lived with the birth family and is 'too young to understand what is going on',⁴² the birth tie is overtaken by the need to find a permanent home as soon as possible. Arden LJ did not accept the local authority's suggestion that 'the ordinary rule' should be that close relatives are

³⁷ [2007] EWCA Civ 1206, at para [51].

³⁸ *Ibid*, at para [17].

³⁹ *Ibid*, at para [17].

⁴⁰ *Ibid*, at para [18].

⁴¹ [2008] EWCA Civ 535, [2008] 2 FLR 625, at para [128].

⁴² [2007] EWCA Civ 1206, at para [43].

informed.⁴³ Her one concession was that the court ‘might’ have been more willing to order disclosure if more time had been available.⁴⁴

Arden LJ’s insistence that no preference is to be given to the birth family over the adoptive family is congruent with the drive for permanence and with Jonathan Herring’s assertion that section 1 is intended to discourage courts from refusing to make an adoption order because of the birth family’s rights.⁴⁵ It nevertheless sits uneasily with Andrew Bainham’s argument that ‘the total severance of the parent-child relationship ought not to occur without a thorough examination of the *parent’s* claims and interests as well as those of the child’.⁴⁶ This was effectively F’s last chance to be informed before his daughter’s adoption, since the apparent disruption caused by informing him would be seen as increasingly detrimental as the process continues.

More fundamentally, the prioritisation of both permanence and the absence of delay may well be inconsistent with the decision of the European Court of Human Rights in *Görgülü v Germany*.⁴⁷ In that case, the Namburg Court of Appeal was found to have breached the Article 8 rights of a father by failing properly to consider his application for custody of his biological child. This was in spite of the fact that the child in question had been cared for by prospective adopters for 2 years at the time the German Court made its decision, and that the father lacked parental responsibility. The European Court admitted that ‘separation from [the] foster family might have had negative effects on [the child’s] physical and mental condition’, but held that the Court of Appeal had ‘failed to consider the long-term effects which a permanent separation from his natural father’ might have.⁴⁸

More will be said later about Article 8 in relation to F’s particular circumstances. On a broader level, however, the European Court is sometimes content to allow stable arrangements for children to be unsettled and delayed if that is necessary to protect the rights of the birth family, and those of the child in relation to that family. The 2002 Act, as interpreted by the Court of Appeal in *Re C*, appears to run counter to that philosophy.

The unmarried father and the lack of a consent requirement

Arden LJ justified much of her approach on the basis that F’s consent was not required for the adoption due to his lack of parental responsibility. This in itself is consistent with Article 5(4) of the European Convention on the Adoption of Children, as recently revised.⁴⁹ Arden LJ admitted that the case law decided under the Adoption Act 1976 required that the views of a father without parental responsibility were generally taken into account, and the key question was therefore whether this position had changed under the 2002 Act.

Arden LJ clearly considered that it had not. She explicitly reached a decision that was consistent with case law under the 1976 Act in which courts refused to give notice of

⁴³ Ibid, at para [42].

⁴⁴ Ibid, at para [43].

⁴⁵ J. Herring, *op cit* n 6, at p 639.

⁴⁶ A. Bainham, *Children: The Modern Law* (Family Law, 3rd edn, 2005) at pp 266–7.

⁴⁷ [2004] 1 FLR 894.

⁴⁸ Ibid, at para [46].

⁴⁹ The text of the Convention is available at

[https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2008\)13&Language=lanEnglish&Ver=final](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2008)13&Language=lanEnglish&Ver=final).

adoption to fathers who had had a ‘fleeting relationship’ with the mother.⁵⁰ In *Re H; Re G (Adoption: Consultation of Unmarried Fathers)*,⁵¹ the Court of Appeal decided that it was not necessary to inform even a father who had been engaged to the mother since he had never cohabited with her. F arguably had a weaker case than the father in *Re H; Re G*, and on that basis perhaps the conclusion is unsurprising. Nonetheless, by considering cases under the old law, Arden LJ rejected HHJ Taylor’s conclusion that the Act required a new approach

Arden LJ also cited the more recent decision of Munby J in *Re L (Adoption: Contacting Natural Father)*, in which he held that nothing could be done (except to ask the mother for her co-operation once more) where it was impossible to identify the father of a child without the mother’s help.⁵² While she doubted whether that was truly the situation in the instant case and was careful to confine *Re L* to its particular facts, Arden LJ was also influenced by her finding that there was ‘no basis for supposing that [F] could provide a home for E’, and that ‘[t]he prospects of his being a long-term carer [were] too intangible to justify a delay in making a placement’.⁵³ Unfortunately, the judgment does not disclose the precise basis on which Arden LJ reached that finding.

It is unhelpful to insist on linking the right to know of a child’s existence with whether or not consent is required for adoption. Herring suggests that the father should be informed unless there are ‘very good reasons’ for failing to do so, such as a risk of violence towards the mother, and he does not consider the lack of a consent requirement a sufficient justification for ignoring the father.⁵⁴ Although Herring appears to confine his suggestion to situations where the father has ‘family life’ for the purposes of Article 8, F’s lack of opportunity to demonstrate such family life (on which see below) could justify the application of this approach to *Re C*. Indeed, the very fact that F’s consent was not required means that he could not have prevented the adoption, and there was therefore little to lose by informing him of the birth.

This aspect of the court’s decision may also be inconsistent with the tone, if not the result, of the more recent case of *Re F (A Child) (Placement Order)*.⁵⁵ The appellant in *Re F* had also been involved in a casual relationship with a woman, and was initially unaware that he was the father of the child to whom that woman gave birth. The local authority involved in the child’s life asked the appellant to participate in blood tests, and he was confirmed to be the father during care proceedings. He subsequently learned that adoption plans were at an advanced stage, but that his daughter had not yet been placed. He sought confirmation that the placement had not yet occurred and did not receive a response. Meanwhile, a placement order was made and the father sought leave to have it revoked.

Unfortunately for him, the Court of Appeal refused to interpret the Act in a manner that would allow them to prevent the adoption at that late stage. In spite of this, it was said that a ‘travesty of good practice’ had occurred because of the local authority’s behaviour with respect to the applicant,⁵⁶ and that future conduct of that sort would result in successful judicial review applications. Such was the perceived gravity of the local authority’s

⁵⁰ [2007] EWCA Civ 1206, at para [2].

⁵¹ [2001] 1 FLR 646.

⁵² [2007] EWHC 1771 (Fam); [2008] 1 FLR 1079.

⁵³ [2007] EWCA Civ 1206, at para [48].

⁵⁴ J. Herring, *op cit* n 6, at p 649.

⁵⁵ [2008] EWCA Civ 439; [2008] 2 FCR 93.

⁵⁶ *Ibid*, at para [34].

misconduct that a copy of Wall LJ's judgment was sent to every adoption agency in England and Wales.

Since *Re F* involved technical facts, it was analysed differently from *Re C*, and the father was still unable to prevent the adoption process from going ahead. Focusing on the normative similarities between the two cases, however, reveals a stark contrast in the attitude displayed by the Court of Appeal towards the two fathers. In *Re F*, the father was lucky enough to be contacted by the local authority so that he knew about the existence of his daughter, and as a result the court reacted sympathetically (if impotently) to his plight.⁵⁷ Yet, following *Re C*, it may have been perfectly lawful for the local authority not to contact the father, and any subsequent court decision would have given scant regard to his interests. There is arguably an inconsistency between these decisions, and the approach in *Re F* is preferable because of the recognition it gives to the father's position.

The father's Article 8 rights

The lack of protection often given to the rights of fathers in this context is an instance of two familiar problems: the difficulties for the unmarried father in demonstrating the existence of 'family life', and the question of whether the paramountcy principle is compatible with Article 8 of the European Convention.

The 'family life' problem

The fundamental difficulty was the Court of Appeal's finding that no 'family life' existed between F and E for the purposes of Article 8. While it was accepted, following *Pini v Romania*,⁵⁸ that Article 8 could cover intended family life, it was held that F's situation in relation to E did not fall within Article 8 because he had never lived with M nor expressed any commitment to E. Arden LJ accepted that F could not have expressed such a commitment because he was unaware of E's existence, but denied that it was a violation of Article 8 to withhold from him the mere *possibility* of an Article 8 right with regard to E.

Lawrence Collins LJ held that a potential relationship was not necessarily outside the protection of Article 8, but found it 'difficult to envisage a situation' in which Article 8(1) would be engaged where the father does not 'know (or care)' about the existence of the child.⁵⁹ The implication that F did not care about E is fallacious, since it is surely sensible to measure care only once knowledge is present. Indeed, Lawrence Collins LJ's use of parentheses implies an acceptance of this argument, but he was nevertheless unwilling to allow it to influence his conclusion.

The European Court itself has shown some flexibility in adoption cases on the question whether 'family life' exists between a father and a child in adoption cases. In *Söderbäck v Sweden*, the court was willing to proceed on the basis that 'family life' was present following a small amount of contact between the applicant and his daughter;⁶⁰ and in *Görgülü v Germany* it was accepted by the parties and the court that 'family life' existed because the parents had a significant relationship, despite the fact that it ended before the father found out

⁵⁷ The exact circumstances in which the invitation to undergo DNA testing was extended are unclear from the judgment.

⁵⁸ (2005) 40 EHRR 13.

⁵⁹ [2007] EWCA Civ 1206, at para [55].

⁶⁰ (2000) 29 EHRR 95.

about the pregnancy.⁶¹ Admittedly, however, the European Court may be less flexible where the father was not aware of the child *and* had only a brief relationship with the mother, even if neither of those factors are of his own making.

Bainham has argued that it is ‘questionable’ that no ‘family life’ subsists in cases where the relationship between the mother and father had broken down before the child was born,⁶² since ‘whether or not the connection is established will depend on whether the mother wants it to be’.⁶³ He concludes that such a situation may infringe the rights of both the father and the child. Bainham’s argument has merit, since it is both illogical and undesirable for the engagement of Article 8 rights, centred on the relationship between two people, to be subject to the whim of a third party. The argument would have fundamental implications for the entire basis of the decision in *Re C*, since F’s rights would have to be recognised under Article 8(1), and any interference with them justified under Article 8(2).

Paramourcy and human rights

In any event, Lawrence Collins LJ held that even if Article 8(1) were engaged, the violation could be justified by invoking the rights of M and E. This may well be an example of the judicial assumption that, as David Bonner, Helen Fenwick and Sonia Harris-Short put it, ‘the child’s welfare will constitute an automatic justification for the interference in accordance with the requirements of Article 8(2)’.⁶⁴

The debate over the relationship and the compatibility between the paramourcy principle and Article 8 was unlikely to be resolved in this case, given what Herring calls the ‘rather ambiguous’ attitude of the European Court of Human Rights towards the whole concept of adoption.⁶⁵ Much of the apparent ambivalence is caused by sensitivity to the particular facts of each case, but it is true that the court has been willing to reach superficially contrasting conclusions. In *Söderbäck v Sweden*, for example, the court refused to hold that the adoption of a child by the mother and her new husband breached the Article 8 rights of the biological father.⁶⁶ On the other hand, the court found a violation in *Görgülü*, a more analogous case to *Re C* (since the mother had put the child up for adoption soon after birth).⁶⁷

In any event, *Görgülü* demonstrates that, if Article 8(1) had been engaged, it could not be assumed that the infringement of F’s rights was justified under Article 8(2), even in the supposed interests of E’s welfare. On the contrary, the starting point is that, where ‘family life’ has been demonstrated, ‘the State must act in a manner calculated to enable that tie to be developed’.⁶⁸

Some commentators find it difficult to square the notions of human rights and adoption at all.⁶⁹ More broadly, however, discussions are likely to continue over the extent to which

⁶¹ [2004] 1 FLR 894. See also *Keegan v Ireland* [1994] 3 FCR 165.

⁶² A. Bainham, *op cit* n 46, at p 291.

⁶³ *Ibid.*, at p 291.

⁶⁴ D. Bonner, H. Fenwick and S. Harris-Short, ‘Judicial Approaches to the HRA’ (2003) 52 *International & Comparative Law Quarterly* 549, at p 578.

⁶⁵ J Herring, *op cit* n 6, at p 647.

⁶⁶ (2000) 29 EHRR 95. See also *Eski v Austria* [2007] 1 FLR 1650.

⁶⁷ [2004] 1 FLR 894.

⁶⁸ *Ibid.*, at para [45].

⁶⁹ See, eg A. Bainham, ‘Arguments about Parentage’ [2008] CLJ 322, at p 350.

judges are performing the role required of them under the Human Rights Act 1998, or too readily adopt a ‘business as usual’ approach.⁷⁰

The child’s Article 8 rights

Another contemporary debate is whether children can have rights that are independent of their welfare. While some refuse to distinguish between the two, as Sonia Harris-Short and Joanna Miles put it, ‘the idea of children’s rights provides a potentially important challenge to the centrality of the welfare principle’.⁷¹ Whether or not they could be subsumed in considerations of her welfare, E did have a number of potential claims under Article 8.

Informational rights

While Arden LJ recognised that Article 8 protected the right to receive information necessary to understand one’s identity, she noted that *Odièvre v France* considered the justification of the infringement to be within the margin of appreciation because of the implications for the privacy of mothers who had given babies up for adoption.⁷² The only right to information expressly provided for under the 2002 Act was in respect of the contents of the adoption file and other records,⁷³ a limitation, she believed, that struck ‘a fair and proportionate balance between the interests of the adopted child and those of its natural parents’.⁷⁴

Further, even though E would benefit from information about F in her adult life, Arden LJ held that this was secondary to the objective of finding her a long-term home, and would actually delay the objective. Arden LJ went so far as to say that it would be an improper use of the guardian’s powers to make enquiries in order to assist the child to establish her identity. It was again emphasised that ‘the decision required to be made, as a matter of some urgency, [was] one as to E’s long-term care’.⁷⁵

A narrow conception of welfare was clearly Arden LJ’s primary concern, with Article 8 rights once more relegated to second place. Nonetheless, in this instance, she was content to invoke parental rights to justify limiting the recognition of what HHJ Taylor had considered to be an important aspect of E’s welfare. Again, the drive towards permanence and the consequent prioritisation of the ‘no delay’ principle seem to have been conclusive. Of course, long-term care of one kind or another is an important priority, but if M continues her intransigence the Court deprived E of her best chance to obtain information about her father for reasons that are not convincing.

A right to be raised by the birth family?

The guardian suggested that even if F had no Article 8 rights in respect of E, E herself had an Article 8 right to be brought up by her natural father. Arden LJ was reluctant to express a final view on that question, since it could only be determined when a final adoption order was made. In any event, as was the case with F, a potential right was insufficient justification to require any disclosure at this stage. The soundness of this argument might be questioned,

⁷⁰ A. Bainham, ‘Unintentional Parenthood: The Case of the Reluctant Mother’ [2002] CLJ 288, at p 290.

⁷¹ S. Harris-Short and J. Miles, *Family Law: Text, Cases and Materials* (Oxford University Press, 2007), at p 625.

⁷² (2004) 38 EHRR 43.

⁷³ Adoption and Children Act 2002, s 60.

⁷⁴ [2007] EWCA Civ 1206, at para [34].

⁷⁵ *Ibid.*

since, as argued above, the closer the case comes to a final hearing, the less likely it is that new enquiries would be made.

Ultimately, the court concluded that none of E's Article 8 rights could be violated by the order preventing disclosure of information about her. This was so in spite of the European Court of Human Rights' insistence in *Görgülü v Germany* that 'it is in a child's interest for its family ties to be maintained, as severing such ties means cutting a child off from its roots, which can only be justified in very exceptional circumstances'.⁷⁶ There is little evidence apparent from the judgment in *Re C* that the delay necessary to make the enquiries and disclose the information would have had any tangible impact on E's welfare whatsoever. It is thus highly doubtful that 'very exceptional circumstances' existed.

Similarly, the rights to establish one's identity and to be raised by one's natural family are both protected by the UNCRC.⁷⁷ While the UNCRC has not been incorporated into domestic law and is inevitably much less persuasive than the European Convention,⁷⁸ it is perhaps telling that none of the judges explicitly mentioned it.

The great irony is that, as Harris-Short and Miles point out, the introduction of the paramountcy principle in the 2002 Act was necessary to bring adoption law into line with Article 21 of the UNCRC itself.⁷⁹ Domestically, the welfare principle has, of course, been subject to criticism and suggestions as to re-conceptualisation.⁸⁰ English law nevertheless remains influenced by the strict interpretation of the word 'paramount' adopted by the House of Lords in *J v C*, which set down welfare as the sole consideration.⁸¹ It is therefore not enough to say that English adoption law is compliant with the UNCRC simply because it treats a child's welfare as the paramount consideration. Rather, account must be taken of the other requirements of the UNCRC before such a conclusion can be drawn.

The grandparents' position

Article 8

All three judges appeared to agree that, by contrast with F's position, the grandparents automatically had 'family life' with E, despite the fact that they had never lived with her. Arden and Lawrence Collins LJ cited *Marckx v Belgium* in support of this proposition.⁸² In that case, the European Court indeed suggested that 'family life' could *include* ties between grandparents and grandchildren, and expressed concern that the mother's family life could be hindered if the child did not become a member of the extended maternal family.

Contrary to the conclusions of the Court of Appeal, this is not necessarily equivalent to saying that all maternal grandparents have automatic 'family life', and Bainham refutes the idea that, following *Marckx*, it arises merely 'by virtue of formal kinship links between the

⁷⁶ [2004] 1 FLR 894, at para [48].

⁷⁷ UNCRC, Arts 7 and 8.

⁷⁸ Bainham argues that the European Court of Human Rights' stance itself 'falls well short' of the protection afforded to identity by the UNCRC. See A. Bainham, "'Truth Will Out": Paternity in Europe' [2007] CLJ 278, at p 281.

⁷⁹ S. Harris-Short and J. Miles, *op cit n 72*, at p 1000.

⁸⁰ See, eg J. Eekelaar, 'Beyond the Welfare Principle' [2002] CFLQ 237.

⁸¹ [1970] AC 668.

⁸² (1979) 2 EHRR 330.

child and members of the extended family'.⁸³ Felicity Kaganas agrees that 'a close link such as frequent contact' is required.⁸⁴ While the grandparents were in the same unenviable position as F for most of E's life, in the sense of being unable to demonstrate such a link due to a lack of knowledge about E's existence, it was illogical for the Court to say that they nevertheless had 'family life' while he did not.

Moreover, in this particular case, M had effectively renounced any 'family life' that she had with E. A failure to recognise the Article 8 rights of the grandparents could therefore do no real damage to M's 'family life'. It follows that much of the basis for the comments in *Marckx* was not present in *Re C*.

In any case, the Court of Appeal also agreed that the interference with the grandparents' Article 8 rights could be justified, since in making the order the Court would have already decided that E's welfare required it. This is another instance of the court presuming that welfare justifies an interference with Article 8 rights through the mechanism of Article 8(2).

In overall terms, *Re C* suggests that, as far as the English courts are concerned, it is easier for maternal grandparents to claim 'family life' with a child than it is for the child's unmarried father to do so. While this may be justified in some factual situations, it is surely undesirable as a general assumption about the nature of family life, and may not accurately represent the meaning of the European Court's statements on the matter in *Marckx*.

The likelihood of providing care

Arden LJ saw no reason to doubt the evidence of M concerning the grandparents and the rest of her family. She did not view the letter written by the grandparents to the local authority as sufficient to delay the placing of E for adoption, since the grandparents had not explained the extent to which they could help to take care of E. A 'better than evens' chance of becoming long-term carers was required to justify the assessment of the grandparents, and there was insufficient evidence to support the existence of such a chance.⁸⁵

The court also attached significant weight to the fact that the grandparents had found out about E only because of a mistake by the local authority, and opined that they should not be placed in a better position than they would have been if the mistake had not been made. The court noted that it was open to the grandparents to make an application to provide long-term care for E, and they had not yet done so. While adoption by relatives is often considered undesirable regardless of the standard of care they are able to provide,⁸⁶ the grandparents could have applied for special guardianship or a residence order. Again, the significant point is that, unlike F, they were able to have some influence on the future role that they would play in E's life.

The mother's rights

At this stage, it is arguable that M was in a strong position by default, since the rights of F, the grandparents and to some extent E were given short shrift by the court. Despite this, it is necessary to assess the court's treatment of her independent rights.

⁸³ A. Bainham, *op cit* n 47, at p 246.

⁸⁴ F. Kaganas, 'Grandparents' rights and grandparents' campaigns' [2007] 19 CFLQ 17, at p 20.

⁸⁵ [2007] EWCA Civ 1206, at para [45].

⁸⁶ See, eg N. Lowe, 'The Changing Face of Adoption – the Gift/Donation Model Versus the Contract Services Model' [1997] CFLQ 371.

The importance of a private birth

M's interests were reinforced by Thorpe LJ. His judgment was strongly influenced by the French right to an anonymous birth,⁸⁷ which he used to illustrate both that 'there is not one lawful answer alone to the tension between the rights of the mother and the rights of the child' and that 'there are valid social policy considerations for permitting the mother to treat the experience of pregnancy and birth as a private experience, even if engaging maternity services and duly registering the birth'.⁸⁸ On his account, the court risked precluding this option if it dismissed M's appeal.

Thorpe LJ was also anxious that the court should not 'exacerbate the mother's difficulties'.⁸⁹ While accepting that E's birth was not in fact secret and that E had not been abandoned in the true sense of the word, Arden LJ took a similar view. In particular, she noted the difficulties in the relationship between M and the grandparents and the fact that there was 'nothing to suggest those difficulties would be magically resolved by introducing E into the wider family'.⁹⁰

Although Thorpe LJ reached his conclusion on E's best interests without 'even factoring in any consideration of the mother's rights to privacy and to autonomous choices',⁹¹ Arden LJ was conscious that disclosure of confidential information about E could violate M's right to respect for her private life under Article 8. As before, however, this could be justified under Article 8(2) in the interests of E.

Arden LJ did accept some further limits on the extent to which M's rights could be invoked to justify non-disclosure. M's counsel sought to rely on Holman J's concern, expressed in *Z County Council v R*,⁹² that disclosure of information about a child against the mother's wishes could result in more pregnant women giving birth in secret or seeking an abortion. Counsel also added that there was a greater risk that babies would be abandoned rather than handed over to local authorities. Arden LJ urged caution with these arguments, since it was now more likely that women would seek abortions rather than carry babies to term. Despite this, she accepted that a risk to the health of the mother or child 'may constitute an additional reason at a macro level for the court having power to withhold information from relatives or the father of a child in an appropriate case'.⁹³

The power of the birth mother

Arden LJ attempted to adopt a balanced approach, and accepted the local authority's submission that the court or adoption agency should not unthinkingly act on what the mother says. She was nevertheless much more willing to allow the Article 8 rights of M to influence her decision than those of F or arguably E. Much of this was permitted by her apparent unification of M and E's rights, despite the fact that she explicitly set out to differentiate child-centred and mother-centred approaches, and to avoid following the latter.

⁸⁷ For analysis of the French law, see, eg N. Lefaucheur, 'The French "Tradition" of Anonymous Birth: The Lines of Argument' (2004) 18 *International Journal of Law, Policy and the Family* 319.

⁸⁸ [2007] EWCA Civ 1206, at para [61].

⁸⁹ *Ibid*, at para [80].

⁹⁰ *Ibid*, at para [44].

⁹¹ *Ibid*, at para [81].

⁹² [2001] 1 FLR 365.

⁹³ [2007] EWCA Civ 1206, at para [38].

This case clearly demonstrates the disparity in power between birth mothers and unmarried fathers without parental responsibility. As Andrew Bainham argues, '[t]he decisive criterion governing involvement of the father or the wider birth family on either side is effectively the mother's own decision'.⁹⁴ This is caused by the fact that only birth mothers automatically have both parental responsibility and 'family life' for the purposes of Article 8. The privileged position is often justified on the basis that the natural mother has carried and given birth to the child, and is most likely to be responsible for caring for him or her.⁹⁵

This reasoning undoubtedly has some merit, and indeed in *Re G (Residence: Same-sex Partner)*, Baroness Hale of Richmond recognised that 'the process of carrying a child and giving him birth (which may well be followed by breast-feeding for some months) brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other'.⁹⁶ Given the dramatic results produced in cases such as *Re C*, however, a more balanced approach is arguably necessary.

Conclusions

As well as the differences in the legal position of the three categories of relative involved, *Re C* demonstrates the sheer variation in the conclusions that can be drawn while purporting to treat a child's welfare as the paramount consideration. At one end of the scale, the trial judge thought that paramountcy, as defined in the 2002 Act with explicit reference to the importance of the birth family, removed any discretion on the issue of informing and consulting with relatives and required the local authority to do so. At the other end, the Court of Appeal's focus on welfare apparently led it to the conclusion that there was even less of a duty than had existed under the old law. These fundamentally opposed positions unwittingly give credence to the 'smokescreen' view of the welfare principle,⁹⁷ and do little to inspire confidence in the notion of the paramountcy of child welfare.

With respect, this decision arguably achieves the wrong result. F, and to a lesser extent the grandparents, should have been allowed a greater role in the process of determining E's future, for their own sake and for that of E. This is true even if it transpired that none of them were in fact suitable carers, or if the Court of Appeal had already decided this to be the case. At the very least, F deserved to be informed of his child's existence, and E's future welfare necessitated that she should have some information concerning the identity of her biological father.

Potentially, there are many reasons for the outcome, in addition to the breadth of the welfare principle. First, it could be that the court simply applied the relevant principles to the facts of the case in a way that was not intended by the legislature. Secondly, it could be that the 2002 Act itself pursues a policy of permanence that is simply normatively undesirable. Thirdly, the problems may have been caused by the weak legal position of the unmarried father, and the corresponding strength of the birth mother. This position is the result of statute and is permitted by the jurisprudence of the European Court of Human Rights,⁹⁸ although decisions such as *Görgülü* suggest that the European Court would have given more recognition to F's

⁹⁴ A. Bainham, 'Arguments about Parentage' [2008] CLJ 322, at p 350.

⁹⁵ See, eg J. Wallbank, 'Clause 106 of the Adoption and Children Bill: legislation for the "good" father?' (2002) 22 *Legal Studies* 276.

⁹⁶ [2006] UKHL 43, [2006] 2 FLR 629, at para [34].

⁹⁷ H. Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267, at pp 296–297.

⁹⁸ See, eg, *B v United Kingdom* [2000] 1 FLR 1.

rights than did the Court of Appeal. Fourthly, perhaps this decision is another instance of the enormous difficulty involved in reconciling the paramountcy principle with Article 8. It is a challenge to isolate which of these factors led to the result in this case, and in reality the problems were caused by a combination of all of them.

Finally, one is left with the feeling that the Court of Appeal was also influenced by factors to which mere readers of the judgment are not privy, such as more specific details on the nature of the relationship between M and F. Indeed, Thorpe LJ said that ‘information as to the mother’s family and as to the putative father [was] not lacking’.⁹⁹ The fact that none of this information is evident in the judgment is regrettable. It represents a setback for principled legal decision-making, especially in an appellate decision so early in the life of a new Act.

⁹⁹ [2007] EWCA Civ 1206, at para [79].