

R (on the application of (1) DL (2) ML) (Claimants) v NEWHAM LONDON BOROUGH COUNCIL (Defendant) & SECRETARY OF STATE FOR EDUCATION (Interested Party) (2011)

[2011] EWHC 1890 (Admin)

07/09/2011

Court

Queen's Bench Division

The court was required to determine the remaining live issues following the partly successful application for judicial review by the claimant prospective adopters (L) in respect of the defendant local authority's decision terminating the placement of a child (K) with them and its refusal to return him to their care. K had been placed with L with a view to his adoption by them. The local authority served notice under the Adoption and Children Act 2002 s.35(2) requiring L to return K to its care. L applied for judicial review of that decision which the court granted in part, having determined that by not giving L a full and informed opportunity to address the reasons why the s.35(2) notice had been given, the local authority had failed to act fairly in breach of the procedural requirements of the European Convention on Human Rights 1950 art.8, and directing the local authority to reconsider whether K should be returned to live with L. The local authority reconsidered that question but determined that he should not be returned. L initially challenged the new decision and sought an order that K should be returned to them, but in the course of the subsequent hearing they indicated that they no longer sought his return. The remaining live issues for determination were whether (i) the decision to give the s.35(2) notice to L constituted a breach of their (and K's) substantive rights conferred by art.8 of the Convention as well as the procedural rights conferred thereby; (ii) in addition to declaratory relief, L should be awarded damages under the Human Rights Act 1998. L contended that a public authority could not avoid a finding, and a remedy, based on an earlier substantive breach because it had, as ordered on a fairness challenge, reconsidered relevant issues and its new decision was either not challenged or the challenge to it failed.

The determination of K's placement and the family relationships, parental responsibility and rights that went with it could found a separate and additional breach of art.8 of the Convention based on an unfair process. Breaches of art.8 might be more serious and merit different relief, including higher compensation, if it could be shown that there was both a substantive and a procedural breach and/or that if the breaches had not occurred it was more likely than not that a different long term outcome would have occurred. In the instant case, however, a fair process around the time that the s.35(2) notice was given would have had the same result, namely K's removal albeit at a different time. Such distinction as there was or might have been between the established breach of art.8 founded on an unfair process or a breach founded on the consequences of the s.35(2) notice on the family lives of L and K did not

found a separate substantive breach. That was because, if a fair process at that time would have led to the removal of K, the essential breach of art.8 related to the circumstances, process and fairness of the termination of the placement rather than its substantive impact. That substantive impact and interference with art.8 rights was the removal of K from L's day-to-day care and thus the termination of the family life enjoyed by a child and the persons with whom he was placed for adoption, and of the prospect of the adoption taking place. Even if a fair process had taken place, K would still have been removed from L at a different and later time, but the timing point did not, of itself, found a substantive breach. There was, accordingly, no separate substantive breach of art.8 of the Convention and damages should not be awarded under the 1998 Act (see paras 12, 14-17, 28 of judgment).

Whilst the termination of a prospective adoption placement under the Adoption and Children Act 2002 s.35(2) had been unfair and in breach of the procedural requirements of the European Convention on Human Rights art.8, there was no breach of the prospective adopters' substantive rights under art.8 entitling them to damages under the Human Rights Act 1998. Had there been a fair process, the child would have been removed from their care in any event.

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