

Re N (an infant)

[HIGH COURT, 1994 (Fatiaki J), 22 March]

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Civil Jurisdiction

Family-adoption-wardship-jurisdiction of the High Court-care order-meaning scope and effect of-powers of Director of Social Welfare-High Court Act (Cap 13) Sections 18,20-Juveniles Act (Cap 56) sections 38,41,47,51,55.

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The foreign national Applicants who wished to adopt a child in care sought declarations. The High Court reviewed its wardship jurisdiction and the jurisdiction to make care orders but declined to interfere with the discretion of the Director of Social Welfare.

Cases cited:

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A v Liverpool City Council [1982] A.C. 363
Brian Nitin Naidu (a minor) Civil Action 33 of 1984
M v Humberside County Council [1979] 2 All ER 744
re AB (an infant) [1954] 2 Q.B. 385
re Curtis [1859] 28 L.J. Ch. 458

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re F [1990] A.C. 1
re H (A minor) 1978 Fam 65
re L (an infant) [1968] P.D. 119
re P (G.E.) (an infant) [1965] 1 Ch. D. 568
re Thain (an infant) [1926] 1 Ch. 676
re W [1985] 1 A.C. 791

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Sachin Deo v Brij Bhan Singh Civil Appeal 18 of 1991
The Queen v Gyngeall [1893] 2 Q.B. 232

J. Singh with Ms. A. Maharaj for the Plaintiffs
Ms I. Jalal for the 2nd Defendants
V. Nathan with Ms F. Fenton for the 3rd and 4th Defendants
D. Sharma for the 5th Defendant

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FatiakiJ:

On the 2nd of March 1993 the plaintiffs issued an Originating Summons seeking 6 declarations. The precise wording of the declarations need not be set out but it is sufficiently clear that the plaintiffs were seeking various declarations and orders that they or their legal advisors considered appropriate to facilitate their efforts to adopt an infant under the custody and care of the Director of Social Welfare.

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No reference was made to any statutory provisions or the High Court Rules in support of the Summons and although the court expressed its concern at the outset little assistance was provided by counsel for the plaintiffs in that regard

other than to appeal to the court's power as *parens patriae*.

No mention was made of Order 90 of the High Court Rules which sets out the procedure to make a minor a ward of court nor was such an order sought by the plaintiffs. In any event the existence of a procedure does not in itself empower the court of its own motion to make the order. The power (if any) must exist outside of the procedure and ought to be invoked by the parties by an appropriate application.

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Nor have the plaintiffs seen fit to seek the exercise of the statutory jurisdiction of the Magistrates Court under Section 16 (1)(e) of the Magistrates Court Act (Cap.14):

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“to appoint guardians of infants, and to make orders for the custody of infants”;

or sought the revocation of the care order by an appropriate application under the relevant provisions of the Juveniles Act.

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In the Matter of Brian Nitin Naidu, (a minor) Civil Action 33 of 1984 Kermode J. was faced with a similar jurisdictional difficulty where the uncle of an infant applied for an order that he be appointed legal guardian of the infant who was then 4 years of age and who had lost both parents.

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The learned judge in considering Section 20 of the Supreme Court (now High Court) Act said at p.2 :

“While that section refers to appointments and control of guardians I am in some doubt as to whether the section was, as regards infants, intended to cover wards of court or whether it extends to cover an application such as the instant one.”

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Then Kermode J. considered Order 91 (now Order 90) and said at p.2 :

“... it appears to me that the rule is designed to deal with applications arising out of statutory provisions in England which have no parallel in Fiji.”

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[Viz : Section 9 of the Law Reform (Misc. Provisions) Act 1949 (U.K.)]

In the circumstances the learned judge was driven to conclude:

“We have no legislation in Fiji which specifically gives this court power to appoint a guardian merely on the ground that the child is an orphan. There is a Juveniles Act which has provisions regarding custody charge and care of juveniles but that Act makes no provision regarding guardianship.”

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Finally in reference to Section 18 of the Supreme Court (now High Court) Act

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he said at p.3 :

- A "There is no doubt that the Supreme Court of Justice in England has jurisdiction to appoint guardians but if jurisdiction is conferred on the Court solely by an enactment which has no application in Fiji, can this Court by virtue of Section 18 assume that jurisdiction? The answer is not free from doubt. Section 22 of the Supreme Court Act may have application but ascertaining what the legal position was in England prior to the 2nd day of January, 1875 on the question of appointment of a Guardian could prove a difficult and tedious task."
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In the absence of any legislation in this country specifically dealing with the power of this court to make a minor a ward of court it is necessary to attempt a brief historical analysis of this Court's powers derived under Sections 18 and 20 of the Supreme Court (now High Court) Act (Cap.13).

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In the recent House of Lords decision in *In re F* [1990] A.C.1 Lord Brandon of Oakbrook said of the nature of the *parens patriae* jurisdiction as follows at p.57:

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"This is an ancient prerogative jurisdiction of the Crown going back as far perhaps as the 13th Century. Under it the Crown as *parens patriae* had both the power and the duty to protect the persons and property of those unable to do so for themselves, a category which included both minors (formerly described as infant) and persons of unsound mind (formerly described as lunatics or idiots)."

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I interpose here to observe that the provisions of Section 20 of the Supreme Court Act grants to this Court in substantially similar terms :

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"... all and singular the powers and authorities of the Lord High Chancellor of England, with full liberty to appoint and control guardians of infants and their estates, and also keepers of the person and estates of such persons as being of unsound mind are unable to govern themselves and their estates."

The learned Judge later said at p.57 :

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"... the present situation with regard to the *parens patriae* jurisdiction as related to minors survives now in the form of the wardship jurisdiction of the High Court, Family Division."

Lord Denning M.R. in *In re L* (an infant) [1968] P.D. 119 said of the inherent jurisdiction of the Court of Chancery in relation to infants at p.156 :

"... It derives from the right and duty of the Crown as *parens patriae* to take care of those who are not able to take care of themselves. *The Crown delegated this power to the Lord Chancellor, who exercised it in his Court of Chancery ...*

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The child was usually made a ward of court and thereafter no important step in the child's life could be taken without the Court's consent. But that was only machinery. Even if there was no property and the child was not a ward of Court nevertheless the Court of Chancery had power to interfere for the protection of the infant by making whatever order might be appropriate ... *This wide jurisdiction of the old Court of Chancery is now vested in the High Court of Justice and can be exercised by any judge of the High Court.* As a matter of convenience, the jurisdiction is exercised by making the child a ward of court and putting it under the care of a judge of the Chancery Division. But that is only machinery. If a question arises as to the welfare of a child before any judge of the High Court, he can make such order as may be appropriate in the circumstances." (emphasis mine)

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In this latter regard it may be noted that Section 18 of the High Court Act (Cap. 13) expressly gives the High Court:

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"... all the jurisdiction, powers and authorities which are for the time being vested in or capable of being exercised by Her Majesty's High Court of Justice in England."

Accordingly I am satisfied that this Court through the above statutory provisions has power to exercise the prerogative of the Crown or State as *parens patriae* in relation to minors or infants. Furthermore that the exercise of that power may be effected through wardship proceedings instituted under Order 90 of the High Court Rules.

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I am fortified in my view by the recent decision in Sachin Deo v. Brij Bhan Singh and Anor. Civil Appeal No. 18 of 1991 where this Court had to deal with the competing claims of a father and grandparents for custody of a 3 1/2 year old female infant.

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Scott J. in assuming jurisdiction in the matter said at p.4 :

"In exercising jurisdiction in this matter this Court does so by virtue of Sections 18 and 22 of the High Court Act (Cap. 13) ... It exercises the jurisdiction which has been exercised by the Court of Chancery from time immemorial. It is a paternal jurisdiction, a judicially administrative jurisdiction in virtue of which the High Court is put to act on behalf of the State as being the guardian of all infants in place of the

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- A parent and as if it were the parent of the child thus superseding the natural guardianship of the parent (See : The Queen v. Gyngall [1893] 2 Q.B. 232, 239)."

Then after referring to Section 1 of the Guardianship of Infants Act 1925 (U.K.) and the decision in In re Thain (an infant) [1926] 1 Ch. 676, Scott J. said at p.5 :

- B "It appears therefore that the rule that the welfare of the infant is the first and paramount consideration is not only the rule in Chancery but also in guardianship applications in Fiji ... It will also be noted that the wording of Section 1 of the 1925 Act is almost precisely the same as the rule laid down in custody proceedings by Section 85(1) of the Matrimonial Causes Act ..."

- C Having said that however I would like to express my concerns that in this day and age as we approach the 21st century it is wholly unsatisfactory that this court should have to resort to antiquated (even arcane) sources of the law to find its jurisdiction to deal with infants. Furthermore in a young population such as ours where a very large proportion of the population is under the age of 21 years the absence of any specific legislation in this area represents a serious lacuna in our statute books.

- D At this point I can quickly dispose of the question of the locus standi of the plaintiffs to bring the present proceedings. Very briefly the defendants argue that the plaintiffs being neither parents, relatives or guardians of the infant are persons with no legally vested interest in the child and therefore have no locus to bring these proceedings.

- E Counsel for the plaintiff however relies on a Deed of Guardianship purporting to appoint the plaintiffs' legal guardians of the infant and a Consent to Adoption also purporting to consent to the adoption of the infant by the plaintiffs.

- F I use the term "purporting" advisedly because both documents clearly post-date a care order issued by the Lautoka Magistrates Court committing the infant into the care of the Director of Social Welfare.

- G Furthermore I entertain the gravest doubts as to the legality or validity of such a Deed which not only operates during the lifetime of the parent in favour of foreign absentee guardians but impliedly excludes the Court's inherent jurisdiction in the infant's guardianship.

In my considered view the Deed of Guardianship was wholly ineffective in achieving what it purported to effect. It need hardly be said that this Court will resist any and every attempt to oust its inherent jurisdiction over infants and more so where an infant is the subject matter of a care order which has not been revoked.

Counsel for the plaintiffs also relies on the provisions of Section 38(3) of the Juveniles Act (Cap. 56) which directs the Director of Social Welfare "in all cases where it appears to him consistent with the welfare of the juvenile ... to endeavour to secure" the release of the juvenile to a "parent, guardian, relative or friend ..." and in this latter regard counsel claims that the plaintiffs may be considered friends of the infant. With all due regard to counsel's submission I cannot agree.

In the first place, Section 38(3) does not empower anyone to apply for the care or custody of an infant already under the care of the Director of Social Welfare under a care order, nor, does it provide for the revocation of a care order no matter how desirable in the interests of the infant such a course might be considered to be. Even Section 42 of the Juveniles Act which expressly deals with the revocation of a care order limits the applicants for such an order to : "a welfare officer or a parent or a guardian of the juvenile".

Secondly, even if the Section could be interpreted inferentially so as to confer locus on the plaintiffs (which I seriously doubt), the term "friend" occurs in the context "parent, guardian, relative or friend", and, although disjunctive, in my considered view the maxim *noscitur a sociis* ought to be applied so as to limit the category of persons who might reasonably be included within the term.

Indeed I would go so far as to say that if the term were not to receive a restricted meaning then the fears so clearly voiced by Kindersley V.C. in *In re Curtis* [1859] 28 L.J.Ch. 458 could well become a reality particularly when he said at p.459-460 :

"The Court does not exercise the jurisdiction in merely considering whether it would be for the benefit of the children that their custody should be with the father or with the mother, or with some other relative or with strangers, simply because, upon the whole, it would be not for the benefit of the children that there should be custody. I repudiate all such jurisdiction as belonging to this court. If such a jurisdiction existed I suspect that the peace of half the families in this country would be disturbed by applications showing, or attempting to show, what, I am afraid, might be shown in a great many cases, that it was most for the interest of the children that they should be removed from the custody both of the father and of the mother ; but happily there is no such jurisdiction."

I am not saying for one moment that the plaintiffs are officious by-standers seeking to meddle in the affairs of the infant or the Director of Social Welfare, but it is necessary to clarify that they are not friends under Section 38(3) of the Juveniles Act as has been argued.

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A Be that as it may I am satisfied that this application may be entertained under the wardship jurisdiction of this Court provided that the infant is ordinarily resident within the Court's jurisdiction. (per Denning M.R. and Pearson L.J. in In re P (G.E.) (an infant) [1965] 1 Ch.D. 568 at pp. 585 and 590 respectively.)

I also note that under Section 55 of the Juveniles Act, any person may apply to a juvenile court for the revocation of a care order.

B I hold therefore that this Court has jurisdiction to entertain the application of the plaintiffs not necessarily because they have locus standi to bring the application but by virtue of this Court's wardship jurisdiction being invoked albeit very indirectly.

C I turn next to the rather vexed question of the status and effect of the care order which was made by the Lautoka Magistrates' Court committing the infant into the care of the Director of Social Welfare on the 25th of February, 1991.

D It is necessary to examine briefly the circumstances under which the care order was made in this case. The male infant was born on 7th November 1990 at the Lautoka Hospital and was effectively abandoned at birth by his natural mother. The case was referred to the Social Welfare Department and a welfare officer Sudha Narayan dealt with it.

E She testified that prior to the birth of the infant she had been informed by the hospital authorities of the mother's intention to abandon her baby. Then a week after the infant was born she interviewed the infant's mother and grandmother and learnt of the unfortunate circumstances under which the infant was conceived and their unwillingness and inability to support the infant. They expressed the clear desire to have the infant placed into the care of the Director of Social Welfare with a view to his eventual adoption.

F The infant was accordingly taken into the care of the Director of Social Welfare and temporarily placed in a place of safety i.e. Lautoka Hospital. Three months later an application was duly made to the Lautoka Magistrate Court for a care order [See : Sections 38(4) and 41(2)(b)]. The care order was made and the infant was transferred from Lautoka Hospital to an approved institution namely the Dilkusha Home at Nausori on the 1st of March 1991 where he remains to date [See: Section 52(b) of the Juveniles Act].

G Learned counsel for the plaintiffs however challenges the validity of the care order on the ground that the mother of the infant was not advised or notified of the application and therefore was deprived of her, statutory right under Sections 41(3)(c) and 47 of the Juveniles Act to object to or be heard on the making of the care order.

I accept at once that Sections 41 and 47 of the Juveniles Act in terms requires the court to hear objections (if any) to the making of a care order from a parent

or guardian or their barrister and solicitor if they so wish but in my considered view such a requirement is directory and not mandatory so as to invalidate the care order for non-compliance.

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To begin with the requirements are directed at the court and imposes no statutory duty on the Social Welfare Department to serve or notify any person of its application for a care order.

Secondly, while the court is empowered to order investigations in respect of the juvenile concerned, having regard to the procedure adopted by the Social Welfare Department where an application by it for a care order is always accompanied by a Welfare Report setting out the background circumstances for the application, a juvenile court in my view is not obliged to ignore such a report and nevertheless order an investigation, much less where the report is of recent date and discloses that the infant had been knowingly and voluntarily abandoned at birth by its parent.

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I am also fortified in my view by the provisions of Section 45(5) of the Juveniles Act which requires any person making an application under Section 41 to notify a welfare officer (not the parents, guardian or relatives of the juvenile) and subsection (6) which requires the welfare officer to investigate various specified matters as are likely to assist the Court. Presumably it is at this investigative stage (if any) that the parents or guardian are afforded the opportunity to express his/her wishes concerning the future care of the child if he/she so desires.

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Thirdly, Section 38(3) of the Juveniles Act requires the Director of Social Welfare, where he has taken a child into his care pursuant to Section 38 (as occurred in this instance), and where it appears to him consistent with the welfare of the juvenile, to endeavour to secure that the care of the child is taken over by either a parent or guardian or a relative or friend.

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In my view that subsection imposes a positive duty on the Director of Social Welfare to use his best endeavours to return the child to its parents or guardian during the 3 month period that he is dutibound to care for the child without a court order. Of course the vigour with which he pursues his duty would be a matter for the Director to gauge bearing in mind the circumstances of the particular case and a Court should be slow to find impropriety in the absence of clear evidence to overturn the presumption *omnia praesumuntur*.

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In my view a juvenile court faced with an application for a care order by the Director of Social Welfare of what may be conveniently referred to as a Section 38 juvenile, is entitled to assume that the Director of Social Welfare had attempted and was unsuccessful in his endeavours to secure the release of the child to its parents, guardian or relatives under Section 38(3) in the 3 months preceding the application for the care order.

- A It may be conveniently noted at this stage that some 9 months after the care order was made the infant's uncle expressed an interest in taking over the care of the infant and although not bound to, the Department was willing at the time to release the child. The offer however was never taken up with the result that the Department subsequently changed its attitude. In this regard contrary to the submissions of counsel for the plaintiffs the uncle's interest cannot be considered
- B under the first limb of Section 38(3) of the Juveniles Act for the simple reason that the subsection had been long superseded by the making of the care order committing the infant into the care of the Director of Social Welfare.
- C Furthermore despite counsel's submissions to the contrary there is not the slightest doubt in my mind that the statutory jurisdiction to vary or revoke a care order is exclusively conferred on a juvenile court which by virtue of Section 16 of the Juveniles Act means a Magistrate's Court exercising *inter alia* any jurisdiction conferred under the Act. References therefore to the provisions of Section 42 and 55 of the Juveniles Act in the context of the present proceedings in the High Court would appear to be misconceived.
- D Needless to say the exercise by this Court of its wardship jurisdiction is not necessarily or inevitably inconsistent with the existence of a care order.
- Finally, by the provision of Section 42, a care order once made may be varied or revoked at any time upon the application of a parent or guardian.
- E Clearly then a parent or guardian who was unaware of an application for or the making of a care order could apply for its revocation on the ground that he was unaware of the application and is opposed to the making of the care order on some genuine and substantial ground relating to the welfare of the infant. Even then the Court retains a discretion in the matter.
- F In my view mere absence of knowledge of an application for a care order without more, is an insufficient ground to warrant the exercise of the court's discretion to vary or revoke a care order under either Sections 42 or 55 of the Juveniles Act. Much less would it render the care order void *ab initio* as has been argued.
- G In the light of the above I hold that the care order committing the care of the infant to the Director of Social Welfare was properly made, remains extant and is valid. What then is its effect ?

Section 51 of the Juveniles Act (Cap. 56) provides :

"The Director whilst having care of a juvenile in consequence of a care order under this Act shall, while the order is in force, have the same rights and powers and be subject to the

same liabilities in respect of his maintenance as if he were the parent of the juvenile, and the juvenile so committed shall continue in his care notwithstanding any claim by a parent or any other person."

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In these circumstances ought this Court to go behind the care order and invoke its wardship jurisdiction?

In attempting to answer that question it is necessary to examine in some more detail the provisions of the Juveniles Act (Cap. 56) as they relate to the powers and duties of the Director of Social Welfare over infants in need of care, protection or control.

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At the outset it will be seen that Section 38(1) imposes a positive duty on the Director of Social Welfare to assume the care of an infant without a court order if he is satisfied of one or other of 2 things and his intervention is necessary in the best interest and the welfare of the infant. The formula adopted by the draftsman in subsection (1) is "where it appears" which means where it appears to his satisfaction and confers an absolute discretion upon the Director of Social Welfare provided it is exercised *bona fide*.

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Furthermore Section 38(2) requires the Director of Social Welfare where he has assumed care of an infant pursuant to subsection (1) to keep the infant so long as the welfare of the infant requires it.

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Section 38(3) however requires the Director of Social Welfare to give the infant to a parent, guardian, relative or friend if they desire to take over the care of the juvenile and, if that event does not occur, nevertheless the Director must use his best endeavours to try to persuade the parent or guardian or failing them a relative or friend to take over care of the infant where it appears to him consistent with the welfare of the infant.

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It will be seen at once that up to this stage the Director of Social Welfare acquires no special rights, interest or status in relation to the infant other than that of a public officer performing his statutory duties.

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Section 38(4) however requires the Director of Social Welfare to apply for a care order in respect of the infant if the period of care is to be extended beyond 3 months. In other words an infant taken into the care of the Director of Social Welfare under Section 38(1) may be kept in the Director's care for a period of 3 months without a Court order and not any longer.

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The application for a care order is then made under Section 41 and upon the grant of a care order the status and rights of the Director of Social Welfare over the infant undergoes a dramatic transformation.

The effect of the care order may be described as putting the Director of Social Welfare thoroughly in the position of *loco parentis*, practically as if he had

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A adopted the child, and is given all parental rights (with few exceptions) while the parent is deprived of those rights. In other words with the making of the care order the Director of Social Welfare has the legal right to control the child and his future, subject to the right in the parents or guardian to apply to the Juvenile Court to vary or revoke the care order.

B It is in this latter situation i.e. post care order that the Courts in England have consistently held over several decades that the exercise by the High Court of its inherent powers in wardship proceedings has been severely restricted.

C In this latter regard I gratefully acknowledge the assistance I have received from the submissions of learned counsel for the infant and would only refer to a decisions that illustrate the approach of the Courts in England when dealing with legislation in substantially similar terms as that to be found in our Juveniles Act (Cap. 56).

I begin with the dictum of Lord Goddard C.J. in *In re AB* (an infant) [1954] 2 Q.B. 385 in which the learned Chief Justice considered the provisions of Section 1 of the Children Act 1948 (U.K.) which is in substantially identical terms to Section 38 of our Juveniles Act.

D In rejecting a submission that the Act did not affect the Court's parental jurisdiction in that case the learned Chief Justice said at p.346 :

E "The Act of 1948 not only enables, but directs the local authority to act without an order of the Court. ... I cannot see, under those circumstances, how this Court can step in and say that as between the local authority and the foster-parents, and contrary to the wishes of the local authority we can order the child to remain with the foster-parents. To do so would be to usurp the duties which are laid on the local authority by the Act of Parliament and we should be substituting our own view as to what was right for the child as against the views of the local authority. It would be quite contrary to the tenor of Part I and Part II of the Act of 1948 for this Court to assume the duty of reviewing the discretion of the local authority, and substituting their own opinion as to what was for the benefit of the child."

G In this case I accept that there are no specific statutory provisions, rules or even departmental guidelines relating to inter-country adoptions and the plaintiffs argue that in the absence of such legislative constraints the Director of Social Welfare ought not to impose any limitations as to the countries to and from which applications for inter-country adoptions ought to be considered or accepted.

In this latter regard the evidence of the Director of Social Welfare was to the effect that Fiji maintains inter-country adoption arrangements with New Zealand and Australia and to a lesser extent with other Pacific Island countries.

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These arrangements worked out over several years and already in place, exists on a government-to-government level between the Fiji Department of Social Welfare and its official governmental counter-part in New Zealand and each State Government in Australia. Under the arrangements all applications and requests are submitted through the respective governmental authorities and includes such matters as official vetting and approval of applicants, preparation and approval of homestudy reports, post-adoption monitoring and reporting and facilitation of immigration requirements and the eventual adoption of the infant in the host country.

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To the question : "Why not consider Canada and U.S.A. where there are many Fijian emigrants?" he answered :

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"In the interest of the children placed in our care we felt it unnecessary to open the net any wider and involve ourselves in unnecessary administrative work. Our sole interest is the future welfare of the children placed in our care. In fact we feared that an expansion of the system would make it harder for us to maintain an efficient, regulated system."

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Earlier in his evidence the Director had said :

"Since 1988 we found out that the volume of applications from N.Z. and Australia far exceeded the supply situation of children available for adoption ... I decided because of lack of staff (i.e. we had only 1 officer on inter-country adoptions) to confine our inter-country adoptions to Australia and N.Z. and other Pacific Island Countries. Decision made because we considered it unnecessary to open up our adoption to the whole world."

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In cross-examination the Director stated that :

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"Limitations of resources, availability of children and unfamiliarity with adoption and reporting procedures were all factors that limit the area of inter-country adoptions."

More specifically in relation to the plaintiffs the Director said :

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"We have nothing against the Lakhans but in the interest of Nilesh and it was clearly explained to them that they were outside the existing system that was already in place and we were satisfied that the existing system would suffice to ensure that Nilesh had a good prospect for the future. Even assuming

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we were willing to make an exception in their case they would have to wait in line."

A and later in cross-examination he said :

B "If Nilesh was sent to Canada (from where the plaintiffs originate) we would probably have to start negotiations with (the Canadian Authorities) and establish a relationship with the Canadian Embassy, immigration and social services ... If Lakhans had been approved by us they would go on a waiting list and would wait at least 1 year, at most 3 years. The Lakhans are here seeking preferential treatment because of a claimed interest in a child. If Nilesh given to Lakhans he would be stepping into our unknown."

C Finally in answer to the Court, the Director of Social Welfare said :

D "To my knowledge there is no written law dealing with inter-country adoptions. There is no written law requiring adoption be available worldwide or restricting the area. In the absence of any written law it has been left to the Department to work out. Department only able to work our arrangements with Australia and New Zealand and Pacific basin countries."

E It is clear that all matters pertaining to inter-country adoptions such as the eligible countries and procedures have been left entirely for the Director of Social Welfare to work out as he sees fit. In those circumstances and in the light of the Director's explanations it would not be proper or indeed desirable for this Court to seek to interfere with the Director's discretion and effectively impose additional administrative duties on an already overly taxed situation.

F The legislature in any event has indirectly conferred a final reviewing power over inter-country adoptions upon the Minister responsible, in so far as Section 54 of the Juveniles Act requires the Minister's written approval for the Director of Social Welfare to arrange for the emigration of an infant subject to a care order, where it appears to (the Minister) to be for the benefit of the juvenile.

G There is no suggestion that the existing inter-country adoption arrangements are in some way in breach of or in disregard of the Director's statutory duties nor has it been shown that the country limitations imposed by the Director (as explained) are an unlawful or unreasonable exercise of his discretion in the "Wednesbury" sense [1948] 1 K.B. 223, 234 per Lord Greene M.R.

Rather the plaintiffs appear to suggest that in failing to open up inter-country adoptions to include Canada and in refusing to consider their application in the case of Nilesh, the Director was somehow thereby not acting in the best interest and welfare of the infant and therefore this Court should exercise a general

reviewing power over the Director's discretion in relation to inter-country adoptions and in particular, the case of Nilesh. I cannot agree.

In the first place, it is by no means clear how the obvious interests of the plaintiffs in having their application considered could be equated with or have any bearing on the paramount interest and welfare of the infant who has been committed to the care of the Director of Social Welfare under the Juveniles Act, and secondly, whilst it is tempting to ask the question whether the interests and future welfare of the infant would be better served by him being adopted by the plaintiffs or by the fifth defendants as proposed by the Director of Social Welfare, such a question would be misconceived.

Lord Brightman in rejecting a similar question in In re W [1985] 1 A.C. 791 said at p.809 :

"It could well be said that the case calls for an objective investigation, with a right for the uncle and aunt at least to be heard, which right only exists in the High Court. But I do not think the question is legitimate. Whether the question is resolved by the local authority or the High Court, the question before the resolver is precisely the same, namely, whether a home with outside adoptors as envisaged by the local authority, or a home with the uncle and aunt as sought by them, ... is in the best interest of (the infant). The arbiter chosen by Parliament to make that decision is the local authority."

Furthermore in the leading case of in A. v. Liverpool City Council [1982] A.C. 363 Lord Wilberforce in rejecting the existence of such a general reviewing power in the Courts said at p.372 :

"Parliament has by statute entrusted to the local authority the power and duty to make decisions as to the welfare of children without any reservation of a reviewing power in the Court ... In my opinion Parliament has marked out an area in which, subject to the enacted limitations and safeguards, decisions for the child's welfare are removed from the parents and from supervision by the Courts."

His Lordship recognised however that the Court's inherent jurisdiction existed in limited instances when he said at p.373 :

"The Court's general inherent power is always available to fill gaps or to supplement the powers of the local authority : what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by Statute to the local authority."

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Lord Roskill for his part and in similar vein said at p.377 :

- A "I am of the clear opinion that, while the prerogative jurisdiction of the Court in wardship cases remains, the exercise of that jurisdiction has been and must continue to be treated as circumscribed by the existence of the far-ranging statutory code which entrusts the care and control of deprived children to local authorities. It follows that the undoubted wardship jurisdiction must not be exercised to interfere with the day-to-day administration by local authorities of that statutory control."
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and later at p.379 :

- C "Clearly the jurisdiction can be invoked by the local authority when its own powers are inadequate to make the welfare of the child paramount or when it is necessary to this end to take action against a stranger. But the Court must not interfere with those matters which Parliament has decided are within the province of a local authority to whom the care and control of a child has been entrusted pursuant to statutory provisions."
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- E I am not unmindful of the unusual case of In re H (A minor) (Wardship : Jurisdiction) 1978 Fam 65 in which the High Court exercised its wardship jurisdiction notwithstanding that the child was then under the care and control of the local authority pursuant to a care order, in order to enable the parents to return to their native Pakistan with their infant child ; or of the dictum of Sir George Baker P. in M. v. Himberside County Council [1979] 2 All E.R. 744 which the learned judge said at p.751 :

- F "... it seems to me that the High Court will assume jurisdiction in limited circumstances. First, if the powers of the lower court require to be supplemented, that is to say, where its powers are inadequate. Second, if there has been some irregularity or excess in the exercise of the powers of the local authority, and, third, the composite head, if there is something, exceptional, something really unusual about the case which necessitates the intervention of the High Court."

- G Both decisions which are cited in the list of authorities and submissions of the plaintiffs' counsel have been the subject-matter of adverse judicial comment which undermines their usefulness as judicial precedents to be followed by a court of first instance.

In particular in A v. Liverpool City Council (op. cit), Lord Wilberforce said of In re H at p.373:

"This is a case very familiar to anyone concerned with the insoluble syndromes of infancy case in which the decision, made in most a circumstances, appears a wise one but if taken to appeal might be hard to sustain, at least on the grounds assigned. I have no inclination to criticise such decisions even if they make doubtful precedents."

A

Lord Roskill for his part preferred to explain the decision in In re H (op. cit) at p.378 :

B

"... as better supported on the ground that the wardship jurisdiction of the Court could properly be invoked in addition to the statutory jurisdiction of the local authority because it was only in this way that the result which was the best in the paramount interest of the child could be achieved, the local authority and the juvenile court being unable within the limits of their powers to achieve that result."

C

As for the third category in M. v. Humberside County Council (ibid), Lord Scarman in In re W (op.cit) said at p.797 :

"... in so far as (it) contains dicta suggesting that there is an exceptional class of case in which though Parliament has entrusted decision on the merits to the local authority, the High Court may intervene to review the merits, the dicta (are) a false guide to the true principle of the law."

D

His Lordship then outlined the relevant principle as follows when he said :

E

"The High Court cannot exercise its powers, however wide they may be, so as to intervene on the merits in an area of concern entrusted by Parliament to another public authority. It matters not that the chosen public authority is one which acts administratively whereas the Court, if seized of the same matter, would act judicially. If Parliament in an area of concern defined by statute (the area in this case being the care of children in need or trouble) prefers the power to be exercised administratively instead of judicially, so be it. The Court must be careful in that area to avoid assuming a supervisory role or reviewing power over the merits of decisions taken administratively by the selected public authority."

F

G

In the light of the above I have no hesitation in holding that this court ought not to exercise its inherent wardship jurisdiction in the particular circumstances of this case where the plaintiffs have neither sought to vary or revoke the care order nor applied for a judicial review of the care order or the actions of the Director of Social Welfare under it.

Re N (an infant)

A In the circumstances it would be both inappropriate as well as ill-advised for this Court to express any views as to the comparative advantages or disadvantages of the homestudy reports of either the plaintiffs or the fifth defendants.

B Parliament has conferred on the Director of Social Welfare far-reaching powers and a near absolute discretion to order the lives of less fortunate children committed to his care and although the exercise of those powers are reviewable by the process of judicial review, they remain largely unsupervised by the Courts. It is therefore of utmost importance that the Director's decisions should be made not only with responsibility but also with a conscious regard to the sensitivity which those decisions inevitably have upon the naturally strong emotions of the persons affected.

C It needs hardly be said also that this is not litigation in the ordinary sense of the word. There are no winners or losers. All parties are here to put forward what they consider to be in best interests and welfare of the children which is the foremost concern of this Court.

D The plaintiffs' originating summons is dismissed with costs to the defendants to be taxed if not agreed.

(Action dismissed.)

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