

Re X (Emergency Protection Orders) [2006] EWHC 510 (Fam)

Hearing where local authority was seeking a care order for X, who had been in foster care since an EPO was granted.

This is a summarised version of the full judgment and has been released by Mr Justice McFarlane as it contains detailed consideration and criticism of how the local authority had been able to obtain a 'Draconian' EPO in this case. He also sets out some firm guidelines on how to handle applications for EPO's in the future.

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 16th March 2006

Before :

MR JUSTICE McFARLANE

RE X: EMERGENCY PROTECTION Orders

JUDGMENT

Mr Justice McFarlane :

Background

1. In January and February 2006 I conducted a three week hearing of a case in which a local authority sought a care order with respect to a 9 year old girl (who I will refer to as X). The local authority had been aware of the girl, who was displaying some modest behavioural difficulties, for some months. The girl's mother had expressly sought the help of the social services and child health services. Professional concern about X was such that two Child Protection Case Conferences had been held, and a low level of intervention by way of a referral to the lo-

cal Child Guidance Unit and some further assessment work had been recommended. The child's name had been entered onto the local Child Protection Register in the category of 'emotional harm'.

2. On the 23rd November 2004 there was a further case conference to review the progress of the work. Those at the meeting remained concerned about the child's emotional well being. The local authority was to hold a legal planning meeting within the following five days to consider whether care proceedings should be issued. A psychiatric assessment of the mother, which was in the process of being set up, was to proceed; as was a further psychological assessment of the child. At the time that the meeting concluded there was no suggestion from the social workers, or any other professional attending the case conference, that the child should be removed from her parents' care – either immediately or at all.

3. Within two hours of the case conference concluding, however, the social work team leader was giving evidence before a bench of lay justices in support of an application for an Emergency Protection Order ('EPO'). That application was made without any notice to the parents. The justices granted an EPO. At that time the mother and child were at a local hospital, to which the mother had taken the child for a check up because the child was complaining of abdominal pain. The social workers, accompanied by four uniformed police officers, attended the hospital and removed the child from her mother's care. She was placed in foster care, in which state she remained (with a number of changes of carers) for the following 14 months under a series of interim care orders.

4. In the course of the hearing I investigated how such a Draconian order came to be granted in a case which, up until that time, had been one where low level intervention by way of assessment and counselling had been the agreed plan. As a result of that investigation I have found significant flaws in the manner in which the system operated by the social services and the family justice system itself impacted upon this family. There is in my view a public interest in wide publicity being given to what took place in this case in the hope that lessons may be learned to ensure that what befell this family is not repeated elsewhere.

5. In order to maintain the focus upon the circumstances surrounding the EPO, and in order to preserve the confidentiality of the family's circumstances, the full judgment in the case, which runs to over 300 paragraphs, is not being released for publication or law reporting. I therefore propose to do no more than summarise the factual background in very short terms.

6. The facts of this case have led me to produce a judgment which is highly critical of the social workers and the social services department who became involved with this family. I wish to record at the outset of this reported version of the judgment that, in my experience, failures of this degree are rare indeed. The ordinary experience of the family courts is of social workers and social services departments whose professional work is both valuable and appropriately targeted to meeting the particular needs of children and their families. Often that work is undertaken within the context of limited resources and consequential stress upon the social services organisation and the individuals who work within it.

Summary of history

7. Prior to the commencement of the proceedings X, an only child, had always lived at home with her parents. Concern about her behaviour at home and at school had led her mother to seek professional assistance. This led to a recommendation from a child and adolescent psychotherapist that the girl would benefit from some ongoing psychological support. The psychologist also referred the case to the social services because she was concerned about X who seemed very scared, insecure, withdrawn and frightened. She was also concerned about how well the father's mental illness was controlled and about issues regarding sexual abuse arising from the mother's own childhood and a sexual incident that had occurred with the girl and a young cousin some years earlier.

8. An initial case conference took place in March 2004. A range of assessments were recommended. It was also recommended that psychotherapy counselling services should be provided to the child and her mother by the Child Guidance Unit as soon as possible. The child's name was entered on the local Child Protection Register in the category 'emotional abuse'. It is to be noted that the government guidance "Working Together to Safeguard Children" defines "emotional abuse" as being "the persistent emotional ill treatment of a child such as to cause severe and persistent effects on the child's emotional development".

9. By the time of the next case conference in June 2004, few if any of the planned interventions and assessments had taken place. Reports from the school and the health authorities indicated improvement in the child's behaviour and general health. The Child Protection Registration was continued and the planned intervention remained largely unchanged.

10. Prior to the final case conference, the local authority held a legal planning meeting to consider the prospect of court proceedings. The notes of the legal planning meeting in part record the following: 'No neglect issues → home and care good. Mother and child have good relationship. Detrimental to move'. The notes also record: 'SS view mother ill / factitious illness. Suspicion → multiple personality disorder'. The meeting concluded that care proceedings should not be issued at that stage.

11. At the case conference, despite the legal planning meeting having been told of the social worker's view being that this was a case of factitious or fabricated illness, no reference was made to any such condition. There was however a contribution by the father's community psychiatric nurse ['CPN']. The father had for a number of years suffered from a schizo-affective disorder. His condition had been moderated in recent years by regular medication. At the conclusion of the hearing I found as a fact that the CPN told the case conference that, if X was taken into care, the father might possibly commit suicide as he was so close to his daughter and that was what kept him going mentally. The CPN's contribution is neither recorded nor referred to in the official minutes of the meeting. The social workers assert that the CPN asked for his advice to be treated as confidential (he denies making this request). The result was that there is no official record (either minutes or on the social work file) of this important information. From the parents point of view, there is not even a record that confidential information was given to the meeting.

12. The case conference concluded, as I have described, with a continuation of the previous plan, but with the recommendation that the local authority should hold a legal planning meeting to consider possible care proceedings.

13. At the end of the case conference, the social worker received information from a nurse at the local hospital to the effect that the mother was at the hospital requesting that X be seen by a doctor for stomach pain, despite the fact that the triage nurse had assessed her and considered that there was no problem.

14. The social worker and her Team Manager considered this new development and determined that there was a need for X to be removed immediately from her parents' care under an EPO. This decision was communicated to the conference chair, who was apparently still in the building, and to the relevant social services service manager. Both of these individuals apparently approved the proposed course of action, although neither was tasked with making a formal decision upon it.

15. The application for an EPO was made without notice to the parents. The justices heard evidence from the team manager and granted the order that afternoon. Thereafter the social workers attended at the hospital with four uniformed police officers and removed X from her mother's care. She was placed in an emergency foster placement.

16. Care proceedings were then commenced. At that time the local authority asserted that the child was being emotionally abused. The social services' stated concerns for the child's wellbeing were wide ranging and included:

- a) Possible sexual abuse;
- b) Unhealthy beliefs within the family regarding spirits and ghosts;
- c) Symptoms of illness being fabricated or induced in the child;
- d) The mother's anxiety about the child being bullied at school, where the school have found no evidence of this; and
- e) The father's history of mental ill-health.

17. A central plank of the social services case was that this was a case of fabricated or induced illness (previously referred to a Munchausen's Syndrome by Proxy). This was clearly the factor that was uppermost in the minds of the social workers when, having heard that the mother was at the hospital, they determined that the child needed to be immediately removed from her parents' care. X had indeed received medical attention in the previous months and years. However no doctor had ever raised any question relating to induced or fabricated illness. Despite the fact that the social workers had entertained the view for some weeks that this was such a case, at no time did they seek any medical advice. Moreover, once the care proceedings began and the local authority lawyers set out that the case was based on an allegation of induced or fabricated illness, even at that stage the local authority made no attempt to obtain a medical opinion on the point. In the course of the guidance that follows, I will give specific attention to cases of alleged induced or fabricated illness.

18. Finally, by way of background, it should be recorded that one year after X was taken into care, and only after receipt of all of the expert assessments that were prepared for these proceedings, the local authority abandoned its reliance upon any allegation of sexual abuse or induced/fabricated illness. The case thus proceeded on the basis

solely of allegations of emotional abuse to X. At the conclusion of the hearing I found that the threshold criteria of 'significant harm' under CA 1989, s 31 were not established. With the agreement of all parties, I made X a ward of the High Court for a short period in order facilitate the child's return home and the provision for support to the family as they began to rebuild their life together.

19. The local authority's actions on the 23rd November 2004 in applying for and obtaining the EPO based on the social worker's uninformed opinion that this was a case of fabricated illness were described by counsel for the mother as 'outrageous' and 'inexcusable' leading, as it did, to 'the destruction of this family's ordinary life'; such descriptions do not, in my view, overstate the quality of what took place on that day.

20. The child protection system depends upon the skill, insight and sheer hard work of front line social workers. Underlying those key features, there is a need for social workers to feel supported and valued by the courts, the state and the general populace to a far greater degree than is normally the case. Working in overstretched teams with limited resources, social workers frequently have to make crucial decisions, with important implications, on issues of child protection; often of necessity these decisions must be based upon the available information which may be inchoate or partial. There are often risks to a child flowing from every available option (risk of harm if the child stays at home, risk of emotional harm at least if the child is removed). It is said that in these situations, social workers are 'damned if they do, and damned if they don't' take action. Despite these difficulties, it is my experience that very frequently social workers 'get it right' and take the right action, for the right reasons, based upon a professional and wise evaluation of the available information. Such cases sadly do not hit the headlines, or warrant lengthy scrutiny in a High Court judgment. I say 'sadly' because there is a need for successful social work, of which there are many daily examples, to be applauded and made known to the public at large.

21. I wish to record without hesitation that I have found no evidence of any malevolent or unprofessional motive featuring in the actions of any of the individual social workers who have been involved in the case. They had, I am sure, only a desire to meet X's needs (as they perceived them to be) as their motive. The only exception to this generalised observation might have been with respect to team manager's actions in giving the evidence that she gave at the EPO hearing, but, as she was not in a position to be asked directly about this (because the material to challenge her was only available after she had given evidence) I am not able to express a concluded view on her motives.

22. Against the background that I have described in the previous paragraph, it gives me absolutely no pleasure to have to record the multiple failings of the local authority in this case in its involvement in the life of this family. To do so was necessary not only in order to come to a conclusion on the issues in this case, but also in order that lessons may be learned for the future in other cases.

23. The legal costs generated by these care proceedings are substantial and run to over £500,000. On the basis of the findings that I have made, some of which are recorded in this shortened public judgment, at the conclusion of the case I made an order that the local authority should pay £200,000 towards the parents' legal aid bill.

24. I set out below those parts of my judgment which deal with the following topics:

- a) Recording confidential material given during a case conference;
- b) Emergency Protection Orders
- c) Fabricated or induced illness allegations.

Recording confidential material given to a Case Conference

25. At this stage it is necessary to consider the position with regard to the information given to the case conference by the CPN and which was treated as confidential for the purposes of the minutes. Whilst the CPN asserts that he never sought for his contribution to be kept confidential, the absence of any reference to it in the otherwise detailed minutes indicates that it was indeed regarded as confidential.

26. A thorough search of the social work files has failed to reveal any record of this information, which was, on any view, of importance. No note of it was apparently made by either the social worker or team manager attending the conference. Nowhere is there a 'confidential' section of the minutes where the material is recorded. Indeed the fact that confidential information was imparted by the CPN is not mentioned in the minutes. Further, the CPN's contribution is not referred to in any of the social work statements filed in these proceedings and it was only during the course of this hearing, when the social worker gave oral evidence and the notes of the EPO hearing were unearthed from the files, that it became known to the court, the guardian and the parents that anything of this sort had been said at all.

27. The unsatisfactory nature of the way that this key information was treated in this case is plain. Firstly, there is no accurate official record of what was said. Secondly, once the need for confidentiality had passed, there was no disclosure of it to the parents, this court or the guardian.

28. The very late discovery that important observations had been made to the case conference by the CPN, but not recorded in the minutes, has led this court to give consideration to the practice of dealing with information that is given to a case conference which, at least at the time, needs to be kept confidential from the parents. I have been assisted by the researches of counsel who have drawn my attention to the guidance given nationally in "Working Together to Safeguard Children" (DOH 1999). I have also seen similar local guidance produced for the area involved in this case. I do not intend to quote the detailed guidance upon exclusion of parents from parts of the conference and upon the taking of minutes which are to be found at paragraphs 5.58 and 7.15.3-13 of Working Together.

29. In line with the guidance, and in accordance with fairness, good practice and, if proceedings take place, the need for the court to have an accurate record of what is said in all parts of a case conference, I consider the following to be basic requirements in this regard:

- a) If the circumstances are sufficient to justify the exclusion of the parents from part of a case conference (such circumstances are described in the paragraphs of guidance referred to above), or the parents are otherwise absent, a full minute should nevertheless be taken of everything that is said during the conference;
- b) If it is considered necessary to treat part of what is minuted as confidential from the parents, that part of the minutes should be disclosed for approval to the professionals who attended the conference, but that part of the draft/approved minutes should be maintained separately from the body of the minutes which are sent to the parents;
- c) The non-confidential section of the minutes should expressly record at the appropriate stage that confidential information was disclosed or discussed;
- d) The need for continued confidentiality with respect to confidential sections of the minutes should be kept under review by the conference chair, with confidentiality only being maintained if it continues to be necessary.

The Emergency Protection Order

30. Having heard evidence from the social worker, the team manager and the local authority lawyer regarding the events of the afternoon of 23rd November, and having obtained the notes made by local authority lawyer and by the justices' clerk during that hearing, the following account is probably close to what took place in the lead up to the justices' decision.

31. At the end of the case conference, and before any knowledge that X had been taken to hospital that day, there was no intention to seek the removal of the child from parental care that afternoon. The local authority's intention was to hold another legal planning meeting to consider the option of care proceedings.

32. The social worker received a message from a triage nurse at the hospital. This telephone contact was, I find, not a 'referral' by the hospital to the social services, but was simply the proper action of the nurse in reporting an event in relation to a child who was on the CPR (the mother having quite properly expressly informed the nurse of X's registration).

33. The social worker's note reads: '[Nurse] stated Mother attended Walk-in with X with abdominal pain. Mother demanded further investigation, stating this was an ongoing problem. Worms for the last 2 years. ...X referred to Children's A+E. Nurse's observation of X is that she is fine.' This note somehow became inflated when the social worker later produced her statement in support of the application for an interim care order to: 'Mother then demanded X have further investigations and treatment' (emphasis added).

34. The nursing notes do not go beyond the mother's account of events, which is that she was concerned about X and, despite the nurse's assurance, simply wanted her daughter to be seen by a doctor for assessment.

35. Thereafter the social worker ascertained from the A+E department that X was being seen by the doctor and he would telephone the social services in about an hour. In the event the application for an EPO went ahead without any feedback from the doctor being obtained by the social services.

36. The social worker accepted in evidence that she knew that X had not been presented to the hospital for a number of months and that the issue had not been raised as a concern at the case conference.

37. The team manager in evidence to me stated that her concern was that X would be exposed to unnecessary medical examination which could be abusive to a child. She was pushed further to justify her decision to go for an EPO and her reply, on more than one occasion was: 'I was in a position of having to say that X was 100% safe in that household and I could not do that'.

38. The team manager stated that she had discussed her decision with the conference chair and with her Service Manager.

39. The social worker, on the instruction of the team manager, sought advice from the local authority legal department. The lawyer, Ms A is noted as being 'not sure we have enough grounds for EPO'. Notwithstanding this advice, the social workers determined that an EPO application would be made that afternoon. In evidence the social worker told me that the EPO had been sought because X was at immediate risk of further emotional harm and unnecessary medical investigation by the hospital.

40. Ms B, who was the lawyer who represented the local authority at the EPO hearing, explained to me that the lawyer's role is to advise whether there are sufficient grounds to apply without notice. The decision whether to do so is up to the social work team. It would, she considered, be appropriate where the legal adviser was unsure if there were sufficient grounds to bring the case without notice, to issue the application anyway and let the magistrates decide if the grounds were made out.

41. Ms B, who had been at the local Family Proceedings Court that day, was asked to remain in order to take part in the EPO hearing. She told me that she knew nothing about the case. However, after Ms B had given her evidence, the note of the legal planning meeting held in September 2004 was disclosed which shows that she was the lawyer conducting that meeting. The notes of the meeting record that there is a good attachment between X and her mother and that it would be detrimental to the child to remove her from home. The team manager's evidence is that she recalls the advice given at the September meeting (presumably by Ms B) being that there were insufficient grounds to support an application for a care order.

42. Ms B's role in the hearing seems to have been that of introducing the social work witness and taking notes of the proceedings. She did not recall submitting any detailed arguments in support of the application. Neither does she seem to have addressed the magistrates about the approach in law (both domestic and ECHR) that is required when an application for an EPO is made (let alone one made without notice).

43. Ms B explained to me that an application for an EPO which is to be made without notice is usually made by just the social worker or the team manager without the attendance of any lawyer from the local authority at all. A lawyer is normally in attendance only if the application is made on notice.

44. A formal application for the EPO was prepared by the local authority legal department; however having investigated the matter it is clear to me that the justices did not have this application form (or indeed any written material about the case) in front of them when they heard the application.

45. The Team Manager, because of her role in the hierarchy, lacked detailed and direct knowledge of the case. She explained to me that she had invited the justices to await the arrival of the social worker who was coming to court with the files so that the social worker could give first hand evidence. She recalls, however, that the bench were keen to start the hearing and insisted upon her giving evidence. She told me that the court wanted to get on with the day's listed cases. The team manager considered that it was appropriate for her to give evidence, as she had 'a broad knowledge of the case'. She accepted that only having a broad knowledge may have led her to tell the magistrates that the father still had a ceremonial sword at the home as she was not seized of all the details.

46. It is to be borne in mind that the magistrates had no written material before them about the case at all. Their sole source of information was the team manager's 'broad knowledge' of the case.

47. In order to understand what oral evidence was given to the justices, it has been necessary to rely upon the handwritten notes of Ms B and the justices' clerk. Counsel have prepared a summary of the material as part of their closing submissions. The summary is not disputed by other parties and I thus repeat it at this stage in the judgment. The team manager apparently made the following assertions to the magistrates:

- (i) The mother was suffering from MSBP/FII.
- (ii) That there were allegations of sexual abuse of X, (without any proper indication that these were historic and that the parents had acted with complete propriety in dealing with them and protecting X).
- (iii) That the mother was projecting her own trauma onto X.
- (iv) That the mother was not complying with the child protection plan.
- (v) That there had been no mental health assessment on the mother (ignoring the fact that the same was in the process of being carried out).
- (vi) That the father was mentally ill, (without any reference to the fact that his condition was well controlled and – as the team manager accepts – she knew this).
- (vii) That the father suffered auditory hallucinations relating to X (ignoring the fact that these were described as being historic in December 2003).
- (viii) That there was a decline in the parents' attitude.
- (ix) That X had twice been presented to doctors that day.
- (x) Mother described X at hospital that day as "riddled with worms" (despite the absence of any such record in medical notes or in the team manager's statements anywhere to that effect).

- (xi) That the CPN said that father would harm/kill himself and/or X if given notice of the proceedings
- (xii) That he has or had ceremonial swords, with the inference to be drawn that they might have been a mode of carrying out his threat.
- (xiii) That mother was demanding treatment at hospital (when she was only demanding examination).

48. It is important to stress that every single one of the above elements of the team manager's evidence was misleading or incomplete or wrong.

49. The matter goes further than that as the notes of the justices clerk show that he or she understood that X was on the CPR for 'sexual abuse' rather than 'emotional abuse'. Further, there was no reference at all to the fact that there had been a case conference but a few hours before at which there was no recommendation for the immediate removal of the child.

50. The clerk's note does not record further matters which are in Ms B's notes and are in more positive terms, namely that X is a 'nice child' and has received 'good nurturing'. Despite these more favourable comments recorded as coming from the team manager, the general balance of her recorded evidence is very much to accentuate negative matters and not to mention positive aspects. The picture given to the magistrates by the team manager was, in my view, so seriously distorted that it is likely to have led the bench to have a totally erroneous view of the issues in this case. Had the bench had available to it any other source of information other than the team manager's oral testimony they may have been in a position to obtain a more rounded view of the case. The previous case conference minutes for example, with their low level of recommended intervention, would at least have put the bench upon notice of the wider picture.

51. As a matter of future guidance, in all EPO applications the court should be furnished at the very least with copies of the minutes of the most recent case conference (if there has been one), unless there are very pressing reasons to the contrary.

52. The team manager's account, which I do not necessarily accept, is that her testimony came to an end when the Chairman indicated that he had 'heard enough' and the EPO was made. She considered that the hearing was very rushed and that she was 'in and out in a flash'.

53. The only record of the justices' reasons is to be found in the clerk's note and read: 'Having heard from Ms K, Team Manager, Child Protection Register Scheme, that the child would suffer imminent harm unless an EPO is made'.

54. This statement of the justices' reasons is wholly inadequate and is in effect no more than a statement that the bench found the case proved. The need for justices to state their reasons and the basis for those reasons is well established in the rules [FPC(CA 1989)R 1991, r 21(5)] and by authority [*T v W (Contact: Reasons for Refusing Leave)* [1996] 2 FLR 473; *Stray v Stray* [1999] 2 FLR 610]. A failure to give reasons is a serious deficiency and should only occur in quite exceptional cases. In *S v Oxfordshire County Council* [1993] 1 FLR 452, Connell J said:

"It would be unjust to this child to allow a decision to stand which so affected his future without at least understanding the main bases upon which the decision was reached."

That was not an EPO case, but the principles of justice and fairness must equally apply in an emergency case given the draconian effect of the order that is being made. Where the decision is required urgently, if the justices decide to grant an EPO that decision can be announced and the order granted, with the reasons being reduced to writing after that. The emergency nature of the application, whilst requiring prompt determination, does not absolve the court of its duty to give a reasoned explanation for its decision.

55. There is no clear indication to suggest that the justices expressly considered whether or not to allow the application to proceed without notice to the parents.

56. The need to give detailed reasons is important not only as a means of explaining the decision to the interested parties. It is important because the very process of giving reasons requires the tribunal to consider its decision in a structured manner, matching the evidential material against the relevant statutory criteria.

57. Until I looked into the court file and found the justices clerk's handwritten note during the first day of evidence, no one had asked for, nor yet seen, any account of the without notice hearing. Ms B agreed with me that the system should always provide the parents and other parties with a full note of the evidence and reasons at a without notice hearing.

58. The EPO was then put into action and the social workers attended at the hospital, together with uniformed police, to remove the child. The medical notes record the following information which, I find, must have come from the social workers:

'Social services are concerned regarding mother's mental health, previous history of suspected Fabricated Illnesses. X is on CPR for neglect.'

'SW and police attend hospital. Case conference held today. SW state plan made to remove X because of concerns re Fabricated or Induced Illness.'

59. These references, taken together with the reference to the social worker's view that this was a factitious illness case and with the reference in both sets of notes of the evidence given to the justices ("MSPB" or "Fabricated Illness") make it plain to me that this was indeed the social worker's view of the case. That view also provides an explanation for the very radical and rapid change of plan as soon as the social work team heard that the mother had taken X to the hospital that day.

60. I shall in due course have some observations to make about the manner in which cases of suspected Induced or Fabricated Illness must be approached, and I will identify where I consider the social worker's actions in this case fell disastrously short of what was required.

61. Under CA 1989, s 44(1) a court may only grant an Emergency Protection Order if it is satisfied that:

- a) There is reasonable cause to believe that the child is likely to suffer significant harm if:
 - i) he is not removed to accommodation provided by or on behalf of the applicant; or
 - ii) he does not remain in the place in which he is then being accommodated.

Alternatively, an order may be made if access to the child for the purpose of assessment is being denied.

62. Where an EPO is in force the applicant may only exercise the power given to remove or detain the child in order to safeguard the welfare of the child and shall only take such action under the order as is reasonably required to safeguard and promote the welfare of the child (CA 1989, s 44(5)).

63. The Government Guidance issued prior to the introduction of the CA 1989 states with respect to EPO's:

'The purpose of the new order, as its name suggests, is to enable the child in a genuine emergency to be removed from where he is or be kept where he is, if and only if this is what is necessary to provide immediate short-term protection.' (Children Act 1989 Guidance and Regulations Volume 1, page 51).

The words 'genuine emergency' and 'only what is necessary to provide immediate short-term protection' cannot, in my view, be stressed enough.

64. In *X Council v B (Emergency Protection Orders)* [2004] EWHC 2015 (Fam); [2005] 1 FLR 341, Munby J undertook a review of the law and practice relating to EPO's. I gratefully adopt his masterful summary of both the domestic and European jurisprudence on the topic as a result of which (at paragraph 57) he drew the following conclusions:

"The matters I have just been considering are so important that it may be convenient if I here summarise the most important points:

- (i) An EPO, summarily removing a child from his parents, is a 'draconian' and 'extremely harsh' measure, requiring 'exceptional justification' and 'extraordinarily compelling reasons'. Such an order should not be made unless the FPC is satisfied that it is both necessary and proportionate and that no other less radical form of order will achieve the essential end of promoting the welfare of the child. Separation is only to be contemplated if immediate separation is essential to secure the child's safety: 'imminent danger' must be 'actually established'.
- (ii) Both the local authority which seeks and the FPC which makes an EPO assume a heavy burden of responsibility. It is important that both the local authority and the FPC approach every application for an EPO with an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the European Convention rights of both the child and the parents.
- (iii) Any order must provide for the least interventionist solution consistent with the preservation of the child's immediate safety.

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

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

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

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

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

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

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

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

or for information about what took place at the hearing. It will, therefore, be prudent for those acting for the local authority in such a case to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide.

(xii) Section 44(5)(b) of the Children Act 1989 provides that the local authority may exercise its parental responsibility only in such manner 'as is reasonably required to safeguard or promote the welfare of the child'. Section 44(5)(a) provides that the local authority shall exercise its power of removal under s 44(4)(b)(i) 'only ... in order to safeguard the welfare of the child'. The local authority must apply its mind very carefully to whether removal is essential in order to secure the child's immediate safety. The mere fact that the local authority has obtained an EPO is not of itself enough. The FPC decides whether to make an EPO. But the local authority decides whether to remove. The local authority, even after it has obtained an EPO, is under an obligation to consider less drastic alternatives to emergency removal. Section 44(5) requires a process within the local authority whereby there is a further consideration of the action to be taken after the EPO has been obtained. Though no procedure is specified, it will obviously be prudent for local authorities to have in place procedures to ensure both that the required decision-making actually takes place and that it is appropriately documented.

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

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

65. Many of the matters described by Munby J in *X Council v B* are clearly applicable to the present case. I agree with each and every one of his observations. I regard this list of 14 factors to be 'required reading' for every magistrate and justices clerk involved in any EPO application. The list should be copied and placed before the court on every occasion that an application is made for an EPO, so that the bench may consider its applicability to the case that is before them. Applicants for an EPO and their legal advisers should consider themselves under a duty to the court to ensure that this list is expressly and in terms drawn to the attention of the bench.

66. The only development of the *X Council v B* guidelines that I would offer is in relation to the record of the hearing. It seems to me that the following two steps should be undertaken whenever an application is made without notice for an EPO:

a) The hearing ought to be tape recorded. Most magistrates' courts are not wired up for regular recording, but in my view resources ought to be made for the introduction of a small portable tape recorder (or even a dictation

recorder). In the absence of such provision then a dedicated note taker, in addition to the clerk, should attend the hearing with the task of compiling a verbatim note;

b) Paragraph (xi) of the B Council guidance limits the requirement to provide information to parents, where the hearing has taken place without notice, to cases where the parents ask for the information. I would go further and say that unless there is very good reason to the contrary, the parents should always be given a full account of the material submitted to the court, the evidence given at the hearing, the submissions made to support the application and the justices reasons whether they ask for this information or not.

Induced or fabricated illness

67. I have found that the social work team had for some weeks considered that this was probably a case of induced or fabricated illness. The need for particular care and caution in approaching such cases is well known. Extensive guidance has been issued by central government (Safeguarding children in whom illness is fabricated or induced – Department of Health 2002) explaining the particular approach that is required in such cases. A key message to social workers from this guidance is that any concerns about a child's health must be discussed with the GP or a paediatrician. Whether or not a child may be at risk of induced or fabricated illness must of necessity involve a medical assessment of his past health and parental care. It is not a diagnosis that can be made by social workers acting alone, it is a matter that requires skilled medical appraisal.

68. In addition to the guidance from central government, some local authorities, for example those in the London area (London Child Protection Procedures – July 2003) have produced their own guidance which includes a whole section covering the procedure for cases of suspected induced or fabricated illness. The LCPC guidance stresses that where a social services department is considering what action to take in such a case 'the decision must be taken in consultation with the consultant paediatrician responsible for the child's health care.'

69. The European Court of Human Rights considered the use of an EPO in a case of suspected induced or fabricated illness in *P, C and S v UK* (2002) 35 EHRR 31; [2002] 2 FLR 631. The facts of that case were different and involved a baby being removed at birth, but the court clearly held that where the possibility of harm arose from the mother introducing something into the child's system (such as a laxative) that did not justify separating mother and child. In the present case, even on what the social workers apparently believed, there is no suggestion of positive action by the mother to induce symptoms, and the implication must be that under the ECHR there is even less justification for emergency removal of the child in those circumstances.

Criticism of the process by which the EPO was obtained in this case

70. The importance of the decision to grant an EPO cannot be underestimated in this case. X's enforced separation from her parents' care, which has so far lasted 14 months, commenced with the making of this order. Thereafter the parents were forensically unable to challenge the grounds for continued separation under interim care orders. They were facing multiple allegations of sexual and emotional abuse, together with allegations of fabricating illness. It has taken a three week hearing to clarify the basis, or lack of it, of these allegations. It was no surprise

for me to be told that at an earlier hearing the case management High Court judge had expressed a pessimistic opinion upon the parents' prospects of being able to challenge further interim orders pending the full hearing.

71. The decision to apply for the EPO, the decision to apply without notice, the process adopted by the local authority and by the magistrates' court and the decision of the justices are all badly flawed. The following seem to me to be the central errors in what took place.

(a) There was no emergency

72. No doubt with the government guidance requiring there to be a 'genuine emergency' in mind, during the course of the oral evidence each of the relevant witnesses was asked 'what was the imminent danger that X faced on the afternoon of 23rd November 2004?'. None of them could give a satisfactory reply. The case conference that morning had not contemplated the child's immediate removal. The social workers themselves had not contemplated removal prior to receiving the information from the hospital. All that had changed was, on the social worker's view, the mother had sought an unnecessary referral to a paediatrician, who was at that moment assessing the child.

73. The social workers, rightly, regarded this as a complex case. They had a number of 'concerns', but lacked expert assessments. Some of those assessments, in particular the referral of the mother for a psychiatric investigation, were in train. The social workers' principal concern on the 23rd November was seemingly fabricated illness. They had in fact undertaken no steps to investigate this aspect of the case. The social work witnesses were apparently totally unaware of the detailed local and national guidance for working in cases of induced or fabricated illness.

74. Using an EPO (particularly one obtained without notice to the parents) solely for the purpose of achieving some form of assessment or investigation will very very rarely, if ever, be justified.

75. The need for investigation does not, of itself, give rise to a need to remove a child from her home. Both CA 1989, s 1 and ECHR, Art 8 require that where such a removal is proposed the welfare based need for it must be set proportionately against the impact on the child's welfare of removal from home.

76. If the local authority had decided that necessary assessments or investigations could not take place due to parental opposition, the remedy available was to apply for a Child Assessment Order (CA 1989, s43) or to issue an application for a care order and apply to the court for directions and/or an interim care order.

77. Lack of information, or the need for assessment, can never, of themselves, establish the existence of 'a genuine emergency' within which there is a need to provide protection for a child. What is needed is positive evidence sufficient to establish the threshold in s 44 ('reasonable cause to believe ... significant harm'). The social services conflation of a lack of information and a need for assessment into a genuine child protection emergency found its expression in the team manager's repeated assertion that 'I could not say that X was 100% safe in that household'. That assertion is nothing like the test needed to justify an EPO application. The test in CA 1989, s 44(1) is that there are reasonable grounds for believing that the child is likely to suffer significant harm if he is not removed from parental care.

78. In this case, the only evidence which suggested some form of imminent danger to X arose from the CPN's concern that the father may harm himself if care proceedings were commenced. This was embellished by the social workers to a concern that he might also harm the child. The 'danger' therefore arose not from the child's current circumstances, but from the father's potential reaction to proceedings. The danger was a potential consequence of the application, rather than an originating ground for making it. The concern arising from the CPN's advice may have been grounds for making an application (justified on other grounds) without notice to the parents, but it was not, in my view, a ground for the EPO application itself.

79. The reality is that X was not in imminent danger of harm that in any way justified her removal from parental care that afternoon. There was, even on the evidence available to the social workers and the justices, no grounds for applying for, let alone making, an EPO. The legal advice that the social workers were apparently given, was correct. This was a long way from being an emergency protection order case.

(b) The role of the social work team

80. Whilst it is in the end a matter for local authorities, I deprecate the practice of permitting the social workers to override the legal adviser's advice upon whether the grounds for an EPO are established. This is particularly so where, as here, the social worker had a totally distorted understanding of the statutory test. In the event of a difference of view between social workers or the legal advice, the decision whether or not to proceed should have been taken by a named individual above Team Manager status.

81. In the absence of any documentary evidence, the direct evidence given to the justices should have come from the best available source. In this case that was the social worker rather than the team manager, who only had a broad knowledge of the case. The evidence given by the team manager was in many material respects, misleading, incomplete or wrong. Both she, and the justices, should have insisted upon the first hand evidence of the social worker.

82. Given the work that has gone into preparing authoritative national and local guidance upon cases of induced or fabricated illness, the court is entitled to expect that when a social work team manager asserts in evidence that this is a case of 'Munchausen's syndrome by proxy' or 'factitious illness syndrome' (depending on which note of evidence is correct) the social work team has acted in accordance with the guidance and that the assertion being made is backed up by paediatric opinion.

83. At no stage did either the social worker or her team manager seek any medical opinion or take any other step to investigate their view that this was a case of a mother seeking inappropriate medical intervention for her daughter. Yet this was clearly the very reason that drove them to apply for an EPO. The issue had never even been raised at the case conference that very day. Looking ahead of the 23rd November, it is striking that, despite filing a 'threshold criteria' document dated 6th January 2005 in which 'factitious illness' is asserted to be made out, the local authority filed absolutely no evidence on the topic from any medical witness (despite a direction from the court that they should do so). It was not until the 25th February 2005, when the court directed the instruction of an expert paediatrician, that any attempt to obtain relevant medical evidence was made.

84. In the course of closing submissions, counsel for the local authority, on express instructions from the Assistant Director of Social Services for the applicant authority asserted that the EPO application was properly presented to the Court and that the Court ultimately made the decision to allow the authority to remove X from the care of her parents.

85. I found that submission, made as it was after all of the faults in the social workers' presentation of the case had been laid bare, to be truly astounding. The presentation of the case by team manager was deeply and fundamentally flawed. The fact that the justices were erroneously encouraged by her partial, inaccurate and misleading testimony to make the order does not give the process any validity or justify the means by which the order was obtained. The fact that this considered submission was made demonstrates a worrying lack of insight on the part of the local authority.

86. On instructions from the Assistant Director of Social Services, counsel for the local authority, was able to concede during final submissions that the social work assumption underpinning the EPO application (namely, it is said, inappropriate presentation for medical treatment) was made without sufficient careful and due consideration to the prevailing circumstances and the history of the family. It was also an assumption made (it is conceded) without careful consideration of what in fact occurred at the hospital that day. It is accepted that there should have been a more rationalised and proportionate intervention than the without notice application for an EPO.

(c) The role of the local authority lawyer

87. The importance of the lawyer for the local authority in an application for an EPO, whether it is made with or without notice, should not be underestimated. It is, in my view, even more important that a lawyer is there to present the application where it is made without notice than it is in an 'on notice' case.

88. The hearing seemingly took place without the justices being referred to any of the relevant case law about either EPO applications, or without notice applications. The local authority lawyer in such circumstances must consider him/herself under a duty not only to present the case for the applicant, but also to ensure that it is presented fairly and that the bench are fully aware of the legal context within which the application is made.

89. The local authority legal department should ensure that a clear note of the proceedings is prepared and made available to the parents, together with copies of any material submitted to the court, at the earliest opportunity unless there are countervailing considerations that require confidentiality.

(d) The role of the Family Proceedings Court

90. I bear very much in mind that the justices and their clerk have played no part in the hearing before me. I have neither sought nor received any representations from them upon the procedure that was adopted at the hearing of the EPO application. The observations that follow must be read in the light of that factor.

91. There can be few more Draconian or important orders that justices are called upon to consider than making an EPO; particularly one made without notice to the child's parents. Rather than fitting the application round a busy court list, it should, in my view, be given full consideration by the court sufficient for the justices to:

- a) Receive detailed written and/or oral evidence from the most reliable source available;
- b) Be advised upon the legal context within which their decision must be made;
- c) Give reasons which adequately address both the factual evidence and the legal context.

92. If the consequence of hearing an EPO application is that one or more cases in the ordinary list cannot be heard, then for my part that is an unfortunate outcome that has to be borne by the parties in the other cases. Priority should be given to the EPO hearing.

93. It is incumbent upon the justices' legal adviser to advise the bench of the matters upon which they need to be satisfied as a matter of law before the bench is required to consider its decision. I have already stated that the 14 point summary compiled by Munby J in *X County Council v B* should be copied and placed before the bench at every EPO hearing.

94. By Family Proceedings Rules 1991, r 4.4(4) an application for an EPO may be made 'ex parte' (as is the phrase that still appears in the rules). There does not appear to be any direct reported authority upon the use of the without notice procedure in EPO applications.

95. Part of the legal advice given to justices in a case where the application is made without notice must be that they have to consider two separate matters:

- i) Should the application proceed without notice to the parents?
- ii) Are the grounds for the EPO made out?

If the decision on point (i) is that there are insufficient grounds for proceeding without notice, then the court may direct that the application be made on notice (FPR 1991, r 4.4(5)). Given the serious consequences that flow from the making of an EPO, and its impact upon the ECHR Art 8 rights of a child and her family, and given the clear impact that proceeding without notice has upon the family's Article 6 rights, it is important for the court to be fully satisfied that there is a pressing need for without notice hearing before deciding to proceed on such a basis.

96. No separate consideration was apparently given to the 'without notice' nature of the application in X's case. An implication from the available evidence is that the magistrates were understandably struck by the account of the CPN's advice about the immediate risk of self-harm to the father and harm to X that might occur were the father to get wind of any court application by the local authority. That information may well have justified some sort of application being made without notice, but it did not go to the grounds for making the EPO itself. There was no apparent attempt by the court to tease out these two separate matters.

97. In the present case, the justices' stated reasons in any event were totally inadequate in explaining what 'imminent harm' would befall X were an order not to be made.

98. The paucity of the justices' stated reasons is, regrettably, another indication that this hearing was rushed through. An application for an EPO may only be heard in a Family Proceedings Court (unless there are already proceedings pending in another court). In a complex case such as the present, where the evidence relied upon at the EPO hearing involves induced or fabricated illness, emotional harm and possible sexual abuse, the wisdom of the system preventing such an important issue being transferred up to a higher tier of court must be seriously in doubt. Allegations of induced or fabricated illness and/or emotional harm are unlikely to give rise to a genuine emergency sufficient to justify immediate removal of the child.

99. In the present case, where the need, correctly perceived by the case conference and the social workers, was for expert assessment of this 'complex' case, the proper course if there was indeed a failure by the parents to cooperate in the assessment process, was for an application for a Child Assessment Order (s 43) or an interim care order to be made.

100. I have already questioned the wisdom of confining applications of this sort to the FPC level. One course open to the justices in the present case, if they had seen the benefit in a higher tier of the system dealing with the issue, would have been to encourage the local authority to issue an application for an interim care order and then providing for the immediate transfer of that application to a higher court.

Emergency Protection Orders: good practice guidance

101. For ease of reference I will now draw together the observations I have made with some additional guidance:

- a) The 14 key points made by Munby J in *X Council v B* should be copied and made available to the justices hearing an EPO on each and every occasion such an application is made;
- b) It is the duty of the applicant for an EPO to ensure that the *X Council v B* guidance is brought to the court's attention of the bench;
- c) Mere lack of information or a need for assessment can never of themselves establish the existence of a genuine emergency sufficient to justify an EPO. The proper course in such a case is to consider application for a Child Assessment Order or issuing s 31 proceedings and seeking the court's directions under s 38(6) for assessment;
- d) Evidence given to the justices should come from the best available source. In most cases this will be from the social worker with direct knowledge of the case;
- e) Where there has been a case conference with respect to the child, the most recent case conference minutes should be produced to the court;
- f) Where the application is made without notice, if possible the applicant should be represented by a lawyer, whose duties will include ensuring that the court understands the legal criteria required both for an EPO and for an application without notice;

- g) The applicant must ensure that as full a note as possible of the hearing is prepared and given to the child's parents at the earliest possible opportunity;
- h) Unless it is impossible to do so, every without notice hearing should either be tape-recorded or be recorded in writing by a full note being taken by a dedicated note taker who has no other role (such as clerk) to play in the hearing;
- i) When the matter is before the court at the first 'on notice' hearing, the court should ensure that the parents have received a copy of the clerk's notes of the EPO hearing together with a copy of any material submitted to the court and a copy of the justices' reasons;
- j) Cases of emotional abuse will rarely, if ever, warrant an EPO, let alone an application without notice;
- k) Cases of sexual abuse where the allegations are inchoate and non-specific, and where there is no evidence of immediate risk of harm to the child, will rarely warrant an EPO;
- l) Cases of fabricated or induced illness, where there is no medical evidence of immediate risk of direct physical harm to the child, will rarely warrant an EPO;
- m) Justices faced with an EPO application in a case of emotional abuse, non specific allegations of sexual abuse and/or fabricated or induced illness, should actively consider refusing the EPO application on the basis that the local authority should then issue an application for an interim care order. Once an application for an ICO has been issued in such a case, it is likely that justices will consider that it should immediately be transferred up for determination by a county court or the High Court;
- n) The requirement that justices give detailed findings and reasons applies as much to an EPO application as it does to any other application. In a case of urgency, the decision may be announced and the order made with the detailed reasons prepared thereafter;
- o) Where an application is made without notice, there is a need for the court to determine whether or not the hearing should proceed on a without notice basis (and to give reasons for that decision) independently of any subsequent decision upon the substantive EPO application.

[END OF JUDGMENT]