Socialudvalget
L 8 – svar på spm.3
Offentlig

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Folketingets Socialudvalg

NEH/ J.NR.

Under henvisning til Folketingets Socialudvalgs brev af 29. november 2004 følger hermed – i 5 eksemplarer – socialministerens svar på spørgsmål nr. 3 ad L 8 (SOU Alm. del).

Spørgsmål nr. 3 ad L 8:
"Ministeren bedes redegøre for, om de præmisser der lægges til grund for dommen af 28. september 2001 fra the High Court of Justice (CO/965/2001) også vil kunne gøres gældende overfor lovforslaget, og at lovforslaget dermed kan være i strid med Den Europæiske Menneskerettighedskonvention?"

Svar:
I dommen fra den britiske landsret, the High Court of Justice, tages der stilling til lovligheden af Manchester City Councils politik og praksis for betaling til plejeforældre fra barnets slægt. Landsretten fastslår, at den omhandlede politik og praksis er i strid med såvel national lovgivning som artikel 8 sammenholdt med artikel 14 i Den Europæiske Menneskerettighedskonvention.

Det er Socialministeriets vurdering, at dommen ikke har betydning for lovforslaget om anbringelsesreformen. Dette skyldes, at Manchester City Councils politik og praksis adskiller sig fra ordningen i anbringelsesreformen på et vigtigt punkt. Således som ordningen i Manchester er beskrevet i dommen, er der tale om forskellige satser for kompensation for plejefamiliens udgifter. Der er – således som dommen beskriver ordningen - ikke tale om spørgsmål om aflønning af plejefamilien.

I lovforslaget om anbringelsesreformen indføres en ny type anbringelsessted, netværksplejefamilier. Netværksplejefamilier er plejefamilier fra barnets eller den unges netværk, fx familiemedlemmer eller venner af familien. Ifølge lovforslaget får disse netværksplejefamilier ret til at få dækket deres udgifter. Netværksplejefamilierne kan samtidig modtage godtgørelse for tabt arbejdsfortjeneste, når dette er nødvendigt. Der indføres med lovforslaget om

anbringelsesreformen altså ikke forskellige satser for, hvordan netværksplejefamilier og almindelige plejefamilier kan få dækket deres udgifter.

Lovforslaget om anbringelsesreformen betyder imidlertid, at netværksplejefamilier ikke skal have aflønning, som betaling for deres indsats, på samme måde som almindelige plejefamilier. Det er hensigten, at det skal være økonomisk neutralt at modtage et barn eller en ung fra sit netværk, da det dermed kan undgås, at en netværksplejefamilie tager imod et barn alene for pengenes skyld.

Efter Den Europæiske Menneskerettighedskonventions artikel 14 sammenholdt med artikel 8 skal retten til respekt for familielivet sikres uden forskelsbehandling. Efter lovforslaget behandles en almindelig plejefamilie, som får aflønning, forskelligt i forhold til en netværksplejefamilie, som ikke får aflønning. Det er imidlertid Socialministeriets vurdering, at denne forskel i aflønningsform er sagligt begrundet og proportional og dermed i overensstemmelse med konventionens artikel 14 sammenholdt med artikel 8.

Eva Kjer Hansen

/Lone Larsen

Bilag vedlagt: Dom af 28. september 2001 fra the High Court of Justice, Storbritannien (CO/965/2001).

Neutral Citation Number: [2001] EWHC Admin 707
IN THE HIGH COURT OF JUSTICE **CO/3954/2000**
QUEEN'S BENCH DIVISION **CO/965/2001**
ADMINISTRATIVE COURT
MR JUSTICE MUNBY

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 28TH September 2001

BEFORE:

MR JUSTICE MUNBY

R (L and others)
v
MANCHESTER CITY COUNCIL

R (R and anor)
v
MANCHESTER CITY COUNCIL

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Roger McCarthy QC and Mr Neil Allen (instructed by Green & Co) appeared on behalf of the applicants

Mr Ernest Ryder QC and Ms Yvonne Coppel (instructed by the City Solicitor, Susan Orrell) appeared on behalf of Manchester City Council

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Judgment
As Approved by the Court

28 September 2001

MR JUSTICE MUNBY:

1 These are separate applications for judicial review both of which raise essentially the same points although the facts of the two cases are slightly different.

2 Put shortly the issue is the legality of a local authority's policy under which it pays those of its short term foster carers who are friends or relatives of the child at a different and very significantly lower rate than it pays other such foster carers.

3 In the one case (CO/3954/2000) the applicants are J, who was born on 15 September 1995, and his younger twin brothers born on 18 August 1997. The L children, as I shall refer to them, act by their litigation friend, Edward Taylor ("Mr Taylor"). In the other case (CO/965/2001) the applicants are H, who was born on 9 May 1993, and her younger sister born on 12 May 1996. The R children, as I shall refer to them, act by their litigation friend Joan Rowland ("Ms Rowland"). In each case the defendant is Manchester City Council ("Manchester").

The L children

4 On 17 November 1997 emergency protection orders under section 44 of the Children Act 1989 ("the Act") were made in respect of all three children. On19 November 1997 care proceedings were commenced by Manchester under Part IV of the Act and Mr Taylor was appointed the children's guardian ad litem. Interim care orders in favour of Manchester were made on 20 November 1997. On 28 November 1997 the eldest boy was placed by Manchester with J and NT, who are and who I will refer to as the maternal grandparents. On 4 December 1997 the younger two boys were likewise placed with the maternal grandparents. On 8 January 1998 Manchester approved the placement of the children with the maternal grandparents on a short term basis. On 9 January 1998 a placement plan for the children to remain with the maternal grandparents was drawn up. On 21 January 1998 a placement agreement was entered into between the maternal grandparents and Manchester social services. On 8 January 1999 the maternal grandparents became long term foster carers for the three children and on 27 January 1999 the care proceedings came to an end with the making of full care orders. The children remain placed with the maternal grandparents.

The R children

5 On 16 March 1999 emergency protection orders were made in respect of both children. On 19 March 1999 Ms Rowland was appointed the children's guardian ad litem. On 24 March 1999 care proceedings were commenced by Manchester. Manchester's original aim had been to attempt to rehabilitate the children to their mother but this foundered and in November 1999 it was determined that the children required a permanent adoptive placement. However in December 1999 their elder half-sister, who I shall refer to as C, put herself forward, asking to be considered as a permanent carer for the children. On 18 April 2000 the fostering

panel decided not to approve her as a long term foster carer. But on 25 April 2000 she was joined as a party to the care proceedings and granted leave to apply for a residence order under section 8 of the Act. Following the completion on 26 July 2000 of an independent social work assessment, on 17 August 2000 the permanence panel endorsed the recommendation of the assessment that permanence was in the best interests of the children and would best be met by their placement with C. On 5 September 2000 the process of rehabilitation of the children to C commenced and on 17 September 2000 they were placed with her. Placement agreements in relation to the children were completed on 6 October 2000. On 9 January 2001 the court made final care orders in relation to both children. The children remain placed with C.

The legal framework

6 By virtue of sections 31(11), 33(1) and 22(1)(a) of the Act the L children have at all times since 20 November 1997 and the R children have at all times since 16 March 1999 been, and they all remain, children who are being "looked after" by Manchester within the meaning and for the purposes of sections 22 and 23 of the Act.

7 Manchester's duties and powers in relation to children being looked after by it are set out in sections 22 and 23 of the Act. These include the duty to safeguard and promote the children's welfare and to provide accommodation and maintain the child in other respects (sections 22(3)(a), 23(1) and 23(2)). By section 23(2)(a)(ii) accommodation and maintenance may be provided by arranging placement with a relative. After placement, unless he or she falls within one or other of the excluded categories in section 23(4) (and in the present case neither the maternal grandparents nor C are so excluded) such a relative is by virtue of section 23(3) a "local authority foster parent". Section 23(2)(a) provides that placement is to be "on such terms as to payment by the authority and otherwise as the authority may determine".

8 It should be noted that the statutory framework envisages that all appropriate steps are taken to ensure that children are placed with their families so far as possible (section 23(6)). In this way the Act promotes the aim of implementing the right to respect for family life enshrined in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

9 Any placement of a child under section 23(2)(a) of the Act is further regulated by the *Foster Placement (Children) Regulations 1991, SI 1991 No 910.* These regulations require that a written agreement covering the matters specified in Schedule 2 of the regulations is to be completed before approval of a person as a foster parent (reg 3(6)) and, save in the case of emergency and immediate placements, which are governed by reg 11, that a written agreement covering the matters specified in Schedule 3 is to be completed prior to any placement of a child with the foster parent (reg 5(6)). Schedule 3 includes amongst the matters that must be set out in the placement agreement (para 2) the local authority's

arrangements for the financial support of the child during the placement.

10 Quite apart from the duties it owes to "looked after" children, Manchester is under a duty, imposed on it by section 17 of the Act, to safeguard and promote the welfare of children who are in need, as defined in section 17(10). Section 17(6) empowers a local authority for this purpose to give "assistance in kind or, in exceptional circumstances, in cash."

Manchester's policy in relation to paying foster carers

11 Manchester's policy in relation to paying foster carers is set out in its Children's Service Manual dated May 1992.

12 In relation to foster carers generally it provides for a minimum payment which in January 1998, when the L children were placed with the maternal grandparents, was £77.60 per week per child for children up to seven years old. In March 1998 it was increased to £79.93 per week per child, in March 1999 to £81.13 per week per child, and by October 2000, when the R children were placed with C, had risen to £84.42 per week per child (£104.86 for children from eight to ten years old). These sums were expressed as comprising a "maintenance" and an "expenses" element, the latter including "clothing, school uniform, pocket money, dinner money, purchase of toys and books." Thus for children up to seven years old the figures were:

	Maintenance	Expenses	Total
1997	£46.85	£30.75	£77.60
1998	£48.26	£31.67	£79.93
1999	£49.46	£31.67	£81.13
2000	£52.75	£31.67	£84.42

In addition Manchester normally pays a birthday allowance, currently £25.22 per child, a Christmas allowance, £50.46 per child, and a holiday allowance, £138.75 per week per child.

13 Manchester has a different policy in relation to cases where there is an emergency or immediate placement under reg 11(3) *with a friend or relative* and also in relation to cases where there is what it terms a "short term placement" *with a friend or relative*. These are dealt with in paragraphs 5 and 6 respectively of Chapter Eight (iv) in Volume 2 of the Children's Service Manual, 'Placement of Children with Friends/Relatives'. I am concerned in the present case with paragraph 6 short term placements.

14 Financial support for such placements is dealt with in paragraph 6(10) which reads as follows:

> "Given the various possibilities that could arise during the planning/sorting out period whilst a child is placed short term with a

friend/relative, it is important to get the balance correct between adequately supporting the placement financially and not creating unnecessary financial dependency upon the Local Authority; raising financial expectations that cannot be maintained; or providing a disincentive for a friend/relative to apply for a Section Eight Residence order on financial grounds alone. It is also felt that during this period it would be beneficial to treat a child so placed by the local authority in a similar fashion to children in need living with friend/relative(s), not so placed by the local authority.

Therefore a discretionary sum of money will be made available for the relative/friend to contribute towards the cost of maintaining the child short term in the household as follows:-

(1) An initial sum of up to £500 per child during the placement. This will be at the discretion and approval of a Team Manager ...

(2) A further sum of £500 per child during the placement may be made available upon request ... to the Principal Manager for her/his approval ... to cover exceptional circumstances ...

The sums above are to be used as imaginatively as possible but it is recommended that regular weekly maintenance payments are not paid during this period for the reasons outlined above. This is not to say that the same equivalent amount of money (or more) cannot be used in supporting the placement; rather it is felt that until it is clear the Local Authority wishes the child to remain long term with the friend/relative(s) AND such a placement requires overseeing and monitoring by the Local Authority under an accommodation agreement or because the child is in Care and needs to remain so, then such weekly maintenance payments might militate against the best long term legal outcome for the child."

15 The reference in paragraph 6(10) to Manchester's section 17 powers in relation to children in need will be noted. Paragraph 4(1) in the same Chapter refers to the framework of section 17 payments provided by Manchester: financial support up to a maximum of £500 per child within the financial year.

16 I should refer also to paragraph 7 which sets out the 'Procedure for long or longer term placement with a relative/friend as foster carer.' Paragraph 7(1) states that

"Subsequent to an immediate/urgent or short term placement being made, reviews will be held of the child and its placement, within the statutory time limits ... Such reviews will identify what the long term plans for that child should be. It is envisaged that such a plan will most usually be formulated within six months of making the initial placement, and frequently much sooner."

Paragraph 7(8) makes clear that once a relative or friend has been approved as a long term foster carer he or she "will be eligible for the normal fostering allowances".

17 Certain aspects of Manchester's policy were changed in April 1997. A document headed 'Guidelines for payments - relatives and friends as carers budget' was circulated to all managers under cover of an interdepartmental memorandum dated 12 March 1997 from the then Assistant Director, Children & Families Division. It contains the following:

> "Principle
>
> Children and young people "looked after" who are placed with relatives or friends will be regarded as financially supported within the "Children in Need" framework. This means that the baseline for payments will be within the "Section 17" payments framework, and not the "Fostering allowances" framework ....
>
> Payments
>
> 1 Where a carer requires financial support to maintain the child, the carer should make an Income Support claim if they are eligible to do so.
>
> 2 Where the carer is ineligible, or unsuccessful in that claim, the maximum payments ... will be the equivalent of Income Support level of a child of that age, per week.
>
> 3 The maximum payments per child per year is £1,500.
>
> 4 Approval of payments is: up to £750 by Team Manager; and a further £750 by Principal Manager ...
>
> ...
>
> Child benefit
>
> All carers are required to make a claim for Child Benefit; this is to be deducted from any weekly payments or the equivalent of weekly payments if in the form of irregular payments ...
>
> Methods of payment
>
> 1 Regular payments may jeopardise the success of an Income Support claim, or the continuation of income support payments. Where practicable, therefore, "one off" payments or "irregular" payments should be made UNTIL the Income Support claim is processed, AND FOLLOWING a successful income support claim.

...

Practice Issues

Where a placement looks likely to extend beyond six months, reassessment as long term carers needs to be considered ...

FOOTNOTE - SECTION 17 BUDGET

The maximum payment per child per year under Section 17 budget is to be increased from £500 to £750 to provide parity with Relatives/Friends as Carers Budget."

18 I should add that, as I understand it, foster allowances to short term relative foster carers were historically made by Manchester as block payments, rather than weekly or fortnightly payments, in order to try and prevent the prejudice that might be caused to the carer if their income support was thereby affected. Such payments must not however be confused with similar block payments made as grants for specific purposes under section 17 of the Act.

Manchester's policy in context

19 The National Foster Care Association ("NFCA") has been publishing foster parent rates paid by all local authorities and its own national recommended rates since 1974 in its publication *Foster Care Finance* ("FCF"). The NFCA rates are based on the Family Expenditure Survey and Expenditure Home Scales which are published by the Government Office for National Statistics. The introduction to FCF states:

"The minimum allowances recommended by the Association are based on the Family Expenditure Survey and Expenditure Home Scales. They contain *no element of reward for foster carers*, and actually measure the average costs of caring for a child living in his or her own home. Living away from home for a child is an exceptional/unusual experience. It is important to recognise that additional costs are involved in fostering and this has been born out by the work of many local foster care associations (emphasis added)."

FCF also says this:

"Looking after children is expensive, looking after foster children especially so. Foster carers who have monitored their expenditure claim that foster children are at least 50% more expensive to look after than their own children ... Foster carers should receive adequate basic allowances so that they are not always coming to social workers "cap in

hand" to ask for additional money."

20 In its publication *Friends and Relatives as carers* NFCA says that:

> "relevant foster care allowances and any additional allowances including birthday, religious festivals and holidays should be paid at the same rate as would be paid to carers recruited to the general fostering service".

21 The NFCA recommended rates in 1998 were between £60.08 and £120.16 per week per child depending upon the child's age. Its recommended rates in 2000 per week per child were as follows (Manchester's rates being shown in parenthesis):

NFCA		Manchester	
0-4	£92.82	0-7	£84.42
5-10	£115.29	8-10	£104.86

I have not been told what the 2001 rates are.

22 Put shortly the claimants complain that the Manchester policy on short term relative foster care payments does not come close to national standards (or indeed Manchester's own standards) on foster care payments. In fact, as the 1997 guidelines make clear, the short term relative foster care payments made by Manchester are explicitly linked to the sums paid to unemployed parents by way of income support. Manchester's policy is that children in short term relative foster care are to be supported if possible by income support. If income support is not available weekly payments are to be limited to income support levels. Manchester thus equates the cost of payments for the support of each such child which it is obliged to maintain and accommodate away from home with those under a scheme providing for children living at home.

The application of Manchester's policy - the maternal grandparents

23 It will be recalled that the L children were initially placed with the maternal grandparents in November/December 1997. At that time the children were all under four years of age. Payment per week per child in accordance with NFCA recommendations would accordingly have been £74.55 or in accordance with Manchester's normal rates £77.60 (£79.93 from March 1998). In accordance with Manchester's policy the maternal grandparents were in fact paid £15 with effect from 22 January 1998. In addition on 13 May 1998 approval was given for a payment of £157.49 for feeding chairs, a cot and car seats. On 9 January 1999 they became long term foster parents and thereafter received the normal fostering allowance. It is said on their behalf (though the basis of the calculation has not been explained to me) that the difference between the sums which the maternal grandparents in fact received between November 1997 and January 1999 and the sums which they would have received if they had been paid Manchester's normal fostering rates amounts to £11,088.70.

24 Put in context the maternal grandparents were thus being paid something a little under one-fifth of Manchester's normal rate, itself somewhat lower than the NFCA's minimum recommended rate which, it requires to be emphasised, reflects only the *cost* to the foster parent of looking after the child and contains no element of reward. Looked at from another point of view, the effect of Manchester's policy is that the financial situation for the friend or relative foster parent is transformed by the change of status to long term foster carer - in the case of the maternal grandparents an overnight increase from £15 to £79.93 per week per child - *even though the fostering task remains the same and the needs of the children have not changed at all.*

The application of Manchester's policy - C

25 It will be recalled that the R children were placed with C in September 2000. At that time the older girl was seven and the younger girl four years old. Payment per week per child in accordance with NFCA recommendations would accordingly have been £115.29 for the older girl and £92.82 for the younger or in accordance with Manchester's normal rates £84.42 for both children. C was in fact paid £42.75, increased with effect from 10 November 2000 (though not in fact paid at this rate until after the making of the care orders in January 2001) to £44. Manchester's evidence on this point, not accepted by her, is that the figure of £44 was C's own estimate of what she would require, arrived at in discussions with a social worker on 17 October 2000. In addition C has been paid a total of £967.59, being £345 for essential furniture on 8 September 2000, £200 for clothing on 6 October 2000, £250 Christmas allowance, including presents and clothing, on 11 December 2000 and £172 for a holiday on 2 April 2001.

26 Notwithstanding the making of care orders on 9 January 2001, and despite Manchester's own policy as set out in paragraphs 7(1) and 7(8) of the relevant part of its Children's Service Manual dated May 1992 and reiterated in the April 1997 document, as at the date of the hearing before me (28-29 June 2001) C had not been approved by Manchester as a long term foster carer and accordingly was still not receiving the normal fostering allowances. Manchester's explanation is set out in a witness statement dated 18 June 2001 by Antony Haley, the Acting Principal Manager with responsibility for the R children:

> "On 9.1.01 a final care order was made. Given that the question of whether there should be a residence order was to be reviewed after 6 months and therefore that this was not a permanent long term fostering arrangement, the policy which provides for full foster carer rates to be paid on a long term placement under a care order was not applicable. [C] therefore continues to receive £44 per week per child based on the assessment of her requirements."

27 In his witness statement dated 18 June 2001, Glen Mason, Manchester's Assistant Director of Social Services, Children and Families Division, says:

> "Once approved as long term foster carers, relatives and friends are supported by fostering allowances and other payments that are the same as those paid to stranger foster carers (paragraph 7(8) of the policy). This ... has not yet happened in the claim of [the R children] because [C] has not yet been approved as a long term foster carer for the two children. I do not believe, therefore, that paragraph 7 of the policy is relevant to these claims."

He relates this to what he says is Manchester's practice:

> "Previous practice was that where a care court was involved it would usually be the case that approval did not take place until the care plan was formulated and approved by the Judge.
>
> The existing practice is that prior to a final hearing in the care court, relative and friend carers who are to be long term foster carers of looked after children should be approved by the Permanence Panel (which is the successor in title to the Family Placement and Adoption Panels) as foster carers for the particular children they are to continue to care for. A final decision on the approval is then made by the Director after the contested proceedings are concluded or agreements are made between the Council and the parties to the proceedings with the approval of the judge. If the Council's care plan provides for a trial period on a care order as in the R [children] case, the Permanence Panel would not be asked to consider the approval of relatives as long term foster carers during the trial period."

28 Ms Rowland's account of events in her witness statement dated 8 March 2001 does not accord with Mr Mason's. She says:

> "After placement C rethought her position and decided for good grounds that she and the children would be more secure if she looked after them under a Care Order. She asked for her application for Residence Orders (only necessary in the first place because of the Council's rejection of her as a foster carer) to be adjourned. The Council has always made it clear that it wanted her to move towards a Residence Order. For this reason the Council proposed at the final care hearing on 9th January 2001 that a final Care Order should not be made. It proposed that interim Care Orders should be made to cover the possibility that C would change her mind and agree to Residence Orders being made. The Court rejected the Council's proposal, made final Care Orders and dismissed C's applications."

29 I have seen the Addendum Care Plans in relation to each of the R Children. They are dated 11 December 2000 and, as I understand it, set out Manchester's plans as they were presented to the court for approval at the hearing on 9 January 2001. Each care plan is so far as relevant for present purposes the same. Mr Mason's assertion that the care plan "provides for a trial

period on a care order" slides over two important matters. First, the fact that although, as the care plans make quite clear, Manchester's case was indeed, as Ms Rowland says, that final care orders should not be made at that hearing and that a final determination should be deferred for six months, at which time it envisaged disposal being by means of a section 8 residence order rather than a care order, what Manchester was proposing was a continuation during that six month period of the existing *interim* care orders. Secondly, the fact that, as Ms Rowland's unchallenged evidence asserts, that plan was rejected by the court which proceeded on 9 January 2001 to make *final* care orders and dismissed C's applications for residence orders.

30 I note in passing that the older girl's eighth birthday was on 9 May 2001, from which date the normal fostering rate for her (assuming for this purpose, which is unlikely, that such rates had not in fact increased with effect from March 2001) would have been increased from £84.42 to £104.86.

31 Put in context C was thus being paid only about a half of Manchester's normal rate and, in relation to the older girl, significantly less than half of the NFCA's minimum recommended rate. The aggregate shortfall in the case of the R children is, I am told, £4,361.55.

The proceedings

32 The L children's letter before action was dated 1 September 2000. Manchester responded on 3 October 2000. The claim for judicial review was filed on 27 October 2000. The R children's letter before action was dated 9 January 2001. Manchester responded on 17 January 2001. The claim for judicial review was filed on 12 March 2001. Manchester's acknowledgements of service (in each case seeking an oral hearing of the application for permission and that the matter be heard by a judge of the Family Division) were filed on 22 November 2000 and 30 March 2001 respectively.

33 Common to both acknowledgments of service was one of the grounds put forward for contesting the claim which merits attention. Manchester said:

> "The Local Authority intends to change the Policy which is in issue.
>
> a The policy complained of is being reviewed. Draft proposals are under consideration. It is anticipated that a new policy will be approved by the Council's executive and thereafter by the full council before a full hearing of this application could be heard.
>
> b Contrary to the Claimant's assertion, it is the Local Authority's

intention to provide for a principle of equality of treatment in respect of foster carer treatment, that is a new policy would remove any alleged differential between relative foster carers and others. It is intended that the new policy will provide a guaranteed basic rate of payment for all foster carers with uplifted payments which would be dependent on the factual circumstances of each case."

I must return to this matter in due course: see paragraphs [50]-[51] below.

34 The applications for permission in each case came before me on paper. On 11 May 2001 I directed that both applications for permission were to be listed for an oral hearing before me, if possible during the week commencing 11 June 2001 with a view if permission was granted to both cases being heard if possible by me in the week commencing 25 June 2001.

35 In the event I heard the applications for permission on 12 June 2001. In addition to addressing me on the merits, Mr Ernest Ryder QC on behalf of Manchester put forward two other arguments I ought briefly to mention as to why I should refuse permission.

36 The first related to the standing of the litigation friends. Both Mr Taylor and Ms Rowland, appearing as the litigation friends of the L children and the R children respectively in these proceedings, had, as I have already noted, previously acted as the children's guardians ad litem in the care proceedings. As I understood his submissions Mr Ryder challenged the propriety of their now acting in this different role. He submitted that, save only for the purposes of section 41(10)(b) of the Act, they had become functus officio at the conclusion of the care proceedings. So they had but that seems to me to be neither here nor there. They were not purporting to appear in front of me in any sense as the children's guardians ad litem in the care proceedings but as their litigation friends (in old fashioned jargon as their next friends) in these proceedings.

37 Mr Ryder asserted that those directly affected by the decisions complained of are, in the one case, the maternal grandparents and, in the other, C and submitted in effect that they were the proper claimants. I do not doubt that they would have had locus standi to bring these applications if they had wished to do so, but for reasons which I can well imagine they have chosen not to. The question is not whether their foster carers would have locus standi to bring such proceedings if they chose to do so but whether the children, who have actually done so, acting of necessity by a litigation friend, have the necessary standing. In my judgment they quite plainly do. For in each case, and this is at the forefront of the arguments put forward on their behalf, their welfare - which, to repeat, it is the statutory duty of Manchester to safeguard and promote - is, it is said, adversely affected by the fact that those charged by Manchester with the day to day responsibility of looking after them are, so it is said, given inadequate funds for that purpose.

38 If the children have locus to bring these proceedings I can see no possible

objection to Mr Taylor and Ms Rowland choosing to act on their behalf as litigation friends. It was said by Mr Ryder in his skeleton argument that their role as the claimants' litigation friends is "a legal fiction" disguising the truth that they are the applicants in fact, unfettered by any constraint save this court's control, and that they are merely "interested bystanders" who are "using the children as nominal applicants." He goes so far as seemingly to complain that, unlike the maternal grandparents and C, Mr Taylor and Ms Rowland have no financial interest in the claim, a somewhat curious complaint given the terms of CPR 21.4 and the long recognised principle that anybody can in principle act as a child's next (now litigation) friend. I have no doubt at all that both Mr Taylor and Ms Rowland have acted throughout in these matters with complete integrity and from the highest of motives. I do not doubt for a moment that their concerns about Manchester's policy extend beyond their concerns about the impact of that policy on these particular children. Indeed their evidence, to which I return below, says as much. But that in no way disqualifies them from acting as litigation friends to these children. The requirements laid down in CPR 21.4(3)(a) and (b) are that they can fairly and competently conduct proceedings on behalf of the children and that they have no interest adverse to that of the children. Those requirements are plainly met in this case. Indeed, Mr Ryder did not in terms suggest the contrary.

39 With all respect to him Mr Ryder's objections to the manner in which these proceedings have been constituted are wholly misconceived.

40 I repeat, because I would not wish there to be any doubt in anyone's mind on the point, that Mr Taylor and Ms Rowland have acted throughout in these proceedings with complete propriety and integrity, both from the personal and from a professional point of view.

41 Mr Ryder also sought in answer to the L children's claim, though not the R children's claim, to rely upon the admitted delay in bringing the proceedings. It did not seem to me, in all the circumstances, that this delay should of itself prevent the application being allowed to proceed.

42 In the outcome I granted permission in each case and directed that the two cases were to be heard together on 28-29 June 2001, as in the event they were. On that occasion, as previously, Mr Ryder appeared on behalf of Manchester leading Ms Yvonne Coppel; the applicants were represented by Mr Roger McCarthy QC and Mr Neil Allen. I am very grateful to all the counsel involved for their exceedingly helpful skeleton arguments and oral submissions. The hearing concluded on 29 June 2001 immediately before my departure on Circuit. I am sorry that the preparation of this judgment has been delayed.

The evidence

43 The main body of the evidence is to be found in witness statements by Mr Taylor dated 24 October 2000, by Ms Rowland dated 8 March 2001, by Mr Mason dated 18 June 2001 and, in response, by Mr Taylor and Ms Rowland jointly dated 25-26

June 2001. The primary facts are not in dispute. Much of the evidence is argumentative, though none the less helpful for all that. There are, however, some parts of it to which I should draw attention.

The evidence - the litigation friends

44 Mr Taylor and Ms Rowland are both highly experienced. He has been involved in social work for about 30 years, she for about 25. He has been a guardian ad litem for about 15 years. In his evidence Mr Taylor says that:

> "As guardian ad litem in the care proceedings relating to the children I was gravely concerned about the approach which [Manchester] was taking to financial support for the [maternal grandparents'] household. The financial and other demands placed on the [maternal grandparents] were such that it was necessary in my considered view for them to receive the full fostering allowance of what I understand to be £77-60 until March 1998 and thereafter £79-93 per week per child so as to enable [the maternal grandparents] to devote all their time to caring for the children.
>
> [Manchester's] decision caused a number of problems which in my view impacted adversely on the children's welfare. These were that throughout the care proceedings the majority of the costs relating to [the L children] was borne by [the maternal grandparents]. [The maternal grandfather] by that time was 68 and retired and [the maternal grandmother] was 61 and worked as a warden in a sheltered accommodation complex. [The maternal grandparents] lived in a tied property attached to that complex and [the maternal grandmother] had responsibility which included being 'on call' to the residents of that complex on a 24 hour basis. Consequently, a large proportion of the care responsibilities of the children fell to [the maternal grandfather]. The couple had their own private house in another part of Manchester and advised me that they would have liked to have considered [the maternal grandmother] retiring and returning there but needed her income to meet their own living costs and that of caring for three very young children whom they needed to clothe, feed and generally attend to all their needs. At the time [the maternal grandparents] were responsible for supervising all contact between the children and ... the children's parents [who] were unable to assist financially."

45 Mr Taylor adds that his position as a guardian ad litem in the area gives him reason to be concerned about Manchester's actions as they affect children in need in the area as a whole. He says:

> "From my own experience in the Manchester area I am aware of other family local authority foster carers and children placed with them who have been disadvantaged by the relevant policy. I have no doubt that it continues to have effect and will prejudice the position of significant

number of people in future.

It is my view that many foster parents who are family members are likely to feel too apprehensive to challenge the Council which seeks to make it clear that it does not have to pay anything at all. I believe from my own extensive experience that the current financial arrangements maintained in Manchester to deal with these fostering allowances are a substantial disincentive to family members putting themselves forward to look after children who are in care or being accommodated. In this way the Council has significantly failed to apply itself to do all it can to make sure that children live with their own families wherever reasonably possible."

46 Ms Rowland says of Manchester's position in relation to C and the R children:

"In normal circumstances once a Care Order is made the foster parent who is the intended carer for the future is designated as a long term foster carer by the Council. Once this happens they would normally receive the "full" fostering rate regardless of status of £84.42 per week per child. In this case the Council has decided not to increase the payments and continues to treat C as a short term foster parent. The financial pressure applied by the payments of an inadequate fostering payment therefore continues even though C is now an approved foster carer for the foreseeable future and no one suggests that the children should live elsewhere. In my opinion therefore C has financial pressure applied to her to seek a Residence Order in preference to the existing Care Order by virtue of the existing arrangement. I believe that it is disadvantageous to the children that this should be so because it was the Courts view that the care orders would be in their best interests for the foreseeable future. I do not say that the children will starve without the extra payments but I do say that there is no sufficient reason why they should not get the benefit of the extra weekly payments, holiday payments, birthday and Christmas payments. C does not have the necessary financial resources to make up the extra sums."

47 Speaking more generally of her experience as a guardian ad litem Ms Rowland says of Manchester's policy:

"It is widely thought by those on the guardian ad litem panel that this policy is disadvantageous to children being looked after by related foster carers. It is generally considered by guardians who deal with [Manchester] in the context of care proceedings that the policy is a financial disincentive to family members putting themselves forward as potential local authority foster carers. The normal fostering payments are intended by [Manchester] to be a sum which is sufficient to provide a suitable level of care for foster children. It is no cheaper for family members to provide the level of care which is required under a Children Act 1989 Part III arrangement then it is for non family members."

And:

> "I can think of no child related reason why a vulnerable child to whom [Manchester] has a statutory responsibility should lose financial support simply because the person who is selected as a carer has some family relationship with that child. [Manchester] should if possible seek a family member as foster carer and it is my opinion that the financial disincentive to any family members putting themselves forward makes a serious inroad into this obligation. It is requiring the child to do without because the family members may be prepared to react to a sense of moral obligation. The difference of opinion between guardians and the local authority has often been the subject of debate in Court proceedings and there have been occasions in which the unsatisfactory nature of the arrangements have been remarked upon by the circuit bench. Any lobbying by those on the guardian ad litem's panel to change the policy has had no effect."

And:

> "I have no doubt that the policy is disadvantageous to children who could be looked after by members of their family under local authority fostering arrangements because it provides a disincentive to carers and to those who are so looked after because they are obliged to live under a lower standard of living."

48 As Mr Taylor and Ms Rowland correctly point out in their later joint statement, none of this evidence has been commented on or contradicted either by Mr Mason or by the other Manchester witnesses, though I place on record that Mr Ryder made clear that Manchester does not accept what is said as to the attitude of the local circuit bench. They invite the court to conclude that Manchester accepts that their points cannot be contradicted.

The evidence - Mr Mason

49 In his statement Mr Mason, who explains that his connection with Manchester dates back only to October 1998, states that the only documents which describe Manchester's policy are those I have referred to in paragraphs [11] and [17] above. He says that, despite searches which he has caused to be made, Manchester has been unable to find any working papers, reports or resolutions relating to the adoption of either the 1992 policy or the 1997 guidelines. He adds:

> "I know of no other documents that describe the policy or its application."

I return to this in paragraphs [63]-[67] below.

50 It will be recalled (see paragraph [33] above) that when these proceedings were first launched Manchester indicated its intention to introduce a new policy

providing for what it described as a principle of equality of treatment. This seems to have fallen by the wayside, though despite what had been set out in Manchester's acknowledgments of service this fact was not communicated to the claimants until the day before the hearing on 12 June 2001. According to Mr Mason:

> "Since 1997 the Council has been asked to review its payments policy. The Council has not ignored these requests but has endeavoured to reconsider the issues that are raised. Despite considerable internal discussion, the Council has not yet identified a substitute policy which avoids inappropriate disincentives, financial overstretch or breach of central Government imperatives while according with the Council's statutory duties. These discussion documents have not been adopted by the Council as policy and, therefore, I do not believe that they are relevant to these claims."

None of these documents have been produced for inspection. I am invited to draw the inference from this fact that a past recognition that the policy was unlawful is being hidden from the court. I have to say that I find Manchester's stance unhelpful, to use no stronger word, but it is neither necessary nor in my judgment would it be safe to draw such a damaging inference. Nor is there any basis for concluding that Manchester's attempt to construct a new policy was anything other than entirely genuine.

51 All that either I or the claimants know about this now abandoned search for a new policy is what is set out in Mr Mason's statement:

> "There have been discussions relating to a new policy. Such a policy would have to be compliant with ECHR principles, the principles underlying the Act and central Government policy. It would also have to be feasible within the resource limitations of the Council.
>
> An alternative system of baseline payments and discretionary allowances has been considered. The Council believes that such a policy would act as a financial disincentive to the carer who does well for the child's needs and whose payments / allowances are reduced in comparison with the carer who is not as able to met a child's needs and who would continue to be assessed as dealing with greater need justifying higher funding. It is precisely this type of level or banded funding that existed prior to the Children Act as 'boarding out payments' and which as I understand it was felt to be in need of reform when the policy was issued in 1992.
>
> I am advised ... that the effect of equalising all foster care payments at the higher recommended rate by NFCA is between £1.25m and £1.5m. The total social services budget is £23.7m and £1.5m represents the equivalent of ceasing to employ 40% of the Council's field social workers."

Mr Mason provides no further detail as to the potential cost implications. It will be noted that his comparison is between Manchester's short term relative foster care rates and the NFCA rates: bringing the short term relative foster care rates into line with Manchester's normal rates (which are *below* NFCA rates) would of course cost less. The claimants also suggest that Mr Mason has not brought into account the savings which, they say, would follow from encouraging more families to be foster carers. I return to this in paragraphs [81]-[84] below.

52 In relation to Manchester's policy as formulated in 1992 Mr Mason says this:

> "I believe that the Council's reasons for the differential payments policy ... were discussed at the time the policy was drafted in 1991/1992. They are:
>
> a Relative and friends carers are not initially assessed and approved as foster carers by the panel and provide a short term service with the approval of a Principal Manager until they are approved by panel.
>
> b Stranger foster carers are recruited to care for a range of children with particular needs who are not known to them, they undergo specific preparation and training for this task and once approved receive regular ongoing training.
>
> c Stranger foster carers have to get to know and understand each child and incorporate them into a family together with other children who are themselves from different families and who are not / have not previously been known to each other.
>
> d Recruitment availability and retention are not relevant issues for relatives and friends who are offering to provide care. They are known to the child and vice versa (usually) and they usually have an existing commitment to the child.
>
> e Children placed with relative foster carers as short term carers are treated in the same way as children who are not looked after but who are likewise placed with relatives and are in need in the community.
>
> f There is a distinction to be drawn between short term foster care provided by relative and friends carers for looked after children and the long term care of looked after children.
>
> g A balance should be struck between adequate levels of financial support for relative foster carers and inappropriate financial dependency which would act as a disincentive to apply for a residence order and an incentive to permit continuing statutory intervention on the part of the Council which would be a disproportionate intervention.

> With the creation of a commercial market for foster carers which began in 1996 / 1997, an additional reason for the policy became important, namely that the stranger foster care market is competitive and commercial and it is necessary to pay market rates to recruit and retain stranger foster carers.
>
> The Council has always been of the view that it should encourage the relaxation of statutory controls that affect a child (statutory reviews, social work interventions and the umbrella of state control) by recommending the making of residence orders in appropriate cases. For the avoidance of doubt, it is important to note that children who cease to be looked after children may qualify for residence order allowances or children in need payments under section 17 of the Act.
>
> I believe that the reasons set out above have continuing validity."

53 As I have already observed Mr Mason does not claim to have access to any of the contemporaneous documentation which shows Manchester's thinking in either 1992 or 1997. Moreover, as Mr Taylor and Ms Rowland point out, many of these reasons conspicuously do *not* appear in the 1992 policy document itself as explanations for the policy. Mr Mason's description of the thinking which underlies Manchester's policy no doubt reflects to an extent, as Mr Ryder suggested, what I might call Manchester's conventional lore or the departmental memory but in reality it must to a significant extent be an attempt at ex post facto rationalisation, though none the less valuable for all that. I return to this in paragraphs [85]-[86] below.

54 Mr Mason seeks also to toll the bell of scarce resources:

> "It is clear that the 1992 policy and the 1997 guidelines are to an extent based upon the limited financial resources that constrain the exercise of the Council's duties and discretions. I believe that a local authority is entitled to balance the needs of all children looked after, the needs of the particular children concerned and the scarcity of its resources and that the balance undertaken by this Council is lawful and fair."

I shall return to this in due course: see paragraphs [81]-[84] below.

55 There is one other part of Mr Mason's evidence to which I should draw attention, where he asserts that Manchester's policy is not in fact inflexible:

> "The policy expressly provides for the possibility that more money may be needed to support the placement (4th line, page 153 of the manual under paragraph 6(10)). In addition to the maintenance sum paid as a fostering allowance, additional needs payments are made to meet identified needs of the particular child whether the need be a regular event or a specific provision. The additional needs payments are also made from relatives / friends as carers budget. Managers make these additional

payments within their levels of authority.

Although the maintenance element of a fostering allowance may appear to be fixed within the financial limits set out in the policy, the additional discretionary payments that are made illustrate the flexibility of decision making in each case. A manager can also use a surplus in one budget to fund another budget, if he sees fit, to satisfy the needs of a child in a particular case.

At the review panel meeting held on the 8th December 1999 in relation to the complaint made by Mr Taylor on behalf of the TLL children I said that the level of payment made to a relative foster carer was considered on its merits in each case and that there is no blanket level of payment. I stand by this opinion because of the provisions of the policy and the practice of the Council in considering the requests of carers, guardians or the court to consider service provision and additional needs payments in addition to the maintenance element described in the policy."

56 I have to say that the *evidence* on this topic is not as clear and precise as I should have liked. In support of his case Mr Ryder draws attention to the difference between the baseline payments and additional payments made from the same budget, to what he says were "very significant" additional payments made to the maternal grandparents, to the payments for furniture and other items made to C and, indeed, to the fact that C was paid initially £42.75 and then £44 per week per child, amounts substantially in excess of the maximum of £1,500 laid down in the 1997 guidelines. Mr McCarthy ripostes that these are merely isolated cases, that the policy on its face is quite clear, providing, as amended in 1997, for a *maximum* payment of £1,500 per annum, and that in any event - and this appears to be the fact - none of these additional payments goes anywhere near to bridging the yawning gap between Manchester's short term relative foster care payments and its normal rates.

The claimants' case

57 Mr McCarthy says, and in this he appears to me to be correct, that the L children and the R children are typical of the vulnerable children whose physical emotional and psychological needs will have been damaged by poor parental care and who need more than subsistence care to allow them to recover and to benefit from their foster settings. Their backgrounds and circumstances are typical of the type of children who will be assisted by this application. The problems of these foster carers are typical of those of family members who Manchester, as he would have it, requires to subsidise its fostering costs. He says, and this has not been challenged, that the issues which I have to confront affect a significant number of children in the Manchester area and that the policy which drives Manchester's decisions is similar to that operated by a number of other local authorities.

58 In a nutshell Mr McCarthy summarises the applications as challenging a policy

driven approach which he alleges is, in effect even if not in intention:

(1) A financial disincentive to family members being foster carers (thereby making it more difficult for family members to be foster carers than non family members).

(2) An attempt to utilise the sense of moral obligation of relatives of children in care so as to compel them to accept a grossly inadequate level of financial support (very much less than that which has been determined by Manchester to be necessary for the maintenance and support of other foster children of like age and similarly less than the sum which will be paid if long term approval is given).

(3) An attempt to apply financial pressure to family members to move away from local authority support, thereby creating a financial "under class" of children who do not get the level of support which a rational policy would provide and whose foster parents will be under financial pressure to go out to work.

(4) A discriminatory policy which is fashioned on the basis of family relationship (an "other status" within the meaning of Article 14 of the Convention).

(5) A failure to provide adequate implementation of the central obligations of Manchester (a public authority within section 6 of the Human Rights Act 1998) to promote the right to respect for family life guaranteed by Article 8 of the Convention.

(6) An attempt to transfer the financial burden of looked after children away from the local authority.

(7) An abuse of the dominant position held by the local authority in relation to foster parents and children who have no "bargaining power".

The issues

59 Mr McCarthy helpfully defines the central issue as follows: Has Manchester exercised its discretion in an unlawful manner in the formulation and implementation of its policy on payments to relative foster carers? Save in one particular respect, which I deal with in paragraphs [100]-[101] below, there is no specific challenge to the individual discretionary decision in either case.

60 For the avoidance of doubt I should briefly indicate what this case is *not* about. As Mr Ryder properly points out, the claimants do not suggest that the financial support provided for either placement is an unlawful execution of or a change to the provisions of the care plans approved in each case by the court. Nor do the claimants seek to enforce as such any duty owed by Manchester under section 17

or sections 22 and 23 of the Act to give financial assistance either in a particular way or at a particular level. The challenge is simply to the lawfulness of the policy adopted, in the exercise of its discretion, by Manchester as the basis for the exercise of its statutory duties and powers. This being so there is no need for me to consider the juridical nature of Manchester's obligations under sections 17, 22 and 23 of the Act or the issues considered in such cases as *R (on the application of G) v London Borough of Barnet [2001] EWCA Civ 540* [2001] 2 FCR 193 and *A v London Borough of Lambeth [2001] EWHC Admin 376* (2001) May 25 (Scott Baker J).

61 Mr Ryder sought to persuade me that the claimants had an alternative remedy which they could and should have pursued before resorting to judicial review. I do not agree. At one stage, though he subsequently abandoned the point, he submitted that the claimants could have asked the Secretary of State for Health to exercise his default powers under section 84 of the Act, commenting that, had they done so, the result might well have been the clarification of national policy rather than an attempt to quash an individual policy. His real point was founded in the submission that an alternative remedy is now available to the claimants by an application to the care judge under section 7(1) of the Human Rights Act 1998 in accordance with the decision of the Court of Appeal in *Re W and B, Re W (Care Plan) [2001] EWCA Civ 757* [2001] 2 FLR 582. In this connection he referred me also to Coleridge J's as yet unreported decision in *Re C (Children) (Adoption and Permanent Placement Policy)* (2001) February 9. Available remedies, he says, referring to Hale LJ's judgment in *Re W and B* at 609 (paras [75]-[76]), would include injunctive relief under the inherent jurisdiction or pursuant to section 37 of the Supreme Court Act 1981. No doubt, but as Mr McCarthy points out the policy which he seeks to challenge in these proceedings long precedes any care plan or decision in relation to either the L Children or the R children and, whatever may be the ambit of the *Re W and B* jurisdiction exercisable by a family judge, a judge in care proceedings does not have any jurisdiction (even if he is a Judge of the High Court) to making a quashing order of the kind sought here - that is an order which can only be made by a Judge of the Administrative Court exercising jurisdiction under CPR Part 54.

A preliminary point

62 Before addressing the central issue as to the legality of Manchester's policy I must mention one important matter which emerged at a late stage in the proceedings.

63 It will be recalled (see paragraph [49] above) that Mr Mason was unable to produce any contemporary documentation in relation to the discussion and adoption of the policy in 1992. This prompted Mr Taylor and Ms Rowland to say in their joint statement that without production of Manchester's relevant standing orders they were not prepared to accept that the policy had been made under proper delegated authority. This produced a somewhat indignant response to the effect that there was no evidence that Manchester's 1992 policy and 1997 guidelines were or are *ultra vires* by reason of some unparticularised technical

objection to their promulgation by the directorate under delegated powers, that Mr Taylor and Ms Rowland were engaging in no more than speculation in this regard and that, if the matter was to be seriously pursued, then Manchester would have to examine its standing orders from time to time and the details of delegated authorities at the time and subsequently, a task that would be disproportionate without a *prima facie* allegation of complaint.

64 Mr McCarthy, maintaining his composure under Mr Ryder's fire, was not to be deflected and it was eventually agreed that the matter would have to be explored, albeit after the conclusion of the hearing.

65 On 19 July 2001 I received from Mr McCarthy and Mr Ryder what was described as an agreed note on the question of whether the policy decisions under challenge were made under Manchester's delegation scheme. I think that in the circumstances I should set this note out in full:

> "1 This one issue was left outstanding after the close of argument in this case. It arose initially because in Mr Glen Mason's statement for [Manchester] he expressed the belief at paragraph 4 that the relevant policy decisions had been made at directorate level. The litigation friends required production of the delegation scheme operated by [Manchester] without which they did not accept that the decision had been made under effective delegated authority.
>
> 2 [Manchester]'s delegation scheme to Directorate level has been disclosed and considered by both parties legal advisers. It contains no reference to a scheme for delegation of this type of decision to officer level.
>
> 3 Had there been such a scheme [Manchester] could have lawfully delegated authority to act pursuant to section 101 Local Government Act 1972. Since there is no such scheme [Manchester] cannot effectively rely on the 1992 policy and the 1997 guidelines to limit payments to a level which is less than that of normal foster parents. [Manchester] cannot however lawfully reclaim sums paid in the past given the fact that payments were made under ostensible authority and [Manchester] is in any event estopped from doing so.
>
> 4 To save its decisions [Manchester] has to either
>
> (a) make fresh decisions at social services committee level, or
>
> (b) ratify the past decisions at social services committee level.
>
> (Section 2 of the Local Authority Social Services Act 1970 requires social services authorities to delegate functions under Schedule 1 (including Children Act functions) to their social services committee).

5 To make either decision 4(a) or 4(b) without awaiting the Court's decision on the propriety of the past decisions would given the issues in play in this case be irregular and liable to challenge. [Manchester] will therefore defer its decision as to what is to be done until the Court has given its judgement.

6 If the Court upholds [Manchester's] past decisions it is likely that [it] will wish to ratify its past decisions although it may be required to receive representations from interested parties (such as the litigation friends) as to whether this is the right course and as to what should be taken into account.

7 If the Court does not uphold [Manchester's] past decisions then any fresh decisions on the relevant fostering allowances will have to be carried out in accordance with the findings of the Court. Interested parties such as the litigation friends may also wish to make representations.

8 In the circumstances, the Court findings on the matters at issue between the parties remains crucial to the resolution of their dispute and the question of whether the policy is lawful as at presently formulated.

9 The delegation issue therefore does not alter the fact that the main purpose of the judicial review is to settle the issue of principle about the legality of Manchester's and other similar policies."

66 In these circumstances Mr McCarthy applied for permission under CPR 54.15 to amend the statement of grounds in each application to allege that the decisions to formulate and implement the 1992 policy and the 1997 guidelines were "ineffective in law" having been made by officers of Manchester who had no delegated authority to make those decisions, which were reserved to the social services committee. Mr Ryder in a written note dated 18 July 2001 informed me that Manchester did not oppose this application under CPR 54.15 "and accept that the 1992 and 1997 decisions are liable to be quashed on this ground."

67 This, if I may say so, seems to me to be a very proper stance for Manchester to adopt. It follows that the claimants are entitled to the relief they seek, that is the quashing of both the 1992 policy and the 1997 guidelines. The remaining - and important - issue, and one on which I have heard full argument, is whether the 1992 policy and the 1997 guidelines are to be quashed, as Mr Ryder would submit, solely because of this essentially procedural defect or additionally, as Mr McCarthy would have it, because they are in any event unlawful for the reasons summarised in paragraphs [58] and [59] above. To that central issue I now turn.

The central issue

68 There was no dispute between Mr McCarthy and Mr Ryder as to the relevant legal

principles and I can therefore adopt Mr McCarthy's helpful summary. The financial framework providing for fostering allowances is left by section 23(2)(a) of the Act to Manchester's discretion. That discretion must be exercised according to conventional public law principles:

(1) It must be formulated and implemented so that it can be exercised flexibly.

(2) It must be formulated and exercised according to the needs of the children concerned and having regard to its advantages and disadvantages in the individual case.

(3) It must be exercised without reliance on irrelevant considerations.

(4) It must be formulated and exercised without disregard of relevant principles.

(5) It must not be exercised in a perverse manner.

(6) It must be formulated and exercised in the light of the aim of the statutory framework within which it is comprised.

(7) It must not be formulated or exercised so as to conflict with any duties within that framework.

(8) It must be formulated and exercised so as to adequately safeguard the right to respect for family life guaranteed by Article 8 of the Convention and so as to avoid discrimination in breach of Article 14.

69 Mr McCarthy accordingly formulates his case by posing this question: Has Manchester exercised its discretion in an unlawful manner in the formulation and implementation of its policy on payments to relative foster carers? In particular:

(8) Has it fettered its discretion so as to prevent itself from acting flexibly?

(9) Has it exercised its discretion according to the needs of the children concerned and having regard to its advantages and disadvantages in the individual case?

(10) Has it exercised its discretion without reliance on irrelevant considerations?

(11) Has it exercised its discretion without disregard of relevant principles?

(12) Has it exercised its discretion in a perverse manner?

(13) Has it exercised its discretion in legitimate pursuit of the statutory

framework within which it is comprised?

(7) Has it exercised its discretion so as to conflict with any duties within that framework?

(8) Has it exercised its discretion so as to adequately safeguard and promote the right to respect for family life guaranteed by Article 8 of the Convention and so as to avoid discrimination to the children and families in breach of Article 14?

I shall deal separately with the Convention issues which arise in relation to question (8): see paragraphs [88]-[98] below.

70 Mr McCarthy helpfully summarised his arguments separately in relation to each of his first seven questions. But since both the questions and the arguments somewhat overlap I propose to summarise Mr McCarthy's arguments as a whole.

71 Mr McCarthy will, I hope, forgive me if I do not deal in turn with every one of his arguments. It suffices if I identify the key points in his case. Fundamentally his complaint is that Manchester maintained a policy for payment of relative foster carers which

+ was separate and different from that for non-relative foster carers and maintained a wholly different financial structure

+ imposed an arbitrary cash limit on the sum to be paid and prevented any discretionary payments beyond the cash limit (payments to non-relative foster carers were not subject to an absolute cash limit)

+ did not reflect any welfare based analysis of the financial needs created by the placement

+ operated so as to discourage family members from being foster carers.

72 More specifically (and in addition to the points which I have already identified in paragraphs [22], [24], [56] and [58] above) Mr McCarthy's case can be summarised in the following submissions:

(a) The policy as published in 1992 and revised by the 1997 guidelines excludes any flexibility to allow payment of the normal fostering allowance to relative foster carers in appropriate cases. There is no discretion to exceed the cash limit. The policy does not permit the needs of the children concerned to be properly taken into account. It does not recognise that there will be cases where the needs of a child or the finances of the family may require a higher payment nor that in certain circumstances the cash ceiling will not be feasible. The policy is totally different from that for other foster carers. The imposition of a cash limit is a classic example of inflexibility in practice.

(b) The financial levels set by the policy are set so low, particularly given the NFCA recommended rates, as to make it inevitable that there will be conflict with the welfare principle, or at least a much greater likelihood of such conflict than in the case of normal allowances. Since the amounts are set at a rate which would be lower that the minimum for non-relative fostering there are bound to be significant numbers of placements in which they do not provide enough money to provide sufficient maintenance. The statutory framework focuses on the welfare of the child. Manchester, while permitted on normal local government principles to avoid profligate expenditure, is neither encouraged nor permitted to take any approach which puts the welfare of the child in question at the bottom of the statutory factors. The tension between child welfare and the financial aims of the policy are so great as to make it clear that welfare has little, if any, effect. The discretion as to payment which is given by section 23(2)(a) of the Act can only be read so as to be at a level which is appropriate to promote the section 22(3)(a) duty.

(c) The great difference of fostering rates as between relative and non-relative foster carers, short term relative carers and long term relative carers, and between the Manchester short term rates and national rates for doing the same job demonstrates perversity.

(d) There are *no* age uplifts for relative foster carers - so the disparity with other foster carers increases with the child's age. The absence of a sliding scale shows that the policy is not about the child's needs and hence that it is irrational.

(e) The policy is not just cash-limited but also time-limited. Although the policy focuses on what is to happen after the short term placement has ended, at the initial stage the *immediate* effect is to give the family insufficient money. The policy does not recognise that there will be cases where the cash ceiling is simply not feasible at the point of initial placement and not just long-term. Moreover, the concept that it is beneficial to treat children as though they were not placed by the authority sets up as a benefit something which is illusory since there is no alteration to the child's living arrangements after the change of status.

(f) The references to "unnecessary financial dependency" and "raising financial expectations that cannot be maintained" in the 1992 policy document obscure the fact that "financial dependency" is another way of describing financial need, that is, the *child's* need and the amount that the foster carer needs to meet the *cost* of maintaining the child as quantified by the NFCA rates. How, says Mr McCarthy, can the cost of such maintenance sensibly be described as "unnecessary"? They demonstrate error and irrationality on Manchester's part and show Manchester taking into account extraneous and irrelevant matters. Since financial dependency is not treated as being "unnecessary" in the case of non-relative foster carers, the label "unnecessary" must relate to something other than the child's needs - and hence to something extraneous and irrelevant. Irrationally, the policy is not thought to be relevant after approval of a relative as a long term foster carer, even though the same considerations of dependence continue to

apply. Furthermore, it is irrational to increase the relative foster care rate at the very point when the relative becomes a long-term carer and thus when there is an enhanced likelihood of the relative sooner or later applying for a section 8 order: rationally there is *less* rather than more reason to increase the rate at this point.

(g) There is no evidence that the disadvantages to the children of the financial limit and the impact on their needs was a factor taken into account in formulating the policy. A rational policy must identify the discrepancy and give adequate reasons for nonetheless perpetuating it. There is no evidence that Manchester took account of prevailing trends (eg, the NFCA recommended rates) in its decisions. Section 22(4) of the Act sets out matters which the local authority shall take into account in making decisions in relation to looked after children. These were not taken into account by Manchester in the making of the fostering allowance decisions.

(h) The baseline approach that family members should be treated differently as a matter of principle is irrational. In relation to both the relative foster carer and the non-relative foster carer the route into foster care and the applicable legal framework are the same - so Manchester's obligations should be the same in relation to both. The fact that the future care outcome *may* be different (a section 8 order as against long-term foster care) cannot justify the policy: one cannot justify *present and actual* discrimination by some *future and contingent* distinction.

(i) Moreover this approach clearly envisages a situation in which Manchester may force a relative into a 'trade off' between the amount of money they need to keep the child in a suitable manner and a moral commitment to the child. It allows Manchester to engage in an unprincipled approach to its own statutory responsibilities under Part III of the Act. This approach is not consistent with any published guidance. In fact it is inconsistent with the statutory scheme.

(j) The policy as formulated is informed by an attempt to manipulate the approach of the family member. In particular Manchester's main attempt is to ensure that to continue fostering the child is not financially worth while. The concept of over dependence on the allowance is to be seen as an irrelevant consideration once it is seen that it does not apply to other foster carers. The policy is exercised for extraneous purposes, that is, to force the family to a position where the family cannot afford to look after the child under Manchester's scheme.

73 In fine, Mr McCarthy says there are four stark facts that Mr Ryder is unable to meet: First, that the policy provides that in no circumstances will Manchester pay a short term relative foster carer the normal rate. Second, that even accepting everything Mr Mason says, there is no evidence which comes close to establishing that any additional payments which may be made to relative foster carers will come even close to bridging the gap with the non-relative foster carer rate. Third, that at no stage has Manchester ever considered the possible effect of the policy in

discouraging *potential* family foster carers - and, as he points out, Manchester can hardly assert that its policy has no effect on the willingness of such people to help, if it is to sustain what is said in paragraph 6(10) of the 1992 policy document. This omission, he says, is fatal to the validity of the policy. Fourth, that Manchester has simply not considered if the weekly sums paid are in fact adequate during the short term.

74 In answer to all this Mr Ryder submits that Manchester's policy as formulated and implemented is lawful, Convention compliant, rational, reasonable and flexible, in other words, he says, it complies with classic public law principles. It is also, he submits, compatible with the principle that there should be the minimum intervention in family life. In particular he makes the following submissions:

(a) Paragraphs 3(1), 3(2) and 4(2) of the 1992 policy document show that, in circumstances where it would not be reasonably practicable or consistent with the child's welfare to place a looked after child with a parent, Manchester will endeavour to place the child with a relative, a friend or another person connected with him in accordance with the duties set out in sections 23(2) and 23(6) of the Act.

(b) The nub of the issue concerns the reasons set out at paragraph 6(10) of the policy, namely, (1) whether *"it is important to get the balance correct between adequately supporting the placement financially and not creating unnecessary financial dependency upon the local authority; raising financial expectations that cannot be maintained; or providing a disincentive for a ...relative to apply for a section eight residence order on financial grounds alone"* and (2) whether *"it is beneficial to treat a child so placed by the local authority in a similar fashion to children in need living with friends / relatives, not so placed by the local authority"*. It is reasonable to pursue a policy which encourages the relaxation of statutory controls that affect a child (statutory reviews, social work interventions and the umbrella of state control) by the making of residence orders in appropriate cases and which guards against disproportionate intervention.

(c) It is not unreasonable to expect carers who may be able to claim from central funds to do so before claiming against Manchester.

(d) Mr Mason's evidence is that flexibility is provided for in the policy and that in implementing the policy Manchester is flexible and responds properly to the needs of the individual child, having regard to the statutory framework of the Act. There is not a blanket inflexible policy - if there was it would be bad. The evidence is that additional payments are made; these, says Mr Ryder, will cover the very items which are paid for by weekly allowances once a placement becomes long term. He points, for example, to what he says were the "very significant" additional payments made to the maternal grandparents and to the difference between the baseline payments and additional payments made from the same budget and, indeed, to the fact that C was paid initially £42.75 and then £44 per week per child, amounts substantially in excess of the maximum of £1,500

laid down in the 1997 guidelines. So, the policy does not fail to meet the needs of the individual child.

(e) Any difference in treatment as between relative and stranger foster carers is not discriminatory as respects either the carers or the children concerned.

(f) Much of the litigation friends' evidence is anecdotal. There is no real evidence, only anecdotal opinion from the litigation friends, to the effect that Manchester's policy discourages relatives from agreeing to be foster carers for looked after children. After all, Mr Ryder observes, it did not discourage either the maternal grandparents or C. Likewise, there is no evidence that the policy in its implementation tends to act contrary to the statutory scheme or to Manchester's general or specific duties under the same.

(g) There is no evidence of manipulation of the short and long term approval mechanisms for financial reasons. Applying the well-established 'twin track planning' jurisprudence, the care court expects the long term proposals contained in care plans to have been scrutinised by Manchester. That process is undertaken through an advisory panel and placement decisions are made by the Director. The court process of assessment, determination and approval of care plans is under the control of the care judge not Manchester.

(h) Manchester's policy and the agreements made with relative foster carers under the *Regulations* are not a reflection of some improper use of Manchester's alleged bargaining power. Every local authority should want to place looked after children in their extended families wherever possible; there is no issue that subject to individual circumstances this is qualitatively better for the children concerned. There is no purpose to providing a financial disincentive to relative foster carers as the children concerned would then have to be cared for in potentially less ideal placements that may only be available to Manchester at long term fostering allowance or even at commercial rates above Manchester's long term fostering rates.

(i) On the contrary, an alternative system of baseline payments and discretionary allowances would act as a financial disincentive to the carer who does well for the child's needs and whose payments or allowances are reduced in comparison with the carer who is not as able to meet a child's needs and who would continue to be assessed as dealing with greater need requiring or justifying greater funding.

75 Now there is much in Mr Ryder's submissions which I have little difficulty in accepting. Thus in general terms I can accept his submissions as I have summarised them in paragraphs [74(a)], [74(b)], [74(c)] and [74(g)] above. (On the other hand I do not find his submission as I have summarised it in paragraph [74(i)] particularly plausible and the point made by Mr Ryder as summarised in paragraph [74(c)] can be met, as it was by Mr McCarthy, with the observation that if the argument is sound one might expect to find - but one does not - the same

policy applied by Manchester to non-relative carers.) And despite his eloquence I am not prepared to accept those parts of Mr McCarthy's submissions which involve imputing to Manchester a variety of less than worthy motives: thus although this may be the *effect* of its policy I cannot accept that Manchester operates the policy with the *subjective intention* of applying either moral or financial pressure to relative foster carers (see paragraphs [58(ii)], [58(iii)], [72(i)] and [72(j)] above) or abusing a dominant position (paragraph [58(vii)]). I also agree with Mr Ryder that one has to be careful not to place undue weight on what he calls the anecdotal parts of Mr Taylor and Ms Rowland's evidence. This is not, I stress, because I wish to question in any way the genuineness of their views and their conviction that these views are more than well founded. It may very well be that they are. But in fairness and justice to Manchester I have to remember that the litigation friends' views, as set out in their witness statements, are in large measure anecdotal, lacking any great particularity, and that, given the nature of the proceedings, neither Manchester nor I have had the opportunity to explore the factual basis for their views to the extent that would be necessary if I were to come safely to any conclusions adverse to Manchester. (That said I have to say I do not find Mr Ryder's argument (see paragraph [74(f)] above) based on the fact that neither the maternal grandparents nor C has been discouraged from agreeing to be foster carers particularly compelling: as Mr McCarthy commented, the fact that people will put up with the policy it is not a proper consideration.)

76 In particular, and of central importance, I accept that Manchester's policy was and is genuinely driven in significant measure by the principle, articulated in paragraph 6(10) of the 1992 policy document, that it is undesirable to create a financial dependency upon the local authority *if* (and I emphasise the word if) that is going to provide a disincentive for a friend or relative to apply for a section 8 residence order on financial grounds alone. This is not just some piece of disingenuous window-dressing. It is, I accept, a central part of a policy which has been conscientiously formulated and, in large part, equally conscientiously applied. Furthermore I agree with Mr Ryder that it is an entirely legitimate consideration for Manchester to have in mind when deciding and implementing its policy. I can see nothing in this particular objective which is in any way inconsistent with Manchester's duty, either under the Act or under the Convention. On the contrary, it seems to me entirely in accordance with the key principle, explicitly recognised in section 26(3) of the Act, that, other things being equal, children ought to be brought up, if not by their parents then if at all possible by members of the wide family. (For the avoidance of doubt I should make it clear that I have much more difficulty with the references in paragraph 6(10) to the concept of "unnecessary" financial dependency, to the "raising [of] financial expectations that cannot be maintained" and to the idea that "it would be beneficial to treat a child so placed ... in a similar fashion to children in need ... not so placed".)

77 On the other hand, and even putting all of this in the balance, there remains the central core of Mr McCarthy's case to which, as it seemed to me, Mr Ryder at the end of the day had no effective answer. I have in mind, in particular, those parts of

Mr McCarthy's submissions which (taking them in no particular order) I have summarised in paragraphs [22], [24] and [72(a)]-[72(h)] above.

78 At the end of the day there are, in my judgment, four essential reasons why, as Mr McCarthy submits, Manchester's policy is unlawful, and this notwithstanding what I have said in paragraph [76] above. I accept, as I have said, that the idea that it is undesirable to create a financial dependency upon the local authority *if* that is going to provide a disincentive for a friend or relative to apply for a section 8 residence order on financial grounds alone is an entirely legitimate consideration for Manchester to have had in mind when deciding and implementing its policy, this being an objective which is in no way inconsistent with Manchester's duty, either under the Act or under the Convention, and, on the contrary, entirely in accordance with the key principle, explicitly recognised in section 26(3) of the Act, that, other things being equal, children ought to be brought up, if not by their parents then if at all possible by members of the wide family. But the way in which Manchester has sought to pursue this objective seems to me to be fundamentally unsound:

(1) First, the policy imposes an arbitrary and inflexible cash limit on the amounts that can be paid to relative foster-carers. I have of course considered very carefully Mr Ryder's submission (see paragraphs [56] and [74(d)] above) that the policy is in fact flexible. But at the end of the day the essential facts remain, as Mr McCarthy submitted, (i) that the policy, at least as amended in 1997, quite clearly on its face provides for a *maximum* payment of £1,500 per annum, (ii) that Manchester has been able to point only to isolated examples of cases where the policy ceiling has in fact been breached (and, I might add, has been wholly unable to explain how it comes about that, despite the terms of the 1997 guidelines, the policy ceiling has been breached) and (iii) that even in those cases which Manchester is able to rely upon as suggesting some degree of flexibility none of the additional payments it is able to point to goes anywhere near bridging the yawning gap between Manchester's short term relative foster care payments and its normal rates.

(2) Secondly, the policy fixes the level of payments to relative foster carers so low as to make it inevitable in my judgment that there will be a conflict with the welfare principle and thus with Manchester's statutory duty, in particular its duty under section 22(3)(a) of the Act. Mr Taylor's evidence in relation to the impact of Manchester's policy on the maternal grandparents (the relevant parts of which I have set out in paragraph [44] above and which has to be read in the context of the facts summarised in paragraphs [23]-[24] above) vividly illustrates, as it seems to me, how that policy, even when correctly applied in accordance with its own terms, quite manifestly fails to meet the welfare requirements of children whose welfare it is Manchester's statutory duty under section 22(3)(a) of the Act to "safeguard and promote".

(3) Thirdly, and having regard to the combined effect of a number of different elements in the policy as analysed by Mr McCarthy (see paragraphs [22], [24],

[72(c)]-[72(f)] and [72(h)] above), I am satisfied that the policy is in the '*Wednesbury*' sense irrational.

(4) Finally, it is apparent that the policy, in effect if not in intention, is fundamentally discriminatory, discriminating against both those short term foster carers who are relatives and those children in care who are fostered short term by relatives rather than by non-relatives.

None of these objections, in my judgment, is met merely by pointing to the legitimacy of the objective that Manchester was seeking to pursue. Additionally there is, I think, some plausibility in Mr McCarthy's contention (see paragraphs [72(g)] and [73] above) that Manchester failed to consider and take into account certain material factors when it was formulating the policy.

79 For all these reasons Manchester's policy in my judgment fails at the very least to meet each of the tests propounded by Mr McCarthy in paragraphs (1), (2), (5), (6) and (7) of the principles as I have summarised them in paragraph [68] above.

80 I conclude therefore that, even without reference to the Convention, Mr McCarthy has made good his case: Manchester's policy is unlawful, not merely because of the essentially procedural defect which is conceded by Mr Ryder but also and in any event on the wider substantive grounds relied on by the claimants. I should, however, address Mr McCarthy's further submissions based on the Convention. Before doing so, however, there are certain other matters I must briefly deal with.

Resources

81 Mr Ryder submits that Manchester is entitled to have regard to resources in the determination and application of its policies in the discretionary environment, that the financial restrictions confronting it were legitimate and proper factors to be taken into account and that a local authority is entitled to balance the needs of all children who are looked after, the needs of the particular children concerned and the scarcity of its resources. He refers in this context to *R v Royal Borough of Kingston-upon-Thames ex p T* [1994] 1 FLR 798, *R v. London Borough of Barnet ex p B* [1994] 1 FLR 592 and *R (Batantu) v London Borough of Islington* (2000) November 8 (Henriques J unreported). And he points to that part of Mr Mason's evidence relating to the cost of equalising all foster care payments at the NFCA rates which I have set out in paragraph [51] above.

82 Mr Ryder also refers to paragraph 1(c) of Schedule 9 of the Social Security Contributions and Benefits Act 1992 which provides that "no person" shall be entitled to child benefit if the child is in the care of a local authority. Now the effect of that, as I understand Mr Ryder's point, is that it deprives relative and friend foster carers of child benefit which would be payable were the child not in care. That I accept. He submits that it is not the function of local government to make good a discrimination or difference in treatment caused by central Government financial policy approved in legislative form by Parliament. That, he

says, is a separate matter which can or should be pursued by the claimants or their carers as against central Government. That I also accept. What I do not accept is that this provision in some way assists Manchester in seeking to justify its policy. As the language I have quoted shows, paragraph 1(c) bears equally on relatives as on other foster carers in cases where the child is in care. Where a child is in care the effect of the legislation is to deny child benefit to the foster carer, whether or not the carer is a relative. In that sense all such foster carers suffer a financial loss. But I do not see how that can of itself assist in justifying Manchester's differential financial treatment of relative and non-relative foster carers. Nor do I see how it can justify a policy, if such is indeed Manchester's policy, of trying to persuade relative foster carers to apply for section 8 orders.

83 Mr McCarthy says that it is not clear from the evidence what part resources in fact played in the policy decisions in 1992 and 1997. He submits that if Manchester fails to prove this then it cannot be put into the balance. Mr Ryder says that the consideration of resources is not just an ex post facto rationalisation for, he says, Manchester's resources are an express feature of its reasons as set out in the 1992 policy document (this, as I understand his submissions, is based on the references in that document to "get[ting] the balance correct between adequately supporting the placement financially and not creating unnecessary financial dependency upon the Local Authority" and "raising financial expectations that cannot be maintained").

84 Whilst I have little doubt that Manchester did have regard to the resource implications of its policy decisions there is no clear evidence as to precisely how this factor was taken into account either in 1992 or again in 1997. So Mr Ryder's submissions do not particularly assist me in determining the crucial issue in the case. But if as a result of these proceedings Manchester has to redetermine its policy the state of its finances will of course be a relevant matter for it to take into account as the authorities referred to in paragraph [81] above indicate. No doubt Manchester will also have regard, to such extent as is appropriate, to all the various matters canvassed in paragraph [51] above.

Policy factors

85 I have already set out in paragraph [52] above Mr Mason's evidence as to the other policy factors which, he says, underlay Manchester's decision-making process in 1992 and 1997. But, as I observed in paragraph [53], this is to a significant extent little more than an attempt at ex post facto rationalisation. Mr McCarthy submits, correctly as it seems to me, that Manchester has failed to establish just which of these policy factors were in play at the relevant time and that, in seeking to broaden the factors beyond what is set out in paragraph 6(10) of the 1992 policy document, Manchester goes further than the evidence warrants. He says, and I agree, that the other policy factors are not shown on the evidence to have been bases of the decisions and are therefore irrelevant for immediate purposes.

86 Mr McCarthy accepts, correctly, that the range of policy factors identified by Mr Mason (including the state of Manchester's finances) will of course be relevant if as a result of these proceedings, Manchester has to redetermine its policy.

Central government policy

87 Mr Ryder submits that, in attempting to formulate policy, Manchester is entitled to have regard not merely to its resources but also to central Government policy. In paragraphs 45-47 of his witness statement Mr Mason identifies some of the relevant policy documents. However, as he himself accepts, this material all post-dates the adoption of Manchester's policy and, as Mr McCarthy comments, none of it is shown to have been taken into account in any of the decisions with which I am concerned. It is therefore not directly relevant to anything I have to consider. There is, I think, force in Mr McCarthy's comment that this attempt at an appeal to central Government authority is simply a rationalisation of Manchester's position and not an explanation. He accepts, of course, that this material will be relevant if, as a result of my decision in these proceedings, Manchester is to be required to reconsider its policy afresh - in just the same way as the materials referred to by Mr Taylor and Ms Rowland in paragraph 15 of their joint statement will also require to be considered by Manchester. Since the material referred to by Mr Mason thus goes essentially only to new policy making there is, as it seems to me, no need for me to consider it further.

The Convention

88 Mr McCarthy relies upon Articles 8 and 14 of the Convention. Article 8 is in the following terms:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

89 Mr McCarthy and Mr Ryder are in large measure agreed on the applicable principles. I can take them relatively shortly.

90 The duty under Article 8 may in appropriate circumstances oblige the state (and hence Manchester) to take positive steps to secure respect for family life: *Marckx v Belgium* (1979) 2 EHRR 330, 342 (para 31) and *X and Y v Netherlands* (1985) 8 EHRR 235, 239 (para 23). The steps required to be taken by Manchester under Part III of the Act in relation to looked after children are a classic circumstance in which the Article 8 positive obligation comes into play. It is coterminous with the obligations under the Act and, as Mr McCarthy points out, all courts which since the coming into effect of the Human Rights Act 1998 have so far had to pronounce on the interrelationship between the Convention and the Act have concluded that the aims are the same and that positive obligation under the Convention mirrors positive obligation under the Act. It follows that the obligation of Manchester under both the Act and the Convention is to take all appropriate positive steps (subject to contrary welfare considerations as set out in section 23(6) of the Act and Article 8(2) of the Convention) to ensure that children should live with their families.

91 The non-discrimination obligation under Article 14 relates to rights, such as those arising under Article 8, which are themselves guaranteed by the Convention. Article 14 extends both to direct discrimination, that is discrimination which is directed at the status of the victim, and to indirect discrimination, that which has a disproportionate effect on a particular group. Mr McCarthy submits, and I agree, that the reference in Article 14 to "other status" includes family status. It follows that differential treatment based on family relationships or which has an additional impact on family members is only to be justified by counterbalancing factors of a compelling nature.

92 Mr Ryder accepts that Article 8 is engaged (though he denies that it has been breached) and that Article 14 is therefore also relevant. Well established Convention jurisprudence, which it is unnecessary to rehearse, requires that any interference with Article 8 rights if it is to be justified has to be (i) in pursuit of a "legitimate aim", (ii) "necessary" as fulfilling a "pressing social need" and (iii) "proportionate", that is in appropriate relationship to the interference in the protected right or non fulfilment of the positive duty. Once an interference or failure to meet a positive obligation is shown, the burden of proof shifts to the defendant to show relevant and sufficient reason for its conduct. So it is for Manchester to prove justification.

93 Mr Ryder accepts that an interference by a public body with a fundamental right requires a substantial objective justification. But, as he points out, for a difference in treatment to be discriminatory either the aim has to be illegitimate or there must be no reasonable justification for the difference in treatment, that is, no reasonable relationship of proportionality between the means employed and the aim sought to be realised: see *Gaygusuz v Austria* (1996) 23 EHRR 364, 381 (para 42) and *Van Raalte v The Netherlands* (1997) 24 EHRR 503, 518 (para 39).

94 The court's examination of the proportionality of a measure involves

consideration of whether there is a less restrictive alternative and whether the measure under consideration is therefore disproportionate. The court's stance in reviewing the necessity and proportionality of a measure is not limited to a '*Wednesbury*' assessment of its rationality: see *R (Daly) v Secretary of State for the Home Department [2001] UKHL 26* [2001] 2 WLR 1622 and in particular the analysis of Lord Steyn at 1634C-1636C (paras 25 and 28). The court is required to review the balance which the decision maker struck and may review the relative weight to be attached to the various factors. Even the heightened scrutiny test in *R v Ministry of Defence ex p Smith* [1996] QB 517, 554, is not necessarily sufficient to the protection of human rights. If fundamental human rights are engaged the decision must be subjected to "the most anxious scrutiny": *R v Secretary of State for the Home Department ex p Mahmood* [2001] 2 FCR 63, 81 (para 39). I agree with Mr McCarthy when he says that the right in question here - the right of children to be brought up by their own families - is one of the most fundamental rights in a democratic society. Indeed, as Lord Templeman and Lord Oliver of Aylmerton were at pains to point out in *In re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806, 812B-E, 825A-E, it is a universally recognised norm accepted in most civilised societies.

95 Mr McCarthy submits that, the obligation being on Manchester to establish that its policy had a "legitimate aim", that it is "necessary" and that it is proportionate, Manchester has failed in all three respects. He relies on the various matters which I have set out in paragraphs [72]-[73] above. Putting the matter shortly he submits that Manchester's policy makes it more difficult for family members to foster children than non-family members, that the setting of low fostering rates for relative foster carers will inevitably tend to discourage such persons from applying and thus be likely to diminish the child's opportunity to participate in family life within its own family, and, indeed, that Manchester has deliberately set fostering rates so as to make this option less attractive for relatives. In so doing Manchester, he says, has breached its duties under Article 8 and Article 14 in circumstances where there is no available justification under Article 8(2) for doing so. For good measure he submits that, insofar as Manchester also has a positive obligation to take steps under the Act or the Convention to allow relatives to have children in care living with them, it has failed adequately to manifest that duty in its approach to fostering allowances. Finally he observes that, because Manchester has not engaged in any actual calculation relating to the financial needs of the family which shows that not to pay family members ordinary fostering allowances will not infringe one of the interests protected by Article 8, it has simply not addressed the Article 8 issue at all.

96 Mr Ryder, as I have said, accepts that Article 8 is engaged but not that it has been breached. He accepts that Article 14 is therefore relevant. He submits that there is no discrimination on the basis of status, only a difference which is rational and explicable on the basis of the same policy reasons which I have already referred to above. He repeats the submissions which I have summarised in paragraph [74] above. Furthermore, he submits,

+ the functions and obligations of relative and friend foster carers are very different from stranger foster carers: they do not take into their care unknown children of disparate backgrounds and complex needs, they are not available for use as carers for other children who need to be fostered, and they are only approved for the specific children they volunteer to care for

+ in the short term before approval of a long term placement, relative carers should not become unnecessarily dependent upon a local authority whose statutory intervention may neither be required nor be appropriate as a proportionate response to the child's needs, nor should there be a financial disincentive to apply for a section 8 order

+ it is beneficial to treat such a child placed by the local authority in a similar fashion to children in need living with friends or relatives who are not so placed by the local authority

+ any difference in treatment is theoretical and not necessarily an adverse treatment in fact and in any event it is justifiable and proportionate.

97 If I am correct in my conclusion that Manchester's policy fails when tested against classic public law principles then it inevitably follows that it will fail to pass muster under the Convention. After all, as I have pointed out (see paragraphs [92]-[94] above), Manchester has to satisfy a more stringent test under the Convention than under traditional '*Wednesbury*' principles.

98 However, even if I am wrong in my conclusions as I have summarised them in paragraphs [78]-[80] above, I would in any event hold that Manchester's policy fails to pass muster under the Convention. Putting the point very shortly, and for reasons which will be apparent, I conclude that the policy insofar as it impacts adversely on short term relative foster carers fails to meet the key Convention tests of "necessity" and, in particular, "proportionality". Accordingly, and in any event, I am satisfied that Manchester's policy involves breaches of both Article 8 and Article 14 of the Convention.

Damages

99 This has been added by way of amendment. It is accepted by Mr McCarthy, having regard to sections 7, 8 and 22 of the Human Rights Act 1998 and to the recent authority of *R (Ben-Abdelaziz) v London Borough of Haringey [2001] EWCA Civ 803*, that damages under the 1998 Act are only available in relation to acts or omissions after the Act came into force on 2 October 2000. He accepts that there can thus be no such claim for damages by the L children, but he asserts that the R children do have such a claim in relation to payments made by Manchester after 2 October 2000, assuming, that is, that the Court has first found in their favour (as I have) in relation to their claims under the Convention. He invites me in these circumstances to adjourn the damages claim for further directions if in the

meantime it has not been possible to settle it. Subject to anything further Mr Ryder may wish to say that is what I propose to do.

C's claim

100 I have already set out the relevant facts at some length in paragraphs [26]-[29] above and Ms Rowland's further observations on the matter in paragraph [46] above. Mr McCarthy says that in failing to approve C as a long term foster carer following the making of the final care orders on 9 January 2001 Manchester appears to have breached its own policy. He submits that, for the reasons set out in paragraph [29] above, the justifications put forward by Mr Haley and Mr Mason do not hold water. He asserts that Manchester's failure to approve her as a long term foster carer must have been influenced by its wish to ensure that she takes over care under a section 8 residence order. It intends - as the care court did - that the children should remain living with her. Its policy indicates that it does not pay the higher rate to family foster carers in part because it does not wish them to have an incentive to carry on as local authority foster carers. C's case, he says, is a classic example of the policy in operation. Manchester wishes her to accept the lower level of payment and to apply, even at this stage, for residence. It thereby uses the lower payment as a means of applying and continuing to apply pressure on her. It is, he says, discriminating against her as a relative foster carer by even now continuing to treat her as a short term rather than accepting her as a long term foster carer. It illustrates, he says, how the status which Manchester attributes to relative foster carers fails to accord with the reality of the foster carer family.

101 Without imputing to Manchester some of the more sinister motives which Mr McCarthy ascribes to it, there seems to me to be no answer to his fundamental complaint that in failing to approve C as a long term foster carer following the making of the final care orders on 9 January 2001 Manchester appears to have breached its own policy. I agree with Mr McCarthy's basic submission. For the reasons which I have already set out in paragraph [29] above the explanations put forward by Mr Haley and Mr Mason do not suffice to justify Manchester's continuing failure since 9 January 2001 to approve C as a long term foster carer paid as such.

102 I will hear counsel further on the appropriate form of order in each case.

103 Counsel were in the event able to agree the form of order: a copy is attached to and forms part of this judgment.

Order

UPON MANCHESTER CITY COUNCIL UNDERTAKING THAT

(1) It will pay the sum of £11,088.70 to and for the benefit of the L children subject to the completion of an agreement between the parties (the terms of which have been agreed)

(2) It will pay the sum of £4,361.55 to and for the benefit of the R children subject to the completion of an agreement between the parties (the terms of which have been agreed)

(3) It will forthwith take steps to ensure that C the foster carer of the R children is approved as a long term foster carer.

1. It is declared that:

(1) The Defendants continuing policy between 1992 and to date by which it pays related foster carers lower fostering allowances that non related carers is unlawful.

(2) The Defendants decisions between 28 November 1997 and 8 January 1999 to pay fostering allowances for the L children at a lower rate than non related foster children were unlawful.

(3) The Defendants decisions from 17 September 2000 and continuing to date to pay fostering allowances for the R children at a lower rate than non related foster children were and are unlawful.

2. It is ordered that:

(1) The Defendants decisions to pay fostering allowances in relation to the L children between 28 November 1997 and 8 January 1999 shall be quashed and redetermined in accordance with the findings of the Court.

(2) The Defendant's decisions to pay fostering allowances in relation to the care of the R children between 17 September 2000 and continuing shall be quashed and redetermined in accordance with the findings of the Court.

(3) The claim for damages in the L and R cases shall be stayed on terms which have been agreed between the parties

(4) 2 (1) and 2(2) are subject to the proviso that there shall be no requirement for the Defendant to redetermine in the event that the Defendants pay the sums described in undertakings (1) and (2) above.

(5) The Claimants costs in each application shall be subject of detailed public funding assessment

(6) The Defendants shall pay the Claimants in each application the costs of both applications (to include reserved costs from the permission hearing) and to include costs incurred by the litigation friends to be assessed if not agreed..

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MR JUSTICE MUNBY: These are judicial review proceedings putting in issue the legality of Manchester City Council's policy under which it pays short-term foster carers who are friends or relatives of the fostered child at a different and very significantly lower rate than it pays other foster carers.

For the reasons set out in a judgment, a draft of which has already been sent to the parties and copies of which will be available in a moment to anybody who is interested, I have decided that that policy is unlawful. In addition, it breaches both Article 8 and Article 14 of the European Convention, and that accordingly the policy and various decisions taken consequential upon that policy shall all be quashed.

MR McCARTHY: My Lord, the parties have come to terms on the form of order which is appropriate. My learned friend Ms Budaly acts for Manchester City Council. She was just checking with Mr Ryder who was previously instructed. I wonder if I could just have a moment?

MR JUSTICE MUNBY: Yes, of course. **(Pause)**

MR McCARTHY: My Lord, there is one minor variation. May I start with the variation first? If you go to the last sub-paragraph 2(6), the reference to the costs of the litigation friends, the amendment which is agreed and proposed is the word "properly" should be taken out.

MR JUSTICE MUNBY: Yes.

MR McCARTHY: And that to the end of the sentence after the words "friends" there should appear the words "to be assessed if not agreed".

MR JUSTICE MUNBY: Yes.

MR McCARTHY: My Lord, it has been agreed between the parties that Manchester City Council will give certain undertakings which bring, if you like, the cutting edge of this

dispute to an end. They undertake to pay what are the sums which amount to the deficiency between the normal fostering rate and the fostering rate which they paid these families. In relation to the L children, that means they have undertaken to pay the sum of £11,088.70 to and for the benefit of the children, subject to the completion of an agreement between the parties, the terms of which have been agreed. My Lord, we think, for various reasons, unnecessary to trouble your Lordship as to the terms of that agreement. It has been put in writing. Both of us have seen it this morning. It has been discussed between both sides and I anticipate, subject to further discussions, that agreement will actually be signed within the next week.

In relation to the R children, the deficiency is £4,361.55, so the same payment is to be made. Very importantly, my Lord, following on your Lordship's paragraphs 100-101 Manchester are going to approve C----

MR JUSTICE MUNBY: Sorry, I just want to move on. Undertaking number 2 contains the word "main" qualifying the word "terms" which does not appear in paragraph 1. Is that intentional?

MR McCARTHY: No, I thank you for pointing that out. That is part of an earlier draft.

MR JUSTICE MUNBY: Delete the word "main".

MR McCARTHY: I will have the alterations - I have got this on disc in chambers, I will have produced it to court. Thank you very much for pointing that out.

Number 3 is important, it follows on from your Lordship's 100-101 paragraphs. C will now in the very near future be approved as a long-term foster parent which will bring these shenanigans to an end as far as she is concerned.

My Lord, there are then declarations relating to the policies in general and the policies as they apply in relation to the two sets of children.

MR JUSTICE MUNBY: Yes.

MR McCARTHY: They are the declarations. Then the orders quashing the decisions might have been unnecessary had the agreement which we anticipate in the undertakings already been completed. But it has not, so we need to protect our position.

MR JUSTICE MUNBY: That is why paragraph 2(4) is in.

MR McCARTHY: Therefore, although they will be quashed, as long as this agreement is concluded and the money is paid over there will be no need for redetermination in these cases. Of course Manchester are going to have to step back and look at their policy as a whole, but that is, essentially, not a matter for the claimants.

MR JUSTICE MUNBY: As I understand it, the effect of this is that so far as concerns these particular claimants and these families, once this agreement is implemented and this payment is made that will retrospectively put these children in the position which they should have been in.

MR McCARTHY: Absolutely.

MR JUSTICE MUNBY: So that there will be no need for any further proceedings. So in particular the further proceedings for damages under the Human Rights Act, which I refer to in my judgment, are being stayed.

MR McCARTHY: Absolutely, my Lord. It would mean henceforth they would be in the financial position which we say they should have been in the first place.

Then, my Lord, there are consequential costs orders at the end.

MR JUSTICE MUNBY: That seems a wholly admirable, if I may say so, it seems to me to be very proper that Manchester should so promptly have agreed to give effect to not merely the letter but also the spirit of my judgment and should have come so promptly to what appears to be a wholly appropriate conclusion in relation to financial compensation.

MR McCARTHY: Discussions started quite a long time ago.

MR JUSTICE MUNBY: So far as concerns those figures, I merely make this observation: the £11,000 figure in relation to the L children is referred to in my judgment, although as I made the point nobody has ever explained how it is arrived at. I think I am right in saying the £4,000 figure in relation to the R children is novel, as far as I am concerned. Again, I have no information as to how it is arrived at, I do not require to know. But since they are parts of undertakings and on the basis that these two very dedicated and conscientious litigation friends are satisfied those are the appropriate figures, I accept that without further exploration.

Well thank you very much indeed.

Subject to the deletion in undertaking 2 of the word "main", and those slight alterations to paragraph 2(6), I will make an order in those terms.

MR McCARTHY: My Lord.

MR JUSTICE MUNBY: That is all agreed, Ms Budaly, is it?

MS BUDALY: My Lord, yes.

MR JUSTICE MUNBY: Thank you very much.

I think, Mr McCarthy, you are spared the burden of taking away four of these files because the office will want to keep them.

MR McCARTHY: Since I fell down some stairs moving furniture yesterday afternoon, I am heartily delighted to hear it.

MR JUSTICE MUNBY: There is a large file which I am afraid represents my reorganisation of authorities by both you and Mr Ryder.

Thank you very much indeed.