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Public Law Case Law Update

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This is an appeal allowed and remitted for rehearing before another judge by Lord Justice Peter Jackson and Lord Justice Miles in the Court of Appeal.

The local authority and the Children's Guardian appealed on the basis that His Honour Judge Oliver had prematurely determined a main issue in the case, namely whether a placement order with a plan for adoption should be made, in the middle of a final hearing having only heard evidence from the allocated social worker and the mother.

Re C (Children: Premature Determination) [2025] EWCA Civ 1481

Background

The mother has had six children with the eldest two having been adopted. In regard to the other four children, the eldest two were made subject to special guardianship orders with a family placement in Ireland. The youngest two children R and A, having been separated from their mother in February 2024 with a care plan for adoption, were the subjects of a five-day final hearing listed before His Honour Judge Oliver in February 2025. This was the first time the matter was before him.

Having heard evidence from an independent social worker and a psychologist, the local authority withdrew its application for a placement order for R and in August 2025 he was placed in a residential therapeutic unit, aged just 5.

Four further case management hearings took place before HHJ Oliver and the final hearing, having been adjourned, resumed on 6 October 2025. Four witnesses were to be heard: the social worker, the mother, the family finder social worker, and the Children's Guardian.

The Law

The court cited CPR 52.21(3) in regard to the law on appeal and gave a helpful summary of the law on predetermination as follows:

> *"For a judge to share their provisional thinking for the benefit of the parties in appropriate circumstances is a normal element of judgecraft, but premature determination that indicates a closed mind is not. A conclusion about which side of the line a judicial intervention falls requires a sensible, and not over-sensitive, assessment of whether it gives rise to a real possibility that the proceedings as a whole would not be fair. That calls for an understanding of the intervention and the context in which it arose."*

The authorities from which they drew this approach, set out at paragraphs 4-8 of the judgment are:

> *"In Lanes Group Plc v Galliford Try Infrastructure Ltd [2011] EWCA Civ 1617; [2012] Bus LR 1184; [2012] 1 EGLR 27; [2012] BLR 121, Jackson LJ noted that predetermination arises when a judge or other decision-maker reaches a final conclusion before they are in possession of all the relevant evidence and arguments. In practice, findings of actual predetermination are rare,*

because of the difficulties of proof, and most cases therefore concern apparent predetermination.

As Lewison LJ explained in Re H (A Child) (Recusal) [2023] EWCA Civ 860; [2023] 4 WLR 64 at [63-74], the classic authorities on the question of judicial bias are not always adequate to cover the various circumstances in which a judge may be asked to recuse themselves. The question that arises in a case where proceedings are ongoing is whether a fair-minded and informed observer, having considered the facts in the context of the proceedings as a whole, would conclude that there was a real possibility that a party would not receive a fair hearing.

There is an important difference between a judge disclosing their provisional thinking for the benefit of the parties and a premature arrival at a settled decision. The first is acceptable and may be beneficial, while the latter is inappropriate and may well be unjust. As Sir Thomas Bingham MR said in Arab Monetary Fund v Hashim [1994] 6 Admin LR 348 at 356a-c:

> *"In some jurisdictions the forensic tradition is that judges sit mute, listening to advocates without interruption, asking no question, voicing no opinion, until they break their silence to give judgment. That is a perfectly respectable tradition, but it is not ours. Practice naturally varies from judge to judge, and obvious differences exist between factual issues at first instance and legal issues on appeal. But on the whole the English tradition sanctions and even encourages a measure of disclosure by the judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be."*

These observations were made in a fact-finding context, but they apply equally to an evaluative decision.

Disclosure of a judge's current thinking may be positively helpful. In Singh v Secretary of State for the Home Department [2016] EWCA Civ 492; [2016] INLR 679 Davis LJ put it this way at [35]:

> *"… such statements can positively assist the advocate or litigant in knowing where particular efforts may need to be pointed. In general terms, there need be no bar on robust expression by a judge, so long as it is not indicative of a closed mind. In fact, sometimes robust expression may be positively necessary in order to displace a presumption or misapprehension, whether wilful or otherwise, on the part of an advocate or litigant on a point which has the potential to be highly material to the case."*

However, as Peter Gibson LJ warned in London Borough of Southwark v Jiminez [2003] EWCA Civ 502; [2003] IRLR 477; [2003] ILR 477, [2003] ICR 1176 at [40]:

> *"… I would add a word of caution for tribunals who choose to indicate their thinking before the hearing is concluded. As can be seen from this case, it is easy for this to be misunderstood, particularly if the views are expressed trenchantly. It is always good*

> *practice to leave the parties in no doubt that such expressions of view are only provisional and that the Tribunal remain[s] open to persuasion."”*

Hearing

At the October hearing, which took place in Week 122 of the proceedings, the local authority sought a care order for R and a placement order for A. The Guardian, having previously recommended adoption for both children, was in support of the local authority's revised position.

The mother opposed the local authority's plan for both children and particularly opposed adoption for A, alongside A's father, and sought for both children to be returned to her care.

The main issue for the court was therefore to decide between the three realistic options for A:

a. Return to her mother
b. Long term foster care
c. Adoption

On the first day of the hearing, which began on Monday 6 October, HHJ Oliver heard live evidence from the allocated social worker and the mother. Though the Court of Appeal did not have a transcript of the Monday hearing, despite it being directed, it was accepted by all parties that the judge gave a proper judicial indication at the end of the day that he did not favour adoption for A. The judge invited the parties to consider this overnight.

On the Tuesday morning between 10.30am and 10.50am, an exchange took place between the judge and counsel for the local authority, Mr Coutts, in which HHJ Oliver, upon probing from counsel, said the following (emphasis added) (at [20]):

> *"I don't mind not beating about the bush, no, it's not a preliminary determination, it's a clear indication that I cannot at the moment accept the care plan, I decided to tell you at this stage in proceedings because* ***I didn't want us to waste time hearing evidence that I cannot see in any way shape or form will change my view****. We're going to hear from the family finder but that is not going to tell me anything about the principle of whether adoption is the correct course of action… it'll tell me how quickly it can be done. I don't say that the child should be returned to mother, I'm not in any way suggesting that that is my view at the moment but what I'm saying is that I cannot at the moment…* ***I can't think of any evidence that I'm going to hear from the Guardian that will change my mind."***

As the judge had made it clear that he was not going to make a placement order in relation to A, no matter what evidence he heard from the remaining witnesses, the parties sought further time to consider how to proceed culminating in the local authority sending an email to the judge asking for permission to appeal on the basis that he had predetermined the issue of adoption for A. It did not ask him to reconsider his stance, and it did not frame the matter in terms of recusal.

The hearing continued at 12.40pm, with the second appearance lasting only ten minutes. Within this exchange, the judge gave the local authority permission to appeal and granted a stay of the proceedings but set no timetable for filing of the Appellant's Notice. The judge made the following comments (emphasis added) (at [23]):

> *"Although if the outcome is to overturn me, you might want it in front of another judge. But that's another story, and you know, I am quite relaxed about that. The other thing Mr Coutts*

that you might want to do is get a transcript of the bit of the hearing this morning where I, frankly, ***made the decision****."*

"I'm sorry that I… well I'm not sorry that I've said what I've said because I actually believe quite firmly what I've said is right, but I am sorry that it is ***causing a further delay*** *which I didn't want to do but I thought it is better to do it at this stage than to do it, I think, at the end."*

Appeal

Despite the urgency of the case, it took the local authority 20 days to issue its Appellant's Notice and file its skeleton argument. After a further 16 days, the Guardian lodged their Respondent's Notice seeking to appeal on additional grounds and both applications were heard the day after on the 13 November 2025.

The positions of the parties

The local authority argued that the judge made a plain and obvious error. His comments amounted to a clear decision on a key issue in the proceedings, as the judge acknowledged himself on the Tuesday. By not hearing from the family finder on the issue of contact, and by preventing the Guardian from expressing her professional independent view on the issues at hand or the judge's initial indication, the judge had deprived A of a full analysis of the options for her future.

The Guardian supported the submissions of the local authority and submitted that the judge's mind was closed. He did not hear submissions, the Guardian had not given oral evidence at any point during the two years of proceedings, and these factors gave ride to a perception of unfairness. As such, the Guardian advanced three further grounds of appeal, as follows:

a. The judge failed to properly consider the impact of further delay on children who had already experienced extreme delay. The course he took, with no clear onward timetabling, was unconscionable.
b. The judge had no regard to the fundamental principle that specific analysis is required where the court departs from the recommendations of its appointed Guardian, which took account of wider considerations than those that he referred to.
c. There was no proper welfare checklist survey, with the judge's approach being reflected in limited references to aspects of the checklist that supported his view.

The mother argued that the judge gave a robust indication, not a predetermination, as he himself said at the beginning of the first exchange on the Tuesday morning, and that by inviting the Guardian to give evidence on the Monday he showed that he did not have a closed mind.

A's father agreed with the mother's submissions and submitted that there would be real disadvantages in the proceedings having to be reheard by a different judge. He disagreed with the submissions of the local authority and the Guardian and went further to suggest that the remedy had been in their hands by way of calling the evidence or trying to change the judge's mind by explaining to him how that evidence would be likely to assist him. As such, he submitted that the appeals did not meet the high test for judicial recusal.

Decision of the appeal court

The court allowed the appeals of both the local authority and the Guardian for the following reasons (emphasis added) (at [36]-[38]):

"We reject the argument that the judge's statements on the second day of the hearing amounted to no more than a robust indication. He repeatedly said that he could not sleep at night if he made an adoption order and that it would be a waste of time to hear further evidence. He said and repeated that he had "made the decision". ***This was an unmistakeable predetermination by a judge who had closed his mind to the case being advanced by two of the parties in relation to a matter of profound and lifelong importance to A."***

"The local authority offered the judge an opportunity to give reassurance that he remained open to persuasion, but he did not do that and instead expressed his views even more strongly. This placed the parties in an impossible position. It would have been unrealistic to simply call the witnesses in front of a judge who had already made his mind up on the things they would be speaking about. We also reject the submission that the advocates should have tried to persuade the judge to keep an open mind until he had heard all the evidence. ***Parties are entitled to expect that of a court and should not have to argue for it.*** *In any event, as the transcription shows, further argument (in effect premature final submissions in favour of adoption) would have been futile."*

"We regret to say that the judge's escalating intervention had the predictable effect of derailing the trial that he was conducting. The only way the hearing could have continued would have been if the local authority and the Guardian had fallen in with his view. That is clear from the one question that he asked of the Guardian: "Has she changed her mind?" ***A fair trial was now impossible."***

Whilst the court also acknowledged that the appeal concerned a decision on procedure rather than merits, that the judge was in a good position to give judicious indication of his preliminary thinking if it had remained as such, and that the local authority's planning had been subject to justified criticism throughout, the court felt it necessary to express three specific concerns about what had occurred in the case, namely:

a. The equanimity with which the judge stayed proceedings indefinitely and his creating of the conditions that caused the delay which deprived all parties of a long-overdue decision. The court was further concerned that delays on this extravagant scale can become decisions by default as time forecloses on the range of available options.
b. The likelihood that the judge's statements will have led the parents to feel that they had fended off the prospect of placement orders in circumstances where the mother is a vulnerable person now facing the prospect of more delay and potentially having to give evidence again.
c. The judge's unaccountable lack of interest in hearing from the Children's Guardian. The court's view was that Children's Guardians are a cornerstone of our public law system and the judge's understanding of A's situation could only have been enhanced by hearing from her experienced Guardian, regardless of his final decision, and that to determine the issue without hearing that evidence was obviously procedurally unfair.

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Conclusion

This decision from the Court of Appeal provides helpful authority in understanding that the consequence of forgoing procedural fairness in order to short-circuit the process can itself cause unconscionable delay.

Furthermore, it provides another example of when an indication becomes a premature determination and warns against judges imposing their own views in the absence of important evidence and parties' submissions.

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