argue that the disclosure of such reasons was somehow confidential or damaging to security interests (at [212]).

Less happy for the applicant, however, was the outcome of his claim for damages against the Council: although the CFI acknowledged that the breach of the applicant's rights of defence was sufficiently serious in principle to found a claim for compensation against the Council, it held that annulment of the measure amounted to sufficient "compensation": at [239]–[241]. Further, the CFI characterised a number of the heads of damage as being causally connected only to the actions of the Member State and not those of the EC (see, in particular, at [246]). This approach to the applicant's damages claim creates significant practical difficulties for those affected by a decision to freeze their assets: first, must they thus bring parallel claims before both the national courts and the CFI to cover their losses? Second, significant danger lurks behind the idea that mere annulment of the measure was sufficient to compensate the alleged losses, unless the CFI is prepared to examine each case on its own facts. Third, given that the CFI's earlier reasoning (at [183]) allows the Council to withhold significant information about the decision to freeze a given applicant's assets, this may make it virtually impossible for the applicant to know whether the Council, or a Member State (and if the latter, then which one?) should be taken to be responsible for the decision to add the applicant's name to the list. Without a clear answer on this point, how is the applicant to choose the appropriate defendant against which to bring his action?

In conclusion, the CFI's clarifications in the *Sison* case are a welcome development in fleshing out the procedural protections in the process of deciding to freeze the assets of those suspected of terrorist connections. However, there is still some distance to travel before this system can be said to have achieved a proper balance between its laudable anti-terrorist goals and the need for effective judicial protection of the interests of those who may be affected by orders to freeze their assets.

ANGUS JOHNSTON

## ADOPTION, WELFARE AND THE PROCREATIVE ONE-NIGHT STAND

THE full impact of the welfare focus in the Adoption and Children Act 2002 has yet to be realised. In *Re C (a child) (adoption: duty of local authority)* [2007] EWCA Civ 1206, [2007] 3 F.C.R. 659, the Court of Appeal took a distinctly individualistic view of the issue. In that case,

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19-year-old M became pregnant with E after a "one-night stand" with F. She told neither F nor her own parents and wanted E to be adopted.

The local authority sought judicial guidance on whether they should approach E's extended family with a view to placing her with them, despite M's objections. The judge held them to be under a duty to obtain as much information about the family as possible, including F and his family if he could be identified. M appealed, by which time the maternal grandparents were aware of E's birth due to a local authority error. They offered assistance but took no part in the proceedings. The Court of Appeal, led by Arden L.J., found no duty to make enquiries that did not "genuinely further the prospect of finding a long-term carer…without delay" (at [3]), and neither F nor the grandparents were considered to be likely carers.

Arden L.J. admitted that the paramountcy principle in section 1 of the 2002 Act embraced E's interest in retaining her identity, and required the court to consider the effect of her ceasing to be a member of the birth family and her relationships with "relatives". Both the grandparents and F were considered "relatives", despite F's ignorance of E's birth, but that alone did not generate an obligation to approach them. The birth family were not prioritised by virtue of their status, and the only aspect of welfare emphasised by Parliament was preventing delay: s. 1(3) of the Act. Thus, there could be no absolute duty to make the enquiries. Arden L.J. also denied the existence of an "*expectation* of disclosure" (at [23]). While disclosure would be in the child's interests in many cases, in "exceptional situations" such as this it was appropriate for relatives, including a father, to remain ignorant of a child's birth at the time of adoption. This, she opined, was consistent with the fact that F's consent was not required for the adoption due to his lack of parental responsibility.

The Court considered this to be compatible with Article 8 of the European Convention on Human Rights, since F did not have "family life" with E, having neither lived with M nor expressed commitment to E. Despite his ignorance of E's existence, which made it impossible to express such commitment, it was held that preventing F from obtaining the *possibility* of a right with regard to E did not violate Article 8. There was therefore no need for a justification under Article 8(2). Arden L.J. also noted that the Article 8 right to receive information relating to one's identity was within the state's margin of appreciation following *Odièvre* v. *France* ([2003] 1 F.C.R. 621). The only such right provided under the 2002 Act related to the adoption file, so no informational right would justify the enquiries. Further, any benefit that E would eventually derive from information about her origins was secondary to, and would actually delay, the objective of finding a long-term home. The Court held that the existence of a right

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for E to be raised by F could be determined only when a final adoption order was made, and a potential right could not require disclosure at this stage. By contrast, the grandparents were said to have "family life" automatically following *Marckx* v. *Belgium* ((1979) 2 E.H.R.R. 330), although their rights would not be violated if E's welfare required a non-disclosure order.

Arden L.J. then considered the exercise of the court's *discretion* to inform the extended family in the absence of a duty. The over-arching consideration was the welfare of the child *as an individual*. Where a child had never lived with the birth family, the tie was overtaken by the need to find a permanent home. The grandparents' communications were insufficient to delay E's placement for adoption, especially since they had not made an application to provide care. Moreover, four-month-old E had formed bonds with her foster parents. Finally, Arden L.J. held that there was "no basis for supposing that [F] could provide a home for E", and that possibility was "too intangible" to delay a placement (at [48]). Thorpe L.J. recognised the "good social policy reasons for accepting the option of a private birth", which the Court risked precluding if it dismissed the appeal (at [82]). They therefore ordered the local authority not to take any steps to identify F or inform him about E, or to assess the grandparents as prospective carers.

Arden L.J.'s admission that disclosure would be appropriate in many cases is admirable. However, while she viewed this case as exceptional, it might have been a typical example of a mother keeping a pregnancy secret because she wants nothing more to do with the father, irrespective of the child's interests. Further, it is doubtful that the lack of a *consent* requirement justifies denying a father without parental responsibility *knowledge* of his child's existence and adoption.

At the heart of this case lies the power differential between birth mothers and fathers without parental responsibility. Although the Court emphasised the "child-centred" rather than "mother-centred" nature of the 2002 Act (at [15]), the mother's automatic family life with the child collapses this distinction somewhat. The narrow view of welfare arguably prioritised M's interests rather than E's, and the Court was dismissive about the *existence* of E and F's Article 8 rights, let alone the need to justify their infringement. M was free to demand child support from F, put E up for adoption, or do anything in between, while F was powerless. Whether or not it is justified (the debate over biological and social parenthood continues), this state of affairs is undeniably controversial. The case also illustrates that it can be easier for maternal grandparents to demonstrate family life with a child than it is for an unmarried father. While this is sometimes

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acceptable, it represents an undesirable *assumption* to make about the reality of family life.

Some commentators will certainly be surprised at the results produced when courts have a wide discretion to interpret "welfare", even in the era of Article 8.

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