THE COURT ORDERED that that no one shall publish or reveal the name or address of the children who are the subject of these proceedings or reveal any information which would be likely to lead to the identification of the children or of any member their family in connection with these proceedings. In addition, the Court reminds that section 12(1) of the Administration of Justice Act 1960 establishes an automatic restriction on reporting and publication in family cases involving children.

Hilary Term
[2025] UKSC 1
On appeal from: [2024] EWCA Civ 694

JUDGMENT

The Father (Appellant) *v* Worcestershire County Council (Respondent)

before

Lord Reed, President
Lord Sales
Lord Leggatt
Lord Stephens
Lady Simler

JUDGMENT GIVEN ON
29 January 2025

Heard on 15 October 2024

Appellant
Self-represented

Respondent
Matiss Krumins
(Instructed by Worcestershire County Council)

LORD SALES AND LORD STEPHENS (with whom Lord Reed, Lord Leggatt and Lady Simler agree):

1. Introduction

1. The writ of habeas corpus is of the highest constitutional importance as it is a means by which the liberty of the individual is vindicated. The appeal in this case concerns an application made in March 2024 by a father of two children for a writ of habeas corpus seeking their release from what he contends is their detention by Worcestershire County Council ("the Council") in whose care the children have been placed under a care order made by DJ Solomon in the Family Court on 9 June 2023 under section 31 of the Children Act 1989. The care plan for both children is for them to be in long term foster care and currently they are living with the same foster parents.

2. On 15 April 2024 the application for a writ of habeas corpus was dismissed by Russell J on the basis that the "correct process" was for the father to appeal the care order and applying for the writ was "inappropriate" and "wrong".

3. The father appealed to the Court of Appeal against the refusal of an order to release the children. He brought his appeal without any requirement to obtain leave: see section 15 of the Administration Act 1960 ("the AJA 1960") and rule 30.3(2)(c) of the Family Procedure Rules 2010 ("the FPR"). On 20 June 2024 the father's appeal to the Court of Appeal was dismissed in a joint judgment delivered by Lewison, King and Falk LJJ ([2024] EWCA Civ 694). The Court of Appeal set aside the judge's order on the grounds that the hearing before her had been unfair, and she had not given proper reasons: this part of its ruling is not the subject of any cross-appeal by the Council. However, having done that, the Court of Appeal considered the matter afresh and dismissed the father's claim for habeas corpus on two grounds. First, the Court of Appeal stated, at para 13, that "[a]lthough the father raised a number of matters in the written material he placed before the court, his fundamental point is that the order of DJ Solomon, placing the children in the care of the local authority, was made without jurisdiction because the threshold condition in section 31(2) of the Children Act 1989 [ie regarding them suffering or the likelihood of them suffering significant harm and the attribution of that harm] had not been satisfied" The Court of Appeal stated, at para 14, that:

> "Because the father's challenge to the district judge's jurisdiction, as articulated to this court, is that the threshold condition had not been met, his challenge is necessarily a challenge to her factual findings. The order that the district judge made is therefore an order of a kind which stands unless and until set aside or discharged by following the procedures contained in the Children Act and the Family Procedure Rules."

Therefore, the Court of Appeal agreed with the judge's "ultimate conclusion" (para 15) that the correct process was for the father to follow the procedures for challenging a care order which are contained in the Children Act 1989 and the FPR. Those procedures include an appeal against the care order. In conclusion, the Court of Appeal agreed that the father's application for a writ of habeas corpus was not the "correct process" but rather was "inappropriate" and "wrong."

4. Secondly, the Court of Appeal stated, at para 14, that:

> "… a child living with foster parents under a care order is not detained but is simply living in the same type of domestic setting as any other child of their age would be. That is not the kind of detention at which the writ of habeas corpus is aimed."

Therefore, in addition to the reason given by Russell J for dismissing the application for a writ of habeas corpus the Court of Appeal also dismissed the application because neither child was detained.

5. The father now appeals to this court, without any requirement to obtain leave, pursuant to his right of appeal under section 15 of the AJA 1960. In this court, as in the Court of Appeal, the father raised various matters in the written material which he placed before the court. However, in his oral submissions he identified the fundamental points upon which he relied. First, he contended that by virtue of the care order the children were detained in their foster placement by the Council. Secondly, he contended that the care order placing the children in the care of the Council was unlawful because the application for a care order was not made by a local authority or an authorised person as it must be by virtue of section 31(1) of the Children Act 1989. Rather, he submitted the application had been made by a limited liability company, Worcestershire Children First Ltd, so that the care proceedings had not been properly initiated. In support of this contention the father relied on the initial statement, dated 25 October 2022, made by the social worker in which she identifies the local authority as "Worcestershire Children First" and in which she states that she is employed by "Worcestershire Children First" and that it was seeking an interim care order in respect of the children. Thirdly, he contended that the order of DJ Solomon, placing the children in the care of the local authority, was made without jurisdiction because the threshold condition in section 31(2) of the Children Act 1989 had not been satisfied.

6. The Council's response to the father's three fundamental points can be summarised as follows. First, the Council contends that the children are not detained, for the reasons given by the Court of Appeal. Secondly, the Council acknowledges that, because of an error, the social worker in her initial statement referred to Worcestershire Children First rather than to the Council. However, the Council submits that this error was not reflected

in the application for the care order in which the applicant was correctly identified as the Council rather than Worcestershire Children First Ltd or Worcestershire Children First. Therefore, the Council contends, and we agree, that the proceedings were in fact commenced by a local authority in accordance with section 31(1) of the Children Act 1989. Thirdly, the Council contends that DJ Solomon was not wrong in her threshold factual findings and furthermore that an application for a writ of habeas corpus is not the correct process for challenging those findings or the order which has been made.

7. We have set out the appellant's three fundamental points together with the Council's response to demonstrate that the first raises the issue as to whether the children are detained and the second and third are a direct challenge to the lawfulness of the care order. They give rise to the question of whether an application for habeas corpus is an appropriate and legitimate procedure to use to challenge that order, notwithstanding other procedural avenues available to do so.

8. The father has conducted the care proceedings and the application for a writ of habeas corpus without legal representation. We pay tribute to the polite way in which he presented his appeal in this court, and we acknowledge his concerns about and his feelings for his children.

2. The care proceedings, an outline of the family, and the father's decision not to appeal against or apply to discharge the care order

9. For the purposes of this appeal, it is not necessary to go into any great detail as to the family's circumstances, the care proceedings, the factual findings made by DJ Solomon at the threshold stage, her determination of the welfare stage, nor her determination as to whether the interference with the rights of the children, the father, and the mother under article 8 of the European Convention on Human Rights (the right to respect for private and family life) ("article 8") by making a care order was in accordance with the law and necessary in a democratic society.

10. The children are now aged 11 and 9.

11. The parents are not married to each other, and they do not live together.

12. On 21 August 2019, pursuant to section 8 of the Children Act 1989, a child arrangement order was made by the Family Court under which the children were to live with the father with supervised contact with the mother.

13. On 28 October 2022, care proceedings were commenced under section 31 in Part IV of the Children Act 1989. Prior to the commencement of the care proceedings the children were living with the father.

14. On 2 November 2022, pursuant to section 38(1) of the Children Act 1989, an interim care order was made under which the children were placed together in foster care.

15. On the hearing of the care proceedings, the father opposed the making of a care order and sought the return of the children to his care. The mother also opposed the making of a care order and stated that she wanted the children to be in her care. The children wished to live with their father, but their representative, the children's guardian appointed under section 41(1) of the Children Act 1989, whilst informing the court of their wishes and feelings, supported the Council's application for a care order and supported the care plan of long-term foster care. In her judgment handed down on 9 June 2023 DJ Solomon stated that prior to the oral hearing she had read and considered "all relevant papers" (para 8). Her judgment also records that during the hearing she heard oral evidence from a parenting assessor, an education investigation officer, a social worker, a police officer, the mother, the father, and the children's guardian.

16. DJ Solomon found on the facts that the threshold in section 31(2) of the Children Act 1989 had been crossed in relation to both the mother and the father. It is sufficient to state that her factual findings included a history of domestic violence, the father's criminal history and drug and alcohol abuse. Crossing the threshold opened the way, at the welfare stage, applying the principles under section 1 of the Children Act 1989, to the possibility of making a care order. The principles in section 1 of the Children Act 1989 include: (a) the welfare principle in section 1(1) that "[w]hen a court determines any question with respect to … the upbringing of a child … the child's welfare shall be the court's paramount consideration"; (b) the principle in section 1(4) that when a court is considering whether, for instance, to make a care order it "shall have regard in particular to" the factors set out in section 1(3)(a)–(g) such as "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)" and "how capable each of his parents … is of meeting his needs"; (c) the principle in section 1(2) that in any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child; and (d) the principle in section 1(5) that whenever a court is considering whether to make, for instance a care order, with respect to a child, "it shall not make the order … unless it considers that doing so would be better for the child than making no order at all".

17. In relation to the welfare stage it is sufficient for the purposes of this appeal to state that DJ Solomon held, at para 114, "that it would be neither safe nor in the children's welfare interest for them to be returned to mother or father" and she concluded, at para

115, that the children's welfare "demands that care orders are made and that the local authorities care plans are endorsed".

18. DJ Solomon, at para 39, identified the rights of the children, the father, and the mother under article 8 and, at para 116, determined that there was no breach of article 8 as the interference with those rights, by making a care order, was in accordance with the law, pursued a legitimate aim and was necessary in a democratic society.

19. The father could have applied for leave to appeal the care order made by DJ Solomon to a circuit judge: see paras 24–28 below. The father decided not to make an application for permission to appeal within the 21-day period permitted under rule 30.4(2)(b) of the FPR. The father has subsequently explained that he did not apply for leave to appeal because he thought that it would mean that he accepted the order as valid. However, as the Court of Appeal observed, at para 14 of its judgment, "[a]n appeal against an order means that the party appealing does not accept the order but, on the contrary, asserts that it was wrong".

20. The father could have and can still seek permission to appeal out of time, giving reasons for the delay in appealing: see rule 4.1(3)(a) of the FPR. He decided not to do so and still has not done so.

21. Another remedy available to the father in relation to the care order is for him to apply to discharge the order under section 39(1) of the Children Act 1989. He decided not to do so. The father explained to this court that he did not do so because he thought that he could not apply to discharge an order when he considered that it was not a lawful order. However, an application to discharge an order does not mean that the applicant accepts that the order was lawful.

22. As a result of the absence of an appeal against the care order or an application to discharge it, the care order remains in force with respect to the children.

3. Challenging a care order under the Children Act 1989

(a) An appeal against the care order

23. The care order in this case was made by a district judge sitting in the Family Court exercising the statutory jurisdiction of that court. The Family Court was established in 2014 as a court comprising different levels of judges, from district judges to High Court judges, so as to allow for efficient allocation of work within the court to the appropriate

level of judge and also to allow for appeals to occur, so far as appropriate, within the Family Court structure.

24. Section 31K(1) of the Matrimonial and Family Proceedings Act 1984 ("the 1984 Act") provides that "[s]ubject to any order made under section 56(1) of the Access to Justice Act 1999", there is a right of appeal from the Family Court to the Court of Appeal. However, the right of appeal from the Family Court to the Court of Appeal provided by section 31K(1) of the 1984 Act was amended by the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2014 (2014/602), made under section 56(1) of the Access to Justice Act 1999. Article 2(2)–(3) of this Order states that an appeal brought under section 31K(1) of the 1984 Act from a decision of some judges, including district judges, lies to the Family Court rather than to the Court of Appeal. The composition of the Family Court which hears such appeals is dealt with by the Family Court (Composition and Distribution of Business) Rules 2014 (2014/840), promulgated under Schedule 1 to the Constitutional Reform Act 2005 as provided for by section 31D of the 1984 Act. Rule 19 states that an "appeal shall be allocated to a judge in accordance with rules 5 to 7". In accordance with those rules, an appeal in this case would fall to be heard by "a judge of circuit judge level sitting in the Family Court".

25. Section 54(1) of the Access to Justice Act 1999 states that rules of court may provide that the right of appeal to the Family Court or the Court of Appeal may be exercised only with permission. Rule 30.3(1B) of the FPR, which is to be read with paragraph 4.1 of Practice Direction PD30A ("PD30A"), provides that permission to appeal is required.

26. An application for permission to appeal should be made orally at the hearing at which the decision to be appealed against is made: paragraph 4.2 of PD30A. However, where no application for permission to appeal is made at the hearing or the lower court refuses permission to appeal, an application for permission to appeal may be made to the appeal court in accordance with rules 30.3(3) and (4) of the FPR and paragraph 4.3 of PD30A. Moreover, where an appeal court, without a hearing, refuses permission to appeal, the person seeking permission may, subject to some exceptions, request that the decision be reconsidered at a hearing: see paragraph 4.5 of PD30A.

27. These provisions provided the father with a right to appeal against the care order to a circuit judge sitting in the Family Court, but subject to a requirement that permission to appeal be granted.

28. The procedural advantages for the children, the father, the Council and the court of a challenge to the care order by the process of an appeal, by comparison with a simple application for habeas corpus, are obvious. The father would be a party to the appellate proceedings as would the Council. A guardian would be appointed under section 41(2)

read with section 41(6)(h)(i) of the Children Act 1989, who would be under a duty to safeguard the interests of the children in the manner prescribed by rules of court. Therefore, the court would have the advantage of hearing submissions from all the parties aimed at securing, as its paramount consideration, the welfare of the children: see section 1(1) of the Children Act 1989. Where necessary, when an application for habeas corpus is made in relation to a child, procedural directions could be given to ensure that the child's interests were properly taken into account; but the ordinary procedures in respect of an application for habeas corpus have not been set up to achieve that.

(b) An application to discharge the care order

29. Section 39 of the Children Act 1989, headed "Discharge and variation etc. of care orders and supervision orders", in so far as relevant, provides that a care order may be discharged by the court on the application of, amongst others, any person who has parental responsibility for the child. A care order does not extinguish the father's parental responsibility for the children. Rather, one effect of the care order, whilst it is in force with respect to the children, is that parental responsibility is shared between the Council, the father and the mother: see section 33 of the Children Act 1989. Therefore, as the father still has parental responsibility, he is eligible to apply under section 39(1) of the Children Act 1989 to discharge the care order. Furthermore, if the application to discharge the care order is dismissed, the father can make a further application, without the leave of the court, if the period between the disposal of the previous application and the making of the further application exceeds six months: see section 91(15) of the Children Act 1989.

30. Again, the procedural advantages for the children, the father, the Council and the court of a challenge to the care order by the father making a discharge application, as compared with a simple application for habeas corpus, are obvious. The father would be a party to the application to discharge the care order as would the Council. A guardian would be appointed under section 41(2) read with section 41(6)(c) of the Children Act 1989, who would be under a duty to safeguard the interests of the children in the manner prescribed by rules of court. So, again, the court would have the advantage of hearing submissions from all the parties aimed at securing, as its paramount consideration, the welfare of the children.

4. Challenging a care order on an application for habeas corpus

31. Habeas corpus is a means by which the liberty of the individual is vindicated. Therefore, on an application for habeas corpus the lawfulness of a care order is only relevant if it is an order for the detention of a child or an order under which a local authority may, in the exercise of parental responsibility, consent to the deprivation of a child's liberty amounting to detention. In this appeal the father has *assumed* that the care order is an order for the detention of the children or an order under which a local authority

may, in the exercise of parental responsibility, consent to the deprivation of the children's liberty amounting to detention.

32. The effect of a care order is set out in section 33 of the Children Act 1989.

33. Section 33(1) provides that "[w]here a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force". The effect of section 33(1) is that it simply places a duty on the local authority to receive the child into their care and to keep the child in their care while the order remains in force. However, the application for a care order may have been based on a care plan which proposed accommodation of the subject child which amounted to a deprivation of liberty amounting to detention. In such circumstances it is normal practice for the local authority also to apply for a deprivation of liberty order: see *In re A (Children) (Care Proceedings: Deprivation of Liberty)* [2018] EWHC 138 (Fam); [2019] Fam 45, para 54.

34. Section 33(3) and (4) also makes provision for parental responsibility whilst a care order is in force. The effect of these provisions is that whilst the care order is in force the local authority is empowered to make decisions on behalf of the child, as an exercise of parental responsibility. Arrangements for the delegation of authority to foster parents must be set out in the placement plan: see sections 4A and 4B of paragraph 3 of Schedule 2 of the Care Planning, Placement and Case Review (England) Regulations 2010, SI 2010/959 ("the 2010 Regulations"); Chapter 3, paras 3.192–3.201 of The Children Act 1989 Guidance and Regulations Volume 2: Care Planning, Placement and Case Review (2010); and Chapter 3, paras 3.9–3.24, 3.27 and 3.108–3.109 of The Children Act 1989 Guidance and Regulations Volume 4: Fostering Services.

35. There are conflicting authorities as to whether a local authority in the exercise of parental responsibility under a care order may consent to a deprivation of liberty amounting to detention. Keehan J in *In re AB (A Child) (Deprivation of Liberty: Consent)* [2015] EWHC 3125 (Fam); [2016] 1 WLR 1160, para 29, emphatically answered "No" to the question as to whether a local authority may in the exercise of its parental responsibility consent to what would otherwise amount to a deprivation of liberty amounting to detention where a child is in its care under a care order. Keehan J's decision was considered and approved by Sir James Munby in *In re A (Children)*, para 12(i) and was also considered in *Re D (A Child) (Residence Order: Deprivation of Liberty)* [2017] EWCA Civ 1695; [2018] 2 FLR 13, paras 48 and 109–112. However, Lieven J in *Re J: Local Authority consent to Deprivation of Liberty* [2024] EWHC 1690 (Fam) held that a local authority has the power to consent to a deprivation of liberty amounting to detention in the exercise of its powers of parental responsibility: for a commentary on that authority see the article dated 12 July 2024 published in the Local Government Lawyer by Alex Ruck Keene KC entitled "Local authorities, care orders and consent to confinement". An

appeal to the Court of Appeal is pending in relation to the decision of Lieven J. Nothing in this judgment should affect that appeal.

36. We heard no submissions in relation to the father's assumption and it is not something which we need to decide for the purpose of disposing of this appeal. It is sufficient for the purposes of this appeal to state that *if*, as the father has assumed, a care order is an order for the detention of the children or an order under which the Council may, in the exercise of parental responsibility, consent to the deprivation of the children's liberty amounting to detention, then, as we explain in section 8 below, on an application for habeas corpus (a) the care order would be lawful authority for the children's detention and a complete defence to the application unless the order was set aside by some appropriate procedural route; (b) ordinarily the applicant would have to bring judicial review proceedings, in aid of the habeas corpus application, to quash the care order; (c) permission to bring an application for judicial review would be refused if, as here, there was a suitable alternative remedy by way of an appeal against, or an application to discharge, the care order; and (d) in such circumstances the application for habeas corpus would be dismissed.

5. The ordinary exercise of parental responsibility under a care order

37. The ordinary exercise of parental responsibility under a care order by a local authority, or the foster parents' exercise of their delegated authority, will not deprive a child of liberty amounting to detention. This was explained by Munby J in *Re S (Habeas Corpus); S v Haringey London Borough Council* [2003] EWHC 2734 (Admin), [2004] 1 FLR 590, in a passage, at para 28, with which we agree. Munby J stated:

> "The third point is more fundamental. Habeas corpus ad subjiciendum (which is the form of the writ with which I am concerned) is a remedy protecting the citizen or subject against an unlawful detention or imprisonment. Detention need not be at the hands of the state or public authority. Even a domestic house may for this purpose be a prison: see *R v Jackson* [1891] 1 QB 671, [especially] per Lord Esher MR at p 682. That was the celebrated case where a wife who had been detained by her husband in his house, being given the full run of the house short of leaving it, was freed on a habeas corpus, the Court of Appeal denying that a husband has in law any right either to imprison or to confine his wife. But there must be a detention. The children in the present case are not in secure accommodation (whether in the sense in which that expression is used in s 25 of the Children Act 1989 or in any other sense). They are not being detained. They are simply living with foster parents in exactly the same type of domestic setting as any other children of their

> ages would be, whether living at home with their parents or staying with friends or relatives. Habeas corpus does not lie because a parent, or other person in loco parentis, makes it a rule that a child of tender years is not to leave the house unless accompanied by some suitable person or because an exasperated parent has sent a naughty child to his room and told him to stay there for two hours or because a rebellious teenager has been 'grounded' or subjected to a parentally enforced curfew, any more than habeas corpus lies if the headmaster of a boarding school forbids his charges to leave the school premises except at permitted times and for permitted purposes. And it makes no difference for this purpose that the domestic rule is actually enforced by the turning of a key in a lock."

This reasoning was endorsed by the Court of Appeal in *Re AB (a child) (Habeas Corpus)* [2024] EWCA Civ 105, [2024] 1 FLR 1209, paras 36–40, and was followed by the Court of Appeal in the present case at paras 14–15.

6. Improper exercise of parental responsibility under a care order

(a) Extreme circumstances which may amount to deprivation of a child's liberty

38. On an application for habeas corpus there may be no challenge to the care order. Rather, the applicant may contend that there has been improper exercise by foster parents of the authority delegated to them by a local authority, which exceeds the authority granted by the care order. In some extreme or unusual circumstances, the improper exercise of parental responsibility by a local authority, or delegated authority by foster parents, may result in the deprivation of a child's liberty amounting to detention. Suppose, for example, foster parents locked a child in his or her bedroom for a month: on no view could that treatment be regarded as the proper exercise of parental responsibility vested in the local authority by the care order which has been delegated to the foster parents. In our judgment, a claim for habeas corpus would in principle be available in such a case and there would be no good defence to it. As a matter of legal analysis, it would be the same as if the foster parents had taken a child off the streets and imprisoned him or her. This would be a case falling within the category for which the writ of habeas corpus is an appropriate remedy.

39. However, if the challenge is to the purported exercise of parental responsibility and if the application succeeds, then the appropriate order will be for the child to be released from the detention which is unauthorised, not that the care order should cease to have effect. Therefore, the release will not remove the child from the care of the local authority but will place the child back in a position where they are subject to parental

responsibility conferred on the local authority by the care order. That parental responsibility would then have to be exercised afresh in a proper and lawful manner, with the court giving directions if appropriate.

40. Whilst habeas corpus is in principle available in such cases, we consider that in practice its availability will be extraordinarily limited as there must be an allegation of extreme or unusual circumstances amounting to the unauthorised detention of a child. If there is no such allegation, the application will fall to be dismissed on a summary basis: see para 81 below.

41. If there is an allegation of extreme or unusual circumstances, then an initial judgment will have to be made as to whether the claim has a "real prospect of success". The test of a "real prospect of success" is the same as the test for resisting summary judgment, namely, that the claim has a real prospect of success: see eg *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, paras 71, 82 (Lord Collins); *Lungowe v Vedanta Resources plc* [2019] UKSC 20; [2020] AC 1045, para 42 (Lord Briggs). Whilst there is no need for permission to bring an application for habeas corpus, if there is no real prospect of success, the application will fall to be dismissed on a summary basis: see para 81 below.

42. In determining whether there is a real prospect of success, the allegation of extreme or unusual circumstances must be seen in the context of the statutory regime for looked after children. As we set out below, the regime contains a comprehensive set of obligations to ensure that the child is properly looked after and that the arrangements are monitored and scrutinised by an allocated social worker, an independent reviewing officer and regular Looked After Children reviews. For there to be a claim with a real prospect of success, there will have to have been failures in relation to those procedures by several individuals.

43. If, despite all the monitoring and regulation of looked after children, there is a claim with a real prospect of success that a child's foster parents have improperly exercised their delegated authority so as to deprive the child of liberty amounting to detention, then it is open to the judge dealing with the habeas corpus application to adjourn it under CPR rule 87.4(1) (for applications for a writ of habeas corpus for release in relation to a child, the FPR, by rule 12.42A, now incorporates relevant parts of CPR Part 87 by reference: see paras 78 to 80 below), so that the local authority can either terminate the foster placement or provide supports or services so that the child can be maintained in the placement: see para 50 below.

(b) The regime for looked after children

44. We refer to some aspects of the statutory regime for looked after children which provides the context within which an allegation of extreme or unusual circumstances should be considered.

45. Section 22(3)(a) of the Children Act 1989 provides that it shall be the duty of a local authority looking after any child "to safeguard and promote his welfare". Sections 22A to 22D of the Children Act 1989 (inserted by the Children and Young Persons Act 2008) make provision for the accommodation and maintenance of a looked after child. For instance, section 22C sets out the "Ways in which looked after children are to be accommodated and maintained" and provides that the Secretary of State may make regulations for, and in connection with, the purposes of section 22C(11). The 2010 Regulations have been made not only under section 22C but also pursuant to powers under sections 23D, 23E, 23ZA, 23ZB, 25A, 25B, 26, 104, and paragraphs 12A–E of Schedule 2 of the Children Act 1989. The 2010 Regulations are extensive. They are not confined to the ways in which looked after children are to be accommodated and maintained. Rather, they cover many aspects of the arrangements for looked after children.

46. The local authority must review the circumstances of a child in its care within 20 working days of the child first being looked after: regulation 33(1) of the 2010 Regulations. They must conduct a second review within three months of the initial review and conduct subsequent reviews every six months thereafter: regulation 33(2) of the 2010 Regulations.

47. It is the duty of the local authority under section 23ZA of the Children Act 1989 to ensure that a looked after child is visited by a representative of the authority and this duty is to be discharged in accordance with the 2010 Regulations.

48. Under section 25A of the Children Act 1989, an independent reviewing officer must be appointed, and that officer must, amongst other matters, monitor the performance by the local authority of their functions in relation to the child's case: see section 25B(1)(a) of the Children Act 1989.

49. The continuation of a foster placement is a matter which the local authority will keep under review and must be specifically considered at each Looked After Child review: Schedule 7, paragraph 5 of the 2010 Regulations.

50. Regulation 14 of the 2010 Regulations provides for the termination of a foster placement by the responsible authority. The local authority has the right to remove a child who is the subject of a care order from the foster parent's care at any time. Ordinarily, a

local authority can only terminate a foster placement after carrying out a review of the child's case in accordance with Part 6 of the 2010 Regulations: regulation 14(1) of the 2010 Regulations. In carrying out the review the local authority must ensure that the views of all the people concerned have been heard, including the child (to a degree appropriate to their age and understanding), parents (where appropriate), the child's carer, and other people who were notified (under the requirement in section 22(4)(d) of the Children Act 1989) when the placement was made. The review will consider what, if any, support and services could be provided which would avoid the need to terminate the placement. If that is not possible, the review will consider what would be the most appropriate new placement for the child, taking account of any concerns which have led to the decision to terminate the current placement. Before terminating, the local authority must make other arrangements for the child's placement, in accordance with their responsibilities under section 22C of the Children Act 1989: regulation 14(2)(a) of the 2010 Regulations. They must also inform the independent reviewing officer and, so far as is reasonably practicable, give notice to the child's parents and others who were notified of the placement, to the foster parent and to the local authority (if different) where the child is placed: regulation 14(2)(c) of the 2010 Regulations. However, a local authority may terminate a foster placement immediately and without review if there is an immediate risk of significant harm to the child or a need to protect others from serious injury: regulation 14(3) of the 2010 Regulations. Alternative accommodation must be found, and the independent reviewing officer informed, as soon as is reasonably practicable: regulation 14(3)(b) of the 2010 Regulations.

7. Whether the children are detained

51. One of the grounds on which the Court of Appeal dismissed the father's application for a writ of habeas corpus was that neither child was detained. Rather, both were "simply living in the same type of domestic setting as any other child of their age would be" (para 14).

52. Orders can be made in the family courts under which a child is deprived of liberty amounting to detention. A secure accommodation order, made under section 25 of the Children Act 1989, does result in the deprivation of a child's liberty amounting to detention. A child can also be deprived of liberty amounting to detention by virtue of an order made in the High Court under its inherent jurisdiction: see *In re T (a Child)* [2021] UKSC 35; [2022] AC 723. There is debate as to whether, in the exercise of parental responsibility under a care order, a local authority may deprive a child of liberty amounting to detention: see para 35 above. However, in this case, there is no suggestion that the Council has exercised its parental responsibility in that way in relation to the children.

53. Applying the approach in *Re S (Habeas Corpus)* to the facts of this case, neither child is detained. The children are living together in the same foster placement. It is not

suggested that there are any extreme or unusual factual circumstances in this case in relation to the exercise of the foster parents' delegated authority. Furthermore, it is not suggested that the Council has exercised its parental responsibility to deprive the children of their liberty amounting to detention. Rather, as it was put in *Re S (Habeas Corpus)* at para 28, the children "are simply living with foster parents in exactly the same type of domestic setting as any other children of their ages would be, whether living at home with their parents or staying with friends or relatives". We would therefore dismiss the appeal on the ground that the children are not detained.

8. Is habeas corpus available when there are alternative family law remedies?

54. This section of our judgment considers the position where a care order is for the detention of the applicant's children. Although we have concluded that that is not the position here, the procedural issues are important, were addressed by the courts below and merit examination in this court.

55. The main object of the writ of habeas corpus for release (previously called habeas corpus ad subjiciendum), and the reason for its constitutional importance, is to provide a speedy and effective remedy in cases of unlawful detention. If an individual is being detained unlawfully, then by issuing a writ of habeas corpus a court can compel their immediate release. It is a procedural mechanism of central importance in securing the liberty of the individual. It operates as a form of specific relief which supplements, and will usually be even more important than, any claim the individual may have to damages for false imprisonment.

56. In view of the constitutional significance of habeas corpus and of the importance of the protection of individual liberty, and having regard to the principle of legality, it would require a very clear provision in primary legislation to remove the right to apply for habeas corpus to achieve the object referred to above: see *R v Secretary of State for the Home Department, Ex p Simms* [1999] UKHL 33; [2000] 2 AC 115, 131 (per Lord Hoffmann); *R (Hilali) v Governor of Whitemoor Prison* [2008] UKHL 3; [2008] 1 AC 805, para 21. There is nothing in the Children Act 1989 or in the legislative regime which establishes the Family Court which has that effect.

57. The procedure in relation to habeas corpus reflects its importance. Unlike a claim for judicial review, an application for habeas corpus is not subject to a requirement of permission before it can be brought. Similarly, by virtue of section 15 of the AJA 1960, there is a right of appeal without having to seek permission.

58. However, there are many circumstances in which an individual is detained by someone on the basis of a lawful authority to do so. In such cases, the person who is detaining the individual will give a good return to the writ of habeas corpus and will have

a complete defence by showing that they have such lawful authority. Where a court has made an order that requires or authorises the detention, the defence will ordinarily be established by pointing to that order. In that situation, the individual who is detained needs to challenge the lawfulness of the order authorising their detention to pursue their claim to be released. An application for habeas corpus is not a procedural route to challenge an order of a court, since the writ is directed to the person who holds the individual in detention rather than to the court which has made the order. Accordingly, to succeed on an application for habeas corpus where detention is authorised by an order of a court, the applicant will need to use the judicial review procedure to apply for a quashing order (formerly known as a writ of certiorari) in relation to the order requiring detention, to support and make good their claim for habeas corpus.

59. Judicial review is not available to challenge an order made in the High Court. In such a case, an appeal is the route to challenge the order (there might also be scope to ask the High Court to reconsider the matter). However, the care order in the present case was made by the Family Court, which has limited jurisdiction and is accordingly subject to the supervisory jurisdiction of the High Court.

60. A quashing order is potentially available in relation to a decision of a court of limited jurisdiction, but not if there is a suitable alternative remedy. There are such remedies in this case: see paras 82–86 below. The father is not able to circumvent this fundamental problem which confronts him.

61. Where the individual has a right of appeal against the order requiring detention or a right to apply to discharge the order, habeas corpus is unnecessary, because if the order is overturned on appeal or discharged the consequence will be that the individual is released by virtue of achieving either of those results. However, there may be reasons why the individual may wish to seek to challenge the order by another procedural route, perhaps because they believe that they may be able to secure their release with less delay by doing so or because there is no right of appeal or no right to apply to discharge the order.

62. Where the detention order has been made by a court of limited jurisdiction, which is subject to the supervision of the High Court, the individual may seek to bring a judicial review claim for a quashing order directed against that order. Historically, it was common for an application for habeas corpus to be accompanied by an application for certiorari: see, eg, *Ex p Hopkins* (1891) 17 Cox CC 444 (discussed in J Farbey and RJ Sharpe, *The Law of Habeas Corpus*, 3rd ed, 2011, pp 26 and 46, and in Simon Brown, "Habeas Corpus – a new chapter" [2000] Public Law 31). The logic of this is clear. Certiorari had to be granted to quash the detention order which operated as a defence to the claim for habeas corpus, and the way would then be clear for habeas corpus to be granted. As it was put in the old cases, an application for certiorari was made in aid of the application for habeas corpus. The old forms of procedure gave rise to debate about when an application for

habeas corpus might be used to achieve what we would now call judicial review without seeking certiorari (see Farbey and Sharpe, pp 23–30 and 45–47; as they point out at p 46 "one of the reasons that certiorari-in-aid was not used more frequently was undoubtedly because in many cases the courts acted just as if it had been used"). But the development of the modern law and procedure of judicial review means that a coherent statement of the law should be more principled.

63. The position may be different in some circumstances where a person acts on their own authority, rather than pursuant to an order of a court, to detain an individual so that an application for habeas corpus may be used to challenge the decision to detain as well as the detention itself without the need to seek a quashing order as well. This is illustrated by *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74 ("*Khawaja*"), discussed in para 69 below.

64. In certain other limited circumstances, it may exceptionally be possible to challenge a legal measure by way of a collateral attack in the course of mounting a defence to a civil claim or a prosecution, without challenging it by way of a judicial review claim: see, eg, *Wandsworth London Borough Council v Winder* [1985] AC 461 and *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143. That may be justified where the individual concerned has not previously had a fair opportunity to challenge the measure in question and is concerned to defend him- or herself in proceedings brought against them on the basis of it, and takes the first opportunity in those proceedings to claim that the measure was unlawful by virtue of application of principles of public law.

65. However, where a court has made a detention order in respect of an individual, in circumstances where they had a fair opportunity to participate in the proceedings leading to the making of that order, an attempt to bypass the usual procedures for challenging the relevant measure, whether by judicial review, appeal or other forms of procedure, is not justified. The individual concerned cannot bring a claim for habeas corpus and seek to use that as the procedural vehicle to challenge the lawfulness of the order on the basis of which they have been detained.

66. Some older authorities, in particular the decision in *Armah v Government of Ghana* [1968] AC 192, indicated that there might be wider scope to use an application for habeas corpus to challenge the lawfulness of an order authorising detention without the need to apply for certiorari to quash the order, and there is some support for that view in academic writing: see eg Farbey and Sharpe, above, 3rd ed, 2011, pp 56–64, and HWR Wade, "Habeas corpus and judicial review" (1997) 113 LQR 55. However, as we have noted, it was also a common feature in other older authorities that it was thought that an application for certiorari should be made in aid of habeas corpus. The *Armah* decision preceded the important procedural reform in 1977 to introduce the new judicial review procedure involving a requirement of permission (or leave, as it was originally called) and did not

address the proper procedural approach to be adopted when that new procedure became available.

67. There is now a substantial body of modern authority which does address that question and which supports the analysis we have set out. *R v Secretary of State for the Home Department, Ex p Cheblak* [1991] 1 WLR 890 ("*Cheblak*"), concerned an individual in respect of whom an order for deportation had been made by the Secretary of State and who had been detained on the authority of that order with a view to his removal from the United Kingdom. He made parallel claims for habeas corpus and for judicial review of the deportation order. Both claims failed. At p 894, Lord Donaldson of Lymington MR explained that the two forms of relief are fundamentally different:

> "A writ of habeas corpus will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. The remedy of judicial review is available where the decision or action sought to be impugned is within the powers of the person taking it but, due to procedural error, a misappreciation of the law, a failure to take account of relevant matters, a taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken. In such a case the decision or action is lawful, unless and until it is set aside by a court of competent jurisdiction."

68. The same analysis was adopted by the Court of Appeal in *R v Secretary of State for the Home Department, Ex p Muboyayi* [1992] QB 244 ("*Muboyayi*"), which concerned the detention of the claimant, an unlawful immigrant, on the authority of a direction by the Secretary of State with a view to securing his removal. The claimant applied for habeas corpus which was granted at first instance, but the Court of Appeal allowed an appeal by the Secretary of State and the Chief Immigration Officer. In that court the claimant also applied directly to the Court of Appeal for judicial review, which was refused. In allowing the appeal in relation to the claim for habeas corpus the Court of Appeal accepted the submission of the Secretary of State that the proper procedure for the claimant to seek relief was to apply for judicial review of the Secretary of State's refusal to grant him leave to enter, since unless and until that decision was quashed the claimant's detention was lawful: pp 253–258. Lord Donaldson, giving the leading judgment, affirmed and followed the analysis set out in *Cheblak*, above. At p 257 he said that an application for certiorari in support of habeas corpus had always been required in appropriate cases and added that in any event the introduction of the new judicial review procedure under what was then RSC Order 53 (now CPR Part 54), with its in-built safeguards (ie including the requirement of permission), would justify confining the ambit of the writ of habeas corpus as set out in *Cheblak* (see, to similar effect, Taylor LJ at p 268). This foreshadows the analysis in our judgment.

69. On the current state of the law, it appears that there is an exception to the general rule that habeas corpus cannot be used to challenge the lawfulness of an order for detention, and that an application for judicial review to quash the order is required to do that. In *Muboyayi*, pp 254–255, Lord Donaldson put to one side challenges to the lawfulness of an order for detention made by an official where the power exercised by the official depends upon the objective existence of some precedent fact, of which *Khawaja* is the classic example. In such cases an application for habeas corpus can be used as a procedural vehicle to bring a challenge to the lawfulness of the order for detention on the basis that the precedent fact does not exist, as an alternative to seeking a quashing order using the judicial review procedure. That had been accepted in *Khawaja* itself by Lord Wilberforce (pp 101–102), Lord Scarman (p 110), Lord Bridge (pp 122–123) and Lord Templeman (p 128). As Glidewell LJ explained in *Muboyayi*, at p 266, in such cases the detaining officer is under an obligation to prove by evidence the existence of the precedent facts in order to justify the detention, which is not the case where the power to detain depends upon the officer making a rational evaluative judgment or exercising discretion. Taylor LJ drew the same distinction: pp 267–268. But the challenge in *Muboyayi* was not based on the non-existence of a precedent fact, so that exception to the general rule requiring a challenge to the detention order to be brought by way of judicial review, not habeas corpus, did not apply.

70. The distinction between the precedent fact cases and other cases involving detention pursuant to orders made by officials is not free from difficulty: see the discussion in Farbey and Sharpe, above, pp 56–64. Also, since in some cases there may be potential grounds of challenge both by reference to precedent facts and by reference to the exercise of discretionary power, it may be questioned whether the potential bifurcation of procedure, involving the possibility of applying for habeas corpus or judicial review as a matter of choice in relation to the first ground of challenge but limited to judicial review in relation to the second, is appropriate. As Simon Brown (later a Law Lord) observed in his article, "Habeas Corpus – a new chapter" [2000] Public Law 31, judicial review has evolved to become a speedy and effective remedy which can protect the rights of the individual just as well as habeas corpus, and is available in respect of all grounds of challenge, so the justification for allowing the judicial review procedure to be bypassed in any such case is no longer as clear as it might once have been. The validity of the distinction between cases involving precedent facts and those involving other forms of public law error might have to be addressed in future in some suitable case, but no such examination is required here.

71. That is for three reasons:

(i) The order in this case was made by a court, not a government official. A writ of habeas corpus is directed to the person doing the detaining, not the court which makes the order for detention. So the question of the detainer having to be ready to prove some precedent fact does not arise: they simply have to point to the order of the court.

(ii) It would be entirely inappropriate to require a court to participate in court proceedings as if it were a party which had to justify its decision in such a way. It is true that a court of inferior jurisdiction may be a defendant in a judicial review claim, but where that happens the court is generally expected to play an entirely passive role, and is not required to file evidence in an attempt to justify and defend the order it has made; nor is it appropriate for it to seek to defend its decision by adversarial argument. Its judgment explains its reasons and if there is to be adversarial argument in relation to the judicial review claim then, other than in wholly exceptional circumstances, it is for the party in whose favour the order was made to advance submissions to defend it: see *Special Tribunal v Estate Police Association* [2024] UKPC 13; [2024] 1 WLR 4252, paras 39–58.

(iii) In any event, a precedent fact analysis is directed to the issue of whether the official in question has jurisdiction to make the order in question. But in the case of the Family Court its jurisdiction is established by the applicable statutory regime and is properly and effectively invoked by a person such as the Council using the appropriate procedure to bring a case before it. Its jurisdiction does not depend upon the existence of precedent facts of the kind discussed in *Khawaja*. This point is reinforced by rule 4.7 of the FPR, which gives the Family Court power to correct any procedural defects in relation to the proceedings before it. In so far as it might have been necessary to do so, the court in this case could simply have directed that the application made in the name of Worcestershire Children First Ltd should be treated as an application by the Council, and on appeal the appellate court has the same power. We note that in *In re W (A Child) (Care Proceedings: Court's Function)* [2013] EWCA Civ 1227; [2014] 1 WLR 1611, Ryder LJ referred (para 35) to the matters which have to be established before a court can make a care order under section 31(2) of the Children Act 1989 as "jurisdictional facts which have to be satisfied" before such an order can be made; but that was in the context of an appeal from such an order—which clearly would succeed if it appeared that the threshold conditions did not exist—and was not intended to indicate that judicial review (let alone habeas corpus) would be available as a route of challenge in such a case.

72. A range of other cases adopt the analysis above and support the view that habeas corpus is not available in a case like the present, to challenge the order made by a court: *Linnett v Coles* [1987] QB 555 (claimant not entitled to use a claim for habeas corpus to challenge the lawfulness of their detention pursuant to an order committing them to prison for contempt of court, where the appropriate route of challenge was by way of an application to the Court of Appeal under section 13 of the AJA 1960); *R v Oldham Justices, Ex p Cawley* [1997] QB 1 (habeas corpus could not be used to challenge a defective committal order, where judicial review was the appropriate remedy); *Re S (Habeas Corpus)*, above, para 23 per Munby J ("applications for habeas corpus are to be deprecated where care proceedings are on foot and where the purpose of the application is to challenge the exercise by the local authority of its powers. The proper forum for such challenges is within the care proceedings, not in the Administrative Court"); *Gronostajski*

v Government of Poland [2007] EWHC 3314 (Admin), para 8 per Richards LJ; and *Jane v Westminster Magistrates' Court* [2019] EWHC 394 (Admin); [2019] 4 WLR 95 ("*Jane*"), paras 45–68 per Singh LJ, with the agreement of Dingemans J. *Jane* was followed in *Cosar v Governor of HMP Wandsworth* [2020] EWHC 1142 (Admin); [2020] 1 WLR 3846, paras 44–49; *Verde v Governor of HMP Wandsworth* [2020] EWHC 1219 (Admin), paras 33–38; and *Polakowski v Westminster Magistrates' Court* [2021] EWHC 53 (Admin); [2021] 1 WLR 2521, paras 5–12.

73. *Jane* concerned the detention of an individual pursuant to an order made by a magistrates' court for his extradition to Lithuania (he was in fact released on bail, but it was assumed that this qualified as detention). He claimed that he had been detained for that purpose for an excessive period of time and should therefore be released. His application for discharge from detention was dismissed, whereupon he applied for habeas corpus and in the alternative for judicial review of the court's decision to refuse to order his release. On the basis of a careful examination of authority, including *Cheblak* and *Muboyayi*, Singh LJ held that the application for habeas corpus was procedurally inappropriate and instead treated it as a claim for judicial review, which was dismissed. He explained (para 47) that the fundamental difficulty with the claim for habeas corpus was that in a case like that before the court "a complete answer to the writ of habeas corpus would be provided by the fact that there is lawful authority for his detention. That authority is provided by the order of a court. The gaoler (for example a prison governor) would be able to cite the order of the court as providing the lawful authority for the detention". Accordingly, the claimant needed to attack the order of the court refusing his application for discharge and authorising his continued detention, but the appropriate procedure to do that was an application for judicial review to have the order quashed: paras 48–49.

74. Similarly, in the present case, on the assumption that the care order is to be treated as an order for detention, the father needs to attack the care order. The father was involved in the proceedings in the Family Court and was able to, and did, assert claims in those proceedings which reflected the rights of his children, as he saw them. The children were also separately represented by a guardian. This is not a case in which a collateral attack on the care order by means of an application for habeas corpus could be justified. Therefore, in order to be able to succeed in his claim on behalf of his children for habeas corpus, the father would have to be able to challenge the care order made in respect of them by some appropriate procedure other than an application for habeas corpus.

75. Since the care order was made by the district judge in a court of limited jurisdiction, the alternatives are an appeal and judicial review. The father has not sought to appeal.

76. A claim for certiorari (a quashing order) is now subject to the judicial review procedure introduced in 1977, as carried forward into CPR Part 54. Permission to apply

for judicial review is required. A claimant has to show that they have a good arguable case. The court hearing the application for permission will consider whether there are any obvious defences to such a claim. In *O'Reilly v Mackman* [1983] 2 AC 237 the House of Lords gave guidance which emphasised the importance of adhering to the judicial review procedure, involving seeking and obtaining permission to apply for judicial review. In all save exceptional cases, it is an abuse of process to seek to avoid using the judicial review procedure where that is the appropriate procedure to use to obtain the type of order being sought, such as a quashing order.

77. This means that the procedure for seeking habeas corpus and the procedure for seeking a quashing order have pulled apart, being subject to a requirement of the grant of permission in the latter case but not the former. It cannot be said that seeking habeas corpus is in itself an abuse of process. It is a remedy specifically designed to secure the release of an individual if it is said that there is no lawful authority to justify their detention. It is difficult to think of something which could be more important than that and as a matter of policy, reflected in legislation, a minimum of procedural impediments are to be placed in the way of someone who seeks to argue that there is no justification for their detention. But if there is a defence to the claim for habeas corpus, eg in the form of a court order authorising the detention, the claim will be dismissed.

78. The procedure governing a claim for habeas corpus has developed to allow for defences to be put forward and, if appropriate, to allow time for the defendant to prepare their case and any necessary evidence: see now CPR Part 87; and, for applications for a writ of habeas corpus for release in relation to a child, the FPR as incorporated (see para 43 above).

79. In relation to a child, an application for habeas corpus for release has to be filed in the Family Division of the High Court. The application comes before the court speedily at a first stage, by means of a claim form supported by an affidavit or witness statement (CPR rule 87.2, as incorporated into the FPR), and may be considered initially on paper by a single judge (rule 87.3–87.4). In an ordinary case directions will be given to enable the defendant to state its defence and to provide for a full hearing of the merits at a second stage.

80. Rule 87.4(1) provides that when an application is considered on paper the judge has a range of options as to how to proceed, including adjournment (sub-paragraph (b)), transfer of the application to a Divisional Court (sub-paragraph (c)), direction that the application continues as an application for permission to apply for judicial review (sub-paragraph (d)), and giving appropriate directions for the resolution of the application (sub-paragraph (e)). The court may also dismiss the application (sub-paragraph (f)). Where a paper application is dismissed, the applicant may ask for it to be reconsidered at a hearing: rule 87.4(1)(2).

81. At this stage it might appear to the court that the application for habeas corpus has no real prospect of success. In such a case, the court would dismiss the application, as stated in sub-paragraph (f), in effect by way of summary judgment. In a situation where there is a court order authorising the detention, that is likely to be the outcome unless the individual can show that they have an arguable ground to challenge the order by way of judicial review having a realistic prospect of success: *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 780, para 14. The court is able to treat the first stage hearing as including an application for permission to apply for judicial review of the order or can direct that such an application be made on notice to the defendant and can give directions for the case to proceed by way of judicial review in conjunction with the claim for habeas corpus: rule 87.5.

82. However, it is well established that judicial review will only be granted if there is no suitable alternative remedy: *Sharma v Brown-Antoine*, para 14; *In re McAleenon* [2024] UKSC 31; [2024] 3 WLR 803, paras 50–64. Where there is a statutory right of appeal in respect of an order, that is regarded as a suitable alternative remedy (save in exceptional circumstances) and will operate as a defence to a claim in judicial review to challenge the order in issue: *Noeleen McAleenon*, para 51; *R (Watch Tower Bible & Tract Society of Britain) v Charity Commission* [2016] EWCA Civ 154; [2016] 1 WLR 2625, para 19 and *R (Glencore Energy UK Ltd) v Revenue and Customs Comrs* [2017] EWCA Civ 1716; [2017] 4 WLR 213, paras 55–58. Therefore, if the individual wishes to challenge the detention order in circumstances where there is a right of appeal, they are obliged to do so by way of appeal and are precluded from doing so by judicial review. Although not usually described as such, the suitable alternative remedy rule is a form of abuse of process doctrine. It means that the judicial review procedure cannot be used inappropriately, ie where there is another suitable remedy available.

83. In accordance with this jurisprudence, in the present context an appeal against the care order is a suitable alternative remedy. The relief sought by the father in the application for habeas corpus, when properly analysed, is for the care order to be quashed so that in the exercise of his parental responsibility he can decide that the children should return to live with him. This relief could have been obtained by an appeal against the care order, which would be conducted on the basis of a review of the decision of DJ Solomon or by a re-hearing if the interests of justice so required: see rule 30.12 of the FPR.

84. For instance, in relation to the threshold stage, on an appeal the care order would be overturned and the children would return to live with the father if the father established that DJ Solomon was wrong to conclude either: (a) that the children were suffering, or were likely to suffer, significant harm; or (b) that the harm, or likelihood of harm, was attributable to the care given to them, or likely to be given to them, by the father not being what it would be reasonable to expect him to give to them. Furthermore, on appeal in relation to the welfare stage, the appellate court could overturn DJ Solomon's decision (para 114) "that it would be neither safe nor in the children's welfare interest for them to be returned" to their father. Again, the children could then return to live with the father.

Finally, on appeal in relation to the Convention article 8 rights of the children and of the father, the appellate court could overturn DJ Solomon's decision that the interference with those rights occasioned by making a care order was necessary in a democratic society. Again, the children could then return to live with the father. There would also be procedural advantages associated with an appeal: para 28 above.

85. We also consider that an application under section 39 of the Children Act 1989 to discharge the care order is a suitable alternative remedy which would preclude the availability of judicial review in ordinary circumstances. The jurisdiction under section 39 is discretionary and determined by the court in accordance with section 1 of the Children Act 1989: see *In re TT (Children)* [2021] EWCA Civ 742; [2022] Fam 213. So, for instance, the child's welfare shall be the court's paramount consideration in determining whether to discharge the care order: see section 1(1) of the Children Act 1989. Also, by virtue of section 1(4)(b), in determining whether to discharge the care order the court shall have regard in particular to the factors in the welfare checklist contained in section 1(3). Applying those principles, all of the relief which the father seeks in the application for habeas corpus could be obtained by an application to discharge the care order. There would also be procedural advantages associated with an application to discharge the care order: para 30 above.

86. The practical effect of this analysis in a detention case based on an order of a court is that, if there is a right of appeal, the individual is precluded from applying for judicial review of the court order in conjunction with habeas corpus. Since the court order cannot be challenged in that way, the outcome of the habeas corpus application will be a foregone conclusion. It will fall to be dismissed, because the order provides a clear lawful basis for the detention. As explained above, if the individual pursues an appeal, an application for habeas corpus is unnecessary, so there is no good reason to allow any such application to remain on foot.

87. As this court explained in *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46; [2022] AC 461, paras 43–56, the principle of the rule of law requires that orders made by courts or tribunals of limited jurisdiction have to be respected and complied with unless and until set aside, just as is the case in relation to orders made by a court of unlimited jurisdiction such as the High Court. In the present case, the care order made by the district judge under section 31 of the Children Act 1989 required the Council to take and keep the children in its care and this established the legal position of the children until such time as it was set aside.

88. The only difference between an order made by the High Court and an order made by a court or tribunal of limited jurisdiction is that the latter might, in certain limited circumstances, be challenged by way of judicial review instead of by appeal: see *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 WLR 475. The clearest example of such a challenge is where an appellate tribunal refuses to

grant permission to appeal in respect of a decision by a lower adjudicator or tribunal: *Sivasubramaniam*, paras 50–52; and see, eg, *CAO v Secretary of State for the Home Department* [2024] UKSC 32; [2024] 3 WLR 847, paras 25–27.

89. But judicial review is not permitted in relation to decisions of district judges in the county court in respect of which appeals lie to a circuit judge: *Sivasubramaniam*, paras 53–54. As the Court of Appeal (Lord Phillips of Worth Matravers MR, Mance and Latham LJJ) explained in that case, at para 54, if an appeal does not proceed in such a case that is because permission to appeal will have been refused by two judges (the district judge and the circuit judge) and an attack on the refusal of permission by the circuit judge is likely to be misconceived; judges in the Administrative Court ought not to be required to devote scarce judicial time to reconsidering the matter; and they should dismiss such applications summarily in the exercise of their discretion: "The ground for doing so is that Parliament has put in place an adequate system for reviewing the merits of decisions made by district judges and it is not appropriate that there should be further review of these by the High Court."

90. Although not described as an application of the doctrine of abuse of process, that is the foundation of this approach. It is an abuse of the judicial review process to seek to use it to re-open a matter which has been decided in this way.

91. This reasoning is equally applicable to the decision-making and appellate structures within the Family Court. The Family Court is a court established with a limited, statutory jurisdiction. Accordingly, judicial review is in principle available in relation to it, even where that jurisdiction is exercised by a High Court judge. In the present case, of course, the jurisdiction was exercised by a district judge. The position is the same as in relation to the county court, as examined in *Sivasubramaniam*. Where an individual has, or has had, a fair opportunity to raise their grounds of challenge in relation to an order made by a judge of the Family Court by way of an appeal (in relation to which, for good procedural reasons, permission to appeal is required), it is an abuse of process to seek to bypass that procedure by applying for judicial review.

92. Therefore, to sum up, as regards the claim of habeas corpus brought by the father: (i) he was not entitled to seek to challenge the care order using his application for habeas corpus as the vehicle for that and the application was rightly dismissed summarily; (ii) he was not entitled to challenge the care order by way of judicial review, because he had a suitable alternative remedy available to him in the form of a right of appeal or an application to discharge; and (iii) his claim for habeas corpus was therefore bound to fail. The Court of Appeal was right to dismiss it.

93. In addition, it can be seen that the father would not have been entitled to seek to challenge by way of judicial review any refusal of permission to appeal in relation to the

care order made by the district judge, because that would have been an abuse of process as explained in *Sivasubramaniam*.

94. The effect of all of this is that, if the father wished to challenge the care order, he was obliged to do so using the procedural route specifically created by legislation for that purpose, namely the right of appeal within the Family Court (and as we have noted above, an application under section 39 of the Children Act 1989 to discharge the care order could also have been made). And to exercise the right of appeal, the father would need to seek and obtain permission to appeal by showing that his contention that the care order had been made improperly had a real prospect of success on appeal or that there was some other compelling reason why he should be granted such permission. If he could not do that, there would be no sound justification why further judicial resources should be devoted to examining whether the care order had been validly made.

95. By way of a footnote we should mention that there is another category of case involving children, in addition to those discussed in section 6 above, in which habeas corpus is an appropriate form of remedy or, more accurately, an appropriate procedural mechanism to enable the court to exercise its powers in relation to the child pursuant to its inherent parens patriae jurisdiction. The writ of habeas corpus in the ad subjiciendum form was developed as an order to produce a person (body) to the court (see Farbey and Sharpe, above, pp 2–5), from which it could follow that the court might order the person to be released if their detention was unlawful (habeas corpus for release, as discussed above) or that the court would be able to exercise other powers it had in relation to the person. As Lord Esher MR explained in *Barnardo v McHugh* [1891] 1 QB 194, 204, "[t]he writ of habeas corpus is a writ of procedure for the purpose of bringing some person into the presence of the court or a judge, so that the court or a judge may make an order with regard to that person".

96. Where the person in question is a child, habeas corpus may be used for this second, essentially procedural object. As noted in Farbey and Sharpe, above, p 188, the writ "was long used to gain the custody of infants", ie not to secure the release of a child, but to enable the court to determine who should have custody and on what terms. As it was put in *Barnardo v McHugh* at p 204, per Lord Esher MR, it involves "not a question of liberty, but of nurture, control and education" (the decision in the Court of Appeal was affirmed at [1891] AC 388). The powers of the court to be exercised after securing the child are those under its parens patriae jurisdiction. The use of habeas corpus for these purposes was examined in this court in *Birmingham City Council v D* [2019] UKSC 42; [2019] 1 WLR 5403, para 21 (Baroness Hale of Richmond) and paras 55–66 (Lady Black), referring in particular to the discussion by Sachs LJ in *Hewer v Bryant* [1970] 1 QB 357, 372–373. For the most part, the court's parens patriae jurisdiction has now been replaced by statutory proceedings under the Children Act 1989 and where that is so then, as we have explained, it is the statutory procedures which should be used.

97. However, in the light of this discussion we do not consider that it is accurate to say that habeas corpus has no role to play or is "obsolete" in relation to family proceedings (as it was put by the Court of Appeal in *In Re B-M (Care Orders)* [2009] EWCA Civ 205; [2009] 2 FLR 20, para 39). The fact that the FPR include provision for habeas corpus claims to be brought in relation to children bears this out. Nonetheless, the analysis above shows that the scope for habeas corpus claims in relation to children is limited, and (save perhaps in wholly exceptional cases) there is no possibility for them to be used to cut across the elaborate and carefully balanced procedures contained within the Children Act 1989.

9. Conclusion

98. We would dismiss the appeal.

99. We have no sense of regret in relation to the outcome of this appeal given that the remedies which are available to a person in the position of the father, of an appeal against the care order or of an application to discharge the care order, are carefully calibrated to protect children either by ensuring that they are returned to their families or by ensuring that they are not exposed to significant harm. The procedures to be followed in the Family Court in applying for such remedies have also been carefully worked out to ensure that the court is able to establish what are the best interests of a child as regards where or with whom the child should live.