Neutral Citation No: [2019] EWCA Civ 1560
Case No: B4/2019/0354

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PORTSMOUTH FAMILY COURT
(HER HONOUR JUDGE BLACK)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 2 July 2019

Before:

LORD JUSTICE FLOYD
LORD JUSTICE BAKER
and
LADY JUSTICE ROSE

IN THE MATTER OF R-B (A CHILD)

Transcript of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS
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Sophie Prolingheuer (instructed by **BTMK Solicitors**) appeared on behalf of the **Appellant** mother

Katrina Hambleton (instructed by **Hampshire County Council**) appeared on behalf of the **Respondent** local authority

Judgment

(Approved)

LORD JUSTICE BAKER:

1. This is an appeal against care and placement orders made by HHJ Black sitting in the Family Court at Portsmouth on 28 September 2018. The child who is the subject of these proceedings ("J") was born on 29 May 2018 and is therefore now aged 13 months. At the time of his birth, his mother ("S") was herself aged only 16 years, three months. When J was born, S and her siblings were living at home with their mother. For several years, the family had been known to social services, and the children, including S, had been categorised as children in need and latterly had been the subject of child protection plans under the category of neglect. The local authority had a wide range of concerns about the family, including the very poor condition of the home and the behaviour of S's younger siblings.

2. In the light of these concerns, the local authority made J the subject of a child protection plan himself during S's pregnancy and after he was born decided to start care proceedings. An application was issued on 5 June 2018 when he was only a few days old. At the first hearing on 25 June, HHJ Levey made an interim care order on the basis of a care plan that provided for S and J to be accommodated together in a mother-and-baby foster placement while various assessments were carried out of S's capacity to care for J. J's father was not living with S, and, although he has had contact with J, he has not at any stage put himself forward as a potential carer. He too is a young person from a difficult family background who has been supported by social services for a number of years.

3. In the following weeks, S and J did not have a stable life. Instead, they moved on several occasions between a series of mother-and-baby placements. Two of those

moves were apparently necessary because the foster carers had pre-booked holidays. Other moves apparently took place because S said she was unhappy in the home. In the course of those placements, various concerns were raised about the quality of care which S was providing to her baby. There was also concern about S taking J to the family home and exposing him to the risk of harm there. On a number of occasions it was alleged that S had left J in the care of a foster carer for several hours, contrary to the arrangements set out in the care plan. As a result of these concerns, the local authority imposed a further restriction that S would not have unsupervised contact with J.

4. The assessments carried out included a psychological assessment of S. The psychologist concluded that her full-scale IQ was within borderline range. She was said to have the immaturity and inexperience of many girls of her age from deprived backgrounds. She was assessed as having the capacity to conduct proceedings and to give instructions, although it should be noted that the psychologist expressed a degree of caution about this, observing that "provided her solicitor is suitably experienced in and mindful of these considerations, and provided matters are discussed patiently and in simple terms, [S] should be able to provide appropriate instructions".

5. During the proceedings, the local authority instigated a PAMS assessment. The report of that assessment indicated a number of ways in which S had failed to provide appropriate care for her baby. The conclusion reached by the assessor was that, despite the support she had received in the placements, S had failed to demonstrate that she had the capacity to care for J or to prioritise his needs. The local authority therefore concluded that J should be removed permanently from her care and placed for adoption.

To that end, the local authority filed a final care plan in those terms together with an application for a placement order. In accordance with earlier court directions, the local authority also filed a report under section 37 of the Children Act 1989 in respect of S's siblings. The care plan for J was supported by the children's guardian.

6. In accordance with the public law outline, the case was listed for an issues resolution hearing originally on 1 October 2018 but then brought forward by the court to 28 September 2018. In a position statement filed on her behalf two days before that hearing, S's solicitor stated that S had had the opportunity of reading the local authority's final evidence, was aware of the plan for adoption and was opposed to the plan. The solicitor proceeded to go through the allegations on which the local authority relied in support of their care plan and argument that the threshold under section 31 of the Children Act was crossed. The solicitor stated that the mother accepted some of the allegations but not others. The solicitor stated that the main point that S wished to raise was the fact that she and J had moved foster placements on four previous occasions. The solicitor contended that it was clear that this level of moving was not conducive to S's learning. The solicitor added however that S had been much more settled in her current placement, where she had been getting on really well with her carer.

7. The issues resolution hearing was listed before HHJ Black. A transcript of the hearing has been prepared for this appeal. The first part of the hearing lasted 13 minutes. I realise the danger of a partial quotation from a transcript such as this, but what follows is, I hope, a fair summary of what transpired during those 13 minutes. After the introduction, the judge addressed the mother's counsel. She referred to the mother's very young age and cognitive difficulties and to the fact that she had moved foster

placements on several occasions. The judge expressed concern about the PAMS assessment and the concerns identified by the local authority. She said that:

> "The PAMS assessment was really important, because that was really to reinforce all the teaching and to get your client, because she is a young parent and because she has got her own learning difficulties, to make sure that she really did give and was given the best opportunity to learn more than anything else."

The judge added:

> "And that is the difficulty you have. That was your chance, really, and it does not seem to have been used in the way that I was expecting it to be."

8. Counsel then addressed the concern raised by the local authority about S absenting herself from the foster home and said that S had found it difficult when J had not been allowed to stay in her room after the restriction on unsupervised contact had been imposed. To this the judge responded:

> "Yes, but it is a vicious circle, really, isn't it, because these extra restrictions were put in place because of the worries that social services had. But you should still be there caring for your child, even with those restrictions in place. If you're not, what is the point of you being there? That seems to be your client's view, in that she is not there. In fact, what I see more is your client almost having to come to terms with the fact of the reality of the situation and just waiting for a decision to be made, because her actions are not showing to me someone who is wanting to roll up her sleeves and say, 'Well, stuff the social workers, I can prove that I can do this'. It is quite the reverse."

9. A little later in the transcript the following exchange took place:

"JUDGE: She's had four months. It's a long time. What are you suggesting I do?
COUNSEL: Well, mother wishes to put her case forward.
JUDGE: Yes, but what does she want me to do with J? Where is she thinking this is all going?
COUNSEL: She wishes to be afforded a further opportunity to demonstrate that she can bridge the gap between what the PAMS assessment is saying, the understandable concerns that have generated from that, and her ability to meet his needs.
JUDGE: Yes, but your client knows she's got 26 weeks to do this in. There is no reason to go outside 26 weeks. She has four months now in a mother-and-baby foster placement. How much longer are you thinking I should give her?
COUNSEL: I would suggest another two months to be able to demonstrate a level of stability.
JUDGE: I can't. That's over six months, isn't it?"

10. There followed a discussion as to the precise length of the proceedings and when precisely the statutory 26 weeks would expire. The exchange between the judge and S's counsel then continued as follows:

"COUNSEL: I explained to mum of course the view the court would be giving today, and of course she may need to reflect upon that, but her primary position is she wants to be able to demonstrate either through the course of having the further two months or through the course of her giving evidence, perhaps to test her.
JUDGE: But what does she then expect the court to do? Where would she go, and what would happen with her and her baby?
COUNSEL: Of course, she is 16, so the opportunities could be for her potentially, if deemed safe, and of course the local authority could say it would be assumed safe, to go to her parents' home.
JUDGE: Can I tell you, I have read the section 37 report. I have read an awful lot of those reports as final statements in care proceedings. I can tell you now, the one place that your client will never go with that baby is to the family home, okay? You can rule that out absolutely one hundred per cent. I'm on the cusp of thinking that those children shouldn't be living there, okay?
COUNSEL: Then the alternative course is that she can be accommodated voluntarily by the local authority given she is 16, of course, and they will accommodate her and [J] together. So that's the --
JUDGE: Well, given the level of restrictions on her being able to care, she is way, way off anyone having the confidence of giving her 24/7 care of this baby. I just can't us getting to a point in a

month's time or two months' time or three or four or five months' time, given what I have read, of thinking that I'd have the confidence of her being somewhere on her own with this baby 24 hours a day, seven days a week, and if I can't see that, I've got to see what the outcome is, which is why … it seems to me to be the reality of the situation.
COUNSEL: Your Honour, I have advanced the mother's position.
JUDGE: What I would like you to do, please, Mr Hughes, is to go outside and just talk to her about it. I think she's probably done her best. I think she has probably done what she can to be able to show to everyone, but I need to have someone who is going to be able to do that every day, every moment of every day, and not just on occasions, because that is what being a parent is about. I wouldn't have wanted to think about being a parent when I was 16, and most of us in court wouldn't want to be doing that. So I recognise it is really difficult, and the rules that we expect for a parent are possibly quite unfair, but that is what this child needs. So, if you want to be a parent, however old you are, those are the rules that you are going to have to be able to comply with, and they're just basic.
COUNSEL: If I could just have some time outside to --
JUDGE: Yes, okay."

11. The hearing was then adjourned and resumed 29 minutes later. S's counsel indicated that his client wished to be excused for the rest of the hearing. There followed this exchange between counsel and the judge:

"COUNSEL: We had a conversation. Of course, given her cognitive functioning and her age --
JUDGE: I think that's probably the only concern that I have as to whether, if you like, it's appropriate to deal with today, so I will be interested to hear your views about that.
COUNSEL: I oscillated between being quite concerned but ultimately satisfied that the instructions she has given me that she understands my breakdown of your assessment of the case and she understands the advice that I have given her, she understands the options open to her, and I made it clear to her that it will be for her to try to persuade yourself or another judge, if she had the opportunity to care for [J], that the way to persuade will be via means potentially of a final hearing being listed with evidence being given, and she understood what that meant. I explained to her and she understood and appreciated your Honour's comments about her trying her best for [J]. I think she has tried her best for J.
JUDGE: Yes.

> COUNSEL: She says to me that she loves him dearly …
> JUDGE: Yes, I'm sure she does.
> COUNSEL: … that she would desperately want to care for him. She understands the window with which decisions need to be made for him, and she understood and recognised that there was a long period for her to have demonstrated changes in parenting but the case may potentially have ended up different, but, of course, given the fact that we are where we are, we're four months down the line. She acknowledges that she is not in a position to care for him today. She understands that, and she recognises she is not in a position to demonstrate change in the time afforded. So I went round several times explaining the options to her and the potential decisions. I felt she understood what was being said and the options before her, and I have asked her several times what the outcome would be if she doesn't oppose the making of orders, and she understood the outcome, that the outcome would be of course [J] being placed for adoption. She recognised that. So, on that basis, she tells me, she does not oppose not consent to the making of the order sought, and of course I would seek perhaps the usual recital in the order --
> JUDGE: Yes, of course.
> COUNSEL: -- as to her decision.
> JUDGE: I am very happy for you to put whatever you want. She's obviously filed a position statement today, so she's seen her solicitor."

12. The judge then asked counsel whether the mother had had similar conversations with her solicitor, to which counsel replied that they had taken place. Counsel then continued with this observation:

> "I have to be honest. When I was talking with her, like I said, I was oscillating between how much she was understanding. It may well have been the way I was describing things, so I changed and then came back at it from different angles. But I was satisfied at the end of that conversation that she understood the decisions being made and indeed the advice being given, the possible options to her, and I am satisfied that she gave me sensible instructions on the back of that."

13. The father's counsel then indicated that her client would support whatever S wanted to do. The judge then asked of the guardian's legal representative if the guardian felt that

the process was right for her to make the orders today. The local authority indicated that they were content to amend the threshold document on the basis of the mother's admissions, and the judge said that she would find the threshold proved on the basis of that document.

14. The judge then gave a judgment. It is very short and, in fairness to all sides, I propose to recite it in its entirety:

> "1. I made a lot of comments about this case before, and I am not going to repeat those. I know everyone took a careful note of them. I recognise both parents have made incredibly difficult childhood decisions and, as I have said, very adult decisions for parents who are so young, and I understand how difficult that has been for them to make.
>
> 2. My main concern, I have to say, having heard the change of position of the mother, was whether or not, given her age and her cognitive abilities, it was appropriate still to make final orders today. But I have been reassured by the fact that I know that the guardian (and she deals with it in her position statement) has been to see her and discuss the case with her, so she was aware of the guardian's position, aware of, if you like, what was probably the reality of the case; and knowing the solicitor who instructs and the fact that a position statement was served and advice and support would have been given to her in preparation of that; and knowing Mr Hughes as I do, and he has given a detailed account to the court of the process that he has gone through today and that he is satisfied that this is a decision that she has made and that she understands the decision she has made and what the impact of that will be.
>
> 3. Therefore, on balance, I am satisfied that it is appropriate and I can deal with this case by making final orders today. It is obvious from that I have said that I really could not see a way in which this mother could care for her son given the evidence against her.
>
> 4. So I make the care order sought by the local authority, I dispense with the consent of the parents, and the child's welfare requires it, and I make the placement order sought. I am content for appropriate recitals to go in to record the love and the care that

both parents have for their child and their expressions of wishing that there could have been a different outcome."

15. The hearing then concluded with the judge making further observations about the section 37 report and the position of S's siblings. The whole hearing, including the time allowed for discussions between counsel and S, had lasted 55 minutes. The order made following the hearing, not apparently sealed for several weeks, was headed "Case management order number 3" and included inter alia the following terms:

"**THRESHOLD**

The court finds the threshold on the basis of the threshold document at A20-23, dated 20 September 2018, of the bundle.

THE PARTIES' POSITIONS

LOCAL AUTHORITY
The local authority remains of the view that [J] cannot safely be cared for by the mother or father within the child's timeframe. In view of the fact that no alternative carer is able to care for [J], the local authority seek a care and placement order. The proposed plan is for [J] to continue to be accommodated in local authority foster care pending allocation of suitable adopters. The mother will be asked to leave the placement.

PROPOSED CONTACT
It is proposed that [J's] contact with his mother will be reduced by week 5 to monthly until a suitable adoptive placement is found. The local authority propose that father has a goodbye contact.

MOTHER
The mother neither opposes nor consents to the orders sought by the local authority.

FATHER
The father neither opposes nor consents to the orders sought by the local authority.

THE CHILD'S GUARDIAN
The guardian supports the local authority's application.

EVIDENCE
After reading the materials filed and described in the index/record of hearing, and upon it being recorded that the mother dearly loves [J] and would desperately wish to care for him but recognises that at this time she is unable to do so, and while she believes she could care for him in future, she recognises [J's] urgent need for permanence and stability and has made the heart-wrenching, child-focused decision to place his needs before her own and so does not oppose the orders sought by the local authority, and upon the court noting that the father loves [J] very much but he recognises that he is sadly not able to care for him and, having always supported the mother's position, he does not oppose the orders sought by the local authority, the court orders that [J] is made subject of a care order. There shall be placement orders in respect of [J] in favour of the local authority. The parents' consent to the making of placement orders is dispensed with where the child's welfare requires this."

16. Following the hearing, the local authority embarked upon a process of placing J for adoption. He was matched with prospective adopters in December 2018, introduced to them in early January and placed with them later that month. He has therefore been living with his prospective adopters for the past six months and is, we are told by local authority counsel today, well settled there.

17. On 12 February 2019 S filed a notice of appeal against the placement order. Her notice of appeal was four months out of time. It must, however, be remembered that she is still under the age of 17, has borderline learning difficulties and was apparently unrepresented following the hearing. In her notice of appeal she explained that she had not been able to find someone to give her legal advice until the middle of January and had been under the impression that she could not file a notice of appeal without the sealed order from the court below, which she did not receive until 15 January 2019. The grounds of appeal identified in the notice of appeal were: (1) that the judge did not

provide her reasons in writing for making the placement order; and (2) the mother neither consented nor opposed the making of a placement order, which the court regarded as consent in that there was no contested hearing.

18. The local authority was invited to file a statement in respect of the application for permission to appeal and did so on 26 February, opposing the application. There was then some delay while a transcript of the short judgment given by Judge Black was obtained, and it was not until May that the application for permission to appeal was referred to me.

19. On 23 May I granted permission to appeal, observing that there was a real prospect that the appellant mother would succeed in demonstrating that the process by which the judge reached the decision to make a placement order and expressed her decision in very brief reasons failed to comply with the requirements of statutory and case law, including the decision in *Re B-S* and the subsequent line of authorities. I gave directions for an urgent hearing of this appeal and for a transcript of the full hearing on 28 September to be obtained and expedited. I also gave directions about the mother's representation. At that point she was still unrepresented and remained so for some further weeks. Her application for legal aid was, we were told, delayed because she had failed to file the necessary financial information. At my request, the Civil Appeals Office contacted the Legal Aid Agency to see what could be done to expedite her application. It is unnecessary to set out the details of the conversations that then took place, but her application was eventually granted towards the end last week. This court is very grateful to the Legal Aid Agency for the assistance it provided in ensuring that S has been represented before us today.

20. In a supplemental skeleton argument filed yesterday, Ms Sophie Prolingheuer, who did not represent S below and who was only instructed late last week, sought to amend the grounds of appeal so as to read as follows:

(1) The judge did not provide adequate reasons for the making of a care and placement order, thereby failing to comply with the requirements of the statutory framework and case law.

(2) The appellant neither consented to nor opposed the making of care and placement orders, which the court regarded as consent and, as a result, there was no contested hearing.

(3) (A new ground) The judge placed unreasonable pressure on S to change her position and denied her the opportunity of a contested final hearing.

21. Before us today, Ms Katrina Hambleton on behalf of the local authority, who also did not appear before Judge Black, did not oppose the application to amend and we accordingly granted permission to amend the grounds of appeal as requested. At the outset of the hearing, Ms Prolingheuer drew attention to the fact that the notice of appeal had not been served on either the father or the guardian by the mother (who was of course then acting in person) and that neither was therefore present or represented at this hearing. Efforts had been made to contact the guardian and the solicitor for the child but had only established that both are currently on leave. Both counsel before us took the pragmatic view that this appeal hearing should continue on the basis that the father would support the mother's position and the guardian would oppose it and support the local authority's position. Given the scope of the appeal, which is to consider the lawfulness of the process before the judge in the family court rather than

the merits of the welfare issues in the case, we concluded that it was appropriate and right to continue to hear the appeal on a basis agreed by counsel.

The law

22. Under section 31 of the Children Act 1989, a care order can only be made if the court is satisfied that the so-called threshold criteria in section 31(2) are satisfied. It was not disputed before us that the threshold criteria were satisfied in this case. When deciding what order to make once the threshold is crossed, the court must apply section 1 of the Children Act, the welfare of the child being the paramount consideration. When dealing with an application for a placement order, the paramount consideration is the child's welfare throughout his life, and the court must have regard to the factors in the welfare checklist in section 1(4) of the Adoption and Children Act 2002. Where the court is asked to approve a care plan for adoption or to make a non-consensual placement order, there must be proper evidence from the local authority and the guardian addressing all the realistic possible options and an analysis for and against each option, and the judge must give an adequately reasoned judgment evaluating all the options and undertaking a comprehensive assessment of the child's welfare.

23. The importance of these two essential requirements has been stressed repeatedly by this court in a line of authorities starting with *Re B-S* (*Children*) (*Adoption Order*: *Leave to Oppose)* [2013] EWCA Civ 1146; [2014] 1 WLR 563. That line of authorities followed the decision of the Supreme Court in *Re B (Care Proceedings: Special Criteria)* [2013] UKSC 37; [2013] 1 WLR 1911, which had stressed, in the light of the court's duty to evaluate proportionality, that non-consensual adoption should only be

approved by courts where no other course is possible in the interests of the child's welfare.

24. The rationale for the need for reasoned judgments in these cases was expressed by McFarlane LJ (as he then was) in *Re G (A Child) (Care Proceedings: Welfare Evaluation)* [2013] EWCA CIV 965 at paragraph 53, quoted with approval by Sir James Munby, P in *Re B-S* at paragraph 45:

> "a process which acknowledges that long-term public care, and in particular adoption contrary to the will of a parent, is 'the most draconian option', yet does not engage with the very detail of that option which renders it 'draconian', cannot be a full or effective process of evaluation. Since the phrase was first coined some years ago, judges now routinely make reference to the 'draconian' nature of permanent separation of parent and child and they frequently do so in the context of reference to 'proportionality'. Such descriptions are, of course, appropriate and correct, but there is a danger that these phrases may inadvertently become little more than formulaic judicial window-dressing if they are not backed up with a substantive consideration of what lies behind them and the impact of that on the individual child's welfare in the particular case before the court. If there was any doubt about the importance of avoiding that danger, such doubt has been firmly swept away by the very clear emphasis in *Re B* on the duty of the court actively to evaluate proportionality in every case."

25. The family court is of course required to carry out robust case management in proceedings involving children, and that involves taking appropriate steps to identify and narrow the issues in the case and to resolve those issues expeditiously. It is however axiomatic that robustness cannot trump fairness. This principle was amplified by this court in *Re S-W (Children) (Care Proceedings: Case Management Hearing) Practice Note* [2015] EWCA Civ 27. In his judgment in that case at paragraph 52, Sir James Munby, P observed that:

> "Vigorous and robust case management has a vital role to play in all family cases, but as rule 1.1 of the Family Procedure Rules 2010 makes clear, the duty of the court is to 'deal with cases justly, having regard to any welfare issues involved'."

26. At paragraphs 54 to 47, the President continued:

> "54. We are all familiar with the aphorism that 'justice delayed is justice denied'. But justice can equally be denied if inappropriately accelerated. An unseemly rush to judgment can too easily lead to injustice. As Pauffley J warned in *Re NL (A child) (Appeal: Interim Care Order: Facts and Reasons)* [2014] EWHC 270 (Fam)**,** [2014] 1 FLR 1384, para 40,
>
> > 'Justice must never be sacrificed upon the altar of speed.'
>
> 55. Rule 22.1 gives the case management judge extensive powers to control the evidence in a children case: see *Re TG* [2013] EWCA Civ 5, paras 27-28. But these powers must always be exercised, especially in care cases where the stakes are so high, in a way which pays due regard to two fundamental principles which apply as much to family cases as to any other type of case.
>
> 56. First, a parent facing the removal of their child must be entitled to put their case to the court, however seemingly forlorn …
>
> 57. Secondly, there is the right to confront one's accusers. So, a parent who wishes to cross-examine an important witness whose evidence is being relied upon by the local authority must surely be permitted to do so."

27. Earlier, in her judgment in that case, King LJ considered the practice of making final care orders at case management hearings and sounded these notes of caution at paragraph 41 of her judgment:

> "41. It follows that whilst one can conceive of cases where a final order will be made at the case management hearing, … in reality it is likely that such a course will be appropriate only occasionally and in any event:

> i) Where there remains any significant issue as to threshold, assessment, further assessment or placement, it will not be appropriate to dispose of the case at CMH.
>
> ii) It can never be appropriate to dispose of the case where the children's guardian has not at least had an opportunity of seeing the child or children in question and to prepare to a case analysis in which he/she considers the section 31A care plan of the local authority.
>
> iii) Where, unusually, a case is to be disposed of at CMH, adequate notice must be given to the representatives of the parents and guardian; reluctance on their part will ordinarily be fatal to the proposed course. Having said that, where all that is required is for the parties to have a little more time or for the local authority to prepare a section 31A care plan one can envisage cases where the matter is adjourned for a further CMH with the intention that final orders will be made at the adjourned hearing., Another example where in exceptional circumstances it may be appropriate to make final orders at the CMH could be where, the outcome is inevitable and the child's need for an immediate resolution to the proceedings is critical to his or her welfare.
>
> iv) A care order should not be made without some reasons or a judgment no matter how concise. It is not enough to proceed on the basis that the reasons for making a care order, and still more a placement order, can be distilled from the transcript of discussion between the judge and the parties at court. Whilst appreciating the ever increasing burden on family court judges in the preparing and giving of judgments there must at least be a short judgment/reasons noting the available options, the positions of the parties and confirming that the outcome for the child is in his or her best interests and is proportionate and therefore Convention compliant."

28. Finally, in the context of the present case, it is relevant to cite the observations of the third judge in the constitution of that case, Lewison LJ, at paragraph 43:

> "43. It has long been a fundamental principle of English law that justice must not only be done, but must be seen to be done. Where a judge has apparently made up his mind before hearing argument or evidence that principle has undoubtedly been breached. A closed mind is incompatible with the administration of justice. But in such cases it is always possible that justice itself has not been done

either. As Lord Neuberger MR recently put it in *Labrouche v Frey* [2012] EWCA Civ 881 at [24]:

> 'Any experienced judge worthy of his office will have had the experience of coming into court with a view, sometimes a strongly held view, as to the likely outcome of the hearing, only to find himself of a very different view once he has heard oral argument.'"

Submissions

29. In her clear and succinct submissions to this court, Ms Prolingheuer on behalf of the mother chose to start her argument with ground 3. She pointed out that her solicitor had filed a position statement on behalf of this which set out the matters of factual dispute and clearly opposed the making of the care and placement orders and outlining what the mother would be inviting the court to consider at the final hearing. The case summary on behalf of the local authority also envisaged the listing of a final hearing.

30. Ms Prolingheuer drew attention to the comments made by Judge Black in the hearing cited above and submitted that those comments demonstrated that the judge had a concluded view that the appellant would be unable to provide good enough parenting to her baby. Ms Prolingheuer submitted that it was clear from the exchange after counsel indicated a change of position that that change had been made on the basis of the judge's comments in her assessment of the case and that the task in any final hearing for the mother would be to try to persuade her otherwise. Ms Prolingheuer submitted that there is a line that the court must be careful to navigate in every case between robust case management and premature adjudication of the case. She submitted that Judge Black in this case had erred in prematurely adjudicating matters on the basis of the written evidence alone and in communicating that decision to the vulnerable young

mother. Ms Prolingheuer accepted that the line in every case between robustness and unfairness was case-specific, but she submitted that in this case the line had been crossed, given the age of the mother and her cognitive limitations, the recommendations of the psychologist as to the circumstances in which she would be capable of giving instructions, as cited above, and, importantly, the recognition by her counsel then appearing for her at the hearing before Judge Black that he himself had oscillated between how much she was really understanding. It was submitted that those factors placed an additional duty of care on the judge to ensure that the process was fair and balanced, particularly given the draconian nature of the orders under consideration. Ms Prolingheuer therefore submitted that the comments made by the judge as cited above amounted to undue judicial pressure, so that the concession made by S neither to oppose not consent to the making of the orders was not freely given. In those circumstances Ms Prolingheuer submitted that it was not appropriate for any final order to be made at the hearing in the light of the clear guidance given by this court in *Re S-W*.

31. Ms Prolingheuer moved on to consider her first and second grounds of appeal taken together. She submitted that, given that S was not consenting to the care plan for adoption, it was incumbent on the judge to provide a reasoned judgment. Judge Black's failure to do so infringed the clear guidance of this court in *Re B-S*.

32. In her equally clear and succinct submissions in response, Ms Hambleton for the local authority submitted that the judge's comments at the hearing did not in fact amount to undue pressure at all, and she pointed out that the judge had clearly read the papers, including the PAMS assessment with its pessimistic conclusion, and was entitled to

make the comments which she did. It was entirely appropriate for the judge to give an indication as to the likely outcome of the proceedings. S then had the benefit of taking advice from her experienced counsel and made her choice not to oppose the making of the orders. In those circumstances, there was no contested issue and consequently no need for a fully reasoned judgment. Ms Hambleton submitted that it was clear from the transcript that the judge was aware of the sensitivities arising out of S's age and cognitive difficulties and that S's counsel confirmed that he was satisfied that S had understood the consequences of her change in position.

33. Ms Hambleton relied on the well-known observations of Lord Hoffmann in the case of *Piglowska* v *Piglowski* [1999] 1 WLR 1360 at page 1372:

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account."

34. In the alternative, Ms Hambleton submitted that, if S was dissatisfied about the reasons given for the judge's decision, the right course was for her to apply to the judge for further detailed reasons, in line with the well-established case law; see for example *Re A (Children) (Judgment: Adequacy of Reasoning)* [2011] EWCA Civ 1205, per Munby LJ at paragraph 16. Ms Hambleton submitted that it is clear that Judge Black fully and properly took into account all the evidence with which she had been provided and that that evidence was firmly in her mind when she made her decision. Finally, Ms Hambleton submitted that, if this court did consider that the judgment was deficient, the

right course would be now to remit the matter back to Judge Black to provide further reasons.

Discussion and conclusion

35. I recognise of course the very considerable pressures that family court judges are under, dealing with an enormous caseload, particularly in public law proceedings. In such circumstances, robust and vigorous case management is essential. Judge Black is a highly respected and very experienced family judge who is well aware of the need to ensure that the line between robustness and unfairness is not crossed.

36. I regret to say however that I am in no doubt that the line was crossed in this case. The transcript of the very short hearing demonstrates that the judge came into court with a very clear view of the merits of the case. She indicated in clear terms that she was not prepared to allow the mother further time to demonstrate a level of stability and that, even if she did, she could not see how the mother could then be entrusted with the care of a child for 24 hours, seven days a week. She added:

> "I have got to see what the outcome is, which is why it is sad but it seems to me it is the reality of the situation."

In other words, the judge was indicating in the clearest possible terms at the case management hearing that she did not think the mother had a chance of keeping her child. Having made her views crystal clear, she then told the mother's counsel that she would like him to go outside and talk to the mother about it. As Lewison LJ observed in *Re S-W,* "A closed mind is incompatible with the administration of justice". To my

mind, the judge here was not merely indicating the likely outcome of a contested hearing. She was indicating that she had reached a firm conclusion. With respect to the judge, I consider that this was plainly going too far, particularly given the mother's young age and cognitive limitations. For my part, I accept Ms Prolingheuer's submission that the judge's comments imposed undue pressure on the vulnerable 16-year-old mother in this case. In the circumstances, it is hardly surprising that the mother changed her instructions during her brief conversation with her counsel and then declined to remain in court.

37. When the hearing resumed, her counsel referred on more than one occasion to his mind having "oscillated" as to whether the mother understood the circumstances. That comment should have alerted the judge and everyone else in court as to the dangers of concluding the proceedings at that hearing. The judge was plainly alive to the question whether it was appropriate to proceed but, instead of having her concerns reinforced, seems to have been reassured by what counsel was saying to her. I recognise of course that reading a transcript is different from hearing submissions made orally, but I have to say that when reading the transcript it was manifestly obvious to me that the judge should not have proceeded to make the order that she did in this case at that hearing.

38. In passing I note that counsel told the judge that he had "made it clear" to his client "that it will be for her to try and persuade yourself or another judge". I do not of course know exactly what counsel said to his client, but if that is indeed what he said, it would be erroneous advice. The burden of proof rests at all times with the local authority, and the court can only make a placement order and approve a plan for adoption if satisfied in accordance with the Supreme Court decision in *Re B* that no other course is possible.

39. I therefore conclude that the appeal should be allowed on the third ground advanced by Ms Prolingheuer today. As identified by King LJ in *Re S-W*, it was inappropriate for the court to make any final order at that case management hearing given the significant issue between the parties. In my view, the change in the mother's position only came about because of the inappropriate comments made by the judge.

40. In the alternative, if, contrary to what I have said, it was appropriate for the court to proceed to make a final order, it was incumbent on the judge to give a proper, fully-reasoned judgment. In this case, the judge conspicuously failed to do so. As King LJ observed in *Re S-W*, it is not enough to proceed on the basis that the reasons for making a care and placement order can be distilled from early discussions between the court and counsel, yet in this case the judge began her brief judgment by referring to the fact that she had "made a lot of comments about this case before", adding that she was not going to repeat them knowing that legal representatives had taken a careful note. The judgment in truth does not contain or purport to contain any analysis of the reasons why the order was made. It is rather merely a recapitulation of what had happened at the hearing. The deficiencies in the judgment are to my mind on a scale that could not possibly be corrected by seeking further reasons, as suggested by Ms Hambleton, nor excused by reliance on the dicta of Lord Hoffmann in *Piglowska*.

41. I am reluctant to criticise a judge whose experience and expertise in this area is widely recognised. In this case, however, I regrettably conclude that there was a failure to follow the important guidance given by this court as to the proper management of these sensitive cases. It follows in my judgment that this appeal must be allowed. The applications for care and placement orders must be reheard by another judge. If my

Lord and my Lady agree, I would propose that the matter be relisted in the next seven days before Roberts J, the Family Division Liaison Judge for the Western Circuit, with appropriate case management directions.

42. I should warn the mother that, although (if my lord and Lady agree) this appeal will succeed, she still faces the very formidable difficulties in recovering the care of her baby son. He has been living with the prospective adopters for six months and is, we have been told, well settled with them. There has been no contact between S and J for several months. It may well be that a rehearing of these applications leads to the same result, namely the making of care and placement orders. But the law is clear that such orders can only be made after due process. That principle was manifestly infringed in this case, and I would therefore allow the appeal.

LADY JUSTICE ROSE:

43. I agree.

LORD JUSTICE FLOYD:

44. I also agree.

Order: Appeal allowed

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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