Neutral Citation Number: [2023] EWCA Civ 364

Case No: CA-2023-000146

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT PETERBOROUGH
HH Judge Tolson KC
PE22C50025

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 April 2023

Before :

LORD JUSTICE SINGH
LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

- -

N (REFUSAL OF PLACEMENT ORDER)

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- -

Clare Gould (instructed by **Pathfinder Legal Services**) for the **Appellant**
Martha Gray (instructed by **HRS Family Law**) for the **First Respondent**
Gary Crawley (instructed by **Family Law Group**) for the **Second Respondent, by her children's guardian**

Hearing date : 28 March 2023

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Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2.00pm on 5 April 2023.

LORD JUSTICE BAKER :

1. This is an appeal by a local authority against a decision to refuse an application for a placement order under s.21 of the Adoption and Children Act 2002 in respect of a child, hereafter called "N", who is now aged rising three.

2. At the end of the hearing, we informed the parties that the appeal would be dismissed for reasons to be given at a later date. This judgment sets out my reasons for agreeing with that decision.

Background

3. The proceedings concern two children, N and her older half-sister, G, who is now aged 8. The girls share the same mother but have different fathers. The mother has a disturbed, and disturbing, background. She was removed into care at the age of 2 and initially adopted aged 6. After that placement broke down, she was adopted again but then subjected to physical and emotional abuse at the hands of her second adoptive mother. Unsurprisingly, these traumatic experiences have left her even more opposed to the prospect of adoption for any of her own children. In addition to the two children who were the subject of these proceedings, she has three older boys by a previous relationship, who have lived with their father since 2014, and she has recently given birth to another baby.

4. The relationship between the mother and G's father broke up when G was a baby. Thereafter, G lived with her mother and had occasional contact with the father who had moved away to another part of the country. In 2018, the mother started a relationship with N's father which became violent and abusive soon after N was born. The local authority's children's services became involved with the family because of a number of concerns including allegations that N's father had committed sexual offences against children. The local authority warned the mother not to allow him into the home, but received information that she had not complied with that warning. There were further concerns about poor conditions in the home and G's school made a referral arising out of evidence of severe neglect. After an investigation under s.47 of the Children Act 1989, the children were made subject to child protection plans. After struggling to see the children at home, the social workers asked for a police welfare check which was carried out on 2 March 2022. The police found the children living in dangerous and unhealthy conditions and took them into police protection under s.46 of the 1989 Act. At that point, the local authority started care proceedings and both girls were made subject to interim care orders and placed together in foster care. In the judgment now under appeal, the judge observed that this was "a highly-skilled foster placement" where the girls thrived.

5. G's father was joined as a party to the proceedings, but N's father has played no part in them. The mother moved to another local authority area, and it later emerged that she was expecting another baby. In the course of the proceedings, the mother and G's father conceded that the threshold criteria for making care orders under s.31 of the Children Act were satisfied on the basis of evidence as to the conditions in which the children had been found by the police in March 2022. Thus the issue for the court was what orders to make for the future care of the girls. To assist resolving that issue, various assessments were carried out, including parenting assessments of the mother and of G's father and his current partner, a special guardianship assessment of G's

paternal grandmother and her partner, and two sibling assessments of the relationship between G and N. The local authority filed an application for a placement order in respect of N, and the further documents filed with the court included a statement from the local authority "family finder" and a child permanence report for N.

6. At the final hearing, the position of the parties was as follows.

   (1) The local authority, supported by the children's guardian, sought a special guardianship order in respect of G, placing her with her paternal grandmother and partner, and a placement order in respect of N.

   (2) The mother sought the return of both children to her care. If the court concluded that was not possible, she proposed that they be looked after in long-term foster care. Her third option for G was placement with the grandmother, as opposed to the father. She was strongly opposed to adoption for N.

   (3) G's father asked for his daughter to be placed in his care.

7. The final hearing took place over five days, at the end of which judgment was reserved and handed down on 25 November 2022. Following judgment, the judge made a child arrangements order providing for G to live with her father and a care order in respect of N, on the basis that she would be placed in long-term foster care, either with the carer with whom she and G have been living since the start of proceedings or with another long-term carer. The application for a placement order was dismissed. The judge made a further order under s.34 of the 1989 Act that the local authority "shall permit generous and flexible contact between G and N to include overnight contact in G's placement for N". He gave G's father liberty to apply in the event of the contact arrangements proving unsustainable. The local authority sought clarification of the judge's reasons which was provided on 3 January 2023. On 27 January 2023, the local authority filed notice of appeal (five weeks out of time) against the refusal of the placement order. On 13 March 2023, I granted an extension of time for appealing and permission to appeal.

The judgment under appeal

8. Since the hearing, N has remained with her foster carer but G has moved to live with her father who, as stated above, lives in another part of the country some 200 miles away. At the appeal hearing we were informed that, contrary to the plans for the children, no face-to-face contact has yet taken place. One other development is that the mother has now given birth to the baby she was expecting, and after a period in a mother and baby unit is now living with the baby in the community. To date, no proceedings have been started in respect of the new baby.

9. At the start of his judgment, the judge observed that the proceedings were unusual in that there were "no fewer than seven reasonably arguable options" for the court to consider. In summary, these were:

   (1) G and N remaining in their foster placement for the long term;

   (2) G and N returning to their mother's care;

   (3) G living with the father under a child arrangements order;

(4) G living with the grandmother under a special guardianship order;

(5) N being placed with prospective adoptive parents under a placement order;

(6) The local authority's care plan for N of adoption being approved but without a placement order, enabling the mother to be involved in the adoption application to ensure a placement providing the necessary sibling contact; and

(7) N being placed with prospective adoptive parents under a placement order and with an order for sibling contact made.

The judge commented that "the reality is that there is no ideal answer and an array of pros and cons for all the options."

10. In summarising the background, the judge identified what he regarded as an important feature of the case at paragraphs 7 to 9:

> "7. It is also a highly significant feature of the case that the girls have a close relationship with each other. Unpacking that, what is really meant is (i) that G feels very attached to N; (ii) dreads separation from her; but also, (iii) has in the past adopted the role of a carer towards her little sister; and, (iv) there is a sense that N has relied on her relationship with G. On this last point, N is described as presenting as rather 'out of it' when first in the foster home – rather lost in her own world rather than relating to those around her; but also as lighting up when G was in the room. The conclusion is that N – who also has some catching up to do in terms of her development - was under-stimulated by her 'lost' mother, but not by her older sister.
>
> 8. What is abundantly clear is that G dreads losing N. She has written me the most touching of letters telling me so. She has gone out of her way to tell anyone and everyone who would listen that this is her worst fear. She has been given a 'worry monster' by her foster carers and the loss of N is the worry which, for months on an almost daily basis as I understand it, she has physically (i.e. on a piece of paper) deposited with the monster before leaving for school as a way of defusing her fear. The worry has 'disappeared' on her return home – but only to be posted again the next day. More than this, there is to my mind a quite remarkable analysis of her fears for an 8 year old, in the context of the adoption care plan for her sister. G has told her guardian that what she fears is that N will, first, be a long way away and, secondly, will forget her. It is indeed the evidence before me that there is no local adoptive placement for N at the current time (and thus N could be placed for adoption anywhere in England) and, of course, it would be usual in an adoptive placement for a young child not to know, and so to forget, its birth family.

> 9. This touching but troubling concern of G's has been a feature of this hearing, but the guardian rightly reminds me that it is but one consideration. That said, the situation is such that both [the allocated social worker] and [the guardian] elevate the need for ongoing sibling contact post-N's adoption to the level of essential…."

11. The judge then referred briefly to the relevant law. He recorded that the welfare of each child was his paramount consideration, adding that, when considering the adoption care plan for N, the paramount consideration was her welfare throughout her life and the matters to be considered included those in the checklist in s.1(4) of the Adoption and Children Act 2002 (as opposed to the checklist in s.1(3) of the Children Act 1989 which was applicable in the case of G for whom adoption was not an option). He summarised the principles derived from case law in these terms (paragraphs 18 and 20):

> "I can make a placement order in N's case only if I am satisfied that her welfare requires that I do so. The word 'requires' carries a connotation of an imperative – that "nothing else will do." In this way English domestic law is aligned with the requirements of Article 8 of the ECHR: the interference in the right to respect for family life represented by an adoption care plan can only be proportionate and necessary if there is a "pressing social need" for it …. I must consider the welfare analysis of all options globally and holistically, that is to say in the round and together, without first ruling out one, then another, only to leave myself with Hobson's choice".

12. The judge then analysed the evidence and arguments under the heading "The Welfare Analysis. The Checklists". First, he considered the children's wishes and feelings. He noted G's wish to be with her mother which he said had perhaps been "drowned out by the volume of her desire not to be separated from her sister". In contrast, he observed that

> "N is of course too young to express a view. N's current inner feelings are in fact hard to determine: she presented as something of a lost soul in foster care, save perhaps when G was present."

13. Next, he considered the extent to which the children's needs would be met under the various options. He stated that there was no sound basis on which he could currently conclude that the mother could meet their needs. He then considered the capacity of members of G's family to meet her needs. It is unnecessary for the purposes of this appeal to refer to this save to note that he formed a positive view about both the father and the paternal grandmother. He added, however:

> "The need which neither the father nor the grandparents can meet is the need for the girls to be together if possible. There can be no criticism of the paternal family for their approach in offering a home to G alone. They were clear that N would be a welcome visitor to both of their homes – welcome for stays

> short and long – a week's holiday was mentioned. Thus if N were with her mother or in a foster home she could spend at least a reasonable amount of time with G. If she were in foster care some creative thinking around visits to the North would be required, but I can see no reason why this should not take place on a regular and generous basis. If N is adopted, I find that borders on the impossible. At best there would be a limited, occasional visit."

14. Continuing with his evaluation of the extent to which the children's needs would be met under the various options, he observed:

> "The current foster home seems to meet all the girls' needs for the time being. The arguments against the girls remaining in foster care were the usual ones advanced: they would be subject to continuing professional involvement and the prospect of moves in future – frequent or otherwise. The age of the current foster mother – 61 – is against her. All this evidence was given before the current foster mother was approached late in the trial and asked if she could keep N alone. The unexpected response that she could keep one or both girls is not tested as it undoubtedly should be."

I interject here that subsequently the foster carer has decided that she is unable to offer a long-term home for either child.

15. The judge then considered the competing options of adoption and fostering for N:

> "32. An adoptive placement is likely to be found for N, albeit that it is unlikely to be local. It is likely to meet all of her needs except her need to be in touch with her sister (regarded, it will be recalled, as essential by the mother, local authority and guardian alike). Before turning to that, it is worth stating that although I find N is developmentally behind where she should be, I find myself with all due deference not quite as pessimistic as [the social worker] and in particular [the guardian] as to the level of reparative parenting which she is likely to need in future…. However, if I am wrong about this, it would in my judgment be an argument not for adoption, but for foster care and in particular for N to remain where she is. Adoptive parents are unlikely to be experienced and would probably not come with any particular expertise in dealing with a child bearing the scars of past failures in parenting. It is also important to point out, bearing in mind the history of the mother, that an adoptive placement would not come with any guarantee of success. I find that in almost all cases the professional approach is to favour adoption over long-term fostering for any child under the age of around 5 or 6 (this is not as I understand it the law, but it continues to be the all too common professional approach and I intend no criticism of the individuals in this case). It is normal for me to find very little

> in the way of a "*Re B-S Analysis*" of adoption: the process seems to be to consider parents first, wider family next and then if they are ruled out the assumption seems to be that long-term fostering is ruled out on the grounds of age - and that adoption is ruled in as almost a panacea. The history of the mother is a reminder that this is not so. [The mother's counsel], armed with the mother's history and the need to keep the children together if possible, was robust in her cross-examination: why is it thought that foster care is so bad in comparison if adoption means losing your sister? And if it has worked so well to date? To these I would respectfully add: and if 'reparative care' is needed? I record there were no persuasive answers to these questions. Again, I intend no criticism. This is a particularly nuanced case. Both the local authority and the guardian recommended only a time-limited search for an adoptive placement. Neither seemed entirely wedded to any particular outcome or order."

16. The judge continued:

> "33. These considerations bring me to a, perhaps the, key concern about adoption. If on-going sibling contact is essential then can adoption for N meet that need? There was much talk about finding adopters willing to accept up to 4 meetings a year – which in the professional mind would be short encounters, perhaps by videolink in some cases. Even if achievable it would be a far cry from the kind of arrangements which would be possible from foster care. Moreover - and this for me is a key point on which the professionals did not touch in their written material - any prospective adopters would have to be told not just that sibling contact was required but that the sibling in question would (this is common ground in the case of G) also be seeing her mother and thus the usual seal between adoptive and birth parents could not be maintained in the long- or even the medium-term. The professionals accepted that the need for sibling contact would in itself narrow the pool of adopters.…[T]he team manager, told me that locally there was a large surplus of children waiting to be adopted over adoptive parents waiting for children. He believed the national picture was patchy. In these circumstances I find myself unsure as to whether adopters could be found for N who would permit sibling contact in these circumstances. I am satisfied that not enough thought has been given to this question before trial."

17. Proceeding with his analysis of the relevant factors in the welfare checklists, the judge considered the risk of significant harm and concluded that such a risk remained if the children were returned to their mother. He continued:

> "35. The existing relationships held by N (and of course G, but 'existing relationships' is a specific factor in the 2002 Act checklist which applies to N alone – see sub-section 1(4)(f)) are

> relevant in the context of the mother as well as G. This is not a case in which I can rule out with certainty the mother's ability to care for N (or G) in future. Moreover, the mother will continue to spend some time with G and it may be a future source of confusion and concern for N to know that she has a half-sister who continues to see her birth mother when she herself does not.
>
> 36. Looking at N's welfare throughout life, I can acknowledge that adoption is likely to provide her with a 'forever family' in a way that long-term fostering would not. (That said it is worth noting that I was told about the wall of photographs of past foster children found within her current foster home.) Care by her mother in future would provide her with a wider maternal but not paternal family.
>
> "37. The character and personality of the children plays out in particular in terms of their relationship with each other, and G's desire to be with N. This needs to be analysed in a little more detail. The major loss if they were to be separated would be to G, rather than to N. N is of course much younger. She has looked to her older sister in the past for care and she clearly means something to her. It is G, however, who in the words of [the social worker] would experience the loss of her sister as a "bereavement". N's immediate sense of loss would be much less acute."

18. The judge then set out his final analysis under the heading "The Balance", starting by asking the question: "How then to weigh these various factors within the checklists against each other in the context of the various options available?" He carried out a detailed balancing of the factors relevant to the decision about G's future, identifying the advantages and disadvantages of each option, before concluding that a placement with her father was to be preferred. Turning to N, he concluded that a return to her mother was "for the moment … impossible". He continued:

> "47. Thus the options for N come down to adoption or long-term fostering. Viewed at present it seems to me that long-term fostering is the better option. First, as indicated above, I doubt that a placement would be found which could tolerate on-going sibling contact. Secondly, the option of N remaining where she is at present is attractive. She has done well there and she is settled. If she is losing the companionship of her sister, she does not need any more change. The state of the evidence is that the foster mother can offer this long-term placement. I agree that the issue will have to be explored but the circumstances are such that the offer should not be discouraged. I was told on behalf of the guardian that, at 61, the foster mother would be regarded as too old to pass approval by the fostering panel. I think this would be a mistake, but it does not alter my conclusion. Any long-term fostering placement is bound to be able to offer on-going good quality contact to both

> G and the mother. Whilst I acknowledge that such a regime would run counter to a traditional local authority approach to contact within a foster placement, I believe a much more creative, flexible and broader approach to N's time with her sister is possible and desirable in this case. I cannot see any good reason why there should not be holidays spent together and other regular meetings. I invite the local authority to consider this specifically. On this evidence, I am unable to say that "nothing else will do" other than a placement order. Far from it. My conclusion is that long-term fostering is a better option. It is available and it better meets N's needs whilst keeping her safe from harm.
>
> 48. Whilst I acknowledge that both the local authority and the guardian are of a different mind, make powerful arguments and gave evidence well, it may be some indication that both are alive to the difficulties in adoption (and perhaps to the positives in long-term fostering) that both have indicated that any search for an adoptive placement should in any event be time-limited to 6 months from the date of the placement order.
>
> 49. I acknowledge that there is no perfect solution; that each of the options before me has significant disadvantages. I also emphasise that having decided the preferable option for each child individually, I have revisited my conclusions in respect of one child in the light of my conclusions in respect of the other. Specifically, if N is remaining in foster care, then might it not be best for G to remain there as well? It is an arguable case. Nevertheless, I conclude that the advantages of family care overcome G's obvious and clear desire to remain with her sister. If G is to leave the current placement, might that not favour adoption for N? I do not believe so."

19. Following the handing down of the judgment, the local authority submitted a request for clarification. The questions relevant to this appeal can be summarised as follows:

(1) Why did the court discount options (6) and (7) (see the list of options in paragraph 8 above)?

(2) Can the court expand on the impact on N if she is moved from her current foster carer and how this would impact on the reasoning?

(3) Can the court expand on how N's relationship with her sister was considered in isolation from consideration of G's relationship with her sister when considering placement options and the welfare checklist?

On 3 January 2023, the judge replied in these terms:

> "I believe the judgment sufficiently explains my reasoning and does not require elaboration pursuant to the principles in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605.

> I would, however, briefly comment as follows.
>
> As the judgment seeks to explain, no adoption plan or order would be likely to provide the level of contact required between the girls and no sufficient thought has been given to the effect on potential adopters (and therefore on the plan) of the inability to keep the "seal" from the birth parents.
>
> The impact of a move of foster carers for N is unpredictable and would depend on the circumstances of the time. It is to be hoped that she can remain where she is – which the evidence indicated was not just possible but likely – at least so far as the foster carer is concerned.
>
> The judgment makes clear that the impact of the loss of G upon N is likely to be less than the loss of N upon G. I do not believe it is possible to elaborate further."

The appeal

20. The local authority advanced two grounds of appeal: (1) the judge carried out an incorrect balancing exercise, and (2) the judge carried out an incorrect implementation of the welfare checklist. Inevitably, there was a degree of overlap between these two grounds and it is convenient to consider them together, highlighting the arguments made by Ms Clare Gould in her helpful written and oral submissions which were adopted by Mr Gary Crawley on behalf of the guardian.

21. The principal point made on behalf of the appellant was that, whilst the sibling relationship was of importance to N, the weight given to it by the judge was excessive. The balancing exercise ought to have weighed a realistic evaluation of the benefit of such contact against the benefit to N of living in a secure and stable adoptive placement that was not subject to the uncertainties of being a looked after child. In evaluating the benefit of contact, the judge ought to have taken into account the evidence that the relationship, though important to N, was less important to her than to her sister. He ought also to have taken into account the fact that, even if N was in foster care, the level of contact would be significantly less than it has been when the sisters have been living together. The level of contact would be further constrained by the fact that G would be living 200 miles away with her father.

22. It was submitted that the judge had gone astray when reaching the decision about N's future by attaching excessive weight to G's wishes and feelings. It was accepted that the checklist in s.1(4) of the 2002 Act required the court inter alia to have regard to the wishes and feelings of the child's relatives, including G. Ms Gould submitted, however, that it was clear from the judgment that the judge had prioritised G's strongly expressed wishes and feelings regarding her relationship with her sister and allowed them to outweigh N's welfare needs.

23. Ms Gould cited the observation of McFarlane LJ in *Re W (A Child)* [2016] EWCA Civ 793 at paragraph 75 approving the comment of counsel that

> "it is all very well to purport to undertake a balancing exercise, but a balance has to have a fulcrum and if the fulcrum is incorrectly placed towards one or other end of that which is to be weighed, one side of the analysis or another will be afforded undue, automatic weight."

Ms Gould submitted that judge fell into error in allowing the "fulcrum" of the court's consideration to fall closer to prioritizing familial relationships at all costs despite the obvious detriments to the welfare of N in remaining in long term foster care, including less stability and security, the risk of applications to discharge the care order, and the requirement for statutory intervention for the rest of her minority. It was argued that the judge placed undue weight upon the possibility of the mother making sufficient progress to lead to the care order being discharged. There was no basis on which the judge could assess the likelihood of this happening, and the fact that the judge took it into consideration was further evidence that he gave undue weight to prioritising familial relationships.

24. Ms Gould submitted that, in contrast, the judge gave insufficient weight to other factors which favoured adoption over fostering. She drew attention to the language used by the judge when referring to some of the advantages and disadvantages of adoption and fostering. In particular, she pointed to his observations that "the arguments against the girls remaining in foster care were the usual ones – they would be subject to continuing professional involvement and the prospects of moves in future", that "an adoptive placement would not come with any guarantee of success", and that "the professional approach is to favour adoption over long-term fostering for any child under the age of around 5 or 6". It was submitted by Ms Gould that in these respects the judge had carried out the balancing exercise and the analysis of the factors in the welfare checklist by reference to generalisations about adoption and fostering, rather than the specific needs and circumstances of the child. Furthermore, although he had identified seven options at the outset of his judgment, he had failed to address options (6) and (7) in his ultimate analysis. As those options might have provided a way forward for N to be adopted while maintaining the necessary level of contact with her sister, this was a significant omission.

25. In her clear and cogent submissions on behalf of the mother, Ms Martha Gray accepted that the judge had concluded that the magnetic factor for him in making his decision was the impact which a placement order would have on sibling contact. It was her case, however, that he was not wrong to do so. His finding about the extent of this impact was supported by the evidence in the sibling assessments, the permanence report, and the social worker's statements, as well as the professional evaluation of the guardian. The careful analysis in paragraph 33 of the judgment of the difficulties of achieving in an adoptive placement the level of sibling contact which N needed led the judge to the conclusion summarised in the response to the request for clarification that "no adoption plan or order would be likely to provide the level of contact required between the girls".

26. It was Ms Gray's case that the judge's analysis was fully in accordance with the requirements laid down by case law. He identified the options at the start of his judgment and dealt carefully with the advantages and disadvantages of each. In particular, he engaged with the key differences between fostering and adoption. Ms Gray cited the summary of those differences identified by Black LJ in *Re V*

(Children) (Long-term Fostering versus Adoption) [2013] EWCA Civ 913 at paragraph 96:

> "(1) Adoption makes the child a permanent part of the adoptive family to which he or she fully belongs. To the child, it is likely therefore to "feel" different from fostering. Adoptions do, of course, fail but the commitment of the adoptive family is of a different nature to that of a local authority foster carer whose circumstances may change, however devoted he or she is, and who is free to determine the caring arrangement.
>
> (2) Whereas the parents may apply for the discharge of a care order with a view to getting the child back to live with them, once an adoption order is made, it is made for all time.
>
> (3) Contact in the adoption context is also a different matter from contact in the context of a fostering arrangement. Where a child is in the care of a local authority, the starting point is that the authority is obliged to allow the child reasonable contact with his parents (section 34(1) Children Act 1989). The contact position can, of course, be regulated by alternative orders under section 34 but the situation still contrasts markedly with that of an adoptive child. There are open adoptions, where the child sees his or her natural parents, but I think it would be fair to say that such arrangements tend not to be seen where the adoptive parents are not in full agreement. Once the adoption order has been made, the natural parents normally need leave before they can apply for contact.
>
> (4) Routine life is different for the adopted child in that once he or she is adopted, the local authority have no further role in his or her life (no local authority medicals, no local authority reviews, no need to consult the social worker over school trips abroad, for example)."

Ms Gray submitted that on a careful reading of the judgment it was clear that the judge had engaged with the factors which the local authority asserted had been neglected, including the contrasting features of adoption and fostering identified by Black LJ in *Re V*.

27. Ms Gray submitted that the judge had been required by statute to take into account G's wishes and feelings when reaching a decision whether to make a placement order in respect of her sister. Rightly, however, he had acknowledged that this was just one part of the analysis. It was her case that, reading the judgment as a whole, it could not be said that the judge had fallen into the trap of allowing G's strongly expressed wishes and feelings to dictate the outcome. She drew attention to the way in which the judge at paragraph 49 of the judgment had expressly revisited his conclusions for each child in the light of his conclusions for the other.

Discussion and conclusion

28. Under s.1 (1) and (2) of the Adoption and Children Act 2002, whenever a court is coming to a decision relating to the adoption of a child (which include whether to make a placement order) the paramount consideration must be the child's welfare throughout her life. The addition of the last three words distinguishes this principle from its equivalent in s.1 of the Children Act 1989, a distinction which is also reflected in the welfare checklist in s.1(4) of the 2002 Act which requires the court to have regard to the following matters among others:

> "(a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),
>
> (b) the child's particular needs,
>
> (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
>
> (d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,
>
> (e) any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering,
>
> (f) the relationship which the child has with relatives, with any person who is a prospective adopter with whom the child is placed, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including –
>
> (i) the likelihood of any such relationship continuing and the value to the child of doing so,
>
> (ii) the ability and willingness, of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
>
> (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child."

29. The factors in s.1(4)(f) do not feature in the checklist in s.1(3) of the Children Act. They are matters which must be taken into account when making any decision relating to adoption and follow on from the obligation to give paramount consideration to the child's welfare throughout her life. A child's existing relationships are obviously an important component of any analysis of her welfare "throughout life". And a sibling relationship is a paradigm example because, unlike nearly every other relationship, it is likely to be lifelong.

30. The approach to be adopted by a judge when deciding whether to make a placement order is now well-established and need not be repeated at length again here. Under Article 8 of the ECHR, any interference with the exercise of the right to respect for family life should be proportionate to its legitimate aim. There can be no greater interference than the permanent removal of a child. Consequently, the relationship between parent and children can be severed "only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short

where nothing else will do", per Baroness Hale of Richmond in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33 [2013] 2 FLR 1075 at paragraph 198. A judge determining an application for a placement order must therefore carry out a rigorous analysis and deliver a reasoned judgment. The key requirement of the judgment, as stated by McFarlane LJ in *Re G (A Child)* [2013] EWCA Civ 965 at paragraph 54:

> "is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options."

31. The role of the appellate court hearing an appeal against a judge's decision on such an application is, first, to consider whether the judge's decision was sufficiently founded on the necessary analysis and comparative weighing of the options and, secondly, if it was, to determine whether the orders were necessary and proportionate. As to the second issue, the approach to be adopted by this Court is clearly delineated by the decisions of the Supreme Court in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33 [2013] 2 FLR 1075 and *Re H-W (Children)* [2022] UKSC 17, as summarised by Dame Siobhan Keegan at paragraph 49 of the latter case:

> "In a case where the judge has adopted the correct approach to the issue of necessity and proportionality, the appellate court's function is accordingly, as explained in *In re B*, to review his findings, and to intervene only if it takes the view that he was wrong. In conducting that review, an appellate court will have clearly in mind the advantages that the judge has over any subsequent court - see Lord Wilson in *In re B* at para 41 and the earlier decision of the House of Lords in *Piglowska v Piglowski* [1999] UKHL 27, [1999] I WLR 1360."

32. In the present case, the judge began by identifying the options. At an early point in the judgment, he succinctly reminded himself of the requirement to "consider the welfare analysis of all options globally and holistically, that is to say in the round and together". His assessment was carried out by reference to the relevant factors in the welfare checklists. In embarking on his ultimate analysis, which he headed "The Balance", he framed the question as being how to weigh the various factors he had identified within the checklists against each other in the context of the various options. At the end of the judgment, he revisited his conclusions in respect of one child in the light of his conclusions in respect of the other. All these elements demonstrate that the judge was fully aware of the approach he was required to adopt.

33. It is correct to say that the concluding section of the judgment does not set out the advantages and disadvantages of adoption and long-term fostering in a balance sheet. But, although such a style might be prudent as a method of ensuring and demonstrating that all relevant matters have been identified and considered, it is not an imperative. As McFarlane LJ observed in *Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882, while a balance sheet may be "of assistance" to judges, "its use should be no more than an aide memoire of the key factors and how they match up against each other …. a route to judgment and not a substitution for the judgment itself". Usually, the judge will draw all the strands together in the concluding section of the judgment, but not invariably. As Peter Jackson LJ said in

this Court in *Re S (A Child: Adequacy of Reasons)* [2019] EWCA Civ 1845 at paragraph 34):

> "I would also accept that a judgment must be read as a whole and a judge's explicit reasoning can be fortified by material to be found elsewhere in a judgment. It is permissible to fill in pieces of the jigsaw when it is clear what they are and where the judge would have put them. It is another thing for this court to have to do the entire puzzle itself."

34. In this case, I am confident reading the judgment as a whole that the judge identified the factors relevant to his decision. He acknowledged the greater degree of permanence and security provided by adoption as opposed to fostering (judgment paragraph 36). He recognised that a foster placement involved ongoing professional involvement and the prospect of further moves of placement (paragraph 31). It is true that he did not analyse these features at length, but they were certainly in his mind. And for my part, I do not think that his description of the arguments advanced against adoption in this case as being "the usual ones" indicated a failure to take them seriously or attach to them appropriate weight. I have considered Ms Gould's submission that the judge determined this issue by reference to generalisations about adoption and fostering, rather than the specific needs and circumstances of this child. Reading the judgment as a whole, however, I am unpersuaded by this argument. I find that the judge recognised and took into consideration the clear advantages of adoption, and the disadvantages of foster placements as part of his overall evaluation. In some instances he did so by reference to generalisations but in doing so he was largely reflecting what was said in the evidence. On other aspects, he focused on the specific circumstances of the case.

35. It is clear that the "magnetic factor" in the judge's estimation was the importance of the sibling relationship. As he said in his response to the request for clarification, he concluded that the impact of the loss of G upon N was likely to be less than the loss of N upon G. Nevertheless, he found it to be of very great importance to N. It is correct, as Ms Gould reminded us in oral submissions, that there have been some negative features of the relationship. When the children arrived in care, G aged only 7, was assuming an inappropriate degree of responsibility for caring for her sister. It is also correct, as Ms Gould emphasised, that the judge was clearly impressed by the strength of G's expressions of feelings about being separated from her sister. As Ms Gray submitted, he was entirely right under s.1(4)(f)(iii) of the 2002 Act to take into account G's wishes and feelings. Whilst describing it as "touching and troubling", however, he accepted that it was "but one consideration". The factor to which he attached particular and ultimately decisive weight was, under s.1(4)(f)(i), the value to N of the sibling relationship continuing. Given the evidence about the relationship between G and N in the sibling assessments and other documents put before the court, and the opinion of the allocated social worker and the guardian that ongoing sibling contact was "essential", it is unsurprising that the judge regarded it as the "magnetic factor".

36. In my view it is equally unsurprising that the judge concluded that the level of sibling contact which N required could not be realistically achieved were she to be adopted. His analysis at paragraph 33, reiterated in his response to the request for clarification,

was irrefutable. The evidence before him was that any requirement for sibling contact narrowed the pool of possible adopters. The requirement for contact on a scale necessary to meet N's interests would reduce the pool still further. In addition, prospective adopters would be discouraged by the fact that G would be having contact with her mother as well as with N so that the "usual seal" between adoptive and birth families could not be maintained. No sufficient thought had been given to this issue when the plan for adoption was prepared. In those circumstances, the judge was entitled to conclude on the evidence that this was not a case where nothing else but adoption would do but, rather, that long-term fostering was the better option.

37. Although the judge did not refer in the concluding section of his judgment to two of the options he had identified at the outset – options (6) (approving the care plan for adoption whilst refusing to make a placement order) and (7) (making a placement order and an order for sibling contact under s.26 of the 2002 Act) – they were effectively ruled out by his conclusion that the level of sibling contact which N required could not be realistically achieved were she to be adopted.

38. I therefore conclude that this is a case where the judge carried out the necessary analysis of the relevant factors in the welfare checklist and comparative weighing of the options. For my part, I see no basis on which this Court could properly say that he was wrong. It was for those reasons that I decided that the appeal should be dismissed.

39. I was concerned to be told that no direct contact has taken place between the sisters since G moved to live with her father. The local authority is under an obligation to arrange contact under the judge's order. Given the unanimous view of the professional witnesses that sibling contact is "essential", it is imperative that the local authority complies with the order, and that its compliance is scrutinised at the regular Looked After Child Reviews.

LADY JUSTICE ELISABETH LAING

40. I agree.

LORD JUSTICE SINGH

41. I also agree.