Neutral Citation Number: [2024] EWCA Civ 429

Case No: CA-2024-000171

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT BARROW-IN-FURNESS
Recorder Gough
BW22C50019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 May 2024

Before :

LORD JUSTICE BAKER
LORD JUSTICE GREEN
and
LADY JUSTICE WHIPPLE

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H AND J (PLACEMENT ORDERS)

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Richard Hunt (instructed by **Holdens Law**) for the **Appellant**
Aidan Vine KC and Carolyn Bland (instructed by **Local Authority solicitor**) for the **First Respondent**
Matthew Carey (instructed by **Milburns Solicitors**) for the **Third and Fourth Respondents**
The Second Respondent was not present nor represented at the hearing

Hearing date : 23 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE BAKER :

1. With the permission of this Court, a mother appeals against placement orders made in respect of her two youngest children whom I shall refer to as H (now aged rising 6) and J (rising 5).

2. H and J have three older half-siblings, brothers born in 2006 and 2015, and a sister born in 2009. In March 2022, the local authority started care proceedings in respect of all five children. The basis on which the local authority contended that the threshold criteria for making care orders was crossed included domestic abuse, alcohol misuse, and chaotic lifestyles. The five children were made subject to interim care orders, with the older two in separate family placements, the third in foster care, and H and J placed together, initially with a family friend but from September 2022 with foster carers. Assessments of the parents concluded that they could not safely care for the children. The issue for the two younger children was whether they should be placed for adoption or in a long-term foster placement. At the time of the hearing of the placement order application, the boys remained with the foster carers with whom they had been living for some time. Although those carers had not been approved as long-term foster carers, they indicated they were willing to be assessed as long term carers for the boys if the plan were to be one of adoption.

3. An important factor in reaching a decision about their future care has been the strength of the relationship between the boys and their elder siblings. A sibling assessment report was completed in October 2022 by a social worker who had known the family for over a year. She recommended that, if H and J were placed for adoption, they should be "placed together in an open adoption [which would] enable and support the children to retain contact with each other and maintain their relationship throughout their childhood and throughout their adult lives." Whereas contact between the boys and their parents would be on a letter-box basis only, it was recommended that there should be direct contact between H and J and their siblings three to four times a year. In the event that they were placed in long-term foster care, it was recommended that sibling contact should take place two to three times a month, depending on the children's other commitments and to be reviewed annually.

4. The proceedings were delayed by an application by the paternal grandmother for an independent social worker's assessment. That was granted in November 2022 but, in January 2023, the grandmother withdrew. At a further case management hearing, the case was listed for an issues resolution hearing ("IRH") in June 2023, with a direction for a decision by the agency decision maker ("ADM") by April. In the event, a permanence planning meeting did not take place until May. It concluded that the care plan for H and J should be adoption. The plan was approved by the ADM. On 26 May, a pre-matching meeting took place, following which prospective adopters were identified for H and J and positively matched. On 31 May, applications for placement orders were filed. The case was then re-timetabled to an IRH in July at which it was listed for a final hearing in September.

5. On 28 September 2023, the case came before Recorder Gough for the first time. On that occasion, she made final orders in respect of the three older children. The applications concerning H and J were adjourned for a further assessment of their father and an updated sibling assessment. In the event, neither assessment was carried out. At a further case management hearing before the recorder on 6 November, the directions

were discharged. The court concluded that a further assessment of the father was no longer justified in the light of further information about his circumstances and that a supplemental sibling assessment was not required as, according to a recital to the order, the court "was satisfied that an analysis regarding the care plans and sibling relationship could be provided by the guardian and social worker". There was no appeal against the case management directions order.

6. For the final hearing, the local authority filed a statement from the children services team manager who, as she accepted in oral evidence, had not spoken to any of the children or witnessed any contact. In her report, she recorded that the local authority recognised that the sibling group were close as a result of their shared lived experiences of neglect and abuse in their parents' care. For the three older children, if a placement order was made in respect of their two younger brothers, their sense of loss would be "devastating". The team manager recorded in particular that the boys' sister, who had acted as their main carer at home, was understandably upset at the prospect of not seeing them if they were adopted. The team manager reported that the boys enjoyed their contact with their siblings approximately every six weeks, but said that the foster carer observed that they rarely made reference to their siblings outside contact.

7. The team manger added:

> "The local authority recognise that H and J if placement orders are granted would experience the loss of their birth family and the current level of contact would be severed as the prospective adopters would only support indirect contact in the first instance but are open to reviewing this in the future we consider the boys right to a family life balances the loss that will be experienced."

8. The guardian, who had prepared a report earlier in the proceedings, filed a supplemental report headed "Final Analysis". Unlike the team manager, she had visited the boys again. They had spoken with excitement about the contact visit with their siblings planned for the next day when a Christmas-themed adventure had been arranged. In her supplemental report, the guardian expressed her conclusions and recommendations in these terms:

> "27. I have carefully considered the risks and benefits of long term foster care and adoption for H and J, and considered all of the available evidence, and made my own enquiries. I recognise the profound impact that adoption would have upon H, J and their family; and that I need to be satisfied that in their circumstances, nothing else will do.
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> 28. On careful balance, it is my unequivocal view that H and J should have a care plan of adoption, because the opportunity for achieving a sense of permanence, stability and security outweighs the benefits of maintaining direct contact with their parents and siblings. H and J are 4 and 5 years old, and their life has been featured by adverse childhood experiences, and further instability because of the long running proceedings. H and J continue to experience emotional and behavioural difficulties, and for them it is important that they can build secure

> attachments that will influence their development through childhood and beyond to adulthood, and it is my professional opinion that this could not be achieved in long term foster care. H and J need the stability, security, commitment and emotional investment that they would much more likely find in an adoptive placement. H and J need sense of belonging to a family that only a Care Plan of adoption could properly provide them, based on their individual needs and circumstances. It is my professional opinion that this cannot be realistically achieved with a plan of foster care in respect of their unique needs and circumstances; a plan of long term foster care would not meet H and J's needs.
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> 29. I do not underestimate the emotional harm that not having contact with their parents and siblings will have on them, and it is important that the risks are mitigated for them. Their familial relationships have been limited since April 2022 when they were separated from their parents and siblings, however, they have maintained direct contact and will experience a significant sense of loss."

9. Under the heading "Case management requirements", the guardian added

> "30. Letterbox contact is proposed, and there should be further discussions with potential carers about whether, with support, they could promote face to face contact between the children and their siblings, which could be beneficial for H and J in terms of their identity. The risks may be too great in terms of promoting parental contact. I understand direct contact is not supported at this stage with proposed adopters, and if they cannot be reassured and supported to promote direct contact between H and J with their siblings, there will need to be careful planning around how contact will be reduced prior to transition between the children, their parents and their siblings.
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> …
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> 33. The search for an adoptive placement should be time limited for H and J, if the identified placement does not progress. [They] have waited a long time and need to achieve permanence without delay."

10. At the final hearing on 8 December, the recorder heard evidence from the children's services' team manager and the guardian. At the appeal hearing, the Court was told by counsel for the guardian that in her evidence the team manager had agreed that the boys' care plan should be amended to include a provision that the search for an adoptive placement should be time limited. At the end of the hearing judgment was reserved and ultimately delivered on 10 January 2024.

11. In her judgment, the recorder started by summarising the background. She set out the legal principles, including the relevant statutory provisions, in particular section 1 of the Adoption and Children Act 2002 and the leading cases of in *Re B (Care*

Proceedings: Appeal) [2013] UKSC 33 [2013] 2 FLR 1075 and *Re B-S* [2013] EWCA Civ 1146.

12. She summarised the evidence of the team manager, who she described as a "good, reliable, professional witness". She recorded that the team manager

> "accepted there were pros and cons of both plans, however, the children's needs for permanence must take priority over the existing sibling relationship and contact. Her analysis, however, shows that she considered both plans as potentially providing permanence and not just adoption."

13. The recorder then summarised the guardian's evidence, noting her view that the sibling group contact had been positive and consistent throughout the proceedings. She continued:

> "The guardian agreed that H and J firmly identified as members of their birth family and that adoption and separation from the family would cause emotional upset to the parents, the siblings and to H and J. She further agreed that adoption is not a panacea and that long-term foster care can offer stability and security for some children in the long term. H and J have waited a long time for permanency consequently, she thought any search for adopters should be limited to six months and if the search were unsuccessful, the matter should return to court to address their long-term placement."

She recorded the guardian's evidence, which she accepted, that the three older children would be opposed to the plan for the younger boys to be adopted. At paragraph 36, she observed:

> "I conclude that the impact of the separation will be felt by all the sibling group, no doubt for the rest of their life, and it is not to be lightly disregarded. I accept the guardian's evidence that the loss of the relationship would have to be managed and mitigated through clear, thought-out, therapeutic work and life story work for H and J. The siblings' views are, however, just one of the factors that I have to weigh into the balance, and they are not, I remind myself, determinative."

At paragraph 37 she added:

> "I do find, however, that H and J would feel the emotional impact of the cessation of contact with their siblings and parents, particularly as arrangements have been going on now for in excess of 20 months."

14. The recorder recited the passage from the guardian's supplemental report in which she had recorded the boys' excitement at the forthcoming sibling contact visit. She continued:

> "40. The guardian accepted that this comment was spontaneous and unsolicited, and clearly shows how H and J identified in their family. She did not consider that the sibling bond had increased or diminished since the sibling assessment in 2022, and I accept her evidence on that point. She gave evidence that the bond remained constant throughout the proceedings, but she also reminded the court that the children have not lived together since April 2022 and will not do so whatever the outcome of today's hearing.
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> 41. To conclude, therefore, although the guardian and [the team manager] have not observed sibling contact, I am satisfied that I have the siblings' and the parents' views. The evidence shows that H and J clearly identify as belonging within the family and their position within the family. The sibling contact has been good and consistent, and the local authority and the guardian do not underplay the strength of the connection that H and J have with their siblings and parents."

15. The recorder then set out what she described as a balance sheet of the options. She identified a number of benefits of long-term fostering: that it would allow them to remain in contact with their siblings and parents; that they had established a bond with their current foster carers; that they were "on the cusp" of being adoptable and that experience and research showed that "it is harder for children to bond with adoptive parents the older they become". Disadvantages of fostering included that the foster placement may break down; that the current foster carers had not given a clear indication of whether they would be willing to care for the boys long term; that the boys may have to move for other reasons; that under a care order the local authority would continue to play a role in their lives; and that they would remain in care from their current young ages until adulthood.

16. With regard to adoption, the recorder noted, amongst the benefits, that it "would enable the boys to become part of a family and gives an opportunity for them to forge and sustain secure attachments"; that "the support of an adoptive family would reach far beyond childhood and into adulthood"; and that the guardian's view, which she accepted, was that the children were adoptable. The recorder accepted that the breakdown of an adoptive placement is always possible and that a breakdown of an adoption in this case would be "devastating" for the boys, although she accepted the guardian's view that there was not a high risk of such a breakdown in this case. The recorder accepted that ongoing sibling contact could lead to the parents undermining the placement, although she noted that some potential adopters may be prepared to work with the local authority to ameliorate that risk. She accepted that being separated from their birth family would have a long term effect on the boys.

17. Having considered the benefits and disadvantages of each option, the recorder reached the clear conclusion that "nothing else other than adoption will do". On the issue of the sibling relationship, she concluded (at paragraph 59):

> "While H and J have a sense of identity and belonging within their family, they have not lived within that family for almost two years. Their siblings are placed separately and there is a

> wide age gap between them and [their two elder siblings]. I do not underestimate the emotional effect on the other siblings when learning that the court has approved a plan for adoption, but I have to look at H and J's needs individually and distinct from their siblings throughout their lifetime."

Ultimately, she expressed her decision in these terms (at paragraph 61):

> "While the foster care can offer stability and permanence, I am not satisfied that in these particular circumstances that long-term foster care can offer the permanence that both boys need. Having regard to H's and J's needs throughout their lifetime, I am satisfied that any risk of harm to the children by severing the family ties is outweighed by the permanence, stability and security that will be achieved if the boys were adopted. The boys need a forever adoptive family. I do not underestimate that this may require extra time and support to adjust to a new placement. However, this is unavoidable, as the alternative plan for long-term foster care is uncertain and falls short of what they need."

18. At the end of her judgment, the recorder added this paragraph:

> "64. I therefore make the care order. I find that the parents' refusal to consent to adoption is unreasonable, I dispense with the parents' consent and I make the placement order as sought by the local authority, with recordings to the order that, firstly, if a suitable match can be made with adoptive parents that support sibling contact (and that can be safely put into place), that should be prioritised. The search is limited to six months, after which, if the boys have not been placed, the local authority must return the matter to court. The existing contact arrangements to remain in place while a placement search continues. The local authority agrees to put in place therapeutic work for all the sibling group and, if the boys are successfully placed, life-story work for H and J. Finally, consideration of the siblings being part of the letterbox contact that the parents will engage in."

19. The local authority's advocate then drafted an order which was agreed by the other legal representatives and approved by the recorder. It included care and placement orders, recording that "the consent of the parents to the making of a placement order is dispensed with on the ground that the welfare of the children requires that their consent be dispensed with." The order also included a number of recitals including the following:

> "4. The Court stated that if a suitable adoptive match could be made that supports sib contact, that should be prioritised.
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> 5. The search for an adoptive placement should be limited to a 6 month search and if no match is found by 10th July 2024, the Local Authority should make an application to revoke the placement order.

> 6. The existing contact arrangements should remain in place until matching takes place.
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> 7. There should be therapeutic work undertaken with all siblings and detailed life story work.
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> 8. Once placed, consideration should be given to siblings forming part of letterbox contact."

20. Since the order was made, there has been one important development. The boys' foster placement has broken down and they have moved to a new placement. We were told that, unless the appeal is allowed, the local authority hopes to place the boys with the prospective adopters identified in 2023. A further matching panel meeting has been arranged for 12 June.

21. Permission to appeal was granted to the mother by this Court on the following grounds:

(1) The recorder failed to give sufficient weight to the following:

(a) the ages of the boys and the fact that, in July 2023, the children's guardian observed that then they were on "the cusp" of being adoptable.

(b) the clear evidence that they already associated with a "once and forever family" creating a real risk that the children would reject an adoptive placement;

(c) the potential impact of severance of the children's relationships within their family and the impact of difficult behaviour emerging subsequently in another placement;

(d) the lack of any analysis as to the risk of significant emotional harm likely to be caused to the boys by having their family ties severed if they are removed from their current foster carers and placed with strangers;

(e) as an alternative to placement orders, the more realistic option of the boys being able to remain in long term foster care, possibly with their current foster carers, retaining their ties with their parents and their older half-siblings.

(2) The recorder was wrong to determine after her own detailed analysis that the balance of harm for these boys came down in favour of time limited placement orders.

(3) In seeking to justify her decision, the recorder did not fairly balance the evidence in relation to each of the two final options before the court.

(4) The recorder, whilst accepting that she could not make a time limited placement order, was wrong in law to seek to limit the orders that she made by inviting the local authority to apply to discharge the placement orders after 6 months.

(5) The recorder was wrong to find that the fact that the current foster carers were "willing to be assessed as long-term foster carers", was not the same as "a

commitment to be long-term foster carers", thus implying that they were not to be considered as a long-term option for placement.

(6) In all of the circumstances, there is no reasonable basis in law or fact to make the placement orders, and they should be discharged leaving the boys in long-term foster care, being able to continue to be able to spend family time with their parents and half-siblings, and maternal grandparents.

22. In his succinct and well-judged oral submissions on behalf of the mother, Mr Richard Hunt focused on two issues – the severing of the relationship between the boys and their siblings and the apparent imposition of a time limit on the placement order in recital 5.

23. On the first issue, Mr Hunt made two points. First, he submitted that there was insufficient up to date evidence before the recorder about the sibling relationship. At the previous hearing in November, she had been persuaded to set aside the earlier direction for a supplemental sibling assessment report by assurances that the local authority and guardian would provide the court at the final hearing with an analysis of the relationship. It was Mr Hunt's submission that the local authority and guardian failed to comply with those assurances. Instead of calling a social worker who was able to provide up to date evidence about the boys' contact and relationship with their brothers and sister, the local authority relied on the evidence of the team manager who had never spoken to the boys. Although the guardian had spoken to the boys, who had told her excitedly about their forthcoming contact visit, she had not witnessed that contact so was unable to give direct evidence about the current state of the sibling relationship or its importance to H and J. It followed that the recorder was not given the up to date evidence that she said she needed on the 6 November 2023 to make a balanced decision. In those circumstances, the recorder was not able to carry out the evaluation, as required under s.1(4)(f) of the Adoption and Children Act 2002, of the relationship which the boys have with their siblings, the likelihood of that relationship continuing, and the value to the boys of its doing so. Consequently, the recorder was not in a position to carry out the robust and rigorous analysis of the advantages and the disadvantages of the realistic options for the children as required by this Court in *Re B-S*.

24. Secondly, he submitted that the relationship between the boys and their siblings was of such importance that it outweighed all other factors so that the recorder's decision was plainly wrong. There was clear evidence that the children identify with their siblings and enjoy contact. There was no, or no sufficient, analysis in the judgment of the significant emotional harm that the boys would suffer if their ties with the family were severed. They already have a "once and forever" family. Whilst the older siblings were no longer parties in the proceedings when the placement order was made, it is clear that their wishes and feelings very much supported a continuing relationship with their younger siblings. The option of long-term fostering would provide permanence whilst allowing contact with the birth family, in particular the siblings, to continue.

25. I am unpersuaded by these submissions. As required by case law, the recorder carried out a careful and thorough analysis of the advantages and disadvantages of the realistic options for the boys. This included a focused consideration of their relationship with their siblings. She had the benefit of a full assessment of the siblings carried out in 2022, updated by some further evidence from and an analysis by the guardian and an

analysis by the team manager. I do not accept the submission made by Mr Hunt that she was in any way "let down" by the local authority and guardian. The analysis they provided on the sibling relationship was detailed and manifestly sufficient for the recorder's purposes. All parties, including the local authority and the guardian, recognised the importance of the relationship and the impact of severing it, both on the boys themselves and their brothers and sisters. The recorder plainly took this factor into account and considered it very carefully. She concluded, however, that it was outweighed by other factors, in particular the boys' need for stability which adoption could best provide. She recognised that long term fostering provided a degree of stability but ultimately not on the scale provided by adoption. The central part of her reasoning was set out in paragraph 61 – "any risk of harm to the children by severing the family ties is outweighed by the permanence, stability and security that will be achieved if the boys were adopted". As the trial judge, the recorder was best placed to carry out this assessment and the appellant has not identified any reason why this Court should interfere with it.

26. There are cases where the judge carrying out the robust and rigorous analysis of the advantages and the disadvantages of the realistic options for the children concludes that the importance of sibling contact is such that a placement order should not be made – see for example *Re T and R (Refusal of Placement Order)* [2021] EWCA Civ 71 and *Re N (Refusal of Placement Order)* [2023] EWCA Civ 364. In each of those cases, the judge at first instance refused to make a placement order and this Court dismissed an appeal against the decision. But those decisions do not lay down any general rule beyond what is provided by the statute. The judge must consider such relationships where they exist, the likelihood of their continuing and the value to the child if they do. In this case, the recorder complied with that obligation but concluded that the value of the sibling relationship continuing was outweighed by the boys' need for a stable permanent placement which adoption would best provide.

27. The second issue on which Mr Hunt focused his oral submissions arises out of the fourth ground of appeal – that the recorder, whilst accepting that she could not make a time limited placement order, was wrong in law to seek to limit the orders that she made by inviting the local authority to apply to discharge the placement orders after 6 months. It is well established that the court does not have jurisdiction to attach conditions to a placement order. In *Re A (Placement Order: Imposition of Conditions on Adoption)* [2013] EWCA Civ 1611; [2014] 2 FLR 351, this Court set aside a placement order in which it was recorded that the court had accepted that, "as a pre-requisite to placement for adoption", prospective adopters should have certain characteristics identified in the recital and that "the care plans are approved and placement orders granted on the basis that the list of attributes set out above is adhered to by the local authority". Section 21(1) of the 2002 Act provides that "a placement order is an order made by the court authorising a local authority to place a child for adoption *with any prospective adopters who may be chosen by the local authority* [my emphasis]". This Court held that the judge's order fell "well beyond the line that divides the role of the court and the role of the local authority under a placement for adoption order" (per McFarlane LJ at paragraph 33). Furthermore, as the court has no jurisdiction to dictate the choice of placement, where a court is satisfied that adoption will only meet the child's needs in certain specific circumstances, it will not be possible for the court to hold that the child's welfare 'requires' adoption and that 'nothing else will do' (per McFarlane LJ at paragraph 40).

28. In his grounds of appeal and written submissions to this Court, Mr Hunt seemed to be contending that the references to a six-month time limit in paragraph 64 of the judgment and recital 5 of the order amounted to the imposition of a impermissible condition to a placement order. On behalf of the guardian (who had, in paragraph 33 of her supplemental report quoted above, advised that there should be a time limit on the search for an adoptive placement), Mr Matthew Carey conceded in submissions to this Court that the order as drafted could not stand and that, if no remedy order was available to allow the order to survive without the recital, the appeal would have to be allowed on ground 4 and the matter remitted for rehearing. On behalf of the local authority, it was argued by Mr Aidan Vine KC (who took over the case from Ms Gemma Taylor KC who had settled the skeleton argument but was unfortunately unable to attend the hearing) and Ms Carolyn Bland that the recital did not amount to a condition of the sort prohibited by *Re A* but should be interpreted as reflecting the court's expectation that the search should be limited for six months. In the alternative, it was submitted that, if it was concluded that the appeal would have to be allowed under this ground, this Court should substitute its own order deleting the recital (although no cross-appeal or respondent's notice to that effect was filed).

29. In the appeal hearing, however, it emerged that, during the course of the team manager's evidence, she had agreed not only that there should be a time limit to the search for an adoptive placement but also that the care plan should be amended to that effect. In that respect the provision set out in recital 5 fell into the same category as those in recitals 4, 6, 7 and 8. In line with what was recorded in those recitals, it was agreed by the parties, that, if a suitable adoptive placement could be found that supported ongoing sibling contact, it should be given priority; that the existing contact arrangements should continue until matching takes place; that there should be therapeutic work undertaken with all the siblings together with detailed life story work; and that, once the boys were placed for adoption, consideration should be given to including the siblings in the letterbox contact. The provisions in these five recitals should therefore be seen not as conditions imposed by the court but rather as an endorsement by the court of points which had been agreed by the local authority and which would be incorporated into the amended care plan.

30. I recognise that the language used by the recorder in paragraph 64 of her judgment was more prescriptive. For my part, however, looking at the totality of the judgment and the order together, I accept that she was not seeking to impose a condition on the order but rather reflecting what had been agreed by the local authority. Unlike the judge in *Re A*, the recorder did not stray across the line that divides the role of the court and the role of the local authority.

31. Finally, I should point out another apparent error of law which readers of this judgment may spot. At two places in her judgment (including in the final paragraph 64 quoted above), the recorder referred to dispensing with the parents' consent to the placement order on the grounds that they were withholding consent unreasonably. Under section 52(1) of the Adoption and Children Act 2002, however, the court cannot dispense with parental consent to a placement order unless the parents cannot be found or lack capacity to give consent or the welfare of the child requires consent to be dispensed with. It was under the previous law that the consent could be dispensed with on the grounds that it was being withheld unreasonably. As noted above, however, the order made following the hearing recorded that the parents' consent to the placement order

was "dispensed with on the ground that the welfare of the children requires that their consent be dispensed with". No party sought to argue that the order should be set aside because of what I take to be an inadvertent slip by the recorder when delivering her judgment.

32. The other issues raised in the grounds of appeal were not developed in the course of the hearing and in my view have no merit. Criticisms that the judge failed to attach sufficient weight to specific issues, or that she did not fairly balance the evidence, are not sustainable where, as here, the judge has plainly carried out a comprehensive analysis of the relevant factors. The argument raised in the fifth ground about whether the couple who were acting as foster carers at the date of the hearing were or were not potential long-term carers has fallen away now that the placement has broken down.

33. For the reasons set out above, I would dismiss this appeal.

LORD JUSTICE GREEN

34. I agree.

LADY JUSTICE WHIPPLE

35. I also agree.