

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT IN NOTTINGHAM
Recorder Sanghera
NG20C00204

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 March 2022

Before :

SIR ANDREW MCFARLANE, PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE NICOLA DAVIES

B (A Child)(Adequacy of Reasons)

Stephen Williams (instructed pro bono through **Advocate**) for the **Appellant Mother**
Lucy Limbrey (instructed pro bono through **Advocate**) for the **Appellant Father**
Anita Guha (instructed by **Nottingham City Council**) for the **Respondent Local Authority**
Alison Moore (instructed by **Rotheras Solicitors**) for the **Respondent Child**
by their Children’s Guardian

Hearing date : 9 March 2022

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10:30am on Friday, 25 March 2022 by circulation to the parties or their representatives by email and by release to BAILII and The National Archives.

Sir Andrew McFarlane P:

Introduction and background

1. This appeal concerns the adequacy of a judgment leading to the making of a placement order in respect of E, a boy now aged 18 months. Since birth, E has been in foster care, with the exception of the period between September 2020 and January 2021 during which he was placed in a residential assessment unit (Amber House) with his parents.
2. The parents, who are now in their 30s, both experienced extremely difficult childhoods. E is the youngest of the mother's five children. Her first child, a girl named C, was born in 2006 during a violent and abusive relationship. The parents' own relationship began in 2009 and they married in 2011, after which they had three children who, along with C, became the subject of earlier proceedings and have since been adopted. In proceedings in 2013 in relation to C and the parents' older two children, His Honour Judge Lea found that C had been assaulted when she was six years old, causing bruising. He was unable to identify whether the assault had been carried out by the mother, the father, or by a Mr K, in whose home the family was living. He also found that children had suffered or (in the case of the third child, who was removed at birth) were at risk of suffering significant physical and emotional harm and neglect. In September 2016, Judge Lea refused an application by the parents for leave to oppose the making of an adoption order in C's case and in November 2016 he made a care and placement order in respect of the fourth child, born earlier that year. At those hearings he found that the parents did not accept the reason for the removal of the older children, and that their situation was essentially unchanged, despite the passage of three years since the first hearing.
3. Against this troubled background, E was born in August 2020. Proceedings were brought by the Local Authority, relying on the findings from the previous proceedings, the parents' denial of the previous problems, longstanding concern about the father's cannabis use, the mother's dependant personality style, the father's impulsivity and severely insecure attachment style, and the parents' inability to work honestly and openly with professionals. Nonetheless, E's guardian recommended a residential assessment with C and the family moved into Amber House in September 2020. At the midpoint of the assessment, it seemed possible that they might eventually be able to move into the community with E, but the final report of 16 December 2020 concluded that this would not be safe. The assessors' key concerns were that, although they denied injuring C themselves, the parents did not view Mr K as posing any risk to C and had not been honest about continuing contact with him; further, that, despite substantial support over the years and the loss of their older children, the parents still did not reflect or take responsibility for their behaviour and recognise their poor parenting skills. This, combined with an inability to work productively with others and to prioritise E's needs meant that they were unable to meet E's needs or keep him safe.
4. On the guardian's recommendation, the court authorised a single joint expert to undertake a psychological assessment of both parents, including a risk assessment addressing the findings made in previous proceedings. In his report of 3 December 2020, Mr Alexander Marshall highlighted ongoing issues of risk: the mother's dependent personality type and continuing contact with Mr K; her severely insecure adult attachment style with features of enmeshment; the parents' unsatisfactory

response to the issue of C's injuries, with the mother in particular not accepting the court's findings that they had been inflicted; their inability to protect E from any risk from the other parent; the ongoing risk from the father's history of cannabis use; and the evidence of the parents not working honestly with professionals. Mr Marshall considered that the parents would need to demonstrate a sustained period of change, and would require therapeutic input over a period of at least six months, without there being any guarantee of a successful outcome.

5. In the light of these assessments, E returned to foster care in January 2021, with the parents continuing to have contact.

The hearing

6. Very regrettably, the final hearing of the local authority's application did not take place until November 2021, when it came before Recorder Sanghera ('the judge') for a hearing at which evidence was heard over four days from Mr Marshall, the social worker, the two Amber House assessors, the parents and the guardian. Written submissions were made by the parties, with oral submissions on behalf of the mother.
7. As to the overall state of the evidence, the social worker and the parents had filed updating statements in August/September, but the reports of Amber House and Mr Marshall were of course based on matters as they stood at the beginning of the year. The social worker and the guardian continued to maintain that adoption was necessary for E. There is no transcript of the evidence, but the closing written submission of the local authority's solicitor contained a useful note of extracts from their evidence and that of Mr Marshall and that is sufficient for our purposes. In Mr Marshall's case, the note contains these passages:

"When questioned in chief Mr. Marshall confirmed that he was not surprised by the conflicting information given to him by the parents as such was consistent with the reports generally about their presentation; the lack of openness and honesty was consistent and in part lead to his formulation.

Mr. Marshall was presented with the factual basis by counsel for the mother:

- No evidence of contact with Mr. K since November 2020;
- No evidence of cannabis use by father since August/September 2020;
- Last episode of aggression by father was in January 2021;
- No domestic abuse between the parents,
- Parents now have housing and are in employment.

Mr Marshall was asked to clarify the 'period of sustained change' he referred to in his reports. He asserted that from a psychological perspective a period of one year would equal a

significant risk reduction and a period of two years would mean that risks were classed as historical.

He accepted that parents could evidence some positive change but was clear that if the Court found that either of the parents had continued to be dishonest that would raise his concern as did the incidences of father expressing angry responses. Mr Marshall was of the view that if the Court found that the parents had evidenced the required sustained change that he would recommend reassessment of their understanding of and acceptance of the findings.

In relation to [the mother], Mr. Marshall was clear that during his assessment she was able to ‘acknowledge’ some of the harm but when he delved deeper there was less ‘acceptance’ of the findings and she offered excuses and a deflection away from responsibility. He maintained his view that at the time of his assessment [she] did not accept findings made in 2013.

Mr. Marshall asserted that [the mother] continued to show evidence of her dependant personality and was clear that such personality patterns are enduring. He was of the view that should a relationship pose a risk that [she] would not cease that relationship as the evidence that she prioritised relationship over the needs of her children was both historic and current given she maintained her relationship with [the father] despite the concerns over his treatment of her daughter, C. He was further worried that a child in her care would be exposed to her emotional inconsistency.

Mr. Marshall accepted that the parents commencing therapy may be a positive indicator for engagement with and completion of such but opined that this would depend on their reasons for doing so. He was clear that if they are just going through the motions then this could not be seen as a positive.

Mr Marshall was clear that assessed change was the key measure rather than therapy.”

8. The matters put by the mother’s counsel, Mr Williams, to Mr Marshall of course reflected the evidence given by the parents in writing and orally.

The appeal

9. The appeal presented by each parent is to the same effect, namely that the serious flaws that they assert are contained in the court’s judgment mean that the judgment cannot be supported and must be set aside. For reasons which I will explain, I have been persuaded that the appellants are, unfortunately, correct and that this appeal must be allowed with the result that the case must return to the Family Court for rehearing. In those circumstances, it is not appropriate for the judgments of this court to descend to detailed consideration of the underlying facts. I therefore propose to indicate the essential

matters of concern that have been raised by the appellants, before, going to the specific parts of the judgment to which they relate and rehearsing the issues raised on appeal.

10. The principal grounds of appeal in summary amount to [1] that the judge did not conduct an adequate analysis of the evidence (including the oral evidence) and [2] that the judge's welfare analysis was legally in error. More particularly, the appellants make the following points:
- i) In his summary of the evidence, the judge very largely referred to the written statements and reports by Amber House, Mr Marshall and the social worker. This material related to work done nearly 12 months earlier. There was little reference to the oral evidence from the 4-day hearing which, in a number of respects, indicated changes either in the parents' circumstances or the assessment of future risk;
 - ii) The parents' oral evidence and the case advanced on their behalf were not adequately considered in the judgment. In particular the parents relied upon the following matters:
 - a) The father, who had been an habitual user of cannabis from the age of 13 years, had abstained from drugs for some 12 months;
 - b) There was no evidence that the parents had had any contact with Mr K for a long time;
 - c) The couple had maintained good home conditions in their new home;
 - d) Their housing arrears had been paid off;
 - e) The father had found and held onto paid employment;
 - f) The father had been undertaking Dialectical Behavioural Therapy ['DBT'] at his own cost;

The parents' case on appeal is that the judge failed to consider these factors against the more negative material upon which he relied and that the judge failed to undertake any assessment of future risk to E if placed in their care;
 - iii) Both Mr Marshall and the guardian acknowledged in their oral evidence that the balance of risk had changed, yet the judgment does not make any reference to this evidence;
 - iv) Matters relied upon by the judge as recent grounds for concern over the parents' care were given an inflated importance;
 - v) The judge conducted not only a 'linear' analysis of the child's welfare, but one that could be characterised as 'polar' in that rehabilitation to the parents' care was ruled out in a preliminary analysis which was conducted solely by reference to the welfare provisions of Children Act 1989 ('CA 1989'), s 1, and without any reference to the alternative option of adoption or to the adoption welfare provisions in Adoption and Children Act 2002 ('ACA 2002'), s 1;

- vi) On that basis the judge, having held at an earlier stage that placement with parents was one of the ‘realistic options’, went on to rule it out as an option before, for the first time, moving on to consider adoption and the requirements of the ACA 2002;
 - vii) In the final stage of the judgment, the only option being considered in the context of the ACA 2002 welfare provisions was adoption.
11. In addition to the appellants’ grounds of appeal, it is a matter of concern that the judgment does not identify the basis upon which the judge found that the CA 1989, s 31 threshold criteria were met. In terms of its place in the sequence of any judicial evaluation, it is sensible to take this point first.

Threshold criteria finding

12. On 24 November 2021, the Judge gave an extempore judgment extending to 15 pages of transcript. He began by setting out the relevant factual background in detail. He then went on to summarise the local authority’s final threshold document which referred to the various matters that I have summarised at paragraph 3. The judgment does not, however, record any finding as to threshold. Mr Williams submitted that only part of the local authority document had been accepted by the parents and, although it was conceded that the CA 1989, s 31 threshold criteria were met, the basis upon which the threshold was crossed must be limited to those concessions in the absence of any wider finding by the Judge. The parents’ concessions were limited to the first four paragraphs of the local authority threshold document, namely that, as at E’s birth:
- a) The findings previously made about the older four children;
 - b) The parents continue to deny inflicting the injuries found on C, they fail to acknowledge past concerns about their parenting and the risk factors that led to findings of emotional and physical harm and neglect, and the parents continue to reside with Mr K despite blaming him for C’s injuries;
 - c) The father has abused cannabis and there remains a significant risk that he will do so again;
 - d) The mother’s personality (as it has been assessed) renders her vulnerable to prioritising adult relationships over the needs of her child and she may fail to identify warning signs in any deterioration in her mental health or signs of abusive behaviour in any given relationship.
13. The remaining three elements relied upon by the local authority, but not conceded by the parents, were:
- e) Deficits in the father’s intellectual functioning and personality. He is prone to impulsivity and has a severely insecure adult attachment style, which results in maladaptive stress responses and difficulties in sharing emotions with others. There is a significant risk that he is not able to prioritise the needs of a child in his care over his own needs;

- f) The parents distrust professionals, deny and minimise concerns and reject support aimed at improving child safety. They are unable to work honestly and openly with professionals to safeguard E;
 - g) The parents are unable to maintain good home conditions when they have a child in their care or to manage their finances.
14. The judge summarised the factors pleaded by the local authority and, in relation to (g), observed that the home conditions ‘are no longer considered to be in issue’. He then recorded the parents’ evidence with respect to the matters that were not conceded.
15. The s 31 threshold criteria are not referred to again until, in the course of a summary as to the legal structure under CA 1989 for determining an application for a care order, he stated: ‘In this case, the evidence is clear and convincing, the threshold criteria have been satisfied.’ No further explanation is given of the basis upon which they had been satisfied and, in particular, of the court’s decision on the matters that had not been conceded by the parents. The threshold criteria are not referred to again.
16. It is now more than six years since Sir James Munby P in *Re A (A Child)* [2015] EWFC 11 (Fam) and the Court of Appeal in *Re J (A Child)* [2015] EWCA Civ 222 gave detailed guidance in relation to the establishment of the threshold criteria and the need to specify in the case of each allegation how and why it would establish that the child ‘is suffering or is likely to suffer’ significant harm. In *S & H-S (Children)*, I offered the following guidance on this issue:
- “56. In the course of a necessarily long judgment covering a range of issues and a substantial body of evidence, where the threshold criteria are in issue, it is good practice to distil the findings that may have been made in previous paragraphs into one or two short and carefully structured paragraphs which spell out the court’s finding on threshold identifying whether the finding is that the child ‘is suffering’ and/or ‘is likely to suffer’ significant harm, specifying the category of harm and the basic finding(s) as to causation.
57. When making a finding of harm, it is important to identify whether the finding is of ‘significant harm’ or simply ‘harm’.
58. A finding that the child ‘has suffered significant harm’ is not a relevant finding for s 31, which looks to the ‘relevant date’ and the need to determine whether the child ‘is suffering’ or ‘is likely to suffer’ significant harm.
59. Where findings have been made in previous proceedings, either before the same judge or a different tribunal, a judgment in subsequent proceedings should make reference to any relevant earlier findings and identify which, if any, are specifically relied upon in support of a finding that the threshold criteria are satisfied in the later proceedings as at the ‘relevant date’.
60. At the conclusion of the hearing, after judgment has been given, there is a duty on counsel for the local authority and for the child, together with the judge, to ensure that any findings as to the threshold criteria are sufficiently clear.

61. The court order that records the making of a care order should include within it, or have annexed to it, a clear statement of the basis upon which the s 31 threshold criteria have been established. In the present case, during the oral appeal hearing, counsel for the guardian explained that, following the judgment, she had submitted a detailed draft order to the court by email for the judge's approval. We were shown the draft which, whilst in need of fine tuning, does provide a template account of the court's threshold findings. It is most unfortunate that counsel's email, which may not have been seen by the judge, did not result in further consideration of the form of the order and statement of threshold findings. Had it done so, the need for the present appeal may not have arisen."

17. The reason why the former President and this court in these and other judgments have stressed the importance of detailed and clear findings on threshold is not one of form for form's sake. The task of evaluating threshold goes to the core of the judicial exercise in every case. It is, in essence, what the case is about. Unless the court has a clear and detailed understanding of the basis upon which it finds, if it does, that a particular child 'is suffering or is likely to suffer significant harm', substantial difficulties will be encountered when the court then moves on, as it must, to evaluate future risk of harm at the welfare stage. Public law proceedings under CA 1989, s 31 are engaged in the business of 'child protection'. Unless a court has made detailed findings as to what it is that a particular child is to be protected from, in terms of significant harm, it is unlikely that the court will be able to undertake a focussed and bespoke evaluation of any plan to protect the child from that harm.
18. In the present case, whilst no finding was made as to item (e) relating to the father's psychological functioning, the judge made findings as to the parents' lack of honesty and trust in their relationship with professionals, and he found that they had not taken on board the professionals' concerns. He therefore found that their insight and ability to safeguard their child is, as a consequence, severely limited. At no stage, however, did he draw these matters together or make any finding as to the likelihood of significant harm to E, or what the nature of that harm would, on the balance of probability, be.

Failure to engage with the oral evidence

19. The grounds summarised at (i) to (iv) of paragraph 10 can be taken together under the general heading of a failure to engage with the oral evidence. The essence of the appellants' case is that both the final reports from Amber House and from Mr Marshall are dated December 2020. The final hearing took place in November 2021. During the intervening period the parents' lives had moved on and improved in a number of respects relevant to their ability to provide safe and good enough parenting for E.
20. Whilst it is difficult to be clear, as accounts of the written reports of Amber House and Mr Marshall are interspersed with some more recent observations which must have been drawn from the oral evidence, it does indeed appear to be the case that much of the judge's extensive summary of the evidence from these two sources is drawn from the written material and not from what was said by the professionals at the hearing.
21. Further, and importantly, there is effectively no account by the judge of the parents' evidence or of the general case put forward on their behalf. This, in my view, is a significant omission. A parent in proceedings of this nature should expect to see from the judgment that their case has been 'heard', with the judgment containing at least a

short summary of their position and the judge's reasons for discounting it, if that is the position. The point is put shortly at paragraph 16 of *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605:

‘... justice will not be done if it is not apparent to the parties why one has won and the other has lost.’

22. Looking at the judgment, there is express reference to Mr Marshall accepting in oral evidence that that mother was now able to separate from being reliant on Mr K. He is also recorded as saying that there was a need for the mother to demonstrate over a sustained period that she had been able to recognise the need for change. Again, the expert's oral evidence is recorded as acknowledging the change in home conditions, although there was no indication of any understanding that what had occurred before presented a risk of harm. Mr Marshall is noted as accepting that there was no evidence of cannabis use since August 2020 and that both parents had embarked on courses of DBT therapy. He accepted that there was no evidence of aggression since January 2021 and no domestic violence in the parent's own relationship. Mr Marshall was concerned by evidence of continued involvement with drugs arising from an incident where the father assisted in the supply of cannabis in March 2021.
23. The short account in the judgment of the evidence from Amber House appears to be entirely based on the written assessment report. The oral evidence of the social worker is referred to in only one paragraph, which deals solely with the question of support for the family that might be offered and referring to the fact that the support at Amber House, which was 24/7, had not been sufficient. The children's guardian's written and oral evidence, which was supportive of the local authority case, is referred to in one paragraph.
24. So far as the parents' written and oral evidence is concerned, and their case as presented at the hearing by counsel, save for some few specific references in the course of his narrative of the expert evidence, the judgment is limited to the following single sentence: "The parents' position is that they have made and sustained changes.", which is followed by this conclusion: "Sadly, the evidence that I have heard over four days, followed by written and oral submissions for a further day, today, has provided scant evidence of this."
25. For the mother, Mr Stephen Williams, who appeared below and who appears before this court acting pro bono, pointed to his written opening submissions in which nine individual positive changes were relied upon in support of the overall submission that the balance of risk was moving and had changed since the original professional assessments of December 2020. Mr Williams submitted that the judge failed to engage with these points, or the parents' evidence that underpinned them, at all. Similar submissions were made on behalf of the father by Ms Lucy Limbrey, who did not appear below and now also acted pro bono in the appeal. Ms Limbrey took this court to the detailed evidence of each element of change relied upon, before submitting that none of these matters appear to have been taken into account by the judge.
26. Mr Williams submitted that such positives as the judge recorded during his account of Mr Marshall's oral evidence, were not brought into account in any analysis as to the present position. Further, Mr Williams asserted that both Mr Marshall and the children's guardian made a number of significant concessions as to the positive changes

that had taken place, yet these are not adequately recorded (or in the case of the guardian not recorded at all) or properly taken into account.

27. It is accepted by all parties that, during his oral evidence, Mr Marshall was asked to clarify the ‘period of sustained change’ he referred to in his reports and that he stated that, from a psychological perspective, a period of one year would equal a significant risk reduction and a period of two years would mean that risks were classed as historical (these words are taken from the local authority’s written closing submissions). This evidence was, says Mr Williams, a central point in the parents’ case before the judge, yet it is not even mentioned in the judgment.
28. Quite properly, immediately after the judge had given judgment, Mr Williams sought clarification on four points one of which was specifically to question the lack of reference to Mr Marshall’s evidence with respect to 12 months of substantive change. In response the judge, without responding to any of the specific points, said: “when one gives an ex tempore judgment quickly following closing submissions in the case, one cannot deal with every single issue, but I am satisfied that I have dealt with all the issues that were material to my decision”.
29. In her submissions on behalf of the local authority in responding to the appeal, Ms Anita Guha, who did not appear below, volunteered that the establishment of significant and meaningful change was the ‘cornerstone’ (as she put it) of the parents’ case before the judge and that it was accepted that some positive changes had taken place. Ms Guha submitted that it was, however, insufficient simply to look at lifestyle changes. What was needed was change with respect to the core risks identified by HHJ Lea, on which the professional witnesses had not altered their opinion.
30. In response to a question from the court, asking to be taken to the parts of the judgment in which the judge had dealt with the cornerstone of the parents’ case, Ms Guha could only point to paragraphs 31 and 32, which deal solely with the parents ability to accept the previous findings and the involvement of Mr K. Ms Guha submitted that, whilst the judge may not have expressly identified what the future risk to E would be, there was no need to do so as the risk of harm was self-evident and included the entire spectrum of emotional, physical and developmental harm. The range of risk, she submitted, was extremely serious.
31. Partly, I suspect, as a result of the absence of any funding for the appellants’ representation, no transcripts of the oral evidence have been prepared for this appeal. We were not, therefore, able to investigate in any more detail precisely what was or was not said by the professionals and the parents on the issue of any changes that had been made. It is not, in my view, necessary to do so. The essential point is made out by:
 - a) Mr Williams’ opening submissions;
 - b) the acceptance by all parties that Mr Marshall indicated that a sustained change for some 12 months would equate to a significant risk reduction;
 - c) the unanimity of the submissions of Mr Williams (‘central point’) and Ms Guha (‘cornerstone’) as to this being the kernel of the case being put forward;

- d) yet the absence of any reference to it in the judgment; and
 - e) the judge, on being told of the omission, stating that he had included all of the material issues.
32. Against that background I am driven to the conclusion that the judge failed to engage with this central issue, which went directly to the question of the assessment of future risk and was therefore central to the case. More generally, but it is essentially part of the same point, by focussing very much on the written material, which largely arose from assessments made nearly 12 months earlier, and making little reference to the oral evidence of the parents, Mr Marshall and the guardian, the judge compromised his ability to undertake an assessment of future risk which took into account, not only the negative factors which the judge rightly identified in his judgment, but the potential positives that were being put forward by the parents and which had, apparently, been the subject of oral evidence from the professional witnesses.

Should the welfare decision have been taken under CA 1989 or ACA 2002?

33. Grounds (v) and (vii) summarised in paragraph 10 each engage with the difference that exists between the statutory welfare provisions in CA 1989, s 1 and those in ACA 2002, s 1.
34. The relevant parts of CA 1989, s 1 require:

“1 (1) When a court determines any question with respect to—

(a) the upbringing of a child; or

(b) the administration of a child’s property or the application of any income arising from it,

the child’s welfare shall be the court’s paramount consideration.

...

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.”

35. The relevant parts of ACA 2002, s 1 provide:

“ (1) Subsections (2) to (4) apply whenever a court or adoption agency is coming to a decision relating to the adoption of a child.

(2) The paramount consideration of the court or adoption agency must be the child’s welfare, throughout his life.

...

(4) The court or adoption agency must 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 (c. 41)) 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 its 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.”

36. Whilst there are other distinctions between the two statutory requirements, the principal differences are:

a) Under the ACA 2002 there is an express requirement to consider the welfare of the individual child ‘throughout his life’;

- b) The focus under ACA 2002, s 1(4)(c) on the likely effect on the child of ceasing to be a member of the original family, and becoming adopted; and
 - c) Under s 1(4)(f) on the relationship that the child has with relatives, prospective adopters and others, the value of that relationship to him, their capacity to provide a secure environment and meet his needs, and the wishes and feelings of those people.
37. It is plain that the statute requires courts and adoption agencies to apply the test in ACA 2002, s 1 whenever they are ‘coming to a decision relating to the adoption of a child’ (s 1(1)). The choice facing the court in the present case was a straight one between placing E in the care of his parents or pursuing the local authority plan by placing him for adoption. That choice plainly involved coming to a decision relating to adoption and the court was required to apply the ACA 2002, s 1 provisions when making its decision.
38. In the present case the judge unfortunately fell into error, as a matter of law, in conducting his entire evaluation of the proposal that E should be placed with his parents within the context of CA 1989, s 1. The judge reached his conclusion on this point before making any reference to the requirements of ACA 2002, s 1, or adoption and ‘nothing else will do’. The decision in the case involved determining whether E was to be placed with his parents or adopted (or as the judge added, placed in long-term foster care). The presence of adoption in the range of realistic options dictated that ACA 2002, s 1 was the relevant provision, and the judge was in error in making any reference to CA 1989, s 1 in that context.
39. Further, even if the judge had been correct in conducting a separate analysis of the care order application under CA 1989, s 1 (which, for the reasons that I have given, he was not) a crucial stage in that evaluation was missed out. By CA 1989, s 31(3A), a court deciding whether to make a care order is required to consider the ‘permanence provisions’ of the local authority care plan. The permanence provisions in the care plan for E were for adoption, and there was a requirement to consider adoption, rather than looking solely at the option of parental care. The judgment does not contain any reference to the local authority plan of adoption during the evaluation of the care order application; had it done so, this step may have headed the judge away from his error in determining the issue under the incorrect statutory scheme.

What is the place of a s 31 care order application in ‘placement for adoption’ proceedings?

40. At paragraph 39, the judge set out a description of the steps to be taken, at that stage of the judgment, as if the issues before the court had not included an application for a placement for adoption order, but had been confined to the local authority’s application for a care order. Having described the need for the s 31 threshold criteria to be satisfied, the judge then went on to evaluate E’s welfare under CA 1989, s 1 before concluding that placement with the parents should be ruled out. Whilst, when making a placement for adoption order under ACA 2002, s 21, a court will normally also make a care order, the placement application, and not the CA 1989, s 31 application, is the primary application before the court. It is not merely unnecessary for the court to consider the care application on its own, and before turning to the placement order application, it is

wrong to do so and may readily lead to the error in the choice of statutory welfare requirements into which the judge fell.

41. ACA 2002, s 21(2) stipulates that the court may not make a placement order unless:
- a) the child is subject to a care order,
 - b) the court is satisfied that the conditions in CA 1989, s 31(2) are met, or
 - c) the child has no parent or guardian.

The need for the s 31 threshold to be crossed is therefore expressly incorporated within the ACA 2002 process, and there is no need for there to be a separate evaluation by hiving off the CA 1989, s 31 application and dealing with this first.

42. Where a court has reached the stage of determining that a placement for adoption order should be made, and parental consent should be dispensed with, the grounds for making a care order will be plainly made out. As a placement for adoption order under ACA 2002, s 21 gives parental authority to the local authority (as an adoption agency) [ACA 2002, s 25(2)] the question may be asked whether it is necessary also to make a care order at that time. The established practice in the Family Court of making a care order alongside a placement order is, in my view, sound. Where a care order is made at the same time as a placement for adoption order, the care order will, in effect, be dormant and the dominant provision will be the placement order. Where, however, a placement order is not converted into an adoption order, but is subsequently revoked under ACA 2002, s 24. In such circumstances, it is likely to be of benefit to the child and the orderly conduct of any future proceedings for the care order to be in place. Not to have a care order where one is required to control the child's care arrangements following revocation of a placement order, would entail the local authority making a fresh s 31 application at that time.

A linear analysis?

43. In a series of judgments, most notably *Re B-S (Children)* [2013] EWCA Civ 1146 and *Re R (A Child) (Adoption: Judicial Approach)* [2014] EWCA Civ 1625, [2015] 1 WLR 3273, this court has stressed the need for a court that is determining an issue relating to adoption under ACA 2002, s 1 to conduct an holistic balancing exercise, in which each of the realistic options for the child's future is assessed against each other. In *Re G (A Child)* [2013] EWCA Civ 965 (at paragraph 54) I described the required approach:

“What is required 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.”

That formulation was approved by the Court of Appeal in *Re B-S* at paragraph 44 and again in *Re R* at paragraph 69. This court has, in like manner, consistently cautioned against judges applying a 'linear' approach when determining which of two or more competing options best meets a child's future welfare needs. In *Re G (A Child)* I described the linear approach in these terms at paragraphs 49 and 50:

“In most child care cases a choice will fall to be made between two or more options. The judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option.

The linear approach ... is not apt where the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare.”

That description of the approach was endorsed in *Re B-S* at paragraph 43.

44. The decision in *Re R* is also important in explaining that, where a choice of care plans for a child is to be made, the range of options should be limited to those which the court regards as being ‘realistic’. Sir James Munby P described the approach (at paragraph 59):

‘I emphasise the words “realistically” (as used in *Re B-S* in the phrase “options which are realistically possible”) and “realistic” (as used by Ryder LJ in the phrase “realistic options”). This is fundamental. *Re B-S* does *not* require the further forensic pursuit of options which, having been properly evaluated, typically at an early stage in the proceedings, can legitimately be discarded as not being realistic. *Re B-S* does *not* require that every conceivable option on the spectrum that runs between ‘no order’ and ‘adoption’ has to be canvassed and bottomed out with reasons in the evidence and judgment in every single case. Full consideration is required only with respect to those options which are “realistically possible”.’

And further at paragraphs 61 and 62:

‘What is meant by “realistic”? I agree with what Ryder LJ said in *Re Y*, para 28:

“Realistic is an ordinary English word. It needs no definition or analysis to be applied to the identification of options in a case.”

In many, indeed probably in most, cases there will be only a relatively small number of realistic options. Occasionally, though probably only in comparatively rare cases, there will be only one realistic option. In that event, of course, there will be no need for the more elaborate processes demanded by *Re B-S* and *CM*: see *Re S (A Child)* [2013] EWCA Civ 1835, paras 45-46, and *Re Y* [2014] EWCA Civ 1553, paras 23, 25. The task for the court in such a case will simply be to satisfy itself that the one realistic option is indeed in the child's best interests and that the parent's consent can properly be dispensed with in accordance with section 52(1)(b) of the 2002 Act, as explained in *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625.’

45. In the present case the judge, in the first section of analysis, when focussing on the care order application, stated that ‘the realistic options and the choices, therefore, in this case, are stark: return to parents’ care, long-term foster care, foster care with a plan for adoption’. At the conclusion of that section the option of parental care was ruled out on the basis that, on his findings, the parents were simply not able to care for their child. The judge then concluded in these terms: ‘the placement of E with the parents is not an option, particularly when balanced with the other options of foster care and adoption’.
46. The list of ‘realistic options’ had therefore been pruned of the potential for placement in parental care, as a result of a process of judicial evaluation which had only considered that option alone, on its own internal merits and de-merits, and without reference to any of the other realistic options. Despite the phrase ‘when balanced with the other options of foster care and adoption’, neither of these other possible care plans had, by that stage, been given any consideration in the judgment.
47. In the remaining four paragraphs of the judgment, the option of adoption is considered. The judge made reference to the relevant statutory welfare provisions, the need to be satisfied that ‘nothing else will do’ and that adoption is the most draconian order that a court can make. Under a paragraph heading ‘what about E?’, the judge then undertook a short comparison between the effects of a long-term foster placement and adoption. No reference is made at this stage of the judgment to placement with the parents. Then, after recording that he did not disagree with the children’s guardian’s analysis, he concluded:
- ‘He deserves the commitment and love that an adoptive placement will provide; he should not suffer the long-term stigma of a potentially changeable foster placement, and, in the circumstances, balancing the three stark choices I have before me, the realistic and most just and proportionate option before me is to approve the local authority’s care plan, and to make a final care order and placement order.’.
48. In the final paragraph, the judge went on to dispense with parental consent.
49. Standing back and looking at this judgment as a whole, it is impossible to avoid attaching the ‘linear’ label to it. Submissions made by the local authority and the children’s guardian that this was a ‘rolled up’ decision are not sustainable. The judge considered the options in water-tight compartments, with parental placement being ruled out before the prospect of adoption had begun to be considered, so that, at no point, did the judge balance and weigh up the one route for the child’s future against the other. Whilst this may be a very clear example of linear reasoning, and it is not helpful to introduce yet more jargon by referring to this approach as ‘polar’ or ‘siloes’, the point made in the previous authorities is clear. What is required is a balancing exercise in which each realistic option is evaluated for its own internal positive and negative features, before being compared, side-by-side, with each of the other such options. Unfortunately that process was not followed in this case. The only side-by-side comparison appears in the short final section in which the judge put the ‘straw-man’ option of long-term fostering, which no party was advocating, up against adoption.
50. Further, the judge having held that placement with the parents was one of the ‘realistic options’ for E’s future care, was wrong to dispose of that option by a preliminary ruling which then removed it from the list of options during the course of the same judgment. As Sir James Munby explained in *Re R*, removal of an option from the list of realistic

options will typically take place at an early stage in proceedings. The focus on only considering ‘realistic’ options, is to avoid the court taking time in considering every single possible option. It will be a comparatively rare case that has only one realistic option that falls for consideration.

51. In the present case, the court had spent four days considering the option of placement with the parents and the judge had concluded that it was one of the realistic options. On that basis, it was not open to the court to then prune that list and remove the option, thereby avoiding the need to undertake a comprehensive holistic evaluation of the child’s future welfare by weighing parental placement against the option of adoption.

Conclusion

52. I would therefore allow this appeal on the basis that the judicial analysis fell significantly short, not only in terms of evaluation of the evidence and the central point of the parents’ case, but also because of the structure and content of the essential welfare balancing exercise which was, in a number of respects, fundamentally flawed as a matter of law.
53. This case, which might have been determined in the early part of 2021, but was not in fact heard until November 2021, must now, in March 2022, be sent back to be reheard in the Family Court. Following the termination of the assessment in Amber House in January 2021, E has been waiting in short-term foster care for a decision to be made on his future care. Further delay in resolving these matters is therefore profoundly contrary to his best interests. Whilst the lists in the Family Court are filled with other pressing cases, I hope that the rehearing of this application can proceed without any further delay.

Lord Justice Peter Jackson:

54. I agree that the appeal must be allowed for the reasons given by the President, and for the following reasons.
55. It should first be said that the appeal succeeds because the judge’s reasoning does not sustain his order. The decision is unjust because of a serious procedural irregularity: CPR 52.21(2)(b). Our decision has no bearing on the merits or demerits of the local authority’s application for a placement order in respect of E, particularly as there will no doubt be updating evidence at the rehearing.
56. I next say something about judgments in general, because in my view this judgment fell short in respects that are not specific to adoption cases.
57. A judgment is the means by which the court delivers its decision to the parties and to the world beyond. There is no one way of doing that, but every judgment, whether delivered orally or handed down in writing, will have a structure. The structure chosen will depend on the nature of the case, but a reasonable structure is essential for disciplined and transparent decision-making. It helps the judge to make the best possible decision and others to understand why the decision has been made. The court’s task is not accomplished by handing down a decision that happens to be correct if it is not also properly explained. Fairness to the losing party demands no less.

58. The need for structure is perhaps particularly true of oral (extempore) judgments. These are to be encouraged as an efficient use of judicial time, but before embarking on an oral judgment it is obviously essential to establish (and helpful to the listener to declare) a structure so that steps in the presentation or reasoning are not inadvertently omitted when a decision is being given live.
59. Judgments reflect the thinking of the individual judge and there is no room for dogma, but in my view a good judgment will in its own way, at some point and as concisely as possible:
- (1) state the background facts
 - (2) identify the issue(s) that must be decided
 - (3) articulate the legal test(s) that must be applied
 - (4) note the key features of the written and oral evidence, bearing in mind that a judgment is not a summing-up in which every possibly relevant piece of evidence must be mentioned
 - (5) record each party's core case on the issues
 - (6) make findings of fact about any disputed matters that are significant for the decision
 - (7) evaluate the evidence as a whole, making clear why more or less weight is to be given to key features relied on by the parties
 - (8) give the court's decision, explaining why one outcome has been selected in preference to other possible outcomes.
60. The last two processes – evaluation and explanation – are the critical elements of any judgment. As the culmination of a process of reasoning, they tend to come at the end, but they are the engine that drives the decision, and as such they need the most attention. A judgment that is weighed down with superfluous citation of authority or lengthy recitation of inessential evidence at the expense of this essential reasoning may well be flawed. At the same time, a judgment that does not fairly set out a party's case and give adequate reasons for rejecting it is bound to be vulnerable.
61. In the present case, it was clear that the parents' history was a matter of serious and long-standing concern, but the key issue was whether and to what extent they had shown the ability to change, particularly during the course of the past year. Their case about that was squarely put and, in fairness to them, and to E, it had to be squarely addressed. As My Lord has shown, that did not happen. A reader of the judgment would not know anything that the parents had said in their oral evidence, which lasted for about a day, and the parents themselves understandably complain that their efforts to better their situation and recover the care of E were not adequately considered. Their core case was not recorded, key disputed threshold allegations were not clearly determined, and the judge's evaluation of the options and explanation of his decision were, I regret, perfunctory.

62. Turning to judgments in cases where a placement order is sought, the sequence of questions that must be asked are:
- (1) Are the threshold conditions under s.31(2) CA 1989 satisfied, and if so, in what specific respects?
 - (2) What are the realistic options for the child's future?
 - (3) Evaluating the whole of the evidence by reference to the checklist under s.1(4) ACA 2002, what are the advantages and disadvantages of each realistic option?
 - (4) Treating the child's welfare as paramount and comparing each option against the other, is the court driven to the conclusion that a placement order is the only order that can meet the child's immediate and lifelong welfare needs?
63. In this case, as My Lord has shown, the judge did not take a systematic approach and we therefore cannot uphold his decision.
64. Finally, this is a case in which the parents have had the good fortune of excellent pro bono representation by Mr Stephen Williams, trial counsel for the mother, and by Ms Lucy Limbrey, who came into the case for the father at the last moment. In each case, their involvement was arranged through Advocate (formerly the Bar Pro Bono Unit), and it has been instrumental in the outcome of the appeal. It is unfortunate that legal aid was for whatever reason not in place, particularly after permission was granted by King LJ on 8 February 2022, but this appeal underlines the extent to which the administration of justice depends upon lawyers who are willing to step up to represent litigants in person, and upon the organisations that facilitate this.

Lady Justice Nicola Davies:

65. I agree with the judgments of Sir Andrew McFarlane P and Lord Justice Peter Jackson.