

**THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellants who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellants or of any member of their family in connection with these proceedings.**



**Trinity Term  
[2022] UKSC 17**

*On appeal from: [2021] EWCA Civ 1451*

## **JUDGMENT**

**In the matter of H-W (Children)**

**In the matter of H-W (Children) (No 2)**

before

**Lord Hodge, Deputy President**

**Lord Kitchin**

**Lord Burrows**

**Lord Hughes**

**Dame Siobhan Keegan**

**JUDGMENT GIVEN ON**

**15 June 2022**

**Heard on 22 March 2022**

*1st Appellant (M (mother of C, D, E and F))*

*(Acting Pro Bono)*

Hannah Markham QC

Kate Makepeace Grieve

Lara Izzard-Hobbs

(Instructed by Bastian Lloyd Morris LLP)

*2nd Appellant (F3 (partner of M and father of F) (also a respondent for M's application))*

*(Acting Pro Bono)*

Will Tyler QC

Emily Beer

Amy Stout

(Instructed by Crane & Staples Solicitors)

*1st Respondent (A Local Authority)*

Damian Woodward-Carlton QC

Sharan Bhachu

Katie Phillips

(Instructed by A Local Authority)

*2nd Respondent (F1 (father of C and D))*

*(written submissions only)*

Baldip Singh

(Instructed by Philcox Gray Solicitors)

*3rd Respondent [F2 (father of E)]*

*4th, 5th and 6th Respondents (Childrens' Guardians)*

Cyrus Larizadeh QC

Amanda Meusz

(Instructed by David Barney & Co)

**DAME SIOBHAN KEEGAN: (with whom Lord Hodge, Lord Kitchin, Lord Burrows and Lord Hughes agree)**

**Introduction**

1. These appeals concern the proportionality of care orders made in relation to three children and appellate review of those orders. It is convenient to adopt the alphabetic identification of the family which was used in the courts below. The appellants are the mother M and her partner F3 who currently care for the children at home. The subject children are now aged 14, 11 and nine and are known as C, D and E. M has three other children. These are A, aged 22, and B aged 19, both of whom are independent and live outside of the family unit. M's son, A, who features in this case, is clearly a troubled young man. He was made the subject of a care order during his minority. As will be seen, he, and M's reaction to him, are the keys to this case. M also has a young child F now aged two who currently lives in the home with C, D and E and M and her current partner F3 who is the father of F. The other children within the family unit have different fathers. Child E's father has not taken part in this appeal and is referred to as F2. The father, F1, of children C and D has filed written submissions although his role in the life of these children has been limited.

2. The care orders were made by the judge on 26 July 2021. These orders were made approving a care plan of removal of the three children C, D and E from the family home with a view to separate long term foster placements. That decision was appealed to the Court of Appeal where the orders were affirmed on 7 October 2021 by a majority of Lewison and Elisabeth Laing LJ, Peter Jackson LJ dissenting.

3. The grounds of appeal of the appellant parents (M and F3) were refined by this court which in granting permission formulated two questions as follows:

“In making care orders for the removal of three of the first appellant's children into foster care:

(1) In order to decide whether those orders were proportionate, was it necessary as a matter of law to assess the likelihood that, if left in the first appellant's care, (a) the children would suffer sexual harm; (b) the consequences of such harm arising; (c) the possibility of reducing or mitigating the risk of such harm; and (d) the comparative welfare advantages and disadvantages of the options presented; and

(2) Did the judge err in law by failing to make any or any proper assessment of those matters?"

4. The first question focuses on the issue of the proportionality of the care orders which were made for C, D and E. To be proportionate a care order which removes a child into care from its parents, and in this case from each other, must be necessary to meet the needs of the children having regard to the advantages and disadvantages of each available option. The four elements of question (1) identified as (a)-(d) above help to answer the question whether the care orders were in fact proportionate and necessary. The second question focuses on the assessment made by the judge of these issues and essentially asks whether the judge carried out the correct balancing exercise.

5. An answer to these questions requires consideration of the background facts, discussion of the decision of the judge as examined on appeal, determination of the issues identified in the permission and a decision as to whether any error has been made in the proportionality evaluation.

6. In outlining the contours of these appeals it is important to state that the appellants do not seek to challenge the primary factual findings made by the judge. They do not argue that his assessment of the risk of harm to the children in their mother's care was wrong. Rather, they say that the judge erred in failing to consider the proportionality of the orders he made by balancing the risk of harm to the children in the care of their mother with the harm the children would suffer should they be removed from her care and from each other, to separate placements with limited contact with their family and against their clear wish to stay at home.

## **The history**

7. The local authority began involvement in the life of this family when M was herself a child. She was in public care and suffered from neglect and sexual abuse which began when she was a teenager. That abuse was perpetrated by F2 with whom M was to have child E in 2013. F2 has remained as a shadow in M's life and has partaken in this appeal to the extent that he supports M's case and contends for the maintenance of the placement of the children at home with M. However, for a substantial period of time he has had only supervised contact with child E. Aside from F2 and issues of sexual risk there has also been local authority involvement with the family over many years due to issues of neglect.

8. Court proceedings for removal of these children have been contemplated before. The first time that removal was attempted was in March 2012. This was precipitated by F2 being found concealed in the family home. The risk of sexual harm from him was the basis for the application, given F2's history. However, there was no removal of the children at this time save that a care order was made in relation to A. In relation to the other children residence and supervision orders were made by a different judge in March 2014 and, perhaps most significantly for the purposes of this appeal, an injunction was made against F2 to prevent him from attending at the home again. This injunction remains in place to this day.

9. From 2014, when the aforementioned proceedings concluded, to 2018 there appears to have been a period of relative stability in the family save that in 2016 there were proceedings in relation to F3's children by a different mother. Of significance in relation to those proceedings, was that one child who had been living with M and F3 was removed into foster care. This was without criticism of the care givers and simply on the basis that the placement was simply not sustainable. In 2019 there were further proceedings, brought by F1 for C and D to live with him; however they were dismissed.

10. In March 2019 the local authority reduced intervention to a level of support synonymous with "children in need" obligations. On 28 October 2019 the case was closed by social services on the basis that the family had made considerable progress and that the children were happy. Therefore, when the current proceedings were issued in March 2020 the family unit was relatively stable. C, D and E lived at home with their mother and F3 was part of the family structure in a stepfather role. A baby was born in early 2020, namely F. Also, a permanent injunction had been made against F2 and so he had only supervised contact with the family. By the time that the current proceedings issued none of the children who were ultimately made the subject of care orders had ever been out of the care of their mother.

11. The current proceedings began on 31 March 2020. They were triggered by the conduct of A. On that date the local authority made an application for an emergency protection order to remove C, D and E. This was in the usual way made on an *ex parte* basis. The application was refused. However, in refusing the application for an emergency protection order directions were given for a care order hearing. A non-molestation order was also made against A, which among other things prevented him from coming to the family home. The reason why the non-molestation order was made against A is important to state and is a matter to which I will return.

12. The trigger for court proceedings in March 2020 was an incident in November 2019. This involved A coming to the family home and sexually abusing the child E. At this time A was advised by the police to leave his supported accommodation for his

own safety. M was expected to prevent A from staying in the house or being unsupervised around the other children. Notwithstanding this, A was apparently allowed to visit the house for short periods. In November 2019 A stayed at the house for a period of time and on 18 November he sexually abused the child E whilst M and F3 were distracted in the house by an injured dog. An added concern was that the matter was not reported to social services until 21 November 2019, A having gone back to his own accommodation on 19 November 2019. Therefore, the local authority case made against M and F3 was that they had failed to protect E and the other children from A and failed to notify the social services when he abused E in the home.

13. Unsurprisingly, after this event an initial Child Protection Case Conference was held on 9 January 2020. Conferences of this nature involve a multi-disciplinary discussion on whether or not intervention should ensue. The decision of the initial Child Protection Case Conference was not to issue any court proceedings by way of care order application or otherwise. However, court proceedings were issued at the end of March 2020 following statements made by E to a student social worker and to a head teacher on 16 March 2020 suggesting more extensive abuse by A during the time he was in the house and since. The local authority sought care orders, and removal from the home, not only of C, D and E, but also of F.

14. The current proceedings came to court for hearing before the judge. As is usual there was a fact-finding hearing to deal with threshold criteria in the first instance and then a welfare hearing. Both hearings were lengthy. At the fact-finding hearing findings were made in relation to the assault on E in November 2019. The judge did not make any further findings in relation to the additional allegations made by E to the head teacher and the student social worker as these were not proven to the requisite standard. His findings against A were thus limited to the single occasion when the parents were distracted by the injured dog. The judge was not asked to make findings of neglect or on any other issues and so the threshold criteria were essentially confined to sexual abuse having occurred, a risk of sexual harm and a failure to protect. The background facts relating to the family were also informed by the earlier fact-finding decision of the first judge in 2014.

15. Thereafter, a welfare hearing took place. This was a lengthy hearing of some six days during which the judge had to decide whether or not care orders should be made for the subject children. The outcome of this hearing was that the judge decided that care orders should be made for C, D and E but that the case of F should be adjourned to allow for a further assessment of the possibility of B caring for her.

16. We are only concerned with the care orders that were made. The judgment was given *ex tempore* on 26 July 2021 after what was undoubtedly a difficult hearing beset

by the need to conduct much of it remotely. It is a comprehensive judgment which deals in detail with the factual background of the case, the basis for intervention, the evidence and the legal tests to be applied.

17. Pausing at this point, it is important to note that in the course of these proceedings the judge heard oral evidence from ten witnesses including four social workers, a family support worker, a Consultant Child and Adolescent Psychiatrist, Dr Judith Freedman, the mother and F2 and the children's guardian. A letter was also sent to the judge by the child C setting out her wish that the family remain together. The social work evidence, which was extensive, highlighted the social work opinion that the adults in this case had not accepted the risk that A posed and would not be able to guard against that risk in future, notwithstanding the fact that the practical care of F had been good and there was co-operation.

18. The expert report from Dr Freedman is some 200 pages. In this report Dr Freedman expresses the view "assessing this large extended family is a challenge." Dr Freedman balanced the pros and cons and reached the following position:

"On the one hand it becomes increasingly apparent over the years of judgments and assessments that matters in the family have not changed greatly. The presentation of the children and the state of the home are described as just adequate. The children struggle in their education. Boundaries are broken. Sexual abuse emerges repeatedly as a risk.

Yet, on the other hand, it is difficult to imagine how C, D and E would manage separation from their mother - much less how M would manage separation from them. And this conundrum also will impact on F, who I have not been asked to include in this assessment."

19. M is described as having some vulnerabilities, exacerbated by her own abuse and also some learning deficits. The social work reports refer to therapy and support being provided for M and the family but was overall pessimistic about the ability of M and F3 to protect the children from sexual harm given the history of the case.

20. The children's social worker also completed a comprehensive report and care plans which are instructive to read. In particular, the social worker's evidence outlines the individual characteristics of each child in the following respects. C was 13 at the

date of the hearing of this appeal and is described as suffering from anxiety and gender identity issues and having been absent from school. D is described as having some intellectual deficits, ADHD and possible ASD and in need of a specialist school placement which was promoted by M. E is described as having suffered sexual harm and exhibiting behavioural difficulties at school. A sibling assessment conducted by the social worker recommended separate placements for all four children and set out some issues in relation to educational potential and otherwise.

21. The children's guardian provided a recommendation in support of the social workers and said in relation to the mother that, in her opinion, "she has a blind spot in respect of A." The plan for the youngest child F, by this stage, was adoption; however, the guardian was unable to recommend this drastic course without a guardianship assessment of B being undertaken. Therefore, the judge acceded to an adjournment of F's case for further assessment and so her case remains before the first instance court.

22. The import of the decision made in relation to C, D and E is profound in that by virtue of the orders made they would be removed from the care of M and F3 to separate foster placements and with contact six times per year. The fourth child, F, was to remain at home by virtue of the judge's orders pending an assessment of whether or not her half-sister B, could be approved as a special guardian for her, but unless B was shown to be a viable long-term carer for her, she would be adopted.

23. We were told that there was a contingency plan for the hearing of F's case in April before the judge. We also understand that the recommendation in relation to B's special guardianship application has not been positive. Therefore, we can see that F's case may be contested and issues arising in this case will have a bearing upon it.

### **The judgment of the judge at first instance**

24. This court cannot fail to be impressed by the care and attention taken by the judge to hear and conclude this complicated case during the Covid-19 pandemic. The court is also complimentary of the judge's legal directions to himself which are comprised in his judgment. It is a mark of the experience of this judge that his *ex tempore* ruling was delivered immediately at the end of a lengthy hearing. The judgment extends to 32 pages.

25. There is no criticism made of the factual findings or the recitation of the legal tests. At para 139 of the judgment the judge rightly directs himself as follows:

“It is not enough simply to consider that the paramountcy of the children’s welfare and the matters itemised for consideration in section 1(3) of the Children Act 1989, commonly referred to as the welfare checklist. I have to consider the proportionality of any decision I make to remove a child permanently from their family. In other words, I have to be satisfied that the steps taken or the order made are indeed proportionate to the harm found or feared.”

26. At paras 142-145 of the judgment the judge also refers to the available options in this case and sets out the parties’ positions. At para 145 he refers to care orders and supervision orders. Thereafter the judge refers to various parts of the welfare checklist. His conclusion is found at para 169 which records his view that it would no longer be safe for the children to remain in the care of the mother and F3.

27. The rationale for this decision is found in para 176 where the judge says:

“176. I have carefully considered the local authority section 31A plan for a placement in foster care under a care order. It seems to me necessary so as to allow the children to be cared for in foster care and for the local authority to share parental responsibility with their parents and determine the extent to which their parents can exercise their parental responsibility. It is the only way, I think, of stopping the difficulties that the children have suffered in the care of their mother and in the care of one or more of their fathers throughout their lives, and I have concluded that each would continue to suffer if they remained in that care.”

The judge refused leave to appeal. However, he granted a short stay of the decision and the stay has subsequently been retained by virtue of orders of the Court of Appeal and this court.

### **The judgments in the Court of Appeal**

28. Each judge in the Court of Appeal described this as a difficult case. The nub of Peter Jackson LJ’s reasoning (dissenting) is found at para 57 of his judgment wherein he states that:

“Making every allowance for the fact that this was an ex tempore judgment, I am driven to accept the submission that it does not contain an assessment of the welfare advantages and disadvantages of the rival plans for the children. The judge stated a number of the relevant factors, so he clearly had them in his mind, but it is not possible to see how he balanced them out.”

29. Elisabeth Laing LJ at para 68 of her judgment referred to the fact:

“There is a range of different ways in which a judgment like this can be expressed, just as there is a range of reasonable decisions which are open to the first instance judge; even if sometimes that range is confined to a choice between two available options. The judge had to make his own assessment of a complicated picture and then, on the basis of that assessment, to make a very difficult decision. ... The judgment of Peter Jackson LJ is cogent indeed. But I cannot say that the decision of the judge was ‘wrong’ (in the sense in which that word is used in the test for allowing an appeal in a case like this).”

30. Lewison LJ at para 79 of his judgment said that:

“The question is not whether we would have reached the same decision as the judge. In cases which are marginal it is, in my judgment, all the more important to trust to the wisdom and discretion of an experienced family judge, particularly one who has been immersed in the evidence, not only in relation to the welfare decision but also the prior fact-finding decision.”

At para 81 Lewison LJ also said that:

“I find myself in the uncomfortable position of reviewing a decision which I cannot say was right or wrong. In that situation Lord Neuberger considered that the appeal should be dismissed.”

31. The tension between the majority and the minority in the Court of Appeal emerges from the foregoing passages. Jackson LJ raises the adequacy of the proportionality review actually undertaken by the judge and questions whether or not all options were fully considered. The majority, whilst respecting this view, have focussed on their view of the limits of the appellate review and the deference to be afforded to the judge who heard and saw the witnesses and had conduct of the case for some time.

32. Both of these perspectives are understandable in family law terms and of course raise issues as to the correct approach to be taken on appeal. All of the appeal judges refer to the profound effects of decisions taken to remove a child into public care. In this case three children who have never been outside parental care may be removed and one very young child may face adoption. Hence, it is imperative to scrutinise with care the decision made in relation to their future.

### **The competing positions of the parties**

33. On behalf of the appellants, Ms Markham QC and Mr Tyler QC have argued that the decision of the judge is wrong essentially for failing to consider other less interventionist options in this case which would meet the risk of harm, namely sexual harm.

34. Helpfully, after the conclusion of oral submissions and at the request of the court, counsel submitted an options paper to the court which set out the viable options as follows: placement of all children in foster care; placement of C, D and E at home with M and F3; placement of C and F at home and D and E in foster care. Counsel also highlighted the orders which could underpin the placement at home, namely no order, a child arrangements order under section 8 of the Children Act 1989, a supervision order under section 31 of the Children Act 1989 or a care order under section 31 of the Children Act 1989.

35. In addition, counsel set out the other orders which could be made in conjunction with the above, namely: (i) a non-molestation order under the Family Law Act 1996 against A, with geographical exclusion; (ii) a non-molestation order against F2 under the Family Law Act 1996 with geographical exclusion; (iii) a prohibited steps order in liaison with the supervision order under section 8 of the Children Act 1989 for example prohibiting M and F3 from allowing A or F2 into the house or into contact with any of the children; (iv) an interim care order with an exclusion order under section 38A of the Children Act 1989 prohibiting A or F2 from entering the home or coming within a set distance of it; and (v) a care order with an injunction pursuant to

the inherent jurisdiction prohibiting M or F3 from allowing A or F2 into the house or any contact with any of the children.

36. Further reference was made to support monitoring that could be put in place in relation to these children in the form of family safety plans, supervised contact, therapeutic intervention and support through universal services and regular social work visiting as part of a supervision plan.

37. During oral argument the local authority, represented by Mr Woodward-Carlton QC stressed the history of “repeated lapses in protection” within this family. Thus, he maintained that the local authority plans were justified and necessary and that the judge had reached the right decision. Mr Woodward-Carlton candidly accepted that there was no mention of the non-molestation order or injunction in the judge’s ruling. Whilst he accepted that the judge had not specifically addressed point (g) in the welfare checklist (ie the range of powers available to the court) he contended that there was more than enough in the judgment read as a whole to confirm the view that the judge considered all of the options and where this was not expressed it could be implied.

38. During the currency of this appeal Mr Larizadeh QC on behalf of the children instructed by the children’s guardian revised her position and articulated reluctant support for the appellant’s position that the judge was wrong in not expressly weighing the less interventionist option. This revised position therefore led to the local authority being the only party defending the decision of the learned judge on the basis that he was right having had the benefit of hearing oral evidence and having been seised of the case for a number of years to make an assessment that care orders were the only orders that could guard against the risk in this case.

## **Legal Framework**

39. The legal framework is well known. Most applications for a care order, and this one is an example, will require the judge to traverse three principal stages:

- (i) finding the relevant primary facts;
- (ii) determining whether the legal threshold for the making of a care order has been crossed (section 31(2)(a) Children Act 1989); and, if yes, then
- (iii) deciding the proper order to make (the disposal or welfare stage).

40. Where a court is considering whether to make a care order which is a Part IV order, by virtue of section 1(4) a court shall have regard to the welfare checklist and 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.

41. In the present case there is no challenge to the judge's findings of primary fact, nor could there be. Nor is there any appeal against his conclusion that the threshold criteria of section 31(2)(a) were met; there is and could be no quarrel with his assessment that a risk of sexual abuse existed, bringing with it a real possibility of significant harm, and that this was attributable to the parenting of M and F3 not being what could reasonably be expected of them - in particular M had a "blind spot" about A.

42. The issue, accordingly, is squarely whether the judge, notwithstanding the thoroughness and care of his approach to these two stages, fell into error at the third stage. Did he proceed too directly from his assessment of risk of significant harm to the making of a care order for the long term? What was required of him in making this third stage decision? In particular, what is required to demonstrate that the order being made is proportionate and necessary? This is, in my view, the first issue which needs to be addressed on this appeal.

43. That first issue brings with it the second issue: What is the correct approach for an appellate court to take when dealing with a judge's conclusions as to disposal? In particular, should an appellate court undertake for itself a fresh assessment of the issue of proportionality and necessity of any orders?

44. A search for answers to both of these issues can conveniently start with this court's decision in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911. In that case this court examined aspects of the threshold criteria to the making of a care order, the proportionality and necessity requirement which stems from article 8 of the European Convention on Human Rights, and the boundaries of appellate review. The first element is not material in this appeal. However, the court's views on the second two areas bear some examination, touching as they do on the issues germane to this appeal.

### **Proportionality and necessity**

45. The effect of a care order is to vest parental responsibility for the child in the local authority: section 33 Children Act 1989. Thereafter, the parents can exercise their parental responsibility only to the extent that the local authority determines. As this court explained in *In re B*, that intrusive power clearly engages the article 8 rights of the parents and children. It follows that a care order can only be made, even if the statutory threshold criteria under section 31(2) are met, if such an order is necessary in a democratic society for the protection of the child(ren)'s right to grow up free from harm. That means that the order can be made only if it is proportionate to the needs of the situation. See especially Lord Wilson at paras 32-34, Lord Neuberger of Abbotsbury at paras 73-79 and Baroness Hale of Richmond at paras 194-198. And it follows also that, as Lord Wilson put it at para 45, a judge considering a care order has an obligation not to act incompatibly with the article 8 rights involved. In truth, the obligation under article 8 ECHR, so clearly recognised in *In re B* does no more than re-state the longstanding proposition of English childcare law that the aim must be to make the least interventionist possible order, but the emphasis given to the issue in *In re B* was overdue.

46. In *In re B* the care order under consideration was one with a care plan for adoption of the children, so that if made it would result in a complete legal severance of the family relationship between natural parent and child. That is, no doubt, the most intrusive form of care order which our law knows. But a care order of the kind in question here has consequences almost as far-reaching. It will break up the existing family and indefinitely so; it can be expected to last throughout the minority of the children. It will separate them from their parents and also from each other. The

principles set out in *In re B* as to necessity and proportionality clearly apply, *mutatis mutandis*, also to this kind of case.

47. All this has been common ground between all the parties in this appeal. Common ground also has been the acknowledgement of the very valuable guidance which has been given since *In re B* by several highly experienced family judges who have addressed what is involved in the third or disposal stage of consideration of a care order and how a judge goes about ensuring that the obligation to intervene only when necessary and proportionate is discharged. The repeated concerns of, *inter alia*, Sir James Munby P, Sir Andrew McFarlane P and Lady Black are well set out in the former's judgment in *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146; [2014] 1 WLR 563. The precise context of that case was a parent's application for leave to oppose adoption despite the previous making of a care and placement order, but observations about the approach to decisions on necessity and proportionality are of general application. They were most conveniently summarised at para 44, adopting a passage derived from the judgment of McFarlane LJ (as he then was) in *In re G (A Child) (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965; [2013] 3 FCR 293:

“The judicial task is to evaluate all the options, undertaking a global, holistic and ... multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option ...

‘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.’”

This is now rightly the accepted standard for the manner in which a contemplated child protection order must be tested against the requirement that it be necessary and proportionate.

### **The approach on appeal**

48. The very clear decision in *In re B*, albeit by majority, is that the existence of the requirement of necessity and proportionality does not alter the near-universal rule that appeals in England and Wales proceed by way of review rather than by way of re-hearing. It follows that it is not incumbent upon an appellate court to undertake a

fresh evaluation for itself of the question of necessity and proportionality. For the reasons clearly stated by, in particular, Lord Neuberger at paras 83-90, such is contrary to principle, as well as undesirable in practice. In particular, if each appellate court were to undertake such a fresh evaluation, it would expose the parties, and the children, to the risk of successive investigations of the same issue, certainly two, and in some cases three or even four times. It would also mean that the appellate court was expected to undertake a task for which it is unsuited, having not heard the evidence or seen the parties for itself. A decision on paper is no substitute for the decision of a judge who has, as Lord Wilson felicitously put it at para 42, had the advantage of a face-to-face, bench-to-witness-box acquaintanceship with those who are under consideration as carers of the child(ren).

49. 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] 1 WLR 1360.

50. In *In re B* Lord Neuberger, at para 93, essayed a further dissection of the process of deciding whether a judge's decision was wrong. He cautiously prefaced his suggested breakdown of the possible states of mind of an appellate judge with the observation that there was danger in over-analysis. With hindsight, that was a prophetic observation, as this court held in the subsequent case of *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR 4079. Lord Carnwath, giving the judgment of the court, said this at para 63:

“With hindsight, and with great respect, I think Lord Neuberger's warning about the danger of over-analysis was well made. The passage risks adding an unnecessary layer of complication. Further, it seems to focus too much attention on the subjective view of the appellate judges and their degrees of certainty or doubt, rather than on an objective view of the nature and materiality of any perceived error in the reasoning of the trial judge.”

51. On this appeal the real issue is not whether the appellate court is satisfied that the judge reached a conclusion which was wrong. The question is rather concerned with the adequacy of the judge's process of reasoning in reaching his conclusion. This appeal asks the question whether the judge did go through the rigorous process

described at para 47 above or whether he proceeded too directly from his finding that the threshold criteria were met to the conclusion that it followed that a care order ought to be made. If, on appeal, it is found that a judge has unduly telescoped the process, and has not made the side-by-side analysis of the pros and cons of each alternative to a care order, then the likely conclusion is that his decision is, for that reason, flawed and ought to be set aside.

### **This case**

52. All parties agreed that the four elements of question 1(a)-(d), set out in para 3 above, were valid questions which required to be considered upon a care order application. It is necessary as a matter of law for the court when asked to decide whether to make a care order to consider: (a) the nature and likelihood of risk of harm arising; and (b) the consequence of harm, if suffered.

53. These two elements of question 1 comprised in (a) and (b) interlink and are an inevitable consequence of a holistic evaluation in a case of this nature and specifically flow from consideration of the welfare checklist which highlights harm in point (e).

54. The next element contained in question 1(c) poses the question whether the court must consider the possible reduction or mitigation of the risk which pertains and the welfare advantages and disadvantages of imposing an order. Again, it is clear that this question should be asked when a court is considering whether to make a care order. That is because a court must look to determine whether any order is necessary by virtue of the Act: section 1(5), and whether or not the most interventionist order is necessary: article 8(2) of the Convention.

55. In addition, point (g) of the welfare checklist specifically refers to the range of powers available to the court under the Act. Consideration of the range of orders obviously includes the ability of the court to consider in a care order case a supervision order or other orders and options.

56. Therefore, this court has no hesitation in concluding that the above questions posed by this court and set out in para 3 are required to be answered in discharge of the obligations imposed under the Children Act itself and by virtue of the Human Rights Act which in tandem with the domestic legislation, requires a court to consider the proportionality of any intervention in the light of the harm that may arise. In this case it was quite right to assess the harm as sexual harm and risk. It was also quite right to attribute the failure to protect from that harm both to a third party and the parental unit. There is no valid argument against the judge's ruling in relation to this

particularly given that he had the benefit of hearing substantial evidence including expert evidence and in light of his knowledge and experience of the case. This case does involve serious episodes of repeat patterns of sexual abuse and a lack of appreciation of sexual harm which the judge was correct to articulate.

57. The appeals boil down to how the judge assessed mitigations and options. The judge was required to look at both. The local authority has rightly referred to the comprehensive papers which set out the various options filed on behalf of social services, in particular, by the main social worker. However, on close inspection the paragraphs previously referred to simply set out the options and there is in fact no analysis of the competing options and the issue of mitigation.

58. Of particular significance is the fact that the judge did not mention the efficacy of the injunction against F2 and also the non-molestation order made against A. It is quite right to say that a judge does not have to recite each and every piece of evidence in a case. However, a judge does have to refer to the core elements of a case in order to reach a conclusion which is understandable and accords with the law.

59. Unfortunately, whilst the judge deals with the welfare checklist from (a)-(f) he does not specifically deal with (g) which is the range of options. Also, he does not fully recognise the impact of the section 31A plan for permanence in relation to each child. Unfortunately, paras 142-145 of the judgment cannot cure the problem as these paragraphs simply raise the issues rather than analyse them.

60. The judge's treatment of the facts and the evidence was thorough. He undoubtedly directed himself that his orders were required to be proportionate. However that is not the end of the matter. The difficulty is that one looks in vain for the critical side-by-side analysis of the available options by way of disposal, and for the evaluative, holistic assessment which the law requires of a judge at this stage. Whilst the judge has identified the risk of sexual harm as satisfying the threshold criteria for intervention, there is no evaluation of the *extent* of the risk of significant harm by way of sexual harm, nor of any available means by which the risk might be reduced for each child. Nor is there any comparison of the harm which might befall the children if left at home with the harm which would be occasioned to them if removed, and separated not only from the parents but from each other.

61. It follows that the decision was insufficiently founded on the necessary analysis and comparative weighing of the options. In the absence of the evaluative analysis which is required this appellate court cannot determine whether the orders made were proportionate and necessary. That being so, it was premature to ask, as Lewison LJ did, whether the order was one which he could say was right or wrong.

62. Rather, the process adopted by the judge is flawed as it did not adequately assess the prospects of various options to mitigate the risk of sexual harm. The judge does not state why the emotional damage that each of the very different subject children would suffer under a care plan which separated them from their mother, from their stepfather and no less importantly from their siblings, was proportionate to and necessitated by the identified risk of sexual harm from A, when no instances of harm had occurred since November 2019 and where a protective framework of non-molestation and interim supervision orders was in place. The answer to question (2) found in para 3 is therefore that the judge erred in law by failing to make a proper assessment in reaching his decision.

### **Next steps**

63. During the oral argument Mr Larizadeh applied most vigour to the suggestion that this court should consider substituting supervision orders for the care orders in relation to the three children. His argument was based on the need for certainty for the children and to avoid delay. Such a position is understandable. However it cannot prevail in this case for the simple reason that a court would need to scrutinise a revised plan and be satisfied itself as to any mitigations which might address the identified risks. This court is not equipped to conduct that exercise. This court would be stepping in to make its own proportionality assessment which is contrary to the line of authority we approve emanating from *In re B*.

64. Therefore, the only realistic course to take in this case where, unfortunately, we have found that the judge fell into error, is to remit the case for rehearing. It is better that a different judge should hear the case. It remains to be seen what the ultimate outcome will be. Given the amount of information already generated it is to be hoped that updating reports will not result in a lengthy process. We would also hope that it is feasible to have the remitted case relating to C, D and E and the outstanding case relating to F, heard together and concluded in the near future in order to settle arrangements for the entire family.

65. The appeals will be allowed and the case remitted for rehearing.