Case No: B4/2012/3187

Neutral Citation Number: [2013] EWCA Civ 965
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION
HER HONOUR JUDGE HUGHES QC
FD12C05013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2013

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE MCFARLANE
LORD JUSTICE DAVIS

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Re: G (A Child)

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Dennis Sharpe (instructed by **Hanne & Co**) for the **Appellant mother**
Nicholas Horsley (instructed by **Southwark LBC**) for the **Respondent local authority**
Michelle Powell (instructed by **Duncan Lewis**) for the **Respondent child**

Hearing date : 2nd May 2013

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Judgment

Lord Justice McFarlane:

1. The focus of this appeal is upon two aspects of judicial process in Family proceedings. The first relates to the need for a judge to conduct a proper welfare balancing exercise before making a full care order, and the second relates to the degree of scrutiny to be expected from a circuit judge when considering an appeal in care proceedings.

2. The proceedings relate to a young boy, J, who was born on 3rd May 2004, and was therefore nearly eight years of age when District Judge Tempia granted a full care order with respect to him in the Inner London and City Family Proceedings Court on 30th April 2012. J's mother appealed the district judge's decision, but that appeal was dismissed by Her Honour Judge Hughes QC, sitting in the Principal Registry of the Family Division, on 23rd July 2012. The mother now brings a second appeal to this court following my decision on 14th March 2013 to grant her limited permission to appeal.

3. As the substance of the appeal relates to the adequacy of the judicial process, both at first instance and on appeal, and as a successful appeal in this court will inevitably result in the matter being re-heard, it is neither necessary nor wise for me to comment in detail upon the factual background. In any event, the key dates leading up to the institution of care proceedings can be shortly stated.

4. J's mother ["M"] was born in Nigeria and lived there until she left that country in 2003 as a result of the civil unrest that was at that time taking place. She fled to Ireland and sought asylum there. By that time she was pregnant with J and in due course J was born to her in Dublin. In 2005 M was granted leave to remain in the Irish Republic. There is a history of involvement with the Irish social services and in 2007 it is established that M left J at the social services offices in Dublin thereby abandoning him to the care of the Local Authority. He remained in foster care for most of one year, but at the conclusion of proceedings in Ireland J was returned to M's care with no statutory order being made.

5. In December 2009 M and J travelled to London and sought to set up home in the London Borough of Southwark. Records show that during the first twelve months of their time here there was some limited interaction with the local social services. However, on 9th December 2010 M attended the social services office and asked for J to be taken into care, initially for a period of two weeks. Thereafter, save for one telephone call, the social services had no contact from J's mother for over three weeks. Care proceedings were started and J has effectively remained in foster care from the time that his mother left him at the social services offices in December 2010 until the present day.

6. The final hearing of the local authority application for a care order was heard over the course of three days by District Judge Tempia in the Family Proceedings Court in April 2012. A reserved judgment was then handed out to the parties at a hearing on 30th April. The threshold criteria were apparently agreed and were set out in a commendably short schedule which I reproduce here in its entirety:

> "J has suffered and is at risk of suffering significant harm due to the care he has received and would receive if the order was not made, not being what a reasonable parent would provide.
>
> The reasons are:
>
> 1. On 9th December 2010 J was left at social services offices by his mother. She left an explanatory letter on that occasion.
>
> 2. M did not meet with social workers, return to collect J or attend for contact with him until 4th January 2011. M did telephone the Local Authority on 13th December 2010.
>
> 3. M has previously left J in social services offices in Dublin in 2007 leading to a period of foster care (believed to be 9-12 months)"

7. It is also relevant to record that in 2008 J was diagnosed with autism spectrum disorder with a score in the "severe" range of the Childhood Autism Rating scale. He was also assessed as having a "moderate learning disability", significant hyperactivity and epilepsy.

8. Before the district judge the Local Authority sought a full care order. The Local Authority care plan was for J to be placed in a suitable long-term foster placement for the remaining ten years of his minority. The Local Authority case was endorsed and supported by the Children's Guardian.

9. J's father, a Mr G, has remained in Nigeria throughout and played no part in the proceedings.

10. Before the district judge M sought the return of J to her care but she conceded that the threshold criteria in Children Act 1989, s 31 were met and that any plan to place J back in her care would involve an element of support from the Local Authority and any rehabilitation would be conducted either via a short series of interim care orders or under the umbrella of a supervision order.

11. The district judge heard evidence from a consultant psychiatrist, who had assessed M and also from a chartered clinical psychologist who had conducted a similar assessment. No direct evidence was heard in relation to M and J's time in Ireland, but the court had received disclosure of relevant social services and court material from the Irish Republic. A full parenting assessment had been conducted by the Local Authority social worker who had held the case for much of its life, and the judge heard from that worker together with the current social worker. M also gave evidence, as did the Children's Guardian.

12. The focus of the hearing was largely upon whether or not M could be relied upon to provide stable and secure parenting for J without any further unplanned acts of abandonment. In addition M sought to explain and minimise the circumstances around the two accepted episodes of abandonment.

13. Before turning to the aspect of the district judge's judgment which has fallen for criticism during the course of this appeal, it is right to record that insofar as the judgment seeks to summarise and analyse the expert, professional and lay evidence, it is an impressive piece of judge-craft. The most significant conclusions from the evidence appear to be:

    a) The assessment of M by both experts was essentially normal save that she exhibits a clear potential to respond adversely to stress but, as the psychologist put it, these features were in the sub-clinical range and meant that "similar personality features would be expected to be found in a sub-section of the normal population".

    b) During the proceedings in Ireland M had professed and displayed insight into the Local Authority concerns arising from the act of abandonment, however, as soon as the proceedings ended M began to move to different parts of Dublin, moving J from school to school and failing to engage with professional support.

    c) The social worker's parenting assessment had been essentially favourable and recommended rehabilitation of J to M's care. However, by the time he gave evidence, the social worker had changed his recommendation as a result of reading the paperwork that had subsequently arrived from Ireland. He considered that there was a clear potential for history to repeat itself, given that M's actions in London in December 2010 were very similar to those in Dublin in 2007, and this indicated that J would be at risk of repeat behaviour in the future. He also reported that his professional relationship with M had broken down after he had given advice which was perceived by M as criticising her parenting skills.

    d) The current social worker recorded a good working relationship with M but she too adhered to a care plan for long term fostering.

    e) The Guardian expressed concern that M lacked insight into the circumstances that led her to act as she had done in the past. She considered that it was "a risk" to place J back in M's care and it was not a risk that she would recommend taking.

14. The district judge made a number of positive findings about M, in particular that she loved J very much, she is his only relative in this country and they have a very strong bond. M was also given credit for the work that she had put in place to gain a support network in London and the work that she had done for herself in learning how to cope with stress. However, the district judge was very concerned about the information that had arrived from Ireland. She was also concerned about M's inability to work with the professionals in the case and her apparent lack of insight.

15. The district judge concluded her short passage of analysis in the following terms:

> "However, my view is that given her inability to work [with] the professionals in this case, her lack of insight, and the history in Ireland I find she will be unable to prioritise J's needs

> when she finds herself in the inevitable stressful situation of looking after J full time."

16. In terms of the structure of the judgment, the district judge went on to hold that the threshold criteria were met, she summarised the range of available orders as being a care order, a supervision order or no order at all and recorded that M "urges me to make no order at all and to return J to her care". The judge then records that the child's welfare must be the court's paramount consideration and then, by reference to the "welfare checklist" analysis conducted by the social worker in her final statement, the judge deals with the checklist by simply stating that she accepts the social worker's analysis. After a short passage in which the need to consider Article 8 of the European Convention on Human Rights is noted the judgment simply concludes as follows:

> "To make no order would leave J entirely unprotected and in my view given my reasons that is not appropriate.
>
> In this case the only order that will protect and safeguard J's welfare is a care order to allow the Local Authority to share parental responsibility. It is necessary and proportionate to the aim of promoting his welfare. He is a young boy with specific needs and requires security, stability and routine.
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> I will make a care order to the London Borough of Southwark in respect of J. In relation to the care plan I agree contact as agreed by the parties."

17. One of the criticisms raised by counsel who then represented the mother on appeal to HHJ Hughes was that the mother's case before the district judge was incorrectly stated in the typed judgment handed out by DJ Tempia in which it was stated: "M urges me to make no order at all and to return J to her care". Counsel submitted that M's case before the district judge accepted that there should be a public law order, but argued that the plan should be for rehabilitation of J to the mother's care either under a series of interim care orders or a supervision order. For the purposes of the appeal before this court we have seen the written submissions handed to the district judge by mother's counsel which plainly support that complaint and make express reference, both at their start and at their conclusion, to the making of a supervision order. The point was apparently raised with the district judge when her draft judgment was circulated and the judge made the following two handwritten amendments. The words "no order at all" to which I have made reference were deleted and replaced with "a supervision order", and the words "to make no order would leave J entirely unprotected and in my view, given my reasons, that is not appropriate" are deleted.

18. In support of her appeal to HHJ Hughes, mother's counsel filed combined Grounds of Appeal and skeleton argument. The second ground was that "the learned judge erred in mistakenly understanding that the mother sought the return of J with no order". The third ground was "the learned judge did not undertake a balancing exercise in respect of the harm J may suffer by not being returned to the mother's care".

19. At the appeal hearing on 23rd July 2012 HHJ Hughes dealt with these two points shortly and it is convenient to quote the relevant parts of her judgment in their entirety:

> "3. I think there is even less substance in the second point because it seems to me that it is all very well to say the mother showed insight by saying a supervision order and the district judge was wrong to say the mother was seeking no order, but actually it does not matter what labels are put on things. The fact is the judge is considering this case and she is considering the facts in this case and a mistake like 'she is urging me to make no order at all' when she is actually saying 'I am willing to have a supervision order', I think, is neither here nor there, to be honest. It was corrected at the end of the hearing. Apparently, it was mentioned during the hearing and it does not, to me, affect the mother's level of insight one way or the other whether she is asking for a supervision order or she is asking for no order. So I am afraid I do not find that point proved.
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> 4. I think the most important point in regard to this appeal is the third point that is made because what is said is that she has not weighed the evidence and she has not conducted the balancing exercise. I am not with the mother in that in this sense that, if you read this judgment carefully, she has taken into account both sides. I appreciate she has not specifically said, 'I take into account the welfare checklist' and she has not said, 'the harm to the boy if he stayed with mother would be this' and 'the harm if he went in the care of the Local Authority would be this' and 'I prefer this or that'. I accept that that has not been done, but I am not willing to say in this case she has not conducted a balancing exercise.
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> 5. I am afraid, in all the circumstances, I am not prepared to say this district judge was plainly wrong in the position that she came to or the way she reached her decision. Therefore, this appeal must be dismissed."

20. Despite the fact that the mother's application to this court was for a second appeal, thereby engaging the enhanced test in Civil Procedure Rules 1998, r 52.13, I granted permission to appeal on 14th March 2013 on the limited basis set out in grounds 2 and 3 of the mother's original Grounds of Appeal. In doing so I concluded that the mother had little prospect of success were she to seek to challenge the very thorough investigation and analysis of the available evidence that had been conducted by the district judge and which supported the conclusions which were adverse to the mother's case to which I have already made reference.

21. Before this court the mother has been represented by counsel, Mr Dennis Sharpe, who has concentrated his submissions on grounds 2 and 3 to the effect that the district judge failed to undertake an adequate balancing exercise or to consider the

proportionality of permanent separation between mother and child when set against the adverse findings that had been made. Mr Sharpe submits, in particular, that, having made a finding that there was "a very strong bond" between M and J, the judge failed to bring that finding in to any form of balancing exercise. Mr Sharpe summarised his core submission in terms which are both robust and attractive by saying "despite the length of the judgment, when we get to the bit that matters, the district judge needed to carry out a balancing exercise to identify the risks of separating J from M in contrast to the risks of returning home." His case is that the judge plainly failed to undertake that key task.

22. The appeal is opposed by Mr Nicholas Horsley on behalf of the Local Authority and Miss Michelle Powell on behalf of the Children's Guardian. Mr Horsley accepted that the district judge did not embark on a lengthy analysis of the options open to the Court and did not set out any discussion at all on the prospect of a supervision order. However, he submits that by the time the judge reached the stage of considering which order to make, she had already ruled out the prospect of J being placed in the mother's care and therefore the only viable option was to make a care order to allow the Local Authority to share parental responsibility. Mr Horsley points to the fact that in the social worker's final statement reference is made to the possibility of making a supervision order and the opinion is expressed that such an order "would not ensure that J's needs are fully met and that he is safeguarded".

23. Miss Powell drew our attention to the fact that in the judge's summary of the social worker's evidence reference is made to a supervision order and the social worker's view that in Ireland the mother had indicated an intention to co-operate during the court proceedings but that that state of affairs seemingly evaporated as soon as those proceedings ended. Miss Powell agreed that the district judge had not set out the various options for J's future care that lay between the making of a full care order and the simple return of the child to the care of his mother without any order being made. However, she points to the fact that the Children's Guardian had ruled out a community based outcome and submits that the district judge was entitled to rely upon that analysis. Finally, Miss Powell submitted that there was nothing to be gained by remitting the case now for a re-hearing as the end result would be exactly the same.

24. Given the argument made by Mr Sharpe in relation to proportionality when considering the outcome for the child as against the level of harm indicated in the threshold document, reference was made to the recent authority in this court (Rix, Black and Lewison LJJ) *Re: B (A child)* [2012] EWCA Civ 1475 on this point. *Re: B* had subsequently been considered by the Supreme Court and at the time of the hearing before us their Lordships' judgments had not been handed down. Given that the degree of urgency in the present case is not at its highest, it was agreed by all parties that we should postpone giving our judgments in the present case until the Supreme Court's determination in the case of *Re: B* was available.

25. As matters have turned out, our decision to await the Supreme Court's judgments in *Re B (A Child)* [2013] UKSC 33 was additionally justified by the fact that a significant part of their Lordships' judgments has focussed upon the role of an appellate court in public law children proceedings; a topic which is at the heart of second limb of this appeal.

26. The Supreme Court decision in *Re B* is rich in detail in relation to the approach to ECHR, Art 8 proportionality in a public law children case and in relation to the role of the appellate court. The full impact of *Re B* may fall to be considered in future cases to a greater extent than is necessary for the determination of the present appeal. I therefore propose simply to refer to those parts of their lordships' judgments which appear to be particularly relevant to this case.

27. In very short terms, the question of proportionality under ECHR, Art 8 arose on the facts of *Re B* in circumstances where the statutory threshold criteria in Children Act 1989, s 31 were satisfied on a relatively modest factual basis, yet the final orders made by the court were at the highest level of interference with Art 8 rights to family life, namely a care order and an order under Adoption and Children Act 2002, s 21 authorising the local authority to place the child for adoption. Lord Wilson SCJ, with whom, on this point, the other Justices either agreed or did not expressly disagree, concluded (paragraph 29) that the crossing of the s 31 threshold does not, of itself, engage Art 8. Once the threshold criteria are satisfied, the question of what, if any, order is to be made plainly does engage Art 8. Where, as was the case in *Re B*, placement for adoption is being considered, Lord Wilson (paragraph 34) held that both domestic law and ECHR law require a 'high degree of justification' before such an outcome is endorsed as being 'necessary' (ECHR, Art 8) or 'required' (ACA 2002, s 52(1)(b)).

28. Lord Neuberger PSC focussed upon the correct legal test to be applied to the decision of whether or not to make a care order, once the s 31 threshold has been crossed. *Re B* concerned a case at the extreme end of state intervention, namely the permanent removal of a child and placement for adoption against the will of a parent. The words of Lord Neuberger must therefore be read with that context in mind. The determination in the present case, removal of the child to public care with limited ongoing parental contact for an indefinite period which may run for 10 years, being the remainder of his childhood, whilst being of a lower order of intervention, must, in my view, fall to be considered in like manner with the difference in the level of intervention being reflected in the application of the yardstick of proportionality and thus the evaluation of whether the proposed order and care plan are 'necessary'.

29. Given the general application of the approach described by Lord Neuberger it is helpful to set out his words at paragraphs 73 to 78 in full at this point:

> 73. "I turn to consider the first question, which involves first identifying the correct test. The effect of section 1(1) of the 1989 Act is that, when considering whether to make a care order, the court must treat the welfare of the child as the paramount consideration, and this involves taking into account in particular the factors identified in section 1(3), which includes, in para (g), the range of powers available to the court. As Lady Hale (who knows more about this than anybody) says in para 194, the 1989 Act was drafted with the Convention in mind; in any event, with the coming into force of the Human Rights Act 1998 ("the 1998 Act"), the 1989 Act must now, if possible, be construed and applied so as to comply with the Convention. So too the Adoption and Children Act 2002 ("the 2002 Act") must, if possible, be construed and applied so as to comply with the Convention. It also appears to me that the 2002 Act must be construed and

applied bearing in mind the provisions of the UN Convention on the Rights of the Child 1989 ("UNCRC").

74. A care order in a case such as this is a very extreme thing, a last resort, as it would be very likely to result in Amelia being adopted against the wishes of both her parents.

75. As already mentioned, it is clear that a judge cannot properly decide that a care order should be made in such circumstances, unless the order is proportionate bearing in mind the requirements of article 8.

76. It appears to me that, given that the Judge concluded that the section 31(2) threshold was crossed, he should only have made a care order if he had been satisfied that it was necessary to do so in order to protect the interests of the child. By "necessary", I mean, to use Lady Hale's phrase in para 198, "where nothing else will do". I consider that this conclusion is clear under the 1989 Act, interpreted in the absence of the Convention, but it is put beyond doubt by article 8. The conclusion is also consistent with UNCRC.

77. It seems to me to be inherent in section 1(1) that a care order should be a last resort, because the interests of a child would self-evidently require her relationship with her natural parents to be maintained unless no other course was possible in her interests. That is reinforced by the requirement in section 1(3)(g) that the court must consider all options, which carries with it the clear implication that the most extreme option should only be adopted if others would not be in her interests. As to article 8, the Strasbourg court decisions cited by Lady Hale in paras 195-198 make it clear that such an order can only be made in "exceptional circumstances", and that it could only be justified by "overriding requirements pertaining to the child's welfare", or, putting the same point in slightly different words, "by the overriding necessity of the interests of the child". I consider that this is the same as the domestic test (as is evidenced by the remarks of Hale LJ in *Re C and B* [2001] 1 FLR 611, para 34 quoted by Lady Hale in para 198 above), but it is unnecessary to explore that point further.

78. The high threshold to be crossed before a court should make an adoption order against the natural parents' wishes is also clear from UNCRC. Thus, *Hodgkin and Newell, Implementation Handbook for the Convention on the Rights of the Child*, Unicef, 3rd ed (2007), p 296, state that "there is a presumption within the Convention that children's best interests are served by being with their parents wherever possible". This is reflected in UNCRC, which provides in article 7 that a child has "as far as possible, the right to know and be cared for by his or her parents", and in article 9, which requires states to ensure that

> 'a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child"'.

30. Later in his judgment (paragraphs 104 and 105), Lord Neuberger returned to this theme and, again, I consider that his words are relevant to the circumstances of this case, albeit allowing for proportionality to be evaluated in the context of a decade of long-term fostering as opposed to adoption:

> 104. "We were not addressed on [Article and cases referred to]. However, they all give added weight to the importance of emphasising the principle that adoption of a child against her parents' wishes should only be contemplated as a last resort – when all else fails. Although the child's interests in an adoption case are "paramount" (in the UK legislation and under article 21 of UNCRC), a court must never lose sight of the fact that those interests include being brought up by her natural family, ideally her natural parents, or at least one of them.
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> 105. Hodgkin and Newell, *op cit*, suggest that, under UNCRC, an "adoption can only occur if parents are unwilling or are deemed by judicial process to be unable to discharge" their responsibilities towards the child. The assessment of that ability to discharge their responsibilities must, of course, take into account the assistance and support which the authorities would offer. ... It means that, before making an adoption order in such a case, the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support."

31. Lady Hale SCJ, who agreed with the other members of the court on this point, summarised the position succinctly (paragraph 145): "We also all agree that a court can only separate a child from her parents if satisfied that it is necessary to do so, that 'nothing else will do'."

32. The second aspect of the Supreme Court decision in *Re B* which is relevant to the present appeal arises from their lordships' clarification of the necessary role of an appellate court where there is a challenge to the proportionality of a public law order authorising local authority intervention under CA 1989. Whilst the type of intervention considered in *Re B* was adoption, in my view the approach to be deployed must similarly apply to lesser forms of intervention. On this aspect the majority of the Justices (Lord Neuberger, Lord Clarke and Lord Wilson) concluded that the duty on a court, as a 'public authority', not to act in a manner which is incompatible with the Convention under Human Rights Act 1998, s 6(1) does not mandate the appellate court to undertake a fresh determination of a Convention-related issue (paragraphs 37, 83 to 90 and 136). The majority did not therefore hold that there was a need for a radical departure from the conventional domestic concept of a 'review' of a case on appeal, as opposed to a full re-appraisal on the issue of proportionality. The traditional appellate approach to issues of pure judicial discretion has been that of recognising the generous ambit of reasonable disagreement and only intervening where the judge's decision is seen to be outside that ambit and is 'plainly wrong' (per *G v G* [1985] 1 WLR 647). All five SCJ's however identified that that ('plainly wrong') approach does not apply to an appellate review of the evaluative determination of whether the s 31 threshold is crossed; such a review is to be

conducted by reference simply to whether the determination is 'wrong' (paragraphs 44, 91, 138 and 145).

33. Moving on from consideration of the s 31 threshold criteria, all five SCJ's were agreed that the task of a trial judge making the ultimate determination of whether to make a care order was 'more than to exercise a discretion' (Lord Wilson SCJ, paragraph 45). The trial judge's task is to comply with an obligation under HRA 1998, s 6(1) not to determine the application in a way which is incompatible with the Art 8 rights that are engaged. The majority in the Supreme Court went on from that unanimous position relating to the role of the *trial* judge, to hold that 'the review which … falls to be conducted by the appellate court must focus not just on the judge's exercise of discretion but on his compliance or otherwise with an obligation' (paragraph 45). The 'plainly wrong' criteria in *G v G* being held to be 'inapt' for such a review.

34. Lord Wilson SCJ describes the approach to be taken on appeal in relation to the making of a care order at paragraphs 46 and 47:

> "46. Lord Neuberger, at paras 90 and 91, and Lord Clarke, at para 139, suggest that the criterion for appellate review of an ultimate determination to make (or to refuse to make) a care order should, as in respect to the threshold, be whether it was wrong (or vitiated by serious irregularity). Just as in my view rule 52.11(1) of the Civil Procedure Rules helps to identify the roles of an appellate court in a challenge to the determination of a Convention-related issue, so, as Lord Clarke there suggests, rule 52.11(3) helps to identify the criterion which it should adopt in that it provides: "The appeal court will allow an appeal where the decision of the lower court was – (a) wrong; or (b) unjust because of a serious procedural or other irregularity …". I agree. To be driven to jettison the principles in *G v G* in this context is not to say that the factors which often vitiate the exercise of a discretion – namely that the judge considered an irrelevant matter, failed to consider a relevant matter, erred in law or applied a wrong principle – become irrelevant. On the contrary they may well generate a conclusion that the determination was wrong and should be set aside and either that it should be reversed or that the application should be remitted for consideration afresh. By contrast a judge's failure to give adequate reasons for his determination is likely to lead to its being set aside as unjust within the meaning of rule 52.11(3)(b).
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> 47. There is therefore an attractive symmetry between the criterion for review of a determination of whether the threshold is crossed and that for review of a determination of whether a care order should be made. In each case it is no more and no less than whether the determination is wrong. But the simplicity of the criterion should not disguise the difficulty, in some cases, of its application."

35. Lord Neuberger (paragraph 93) presents a helpful dissection of the various layers of possible appellate conclusion in any given case in order to identify those cases where the first instance decision will be 'wrong' and therefore meet for appeal:

> "There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say

was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii)."

36. Following receipt of the Supreme Court decision in *Re B*, we invited counsel to make further written submissions in the light of their lordships' judgments. Mr Sharpe, for mother, dealing with proportionality accepted that the district judge had used the words 'necessary' and 'proportionate' in the sentence set out at paragraph 16 above, but, he submits, the judge gave no reason why the only order that would 'do' is a care plan for long term fostering (particularly when set against the positives that the district judge had recognised).

37. On the question of the correct approach on appeal, Mr Sharpe respectfully questions whether HHJ Hughes was acting correctly in simply assuming that the district judge had conducted the necessary balancing exercise, notwithstanding the absence of any reference to that exercise in the judgment.

38. Mr Horsley, on behalf of the local authority, submits that the process both at first instance and on appeal was compatible with the principles set out by the Supreme Court in *Re B*. He argues that the district judge's choice of a care order was proportionate once she had concluded, as she did, that there was a need for the local authority to share parental responsibility. In relation to the first appeal, Mr Horsley supports HHJ Hughes' judgment on the basis that, although it may be terse, the judge was alive to all of the points and dealt with them satisfactorily.

39. Miss Powell for the child argues that the district judge correctly summarised the approach to the issue of proportionality in a manner which is entirely consistent with Lord Wilson's description at paragraph 33 of *Re B* and she applied that approach to the facts and to her conclusion that this mother was simply unable to meet her child's needs.

40. In relation to HHJ Hughes' role, Miss Powell submits that, given the very detailed judgment at first instance, it was not necessary on appeal for the circuit judge to do more than she did do in making her own analysis. The use of the phrase 'plainly wrong' in those pre-*Re B* days does not detract from the fact that the correct approach was applied. In any event, Miss Powell submits that the district judge's decision was so clearly 'right' that one gets no further than point (i) on Lord Neuberger's scale. Finally, we are cautioned against opening the floodgates to other cases by allowing this appeal simply on the basis that the district judge did not specifically address the proportionality of her decision to approve long term fostering, as opposed to a return to parental care where the child was likely to suffer significant harm.

Discussion

41. The arrival of the Supreme Court decision in *Re B* during the period immediately following the hearing of this appeal has been both timely and welcome. The uneasiness about the process at first instance and on the first appeal that had caused me to grant permission to appeal did not abate during the Court of Appeal hearing. Each of the judgments in *Re B* stresses the central importance of a proportionate

approach, where the court may only authorise a significant intervention into the family life rights of a parent and child where the child's welfare renders such intervention necessary and, where that intervention is extreme - 'nothing else will do'. Each of the judgments is clear that the *G v G* approach on appeal, with the appellate court only interfering where the judgment below is 'plainly wrong', is not appropriate to a review of a judicial decision which engages with the duty in HRA 1998, s 6(1); in such cases, in so far as there is a difference between 'plainly wrong' and 'wrong' (point (vii) and point (v) on Lord Neuberger's scale), the appellate court has a duty to intervene at point (v) rather than only at point (vii). The majority in the Supreme Court hold that the appellate process should be limited to a review, rather than a fresh determination on the issue of proportionality, but the clear message is that any such review must be a proper process conducted by a judge who is fully alive to the duty for the court process as a whole not to contravene the duty in HRA 1998, s 6(1).

42. At the start of this judgment I placed the focus of the appeal upon the process adopted both at first instance and on the initial appeal. My concern is not, at this stage, to question whether the outcome determined by the district judge may be 'wrong', but whether she conducted her analysis of the options for the child in a manner which properly engaged with the duty not to determine the application in a way which is incompatible with the Art 8 rights that were engaged. In like manner, my concern about the first appeal is upon the process adopted by the judge, rather than upon the outcome of that process; the focus is therefore upon whether the judge can be said to have discharged the duty on an appellate court to conduct an effective review as to proportionality,.

43. Before moving on, I would like to acknowledge the strong professional sympathy that I feel for DJ Tempia and HHJ Hughes who find themselves in the invidious position of having their judgments subjected to scrutiny by the Court of Appeal armed, as it always is, with 20/20 hindsight but, on this occasion, also armed with a strong decision from the Supreme Court that has been injected into the mix between their respective involvements in the case and this judgment. I wish to stress that the observations that now follow are made in this case because it provides the opportunity to do so, and not because there is anything in these two judgments which is worthy of additional individual criticism. My working life is now spent very largely in reading first instance, and less frequently, first level appeal judgments. The concerns that I have about the process in this case are concerns which have also been evident to a greater or lesser extent in a significant number of other cases; they are concerns which are now given sharper focus following the very clear wake-up call given by the Supreme Court in *Re B.* I therefore hope that DJ Tempia and HHJ Hughes will be stoic and may see their judgments in this case as being the unwitting launch vehicles for what now follows, rather than its specific target.

The welfare evaluation at the conclusion of care proceedings

44. The Supreme Court judgments in *Re B* have made it clear that, following the process of finding any relevant facts, the court in a public law children case must first make an evaluation to determine whether the statutory threshold criteria in CA 1989, s 31 are established with respect to the individual child or children as at the relevant date. If the threshold criteria are established, the final stage of the proceedings involves the court evaluating which set of arrangements for the child's future care are to be

endorsed by the court's order and that evaluation is conducted by affording paramount consideration to the child's welfare ('the welfare evaluation').

45. Under CA 1989, s 1(1)(a) "when a court determines any question with respect to the upbringing of a child … the child's welfare shall be the court's paramount consideration". The paramountcy principle in s 1 therefore applies when the court determines 'any question' with regard to a child's upbringing. In any given case there will be a central welfare question as to the child's upbringing that falls for determination. In the present case the question was 'should this child be rehabilitated to M's care, with or without a statutory order, or should he be placed under a care order with a plan for long-term fostering?'. A single holistic question of this type is, in structural terms, distinct from a series of isolated linear questions where, at no stage, are the pros and cons of each option balanced against each other in a single process.

46. Where the options for the child do not include placement for adoption or adoption, the court will apply the 'welfare checklist' in CA 1989, s 1(3) to the welfare evaluation. The wording of certain elements of the welfare checklist must, I would suggest, involve a direct comparison of the relevant options that are being considered, for example:

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

47. Under s 1(3)(c), consideration of the effect of any change in the child's circumstances must involve considering, in the present case, not just the prospect of returning to the mother's care but must include consideration of the effects, positive and negative, of placement in long-term foster care. Under s 1(3)(e), consideration of the risk of harm obviously will include the potential for future harm from parental care, but must also require evaluation of any risk of harm from the alternative option provided by 'any other person', namely the local authority as corporate parent, for example emotional harm as a result of long-term separation of a child from his parent. Under s 1(3)(f), when considering how capable 'each of his parents, and any other person' are to meet the child's needs, again I would suggest that, alongside consideration of the parent's capacity, there is a need to look at the strengths and detriments in the local authority's capacity to meet his needs through long-term fostering.

48. Where the issues before the court include the option of adoption, then the evaluation must be undertaken in the context of the welfare provisions within the Adoption and Children Act 2002, s 1. In an application under the ACA 2002, s 1(2) provides that 'the paramount consideration of the court … must be the child's welfare, throughout his lifetime'. Given the focus that this judgment gives to the need to take into account the negatives, as well as the positives, of an plan to place a child away from her natural family, it is of particular note that s 1(4)(c) in the ACA 2002 welfare checklist requires the court to have regard to: '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'.

49. 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.

50. The linear approach, in my view, 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.

51. One only has to take an extreme example of the effect of linear consideration to see the potential danger for this approach. The linear model proceeds by evaluating and then eliminating each individual option in turn before selecting the option at the end of the line, without evaluation of its own internal merits or de-merits, simply on the basis that it is the only remaining outcome. Much therefore depends on which end of the line the selector starts the process. Conventionally those judges who deploy a linear approach start, for understandable reasons, with the option of rehabilitation to a parent and end with the option of a care or adoption order. If, however, for the purposes of observing the dangers in the process, one were to start at the other end of the line and look at long-term foster care or adoption first, and were then to rule that out on the basis that there are risks and negatives attaching to it, the linear approach would soon arrive at 'rehabilitation to a parent' as the only remaining option and select that without any consideration of whether that is in fact the best outcome for the child. All would agree that such an approach would be untenable. I hope, however, that this example demonstrates how inappropriate the linear model is for a judge who is tasked with undertaking a multi-faceted evaluation of a child's welfare at the end of which one of a range of options has to be chosen.

52. In the present case, Mr Horsley's submission (recorded at paragraph 22 above) to the effect that by the time the judge came to considering which order to make, she had already ruled out the prospect of J being placed in the mother's care and therefore the only viable option was to make a care order, is, with respect, a classic description of the linear approach and, for the reasons I have given, it should not be deployed by a court charged with making a choice between two or more options in relation to a child's welfare.

53. A further concern about the linear model is that a process which acknowledges that long-term public care, and in particular adoption contrary to the will of a parent, is 'the most draconian option', yet does not engage with the very detail of that option which renders it 'draconian' cannot be a full or effective process of evaluation. Since the phrase was first coined some years ago, judges now routinely make reference to the 'draconian' nature of permanent separation of parent and child and they frequently do so in the context of reference to 'proportionality'. Such descriptions are, of course, appropriate and correct, but there is a danger that these phrases may inadvertently become little more than formulaic judicial window-dressing if they are not backed up with a substantive consideration of what lies behind them and the impact of that on

the individual child's welfare in the particular case before the court. If there was any doubt about the importance of avoiding that danger, such doubt has been firmly swept away by the very clear emphasis in *Re B* on the duty of the court actively to evaluate proportionality in every case.

54. In mounting this critique of the linear model, I am alive to the fact that, of course, a judgment is, by its very nature, a linear structure; in common with every other linear structure, it has a beginning, a middle and an end. My focus is not upon the structure of a judge's judgment but upon that part of the judgment, indeed that part of the judicial analysis before the written or spoken judgment is in fact compiled, where the choice between options actually takes place. 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.

55. If authority is required to support the need for the court to place all of the countervailing factors into the scales in order to evaluate which option, on balance, best meets the welfare needs of the child, it is not necessary to look further than the House of Lords decision in *J v C* [1970] AC 668, a decision which remains authoritative on this point, where Lord MacDermott said that the welfare principle connotes:

> 'a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term is now understood.'

56. Finally, before turning to the first instance welfare determination in the present case, I should make reference to those occasions when judges may use a phrase such as 'first consideration' when referring to the weight that is to be given to the relationship between a child and her parents and natural family. In the light of *Re B (A Child)* [2013] UKSC 33, with the repeated use in their Lordships' judgments of phrases such as 'high degree of justification', 'necessary', 'required', 'a very extreme thing', 'a last resort' and 'nothing else will do', it is clear that the importance of a child either living with, or maintaining a relationship with, her parents and natural family has certainly not been reduced. In this regard I would expressly link what I have said in this part of this judgment with that of Black LJ (which is being handed down today) in *Re P (A Child)* [2013] EWCA Civ 963.

The first instance welfare determination in this case

57. In my view, despite the impressive factual analysis that takes up the main body of the judgment, the district judge's conclusion in the present case fails to indicate that the judge undertook an holistic evaluation of the welfare options for J's future in the manner that I have described. Mr Sharpe's submission that 'when we get to the bit that matters, the district judge needed to carry out a balancing exercise to identify the risks of separating J from M in contrast to the risks of returning home' is entirely well made.

58. The decision facing the court was not a straight forward one. The level of harmful parenting, and the risk of future harm, was established, but was not at the most grave

end of the spectrum. The mother loved J very much, she was his only relative in this country and they had a very strong bond. The expert assessment demonstrated that, whilst the mother had a clear potential to respond adversely to stress, this aspect of her personality was within the range of normality. There had been an essentially favourable parenting assessment. However, M lacked insight, had difficulty in working with professionals and was likely to be unable to prioritise J's needs at times of stress. Placing J for an indefinite period, which might extend for the remaining ten years of his minority, in public foster care would be likely to protect him from the potential for harm that had been identified, but was an option which would inevitably weaken or extinguish the very strong bond with his mother and would be likely to expose J to the well known detriments that can be experienced by any child in long term foster care. The only analysis of the countervailing factors that were in play in the district judge's judgment is that set out above at paragraphs 15 and 16 and it amounts to no more than a statement of the judge's conclusions that:

a) the mother will be unable to prioritise J's needs when she finds herself in the inevitably stressful position of looking after J full time;

b) to make no order would leave J entirely unprotected and is therefore unacceptable;

c) the only order that will protect and safeguard J is a care order;

d) he is a young boy with specific needs and requires security, stability and routine;

e) a care order is therefore necessary and proportionate to the aim of promoting his welfare.

59. Although the district judge does record the children's guardian's evidence to the effect that it cannot be said that there are no risks in foster care and a placement can breakdown, the judicial analysis, which is undertaken prior to consideration of threshold and prior the short references to CA 1989, s 1 and ECHR, Art 8, is entirely focussed upon the mother. It is, in short, a linear analysis in which the mother is ruled out and therefore the only remaining option, and the one therefore endorsed by the court without further consideration, is long term fostering under a care order. The two options are never considered side by side as part of an holistic balancing exercise in which the pros and cons for each are weighed up and a express choice is made between the two by applying J's welfare as the paramount consideration.

60. In the context of proportionality and the Supreme Court judgments in *Re B*, and despite accepting as I do that the district judge concludes that the mother would be unable to prioritise J's needs at times of stress, nowhere does the judge contemplate why that conclusion renders permanent separation of mother and child as being 'necessary' on the basis that it is the 'last resort' and 'nothing else will do'.

61. Further, at no stage during her short conclusion does the district judge make any reference to the care plan (long term fostering) other than to state that a care order will allow the local authority to share parental responsibility and the court endorses the contact arrangements agreed between the parties.

62. In addition I consider that the criticism that the judge had failed to give any consideration to the option of making a supervision order is well made. The process of simply altering the wording of the draft judgment to change the phrase 'the mother urges me to make no order at all' to 'the mother urges me to make a supervision order', does not indicate that the judge engaged in considering whether the making of a supervision order may indeed be the proportionate outcome on the facts of this particular case. Here the endorsement by Lord Neuberger at paragraph 105 of *Re B* [quoted at paragraph 30 above] of the phrase 'the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support' is plainly relevant.

63. It follows that I consider that the appeal heard by HHJ Hughes should have been allowed. In expressing this conclusion, it is necessary to stress that I do so solely on the basis that the judge failed to carry out the required balancing exercise. That exercise will now fall to be conducted at a fresh hearing where, in addition to the evidence and information that was available to the district judge in April 2012, the judge will consider any relevant updating material in relation to the mother and J. In deciding this appeal as I do, I am in no manner expressing any view as to what the outcome of that evaluation should be, neither am I holding that the outcome chosen by the district judge was 'wrong'; these will be matters entirely for the judge who must now conduct the fresh hearing.

The first appeal

64. I have already summarised the Supreme Court judgment in *Re B* relating to the role of an appellate court in public law children cases [paragraphs 32 to 35 above]. It follows that there was a positive duty, under HRA 1998, s 6, upon the circuit judge in the present case to conduct a review of the first instance decision to make a care order in order to determine whether, in terms of proportionality, that decision was 'wrong'.

65. In a manner which is out of character for a tribunal noted for her great experience and often painstaking approach to teasing out the detail in a case, the judgment of HHJ Hughes is in this case extremely short. Although brevity of itself is by no means either unwelcome or evidence of judicial error, where, as is now even more clear than was the case at the time, there is a positive duty upon the appellate court to conduct a review of proportionality, the resulting judgment must demonstrate that that is what the judge has actually done.

66. I have already concluded that the district judge was in error in the manner in which she conducted the first instance welfare determination and that the appeal should have been allowed. It follows that I also conclude that HHJ Hughes was in error in dismissing the appeal. It is, however, necessary to go further and consider the substance of her appeal judgment, the relevant parts of which are set out in full at paragraph 19.

67. The judge's statements regarding the distinction between making 'no order' or making a supervision order to the effect that 'it does not matter what labels are put on things' and that the distinction is 'neither here nor there' are, in my view, untenable as a matter of law for the following shortly stated reasons:

i) In the welfare checklist at CA 1989, s 1(3)(g) the court is expressly required to have regard to 'the range of powers available to the court under CA 1989 in the proceedings in question';

ii) there is a clear distinction, when contemplating the range of orders, between making 'no order' and making a supervision order, the most prominent of which are:

a) a supervision order can only be made if the circumstances are sufficiently serious to meet the threshold criteria in s 31;

b) a supervision order places a named local authority under a duty to allocate resources in order to advise, assist and befriend the supervised child;

iii) there is a body of established case law which describes the differences between 'no order', a supervision order or a care order [*Re O (Care or Supervision Order)* [1996] 2 FLR 755; *Oxfordshire County Council v L (Care or Supervision Order)* [1998] 1 FLR 70 and *Re K (Supervision Orders)* [1999] 2 FLR 303].

68. Although it is fair to observe that the judge's judgment seems to be focussing upon a submission that the mother's willingness to accept a supervision order demonstrated an enhanced level of insight, that narrow submission, if made, should not have diverted the judge herself from considering whether or not the district judge had, as a matter of proportionality, given adequate consideration to the option of making a supervision order and whether the decision to make a care order, as opposed to a supervision order, was 'wrong' in terms of proportionality.

69. Secondly, for the reasons that I have already given, I consider that the district judge failed to conduct the necessary welfare balancing exercise and I therefore consider that HHJ Hughes was in error in holding that she was 'not willing to say that the judge has not conducted a balancing exercise'. Where, as here, a circuit judge accepts that the first instance judge has not expressly referred to the welfare checklist and has not expressly weighed up the harm of returning to the mother against the harm if the child went into local authority care, then, on the basis of the positive duty identified by the majority in *Re B,* the judge must go on and herself review the proportionality of the order that has been made to determine whether that order is 'wrong'.

70. For the reasons that I have given, I have therefore concluded that both the district judge and the circuit judge in this case erred significantly in the manner in which they discharged their respective roles in relation to these proceedings. As a result I would allow the appeal, set aside the care order and reactivate the interim care order that was in force prior to the final hearing. The interim care order will run initially for 28 days from the date of this judgment. In consequence there must inevitably be a rehearing of the local authority application for a care order. That hearing should be conducted at circuit judge level by a fresh tribunal and I would therefore direct that the matter is to be placed before the Family Division Liaison Judge for London for allocation.

Lord Justice Davis:

71. I agree.

Lord Justice Longmore:

72. I also agree.