Neutral Citation Number: [2020] EWCA Civ 787

Case No: B4/2020/0448

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE WEST LONDON FAMILY COURT
Recorder Thain
ZW18C00427 and ZW47/19

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2020

Before :

LORD JUSTICE BAKER
LADY JUSTICE CARR DBE
and
SIR STEPHEN RICHARDS

- -

IN THE MATTER OF THE ADOPTION AND CHILDREN ACT 2002
AND IN THE MATTER OF LC (PLACEMENT ORDER)

Between :

A LONDON BOROUGH	**Appellant**
- and -	
A MOTHER (1)	**Respondent**
A FATHER (2)	
LC (by her children's guardian) (3)	

- -
- -

Deirdre Fottrell QC and Richard O'Sullivan (instructed by **Local Authority Solicitor**) for the **Appellant**
James Holmes (instructed by **Duncan Lewis Solicitors**) for the **Second Respondent**
Gemma Taylor QC and Philip McCormack (instructed by **Harris Temperley LLP**) for the **Third Respondent**
The First Respondent was present but not represented.

Hearing date: 4 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals

Judiciary website. The date and time for hand down is deemed to be 10:30 on Tuesday 23 June 2020

LORD JUSTICE BAKER:

1. This is an appeal by a local authority against the decision of Recorder Thain dated 7 February 2020 to refuse the authority's application for a placement order in respect of a child, hereafter referred to as LC, who was born in May 2018 and is therefore now aged two.

2. LC is the youngest of three children in her family. She has two older brothers, X, now aged eight, and Y, aged seven. Their father is a 56-year-old man of Indian heritage who was married on three previous occasions before his relationship with the children's mother. Thirty years ago, he was convicted of incest as a result of a sexual relationship with his younger sister which started when she was seven years old and he was aged fourteen and continued for some ten years. The father has five older children by his earlier marriages. In all of those marriages, there were allegations of domestic abuse, and allegations of harassment following the breakdown of the relationships.

3. The children's mother is a 24-year-old woman of Hungarian Roma heritage with learning difficulties and a diagnosis of paranoid schizophrenia. She had a very troubled upbringing, having been sexually abused as a child and left unsupported by her own mother with whom she has a difficult relationship.

4. The parents' relationship started in 2011 at a point when the mother was sixteen years old. She and her extended family moved into a house owned by the father. The mother quickly became pregnant and gave birth to X in early 2012. Her second son, Y, was born the following year. Local authority social services and the police were involved on several occasions in the next few years because of concerns about the father's previous conviction and allegations that he was physically abusive towards the mother. In May 2015, the mother was admitted to hospital because of concerns about her mental health. Her condition improved with medication but deteriorated again in 2017 when she stopped the treatment with the intention of having another baby.

5. Following LC's birth in May 2018, she and her mother were placed together in a hospital ward where they received 24-hour support from mental health staff. The mother's condition worsened and she was reported as hearing voices and displaying violent behaviour towards the father. A social work visit to the family home revealed that the property was in a very poor condition with the whole family sleeping together in the living room because the bedrooms were unusable. The children were placed under child protection plans following a case conference. There were further reports of domestic abuse between the parents and no evidence of significant improvement in the condition of the home.

6. In July 2018, the parents agreed to the three children being accommodated by the local authority under s.20 of the Children Act 1989. The following month, the authority started care proceedings in respect of the children. Upon removal from home, the children were placed together in a foster placement in Kent. It is agreed that they thrived in that placement, but in October 2018 the local authority decided to move the children to another foster placement within its own area. In her judgment, the recorder noted that it was generally accepted that the second placement, although a closer cultural match, was less nurturing and supportive for the children. In July 2019, the foster placement came to an end and the children were moved, on this occasion to separate placements,

with the boys placed in one foster home and LC in another. The sibling relationship was maintained through family contact three times a week.

7. The final hearing of the care proceedings was listed before the recorder for five days, beginning 30 September 2019. The local authority sought final care orders in respect of all children, on the basis of care plans which provided for the boys to be placed together in long-term foster care and LC placed for adoption. An application for a placement order for LC was issued and listed for determination at the hearing. The parents opposed the applications and asked the court to return the children to their care. The children's guardian supported the application for care orders but opposed the application for a placement order in respect of LC. Her preference was for all three children to be placed together, preferably in the foster home in Kent where they had thrived after being removed from the family home, or alternatively with another experienced foster carer.

8. In her first judgment, delivered after the conclusion of the hearing on 4 October 2019, the recorder concluded that the threshold criteria under s.31 of the Children Act were satisfied and that there was no realistic prospect of the children being returned to the care of the parents, but that it was not possible to reach a final decision about the placement of the children at that stage. She therefore adjourned the hearing, initially for one month, for the local authority to file further evidence.

9. It is unnecessary for the purposes of this appeal to consider the threshold findings in any detail. Suffice it to say that the recorder made a series of findings that the children had suffered neglect, had been exposed to domestic abuse between the parents and had been subjected to excessive physical chastisement. She also found that the parents had failed to prioritise the children's needs or to establish and maintain routines and boundaries, that they had shown no insight into the effect of their parenting on the children's emotional development, and that the mother's mental health problems made it likely that she would become emotionally and physically unavailable to the children in future. The recorder concluded that the children's psychological functioning had been significantly affected by the trauma and deprivation they had endured.

10. In conducting the welfare analysis, the recorder had the benefit of expert evidence about the parents from a clinical psychologist, a forensic psychiatrist, and a PAMS parental assessor. On the basis of that evidence, coupled with the evidence given by the social workers and the parents themselves, the recorder concluded that a rehabilitation of the children with the parents, either together or separated, was not a realistic option for their future care. That decision does not form part of the appeal before us and it is unnecessary to consider the reasons for the decision any further.

11. The recorder also had evidence from a clinical psychologist who had conducted an evaluation of the children. She approached his report with some caution because of criticisms levelled at the report by a number of professionals. In particular, none of the parties accepted his recommendation that the boys should be separated. The children's allocated social worker gave evidence of a close bond between the brothers which led the recorder to conclude that separation would be wholly contrary to their best interests. The recorder took into account, however, the psychologist's observation that LC's behaviour indicated a lack of secure attachment as a result of the deficiencies in her mother's care in the first weeks of her life, coupled with the subsequent moves between foster carers.

12. The principal difficulty facing the recorder at the hearing in September/October 2019 arose from the disagreement between the local authority and the guardian about LC's future care. When he gave his evidence, the allocated social worker was at a disadvantage because the guardian's proposal to return all three children to the foster carers in Kent had only been put forward at a relatively late stage and no enquiries had been made to establish whether they would be willing to take the children. Having noted the disadvantage which the social worker was under, however, the recorder was critical of his approach in these terms (paragraph 79 of her first judgment):

> "However, without having had the chance to consider this proposal fully, I was struck by the social worker's insistence that such a plan would be wrong for LC because, at her age, she required permanence that could only be achieved through adoption. I found that answer lacking in any real analysis of the individual needs of this young child, and the answers appeared to be more in line with a policy decision based on age as opposed to an approach where there was a proper welfare analysis."

The recorder was also critical of the evidence from the local authority's permanence team which she described as being out of date and providing little by way of analysis in matching the individual needs of the children to reliable information about placement or timescales.

13. On the other hand, the recorder was strongly influenced by the evidence given by the guardian whom she described as an extremely impressive witness. By the time she gave her evidence, the guardian had spoken to the foster carers in Kent who had expressed a willingness to offer a long-term home for all three children, although they were unwilling to adopt them or to become their special guardians. One difficulty, however, was that at that point they were looking after another sibling group who were awaiting a final decision about their future. The guardian spoke in what the recorder described as "glowing terms" about the Kent foster carers, noting the impact of their care on the boys and the significant emotional connection they had made. The boys told the guardian that they wanted to move back to the Kent carers "tomorrow".

14. The guardian's proposal was therefore for an adjournment to allow further investigations to made about the feasibility of returning the children to the foster carers in Kent. In the alternative, she proposed that the local authority should make enquiries about the possibility of another foster placement for all three children. The principle of keeping the three siblings together was her primary position, with adoption as the last resort. It was the guardian's view that there was not less security or permanence in long-term foster care. She saw a positive benefit arising from the extensive support available to foster carers on a scale which would not be available to adopters. The guardian was also concerned about the risk of adoption breakdown and the catastrophic impact such a breakdown would have on LC. The recorder noted that the guardian was of the view that in LC's case the benefits of adoption were outweighed by the advantages of continuing a close relationship with her brothers and that there were frailties in LC's ability to form attachments which increased the risk of an adoption breakdown.

15. In her October judgment, the recorder set out the legal principles relevant to her welfare decision. At paragraph 151, she observed:

> "The case law emphasises that adoption is very extreme and must be the last resort to be approved only where nothing else will do. It must be necessary and required in the welfare interests of the child."

In the following paragraph, she reminded herself of the guidance given by this Court in *Re B-S* [2013] EWCA 1146 as to the need for the local authority and guardian to analyse the arguments for and against each realistically possible option for the children's future, and the need for an adequately reasoned judgment demonstrating that the court had conducted a global holistic evaluation of those options taking into account the negatives and positives of each.

16. In addressing the welfare analysis, the recorder noted, first, that the children's development had been profoundly affected by the poor parenting they had received. In particular, the boys' emotional, social and behavioural development had been affected. Of LC, the recorder noted (at paragraph 172):

> "LC's emotional needs were not met in the formative months of her life. The full impact of this is not yet known, but it is already evident that LC has been unable to form an attachment with a single carer. LC learned at an early age that her demands were not responded to by her mother. As a result, she does not make demands that should come naturally to a baby, she does not expect to receive attention and thus does not crave it. LC requires well-attuned and responsive carers with whom she can form a loving and trusting attachment, LC needs to learn that her needs will be met consistently and in a timely manner."

17. At paragraph 173, the recorder added:

> "LC is too young to understand her situation and cannot express her wishes and feelings. I have no doubt, however, that given the choice she would wish to remain part of her natural family. It is clear from the contact notes that she recognises her parents and brothers and responds well to them. She appears to be comfortable and content in the presence of her family, and particularly enjoys interaction with her brothers, who adore her."

18. Although she was able to conclude that rehabilitation to the parents was not a realistic option, the recorder found she was unable to decide between the options proposed by the local authority and guardian. At paragraph 182, she said:

> "There is an uneasy tension between the competing needs for permanence, and the need for the children to remain part of a sibling group. There are powerful arguments in favour of adoption for LC, but I am conscious that this is an option of last resort, and I must explore all realistic alternatives available. I am hampered in my decision-making due to a lack of clarity about the guardian's preferred option of placing the three children together with the foster carers in Kent. Without a clear permanent plan, I feel unable to conclude matters at this stage."

She therefore adjourned the matter for one month with a direction for further evidence to be filed about the timescales of a return to the Kent foster carers, and about searches for alternative foster carers who might be available for all three children, together with an update on LC's developing attachment with her current carer and the relationship between the siblings.

19. At the adjourned hearing in November 2019, however, the recorder found that the information provided by the local authority fell short of what she had expected when adjourning the hearing in October. The search for alternative foster placements for all three children was, in the judge's subsequent words, "extremely limited". As a result, the recorder was still unable to balance the available placement options and therefore adjourned the case for a further three months to enable the local authority to make good the deficiencies in the evidence.

20. By the time of the final hearing on 7 February 2020, the guardian's preferred option of returning the children to the foster carers in Kent had been abandoned because of the commitment those carers had to children currently in their care. The issues for the recorder had therefore narrowed. All parties agreed that the two boys should remain together in long term foster care. The guardian and the parents contended that LC should also be placed in long-term foster care, preferably in the same placement as the boys. The local authority, on the other hand, pursued its application for a placement order.

21. At the conclusion of the hearing, the judge delivered an ex tempore judgment which was notably shorter than her earlier judgment delivered in October 2019. She adopted the contents of her first judgment. She did not repeat the extensive summary of the law set out in the earlier judgment but stated that she had in mind all the guiding principles. She did, however, remind herself that she had to consider the welfare of each child separately and to have regard to the welfare checklists in s.1(3) of the Children Act and in s.1(4) of the Adoption and Children Act 2002, noting that, under the latter act, the statute required her "to determine for LC what is in her welfare interest for the rest of her life". She repeated that she was "conscious that adoption is an option of last resort, to be undertaken only where nothing else will do".

22. Although the parties were agreed as to the outcome for the boys, the recorder rightly considered whether the agreed proposal would meet their needs. She found that, for the boys, long-term foster care would provide them with stability and security and with carers who would meet their needs. She observed:

> "They will benefit enormously from having each other within the placement. That is not only because they have shared experiences in their lives and can be there to support each other and understand each other with the context of those shared experiences, but these children also have unusual mixed heritage, that being Indian/Hungarian. Their culture and their heritage are very important to them."

The recorder also noted that the boys would benefit "enormously" from the positive relationship they continue to share with their parents. Noting that the parents had not sought to undermine the foster placements, she found that the ongoing relationship between the boys and their parents would provide important reassurance.

23. The recorder then turned to consider LC's future. Her decision and reasons were set out in the following paragraphs:

> "18. It is unusual, in my opinion, that this local authority, having set out so clearly all of the positive benefits that long-term foster care can offer to the boys, have, in my view, closed their minds to the opportunities that might similarly be offered to LC if she remained in long-term foster care. The care plan for LC is one for

adoption. That means if I grant the order that all legal ties with her biological family would be severed. The local authority tell me in their care plan that LC will be able to then find an alternative forever home and family which will meet her needs, a family which she can call her own. Adoption is not a panacea. I have concerns that the local authority have promoted the option of adoption for LC above all else due to her age rather than undertaking a careful, considered and evidence-based analysis of the pros and cons of adoption as against alternative options such as long-term foster care. In particular, I am satisfied that the local authority have had too little regard for the very positive benefits that the ongoing relationship of LC with her parents and LC with her siblings would bring to her life and the enormous benefits that will provide to her throughout her life.

19. Maintaining a link with her natural family provides an enormous benefit to LC. It is quite clear that she is loved by her parents and she loves them in return. I have read with great delight the very positive reports of the interaction that exists between LC and her brothers and her parents when they have contact. I am moved by the letters written to me by the boys whose greatest wish is to have their sister placed with them. If that does not speak volumes about the closeness of the bond and attachment I do not know what does. It is not just the bond and attachment with her family that provides LC with enormous benefit. It is also the issue of her own cultural identity as I have already touched upon in considering the welfare of the boys. I have already said it is important to recognise that aspect of her heritage. It is important to maintain that aspect of the heritage and, unusual as it is, the best way to maintain those aspects of the heritage and thus her identity is to maintain the links with her natural family.

20. I am also concerned about certain issues in LC's background which would mean that the option of finding an adoptive placement for her will present challenges. Although she is nearly two LC has already experienced a number of placement moves and the guardian highlighted to me and I addressed earlier in my first judgement the concerns there were about her ability to form secure attachment set against that background. There is the unusual cultural match which means that it is highly unlikely that LC would be adopted by a family with a similar cultural match. There is in her background the fact that the mother has mental health difficulties and that is an aspect, sadly, which can put off some prospective adopters.

21. The courts know only too well that many children languish in the system with placement orders made in relation to them but no match found for them. I fear that in this case, as has been highlighted to me by the guardian, the local authority may have taken an overly optimistic view of the prospects of a match which is quite possibly unrealistic.

22. Of course if LC remains in foster care there is a chance that she may experience in the future either placement breakdown or changes in her placement that would have a deep and significant impact on her. That is true and I acknowledge that, but it is also a fact that adoption can lead to breakdowns and adoptive breakdowns can have even more drastic impacts on children.

23. A long-term foster care placement would obviously provide LC with stability and security and carers who can meet her physical, her educational and emotional

needs. The particular challenges that LC may present with in the future may also be better supported if there is continued statutory intervention as opposed to the support that is available through key workers to adoptive families.

24. Significantly, I find that LC's needs to maintain a bond, a link, and attachment with her family and a link to her cultural heritage, that her desire for that and the boys' desire to continue to have LC as part of their family and the continuing need for all of these children to know their parents outweighs the benefits provided by adoption and, whilst unusual for a child of this age to be made subject to a long-term care order with a plan to place in long-term foster care, in my assessment and analysis of all of the arguments, I am in no doubt that the balance tips in favour of a care order with a plan for long-term foster care."

24. For those reasons, the recorder granted care orders in respect of all three children but refused the application for a placement order with regard to LC. She noted that, once a care order had been made, it was not for the court to "micro-manage" the local authority's implementation of the order. She added, however, that:

> "I do wish to make clear my greatest hope that every effort will be made to place these children, if not in one single placement together, in placements which allow the very close and loving bond they have to be promoted."

25. On 28 February 2020, the local authority filed a notice of appeal against the dismissal of the placement order application. On 27 March, King LJ granted permission to appeal, listed the appeal for an urgent hearing, and directed *inter alia* the local authority to file updated evidence as to the availability of both adoptive and foster placements.

26. A central focus of the appeal is the recorder's application of the relevant statutory provisions in s.1 of the Adoption and Children Act 2002, in particular the following subsections:

> "(1) Subsections (2) to (4) apply whenever a court or adoption agency is coming to a decision relating to the adoption of a child.
>
> (2) The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.
>
> (3) The court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare.
>
> (4) The court or adoption agency must have regard to the following matters (among others) –
>
> (a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding);
>
> (b) the child's particular needs;
>
> (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person;

(d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant;

(e) any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering;

(f) the relationship which the child has with relatives, with any person who is a prospective adopter with whom the child is placed, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including

(i) the likelihood of any such relationship continuing and the value to the child of its doing so,

(ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,

(ii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

….

(6) In coming to a decision relating to the adoption of a child, the court or adoption agency must always consider the whole range of powers available to it in the child's case (whether under this Act or the Children Act 1989), and the court must not make any order under this Act unless it considers that making the order would be better for the child than not doing so."

27. A further focus of the appellant's case was the guidance on decisions about adoption set out in the reported case law. This is well-trodden ground but in summary the salient points are as follows.

28. After a series of decisions of the European Court of Human Rights, including *YC v United Kingdom* (2012) 55 EHRR 967, the Supreme Court addressed the question of the proportionality of an adoption order in *Re B (Care Proceedings: Appeal)* [2013] UKSC 13. Lord Neuberger (at paragraph 104) endorsed

> "the principle that adoption of the child against her parents' wishes should only be contemplated as a last resort – when all else fails."

Baroness Hale of Richmond, having reviewed the case law of the European Court of Human Rights, concluded (at paragraph 198):

> "it is quite clear that the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do."

29. Following the decision of the Supreme Court in *Re B*, the Court of Appeal addressed the approach to proportionality in adoption in a series of cases, of which *Re B-S* [2013]

EWCA Civ 1146 is the most prominent. In that case, the Court identified the fact that non-consensual adoption is unusual in the European context, that under ECtHR law family ties are only to be severed in very exceptional circumstances and that, as a result, everything must be done where possible to rebuild a family. The court stressed that it is incumbent on (a) the local authority that applies for care and placement orders, (b) the children's guardian entrusted with representing the children in the proceedings, and (c) the court to carry out a robust and rigorous analysis of the advantages and the disadvantages of all realistic options for the child and, in the case of the court, set out that analysis and its ultimate decisions in a reasoned judgment.

30. The local authority emphasised in particular the observations of McFarlane LJ (as he then was) in *Re G (A Child)* [2013] EWCA Civ 965:

> "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.
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> 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.
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> …
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> 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 …."

31. The local authority's grounds of appeal against the recorder's dismissal of the application for a placement order were as follows:

(1) The recorder erred by failing to weigh the benefits and detriments of each of the realistic options for LC, providing inadequate consideration as to the benefits of adoption for LC distinct from her siblings and her heightened need to form secure and stable attachment.

(2) She placed disproportionate weight on LC's cultural identity and failed properly to balance this factor against the disadvantages of long-term foster care. In doing so, she failed to recognise that there had been expressions of interest in the child's profile from potential adopters with similar cultural profiles.

(3) She wrongly placed disproportionate weight on the potential loss of the relationship with the siblings, elevating this factor above other relevant factors in the balancing exercise.

(4) She wrongly placed disproportionate weight on the potential difficulties in finding an adoptive placement and failed to balance this factor against the benefits of such a placement.

(5) She wrongly placed disproportionate weight on the potential impact of a breakdown in an adoptive placement and failed to balance this factor properly against the disadvantages of long-term foster care.

32. At the hearing before us, Ms Deirdre Fottrell QC, instructed for the local authority on the appeal, leading Mr Richard O'Sullivan, focused her argument on the first ground, with the following grounds put forward as examples of what was said to be the recorder's erroneous approach to the balancing exercise. It was Ms Fottrell's central submission that the recorder's evaluation of the realistic options for LC was superficial and simply not good enough.

33. Ms Fottrell started by reminding the court of the provisions of s.1 of the Adoption and Children Act 2002, and in particular the factors in the so-called checklist in s.1(4). She accepted that it may be that in any case one element in the list will attract greater weight but submitted that the court is always under an obligation to consider each element in the checklist in respect of each child. It was the local authority's case the recorder here focused almost exclusively on the factor in s.1(4)(f) and failed to have sufficient regard to the other factors in the list.

34. Ms Fottrell cited the well-known passage in the judgment of Sir James Munby P in *Re B-S (Children)* at paragraphs 30 *et seq*, in particular the requirement specified in paragraph 41 for an "adequately reasoned judgment" in cases where the court is considering a care plan for adoption. She also cited the observations of McFarlane LJ in *Re G (A Child)* set out above. It was submitted that in neither the October judgment nor the February judgment did the recorder undertake the appropriate balancing of the welfare factors, comparing one option against the other, as described in *Re B-S*. It was submitted that there was a particular need to do so in this case, which the recorder herself described as extremely difficult and finely balanced. Whilst the recorder referred in the October judgment to there being "powerful arguments" in favour of adoption, she failed to spell out what those arguments were when carrying out the balancing exercise. The assessment set out at paragraph 24 of the February judgment fell short of an adequate comparative analysis of the options.

35. Ms Fottrell submitted that the weight attached by the recorder to the maintenance of LC's relationship with her birth family, and in particular her siblings, was excessive. The local authority has not succeeded in finding a placement for the children together so LC will continue to live apart from her brothers. As they are several years older, she will be on her own in the care system for much longer than they, including several years after they have attained their majority. Ms Fottrell also drew attention to passages in the child psychologist's report, in particular his conclusion (at paragraph 1.5 of his report), that:

> "the boys' relationship with LC is important to them, but not characterised by the strength which would have resulted from shared experience and a smaller age gap. Her chances of adoption are much higher were she to be placed separately, and in my view her need for permanence is therefore more likely to be met by a separate placement."

Ms Fottrell submitted that the recorder had failed to consider this opinion when reaching her decision.

36. It was also submitted that the recorder omitted to mention other important aspects of the evidence before her at the February hearing, for example the progress that LC had made in her foster placement, or the evidence provided by the local authority adoption team service manager about the progress of finding a family for LC. This included the fact that fourteen families had seen the anonymous profile prepared for LC and had expressed an interest in having more information about her. It was the local authority's plan to try to find a placement for LC with adopters who would agree to continuing contact with the hoys. It was argued that the recorder's observation at paragraph 21 of the February judgment that "the local authority may have taken an overly optimistic view of the prospects of a match which is quite possibly unrealistic" failed to take account of the view expressed by the adoption team service manager that she was very confident of finding a suitable adoptive placement within three to six months of a placement order.

37. In contrast, Ms Fottrell argued that the children's guardian's recommendation, to which the recorder had attached significant weight, had been put forward without any adequate analysis of the advantages and disadvantages of the realistic options, in contrast to the analysis set out in the social worker's report. Furthermore, the recorder had omitted to direct the guardian to file a supplemental report prior to the February hearing.

38. Ms Fottrell acknowledged that there may be cases where a judge fails to set out in clear terms the advantages and disadvantages of the realistic options for the child, but it is nonetheless possible for the parties, and an appellate court, to identify through the body of the judgment an analysis which satisfies the requirements of the *Re B-S* line of authorities. She submitted, however, that this is not such a case.

39. The father and the guardian invited the court to dismiss the appeal. The mother, who was present at the hearing but not represented, indicated in an email from her solicitors that she also opposed the appeal. In short, it was contended by those parties that, reading the judgment as a whole, the evaluative process identified in the case law was followed, that the recorder's conclusion that the positives of long term foster care applied to LC as well as to the boys was open to her on the evidence, and that her assessment of the weight to be attached to the factors cited in grounds two to five of the appeal notice fell within her discretion as the trial judge and was not something with which this court should interfere. It was submitted that this is not a case where it can be said that nothing else but adoption will do. On the contrary, as Ms Taylor put it on behalf of the guardian, the recorder concluded that in this case something else *will* do, namely long-term foster care.

40. I accept Ms Fottrell's submission that a judge considering an application for a placement order is required by the Adoption and Children Act to have regard to all the factors in the checklist in s.1(4). I do not, however, accept the submission that the recorder in this case focused on one factor to the exclusion of the others.

41. It is true that the recorder did not spell out in express terms the weight she attached to each factor in the checklist. That is a legitimate criticism, but it does not necessarily lead to a successful appeal. A similar argument was advanced in *Re FL (A Child)* [2020] EWCA Civ 20, in which I said (at paragraphs 31 and 33):

> "31. …. [T]he discipline of identifying the realistic options and summarising the advantages and disadvantages of each before making a final order is one which should be followed whenever the court is making a decision about the future of a child …. A judge who fails to adopt that approach runs the risk that his decision may be challenged on the grounds that he has failed to take into account a material advantage or disadvantage of one or other of the realistic options. It does not follow, however, that a judgment in which this approach is not adopted will inevitably be overturned. This court will only allow an appeal where persuaded that the decision below was wrong or unjust because of a serious procedural or other irregularity.
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> ….
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> 33. …. I do not think his failure to set out in detail the advantages and disadvantages of adoption is by itself sufficient reason for this court to intervene."

In *Re M (A Child: Care Proceedings)* [2018] EWCA Civ 240, King LJ observed at paragraph 63:

> "I repeat that it is well established (for example: *Re G (Children)* [2006] 2 FLR 629 HL) that it is neither necessary nor appropriate for a judge slavishly to rehearse every factor set out in the checklists. What is necessary is that important, critical (or even decisive) factors within those checklists are adequately identified and analysed so that it can be seen what part they have played in the overall decision-making process. This is of particular importance, as noted in Re G, in cases that are difficult or finely balanced."

42. In this case, the recorder acknowledged in her October judgment that there were "powerful arguments in favour of adoption". In her February judgment, she referred to the argument in favour of adoption identified by the local authority that LC would "be able to then find an alternative forever home and family which will meet her needs, a family which she can call her own". She also noted that it was unusual for a child of this age to be placed in long-term foster care. In my judgment, these are clear signs that the recorder took into account, as arguments in favour of adoption, (a) LC's very young age, (b) the fact that an adoptive placement would meet her needs, and (c) that through adoption she would have the opportunity to be part of a permanent "forever" family which she could "call her own". I am in no doubt that the recorder had these factors in mind and took them into account in her analysis.

43. It is clear, however, that the recorder was dissatisfied by the way in which the local authority presented its case. Having heard the key social worker give evidence, and undergo cross examination in which the local authority's argument in favour of adoption were tested, she concluded that the arguments lacked substance because (as she observed at paragraph 18 of the February judgment), the local authority had:

> "promoted the option of adoption for LC above all else due to her age rather than undertaking a careful, considered and evidenced-based analysis of the pros and cons of adoption as against alternative options such as long-term foster care".

44. Reading the two judgments as a whole, I find that the recorder did engage with the advantages of adoption as identified by the local authority but concluded, after careful

consideration over three hearings, that in the circumstances of this case they were outweighed by the disadvantages.

45. Ms Fottrell is right that for the recorder it was the factors in s.1(4)(f) which were decisive in this case. So much is clear from the following sentence from paragraph 18 of her February judgment which came immediately after the passage cited in paragraph 43 above:

> "I am satisfied that the local authority have had too little regard for the very positive benefits that the ongoing relationship of LC with her parents and LC with her siblings would bring to her life and the enormous benefit that will provide to her throughout her life."

But it is hardly surprising that this should have been the focus of the recorder's analysis. It will be a major focus – perhaps the major focus – in nearly every case in which a care plan for adoption is contested by the birth family. In most cases, the effect of adoption is to sever the child's relationships with all members of her birth family. And as Baroness Hale of Richmond observed in *Re B* [2013]:

> "…it is quite clear that the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do."

46. It follows that, before severing the relationships between the child and the birth family, a judge must look very carefully, amongst other things, at the quality of those relationships, the likelihood of the relationships continuing, and the value to the child of their doing so.

47. In this case, the recorder considered the relationships between LC and her parents and between LC and her siblings as being of very significant value. She emphasised, in particular, the relationships between siblings which are, of course, lifelong relationships. She also concluded that maintaining links with her birth family would be the best way of enabling LC to sustain her distinctive cultural heritage. In my judgment, the recorder was best placed to evaluate the importance of these factors and her conclusions about them were plainly open to her on the evidence. She identified other advantages for LC in a long-term foster placement in this case, including the difficulty the child may have in forming secure attachments as a result of her extremely unsettled early experiences, having had four primary carers in the first 18 months of her life. But in her final analysis in paragraph 24 of her judgment, the recorder identified the importance for LC of maintaining a bond with her birth family and a link to her cultural heritage as being the decisive factor.

48. I do not consider that the recorder's judgments delivered in October 2019 and February 2020 can be described as "linear" in the sense identified by McFarlane LJ in *Re G*. Although the assessment of the realistic options in the February judgment did not follow the structure recommended in previous authorities, I am satisfied that the recorder did take into account all relevant matters and that her analysis meets the standard of an adequately reasoned judgment required by this court in *Re B-S*. To adopt McFarlane LJ's words, she carried out a "full and effective process of evaluation" in which she "engaged with the very detail of the option of adoption which rendered it 'draconian'".

In this case, the factor which would render the adoption of LC 'draconian' would be the consequence that her relationship with her family would be severed. In this case, the recorder clearly engaged with this aspect, scrutinised it carefully, and concluded that the relationships between LC and her birth family were of sufficient importance to outweigh the advantages of adoption.

49. Nothing I have said should be read as undermining the importance of judges adopting the structured approach when drafting judgments recommended in the earlier authorities. For my part, however, I am satisfied that the recorder in this case carried out a fair and balanced analysis and her decision cannot be described as wrong. For those reasons, I would dismiss this appeal.

CARR LJ

50. For the reasons set out by Baker LJ I too would dismiss this appeal.

SIR STEPHEN RICHARDS

51. I also agree.