Neutral Citation Number: [2025] EWCA Civ 823

Case No: CA-2024-002275

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HHJ HAYES KC
Family Court in Leeds LS23C50063

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01.07.2025

Before:

THE RT HON SIR ANDREW MCFARLANE
President of the Family Division
LADY JUSTICE KING
and
LORD JUSTICE SINGH

- -

In Re S (Placement Order Contact)

Between :

The Mother	**Appellant**
- and -	
Local Authority [1]	**Respondents**
The Father [2]	
Children's Guardian [3]	
ALC (Intervenor) [4]	
CoramBAAF (Intervenor) [5]	

- -

Julia Cheetham KC and Sara Anning (instructed by **Wilkinson Woodward**) for the **Appellant**
Karl Rowley KC and Louise McCallum (instructed by **Calderdale MBC**) for the **First Respondent**
The Father (unrepresented) **Second Respondent**
Lorraine Cavanagh KC and Karen Lennon (instructed by **JWP Solicitors**) for the **Third Respondent**
Deirdre Fottrell KC and Sharon Segal KC and Andrea Watts (instructed by **Osbornes Law**) for the **Fourth Respondent/Intervenor**
Alexandra Conroy-Harris for the **Fifth Respondent/Intervenor**

Hearing date: 27th March 2025

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Approved Judgment

This judgment was handed down remotely at 11.30am on 1st July by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Andrew McFarlane P:

1. This is an appeal against a decision of HHJ Hayes KC in which the judge made a placement for adoption order but declined to make an order under the Adoption and Children Act 2002, s 26(2)(b) [‘ACA 2002’] for sibling contact. The decision arose at the conclusion of care proceedings relating to two brothers, ‘R’ and ‘S’, aged 8 and 2 years. Both boys were to be subject to care orders, but only the younger one was to be the subject to an order authorising placement for adoption. The appeal raises a number of issues of general application regarding the court’s approach to contact between siblings in adoption and the approach to be taken to sibling contact at the placement for adoption stage.

The factual context

2. Care proceedings began in January 2023 after the younger boy, then only a few months old, was admitted to hospital with head injuries and a healing rib fracture.

3. In November 2023, following a contested hearing and a full judgment, HHJ Hayes made serious findings against both parents. He found, in particular, that the boy’s father had caused S’s injuries and had beaten R. The findings extended beyond the occasions when S had been injured, and included holding that the father had been impatient and forceful in his handling of both boys, and that he had regularly used very derogatory terms to describe them in text messages to the mother. The judge concluded that the boys’ mother had been aware of the father’s behaviour and had failed to protect her children. There was also a significant finding of failure to seek medical attention for S extending from mid-November 2022 to mid-January 2023. Photographs taken of S in early January had shown the baby as looking ‘very, very ill’, yet no medical attention was sought for him then. The judge expressly highlighted the level of dishonesty of both parents who had consistently attempted to present a false picture to social services and to the court.

4. Prior to that hearing R had been placed with his paternal grandparents, but, following the findings, he was moved to foster care. S had been with different foster carers throughout the court proceedings.

5. At the final hearing there was an issue around the degree to which the parents’ relationship had endured after the initial findings of fact had been made. The parents’ pleaded case was that they had separated and that there had been little contact between them, save for necessary communication over practical and financial arrangements. The mother had said that it had been ‘a very difficult decision’ to separate from the father. The judge then made orders for the parents’ phones to be taken for examination. Having heard oral evidence, and after a good deal of expert evidence, he concluded that there had in fact been extensive contact between them, which they had attempted to conceal by setting their phones back to ‘factory setting’ before they were examined, and by giving a wholly dishonest account of matters in their evidence.

6. Although the issue before this court relates to inter-sibling contact, I have given this account of the parents’ actions, and, as the judge found, their sustained dishonesty, because a factor in relation to sibling contact is that the older boy, R, is to continue to have direct contact with his parents. If sibling contact is to take place there is concern

that R's contact with the parents may establish some form of indirect link between the parents and S.

7. A further factor of relevance is that, as a consequence of the head injury that he sustained, whilst S was initially not thought to have suffered any developmental detriment, he has subsequently been identified as having a mild developmental delay, with scores at the lower end of the expected range. His presentation when seen in June 2024 was encouraging, although the long term effects of his head injury remained unknown.

8. A permanence report dated June 2024 relating to S recommended that 'indirect contact between [R] and [S] would be of benefit to them and it would be hoped that any adoptive family felt able to facilitate this for him'. It went on to suggest that 'further thought is given to direct contact up to two times per year, but this would need to be subject to further risk assessment'. Contact between S and his parents was to be limited to annual 'letterbox' contact.

9. Reports from the social worker charged with finding a family for S indicated that the primary focus would be to find adopters who were willing to take on a child with challenging disabilities and an uncertain prognosis. Such adopters, it was thought, may be more open to considering direct contact than the average adoptive family, but that prospective adopters were often put off by contact with a sibling, such as R, who was to remain in contact with the birth parents.

10. Following the decision of the 'Agency Decision Maker', the advice of the adoption agency arm of the local authority was that post-adoption contact 'should be promoted and would ideally be put in place' but that it 'should be seen as a desirable element rather than an essential' to S's placement.

11. The final social worker's statement proposed that, subject to a risk assessment, after S was placed for adoption, the siblings would have two occasions of direct contact and two of indirect contact each year. The final care plan recorded that the current level of contact, which was set at three times each week, should be reduced to fortnightly pending an adoptive placement being found.

12. Following the placement for adoption order made by the judge, and on the basis that there is no order for continuing direct contact, S' details have been on the national adoption database but, despite the fact that his profile had (by the time of the hearing before this court) been viewed by some 23 families, none had thus far indicated any interest in being matched with him.

The Legal Framework

13. The lodestar provision in the ACA 2002 is section 1 which stipulates the considerations that apply to the exercise of powers under the Act:

> '(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,

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

(5) In placing a child for adoption, an adoption agency in Wales must give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background.

(6) In coming to a decision relating to the adoption of a child, a 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.

(7) In this section, "coming to a decision relating to the adoption of a child", in relation to a court, includes—

(a) coming to a decision in any proceedings where the orders that might be made by the court include an adoption order (or the revocation of such an order), a placement order (or the revocation of such an order) or an order under section or (or the revocation or variation of such an order),

(b) coming to a decision about granting leave in respect of any action (other than the initiation of proceedings in any court) which may be taken by an adoption agency or individual under this Act, but does not include coming to a decision about granting leave in any other circumstances.

(8) For the purposes of this section—

(a) references to relationships are not confined to legal relationships,

(b) references to a relative, in relation to a child, include the child's mother and father.'

14. ACA 2002, s 21 establishes the court's jurisdiction to make a placement for adoption order:

'21 Placement Orders

(1) A placement order is an order made by the court authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the authority.

(2) The court may not make a placement order in respect of a child unless—

(a) the child is subject to a care order,

(b) the court is satisfied that the conditions in section 31(2) of the 1989 Act (conditions for making a care order) are met, or

(c) the child has no parent or guardian.

(3) The court may only make a placement order if, in the case of each parent or guardian of the child, the court is satisfied—

(a) that the parent or guardian has consented to the child being placed for adoption with any prospective adopters who may be chosen by the local authority and has not withdrawn the consent, or

(b) that the parent's or guardian's consent should be dispensed with.

This subsection is subject to section 52 (parental etc. consent).

(4) A placement order continues in force until—

(a) it is revoked under section 24,

(b) an adoption order is made in respect of the child, or

(c) the child marries, forms a civil partnership or attains the age of 18 years.

"Adoption order" includes a Scottish or Northern Irish adoption order.'

15. Under a placement order, the local authority hold parental responsibility in a manner similar to that under a care order (Children Act 1989, s 31) ['CA 1989'] and a parent

who has parental responsibility retains it. Once a child is placed for adoption under a placement order, the pool of those who hold parental responsibility is expanded to include the prospective adopter(s) under ACA 2002, s 25:

> '25 Parental responsibility
>
> (1) This section applies while—
>
> (a) a child is placed for adoption under section 19 or an adoption agency is authorised to place a child for adoption under that section, or
>
> (b) a placement order is in force in respect of a child.
>
> (2) Parental responsibility for the child is given to the agency concerned.
>
> (3) While the child is placed with prospective adopters, parental responsibility is given to them.
>
> (4) The agency may determine that the parental responsibility of any parent or guardian, or of prospective adopters, is to be restricted to the extent specified in the determination.'

16. ACA 2002, s 26 makes provision in respect of contact for a child who is subject to a placement order:

> '26 Contact
>
> (1) On an adoption agency being authorised to place a child for adoption, or placing a child for adoption who is less than six weeks old —
>
> (a) any contact provision in a child arrangements order under section 8 of the 1989 Act ceases to have effect,
>
> (b) any order under section 34 of that Act (parental etc contact with children in care) ceases to have effect, and
>
> (c) any activity direction made in proceedings for the making, variation or discharge of a child arrangements order with respect to the child, or made in other proceedings that relate to such an order, is discharged.
>
> (2) While an adoption agency is so authorised or a child is placed for adoption—
>
> (a) no application may be made for —
>
> (i) a child arrangements order under section 8 of the 1989 Act containing contact provision, or
>
> (ii) an order under section 34 of that Act, but

> (b) the court may make an order under this section requiring the person with whom the child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for the person named in the order and the child otherwise to have contact with each other.
>
> (3) An application for an order under this section may be made by—
>
> (a) the child or the agency,
>
> (b) any parent, guardian or relative,
>
> (c) any person in whose favour there was provision ... which ceased to have effect by virtue of subsection (1)(a) or an order which ceased to have effect by virtue of subsection (1)(b),
>
> (d) if a child arrangements order was in force immediately before the adoption agency was authorised to place the child for adoption or (as the case may be) placed the child for adoption at a time when he was less than six weeks old, any person named in the order as a person with whom the child was to live,
>
> (e) if a person had care of the child immediately before that time by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, that person,
>
> (f) any person who has obtained the court's leave to make the application.
>
> (4) When making a placement order, the court may on its own initiative make an order under this section.
>
> (5) . . . . . .
>
> (5A) In this section "contact provision" means provision which regulates arrangements relating to—
>
> (a) with whom a child is to spend time or otherwise have contact, or
>
> (b) when a child is to spend time or otherwise have contact with any person;
>
> but in paragraphs (a) and (b) a reference to spending time or otherwise having contact with a person is to doing that otherwise than as a result of living with the person.
>
> (6) In this section "activity direction" has the meaning given by section 11A of the 1989 Act.'

17. An order under ACA 2002, s 26 may be made on application by a person listed at s 26(3)(a)-(e), or one who has obtained the court's leave to apply under s 26(3)(f). In addition the court may make a contact order on its own initiative under s 26(4).

18. ACA 2002, s 27 makes further provision relating to contact:

> '27 Contact: supplementary
>
> (1) An order under section 26—
>
> (a) has effect while the adoption agency is authorised to place the child for adoption or the child is placed for adoption, but
>
> (b) may be varied or revoked by the court on an application by the child, the agency or a person named in the order.
>
> (2) The agency may refuse to allow the contact that would otherwise be required by virtue of an order under that section if—
>
> (a) it is satisfied that it is necessary to do so in order to safeguard or promote the child's welfare, and
>
> (b) the refusal is decided upon as a matter of urgency and does not last for more than seven days.
>
> (3) Regulations may make provision as to—
>
> (a) the steps to be taken by an agency which has exercised its power under subsection (2),
>
> (b) the circumstances in which, and conditions subject to which, the terms of any order under section 26 may be departed from by agreement between the agency and any person for whose contact with the child the order provides,
>
> (c) notification by an agency of any variation or suspension of arrangements made (otherwise than under an order under that section) with a view to allowing any person contact with the child.
>
> (4) Before making a placement order the court must—
>
> (a) consider the arrangements which the adoption agency has made, or proposes to make, for allowing any person contact with the child, and
>
> (b) invite the parties to the proceedings to comment on those arrangements.
>
> (5) An order under section 26 may provide for contact on any conditions the court considers appropriate.'

19. Section 27 makes it plain that a s 26 contact order may be varied or revoked by the court on application by the child, the adoption agency (local authority) or a person named in the order. The adoption agency may refuse to allow contact required by an order for up to seven days in an urgent case where to do so is necessary to safeguard or promote the child's welfare. Importantly, s 27(4) requires the court to consider the contact arrangements, and invite submissions on them, before making a placement order.

20. The welfare provisions in ACA 2002, s 1 apply in full to any decision concerning contact made under ACA 2002, ss 26 and 27. Thus, although the period of time covered

by a s 26 contact order is limited to that between the making of a placement for adoption order and the child's subsequent adoption, the lens through which issue of contact is to be determined is the life-long welfare of the child, including the impact on the child of ceasing to be a member of their birth family and the relationship that the child has with relatives [ACA 2002, s 1(4)(c) and (f)].

21. Despite the fact that s 26 has been on the statute book and in force for two decades, there is very little caselaw from the higher courts as to its application to, and impact upon, the court's approach to contact at the placement for adoption order stage. Fortunately, in terms of the length of this judgment, in *Re R (Children)* [2024] EWCA Civ 1302 Baker LJ's judgment includes a comprehensive review of the legal background, including the 'changing nature of adoption', the statutory provisions, the case law and 'other recent developments'. The latter heading referred to a lecture that I had delivered in two parts on 'Adapting Adoption to the Modern World'[1] in November 2023 and May 2024, but did not refer to the important report of the President's Public Law Working Group ['PLWG'] making recommendations for good practice in adoption which was not published until November 2024 (after the judgment in *Re R* had been delivered)[2]. Baker LJ's review of the legal background is authoritative and thorough and I do not intend, therefore, to re-till that ground here.

22. It is, however, necessary to identify the three key authorities on contact at the placement order stage (including *Re R*) and give an account of what is to be taken from them for application to future cases.

23. The first is *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535 [Thorpe LJ, Wall LJ and Munby J], in which a s 26 order for inter-sibling contact had been made alongside placement orders for two siblings who might not be placed in the same adoptive home. The appeal was against the making of the substantive placement order, and not the contact order, but in the course of his judgment Wall LJ, giving the judgment of the court, observed [paragraph 151] that it was recognised by all parties that the relationship between the siblings needed to be preserved. On that basis, he held that:

> 'the question of contact between the two children is not a matter for agreement between the local authority and the adopters; it is a matter which, ultimately, is for the Court. It is the Court which will have to make adoption orders or orders revoking the placement orders, and in our judgment, it is the Court which has the responsibility to make orders for contact if they are required in the interests of the two children.'

24. In *Re P*, both of the children presented troubling behaviour as a result of the care that they had experienced in the family home. Finding adoptive placements for them was not an easy task, but, as the trial judge held, it was nevertheless 'key' that the two should continue to have contact with each other. Previously the local authority had unilaterally terminated the contact between one of the children and her mother, without resort to the court. Wall LJ expressed concern at that turn of events [paragraph 54] and observed that 'in our judgment it reinforces the point made by the guardian that the children's

[1] https://www.judiciary.uk/speech-by-sir-andrew-mcfarlane-adapting-adoption-to-the-modern-world/ and https://www.judiciary.uk/speech-by-the-president-of-the-family-division-adapting-adoption-to-the-modern-world-part-two/ .
[2] https://www.judiciary.uk/guidance-and-resources/wholesale-reform-to-adoption-process-is-needed-says-public-law-working-group/#related_content .

right to contact with each other, in particular, needs to be safeguarded by a court order for contact'. The importance of maintaining contact between the children was such that the Court of Appeal considered that if it turned out that prospective adopters were unwilling to support that contact, then that would provide a proper basis for their mother to apply for leave to apply to revoke the placement order [paragraph 150].

25. The second case is *Re D-S (A Child: Adoption or Fostering)* [2024] EWCA Civ 948, which concerned an 11 month old child ['C'] with two older half-siblings who were in long-term foster care. At first instance, a judge had refused to make a placement order with respect to C. The appeal was allowed, and, rather than remitting the case, the Court of Appeal made a placement order. In doing so, Peter Jackson LJ said [para 17]:

> 'We will make a placement order on the basis of the local authority's plan, which aims for there to be some contact before and after adoption. We will not make a contact order, because that might complicate the search for adopters, which must be the priority.'

26. In conducting his evaluation of C's welfare Peter Jackson LJ held, at paragraph 52, that 'the dominant feature of C's present situation is … her particular needs at her very young age. At the heart of the matter, she needs a lifelong family where she can feel that she belongs. I agree with the professional assessment … that this can only happen through adoption'. The advantages of adoption were 'overwhelming' and even if contact could not be arranged the welfare outcome favouring adoption 'is the same' [paragraph 55].

27. The court's reasoning with respect to contact was understandably short as it had not been a principal issue in the appeal. At paragraph 56, Peter Jackson LJ said:

> 'As to contact, the local authority can be expected to honour its care plan for current contact, and for a 3-month search for adopters who will accommodate meetings with family members. … Overall, it would not be better for us to make a contact order, in fact it might be detrimental to the greater priority of finding an adoptive family for C.'

28. The earlier decision in *Re P* was not referred to in the judgments in *Re D-S*, but there is a clear distinction on the facts between the two cases with continuing contact being 'key' in *Re P* in contrast to *Re D-S* where the need to achieve an adoption was the 'overwhelming' factor, even if it were at the expense of contact.

29. The third authority is *Re R* itself, which concerned four siblings, the younger two of whom were to be placed together for adoption. The care plans provided for continued direct contact between the four siblings at a minimum of six visits a year. The judge dismissed the local authority's application for placement for adoption orders for the two children on the ground, amongst others, that given that he could not predict whether prospective adopters would accept a direct sibling contact order, the court could not impose an unwelcome regime upon them. He directed a revised care plan for long-term fostering.

30. The Court of Appeal [Asplin, Baker and Elizabeth Laing LJJ] allowed the appeal, holding that it was not the case that the option of adoption fell to be ruled out in every case where the court concluded that it was strongly in the interests of the children to

continue to have sibling contact. Each case would fall to be determined on its own facts. The 'discussion and conclusion' section of Baker LJ's judgment in *Re R* justifies detailed consideration [paragraph 64 onwards], in particular:

> '65. A key element in the judge's reasoning was his assertion that "permanence comes at a significant cost, namely the complete and irrevocable severance of all ties with the natural family". As demonstrated by the summary of the case law set out above, that may have been true of all adoptions at one stage, and it remains true of some adoptions now. But it is emphatically not true of many adoptions and is at odds with the concept of open adoption which is now embraced as a model in what the President has called the modern world. The judge acknowledged that the severance of ties with the natural family "can sometimes be ameliorated by continued contact between the birth family and the adopted child" and that, in this case, the local authority has "committed itself to a search only for adopters willing to promote direct sibling contact". He discounted these factors, however, on the basis that ongoing contact "is at the discretion of the adopters" and that "sibling contact cannot be guaranteed" because "even adopters who are open to it initially may not continue to promote it after the making of an adoption order".
>
> 66. In these observations, the judge overlooked the fact that it was his duty to "set the template for contact going forward". This case seems to fall four square within the words used by Wall LJ in *Re P* at paragraph 151. As in that case, there is a "universal recognition" that the relationship between the siblings needs to be preserved. It is "on this basis that the local authority / adoption agency is seeking the placement of the children …. [T]his means that the question of contact between the two children is not a matter for agreement between the local authority / adoption agency and the adopters: it is a matter which, ultimately, is for the court". In those circumstances, "it is the court which has the responsibility to make orders for contact if they are required in the interests of the two children".
>
> …
>
> 68. Under the current law, as the President said in *Re B*, "it will only be in an extremely unusual case that a court will make an order stipulating contact arrangements to which the adopters do not agree". But that does not obviate the court's responsibility to set the template for contact at the placement order stage. In this case, the local authority was committed to search only for adopters willing to accommodate sibling contact and invited the court to make an order for contact under s.26, both to meet the children's short-term needs and to set the template. There was of course a possibility that the search for such adopters might be unsuccessful or that adopters might subsequently refuse to agree to contact. But in the circumstances of this case, that possibility was not a sufficient reason to refuse to make the placement order.'

31. Baker LJ went on to conduct a thorough evaluation of the issues relating to the children's welfare before concluding [paragraph 89] that adoption in accordance with the local authority's plans was the only option which would meet the children's needs, which were for a placement that provided the greatest level of security, a family to which they can belong, but also one that will enable them to maintain a relationship with their siblings through regular contact. The Court of Appeal made placement orders and an order under s 26(2)(b) specifying that there should be six visits each year with

their two siblings. The court also added a recital to its order recording its view that after adoption the two children should continue to have direct contact with their siblings six times a year.

32. Standing back from these three authorities, there is a distinction to be drawn between those cases where continuing direct sibling contact is considered to be necessary for the child's future welfare, and cases where the achievement of an adoptive home is the overarching goal, with future sibling contact being desirable as opposed to a pre-requisite. In the former circumstances (as in *Re P* and *Re R*) the court has 'a responsibility' to make a s 26 contact order.

33. As Baker LJ held in *Re R*, each case will fall to be determined on its own facts. The two authorities where an order was made were cases where to do so was justified by the degree of importance that continued sibling contact had as part of the overall adoptive plan.

The judgment

34. At the final hearing the local authority sought a care order with respect to both children and a placement for adoption order for S. In a full judgment, the judge made those orders but declined to make a s 26 order for direct contact between the siblings on the basis that doing so would limit the pool of prospective adopters. The boy's parents had been in favour of a s 26 order, but the local authority and the children's guardian were not. The guardian, in particular, did not consider that making such an order would be better for S than not doing so.

35. In his judgment the judge recorded the serious findings that had been made at the previous hearing against both parents. He found that both parents had deliberately re-set their phones in order to prevent the court discovering the large number of calls and messages that were passing between them in the period after their 'separation'. He found that both parents had been thoroughly dishonest in their evidence to the court on this aspect, and that, when the lie was found out, the mother's response was to pursue a course of obstinate denial, rather than admission. The judge therefore concluded that he could not accede to the mother's request for the return of the children to her care as his recent findings, coupled with the core findings of fact, meant that to do so would expose them to an unacceptable risk of significant harm.

36. The judgment includes a thorough description of the legal context applicable to the welfare determinations for each boy, correctly identifying that the welfare requirements in CA 1989, s 1 applied to R, whereas the different, life-long, perspective of the provisions in ACA 2002, s 1 applied in the case of S.

37. With respect to the issue of whether or not to make a s 26 contact order, the judge drew attention to the decision of this court in *Re D-S (A Child: Adoption or Fostering)*, where no order was made, but also referred to the earlier case of *Re P (A Child)*.

38. As part of his review of the statutory welfare provisions in ACA 2002, s 1, the judge drew particular attention to the 'no order' provision in s 1(6).

39. Within the legal context that he had described, the judge then conducted a detailed evaluation of the needs of the two children. Whilst he did so as part of a single, all

encompassing, exercise dealing with rehabilitation, care orders, placement for adoption and contact, often referring to each of the children within the same paragraph or heading, there is no indication that he lost sight of the different perspective that must be applied to S under the ACA 2002 to that required for R under CA 1989. As part of his conclusion on the question of whether S should be the subject of a placement order, he said:

> 'I agree with [the] consensus of professional opinion. S needs carers and a home that will offer him a sense of identity, belonging, permanence and long-term security. It is likely that adoption at this early stage in his life will give S the opportunity to form a secure attachment to an adoptive family. I accept that, sadly, it may be the case that such a placement is not identified for S. But this does not mean that the Court should refuse to make a Placement Order. If I were to take that course the opportunity would be denied to him.'

40. Turning to contact, and after noting that no party suggested that there should be an order for contact with his parents, the judge accepted that the two boys would not be in the same placement and that R would be having some form of ongoing parental contact. Against that background, the local authority care plan for S described 'one of the essential criteria' for the Family Finding process as being to search for adopters who are open to considering post-adoption contact. Subject to a positive risk assessment and the views of potential adopters, the local authority proposal for contact after adoption for the boys was twice each year. Prior to identifying adopters, the sibling contact would be fortnightly.

41. The s 26 order being sought by the parents was in accord with the local authority plans for contact. The single issue was, therefore, whether these contact arrangements should be the subject of a court order. In his analysis of that issue the judge noted that [paragraph 154]:

> '… if a section 26 order providing for direct contact between the siblings risks making the plan for adoption more difficult to achieve, or even threatens to thwart that plan altogether, it is unsurprising that all professionals do not recommend that course.'

42. The judge summarised the submissions of Ms Anning, counsel for the mother, based on recent research and the PLWG report on adoption as identifying a need for 'enhanced awareness' of the importance of promoting ongoing family relationships so that 'the approach to contact must be creative and focussed on making such contact happen when it is in the best interests of the child to do so'. The judge was aware that the parents' case was limited to the level of sibling contact at two times per year proposed in the care plan after placement, which was two occasions per year.

43. The judge's conclusion on the issue is at paragraph 159:

> '159. In resolving this issue, I keep my focus solely on the best interests of [S]. I have considered the material produced, but I must also have regard to the evidence before the Court and the particular facts of this case. I consider it my responsibility, having regard to that evidence, to analyse whether a section 26 contact order might hinder the task of family finding for [S]. If making a section 26 contact order creates that risk, that will have an adverse impact on [S]'s welfare. Factoring that

> in is not the Court improperly shifting its focus to the interests of potential adopters. Rather, it is the Court keeping its focus on [S]'s best interests and putting the risk of deterring potential adopters into the holistic welfare balance for him. This is what the professionals have done in this case. It is what I also do. To say that "Courts should not be inhibited by a fear of not finding adoptive parents" is, I respectfully suggest, wrong in principle. If that risk exists, then I would be failing in my duty to [S] if I did not put it in the welfare balance. If further support for this proposition is needed, it comes from paragraphs 17 and 56 of the recent Court of Appeal ruling in *Re D-S*. The Court of Appeal clearly treated this as a material factor directly relevant to its welfare decision not to make any contact order in that case.'

44. It is necessary to pause at this point to pick up the phrase "Courts should not be inhibited by a fear of not finding adoptive parents" referred to by the judge. This was apparently a reference to (but not a quotation from) a passage in the speech that I delivered in 2023[3] where I referred to concern that a contact order might hinder the task of finding prospective adopters and said 'I do not agree that this should be an inhibiting factor in the court making an order where that is justified', in a case where 'the court considers that there should be continuing contact up to and after adoption'. The approach there described is in accordance with that set out by Wall LJ in *Re P*, which was a case where the court concluded that there should be continuing contact. In such a case, as Wall LJ explained, 'it is the Court which has the responsibility to make orders for contact if they are required in the interests of the two children'. The approach described by Wall LJ was expressly endorsed and applied by this court in the recent case of *Re R*. Each case will turn on its own facts. In some cases the need to preserve contact will be a preference, in others it may be essential. In all cases it will be necessary to take account of the impact on family finding of a care plan that includes ongoing contact and/or proposals for a s 26 order for contact. There will be some cases where the priority to be given to preserving the sibling relationship will be such that the court should make a contact order, notwithstanding that to do so may make the task of finding an adoptive family more challenging.

45. Moving on, the judge expressed himself as satisfied that each of the professional witnesses did not hold 'ingrained beliefs that are out of date'. He was clear that they all spoke of the benefits of the sibling relationship being maintained through ongoing direct contact. Equally, they were clear that S needed a permanent adoptive home. But 'their view that a s 26 contact order could hinder rather than help achieve that outcome for [S] was rooted in securing his best interests'. There was a difference between having to tell prospective adopters that a court order was in place requiring sibling contact, and, on the other hand, seeking to achieve that objective through careful and skilled social work. The professional evidence was that having a s 26 order might deter potential candidates before any such discussions could take place.

46. The judge went on to summarise S's history as it might be presented to any would-be adopters. He found that there would be a balance of factors pulling in different directions. He considered that, if given the full picture, they would be naturally worried whether ongoing contact (particular as R would still be seeing his parents) might have adverse consequences as well as benefits. These would not, the judge found, simply be

[3] https://www.judiciary.uk/speech-by-sir-andrew-mcfarlane-adapting-adoption-to-the-modern-world/ .

fears of the unknown, but legitimate concerns based upon the information that they would have been given.

47. In terms of there being a need for an order, the judge concluded that, because there was a settled plan for contact leading up to identification of prospective adopters, an order was not required for that period. Thereafter, if an order were in place, it would require prospective adopters to comply although they had had no say when that order had been made; he was concerned that this may worry them and cause them to conclude that they do not wish to proceed with the matching. The judge considered that such an outcome would be against, rather than promoting, S's best interests. The judge therefore agreed with the professionals that there was an advantage, not a disadvantage, in approaching contact in the manner that they proposed, without a court order.

48. In the two concluding paragraphs of the judgment the judge explained his final decision:

> '168. My task, as prescribed by statute, is to apply section 1 of the ACA 2002. I do so having regard to the evidence before the Court. I must also apply the no order principle enshrined in section 1(6) of the ACA 2002. This means that I must not make an order (which includes a section 26 contact order) in respect of [S] unless I consider that making the order would be better for [S] than not doing so. This requires me to evaluate what the effect on [S] will be of making a section 26 contact order providing for ongoing direct contact with [R].
>
> 169. I accept the combined view of all professionals that making a section 26 contact order requiring face to face contact with [R] risks acting as a deterrent to potential adopters putting themselves forward for [S]. It cannot be in [S]'s best interests if this has the effect of limiting the pool of prospective adopters or, worse still, it thwarts altogether the prospect of finding an adoptive placement for [S]. In reaching this conclusion, I am not questioning the importance of seeking to maintain a relationship through contact between [S] and [R]. Rather, I must balance the aspiration to achieve that for both boys with the welfare imperative of finding an adoptive home for [S], having regard to his welfare throughout his life. Applying section 1(6) of the ACA 2002, I do not consider that making a section 26 order for direct sibling contact would be better for [S] than not doing so. I therefore decline to make such an order.'

The appeal

49. In addition to the core parties, the court had the benefit of written and oral submissions on behalf of the Association of Lawyers for Children ['ALC'] and CoramBAAF as interveners.

50. The appellant mother relies upon six grounds of appeal:

> i) The decision was contrary to unanimous evidence from the social worker and the guardian that direct sibling contact would be the best outcome after adoption;
>
> ii) The judge failed to properly weigh the benefits of continuing contact against the reluctance of prospective adopters;

iii) The judge was wrong to hold that leaving the contact decision to professionals and adopters would not disadvantage the children. The evidence demonstrated that contact arrangements were rarely achieved in this way;

iv) The judge failed to take account of the ability to vary or discharge the order;

v) The judge gave too little weight to the need to reduce the impact on family life to that which is necessary, and that the s.26 order was necessary to make the interference with family life proportionate;

vi) The judge erred by juxtaposing contact as a welfare aspiration against adoption as an imperative necessity. The true task was to find an adoptive placement that best served the child's long-term welfare interests.

51. On behalf of the appellant Ms Julia Cheetham KC, leading Ms Sara Anning, submitted that, in light of the high level of contact that had been maintained between the brothers (which had been three times per week throughout), and the clear professional evidence that it was in their interests for this to continue at a modest level post-adoption, the court should have made a s 26 contact order. The judge had, in Ms Cheetham's submission, placed too much weight on the possibility that prospective adopters might be put off adopting S if there were a court order for contact. Not to have an order in place would leave the decisions about contact up to the local authority and any would-be adopters. The appellant's case was that, given the importance of continuing contact between the brothers, there was a risk that, as time went by, there may be a falling away from the current stated contact plan in the absence of an order. It was submitted that any short term risks to the family finding process would be outweighed by the long term gains to be had from maintaining contact between the two brothers.

52. The appellant challenged the judge's reliance on *Re D-S* as an authority of direct relevance in this case. Firstly, the element of the care plan that was in focus in *Re D-S* was that adopters would be expected to undertake meetings with the child's family, which is materially different from maintaining inter-sibling contact. Secondly, the use of s 26 had not been central in the appeal in *Re D-S*, which had been an appeal against the making of the placement order.

53. Ms Cheetham drew attention to data upon which the judge relied which indicated that some potential adopters might be deterred from proceeding if ongoing 'contact' was proposed. She observed that the data grouped all categories of case together, without sub-dividing those where contact was to be with the child's parents or wider family, and those confined only to inter-sibling contact. It was not, she submitted, therefore, a reliable indication of the likely reaction to a case such as the present.

54. Separately, Ms Cheetham submitted that, in any event, there was a need for contact to be maintained at the proposed reduced level pending identification of a placement and an order, which might subsequently be varied, was required to support this.

55. Overall, Ms Cheetham characterised the judge's welfare analysis as directed solely to the detrimental impact that an order for contact may have on the prospect of finding a family for R. Whilst this was a factor in the balance, it was not the only factor. Although the judge said [paragraph 159] that he was putting that factor 'into the holistic welfare

balance', he did not go on to identify the other countervailing factors in that balance, such as the established relationship between the brothers.

56. For the local authority, Mr Karl Rowley KC, leading Ms Louise McCallum, opposed the appeal. They emphasised that the judge, who had conducted a full fact-finding hearing followed by a further full final hearing, was in a privileged position to understand the issues in the case. A welfare decision by a judge in such a position should only be overturned where it is outside the generous ambit of discretion and where, as here, either making an order or not doing so might be justified, the judge could not be criticised for choosing one option over the other. Further, whilst the professional opinion was in favour of adoption, that opinion was equally clear that a s 26 order should not be made. Mr Rowley submitted that a conscientious decision by a judge so steeped in the case as this should be respected by the appellate court, particularly so as it was based on unanimous professional opinion and was clearly within the bounds of his discretion.

57. Whilst the local authority and the judge had acknowledged the recent focus on increased contact arising from the PLWG report and my extra-curial observations, a case where siblings had lived apart save for the few early months in the life of the youngest was not a vehicle in which to signal any significant change in approach to post-adoption contact.

58. In the present case, whilst some continuing contact was desirable, it was not essential and should not be sought or maintained at the expense of finding an adoptive placement. The judge had been right to acknowledge and give full weight to the impact on family finding if a contact order were made. Although the degree of contact proposed (twice per year) was modest, it was the fact of there being an order which would deter applicants irrespective of the detailed arrangements. Mr Rowley summed this central point up by saying that there is no purpose in looking at contact in adoption if there is to be no adoption.

59. For the children's guardian, Miss Lorraine Cavanagh KC, leading Miss Karen Lennon, supported the local authority's stance in opposing the appeal. The professional evidence was in favour of some continuing direct contact between the brothers, but it was submitted that the judge was well within the ambit of his discretion in holding that it was not necessary to make a contact order. The prospective pool of adopters for a child with potential neuro-developmental difficulties was small and should not be further reduced by there being a contact order. Miss Cavanagh addressed the appellant's proposition that an order should be made as it could be varied or discharged if it, later, it came to be seen as inhibiting finding adopters and submitted that this proposition was flawed as, by that time, any damage would have been done. Miss Cavanagh countered the appellant's criticism that the judge had solely focussed on the impact that a contact order might have on family finding. She pointed to paragraphs 165 and 166 where the judge, in terms, rehearsed the pros and cons that a potential adopter would have in mind, including the fact that the boys were 'enjoying an ongoing relationship through contact.' The care plan was clearly in favour of contact, the sole issue was whether there should be an order.

60. Ms Deirdre Fottrell KC, Ms Sharon Segal KC and Ms Andrea Watts provided submissions on behalf of the ALC in which they observed that, during the 20 years of its existence, the court's power to make orders for contact under s 26 had been 'under-

utilised'. It is the understanding of the ALC (from its members) that applications for a s 26 order are routinely met with 'default opposition' on the basis that there will be a risk of limiting the pool of prospective adopters, and that this is used as a trump card. The local authority's position in the present case was an example of this and was demonstrative of a 'wider resistance running through the Family Court to post adoption contact'. As a result, part of the statutory scheme was simply not being used. The ALC supported the PLWG report, which, it observed, had asserted clearly that there was a need for cultural change, and which was an 'important and seminal document'.

61. The ALC submissions drew attention to the current 'Statutory Guidance on Adoption for local authorities, voluntary adoption agencies and adoption support services' which was last issued in July 2013. The ALC is critical of this guidance on the basis that it takes no account of the extensive research that has been published in the ensuing decade; they suggest that the guidance is now ripe for review. This is particularly so as there is a dearth of case law on ACA 2002, s 26.

62. The ALC drew attention to the extensive research by Professor Elsbeth Neil and others as to the benefits of post-adoption contact. It was submitted that the prevalence of the assertion that proposals for post adoption contact may have a chilling effect on the recruitment of adopters, demonstrated a lack of knowledge of that research within local authorities. The ALC skeleton argument stated:

> 'It appears to the ALC that the detail of this research is simply not known or properly understood by local authorities, guardians and perhaps the judiciary. It is relevant that research by Professor Neil simply does not support the assumption that the pool is reduced by the making of a section 26 order. But perhaps more importantly she observes that the Act requires local authorities and the court to consider a different question – namely the benefit to the particular child of post adoption contact with their birth family.'

63. The ALC quoted from an article by Professor Neil, 'Maintaining Children's Birth Family Relationships in Adoption' [2024] Fam Law 575:

> 'Once the child's needs in relation to maintaining relationships have been clearly identified, in searching for adopters at the matching stage these needs must be given priority alongside other needs. It is not good enough to allow the child's contact plans to be driven primarily by the wishes of adoptive parents, or indeed the perceived wishes of as yet unidentified adoptive parents (as happens when contact plans are scaled back lest they 'put off' prospective adopters). It is however vital that once adopters are identified they can have input into the exact shape of contact plans and in determining what support is needed'.

64. The ALC submitted that a placement for adoption order should be seen as a bridging decision, designed to move the child from their current circumstances into an adoptive placement. On that basis, where the court is clear that continuing contact is an important element in the structure of that bridge, that should be reflected in the orders that are made.

65. For CoramBAAF, Ms Alexandra Conroy Harris described the changing approach to adoption, and to the preparation and training of prospective adopters, aimed at reflecting numerous research studies which had identified a correlation between well-

managed and well-supported contact and the wellbeing of an adopted child, their sense of identity and the stability of the adoptive placement. She emphasised the long-term potential importance of sibling relationships.

66. Ms Conroy Harris reported that, as a result of changes in training, the number of adoptive homes with ongoing contact arrangements was steadily rising and, in figures from Adoption UK for 2024, 97% of new adoptive families had agreements for indirect contact and 45% had an agreement for some direct contact (whether with parents or siblings); no separate figures for sibling contact alone were available. CoramBAAF, which is the leading UK organisation for professionals working in adoption, believes that 'the continuing development of an open adoption culture is the most effective way of embedding ongoing contact', which, in turn, is a development that CoramBAAF supports.

67. Ms Conroy Harris advised that a key message from research is for contact arrangements to remain flexible so as to reflect the changing needs of the child. Imposing a specific requirement for contact, which may be seen as rigid and inflexible, via a s 26 order may not be appropriate at a time when the child and their family's relationships are so fluid. Thus, a form of s 26 order which recognised the importance of continuing contact, but allowed for a significant degree of flexibility, might be the most appropriate means of meeting a child's needs in some cases.

68. CoramBAAF told the court that there is 'a great deal of confusion' over the approach that should now be taken to issues of contact at the placement order stage. One area of confusion is said to arise from the decision of this court in *Re R (Children)*. As I have already described, *Re R* concerned four siblings, two of whom were to remain in foster care, with the younger two moving to adoption. The care plan provided for direct contact between the siblings at a minimum of six visits a year. The appeal against the refusal of the placement order was allowed and, rather than remitting the case back to the Family Court, the Court of Appeal made a placement for adoption order for the two younger children and made an order under s 26 for visiting contact between the four siblings six times per year.

69. The point to which Ms Conroy Harris drew attention in terms of the impact of the decision in *Re R* in the lower courts was that, where continuing direct contact was agreed to be in a child's best interest, courts were, she said, routinely imposing a regime for 'six visits per year' in each case, irrespective of whatever frequency of contact may have been recommended in any of the particular cases. Pausing there, if that is so, then it is a concerning development and one which surprised this court when we were told about it. Insofar as contact at the level of six times per year was ordered in *Re R*, the Court of Appeal was doing no more than encapsulating the agreed arrangements in that particular case in its order. A key message from Baker LJ's judgment in *Re R* is that each case will turn on its own facts. In the context of adoption, contact as often as six times a year may be thought as being on the high side. It was recommended by the professionals in that case but, for example, would not be recommended by the professionals in the present case. If Ms Conroy Harris is correct that some courts are simply cutting and pasting the bottom-line outcome in *Re R* into every case where there is to be continuing direct contact post-placement order, then those courts are misapplying that decision. If there is to be continuing direct contact in any case, the level of contact should be at a bespoke rate for the needs of the particular child(ren) in that case. In that context, the actual rate ordered in *Re R* is irrelevant.

70. Ms Conroy Harris informed the court that CoramBAAF had launched a revised template for the Child's Permanence Report ['CPR'] in March 2025. The phrase 'staying in touch' replaces 'contact' and the issue is much more prominent in this new version. The CPR is often the basis of the Annex B report filed by the adoption agency in the court process, in accordance with PD14C, where there has been an application for a placement order

Post placement order contact: the legal context

71. From a range of perspectives, it is possible to discern a clear shift over recent years in the direction of travel in understanding the approach to be taken to the issue of post-adoption contact. This shift has been driven by research (from a social work and psychological perspective) into arrangements that best meet the complex and life-long needs of children who are to be placed for adoption. The direction of travel is well delineated in the detailed analysis given by Baker LJ in *Re R*. It is underpinned by the extensive research of Professor Neil and others (both domestically and internationally). It was described in detail and taken up in the recommendations of the PLWG, and, importantly, it is endorsed by CoramBAAF, which has recently enhanced the focus on arrangements for a child to 'stay in touch' with family members post-adoption.

72. The question of how this shift in understanding should be reflected, if at all, by the court in making orders under ACA 2002, s 26 is at the centre of this appeal, and it is a difficult one. The difficulty, in part, arises from the binary nature of a court's decision whether to make, or not to make, an order, where the underlying factors are in essence subtle and, to a large extent, involve looking into the future when a key element of that future, namely the attitude of specific potential adopters, is a known-unknown. It is easy to understand how courts may opt to play safe and decline to make a s 26 order, when faced with the 'default opposition' identified by the ALC, but, as was submitted, a court should consider whether the evidence in the case before it establishes grounds for holding that would-be adopters are likely to be deterred or whether, as the ALC submitted, research does not, in fact, support that conclusion.

73. In terms of potential adopters possibly being deterred from pursuing interest in a child who is waiting to be placed, it was concerning for the court to be told that the information disclosed through the online family-finding network did not differentiate between parental contact and sibling contact, with the entry simply recording that there was a requirement for ongoing 'contact' – irrespective of whether this was limited to sibling only. The possibility that would-be adopters, who might well contemplate sibling only contact, are put off by the catch-all label of 'contact', is an unwelcome further complication when a court is trying to discern the impact of making a contact order.

74. But, difficult though the issue may be, it would be wrong for the risk of deterring potential adopters to be the determining factor in each and every case. That this is so is demonstrated by the decisions of the Court of Appeal in both *Re P* and *Re R*. Wall LJ and, nearly two decades later, Baker LJ were both right to hold that it is the responsibility of the court to make orders for contact if they are required to meet the child's welfare needs, as determined under ACA 2002, s 1. The position of potential adopters should not, to use Baker LJ's words, obviate the court's responsibility to set the template for contact at the placement order stage. There will be cases where the importance of preserving a measure of direct sibling contact is such that the court

should stipulate that that is so in an order, rather than leaving it to the adoption agency and adopters to negotiate. In other cases, the comparative importance of maintaining contact will be secondary to achieving an adoptive placement, and making a formal order may not be justified.

75. The duty imposed on the court under ACA 2002, s 27(4) to consider the proposed arrangements for contact is an important one. It applies to every application for a placement order, whether or not a formal application for contact has been made. In contrast to all other elements of the care plan for a child who is to be placed for adoption, Parliament has given the courts this responsibility to consider the contact arrangements and jurisdiction to make orders where to do so is in the best interests of the subject child.

76. When evaluating the issue of contact, the welfare provisions in s 1, with their life-long perspective, apply in full. It is likely that s 1(4)(c) and (f)(i) will be of particular importance in assessing the value of future contact:

> '(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,'
>
> '(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,'

77. Although, in strict legal terms, a contact order made under s 26 is limited to the period between the making of a placement order and either the ultimate adoption of the child or the discharge of the placement and/or contact order, the requirement for the court to afford paramount consideration to the child's welfare 'throughout his life' means that the s 26 decision must look to the place that contact during this crucial transitional phase of placement for adoption will play in the child's overall, life-long, welfare requirements. It may be helpful for professional evidence to be set out in a way that offers the court and the parties a 'road map' for contact looking forward, through the initial placement stage, and onto the longer term future.

78. In that regard, it may be helpful for the court to consider dividing the period to be covered by any s 26 contact order into two, 'phase one' and 'phase two', with phase one running up to the point where a placement for adoption has been identified, and phase two running thereafter. In the present case, the plan is for sibling contact to be fortnightly pending the identification of a placement, but reducing to two direct and two indirect occasions each year thereafter. In such a case an order might be made expressly providing that at the end of phase one, prior to or at the time of placement, an application to vary or revoke the order may be made under s 27(1)(b). Alternatively, phase two might simply identify the court's endorsement of the principle that some level of direct contact should continue, or set a bare minimum, without being unduly prescriptive.

79. The need for a bespoke analysis of the future contact arrangements in each case for each child, as required by the statute, cannot be too firmly stressed. If, where some continuing direct sibling contact is justified, courts are, astonishingly, fixing the level at six times per year simply because that was the rate endorsed by the Court of Appeal in *Re R*, they are wholly wrong to do so. Just as the decision whether an order is necessary will turn on the particular facts of each case, so too will the detailed contact arrangements.

80. Finally, in terms of general observations on this issue, I wish to endorse Ms Conroy Harris' valuable suggestion that a form of s 26 order which recognised the importance of continuing contact, but allowed for a significant degree of flexibility, might be the most appropriate means of meeting a child's needs in some cases. An express order for finite contact arrangements, specifying the number and circumstances in which it is to take place, may not be apt in some cases. Given the number of uncertainties in play at the time that a placement order is being made, a more flexible statement of the road map for future contact that the court has determined for the child may well be more appropriate. In such cases, rather than having an order for contact in concrete terms, the court might record its views, and its endorsement of the future contact plans, in a recital to the placement order. Although whether to make, or not to make, an order is a binary choice, the terms of any order where justified can, and should, be used to establish flexibility over the contact arrangements where this is justified. Where a precise order for contact may not be appropriate, courts should therefore be encouraged to use recitals in a placement order and/or a s 26 order, setting out in short terms its welfare conclusion as to future contact.

The appeal: discussion and conclusion

81. Turning to the appeal itself, the central criticism made by the Appellant is that the judge focussed solely on the detrimental impact that an order for contact may have on the prospect of finding a family for R. It is a criticism that can validly be raised against the judgment. Although, at one point, the judge indicated that he was placing the risk of deterring potential adopters into the 'holistic welfare balance', as a matter of structure and content there is no point in the judgment when he set out what the other key factors in that balance were, and what weight he attributed to each. Whilst judges do not need slavishly to recite the s 1(4) welfare checklist, the judge did not refer to it in the part of the judgment in which he determined this issue. Reference to s 1(4)(c) and (f)(i) would have brought focus upon weighing the importance of S's relationship with R within the overall welfare balance. One only finds reference to the benefit to S of continued contact with R in the judge's summary of the factors that a prospective adopter would come to know and weigh up when considering proceeding with the placement, and in the final paragraph [169] where he states that he is 'not questioning the importance of seeking to maintain a relationship through contact between [S] and [R]'.

82. There is, however, a danger for an appellate court to be drawn too closely into forensic dissection of a judgment to the exclusion of all else. Mr Rowley's submissions encouraging proper respect for the privileged perspective of the trial judge, especially one who had been as steeped in this case and this family as this judge had been, are sound. An appeal is against the order made by the lower court, and not the judgment. Where a judgment discloses a fundamental error of law or fact, then the resulting order is likely to be very vulnerable on appeal. But, in the present case, the judge was exercising judicial discretion on a finely balanced issue of child welfare. He was faced,

unusually, with total agreement from all those before the court as to the planned contact arrangements in phase one of the move towards placement, and there was consensus as to the goal for contact thereafter. The only question was whether or not those arrangements should be encapsulated within a court order. It was not, therefore, necessary for the judge to determine any issue concerning the benefit, or otherwise, of continuing contact between R and S as that was agreed. In that context, the absence of an overall review of the principle of contact was not required and the judge's focus on the detriment that would flow from the making of an order, as opposed to allowing the agreed plan to be implemented by the adoption agency, was not inappropriate.

83. Secondly, the judge expressed his full confidence in the unanimous professional opinion before the court and in the social work team's commitment to contact and its ability to work with potential adopters without an order. This was an important judicial evaluation, which was a relevant factor in the 'order/no order' evaluation, and the judge was right to take it into account.

84. Thirdly, because of S's uncertain neurological prognosis, the evidence was that it would be harder to find adopters for him and, in that context, the potential for a court order to have at least some chilling effect on recruitment was clearly a relevant factor to which the judge was entitled to attach weight.

85. Finally, in a case where the sole live issue is whether an agreed arrangement should be embodied in a court order, ACA 2002, s 1(6) prevented the judge from making an order unless he considered that 'making the order would be better for the child than not doing so'. The judge had s 1(6) in focus throughout and he correctly directed himself on its impact in the penultimate paragraph [168] before setting out his conclusion which was, in terms: 'I do not consider that making a s 26 order for direct sibling contact would be better for [S] than not doing so. I therefore decline to make such an order.'

86. The judge was fully immersed in the detail of this case after two full hearings and having delivered two thorough judgments. Against that background, he understood and accepted the professional evidence about the impact of making an order for contact in this case. In contrast to the factual matrices in *Re P* and *Re R*, the maintenance of contact between R and S was, in the local authority's view, which the judge accepted, that it 'should be promoted and would ideally be put in place' but that it 'should be seen as a desirable element rather than an essential'. He was satisfied in the good faith and professional resolve of the social work team on this issue. In the circumstances, it is simply not possible to hold that the judge was wrong in applying s 1(6) as he did and declining to make an order in this case.

87. For the reasons that I have now given, I would dismiss this appeal.

Lady Justice King:

I agree.

Lord Justice Singh:

88. I also agree.