Neutral Citation Number: [2013] EWCA Civ 1146

Case No: B4/2013/1377

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHELMSFORD COUNTY COURT
Mrs Justice PARKER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 September 2013

Before :

LORD DYSON MASTER OF THE ROLLS
SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
and
LADY JUSTICE BLACK

- -

Re B-S (Children)

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- -

Ms Maureen Obi-Ezekpazu (instructed by the Bar Pro Bono Unit) for the appellant (mother)
Mr Alex Verdan QC (instructed by Baxter Harries Solicitors and Essex County Council) for the respondents (the adopters and the local authority)

Hearing date : 22 July 2013

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Approved Judgment

Sir James Munby President of the Family Division :

1. This is the judgment of the court.

2. This is an appeal, pursuant to permission given by McFarlane LJ on 14 June 2013 (*Re B-S (Children)* [2013] EWCA Civ 813), from an order dated 7 May 2013 made by Parker J sitting in the Chelmsford County Court. Parker J refused a mother's application under section 47(5) of the Adoption and Children Act 2002 for leave to oppose the making of adoption orders in relation to her two children. At the conclusion of the argument we were satisfied that the appeal had to be dismissed and informed the parties accordingly. We have taken some time to put our reasons in writing because the appeal not merely requires us to determine an important question of law as to the proper application of section 47(5); it also raises some very significant matters of more wide-reaching importance.

The background facts

3. The mother has two children, the elder born in November 2007 and the younger in September 2008. In February 2011 they were removed from the mother's care. In October 2011 they were made the subject of care and placement orders, the court dispensing with the mother's consent in accordance with section 52(1)(b) of the 2002 Act. Contact between the mother and the children ceased in December 2011. The children were placed with prospective adopters in April 2012. An application for adoption followed in 2013. It was listed before Parker J on 7 May 2013. The mother applied under section 47(5) of the Act for leave to oppose the adoption. The basis of her application was that there had been what MacFarlane LJ described as "an astonishing change of circumstances" since the making of the care and placement orders. Parker J gave a full judgment explaining why she refused the mother's application and then proceeded to make adoption orders. We return below to consider Parker J's reasoning. Parker J refused the mother permission to appeal.

The appeal

4. The mother filed an appellant's notice on 23 May 2013 setting out seven grounds of appeal and seeking a new trial. McFarlane LJ explained in some detail why he was giving permission to appeal on all except one of the grounds relied on. He was concerned that the full court should have the opportunity of considering the then very recent decision of the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911. In particular he thought that the test in *Re W (Adoption: Set Aside and Leave to Oppose)* [2010] EWCA Civ 1535, [2011] 1 FLR 2153, might need to be reconsidered in the light of *Re B*. He indicated (para 10) that there was a potential here for what he called a fundamental review of the test to be applied to applications of this sort for leave to oppose adoption. He questioned (para 18) whether some of what had been said in *Re W* was still tenable in the light of what the Supreme Court had subsequently said in *Re B*. He accordingly gave permission to appeal (para 19) "so that the test to be applied in these

applications for leave as cast in *Re W* can now be audited in the light of the judgments of the Supreme Court in *Re B* to ensure that it sets the threshold at a proportionate level."

The statutory framework

5. Care orders are made in accordance with section 31 of the Children Act 1989. Placement and adoption orders are made in accordance with sections 21 and 46 respectively of the 2002 Act.

6. The court cannot make a placement order unless either the parent has consented or the court is satisfied that the parent's consent should be dispensed with: section 21(3). The court cannot dispense with a parent's consent unless either the parent cannot be found, or lacks capacity to give consent, or the welfare of the child "requires" the consent to be dispensed with: section 52(1). In deciding whether or not to make a placement order the paramount consideration of the court must be the child's welfare "throughout his life": section 1(2). The court must have regard to the 'welfare checklist' in section 1(4). So far as material for present purposes a placement order continues in force until it is revoked under section 24 or an adoption order is made: section 21(4).

7. A parent who seeks the revocation of a placement order must first be given leave to apply: section 24(2)(a). The court "cannot" give leave "unless satisfied that there has been a change in circumstances since the order was made": section 24(3). There is therefore a two-stage process: Has there been a change in circumstances? If so, should leave to apply be given?

8. The change in circumstances does not have to be "significant", but needs to be of a nature and degree sufficient to open the door to a consideration of whether leave to apply should be given: *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616, [2007] 2 FLR 1069. At the second stage, the child's welfare is relevant but *not* paramount: *M v Warwickshire County Council* [2007] EWCA Civ 1084, [2008] 1 FLR 1093. The question for the court is "whether in all the circumstances, including the mother's *prospect of success* in securing revocation of the placement order and *T's interests*, leave should be given": *NS-H v Kingston upon Hull City Council and MC* [2008] EWCA Civ 493, [2008] 2 FLR 918, para 27.

9. It is to be noted that the parental right to apply under section 24(2) for leave to apply to revoke a placement order comes to an end when the child is placed for adoption: section 24(2)(b). Thereafter there is no opportunity for a parent to challenge the process until an application for an adoption order is issued: *M v Warwickshire County Council* [2007] EWCA Civ 1084, [2008] 1 FLR 1093, *Re F (Placement Order)* [2008] EWCA Civ 439 [2008] 2 FLR 550.

10. Section 42 sets out minimum periods during which the child must have lived with the prospective adopters before an application for an adoption order can be made. Where, as typically and as in the present case, the child has been placed with the applicants by an adoption agency, here the local authority, that period is 10 weeks: section 42(2). Longer periods applicable in other cases are prescribed by sections 42(3)-(5).

11. Section 47 sets out the conditions for making an adoption order. So far as material for present purposes it provides as follows:

> "(1) An adoption order may not be made if the child has a parent or guardian unless one of the following three conditions is met; but this section is subject to section 52 (parental etc consent).
>
> (2) The first condition is that, in the case of each parent or guardian of the child, the court is satisfied –
>
> (a) that the parent or guardian consents to the making of the adoption order,
>
> (b) that the parent or guardian has consented under section 20 (and has not withdrawn the consent) and does not oppose the making of the adoption order, or
>
> (c) that the parent's or guardian's consent should be dispensed with.
>
> (3) A parent or guardian may not oppose the making of an adoption order under subsection (2)(b) without the court's leave.
>
> (4) The second condition is that –
>
> (a) the child has been placed for adoption by an adoption agency with the prospective adopters in whose favour the order is proposed to be made,
>
> (b) either –
>
> (i) the child was placed for adoption with the consent of each parent or guardian and the consent of the mother was given when the child was at least six weeks old, or
>
> (ii) the child was placed for adoption under a placement order, and
>
> (c) no parent or guardian opposes the making of the adoption order.

> (5) A parent or guardian may not oppose the making of an adoption order under the second condition without the court's leave.
>
> …
>
> (7) The court cannot give leave under subsection (3) or (5) unless satisfied that there has been a change in circumstances since the consent of the parent or guardian was given or, as the case may be, the placement order was made."

12. In the present case, and because placement orders had been made and not revoked, the adoption application was proceeding under "the second condition": see section 47(4)(b)(ii). Had the mother been given leave to oppose, the matter could no longer have proceeded under that condition: see section 47(4)(c). It would necessarily have had to proceed under "the first condition". As McFarlane LJ put it (*Re B-S* [2013] EWCA Civ 813, para 1 1):

> "The effect if leave is given to oppose is that the case can no longer proceed as it was doing under "the second condition" in s 47(4), and the adoption application would fall to be determined at a full hearing under which the "first condition" in s 47(2) would be in play, with the question of whether the child's welfare requires dispensing with parental consent to adoption being determined at that hearing in the light of the circumstances that then exist."

We agree.

13. So one can see the crucial effect of a parent being given leave to oppose under section 47(5): not merely is the parent able to oppose the making of an adoption order, but the parent, notwithstanding the making of the earlier placement order, is entitled to have the question of whether parental consent should be dispensed with considered afresh and, crucially, considered in the light of current circumstances (which may, as in the present case, be astonishingly different from those when the placement order was made).

14. We must return in due course to consider the precise nature of the exercise which the court has to undertake in considering an application under section 47(5). Here we need note only that, in contrast to the somewhat analogous process under section 24(2), on an application under section 47(5) the child's welfare *is* paramount: *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616, [2007] 2 FLR 1069, *M v Warwickshire County Council* [2007] EWCA Civ 1084, [2008] 1 FLR 1093.

Adoption – the wider context

15. Lurking behind the present case, and indeed a number of other recent cases before appellate courts which we refer to below, one can sense serious concerns and misgivings about how courts are approaching cases of what for convenience we call 'non-consensual' as contrasted with 'consensual adoption'; that is, cases where a placement order or adoption order is made without parental consent. Most frequently, parental consent is dispensed with in accordance with section 52(1)(b), on the footing that the welfare of the child requires the consent to be dispensed with. But we must not forget the not inconsiderable number of cases where parental consent is dispensed with because the parent lacks capacity.

16. We – all of us – share these concerns.

Adoption – fundamental principles

17. Before proceeding any further, it is necessary for us to go back to first principles and to emphasise a number of essential considerations that judges *must* always have in mind, and we emphasise this, at *every* stage of the process. Regrettably, the continuing lack of attention to what has been said in previous judgments necessitates our use of plain, even strong, language.

18. We start with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. There is no need for us to go through the jurisprudence of the Strasbourg court. The relevant passages from three key decisions, *K and T v Finland* (2001) 36 EHRR 255, *R and H v United Kingdom* (2012) 54 EHRR 2, [2011] 2 FLR 1236,[1] and *YC v United Kingdom* (2012) 55 EHRR 967, are set out by the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911. The overarching principle remains as explained by Hale LJ, as she then was, in *Re C and B* [2001] 1 FLR 611, para 34:

> "Intervention in the family may be appropriate, but the aim should be to reunite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child."

To this we need only add what the Strasbourg court said in *YC v United Kingdom* (2012) 55 EHRR 967, para 134:

> "family ties may only be severed in very exceptional circumstances and … everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the

[1] This case, the aftermath of *Down Lisburn Health and Social Services Trust and another v H and another* [2006] UKHL 36, involved a freeing order under the Northern Ireland equivalent of the Adoption Act 1976 rather than a placement order under the 2002 Act but the principles are the same.

> family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing."

19. In this connection it is to be remembered, as Baroness Hale pointed out in *Down Lisburn Health and Social Services Trust and another v H and another* [2006] UKHL 36, para 34, that the United Kingdom is unusual in Europe in permitting the total severance of family ties without parental consent.

20. Section 52(1)(b) of the 2002 Act provides, as we have seen, that the consent of a parent with capacity can be dispensed with only if the welfare of the child "requires" this. "Require" here has the Strasbourg meaning of necessary, "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable": *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625, paras 120, 125. This is a stringent and demanding test.

21. Just how stringent and demanding has been spelt out very recently by the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911. The significance of *Re B* was rightly emphasised in two judgments of this court handed down on 30 July 2013: *Re P (A Child)* [2013] EWCA Civ 963, para 102 (Black LJ), and *Re G (A Child)* [2013] EWCA Civ 965, paras 29-31 (McFarlane LJ). As Black LJ put it in *Re P*, *Re B* is a forceful reminder of just what is required.

22. The language used in *Re B* is striking. Different words and phrases are used, but the message is clear. Orders contemplating non-consensual adoption – care orders with a plan for adoption, placement orders and adoption orders – are "a very extreme thing, a last resort", only to be made where "nothing else will do", where "no other course [is] possible in [the child's] interests", they are "the most extreme option", a "last resort – when all else fails", to be made "only in exceptional circumstances and where motivated by *overriding requirements* pertaining to the child's welfare, in short, where nothing else will do": see *Re B* paras 74, 76, 77, 82, 104, 130, 135, 145, 198, 215.

23. Behind all this there lies the well-established principle, derived from s 1(5) of the 1989 Act, read in conjunction with s 1(3)(g), and now similarly embodied in s 1(6) of the 2002 Act, that the court should adopt the 'least interventionist' approach. As Hale J, as she then was, said in *Re O (Care or Supervision Order)* [1996] 2 FLR 755, 760:

> "the court should begin with a preference for the less interventionist rather than the more interventionist approach. This should be considered to be in the better interests of the children … unless there are cogent reasons to the contrary."

24. Linked with this is the vitally important point made by Wall LJ in *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625, para 126:

> "Section 52(1) is concerned with adoption – the making of either a placement order or an adoption order – and what therefore has to be shown is that the child's welfare 'requires' adoption as opposed to something short of adoption. A child's circumstances may 'require' statutory intervention, perhaps may even 'require' the indefinite or long-term removal of the child from the family and his or her placement with strangers, but that is not to say that the same circumstances will necessarily 'require' that the child be adopted. They may or they may not. The question, at the end of the day, is whether what is 'required' is adoption."

25. Implicit in all this are three important points emphasised by Lord Neuberger in *Re B*.

26. First (*Re B* paras 77, 104), although the child's interests in an adoption case are paramount, the court must never lose sight of the fact that those interests include being brought up by the natural family, ideally by the natural parents, or at least one of them, unless the overriding requirements of the child's welfare make that not possible.

27. Second (*Re B* para 77), as required by section 1(3)(g) of the 1989 Act and section 1(6) of the 2002 Act, the court "must" consider all the options before coming to a decision. As Lady Hale said (para 198) it is "necessary to explore and attempt alternative solutions". What are these options? That will depend upon the circumstances of the particular cases. They range, in principle, from the making of no order at one end of the spectrum to the making of an adoption order at the other. In between, there may be orders providing for the return of the child to the parent's care with the support of a family assistance order or subject to a supervision order or a care order; or the child may be placed with relatives under a residence order or a special guardianship order or in a foster placement under a care order; or the child may be placed with someone else, again under a residence order or a special guardianship order or in a foster placement under a care order. This is not an exhaustive list of the possibilities; wardship for example is another, as are placements in specialist residential or healthcare settings. Yet it can be seen that the possible list of options is long. We return to the implications of this below.

28. Third (*Re B* para 105), the court's assessment of the parents' ability to discharge their responsibilities towards the child must take into account the assistance and support which the authorities would offer. So "before making an adoption order … the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support." In this connection it is worth remembering what Hale LJ had said in *Re O (Supervision Order)* [2001] EWCA Civ 16, [2001] 1 FLR 923, para 28:

> "It will be the duty of everyone to ensure that, in those cases where a supervision order is proportionate as a response to the risk presented, a supervision order can be made to work, as

> indeed the framers of the Children Act 1989 always hoped that it would be made to work. The local authorities must deliver the services that are needed and must secure that other agencies, including the health service, also play their part, and the parents must co-operate fully."

That was said in the context of supervision orders but the point is of wider application.

29. It is the obligation of the local authority to make the order which the court has determined is proportionate work. The local authority cannot press for a more drastic form of order, least of all press for adoption, because it is unable or unwilling to support a less interventionist form of order. Judges must be alert to the point and must be rigorous in exploring and probing local authority thinking in cases where there is any reason to suspect that resource issues may be affecting the local authority's thinking.

<u>Adoption – our concerns</u>

30. We have real concerns, shared by other judges, about the recurrent inadequacy of the analysis and reasoning put forward in support of the case for adoption, both in the materials put before the court by local authorities and guardians and also in too many judgments. This is nothing new. But it is time to call a halt.

31. In the last ten days of July 2013 very experienced family judges in the Court of Appeal had occasion to express concerns about this in no fewer than four cases: *Re V (Children)* [2013] EWCA Civ 913 (judgment of Black LJ), *Re S, K v The London Borough of Brent* [2013] EWCA Civ 926 (Ryder LJ), *Re P (A Child)* [2013] EWCA Civ 963 (Black LJ) and *Re G (A Child)* [2013] EWCA Civ 965 (McFarlane LJ). In the last of these, McFarlane LJ was explicit (para 43):

> "The concerns that I have about the process in this case are concerns which have also been evident to a greater or lesser extent in a significant number of other cases; they are concerns which are now given sharper focus following the very clear wake-up call given by the Supreme Court in *Re B*."

32. It is time to draw the threads together and to spell out what good practice, the 2002 Act and the Convention all demand.

<u>Adoption – essentials</u>

33. Two things are essential – we use that word deliberately and advisedly – both when the court is being asked to approve a care plan for adoption and when it is being asked to make a non-consensual placement order or adoption order.

Adoption – essentials: (i) proper evidence

34. First, there must be proper evidence both from the local authority and from the guardian. The evidence must address *all* the options which are realistically possible and must contain an analysis of the arguments *for* and *against* each option. As Ryder LJ said in *Re R (Children)* [2013] EWCA Civ 1018, para 20, what is required is:

> "evidence of the lack of alternative options for the children and an analysis of the evidence that is accepted by the court sufficient to drive it to the conclusion that nothing short of adoption is appropriate for the children."

The same judge indicated in *Re S, K v The London Borough of Brent* [2013] EWCA Civ 926, para 21, that what is needed is:

> "An assessment of the benefits and detriments of each option for placement and in particular the nature and extent of the risk of harm involved in each of the options".

McFarlane LJ made the same point in *Re G (A Child)* [2013] EWCA Civ 965, para 48, when he identified:

> "the need to take into account the negatives, as well as the positives, of any plan to place a child away from her natural family".

We agree with all of this.

35. Too often this essential material is lacking. As Black LJ said in *Re V (Children)* [2013] EWCA Civ 913, para 88:

> "I have searched without success in the papers for any written analysis by local authority witnesses or the guardian of the arguments for and against adoption and long term fostering … It is not the first time that I have remarked on an absence of such material from the evidence, see *Plymouth CC v G (children)* [2010] EWCA Civ 1271. Care should always be taken to address this question specifically in the evidence/ reports and that this was not done here will not have assisted the judge in his determination of the issue."

In the *Plymouth* case she had said this (para 47):

> "In some respects the reports of the guardian and the social worker, and the social worker's statement, are very detailed, giving information about health and likes and dislikes, wishes and feelings. However there is surprisingly little detail about the central issue of the type of placement that will best meet the children's needs … In part, this may be an unfortunate by-product of the entirely proper use, by both witnesses, of the checklist of factors and, in the case of the social worker's placement report, of the required pro forma. However, the court requires not only a list of the factors that are relevant to the central decision but also a narrative account of how they fit together, including an analysis of the pros and cons of the various orders that might realistically be under consideration given the circumstances of the children, and a fully reasoned recommendation."

36. Black LJ has not altered the views that she expressed on these earlier occasions and the other members of the court agree with every word of them. We draw attention in particular to the need for "analysis of the pros and cons" and a "fully reasoned recommendation". These are essential if the exacting test set out in *Re B* and the requirements of Articles 6 and 8 of the Convention are to be met. We suggest that such an analysis is likely to be facilitated by the use – which we encourage – of the kind of 'balance sheet' first recommended by Thorpe LJ, albeit in a very different context, in *Re A (Male Sterilisation)* [2000] 1 FLR 549, 560.

37. It is particularly disheartening that Black LJ's words three years ago in the *Plymouth* case seem to have had so little effect.

38. Consider the lamentable state of affairs described by Ryder LJ in *Re S, K v The London Borough of Brent* [2013] EWCA Civ 926, where an appeal against the making of a care order with a plan for adoption was successful because neither the evidence nor the judge's reasoning was adequate to support the order. It is a lengthy passage but it merits setting out almost in full (paras 22-26):

> "22 … what was the evidence that was available to the judge to support her conclusion? … Sadly, there was little or no evidence about the relative merits of the placement options nor any evidence about why an adoptive placement was necessary or feasible.
>
> 23 The allocated social worker in her written statement recommended that [S] needed:
>
> > "a permanent placement where her on-going needs will be met in a safe, stable and nurturing environment. [S]'s permanent carers will need to demonstrate that they are

> committed to [S], her safety, welfare and wellbeing and that they ensure that she receives a high standard of care until she reaches adulthood
>
> Adoption will give [S] the security and permanency that she requires. The identified carers are experienced carers and have good knowledge about children and the specific needs of children that have been removed from their families …"

> 24 With respect to the social worker … that without more is not a sufficient rationale for a step as significant as permanent removal from the birth family for adoption. The reasoning was in the form of a conclusion that needed to be supported by evidence relating to the facts of the case and a social worker's expert analysis of the benefits and detriments of the placement options available. Fairness dictates that whatever the local authority's final position, their evidence should address the negatives and the positives relating to each of the options available. Good practice would have been to have heard evidence about the benefits and detriments of each of the permanent placement options that were available for S within and outside the family.
>
> 25 The independent social worker did not support adoption or removal but did describe the options which were before the court when the mediation opportunity was allowed:
>
> > "Special Guardianship Order: This is the application before the Court and which would afford [S] stability, in terms of remaining with the same primary carer and the opportunity to be raised within her birth family. I do not consider that the situation within the family is suitable at present for this Order to be made.
> >
> > Adoption: [S] could be placed with a family where she should experience stability and security without conflict. This may be the best option for [S] if current concerns cannot be resolved in a timely manner."
>
> 26 In order to choose between the options the judge needed evidence which was not provided. The judge's conclusion was a choice of one option over another that was neither reasoned nor evidenced within the proceedings. That vitiated her evaluative judgment which was accordingly wrong."

39. Most experienced family judges will unhappily have had too much exposure to material as anodyne and inadequate as that described here by Ryder LJ.

40. This sloppy practice must stop. It is simply unacceptable in a forensic context where the issues are so grave and the stakes, for both child and parent, so high.

Adoption – essentials: (ii) adequately reasoned judgments

41. The second thing that is essential, and again we emphasise that word, is an adequately reasoned judgment by the judge. We have already referred to Ryder LJ's criticism of the judge in *Re S, K v The London Borough of Brent* [2013] EWCA Civ 926. That was on 29 July 2013. The very next day, in *Re P (A Child)* [2013] EWCA Civ 963, appeals against the making of care and placement orders likewise succeeded because, as Black LJ put it (para 107):

> "the judge … failed to carry out a proper balancing exercise in order to determine whether it was necessary to make a care order with a care plan of adoption and then a placement order or, if she did carry out that analysis, it is not apparent from her judgments. Putting it another way, she did not carry out a proportionality analysis."

She added (para 124): "there is little acknowledgment in the judge's judgments of the fact that adoption is a last resort and little consideration of what it was that justified it in this case."

42. The judge must grapple with the factors at play in the particular case and, to use Black LJ's phrase (para 126), give "proper focussed attention to the specifics".

43. In relation to the nature of the judicial task we draw attention to what McFarlane LJ said in *Re G (A Child)* [2013] EWCA Civ 965, paras 49-50:

> "In most child care cases a choice will fall to be made between two or more options. The judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option.
>
> The linear approach … is not apt where the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare."

We need not quote the next paragraph in McFarlane LJ's judgment, which explains in graphic and compelling terms the potential danger of adopting a linear approach.

44. We emphasise the words "global, holistic evaluation". This point is crucial. The judicial task is to evaluate *all* the options, undertaking a global, holistic and (see *Re G* para 51) multi-faceted evaluation of the child's welfare which takes into account *all* the negatives and the positives, *all* the pros and cons, of *each* option. To quote McFarlane LJ again (para 54):

> "What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options."

45. McFarlane LJ added this important observation (para 53) which we respectfully endorse:

> "a process which acknowledges that long-term public care, and in particular adoption contrary to the will of a parent, is 'the most draconian option', yet does not engage with the very detail of that option which renders it 'draconian' cannot be a full or effective process of evaluation. Since the phrase was first coined some years ago, judges now routinely make reference to the 'draconian' nature of permanent separation of parent and child and they frequently do so in the context of reference to 'proportionality'. Such descriptions are, of course, appropriate and correct, but there is a danger that these phrases may inadvertently become little more than formulaic judicial window-dressing if they are not backed up with a substantive consideration of what lies behind them and the impact of that on the individual child's welfare in the particular case before the court. If there was any doubt about the importance of avoiding that danger, such doubt has been firmly swept away by the very clear emphasis in *Re B* on the duty of the court actively to evaluate proportionality in every case."

46. We make no apologies for having canvassed these matters in such detail and at such length. They are of crucial importance in what are amongst the most significant and difficult cases that family judges ever have to decide. Too often they are given scant attention or afforded little more than lip service. And they are important in setting the context against which we have to determine the specific question we have to decide in relation to *Re W (Adoption: Set Aside and Leave to Oppose)* [2010] EWCA Civ 1535, [2011] 1 FLR 2153.

<u>Adoption – the current reforms to the family justice system</u>

47. First, however, we need to see how all this fits in with the current reforms to the family justice system and, in particular, with the revised Public Law Outline.

48. Our emphasis on the need for proper analysis, argument, assessment and reasoning accords entirely with a central part of the reforms. In his 'View from the President's Chambers' the President has repeatedly stressed the need for local authority evidence to be more focused than hitherto on assessment and analysis rather than on history and narrative, and likewise for expert reports to be more focused on analysis and opinion: see 'The process of reform: the revised PLO and the local authority', [2013] Fam Law 680, and 'The process of reform: expert evidence', [2103] Fam Law 816. What the court needs is expert opinion, whether from the social worker or the guardian, which is evidence-based and focused on the factors in play in the particular case, which analyses *all* the possible options, and which provides clear conclusions and recommendations adequately reasoned through and based on the evidence.

49. We do not envisage that proper compliance with what we are demanding, which may well impose a more onerous burden on practitioners and judges, will conflict with the requirement, soon to be imposed by statute, that care cases are to be concluded within a maximum of 26 weeks. Critical to the success of the reforms is robust judicial case management from the outset of every care case. Case management judges must be astute to ensure that the directions they give are apt to the task and also to ensure that their directions are complied with. Never is this more important than in cases where the local authority's plan envisages adoption. If, despite all, the court does not have the kind of evidence we have identified, and is therefore not properly equipped to decide these issues, then an adjournment must be directed, even if this takes the case over 26 weeks. Where the proposal before the court is for non-consensual adoption, the issues are too grave, the stakes for all are too high, for the outcome to be determined by rigorous adherence to an inflexible timetable and justice thereby potentially denied.

Section 47(5) of the 2002 Act

50. We turn to the issue of law in relation to *Re W (Adoption: Set Aside and Leave to Oppose)* [2010] EWCA Civ 1535, [2011] 1 FLR 2153, identified for us by McFarlane LJ. Before coming to *Re W* itself, however, we need to look at *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616, [2007] 2 FLR 1069, also a decision on section 47(5).

Section 47(5) of the 2002 Act – *Re P*

51. In *Re P* the judgment of the court (Thorpe and Wall LJJ and Hedley J) was given by Wall LJ. He explained (para 26) that section 47(5) involves a two stage process:

> "In our judgment, analysis of the statutory language in ss 1 and 47 of the 2002 Act leads to the conclusion that an application for leave to defend adoption proceedings under s 47(5) of the

> 2002 Act involves a two-stage process. First of all, the court has to be satisfied, on the facts of the case, that there has been a change in circumstances within s 47(7). If there has been no change in circumstances, that is the end of the matter, and the application fails. If, however, there has been a change in circumstances within s 47(7) then the door to the exercise of a judicial discretion to permit the parents to defend the adoption proceedings is opened, and the decision whether or not to grant leave is governed by s 1 of the 2002 Act. In other words, 'the paramount consideration of the court must be the child's welfare throughout his life'."

52. He rejected the submission that the change in circumstances had to be "significant" and continued (para 30):

> "The change in circumstances since the placement order was made must … be of a nature and degree sufficient, on the facts of the particular case, to open the door to the exercise of the judicial discretion to permit the parents to defend the adoption proceedings."

He added (para 32):

> "We do, however, take the view that the test should not be set too high, because, as this case demonstrates, parents in the position of S's parents should not be discouraged either from bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable. We therefore take the view that whether or not there has been a relevant change in circumstances must be a matter of fact to be decided by the good sense and sound judgment of the tribunal hearing the application."

53. Having rehearsed the provisions of section 1 of the 2002 Act, Wall LJ said this (para 35):

> "Thus, even if the parents are able, on the facts, to identify a change in circumstances sufficient to make it appropriate for the judge to consider whether or not to exercise his discretion to permit the parents to defend the adoption proceedings, the paramount consideration of the court in the actual exercise of the discretion must be the welfare of S throughout her life and, in that context, the court must have regard in particular to the matters set out in s 1(4) of the 2002 Act."

54. In *Re P* the parents had failed in their application under section 47(5). In the course of explaining why their appeal had to be dismissed, Wall LJ said this (para 47):

> "when exercising his discretion under s 47(5) of the 2002 Act the judge was fully entitled – indeed bound – to give considerable weight to the fact that, from the date of the care order (May 2006) until the date of the hearing of the application for leave to defend the adoption proceedings (April 2007), a period of nearly a year, the plan for S had been adoption; that the plan had, moreover, been implemented by S's placement with the applicants in July 2006, and that it was a plan which was working."

Section 47(5) of the 2002 Act – *Re W*

55. In *Re W (Adoption: Set Aside and Leave to Oppose)* [2010] EWCA Civ 1535, [2011] 1 FLR 2153, Holman J had granted a mother leave to oppose the making of an adoption order in accordance with section 47(5). The adopters, supported by the local authority, appealed. This court (Thorpe and Munby LJJ and Coleridge J) allowed the appeal. The main judgment was given by Thorpe LJ. The core of his reasoning is to be found in two paragraphs. First (para 18):

> "once an adoption application is challenged by the natural parent at a very late stage, it is easy to see that to avert the progress, the completion of the progress to adoption, the applicant has to clear three fences which can be seen to be progressively higher fences. The first is to establish the necessary change of circumstances. The second is then to satisfy the court that, in the exercise of discretion, it would be right to grant permission. The third and final stage would, of course, be to persuade the court at the opposed hearing to refuse the adoption order and to reverse the direction in which the child's life has travelled since the inception of the original public law care proceedings."

We do not read that as in any way contradicting what had earlier been said in *Re P*, to which of course Thorpe LJ had been party.

56. At the point when leave is being sought under section 47(5), there is the two stage process identified by Wall LJ in *Re P* and by Thorpe LJ here in *Re W*. Thorpe LJ's reference here to the third stage is, as he makes clear, to the fence that the parent has to surmount, if given leave, when opposing the making of the adoption hearing at the substantive hearing. As McFarlane LJ said, when giving permission to appeal in the present case (*Re B-S (Children)* [2013] EWCA Civ 813, para 15):

> "it seems plain to me in reading that that the "third and final stage" referred to relates to the full adoption hearing if the parent is given leave to oppose. It does not relate to the decision whether or not leave to appeal the adoption should be granted."

57. Thorpe LJ continued (para 20):

> "where a judge exercises a broad discretion as to whether or not permission should be granted at the second stage under s 47(5), the judge must have great regard to the impact of the grant of permission on the child within the context of the adoptive family. Of course, each case will depend upon its particular facts. The present case may be said to be a strong case in the sense that the mother had had no sight of J since the summer of 2007. J had been placed for over a year. J had been told of and had reacted to the making of the adoption order in the spring. To put all these seemingly solid steps into melting question would inevitably have a profoundly upsetting effect on the adopters and the child. So such a consequence should surely not be contemplated unless the applicant for permission demonstrates prospects of success that are not just fanciful and not just measurable. In my opinion, they should have substance. Perhaps, to borrow from the language of Lord Collins of Mapesbury in another sphere, they should have solidity."

That is a reference to what Lord Collins had said in *Agbaje v Agbaje* [2010] UKSC 13, [2010] 1 AC 628, para 33.

58. Explaining why the appeal should be allowed, Thorpe LJ referred (para 26) to the way in which the judge had formulated the issue, which was as follows:

> "I have concluded that there is a real possibility (I do not say probability) that after due investigation, assessment and reconsideration a court will conclude that he can even now return to his mother and should not be adopted."

He contrasted that with what McFarlane J, as he then was, had said in *X and Y v A Local Authority (Adoption: Procedure)* [2009] EWHC 47 (Fam), [2009] 2 FLR 984, para 15:

> "On the information that is before the court it seems entirely improbable that this mother could persuade the court not only that there had been a change of circumstances sufficient to justify giving her leave to oppose the adoption but also that the court would hold that to give her leave was in the children's best interests (the test that has to be applied: *Re P*)."

Thorpe LJ continued (para 28):

> "The language of McFarlane J seems to me much more to reflect the stringent approach that I consider necessary. The language of Holman J in this case seems to me to adopt altogether too permissive an approach."

59. Thus far, subject only perhaps to his use of the word "stringent", we see nothing in what Thorpe LJ was saying that is in any way inconsistent with the analysis in *Re P*. There is a two stage process. In deciding how discretion is to be exercised at the second stage the court must have regard to the parent's ultimate prospects of success if leave to oppose is given. In deciding how discretion is to be exercised the child's welfare is paramount; that being so one can well see why the parent's prospects must be more than just fanciful and must be solid – for how otherwise can it be consistent with the child's welfare to allow matters to be reopened?

60. What is more problematic is something Thorpe LJ had said earlier in his judgment (para 17). He noted that:

> "under the statutory regime the natural parent who has lost a child to a care order and a placement order has the limited right to apply to set aside the care order and the placement order prior to placement. So, turning to the chronology in this case, the mother's window of opportunity to apply to set aside the placement order existed between 16 June 2008 and 25 February 2009. The making of the adoption application in the county court gave the mother a new opportunity, namely to apply for permission to oppose the adoption application."

With that there can be absolutely no quarrel. It brings out the unhappy fact – unhappy, that is, for a parent – that the parental right to apply under section 24(2) for leave to revoke a placement order comes to an end when the child is placed for adoption and that thereafter the parent can do nothing until there is an application for an adoption order. It is the next part which is problematic:

> "However, it cannot be too strongly emphasised that that is an absolute last ditch opportunity and it will only be in exceptionally rare circumstances that permission will be granted after the making of the care order, the making of the placement order, the placement of the child, and the issue of the adoption order application."

61. It was this part of Thorpe LJ's analysis which particularly troubled McFarlane LJ when considering the mother's application for permission.

62. We shall return to this in due course.

63. Before parting from *Re W* we should refer to Coleridge J's short concurring judgment (para 30):

> "No one can have anything but the profoundest sympathy for this mother who seems to have turned her life round in the course of the last two years and to have conquered her addiction to hard drugs. If the court was in the business of

> rewarding parents for effort in these circumstances no doubt, she would succeed and retain the effect of the Holman J order. However, whilst she has been sorting out her life, her child's life has inevitably moved on in her absence. He has not seen her for three years and is now completely embedded in his new family. To unravel the whole process through which the child and the adopters have passed since the child's original removal and placement is quite simply a horrendous prospect both from the point of view of the adopters but more importantly the child himself. It seems to me that it is "entirely improbable", to adopt the words of McFarlane J in the case of *X and Y v a Local Authority*, that the mother would in the end succeed in overturning the adoption order much less the overall plan for adoption so that the child would return to live with her. Even to embark on the process cannot be in his best interests, let alone actually to remove the child from his current home. I doubt it is really in the mother's interest either, merely having the effect of raising false hope for it to be dashed later."

64. Since *Re W* there has been another case in the Court of Appeal to which we should refer: *Re C (A Child)* [2013] EWCA Civ 431. It was an appeal against the refusal of the judge to give leave under section 47(5). The facts were very stark. The father, whose application it was, had been deceived by the child's mother and had never seen his son. The child had been placed with adopters in November 2010. The application for an adoption order was made in April 2011. The father's application under section 47(5) was made in October 2011 and was heard by Her Honour Judge Redgrave in February 2012. The appeal was heard in December 2012.

65. Giving judgment, Sir James Munby P said this (paras 29-30):

> "Before Judge Redgrave, the appellant had to clear two fences. First, he had to establish (as he did) the necessary change of circumstances referred to in section 47(7) of the 2002 Act; second, he then had to satisfy the court that, in the exercise of discretion, it would be right to grant permission: *Re W (Adoption Order: Set Aside and Leave to Oppose)* [2010] EWCA Civ 1535, [2011] 1 FLR 2153, para [18]. In relation to the second, the question fell to be decided by the application of section 1 of the 2002 Act to the facts of the case, so the paramount consideration for the court was C's welfare throughout his life: *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616, [2007] 1 WLR 2556, [2007] 2 FLR 1069, paras [27], [55].
>
> At this stage a "stringent approach" was required: *Re W*, para [28], approving the approach adopted by McFarlane J, as he then was, in *X and Y v A Local Authority (Adoption: Procedure)* [2009] EWHC 47 (Fam), [2009] 2 FLR 984, para [15]."

Explaining why the appeal had to be dismissed the President said (para 37):

> "Standing back from all the detail, the reality is that the appellant has no relationship with C, indeed has never even seen him, and that C has now been settled for over two years with the adopters. How can we, how could any judge, take the risk of disturbing that?"

66. McFarlane LJ, as we have mentioned, was troubled in particular by Thorpe LJ's use in *Re W* of the phrase "exceptionally rare circumstances". He referred to what Lord Neuberger and Lady Hale had said in the paragraphs in *Re B* to which we have already drawn attention. He continued (para 18):

> "Having read those judgments, and having read the Court of Appeal decision in *Re W*, I am concerned that the test in *Re W* may now need to be reconsidered in the light of the approach to adoption which has been restated in these very clear terms by the Supreme Court. In particular, I am concerned that the words of my Lord … where he describes as "exceptionally rare" a parent succeeding in an application of this sort may no longer be tenable."

67. McFarlane LJ continued by making this powerful point:

> "Particularly I have in mind that a parent can only be in the position of *making* an application under section 47(5) if there *has been* a care order, a placement order, the placement of the child for adoption and an adoption application being lodged. Those are the very circumstances that trigger the jurisdiction under section 47(5)."

We agree, and add a point to which we have already drawn attention: section 42(2) requires the child to have been living with the prospective adopters for at least 10 weeks before the application for an adoption order can be made.

Section 47(5) of the 2002 Act – fundamentals

68. We share McFarlane LJ's misgivings about Thorpe LJ's use of the phrase "exceptionally rare circumstances", as also about his use, followed by the President in *Re C*, of the word "stringent" to define or describe the test to be applied on an application under section 47(5). Both phrases are apt to mislead, with potentially serious adverse consequences. In the light of *Re B* they convey quite the wrong message. Neither, in our judgment, any longer has any place in this context. Their use in relation to section 47(5) should cease.

69. Moreover, we suggest that too much must not be read into the use by McFarlane J in *X and Y v A Local Authority (Adoption: Procedure)* [2009] EWHC 47 (Fam), [2009] 2 FLR 984, para 15, of the phrase "entirely improbable." We read that as being merely his assessment of the applicant's prospects of success in that particular case. It was not intended as a test and should not be treated as such.

70. Section 47(5) is intended to afford a parent in an appropriate case a meaningful remedy – and a remedy, we stress, that may enure for the benefit not merely of the parent but also of the child. Whilst we can understand what lay behind what Thorpe LJ said, we think that his use of the phrase "exceptionally rare circumstances" carries with it far too great a potential for misunderstanding, misapplication and indeed injustice for safety. The same, if in lesser measure, applies also to the word "stringent". Stringent, as we have said, is a word that appropriately describes the test that has to be surmounted before a non-consensual adoption can be sanctioned. It is not a word that comfortably describes the test that a parent has to meet in seeking to resist such an adoption.

71. Parliament intended section 47(5) to provide a real remedy. Unthinking reliance upon the concept of the "exceptionally rare" runs the risk – a very real and wholly unacceptable risk – of rendering section 47(5) nugatory and its protections illusory. Except in the fairly unusual case where section 47(4)(b)(i) applies, a parent applying under section 47(5) will always, by definition, be faced with the twin realities that the court has made both a care order and a placement order and that the child is now living with the prospective adopter. But, unless section 47(5) is to be robbed of all practical efficacy, none of those facts, even in combination, can of themselves justify the refusal of leave.

Section 47(5) of the 2002 Act – the proper approach

72. Subject only to one point which does not affect the substance, the law, in our judgment, was correctly set out by Wall LJ in *Re P*, though we fear it may on occasions have been applied too narrowly and indeed too harshly. The only qualification is that the exercise at the second stage is more appropriately described as one of judicial *evaluation* rather than as one involving mere *discretion*.

73. There is a two stage process. The court has to ask itself two questions: Has there been a change in circumstances? If so, should leave to oppose be given? In relation to the first question we think it unnecessary and undesirable to add anything to what Wall LJ said.

74. In relation to the second question – If there has been a change in circumstances, should leave to oppose be given? – the court will, of course, need to consider all the circumstances. The court will in particular have to consider two inter-related questions: one, the parent's ultimate prospect of success if given leave to oppose; the other, the impact on the child if the parent is, or is not, given leave to oppose, always remembering, of course, that at this stage the child's welfare is paramount. In relation

to the evaluation, the weighing and balancing, of these factors we make the following points:

i) Prospect of success here relates to the prospect of resisting the making of an adoption order, *not*, we emphasise, the prospect of ultimately having the child restored to the parent's care.

ii) For purposes of exposition and analysis we treat as two separate issues the questions of whether there has been a change in circumstances and whether the parent has solid grounds for seeking leave. Almost invariably, however, they will be intertwined; in many cases the one may very well follow from the other.

iii) Once he or she has got to the point of concluding that there has been a change of circumstances and that the parent has solid grounds for seeking leave, the judge must consider very carefully indeed whether the child's welfare really does necessitate the refusal of leave. The judge must keep at the forefront of his mind the teaching of *Re B*, in particular that adoption is the "last resort" and only permissible if "nothing else will do" and that, as Lord Neuberger emphasised, the child's interests include being brought up by the parents or wider family unless the overriding requirements of the child's welfare make that not possible. That said, the child's welfare is paramount.

iv) At this, as at all other stages in the adoption process, the judicial evaluation of the child's welfare must take into account *all* the negatives and the positives, *all* the pros and cons, of *each* of the two options, that is, either giving or refusing the parent leave to oppose. Here again, as elsewhere, the use of Thorpe LJ's 'balance sheet' is to be encouraged.

v) This close focus on the circumstances requires that the court has proper evidence. But this does not mean that judges will always need to hear oral evidence and cross-examination before coming to a conclusion. Sometimes, though we suspect not very often, the judge will be assisted by oral evidence. Typically, however, an application for leave under section 47(5) can fairly and should appropriately be dealt with on the basis of written evidence and submissions: see *Re P* paras 53-54.

vi) As a general proposition, the greater the change in circumstances (assuming, of course, that the change is positive) and the more solid the parent's grounds for seeking leave to oppose, the more cogent and compelling the arguments based on the child's welfare must be if leave to oppose is to be refused.

vii) The mere fact that the child has been placed with prospective adopters cannot be determinative, nor can the mere passage of time. On the other hand, the

older the child and the longer the child has been placed the greater the adverse impacts of disturbing the arrangements are likely to be.

viii) The judge must always bear in mind that what is paramount in every adoption case is the welfare of the child "throughout his life". Given modern expectation of life, this means that, with a young child, one is looking far ahead into a very distant future – upwards of eighty or even ninety years. Against this perspective, judges must be careful not to attach undue weight to the short term consequences for the child if leave to oppose is given. In this as in other contexts, judges should be guided by what Sir Thomas Bingham MR said in *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 129, that "the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems." That was said in the context of contact but it has a much wider resonance: *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677, para 26.

ix) Almost invariably the judge will be pressed with the argument that leave to oppose should be refused, amongst other reasons, because of the adverse impact on the prospective adopters, and thus on the child, of their having to pursue a contested adoption application. We do not seek to trivialise an argument which may in some cases have considerable force, particularly perhaps in a case where the child is old enough to have some awareness of what is going on. But judges must be careful not to attach undue weight to the argument. After all, what from the perspective of the proposed adopters was the smoothness of the process which they no doubt anticipated when issuing their application with the assurance of a placement order, will already have been disturbed by the unwelcome making of the application for leave to oppose. And the disruptive effects of an order giving a parent leave to oppose can be minimised by firm judicial case management *before* the hearing of the application for leave. If appropriate directions are given, in particular in relation to the expert and other evidence to be adduced on behalf of the parent, *as soon as* the application for leave is issued and *before* the question of leave has been determined, it ought to be possible to direct either that the application for leave is to be listed with the substantive adoption application to follow immediately, whether or not leave is given, or, if that is not feasible, to direct that the substantive application is to be listed, whether or not leave has been given, very shortly after the leave hearing.

x) We urge judges always to bear in mind the wise and humane words of Wall LJ in *Re P*, para 32. We have already quoted them but they bear repetition: "the test should not be set too high, because … parents … should not be discouraged either from bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable."

75. We shall return in due course to consider the application of these principles to Parker J's judgment in this case. First, however, we need to consider, in the light of *Re B,* the

approach which we should adopt as an appellate court hearing an appeal against a refusal of leave under section 47(5).

The appellate approach

76. We can take this fairly shortly because the application of *Re B* in various family law contexts has been considered in a number of recent judgments in this court of Black LJ and McFarlane LJ: see *Re A (Children)* [2013] EWCA Civ 1026, *Re V (Children)* [2013] EWCA Civ 913, *Re P (A Child)* [2013] EWCA Civ 963, *Re G (A Child)* [2013] EWCA Civ 965 and, most recently, *Re A (A Child)* [2013] EWCA Civ 1104.

77. We do not need to go through *Re B* yet again, except to note that it leaves undisturbed the approach in case management appeals set out by this court in *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, [2013] 1 FLR 1250: see *Re B* para 45 (Lord Wilson). Nor does the new learning in *Re B* affect the traditional approach to appeals from fact-finding determinations: *Re A (Children)* [2013] EWCA Civ 1026, para 34.

78. For present purposes the key principles to be extracted from *Re B* are conveniently summarised in the judgment of McFarlane LJ in *Re G (A Child)* [2013] EWCA Civ 965, paras 32-33:

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

> threshold is crossed; such a review is to be conducted by reference simply to whether the determination is 'wrong' (paragraphs 44, 91, 138 and 145).
>
> 33 Moving on from consideration of the s 31 threshold criteria, all five SCJs were agreed that the task of a trial judge making the ultimate determination of whether to make a care order was 'more than to exercise a discretion' (Lord Wilson SCJ, paragraph 45). The trial judge's task is to comply with an obligation under HRA 1998, s 6(1) not to determine the application in a way which is incompatible with the Art 8 rights that are engaged. The majority in the Supreme Court went on from that unanimous position relating to the role of the trial judge, to hold that 'the review which … falls to be conducted by the appellate court must focus not just on the judge's exercise of discretion but on his compliance or otherwise with an obligation' (paragraph 45). The 'plainly wrong' criteria in *G v G* being held to be 'inapt' for such a review."

79. The point was put succinctly by Black LJ in *Re P*, para 105:

> "Because of the obligation of the trial judge not to determine the matter in a way which is incompatible with article 8 ECHR, the review by the appellate court must focus not just on the judge's exercise of his discretion in making a care order but also on his compliance or otherwise with that obligation"

80. In *Re B* itself, Lord Neuberger had said this (para 93):

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

He went on to say that the appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (v) to (vii).

81. It is clear on the authorities that the simple test of whether the trial judge was "wrong" applies where the issue – which is an evaluative issue rather than a mere matter of discretion – is whether 'threshold' under section 31 of the 1989 is established; where the issue, 'threshold' having been established, is whether there should be a care order; and where the issue, whether or not the need for a care order is conceded, is as to

whether the care plan should be for adoption or some less interventionist approach: see *Re B*, *Re V*, *Re P* and *Re G*.

82. The question of whether the same approach – was the judge wrong? – applies in the case of appeals in private law cases was considered by this court in *Re A*, where McFarlane LJ said this (para 43):

> "*Re B* concerned decisions under the CA 1989 and the Adoption and Children Act 2002 making public law orders relating to children which plainly engaged the right to family life protection enshrined in ECHR, Article 8. It may well be that not all orders under CA 1989 relating to children will be of sufficient import to engage Art 8 (for example an order which merely defines the time of day and/or place for contact), but the impact of Art 8 is by no means confined to public law orders. There will be a range of private law children orders which engage Art 8 and which must now be approached on appeal in the manner established by the majority of the Supreme Court in *Re B*. It is not necessary for the purposes of this judgment to establish where the outer limit of this 'range' may be, and I expressly do not intend to do so, but an order refusing all direct contact between parent and child must plainly be on the *Re B* side of the boundary."

83. We agree with the analyses of Black LJ and McFarlane LJ in the judgments to which we have just referred. Like them, we decline any attempt to establish the boundaries of the *Re B* approach.

84. Given the nature of the issues and their potential gravity for both the parent and the child, and given also, as we have already described it, the evaluative nature of the judicial task in such cases, we have no doubt that where the question is whether the parent should be given leave to seek the revocation of a placement order in accordance with section 24 of the 2002 Act, or leave to oppose the making of an adoption order in accordance with section 47(5) of the 2002 Act, the *Re B* approach must apply. Both require that an appellate court be able to intervene whenever the judge was 'wrong'. Whether the approach identified in *Re B* – was the judge wrong? – applies in all cases where the issue for the judge was whether or not to give a family member leave to participate in proceedings under the 1989 Act or the 2002 Act is not something for decision today.

85. The question for us therefore is whether Parker J was wrong.

<u>Parker J's judgment</u>

86. We do not have an official transcript of Parker J's judgment. We do, however, have a detailed and seemingly careful note of her judgment and are content, as are counsel, to proceed on that basis.

87. Parker J set out the history of the matter. She noted and expressed her "great admiration" that the mother's life had "turned round" and that "the signs are good".

88. Referring to what Thorpe LJ had said in *Re W*, Parker J noted that there is a three stage test, with three fences each presenting a higher obstacle. She said that the second and third hurdles "are conflated in one test"; later in the judgment she said they had to be "looked at together." She continued: "In all these cases it is impossible to ignore the facts which gave rise to the children coming into care … It has an effect on them." Having summarised those matters she said:

> "It is obvious that the children had terrible experiences … [children] who have had these experiences are going to behave in a way that is sometimes aggressive, unsettled, easily upset … in many respects they are beginning to recover from these experiences, but any upset brings the risk that they will behave in the way in which they were described when originally placed, emotionally deregulated … It seems obvious that now they are in a house they think of as their home, they are bound to have made attachments with their new family."

89. Parker J said she was perfectly satisfied that there had been a change. Turning to the second and third stages she referred to the welfare checklist in section 1(4) and correctly directed herself that the interests of the children must be the paramount consideration.

90. Going through the welfare checklist, Parker J made various findings that we need not summarise. Importantly, she noted that the elder girl "has some unhappy anxious memories", commenting that this indicated that her past history had impinged on her wishes and feelings. She said "There is a need for both children to have particularly stability and care". She recognised that adoption "is not to be undertaken without compelling reason." She identified "the risk that the mother might not be able to cope if the care order was discharged" and said "there is a long road to travel." She said that both the mother and the adopters had Article 8 rights which were engaged. She said that the children "have the capacity to understand" that when they were placed there was an expectation of the placement being forever. She said "I accept that adoption is not a universal solution every time a parent is not able to parent a child to a good enough standard." She said she was "struck" by what Coleridge J had said in *Re W* in the passage we have already quoted. She concluded that it was "entirely improbable" that the mother would ultimately succeed. To embark upon the process would be "utterly devastating" for the adopters. So, she refused the mother leave to oppose.

The grounds of appeal

91. Ms Maureen Ngozi Obi-Ezekpazu appeared before us on behalf of the mother acting pro bono. For that we are grateful, as no doubt is the mother. Pursuant to the permission granted by McFarlane LJ she took six grounds of appeal in addition to those identified by McFarlane LJ. We take them in turn.

92. Mr Alex Verdan QC on behalf of the local authority and the adopters accepted that there had been a change of circumstances sufficient to satisfy the first stage test but submitted that Parker J had been entirely correct to refuse leave to oppose. Indeed, he said, the welfare of the children strongly indicated that leave should not be given.

Ground 1

93. The first ground of appeal is that Parker J erred in law by applying an additional test to that laid down in section 47(5), namely a 'prospect of success test'. There is, with respect to counsel, nothing in this point. Both principle and the authorities to which we have referred require a court operating a leave filter, including under section 47(5), to have regard to the applicant's ultimate prospects of success. If and insofar as complaint is made that Parker J wrongly conflated the second and third stages in the *Re W* analysis, we agree, for reasons we have already given, that she was wrong to do so. But we do not think that this error of law in fact vitiated her essential reasoning or her conclusion. We note McFarlane LJ's view (*Re B-S (Children)* [2013] EWCA Civ 813, para 17) that if this had been the only point he would have been reluctant to grant permission to appeal because, as he put it, and we agree, the judge's general approach to the determination of the issue before her seems to have been more generally in line with authority.

Ground 2

94. The second ground of appeal is that Parker J fell into error in failing to provide a full analysis as to why the change in circumstances was not sufficient to permit the mother to oppose the making of adoption orders. There is, in our judgment, no merit in this ground of appeal. The judge identified and explained the reasons why, despite the admitted change in circumstances, leave to oppose ought not to be given, including, in particular, the children's memories, their at least partial understanding of the current situation, and the risk that giving leave would risk great upset and behavioural regression.

Ground 3

95. The third ground of appeal is that Parker J failed to give sufficient weight to the losses that would accrue to the children if adoption orders were made. Again, we cannot accept this. The judge was very well aware of what the children would be losing if adoption orders were made but, within the framework of the task imposed on her by section 47(5), had to look at the full picture, balancing what the children would, or might, lose if leave to oppose was not granted against what they would, or might, lose

if leave to oppose was granted. We have already identified the factors that weighed in particular with the judge. The judge was in our judgment entitled to give the various factors, pro and con, the weight that she chose to attribute to them.

Ground 4

96. The fourth ground of appeal is that Parker J acted unfairly and in breach of Articles 6 and 8 in reverting to the original 'harm' issues and placing great weight upon them. This is linked with a complaint that the judge failed to look in any depth at the extent and breadth of the changes since the placement orders were made that were relevant to the adoption application. We cannot agree. The original 'harm' issues, as counsel describes them, were plainly relevant, and given their continuing impact on the children as found by the judge it was clearly open to her to attach considerable weight to them. In relation to the other part of the complaint we repeat what we have already said in relation to ground 2.

Ground 5

97. The fifth ground of appeal is that Parker J failed to give the mother and her representatives time to consider new material produced at the hearing by the local authority, thereby denying her a fair trial. We reject this complaint. The fact is that the mother and her representatives did have time to consider this material. And, importantly, no application was made either for an adjournment or for cross-examination.

Ground 6

98. The sixth ground of appeal, linking in with what McFarlane LJ had said, is that the test in section 47(5) does not afford someone in the mother's position a 'real' remedy, since placement is itself a bar to any ability to persuade the court to allow opposition to the making of an adoption order.

99. As a general proposition we cannot accept this complaint. *If* section 47(5) is understood and applied as we have explained it should and must be, then there can be no cause for concern. In particular, and to repeat, the facts that a parent applying under section 47(5) will always, by definition, be faced with unless the case falls within section 47(4)(b)(i) – that the court has made both a care order and a placement order and that the child is now living with the prospective adopter – cannot of themselves, even in combination, justify the refusal of leave.

100. The real question at the end of the day is whether, having regard to the proper approach to applications under section 47(5) which we have spelt out, it can be said, as Ms Obi-Ezekpazu would have us accept, that Parker J's decision refusing leave to oppose was wrong. In our judgment Parker J was not wrong.

101. Parker J accepted that there had been significant change: the mother's life had "turned round". She recognised that adoption is not "a universal solution" when a parent is not able to give a child good enough parenting and that it "is not to be undertaken without compelling reason." She did not, as Mr Verdan observed, make any reference to Thorpe LJ's "exceptionally rare circumstances" approach. She went through the relevant welfare checklist, recognising correctly that the children's interests were paramount. She did not treat the matter as concluded by the mere fact that the children had been placed successfully for some time.

102. As we have already mentioned, the judge drew attention to a number of key facts: the fact that the children had had "terrible experiences", which "has an effect on them"; the fact that in consequence they were at risk, if subject to upset, of reverting to their previous "emotionally deregulated" behaviour and that accordingly they needed particularly stability and care; the fact that the elder girl has "unhappy anxious memories" which impinged on her wishes and feelings; and the fact that the children have the capacity to understand the "forever" nature of their adoptive placement. She also identified "the risk that the mother might not be able to cope", saying that "there is a long road to travel." There is no suggestion that those were not findings that Parker J was entitled to make on the evidence.

103. In these circumstances we can well understand how Parker J came to the conclusion that it was "entirely improbable" that the mother would succeed in opposing adoption. More to the point, we can well understand how, not least in the light of the factors to which she had drawn particular attention, Parker J concluded that the mother's application for leave to oppose should be refused. She was entitled to attach to these factors the weight she did and to conclude that, taken together and in all the circumstances, they meant that in the children's best interests the mother's application had to be dismissed. We cannot say that Parker J was wrong; on the contrary, we consider that she was right.

Conclusion

104. The appeal must accordingly be dismissed.