Neutral Citation Number: [2021] EWCA Civ 875

Case No: B4/2021/0601

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT READING
HH Judge Marshall
RG20C00340

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/06/2021

Before :

LORD JUSTICE BAKER
LADY JUSTICE CARR
and
LORD JUSTICE LEWIS

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF THE ADOPTION AND CHILDREN ACT 2002
AND IN THE MATTER OF R (CARE PROCEEDINGS: JOINDER OF FOSTER CARERS)

Between :

A LOCAL AUTHORITY	**Appellant**
- and -	
A MOTHER (1)	**Respondents**
R (by his children's guardian) (2)	
MR AND MRS A (3) and (4)	

- -
- -

Deirdre Fottrell QC and Louise MacLynn (instructed by **Local Authority Joint Legal Team**) for the **Appellant**
Denise Gilling QC and Lucy Maxwell (instructed by **Albin and Co**) for the **First Respondent**
Piers Pressdee QC and Joanne Porter (instructed by **Griffiths Robertson**) for the **Second Respondent**
The Third and Fourth Respondents appeared in person

Hearing date : 18 May 2021

- -

Approved Judgment

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

Judiciary website. The date and time for hand down is deemed to be 10.30am on Tuesday 15 June 2021.

LORD JUSTICE BAKER :

1. The principal question arising on this appeal in the course of proceedings involving a boy, R, now aged 14 months, is whether the judge was wrong to join the foster carers with whom the child has been placed since he was a few days old, and who now wish to apply to adopt him, as parties to the proceedings. The proceedings comprise an application for a care order under section 31 of the Children Act 1989 and an application for a placement order under section 21 of the Adoption and Children Act 2002.

Background

2. R's mother has a long history of criminal offences relating to drugs and over a number of years has led a chaotic lifestyle with periods of homelessness. At the date of the hearing of the appeal, she was in prison again. She has three older children, all of whom are living with members of their extended family. When she became pregnant again in 2019, she failed to engage with the local authority and did not attend appointments for a parenting assessment. As a result, the local authority made the unborn child subject to a child protection plan and prepared to take proceedings under the Public Law Outline.

3. R was born on 3 March 2020. On the same day, the local authority filed an application for a care order. At the first hearing two days later, an interim care order was made and on R's discharge from hospital he was placed with foster carers, Mr and Mrs A, with whom he remains. In accordance with its statutory obligations, the local authority investigated alternative placements within the family, but initial assessments were negative. R's paternity was unknown although a man, Mr Z, was identified as his putative father. The proceedings were listed for an issues resolution hearing and early final hearing in August 2020, but adjourned to enable the mother to attend a residential assessment with R. Once again, however, the mother failed to engage with the plans for the assessment and the final hearing was relisted for December 2020. Meanwhile, R remained with Mr and Mrs A.

4. After the mother's failure to engage with the assessment, the local authority decided that R should be placed for adoption and on 4 December 2020 applied for a placement order. Mr and Mrs A indicated that they would like to be considered as adopters. Meanwhile, the local authority continued with its inquiries about family members and identified a cousin of the mother, Ms G, and her partner as possible adopters. An initial assessment of them proved positive, and at a hearing before magistrates on 7 December 2020, the mother indicated that she would not oppose R being placed with her cousin if she was unable to resume caring for him herself. At a further hearing before the magistrates on 3 February 2021, a dispute arose between the local authority and the children's guardian as to the future course of the proceedings. As a result, the proceedings were transferred to a circuit judge and listed before HH Judge Marshall on 12 February. At that hearing, the local authority proposed that R should move to live with Ms G as a "connected person" foster carer. The guardian, however, expressed concern about this proposal on the grounds that there was insufficient information to enable her to conclude whether it was in R's interests to move to Ms G or remain with his current carers. The order made following the hearing included a recital that the judge indicated "that R should not be moved from his current placement without the matter first being considered by the court but that introductions with Ms G can commence". The judge directed that Mr and Mrs A be given notice of the next hearing. In addition,

the court directed that DNA testing be carried out to establish whether Mr Z was R's father, and the court also ordered the local authority to complete an assessment of Mr Z's sister to ascertain whether she could care for the child.

5. In the event, DNA testing established that Mr Z was not the father and the assessment of his sister did not proceed. But the assessments of Ms G continued. On 24 February, the fostering permanence panel recommended Ms G and her partner for approval and the local authority then embarked on a further assessment under the Adoption Agency Regulations to establish whether they were suitable to adopt R. An appointment was made with the adoption panel on 13 May 2021 to consider approval of the adoptive placement with Ms G and her partner.

6. The hearing on 15 March, which was conducted remotely, was attended by Mr and Mrs A in addition to the parties to the proceedings and their legal representatives. No judgment was delivered but we have the benefit of a full transcript of the hearing from which it is possible not only to discern the submissions made to the court but also to identify the reasons for the orders made by the judge.

7. Shortly before the hearing, Mr and Mrs A, who do not have legal representation, had filed a notice of application for an adoption order. Under the provisions of the Adoption and Children Act, however, no such application could lawfully be made at that stage because, although R had by then been living with them for over a year so as to entitle them to apply for an order under s.42 of the Act, they had not given notice to the local authority as required under s.44. It was clear, however, that there were now two couples who had expressed an interest in adopting the child. The local authority's position was that the identification of suitable prospective adopters for R was a matter for the authority and that the court should therefore list the proceedings for a final hearing of the applications for a care and placement order as soon as possible. The guardian, however, disagreed, on the grounds that further information was required about both sets of prospective adopters before she would be in a position to make any recommendation. In the position statement filed on her behalf for the hearing, the guardian expressed concern about some matters relating to the proposal to place R with Ms G and her partner.

8. In the course of argument, the judge identified the issue in these terms:

> "The difficulty for both of those parties [i.e. Mr and Mrs A and Ms G and her partner] then is that it leaves [the adoption agency] to make that determination and what I would have to consider as the judge dealing with the care proceedings is that I would need to be persuaded that that is an appropriate thing to do for R. Just to make a placement order which leaves the local authority then to determine that issue or whether actually as part and parcel of the welfare determination the court itself should be determining that in terms of who should be looking after the child because the court, when a care order is before the court, it has to make two determinations, where the child should be placed and under what orders.
>
> And what we actually have are specific people available for the court to think about as to whether they should be looking after R

> whereas normally … when the court is asked to make a placement order there is no specific person in the frame. The local authority goes away and seeks prospective adopters. But this is an unusual case in that we have actually got more than one person already identified who may be able to care for the child and is indicating it would be by way of adoption, so it does add something different, in my view, to this case and makes the local authority's application for a placement order one where the court has to consider very carefully whether it is appropriate to leave that in the hands of the local authority or whether, in fact, it is better to determine who is the best person to care for this child and under what orders as part of the care proceedings. And if the court were to determine that he should be looked after by either of these carers it may still be the court's view that actually that should be done by way of them making an application for adoption and the court dealing with it that way, rather than leaving it to the local authority to do it through the placement process."

9. In the course of further argument, the judge suggested that Mr and Mrs A be joined as parties to the proceedings. There followed this exchange with counsel for the local authority:

> "Judge: Does anyone have anything they would want to say about what I think is probably my proposal that I join Mr and Mrs A to the proceedings to allow them to put before the court their case to be assessed as a carer for R? …
>
> Counsel: Your Honour, I was pausing and thinking. Your Honour, the only observation I would make is that I don't think the local authority would object to that on the face of it, but I would make the observation that I think we would probably deem their application to be given, to be notice, as it were –
>
> Judge: Yes. Yes I think that would be sensible.
>
> Counsel: - start that process. So I suppose it's argument actually that they don't need to be parties until that process is complete if that is the way we are going. In addition to that, I'm just bearing in mind the position of Ms G and her partner. I just wonder if Mr and Mrs A are made party to the proceedings, I suspect Ms G may well say. 'Well hang on why am I being excluded?' That's my only concern. So whether that means we also join them as well, that was my only thought.
>
> Judge: Well, it may be that they do, that she does wish to ask to be joined as a party because, the situation we have the moment is that Ms G may say, 'Well look the local

> authority is promoting my position, I don't need to be a party'. That is really a matter for her to think about …."

After further discussion with counsel, the judge continued:

> " I think it would be helpful if mother's solicitors could just update her [i.e. Ms G] on the discussions we have had … and explain to her that she can make an application to be a party if she feels that she wants to protect her own position and not simply rely on the local authority putting her care forward. That is a matter for her, yes. But it would not exclude her from being a party ….
>
> On the other hand, I think for Mr and Mrs A there is no one to put their case before the court and so the only way to secure that for them, it seems to me is to make them a party because otherwise, all we have got is their notice to the local authority and that assessment going alongside, but they have got no information about what is happening within the care proceedings and no control over what is happening within the care proceedings. So whilst I entirely accept that the adoption application itself has to be put on hold, because of that procedural requirement for three months' notice, it does not stop them being made parties to the care proceedings, it is unusual, but I think that is the right way forward given the rather complex natures of the situation we find ourselves in.
>
> I also think it would be very helpful for Mr and Mrs A to have information that it is likely that they have not got at the moment about what is happening. I hear what is being said that there are problems with a lack of communication and of course I've actually seen the adoption application. I understand the other parties have not and there is a short statement from Mr and Mrs A explaining some of the problems they say they have had in understanding what has been going on and being kept up to date. So joining them as parties also means that they will know what is going on and they will get copies of the orders and they should be provided with the court bundle …."

10. After further discussion as to the appropriate case management directions, the order made at the conclusion of the hearing included recitals that:

> "UPON the court determining that further evidence in relation to both realistic placement options for R is required before the court can determine these proceedings and that both options should now be assessed in parallel to each other
>
> …
>
> AND UPON the foster carers attending this hearing having issued an adoption application, it being noted that such

> application was made without them having given the required notice under ACA 2002 s. 44 but the application now constitutes such notice and that an assessment of the suitability as prospective adopters for R must now progress
>
> AND UPON the Court indicating that [Ms G and her partner] are at liberty to make an application for permission to be joined to these proceedings if they so wish and that this should be communicated to them by the local authority or the solicitors on behalf the mother."

11. Under the terms of the order, Mr and Mrs A were joined as parties to the care proceedings. The local authority was directed to arrange for service of the court bundle on Mr and Mrs A and to file and serve adoption assessments of Ms G and her partner and of Mr and Mrs A. The matter was listed for a further hearing on 18 June 2021.

12. It seems from the position statements and case summary filed for the hearing, and is confirmed by the transcript, that the suggestion to join Mr and Mrs A as parties to the proceedings came from the judge herself, rather than any of the parties. There was no opportunity for consideration of the relevant statutory provisions or case law.

13. On 31 March, the local authority filed a notice of appeal against the order joining Mr and Mrs A as parties to the proceedings and the orders directing the local authority to file the two adoption assessments within the proceedings. The grounds of appeal are:

    (1) The judge erred in law in joining the foster carers as parties to the proceedings.

    (2) The judge was wrong not to list the local authority applications for a final hearing. The consequence of joining the foster carers before they were entitled to make an application to adopt was to seek to circumvent the statutory framework under which the local authority is responsible for identifying adopters and matching a child.

    (3) The judge was wrong in law to direct the local authority to complete an adoption assessment of the family members and file it within the care and placement proceedings. Similarly, the court was wrong to direct that the assessment of the foster carers, as adopters, should be filed within the proceedings.

    On 21 April, permission to appeal was granted by King LJ. On 5 May, I ordered that the directions to the local authority in the order of 15 March to serve documents upon Mr and Mrs A be stayed until the determination of the appeal.

14. On the day before the hearing of the appeal, Ms G and her partner were approved as prospective adopters by the adoption agency decision maker. At the hearing of the appeal on 18 May, the local authority, the mother and the guardian were all represented by leading and junior counsel, none of whom had appeared at the hearing before the judge. Mr and Mrs A represented themselves. At the conclusion of the hearing, we reserved judgment. Six days later, on 24 May, Mr and Mrs A were also approved as prospective adopters by the agency decision maker.

The law

15. It is notable that there was no discussion of the law in the hearing before the judge. In contrast, counsel appearing before us cited extensively from the statutory provisions and case law relating to the joinder of foster carers to care proceedings. Before considering some of those citations, however, it is important to recall what the House of Lords and Supreme Court have said on two issues at the heart of this appeal – the approach to be adopted to non-consensual adoption and the division of responsibilities for care orders between courts and local authorities.

16. The approach of the courts in England and Wales to adoption underwent a transformation following the decision of the Supreme Court in ***Re B (Care Proceedings: Appeal)*** [2013] UKSC 13 and a subsequent series of cases in the Court of Appeal, of which ***Re B-S*** [2013] EWCA Civ 1146 was the most prominent. The transformation was prompted in part by a number of decisions of the European Court of Human Rights, notably ***YC v United Kingdom*** (2012) 55 EHRR 967 in which the Court had said:

> "The Court reiterates that in cases concerning the placing of a child for adoption, which entails the permanent severance of family ties, the best interests of the child are paramount. In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and secondly, it is in the child's best interests to ensure his development in a safe and secure environment. It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family."

17. In ***Re B (Care Proceedings: Appeal)*** [2013] UKSC 13 [2013] 2 FLR 1075 the Supreme Court addressed the question of the proportionality of an adoption order. At paragraph 77, Lord Neuberger observed:

> "It seems to me to be inherent in section 1(1) [of the Children Act] that a care order should be a last resort, because the interests of the child will self evidently require her relationship with her natural parents to be maintained unless no other course was possible in her interests. That is reinforced by the requirement in section 1(3)(g) that the court must consider all options, which carries with it the clear indication that the most extreme option should only be adopted if others would not be in her interests."

At paragraph 104, he endorsed:

> "the principle that adoption of the child against her parents' wishes should only be contemplated as a last resort – when all else fails. Although the child's interests in an adoption case are

> "paramount"…the court must never lose sight of the fact that those interests include being brought up by her natural family, ideally her natural parents or at least one of them."

At paragraph 198, Baroness Hale of Richmond said:

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

18. Following the decision of the Supreme Court in ***Re B***, the Court of Appeal addressed the approach to proportionality in adoption in a series of cases, of which ***Re B-S*** [2013] EWCA Civ 1146 was the most prominent. In that case, the Court identified the fact that non-consensual adoption is unusual in the European context, that under ECtHR law family ties are only to be severed in very exceptional circumstances and that, as a result, everything must be done where possible to rebuild a family. The court stressed that it is incumbent on (a) the local authority that applies for care and placement orders, (b) the children's guardian entrusted with representing the children in the proceedings, and (c) the court to carry out a robust and rigorous analysis of the advantages and the disadvantages of all realistic options for the child and, in the case of the court, set out that analysis and its ultimate decisions in a reasoned judgment.

19. The division of responsibility for the making and administration of care orders as defined in the Children Act was explained by Lord Nicholls of Birkenhead in ***Re S (Minors) (Care Order: Implementation of Care Plan), Re W (Minors) Care Order: Adequacy of Care Plan*** [2002] UKHL 10 in the following terms:

> "23. …[A] cardinal principle of the Children Act is that when the court makes a care order it becomes the duty of the local authority designated by the order to receive the child into its care while the order remains in force. So long as the care order is in force the authority has parental responsibility for the child. The authority also has power to decide the extent to which a parent of the child may meet his responsibility for him: section 33. An authority might, for instance, not permit parents to change the school of a child living at home. While a care order is in force the court's powers, under its inherent jurisdiction, are expressly excluded: section 100(2)(c) and (d). Further, the court may not make a contact order, a prohibited steps order or a specific issue order: section 9(1).
>
> 24. There are limited exceptions to this principle of non-intervention by the court in the authority's discharge of its parental responsibility for a child in its care under a care order. The court retains jurisdiction to decide disputes about contact with children in care: section 34. The court may discharge a care order, either on an application made for the purpose under section 39 or as a consequence of making a residence order

> (sections 9(1) and 91(1)). The High Court's judicial review jurisdiction also remains available.
>
> 25. These exceptions do not detract significantly from the basic principle. The Act delineated the boundary of responsibility with complete clarity. Where a care order is made the responsibility for the child's care is with the authority rather than the court. The court retains no supervisory role, monitoring the authority's discharge of its responsibilities. That was the intention of Parliament."

20. Further on in his judgment (at paragraph 27), Lord Nicholls explained the rationale for this basic principle.

> "The change brought about by the Children Act gave effect to a policy decision on the appropriate division of responsibilities between the courts and local authorities. This was one of the matters widely discussed at the time. A report made to ministers by an interdepartmental working party 'Review of Child Care Law' (September 1985) drew attention to some of the policy considerations. The particular strength of the courts lies in the resolution of disputes: its ability to hear all sides of a case, to decide issues of fact and law, and to make a firm decision on a particular issue at a particular time. But a court cannot have day to day responsibility for a child. The court cannot deliver the services which may best serve a child's needs. Unlike a local authority, a court does not have close, personal and continuing knowledge of the child. The court cannot respond with immediacy and informality to practical problems and changed circumstances as they arise. Supervision by the court would encourage 'drift' in decision making, a perennial problem in children cases. Nor does a court have the task of managing the financial and human resources available to a local authority for dealing with all children in need in its area. The authority must manage these resources in the best interests of all the children for whom it is responsible."

21. Once a final care order is made, the division of responsibilities between the court and the local authority is clear. During the currency of court proceedings, however, the boundary is in some respects less clear and has been the subject of statutory amendments on several occasions since the implementation of the Act in 1991.

22. Care proceedings are brought under Part IV of the Act. The court may only make a care order if satisfied that the threshold criteria under s.31(2) are met. In determining what order to make, the court must apply the principles in s.1, including the principle that the child's welfare is the paramount consideration and the welfare checklist in s.1(3). For the purposes of this appeal, it is unnecessary to set out those well-known provisions in full, but it is important to recall that the checklist in subsection (3) includes "the likely effect on the child of any change of circumstances" (paragraph (c)), "how capable each of his parents, and any other person in relation to whom the court considers the question

to be relevant, is of meeting his needs" (paragraph (f)) and "the range of powers available to the court under this Act in the proceedings in question" (paragraph (g)).

23. Under s.31A:

> "(1) Where an application is made on which a care order might be made with respect to a child, the appropriate local authority must, within time as the court may direct, prepare a plan ("a care plan") for the future care of the child.
>
> …
>
> (5) In section 31(3A) and in this section, references to a care order do not include an interim care order.
>
> (6) A plan prepared, or treated as prepared, under this section is referred to in this Act as a 'section 31 A plan'."

When s.31A was first inserted into the Act by the Adoption and Children Act 2002, a new s.31(3A) was also inserted providing that "no care order may be made with respect to a child until the court has considered a section 31A plan". The intention of these reforms was to increase the level of court scrutiny of care plans within the proceedings. In the following years, concerns arose that judges were subjecting plans to excessive scrutiny and intruding into the sphere of responsibility which Parliament had allocated to local authorities. As a result, the Children and Families Act 2014 amended s.31(3A) so as to restrict the scope of the court's scrutiny of the plan. Following that amendment, s.31(3A) now reads

> "(3A) A court deciding whether to make a care order
>
> (a) is required to consider the permanence provisions of the section 31A plan for the child concerned, but
>
> (b) is not required to consider the remainder of the section 31A plan, subject to section 34(11) [which requires the court to consider arrangements for contact]."

"Permanence provisions" were defined in a new s.31(3B) which, as originally drafted in 2014, restricted scrutiny to those parts of the plan that related to the placement of the child. Subsequently, however, s.31(3B) was amended by the Children and Social Work Act 2017 so as to extend the definition of "permanence provisions" and thereby extend the degree of scrutiny which the court is required to undertake under s.31(3A). It now reads:

> "(3B) For the purposes of subsection (3A), the permanence provisions of a section 31A plan are
>
> (a) such of the plan's provisions setting out the long-term plan for the upbringing of the child concerned as provide for any of the following

(i) the child to live with any parent of the child's or any other member of, or friend of, the child's family;

(ii) adoption;

(iii) long-term care not within sub-paragraph (i) or (ii).

(b) such of the plan's provisions as set out any of the following –

(i) the impact on the child concerned of any harm that he or she suffered or is likely to suffer;

(ii) the current and future needs of the child (including needs arising out of that impact);

(iii) the way in which the long-term plan for the upbringing of the child would meet those current and future needs."

24. In *Re S-W (Care Proceedings: Case Management Hearing)* [2015] EWCA Civ 1146, (decided before the amendment to s.31(3B) in 2017), King LJ, in a judgment with which other members of the Court agreed, made two important observations about s.31(3A) and (3B). At paragraph 34, she said:

> "The fact that the court is "not required" to consider certain other aspects of the plan does not mean it is prohibited from doing so; one can imagine any number of situations where a particular child's individual identified needs will mean that the court, whilst not seeking to trespass on the exercise of parental responsibility of the local authority, forms the view that the child's welfare necessitates the court satisfying itself in relation to certain important aspects of the care plan not found within the permanence provisions themselves."

At paragraph 37 she added:

> "Where a care plan anticipates that a child will live permanently with a family or friend, the identity and sufficient information about that family member or friend must be before the court. Without such information the court will be unable properly to consider the proposed permanency provisions. Such an approach chimes with the position, as it has been for many years, in relation to the treatment of long term foster placements where, if it is intended that a child is to remain in a long term foster placement, the care plan must contain a description of the placement and of the foster carers to be provided by a social worker who knows the foster carers in question. *Re J (Minors) Care: Care Plan)* [1994] 1 FLR 253."

25. The introduction of and subsequent amendments to s.31(3A) and (3B) are examples of Parliament's redrawing of the boundary between the respective responsibilities of the courts and local authorities during the currency of care proceedings.

26. Amongst other provisions of the Children Act which have been amended and re-amended since 1989 are the sections in Part III dealing with the duties of a local authority towards children in their area. It is unnecessary to trace the legislative history. In broad terms, one effect of the amendments has been to emphasise the obligation to place children where possible within their birth families, subject to the overriding principle that the child's welfare is the paramount consideration.

27. Under s.22 of the Act, a child such as R who is subject to an interim care order comes within the category of a "looked after" child. S.22 identifies general duties of local authorities in relation to children looked after by them, including, under s.22(3)(a) the duty to "safeguard and promote his welfare". S.22C prescribes ways in which looked after children are to be accommodated and maintained. So far as relevant to this appeal, the section provides:

> "(1) This section applies where a local authority are looking after a child ("C").
>
> (2) The local authority must make arrangements for C to live with a person who falls within subsection (3) (but subject to subsection (4)).
>
> (3) A person ("P") falls within this subsection if
>
> (a) P is a parent of C;
>
> (b) P is not a parent of C but has parental responsibility for C; or
>
> (c) in a case where C is in the care of the local authority and there was a child arrangements order in force with respect to C immediately before the care order was made, P was a person named in the child arrangements order as a person with whom C was to live.
>
> (4) Subsection (2) does not require the local authority to make arrangements of the kind mentioned in that subsection if doing so
>
> (a) would not be consistent with C's welfare; or
>
> (b) would not be reasonably practicable.
>
> (5) If the local authority are unable to make arrangements under subsection (2), they must place C in the placement which is, in their opinion, the most appropriate placement available.
>
> (6) In subsection (5), "placement" means
>
> (a) placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;

(b) placement with the local authority foster parent who does not fall within paragraph (a);

(c) ….

(d) ….

(7) In determining the most appropriate placement for C, the local authority must, subject to subsection (9B) and the other provisions of this Part (in particular, to their duties under section s.22)

(a) give preference to a placement falling within paragraph (a) of subsection (6) over placements falling within the other paragraphs of that subsection

….

(9A) Subsection (9B) applies (subject to subsection (9C)) where the local authority

(a) are considering adoption for C;

(b) are satisfied that C ought to be placed for adoption but are not authorised under section 19 of the Adoption and Children Act 2002 (placement with parental consent) or by virtue of section 21 of that Act (placement orders) to place C for adoption.

(9B) Where this subsection applies

(a) subsections (7) to (9) do not apply to the local authority,

(b) the local authority must consider placing C with an individual within subsection (6)(a), and

(c) where the local authority decided that a placement with such an individual is not the most appropriate placement for C, the local authority must consider placing C with a local authority foster parent who has been approved as a prospective adopter.

(9C) Subsection (9B) does not apply where the local authority have applied for a placement order under section 21 of the Adoption and Children Act 2002 and the application has been refused."

28. Under s.1(1) and (2) of the Adoption and Children Act 2002, whenever a court or adoption agency is coming to a decision relating to the adoption of a child, the paramount consideration must be the child's welfare throughout his life. S.1(4) sets out the checklist of matters to which the court or adoption agency must have regard. The

checklist differs in several respects from the equivalent list in s.1(3) of the Children Act. It includes, under paragraph (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"

and, under paragraph (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 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 persons, regarding the child."

29. S.1(6) includes a provision similar to, though slightly different from, s.1(3(g) of the Children Act:

> "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 orders under this Act unless it considers that making the order would be better for the child than not doing so."

30. The 2002 Act distinguishes between adoptions where the child has been placed for adoption by an adoption agency ("agency adoptions") and those where the child has not been so placed ("non-agency adoptions"). In the case of agency adoptions, it establishes two routes by which an adoption agency may be authorised to place a child for adoption – placement with parental consent under s.19 or placement under a placement order under s.21. S.21 provides, inter alia:

> "(1) A placement order is an order made by the court authorising a local authority to place the 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) … are satisfied, 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.

…."

31. Under s.22(2)(a):

"If … an application has been made (and has not been disposed of) on which a care order might be made in respect of a child … the appropriate local authority must apply to the court for a placement order if they are satisfied that the child ought to be placed for adoption."

Under s.22(5), however, ss.22(2) does not apply

"(a) if any persons have given notice of intention to adopt, unless the period of four months beginning with the giving of the notice has expired without them applying for an adoption order or their application for such an order has been withdrawn or refused or

(b) if an application for an adoption order has been made and has not been disposed of."

32. S.42 sets out certain requirements for a child to live with prospective adopters before adoption. So far as relevant to this appeal, it provides:

"(1) An application for an adoption order may not be made unless

(a) if subsection (2) applies, the condition in that subsection is met,

(b) if that subsection does not apply, the condition in whichever is applicable of subsections (3) to (5) applies.

(2) If

> (a) the child was placed for adoption with the applicant or applicants by an adoption agency … or
>
> (b) …
>
> the condition is that the child must have had his home with the applicant, or, in the case of an application by a couple, with one or both of them at all times during the period of ten weeks preceding the application.
>
> …
>
> (4) If the applicants are local authority foster parents, the condition is that the child must have had his home with the applicants at all times during the period of one year preceding the application.
>
> …
>
> (6) But subsection … (4) … [does] not prevent an application being made if the court gives leave to make it."

33. S.44 makes provision for the giving of notice of intention to adopt in non-agency adoptions. So far as relevant to this appeal, the section provides as follows:

> "(1) This section applies where persons (referred to in this section as "proposed adopters") wish to adopt a child who is not placed for adoption with them by an adoption agency.
>
> (2) An adoption order may not be made in respect of the child unless the proposed adopters have given notice to the appropriate local authority of the intention to apply for an adoption order (referred to in this Act as a "notice of intention to adopt").
>
> (3) The notice must be given not more than two years, or less than three months, before the date on which the application for the adoption order is made.
>
> (4) Where
>
> (a) if a person were seeking to apply for an adoption order, subsection (4) or (5) of section 42 would apply, but
>
> (b) the condition in the subsection in question is not met,
>
> the person may not give notice of intention to adopt unless he has the court's leave to apply for an adoption order.
>
> (5) On receipt of a notice of intention to adopt, the local authority must arrange for the investigation of the matter and submit to the court a report of the investigation.

…."

A notice of intention to adopt must be in writing: s.144(1).

34. Under s.42, therefore, Parliament has given foster carers the right to apply to adopt a child who has been in their care for at least 12 months, subject to the obligation to give notice to the local authority under s.44(2) and (3). Such an application will be outside the statutory scheme for agency adoptions, but it is nevertheless open to foster carers to go through the agency route rather than apply for adoption themselves. Para 3.75 of the Statutory Guidance of Adoption (2013) states:

> "Although foster carers have a legal right to institute their own adoption application once the child has lived with them for a specific period of time (known as a non-agency case), the local authority should encourage them to participate in the adoption agency process."

35. The final statutory provisions of relevance to this appeal are those introduced by the Children and Families Act 2014 to reduce delays in care proceedings with a view to achieving the resolution of proceedings within the period of 26 weeks recommended by the Norgrove Family Justice Review and adopted by Parliament. Under s.32(1) of the 1989 Act (as amended by the 2014 Act), a court in care proceedings is required under paragraph (a) to draw up a timetable with a view to disposing of the application (i) without delay and (ii) in any event within twenty-six weeks beginning with the day on which the application was issued. S.32(5) to (8) permit the court to extend the timetable, but only in limited circumstances. Thus, s.32(5) provides that the court may extend the period only if it "considers that the extension is necessary to enable the court to resolve the proceedings justly", s.32(7) provides that "extensions are not to be granted routinely and are to be seen as requiring specific justification", and s.32(8) provides that each separate extension under subsection (5) is to be no longer than eight weeks.

36. I now turn to consider the case law on the principal issue arising on this appeal, whether it is lawful or appropriate to join foster carers to care proceedings. On this point, the case law is clear. As Sir James Munby P observed in ***Re T (A Child) (Early Permanence Placement)*** [2015] EWCA Civ 983, [2017] 1 FLR 330 (considered in more detail below):

> "From the very earliest days of the 1989 Act (which, it will be remembered, came into force in October 1991), the court has set its face against the joinder in care proceedings of foster-parents or prospective adopters."

37. The first reported decision in which this issue occurred was ***Re G (Minors) (Interim Care Order)*** [1993] 2 FLR 839. It arose in lengthy proceedings concerning two children which had started under the previous law. By the time of the orders under appeal, one child had been living with living with foster carers for two years, initially under a "matrimonial care order" made with divorce proceedings (as was permitted under the pre-Children Act law). The other child had been living with the same foster carers for six months. The foster carers wished to continue caring for both children and applied for a residence order (the predecessor of a "living with" child arrangements order) with

the support of the mother. At first instance, the circuit judge had upheld an earlier decision by a district judge that the matrimonial care order was a nullity, refused to make interim care orders under the Act pending a final hearing, and joined the foster carers as parties to the care proceedings. This Court allowed an appeal by the local authority against the refusal to make an interim care order but concluded that there was no ground for interfering with the decision to join the foster carers as parties. In reaching that decision, Waite LJ said (at page 72):

> "It should, however, be observed that this is an exceptional case with many unusual features. In ordinary circumstances I would not expect the court to regard it as appropriate to join foster-parents as parties to proceedings of this kind. To do so would in most cases run counter to the clear policy of the Act …. The assistance afforded by foster-parents to the effective functioning of any system of child care is invaluable and should never be discouraged. Theirs is not a role, nevertheless, which would normally make it necessary for them to be joined formally as parties to proceedings in which the future upbringing of the children in their temporary care is in issue. There will generally be ample means for making their views known to the court, either directly as witnesses or indirectly through the inquiries of the guardian ad litem, without the necessity of adding them formally as parties."

38. In *Re A; Coventry County Council v CC and A* [2007] EWCA Civ 1383, [2008] 1 FLR 959, a foster mother with whom a child had been placed at birth indicated after five months that she wanted to adopt him, but was not informed of the local authority's rejection of her proposal until after the magistrates sitting in the family proceedings court had made care and placement orders. Her application for leave to apply for an adoption order was refused by a circuit judge in part because he considered that the magistrates had known that the local authority was not intending to support an adoption by the foster carer when they approved the care plan. The foster mother's appeal to this Court was allowed and she was granted leave to apply for an adoption order.

39. Wilson LJ (with whom the other judges agreed) observed that the judge had been wrong to describe the magistrates as having reached any decision that the child should not be placed with the foster mother. He continued (at paragraph 34):

> "I do not agree with the judge that the proper forum for consideration of the identity of the optimum adopter or adopters for a child is the court which makes the care and placement orders. For, in terms of the adoption of the child and in contradistinction to the child's committal into care, the placement order is not the court's last word. Its last word is articulated when the adoption order is made; and any court which makes a placement order knows that any issue in relation to the identity of the optimum adopter or adopters of the child can be ventilated in an application for an adoption order, which is precisely what this foster mother aspires to make. In my view the magistrates were rightly unattracted to the suggestion, albeit that it was later endorsed by His Honour Judge Bellamy, that the

> foster mother might in some way join in the proceedings before them. As a judge of the family justice system for almost 15 years, I have never encountered a case in which an aspiring adopter participated in the hearing of proceedings relating to whether a child should be placed for adoption, or should be freed for adoption under the old law set out in s 18 of the Adoption Act 1976. For the law provides a forum in which issues as to the identity of the optimum adopter can later be ventilated. In my view, therefore, the requirement for close scrutiny of the care plan should in principle not extend to an address of any issue as to the identity of the optimum adopter or adopters for the child."

40. Wilson LJ endorsed observations by Hedley J in *Re R (Care Plan for Adoption: Best Interest)* [2006] 1 FLR 483 that exceptionally it may be appropriate for a court hearing an application for a care order to scrutinise the credentials of proposed adopters to weigh whether adoption is truly in the child's interests. He added, however, that:

> " [to] say that the credentials of proposed adopters may exceptionally need to be considered in care proceedings in order that the court should better be able to reach the central decision whether the child should be removed from his family and adopted is not to say that care or indeed placement proceedings are an appropriate forum for resolution of an issue between a proposed adopter and the local authority as to the merits of her candidacy."

41. In *Re T (A Child) (Early Permanence Placement)* [2015] EWCA Civ 983, [2017] 1 FLR 330, a child had been placed aged seven days old with foster parents with a view to adoption under what is known as an early permanence placement. Subsequently, the paternal grandparents put themselves forward as prospective special guardians for the child and the local authority abandoned its plan for adoption. When the child was six months old, the foster carers, with whom he was still living, applied under s.42(6) for leave to apply for an adoption order. The circuit judge granted leave and joined them as parties to the care proceedings. Two days later, the foster carers gave notice of intention to adopt under s.44.

42. In setting out the law, Sir James Munby P (at paragraph 41) emphasised that:

> "in the case of a private law adoption, as in the case of a public law adoption, the court cannot make an adoption order in the absence of parental consent except as 'a last resort' and only if 'nothing else will do.'…."

Having cited *Re B* and *YC v United Kingdom*, he added (at paragraph 42) that:

> "What might otherwise 'tip the balance' in a private law case does not necessarily suffice to justify adoption in the face of parental opposition."

43. After referring to *Re G* and *Re A*, the President observed (at paragraph 49) that he saw "no reason to depart from this long-established approach and, indeed, every reason to

follow it", adding that "nor, in particular, is there anything in the status or function of an early permanence placement foster carer which either justifies or requires any change in approach." He continued (at paragraph 50):

> "The care judge is concerned at most with consideration of adoption *in principle*, not with evaluating the merits of particular proposed adopters. There is no need for the prospective adopters to be joined, for it is the children's guardian (who will be aware of Mr and Mrs X's stance and can, if necessary, address their suitability) who has the task, indeed is under the duty, of subjecting the local authority's care plan to rigorous scrutiny and, where, appropriate, criticism. So, I agree, Mr and Mrs X's joinder to the care proceedings is inappropriate. Moreover, as was pointed out, and I agree, there is no need for Mr and Mrs X to be parties to the care proceedings to demonstrate that they are suitable prospective adopters for T, for they have already been positively assessed."

44. At paragraph 53, the President identified:

> " a very real risk that if, in a case such as this, the forensic process is allowed to become in effect a dispute between the prospective adopters and the birth family, the court will be diverted into an illegitimate inquiry as to which placement will be better for the child. That, it cannot be emphasised too much, is *not* the question before the court. I repeat, because the point is so important, what the Strasbourg court said in *Y v United Kingdom* [2012] 55 EHRR 33
>
> > 'family ties may only be severed in very exceptional circumstances … It is not enough to show that a child could be placed in a more beneficial environment for his upbringing.'"

45. And at paragraph 54, he went on to identify:

> "another significant matter which, in my judgment, points in the same direction. The effect of sections 44(2) and (3) of the 2002 Act is to impose a period of three months' delay in a case such as this. This is an appropriate aspect of the statutory scheme in relation to private law adoptions. But it would sit most uncomfortably if, as suggested in the present case, the statutory scheme under the 2002 Act is to be run in tandem with the quite separate statutory scheme in relation to care proceedings under the 1989 Act, required, by the recently amended section 32(1)(a)(ii) of the 1989 Act, to be concluded within a total period of only 26 weeks."

46. For those reasons, the Court allowed appeals against the order joining the foster carers as parties to the care proceedings and the order granting them leave to apply for an adoption order. The President added, however, that the fact that the latter order was

being set aside would not prevent the foster carers pursuing their application, if appropriate, once the care proceedings had concluded.

47. Apart from ***Re G***, no case was cited to us in which this Court had approved the joinder of a foster carer as a party to care proceedings. In ***Re RP (A Child)(Foster Carer's Appeal)*** 2019 EWCA Civ 525, however, this Court (King LJ, Baker LJ and Moor J) gave permission to appeal and allowed an appeal by an English foster carer against an order made in care and placement proceedings under which the judge ordered that the child be placed in foster care in Poland, her mother's country of origin. The principal ground of appeal was that the judge failed to comply with the obligation under s.1(4) of the 2002 Act to identify the foster carer's relationship with the child as relevant to her decision or to take into account the value to the child of that relationship continuing. The foster carer had not been a party to the proceedings but was granted permission to appeal as a non-party following the principle articulated by Dyson LJ in ***George Wimpey UK Ltd v Tewkesbury Borough Council*** [2008] EWCA Civ 12 [2008] 1 WLR 1649 at paragraph 9 that to deny a non-party a right of appeal in such circumstances

> "could work a real injustice, particularly in a case where a person who was not a party to the proceedings at first instance, but who has a real interest in their outcome, wishes to appeal, the losing party does not wish to appeal and an appeal would have real prospects of success."

In giving my reasons for supporting the decision to grant the foster carer permission to appeal, I said (at paragraph 40):

> "How should the court approach an application by a foster carer for permission to appeal when she is not a party to the proceedings? Every foster carer has an interest in the child they are looking after, but not everyone will be able to demonstrate a real interest in the outcome of an appeal in proceedings concerning the child. Without hearing full argument, I would prefer not to make any observations about where the line should be drawn or the criteria to be considered when considering such an application. In the present case, LR manifestly has a real interest in the proposed appeal, and in addition her position on the substantive issues is unsupported by any of the other parties. For reasons that will become clear later, I conclude that the proposed appeal does have a real prospect of success. In those circumstances, I would grant her permission to appeal."

48. In the course of submissions in ***Re RP***, the respondent's counsel had cited the observation of Sir James Munby P in ***Re T***, at paragraph 50, quoted above, to the effect that "the care judge is concerned at most with consideration of adoption in principle, not with evaluating the merits of particular proposed adopters". In my judgment (with which the other members of the Court agreed), setting out my reasons for allowing the appeal, I said:

> "where, as here, a child, particularly a child of this age, has formed a strong bond with a foster carer, it is manifestly in the child's interest for the court to consider the likelihood and value

> of that relationship continuing. I am quite sure that Sir James Munby P was not intending to suggest otherwise in the passage in his judgment from ***Re T*** cited by Ms King. As Sir James himself acknowledged subsequently in ***Re B (A Child) (Sibling Relationship: Placement for Adoption)*** [2018] EWCA Civ 20, [2018] 2 FLR 1 at paragraph 25 of his judgment,
>
> > "there is nothing in ***Re T*** to say that the court can ignore a crucial factor which is necessarily concomitant with a particular placement".
>
> For my part, the court's statutory obligation when considering an application for a placement order to identify any relevant relationship and consider the likelihood of that relationship continuing and the value to the child of its doing so may extend to a relationship between a child and foster carers who have put themselves forward as prospective adopters."

Submissions

49. On behalf of the appellant local authority, Ms Fottrell QC and Ms MacLynn submitted first and foremost that the decision of the judge to join the foster carers as parties to the proceedings was both wrong in principle and wrong in law. It offended against the statutory scheme and was contrary to the case law set out in the line of authorities from this Court cited above. The local authority's plan, in accordance with its statutory obligation under s.22C of the Children Act, was to place R for adoption with members of his family.

50. There is no reported authority in which a court has been asked to determine an application for a placement order in public law proceedings alongside a private law non-agency adoption. The local authority's case on appeal was that the correct approach is to determine the care and placement applications first. It is not unusual for foster carers to express an interest in adopting a child. Ms Fottrell and Ms MacLynn submitted that, pursuant to its obligations under s.22C, a local authority should not investigate such a proposal until it is satisfied that a family placement cannot be found. The decision as to whether a child should be placed for adoption with foster carers is one to be taken by the local authority. The statutory guidance provides that local authorities should encourage foster carers to participate in the adoption agency process. On behalf of the local authority, it was submitted that the court must not permit the foster carers to circumvent the statutory scheme.

51. Ms Fottrell and Ms MacLynn contended that the fact that other issues have delayed the progress of the application for a care order beyond the statutory 26-week period stipulated in s.32(1)(a)(ii) of the 1989 Act to the extent that, as a result of the passage of time, Mr and Mrs A have been brought within s.42(4) of the 2002 Act should not result in the court joining them to the care proceedings and thereby delaying the determination of the proceedings still further. In any event, at the time of the hearing before the judge, there was no valid application to adopt before the court and Mr and Mrs A were not entitled to file such an application until the expiry of the three-month notice period.

52. They submitted that the fundamental difficulty with the judge's approach is that it sets the foster carers up in direct conflict and competition with the birth family. By granting them party status, the judge enables them to argue for the permanent removal of the child from the family. Ms Fottrell and Ms MacLynn described this as being neither appropriate nor an attractive position for a foster carer to occupy. They submitted that it is clear from the decision in ***Re T*** that the statutory scheme did not envisage such a scenario. The judge had fallen into the same error as had been made at first instance in ***Re T***. The court should not have permitted it by joining the foster carers prematurely to care proceedings before any adoption application could be made. The more appropriate route for the foster carers to adopt would be to put themselves forward for an agency adoption.

53. Under the second ground of appeal, the local authority contended that the judge had been wrong not to list the care and placement applications for a final hearing. S.32 of the 1989 Act as amended requires the court to be satisfied that it was necessary to extend the time for the determination of the proceedings and to scrutinise any proposal carefully before agreeing to any extension. Here, there was no proper justification for doing so, bearing in mind that the proceedings have already been ongoing for a year. The correct approach was for the court to determine the local authority applications first. The foster carers had no valid application before the court. If care and placement orders are made at the conclusion of the proceedings, the foster carers' proposal to adopt a child can be considered as part of the agency approval process.

54. The local authority's third ground of appeal was that the judge was wrong in law to direct the local authority to complete adoption assessments of Ms G and her partner, and Mr and Mrs A, and file them within the care and placement proceedings. Such assessments are to be lodged within any application to adopt after the making of a placement order has been made by the agency decision maker. A further complication arising out of this direction is that it breached the adoption process. The regulations governing both agency and non-agency adoptions stipulate that such assessments are confidential documents. Mr and Mrs A should not have access to confidential information about Ms G and her partner, and vice versa. Similarly, the court's direction to the local authority to provide Mr and Mrs A with a copy of the court bundle was wrong, since the bundle includes extensive personal and confidential information about the mother and her family.

55. In the course of argument before us, Ms Fottrell stressed that the local authority's principal complaint was about the decision to join the foster carers as parties. If this Court took the view that the judge could not ignore the reality that Mr and Mrs A were intending to apply to adopt as they were entitled to do, the way forward might be for their application to proceed in parallel with the placement order application after a final care order has been made. The local authority's preferred course, however, was that the matter should proceed as an agency adoption. Mr and Mrs A would not be excluded from consideration and the local authority and guardian could provide information to enable the court to reach a decision as to the appropriate adoptive placement. In later submissions, Ms MacLynn confirmed that the local authority agreed not to remove R from Mr and Mrs A's care without giving notice to them or further order of the court.

56. At the time of the hearing before the judge, the mother had indicated her agreement to the proposal that R should be adopted by Ms G and her partner. By the hearing of the appeal, however, she had changed her position. She now proposed that R be placed with

her cousin until such time as she herself is able to resume care. At the hearing before us, the mother supported the local authority's appeal. On her behalf, Ms Gilling QC and Ms Maxwell submitted that there was nothing unusual in the case to warrant joining the foster carers as parties. Their views could be made known through the guardian. The legitimate enquiry for the proceedings was whether the local authority's plan for adoption should be approved by the court in principle. By joining the foster carers to the proceedings, the court would be diverted into conducting an "illegitimate enquiry" as to which adoptive placement would be better for the child. The right time to consider the foster carers' application will be at the conclusion of the care proceedings. The appropriate time for considering the merits of specific adoption placements would be within any adoption proceedings.

57. On behalf of the guardian, Mr Pressdee QC and Ms Porter conceded that there were aspects of the judge's approach which could not be supported. They accepted that it is not open to the court to seek to exert influence over the choice of prospective adopters under a placement order. To the extent that the judge infringed that principle so that she set up a direct contest between two competing proposed adoptive placements, the judge had been wrong. That said, it did not follow that the key decision to join the foster carers to the proceedings should be set aside. On the contrary, Mr Pressdee and Ms Porter sought to support the decision by filing a Respondent's Notice in which, in the absence of a judgment, they identified what they described as features from the factual and legal context which justified the decision. Although foster carers should not ordinarily be joined, the circumstances in this case justified the judge taking this course. A judge making case management decisions has a very wide discretion and any party seeking to overturn a case management decision made within the judge's discretion must cross a high threshold.

58. The features in the factual context relied on included (a) the fact that R has lived with Mr and Mrs A since he was three days old; (b) that as a result they are the only parents he has known; (c) the view of the guardian is that R has settled well in their care and is meeting all his milestones; (d) the fact that Mr and Mrs A gave notice of their interest in providing permanent care some months ago; and (e) the likelihood that, by the time of any final hearing, their application for an adoption order would be validly before the court. The aspects of the legal context relied on included (a) that under s.42(4) of the 2002 Act Mr and Mrs A are now entitled as of right to apply for an adoption order having looked after R for over a year; (b) that, under the 1989 Act, they are also entitled to apply for other orders as of right, including a child arrangements order with a living with provision and a special guardianship order; (c) the duty on a court deciding what order to make at the conclusion of care proceedings to consider all realistic options; and (d) the legal obligation on the court coming to a decision relating to R's adoption, including a decision on whether to make a placement order, to have regard under s.1(4)(f) of the 2002 Act to the relationship between R and his foster carers, the likelihood of the relationship continuing, the value to R of its doing so, the ability of Mr and Mrs A to provide R with a secure environment in which he can develop and to meet his needs, and their wishes and feelings regarding the child with whom they have formed a deep attachment.

59. Mr Pressdee and Ms Porter argued that there was nothing in ***Re T*** which made it obligatory not to join foster carers as parties to care proceedings, that the decision in ***Re G*** that joinder was permitted in exceptional circumstances had not been overruled, and

that the circumstances of the present case were sufficiently exceptional to justify the judge's decision. They also sought to distinguish ***Re A*** and ***Re T*** on the grounds that, in both cases and unlike the present case, the child had lived with the foster carers for less than a year. In each case, the issue was whether to bring the foster carers into the fray by giving them leave to apply to adopt. In contrast, Mr and Mrs A are already, in Mr Pressdee's phrase, in the fray because they are entitled to apply to adopt R and have already embarked on the process. The joinder of the foster carers to the proceedings would enable them to have the necessary information to shape and put their case to care for R permanently and to have a say in the decision-making process. In addition, joining them as parties would assist the guardian to advise the court whether this is a case in which nothing but adoption would meet the child's needs since it would enable her evaluate all the realistic options. Mr Pressdee and Ms Porter submitted that there was no real difficulty in seeing how the proceedings would work. The court would first determine the local authority application for a care order and then go on to consider the foster carers' adoption application in parallel with the local authority's application for a placement order.

60. In the circumstances, the decision to join the foster carers as parties was open to the judge in the exercise of her discretion and ought not to be set aside.

61. Mr and Mrs A addressed the Court briefly towards the end of the hearing. They described how they had not set out to adopt R but over the last 15 months he had become a much loved member of the family. They see themselves as the only family R has ever known, although they stressed that they want him to grow up knowing about his background. They are concerned the local authority may not be objective when reaching its decision about placement. They have met Ms G and her partner and agreed that, whatever decision is made about the long-term future, they should stay in touch.

Discussion

62. I accept Ms Fottrell's submission that the judge's decision to join the foster carers as parties to the proceedings was wrong in principle and wrong in law. The case law is clear. Save in exceptional circumstances, foster carers and prospective adopters should not be joined as parties to care proceedings. As Sir James Munby P said in ***Re T***:

> "the care judge is concerned at most with consideration of adoption *in principle*, not with evaluating the merits of particular proposed adopters. There is no need for the prospective adopters to be joined, for it is the children's guardian (who will be aware of Mr and Mrs X's stance and can, if necessary, address their suitability) who has the task, indeed is under the duty, of subjecting the local authority's care plan to rigorous scrutiny and, where, appropriate, criticism."

And as Wilson LJ observed in ***Re A***, the fact that it may be necessary for the court to consider the credentials of proposed adopters when deciding whether to approve a care plan for adoption does not mean that the care proceedings are the appropriate forum for resolving a dispute as to the merits of a proposed adoption.

63. Of course, Mr and Mrs A are now entitled to apply for an adoption order because Parliament has decided that foster carers with whom the child has lived for over a year

are entitled to bring such an application. To that extent, the position facing the judge was different from that which arose in ***Re T***. In those circumstances, their application to adopt must be considered before any final decisions are taken about the child's future. But that does not require them to be joined as parties to the care proceedings. I do not accept Mr Pressdee's characterisation of Mr and Mrs A's situation as being "in the fray" in the sense of fully involved in decisions about the child's future. They have made an application to adopt R, but in the circumstances of this case that application only arises for consideration once the court has decided in principle that he should be adopted. Similarly, I do not accept the submission that the foster carers should be joined as parties to enable them to have a say in the decision-making process nor that joining them as parties will enable the guardian to evaluate the realistic options for the child so as to advise the court whether this is a case where only adoption will meet his welfare needs. The guardian is well able to carry out all necessary inquiries without Mr and Mrs A being joined as parties.

64. The fact that, exceptionally, this Court in ***Re RP*** gave permission to a foster carer to bring an appeal against an order made in care proceedings to which she had not been a party provides no support for the judge's decision in the present case to join Mr and Mrs A as parties to the proceedings. The foster carer in ***Re RP*** was allowed to bring an appeal because there were good prospects of establishing that the decision was contrary to the child's interests and wrong, none of the parties to the proceedings was seeking to bring an appeal, and to deny the foster carer the opportunity to appeal would have caused real injustice.

65. By March 2021, the present proceedings had been continuing for over 12 months, substantially over the 26-week period specified in s.32(1)(a). I have no doubt that the judge was understandably and rightly concerned at the delay that had occurred and anxious to reduce the risk of any further delay before final decisions were taken. But the effect of the order made on 15 March was to prolong the care proceedings without conducting the analysis and process of identifying specific justification required by s.32 of the 1989 Act. In saying that, I do not intend to be unduly critical of the judge who was plainly looking creatively for a way to resolve all the issues as quickly as possible. Nor am I being critical of counsel who were faced with an unexpected turn of events in the course of the hearing. I can well understand the judge's wish to short-circuit the process and avoid further delay, but the course she adopted of joining the foster carers to the care proceeding was plainly wrong in law.

66. It seems to me that the right course for the judge would have been to list the local authority's application for a care order for a final hearing. At that point, the judge could have considered whether adoption in principle was the right option, applying the test laid down in ***Re B*** and ***Re B-S***. In the event that the court determined that adoption was the right option, it could have made a care order and proceeded to consider Mr and Mrs A's application alongside the local authority's application for a placement order. That might have necessitated an adjournment for assessments and would undoubtedly have required careful consideration about issues of confidentiality. In my judgment, however, it would have been an unobjectionable course to take in the light of the authorities.

67. As the judge's order joining Mr and Mrs A was wrong in law, this Court is entitled to intervene, notwithstanding the fact that it was a case management decision.

68. But it is important to stress that the fact that the judge was wrong to join the foster carers as parties to the care proceedings does not mean that their proposed application is irrelevant to the court's decision whether to make care and placement orders. I do not accept the local authority's submission that the foster carers' application is an impermissible attempt to circumvent the statutory scheme. If the local authority believes that a looked-after child who is subject to care proceedings should be placed for adoption, it must apply for a placement order: s.22(2)(a) of the 2002 Act. But there is nothing in the statutory scheme to prevent a person who is lawfully entitled to apply for a private or non-agency adoption from doing so before or after the local authority has applied for a placement order. Indeed, where such a person has given notice of intention to apply to adopt, the local authority is absolved from its statutory obligation to apply for a placement order, provided the adoption application is issued within four months and has not been withdrawn or refused: s.22(5). And when a lawful application has been made under s.42, the court must consider it and is not constrained from doing so by the terms of s.22C. That section imposes obligations on the local authority, not the court.

69. Once a care order has been made, the responsibility for the child's care rests with the local authority not the court: ***Re S, Re W***. But the resolution of any dispute about whether or not a care order should be made is a matter for the court, not the local authority. The court can only endorse adoption as a last resort when satisfied that no other option will meet the child's needs: ***Re B***. In order to identify the right outcome for the child, the local authority, the guardian and the court will have to carry out a robust and rigorous analysis of the advantages and disadvantages of all realistic options: ***Re B-S***. In making its decision, the court must have regard to the "permanence provisions" in the care plan and may, where appropriate, consider other aspects of the plan: ***Re S-W.*** Furthermore, when scrutinising the "permanence provisions" in the care plan, the court is entitled to consider information about persons with whom the plan anticipates the child will be placed: ***ibid***. As Carr LJ observed in the course of the hearing, a court cannot consider a care plan for adoption in a vacuum.

70. A court evaluating the local authority plan in order to decide what order to make at the conclusion of care proceedings must have regard, amongst other things, to the likely effect on the child of any change of circumstances: s.1(3)(c). Where a child now aged 15 months has been placed with foster carers since he was three days old, any change of circumstances will inevitably be very significant. Furthermore, when his carers are offering to look after him permanently and have given notice and intention to apply for an adoption order, it is incumbent on the court deciding what order to make at the conclusion of care proceedings to consider how capable the carers are of meeting the child's needs: s.1(3)(f).

71. In ***Re RP***, I said:

> "the court's statutory obligation when considering an application for a placement order to identify any relevant relationship and consider the likelihood of that relationship continuing and the value to the child of its doing so may extend to a relationship between a child and foster carers who have put themselves forward as prospective adopters."

Where a child has been in foster care from the age of three days to 12 months or longer, and the foster carers are putting themselves forward as permanent carers, any court coming to a decision relating to the adoption of the child is obliged to consider the strength of the relationship, the likelihood of it continuing, the value to the child of it doing so, and the willingness and ability of the foster carers to provide the child with a secure environment in which he can develop and to meet his needs: s.1(4)(f) of the 2002 Act.

72. Under s.1(6) of the 2002 Act, a court considering an application for a placement order must consider all the powers available under the 2002 Act and the 1989 Act. It follows, therefore, that where an application for a non-agency adoption has been made, that application has to be taken into account when considering the local authority's application for a placement order.

Conclusion

73. Accordingly, I would allow the local authority's appeal and set aside paragraph 1 of the order dated 15 March 2021

74. The application for a care order should now proceed swiftly to a final hearing at which the judge will have to determine whether to approve the local authority plan for adoption. If she does indeed conclude that nothing but adoption will meet the child's needs, I anticipate that the judge may make a final care order but adjourn the application for a placement order to be determined in parallel with Mr and Mrs A's application to adopt. By the date of the next hearing on 18 June, that application will have been lawfully filed and served. At the hearing before the judge, counsel for the local authority conceded that Mr and Mrs A's written application to the court, although null and void as an application to adopt, should be deemed to be notice of intention to adopt under ss.44(3). The judge agreed with this pragmatic interpretation, although strictly speaking s.144 of the 2002 Act requires any notice to be in writing and, at the date of the hearing, no written notice had been served on the local authority. The effect of the concession was that the notice under ss.44(2) was deemed to have been given on 15 March and the three months required under s.44(3) will therefore have expired three days before the next hearing.

75. I would also set aside paragraphs 3 and 4 of the order of 15 March under which the court directed the local authority to file and serve adoption assessments of Ms G and her partner and of Mr and Mrs A. Although the assessments have now been completed, it is likely that they will contain information that is confidential to each couple. Accordingly, I would discharge the disclosure orders with a view to the question whether the assessments should be filed and served (in whole or in part) being further considered by the judge at the hearing on 18 June.

76. Beyond that, it is neither necessary nor appropriate for this Court to make any comment about how the proceedings should be resolved. We have not looked in detail at the merits of the alternative placements, nor seen the assessment reports which have now been completed. It will be little comfort to the judge for me to say that she faces a difficult decision. But it may be some comfort to the parties to know that the decision is in the hands of the judge with great experience of this difficult and sensitive area of the law.

77. Plainly R should not be moved from his current placement by the local authority without giving notice to Mr and Mrs A or further order of the court. This Court was grateful to the local authority for giving an assurance about this in the course of the hearing. That assurance should be recorded in the order of this Court following this appeal.

CARR LJ

78. I agree.

LEWIS LJ

79. I also agree.