



Neutral Citation Number: [2024] EWCA Civ 1302

Case No: CA-2024-001326

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT NORTHAMPTON

HH Judge Wicks
NN23C50110

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 October 2024

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

R and C (ADOPTION OR FOSTERING)

Jonathan Sampson KC and Alicia Collinson (instructed by **Local Authority solicitor**) for the
Appellant

Stefano Nuvoloni KC and Sophie Laurence (instructed by **Family Law Group**) for the **First**
Respondent

Alex Forbes (instructed by **Sills and Betteridge**) for the **Third and Fourth Respondents (by**
their children's guardian)

The Second Respondent was not represented at the hearing of the appeal

Hearing date : 6 September 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 30 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE BAKER :

1. This appeal is brought by a local authority against a judge's refusal to make placement orders in respect of two young children. The principal reason for the judge's decision was that he concluded that adoption was inconsistent with the children's need for continuing contact with members of their birth family, in particular their two elder half-siblings. The local authority, supported by the children's guardian, say that the judge's decision was wrong. Its care plan contemplates that the children will only be placed with prospective adopters who are prepared to agree to continuing direct contact between the siblings.
2. This appeal falls to be decided at a time when there is renewed discussion about open adoption and provides an opportunity to reiterate the clear principle that, at the stage of making an order under s.21 of the Adoption and Children Act 2002 authorising a local authority to place a child for adoption, it is the court, rather than the local authority or any other person, which has the responsibility for determining whether there should be ongoing contact between the child and the birth family.

Legal background

(1) The changing nature of adoption

3. In the 98 years since legal adoption was first introduced in England and Wales in 1926, the circumstances in which adoption orders are made have significantly changed. Until the 1960s, most children made subject to adoption orders were infants, many of them relinquished by mothers burdened by the social stigma of illegitimacy. The annual number of adoptions rose to a peak of just under 25,000 in 1968.
4. The paradigm form of adoption in the decades following 1926 involved a complete severance of links between the adopted child and their parents. It was considered to be in the interests of the child to have no contact at all with their birth family but rather to be treated in every respect as the child of their adopters.
5. Then, following the liberalisation in social attitudes towards illegitimacy, and the wider availability of contraception and legal abortion, the number of babies relinquished for adoption declined. For most of the last 30 years, the annual number of adoptions has been between 2,000 and 4,000. Furthermore, a significant proportion of children placed for adoption are now beyond infancy – aged between 1 and 5, sometimes older. In many cases they are placed for adoption having been received into care after suffering, or being at risk of suffering, significant harm when living with their parents.
6. Unlike newborn infants, older children placed for adoption have experiences, memories and relationships arising out of living within their birth families. They need the security and permanency which adoption provides. But in many cases they also need to sustain their relationships with some members of their birth families. All adopted children need to develop an understanding of their background and identity. For infants, that can often be achieved through life story work and letter box contact. But for older children, sustaining their sense of identity will in many cases be best achieved by continuing direct contact with members of their birth family.

7. It is to accommodate these twin needs that the concept of open adoption has come to the fore in recent years. Not everyone with personal experience of adoption is comfortable with this development. But the preponderance of opinion amongst those working and researching in the field is that, in many cases, it is in the interests of adopted children to continue to have some direct contact with members of their birth family.

(2) Statutory provisions

8. The succession of statutes passed between 1926 and 1976 regulating adoption were all drafted in terms that were consistent with the paradigm of a complete severance between the adopted child and their birth family. It is notable, however, that even then the courts retained a power to impose a condition that there should be ongoing contact with the birth family. As one judge stated over fifty years ago, the law provided that “the general rule which forbids contact between an adopted child and his natural parent may be disregarded in an exceptional case where a court is satisfied that by so doing the welfare of the child may be best promoted” (per Rees J in *Re JP (Adoption Order: Conditions)* [1973] 2 WLR 782 at page 790D to E).
9. The statute now governing adoption in England and Wales is the Adoption and Children Act 2002. The Act governs the routes by which a child may be adopted. The route with which this case is concerned is the “placement order” route. Where a local authority starts care proceedings in respect of a child under Part IV of the Children Act 1989 and concludes that the child’s welfare requires that he should be adopted, it must apply for an order authorising it to place the child for adoption – a placement order. Having obtained the order, it may place the child with prospective adopters who may then apply for an adoption order. There are extensive provisions in the Act, and in secondary legislation, governing these processes. The following statutory provisions are relevant to this appeal.
10. The fundamental principles are set out in s.1 of the 2002 Act. Under s.1(2), “the paramount consideration of the court or adoption agency must be the child’s welfare, throughout his life”. The “paramountcy principle” is well-established throughout children’s law, and of course is found in s.1(1) of the Children Act 1989. But importantly, the principle in the 2002 Act is qualified by the words “throughout his life” which are not included in s.1(1) of the 1989 Act.
11. Under s.1(3), “the court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child’s welfare.”
12. S.1(4) lists factors to which the court and adoption agency must have regard (amongst others):
 - “(a) the child’s ascertainable wishes and feelings regarding the decision (considered in the light of the child’s age and understanding),
 - (b) the child’s particular needs,

- (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
- (d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,
- (e) any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering,
- (f) the relationship which the child has with relatives, with any person who is a prospective adopter with whom the child is placed, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including –
 - (i) the likelihood of any such relationship continuing and the value to the child of doing so,
 - (ii) the ability and willingness, of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
 - (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.”

S.1(3) of the Children Act 1989 also contains a welfare checklist of factors to be taken into consideration by a court making orders under the private law (Part II) and public law (Part IV) provisions of that Act. There is considerable overlap between the checklists in the two statutes. But, reflecting the extended focus on welfare throughout the child's life, the checklist in s.1(4) of the 2002 Act set out above contains factors that are not found in the 1989 Act, in particular paragraphs (c) and (f).

13. The provisions in s.1 of the 2002 Act apply whenever a court or adoption agency is “coming to a decision relating to the adoption of a child”: s.1(1). This phrase is defined in s.1(7) as including coming to a decision in any proceedings where the orders that might be made by the court include an adoption order (or the revocation of such an order), a placement order (or the revocation of such an order) or an order for contact under s.26 or s.51A (or the revocation or variation of such an order).
14. The statutory provisions governing placement orders are set out in s.21. S.21(1) provides:

“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.”

Under s.21(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 s.31(2) of the Children Act are met, or
- (c) the child has no parent or guardian.”

S.21(3) provides:

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

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

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

Under s.52(1),

“the court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or the making of an adoption order in respect of the child unless the court is satisfied that

- (a) the parent or guardian cannot be found or lacks capacity (within the meaning of the Mental Capacity Act 2005) to give consent or
- (b) the welfare of the child requires the consent to be dispensed with.”

S.52(6) provides that “parent” means “a parent having parental responsibility”.

15. The scheme of the Act, therefore, is to bring forward the question of the giving or dispensing of parental consent to the placement order stage, which will normally be before any prospective adopters have been identified. Once a placement order is made, a parent may only oppose a subsequent application for an adoption order if granted leave to do so. The court considering the adoption application does not have to reconsider the question of parental consent unless leave to oppose the adoption is granted.
16. The statutory provisions governing contact on the making of a placement order, which are central to the present appeal, are set out in ss.26 and 27 of the 2002 Act. Under s.26(1), on the making of a placement order, any existing contact order under s.8 or

s.34 of the Children Act 1989 ceases to have effect. Under s.26(2), while an adoption agency is authorised under a placement order to place a child for adoption, no application can be made for a contact order under either of those provisions, but the court may make an order for contact under s.26(2)(b)

“requiring the person with whom the child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for the person named in the order and the child otherwise to have contact with each other.”

Such an order may be made on the application of persons identified under s.26(3) or, under s.26(4), by the court of its own initiative. Under s.27(1),

“a contact order under s.26 (a) has effect while the adoption agency is authorised to place the child for adoption or the child is placed for adoption, but (b) may be varied or revoked by the court on an application by the child, the agency, or a person named in the order.”

Under s.27(4),

“Before making a placement order, the court must (a) consider the arrangements which the adoption agency has made, or proposes to make, for allowing any person contact with the child, and (b) invite the parties to the proceedings to comment on those arrangements.”

17. Although this appeal concerns placement orders rather than adoption orders, it is relevant to note the statutory provisions governing the consideration of contact arrangements and making of contact orders at the adoption stage. These provisions are set out in ss.46(6) and 51A of the 2002 Act. Importantly, even where the court considering the adoption application does not have to consider the question of parental consent (because a placement order was made and the parents do not have leave to oppose the adoption), the court is still required to consider the issue of contact.

18. S.46(6), which was included in the Act as originally passed, provides:

“Before making an adoption order, the court must consider whether there should be arrangements for allowing any person contact with the child and for that purpose the court must consider any existing or proposed arrangements and obtain any views of the parties to the proceedings.”

19. Under the 2002 Act as originally enacted, there was no specific power to make a contact order on adoption. The court’s only power to make an order for contact on adoption was under s.8 of the Children Act 1989 applying the welfare provisions in s.1 of that Act. S.26 of the Act, which, as noted above, provided in subsection (2) that after the making of a placement order no application could be made for a contact order under s.8 of the 1989 Act, also provided in subsection (5) that “this section does not prevent an application for a contact order under section 8 of the 1989 Act being made where the

application is to be heard together with an application for an adoption order in respect of the child.”

20. Subsequently, Parliament passed the Children and Families Act 2014, repealing s.26(5) of the 2002 Act and inserting into it s.51A which introduced an express power to make a contact order in all cases where an adoption agency has placed or was authorised to place a child for adoption and the court is making or has made an adoption order in respect of the child: s.51A(1). S.51A(2) provides:

“When making the adoption order or at any time afterwards, the court may make an order under this section

- (a) requiring the person in whose favour the adoption order is or has been made to allow the child to visit or stay with the person named in the order under this section, or for the person named in that order and the child otherwise to have contact with each other, or
- (b) prohibiting the person named in the order under this section from having contact with the child.”

21. Further provision is made in s.51A as to who may be named in, and apply for, an order under the section.

(3) *Case law*

22. The principles to be applied when considering a plan for adoption and an application for a placement order were reviewed and redefined by the Supreme Court in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33 [2013] 2 FLR 1075, responding to a series of decisions in the European Court of Human Rights, which had considered the proportionality of non-consensual adoption, culminating in *YC v United Kingdom* (2012) 55 EHRR 967. In *Re B*, Lord Neuberger (at paragraph 104) identified

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

At paragraph 198, Baroness Hale of Richmond concluded:

“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.”

23. Following the decision in *Re B*, the Court of Appeal addressed the approach to proportionality in adoption in a series of cases, in particular *Re G* [2013] EWCA Civ 965 and *Re B-S* [2013] EWCA Civ 1146. Those decisions stressed the need for (in the words of McFarlane LJ in *Re G* at paragraph 54)

“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”.

This requires the local authority, the children’s guardian and 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.

24. These principles need no further elaboration. As acknowledged by Dame Siobhan Keegan giving judgment in the Supreme Court (with which the rest of the Court agreed) in *Re H-W (Children)* [2022] UKSC 17,

“This is now rightly the accepted standard for the manner in which a contemplated child protection order must be tested against the requirement that it be necessary and proportionate.”

25. The focus of this appeal is the court’s power to order contact when making a placement order. On this point, it is necessary to say rather more about the development in the case law over recent years to which we were referred in counsel’s submissions.

26. As noted above, adoption after 1926 conventionally involved the complete severance of the relationship between the child and their birth family. There were, however, exceptional cases in which contact continued. In *Re C* [1989] AC 1, the House of Lords allowed an appeal by prospective adopters against a decision of this Court dismissing an appeal against a judge’s refusal of the adoption application. The subject child, who was 13 years old, had a close relationship with her elder brother which the appellants accepted should continue unimpeded after adoption. Her mother, however, withheld her consent to the adoption on the ground that it would weaken the siblings’ relationship. In allowing the appeal and making the adoption order, the House of Lords (with the appellants’ support) attached a condition to the order (under the legislation then in force, the Children Act 1975) providing that there should be continuing contact after the adoption. In his speech with which the rest of the House agreed, Lord Ackner observed (page 17F to G):

“It seems to me essential that, in order to safeguard and promote the welfare of the child throughout his childhood, the court should retain the maximum flexibility given to it by the Act and that unnecessary fetters should not be placed upon the exercise of the discretion entrusted to it by Parliament. The cases to which I have referred illustrate circumstances in which it was clearly in the best interests of the child to allow access to a member of the child's natural family. The cases rightly stress that in normal circumstances it is desirable that there should be a complete break, but that each case has to be considered on its own particular facts. No doubt the court will not, except in the most exceptional case, impose terms or conditions as to access to members of the child's natural family to which the adopting parents do not agree. To do so would be to create a potentially frictional situation which would be hardly likely to safeguard or promote the welfare of the child. Where no agreement is forthcoming the court will, with very rare exceptions, have to

choose between making an adoption order without terms or conditions as to access, or to refuse to make such an order and seek to safeguard access through some other machinery, such as wardship. To do otherwise would be merely inviting future and almost immediate litigation.”

27. In the years following this decision, the principle that a court should not, save in exceptional circumstances, make an order for post-adoption contact with members of the birth family against the wishes of the adopters was firmly applied, even as attitudes towards the benefits of such contact began to change. In *Re R (Adoption: Contact)* [2005] EWCA Civ 1128, this Court considered an appeal involving post-adoption contact a few months before the coming into force of the 2002 Act. Having noted what he described as the “clear change of thinking” since the previous legislation was passed in 1976, Wall LJ observed (at paragraph 49):

“contact is more common, but nonetheless the jurisprudence I think is clear. The imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual.”

28. In *Re P (Placement Order: Parental Consent)* [2008] EWCA Civ 535, following the implementation of the 2002 Act, this Court considered an appeal against placement orders authorising a local authority to place two children separately for adoption. Giving the judgment of the Court and having considered the earlier cases, including *Re C* and *Re R*, Wall LJ continued (at paragraph 147):

“All this, in our judgment, now falls to be revisited under section 26 and 27 of the 2002 Act, given in particular the terms of sections 1(4)(f), 1(6) and (7) and 46(6). In our judgment, the judge in the instant case was plainly right to make a contact order under section 26 of the 2002 Act, and in our judgment the question of contact between [the children], and between the children and their parents, should henceforth be a matter for the court, not for the local authority, or the local authority in agreement with prospective adopters.”

29. Wall LJ continued:

“151. On the facts of this case, there is a universal recognition that the relationship between D and S needs to be preserved. It is on this basis that the local authority / adoption agency is seeking the placement of the children. In our judgment, this means that the question of contact between the two children is not a matter for agreement between the local authority / adoption agency and the adopters: it is a matter which, ultimately, is for the court. It is the court which will have to make adoption orders or orders revoking the placement orders, and in our judgment it is the court which has the responsibility to make orders for contact if they are required in the interests of the two children.

152. In our judgment, the making of placement orders in the instant case requires additional safeguards for the two children over and above the fact that the court has made contact orders under section 26 of the 2002 Act. We accordingly direct that all further applications in the case, including any application for either child to be adopted, should be listed before the same judge, and that all further applications in the case be reserved to him. Whilst we cannot, of course, fetter the future exercise of his discretion, which he must exercise as he thinks fit on the facts of the case, we are satisfied that he must retain control of the case, and that no final step should be taken in relation to either child without his imprimatur.

153. We repeat that our reason for taking this view is that the judge's judgment is predicated on the proposition that the relationship between the two children is of fundamental importance, and that the relationship must be maintained, even if the children are placed in separate adoptive placements, or if one is adopted and the other fostered. In these circumstances it is not, in our judgment, a proper exercise of the judicial powers given to the court under the 2002 Act to leave contact between the children themselves, or between the children and their natural parents to the discretion of the local authority and / or the prospective carers of D and S, be they adoptive parents or foster carers. It is the court which must make the necessary decisions if contact between the siblings is in dispute, or if it is argued that it should cease for any reason.

154. We do not know if our views on contact on the facts of this particular case presage a more general sea change in post adoption contact overall. It seems to us, however, that the stakes in the present case are sufficiently high to make it appropriate for the court to retain control over the question of the children's welfare throughout their respective lives under sections 1, 26, 27 and 46(6) of the 2002 Act; and, if necessary, to make orders for contact post adoption in accordance with section 26 of the 2002 Act, under section 8 of the 1989 Act. This is what Parliament has enacted. In section 46(6) of the 2002 Act Parliament has specifically directed the court to consider post adoption contact, and in section 26(5) Parliament has specifically envisaged an application for contact being heard at the same time as an adoption order is applied for. All this leads us to the view that the 2002 Act envisages the court exercising its powers to make contact orders post adoption, where such orders are in the interests of the child concerned.”

30. In the event, any “sea change” in the years following the implementation of the 2002 Act did not extend to a wider imposition of orders for post-adoption contact against the wishes of the adopters. In subsequent cases, this Court reiterated the principle that it would be extremely unusual to impose on prospective adopters orders for contact with

which they were not in agreement: see *Oxfordshire CC v X, Y and J* [2010] EWCA Civ 581 (sub nom *Re J (A Child) (Adopted Child: Contact)* [2011] Fam 31) and *Re T (A Child)* [2010] EWCA 1527.

31. Following the introduction of s.51A, the issue was reconsidered by this Court in *Re B (A Child: Post-Adoption Contact)* [2019] EWCA Civ 29. In that case, Sir Andrew McFarlane P (in a judgment with which the rest of the Court agreed) summarised the position as follows:

“52. The starting point for any consideration of this issue must be the settled position in law that had been reached by the decision in *Re R*, which was confirmed by this court in the *Oxfordshire* case and in *Re T*. The judgment in *Re R* was, itself, on all fours, so far as imposing contact on unwilling adopters, with the position described by Lord Ackner in *Re C*.

53. As stated by Wall LJ in *Re R*, prior to the introduction of ACA 2002, s 51A, the position in law was, therefore, that ‘the imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual.’

54. Although s 51A has introduced a bespoke statutory regime for the regulation of post-adoption contact following placement for adoption by an adoption agency, there is nothing to be found in the wording of s 51A or of s 51B which indicates any variation in the approach to be taken to the imposition of an order for contact upon adopters who are unwilling to accept it.”

32. In response to submissions about the interpretation and application of s.51A, the President added further guidance:

“59. ACA 2002, s 51A has been brought into force at a time when there is research and debate amongst social work and adoption professionals which may be moving towards the concept of greater 'openness' in terms of post-adoption contact arrangements, both between an adopted child and natural parents and, more particularly, between siblings. For the reasons that I have given, the juxtaposition in timing between the new provisions and the wider debate does not indicate that the two are linked. The impact of new research and the debate is likely to be reflected in evidence adduced in court in particular cases. It may also surface in terms of advice and counselling to prospective adopters and birth families when considering what arrangements for contact may be the best in any particular case. But any development or change from previous practice and expectations as to post-adoption contact that may arise from these current initiatives will be a matter that may be reflected in welfare decisions that are made by adopters, or by a court, on a case by case basis. These are matters of 'welfare' and not of 'law'. The law remains, as I have stated it, namely that it will only be

in an extremely unusual case that a court will make an order stipulating contact arrangement to which the adopters do not agree.

...

“61. Post-adoption contact is an important issue which should be given full consideration in every case [ACA 2002, s 46(6)]. Whilst there may not have been a change in the law in so far as the imposition of a contact regime against the wishes of prospective adopters is concerned, there is now a joined-up regime contained within the ACA 2002 for the consideration of contact both at the placement for adoption stage and later at the hearing of an adoption application. Further, and in contrast to the situation prior to 2014 where the issue of contact on adoption was determined under s.8 by applying the CA 1989, s.1 welfare provisions, issues under both s.26 and s.51A of the ACA 2002 will be determined by applying the bespoke adoption welfare provisions in ACA 2002, s.1, where the focus is not just upon the welfare of the subject of the application during childhood but throughout their life.

62. A placement for adoption hearing has the potential for having an important influence upon the development of any subsequent long-term contact arrangements. As required by ACA 2002, s.27(4), the court must consider the issue of contact and any plans for contact before making a placement for adoption order. The court’s order may well, therefore, set the tone for future contact, but the court must be plain that, as the law stands, whilst there may be justification in considering some form of direct contact, the ultimate decision as to what contact is to take place is for the adopters and that [it] will be ‘extremely unusual’ for the court to impose a contrary arrangement against the wishes of adopters.”

33. Finally, in this regrettably lengthy summary of the case law, I should mention two recent cases, the first cited and relied on by the judge in the present case, the second decided after his judgment but cited by counsel in oral submissions to us.
34. In *Re T and R (Children) (Refusal of Placement Order)* [2021] EWCA Civ 71, this Court (Floyd, Baker and Males LJJ) dismissed appeals brought by a local authority and children’s guardian against a judge’s decision to refuse to make placement orders in respect of two children aged 3 and 2. It is important to note that there were a number of distinctive features. The two children were the youngest members of a sibship of six with the same parents. The six siblings were notably close in age, ranging from 7 to 2. The expert evidence accepted by the judge was that the sibling group was particularly close and that, unless the court made sure that they maintained contact throughout their minority, it would risk damaging the psychological development of the whole sibling group. A further crucial factor was that the children and their parents were members of the traveller community in which adoption was unknown and not accepted. The judge

concluded that: “for these two children to retain their culture, it would be a difficult task for any adopter wishing to claim the children as their own in circumstances where the very culture the children would be exposed to in contact would be one in which adoption is anathema.” In addition, he concluded: “there is a real need to ensure that the culture and heritage of the two children is not lost by being placed away from it. It is of real value to them and it is where they come from. The risks of that being diluted to nothing or being ignored are not fanciful in my view. They are real risks. That aspect of their development can only be maintained by contact with their parents, which in my judgment simply would not happen in an adoptive placement as opposed to a foster placement.”

35. In refusing to make placement orders, the judge also said: “The disadvantage of adoption is that there is no effective mechanism for it [i.e. contact] to be maintained other than, in reality, by the agreement and good will of the adopters, upon whom everybody would have to rely in terms of keeping their word. The court would be unlikely to foist an unwanted contact order upon adopters in respect of sibling contact, and certainly not in respect of parental contact.” In my judgment dismissing the appeal against his decision (with which the other members of the Court agreed), I observed (at paragraphs 37 to 38) that in that respect he was accurately reflecting the approach prescribed by this Court, and cited passages from the judgment of the President in *Re B (A Child (Post Adoption Contact))* [2019] EWCA Civ 29 by way of illustration and held that, in the light of those observations, the judge’s conclusion as to the difficulty in guaranteeing that post-adoption contact would take place was one he was entitled to reach in the circumstances of this case (see paragraphs 37 and 38).
36. In *Re D-S (A Child: Adoption or Fostering)* [2024] EWCA Civ 948, this Court allowed an appeal against a judge’s refusal to make a placement order and made the placement order itself. In his judgment with which the other members of the Court agreed, Peter Jackson LJ concluded that the child’s relationships with her birth family were “not of such importance that they can outweigh the predominant need for her to have a family of her own”. He described this as a factor which spoke “in favour of contact taking place, if it can be arranged, after C is placed for adoption and later adopted.” He recorded that the local authority could be “expected to honour its care plan for current contact, and for a 3-month search for adopters who will accommodate meetings with family members.” But he concluded that “overall, it would not be better for us to make a contact order, in fact it might be detrimental to the greater priority of finding an adoptive family for C.”

(4) Other recent developments

37. Although developments in adoption policy that are not yet reflected in legislative change do not, in my view, call for detailed analysis on this appeal, it is right to record that this appeal falls for determination at a time when there is increased public discussion about the future of adoption in general and of open adoption in particular.
38. These issues were addressed by the President of the Family Division in his two recent lectures – “Adapting Adoption to the Modern World” (the Mayflower lecture in Plymouth, 9 November 2023, <https://www.judiciary.uk/speech-by-sir-andrew-mcfarlane-adapting-adoption-to-the-modern-world/>) and “Adapting Adoption to the Modern World – Part Two” (the POTATO conference lecture, 17 May 2024, reported at July [2024] Fam Law 797). As he stressed in the second lecture, neither lecture was

a court judgment, Practice Direction, or Presidential Guidance, but rather an expression of his “preliminary thoughts” on the question: “How will this cultural shift towards greater openness impact upon the work of the Family Court and how may the court support the looked-for change in the default setting so that maintaining relationships with a child’s birth family is the starting point, rather than the exception?”

39. In the course of his second lecture, the President took the opportunity to underline some features of the existing law and also make suggestions about how the law might develop in future. He observed:

“Orders for contact made under ACA 2002, s 26 when making a placement for adoption order set the template for contact going forward. Where continuing contact in some form is ordered at that stage, this will be an important ‘known known’ about the child to be taken on board by any potential adopters with whom placement may be considered.”

He continued:

“...the likely template for contact arrangements post adoption should be set at the placement order stage. This is not a change in the current approach. A court making a s.26 contact order, in keeping with the duty under s.1 and its lifelong focus, should have regard not only to the short-term contact arrangements required in the pre-adoption stage, but also in setting the course for the maintenance of family relations over the longer term if that is in the child’s best interests. Also, there is nothing wrong, and I would suggest it should be good practice, for a s.26 contact order to contain a recital as to the court’s view on contact arrangements post-adoption.”

40. In these observations, the President was doing no more than reiterating the approach to s.26 mandated by case law. He went on to express some preliminary thoughts about how courts might in future exercise their powers to make contact orders at the adoption application stage. As he acknowledged, in those remarks he was considering steps which go beyond the current case law. It is likely that this Court will consider these matters again at some point, but they do not arise on this appeal. We are concerned only with the interpretation of s.26.

Background to this appeal

41. The order under appeal was made in the course of long-running care proceedings involving four children – N (a boy, now aged 6), Y (a boy, 5), R (a girl, aged 3 years 9 months) and C (a boy, 2 years 9 months). The first respondent is the mother of all four children. There are three fathers, of whom only one, Y’s father, has been involved in the proceedings. The putative father of the two younger children, who does not have parental responsibility, has not involved in their lives at all during the current care proceedings.
42. The first care proceedings involving this family were started in September 2021, after the three elder children were removed from the mother by the police after she had left

them in the care of a third party whose children were in care. Interim care orders were made in respect of the three children on 10 September 2021 and in respect of C shortly after he was born in January 2022. The local authority identified a wide range of matters on the basis of which they contended that the threshold criteria for public law orders under Part IV of the Children Act 1989 were satisfied, including domestic abuse and the mother's association with a range of dangerous persons and her repeated decisions to leave the children in the care of inappropriate adults. The proceedings led eventually to a final hearing before HH Judge Wicks in April 2023, at which supervision orders were made in respect of all four children on the basis of a transition plan for the children to be returned to the mother's care over a period of twelve weeks.

43. Unfortunately, over the next few weeks, the mother continued to behave in a way which compromised the children's safety by failing to provide sufficient parental supervision and repeatedly exposing them to dangerous adults, and drug misuse. In September 2023, after the children had been in the mother's care for 11 weeks, the local authority started further care proceedings. Further interim care orders were made and the children placed in foster care again, with the two elder children returning to their previous carers and R and C placed together in a new placement. The mother's problems continued, including further reports of incidents of domestic abuse and a conviction for possession of cocaine, and a parenting assessment recommended that none of the children be returned to her care.
44. In the course of the second proceedings, a sibling assessment was carried out in December 2023 by the allocated social worker, JH. He found that

“each child has a clear sense of being part of a sibling group of four and, except for C they have shared experiences of living within a home in which they have been subjected to their parents' unhealthy relationships with each other (and their peers) and the associated harmful effects of this”.

He concluded that Y, R and C should be placed together for adoption, whilst N remained with his current foster-carer long-term. The assessment noted:

“It is important to consider that sibling relationships are likely to last the longest in a person's lifetime and if they can be maintained this can help and support a child who lives away from their parents to retain a sense of identity. Should the children be placed in any dynamic outside of a quad the local authority will seek families that support continuing in person relationships between the siblings at least 6 times per year with surrounding letter box contacts on special occasions such as birthdays and Christmases. Additional benefits of this arrangement would allow the two families to offer support to one and other”.

Initially, the local authority accepted the proposal that the three younger children be placed for adoption, but subsequently concluded that Y should be placed in long-term foster care with N.

45. The final hearing in the second care proceedings took place before HHJ Wicks over three days in May 2024. The local authority, supported by the children’s guardian, proposed that the two elder children remain in long-term foster care in a new placement and that R and C be placed together for adoption. The mother, supported by Y’s father, sought the return of all four of the children to her care. In furtherance of the local authority’s plan, an application for placement orders in respect of R and C was issued for determination at the hearing. After amendment, the care plan provided for continued direct contact between the four siblings at a minimum of six visits a year; for the elder children to have direct contact with their mother eight times a year; and for direct contact between R and C and their mother to cease after they were placed for adoption. In a statement in support of the plan, the allocated social worker JH described the need for ongoing sibling contact six times a year as “paramount”. In her final statement, the local authority advance practitioner (who had previously been the children’s social worker) said:
- “the local authority will not defer from finding families who are aware of, and are fully prepared to, support the children in maintaining their sibling links. Without this, the local authority are of the firm standpoint that they would not be the right families for the children.”
46. At the conclusion of the hearing, the judge rejected the mother’s proposal for the return of the children and made care orders in respect of each child, but dismissed the local authority’s application for placement orders and directed that revised care plans for R and C be submitted on the basis that they be placed in long-term foster care.
47. On 18 June 2024, the local authority filed a notice of appeal against the refusal to make placement orders. Permission to appeal was granted on 13 July.

The judgment

48. The judge started by summarising the background in terms similar to those set out above. He quoted paragraph 40 of the judgment in *Re ADA (Children: Care and Placement Orders)* [2023] EWCA Civ 743 in which Peter Jackson LJ summarised the relevant principles to be applied and the approach to be followed in a case where a plan for adoption was under consideration. He recited the basis on which it was agreed that the threshold criteria under s.31(2) of the Children Act were satisfied. He quoted at length from the parenting assessment of the mother carried out by the previous allocated social worker who had concluded that it would not be safe for any of the children to be returned to the mother’s care. He referred to sibling assessments which had, he said, “confirmed the strength and importance of the sibling bond between all four children”. He recorded that the former and current social workers in their evidence “recognised the risks in separating the siblings but thought that those were outweighed by the advantages of permanence offered by the plans in particular for [R and C].” He made some observations about the mother’s evidence and quoted at length from the guardian’s report, in which she too had “recognised the strength of the sibling bond but felt this was outweighed by the advantage of permanency offered by adoption of the two younger children.”
49. The judge identified that “realistic options for evaluation by the court are, firstly, a return to the mother’s care; secondly, long-term foster care for all four children; thirdly,

long-term foster care for N and Y and adoption for R and C.” With regard to the first option, he recorded that the evidence demonstrated that there was a close emotional bond between each of the children and their mother, that contact “had been good” and that her basic parenting abilities were “good enough” so that, “when not distracted by other issues, whether relationship difficulties, mental health or drink or drugs, she is able to care for these children”. But he concluded that the evidence demonstrated that she “had become focused on her own problems and had lost sight of the children’s needs”, that the local authority was “right to conclude that [she] is simply unable to put into effect what she has learned from all the support work”, that a return to her care “would expose the children to further risks and their lives would continue to be disrupted” and that “there are no other options available in terms of safeguards that could be put in place to minimise the risks of future harm to the children”.

50. Turning to foster care, the judge noted that such a placement “would preserve each child’s links with the natural family, particularly the parents, and each child’s siblings”. The evidence satisfied him that all four children “clearly benefit from the contact they have with the mother”. He continued:

“Of equal, if not greater importance, all four have a close bond with each other, and all benefit from their relationship with each other The sibling relationship in this case is likely to outlast relationships with the parents, and the closeness in age of the sibling group means that these relationships are likely to endure for the rest of their lives. In long-term foster care the maintenance of those relationships can be guaranteed.”

51. The judge acknowledged that “long-term foster care cannot be equated to adoption in terms of permanence” and cited passages from judgments of Pauffley J in *Re LRP (A Child) (Care Proceedings – Placement Order)* [2013] EWHC 3974 (Fam) at paragraph 39 and Black LJ in *Re V (Children)* [2013] EWCA Civ 913 at paragraph 95 in which those judges referred to the difference in security provided by, respectively, long-term fostering and adoption, including Pauffley J’s observation that “long-term foster care is an extraordinarily precarious legal framework for any child”. But Judge Wicks observed:

“This is not to say that in every case adoption is to be preferred over [long-term fostering] The positives and negatives have to be evaluated in each case and the risks balanced. There is, in my view, a danger that long-term foster care is too readily discounted simply on the general ground that it lacks the permanence of adoption without the rigorous analysis of the proportionality of long-term foster care versus adoption required.”

52. Turning to adoption, the judge said:

“41. The advantage of adoption is that it offers the permanence that long-term foster care cannot. The adopted child becomes fully a part of his or her new family. There is no continued local authority involvement. Adoptive placements can and do break down, but I accept that in this case, given the absence of any

behavioural issues for R and C, breakdown is a much less significant risk. I cannot discount it altogether. R and C have clear memories of their mother and their siblings and the loss of those individuals may cause emotional harm and upset when the children are older and are able to understand their circumstances better.

42. Permanence comes at a significant cost, namely the complete and irrevocable severance of all ties with the natural family. This can sometimes be ameliorated by continued contact between the birth family and the adopted child, but that is at the discretion of the adopters. In this case, the local authority has committed itself to a search only for adopters willing to promote direct sibling contact. That commitment is a tacit recognition of the importance of the sibling relationship in this case, but sibling contact cannot be guaranteed. Even adopters who are open to it initially may not continue to promote it after the making of an adoption order.”

He noted that the court had the power to make contact orders after making a placement order but qualified that observation by citing paragraphs 36 and 37 from my judgment in *Re T and R (Refusal of Placement Orders)* [2021] EWCA Civ 71.

53. Finally, he set out his conclusions and reasons in the following two paragraphs:

“44. I weigh each of the options against other and I recognise that the arguments are finely balanced. However, ultimately I am not able to accept either the guardian or the social worker’s recommendation in respect of adoption for R and C. These are very young children, but an argument that because of their ages they deserve a right to permanency comes perilously close to social engineering. The role of the court is to protect children from harm. It is not to improve their life chances or to move them to placements where they will be better off. I have to consider R and C’s lifelong welfare. In that [context], the sibling relationship assumes a critical importance. Its maintenance simply cannot be guaranteed in adoption, certainly not to any meaningful level.

45. Furthermore, the mother cannot be completely ruled out. At present the risks to the children of a return to her care are simply too great, but she also has much she can offer once she is able to resolve whatever it is in her emotional and psychological makeup that leads her to make poor decisions about partners and to become socially isolated. Adoption in this case is neither necessary nor proportionate and any advantages in terms of permanence are outweighed by the loss of the sibling and parental relationships. To my mind, long-term foster care, despite its negatives, is the most proportionate means of meeting the children’s welfare in this case, and it guarantees the preservation for R and C of sibling and parental bonds. For those

reasons, I make care orders in respect of all four children and I refuse the placement order applications.”

The appeal

54. The appeal skeleton argument on behalf of the local authority was prepared by Mr Nick Goodwin KC and trial counsel Miss Alicia Collinson. Mr Goodwin was unavailable for the hearing of the appeal where the appellant was represented by Mr Jonathan Sampson KC leading Miss Collinson.
55. Two grounds of appeal were put forward:
 - (1) The judge was wrong to conclude that the sibling relationship could not be preserved if he approved an adoptive care plan.
 - (2) The judge was wrong to refuse placement orders on the basis that the mother “could not be completely ruled out”.
56. Under ground 1, it was argued that judge constructed a dichotomy comprised of, on one hand, the advantage of permanency afforded by adoption and, on the other, the lifelong benefits of preserving a sibling relationship. The judge approached his task by assuming that there was no middle ground. He assumed that he was unable to guarantee direct sibling contact, because he could not predict whether prospective adopters would accept it and could not impose an unwelcome regime upon them. If he had properly considered the use to which orders under s.26 of the Adoption and Children Act 2002 (now) and s.51A of the Act (in the future) might be put, he would have recognised that the court had the power to achieve the best of both worlds for the two children. The dichotomy need not have been so starkly struck. It was observed on behalf of the appellant that this appeal came before this Court at a time of developing thinking regarding the benefits of pre- and post-adoptive contact. Counsel cited passages from the President’s second lecture, “Adapting Adoption to the Modern World – Part Two” including those passages quoted above.
57. It was acknowledged by counsel for the local authority that, under the current law, save for extremely unusual circumstances, no order will be made to compel adopters to accept contact arrangements with which they do not agree. It was submitted, however, that there is a critical difference between, on one hand, imposing on adopters a contact regime that they had never bargained for in respect of a child previously placed with them for adoption and, on the other, crafting a contact regime at the placement order stage so that the eventual adopter accepts the adoptive placement with their eyes wide open to the court-directed imperative for long-term sibling contact. Within the latter regime, the court will “set the tone” or define the template of future contact at a point well before the prospective adopter commits to the child’s placement. The use of s.26 in such circumstances would not be for the purpose of overriding an adopter’s fully formed views about sibling contact, but to shape those views before they are formed. In this case, the judge misconstrued the powers and flexibility afforded him by s.26. He wrongly considered that he lacked the ability to shape the children’s long-term contact with their siblings, and therefore allowed that factor to dominate the welfare evaluation. By concluding that he could not give the children a “guarantee” of sibling contact, he underestimated the efficacy of the statutory steps he could take to achieve that outcome.

The appellants submitted that, if this approach were followed generally, few siblings from a large sibling group would meet the test for adoption.

58. Under ground 2, it was submitted that the judge’s observation that the mother “could not be completely ruled out” was inconsistent with his findings that the mother was “simply unable to put into effect what she has learned from all the support work” and that “there are no other options available in terms of safeguards that could be put in place to minimise the risks of future harm to the children”. The judge was therefore wrong to treat her future prospects as a factor militating against placement for adoption.
59. Supporting the appeal, Mr Alex Forbes on behalf of the children’s guardian submitted that the judge had failed to carry out a holistic welfare evaluation as required by the decisions of this Court in *Re G* [2013] EWCA Civ 965 and *Re B-S* [2013] EWCA Civ 1146. The judgment did not analyse why the preservation of sibling and parental relationships was more advantageous from a welfare perspective than the advantages conferred by an adoptive placement. The analysis was by reference to established principles from the case law rather than by reference to any analysis of these particular children’s individual needs. Furthermore, the judge had been wrong to rely on the decision of this Court in *Re T and R* which was a fact-specific decision in a case where the evidence about the importance of the sibling relationship was of an entirely different nature. The evidence about the relationship between R and C and their elder brothers did not support a finding that it was of such importance that the absence of a “guarantee” of its preservation effectively trumped all other considerations. Mr Forbes cited the decision of the House of Lords in *Re C (A Minor) (Adoption Order: Conditions)* [1989] AC 1 (quoted above) in which the judge was found to have “sacrificed the benefits of adoption in order to provide for an event which might never eventuate, namely the failure of the adopters properly to co-operate in maintaining [sibling contact]”. It was Mr Forbes’ submission that the judge on the present case had fallen into the same error.
60. Mr Forbes submitted that the fact that there are no “guarantees” after making an adoption order does not obviate the need for the court at the placement order stage to consider the steps that are available to the court to ensure the preservation of sibling relationships short of a “guarantee”. Applying *Re P*, it was incumbent on the court at first instance to actively consider the option of making a contact order at the placement order stage. It was not appropriate to require a “guarantee” of post-adoptive contact – what was required was a more nuanced evaluation of the benefits of sibling contact (and the disadvantages if that contact was not preserved); the risk of that not materialising; the options available to the court to minimise that risk; and an overall welfare and proportionality evaluation contrasting that residual risk versus the broader, lifelong, benefits of adoption versus long-term foster care.
61. Responding to the appeal, Mr Stefano Nuvoloni KC leading trial counsel Miss Sophie Laurence submitted that the judge’s decision fell within his broad welfare discretion after consideration of the evidence and submissions. Having been involved in both sets of proceedings concerning these children, this judge was best placed to carry out the evaluation of where their welfare interests lay. Accordingly, this was an example of a decision with which an appellate court ought not to interfere.
62. Mr Nuvoloni invited this Court to reject the argument that the judge had attached excessive weight to the importance of maintaining sibling contact. The evidence showed that there was a close bond between all the siblings, even though they had only

lived together as a foursome for a few weeks. The judge had acknowledged the greater security which adoption would bring and was plainly aware of his power to make a contact order under s.26 but had rightly taken into account that, even if such an order was made at this stage, there would be difficulty in guaranteeing sibling contact should the children be adopted and was concerned that by imposing a requirement of post adoption contact the court would narrow the pool of potential adopters and delay the finding of a long-term placement. He had also been entitled to take the view that there was no adequate analysis by the social workers of the advantages and disadvantages of the options, and that the professional recommendation of adoption had been based on the normally cited advantages of stability and permanence. Mr Nuvoloni argued that it was for this reason that the judge had characterised their arguments as coming “dangerously close to social engineering”.

63. Mr Nuvoloni submitted that the judge had been entitled to conclude that the mother “could not be completely ruled out”. Even though, as he found, she was unable to care for the children at present, he was entitled to conclude that she had “much to offer” once she had “resolved her issues”. Even if rehabilitation with the mother was not a realistic option, the benefits of continued contact were a factor on which the judge was entitled to conclude that the very strict test for severing the relationship between parent and child was not satisfied.

Discussion and conclusion

64. This Court must always proceed with caution when invited to interfere with a judge’s evaluation of the evidence after a hearing in which he and he alone has had the opportunity, in the well-known words of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 (at paragraph 114), to “have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.” In this case, however, I have no hesitation in concluding that the basis of the judge’s decision to refuse the placement order was wrong for the reasons set out in the appellant’s submissions in support of ground 1.
65. A key element in the judge’s reasoning was his assertion that “permanence comes at a significant cost, namely the complete and irrevocable severance of all ties with the natural family”. As demonstrated by the summary of the case law set out above, that may have been true of all adoptions at one stage, and it remains true of some adoptions now. But it is emphatically not true of many adoptions and is at odds with the concept of open adoption which is now embraced as a model in what the President has called the modern world. The judge acknowledged that the severance of ties with the natural family “can sometimes be ameliorated by continued contact between the birth family and the adopted child” and that, in this case, the local authority has “committed itself to a search only for adopters willing to promote direct sibling contact”. He discounted these factors, however, on the basis that ongoing contact “is at the discretion of the adopters” and that “sibling contact cannot be guaranteed” because “even adopters who are open to it initially may not continue to promote it after the making of an adoption order”.
66. In these observations, the judge overlooked the fact that it was his duty to “set the template for contact going forward”. This case seems to fall four square within the words used by Wall LJ in *Re P* at paragraph 151. As in that case, there is a “universal recognition” that the relationship between the siblings needs to be preserved. It is “on

this basis that the local authority / adoption agency is seeking the placement of the children [T]his means that the question of contact between the two children is not a matter for agreement between the local authority / adoption agency and the adopters: it is a matter which, ultimately, is for the court". In those circumstances, "it is the court which has the responsibility to make orders for contact if they are required in the interests of the two children".

67. In reaching his conclusion, the judge quoted passages from my judgment in *Re T and R*. It does not follow, however, that in every case where the court concludes that it is strongly in the interests of the children to continue to have sibling contact the option of adoption should be ruled out. Each case turns on its own facts. In *Re T and R*, the crucial importance of contact to the psychological wellbeing of the subject children and their older siblings, the importance of maintaining the children's sense of their cultural and community heritage, which could only be achieved through contact, coupled with the community's antipathy to adoption which made contact unfeasible, led to a conclusion that adoption was not in the interests of the children's welfare. In other cases, the evidence will clearly demonstrate not only that ongoing sibling contact is in the children's interests but also that it is likely to be achievable in an adoptive placement. In my view, this is just such a case.
68. Under the current law, as the President said in *Re B*, "it will only be in an extremely unusual case that a court will make an order stipulating contact arrangement to which the adopters do not agree". But that does not obviate the court's responsibility to set the template for contact at the placement order stage. In this case, the local authority was committed to search only for adopters willing to accommodate sibling contact and invited the court to make an order for contact under s.26, both to meet the children's short-term needs and to set the template. There was of course a possibility that the search for such adopters might be unsuccessful or that adopters might subsequently refuse to agree to contact. But in the circumstances of this case, that possibility was not a sufficient reason to refuse to make the placement order.
69. The judge was wrong to dismiss the argument that, because of their ages, R and C deserve a right to permanency on the grounds that it "comes perilously close to social engineering". Although it is not entirely clear, it seems he used the phrase "social engineering" to mean taking a decision about the children's future by reference to social policy rather than their specific welfare interests. But the value to a child's welfare of the permanence which only adoption can provide has been recognised in many cases, including in passages cited by the judge from the judgments of Pauffley J in *Re LRP (A Child) (Care Proceedings – Placement Order)* [2013] EWHC 3974 (Fam) at paragraph 39 and Black LJ in *Re V (Children)* [2013] EWCA Civ 913 at paragraphs 95 - 96. Every court considering whether to endorse a plan for adoption must take into account the fact that, in Black LJ's words, "adoption makes the child a permanent part of the adoptive family to which he or she fully belongs." The professional evidence before the judge was that it was in these children's welfare interests to be placed for adoption. There was no justification for describing this as "perilously close to social engineering".
70. I am also troubled by the judge's statement that "the role of the court is to protect children from harm. It is not to improve their life chances or to move them to placements where they will be better off." This is a distorted interpretation of the statutory welfare checklist in s.1(4) of the 2002 Act. The factors in that list include "any harm ... which the child has suffered or is likely to suffer" but it also includes a range

of other factors, including the ability of the child's parents and others to provide the child with a secure environment in which the child can develop and otherwise to meet the child's needs. Where the court concludes that a child has suffered or is likely to suffer significant harm as a result of the parents' care, the court is obliged to consider all the relevant factors in the statutory checklist in order to determine which outcome best provides for the child's welfare throughout their life.

71. I am equally concerned by the judge's further comment that "the mother cannot be completely ruled out" and that, although "at present the risks to the children of a return to her care are simply too great", she also "has much she can offer" once she has resolved her emotional and psychological problems. It is not entirely clear what he was intending to convey by these comments. It may be that he was intending merely to express his view that the continuation of a relationship between R and C and their mother was of value to the children. But the terms in which he expressed himself imply that he was holding out the prospect of the children returning to their mother at some point in the future. If so, this was no more than a speculative hope. There was no evidence on which he could have concluded that she would succeed in overcoming her problems so that, in the words of paragraph (f)(ii) of the checklist, she would acquire the ability to "provide the child[ren] with a secure environment in which [they] can develop and otherwise to meet [their] needs".
72. Overall, the judge's reasoning in paragraphs 44 and 45 of the judgment failed to provide a sufficiently robust and rigorous analysis of the advantages and the disadvantages of the realistic options for the children, as required by repeated decisions of this Court, in particular in *Re G* [2013] EWCA Civ 965 and *Re B-S* [2013] EWCA Civ 1146. As McFarlane LJ said in *Re G*, at paragraph 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". Here, the judge identified many of the advantages and disadvantages of adoption and long-term fostering in the preceding paragraphs, but his ultimate analysis of the competing factors lacked the necessary balance.
73. For those reasons, I would allow the appeal against the judge's decision. The question then arises as to whether this Court has sufficient information on which to make a decision on the application for a placement order or should remit the matter for a further hearing by a circuit judge. The local authority and the guardian invite us to make the decision. The mother asks us to remit. The latter course would obviously involve a significant additional delay in reaching a final decision about the children's future care. As set out above, s.1(3) requires us "at all times [to] bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare". But we can only make the decision ourselves if we have sufficient information.
74. The written evidence before the judge has been included in the appeal bundles and the judgment contains a summary of the relevant oral evidence. On behalf of the mother, Mr Nuvoloni submitted that the fact that the local authority had not filed a family finding statement meant that there was insufficient evidence on which to make a decision. Such evidence is sometimes adduced on placement order applications. But in most cases it is not essential. As Peter Jackson, LJ observed in *Re D-S*:

“When faced with a choice between adoption and fostering, the court's primary task is to take a decision as to whether one or the other is right for the child as a matter of principle. In order to do that, it will not usually have to have evidence about the availability of placements: *Re T (Placement Order)* (CA) [2008] EWCA Civ 248, [2008] 1 FLR at paragraph 17.”

Peter Jackson LJ recognised that there may be exceptions by adding:

“There may be cases at the margins where specific evidence will be necessary, examples being where the plan is for the adoption of a much older child, or the placement of a child with severe health or behavioural problems, or of a large sibling group.”

In *Re D-S*, the subject child was 11 months old. In this case, R and C are aged two and three. For my part, I would not consider they fall into the category of a “much older child”.

75. In any event, the order which the local authority seeks is time-limited. The draft order submitted to the Court by their counsel following the hearing includes a recital that:
- (1) the local authority will arrange direct inter-sibling contact between the subject children and their half-siblings, N and Y, six times per year;
 - (2) the local authority will search exclusively for and will match the subject children only with prospective adopters committed to facilitating inter-sibling contact as set out above and who will propose to adopt both the subject children; and
 - (3) in the event that prospective adopters committed to facilitating inter-sibling contact as set out above have not been found within six months, the local authority will apply to the court.
76. In those circumstances, I conclude that the absence of family finding evidence does not preclude this Court from reaching a decision on the application for a placement order. I do not consider that the family court would be in a better position than this Court to make a welfare evaluation and proportionality assessment.
77. In considering the applications for a placement order, we must apply the principles set out in s.1 of the 2002 Act. In each case, it is the child's welfare throughout his or her life that is our paramount consideration. We must have regard to the presumption that delay in taking a decision is likely to prejudice the child's welfare. We must have regard to the matters in the extended welfare checklist, among others. In this case, no party challenges the judge's decision that the children cannot be returned to the mother's care at the conclusion of these proceedings. The realistic options for R and C's future care before this Court, as before the judge, are therefore long-term fostering or adoption in accordance with the local authority's plans. In considering those options, the factors of particular relevance are, in each case,
- (1) the child's wishes and feelings;
 - (2) his or her particular needs;

- (3) the likely effect on the child throughout his or her life of ceasing to be a member of the original family and becoming an adopted person;
 - (4) any harm the child has suffered or is at risk of suffering;
 - (5) the relationship each child has with their parents and siblings and the value to the child of that relationship continuing; and
 - (6) the wishes of the parents and of N and Y.
78. These two children are too young to articulate their wishes and feelings. It is reasonable to conclude, however, that they would want to live in a home where they were loved and well cared for and felt secure. They would want to live with their siblings to whom they are attached or, if not, have regular contact with them. They would also want to live with their mother or, if not, have regular contact with her.
79. R and C need to be placed together. Neither child has any particular physical, health, or educational needs. Like all children, they need the security of a stable and loving home. They need to have the opportunity to form attachments with primary care givers. They have a close relationship with their siblings which must be maintained through regular contact. Whether they are in long-term fostering or an adoptive placement, they will need help and emotional support coming to terms with the fact that they are not living with their birth family and the sense of loss that this may bring. They will also need help with the sense of loss they will suffer moving on from their current carers. They will need assistance growing up with an understanding of their background and identity.
80. If placed for adoption, the likely effect on them throughout their lives will be that they will prosper as members of their adoptive family and have a sense of belonging which most (though not all) adoptive children experience. On the other hand, they will cease to be members of their birth family and they are likely to experience, to a greater or lesser degree, a sense of loss which may become more prominent in adolescence as they come to understand more about their background and identity. This can be ameliorated by careful and sensitive support, including life story work, and importantly in this case through maintaining their relationships with their siblings.
81. R and C have experienced harm through the disruptions and inadequate parenting when living in their mother's care, and through being removed from their family. Their experiences have made them more vulnerable and in greater need of the stability of a secure placement.
82. They have a close relationship with their brothers and it is strongly in their interests for that relationship to continue. The local authority is committed to placing them only with carers who are willing to accommodate contact in accordance with the plans. The children also have a relationship with their mother. They have enjoyed and benefited from their contact with her since they have been in care. Although it would be of benefit to the children for that relationship to continue, that is outweighed by the children's need for as secure a placement as possible.
83. No member of their birth family is able to offer them a home. Although their mother wishes to look after them, the judge concluded on the evidence that she was unable to

do so at this stage and there is no more than a speculative prospect of her making the necessary changes in her life to equip her to resume caring for her children. Her strong wish is that R and C should not be adopted. Although N and Y are too young to express a wish about their siblings' future, it is safe to assume that, if they cannot all live together, they want to carry on seeing them regularly.

84. Drawing the threads together, I now consider the advantages and disadvantages of the two options – long-term fostering and adoption in accordance with the local authority's plan.
85. The advantages of long-term fostering for R and C include that it would enable the children to remain members of their birth family whilst receiving high-quality care without being exposed to the risk of significant harm. It would allow them to continue having regular contact with their siblings, probably more frequently than the six visits a year which the local authority is proposing under its adoption plan. Given the close relationship between this sibling group, that is a significant advantage in this case. It would also allow them to continue to have direct contact with their mother. In due course, if she were able to address her problems as the judge envisaged, it might be possible for her to play a greater role in the children's lives, and conceivably for them to return to her care. As I have already observed, however, that is no more than speculation at this stage and cannot carry any significant weight in the balancing exercise.
86. The disadvantages of long-term fostering include the fact that it would not provide the same degree of permanence and security for R and C, nor would it enable them to experience the sense of belonging which adoption can afford. The children would legally remain in the care of the local authority indefinitely throughout their minority unless and until the care orders were discharged. They would continue to have social workers involved in their lives and be subject to regular "looked after" reviews. Many children thrive in foster care, and some stay with the same carers throughout their childhood. Unfortunately, however, many children in care experience disruptive moves of placement, as these children have already experienced whilst in care under interim orders. Having regard to their welfare throughout their lives, although many children establish close relationships with their foster carers which continue into adulthood, they are not lifelong members of the family in the same way as adopted children are normally lifelong members of their adoptive families. Despite increased resources devoted to care leavers, it is recognised that they remain more vulnerable to social problems than the rest of the young adult population.
87. The advantages of adoption in accordance with the local authority's plan include that it would provide the children with a permanent home and a higher degree of stability and security than long-term fostering can ever bestow. R and C would become members of the adoptive family for ever and would have the opportunity to acquire a sense of belonging to the family to a degree that a foster child can never experience. As permanent members of the adoptive family, they would maintain this sense of belonging through into adulthood. Through the matching process, adopters would be identified who are able to meet the particular needs of the children. There is a high likelihood that all of their physical, emotional and educational needs would be met. In this case, as the local authority's plan includes continuing sibling contact, R and C would be able to maintain a relationship with their brothers which will continue into adulthood. The continuing contact would help the children grow up with a clearer

understanding of their background and identity. This is not a case in which there is going to be a complete severance of their ties with their birth family.

88. The disadvantages of adoption for R and C include that they would cease to be members of their birth family. Although they would maintain a relationship with their siblings through contact, there would be a severance of the legal relationship. Under the local authority's plan, the children would not have direct contact with their mother. These factors would leave the children feeling a sense of loss, which may be present at the start of the placement and then subside, or may grow as they enter adolescence and come to question why they have been treated differently from their siblings. Furthermore, although most adoptions succeed, a number of adoptive placements break down. Not every adopted child feels the same sense of belonging to a new family.
89. Having considered the relevant factors in the statutory welfare checklist, and analysed the advantages and disadvantages of the two options, I have come to the clear conclusion that, notwithstanding the disadvantages highlighted in the previous paragraph, adoption in accordance with the local authority's plans is the only option which meets the children's needs. R and C need a placement that will provide them with the greatest level of security and a family in which they can grow up feeling a sense of belonging. They also need a placement which will enable them to maintain a relationship with their brothers through regular contact. Long-term fostering can meet the latter need but not the former. Adoption in accordance with the local authority's plans is the only option which meets both of these needs. This will mean that the children no longer have direct contact with their mother, but that is necessary in order to ensure that they have the opportunity to achieve the degree of stability and security which only adoption can provide. This will, of course, be an interference with the mother's Article 8 rights, but that interference is necessary and proportionate in order to secure the children's right to a stable and secure family life.
90. The mother does not consent to the making of placement orders. Under s.52 of the 2002 Act, a court can dispense with a parent's consent in these circumstances if satisfied that the child's welfare requires it. I conclude that, in each case, the welfare of R and C requires that I dispense with the mother's consent to the placement orders.
91. This outcome will be deeply distressing to the mother. The loss of a child to adoption is devastating to any parent. But it is the welfare of the child throughout his or her life that must be the Court's paramount consideration. I conclude that R's and C's welfare requires that placement orders be made authorising the local authority to place them for adoption.
92. If my Ladies agree, I would therefore propose that this Court allows the local authority's appeal, sets aside the judge's order, and makes placement orders in respect of both children. In addition, pursuant to s.26(2)(b) of the 2002 Act, I would add an order requiring the person(s) with whom R and C live, and any other person(s) with whom they are to live while they remain the subjects of placement orders, to allow them to attend visiting contact with their siblings N and Y six times per year, in accordance with arrangements made by the local authority. I would include in the order a recital, in terms proposed by the local authority, recording that

“the local authority confirming that, under its care plans and during its search for prospective adopters for R and C

- (1) that the local authority will arrange direct inter-sibling contact between the subject children and their siblings N and Y, six times per year;
- (2) that the local authority will search exclusively for and will match the subject children only with prospective adopters committed to facilitating inter-sibling contact as set out above and who will propose to adopt both the subject children;
- (3) that, in the event that prospective adopters committed to facilitating inter-sibling contact as set out above have not been found within six months, the local authority will apply to the court.”

93. Finally, in line with the suggestion made by the President in his second lecture “Adapting Adoption to the Modern World – Part Two” (quoted at paragraph 39 above), I would propose adding a recital that it is this Court’s view that after adoption R and C should continue to have direct contact with N and Y six times a year.

LADY JUSTICE ELISABETH LAING

94. I agree.

LADY JUSTICE ASPLIN

95. I agree that the appeal should be allowed, that the judge’s order be set aside and that this Court should make placement orders in respect of both children in the terms proposed by Baker LJ. I come to these conclusions for all of the reasons he has set out.