Neutral Citation Number: [2020] EWCA Civ 20

Case No: B4/2019/2776

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM WEST LONDON FAMILY COURT**
**Mr Recorder Ullstein QC**
**ZW18C00575**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 January 2020

**Before :**

**LORD JUSTICE LEWISON**
**LORD JUSTICE BAKER**
and
**LORD JUSTICE MALES**

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**IN THE MATTER OF THE CHILDREN ACT 1989**
**AND IN THE MATTER OF FL (A CHILD)**

**Between :**

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| **FL (by his children's guardian)** | **Appellant** |
| **- and -** | |
| **EN (1)**<br>**A LOCAL AUTHORITY (2)**<br>**AK (3)**<br>**JL (4)** | **Respondent** |

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**Giles Bain** (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
**Kevin Gordon** (instructed through **Direct Access**) for the **First Respondent grandmother**
**Richard O'Sullivan** (instructed by **Local Authority Solicitor**) for the **Second Respondent**
**Onyoja Momoh** (instructed by **E.H Dawson Solicitors**) for the **Third Respondent mother**
The Fourth Respondent father was not represented.

Hearing dates : 18 December 2019

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# Approved Judgment

## LORD JUSTICE BAKER:

1. By an appeal notice dated 6 November 2019, a guardian appointed to represent an 18-month-old child ("F") in care proceedings appealed against the special guardianship order made by Mr Recorder Ullstein QC in favour of the child's maternal grandmother, hereafter referred to as "Mrs N".

2. At the conclusion of the hearing on 18 December 2019, we informed the parties that the appeal would be dismissed. This judgment sets out the reasons for that decision.

## Background

3. The family originates from Kenya. Mrs N and her children, A and her sister E, came to this country when Mrs N's husband was posted here as a diplomat. At that time, they enjoyed a comfortable lifestyle, but the marriage broke down in 2004 as a result of the husband's violence and coercive control. Mrs N applied for asylum and for a period she and the children lived in a detention centre. When they were granted asylum, they moved into rented accommodation, but the circumstances of the family remained strained and both A and E, then in their early teenage years, developed mental health problems, including eating disorders, in A's case bulimia. The local authority social services became involved and A spent six months in foster care accommodated under s.20 of the Children Act. She returned home but her problems continued, and she was treated for a time at Great Ormond Street Hospital. At that stage, relations between Mrs N and A were sometimes difficult and it was reported that Mrs N was struggling to cope with the family's problems. A was placed under a local authority child in need plan for nine months, but by March 2012 circumstances had improved to the extent that the local authority decided to close the case.

4. Thereafter, the life of the family settled down. Mrs N qualified as a psychiatric nurse. A went to university and obtained a degree in economics and politics.

5. By 2017, A was in a relationship with a man with a lengthy criminal record. When he returned to live in Uganda, A went to visit him in the same year and became pregnant. She returned to this country and on 29 June 2018 gave birth to F. At first, she looked after the baby without apparent difficulty. On 8 September 2018, however, after consuming "a few drinks", A jumped from a second-floor window, sustaining several fractures. Fortunately, Mrs N had been able to take F from A shortly before the incident. In the following days, while A was recovering in hospital, Mrs N looked after the baby. Subsequently, A and F were placed in a mother and baby unit linked to a psychiatric hospital. On 15 October 2018, A was found drunk to a degree that she was unable to care for F. This prompted the local authority to start care proceedings and an interim care order was granted. After a further relapse, A left the unit and F was removed from her care and placed initially with a relative and, after that placement broke down, in foster care.

6. A psychiatric assessment of A was carried out for the purposes of the proceedings. In his report dated February 2019, the psychiatrist recorded that, when giving an account of her personal history, A had described her mother as supportive but old-fashioned. She said that Mrs N had found the bulimia difficult to manage and understand. The psychiatrist concluded that A had suffered from a severe depressive episode in the post-natal period, exacerbated by excessive drinking. By the date of the report, she had

recovered, and her prognosis was described as good, provided she "addresses every issue, moving forward". As to the cause of her illness, the psychiatrist observed:

> "With regard to aetiology, this will be multifactorial. There was probably a predisposition to depression, given that she had an emotionally unsupportive relationship with her mother, there were chronic bulimic symptoms and a sister has an eating disorder also. However one should not also underestimate the aetiological contribution of post-natal period. There is a particularly high incidence of depression at this time. This is probably caused by, at least in part, biological changes … But there are also obvious psychosocial stressors, particularly for A, was [sic] looking after her baby without the support of the father. Further, the alcohol harmful use worsened the level of agitation and insomnia. It is also probable that the 'few drinks' prior to the suicidal act made her more impulsive than usual."

7. Unfortunately, over the following months it became clear that the prognosis given in the report was over-optimistic. A continued to drink and her mental health remained fragile. Hair strand testing carried out in September 2019 revealed that she had consumed chronic excessive levels of alcohol in the preceding six months. The testing also found evidence that the mother had taken ecstasy. By the date of the final hearing, A accepted that F could not be returned to her care.

8. During the course of the proceedings, Mrs N offered to care for F in the event that he could not be returned to his mother. An initial assessment carried out by the local authority was negative, but a subsequent special guardianship assessment supported her. The children's guardian appointed to represent A in the proceedings was dissatisfied with the special guardianship report and applied successfully to the court for a further assessment to be carried out by an independent social worker, Julia Hughes. At the conclusion of her assessment, Ms Hughes recommended that F should not be placed in Mrs N's care. She accepted that Mrs N would be able to provide good care for F in the early years but was concerned about how she would cope when he became older. She also expressed further concerns about Mrs N which she considered added to the risks were F to be placed in her care. These included: (1) that Mrs N had given conflicting accounts about her family history; (2) that she had colluded in A's attempt to obtain employment at a nursery and been less than frank when contacted by the nursery staff raising concerns about A; (3) that she had wrongly said that she had had no relationships since the separation from her husband, but had then identified as referees two men who each told Ms Hughes that they had been in a relationship with her, and (4) that she minimised the risks posed by A to F and could therefore not be trusted to protect F during contact with his mother.

9. In her final report, the children's guardian reached the same conclusion as Ms Hughes. She reported that in their discussions Mrs N had adopted a professional attitude, referring to her experience as a psychiatric nurse. The guardian considered that their discussions illustrated the ongoing communication difficulties between Mrs N and her daughter, and felt there was a "worrying contradiction" between their assertions that they would manage the challenges of a special guardianship placement and what the guardian saw as the reality of their fragile and fraught relationship. The guardian considered that Mrs N underestimated the risks presented to F's long-term stability by

his mother's problems and was over-confident about her capacity to manage her daughter given her lack of awareness of and curiosity about the details of A's life. It was the guardian's opinion that Mrs N continued to lack ideas about how she might have supported A's emotional needs when she was younger and that she would struggle to meet the particular needs that F would face overcoming his earliest experiences.

## The hearing

10. The final hearing of the care proceedings was listed before the recorder in October 2019. The local authority, supported by the children's guardian, submitted that the court should make a care order on the basis of a care plan for adoption, coupled with a placement order. A and Mrs N proposed that F be placed in Mrs N's care under a special guardianship order.

11. In his judgment, the recorder went through the written and oral evidence put before him. He was critical of the evidence given by the local authority social worker, describing her as demonstrating hostility to A and Mrs N. He was also critical of the initial special guardianship assessment, observing that the report demonstrated a lack of understanding of the duties of an expert. Given the extensive guidance now available in Part 25 of the Family Procedure Rules, it is concerning to read such criticisms about an expert witness instructed in care proceedings.

12. In summarising A's evidence, the recorder noted that she described her mother as having been always supportive and agreeing that, if F was placed in Mrs N's care, it would be a permanent placement which she, as his mother, would not seek to undermine. The recorder concluded his summary of A's evidence with this observation:

> "Taken as a whole I found that the mother was trying her best to assist the court. I find that she was a careful witness whose evidence I accept, with one exception. The exception is that I find that she understated her use of alcohol and drugs. It does not, however, lead me to doubt the remainder of her evidence."

13. The recorder then summarised Mrs N's evidence. He began by dealing with her evidence about her relationships with the two men highlighted in Ms Hughes' report:

> "Asked about why she did not disclose her relationships she paused for a long time and eventually said that she was embarrassed because in Kenya having relationships outside marriage is frowned upon …. In the light of the fact that on both occasions she was being assessed it was less than sensible for her not to be open. However, I do not believe that she intended to conceal the true situation at all costs …. She did make full disclosure to Ms Hughes and also gave Ms Hughes the names of the two men with whom she had had relationships as referees. It must have been clear to her that they would tell Ms Hughes the truth. I am left with the impression that she felt that her embarrassment would be less if they told Ms Hughes about the relationships."

The recorder noted and accepted Mrs N's evidence that she had been unaware that A had taken a job at a nursery. He recorded that she accepted that in 2008 the family's circumstances had contributed to A's problems and that at that stage she had no insight into those difficulties. She added, however, that between 2012 and 2018 things had improved. She insisted that she would not allow A to override her on the arrangements for contact. She told the recorder that she would support a supervision order and take part in family therapy.

14. The recorder reached the following conclusion about her evidence:

> "My overall impression was that Mrs N was an honest witness. I do not accept that because she was not wholly open during the course of these proceedings her evidence is unreliable, and I accept it. Care proceedings, particularly when coupled with an application for adoption, are inevitably fraught with emotion and suspicion of social workers is equally inevitable."

15. Dealing with Ms Hughes' evidence, the recorder rejected her suggestion that Mrs N minimised the causes of A's mental health issues. He did not accept the suggestion that conflict between Mrs N and A had been a cause of A's mental health problems. The recorder also rejected Ms Hughes' assessment that Mrs N would struggle to provide emotional support to F as he grew older. He considered that the challenges posed by an adolescent boy would be very different from those faced by Mrs N when caring for her daughters in 2008. He concluded that Ms Hughes had overstated the risks to F if he was placed in his grandmother's care.

16. Finally, the recorder considered the evidence of the children's guardian. He noted her opinion that there was a significant barrier in the relationship between Mrs N and A, that there was an ongoing risk of conflict between mother and daughter, and that Mrs N would not engage with family therapy which might assist her to address that risk. It was the guardian's view that the past was the best predictor of the future. But the recorder did not agree that this was true in this case and set out his reasons at paragraph 77 to 80 of his judgment. He did not think it likely that F would suffer problems of the sort experienced by his mother as she was growing up. Having seen and heard from Mrs N and A, it was his view that their relationship had improved over time. He noted that there was no evidence that Mrs N was not a good parent in difficult circumstances prior to the onset of A's bulimia. Having seen Mrs N, he concluded that she clearly loved F and wanted the best for him. He thought it far more likely than not that she would engage with professionals to improve her parenting.

17. Referring to the law, the recorder directed himself to "have regard to the welfare checklist" and the paramountcy principle. He cited the comments of Baroness Hale of Richmond in *Re B (A Child)* [2013] UKSC 33 about the dangers of social engineering, and the observation of Hedley J in *Re L* [2007] FLR 2050 that "good enough" parenting is sufficient. He added:

> "I have to be satisfied that adoption is both necessary and proportionate. And that there is no other realistic option available."

18. The recorder then went through the relevant factors in the welfare checklist (although it should be noted that he did not specify whether he was considering the checklist in s.1(3) of the Children Act 1989 or the equivalent in s.1(4) of the Adoption and Children Act 2002). F was too young to be able to express his wishes and feelings, but the recorder concluded that, were he able to do so, he would be likely to prefer to remain within his birth family. The recorder considered that the child's physical, emotional and educational needs were the same as those of any small child, adding that his emotional needs were likely to include overcoming the disruption suffered as a result of leaving his foster carers. He noted that there would have to be a change in his circumstances in any event since it was not suggested that he should remain in foster care. He thought it important that F should grow up having knowledge of his cultural background, observing that this would be achieved if he was placed with Mrs N.

19. The recorder noted the emotional harm that F had suffered hitherto because of the upheavals in his life. He continued (paragraph 90):

> "What is the risk of him suffering harm in the future? As set out earlier in this judgment, Ms Hughes and his guardian consider that he would be at risk of emotional harm in the future if he is placed with Mrs N. I have reached the clear conclusion that their fears are unfounded for the reasons set out in paragraphs 77 to 80 …. In my judgment Mrs N will do her utmost to ensure that all his needs are met including his emotional needs and she is now and will in the future be equipped to do so. I am confident that she has taken on board the various criticisms of her in these proceedings and she has already taken the first steps in ensuring that she is properly equipped."

20. In the light of the grounds of appeal advanced before us, I shall set out the recorder's conclusion in full:

> "93. Before making a placement order, I have to be satisfied that no other viable alternative is available. In this case I am not so satisfied. In my judgment Mrs N's parenting is, putting [it] at its lowest, good enough. Her circumstances are very different to 2008. Many parents, of varying intellect and financial circumstances, struggle to cope with a child suffering from bulimia who will, as A did at the time of the core assessment in 2008, lash out at their parents.
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> 94. She cannot be blamed for the fact that A suffered from post-natal depression. Again, that can be suffered by a mother in even the most loving and close family.
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> 95. There is no evidence to support the guardian's view that all was not well between 2012 and 2018 and I remind myself that findings must be evidence-based. Indeed, as I have said, A did very well during that period. Equally there is no evidence that the relationship between mother and daughter was bad during that period.

> 96. Mrs N was supportive of A after F was born up to the suicide attempt in September 2018. There is nothing in the evidence to suggest a breakdown in the relationship during that period.
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> 97. I reject the suggestion that Mrs N will permit A to disrupt the placement. The guardian told me that A fears her mother's disapproval and Mrs N was, in her evidence, very firm that she would not allow A to do so. I accept that evidence.
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> 98. The local authority's case, supported by the guardian, is based on the perceived risk that, in the future, Mrs N will not be able to meet F's emotional needs. For the reasons set out above … I do not accept that their fears for the future are well-founded. Making a placement order in the circumstances of this case would amount to the sort of social engineering which is warned against in the authorities to which I have referred.
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> 99. For all those reasons I dismiss the local authority's applications and make a special guardianship order in favour of Mrs N.
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> 100. I have come to the conclusion that I should make a supervision order to assist F settling in. In my judgment a period of six months should be sufficient for that purpose."

21. In the order made at the end of the hearing, the recorder directed the local authority to file and serve a special guardian support plan by 5 November 2019. The order recited that Mrs N agreed that F should continue to be accommodated by the local authority under s.20 pending completion of his transition to her care and further recited that the local authority and Mrs N had agreed to meet the following day to discuss future arrangements.

22. On 6 November, solicitors representing the guardian filed a notice of appeal against the recorder's decision, and also sought a stay of execution of the order pending appeal. Later that day, King LJ granted a stay of the order for 14 days pending determination of the application for permission to appeal. On 19 November, she granted permission to appeal and extended the stay until the conclusion of the appeal hearing.

**Submissions**

23. In his submissions to this court, Mr Bain on behalf of the guardian identified as the main focus of the appeal the guardian's contention that the reasons for the recorder's decision set out in the judgment were inadequate. Mr Bain cited the well-known decision of the Supreme Court in *Re B* (supra) and in particular the judgment of Lord Wilson at paragraphs 39 to 40 and 46, and the equally well-known decision of this court in *Re B-S (Children)* [2013] EWCA Civ 1146 and in particular the judgment of Sir James Munby P at paragraphs 30, 34 and 43 to 44. Mr Bain submitted that, in the light of the guidance given in those decisions, the recorder's analysis of the proposal that Mrs N should be appointed as special guardian was inadequate. She had been comprehensively assessed by various professionals in the course of the proceedings,

but the guardian submitted that the recorder had carried out only a superficial analysis of those assessments of her capacity to care permanently for her grandson. A number of future risks associated with the proposed placement had been rejected without sufficient justification. As the weight of the professional assessment of Mrs N had been negative, it was incumbent on the recorder to provide a more detailed analysis of how he was ultimately persuaded to reach a positive conclusion.

24. In particular, Mr Bain submitted that the judge had been wrong to dismiss the opinion of Ms Hughes and the guardian that F would be at risk of emotional harm if placed with his grandmother. Documented difficulties experienced by A in her childhood pointed to limitations in Mrs N's parenting capacity, which suggested that F was likely to suffer significant harm if placed in her care. Mr Bain conceded that the recorder had been clearly impressed by A and Mrs N but submitted that, while the recorder was entitled to carry out his own evaluation of the grandmother, he needed to be careful before allowing his own assessment to override the negative professional assessments.

25. Mr Bain criticised the structure of the recorder's judgment, noting that it lacked a "side-by-side" analysis of the realistic options. He submitted that the recorder had erred by carrying out a "linear" analysis. Had he carried out a side-by-side analysis, he may well have reached a different decision. Mr Bain contended that the approach adopted by the recorder was contrary to the practice stipulated by this court in ***Re B-S*** in which the President (at paragraph 44) had stated that:

> "the judicial task is to evaluate *all* the options, undertaking a global, holistic and … multi-faceted evaluation of the child's welfare which takes into account *all* the negatives and the positives, *all* the pros and cons of *each* option."

Instead of adopting this approach, the recorder had, in Mr Bain's words, "started and finished at the same point".

26. On behalf of the local authority, Mr O'Sullivan adopted the submissions put forward by the guardian that the recorder had failed to provide cogent reasons for departing from the professional opinion and had structured his judgment in a way which failed to contain a holistic analysis of the competing placement options. He also submitted that the judgment failed to reflect the history and extent of the local authority's involvement with the family when A was a child, and the repeated concerns that Mrs N had failed to meet her daughter's emotional needs. Mr O'Sullivan criticised the recorder's summary of the law, complaining that he failed to mention some of the relevant statutory provisions and the principles identified in case law.

27. Both Mr Bain on behalf of the guardian and Mr O'Sullivan on behalf the local authority drew attention to the fact that the judgment made no reference to the document agreed between the parties setting out the basis on which the threshold criteria under s.31(2) of the Children Act 1989 were satisfied. They submitted that this omission demonstrated that the recorder did not have in mind the details of the local authority's case as to the likelihood of harm which should have framed his evaluation of the placement options for F.

28. In his skeleton argument Mr O'Sullivan raised for the first time an argument as to whether the court had been able to make a special guardianship order in favour of Mrs

N in the absence of a formal application or a special guardianship assessment completed by the local authority. He sought to argue that the provisions of s.14A of the Children Act precluded an order being made in such circumstances.

29. Counsel on behalf of Mrs N and the mother both invited this court to uphold the recorder's decision. They submitted that the recorder had the benefit of hearing extensive oral evidence over a seven-day hearing. In the light of his assessment of the evidence, he was entitled to decide that F should be placed with his grandmother under a special guardianship order and his judgment adequately explained his reasons for his decision. On behalf of Mrs N, Mr Gordon relied on the concession made by Ms Hughes in evidence that that his client could provide good parenting for F in the early years. In those circumstances he submitted that before allowing this appeal the court would have to be satisfied that there was convincing and cogent evidence that the child will be at risk of significant harm in the grandmother's care after that time and that no considered intervention or support could mediate that risk.

## Discussion and conclusion

30. I deal first with the issue raised by Mr O'Sullivan for the first time in his skeleton argument. The local authority did not seek permission to raise this point before the appeal hearing and in my view it would be wrong to allow the point to be taken at such a late stage. In any event, there is no merit in the point. S.14A(6)(b) permits the court to make a special guardianship order even though no such application has been made. If the local authority wanted to raise the technical objection that no formal application had been made, it should have taken the point before the recorder. It is correct that s.14A(11) precludes the making of a special guardianship order unless the court has received a report dealing with the matters referred to in s.14A(8). In this case, however, those matters were fully assessed in the report prepared by Ms Hughes.

31. I turn next to the criticisms of the structure of the judgment. As I have said in other cases, the discipline of identifying the realistic options and summarising the advantages and disadvantages of each before making a final order is one which should be followed whenever the court is making a decision about the future of a child: see for example *Re J (Children)* [2019] EWCA Civ 2300 para 27. A judge who fails to adopt that approach runs the risk that his decision may be challenged on the grounds that he has failed to take into account a material advantage or disadvantage of one or other of the realistic options. It does not follow, however, that a judgment in which this approach is not adopted will inevitably be overturned. This court will only allow an appeal where persuaded that the decision below was wrong or unjust because of a serious procedural or other irregularity.

32. Mr Bain points out that the recorder in this case did not set out an analysis of the advantages and disadvantages of a special guardianship order on the one hand and adoption on the other. He describes the recorder's judgment as linear rather than holistic. It is instructive to remember the origins of the warning against the "linear" approach to analysis in these cases. It arose in the judgment of this court in *Re G (A Child)* [2013] EWCA Civ 965, which was delivered shortly after the judgment in *Re B* in which the Supreme Court had stressed the crucial importance of a proportionate approach to a decision to remove a child permanently from the family and stated that adoption is the option of last resort to be chosen when nothing else will do. In his

judgment in *Re G* (quoted and endorsed a few weeks later by Sir James Munby P in *Re B-S*), McFarlane LJ, as he then was, said:

> "49. In most child care cases a choice will fall to be made between two or more options. The judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option.
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> 50. The linear approach, in my view, is not apt where the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare."

33. In the present case, however, the recorder, having assessed the evidence, concluded that placing F with his grandmother was viable. It followed that adoption was not an appropriate option because this was not a case when nothing else would do. Applying the principles established in the case law, in particular *Re B*, it was not open to him to make a placement order. In those circumstances, I do not think his failure to set out in detail the advantages and disadvantages of adoption is by itself sufficient reason for this court to intervene.

34. Although the summary of the relevant law set out in the judgment was relatively brief, for my part I consider that the recorder correctly identified and applied the relevant legal principles, both statutory and those derived from case law. I agree that it is unusual for a judge not to refer to the threshold document, but in this case it was not disputed that the threshold criteria under s.31 were satisfied. The issue was what order should be made to meet F's welfare needs. It is correct that the judgment does not contain a detailed recital of the history of the difficulties Mrs N experienced caring for A and her sister during the period of 2008 to 2012, but the passages from the judgment recited above demonstrate that the recorder had those matters in mind when carrying out his analysis. No doubt some judges would have been more expansive in setting out the history and analysing the issues. But in my view the analysis set out in the recorder's judgment is sufficient to explain the reasons for his decision.

35. The crucial question in this case is whether the appellant has demonstrated that the decision to place F with Mrs N was wrong. That decision was based substantially on the recorder's assessment of the evidence given by Mrs N and A, his conclusions about their relationship, and about Mrs N's capacity to meet F's emotional needs as he grows older. He considered carefully the local authority's contention that the difficulties experienced by Mrs N when caring for her own children indicated that she would be unable to meet F's emotional needs as an older child. He rejected that argument for reasons clearly set out in the judgment. As this court has made clear time and again, the assessment of evidence, and the apportionment of weight to be attached to each piece of evidence, are matters for the judge at first instance and an appeal court must not interfere with findings by trial judges unless there are compelling reasons for doing so. It is particularly important to bear this in mind when dealing with a case about the future

of a child where the judge has assessed not merely the credibility of the testimony given by witnesses but the character, strengths and weaknesses of prospective carers who have given evidence before him. Where a judge has carried out an evaluation of a prospective carer having heard him or her give evidence, this court should be extremely slow to intervene.

36. Of course, when carrying out his assessment, the judge must take into account all relevant evidence, including expert evidence. But it is the judge, and only the judge, that is in the position to weigh up the expert evidence against the findings on the other evidence, and it is always open to a judge to arrive at a different conclusion from that reached by experts, provided that conclusion is supported by evidence. It is the judge who makes the final decision.

37. In this case, the recorder carried out a thorough evaluation of the relevant evidence. In my judgment, he gave sufficient consideration to the professional assessments of Mrs N and, where he disagreed with their conclusions, he explained his reasons for doing so. Crucially, his decision was based on his own evaluation of the family members who gave evidence, in particular his assessment of Mrs N herself. None of the arguments advanced on behalf the guardian or the local authority in this case has persuaded me that this court should interfere with that evaluation. Given the recorder's assessment of Mrs N, his decision to make a special guardianship order in her favour cannot be described as wrong.

38. For those reasons, I concluded that the appeal should be dismissed.

**LORD JUSTICE MALES**

39. I agree.

**LORD JUSTICE LEWISON**

40. I also agree.