Neutral Citation Number: [2023] EWCA Civ 721

Case No: CA-2023-000602

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WORCESTER
Recorder Rowbotham
WR22C50115

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 June 2023

Before :

LORD JUSTICE SINGH
LORD JUSTICE BAKER
and
LORD JUSTICE ARNOLD

- -

E (A CHILD) (CARE AND PLACEMENT ORDERS)

- -
- -

Lorna Meyer KC and Faye Edwards (instructed by **Parkinson Wright LLP**) for the **Appellant**
Matiss Krumins (instructed by **Local Authority Solicitor**) for the **Respondent**

Hearing date : 13 June 2023

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Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am on 27 June 2023.

LORD JUSTICE BAKER :

1. This is an appeal by a mother against care and placement orders made in respect of her son, E, who is now just over a year old. The appeal is opposed by the local authority and by the children's guardian.

2. The mother, who is now aged 21, had a very traumatic childhood. She was born in the United States and moved to this country at a young age with her parents and siblings. After moving here, she was sexually abused by her half-brother. He was subsequently convicted of a series of sexual offences involving the mother and her sisters, sent to prison for nine years, and later deported. Following the breakdown of her parents' marriage, her mother formed a relationship with another man who was emotionally abusive to all members of the family.

3. Throughout her teenage years, the mother suffered from mixed anxiety and depression, had suicidal thoughts and regularly self-harmed. In addition, she had various physical health problems, including Ehlers-Danlos syndrome and fibromyalgia. Between the ages of 11 and 18, the mother was under the care of the local Child and Adolescent Mental Health Team through whom she received counselling and various forms of therapy including cognitive and dialectical behaviour therapy. At various points she was referred to the local Complex Needs Service and to the Women's Rape and Sexual Abuse Centre.

4. The mother has had a series of short-term relationships with men, some of which have been abusive. In 2019, she was sexually assaulted again. In 2021, she started a relationship with the father which she has subsequently described as violent and abusive. At the point when she became pregnant in 2021 aged 19, the mother was receiving support from adult social care and was being treated as an outpatient by the adult local mental health team who had prescribed anti-depressant medication. Medical reports from this period included in the court papers identify her diagnosis as emotionally unstable personality disorder. In October 2021, she was seen by counselling psychologists within the team to determine whether she should undergo a full psychological assessment to determine whether she should receive further psychological treatment. A report from the psychologists following this referral recorded that the mother had described her main difficulties as her lack of ability to regulate her emotions and suicidal ideation. She raised the question whether she might be autistic, describing sensory issues she experienced and stating that autism ran in her family with three siblings diagnosed as autistic and a fourth under investigation. At that stage, the counselling psychologists thought that psychological work might be too much for her and recommended that she should concentrate on her pregnancy and "transition to motherhood". It was agreed, however, that she would be referred for a neurodiversity assessment by a "family psychologist" to establish whether she was on the autistic spectrum. The report concluded that "once [her] situation is more settled, she has had her baby and established herself in her new role and has had the assessment by the family psychologist, we would be happy to consider a re-referral to psychology."

5. Following this report, the mother was referred for an assessment by the family psychologist. According to a later letter (9 January 2023) from the mental health team, however, no such assessment has so far been carried out.

6. During her pregnancy, the mother attended all health and social care appointments. She told NHS staff that the father of the child she was expecting and with whom she was in a relationship was controlling and had threatened to kill himself if she separated from him. A multi-agency risk assessment conference was held, but the mother was reluctant to engage with that process or speak to the police. The local authority placed the unborn baby on a child in need plan due to concerns about domestic violence and the mother's mental health difficulties.

7. Following an initial child protection conference in May 2022, the unborn baby was made subject to a child protection plan. On 26 May, the mother gave birth to E. Mother and baby were discharged from hospital to the maternal grandmother's house. The original plan was for an assessment period of six weeks under those arrangements, after which the mother and E would move to the mother's own bungalow.

8. Over the next few weeks, the grandmother told the local authority allocated social worker that she had concerns about the mother's care of E and about her mental health. On 23 June, the mother was seen by her psychiatrist after reporting feeling low and with thoughts of self-harm. The social worker arranged to meet both parents on 27 June at their separate addresses. On arriving at the mother's bungalow, the social worker was informed by the mother of her concerns about the father's mental health. Shortly afterwards, the father arrived and there was an altercation during which the father exchanged blows with the mother's sister. According to the social worker, the mother needed prompting to remove E from the room during the fight. The police and an ambulance were called, and later that day the father was sectioned under s.136 of the Mental Health Act 1983. Thereafter, his contact with E was stopped, and he later declined further assessment and decided not to put himself forward to care for the child.

9. On 14 July, the local authority started care proceedings. In the local authority's initial statement, the social worker reported that the mother had demonstrated a reasonable knowledge of a child's needs, that she could manage a child's basic care and was able to show emotional warmth to E with whom she was said to have "a lovely bond". The local authority's concerns were as to the consistency of her care for the child, her mental health problems, and her abusive relationship with the father. At the first court hearing, E was made subject to an interim care order on the basis of a care plan under which he remained with his grandmother. On 16 September, however, the grandmother withdrew from the kinship assessment process, informing the social worker that she was unable to cope with the mother who was not prioritising care of the child but instead spending time with a new partner. At that point, E moved to a foster placement where he remains.

10. Meanwhile, on 10 August, the mother had applied in the care proceedings for a psychological assessment under Part 25 of the Family Procedure Rules. The draft letter of instruction filed in accordance with the rules set out the proposed instructions to the expert in these terms:

> "1. Please carry out a full psychological assessment, including an assessment of the intellectual, social and behavioural functioning of [the mother], to include an assessment of her ability to function as an individual and as a parent and whether she has any psychological issues which may affect her parenting ability, taking into account the history of this case.

> 2. Does mother, either in her history or presentation, present with any mental health illness, disorder, or any other psychological/emotional difficulty, and if so, what is her diagnosis?
>
> 3. How mother's association with risky adults impact on her child in the short, medium and long term?
>
> 4. Does mother's mental health/psychological profile mean she associates herself with risky adults?
>
> 5. How does mother's psychological profile impact on her ability to meet the child's needs in the short, medium and long term?
>
> 6. Does mother's mental health/psychological profile pose any risks to herself, her child and others? What are those risks?
>
> 7. What are the experiences and antecedents which would explain her difficulties if any (taking into account any available evidence or any other clinical experience)?
>
> 8. What treatment is indicated, what is the nature and likely duration?
>
> 9. What is mother's capacity to engage in and partake in any treatment or therapy?
>
> 10. Are you able to include the prognosis for, timescales for achieving and likely durability of the change?
>
> 11. What is mother's ability to parent her child whilst undertaking such treatment or therapy, in the short, medium and long term?
>
> 12. What other factors might indicate positive change?
>
> 13. Please provide details and recommendations of any therapy, treatment or courses that may be available? For example, names of courses and therapy and how mother can access this."

11. A skeleton argument filed with the application under Part 25 noted that there had been no recent assessment of the mother and referred to the conclusion reached by the community psychologists in October 2021. Addressing the issues identified in s.13(7) of the Children and Families Act 2014 (see below) and in particular the impact giving permission would have on the child's welfare, it was submitted that E deserved to be brought up by his mother if at all possible and that any risks that may prevent that should be properly assessed by an appropriate expert. It was acknowledged that normally no additional expert's report would be required in addition to the assessment of the social worker and children's guardian. In this case, however, given the mother's background and multiple diagnoses, it was submitted that a psychologist should be

instructed to assess her possible complex psychological needs, any associated risks and the timescale of any treatment required to alleviate those risks. These issues could not properly be addressed in the social worker or guardian's assessments. Without a psychologist's report, there would therefore be a significant gap in the evidence.

12. For reasons that are unclear, the hearing of her application was delayed and eventually listed on 26 October 2022 before HH Judge Bugeja. A report from the mother's psychiatrist reported that she had said she had not self-harmed for seven months and advised that, as long as she continued to take her medication and engaged with the mental health team, the prognosis was good. No other evidence was filed for the hearing, but in a position statement counsel set out the local authority's position as follows:

> "The local authority does not oppose mother's application however it does question the necessity of it in order for these proceedings to be concluded justly …. Due to the passage of time the allocated Social Worker CB has completed all of the proposed sessions of mother's parenting assessment and sadly this will be a negative assessment…. In summary since E has not been in his mother's care, mother has been living a really chaotic lifestyle, partying, drinking and taking drugs. Mother has met a number of different partners and brought them to her home, one of those partners has a history of violence. The allocated Social Worker CB has described a pattern prior to E being in mother's care and now, where mother places herself in risky situations.
>
> Mother has not taken support offered to her from Adult Services who offered her a care package, to go in and meet her needs to help her keep on top of the housework and she has not accepted that.
>
> The home conditions are described as atrocious. Mother's attitude to working with her mother is reported as very flippant about everything, sadly the Social Worker is unable to report anything positive as mother has not done anything to improve. It is noted that when Mother's flat was cleaned up it was Mother's parents that actually did this.
>
> Mother has not shown any insight when asked what she feels she needs to do to have E returned to her care – her response was that she just needs a day or two to sort the house out. When challenged about her lifestyle and the need to make changes mother replied she would not do all of those things if E was in her care."

13. After hearing submissions, the judge dismissed the application. Her reasons are set out in an agreed note of judgment:

> "M did appear to make some progress but the updating statement suggests this has not been sustained. I accept it is a position statement not witness statement, and I will direct LA to file

primary evidence. The update would have been shared with M and she would have known of concerns during assessment progress. The LA say M continues to live chaotic lifestyle, no significant changes made since E was moved from her care. She may be disheartened by process and delay and she has had medical difficulties, at the time of this application, there were risk factors to her ability to safeguard E whilst in care. The concerns in the LA's evidence are primarily not capable of resolution by a psychological assessment ….

[The] question needs to be whether it is proportionate and necessary based on merits. I make it clear delay is one factor I take into account; I must remind myself of all matters sets out within s.13. M's position is she requires psychological because only with this that court can understand interactions of various conditions and what support she requires and further, what support package from LA that could be offered to ensure E could return to her. Suggested in any event, court will need to consider contact if E remains in family unit. F is neutral. LA indicate don't oppose but do submit not necessary. Child Guardian is opposed stating that although useful not necessary to determine outcome as court will have wealth of information to determine final orders for E.

Court has regard to s.13 and the law which I won't set out in this short judgment. I am satisfied there is sufficient evidence to determine these proceedings. It is not necessary and proportionate for this piece of work to be completed on the back drop of the LA's continued concerns. A psychological assessment is not necessary to determine contact issues and I take the view there is sufficient evidence, no gaps in this evidence, which I accept is yet to be forthcoming in respect of recent updates. Once that is before the court, I do not find that a psychological assessment will fill a gap in this evidence. Mother's mental health is one aspect of this case and court has to consider if there is sufficient evidence to make a final decision. I dismiss this application."

14. In the course of the proceedings, the local authority filed a parenting assessment completed by the key social worker CB. It included the assertion that "since E has not been in his mother's care, mother has been living a chaotic lifestyle, party, drinking and taking drugs." In conversations with the social worker, the mother said that due to her childhood traumas she was unable to remember much of her childhood and could only provide a certain amount of information for the assessment. Noting that other professionals had also reported that the mother had only provided limited replies to questions, the social worker observed:

"It is unclear as to why this is as [the mother] is an intelligent person. It may be indicative of her struggling with her mental health and feeling overwhelmed to communicate with professionals or a distrust toward professionals to openly share

> information. In either regard it is a concern. It will be difficult to support [the mother] if she is not able to communicate and reflect on her experiences to assist with providing her support and guidance around many areas that would benefit herself such as understanding domestic abuse, parenting, discussing her own mental health and vulnerabilities and expressing E's care needs with professionals. It does unfortunately pose challenges when looking to undertake direct pieces of work with [her]."

The social worker summarised the mother's mental health history and commented:

> "We have no confirmation from mental health professionals that [the mother's] current mental health is impeding on her decision making or resulting in erratic and impulsive decision making. It is however not within my professional expertise to fully understand the potential impact of her current circumstances and its potential impact on her decision-making ability. However, what is clear from discussions with [the mother] that changes in her life can influence changes in her mental health and result in its decline."

15. The social worker concluded that the mother had positive attributes – she loved E, was able to meet his routine care needs and had a basic level of insight. On the other hand, it was observed that at times E was secondary to the mother's relationships and her own needs. She had "complex mental health and emotional needs which impact on her parenting and decision-making". The social worker concluded that the mother would be unable to meet E's needs consistently without prompting and intervention but would continue to prioritise her relationships and expose E to risks.

16. Two further case management hearings took place, at the second of which the mother made an application for an assessment by an independent social worker which was also refused. The local authority issued an application for a placement order. An issues resolution hearing took place in February 2023, and the final hearing was listed before Mr Recorder Rowbotham on 2 and 3 March. In her statement filed on 17 February 2023, the mother said that she was still awaiting the assessment to establish whether she is autistic. She also challenged the assertions made by the local authority about her conduct in the period after E was born, denying that she had been leading a chaotic lifestyle, partying, drinking or taking drugs.

17. Prior to the hearing, the parties agreed the basis on which the threshold criteria for making orders under s.31 of the Children Act 1989 were satisfied. In summary, it was agreed that at the date on which proceedings were started E was at risk of physical and emotional harm as a result of the following matters: (a) the mother had been the victim of domestic abuse during her relationship with the father; (b) the father was unable to control his anger; (c) the father suffered from severe depression with thoughts of self-harm and suicide, and (d) when the parents were living together, the home conditions were poor and unsafe for a small baby. There was no reference in the agreed threshold document to the mother's "chaotic lifestyle". No direct evidence was filed to support the allegations about her lifestyle made at the hearing in October 2022 and the local authority did not pursue findings about them.

18. Threshold having been agreed, the issue to be determined by the recorder was whether to make the care and placement orders sought by the local authority. On behalf of the mother, it was again argued that no decision could properly be taken unless the court had a psychological report on the mother and that the hearing should be adjourned for an assessment to be carried out. The recorder heard evidence from the social worker, the mother and the guardian on the first day. Having heard submissions on the morning of the second day, he delivered judgment in the afternoon.

19. At the outset of his judgment, the recorder set out the issues and the parties' positions in these terms:

> "3. …. The available options before the court, therefore, are somewhat stark: either that I order a return to the mother's care or else a care plan of adoption. There is, in reality, a third route of an adjournment, which I will come to in due course.
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> 4. The local authority's application is supported by the guardian and, perhaps somewhat unusually, actively supported by the father. It is opposed by the mother, who seeks an adjournment for psychological or other assessment with more substantial consideration to be given to the support that she would need to achieve rehabilitation to her care.
>
> 5. The headline questions before me, as I understand them to be, are therefore as follows. First, can the mother provide good enough care to E? Second, is there a need for further evidence such as to justify an adjournment? And third, is this really a case where it can be said that nothing else will do but adoption?"

20. The recorder summarised the background, including the mother's circumstances and health difficulties and the history of the proceedings. He then recorded his impression of the mother as a witness, describing her as intelligent and thoughtful and observing that nothing in her answers led him to conclude that she was a fundamentally dishonest witness. On the other hand, he found that she was not always open with professionals (for example, over her use of cannabis) and was someone who over-estimated her abilities (for, example, her ability to take cannabis alongside other prescribed medication). He noted the evidence that she had struggled to manage home conditions when on her own and lacked insight into the pressures she would face looking after E and whether she could do so with little support available from her limited social network of family and friends. Having summarised the law and the basis on which it had been agreed that the threshold was crossed, the recorder turned to his welfare analysis. He noted "many positives on the mother's side of the balance sheet", and described her as being "in many respects, a very impressive individual who has faced much in the way of trauma but who has fought and continues to fight to make improvements in her life".

21. The recorder then turned to the issue which lies at the heart of this appeal:

> "52. I have read a very detailed parenting assessment completed by the allocated social worker. There are some points in that assessment in which I believe the mother has been unfairly criticised. I do not see, for

example, any evidence of a 'party lifestyle' as has been described, with the use of drugs (save the use of cannabis). I do not see any evidence in this case, and it appears to be accepted that there is no evidence, of regular heavy drinking. I do not see evidence before me of multiple risky partners since she separated from the father, with one caveat to which I will turn.

53. It does seem that the mother has been able to maintain her separation from the father and that concerns early on that she would be unable to prioritise E over that relationship have, in the end, been proven to be unfounded.

54. In my view, all of that does cast some doubt on the decision that was made by Her Honour Judge Bugeja in October of last year not to accede to the mother's Part 25 application for expert psychological assessment. I do not say that in any way to criticise the learned Judge; I say that because the factual matrix which was presented to her on that occasion has not, in my view, been made out, particularly in terms of the allegations of partying, abuse of alcohol and the suggestion that the mother had failed to make any changes or maintain any changes since proceedings were issued.

55. I have considered very carefully whether this now presents a gap in the evidence that it is necessary at this stage to fill. Certainly, the mother may well have what might be thought to be a complex psychological profile, particularly when set against a history of significant trauma that must at least raise the spectre of unmet emotional need.

56. I have wrestled very carefully with the mother's request for an adjournment and/or psychological testing. Certainly, that is an application that she pursues and I have been provided with timescales for various experts ranging from four weeks and upward, although of course the reality would be that, if I were to sanction such assessment at this stage, the proceedings would need to be extended for significantly longer than just the length of time it takes for that instruction. It does not seem to me, as the local authority would have it, that this is a clear cut case. Rather, it is a very finely balanced case involving a very young infant and a deeply vulnerable, first-time mother whose vulnerabilities, rightly or wrongly, have not been fully assessed.

57. I cannot know if Her Honour Judge Bugeja would have reached the same conclusion she did last year in October had the local authority not pleaded its case in the way it did. Having seen the agreed note of her decision, it is clear that the learned Judge did place weight on the facts alleged by the local authority in concluding that the mother had made 'no progress' since proceedings had begun. In fact, those submissions made by the local authority appear to me to have been almost entirely unfounded, particularly with regards to partying and drug use, and there seems little doubt that the court – innocent as it may have been on the

part of the advocates on that occasion – was misled by the local authority.

58. On the face of it, therefore, there is an evidential gap. The question now, as it was for Her Honour Judge Bugeja in October, remains one of necessity. The question is not simply "is there a gap in the evidence?" but "how big is that gap and does it need to be filled with regard to the criteria under section 13(7) of the Children and Families Act 2014 and Part 25?". As matters stand today, I am not persuaded that this is a gap that does need to be plugged at this stage in order for the court to make decisions as to E's welfare. I do not say that simply to avoid delay, although I have to note that we are already in week 32 of proceedings and I am conscious of the statutory duty arising from the 'no delay' principle and the notion and assumption that delay is likely prejudicial to a child's welfare. I note in passing that the option was always there to the mother to appeal the decision of Her Honour Judge Bugeja had she felt it had been made unfairly. We are now some four months on and at final hearing.

59. There seems to me to be ample evidence at this time that the mother is not able to provide good enough care at a fundamental level. That conclusion arises in part from the simple fact that the mother's mental health is said to be stable with a good prognosis, which is accepted by the local authority, and yet there are still outstanding issues concerning her parenting.

60. The local authority accepts that the mother's mental health does not pose a direct risk to the child. It is said (and the mother accepts) that there have been dips during these proceedings, albeit they are not reflected within [her treating psychiatrist] Dr P's letter. In my view, it would have been odd had there not been dips in anybody's mental health considering what appear to have been changes of course, first looking at the maternal grandmother as an alternative carer, then looking at the paternal aunt; the removal of E into foster care; and, finally, confirmation that the local authority, having been twin-tracking the case, were seeking adoption. It seems to me very obvious that the mother at those times and today will have struggled.

61. I have to take the mother and Dr P at their word. The issues in this case are not simply to do with the mother's mental health needs but go much further and cover a wider range of challenges. The mother herself does not accept that she has additional psychological needs that would prevent or impact upon her parenting of E. She cannot, therefore, argue in the same breath that she needs an assessment to identify deficits in her parenting (and offer potential remedies for the same) that she does not accept exist.

62. There are issues outside and above those arising from any question of her mental and psychological health that, in my view, are sufficient to justify the making of a final decision today…"

22. Over the following paragraphs the judge identified and analysed those issues, including the mother's cannabis use, her history of using relationships as a "coping mechanism", the vulnerabilities of her current partner, concerns about her ability to prioritise her baby's needs, and her own limited social network. He rejected the local authority's characterisation of her lifestyle as "chaotic" – a characterisation which he described as "deeply unhelpful" – but observed that there were indicators of "a fundamental lack in stability which poses challenges, and significant challenges at that, were one to consider placing a young baby in the mother's sole care." He accepted her counsel's submission that the contact records were "overwhelmingly positive in terms of the mother-son engagement and interaction" but added that the records demonstrated that "at this stage" she could not be left unsupervised with E because there were things that she still needed to learn and also that she remained overly defensive to criticism which did not bode well for her ability to work with professionals. He gave as an example the occasion when the mother had to be prompted to remove E from the vicinity of the fight in the home.

23. The recorder considered whether the mother should be given the opportunity to do further work before the final decision was taken:

> "87. It may be said that the mother needs to do further work. Certainly, the parenting assessment concludes that she needs to go on a parenting programme. I was somewhat critical and remain somewhat critical that CB was unable to put her finger on any particular type of work that might include; but ultimately, she did explain in her oral evidence that the big concern is not that the mother lacks parenting ability per se but that she lacks the ability to do these things consistently. The issue, therefore, is not necessarily teaching the mother the basics but ensuring that she is able to implement those skills on a consistent basis. In CB's view, there is not a course that could address that particular issue and I took from what she said that, to some extent, she was at a loss as to what she could recommend in such circumstances.
>
> 88. Some of the mother's strengths in this case, to which I have already alluded, do in my view also give rise to weaknesses. There is no doubt that she is fearlessly independent in some regards but in other ways I also find that she is highly dependent on others, as evidenced by her need to engage and find new partners in addition to the partner that she already has. I also, for the reasons that I have already given, find that her confidence in her own ability does in many respects blind her to the deficits in her own abilities. At the end of having listened to the mother in evidence and having read her witness statement, it seems to me that she is still not clear about the areas in which her parenting could be supported but that she remains otherwise overly confident as to her ability to care for E were he to return to her care tomorrow.
>
> 89. Taken as a whole, I find that the mother is not able to provide good enough care. The above issues, in my view, go far beyond those aspects of her ability to care and the mother's own needs

> that would be addressed in any psychological report, either in identifying the reasons for any deficit in parenting and/or identifying work or sources of support that might remedy the same. There is no support that has been identified that could, in my view, remedy or buttress the care that she could provide to make it good enough at this time. There are also, in addition to all of the above, ongoing concerns around the mother's ability to work openly with professionals which casts serious doubt on her ability to work and engage in any rehabilitation plan while other supportive work may be provided."

24. Under the heading "The available options and *Re B-S* analysis", the recorder then set out his conclusions. He rejected the mother's proposal of an adjournment in these terms:

> "For all the reasons that I have already given I am of the view that a psychological assessment of the mother at this juncture, while it might inform any decision that the court makes, is not 'necessary'. For all the reasons that I have indicated, there is sufficient evidence before me of parenting deficit and inability to provide good enough care. I do not, at this stage, require any further information, not least where the mother's own evidence is otherwise that her mental and psychological needs are being met and do not impact on her parenting. It would, in my view, be disproportionate to adjourn this matter further for a report that I do not consider necessary."

25. Concluding that neither parent was able to offer E the stability and consistency he needed, the recorder made the care and placement orders sought by the local authority. He finished with the following observation:

> "I do, however, make one final plea. There may be some time to go between placing E for adoption and finding an adoptive placement. Within that time, it is clear to me that the mother should still be offered support to both maintain what improvements she has been able to make and to make further improvements. She is a very young mother. There is a good and high probability that she will have children in the future. I would ask in those circumstances that the local authority continue to engage meaningfully with her and that the recommendation made in the parenting assessment, that the mother engage in a parenting programme, be one that is taken on in a meaningful way and that referrals are made and the mother assisted to improve in her parenting skills. I also make a plea directly to the mother. She has made progress. She has listened to things that the local authority have said in several regards. I would ask that she make all efforts to continue in that vein, that she continue to work with her treating clinician and that she take up any offer of work that the local authority is able to provide her with."

26. On 27 March 2023 (three days out of time), the mother filed a notice of appeal, relying on four grounds:

(1) the lower court failed to analyse, at all, the credibility of the local authority's evidence given a finding was made they misled the court at a previous hearing;

(2) there was a clear and identifiable gap in the evidence, which the court was wrong to conclude did not require further assessment;

(3) the learned judge erred in his failure to adequately analyse the level and nature of the support the mother is likely to require if caring for E, which led to an erroneous conclusion that "there is no support that could remedy her parenting at this time";

(4) proportionality – the judge did not fully or adequately evaluate the placement option with E being in the care of his mother.

On 15 May 2023, I extended the time for filing the appeal notice and granted permission to appeal on all grounds.

27. I propose first to consider grounds 2, 3 and 4 together.

28. I start with the well-known dicta of Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050:

> "50. …Basically it is the tradition of the United Kingdom, recognised in law, that children are best brought up within natural families. Lord Templeman, in *In re KD (A Minor: Ward) (Termination of Access)* [1988] 1 AC 806, 812, said this:
>
> 'The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature.'
>
> … It follows inexorably from that, that society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done.
>
> 51. That is not, however, to say that the state has no role, as the 1989 Act fully demonstrates. Nevertheless, the 1989 Act, wide ranging though the court's and social services' powers may be, is to be operated in the context of the policy I have sought to describe. Its essence, in Part III of the 1989 Act, is the concept of working in partnership with families who have children in need. Only exceptionally should the state intervene with

> compulsive powers and then only when a court is satisfied that the significant harm criteria in section 31(2) is made out."

29. Part III of the Children Act 1989, to which Hedley J referred, is headed "Support for children and families provided by local authorities in England" and contains detailed provisions, the first of which is section 17, headed "Provision of services for children in need, their families and others". Section 17(1) provides:

> "It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part) -
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to their needs."

This is consistent with the positive obligation under Article 8 of ECHR on the State through the local authority to provide such support as will enable the child to remain with his parents: *Re D (A Child)(No.3)* [2016] EWFC 1, [2017] 1 FLR 237 paragraph 152, *Re H (Parents with Learning Difficulties: Risk of Harm)* [2023] EWCA Civ 59, paragraph 42.

30. This obligation features in every case in which the court is being asked to order the removal of a child from his or her parents. It is particularly important when the order which the court is being asked to make is for the permanent removal of the child by approving a plan for adoption. Under Article 8, any interference with the exercise of the right to respect for family life should be proportionate to its legitimate aim. There can be no greater interference than the permanent removal of a child. In *YC v United Kingdom* (2012) 55 EHRR 967, the ECtHR said (at paragraph 134):

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

31. Following on from *YC* and other cases in the European Court, the Supreme Court addressed the exceptionality of a plan for adoption in *Re B (A Child)* [2013] UKSC 33, [2013] 1 WLR 1911. At paragraph 104, Lord Neuberger said:

> "adoption of a child against her parents' wishes should only be contemplated as a last resort – when all else fails. Although the child's interests in an adoption case are "paramount" (in the UK legislation and under article 21 of UNCRC), a court must never lose sight of the fact that those interests include being brought up by her natural family, ideally her natural parents, or at least one of them."

He continued (at paragraph 105):

> "The assessment of [the parents'] ability to discharge their responsibilities must, of course, take into account the assistance and support which the authorities would offer. That approach is the same as that suggested by Hedley J in the passage quoted … above and I agree with it. It means that, before making an adoption order in such a case, the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support."

32. 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."

33. In subsequent cases, this Court gave guidance as to how a judge goes about ensuring that the obligation to intervene only when necessary and proportionate is discharged. The guidance was summarised and endorsed by the Supreme Court in *Re H-W* [2022] UKSC 17, [2022] 1 WLR 3243. In a judgment with which other members of the Court agreed, Dame Siobhan Keegan cited from the judgment of Sir James Munby P in *Re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563 adopting a passage from the judgment of McFarlane LJ (as he then was) in *Re G (A Child) (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965, [2014] 1 FLR 670:

> "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 … 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."

Dame Siobhan added:

> "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."

34. In *Re H (Parents with Learning Difficulties: Risk of Harm)*, supra, at paragraph 67, I suggested a three-stage approach to evaluating a proposal that a child remain with or be placed back with birth parents:

> "first, … identify and describe the level of support needed by the family, secondly ascertain what can and should be being done under the local authority's obligations, and thirdly … determine whether, with that in place, the child's welfare needs will be met."

That approach was suggested in the context of a parent with learning difficulties. But in fact the positive obligations on the local authority imposed by Article 8 of ECHR and s.17 of the 1989 Act require that approach to be followed in every case when determining whether a child should remain or be placed back with birth parents.

35. The first stage – identifying the level of support needed by the family – involves a thorough assessment of both parent and child. In most cases, a social work assessment will be sufficient. But in some cases, where the parent and/or the child have or may have other needs, other assessments will be necessary. Where, for example, the parent or child has a physical or learning disability, specialist assessment will normally be required. It is recognised that the assessment of parents with learning difficulties or disabilities requires specialist understanding and techniques, commonly delivered in this country through the so-called "PAMS" (Parenting Assessment Manual Assessments) model. A parent with autism may or may not have a learning disability, but their neurodiverse condition merits assessment for the same reason – to identify the level of support needed and, importantly, how and by whom it should be delivered. Such an assessment can only be carried out by someone with the requisite expertise.

36. In recent years there has been concern about the excessive instruction of experts in children proceedings: see for example the Family Justice Review. Parliament has addressed this by passing s.13 of the Children and Families Act 2014 (headed "Control of expert evidence, and of assessments, in children proceedings") which, so far as relevant to this appeal, provides:

> "(1) A person may not without the permission of the court instruct a person to provide expert evidence for use in children proceedings.
>
> …
>
> (6) The court may give permission as mentioned in subsection (1) … only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly.

> (7) When deciding whether to give permission as mentioned in subsection (1) … the court is to have regard in particular to
>
> (a) any impact which giving permission would be likely to have on the welfare of the children concerned …
>
> (b) the issues to which the expert evidence would relate,
>
> (c) the questions which the court would require the expert to answer,
>
> (d) what other expert evidence is available (whether obtained before or after the start of proceedings),
>
> (e) whether evidence could be given by another person on the matters on which the expert would give evidence,
>
> (f) the impact which giving permission would be likely to have on the timetable for, and duration and conduct of, the proceedings,
>
> (g) the cost of the expert evidenced, and
>
> (h) any matters prescribed in the Family Procedure Rules."

37. Part 25 of the Family Procedure Rules provides detailed regulation of expert evidence consistent with these statutory provisions.

38. The need for courts to exercise vigilance over applications for expert evidence in children's cases has been reiterated frequently, for example in the "President's Memorandum – Experts in the Family Court" (4 October 2021) in which the President of the Family Division stated:

> "Such expert evidence will only be "necessary" where it is demanded by the contested issues rather than being merely reasonable, desirable or of assistance (*Re H-L (A Child)* [2013] EWCA Civ 655)"

He added:

> "The instruction of an expert is the primary reason for delay in Family Court proceedings relating to children. The recent statistics show that an application for the instruction of an expert is almost invariably granted. To avoid delay, courts should continue to consider each application for expert instruction with care so that an application is granted only when it is necessary to do so."

39. There are grounds for concern that parties in care proceedings have been too ready to apply for, and judges too ready to grant, a psychological assessment of their clients. On the basis of the information in the papers before us, however, this was not one of those

cases. This was a very young mother involved in care proceedings concerning her first child. The application made for a psychological assessment in this case was based not on speculation nor on the Micawberish hope that something would turn up but rather on the solid foundations of the mother's circumstances and personality – the background of serious abuse and trauma, the history of self-harm, the lengthy engagement with CAMHS throughout her teenage years, the diagnosis of emotionally unstable personality disorder, and the suggestion, as yet unassessed, that she may be on the autistic spectrum. Faced with a client with this constellation of problems, the mother's lawyers were fully justified in applying for a psychological assessment so that the court could be fully informed about her needs and the level and type of support she would require to care for her son.

40. The recorder accepted that there was a gap in the evidence but was not persuaded that it needed to be plugged for the court to make a decision about E's future welfare. His reasons for reaching this conclusion were as follows.

41. First, he took into account the inevitable delay that would follow were he to adjourn the hearing, noting that the proceedings had been continuing for 32 weeks, over the statutory 26-week period. It is plain from his judgment, however, that he did not consider that, by itself, this was a decisive factor. In that respect he was plainly right. If there is an evidential gap which has to be filled before a decision can be taken about a child's future, it is very unlikely that the fact that it might take a few months to fill the gap would by itself warrant refusing an adjournment, bearing in mind the lifelong consequences of the decision reflected in the statutory principle in s.1(1) and (2) of the Adoption and Children Act 2002 that, when coming to a decision relating to the adoption of a child, the paramount consideration must be the child's welfare throughout his life.

42. Secondly, he found that there was "ample evidence" that the mother was unable to provide good enough care at a fundamental level. That conclusion, which does not sit easily with his observation a few paragraphs earlier that this was a "very finely-balanced case", was based in part on what he described as the "simple fact" that her "mental health is said to be stable with a good prognosis … and yet there are still outstanding issues concerning her parenting." But the fact that her mental health was stable did not undermine the case for a psychological assessment. That was based not solely on her mental health but also on her psychological profile, which the recorder accepted may be "complex", her history of significant trauma, and the fact that she had been referred for an assessment to establish whether she was on the autistic spectrum, a referral which 18 months on has yet to be taken up.

43. Thirdly, another factor which the recorder thought counted against directing a psychological assessment was the fact that the mother herself did not accept that she had additional psychological needs that impinged on her parenting. In his view, that precluded her arguing "in the same breath" that she needed an assessment. Given her young age and the strong prima facie evidence that she has psychological needs, it is debateable how much weight should be attached to the mother's own assessment of whether they impinge on her parenting. From the child's perspective, the fact that his mother does not at present accept that she has additional psychological needs that may affect her parenting does not obviate the necessity of an assessment before concluding that she cannot look after him and nothing else but adoption will do.

44. Fourth, the recorder took into account the various issues about her parenting capacity identified in the social work assessment, summarised in paragraph 22 above. But to a greater or lesser extent, the mother's "complex psychological profile" impinged on most if not all of those issues – in particular, her use of relationships as a "coping mechanism", her ability to prioritise E's needs, her limited support network, and her "fundamental lack of stability". Far from being "issues outside and above those arising from her mental and psychological health", they were inextricably linked to it. The social worker's observation in the parenting assessment about the difficulty the mother had in communicating and about her past experiences and the challenges this posed to professionals working with her is a further illustration of the importance of understanding more about her psychological profile in order to identify what support she would need to care for E safely. The evidential gap therefore impeded a full and fair evaluation of her ability to meet E's needs.

45. Finally, the recorder took the view that the assessments carried out by other professionals were sufficient to enable him to reach a decision about E's future. It is plain, however, that an assessment of the mother's psychological profile and how it impinged on her parenting abilities was beyond the professional capacity of the social worker and guardian. This is reflected in the observation of the social worker in the parenting assessment that it was not within her professional expertise to fully understand the potential impact of the mother's circumstances on her decision-making ability.

46. For these reasons, there was in my view a strong case for saying that, even if the mother had not previously applied for a psychological assessment, an adjournment ought to have been granted to provide the court with the essential evidence needed to determine whether the mother could be supported to look after her child. To my mind, the argument is made even stronger by the fact that an application for an assessment was made on her behalf, very properly, at the outset of the proceedings and was refused by the judge in October 2022 on grounds that in some respects were later accepted to be wrong – including assertions that were, in the recorder's words, unfairly critical of the mother, unfounded and misleading.

47. On behalf of the local authority, Mr Matiss Krumins, in addition to reiterating the reasons identified by the recorder for refusing the adjournment and assessment which I have considered in the preceding paragraphs, submitted that the judge was right to conclude no support had been identified that could remedy or buttress the mother's care. It is notable, however, that the recorder was critical of the social worker for being unable to identify any work which the mother might do to address her problems with parenting. Without a report addressing the mother's complex psychological profile, neither any of the parties nor the court was in a position to delineate the nature and level of support that might be required. In his helpful written submissions filed on behalf of the guardian opposing the appeal, Mr Matthew Maynard rightly pointed out that this was far from a single issue case but rather one in which a number of variables were presented as risk factors. But as explained above, many of those variables were related, to a greater or lesser extent, to the mother's psychological profile. Mr Maynard was also right to say that the recorder was fully aware of the evidential gap, that he addressed its significance at length, and that his decision to exercise his case management powers by refusing the adjournment was reached after consideration of all the evidence. I recognise that by allowing this appeal we would be interfering with a decision by a trial

judge who was best placed to evaluate the evidence. That is not a decision to which this Court comes unless satisfied that the judge was wrong.

48. Drawing together the threads in grounds 2, 3 and 4, I agree with the recorder that there was a clear and identifiable gap in the evidence, but I find that he was wrong to decide that there was no necessity for a psychological assessment. As a result, he was not in a position to conduct an adequate analysis of the level and nature of the support the mother would require were she to care for E, and therefore unable to conduct the fair balancing of the realistic options for E's future care which was essential before reaching a conclusion that a plan for adoption was necessary and proportionate.

49. For those reasons, I would allow the appeal on those grounds, set aside the care and placement orders, and remit the local authority applications for rehearing by another judge, to be allocated by the Family Division Liaison Judge.

50. After some hesitation, Ms Lorna Meyer KC, who presented the appellant's case, agreed with the Court's proposal that, if the appeal was allowed on the ground that the judge had been wrong to decide the case without a psychologist's report, we should grasp the nettle and order the report ourselves rather than remit that question to another judge for determination. I recognise the impact which giving permission for the instruction of an expert at this stage in the proceedings may have on the timetable for the proceedings. Applying the statutory criteria in s.13 of the 2014 Act, I am satisfied that, for the reasons set out in this judgment, the instruction of a psychologist is necessary to resolve the proceedings justly. I consider the questions identified in the original draft letter of instruction to be broadly apposite and that they cannot be answered by any other professional currently involved in the proceedings or in treating the mother. As to E's welfare, under s.1(2) of the Children Act 1989, this Court is obliged to have regard to the general principle that any delay in determining the question of E's upbringing is likely to prejudice his welfare. He is now 13 months old and the effect of allowing this appeal and approving the instruction of a psychologist is likely to delay a decision about his future until the Autumn when he will be 18 months old. Nevertheless, I have decided that such a delay is justified because, without the full information as to the extent of the mother's psychological problems and the feasibility of providing her with support so that she can care for her son safely, the court is not in a position to identify, compare and contrast the advantages and disadvantages of the realistic options for E's future.

51. Although the mother's representatives had complied fully with Part 25 when applying before the judge in October, they had not updated their application ahead of the hearing of the appeal. We were assured, however, that the expert the appellant's solicitor is minded to instruct has worked across a broad spectrum of forensic and clinical psychology settings, including in the family court, and has experience in areas that include trauma, domestic violence, substance misuse, personality disorders, family dynamics and attachment, treatment analysis and needs. She would be able to prepare a report in eight weeks.

52. On the basis of that information, if my Lords agree, I would be prepared to include in the order allowing the appeal provision for a psychological assessment and invite counsel to agree detailed directions for the instruction of that expert to be included in the order following this appeal.

53. Having concluded that the appeal should be allowed on grounds 2, 3 and 4, I do not consider it necessary to consider ground 1. That concerned the judge's treatment of the social worker's evidence. There is a risk that any comments by this Court about that evidence may unintentionally influence the conduct or outcome of the rehearing. Nothing said in this judgment should be read as indicating any view as to the right outcome of the proceedings.

LORD JUSTICE ARNOLD

54. I agree. In many ways the recorder's extempore judgment is an impressive one: it contains a careful and detailed review of the evidence and a clear analysis of the issues. As the recorder was plainly conscious, he had been placed in a difficult position by the previous decision of HHJ Bugeja which was based upon inaccurate information about the mother provided in the local authority's position statement. The recorder wrestled with the dilemma this presented. It is understandable that he reached the conclusion he did. With the benefit of the submissions from leading counsel for the mother, who did not appear below, and the greater opportunity for reflection afforded to this Court, however, it can be seen that he reached the wrong conclusion.

LORD JUSTICE SINGH

55. I agree with both judgments.