



Neutral Citation Number: [2021] EWCA Civ 71

Case No: B4/2020/1762

IN THE COURT OF APPEAL (CIVIL DIVISION).
ON APPEAL FROM THE FAMILY COURT AT NORWICH
HH Judge Richards
NR18C01086

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 January 2021

Before :

LORD JUSTICE FLOYD
LORD JUSTICE BAKER
and
LORD JUSTICE MALES

IN THE MATTER OF THE ADOPTION AND CHILDREN ACT 2002
AND IN THE MATTER OF T AND R (REFUSAL OF PLACEMENT ORDER)

Between :

A LOCAL AUTHORITY (1)
T AND R
(by their children's guardian) (2) and (3)
- and -
RS (1)
TL (2)

Appellants

Respondents

Andrew Bagchi QC and Fiona Baruah (instructed by **Local Authority Solicitor**) for the **First Appellant**
Nicholas Goodwin QC and Kitty Geddes (instructed by **Spire Solicitors LLP**) for the **Second Appellant**
Janet Bazley QC and Alison Moore (instructed by **Chamberlins and Norton Peskett**) for the **Respondents**

Hearing date : 9 December 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Thursday 28 January 2021.

LORD JUSTICE BAKER :

1. This case concerns appeals by the local authority and by the children's guardian against the decision of HH Judge Richards to refuse an application by the local authority for placement orders in respect of two children, T and R.
2. At the conclusion of the hearing of this appeal on 9 December 2020, we indicated that the appeal would be dismissed. This judgment sets out my reasons for agreeing to that course.

Background

3. The mother is now 40 years old, the father is 36. They are both from traveller backgrounds and, as the judge observed in his first judgment, they are clearly and proudly part of the traveller community. They met over the internet in 2011 and shortly afterwards started living together. Between 2013 and 2018, the couple had six children, the first four of whom are girls, now aged 7, 6, 5 and 4, followed by the two children with whom this court is concerned, a boy, T, now aged 3 and a girl, R, aged 2. This large sibling group is therefore notably close in age and it is a central feature of the parents' case that the close relationship between T and R and their older sisters is a strong argument against the proposal that they be placed for adoption.
4. The family became known to social services after an altercation with neighbours following which they lost their home and moved into temporary and unsatisfactory accommodation. There was particular concern about the welfare of one of the older girls, C, who was found to be underweight and developmentally delayed. In September 2018, shortly after R was born, the family was living in one room in a hotel. Later that month, C was examined in hospital where she was found to have sustained two metaphyseal fractures and was malnourished and neglected. On 5 October 2018, the local authority started care proceedings in respect of all six children. Interim care orders were made and the children placed in foster care in three separate placements, with T and R being placed together with carers with whom they continue to reside and with whom they have formed a close attachment.
5. Following a series of case management hearings, a fact-finding hearing took place before HH Judge Richards over 15 days in September 2019. In a lengthy reserved judgment delivered on 1 November 2019, the judge concluded that the parents had failed to give priority to C's needs and failed to maintain necessary and rigorous standards of hygiene for her. He found that her fractures had been sustained as a result of one or other parent pulling or lifting her by the arms with sufficient force to cause the fractures. He was unable to determine which of the parents was responsible but was satisfied that there was a real possibility that either of them was the perpetrator. In addition, the parents conceded, and the judge found, that there had been occasions during their relationship when the father had lost his temper and become aggressive and sometimes violent. The judge accepted their evidence, however, that they remained in a close relationship which was supportive and respectful, and a reflection of their culture, upbringing and background. He was not satisfied that it was generally characterised by verbal arguments or abuse.
6. Following the fact-finding judgment, the judge made orders under Part 25 of the Family Procedure Rules for expert assessments by an independent social worker and a

psychologist. The completion of those assessments was delayed following the onset of the Covid-19 pandemic and the final hearing did not take place until July 2020. At that hearing, the local authority sought care orders in respect of all six children on the basis of care plans providing for long-term foster placements for the four older girls and adoption for T and R, in respect of whom they applied for placement orders under section 21 of the Adoption and Children Act 2002. The parents argued for the return of the children to their care. They strongly opposed the proposal that the two younger children be placed for adoption. The children's guardian supported the local authority's plan for all six children although she described the issue of adoption for the younger children as a finely-balanced decision.

7. In a reserved judgment delivered on 28 August 2020, the judge approved the care plans for the four older children and made them subject to full care orders. With regard to T and R, however he declined to endorse the local authority's plans for adoption and dismissed the application for placement orders. He invited the local authority to reconsider its care plans for the younger children with a view to their remaining in long-term foster care. At a subsequent hearing on 21 September 2020, he refused applications by the local authority and guardian for permission to appeal against the dismissal of the placement order applications and directed that the children should remain in the interim care of the local authority pending any further application for permission to appeal to this Court.
8. On 22 September 2020, the local authority filed a notice of appeal against the refusal to grant placement orders. On 13 October 2020, the guardian filed a notice of appeal against the same decision. On 2 November 2020, permission to appeal was granted by Peter Jackson LJ on all grounds, and the appeal was listed for hearing on 9 December 2020 with a time estimate of one day.

The judgment

9. Judge Richards started his judgment at the conclusion of the welfare hearing by summarising the background, the position of the parties and the legal principles. He then set out in some detail the evidence given by the witnesses, starting with the psychologist, Dr Hunnisett. She had conducted a cognitive assessment of the father and the children. Another psychologist had completed an assessment of the mother. The psychologists concluded that the parents both had considerable cognitive difficulties which restricted their ability to meet the children's needs. Dr Hunnisett noted that the parents have a real and deep love of their children, want the best for them, and are unswerving in their belief that only they can provide what is best in terms of care, education and growing up with an understanding of their culture and heritage as members of a traveller family. She concluded, however, that they would be overwhelmed by the demands of caring for the children.
10. In her report, Dr Hunnisett had recommended that the children all remain in their current foster placements. In her oral evidence, however, she told the judge that she had been persuaded by the arguments put forward by the allocated social worker and guardian and now supported the plan for adoption for the two younger children. She told the judge that it was the children's age which persuaded her that this was the right outcome. Importantly, she added that sibling contact was very important for all six children and she saw no reason to exclude the parents from that contact, provided they accepted that the children would be placed away from the family home. The judge

summarised Dr Hunnisett's views about contact as follows in paragraph 55 -56 of his judgment:

“55. Dr Hunnisett also told me that it would be an ‘unreasonable loss for the children’ if the ultimate orders for placement did not, in her words, ‘make sure that the children maintain contact over the course of their minority’. Similarly, she told me that, if there was a placement order and the children were placed with adopters, those adopters would have to understand the importance of the family relationships and the children's culture. In fact she went so far as to say that if they could not do so then they would ‘not be the right carers for the children’. Dr Hunnisett said to me without hesitation this: ‘if you did not make sure of this then you would be risking damaging the whole psychological development of this whole sibling group. It is extremely important that contact is maintained.’

56. In respect of T and R, she told me that if they were to move they would have to form new attachments. She said the contact would be, as she put it, ‘were it not to happen, an unnecessary loss and potentially harmful to all of them to lose those sibling contacts and relationships.’ In her evidence Dr Hunnisett told me, as she put it, ‘central to any decision for the psychological development of the children is to ensure contact throughout their childhood: I think it is essential’....”

11. Next, the judge considered the evidence of the independent social worker instructed in the proceedings, Ms Sue Hayward. He recorded that she described the parents as identifying entirely with the traveller culture and that the older children had a strong sense of identity and loyalty to their parents. Although there was no doubt about the deep love and commitment of the parents to the children, it was Ms Hayward's clear view that the children did not feel safe in their care and that there was no prospect of the parents acquiring the insight and skills needed to look after the children safely within reasonable timescales, if at all. In her report, Ms Hayward had recommended that all six children should remain in foster care, including T and R who had formed an attachment to the current carers. In her oral evidence, she said that, if the children could not remain in their current placement, she would favour adoption.
12. The judge then summarised the evidence given by the local authority adoption social worker, RA, whom he described as very experienced and well-known to and respected by the court. He recorded that she was optimistic that an adoptive placement could be found for T and R that would allow for inter-sibling contact in circumstances where the siblings were having contact with their parents. It was her opinion that prospective adopters who did not accept such a course would be rejected as the wrong match for the children. She was open to the making of a contact order that would underline the importance of contact to all concerned.
13. Turning to the evidence of the social worker allocated to the family, TR, the judge cited what he described as the comprehensive analysis of the options for each child set out in her report, which included a balance sheet of the advantages and disadvantages of each. It was TR's view that the older children had different experiences from the younger ones. The judge noted that she highlighted the cultural aspects of the background of the older children, but he expressed surprise that she did not do so in respect of the younger children. She agreed with others that the sibling links should be preserved whilst acknowledging that this would ultimately be a matter for the adopters and not the local authority. The judge summarised her views in these terms:

“the need for permanence was the ultimate goal and it came above the need to maintain the children’s culture and heritage and with that, inevitably, the risk of contact never taking place were there to be an adoption.”

14. The children’s guardian shared the unanimous professional opinion that the children could not safely be returned to the care of the parents. With regard to T and R, she favoured adoption, although she told the judge that it was a “finely-balanced decision”. She regarded sibling contact and the maintenance of their cultural heritage as essential. She thought it likely that any adopters would require expert assistance to understand and promote traveller culture, describing it as an issue that would “not go away”. The judge summarised the reasoning for the guardian’s conclusion as follows (at paragraph 84 of his judgment):

“She did say to me ... that she had promoted all the ‘usual reasons’, as she described it, for adoption, and she did say to me ‘my support for adoption is the age of the children’, echoing what Dr. Hunnisett said. She told me that every case was individual and that in this case the issue of contact was an absolute necessity and if it could not be achieved then she said in principle adoption would be the wrong plan. That part of her evidence perhaps demonstrates how the guardian has tussled with what she described as ‘finely balanced’. However, [she] ultimately felt that the security offered by adoption came before all else and, although finely balanced, her opinion was that adoption would give the best prospect of a settled childhood for T and R to grow up together.”

15. The judge then summarised the evidence given by the parents. He noted the fundamental importance they attached to their culture, recording the mother’s description – “it cannot be taught but it is something that is lived each day” and the father’s observation that “there’s a difference between the ways of the world and travellers’ ways”. Both parents stressed that adoption was unknown amongst their community. They both remained firmly of the view that the children could all be safely returned to their care.
16. Having summarised the evidence, the judge then analysed the issues. He started by acknowledging the importance of the cultural heritage issues, and the pride and dignity which the parents had demonstrated throughout the hearing. He concluded that there was “no doubt that the children had truly lived the traveller culture and life with their parents”. He expanded on this point at paragraphs 100-1 of the judgment:

“100. ...[T]here is no doubt that the elder children have, as the guardian says, a real lived experience of this culture and that they understand it as their heritage. I can see how the guardian feels the younger two are less influenced by this culture given their ages on reception into foster care and their experiences since. However, it is wholly apparent from contact that this is not something that is strange or alien to T and R. In my view, they have a strong and real sense of belonging to this family They are a real and rooted part of the group is what the overall evidence demonstrates and they share all that it entails.

101 ... I am less confident that the children are not a homogeneous group despite the experience since the separation of the younger two. It is interesting how throughout the evidence culturally young T is treated by his sisters as ‘the boy of

the family’ and with all that it entails in this culture, perhaps more than in contemporary mainstream society for boys.”

17. The judge then set out the advantages and disadvantages of the three options for the children – return home, long-term foster care, and (for T and R) adoption. With regard to long-term foster care, he noted (at paragraphs 106-7) that, in addition to the advantages of a safe environment and ongoing family contact:

“an additional singular advantage is that it would keep alive, reinforce and foster the background from which these children come and which they understand”.

On the other hand, he observed (at paragraph 108) that:

“The disadvantages of such a type of placement are well known. The principal disadvantage is that it is of a different character to being returned home and, indeed, being adopted. Whilst it can properly be described as permanent, there is always a risk that it can change. That risk is in my view incalculable and uncertain ...”

18. Turning to the option of adoption for T and R, the judge summarised the advantages and disadvantages as follows (at paragraph 110-3):

“110. ... the advantages are well known and ‘usual’, as the guardian described them. Such a placement offers the prospect of selected carers committed to meeting the needs of the children and with a life-long commitment to security and emotional stability. It is a regime that gives a child an opportunity to establish an enduring relationship with primary caregivers and gives to a child that sense of permanence in what is described as a ‘forever family’. Additionally, these are young children who run those risks that I identified in respect of foster care for the entirety of their life of being a looked after child, and I acknowledge the ages of the children, and a placement selected to meet their needs and security, are powerful reasons to make an order to ensure that that is what is achieved.

111. The disadvantages, however, are now perhaps clearer to see at this stage of the case. Adoption would inevitably mean that contact could not be secured with anything like certainty. Contact for the children T and R with their older sisters would be curtailed in any event under the plan of the local authority to 3 or 4 times a year. Contact with their birth parents, though, would stop. The relationship would be severed in law and fact. The relationship, apart from the usual aspects of natural love and affection, comes with the only real hope that these children have of knowing or understanding their background, where they come from, and, through their culture and heritage, what I would describe as their place in the world.

112. Contact is considered essential between the siblings by all the professionals and the experts in this case. It is of genetic and cultural importance to them. It has been described as an absolute necessity and so important that prospective adopters who would not contemplate it should be disregarded and that the psychological wellbeing of the whole group would be damaged if not maintained. The disadvantage of adoption is that there is no effective mechanism for it to be maintained other than, in reality, by the agreement and good will of the adopters, upon whom everybody would have to rely in terms of keeping their word. The court

would be unlikely to foist an unwanted contact order upon adopters in respect of sibling contact, and certainly not in respect of parental contact.

113. The importance of that contact between the children was emphasised by all professionals. For the children, as I was reminded, it would be the longest relationships they have – and relationships as part of a family of six traveller children. In respect of the parents, the reality is that severing of the relationship would be complete because their views of adoption would not permit such a course”

19. The judge then set out his reasons for concluding that none of the children should be returned to the care of the parents and for his decision that the four older children should remain in long-term foster care. He then set out his conclusions about T and R in the following paragraphs:

“126. I have thought carefully about the making of a placement order given all the advantages that I have outlined that come with adoption. I have also considered the disadvantages and that welfare checklist in respect of adoption. Ceasing to be a member of their birth family by way of adoption severs all legal ties with their parents and their siblings and, with it, the risk of a damaging impact on the child’s sense of identity and emotional wellbeing.

127. The interference with family life could not be greater. The balancing of family life with an adoptive family is not as clear cut in this case because of the necessity for contact to continue and the inability to have any enduring assurance that it will. Adoption, even with sibling contact would be likely approving a plan to deprive the younger two of their heritage.

128. I have considered the value of the relationships the children have with their parents and siblings and its value in terms of an understanding of being part of a sibling group and, for T, the only boy of that group and its meaning in the travelling culture and its more traditional approach to gender roles. For these two children to retain their culture, it would be a difficult task for any adopter wishing to claim the children as their own in circumstances where the very culture the children would be exposed to in contact would be one in which adoption is anathema. I have, as I have said, also borne in mind the strength as well as the value of the relationships. Even R knows and understands that she is part of that bigger family of which T, with whom she lives, is also a part. It seems to me that there are strong relationships in this family and that they should be described in the same way as having significant value.

129. In those circumstances I have come to the view that in this case, and on these facts, the advantages of adoption are outweighed by the real disadvantages in the risk pertaining to contact that I described and the consequences of it. I am not satisfied that the strict test for severing the relationship between children and their parents and their siblings is satisfied, and I am not able to find any reassurance that a factual continuing of the sibling relationship can be assured to anywhere near the level of certainty that has been described to me and which in my judgment is needed to reflect its importance to these children genetically and culturally. Additionally, in my view, there is a real need to ensure that the culture and heritage of the two children is not lost by being placed away from it. It is of real value to them and it

is where they come from. The risks of that being diluted to nothing or being ignored are not fanciful in my view. They are real risks. That aspect of their development can only be maintained by contact with their parents, which in my judgment simply would not happen in an adoptive placement as opposed to a foster placement.

130. Additionally, in my view there is a residue of concern in my mind that the approach to the placement of the children by way of adoption has been driven by a combination of their age and that they are adoptable. For my part, it has overlooked – to some considerable degree – the loss which I have identified and which would come with such a course and an acceptance of the powerful ‘usual practice’ without a true counterbalance of what are also powerful factors in this case against the making of a placement order leading to adoption. It is not right in my judgement for these two young children. There is no such thing as the ‘normal order’ because of age and apparent ‘adoptability’.

131. In those circumstances, and for those reasons, I am not prepared to approve the current plan for T and R. Accordingly, I refuse to make placement orders in respect of T and R in this case.

132. In coming to that decision, I am conscious that I am departing from the recommendation of their experienced children’s guardian, for whom the court has considerable respect. I make it clear that I do so in circumstances where I find that the decision is not as finely balanced as the guardian felt it was. I have had the considerable advantage of being able to hear detailed evidence and cross-examination about the powerful arguments on each side and particularly in respect of a placement order. For my part, with those advantages, having heard from Dr Hunnisett and the independent social worker about the crucial value of contact, which was recognised by the guardian and emphasised by her, that, coupled with my assessment of the importance of retaining links for the younger children with their culture and heritage which I am persuaded to give more weight to than the guardian, leads me to a different conclusion. It is less finely balanced for me because of the unique privilege I had of hearing the evidence given and tested.

134. I accept that it can be said that there is no right answer, but in my view, when measured against the yardstick of proportionality, which is what the welfare checklist requires, and reminding myself of the strict test that nothing else will do, in my judgment it makes that decision less finely balanced for me; one where plainly adoption is not in the children’s best interests as a placement of last resort. It is not necessary in this case. For those reasons, I depart from the recommendations of the guardian.”

A preliminary issue

20. Before turning to consider the arguments on the appeal, I must deal with a preliminary issue raised by Ms Bazley QC and Ms Moore on behalf of the parents. Five days before the hearing of the appeal, the parents filed an application for an order that the four older children be joined as parties to the appeal and that the hearing be adjourned with a longer time estimate of three days. It was argued that the four elder sisters had a significant interest in the outcome of the appeal. Their interests were different to those of the parents and not capable of being represented by the children’s guardian, who was bringing her own appeal on behalf of only T and R. Her arguments were obviously in

direct conflict with the interests of the four older children (whom she represented below) in maintaining their relationships with their younger full siblings. It was submitted that the four older children's rights were therefore engaged in the appeal and that they were entitled to have their interests represented by a separate guardian appointed by the court. In support of this submission, Ms Bazley and Ms Moore cited the UN Convention on the Rights of the Child, in particular articles 9 and 12, the decisions of this Court in *Mabon v Mabon* [2005] EWCA Civ 634 and *Re T (Children)* [2014] EWCA Civ 1369, in particular the observations of Russell J at paragraphs 57 and 64, the decision of the ECtHR in *Jucius and Juciuviene v Lithuania* (Application No 14414/03) [2009] 1 FLR 403 (cited in *Re T*) and the recent decision of the Supreme Court in *ABC (Appellant) v Principal Reporter and another (Respondents) (Scotland); In the Matter of XY (Appellant) (Scotland)* [2020] UKSC 26 in relation to children's hearings in Scotland.

21. Under rule 14.3 of the Family Procedure Rules 2010, the respondents to an application for a placement order include "the parties or any persons who are or have been parties to proceedings for a care order in respect of a child where those proceedings have led to the application for the placement order". Accordingly, the four older children were parties to the application for placement orders in respect of T and R and were automatic respondents to this appeal. In an amended skeleton argument filed in response to Ms Bazley and Ms Moore's document, Mr Goodwin QC and Ms Geddes on behalf of the guardian accepted that, where an older child who is subject to public law proceedings has capacity to instruct a solicitor and has views that diverge from those of the children's guardian, that child will be separately represented from his or her siblings who will continue to be represented by the guardian. Mr Goodwin and Ms Geddes pointed out that it is not uncommon to find a sibling group in which all lack capacity yet where different permanency outcomes are warranted and there are different views amongst the siblings, and between them and the guardian, as to the outcomes for each of them. They submitted that it would be unnecessary, costly and disproportionate to have multiple guardians appointed in such circumstances and that the potential conflict arising on this appeal no more justified separate representation than it would at first instance.
22. It is unfortunate that this issue was not identified at an earlier stage. That would have allowed consideration to be given to the appointment of a separate guardian for the four older siblings and the filing of written submissions on their behalf. It does not follow, however, that the four older siblings would have been represented at the hearing of the appeal. This Court is careful to guard against the proliferation of representatives at an appeal hearing. It is generally speaking unnecessary and disproportionate for several representatives to deliver oral submissions putting forward the same arguments. In this case, I cannot envisage any argument which could have been advanced on behalf of the four older sisters which has not been put forward on behalf of the parents. In the event, this issue was only raised a few days before the appeal hearing by counsel newly instructed to represent the parents for the purposes of the appeal. In those circumstances, an adjournment of the appeal to allow the older siblings an opportunity to make representations would have been disproportionate and manifestly contrary to the interests of T and R who urgently needed the appeal to be determined as soon as possible.

23. For these reasons, we refused the applications for separate representation and an adjournment. This decision was reached in the particular circumstances that arose on this appeal. If the issue arises again in another appeal, it should be identified at the point where the appeal notice is filed or as soon as possible thereafter so that a decision as to representation can be taken by the Lord or Lady Justice when granting permission to appeal.

The submissions to this Court

24. On behalf of the local authority, Mr Bagchi QC (who did not appear below) and Ms Baruah cited the observations as to the key differences between adoption and long-term fostering by Black LJ (as she then was) in *Re V* [2013] EWCA Civ 913 at paragraphs 95-6 and the advantages of adoption over long-term fostering identified by Pauffley J in *Re LRP (Care Proceedings: Placement Order)* [2013] EWHC 3974 (Fam). They submitted that, whilst the judge had referred briefly to the case law, his analysis of the rival elements did not give sufficient weight to the fundamental aspects of the benefits of adoption as identified in those judgments. In particular in this case, he had failed to give sufficient weight to the fact that the children could not be returned to their parents, to their very young ages and to the fact that they had had a difficult and disrupted childhood. It was the local authority's case before the judge that T and R could not remain with their current carers with whom they had formed a close and secure attachment and would therefore have to move. There was clear evidence that an appropriate adoptive placement could be found which would accommodate sibling contact which would enable them to grow up with a relationship with their older sisters and to develop their sense of identity and maintain links to their cultural background. There remained a significant risk of placement disruption if they were to have contact with their parents who were unlikely to support any placement away from the family.
25. Mr Bagchi and Ms Baruah noted that the judge had given enhanced weight to the importance for the children to maintain cultural and family links, but had failed to attach sufficient weight to RA's evidence that she was optimistic that an adoptive placement could be found for T and R that would allow for inter-sibling contact in circumstances where the siblings were having contact with their parents. In any event, it was wrong in the circumstances for the court to elevate the need for ongoing direct contact above the need for the children to have a secure, stable and enduring placement. Furthermore, the judge failed to analyse why it was justified to give primacy to their need for cultural awareness when the work proposed in the care plans would be likely to foster their sense of identity as children with a traveller background. In addition, the judge failed to conduct an analysis of the risks presented to the children's emotional welfare throughout their lives if they were to suffer breakdowns of foster placements. Mr Bagchi contended that there was a sense in which the judge's sympathy for the parents improperly affected his judgment as to what was in the children's best interests.
26. On behalf of the guardian as second appellant, Mr Goodwin (who did not appear at first instance) and Ms Geddes adopted the arguments advanced on behalf of the local authority, but in addition submitted that the judge had failed to have regard to the totality of the arguments put forward by the guardian in favour of adoption. He had focused on the argument that the ages of T and R supported adoption and failed to attach any or any sufficient weight to other factors identified by the guardian as supporting that option, in particular factors identified by Dr Hunnisett, including their psychological profile, the fact that they did not have significant attachment issues, and

their resilience. All of these factors would assist T and R in forging a strong relationship with prospective adopters. In contrast each of their older sisters had more complex psychological profiles and greater therapeutic needs.

27. Mr Goodwin and Ms Geddes also argued that, in concluding that post-adoption contact could not be guaranteed with any degree of certainty, the judge had overlooked the court's statutory powers under s.26 of the 2002 Act to make an order for contact at the same time as making a placement order and under s.51A to make an order for contact at the same time as making an adoption order. Although this Court in *Re B (A Child (Post Adoption Contact))* [2019] EWCA Civ 29 had confirmed that the imposition of a s.51A order where the adopters are not in agreement remains extremely unusual, each case must be considered on its own facts, and in circumstances where there is professional unanimity as to the imperative need for ongoing sibling contact, and where any prospective adopters would be required to agree to contact as a pre-condition to placement, the court should consider the facts to be sufficiently unusual to justify the imposition of a contact order against the wishes of the adopters. It was submitted that the judge did not properly consider this option. Furthermore, in elevating the risk that post-adoption contact might not occur, the judge had underestimated the risk that a long-term foster placement might not be permanent.
28. In reply, Ms Bazley and Ms Moore (neither of whom appeared before the judge) submitted that it is clear from the judgment that the judge was well aware of the professional and expert opinions as to the advantages of permanence provided by adoption. He had firmly in mind the disadvantages that long term fostering would bring in terms of the continued involvement of the state in the children's lives. He nevertheless concluded, after a thorough welfare analysis, that in this case it could not be said that only adoption would secure the children's welfare. All the professional witnesses were agreed as to the importance of ongoing sibling contact. In the light of the magnetic importance of the children retaining direct links with their family and their culture, he was right to consider carefully whether he could be satisfied that those links would be maintained after adoption. Ms Bazley and Ms Moore described the evidence on that point as, at best, equivocal. The judge also took into account the unchallenged evidence from the parents that adoption is anathema to their culture so that the children would in effect lose their heritage should they be adopted.
29. Ms Bazley and Ms Moore also drew attention to what might be described as a degree of uncertainty about the position of the current carers. The judge proceeded on the basis that the children could not remain in that placement so that a move of some sort was unavoidable. Yet it seems clear that the current carers would have been willing to continue looking after the children. The objection to their doing so seems to have come from the local authority who concluded that, although the placement of T and R in their care had been very successful and the children were strongly attached to them, the carers were only approved for short-term placements and an earlier long-term placement of another child in their care had broken down. It was therefore submitted on behalf of the parents that it could not be said that the children could not remain with their current carers in the long term, albeit there was, as always, a risk of that placement breaking down.
30. Ms Bazley and Ms Moore unsurprisingly cited the decision of the Supreme Court in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33 and in particular the analysis of

proportionality in care proceedings where the plan was adoption. In the well-known words of Baroness Hale of Richmond at paragraph 198:

“it is quite clear that the test for severing the relationship between parent and child 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.”

It was submitted on behalf of the parents that this was a case in which it could not be said that nothing but adoption would suffice to meet the children's needs. Ms Bazley and Ms Moore also cited comments by the Justices in the Supreme Court in *Re B* which emphasised the caution to be applied by an appellate court when considering an appeal against a decision about the future of a child, in particular the observation of Lord Wilson at paragraph 42:

“The function of the family judge in a child case transcends the need to decide issues of fact; and so his (or her) advantage over the appellate court transcends the conventional advantage of the fact-finder who has seen and heard the witnesses of fact.”

Discussion and conclusion

31. The judge was presented with a consensus amongst all the professional witnesses that the best option for T and R was that they should be placed for adoption. Although Dr Hunnisett and Ms Hayward had initially recommended a different outcome, by the conclusion of their evidence each had come round to accepting the local authority's position. The guardian's view was that the decision was finely balanced, but ultimately, she too supported that recommendation.
32. The judge, however, reached a different conclusion. It was his view that this was not a case where adoption was the only option that would meet the children's needs. He concluded that adoption was not the best option and that in all the circumstances of this particular case it was long-term fostering that would meet the overall welfare needs of these young children. In my view, he was entitled to reach that conclusion and his exposition of his reasons was clear and convincing.
33. Like Mr Bagchi, I detected in the judgment a sense of the judge's sympathy with the parents' position. Unlike Mr Bagchi, however, I do not consider that his sympathy for the parents improperly affected his judgment as to what was in the children's best interests. Any judge hearing care proceedings in which the care plan is for permanent separation of children from their birth family will inevitably be sympathetic to the plight of the parents facing the loss of their children. It is essential, however, that a judge in those circumstances maintains focus on the children's welfare as the paramount consideration. In this case, I am quite satisfied that Judge Richards maintained that focus at all times when reaching his decision.
34. As the citations from his judgment set out above demonstrate, the judge carefully identified the options and the advantages and disadvantages of each. It is correct that he could have set out the advantages of adoption in more detail. As noted above, he was aware that the guardian did not base her conclusion solely on the children's ages but had regard to other factors, described as “the usual reasons”. Whilst it might have been better if these had been spelt out rather more fully in the judgment, I see no reason to

doubt that the judge had the factors in mind when he reached his decision. When carrying out his final analysis at paragraph 110, he set out the advantages of adoption in more detail. I do not see any material omission from the factors identified in *Re V* and *Re LRP*. Similarly, it is clear from his summary of the evidence and from his analysis at paragraph 108 that he identified and took into account the disadvantages of long-term fostering. I do not accept the guardian's argument that the judge had underestimated the risk that a long-term foster placement might not be permanent. As noted above, at paragraph 108 of his judgment, he expressly said of long-term fostering:

“Whilst it can properly be described as permanent, there is always a risk that it can change. That risk is in my view incalculable and uncertain.”

Neither Mr Bagchi nor Mr Goodwin persuaded me that this is a case where the judge's reasoning was deficient because he overlooked a significant factor to be taken into account.

35. This is a case where the continuation of contact is a factor of particular importance. The advice of the psychologist, Dr Hunnisett, was that contact between the siblings throughout their childhood was central to the psychological development of the children. If the court did not make sure that contact between the six children continued it would risk damaging the psychological development of the whole sibling group. The adoption social worker, RA, was optimistic about the prospects of finding adopters who would be willing to accept ongoing sibling contact. Neither she nor anyone else could guarantee, however, that such adopters could be found nor that they would adhere to any commitment to contact.
36. I accept that the judge did not consider in detail the statutory provisions governing contact in sections 26 and 51A. He confined himself to the observation in paragraph 112 already cited:
- “The disadvantage of adoption is that there is no effective mechanism for it to be maintained other than, in reality, by the agreement and good will of the adopters, upon whom everybody would have to rely in terms of keeping their word. The court would be unlikely to foist an unwanted contact order upon adopters in respect of sibling contact, and certainly not in respect of parental contact.”
37. In this respect, it seems to me that he was accurately reflecting the approach advocated by this Court repeatedly, notably in *Re R (Adoption: Contact)* [2005] EWCA Civ 1128, *Oxfordshire County Council v X, Y and J* [2010] EWCA Civ 581 and *Re T (Adoption: Contact)* [2010] EWCA Civ 1527. Any suggestion that the insertion of the new s.51A into the 2002 Act by the Children and Families Act 2014, creating a specific statutory power to make orders for post-adoption contact, heralded a different approach was put to rest by the decision of this Court in *Re B (A Child (Post Adoption Contact))* [2019] EWCA Civ 29. In that case, Sir Andrew McFarlane P, with whom King LJ and Coulson LJ agreed, having considered the case law and the new provision in some detail, concluded:

“52. The starting point for any consideration of this issue must be the settled position in law [sc. which] had been reached by the decision in *Re R*, which was confirmed by this court in the *Oxfordshire* case and in *Re T*

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

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

At paragraph 59, the President added:

“The law remains, as I have stated it, namely that it will only be in an extremely unusual case that a court will make an order stipulating contact arrangement to which the adopters do not agree.”

38. In the light of those observations, I consider that the judge’s conclusion as to the difficulty in guaranteeing that post-adoption contact would take place was one he was entitled to reach in the circumstances of this case. There was plainly a risk that sibling contact would not take place after adoption. Given the fundamental importance attached to such contact by Dr. Hunnisett and the other professional witnesses, the judge was entitled to conclude in the interests of T and R that the risk was one which should not be taken.

39. In addition, the judge attached importance to continuing contact between T and R and their parents. One of his reasons for doing so was his conclusion that contact represented the best prospect of maintaining and nurturing the children’s understanding of their cultural history and of their place in the world. His findings that T and R had a strong and real sense of belonging to this family and as to the central importance of their cultural heritage to all of the children, including the younger two, were plainly open to him on the evidence. He reached the view that it would be difficult for the children to retain sufficient awareness of their heritage in an adoptive placement, in part (but not only) because of the strong opposition to adoption within the traveller community. His conclusion that:

“that aspect of their development can only be maintained by contact with their parents, which in my judgment simply would not happen in an adoptive placement as opposed to a foster placement”

was arrived at after a thorough analysis of the evidence.

40. In proceedings under Part 4 of the Children Act 1989 and under the Adoption and Children Act 2002, it is the judge alone who has the responsibility of making the decision as to the future of the child. In this case, Judge Richards reached a decision which departed from the recommendation of the professional witnesses. He concluded that this was not a case in which adoption represented the only realistic option for the children. He decided that in the circumstances of this case long-term fostering was the outcome which best met the children’s particular needs. He provided clear and coherent reasons for his decision, including, as case law requires, his reasons for departing from

the recommendation of the guardian. It is not a decision with which this court should interfere. For those reasons, I concluded that this appeal should be dismissed

41. In reaching his conclusion, the judge proceeded on the assumption that T and R would be unable to stay with their current carers and would therefore be required to move to a different long-term foster placement. For my part, however, I think there is force in the point made by Ms Bazley and Ms Moore that it may be possible for the children to remain in their present placement. Their carers seem to be willing to continue to look after them and it was the view of several professional witnesses that the placement represented the best option. The local authority put forward reasons why this course was not possible. It is not for this court, of course, to direct the local authority how to proceed with identifying long-term carers but it seems to me that this option would be worth looking at again.
42. After we announced our decision at the conclusion of the appeal hearing, Ms Bazley invited the court to give an indication whether the four older children should be represented at the next hearing of the care proceedings regarding T and R. The question whether they should be represented will depend on the circumstances as they exist at that stage, in particular the local authority's amended care plans. Accordingly, I consider that this is a matter to be decided by the family court judge without any comment from this Court.

LORD JUSTICE MALES :

43. I agree.

LORD JUSTICE FLOYD :

44. I also agree.