Neutral Citation Number: [2023] EWCA Civ 334

Case No: CA-2022-002437

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT EAST LONDON
Recorder Main Thompson
ZE21C00022, XE21C00197, ZE/83/22

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 March 2023

Before :

LADY JUSTICE MACUR
LORD JUSTICE COULSON
and
LORD JUSTICE BAKER

- -

C, D AND E (CARE PROCEEDINGS: ADEQUACY OF REASONS)

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Kemi Ojutiku (instructed by **Connaughts**) for the **Appellant**
Tim Parker KC (instructed by **Local Authority Solicitor**) for the **First Respondent**
Tabitha Barran (instructed by **Campbell Chambers**) for the **Third to Fifth Respondents, by their Children's Guardian**

Hearing date : 16 March 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 10:30 on 30 March 2023.

LORD JUSTICE BAKER :

1. This is an appeal against care orders made in respect of three children, hereafter called C, D and E, and a placement order in respect of E, made at the conclusion of care proceedings.

2. At the end of the appeal hearing, we informed the parties that we would allow the appeal and set aside the orders and remit the matter for a rehearing of the welfare aspect of the proceedings by a different judge. This judgment sets out my reasons for agreeing with that outcome.

3. The relevant background can be summarised briefly. The proceedings originally concerned five children – four boys, A (now aged 15), B (aged 12), C (aged 9), D (now aged 6), and a girl, E, (rising 3). The third respondent is the father of all five children. The second respondent is the mother of the two older children. The appellant is the mother of the three younger children. She and the father started a relationship in 2013 following the breakdown of his relationship with the second respondent.

4. A and B were the subject of earlier care proceedings which concluded in 2015 with the making of a child arrangements order that the children should live with the father and a twelve-month supervision order in favour of the local authority.

5. The present proceedings were started in January 2021 after A and B made allegations that they and their half-brothers C and D had been physically abused by the appellant and that the father had failed to protect them. The four children were removed from the family home and placed in foster care under interim care orders. In May 2021, the mother gave birth to E who was also made the subject of care proceedings and placed under an interim care order. After discharge from hospital, the appellant and E were immediately accommodated in a mother and baby residential assessment centre where they remained throughout the proceedings.

6. A fact-finding hearing started in October 2021 before Recorder Main Thompson but was adjourned because of the ill-health of one of the advocates and not completed until April 2022. On 21 April the recorder delivered a judgment in which he made a number of findings against the parents, including that the appellant had physically abused the four older children by punching, kicking, slapping and hitting them with a variety of implements, bathing them in cold water, and in respect of A forcing him to stay in his room without food. The recorder found that the father was aware of the mother's abuse of the children but did nothing to stop it. The proceedings were then adjourned for further assessments and listed for a seven-day final welfare hearing in November 2022, almost two years after the start of the proceedings.

7. At the final hearing, the local authority contended that the four older children should be made the subject of full care orders, with A accommodated in a residential unit and B, C and D in long-term foster care. In respect of E, the local authority proposed that she be adopted, and they filed an application for a placement order authorising her placement for adoption. The plans in respect of A and B were not opposed, and the welfare hearing therefore focused on the future of the three younger children. The father and the appellant proposed that C and D should be returned to their care, or alternatively, placed with a paternal aunt under a special guardianship order. With regard to E, they opposed the local authority's plan for adoption and contended that,

upon leaving the residential unit, E should remain in their care under a supervision order. The children's guardian supported the local authority's plans for all three children.

8. The final hearing extended over six days during which the judge heard oral evidence from nine witnesses, including an independent social worker who had carried out an assessment of various members of the family, the appellant, the father and the guardian, and received written and oral submissions from all parties. Judgment was reserved and handed down on 23 November 2023.

9. The judgment runs to 177 paragraphs. The opening paragraphs introduce the factual and procedural background. At paragraph 10, the recorder found the threshold criteria for making care orders under s.31 of the Children Act 1989 to be made out in respect of all five children on the basis of his earlier findings. At paragraph 14, he directed himself that the welfare of the children was his paramount consideration and quoted the welfare checklist set out in s.1 of the 1989 Act. He then summarised the agreement that had been reached with regard to the two older children and the issues that remained in dispute about C, D and E. Unsurprisingly, it was E's future that was the main focus of the hearing. The recorder summarised the issues about her future at an early stage in his judgment in these terms:

> "28. The case of E has occasioned the most intense deliberation. Her 19 months of life have been spent with her mother … in a mother and baby residential unit where, under the surveillance of the unit, her basic needs have been met by her mother and where she has regular contact with her father and with her siblings, C and D.
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> 29. In the words of the guardian:
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> > "E has been cared for well by her mother in the safe and contained environment of the residential unit. E does have a warm and particularly strong relationship with her mother".
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> 30. The local authority's care plan for E is adoption and their application is for a placement order. All the assessments of the father and the mother are negative, as ultimately is the assessment of the children's paternal aunt as a carer for any child. The guardian, recognising adoption as the last resort and having conducted a thorough analysis, considers adoption to be the only option which will meet E's needs and supports the application for a placement order, endorsing the care plan."

10. At paragraphs 31 to 34, the recorder directed himself on the relevant statutory provisions for the making of a placement order, including the welfare checklist set out in s.1 of the Adoption and Children Act 2002. At paragraph 35, he expressed his thanks to counsel for the guardian and local authority for setting out the case law in their closing submissions. He continued:

> "In order not to over-burden those listening to this judgment, I do not propose to set out orally as I have just done in respect of

> the statutory provisions the case law to which my attention in directed. However, if there is to be a transcript of this judgment, which I suspect is likely, I invite the transcriber to include by way of addendum to this judgment the case law as set out in, I was going to say either of those two documents, but it is helpfully set out, for example, at paragraph six and follows of Ms Barran's position statement, and it may very well be that that is adequate in terms of a recitation of case law for the purposes of this judgment. It is, I should say for the sake of completeness, also set out in paragraph 13, A to E, of Ms Youngs' very helpful submissions."

11. In the event, the transcript of the judgment was prepared in some haste for this appeal, and did not include any addendum setting out the relevant case law. But the appeal bundle included copies of counsel's closing submissions from which this Court has been able to read the summaries of the law on which the recorder relied.

12. From paragraphs 48 to 172, the recorder recited passages from the written and oral evidence, in the order in which each witness had been called. He included passages from the appellant's evidence, including her answers to questions directed at establishing whether she accepted the judge's earlier findings. He also quoted the concluding paragraphs of the guardian's report in which she explained the reasons for her recommendations. For the most part, as he was going through the evidence, the recorder did not make any observations about it although in passing he commented that the appellant's evidence about the findings and her position was "expressed in what might be described as a somewhat equivocal way".

13. Having completed his review of the evidence, the recorder concluded his judgment in four paragraphs:

> "174. The evidence is overwhelming in my judgment that the welfare of B, C and D requires the making of care orders, endorsing the local authority plans for them, endorsed by the Guardian. I am satisfied that those children will continue to thrive in their environments and the course sought by [the father and the appellant] is absolutely fraught with risk, which no Court could safely countenance.
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> 175. In relation to E, the risks are the same. It is extremely sad, given that everybody acknowledges that in the contained environment of the unit, [the appellant] has provided not merely adequate, but good basic care for this little girl. However, the evidence of the parents in relation to the findings and in relation to the concerns and in relation to the past injury, physical and emotional, which the elder children sustained, is confusing, inconsistent and wholly unsatisfactory. The professionals who have investigated and assessed the options for E, have done so, it is clear to me, sympathetically but also with a degree of exasperation at the intransigence and obstacles [the appellant and the father] present to the option of E remaining in the care of [the appellant] with [the father]. I

> accept the analyses of the professionals of the viable options. In my judgment they are entirely correct that the care of E cannot be entrusted to the mother, with or without the father. The risks simply cannot be countenanced, given [the appellant's and the father's] implacable denial of perpetrating and failing to protect against past abuse of then elder children. The professionals have explored other options conscientiously and anxiously, as have I. I share what I perceive to be the exasperation of the professionals. It is in my judgment entirely correct that there is only one option for this little girl, and that is for me to make the placement order sought by the Local Authority. Nothing else will do.
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> 176. In those circumstances, I must dispense with the parents' consent. It is necessary for this little girl to be placed for adoption. The parents do not consent to that course. I fully understand how very difficult it is for parents to consent to such a course in nearly all circumstances – and this this case in which E has been in her mother's care throughout and so will be heart-breaking. But, as was expressed in evidence, this is not about being kind to … the mother, it is about the welfare of this child, which is my paramount consideration and in those circumstances and on that basis, it is necessary for me to dispense with the consent of both [the appellant and the father].
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> 177. It follows that I accept the submissions of Ms Barran on behalf of the Guardian and Ms Youngs on behalf of the Local Authority, and I am very grateful for the assistance which I have received from [the parents' counsel]. I commend the advocates for their erudite submissions. Mr Ikeh and Mr Roy have eloquently advanced everything which could be said on their clients' [behalf] but, in the circumstances, I am driven to prefer and do prefer the submissions made on behalf of the Local Authority and the Guardian. Thank you very much."

14. Following the judgment, as noted above, care orders were made in respect of all three children and a placement order in respect of E. Shortly afterwards, E was removed from the care of her mother, the appellant, with whom she had lived throughout her life, and placed in foster care where she remains.

15. On 16 December 2022, the mother filed a notice of appeal against the care and placement orders. The grounds of appeal (as subsequently amended) read:

    (1) The learned recorder failed to properly evaluate and analyse the risk of harm and future harm to E and the proportionality of mitigating such a risk.

    (2) No or no proper analysis was undertaken pursuant to *Re B-S (Children)* [2013] EWCA Civ 1146.

    (3) There was no evaluation of the welfare checklist in respect of each child.

16. On 9 February 2023, King LJ granted permission to appeal on grounds (1) and (2) in respect of E only and on ground (3) in respect of C, D and E.

17. The approach which must be adopted by a court considering a care plan for adoption is now clear and well-understood. In view of what happened in this case, however, it can do no harm to set it out again.

18. Under Article 8 of ECHR, 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. For that reason, the European Court has ruled 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": *YC v United Kingdom* (2012) 55 EHRR 967, paragraph 134. In turn, the Supreme Court addressed the question of the proportionality of an adoption order in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33 [2013] 2 FLR 1075, where Lord Neuberger (at paragraph 104) endorsed

> "the principle that adoption of the child against her parents' wishes should only be contemplated as a last resort – when all else fails"

and Baroness Hale of Richmond (at paragraph 198) 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 <u>overriding requirements</u> pertaining to the child's welfare, in short where nothing else will do."

19. Following the decision of the Supreme Court in *Re B*, the Court of Appeal addressed the practical consequences of this approach to proportionality in a series of cases, of which *Re P (A Child)* [2013] EWCA Civ 963, *Re G (A Child)* [2013] EWCA Civ 965 and *Re B-S* [2013] EWCA Civ 1146 were the most prominent. In *Re G*, McFarlane LJ observed:

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

…

> 54. In mounting this critique of the linear model, I am alive to the fact that, of course, a judgment is, by its very nature, a linear structure; in common with every other linear structure, it has a beginning, a middle and an end. My focus is not upon the structure of a judge's judgment but upon that part of the judgment, indeed that part of the judicial analysis before the written or spoken judgment is in fact compiled, where the choice between options actually takes place. 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."

20. In *Re B-S*, Sir James Munby P giving the judgment of the Court emphasised two "essentials".

> "34. First, there must be proper evidence both from the local authority and from the guardian. The evidence must address *all* the options which are realistically possible and must contain an analysis of the arguments *for* and *against* each option….
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> 41. The second thing that is essential, and again we emphasise that word, is an adequately reasoned judgment by the judge ….The judge must grapple with the factors at play in the particular case and, to use Black LJ's phrase (paragraph 126 [of *Re P*]), give 'proper focussed attention to the specifics'".

21. In *Re H-W (Children)* [2022] UKSC 17, the Supreme Court endorsed the approach outlined in paragraphs 50 and 54 of *Re G*. At paragraph 47, Dame Siobhan Keegan said:

> "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."

22. Most recently, the correct approach has been reiterated by this Court in *Re D (A Child: Placement Order)* [2022] EWCA Civ 896, Peter Jackson LJ

> "The recent decision of the Supreme Court in *H-W (Children)* [2022] UKSC 17 underlines that a decision leading to adoption, or to an order with similarly profound effects, requires the rigorous evaluation and comparison of all the realistic possibilities for a child's future in the light of the court's factual findings. Adoption can only be approved where it is in the child's lifelong best interests and where the severe interference with the right to respect for family life is necessary and proportionate. The court must therefore evaluate the family placement and assess the nature and likelihood of the harm that

> the child would be likely to suffer in it, the consequences of the harm arising, and the possibilities for reducing the risk of harm or for mitigating its effects. It must then compare the advantages and disadvantages for the child of that placement with the advantages and disadvantages of adoption and of any other realistic placement outcomes short of adoption. The comparison will inevitably include a consideration of any harm that the child would suffer in the family placement and any harm arising from separation from parents, siblings and other relations. It is only through this process of evaluation and comparison that the court can validly conclude that adoption is the only outcome that can provide for the child's lifelong welfare – in other words, that it is necessary and proportionate."

23. These obligations require a disciplined approach to judgment-writing. In *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ 407 at paragraphs 59 - 60, Peter Jackson LJ suggested the following approach:

> "59. Judgments reflect the thinking of the individual judge and there is no room for dogma, but in my view a good judgment will in its own way, at some point and as concisely as possible:
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> (1) state the background facts
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> (2) identify the issue(s) that must be decided
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> (3) articulate the legal test(s) that must be applied
>
> (4) note the key features of the written and oral evidence, bearing in mind that a judgment is not a summing-up in which every possibly relevant piece of evidence must be mentioned
>
> (5) record each party's core case on the issues
>
> (6) make findings of fact about any disputed matters that are significant for the decision
>
> (7) evaluate the evidence as a whole, making clear why more or less weight is to be given to key features relied on by the parties
>
> (8) give the court's decision, explaining why one outcome has been selected in preference to other possible outcomes.
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> 60. The last two processes – evaluation and explanation – are the critical elements of any judgment. As the culmination of a process of reasoning, they tend to come at the end, but they are the engine that drives the decision, and as such they need

> the most attention. A judgment that is weighed down with superfluous citation of authority or lengthy recitation of inessential evidence at the expense of this essential reasoning may well be flawed."

24. In suggesting this approach, Peter Jackson LJ was plainly not being overly prescriptive. Judges adopt different approaches to writing judgments. Some leave all their analysis to the end, whereas others include parts of it at various points in the judgment. There is no hard and fast rule about this. Peter Jackson LJ acknowledged as much in *Re S (A Child: Adequacy of Reasons)* [2019] EWCA Civ 1845 at paragraph 34):

> "I would also accept that a judgment must be read as a whole and a judge's explicit reasoning can be fortified by material to be found elsewhere in a judgment. It is permissible to fill in pieces of the jigsaw when it is clear what they are and where the judge would have put them. It is another thing for this court to have to do the entire puzzle itself."

25. It will be immediately apparent that the recorder's judgment in this case fell far short of the standard required. The reasoning in paragraphs 174 to 176 was peremptory and so far as I can see there is no material earlier in the judgment to fortify what is said in those paragraphs. There was no rigorous evaluation of the possibilities for the children's future, no adequate assessment of the risk of harm or the possibilities for reducing the risk or mitigating its effects, no comparison of the harm that the child would be at risk of suffering in the family placement against the risk of harm from the separation from parents and siblings, and consequently no valid conclusion that adoption was the only outcome that could provide for E's lifelong welfare. At no point did the judge analyse the options for any of the three children by reference to the statutory welfare checklists which he had correctly cited at the outset.

26. The deficiencies are most glaring in the case of E. At paragraph 28 of the judgment, the recorder stated that her case had occasioned "the most intense deliberation". There is no evidence of such deliberation in the judgment. In very simplistic terms, the issue was as follows. On the one hand, E had spent the entire 19 months of her life to that point in the residential unit in the care of her mother with whom she had developed a close attachment. There had been no criticism of the care provided to her by the appellant during that period. On the other hand, the consensus of professional opinion – the independent social worker who had carried out an assessment, the allocated social worker, and the children's guardian – was that, if E remained in the appellant's care, the risk of harm remained unacceptably high. These factors should have been at the centre of the balancing exercise required by case law. There is nothing in the judgment to indicate that such an exercise was undertaken in this case.

27. As well as demonstrating that the court's decision was necessary and proportionate, the court's judgment will serve other purposes. In *Re N-S* [2017] EWCA Civ 1121, McFarlane LJ observed at paragraph 30:

> "Not only is the presentation of adequate reasoning of immediate importance to the adult parties in the proceedings (in particular the party who has failed to persuade the judge to

> follow an alternative course), it is also likely to be important for those judges and other professionals who may have to rely upon and implement the decision in due course and it may be a source of valuable information and insight for the child and his or her carers in the years ahead."

28. It is important to note one specific way in which the judge's reasons for making a placement order will be important in subsequent proceedings. Where the outcome is a placement order, the judgment will have a specific value in the event of a subsequent application (before placement) for leave to discharge the order or (after placement) for leave to oppose the adoption order. On both applications, the court will be required (under the Adoption and Children Act 2002 sections 24(3) and 47(7) respectively) to consider inter alia whether there has been a change of circumstances since the placement order was made. In order to evaluate whether there has been a change of circumstances, the court must have sufficient information about the circumstances which led to the placement order being made. In *Re S (Leave to Oppose Adoption Order: Appeal)* [2021] EWCA Civ 605, this Court allowed an appeal against the refusal of leave to oppose the adoption and ordered the rehearing of the application for leave on the grounds that the judge did not have a transcript of the judgment setting out the reasons why the placement order had been made. In the present case, there is a transcript, but it would not, in my view, provide sufficient assistance to a judge considering whether there had been a change of circumstances so as to open the door to granting leave either to apply to revoke the placement order or to oppose the adoption.

29. Very sensibly Mr Tim Parker KC, who was instructed on behalf of the local authority for the purposes of this appeal, did not attempt to defend the judgment in its current state. He acknowledged that it encompassed neither a drawing together of the strands of the evidence to assess risk nor a detailed assessment of the respective welfare checklists. He wisely refrained from contending that the reasoning of the judgment was sufficiently clear when read alongside the evidence and submissions that preceded it. He accepted that the gravity and life-changing consequences of the decision were too great for the reasoning to be pieced together in that fashion. He submitted, however, that the judgment was sufficiently indicative of the process which the recorder had followed in arriving at his decision to justify this Court asking him to clarify his reasons, in accordance with the procedure first propounded in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409 and first adopted in family cases in *Re B (Appeal: Law of Reasons)* [2003] EWCA Civ 881 [2003] 2 FLR 1035. Following the recorder's judgment, no party had submitted a request for clarification. Mr Parker accepted that, had such a request been made and the judgment remained as it is, there could be no reasonable opposition to the appeal. But he submitted that the right course now was for this Court to adjourn the appeal and to allow a request for clarification to be submitted. He argued that number of benefits would flow from adopting this course. It would remedy a procedural omission by giving the judge the opportunity to provide clarification. It would enable the appellant and the father to acquire a proper understanding as to how the decision was made. It would minimise delay. No prejudice would be suffered by the appellant who would be able to pursue the appeal after clarification had been provided.

30. The practice of seeking clarification of reasons is well established in family cases. The point of it is to clarify "any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process" (per Munby LJ in *Re A and another (Children) (Judgment: Adequacy of Reasoning)* [2011] EWCA Civ 1205, paragraph 16. But recent cases have highlighted the importance of ensuring that it is adopted carefully and only in appropriate circumstances. Three important qualifications have been identified. First, it must be used only for clarification, never to re-argue the case: see *Re I (Children)* [2019] EWCA Civ 898 per King LJ at paragraph 40. Secondly, it is the responsibility of counsel and courts to be disciplined when making and responding to requests for clarification and to avoid routine requests for clarification running to a number of pages which are ordinarily inappropriate and hugely burdensome: see *Re I* per King LJ at paragraph 38 and my observations in *Re C and others (Care Proceedings: Fact-finding)* [2023] EWCA Civ 38, paragraph 43. Thirdly, there is the qualification I described in (*Re O (A Child) (Judgment: Adequacy of Reasons)* [2021] EWCA Civ 149 at paragraph 61

> "there are cases where the deficiencies in the judge's reasoning are on a scale which cannot fairly be remedied by a request for clarification As King LJ said in *Re I* (at paragraph 41):
>
> "It is neither necessary nor appropriate for this court to seek to identify any bright line or to provide guidelines as to the limits of the appropriate nature or extent of clarification which may properly be sought in either children or financial remedy cases."
>
> But where the omissions are on a scale that makes it impossible to discern the basis for the judge's decision, or where, in addition to omissions, the analysis in the judgment is perceived as being deficient in other respects, it will not be appropriate to seek clarification but instead to apply for permission to appeal."

31. In this case, the deficiencies are on a scale which cannot fairly be remedied by a request for clarification. We would not have been asking the recorder to clarify an ambiguity or omission in part of his reasoning but to set out his reasoning in its entirety. For my part, I would not be confident that we would be asking the recorder to set out an analysis which he had in fact carried out but for some reason omitted to include in the judgment. Rather, where the absence of recorded analysis is on this scale, there is a danger that we would be asking him to carry out an ex post facto rationalisation for a decision he has made without proper analysis. We would be asking him to perform a task that should have been undertaken before the decision was made, namely, as McFarlane LJ described it in in *Re G*, "that part of the judicial analysis before the written or spoken judgment is in fact compiled, where the choice between options actually takes place". This would be wrong as a matter of principle and manifestly unfair to the parties, in particular the mother but also the children.

32. It is extremely unfortunate that, having dealt with the case through two hearings, conducting a complex fact-finding hearing and reaching findings which have not been challenged in this Court, the recorder went astray in this way at the end of the

proceedings. How did it come about that he delivered a judgment that was so plainly lacking in analysis?

33. In *Re A (Children) (Pool of Perpetrators)* [2022] EWCA Civ 1348, King LJ gave a warning about the practice of attaching to a judgment a summary of the law agreed by counsel. At paragraph 11 she said:

> "Whilst I fully appreciate the value of such a document to a busy circuit judge, a measure of circumspection is in my view necessary in its use. First, a document which sets out lengthy citations from cases is unwieldy and may contain much which is unnecessary. Simply setting out any significant principle with a reference to the relevant part of the judgment in question will ordinarily be sufficient. Secondly, the judge in his or her judgment still needs to identify and apply the principles of law relevant to the issue, or issues, before him or her. A boiler-plate incorporation of the established law in the form of an attachment to a judgment does not, without analysis in the judgment, help the reader to understand whether, and if so how, the law was applied to the facts and circumstances of the case before the judge."

34. In the present case, as I have recorded above, there was no agreed note of the legal principles. Instead, the recorder noted the summaries of the case law in closing submissions filed on behalf of the local authority and guardian and invited the transcriber to include them in any transcript of the judgment which was subsequently prepared. This course taken by the recorder seems to me to be the wrong practice for several reasons. First, it was inappropriate to delegate to the transcriber the task of drafting an addendum setting out the law by extracting sections from counsel's submissions. It is not the function of transcribers, who are not ordinarily provided with the court bundle, to compile sections of the judgment from other documents. Secondly, even if it had been possible for an appendix to be prepared in this fashion, it would not have been an agreed summary of the law, but merely an abstract from two documents. Thirdly, as King LJ observed in *Re A*, such a course would not obviate the requirement for the judge to identify and apply the legal principles relevant to the issues to be determined. There is a clear danger that relegating the summary of the legal principles to a document to be tacked on to a judgment or cut and pasted into it by the transcribers may lead the judge to overlook important elements in it when reaching his or her decision.

35. In her closing submissions, Ms Barran for the guardian summarised the principles in *Re B-S*, including the requirement that "there must be an adequately reasoned judgment by the judge". For some reason, the recorder failed to comply with that requirement. Had the key legal principles been included in the body of the judgment, it is at least possible that the obligation to carry out a holistic analysis of the advantages and disadvantages of each realistic option would have been in the forefront of the recorder's mind leading him to set out his reasoning in sufficient detail. That is, however, only speculation on my part. The fact is that, for whatever reason, the judgment lacks the crucial analysis, and any adequate consideration of the factors under the statutory welfare checklists, which the senior courts have stressed is

required when reaching and recording decisions about the future of children in public law proceedings.

36. For those reasons, I concluded that the appeal should be allowed in respect of the decisions relating to all three children and the case remitted to the Family Division Liaison Judge for London, to be reallocated to another judge to conduct a fresh welfare hearing

37. There is one further procedural point to be made. A few days before the appeal hearing, after the local authority skeleton argument had been filed, the parties agreed to ask the recorder to clarify his reasons and to apply for an adjournment of the appeal. Indeed, they went so far as to send a request for clarification to the recorder in the form of the grounds of appeal. In the event, this Court informed the parties that we were not minded to adjourn the hearing and the recorder did not respond to the request.

38. In my judgment the course taken by the parties was wholly inappropriate. Where permission to appeal has been granted, no request for clarification should be submitted to the judge without the express approval of the appellate court. If, after permission to appeal has been granted, a party considers it necessary to seek clarification from the first instance judge, an application should be made to this Court for a direction to that effect. That application should be accompanied by a draft of the proposed request. I can conceive of no circumstances in which, after permission to appeal has been granted, it would be appropriate simply to send the grounds of appeal to the judge and ask him to clarify his judgment in the light of those grounds.

LORD JUSTICE COULSON

39. I agree.

LADY JUSTICE MACUR

40. I also agree.