Neutral Citation Number: [2024] EWCA Civ 938

Case No: CA-2024-000453

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF LONDON FAMILY DIVISION
HER HONOUR JUDGE COPPEL
LV22C5009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 August 2024

Before:

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LORD JUSTICE GREEN

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Re: - N (A Child) (Care Order: Welfare Evaluation)

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Hannah Markham KC and Leanne Targett-Parker (instructed by **Liverpool City Council Legal Services**) for the **Appellant**
Jonathan Sampson KC and Natasha Johnson (instructed by **Hogans Solicitors**) for the **First Respondent**
Lorraine Cavanagh KC and Andrew Haggis (instructed by **Morecrofts Solicitors**) for the **Second Respondent**
Nicholas Stonor KC and Mark Senior (instructed by **MSB Solicitors**) for the **Third Respondent**

Hearing date: 25 April 2024

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Approved Judgment

This judgment was handed down remotely at 11.00am on 2 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The Local Authority, supported by the mother and the Guardian, appeal from the order made on 12 February 2024 by Her Honour Judge Coppel ("the Judge") at the conclusion of care proceedings. The only part of the order which is appealed is that which provides that a child, whom I will call N and who is currently living in foster care in England pursuant to an interim care order, should move to live with his father in Italy.

2. The care proceedings were complex in part because they involved three children with three different fathers, one of whom lives in England while the other two live in different European countries. The mother of all three children lives in England, having moved here in 2020. I will call the children M (aged 13), N (aged 6) and O (aged 2). I will call the fathers of M and O respectively, the father of M and the father of O. I will call the father of N, the father.

3. The children were all living with the mother in England until they were removed in February 2022, as set out further below. O has been living with his father since then. M and N have been living together in the same foster placement since March 2022, in other words, for over two years. O, M and N have been having regular contact with their mother and M and N have been having contact with their respective fathers.

4. At the final hearing, it was agreed that O would remain living with his father in England save that the mother sought a shared care arrangement. The mother sought the return of M and N to her care. The father of M sought an order that he should move to live with him in his home country. The father sought an order that N should move to live with him in Italy, his home country. The Local Authority proposed that there should be a final care order in respect of M and N and that they should remain living with their current foster carer who is willing and able to continue to provide a long-term home for them, with contact with the mother and their respective fathers. The Guardian's final recommendation was in support of the Local Authority's proposal.

5. The Judge decided that M should remain in foster care in England and made a final care order in respect of him with a provision that there should be weekly supervised contact between M and the mother and direct contact between M and his father six times a year as well as weekly video contact. An order was made that O should live with his father coupled with a supervision order. The order also provided for weekly supervised contact between O and the mother.

6. As referred to above, the Judge decided that N should move to live with his father in Italy. Contact between the siblings was ordered to take place in England three times per year with the mother "joining such contact".

7. The Local Authority relied on a number of grounds in support of their appeal but the overarching challenge to the Judge's order, as supported by the mother and the Guardian, was that she had failed to undertake the required balancing exercise. It was submitted, as set out further below, that the Judge had effectively applied a presumption or had applied a tilted balance in favour of N moving to live with the father and, as a result, had failed to undertake "the side-by-side analysis of the pros and cons of each alternative" option as referred to by Dame Siobhan Keegan when giving the judgment of the Supreme Court in *Re H-W (children)* [2022] 4 All ER 683 ("*Re H-W*"), at [51].

As a result, it was submitted that the Judge's decision was flawed and should be set aside.

8. At the hearing of the appeal, the Local Authority was represented by Ms Markham KC (who did not appear below) and Ms Targett-Parker; the mother by Mr Sampson KC (who did not appear below) and Ms Johnson; the father by Ms Cavanagh KC (who did not appear below) and Mr Haggis; and the Guardian by Mr Stonor KC and Mr Senior (neither of whom appeared below). The fathers of M and O took no part in the appeal.

9. At the conclusion of the hearing of the appeal, the parties were told that the appeal would be allowed and the matter remitted for rehearing. I set out below my reasons for joining in that decision.

Background

10. I propose to give only a summary of the background and of the matters raised, and findings made, in the proceedings. This is so as to preserve the confidentiality, in particular of some of the findings, because the unusual composition of the family would not make it difficult for them to be identified.

11. The background history does not permit of a clear narrative account. The mother's relationships with each of the fathers overlapped to some extent and the precise living arrangements for M and N are not entirely clear, at least until they and the mother moved to live in England in the middle of 2020. The following is a simplified, and as a result broad, account.

12. The mother was born in, and is a national of, a European country from which she moved to live in Italy when she was in her late teenage years. She met each of the fathers in Italy. She met and was in a relationship with the father of M between about 2004 and, perhaps, 2013/2014. M spent most of his early years living with his father in his home country but, from about 2018, he lived with his mother in Italy.

13. The mother and the father were in, what the Judge described as, "an on/off relationship" from 2013 until early in 2019. N was born in Italy in 2017.

14. The mother and the father of O were in a relationship from about the end of 2015. As set out in the judgment below, he "played a large part in the upbringing of [N] including financially".

15. In 2020 the mother and the father of O decided to move to live in England. There were proceedings concerning M and N in the course of which both the father of M and the father agreed to the children moving with the mother to England. The mother and the children duly moved to England in the middle of 2020. The father of O remained in Italy until August 2021 when he also moved to England. O was born in England after the family had moved here.

16. Following the move to England, by agreement between the parties and facilitated by the father of O, N spent time in Italy with his father, in May, October, November and December 2021. The last of these visits was from 17 December 2021 to 8 January 2022. There was then no direct contact between them until, it would appear, sometime

in 2023 when the father travelled to England. Since then, the father has been travelling to England for contact about once per month.

Proceedings

17. The Local Authority commenced care proceedings in February 2022 following allegations that the mother had been physically and emotionally abusive towards M and N. This was a few days after the police had removed the children from the mother's care exercising their protective powers and had placed them with the father of O in temporary accommodation. An interim care order was made with all three children remaining in the care of the father of O. This was only for a short period after which M and N were placed in foster care. As referred to above, they have been living together in the same placement since March 2022 and O has remained living with his father.

18. For reasons that are not clear, it was not until 19 August 2022 that an order was made for a parenting assessment to be obtained of the father in Italy. This was sought through ICACU (the International Child Abduction and Contact Unit) as the Central Authority under the 1996 Hague Child Protection Convention ("the 1996 Convention"). The order provided that the Italian authorities were to be sent the "court bundle". It was not until the final hearing that it became clear that no or very few court documents had in fact been received by the relevant Italian social services who provided a report as referred to below.

19. The request as sent through ICACU stated: "We need a full parenting assessment of the father and the paternal grandmother to assesses their suitability to care for N". Subsequently, the local authority provided a "parenting assessment template" and requested that this should be used by the "assessing social worker" because it "will indicate what information needs to be covered in order for our court to make a decision as to where and who with the child should live". This template was not in fact used for the purposes of the report.

20. The case was listed for a fact finding hearing in November 2022. This was adjourned because the father of M, who had not previously participated in the proceedings, appeared remotely at the hearing. This led to a consolidated fact finding and welfare hearing which began in April 2023. For a variety of reasons as explained in the judgment below, the hearing continued over a number of days (47 in all) in various months, ultimately concluding in January 2024 with judgment on 12 February 2024.

21. The parties' respective positions as to where the children should live is referred to above. In addition, the Local Authority proposed that there should be weekly contact between the mother and M and O and fortnightly contact between her and N. They initially proposed that M and N should have direct contact with their respective fathers twice per year although, after discussion with the Guardian, this was increased to four times per year. The Guardian's position was that contact with the fathers should be six times per year. The mother sought the return of M and N to her care in England or alternatively a gradual rehabilitation with further work being undertaken with her and the children. The fathers of M and N each sought an order that their child live with them in their home countries. Their respective proposals as to contact are not entirely clear.

22. I do not propose to set out the arguments advanced by the parties below but, in order to give some greater context to explain the issues raised by the case, I will summarise the matters relied on by the Guardian in support of the recommendation that N should remain in foster care in England. The Guardian recognised that N had a close relationship with his father and "loves his contact with him". She also said that the father "should be commended for his very clear commitment to this [contact] and to maintaining his relationship with his son who he clearly loves very much". However, in the Guardian's final position statement (dated 4 December 2023) it was argued that there were "broader welfare reasons for N remaining in foster care with his brother" which went beyond the risks arising from any finding of domestic abuse. The Guardian considered that N "would likely be exposed to significant conflict and hostility between the adults in this case if he lived with the father". "The attempt to arrange … contact would expose the children to conflict between the adults which would be emotionally damaging to them". There was also, for reasons explained by the Guardian, "a significant risk there would within a short period of time be no contact between the children" when "At present it is the Guardian's view that N's most significant relationship is with his brother M". The Guardian concluded that remaining in foster care was, in her opinion, "the only plan that will ensure N maintains contact with the people he has the most significant relationship with and will not expose him to further conflict and emotional instability". In her final submissions, the Guardian summarised why she recommended that M and N should remain in foster because "only with this plan will they receive the consistency they require whilst ensuring that they are able to maintain their sibling relationships and have regular contact with each of their parents".

23. Returning to the evidence provided by Italian social services, the first, preliminary report, contained a very brief summary. The substantive report from the Italian social services, dated 19 January 2023, was a four page document which, as referred to above, did not use the template provided by the Local Authority. It was based on a social worker meeting the father and the grandmother twice and visiting the family home which is owned by the grandmother. They also met the father's brother who was then living in the family home.

24. The purpose of the report was summarised at the outset as follows:

> "We are writing you following your request for a full assessment … concerning the family, employment, and accommodation situation of [the father] and of [the grandmother] … The purpose of this assessment is to evaluate whether they would be suitable for taking care of the child."

The report noted that:

> "During our meetings, we could immediately notice both people's <u>timeliness, appropriateness, and willingness</u> when it came to interact and cooperate with our Service."

And that:

> "Furthermore, during these first few meetings, it also became clear that <u>the family members are really close to each other</u>, and their connection is very strong. They help and support each

> other, in particular during such a difficult moment as the present one, and showed that they not only care for [N], but are also in a condition to properly care for him, both in terms of financial resources and accommodation." (emphasis in original)

25. It would be fair to say that the content of the report was based very much on self-reporting by the father and grandmother with some brief additional observations such as those set out above. Before setting out the conclusion, the report recorded that the father and the grandmother had "stated that they are open to further engage with the services, for example if they will be required to cooperate with the family centre (Consultorio Familiare) in order to assess their parental capabilities, as ordered by the competent Authorities" (emphasis in original).

26. The social worker's ultimate conclusion was:

> "In conclusion, our Social Services have resolved that, judging by the information collected and explored, as of today, there does not seem to be any negative element preventing the father … and the paternal grandmother … from being reunited with the child. As per the information uncovered, the bond between the father, the grandmother, and [N] is strong, present, and genuine."

27. The social worker also gave oral evidence, remotely from Italy. She made clear that she had focused on what she had understood she had been requested to consider, namely "home, work and family conditions". She referred to there being other "procedures and various agencies, family consultants" available in Italy which "will also look into parenting capacity of a family member in question". When, then asked, whether any other such professionals had been involved in the assessment, she replied that:

> "usually the way it would work, we would work in collaboration with those professionals and each carry out enquiries in their field – when I was allocated this case initially it was not a part of this request."

As "nothing was specified in regards to parenting evaluation", no such additional work had been undertaken. This was because a "parenting assessment by [a] consultant would only be done per request of the authority or family itself". The father and grandmother had agreed to this but this would involve a "different" assessment for which there were "very long waiting lists".

28. Later in her evidence, the social worker again said that there are "different services that can be activated" in Italy adding that "at the moment when a specific request is made to evaluate a parenting capacity of the father – I am not able to give this service as I am not part of the agency offering this". She would "support this" and it could be "activated … today" or when N arrived in Italy and "it would offer counselling, assessment of parenting capacity and support to family". The social worker also said that she would be "happy to assist" with any further work that might be required and, if it was, she "would be grateful for full precise instructions".

29. It can be seen from the above that, significantly because of their understanding of what they were being asked to do, the assessment undertaken by Italian social services was very limited in its scope.

30. In addition, it also became clear during the social worker's oral evidence that, as referred to above, she had been provided with very little information and almost no documents from the proceedings in England for the purposes of completing her assessment. She was, therefore, wholly unaware of the issues raised in the case. For example, she had not seen the father's criminal convictions and was unaware of the mother's allegations about the father's behaviour towards her (about which the judge subsequently made findings against the father). These had not been mentioned by the father and were not contained in the documents provided to her for her assessment. The social worker acknowledged that these were matters that needed "exploring" which she would have done if she had been aware of them.

31. The social worker also said that she had not considered the issue of contact between the mother and N nor how N would maintain a relationship with his brothers if he was living with the father. She again referred to the fact that she had only been asked to consider "the situation of this father".

Judgment

32. The judgment contains a lengthy analysis of the complex background history.

33. During the course of her analysis of the law, and when considering "Placements of the children", the first case the Judge referred to was *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 ("*Re L*"), a decision to which she returned on a number of occasions in the course of her judgment. She said:

> "Whilst the recent stream of authorities from the higher courts has concentrated on the correct approach in placement and adoption matters and emphasised that the severance of the relationship with the birth family should only be countenanced if nothing else will do, the underlying principle that if possible the best upbringing for a child is with a birth parent is applicable where any other placement is being considered: *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050."

34. It is right that the Judge then went on to say that: "In determining the outcome, I have regard to the requirement that a global, holistic evaluation of each of the realistic options available for the child's future upbringing should be undertaken before deciding which of the options best meets the duty to give paramount consideration to the child's welfare". However, after saying this, the Judge immediately returned to *Re L* and said:

> "In evaluating the evidence and arriving at my conclusion as to where these children should live, *my starting position is that the best arrangement for a child is to be brought up by a parent unless there are reasons why this should not be the case*. I bear in mind particularly the views of Hedley J in *Re L* … which reflects longstanding dicta warning against social engineering in children's cases." (emphasis added)

35. The influence that this decision had on the Judge's approach can be seen from other observations including; that the Local Authority and the Guardian had given "insufficient consideration … to the principles in" *Re L*; and that she agreed with the principle "that, if possible, [M and N] should have the opportunity of being cared for by their respective fathers if the alternative for them is remaining in care". The Judge also described the option of N remaining in foster placement rather than living with his father as "unthinkable".

36. The Judge made a number of findings about each of the relevant adults but I focus only on the findings she made in respect of the father. These included the following. She found that, contrary to his evidence, the father had been "violent and threatening". He had assaulted the mother in 2018 causing bruising "to her left side and to the left side of her face" as a result of which she went to hospital. This incident took place in front of the paternal grandfather and N. The Judge found that, during his evidence about this incident, the father "was patently lying with the arrogance of someone who expected to be believed and in particular asserted that the unnamed partner from the medical records was in fact" the father of O.

37. The Judge also found that the father was "very manipulative in order to get what he wanted". This included making threats against the mother "as a form of control over her" and making "a number of threats" of violence against the father of O "in order to manipulate him, scare him and get his own way". These threats included a threat against the father of O, when he was facilitating contact between the father and N, that "if he supported the mother's claim for child maintenance" he would kill him. The Judge found that the father's evidence "demonstrated … that he is adept at misleading, deflecting, deceiving and lying".

38. When considering what order to make in respect of N, the Judge noted the adverse findings she had made about the father. She then, importantly, said that, "*Before* considering the balancing exercise" (my emphasis), "I must consider whether N is at risk of harm with his father and whether his father is able to meet his needs". She decided that the father was able "to provide a loving home for N with social services managing any risks that may arise to N from his lifestyle and future relationship where there is a risk of violence". The Judge noted that there was "no evidence that the father will harm N" and then said, "having regard to *Re L* … it is my view that [the father] wants the best for N and, if it is possible, N should have the opportunity of living with [his father] rather than in foster care for the duration of his childhood".

39. This analysis led the Judge to conclude that the father was "not ruled out … as someone able to care for his son". She then went on "to consider whether N should in fact move to his father" by reference to "the balancing exercise". The Judge's ultimate conclusion was expressed as follows:

> "There is a realistic alternative for N which is placement with his father and although I recognise the deficits in the father's character, and the previous violence, I have already addressed this earlier and am satisfied that these matters can be addressed by the involvement of Italian social services. It is unthinkable that N should lose his relationship with his father which is so positive and loving in favour of a foster placement and his relationship with M which may become more distant as M begins

> to exert his own independence. Such a placement in foster care in my view is contrary to his welfare."

40. As to the involvement of social services in Italy, the Judge dealt with the Guardian's concerns about how they would be able to address the risks from the father as follows:

> "The Guardian has expressed concern about how social services in Italy will mitigate the risk to N which arise from findings made against the father in respect of his conduct and character. I have taken into account that the social worker from Italian social services stated in her evidence that they would do whatever was required once they receive the referral. I envisage that on receipt of a relevant summary of my judgment they will carry out their own assessment of what work needs to be done. The Guardian was specifically asked during her evidence (by me) whether she thought that the social services in Italy would be able to manage the risks that she had identified arising from the domestic abuse. Her response was no. the father, she said, would have to undertake work to understand and accept the risks. She said in respect of Italian social services "it does concern me that the level of oversight may not be robust enough ". I have a different approach. I proceed on the basis that the local Italian social services, as a competent local authority, will take on board the identified risks and carry out whatever work and monitoring they deem to be necessary. As a result of these proceedings and their involvement via ICACU, the father and N are now on their radar, and I have no reason to believe that they will not comply with their safeguarding duties."

In another passage relied on by Ms Cavanagh, the Judge noted that "the Italian social worker confirmed in evidence that social services local to [the father] would be available to support the placement of [N] as necessary, and support and supervise contact for the mother in Italy".

41. When summarising her conclusions at the end of her judgment, the Judge again said that Italian social services would be able to manage "any risks that may arise to N from [the father's] lifestyle, from any future relationships where there is a risk of violence and any potential conflicts with the mother in respect of contact"; that it was "unthinkable that N should lose his relationship with his father which is so positive and loving in favour of a long-term foster placement"; and that, among other matters, "insufficient consideration" had been given by the Local Authority and the Guardian "to the principles in *Re L*".

Submissions

42. The parties' respective submissions were, in summary, as follows.

43. The Local Authority mounted a broad challenge to the Judge's decision. It was submitted that the Judge had failed properly to consider a number of matters including the impact of the serious findings she had made against the father; the importance of, and effect of her proposed order on, N's relationship with his mother and his siblings;

and the factors in favour of N remaining in England. The overarching submission was that the Judge had failed properly to balance the relevant factors when making her decision because she had not given paramount consideration to N's welfare but had applied the approach "that the best arrangement for a child is to be brought up by a parent unless there are reasons why this should not be the case" and that it was "unthinkable" that N should "lose" his relationship with his father. The Judge had prioritised N being placed with the father and had misapplied *Re L* with the result that she had adopted a "skewed" approach and had "failed to exercise a full or adequate balancing exercise" which would have included many different factors, including how N's relationship with his father could be protected. Ms Markham added that it was not proposed that N should "lose" this relationship which had been and could continue to be maintained by regular contact.

44. As a result of the approach adopted by the Judge, there was, Ms Markham submitted, no full, properly balanced, analysis of the competing options; no consideration of the factors set out in the welfare checklist; and no risk analysis at all. In short, the Judge had not balanced the relevant factors which would have included the risk of harm to N in the light of the serious findings made by the Judge in respect of the father; the fact that the mother had been N's primary carer until 2022 and the effect of a move to Italy on this relationship; N's relationship with M, its importance and the effect on it if N were to move and live in Italy; the quality of N's relationship with his foster parent and the impact of the loss of that stable relationship.

45. Ms Markham further submitted that the assessments undertaken by Italian social services, through no fault of theirs, did not address the issues in this case which arose, in particular, from the significant findings made against the father by the Judge and from the complexity of N's relationships with M and his other family members. The Italian social worker had made clear that she had not undertaken a parenting assessment. The Judge had also been wrong to decide that the Italian social services would be able to "manage" the risks when there was almost no information about how this would be undertaken nor what support services would, in fact, be available to manage the risks or to support contact and when the father, at the very least, could not be relied on to engage openly and honestly with them. Risk management had not formed part of the assessment undertaken by the Italian social worker and meant that the court did not have the information necessary to make such a significant decision as that N's placement with the father was the right welfare outcome. In summary, there was, Ms Markham submitted, insufficient evidence to justify the conclusion that Italian social services would "manage" the situation when it was not known how they would do this nor how they would respond to the findings and judgment.

46. The mother supported the Local Authority's appeal. Mirroring the submissions made on behalf of the Local Authority, Mr Sampson submitted that the Judge had failed to undertake the required balancing exercise and did not properly consider or weigh the advantages and disadvantages of N moving to live with his father or remaining in foster care. In other words, she had not undertaken the "rigorous process" as referred to by Dame Siobhan Keegan in *Re H-W*, at [51]. He also relied on *Re H (A Child) (Appeal)* [2016] 2 FLR 1173 ("*Re H*") in support of his submission that the Judge had misapplied the case of *Re L* which was not concerned with the welfare analysis but with the threshold under s.31 of the Children Act 1989 ("the CA 1989"). The Judge, as a result, had undertaken "a largely one-sided analysis of the benefits of placement with [the

father] without properly factoring in or attaching sufficient weight to the positives of his current placement, the risks posed by [the father] flowing from her own findings, from [the father's] own evidence given to her and, lastly, without due regard to the limitations of the assessments of him from which there was, at best, limited information about future risk". Just to take one example, Mr Sampson submitted that, while the Judge had referred to M and N's relationship and time together in foster care, "nowhere is there reference within any comparative welfare analysis to the *value* to N of remaining placed with M" although this had been one of the most significant factors in the professionals' evaluation of the positives of N remaining in foster care.

47. Mr Sampson specifically questioned the Judge's reliance on Italian social services and her conclusion that they would be able to manage "any risks that may arise to N from [the father's] lifestyle, from any future relationship where there is a risk of violence and any potential conflicts with the mother in respect of contact to N which will have to be supervised by Italian children's services who have agreed to this". He submitted that this conclusion "lacked evidential underpinning, where it is wholly unclear how they could manage risks of this sort" including because of the Judge's findings about the father's lack of honesty and manipulative behaviour. This was not about the competence of, or what support could be provided by, Italian social services but "about whether that support would or could ameliorate identified risks at all, given the" Judge's findings in relation to the father.

48. In her submissions, Ms Cavanagh strongly opposed the appeal. She submitted that the Judge's decision was sufficiently explained and justified in her judgment. The Judge, a very experienced judge, had heard 49 days of evidence from 17 witnesses and had had approximately 3,000 pages of documents. Her findings were not being challenged, only her welfare decision in which she had departed, as she was entitled to do, from the Local Authority's final care plan and the Guardian's final recommendations. This was, she submitted, a finely balanced decision and she drew our attention to the many authorities which set out the limited circumstances in which the Court of Appeal will interfere with a trial judge's evaluative decision of this nature.

49. As for the assessment undertaken by social services in Italy, Ms Cavanagh pointed to the fact that, following its receipt, no party had sought to ask any further questions or had requested that any additional inquiries be undertaken although the social worker had noted that a further specialist assessment of the father's (and the grandmother's) "parental capabilities" could be carried out by the relevant "family centre" if required. The Local Authority's final evidence and care plan were based on the assessment which had been provided. There was a wealth of other evidence which, she submitted, filled any gaps there might otherwise have been. She also submitted that the Judge was entitled to rely on the Italian social worker's evidence that "social services local to [the father] would be available to support the placement of [N] as necessary, and support and supervise contact for the mother in Italy" and was entitled to assume that Italian social services would "take on board the identified risks and carry out whatever work and monitoring they deem to be necessary".

50. In answer to the Local Authority's overarching case, Ms Cavanagh submitted that the Judge had not applied any presumption or changed the welfare balance but had undertaken the evaluative exercise which was required, namely a "side-by-side analysis of the pros and cons of each alternative" option: *Re H-W*, at [51]. She submitted that, "In particular, when addressing the advantages and disadvantages of the placement with

the father, risk was ever present in the [Judge's] analysis" and she relied on the "factors and analysis" included in the judgment. The Judge had also said that she was "applying the welfare check list".

51. The Guardian supported the appeal and submitted that the Judge had undertaken an inadequate welfare evaluation. As with the Local Authority, the overarching submission was that the Judge's evaluative analysis of the competing placement options for N was flawed. It was flawed because the Judge had effectively applied a presumption in favour of placement with the father which meant that "the balancing exercise was skewed from the outset". Mr Stonor acknowledged that the Judge did not say she was applying a presumption but he submitted, adopting what was said in *Re W (Adoption: Approach to Long-Term Welfare*) [2017] 2 FLR 31 ("*Re W*"), that the Judge had incorrectly place the "fulcrum" of the balancing exercise she had undertaken. This could be seen, he submitted, for example, from the Judge saying, "I agree with the principles that if possible N and M should have the opportunity of being cared for by their respective fathers if the alternative for them is remaining in care". He also relied on the Judge, twice, describing the prospect of foster care being preferred to placement with the father as "unthinkable". This meant that, as set out in *Re H-W* at [62], the Judge "erred in law by failing to make a proper assessment in reaching [her] decision".

52. Mr Stonor also submitted that the Judge had not properly taken into account the very serious findings made against the father. She had, he submitted, not engaged with the harm caused to children through experiencing domestic abuse. Her finding that the risks posed by the father could be "managed" by social services in Italy did not meaningfully address how this might be effective given the nature of those risks, the father's denial of those risks and the Judge's finding that the father "is adept at misleading, deflecting, deceiving and lying".

53. The other specific aspect criticised by Mr Stonor was the Judge's approach to N's relationship with his siblings, especially M. There was, he submitted, a "wealth of evidence" as to the importance for N of his relationship with M, including the Guardian's view that this was N's "most significant relationship". The Judge had not conducted the required "bespoke enquiry" as referred to in *ABC v Principal Reporter and another; Re XY* [2020] 4 All ER 917, at [52].

54. Mr Stonor also raised questions about the manner in which evidence had been obtained from social services in Italy and referred to the guidance given in Black LJ's (as she then was) judgment in *Re V-Z (Children)* [2016] EWCA Civ 475 ("*Re V-Z*"). He acknowledged that his submissions were made with the benefit of hindsight but he questioned why an assessment was not sought until September 2022, some seven months after the proceedings had started. He also pointed to the fact that the information in the final report from Italy was "at a relatively basic level". This was not a criticism of Italian social services but reflected that they did not appear to have any particular knowledge of the issues in this case or of the history beyond the "at best partial" history provided by the father.

Determination

55. This was, undoubtedly, a complex case with, as the Judge said, many layers of detail and a number of different strands and competing interests. Further, as the Judge found,

"All parties except for [the father of O] have been dishonest at times in order to mislead the court".

56. I recognise also that this very experienced Judge was immersed in the evidence in a way that this court cannot begin to be and that she gave a long and detailed judgment of nearly 70 pages. I also agree with Ms Cavanagh's submission that what is important is "the substance of the judicial analysis rather than its structure or form": *In re R (A Child) (Adoption: Judicial Approach)* [2015] 1 WLR 3273, at [18]. However, despite these factors and the arguments strongly advanced by Ms Cavanagh on behalf of the father, the submissions advanced by the Local Authority, the mother and the Guardian clearly demonstrated that the Judge did not carry out the required balancing analysis when deciding that N should move to live with his father. Simply stated, her analysis was not balanced with a proper weighing of the advantages and disadvantages of each possible outcome but was wrongly tilted in favour of one outcome, namely N moving to live with his father. As submitted, in particular by Mr Sampson and Mr Stonor, the Judge's reliance on *Re L* was misplaced as can be seen from what McFarlane LJ (as he then was) said in *Re H* and *Re W*.

57. Before turning to *Re H* and *Re W*, I first note the nature of the court's task as recently reiterated in the Supreme Court's decision of *Re H-W*, in which Dame Siobhan Keegan gave the sole judgment. At [47], she approved what had been said in previous authorities including that the court must undertake:

> "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 option".

This analysis will, of course, incorporate consideration of the relevant factors in the welfare checklist.

58. I propose to quote in full what McFarlane LJ said in *Re H* about *Re L* because it makes clear why the Judge's reliance on it in the present case was misplaced, as submitted by the Local Authority, the mother and the Guardian. In *Re H*, the judge at first instance, Russell J, had referred to *Re L* when making a welfare decision. She had said:

> "There is no conflict with [the] law contained in the Conventions and domestic law for as a matter of English and Welsh law the *presumption* is that children's interests are best served by being brought up within their own birth or biological family as described by Hedley J in his frequently quoted judgment in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050.' (emphasis added.)"

McFarlane LJ made clear that the application of a presumption or starting point was wrong, if applied when making a welfare decision:

> "[88] Pausing there, Russell J's description of there being 'a presumption' in law in favour of the natural family in adoption cases justifies consideration. In the context of private law disputes relating to children, there is no presumption in favour

of a parent (*Re G (Children) (Residence: Same Sex Partners)* s) [2006] KHL 43, [2006] 1 WLR 2305, [2006] 2 FLR 629 and *Re B (A Child)* [2009] UKSC 5, [2009] 1 WLR 2496, [2010] 1 FLR 551). In a private law case, whilst the fact of parenthood is to be regarded as an important and significant factor in considering which proposals better advance the welfare of the child, the only principle is that the child's welfare is to be afforded paramount consideration.

[89] The situation in public law proceedings, where the state, via a local authority, seeks to intervene in the life of a child by obtaining a care order and a placement for adoption order against the consent of a parent is entirely different, but also in this context there is no authority to the effect that there is a 'presumption' in favour of a natural parent or family member. As in the private law context, at the stage when a court is considering what, if any, order to make the only principle is that set out in s 1of the Children Act 1989 (the CA 1989) and s 1 of the ACA 2002 requiring paramount consideration to be afforded to the welfare of the child throughout his lifetime. There is, however, a default position in favour of the natural family in public law proceedings at the earlier stage on the question of establishing the court's jurisdiction to make any public law order. Before the court may make a care order or a placement for adoption order, the statutory threshold criteria in s 31 of the CA 1989 must be satisfied (CA 1989, s 31(2) and ACA 2002, s 21(2)). It is important to observe that Hedley J's remarks in *Re L* were entirely directed to the question of the threshold criteria. Russell J's quotation from para [50] of *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 omits the two opening sentences of that paragraph which establish the context:

> 'What about the court's approach, in the light of all that, to the issue of significant harm? In order to understand this concept and the range of harm that it's intended to encompass, it is right to begin with issues of policy. Basically it is the tradition of the UK …'

The outcome of *Re L (Care: Threshold Criteria)* was that Hedley J found that the s 31 threshold criteria were not met in that case.

[90] In like manner, Lord Templeman's words in *Re KD*, which are also quoted by Russell J, arose in a similar context in wardship proceedings and are preceded by the following two sentences:

> 'Since the last war interference by public authorities with families for the protection of children has greatly increased in this country. In my opinion there is no inconsistency of

> principle or application between the English rule and the [ECHR] rule. The best person to bring up a child …'

[91] Neither the words of Hedley J in *Re L*, nor those of Lord Templeman in *Re KD*, were referred to by Baroness Hale of Richmond in *Re G* when considering whether there is a presumption in favour of a natural parent. That this is so is no surprise given that the former were describing the line that is to be crossed before the state may interfere in family life, whilst the latter were focused upon the approach to be taken when affording paramount consideration to a child's welfare. Although Hedley J's words in para [50] are referred to in each of the main judgments in the Supreme Court in *Re B*, such references are in the context of consideration of the s 31 threshold rather than welfare.

[92] In the circumstances, I consider that Russell J's reference to Hedley J's judgment in *Re L* was out of place, as a matter of law, in a case where the issue did not relate to the s 31 threshold, but solely to an evaluation of welfare.

[93] Russell J's use of the word 'presumption' in this regard at para [69] is not an isolated reference and is in line with her prominent observation during day one that *Re L* was her 'starting point'. In addition during the final 'Analysis' section of her judgment the following references appear:

> 'The circumstances of this case set out in this judgment do not dislodge the presumption that a child should be brought up within her family.' (para [87])
>
> … even if it were not a presumption that children are best brought up within their natural families …' (para [88]).

[94] It is clear that for Russell J the outcome of this case did not turn on the deployment of the 'presumption' that she describes, and this point was not taken within the appeal. My attribution of some prominence to it is not therefore determinative of the appeal. My aim is solely to point out the need for caution in this regard. The House of Lords and Supreme Court have been at pains to avoid the attribution of any presumption where s 1 of the CA 1989 is being applied for the resolution of a private law dispute concerning a child's welfare; there is therefore a need for care before adopting a different approach to the welfare principle in public law cases. As the judgments in *Re B*, and indeed the years of case-law preceding *Re B*, make plain, once the s 31 threshold is crossed the evaluation of a child's welfare in public law proceedings is determined on the basis of proportionality rather than by the application of presumptions. In that context it is not, in my view, apt to refer to there being a 'presumption' in favour of the natural family; each case falls to be determined on

> its own facts in accordance with the proportionate approach that is clearly described by the Supreme Court in *Re B* and in the subsequent decisions of this court."

59. McFarlane J returned to this issue in *Re W* in which he said:

> "[71] The repeated reference to a 'right' for a child to be brought up by his or her natural family, or the assumption that there is a presumption to that effect, needs to be firmly and clearly laid to rest. No such 'right' or presumption exists. The only 'right' is for the arrangements for the child to be determined by affording paramount consideration to her welfare throughout her life (in an adoption case) in a manner which is proportionate and compatible with the need to respect any European Convention Art 8 rights which are engaged. In *Re H (A Child) (Appeal)* [2015] EWCA Civ 1284, [2016] 2 FLR 1173 this court clearly stated that there is no presumption in favour of parents or the natural family in public law adoption cases at paras [89]–[94] of the judgment of McFarlane LJ …"

McFarlane J then added, in a passage relied on by Mr Stonor:

> "[75] As Mr Feehan helpfully observed in his closing submissions, it is all very well to purport to undertake a balancing exercise, but a balance has to have a fulcrum and if the fulcrum is incorrectly placed towards one or other end of that which is to be weighed, one side of the analysis or another will be afforded undue, automatic weight. Taking that point up from where Mr Feehan left it, in proceedings at the stage prior to making a placement for adoption order the balance will rightly and necessarily reflect weight being afforded to any viable natural family placement because there is no other existing placement of the child which must be afforded weight on the other side of the scales. Where, as here, time has moved on and such a placement exists, and is indeed the total reality of the child's existence, it cannot be enough to decide the overall welfare issue simply by looking at the existence of the viable family placement and nothing else."

60. In my view, the present appeal raises a similar question to that raised in *Re H-W*, as set out at [51]:

> "On this appeal the real issue is not whether the appellate court is satisfied that the judge reached a conclusion which was wrong. The question is rather concerned with the adequacy of the judge's process of reasoning in reaching his conclusion. This appeal asks the question whether the judge did go through the rigorous process described at para [47] above or whether he proceeded too directly from his finding that the threshold criteria were met to the conclusion that it followed that a care order ought to be made. If, on appeal, it is found that a judge has

> unduly telescoped the process, and has not made the side-by-side analysis of the pros and cons of each alternative to a care order, then the likely conclusion is that his decision is, for that reason, flawed and ought to be set aside."

61. Once the threshold criteria have been established the child's welfare is the court's paramount consideration and the court's assessment or evaluation requires all relevant factors to be taken into account. In that exercise, there is no starting point and certainly no starting point, as referred to by the Judge, "that the best arrangement for a child is to be brought up by a parent". It is right to acknowledge that the Judge said that she had "to decide what is in the best interests of" the children and that she needed to undertake "a global, holistic evaluation … before deciding which of the options best meets the duty to give paramount consideration to the child's welfare". However, the approach the Judge in fact adopted can be seen from what she said immediately after she had referred to the need to undertake "a global, holistic evaluation". She said, repeating an observation that she had made previously, that:

> "In evaluating the evidence and arriving at my conclusions to where the children should live, *my starting point is that the best arrangement for as child is to be brought up by a parent unless there are reasons why this should not be the case*". (emphasis added)

This is, with all due respect, to assume the likely answer prior to undertaking the required balancing exercise and undoubtedly reflected the Judge's reliance on *Re L*.

62. No-one challenged that the Judge was entitled to take into account, in general terms, the potential disadvantages for a child of remaining in foster care nor of the potential advantages of living with a parent. However, these are, to the extent relevant in the particular circumstances of the case, *part* of the balancing exercise. There is no presumption or tilted balance in favour of the latter because the welfare outcome will depend on the facts of the case. In some cases, the former will be in the best interests of a child and in others, the latter will be.

63. As referred to above, by the conclusion of the hearing of the appeal, it was clear to me that the Judge had incorrectly placed the fulcrum such that she did not undertake the required balancing exercise. Her reliance on *Re L* and her reference to a "starting point" fed into the analysis she undertook which, as a result, was flawed. Among other matters, there needed to be, as referred to by King LJ during the hearing, proper consideration or assessment of the consequences, the risks to N's welfare, if placed with the father, based on the significant findings the Judge made in respect of him and of the specific advantages in this case of N remaining in foster care. The Judge's predisposition against foster care in general terms meant that she did not properly consider the factors advanced in this case by the Local Authority and the Guardian as supporting such a placement for N. These included evidence as to the benefits derived by N from this placement and the stability it had provided.

64. The answer, in my view therefore, to this appeal is the same as that given in *Re H-W*, at [60]:

> "The judge's treatment of the facts and the evidence was thorough … The difficulty is that one looks in vain for the critical side-by-side analysis of the available options by way of disposal, and for the evaluative, holistic assessment which the law requires of a judge at this stage."

65. I would add that I also agree with the submissions made about the limited value of the assessment undertaken by the Italian social services. As noted by King LJ during the hearing, it was plainly not a parenting assessment. As referred to above, the limited nature of the assessment was not through any fault of Italian social services. It reflected the limited information they were provided with and the limited nature of the enquiries they were asked to conduct. There may well be circumstances in which the nature of the issues are such that the court would be justified in deciding in general terms that they could be appropriately managed by child services in another country. But as with a purely domestic case, this would depend on the specific issues in the case. As submitted by Mr Sampson, this is not a question of comity or mutual respect but reflects the need for the court, having regard to the facts of the particular case, sufficiently to scrutinise both the adequacy of an assessment and the adequacy of any available support services and remedies to address the specific risks and issues raised in this case.

66. I agree, therefore, with the Local Authority's submissions that it was not sufficient in the present case for the Judge simply to conclude that Italian social service "would carry out whatever work and monitoring they deem to be necessary" and "would comply with their safeguarding duties". The involvement of foreign child or social services does not absolve the domestic court of the need closely to scrutinise both the adequacy of any foreign assessments which have been provided and the adequacy of support services and remedies available in the relevant foreign jurisdiction. The extent to which this will be necessary will, inevitably, be dependent on the facts of any given case.

67. In the present case, there needed to be some specific evaluation of what the future involvement of Italian social services would entail and, in particular, what the consequences might be for N. Was there, for example, as submitted by Ms Markham, a "real risk" that N might be placed in care in Italy while assessments were undertaken or as a result of any further assessments? How would Italian social services in fact respond to the findings made by the Judge? The general nature of the Judge's conclusions were not sufficient and, as was submitted, were not supported by the evidence.

68. Finally, I agree with the general points made by Mr Stonor about the engagement with Italian social services in this case,. First, it is clearly important, as has been stressed in a number of authorities, that the need to engage with foreign agencies, in particular through Chapter V of the 1996 Convention (either for information/assessments or in respect of a proposed placement), is addressed as early as possible in the proceedings. Secondly, the guidance given by Black LJ in *Re V-Z* (which I set out below) should be applied carefully and consistently. This is to ensure that any requests for information or assessments are clearly focused on the matters which need to be addressed and to ensure that they are supported by the necessary information and documentation. It also involves steps being taken promptly to address any perceived deficiencies in the information or assessment which has been provided.

69. The guidance given by Black LJ in *Re V-Z,* at [42], was as follows:

> "Before leaving the case, I would add that what happened here in relation to the involvement of the Slovak authorities underlines how important it is, when seeking the assistance of foreign authorities, to:
>
> i) Inform them clearly and comprehensively what questions they are requested to answer as part of their assessment;
>
> ii) Provide them with all the information that they need in order to carry out the enquiry/assessment asked of them;
>
> iii) Document carefully and comprehensively what material has been sent to them;
>
> iv) Answer any queries posed by them in the course of their assessment;
>
> v) Follow up assiduously any matters which require further exploration by them, or in respect of which they may be able to provide material information, such as details of local resources to assist in or supervise the care of the children;
>
> vi) Consider creatively how progress might be made in the event that obstacles are encountered, bearing in mind that it may be possible to communicate directly with those who are responsible for carrying out the assessment in the foreign state, although it would be prudent first to consult our Central Authority for advice as to whether that would be acceptable to the foreign state in question."

Conclusion

70. In conclusion, for the reasons set out above, I consider that the Local Authority's appeal should be allowed and the matter remitted for rehearing.

Lord Justice Green:

71. I agree.

Lady Justice King:

72. I also agree.