Neutral Citation Number: [2020] EWCA Civ 1003

Case No: B4/2020/0980
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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE WEST LONDON FAMILY COURT
Mr Recorder Benjamin
ZW20C00222

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2020

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE BAKER

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF N (CHILDREN) (INTERIM CARE ORDERS)

Between :

NP (1)	**Appellant**
JP (2)	
GP (3)	
- and -	
A LOCAL AUTHORITY (1)	**Respondent**
NN (2)	
TN, JN AND AN (3) to (5)	
(by their children's guardian)	

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Ranjit Singh (instructed by **Morrison Spowart**) for the **First and Second Appellants**
Chris Barnes (instructed by **Thompson and Co Solicitors Ltd**) for the **Third Appellant**
Philippa Parry-Jones (instructed by **Local Authority Solicitor**) for the **First Respondent**
Rebecca Mitchell (instructed by **Lovell Chohan**) for the **Third to Fifth Respondents**
The Second Respondent was not present or represented.

Hearing date : 23 July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Friday 31st July 2020

LORD JUSTICE BAKER:

1. In this case we are concerned with three appeals against orders made at a hearing on 25 June 2020 at the West London Family Court in care proceedings involving three children – T, aged six, J, aged four, and A, aged three. Two of the appeals are brought by the children's mother and by their maternal grandparents against interim care orders made in respect of the children. The third appeal, by the children's guardian, is against a case management decision refusing permission for a psychological assessment of the family.

2. At the conclusion of the hearing, we indicated that we were allowing the appeals. This judgment sets out my reasons for agreeing with that decision.

Background

3. The background can be summarised briefly in these terms. The children's parents married in 2013 and separated four years later. The mother alleges that during the relationship she was subjected to domestic abuse by the father, who also misused drugs. Initially after the separation, the children remained with the mother but in early 2018 she took them to the father's home where they lived for until January 2019. The social work statement filed at the start of these proceedings alleges that during the parents' relationship and in the immediate aftermath, the children endured a very unsettled and at times chaotic lifestyle while in the care of one or both of their parents. It was said that, during that period, they had witnessed parental conflict and physical abuse.

4. In January 2019, the father took the children to the maternal grandparents' home and left them there, indicating that he did not wish to resume care in the future. It was at this stage that this local authority first became involved with the family. For the subsequent 18 months, the children have lived with their grandparents and maternal aunt who all occupy the same home. It is accepted that the children have a bond with their grandparents and with their aunt. No criticism is made of the quality of physical care they have received within the maternal extended family. Compared to their previous experiences with their parents, the children seem to have benefited from a much more settled life.

5. Nevertheless, the local authority remained involved with the family. In April 2019, the children were registered as being in need. In early 2020, the grandparents expressed some anxiety about the cost of caring for the children. Around the same time, the mother indicated that she wished to resume caring for them. The local authority was concerned about the risks to the children if they were returned to their mother's care and about the history of difficult and at times abusive relationships within the family. The mother subsequently withdrew her proposal to resume care and, on 6 March 2020, signed a written agreement to the children being accommodated under s.20 of the Children Act 1989. The grandparents also signed the agreement. It was subsequently alleged by the local authority that the grandparents broke the agreement a few days later by allowing the mother to take one of the children to medical appointments.

6. As the children were now being "looked after" by the local authority, they underwent medical examinations which, in A's case, revealed that she was developmentally delayed in communication, language and social skills. No concerns about the boys' development were identified in the medical examinations, although information from their schools included a suggestion that both boys may be on the autistic spectrum. The local authority was also required to identify a carer for the children and therefore carried out a kinship assessment of the maternal aunt under regulation 24 of the Care Planning, Placement and Case Review (England) Regulations 2010. The report recommended that the children be placed in the aunt's care. The author of the report noted that the children had built positive relationships with their maternal family since being left in their care fourteen months earlier; that the aunt and grandparents had been active in meeting the children's basic needs; that the children had experienced what the reporter described as "a settled and predictable environment free from harm"; and that the children recognised their maternal family as their primary caregivers and were able to seek them out when they needed comforting, to be fed or wanted to play. The reporter concluded that it was a positive factor that the children had been able to remain within their birth family where their need for a sense of belonging and identity could be met.

7. That assessment reached a positive conclusion, but the aunt then indicated that she was unable to commit to acting as a carer in the long term. The local authority then carried out a regulation 24 assessment of the maternal grandparents. The author of the report described the grandparents as experienced parents who had the best intentions for the three children to thrive. They had every intention of ensuring that their physical and emotional needs were met, although their insight into those needs was said to be limited. But the reporter described them as committed and cooperative. She thought there was no doubt they would be able to take advice and develop greater understanding about the children's particular needs. The assessment referred to a number of incidents in the family history. In addition to the history of domestic abuse in the children's parents' relationship, it was recorded that the grandfather had a conviction for an offence involving serious violence against an adult ten years ago. There was also a reference to a recent report of a domestic abuse incident in the family in April 2020 when the grandfather was alleged to have hit the grandmother with a broom on the foot and threatened the aunt. The reporter observed that the impact on the children of that incident and wider conflict within the family needed to be explored. Despite those matters, the assessment reached a positive conclusion. The reporter had no concerns that the grandparents would prioritise the children's safety and well-being and protect them from the risk of harm, although they were not always clear on the nature of the risk. The grandparents presented as committed and motivated to care for the children throughout their minority and had indicated that they wish to apply for a special guardianship order. The report recommended that the areas of concern identified in the report should be addressed through a special guardianship assessment.

8. Meanwhile, the local authority had decided to issue care proceedings. The preliminary social work report, whilst identifying a number of concerns about the current placement, recommended on balance that the children should remain in the grandparents' care during the proceedings. The report recorded that "the local authority is mindful that [the children] have not experienced other care arrangements away from the biological family, as such it is recognised that being placed in foster care may be a new and challenging experience for them particularly for A who shares a close bond with her maternal grandmother. It would be beneficial for the children's emotional well-

being to remain in a placement together as this may offer them some comfort and familiarity."

9. At the first hearing on 4 June 2020, an interim care order was made on the basis of a care plan for the children to remain with the grandparents. A case management hearing was listed on 16 June before Mr Recorder Benjamin.

10. Shortly after the interim care order was made, however, the father made further allegations about the maternal family, asserting that the grandfather had been a terrorist when living in Sri Lanka some years ago, that the grandfather had mental health issues, that the maternal aunt had attempted suicide, and that the grandfather had been physically abusive towards J. A number of the allegations made by the father, including particularly the allegation of involvement in terrorism, are denied by the grandparents. On the basis of these allegations, and following further conversations with the grandparents, the local authority carried out a supplemental regulation 24 assessment which concluded that that it was no longer safe for the children to remain in their care.

11. At the hearing on 16 June, the local authority, supported by the guardian, sought the removal of the children from the grandparents' care. The recorder concluded that the court did not have sufficient time to deal with the application for removal at that hearing, which had been listed for only one hour. Furthermore, the grandparents were not at that stage parties to the proceedings. The recorder therefore adjourned the application for removal to a further hearing on 25 June. As the local authority was no longer willing to support the placement of the children with the grandparents under the interim care order, the recorder discharged that order and made an interim child arrangements order for the children to live with the grandparents, coupled with an interim supervision order to continue until the next hearing. The grandparents were joined as parties to the proceedings and appropriate case management directions given.

12. Prior to the hearing on 25 June, the local authority did not file with the court any further statement or interim care plan but did file an application for a "holistic psychological assessment" of the family. The application, which identified the psychologist whom the local authority wished to instruct, proposed that the ambit of the instruction should include (a) a full psychological assessment of the parents including their capacity to care for the children; (b) an assessment of the harm which the children had suffered or were at risk of suffering in the parents' care; (c) an assessment of each child's individual functioning and needs, with recommendations for any support or treatment each child required the timescales for such treatment; (d) an analysis of the relationship dynamics between the parents and the maternal grandparents and any impact this has on their capacity to care for the children; (e) the attachments between the mother and father and each child; (f) the parents' respective level of understanding of and insight into the local authority's concerns and their capacity to work with professionals in an open and honest manner; (g) any support or treatment which might improve the parents' capacity to care for the children; (h) recommendations for the children's future placement needs; (i) impact on the children of placing them away from their mother and siblings, and (j) recommendations for contact in the event the children were placed away from their parents. The scope of the proposed assessment did not include an assessment of the grandparents or their capacity to care for the children.

13. The local authority's applications were supported by the guardian. In her written analysis for the hearing on 25 June, she described a brief meeting with the children in

the garden of the family home in which she observed the children being settled and at ease. But she supported the proposed removal of the children into foster care on the grounds that the kinship assessment was no longer an option because the placement was no longer regulated and there were serious concerns about the children suffering emotional harm during the interim period pending a final hearing.

14. Because of restrictions imposed as result of the Covid 19 pandemic, the hearing on 25 June was conducted remotely. The local authority, mother, father, grandparents and guardian were represented. All the parties, save the father, also attended the hearing. An interpreter participated in the hearing to assist the grandparents and mother. A transcript of the hearing has been produced for the purposes of this appeal. In the first part of the hearing, the recorder considered case management directions including the local authority's application for a psychological assessment and an application on behalf of the mother for an independent social worker, both of which he refused.

15. In the second part of the hearing, the recorder heard submissions on the application for an interim care order. In the course of submissions, counsel for the local authority informed the court that the maternal aunt had told the social worker that she was now living in a different part of the country and had nothing to do with the children. This led counsel for the guardian to submit that,

> "if there was a person within the grandparents' home who could act as a safety net providing consistent protection and safety for these children for the Guardian that might have tipped the balance. But unfortunately that is not the case and it's very difficult to identify protective factors in this placement which would prevent these children suffering further harm."

When counsel for the mother submitted that there had been no material change in circumstances since the original interim care order was made on the basis of the children remaining at home, the recorder observed that one thing that had clearly changed was that the aunt had apparently left the property.

16. Following submissions, the recorder delivered a judgment in which he concluded that the children should be removed from the family home under an interim care order and placed in foster care. I shall return to the reasons for this decision later in this judgment.

17. After the judgment was delivered by the recorder, the mother and grandparents applied for permission to appeal. In the course of those submissions, counsel for the grandparents informed the recorder that instructions had been received that, contrary to the information provided by the local authority, the maternal aunt was still living at the home and intending to stay there. The recorder refused applications by the mother and grandparents for permission to appeal; stayed the interim care orders for seven days to allow time for a renewed application for permission to appeal to be made to this Court; directed that during the stay, the interim child arrangements order and supervision orders should continue; refused the local authority's application for instruction of the psychologist; refused the guardian's application for permission to appeal against the refusal of the instruction; listed the proceedings for an issues resolution hearing in October 2020; and made a number of further case management directions.

18. On 2 July, the mother and grandparents filed separate notices of appeal against the interim care orders. On the same day, I granted both applications for permission to

appeal. On 6 July, the guardian filed a notice of appeal against refusal of the application for a global psychological assessment. On 7 July, I granted the guardian permission to appeal on that application.

The judgments under appeal

19. We were initially supplied with an agreed and approved note of the recorder's short judgment refusing the application for a psychological assessment. On the day before the hearing of the appeal, a full transcript of the hearing at first instance was produced, including a transcript of the ruling on that application. Although that transcript has not been approved by the judge, it is in substantially the same terms as the approved note. We also have been supplied with an approved transcript of his much longer judgement setting out his reasons for making an interim care order and approving the removal of the children from the grandparents' care.

20. In the first judgment, the recorder noted that s.13(6) of the Children and Families Act 2014 provides that the court may only give permission for the filing of expert evidence in children proceedings if it is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly, and that s.13(7) sets out the factors to which the court is to have regard when considering such an application. He agreed with a submission made on behalf the mother that the vast majority of the issues identified in the application were "within the purview of social worker statements". He accepted that cognitive or psychological issues or needs would not be so covered but observed that there was no suggestion of psychological or cognitive assessments being required and concluded that there was no evidential basis for such instruction in this case. The transcript of the hearing shows that counsel for the guardian then pointed out that the boys' school had suggested that T and J may be on the autistic spectrum, and that the medical examination carried out a few weeks earlier suggested that A may be suffering from developmental delay. She asked for permission to appeal against the decision. At that point, the recorder acknowledged the concerns about the children's development but noted that there had not been any referral to CAMHS. He suggested that if a "more specific, better targeted" application was filed proposing an "expert with relevant expertise", the court might be in a better position to determine it. Counsel renewed her application for permission to appeal which the recorder then refused.

21. The recorder then heard argument about the application for an interim care order, at the conclusion of which he delivered a second judgment. Having summarised the history, he referred to s.1 of the Children Act, Articles 6 and 8 of ECHR, and two cases by name – *Re C (A Child) (Interim Separation)* [2019] EWCA Civ 1998, in particular paragraph 2 of my Lord, Peter Jackson LJ's judgment in which he summarised the propositions to be derived from the previous authorities on interim care orders, and *Re A (A Child)* [2015] EWFC 11, in particular paragraph 79 of the judgment in which Sir James Munby P reiterated the point he had made in an earlier decision about the importance of proceeding on the basis of evidence rather than suspicion or speculation.

22. The recorder then identified factors in the s.1(3) welfare checklist relevant to his decision. He noted in particular the positive interaction observed between the children and their grandparents, observing (at paragraph 22):

> "Everyone agrees there is a bond between the children and their grandparents and that removal would be distressing, unsettling and emotionally harmful."

23. The recorder then turned to the factor which he described as the one which would take more time than all the others put together, namely the harm the children had suffered or were at risk of suffering. In this context, he acknowledged again that "severing the bond" with the grandparents would cause them emotional harm. He noted a number of concerns about the grandparents and the maternal family generally, referring to the grandfather's criminal conviction, the local authority's assertion that he was still minimising that offence and various other incidents from the family history in which there had been conflict between family members, including between grandparents and the maternal aunt, grandparents and the mother, and between the grandparents themselves. He concluded that this history led to a concern about what exposure to conflict within the family would do to the children, and to a risk of emotional harm.

24. The recorder noted that the grandparents had disciplined the children by warning them that the police might take them away. He also referred to comments by the grandparents which suggested that they saw themselves as only short-term carers for the children and (at paragraph 49 of the judgment) observed that as a result:

> "the children may already feel unsettled and uncertain about their future. They may already be preparing themselves for a change in home and primary carer and therefore the inevitable harm if I order removal today may be slightly less than would otherwise be the case."

25. The recorder then referred to recent allegations about the incident in which the grandfather was said to have hit the grandmother with a broom on the foot and threatened the aunt, an allegation denied by the grandparents. The recorder noted that the local authority had alleged that following this incident the aunt had protected the children, but added that, as she was no longer living in the house, she would not be available to protect them in future.

26. This led the recorder to his conclusions at paragraphs 60 to 63 of his judgment:

> "60. Drawing all of the threads together now, I am of the view that in the care of the grandparents, there is a risk of emotional and/or psychological harm from: the children seeing their grandparents as short-term carers (leading to feelings of instability); the lack of boundaries and inappropriate threatened consequences for misbehaviour adding to this; witnessing a domestic incident between the grandparents and within their household; and witnessing the conflict between the grandparents and other family members – set against a background of serious incidents arising from conflict within the family. For the avoidance of doubt, I make clear that those are in increasing order of seriousness, from least serious to most.
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> 61. As I indicated at the start of my analysis, in considering the risk of harm, I have to consider the chance of the harm occurring and the seriousness if it does. It is a balancing exercise. With the maternal grandparents, the greater harm seems to arise from incidents involving conflict within the household or within the family. It has rightly been noted on behalf of the Guardian that public law proceedings are stressful

> proceedings. They are proceedings in which allegations are made and have already been made between members of this family. They are proceedings in which emotions run high. There is perhaps a greater risk of conflict within the family, as a result, than there was before proceedings started.
>
> 62. What can I do to manage the risk of conflict in the family, or the risk of abuse within the household? The Local Authority cannot be present 24 hours a day, seven days a week. Initially, I was comforted with the suggestion there had perhaps been only one incident a couple of months ago and that the maternal aunt had taken safeguarding action in reporting it to the police. She is not there to do that now. In the event of an incident or conflict arising, be it domestic abuse within the household, or a violent or damaging incident of conflict with the wider family, she is not there to take the safeguarding action.
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> 63. There was a written agreement in place at one time before those police proceedings. It was broken on more than one occasion. My problem is that any breach of the rules or parameters set by the court or by the Local Authority, or any matter affecting the children's immediate safety, needs to be reported. The only person to have reported matters to the authorities from within the grandparents' household is not there now. When I consider the inevitability of deep, emotional distress and another disruption from uprooting these children again from their primary carer, do I consider that the children's safety or psychological or emotional welfare demands separation from their grandparents and that such a separation until the final hearing, with the harm it will cause, is a proportionate response to the risks if I leave the children in their grandparents' care? After a great deal of thought, I am afraid that I do."

Submissions

27. As already noted, the mother and maternal grandparents each filed notices of appeal against the interim care order. Although their grounds of appeal are couched in different terms, they largely traverse the same issues. In oral submissions before this Court, the issues were refined still further. In essence, the appellants' arguments can be summarised under two broad grounds.

28. The first ground is that the recorder wrongly relied on matters which were not, or not sufficiently, supported by evidence. Three particular lacunae were identified. First, and most importantly, it was submitted that the assertion made by counsel during the hearing about the aunt's absence from the home was unsupported by any evidence. It subsequently transpired that the assertion was inaccurate. The appellants submitted that the local authority's assertion that the aunt was no longer available to act as a protective factor shielding the children from the impact of any family conflict was an important factor in the recorder's decision. Secondly, it was submitted that there was insufficient evidence of the grandparents' alleged breaches of the written agreement. It was contended that there was even less justification for this omission since the alleged

breaches had occurred as long ago as March. Finally, it was pointed out that no written care plan was put before the recorder. As a result, details of the proposed interim foster placement were not available until a late stage in the hearing. Given that the proposed placement was with a carer from a different cultural background who did not speak the children's first language, it was submitted that the absence of a care plan was another important material omission. Furthermore, there was no written care plan for contact between the children and the family members following removal. Overall, it was submitted that the omissions in the evidence, and in particular the lack of any evidence to support what turned out to be an inaccurate assertion concerning the maternal aunt, infected the recorder's analysis and led him to the wrong conclusion.

29. The second ground is that, setting aside those evidential problems, the recorder's conduct of the necessary balancing exercise was flawed. Although he referred to the principles to be applied when considering making an interim care order as summarised by my Lord in *Re C*, in the event he failed to apply those principles when analysing the evidence.

30. It is submitted that, when considering the factors in favour of the children remaining at home, the recorder significantly understated the seriousness of the emotional harm which would result from their removal. The appellants accepted that the recorder referred to the positive relationship between the children and the grandparents and acknowledged that severing the bond would result in emotional harm to the children. On behalf of the mother, however, Mr Barnes submitted that the recorder did not analyse the relationships, or the consequences of severing them, in any detail. In the circumstances, he failed to appreciate, or give any or sufficient weight to, the gravity of the emotional harm which the children would undoubtedly suffer were they to be removed. In fact, the recorder took the view that the degree of emotional harm which the children would suffer may be slightly less because they may be anticipating the removal. Mr Barnes submitted that this observation by the recorder was unsupported by any evidence and was a clear indication that he underestimated the degree of emotional harm the children would be likely to suffer.

31. On the other side of the scales, the appellants submitted that, in carrying out the balancing exercise, the recorder attached excessive weight to the history of conflict within the family. There was little evidence that the conflict had impinged upon the children's welfare. There was only one incident – the alleged incident involving a broom in April 2020 - which was said to have occurred in the children's presence. The circumstances of the incident are disputed and the local authority's allegations are denied by the grandparents. In any event, as Mr Singh pointed out on behalf the grandparents, the incident was mentioned in the initial regulation 24 assessment of the grandparents and thus was a matter of which the local authority was aware when it invited the court to approve the placement with the grandparents under the initial care order.

32. Overall, it was submitted on behalf the appellants that the historical incidents of family conflict and the limited degree of any harm which the children had suffered through being exposed to that conflict were insufficient to outweigh the undoubted and substantial emotional harm that they would suffer if removed.

33. In reply, Ms Parry-Jones for the local authority conceded that there had been deficiencies in the evidence as identified by the appellants but asserted that they had

not been a material factor in the recorder's decision. She acknowledged that the information about the aunt had been given to the court in the manner described but asserted that the family parties had been given some notice of the information earlier in the day of the hearing. As I understood her submission, it was the local authority's case that, if the family parties considered the information given during the hearing by the local authority to be inaccurate, the onus was on them to correct it.

34. Ms Parry-Jones contended that the recorder carefully considered all the evidence about the risks of harm and applied the correct legal principles when analysing the evidence. He acknowledged the positive relationships between the children and the grandparents and the likelihood of emotional harm were they to be removed, but concluded that that harm was outweighed by the risks arising from the history of family conflict were the children to remain at home. The conclusion was one which he was entitled to reach on the evidence and was not a matter with which this Court should interfere.

35. On behalf of the children, Ms Mitchell also submitted that the recorder was entitled to reach his conclusion and pointed out that, in doing so, he had the benefit of an initial analysis by the guardian who had visited the children at the family home, albeit confined to the garden because of the pandemic lockdown restrictions. The guardian endorsed the positive opinion that others had given about the relationships between the children and their grandparents. Nevertheless, her analysis had concluded that the risk of harm from staying at the home outweighed the risks removal. Ms Mitchell drew our attention to the summary of those perceived risks set out in her position statement filed for the hearing on 25 June:

> a) The risk of injury from physical violence perpetrated by the family either directly or by being caught in the cross-fire.
>
> b) The risk of emotional and psychological harm from being witness to physical violence and conflict perpetrated by a family member.
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> c) The risk of emotional harm by being exposed to the uncertainty and ambivalence about their living arrangements.
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> d) The risk of their emotional needs not being met because of the lack of insight and understanding by the grandparents.
>
> e) The risk of not being able to access necessary support and help because of a lack of insight and understanding by the grandparents.

36. Turning to the guardian's appeal, supported by the local authority, against the order refusing the instruction of a psychologist, it was submitted by Ms Mitchell that the assessment proposed by the local authority was clearly necessary in this case, having regard to the children's needs and the complexities of the family relationships. The recorder's decision that the report was not necessary had been based in part on his erroneous belief that there was no evidence that the children had any psychological problems. In fact, the school had identified evidence that the boys were on the autistic spectrum and a medical examination of the youngest child has suggested that she was suffering from a developmental delay.

37. At the hearing before the recorder, the grandparents had adopted a neutral position on the application. Before us, Mr Singh on their behalf submitted that the recorder had been entitled to reach his conclusion that a report was unnecessary. On behalf of the mother, Mr Barnes relied on the principle that an appellant seeking to challenge a case management decision faces a high hurdle and that the recorder had been entitled to conclude that there was no necessity for the specific psychological assessment sought in the local authority's application. Mr Barnes drew attention to the observation of the court following a further exchange with counsel who had pointed out the evidence of psychological problems of the children. The recorder had observed that a more focused application concentrating on those problems might have a better chance of success. Mr Barnes therefore submitted that the recorder was right to base his decision on the specific application placed before him and that in those circumstances the appeal should be dismissed.

Discussion and conclusion

38. The transcript of the hearing before the recorder demonstrates once again the difficulties facing courts required to conduct hearings remotely because of the restrictions imposed as a result of the pandemic. At this remote hearing, the recorder was faced with a series of case management decisions and a contested application for an order which, if granted, would have removed three small children from the family for the first time. During the pandemic there has often been no alternative to conducting truly urgent hearings in this way, but the experience of the past four months has demonstrated that particular care must be exercised when making such important decisions under what are inevitably sub-optimal conditions.

39. In this case, the recorder conducted the remote hearing with commendable care and sensitivity, making sure, for example, that the proceedings were interpreted for the family members, some of whom speak little English.

40. Nevertheless, for my part I am satisfied that his decision to endorse the removal of the children from the grandparents' home under an interim care order was wrong.

41. The recorder referred to the legal principles as summarised in ***Re C***, but I agree with the appellants' submission that he failed to apply those principles, in particular that separation under an interim care order will only be justified where it is both necessary and proportionate, and will only be sanctioned by the court where the child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur.

42. In this case, the recorder needed to balance the risks of leaving the children at home against the risk of removing them. Although he considered the former at length, his references to the latter were brief and general. I accept Mr Barnes' submission that the recorder did not give sufficient consideration to the emotional harm the children would unquestionably experience as a result of separation, and did not take into account, or give sufficient weight to, the gravity of that harm. The children have been placed with the grandparents for nearly eighteen months. They are settled there. They have a close relationship with the grandparents. As the recorder acknowledged, for the youngest child A, the grandparents' home has been her home for over half her life. Plainly she will have no memory of any other home. This illustrates the point made by my Lord in

Re C that removal at interim stage is a particularly sharp interference with a child's right to respect for family life. The emotional harm she would suffer if uprooted at this stage will be substantial. It can only be justified if her safety and welfare require removal.

43. The recorder's observation at paragraph 49 of his judgment to the effect that, because the grandparents had talked about seeing themselves as short-term carers, the children may already be feeling unsettled about their future and preparing themselves for a move and that the "inevitable harm" caused by removal "may be slightly less than would otherwise be the case", was no more than speculation with no evidential support. It reinforces the argument that the recorder underestimated the extent of the emotional harm which the children would suffer if removed which, on any view, would be substantial.

44. For my part, I do not consider the risks identified by the counsel for the guardian in her position statement for the 25 June hearing as likely to arise if the children remain at home are capable of providing sufficient reason for removing the children at this stage. There is no suggestion that the children have been exposed to the risk of physical harm directly or indirectly. The evidence that the children had been caught up in the family conflict is, at this stage, slim. The deficiencies in the grandparents' insight and understanding, cited by the guardian's counsel as a factor justifying the removal of the children, are manifestly not reasons for moving them at this stage. I am also troubled by the suggestion made on behalf of the local authority that, having been given unsubstantiated information that the aunt had left the home, it was for the grandparents to rebut the consequential concerns, particularly when the information was given for the first time during a remote hearing when interpreters were being used. The removal of young children from their home represents a serious intrusion and interference with family life. The burden of proof remains on the local authority at all times. Those professionals representing the local authority and children are under a duty to ensure that recommendations are soundly based. That responsibility is, if anything, even more acute in the inevitably imperfect circumstances of remote hearings.

45. In short, on the evidence before the recorder, the removal of the children was plainly disproportionate. The harm which the children were perceived to be at risk of suffering if they stayed in the home was nebulous and speculative and manifestly outweighed by the harm which the children were certain to suffer if removed from the home.

46. I turn finally to the guardian's appeal against the refusal to authorise instruction of the psychologist. On this issue, the recorder again correctly identified the legal principles to be applied when deciding whether to authorise instruction of experts in family proceedings. The widely-perceived excessive and unnecessary use of experts in such proceedings has led to the requirement of necessity being placed on a statutory footing, and all family judges must comply with this rule. On this occasion, however, it seems to me clear that a psychological assessment is necessary to resolve issues in the proceedings. There is some evidence that each of the children has some sort of psychological problem. Furthermore, the principal issue in the case seems to be the impact of family conflict and dysfunctionality on the children's welfare. In my judgment, a psychological assessment would plainly assist the court in evaluating this issue.

47. I am puzzled why the recorder did not initially appreciate that the children's various psychological problems represented an issue on which psychological assessment would assist. It may be that this point was missed in the course of the remote hearing. It seems clear that the recorder took the view that the specific questions proposed for the expert as set out in the local authority's application were not relevant to the issues in the case. For that reason, he proposed that, if the guardian persisted in wishing to instruct an expert, she should submit a more focused application. Although that approach may conform strictly with the rules, it runs the risk of causing additional delay. A better course in the quasi-inquisitorial context of care proceedings will often be to discuss the issue with the parties in court, identify the broad parameters of an expert assessment which is necessary to assist the court to resolve the proceedings, and then ask the parties' representatives to agree the details of the instruction and submit a draft to the court. I recognise, of course, that judges sitting at first instance often do not have the time to engage in such discussions with the parties, particularly in the current circumstances and at remote hearings, and therefore do not have the opportunity for reflection and consideration that this Court usually enjoys. Furthermore, of course, the recorder on this occasion was not only required to make detailed case management directions in these complex proceedings but was also facing a difficult decision on a contested application for an interim care order.

48. At the conclusion of the hearing before us, when informing the parties that we were allowing the appeals, we invited counsel to try to agree questions to be put to a psychologist, having indicated the broad parameters that we considered necessary. By the end of the afternoon, counsel had provided us with a list of questions which we were happy to endorse. We are very grateful to counsel and their instructing solicitors for their helpful and constructive approach. We also asked the parties to identify the appropriate expert and draft letter of instruction within seven days. I am conscious that this course represents something of a departure from the procedure laid down in Part 25 of the Family Procedure Rules and Practice Direction 25C. In the circumstances, however, I consider the course we adopted to be both proportionate and in keeping with the overriding objective.

49. For the reasons set out above, I concluded that the appeals by the mother and grandparents against the interim care orders and the appeal by the guardian against the refusal of a psychological assessment should be allowed, that the interim care orders should be discharged and replaced with child arrangements orders under which the children are to reside with the grandparents until the conclusion of the proceeding or further order, coupled with interim supervision orders, and that there should be an order under FPR Part 25 authorising the instruction of a child psychologist to carry out an assessment of the children and the family.

LORD JUSTICE PETER JACKSON

50. I agree.

LORD JUSTICE McCOMBE

51. I also agree.