EH v LONDON BOROUGH OF GREENWICH, AA AND A (CHILDREN)
[2010] EWCA Civ 344

Court of Appeal

Smith and Wall LJJ and Baron J

9 April 2010

Care proceeding – Adoption – Evidence that mother had lied about ongoing relationship with dangerous father – Whether determinative of welfare issue – Whether judge must refer explicitly to welfare checklist and human rights of parties

At the fact-finding hearing of the care proceedings the judge concluded that the father had deliberately fractured the arm of the 5-month-old child, had lied about it when questioned, and posed a continuing threat as a result of his propensity to violence. He also found that the mother must have been aware that something very serious had happened, and had both delayed taking the child to the hospital and lied about the incident thereafter. Despite evidence of good parenting the local authority care plan was to remove both children from the parents permanently. No steps were taken to foster and support the mother in order to give rehabilitation a reasonable prospect of success; the authority did not actively support the mother in separating from the father, and told her that even if she left the father the children would be adopted. Nonetheless, the mother did leave the father, moving to a woman's refuge. The father had a form of nervous breakdown, and was admitted to a local psychiatric hospital for a month. These developments led to an adjournment of the welfare hearing. Two positive assessments of the mother were produced, but the mother received no therapy, or any help from the authority. Shortly before the hearing the guardian and both experts were recommending the return of the children to the mother's care. However, while accepting that the mother's contact was of very good quality and that she related well to the children, the authority favoured adoption, on the basis that there was too great a risk that the relationship between the parents was ongoing. At the hearing the authority drew the court's attention to a possible sighting of the father near the contact centre when the mother was having contact, to the fact that the father had obtained the mother's new telephone number, and to an alleged sighting by a social worker of the parents together at a shopping centre 2 days before the final hearing, recorded on CCTV. The mother denied having met the father, but her alibi witnesses failed to attend court. The experts' view was that if the relationship was ongoing and the mother was being duplicitous, it would not be safe for her to care for the children. The judge made it clear that the case should not be further delayed, found that the mother probably had met with the father, and made full care and placement orders on the basis that the mother had lied about an ongoing relationship with the father. The mother appealed.

Held – allowing the appeal; setting aside the care and placement orders and remitting the case to the judge for a fresh final hearing –

(1) It was imperative that when judges in care proceedings were dealing with highly controversial identification evidence, they gave themselves a *Turnbull* direction; judges needed to remind themselves of the dangers of identification evidence (see paras [41], [82], [117]).

(2) The judge's fundamental error had been to treat his critical findings of fact as determinative of welfare. He had been entitled to find that the mother had lied about seeing the father once in a shopping centre but should then have gone on to consider why she might have lied and whether the whole of the evidence was capable of proving a continuing relationship about which she had lied consistently over time. Her

denial of the single meeting for which there was credible evidence might have demonstrated that she could never be trusted to work honestly with professionals for the benefit of children, but the judge should have considered other possible explanations (see paras [50], [51], [52], [80], [93], [101], [117], [120]).

(3) When making a Draconian order, such as a placement order, the judge was required to balance each factor within the welfare checklist in order to justify his conclusions and to determine whether the final outcome was appropriate. In a case in which the care plan was for adoption, the full expression of the terms of Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 must be explicit in the judgment; the judge must show how this extreme interference with family life was both necessary and proportionate. In this case the judge had failed even to mention the statutory welfare checklist or the right of the mother and children to respect for their family life under Art 8; he should, specifically, have considered whether some additional work should be undertaken with this mother, given her qualities as a parent and lack of support, to give her a fair opportunity to demonstrate that her commitment to the children was greater than her relationship with the father (see paras [54], [58], [59], [61], [64], [98]).

Per curiam: in this type of case it was vital that a non-abusive parent who was capable of being a good parent in the absence of the known abuser received proper support at any early stage; the correct approach was that adopted by local authorities who carried out rigorous support work long before the disposal hearing. It was very poor social work abruptly to deny help to a mother who needed and was asking for help to break free from an abusive relationship, without explanation. The conduct of the authority in this case had been entirely inimical to the ethos of the Children Act 1989, wholly contrary to good practice in care proceedings, and unduly adversarial (see paras [16], [55], [102], [105], [116]).

Statutory provisions considered

Children Act 1989, s 1(3), Parts III, IV

Adoption and Children Act 2002, ss 1(2), (4), 26(4), 52(1)(b)

European Convention for the Protection of on Human Rights and Fundamental Freedoms 1950, Art 8

Cases referred to in judgment

B (Care: *Interference with Family Life), Re* [2003] EWCA Civ 786, [2003] 2 FLR 813, CA

B (Care Proceedings: Standard of Proof), Re [2008] UKHL 35, [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141, HL

G (Children) (Residence: Same Sex Partners), Re [2006] UKHL 43, [2006] 1 WLR 2305, [2006] 2 FLR 629, [2006] 4 All ER 241, HL

F (Placement Order), Re [2008] EWCA Civ 439, [2008] 2 FLR 550, CA

M (Fact-Finding Hearing Burden of Proof), Re [2008] EWCA Civ 1261, [2009] 1 FLR 1177, CA

P (Placement Orders: Parental Consent), Re [2008] EWCA Civ 535, [2008] 2 FLR 625, CA

R v Turnbull and Another; R v Whitby; R v Roberts [1977] QB 224, [1976] 3 WLR 445, [1976] 3 All ER 549, CA

Deborah Eaton QC and *Margo Boye* for the appellant

Lucy Theis QC and *Helen Soffa* for the first respondent

David Vavrecka for the third and fourth respondents

Cur adv vult

BARON J:

[1] As this case is ongoing, reporting restrictions will be imposed, and this judgment is being written anonymously. Nothing must accordingly be published which will in any way identify the children concerned.

[2] This is an appeal from a judgment given and order made by His Honour Judge Hayward Smith QC on 9 October 2009. On that occasion the judge made a full care order in favour of the London Borough of Greenwich (the local authority) and a placement order in respect of two children namely R, a boy, now aged 5 years and 2 months, and his full sister, RA, now aged 2 years and 8 months. These children have not lived with their natural parents since January 2008 and, in the light of findings of fact made by the judge, it is the local authority's plan that the children will be adopted outside their birth family.

[3] The grounds of appeal are to the effect that:

(1) the judge was plainly wrong in his analysis of the evidence and, therefore, erred in his finding of fact that the mother and father remained in a continuing relationship with each other;

(2) the judge erred in law by failing to refer explicitly in his judgment to the provisions of the Children Act 1989 (the Children Act); Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention); the Adoption and Children Act 2002 (the Adoption Act) and, therefore, implicitly must have failed to:

  (i) carry out the necessary balancing exercise; and

  (ii) apply the relevant provisions as required by statute/ Convention;

(3) the judge failed to consider whether it was appropriate to make any contact order pursuant to s 26 of the Adoption Act.

The factual matrix

[4] The two children with whom this court is concerned lived with their parents until 3 January 2008 and there were no concerns about their care. On the contrary the evidence was to the effect that both were thriving. The household in which they were brought up was traditional in the sense that the father worked whilst the mother stayed at home and cared for the family.

[5] In January 2008 the parents took RA to the accident and emergency department of the local hospital. She was then aged only 5 months. On admission she was found to be suffering from a comminuted spiral fracture of her left humerus. In fact, the bone was broken in three separate places. The parents could offer no adequate explanation as to how the injury had occurred. The treating medical team considered that it was likely that the injury was non-accidental and social services were informed. Both children were removed from their parents' care on that day and, initially, were placed with their maternal grandmother.

[6] In about May 2008, after a dispute between the father and the maternal grandmother, when the former lost his temper, the children were moved into foster care where they have remained. There was frequent contact with their parents. The judge was satisfied that, in general, the mother's contact was of

very good quality and that she related well to the children. The mother has been steadfast in her commitment to the children. Since about June 2009 the father has ceased to have any contact with them. He has failed to appear at the last three court hearings (including this one) and the local authority have had no recent communication with him.

[7] In January 2008 neither parent accepted that RA's injury was non-accidental or that either had caused it. Moreover, they did not accept that there must have been a failure to protect the baby particularly as they did not seek proper medical assistance immediately after the injury had occurred.

[8] In the light of the parents' denials a fact-finding hearing took place in November 2008. After an extensive 10 day hearing His Honour Judge Hayward Smith QC gave a very carefully reasoned 50 page judgment and concluded that the father (who had a history of violence) had deliberately caused the injury probably because he 'lost his temper with (RA) and was violent to her, thereby causing the fracture'. The judge was not able to make a specific finding as to the precise mechanism but 'it entailed the forces on the arm required to produce the fracture'. In fact, the medical evidence was to the effect that considerable force and a twisting mechanism had been required.

[9] The judge could not determine whether the mother actually saw what the father did to the baby but:

> 'she was in the house at the time and she must have been aware that a very serious event had occurred. The event probably took place during the night of the 2 January or the early morning of the 3 January.'

In the circumstances, the judge was clear that the mother had failed to protect RA and had failed to take her to hospital until mid-afternoon on 3 January. Importantly, he found that she had sought to protect the father by failing to tell the truth about how the injuries had occurred and by agreeing not to take RA to hospital for some hours. The judge also held that the father had failed to give full details of the incident when questioned and that he posed a continuing risk as a result of his propensity to violence.

[10] In November 2008 during the course of his judgment the judge expressly referred to many positive aspects of the parents' care. He pointed to the fact that the contact notes made 'no criticism of [the mother] of any significance. There is abundant evidence that she is a warm and loving mother'. That stated, he found that she was 'very supportive of the father'. At para [298] of his first judgment he said:

> 'I have already recorded in this judgment that these parents have many good qualities; they love their children and the children love them. They have shown commitment to the children. Apart from the fracture to (RA's) arm, there is no evidence that the children have suffered any harm, quite the contrary, they appear to have been thriving. It would be very unfortunate if the children had to be removed from their parents.'

[11] Obviously the parents required some time to come to terms with the judge's findings. I have no doubt that each was required to accept his findings in full if they were to make any progress towards rehabilitation with the children. It is common ground that immediately after the fact-finding hearing

leading counsel for the mother asked the local authority to arrange a meeting with her alone. No doubt her legal team anticipated that the local authority would advise and encourage the mother to separate from her violent partner. In the light of the judge's findings the mother was required to accept that the father posed a danger to the children unless (i) he could be; helped through therapy to control his propensity towards violent outbursts and (ii) assisted to alter the disturbing pattern of behaviour which had bedevilled his adult life.

[12] Despite the mother's request, the local authority arranged a meeting with both parents. This effectively ruled out a detailed discussion with the mother about the need to separate from the father. It is not in dispute that, notwithstanding the judge's remarks at the end of the hearing in November, the mother was given the clear impression by the local authority that the social workers were steadfastly maintaining that, whatever she did, the children would be removed permanently from her care. Their plan was to place the children either with a member of the extended family or in an adoptive placement. His Honour Judge Hayward Smith QC was highly critical of the local authority's actions in this regard. The detail of this part of his judgment (which would seem to me to be very well founded) speaks for itself.

[13] The judge referred to the 'closed mind' of the local authority. He stated that:

> 'one of the unfortunate features of this case is that, despite the evidence of good parenting the local authority formed the view far too early that their care plan should be to place the children away from the parents.'

I am sure that this merited finding has, to a degree bedevilled this case, because the mother has had a continued sense of grievance that she was never given a fair chance and, more importantly, the local authority's social workers have never provided sufficient support to her.

[14] It is obvious from the terms of our domestic statutes and the European Convention that children should remain within their birth families unless the facts are such that they have suffered or are at risk of suffering significant harm. This means that where, in a case such as this, positive features of a parents' care are highlighted, it is only proper that steps be taken to foster and support the positives so that rehabilitation is given a reasonable prospect of success. That process did not occur in this case. Indeed, the two independent professionals who were asked to assess the parents noted that the local authority's 'negative attitude' towards the mother and father 'pervaded' the case. Apparently, it was so explicit that the experts wanted to know if there was additional information to which they had not been made privy. It is difficult to understand how the social workers could have reached the concluded view that this mother was beyond redemption given the judge's careful analysis of her good qualities.

[15] The consequence of the local authority's fixed preference meant that they did not actively support the mother in urging her to separate from the father. Moreover, they did no work with her in regard to her feelings around separation or its impact upon the need to keep the children safe.

[16] This lady had been involved with a violent partner since about 2001. There is no doubt that the couple had an established, long-term relationship which meant a great deal to each of them and was mutually supportive. In

those circumstances, I am sure that it was unlikely that any separation (however essential it may be) would run smoothly without expert, supportive input. In this type of case, I regard it as vital that the non-abusive parent should receive proper support at any early stage provided, of course, that he/she has sufficient qualities to be a good parent in the absence of the known abuser. On the judge's findings, this mother was one such individual.

[17] The case was originally ready for final hearing commencing 2 February 2009 (that is just over 12 months after the precipitating event). However, on 1 February 2009, the mother filed a witness statement indicating that she had finally separated from the father. History confirms that on 31 January 2009 the mother left home to live in a women's refuge. On the same day (no doubt as a result of the separation) the father had what the judge described as 'some form of nervous breakdown' and was admitted to a local hospital where he remained as a voluntary patient until the beginning of March 2009. There was no doubt at the time that the separation was genuine.

[18] In the light of these developments, the case was adjourned and re-fixed for 20 July 2009. I am sure that the delay was purposeful because, if it could be demonstrated that the mother had separated from the father and had accepted that he was a danger to the children, then (given her other noted good qualities) it was likely that she would be able to provide the children with: (i) a good standard of parenting; and (ii) the degree of protection which the professionals considered a necessary prerequisite to her resuming their care.

[19] The intervening period was used, inter alia, to undertake two independent assessments upon the mother and, whilst he was participating in proceedings, the father. Having read them, I am clear that these assessments were reports for the court and were not, in any sense, a therapeutic exercise by which the mother was expected to gain insight into the dangers of her relationship with the father. This mother received no such expert guidance. The local authority did not assist and psychologists attached to the refuge did not feel that they could assist whilst the other assessments were taking place. As such, apart from such general guidance from the independent social worker, the mother did not receive any proper support. Mr M (one of the experts) has described her as being 'in limbo'.

[20] The two experts and the guardian provided reports which were largely positive of the mother. They all seemed to be convinced that the parents' separation was genuine and that she acknowledged, in large measure, that the father posed a danger to the children. Consequently, in the days leading to the July hearing, both experts and the guardian supported the return of the children to their mother at the refuge.

[21] The local authority accepted the expert views but asserted that there were several pieces of evidence which proved an ongoing relationship between the mother and father. In particular, insofar as relevant in the context of the judge's ultimate findings, they placed reliance on the following pieces of evidence:

(i) On about 5 March 2009, when the mother attended the agreed contact centre to visit the children, there had been a possible sighting of the father by a Miss W. Her evidence was to the effect that, whilst driving away from the centre, she thought that

she had seen a man resembling the father on the opposite side of the road, some 100 yards away, walking behind the mother as she made her way towards contact. I note that, at an earlier stage in the proceedings, the local authority had indicated that this was not an incident upon which they intended to rely.

(ii) The father had obtained the number of the mother's new mobile telephone. This telephone had been given to her in February 2009 when she moved to the women's refuge. The local authority pointed to the fact that she had received: (a) two texts sent from the father's number (although the contents of those texts was unknown); and (b) two calls (the first on 15 March 2009 and the second in early June) which had not been answered but which had transferred to voicemail with no message left. The local authority submitted that the mother must have given the number to the father. She denied this contention and presumed that he must have obtained the number from mutual friends.

[22] Prior to giving their oral evidence, the experts had been made aware of allegations at (i) and (ii) above before finalising their reports. They did not consider them serious enough to alter their recommendation of rehabilitation.

[23] On the first morning of the restored hearing the local authority not only also sought to rely upon the above allegations but introduced a serious new accusation. It related to an alleged sighting on Saturday, 18 July 2009 (some 2 days before the final hearing) by the local authority's assistant team manager (a Miss T) of the parents together near social services offices. This, they submitted, was evidence of a continuing committed relationship between them. Consequently, they sought a finding that the mother had deceived everyone and could never be trusted to care for the children. The care plan was, therefore, adoption outside the family.

[24] This allegation took all, bar the local authority, by surprise. Only the bald factual matrix was established on the first day of the trial because the local authority indicated that Miss T's statement would only become available on the following day. There can be little doubt that the mother's legal team were caught unawares by this development and had to deal with it very speedily. The mother denied any contact with the father and gave details of an alibi asserting that, from 9.30 am to 5 pm on the relevant date, she had been at the refuge assisting another resident to pack her belongings. Unfortunately, no staff member was on duty over the weekend and so there was no professional on site able to corroborate her alibi.

[25] Despite the obvious difficulty caused by this late accusation, the trial continued with other oral evidence being given. On the second day Miss T's statement duly arrived. In response to the local authority's new evidence, the mother produced a statement from her alibi witness (a Ms TF), however, the latter could not attend to give evidence because she had not been given sufficient notice and, apparently, had childcare duties. The mother also produced two further statements from friends (only one of whom was available to attend court). They were introduced to deal with a number of other issues and, in particular, a vague suggestion that the mother may have been spending time at weekends with the father when she claimed to have been at a friend's home.

[26] The new evidence was made to fit around the original witness template. Thus, the two experts (namely, clinical psychologist, Mr BM, and independent social worker, SB) gave their oral evidence relating to disposal on Tuesday, 21 July (which was the second day of the trial). This was before all the factual evidence relating to the incident was complete.

[27] Miss T gave oral evidence detailing that she had seen the mother and father together. She asserted that CCTV footage of was available to provide some form of corroboration. On Thursday, 23 July 2009 the judge and counsel attended the relevant police station to view the CCTV footage. It was clear from the material that Miss T (i) had been in the particular street and (ii) had been able to see a black man and a white woman (whose general appearance seemed to be similar to that of the mother) walking and standing together. The judge's provisional view was that the woman in the video appeared to be fatter than the mother. He put it thus in his judgment:

> 'it was apparent that to me that the woman in the CCTV looked very like the mother, including a similar distinctive hairstyle. I did wonder however whether the person alleged to be the mother was somewhat stouter than the mother.'

At that stage the judge refused an adjournment to obtain expert analysis of the CCTV footage.

[28] I note that the experts' written reports were dated: (i) BM (12 January 2009 and addendum 4 June 2009); and (ii) SB (19 January and addendum 4 June 2009). Accordingly, those reports came into being long before the new factual matrix emerged. Indeed, the usual experts' meeting had taken place on 5 June 2009 long before the new allegation.

[29] It is fair to point out that the July hearing had been fixed in February expressly to deal with disposal. However, having read the transcripts of the experts' oral evidence, I am clear that the new factual issue had the effect of derailing concentration upon the central issue relating to the long-term outcome for these children. Counsel for the guardian has expressed it as a 'wind tunnel effect' with all parties, including the judge, being driven relentlessly in one direction and concentrating upon the truth or otherwise of the mother's denial that she had been in the particular street.

[30] The experts were of the clear view that, provided the mother had separated from the father both physically and emotionally, then she could safely parent the children. However, they indicated that if the judge were to find that she was in *a continuing relationship* (emphasis added) and, in consequence, had been duplicitous, then it would not be safe to permit her to care for the children. The rationale being that this would prove that she had been collusive and untruthful over an extended period. Both experts accepted that the quality and extent of the parents' relationship was important.

[31] To be fair BM pointed to a 'middle ground' suggesting that if the mother had simply been seeing the father to tie up loose ends it would not rule out rehabilitation.

[32] Obviously the mother's honesty was in issue. However, as I perceive it, the quality and extent of the parents' relationship should also have been considered as being of crucial relevance.

[33] On 21 July (on the guardian's application) the judge ordered that CCTV footage taken at the women's refuge over the material period be released into the proceedings. The refuge later objected on the grounds of a breach of their clients' confidentiality. Consequently, on 23 July, the judge set that order aside. In the light of this the mother considers that she was deprived of vital evidence that could or would have demonstrated that she was at the refuge at the material time. The judge held that he could not speculate as to what that coverage may have shown. Whilst it is correct that this evidence was not available, I do not consider that its omission was fundamental to the judge's determination because if the mother's alibi witness had come up to proof that live evidence would have been far more potent.

[34] That stated, when vital decisions are being made about the future of children which may lead to their adoption, I consider that, subject to law, all relevant evidence should be available to and heard by the court.

[35] The experts seemed to be clear that if the judge found that the mother had lied to all about a re-established relationship then there could be no confidence that she would work with professionals in an open and honest manner. The guardian apparently supported this stance. Somehow this line of reasoning seems to have morphed into the position that all, save the mother, agreed that if the judge were to find the parents had not separated then the local authority's care plan for adoption would be the inevitable consequence. For myself, I find this conclusion too stark and unsupportable given the factual matrix of this case.

[36] I point specifically to the following points which make this case somewhat unusual:

(i) the mother had very many good qualities and her parenting abilities, per se, were not in issue;
(ii) the local authority because of their 'closed mind' had failed properly to work with her or give her support from separation to July;
(iii) the evidence of her alleged deceit emerged late in the day and derailed concentration on disposal. In effect, the July hearing became a second fact-finding hearing;
(iv) the mother's legal team were on the 'back foot' throughout trying to piece together her case in circumstances which were not easy. Some might regard the entire process as unfair;
(v) most importantly, the judge was not asked and did not determine why this mother might have lied (if that is what he found); and
(vi) he did not consider what the quality/length of the re-established relationship with the father might be.

In the light of all these points, the experts were unable to consider all the issues. They were not asked and did not determine whether with proper support (which it is clear the mother never obtained from the local authority) even if she had lied: (i) the mother might nevertheless be assisted to become open with professionals; and (ii) thereby achieve rehabilitation. Given the ages of these children, this type of evidence was particularly important because the mother had an established and good quality relationship with them.

[37] On 29 July 2009 (after some 5 days of evidence) the judge received the parties' final written submissions. Even at this late stage, the mother's counsel sought an adjournment to: (i) permit her to call her witnesses who had not been able to attend; and (ii) to have an expert report on the CCTV images in the hope that this would exculpate the mother. The judge acceded to those submissions and the matter was adjourned until 9 October 2009.

[38] On the duly appointed date, the mother's main alibi witness (TF) did not attend. Apparently, she had been involved in a car accident and had (as mother's counsel put it to this court) 'minor injuries'. Another of her witnesses did not attend because she was giving evidence in a criminal court. As I understand it, no application was made for an adjournment to permit these witnesses to attend even if only through the medium of a video-link. Perhaps this failure (for it was such) was due to the judge's express stance (in reaction to an application by the local authority to adduce more evidence) that the matter would not be delayed further. I am clear that the mother's case should not have been placed in this type of jeopardy. Even if the judge seemed to be displeased, the application to adjourn should have been made because the alibi was a crucial part of the mother's case. It deserved to be weighed in the balance. Untested by cross-examination, I doubt that any judge would have been persuaded by it. Obviously, the failure to pursue this point cannot be prayed in aid to seek to undermine the judge's ultimate finding in relation to the alleged sighting. However, I am clear that advocates should not be deterred from making an appropriate application just because they perceive the tribunal may be irked by it.

[39] To return to the chronology, the expert analysis of CCTV footage was provided by a firm called BSB. Their report indicated that there was no 'significant difference in the height of woman A and [the mother]'. This meant that she could not be excluded as having been present. Having seen the stills taken from the CCTV pictures it is noticeable that the hairstyle (which is fairly uncommon) of woman A (as she is referred to in the report) is very similar to that of the mother. The expert was clear that the quantity and quality of the pictures did not permit of a more detailed analysis in terms of facial identification or comparison of bodily size. In particular, he pointed to the fact that the type and bulk of the clothing which was being worn by woman A meant that the weight/body shape of that person could not be adjudged with any accuracy. In the light of this evidence the judge's initial impression of woman A's size could not be supported as the pictures simply did not permit that type of precision. Complaint is made of the phrase in the judgment:

> 'I am quite sure that that if the appearance of the woman on the CCTV was fatter than the mother and that would prove that it was not the mother, (the CCTV expert) would have said so. Therefore my initial impression is not supported by the expert evidence.'

It seems to me that the submission is misplaced because the judge was doing no more than accepting that his own initial impression could not be relied on as a matter of expert analysis.

[40] The judge did not give himself a *Turnbull* direction in relation to identification evidence. In all cases such as this, I consider that it is incumbent upon a judge to remind himself in judgment of the precise terms of the

passages in *R v Turnbull and Another; R v Whitby; R v Roberts* [1977] QB 224, [1976] 3 WLR 445 in which Widgery CJ stated at 228 and 447 respectively:

> 'First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weakness which has appeared in the identification evidence.
>
> Recognition may be more reliable then identification of a stranger but even then when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.'

[41] The judge accepted the evidence of Miss T as he was entitled to do. He considered that the CCTV evidence was corroborative of his findings. He stated that:

> 'Her identification is to some extent corroborated by the CCTV evidence which although it does not lead to the conclusions that the woman was definitely the mother it is certainly consistent with her being the mother. The age, the height, the distinctive hairstyle all point to it being the mother. Despite all that I have said *I have reluctantly come to the conclusion that it is probable that Miss T was not mistaken*. [Emphasis added] I find it probable that Miss T did see the mother and the father together on that occasion. It follows that the evidence has driven me to the conclusion that the mother has lied to me. Although it

> astounds me that the mother and the father could have been so unwise as to be together in the vicinity of the social services offices on the 18 July I think it probable that they were.'

[42] He continued from this

> 'That finding lends some corroboration of the evidence of Miss W and thus I think it probable that Miss W was also correct in identifying the Mother and Father *together* [emphasis added] despite my caution in approaching her evidence. Given those findings I also think that it is probable that the Mother did give the Father her mobile telephone number.'

[43] Miss W had worked at the contact centre where the mother had frequent supervised contact with her children. She told the court that on 5 March 2009 she had been driving past the contact centre and had seen the mother walking towards it. This fact was not in dispute. Miss W thought that she had seen the father some 100 yards behind on the other side of the road apparently following the mother. She was so concerned (given the father's propensity to violence) that it 'might be him' that she stopped her car and warned those at the contact centre that the father may be in the vicinity. This lady's evidence was far less cogent than that of Miss T and it is clear that she never placed the mother and father 'together' as the judge asserts above. Counsel for the local authority pointed to earlier passages in the judgment where the judge stated they were 'together in the vicinity' and submitted that the above paragraph should be read in that way. I do not accept that submission. The judge was plainly wrong in stating that the parties were together on 5 March because that evidence was not given. The most that could be concluded was that they were in the same road at about the same time.

[44] Miss Eaton QC, for the mother, has submitted:

> 'Curiously, in his note of refusal of permission to appeal some minutes after he had delivered judgment the judge referred, to "sightings" of mother and father together.'

I accept that this phrase reveals an error because there was only one sighting of the parents together. The judge also referred to the mother and father 'associating with each other' rather than being in a relationship. The terms of this type of note are nothing more than rather loose stated reasons why permission is refused and, as such, no judge can be criticised for his/her use of terminology when the contents are not meant to be binding in the manner of a judgment. However, the judge's words do suggest that he had made more of the evidence of 5 March than he was entitled.

[45] It is clear that the local authority did not take any direct or protective steps as a result of Miss W's concerns. I doubt that her evidence, of itself, could ever be regarded as probative of a continuing relationship because it is plausible, as the judge himself pointed out, that even if the father was properly identified (and the sighting was not of the best) he could have been trailing the mother without her knowledge.

[46] I accept that the judge was entitled to use the evidence of Miss W in his analysis of the events as another piece of jigsaw. He was entitled to consider that it assisted in his investigation of the possible relationship between the parents. However, he was plainly wrong in finding that they were together on that occasion.

[47] The judge then analysed the evidence in relation to the telephone calls/texts from the father in March and June 2009. He found that the local authority's contention that the mother must have given the number to the father was proved. He did so on the basis that it followed upon his finding that the mother was lying in relation to the main incident. Whilst it is permissible for any judge to take this route when analysing evidence I do not consider that it was good practice to draw such an adverse conclusion in this case. The critical finding sought related to an ongoing relationship over time. The telephone calls/texts were central to that issue because they might prove a resumption of communication from about mid-March 2009. As such, the judge should have carefully balanced the detailed evidence before reaching his conclusion that the local authority's allegation was proven as another part of the jigsaw.

[48] The judge found that he was 'driven inexorably to the conclusion that the local authority's suspicions that the mother and the father are still together are correct'. The submission on behalf of the mother is to the effect that:

> 'taken together, at their highest these events were not capable of justifying a finding that the parents had not separated and that there was an ongoing relationship which may endanger the children.'

Miss Eaton QC submits that the judge failed to take proper account, inter alia, of the fact that:

(i) when requested, she offered her phone for forensic analysis and there was no suggestion that she had made calls to the father on that phone;
(ii) she had asked for disclosure of the CCTV footage of the refuge;
(iii) the maternal grandmother had informed the judge that the 'old E (the mother's first name) was back' thereby indicating that she was free from the influence of the father; and
(iv) she had even offered to be tagged.

[49] Despite those submissions, I consider that the judge was entitled to come to the clear conclusion after hearing the evidence that the mother had lied about the sighting in the street particularly in the light of his findings about her reliability in November. On that occasion she had most assuredly lied.

[50] However, once he had made that finding, the judge should have gone on to consider: (i) why the mother might have lied; and (ii) whether the whole of the evidence was capable of proving a continuing relationship about which she had lied consistently over time.

[51] If the judge had undertaken that analysis, he would have realised that the only credible evidence was to the effect that the mother had been with the father on one occasion in a crowded shopping street. Whilst her denial might

have demonstrated that she could never be trusted to work honestly with professionals for the benefit of the children, there could have been another/other explanation(s) and he should have considered them.

[52] The facts in this case could tend to suggest a plausible alternative. Moreover this mother did not have a good relationship with the local authority and so she had never been given proper guidance or help to deal with her separation from the father.

[53] The mother's situation might have been different if, after intensive work, she had been helped to accept that she had seen the father and had been prepared to give reasons. Without support, I am not persuaded that this mother was ever given a fair opportunity to demonstrate that her commitment to the children was greater than her relationship with the father.

[54] Having read the guardian's report, it was anticipated that intensive, supportive work would be undertaken once it was accepted that the children were to be rehabilitated. It is within my knowledge that, in many similar cases, local authorities carry out this type of rigorous support work with a non-abusive parent long before the disposal hearing. I think that this is the correct approach. No such work was undertaken in this case, probably because the local authority had a 'closed mind'. That failure should not redound to the disadvantage of this mother and, more importantly, to her children who will lose their birth family if no such intervention takes place.

[55] Grounds 3 to 6 of the appeal complain of the adequacy of the reasons given in the judgment for the care and placement orders which were made. It is clear that the judgment does not contain any detailed analysis of the applicable law. The result appears to have been wholly fact dependant because the judge accepted that if the mother had been untruthful in her portrayal of her separation from the father then there was no realistic alternative to the making of a care order with its ultimate plan for adoption outside the birth family.

[56] In *Re G (Children) (Residence: Same Sex Partners)* [2006] UKHL 43, [2006] 1 WLR 2305, [2006] 2 FLR 629 there was criticism of the fact that the trial judge did not refer to the welfare checklist. Baroness Hale of Richmond stated at para [40]:

> 'My Lords, it is of course the case that any experienced family judge is well aware of the contents of the statutory checklist and can be assumed to have had regard to it whether or not this is spelled out in a judgment. However, in any difficult or finely balanced case, as this undoubtedly was, it is a great help to address each of the factors in the list, along with any others which may be relevant, so as to ensure that no particular feature of the case is given more weight than it should properly bear. This is perhaps particularly important in any case where the real concern is that the children's primary carer is reluctant or unwilling to acknowledge the importance of another parent in the children's lives.'

[57] By failing to undertake the crucial analysis demanded by statute the judge did not direct his mind to the vital rationale set out therein so as to check that the outcome posited was fair, just and appropriate. It was his task to make the final determination and reach a conclusion that was in the children's best interests. If he had followed the terms of the statute he might have paused

to consider whether, in the light of the new facts as found, there was only one outcome, namely adoption, or whether some other result was possible. I do not read the expert evidence as being as stark as it was portrayed by the local authority and guardian in their final submissions. I accept that the experts were concerned about a long-term deception arising from a lengthy resumption of the parents' relationship but they were not so sanguine in the event of some lesser form of connection. Having analysed the evidence, I am not clear that the judge's final disposal took these matters into account.

[58] Given the mother's qualities as a parent and lack of support during the previous 9 months, I am clear that the judge should have considered whether some additional work should be undertaken urgently to help her understand why she could never have contact with the father unless he had changed through an acknowledged therapeutic route. Moreover, even if the judge thought that rehabilitation was not possible he should have directed his mind as to the possibility of contact, provided that the children were in a safe environment especially as these children had a good relationship with their mother.

[59] The judge did not perceive this case as finely balanced but I disagree. I note that he did not evaluate the expert evidence in his judgment. On the face of it, he simply relied upon the submissions made by the parties as to outcome. He proceeded upon the basis that he had but two alternatives: (i) if he found the mother was telling the truth then rehabilitation was supported by all (albeit reluctantly by the local authority); but (ii) if he found she had been untruthful the outcome was adoption. This methodology was inapt. It was necessary to balance all counsels' submissions with a careful analysis of all the evidence, particularly given the expert evidence was heard before the factual dispute was finally determined.

[60] The judge was making a very Draconian order. As such, he was required to balance each factor within the welfare checklist in order to justify his conclusions and determine whether the final outcome was appropriate. Accordingly, because this analysis is entirely absent, his failure to mention the provisions of the Children Act 1989 and deal with each part of s 1(3) undermines his conclusions and his orders.

[61] The judge did not mention Art 8 of the European Convention. The terms of that Article provide that:

> '1 Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2 There shall be no interference by a public authority with the exercise of this right except such that is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[62] It is submitted that the judge erred in law by failing to express the terms in his judgment. In *Re B (Care*: *Interference with Family Life)* [2003] EWCA Civ 786, [2003] 2 FLR 813 Thorpe LJ stated at para [34]:

> 'where the application is for a care order empowering the local authority to remove a child or children from the family, the judge in modern times may not make such an order without considering the European Convention for the Protection of Human Rights and Fundamental Freedoms Art 8 rights of the adult members of the family and of the children of the family. Accordingly he must not sanction such an interference with family unless he is satisfied that that is both necessary and proportionate and that no other less radical form of order would achieve the essential end of promoting the welfare of the children.'

I agree.

[63] In a case where the care plan leads to adoption the full expression of the terms of Art 8 must be explicit in judgment because, ultimately, there can be no greater interference with family life. Accordingly, any judge must show how his decision is both necessary and proportionate. In this case the judge said 'removing the children from their mother without good reason … would be a tragedy for them, quite apart from the mother'. With all due respect to him, this does not demonstrate that he had Art 8 well in mind. Whilst he decided that the experts apparently proffered no other solution it is apparent from the manner in which this case unfolded that they did not have the opportunity to make recommendations upon the additional evidence which, I remind myself, primarily amounted to a sighting of the father and mother together in the street. Consequently, it was even more incumbent upon him to consider precisely why the family bond should be broken.

[64] As to the placement order the judge put it thus:

> 'I find that the mother has tried to deceive me and the professionals and her own mother. In the light of that finding, the expert evidence and the evidence of the guardian is that it would not be safe to rehabilitate the children and their mother. Neither the mother nor the mather can be trusted to work with the professionals and properly care for and protect the children. For the sake of these children I would have wished it otherwise. The expert and professional evidence is also all agreed in the light of my findings it would not be safe to place the children with their maternal grandmother. She could not protect them. This is not a criticism of her I make that clear. I agree with that expert and professional evidence. It is unanimous. It is in the interests of these children to approve the local authority's care plan for adoption and make the care orders and I do so. The welfare of the children positively demands and requires that the consent of each parent to adoption is dispensed with. I accordingly dispense with their consent on the basis that it is in the interests of these children to be placed for adoption and I accordingly make placement orders in respect of both children.'

[65] The placement orders had been applied for in March 2009. When the case returned on 9 October 2009, it was clear to all that the issue of final care order and placement were to be dealt with at the same time. The mother's submission is to the effect that the failure to mention any terms of the Adoption Act 2002 or the European Convention means that the placement

order is fatally flawed. Miss Eaton QC puts it thus: 'The reference to welfare at the end of the judgment may be a reference to s 52(1)(b) but … it is wholly inadequate'. The judge failed to deal with the precise terms of s 1(4) which are 'wide ranging and demanding'.

[66] In the case of *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625 Wall LJ stated at para [116]:

> 'There is, perhaps, no more important or far-reaching decision for a child than to be adopted by strangers … . Judges approaching the question of dispensation under the section must, it seems to us, ask themselves the question to which section 52(1)(b) of the 2002 Act gives rise, and answer it by reference to section 1 of the same Act, and in particular by a careful consideration of all matters identified in section 1(4) … the best guidance which in our judgment this court can give is to advise Judges to apply the statutory language with care to the facts of the particular case. The message is no doubt, prosaic, but the best guidance, we think, is as simple and as straightforward as that.'

[67] The precise terms of the section which provides:

> 'The Court must have regard to—
>
> (a) The child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding).
> (b) The child's particular needs.
> (c) The likely effect on the child (throughout his life) of having ceased to be a member of his original family and become an adopted person.
> (d) The child's age, sex background and any relevant characteristics which the Court or agency considers relevant.
> (e) Any harm (within the meaning of the Children Act 1989 (c 41)) which the child has suffered or is at risk of suffering.
> (f) The relationship which the child has with its relatives and with any other person in relation to whom the court or agency considers the relationship to be relevant including—
>
> (i) The likelihood of any such relationship continuing and the value to the child of its doing so.
> (ii) The ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop and otherwise meet the child's needs.
> (iii) The wishes and feelings of any of the child's relatives, or of any such person, regarding the child.'

[68] The judge should have turned his mind to each of these provisions and not truncated his considerations as set out above. By so doing he specifically failed to address these children's particular needs and the likely effect on them

(throughout their lives) of their ceasing to be a member of their original family. They have an established attachment to a loving mother who, with targeted assistance, might be able to provide some form of future mothering.

[69] The final point raised relates to the mother's contact with the children pursuant to s 26(4) of the Adoption Act. The guardian prepared a report within the placement proceedings on the assumption that, if it turned out to be the case, the parents were withholding their consent unreasonably then she did not support contact. In relation to the mother she stated:

> 'If [the mother] is found to have been in a relationship with [the father] the risks of her having direct contact with the children would be significant as [the mother] could not be relied upon to support an adoptive placement and as the children become more aware of their environment confidential information about their placement may be at risk. Letterbox contact should be promoted and supported. The local authority proposes three times a year via the post adoption support service.'

[70] As I understand it, no challenge was mounted at any time on behalf of the mother in relation to the recommendations in that report or the position of the local authority. This flaw in presentation should have been considered by the judge because it is he who has the duty to make the right order for the children.

[71] It has been submitted that the criticisms now levelled at the trial judge were not raised at trial or shortly thereafter. In *Re M (Fact-Finding Hearing Burden of Proof)* [2008] EWCA Civ 1261, [2009] 1 FLR 1177 it was stated at para [36]:

> 'It is high time that the Family Bar woke up to this case, and to the fact that it applies to family cases: – see (inter alia) *Re B (Appeal: Lack of Reasons*) [2003] EWCA Civ 881, where Thorpe LJ cited from the judgment of Arden LJ in *Re T (Contact*: *Alienation: Permission to Appeal)* [2002] EWCA Civ 1736, [2003] 1 FLR 531. In her judgment in the latter, Arden LJ specifically considered whether the principle identified in a civil appeal should equally apply to quasi-inquisitorial proceedings under the Act. She saw no reason why not, and went on in the following paragraph to offer some general guidance:
>
> > "In a complex case, it might well be prudent, and certainly not out of place, for the judge, having handed down or delivered judgment, to ask the advocates whether there are any matters which he has not covered. Even if he does not do this, an advocate ought immediately, as a matter of courtesy at least, to draw the judge's attention to any material omission of which he is then aware or then believes exists. It is well established that it is open to a judge to amend his judgment, if he thinks fit, at any time up to the drawing of the order. In many cases, the advocate ought to raise the matter with the judge in pursuance of his duty to assist the court to achieve the overriding objective …; and in some cases, it may follow from the advocate's duty not to mislead the court that he should raise the matter rather than allow the order to be drawn. It would be unsatisfactory to use an

> omission by a judge to deal with a point in a judgment as grounds for an application for appeal if the matter has not been brought to the judge's attention when there was a ready opportunity so to do. Unnecessary costs and delay may result."'

[72] I do not consider that the omissions in this judgment could have been put right by following this route.

[73] In the light of the above, I am of the clear view that the orders made by the judge were plainly wrong. I would set aside the judge's final care and placement orders. I am clear that outcome must be reconsidered, the mother must be given proper support by the local authority and the experts must reassess their recommendations.

[74] Accordingly, the order I would propose would be as follows:

(1) that the appeal be allowed;
(2) that the care and placement orders made by the judge be set aside;
(3) that the matter be time-tabled by the judge to a fresh final hearing of the care proceedings and the applications for placement orders;
(4) that the local authority's applications for the orders set out in (3) above be listed for directions before the judge as a matter of urgency and that each party at the directions appointment identify the evidence it would wish to call and the experts each party would propose to instruct or re-instruct.

WALL LJ:

[75] I have had the advantage of reading in draft the judgment of Baron J with which I am in agreement. For the reasons she gives I would allow this appeal and make the orders she proposes. I am giving a judgment of my own both because we are departing from the course taken by the judge in material respects and because there are features of this case which, in my judgment, call for comment by this court.

[76] I gratefully adopt Baron J's description of the factual matrix of the case, which I will not repeat. I begin with what I fear has become a customary expression of sympathy for the plight of the circuit judge who, in difficult care proceedings, has to make critically important decisions determining the lives of parents and children on what Lord Hoffman has aptly described as 'a binary system in which the only values are one and zero': see *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141 (*Re B*). The whole paragraph warrants citation (para [2]):

> '(2) If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned

> and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.'

[77] Judges in care proceedings, of course, make findings of fact on all the evidence, although where, as here, the question is what is in the best interests of the child concerned, the burden of proof is sometimes elusive. But since a finding of fact frequently involves issues of credibility, and the trial judge has the unique advantage of seeing and hearing the witnesses, this court (which is a court of law and rarely, if ever, hears oral evidence) usually defers to the trial judge's findings, provided, of course, there is material upon which they can properly be made.

[78] This case, in my judgment, is no exception to that rule, although it highlights a series of traps for the unwary which, in my view, judges would do well to avoid. I will identify some of these in a moment.

[79] However, in my judgment, the appeal is complicated by two factors. The first – as I have already intimated – is that the judge was not conducting a fact-finding hearing: he was conducting a welfare inquiry. The second flows from the first, and the judge's fundamental error, in my judgment, was to treat his critical findings of fact as determinative of welfare.

[80] I propose to identify only a few of the traps. They relate largely to identification evidence. The first concerns the *Turnbull* direction. In this regard, what he judge said was:

> 'If I were directing a jury in a criminal case, I would give them a *Turnbull* direction, warning them that they must be careful on such uncorroborated evidence of identification. As against that, the standard of proof in this case is different from that in a criminal case. I do not have to be sure. I have to decide on the balance of probability.'

[81] With great respect to the judge, this will not do. The judge *is* the jury for this purpose, and in my judgment, it is imperative that where judges in care proceedings are dealing with highly controversial identification evidence, it is imperative that they give *themselves* a *Turnbull* direction. This is not a tiresome mantra which a judge must recite in order to tick a box for this court: judges need to remind *themselves* of the dangers of identification evidence.

[82] A simple example of the perils into which the judge's approach led him is provided by the very evidence which the judge is examining in the passage which I have cited at para [6] above. His conclusion is:

> 'I think it probable that Miss W was also correct in identifying mother and father *together* despite my caution in approaching her evidence.'

[83] Miss Eaton invited us to underline the word 'together'. In my judgment, she was right to do so. Miss W's evidence was not that the mother and the father were 'together'. Miss W was in a car driving away from the local contact centre. She saw the mother walking towards her on the left hand side pavement. The mother was legitimately there: it was her time for contact with the children. Approximately 100 yards further on Miss W saw a man who resembled the father walking in the same direction as the mother on the right hand pavement. At no point were the mother and this man seen by

Miss W 'together'. The proposition that they were 'together' is an inference which the judge has drawn from the evidence, but which he attributes (wrongly) to Miss W.

[84] Even allowing for the latitude which this court affords to judges who make findings of fact, his finding, based on Miss W's evidence, that the mother and the father were 'together' is, in my judgment, not a finding which it was open to him to make on the evidence. I was unpersuaded by Miss Theis QC's attempt to persuade us that by 'together' the judge must be taken to mean that which he (wrongly) earlier attributed to Miss W – ie 'if not actually walking side by side, it means they were deliberately together in the vicinity of the contact centre'. If that is what the judge meant, he should have said so when making his finding.

[85] Like Baron J I am unimpressed both by what I will call the 'Miss W identification' and the evidence about the calls to the mother's telephone. In relation to the latter, the evidence was that the mother obtained a new mobile phone on 31 January 2009, and that on 13 March and 13 June the father telephoned the mother's number. There was no evidence that they had spoken on the telephone or that she had called him. Clearly, the father had obtained the mother's number. The judge recorded the local authority's contention that the mother must have given the father the number 'because no one else would have done so'. He also recorded the mother's assertion that she did not know how the father had obtained her number. What he does not record is the fact that the mother made numerous calls on her telephone after 31 January, and that any one of the recipients of her calls could have given the father the number. I do not, accordingly, regard the evidence relating to the telephone as credible evidence of a continuing relationship between the parents, and the judge was wrong to find that it was.

[86] Equally, I am unhappy about the judge's cumulative approach. I will deal in a moment with the sighting by Miss T of which there is CCTV evidence. What the judge says is:

> 'I find that it is probable that Miss T did see the mother and the father together on that occasion. It follows that the evidence that has driven me to the conclusion that the mother has lied to me. Although it astounds me that the mother and the father could be so unwise as to be together in the vicinity of Social Services offices on 18 July I think it probable that they were. That finding lends some corroboration of the evidence of (Miss W) and thus I think it probable that (Miss W) was correct in identifying father and mother *together* (my emphasis) despite my caution in accepting her evidence. Given those findings, I also think it probable that the mother did give the father her mobile telephone number.'

[87] In my judgment, this approach is, once again, impermissible. If what the judge was actually saying was that the fact that the mother was lying to him led him to these conclusions: (a) he should have said so in terms; and (b) he should have given himself what has become known as a *Lucas* direction. Once again, this is not a tedious mantra designed to make the life of the circuit bench more difficult than it is already: it is a formula designed to

make the decision-maker stop and think carefully about the decisions being made. There is no evidence in the judgment that the judge even considered a *Lucas* direction in any shape or form.

[88] I thus turn to the alleged sighting by Miss T on 18 July 2009. This was a Saturday, just 2 days before the hearing before the judge was to recommence on 20 July 2009. Miss T is, of course, the supervisor of the social worker in the case. On the one hand, she was plainly not an independent witness: on the other, she knew both the mother and the father. Her evidence was firstly contained in an extremely brief witness statement dated 20 July 2009, and first made available to the mother's advisers on that day. This said:

> '3 I was on personal business in [the town] on Saturday 18 July. I was walking down [the] Street at approximately 2.30 pm. I saw (the mother) walking in the opposite direction, (the mother) was wearing grey top and black bottoms, and I also say (the father) who was dressed all in blue and wearing a baseball cap. I did not approach (the mother) or (the father); however, I thought it strange that (the mother) had come to [the town] given her fear of (the father).
> 4 I believe (the mother) was in [the town] with (the father) and their relationship continues.'

[89] Miss T gave oral evidence to the judge on the issue on 24 July 2009, and we have a transcript of that evidence. She was fully cross-examined by junior counsel for the mother and did not believe she was mistaken.

[90] The mother's case was that she (the mother) was not there at all and that Miss T was mistaken. There was, however, CCTV footage, and we have a still frame from that CCTV footage in our papers. This shows a sideways view of a black man in a baseball cap standing with his back to a shop apparently talking to a woman whose back is to the camera, but whose clothing is consistent with Miss T's description and whose headwear and hairstyle is similar to a further still, obtained on a later date of the mother in the same location.

[91] As Baron J has related, the parties and the judge watched the CCTV video footage, and we were told that it was at the mother's insistence that expert evidence (which proved inconclusive) was obtained in relation to it. Furthermore, the judge granted the mother an adjournment to obtain that evidence – although she was unable to obtain CCTV footage from the refuge – and in my judgment, that adjournment also gave the mother an abundant opportunity to call her 'alibi' evidence and, if need be, to issue witnesses summonses.

[92] I have, therefore, come to the conclusion – not, I have to say without some hesitation – that, despite the unhappy procedural issues raised by Miss Eaton, and despite the judge's failure to give himself a *Turnbull* direction, there was material upon which he could properly find that the mother and the father were seen together by Miss T on 18 July 2009, and that the mother had lied to him about it. In my judgment, therefore, this finding must stand.

The consequences

[93] At this point, however, I part company from the judge in two major respects. The first is his conclusion that the findings of fact which he has made lead inexorably to the children's adoption. The second is the manner in which he went about making placement and adoption orders.

[94] I propose to take the second point first. A theme of this judgment has been the need to ensure proper process. There is no more important or Draconian decision than to part parent and child permanently by means of an adoption order. It follows, in my judgment, that if this is the course which the court feels constrained to follow, the process whereby it is achieved must be both transparent and must comply with both the European Convention and the relevant statutory provisions.

[95] Once again, these are not hoops imposed by Parliament and the appellate judiciary designed to make the life of the hard-pressed circuit judge even more difficult than it is already. They are not boxes to be ticked so that this court can be satisfied that the judge has gone through the motions. They are important statutory provisions, bolstered by decisions of this court which require a judge fully and carefully to consider whether the welfare of the child concerned *throughout his life* (my emphasis – see s 1(2) of the 2002 Act) requires adoption.

[96] It is, however experienced the judge, wholly inadequate to deal with these crucially important issues in a sentence or two, as His Honour Judge Hayward-Smith has done. This is what he said:

> '[59] The interests of these children is to approve the local authority's care plan for adoption and make care orders and I do so. The welfare of these children positively demands and requires that the consent of each parent to adoption be dispensed with. I accordingly dispense with their consent on the basis that it is in the interests of these children to be placed for adoption and I accordingly make placement orders in respect of both children.'

[97] With all respect to the judge this will not do, and for this reason alone it seems to me that the matter must go back to the judge for him properly to reconsider the making of placement and adoption orders in the light of the statutes and the decisions of this court and whatever evidence is placed before him at the final hearing. In para [60] of her judgment, Baron J has cited the relevant paragraph of this court's decision in *Re P*, which I will not repeat. The judge does not mention either Act (the Children Act 1989 and the Adoption and Children Act 2002) nor does he make any reference to the rights enjoyed by both parents and children under the European Convention, nor does he mention proportionality. In my judgment, these are serious defects which vitiate the judgment and mean that this appeal must be allowed.

[98] The answers to the criticisms I have made are, as I understood them: (1) all these matters were put to the judge so he must have had them in mind; and (2) all the professional and expert evidence was to the effect that if the mother was a liar, and had lied to the judge about her relationship with the father, adoption was inevitable – therefore, the judge was entitled to take a short cut.

[99] In my judgment, neither defence meets the criticism. As to the first, a judge must demonstrate that he has addressed his mind to the critical issues. It is simply not good enough for this court to be told that counsel had made appropriate submissions to the judge, and therefore, the material was available to him. A moment's thought will demonstrate the fallacy of the argument, particularly when the court is dealing with an issue as emotive and important as adoption.

[100] As to the first of the two points identified at para [87] above, it by no means follows, in my judgment, that the judge's findings of fact led inexorably to adoption. The argument of the local authority is that the children need permanence and security of placement, and that this can only be achieved by adoption. That is one perfectly proper perception. However, there is a raft of alternative arguments, some of which I will develop later in this judgment under the heading 'the conduct of the local authority'. Can it be said at this stage and on this evidence that permanent separation between mother and children (one of whom is now 5) who have a powerful relationship with each other is in the interests of these children and appropriate? What help has the mother had to break her relationship with the father? What about injunctions and other court orders? What about a continuation of foster care? There are just some of the considerations which need to be addressed. As I said to counsel in argument, this is why we have judges, and why some important decisions in care proceedings are not made by local authorities. Having now re-read all the papers and listened to skilful argument, I am entirely satisfied and repeat that it seems to me the judge's findings are a very slender thread on which to hang placement and adoption orders, and that the judge needs to reconsider the decisions which he has made in the light of all the evidence which will be placed before him. I thus wholly endorse the proposed order set out by Baron J at para [75] of her judgment.

The conduct of the local authority

[101] This is sufficient to dispose of the appeal. However, I cannot part from the case without: (1) commenting adversely on the conduct of the local authority; and (2) addressing myself directly to the mother. I do the former not out of any wish to engage in gratuitous criticism of social workers, but because the conduct of the local authority in this case strikes me as: (a) entirely inimical to the ethos of the Children Act 1989; (b) wholly contrary to good practice in care proceedings; and (c) unduly adversarial. I do not propose to name any of the social workers involved, but express the hope that both the judgment of the judge and the judgments in this court are read by the social workers concerned, their superiors and by the local authority's director of children's services.

[102] Had the judge not made specific findings about it, I would, speaking for myself, have found the conduct of the social workers in this case hard to credit. The first finding is contained in para [8] of the judgment. I propose to set out the judge's criticisms *in extenso*:

> '[8] One of the unfortunate features of this case is that despite the evidence of good parenting the local authority formed a view far too early that their care plan should be to place the children away from the parents. On the day I gave judgment in November 2008 the mother, as I

understand it, raised the possibility with her advisers of separating from the father. She wanted to discuss that matter with the local authority and she sought a meeting with them for that purpose. The local authority arranged a meeting for 11 December 2008. Within two weeks of my judgment, but the meeting was with *both parents* (my emphasis) and the mother was unable to discuss the implications with the local authority of her separation from the father.'

[103] This is bad enough. What follows, however, is much worse. I continue with my citation from the same paragraph of the judgment:

'That meeting was before either the local authority or the parents had received a copy of the transcript of the judgment and, of course, before any consequent experts' reports were available. A note of that meeting records that the assistant team manager, (Miss T) (who observed the alleged sighting on 18 July) and (CM) the children's social worker, made it clear to the mother and the father in no uncertain terms that the care plan was not to place with children with the parents. A note of the meeting includes the following:

"(Miss T) reported that the purpose of the meeting is to inform the parents of the plans of the local authority in respect of (the children) both in their terms of placement and contact. (Miss T) reported that the local authority is not looking to return to the children (sic) to the care of (the mother and the father). The plan is permanence either with an extended family member of an adoptive placement. (Miss T) reported that in response to the outcome of the court hearing the local authority will be reducing contact initially to three times a week, then weekly, then monthly or six monthly."

The mother's statement made on 1 February 2009 says this about that meeting:

"After the fact finding hearing on 28 November I was extremely upset but I wanted to do all I could to have the children returned to my care. I spoke to my counsel and asked them to tell the local authority that I wished to separate from (the father) and asked what support I could be given. The response they received was that a meeting would be offered to me on 11 December 2008 and that I would receive a letter confirming this. I was a bit surprised when the letter came as it asked both of us to attend, but I though maybe we might be spoken to separately.

We attended the meeting as requested; from the start it was just them tell us what was going to happen. This was the first time we had met the team manager and the social worker was there too. They said that it did not matter whether we separated or not we would never get the children back. They also said that contact was to reduce immediately and then reduce further. I was stunned.

After that statement I felt completely despondent. This was before any of the experts had even begun their assessments and after the judge had said it would be very unfortunate if the children had to be removed. I felt that Social Services were telling me that the

> assessments and the court hearing did not matter, so even if I separated from (the father) I would still lose my children.
>
> The agenda at this meeting was to make it clear that the children would be adopted and nothing more. I was so shocked I said nothing at the meeting I just wanted to tell my solicitor what had happened. This has all been like a terrible nightmare."

The mother's account of that meeting is wholly consistent with the local authority's own note of it to which I have referred. The parents were told on that occasion that the local authority would be reducing contact and yet in my judgment not long before I had said:

> "It would be very unfortunate if the children had to be removed from parents. R in particular would be very upset. Much may depend on how the parents react to this judgment. Not necessarily today but after they have had time to reflect on it."

[9] When (Miss T), at the hearing in July, was asked about that aspect of the case she agreed that that meeting was unfortunate and that thereafter the mother would have felt that the local authority was against her. The local authority gave the parents virtually no time to reflect on the judgment; the parents did not yet have a transcript of the judgment. The local authority appears to have paid scant regard to what I said. The first time the parents saw the judgment was when they met (BM) on 22 December 2008, they had not then had the opportunity to go through it with their solicitors. That fixed and continuing view of the local authority became very apparent. BM, a psychologist instructed in the case, gave evidence before me and told me how there was a strange atmosphere at an experts' meeting on 5 June 2009. He said that the social worker seemed rigidly against rehabilitation of the children to the mother. He described a pervasive feeling against the mother at the meeting which was so strong that he asked the local authority whether they had any evidence that he had not seen. (SB), an independent social worker, also gave evidence before me and was asked about the atmosphere at that meeting. Her immediate reaction to the question was to laugh. She agreed with (BM). She said that at the meeting there was such a gulf between the local authority and her and (BM) that he had indeed asked if there was something the local authority knew that they did not in order to explain the position. If that lack of even handedness by the local authority was apparent to the experts it must have been even more apparent to the parents. That appearance of a fixed view has, in my judgment, caused the local authority to behave in this case in a way that has needlessly antagonised the parents starting as early as the meeting of 11 December 2008.

[10] The mother's response has been emotionally to shut down. The father's response was to become angry and disillusioned. The guardian is critical of the local authority in a number of respects. I too am critical. The local authority even failed to invite the mother to a LAC Review. The mother's relations with the local authority are to be contrasted with her relations with (SB) who has acted with far greater professionalism in her relations with the mother than anyone from the local authority

whom I have seen or heard. I thought BM and SB were very impressive witnesses and I accept what they told me.

[11] The mother's support worker at the refuge (LM) expressed concern about the breakdown in communication between the mother and the local authority. The mother has had a good relationship with (LM). (LM) wrote a letter to the guardian on 11 May 2009. The letter includes the following:

> "I conducted a key worker session with mother on 6 May 2009 when she informed me that she was invited to attend a meeting with the Greenwich Social Services, CM and (Miss T). The mother stated that Social Services gave her no indication about the purpose of this meeting and she is unsure if there will be other parties present. I advised the mother to contact Social Services early in the morning and to postpone the appointment if possible as I also had no knowledge of this meeting.
>
> I telephoned (CM) on 7 May in the afternoon and inquired about the reasons for this meeting with the mother. I was advised by (CM) that the mother knows exactly what is the purpose of this meeting. I raised my concerns regarding the lack of information sharing between Greenwich Social Services and the Refuge. I pointed out that this breakdown in communication is unacceptable and maybe detrimental to the mother's case.
>
> I was advised by (CM) that the mother was invited to three separate meetings but failed to attend. I argued that no member of staff from Greenwich Social Services contacted me or my co-workers and shared this information with us. (CM) apologised and promised that the Refuge staff would be informed of any forthcoming meetings."

There were on 21 July 2009 a number of questions posed by (LM) one of them being "How would you describe the amount of social work involvement in this case?" There has been limited telephone contact, no visit by the social worker until 21 May 2009. Another question: "Did you have to request the social worker to come and visit you?" Her answer was: "Usually social workers do visit; in this case a social worker came to visit after I made the request".

[13] One of the difficulties that the mother faced was that the local authority was in effect requiring her to prove a negative, namely that she was no longer in contact with the father. The local authority ought to have made it clear to the mother what was expected of her. They did not do that until a statement dated 19 June 2009 following a hearing before me on 15 June.'

[104] I have cited this extensive extract from the judge's judgment because I have to say that I find it quite shocking. Indeed, I find it difficult to believe that in 2010, more than 18 years after the implementation of the Children Act, a local authority can behave in such a manner. Here was a mother who needed and was asking for help to break free from an abusive relationship. She was denied that help abruptly and without explanation. That, in my judgment, is very poor social work practice.

[105] If we have learned anything in the past few years it is quite how difficult some women find it to break away from abusive relationships, however, rational such a breach would appear to a disinterested outsider. Here, in my judgment, was a mother demonstrating that this is what she wanted to do. She went to a refuge. She both needed and sought help, and was quite improperly rebuffed by a local authority which had plainly pre-judged the issue.

[106] Miss Lucy Theis, QC, for the local authority, did not seek to defend its conduct. In my judgment, she was wise not to attempt to do so. She said that the local authority accepted the criticisms which the judge made. In my judgment, however, that is insufficient. We have no guarantee that these social workers will not behave in the same way again.

[107] Baron J has spelled out the ethos of the Children Act in her judgment, and I will not repeat what she had said. During the course of argument, we were concerned to see what help the mother had had in this case, and we asked to see the reports of BM and SB, together with their respective letters of instruction. It is plain, in my judgment, neither was instructed in a therapeutic capacity, although BM was invited, in very general terms, within the 20 questions posed to him to consider 'therapeutic services'. The powerful impression with which one is left is that this mother was left to fend for herself, and denied the support she was entitled to expect.

[108] What social workers do not appear to understand is that the public perception of their role in care proceedings is not a happy one. They are perceived by many as the arrogant and enthusiastic removers of children from their parents into an unsatisfactory care system, and as trampling on the rights of parents and children in the process. This case will do little to dispel that perception.

[109] I yield to nobody in my appreciation of the difficult tasks which social workers are called upon to undertake and the pressures under which they are constrained to work. I am very conscious of the criticism that social workers are damned if they do and damned if they do not. At the same time, their duties under Parts III and IV of the Children Act in care proceedings are plain. Their aim should be to unite families rather than to separate them.

[110] I am prepared to accept, as I was in *Re F (Placement Order)* [2008] EWCA Civ 439, [2008] 2 FLR 550, that the social workers in this case were genuinely of the view that it was not in the interests of the children for them to be rehabilitated to their mother's care, although no explanation has been given to us of why they had formed that view. I equally accept that in care proceedings a local authority is entitled to take a view, although that view should always be evidence based and capable of being altered to meet changed circumstances. For all the reasons which I give in *Re F,* however, neither point meets the criticism which the judge made in this case and which I endorse.

The mother's conduct

[111] The mother has been ably represented on this appeal, but she must appreciate several things. The first is that she has come within a whisker of losing her children. The second is that she may still do so. Thirdly, she has forfeited the judge's trust. Abuse apart, she committed what is perhaps the most serious offence which a parent can commit. She has lied to the judge.

[112] The mother must understand that she is not engaged in some elaborate game with the court in which being found out results in a tap on the wrist and no more. The future of her children is at stake. The issues could not be more important.

[113] Wiser heads than hers had decided, rightly in my view, that the father is a danger to her children. Every court sympathises with a woman who has to choose between her partner and her children, but no court will tolerate lies which put children at risk. We have directed the judge to think again. Quite what he will decide I do not know. What I do know is that, rightly, he will not tolerate further lies.

Coda

[114] I very much regret the additional delay which our order will cause. I have, however, carefully considered s 1(2) of the Children Act 1989 and have come to the clear view that the additional delay in resolving the case is justified and proportionate. Although no one suggested the contrary, I see no reason why the case should not return to His Honour Judge Hayward-Smith.

SMITH LJ:

[115] I have read both judgments in draft and agree that the appeal must be allowed. I agree also with the order proposed by Baron J. With regret, I must endorse the criticism which Wall LJ has made of the conduct of the local authority in its failure to support the mother in her expressed wish to separate from the father.

[116] I wish to add a few words of my own because I take a less critical view than Wall LJ of the judge's approach to the identification evidence. First, I think that the judge recognised the inherent weakness in the evidence of Miss W and that relating to the mother's mobile phone number. For the judge, the identification hinged on the evidence of Miss T and the support for it found on the CCTV footage. Although I agree with Wall LJ that the judge ought really to have reminded himself of the specific weaknesses in that evidence, so as to demonstrate that he had applied the *Turnbull* guidance, I am prepared to accept that he had those weaknesses in mind. This judge is very experienced in the conduct of criminal trials and I think it can be inferred from his hesitation in accepting this evidence that he had the guidance in mind. I am concerned that he did not mention that Miss T, being the local authority's team leader and having a specific (and it must be said potentially partisan) interest in the case, was likely to be suggestible and, therefore, more likely to make a mistake in the identification than a truly independent witness would be. However, all that said, I would accept that the judge was entitled to accept Miss T's evidence and conclude that the mother had lied about that event.

[117] Having so found, I would say that the judge was entitled to treat that as support for the accuracy of the evidence of Miss W. If two witnesses (without apparently colluding) both testify as to similar events, that can provide mutual support; if the evidence of one is accepted, the other's is quite strongly supported. So I think the judge was entitled to accept the accuracy of Miss W's evidence and her recognition of the father. However, the judge does not appear to have considered what the evidence signified. He did not appear to consider the possibility that the father was following the mother on that

occasion either without her knowledge or at least without her approval. Instead he seems to have drawn the inference that, even if they were not together at the moment they were seen, they must have been together a while earlier and were walking apart as a ruse. In my view, that was not a safe inference. The mother's progress towards the contact centre with the father trailing her at a distance on the other side of the road is entirely consistent with her being ignorant of his presence.

[118] I would accept that the judge was entitled to weigh that the fact the mother has lied about her contact with the father in respect of at least the 18 July sighting makes it more probable than would otherwise be the case that she has lied about the mobile phone number. He was, therefore, entitled to hold that she probably had given him the number. However, here again, what does that signify? Had she done so willingly because she was still emotionally involved with him? Or had he put her under pressure to give him the number in the period after he came out of psychiatric hospital? There was no evidence that the mother had ever telephoned or texted the father, which is strange if it be right that the two are continuing their former relationship. Here again, the judge appears to have drawn an inference from the evidence which was, in my view, unsafe.

[119] Accordingly, in my view, the judge was entitled to conclude that the mother had probably been with the father on 18 July and had probably given him her phone number. Even those findings were based on evidence which might well be mistaken and it would have been sensible, in my view, if the judge had borne that in mind. He was certainly entitled to conclude that it was not safe for him to accept that the mother had separated from the father and not safe to move towards rehabilitating the children to her care. What the judge should not have done, in my view, on the evidence before him, was to conclude from those factors and the mother's denials that the mother was willingly and intentionally continuing an emotional relationship with the father and that, for the foreseeable future, she could not be trusted to protect the children. She might be wholly untrustworthy but the inference that she is, was not a safe one. If the case was concerned only with her legal rights and she had been caught out lying, the drawing of that inference against her might be justified. But this case is about the future welfare of two children. The judge had said that if possible the children should be reunited with her. Before concluding that the mother could never again be trusted, it seems to me that some attempt should have been made to find out what was really going on between the father and mother and to understand her mental state. As Wall LJ has said, the judge did not give himself a *Lucas* direction. He did not ask himself why she had lied. He inferred that she had lied because she was in an ongoing committed relationship with the father.

[120] I acknowledge that the mother had been encouraged to confide in the social workers and she had not done so. But the judge had already gone some way towards explaining why that might be so. She had received no help or support in her professed determination to separate from the father. Instead the local authority had been implacably against her. She had received no therapeutic counselling as to the importance of separation and the importance of complete honesty. I acknowledge that the experts and the guardian took the view that if the mother had lied, she could never be trusted to protect the children. I acknowledge that the judge thought that it was important to reach a

decision immediately. However, the judge was not bound to accept that view and I do not think that he should have done without further investigation of the mother's state of mind and the provision to her of the kind of support which ought to have been given in the months following the fact-finding hearing.

[121] For those reasons, it was, in my view, premature to make a final order in this case and in particular an adoption order. I respectfully endorse all that Wall LJ has said about the detailed consideration which should be given to the statutory provisions and I agree that there is no reason at all why this case should not be returned for further consideration by His Honour Judge Hayward-Smith.

Order accordingly.

Solicitors: *Cook Taylor* for the appellant
A local authority solicitor
Hodge Jones & Allen for the third and fourth respondents

PHILIPPA JOHNSON
Law Reporter