Re B (A Child) [2014] EWCA Civ 565

A public law children appeal to the Court of Appeal on an important point of principle or practice, considering the power and extent of an appellate court's ability to 'fill the gaps' in the reasoning of a first instance decision and when such a discretion should be exercised, as opposed to directing a full re-hearing.

The Family Proceedings Court (FPC) had made care and placement orders in respect of B, aged 23 months. That decision was appealed by B's parents and the circuit judge (CJ) found that the magistrates' reasoning had been wrong in law for three primary reasons: it was linear; there was a lack of long-term welfare analysis; and there was no evaluation of the proportionality under Article 8 ECHR. Despite this, the CJ undertook her own "holistic" welfare and proportionality evaluation and dismissed the appeal.

Lord Justice Ryder, delivering the main judgment of the Court of Appeal, summarised the principles underpinning a court's decision to make placement orders and briefly reviewed recent case law. He identified a "continuum" between the court's analysis of welfare and proportionality: an error in the former inevitably affected the latter. In light of this, the appellate court's power to review the first instance decision came in two stages: the appellate judge had to (i) identify an error of fact, value judgment or law; and (ii) exercise her discretion as to whether that error permitted her to re-make the decision or necessitated a full re-hearing.

The discretion in (ii) was inevitably fact-specific; if the error was sufficiently discrete to be corrected or the decision could be re-made without procedural irregularity then the appellate court had the power essentially to "fill the gaps" of the defective first-instance reasoning. However, in this specific case the evidence before the magistrates and, therefore, the CJ was deficient so as to have required a re-hearing.

Lady Justice Black did not attempt to describe the attributes of 'a proper case' in which an appellate court should engage in its own welfare and proportionality analysis. However, from paragraph 61 onwards, she helpfully discussed two particular examples of the Court of Appeal's approach to the exercise of this discretion.

Summary by **Thomas Dance**, barrister, **1 King's Bench Walk**

Number: [2014] EWCA Civ 565
13/2629

RT OF APPEAL (CIVIL DIVISION)
FROM Birmingham County Court
dge Clarke

UN12C00038

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 09/05/2014

Before:

THE CHANCELLOR OF THE HIGH COURT
LADY JUSTICE BLACK
and
LORD JUSTICE RYDER
- -

In the Matter of B (A Child)

Between:

MB Appellant
- and -
Staffordshire County Council Respondent
-and-
KM
-and-
B (A Child)
- -
- -

Jeremy Weston QC with **Tracy Lakin** (instructed by **Supreme Law Solicitors**) for the **Father**
Alistair MacDonald QC with **Yolanda Pemberton** (instructed by **Staffordshire County Council Legal Services**) for the **Local Authority**
Martine Kushner (instructed by **Walker & Co Solicitors**) for the **Child** by his Children's Guardian

Hearing dates: 11 December 2013
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Judgment
Lord Justice Ryder:
The question to be decided
1. This appeal is concerned with the review of a first court's decision when a first appeal is pursued in family proceedings and where the first court's reasoning is wrong and that reasoning includes or should have included a proportionality evaluation. This is a second appeal brought with the permission of the single judge under the Civil Procedure Rules 1998 [CPR] rule 52.13(a), that is on the basis that the appeal raises an important point of principle or practice. The issues to be decided have been skilfully argued by counsel to whom the court is very grateful. At the conclusion of the hearing before this court we allowed the appeal and remitted the care and adoption proceedings to be determined afresh in the County Court.

The background
2. The facts that are relevant to the appeal are as follows. The child concerned, who I shall call 'B', is now

23 months old. His mother and father are parties to public law children (care) proceedings under the Children Act 1989 [CA 1989] begun by a local authority, Staffordshire County Council, on 4 April 2012. B has a 5 year old step-sister who has a different father and who was made the subject of a care order in May 2013. She lives with her paternal grandmother and step-grandfather who take no part in this appeal. B's mother gave birth again on or about 21 November 2013.

3. Within the care proceedings, B's parents conceded that the jurisdictional threshold described in section 31 CA 1989 was satisfied. Regrettably, the Family Proceedings Court [FPC] that heard the proceedings did not set out in their Reasons the basis upon which they held that the threshold was satisfied, but the parties have helpfully identified the parents' concessions of fact to be:

i) the domestic violence in their relationship;

ii) the exposure of B to the risk of sexual abuse from the paternal grandfather who has a number of convictions for sexual abuse of children including B's father; and

iii) the parents' (lack of) co-operation with the local authority.

4. The parents were positively assessed by an independent assessment organisation. Rehabilitation of B to his parents' care was recommended and a plan to that effect was implemented on 28 January 2013. In February 2013 the local authority became aware that B's father had stayed overnight at the paternal grandparents' home bringing into question his understanding of the need to protect B from his own father and the co-operation of the parents with the local authority, albeit that there was no question that B had accompanied his father during the visit or had otherwise been exposed to any risk. Underlying that short account is a history of disputed matters to which this judgment need not refer. The local authority changed its care plan within the care proceedings from rehabilitation to adoption and made an application for a placement order under the Adoption and Children Act 2002 [ACA 2002]. For the avoidance of doubt, I stress that the paternal grandfather who presents the risk described above is not one of the adults related to or involved with the care of B's sister.

5. The proceedings under the 1989 and 2002 Acts were heard concurrently by magistrates in the South Staffordshire FPC sitting at Burton-upon-Trent who made care and placement orders on 13 June 2013. I note with concern that yet again the identity of the magistrates sitting in the FPC has been omitted from the face of the order so that the decision is said to be made by 'Justices of the Peace'. I know of no basis in law for the identity of members of a court to be omitted in that way. The parents appealed the care and placement orders to the Birmingham County Court where they were heard on 14 August 2013 by Her Honour Judge Clarke. The appeal was dismissed. The appeal is renewed to this court by B's father on the basis I have described.

The grounds of appeal

6. It is common ground that the FPC's Reasons did not involve a sufficient analysis of the evidence that they had heard and read and in particular, did not set out with any sufficient particularity a welfare analysis which identified the benefits and detriments of the realistic welfare options. There was an insufficient proportionality evaluation that is, an evaluation of the interference with the article 8 ECHR [Convention] right to respect for family and private life that the local authority's care plan and the court's orders would involve. As I shall describe, in fairness to the magistrates, the evidence before the court did not contain the material that would have been necessary to conduct that analysis and evaluation. Furthermore, as the magistrates' Reasons betrayed, the FPC adopted a 'linear approach' to decision making thereby excluding the parents as carers without any comparison of them with the other realistic options for B's long term future care.

7. It is not necessary for this court to adjudicate upon the appellant's complaints about the FPC's decision, although as anyone with experience of family appeals will readily appreciate, it is usually necessary to consider the detail of the first court's findings and value judgments in order to understand how it was said on appeal that the first court's determination was wrong and, on a second appeal, whether the appeal court was likewise right or wrong. It is common ground in this appeal that Judge Clarke held and was entitled to hold that, among other errors, the FPC were wrong in law in the following respects:

i) they adopted a linear approach to their decision making;

ii) they failed to carry out a welfare analysis of the realistic options for B's long term care; and

iii) they failed to conduct a proportionality evaluation of the proposed interference in the family life of B and his parents.

8. In this case and having regard to the first court's Reasons, which this court has had the opportunity to consider, I can take these conclusions as read. Furthermore, it is not suggested that the magistrates' failings led to their analysis and evaluation being other than wrong within the meaning of Lord Neuberger's formulation at [93 (v) to (vii)] and [94] of *In the Matter of B (A Child)* [2013] UKSC 13 [Re B]. On that basis alone, it was open to Judge Clarke to have considered allowing the appeal and if she had set aside the orders, to have directed the applications be re-heard. She did not do that, but instead undertook her own welfare analysis and proportionality evaluation. Although that analysis is itself criticised for a lack of reasoning and detail in the necessary comparative exercise, the judge felt able to come to the same conclusion as the FPC and dismissed the appeal.

9. Mr Weston QC on behalf of B's father, initially submitted that the judge had no power to substitute her own analysis and evaluation for that of the FPC without first allowing the appeal and setting aside their orders. That submission developed into a much more nuanced analysis of the powers under the Rules which I shall describe. He submits that, having concluded that the FPC had erred in law, she should have allowed the appeal and directed a re-hearing. It is common ground that such a re-hearing could have been before herself but the essential difference would have been that she would have re-heard the evidence in its totality (at least so far as the welfare of B was concerned). Given the stringent and demanding nature of the scrutiny involved in the court's welfare analysis and proportionality evaluation, it is also submitted on father's behalf that an appeal hearing where no re-hearing of evidence is undertaken is not an appropriate forum for a fresh determination of the same.

10. Mr Weston identifies what he submits is the error of approach in the procedure adopted by the judge by reference to two paragraphs of her judgment at [50] and [75] as follows:

"50. In the light of those authorities, it seems to me that my task in this appeal is, firstly, to consider whether the Justices carried out an appropriate and sufficient Convention-compliant balancing exercise in respect of the welfare outcome for [B] and the proportionality of the orders sought; if they did, to decide on review whether the conclusion they reached was wrong. If I conclude that the Justices did not carry out the appropriate balancing exercise, then it seems to me, on the basis of what was said in *Re G*, that I must, if I consider that I can properly do so, revisit that issue in order to determine whether the decision reached was wrong."

"75. In light of the Justices' omission, in my judgment, to carry out an appropriate and Convention-compliant balancing exercise by failing to take into account the potential harm to [B] throughout his life

> of becoming an adopted person, in my judgment it would be appropriate for me to revisit that exercise in the holistic manner recommended by Lord Justice McFarlane. It seems to me that I do have the proper information to enable me to carry out that exercise, and I do not think it would be in anyone's interests, least of all [B's], for me to remit this matter for a rehearing, with the inevitable expense and delay that that would involve."

11. The judge's own welfare analysis and proportionality evaluation are criticised for failing to consider the determinations required through the imperative of why it was necessary or required that B be adopted, for failing to undertake a detailed comparative exercise in the welfare balance and for failing to make explicit reference to the test for the dispensation with the parents' consent in accordance with section 52(1)(b) ACA 2002.

The welfare analysis and the proportionality evaluation

12. A family court cannot make a care order unless the jurisdictional threshold in section 31 CA 1989 is satisfied and the court has considered the care plan filed by the local authority. The court's evaluation of the necessity for an order follows on from its analysis of the welfare options. That analysis applies and has regard to, among any other matters, the factors set out in the 'welfare checklist' in section 1(3) CA 1989 so that there is a balance sheet of the benefits and detriments of each realistic option for the long term care of the child. In the rare case where the court and the local authority disagree, the court's function as the decision maker and the local authority's responsibilities as the agency of the State who will hold parental responsibility with the parents under the care order, have to be balanced in the way described by this court in In the Matter of ***W (A Child), RW v Neath Port Talbot BC & Ors* [2013] EWCA Civ 1227**. The decision whether to make a care order (unlike the question whether the threshold is satisfied) engages article 8 of the Convention and has to be justified, hence the need for a proportionality evaluation.

13. Where a family court is asked to consider a care plan which proposes a placement for adoption then alongside the welfare factors in section 1(3) CA 1989 the court will need to consider the qualitatively different welfare factors that relate to placement for adoption which are set out in section 1(4) ACA 2002, and in particular sub-sections 1(4)(c) "the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person" and 1(4)(f): "the relationship which the child has with relatives […]". It will need to do so even if the placement order proceedings have not yet been issued. It is only in this way that the court can consider an evaluation of each of the options before deciding which option is in the child's best interests, whether and if so what order is necessary and whether the interference thereby proposed is proportionate.

14. The recent decisions of the Supreme Court and this court on these questions are common ground and I need only highlight the sources of the jurisprudence that are relied upon:

> i) Welfare evaluation: a linear approach to deciding welfare outcomes is inappropriate and instead a global, holistic evaluation of each of the realistic options available for the child's future upbringing should be undertaken before deciding which of the options best meets the duty to give paramount consideration to the child's welfare. A judgment should include a balancing exercise in which each option is evaluated to a degree of detail necessary to analyse and weigh the internal positives and negatives of each option as well as a comparison of each option, side by side: ***Re G (A Child)* [2013] EWCA Civ 965** at [44] to [56] and ***Re B-S (Children)* [2013] EWCA Civ 1146** at [23] to [29].
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> ii) Proportionality: the first court which makes the ultimate determination of whether to make a care order and/or a placement order has "an obligation under section 6(1) HRA 1998 not to determine the application(s) in a way which is incompatible with the Art 8 rights that are engaged": *Re G* above at

[33]. The welfare analysis of the realistic options before the court and the question what, if any, orders are necessary engage article 8 of the Convention and the proportionality of the intervention proposed must be justified: see, for example *Re B* above at [75] to [77] and [197] to [198].

iii) A plan for placement with a view to adoption: where within CA 1989 proceedings, the court is considering a care plan which proposes an adoptive placement, then whether or not there is a concurrent application for a placement order under ACA 2002 it is necessary to consider the separate welfare checklist under section 1(4) of that Act. In any event, where a placement order application is being heard it is necessary to distinguish between the qualitatively different tests in the CA 1989 and the ACA 2002, in particular sub-sections 1(4) (c) and (f): see, for example, *Re G* above at [48].

iv) Dispensing with the consent of any parent: in every application in which a placement order is to be made the court must dispense with the consent of a parent or guardian if a placement order is to be made. By section 52(1)(b) ACA 2002, a court cannot dispense with that consent unless it is satisfied that the welfare of the child requires the consent to be dispensed with. Such orders are only to be made where it is necessary to safeguard the child's interests that is, where the welfare of the child requires this. The connotation of the imperative in the test involves a stringent and demanding level of scrutiny by a court such that it must be satisfied that "nothing else will do", that is that "no other course [is] possible in [the child's] interests" (see *Re B* at [74], [76-77], [82], [104], [130], [135], [145], [198] and [215].

The powers of the court on an appeal

15. The powers of the court hearing an appeal in the Family Court (and before 22 April 2014 when the Family Court is created as between the FPC and the County Court) are set out in the Family Procedure Rules 2010 [FPR] r 30.12(1) which are in the same terms as CPR r 52.11(1):

"(1) Every appeal will be limited to a review of the decision of the lower court unless –

(a) an enactment or practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

(2) Unless it orders otherwise, the appeal court will not receive –

(a) oral evidence; or

(b) evidence which was not before the lower court.

(3) The appeal court will allow an appeal where the decision of the lower court was –

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings of the lower court.

(4) The appeal court may draw any inference of fact which it considers justified on the evidence.

(5) [...].

16. The role of an appellate court in examining the proportionality of an order granted by the first court is ordinarily limited to a review. In Re B Lord Neuberger (with whom Lord Wilson at [37] and Lord Clarke at [136] agreed) said:

"[88] As I see it, this limitation on the function of the appellate court is based on similar grounds as set out in paras 53 and 57-61 above - see per Lord Diplock in *Hadmor Productions Ltd v Hamilton* [1983] AC 191, 220 and per May LJ in *EI du Pont* para 94. If, after reviewing the judge's judgment and any relevant evidence, the appellate court considers that the judge approached the question of proportionality correctly as a matter of law and reached a decision he was entitled to reach, then the appellate court will not interfere. If, on the other hand, after such a review, the appellate court considers that the judge made a significant error of principle in reaching his conclusion or reached a conclusion he should not have reached, then, and only then, will the appellate court reconsider the issue for itself if it can properly do so (as remitting the issue results in expense and delay, and is often pointless)."

17. The approach of the appellate court to its reviewing function was then considered by my Lady, Black LJ in ***Re P (A Child)* [2013] EWCA Civ 963** at [105] where she said:

> "[105] *Re B* also establishes that we must approach the appeal adopting the normal reviewing approach to appeals rather than considering the issues that the judge determined afresh. Because of the obligation of the trial judge not to determine the matter in a way which is incompatible with article 8 ECHR, the review by the appellate court must focus not just on the judge's exercise of his discretion in making a care order but also on his compliance with that obligation (§45)"

18. In *Re G* at [32] and [69], McFarlane LJ said:

> "[32] The second aspect of the Supreme Court decision in *Re B* which is relevant to the present appeal arises from their lordships' clarification of the necessary role of an appellate court where there is a challenge to the proportionality of a public law order authorising local authority intervention under CA 1989. Whilst the type of intervention considered in *Re B* was adoption, in my view the approach to be deployed must similarly apply to lesser forms of intervention. On this aspect the majority of the Justices (Lord Neuberger, Lord Clarke and Lord Wilson) concluded that the duty on a court, as a 'public authority', not to act in a manner which is incompatible with the Convention under [the] Human Rights Act 1998, s 6(1) does not mandate the appellate court to undertake a fresh determination of a Convention-related issue (paragraphs 37, 83 to 90 and 136). The majority did not therefore hold that there was a need for a radical departure from the conventional domestic concept of a 'review' of a case on appeal, as opposed to a full re-appraisal on the issue of proportionality."
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> "[69] [...] Where, as here, a circuit judge accepts that the first instance judge has not expressly referred to the welfare checklist and has not expressly weighed up the harm of returning to the mother against the harm if the child went into local authority care, then, on the basis of the positive duty identified by the majority in *Re B*, the judge must go on and herself review the proportionality of the order that has been made to determine whether that order is 'wrong'."

19. Mr Weston submits that it was in her understanding of the meaning of the last part of [69] that the judge fell into error, for example at [50] and [75] of her judgment (above), by interpreting the phrase "the judge must go on and herself review the proportionality of the order that has been made to determine whether that order is 'wrong'" to be an injunction to re-make the decision if it is wrong.

20. As Mr MacDonald QC submitted on behalf of the local authority, with perhaps a touch of optimism: where it is plain on the face of a decision that the lower court has carried out an analysis of the proportionality

of the order granted and the nature and outcome of that analysis is clear, the appellate review of proportionality that is required before deciding whether the order is right or wrong will be a relatively straightforward task. The question that this court has to decide comes into play where there is no welfare analysis and proportionality evaluation or the reasoning is opaque.

Discussion:

21. Where there is no welfare analysis of the realistic options before the court and/or no balance of the realistic options and no evaluation of the proportionality of the interference proposed, then following the decision of this court in Re B-S above at [30] to [46], the decision making is flawed on the basis that the interference with article 8 of the Convention has not been justified. In a placement order case the reason for dispensing with a parent's consent would also be missing. As this court said in ***Re W (A Child), Re H (Children)* [2013] EWCA Civ 1177** at [16] and [18], there are cases (particularly those decided before *Re B-S*) where it can be argued that on a fair and sensible reading of the judgment as a whole, the essence of what is required can be found. The court is concerned with substance not form. Care must be taken on an appeal to identify cases where the substance of the reasoning exists and where that is sufficient.

22. In this case, Judge Clarke held that the magistrates reasoning was insufficient and thereby wrong and the question arises whether a judge was permitted to 'fill the gaps', provide her own reasoning or substitute her reasons for those of the first court.

23. Mr Weston for the appellant makes a strong and clear case about what he submits was the irregularity of what happened. He submits that the judge rightly decided that the FPC had to consider the substance not just the letter of the statutory provisions. They had to undertake an analysis rather than pay lip service to the words. He submits that the FPC could not do that because the evidential materials were missing. Not only were they missing in the FPC, but at the hearing where the judge conducted her own analysis and evaluation, the evidence was still missing. Any new evidence relating to new issues of fact and changes of circumstance (and there was at least one new and potentially significant allegation that may have been relevant) or the implications of the same for the welfare analysis and proportionality evaluation, was also missing. Furthermore, the benefit of listening to and appraising the witnesses including the parents was lost in a procedure which was not a true re-hearing. Mr Weston accordingly submits that the procedure adopted was wrong and that its consequence was a welfare analysis and a proportionality evaluation that were inevitably flawed.

24. Mr Weston also submits that a judge conducting a review has a decision to make as respects any evidence that needs to be heard or re-heard when a determination is wrong as a matter of substantive or procedural law. He or she may conduct a limited re-hearing on a discrete point if the material exists to enable that to be done. That may involve considering an application to adduce additional evidence but in any event will involve a careful appraisal of whether the evidence exists to decide the issue in question and how that exercise is to be conducted to ensure procedural regularity.

25. Mr Weston's final point is that the evidence in these proceedings was so defective on the point that it was not available to the judge to fill the gaps that existed. Accordingly, even if she had allowed the appeal and moved to re-hear the case, she could not have done so immediately without the benefit of case management to ensure that the court had the evidence that it needed to conduct its own analysis and evaluation.

26. Mr MacDonald like Mr Weston carefully identified the difference between a review and a re-hearing but was astute to identify cases in which a review and a re-hearing may be a continuum. He submitted, correctly, that the duty of the judge conducting a first appeal is to decide whether the proportionality evaluation of the first court was wrong. A proportionality evaluation is not a discretionary decision: it is either right or wrong

and whether a decision based upon it should be set aside on appeal depends upon an analysis of the kind formulated by Lord Neuberger in *Re B* at [93] and [94]. Mr MacDonald submitted that the judge on appeal having identified the deficiencies in the first court's decision making was obliged to consider whether the proportionality evaluation was thereby or in any event wrong. In an attractive submission he demonstrated that in every case where the first court has made an error in the welfare analysis (even where that analysis is based on a sufficient evidential base) the proportionality evaluation will be affected such that it may have to be re-made. He rhetorically asks the question whether in every such case the appeal court is required to remit the proceedings for a re-hearing when everything else in the case is intact and procedurally regular.

27. The continuum described by Mr MacDonald is very real in two senses: a) the welfare analysis and proportionality evaluation are intimately connected because an error in the analysis will inevitably have an effect on the evaluation with the consequence that an appeal court has to consider them together and b) the appellate court's review of welfare and proportionality will involve having to consider whether there would be any difference in the ultimate conclusion, that is the order made, if the welfare analysis and proportionality evaluation were to be re-made. Aside from other considerations, that is because an appeal lies against an order and not the reasons for it (see *Lake v Lake* [1955] P 336). That at least involves, where practicable, a hypothetical exercise in seeing what the evaluation would be if it were to be re-made on a correct welfare basis.

28. Mr MacDonald acknowledged that the decision by an appeal court whether to re-make a welfare analysis and proportionality evaluation or remit for a re-hearing is itself a discretionary exercise. He identified the question which the appeal court needed to ask in relation to that discretionary exercise as being: "is the error rectifiable by the appeal court or is it too big?" That tends to suggest that there is an identity of approach by the appellant and the respondent to the question this court is asked to answer.

Conclusion in principle:

29. I have come to the following conclusion about the question asked of us. On an appellate review the judge's first task is to identify the error of fact, value judgment or law sufficient to permit the appellate court to interfere. In public law family proceedings there is always a value judgment to be performed which is the comparative welfare analysis and the proportionality evaluation of the interference that the proposed order represents and accordingly there is a review to be undertaken about whether that judgment is right or wrong. Armed with the error identified, the judge then has a discretionary decision to make whether to re-make the decision complained of or remit the proceedings for a re-hearing. The judge has the power to fill gaps in the reasoning of the first court and give additional reasons in the same way that is permitted to an appeal court when a Respondent's Notice has been filed. In the exercise of its discretion the court must keep firmly in mind the procedural protections provided by the Rules and Practice Directions of both the appeal court and the first court so that the process which follows is procedurally regular, that is fair.

30. If in its consideration of the evidence that existed before the first court, any additional evidence that the appeal court gives permission to be adduced and the reasons of the first court, the appeal court decides that the error identified is sufficiently discrete that it can be corrected or the decision re-made without procedural irregularity then the appeal court may be able to rectify the error by a procedurally fair process leading to the same determination as the first court. In such a circumstance, the order remains the same, the reasoning leading to the order has been added to or re-formulated but based on the evidence that exists and the appeal would be properly dismissed.

31. If the appeal court is faced with a lack of reasoning it is unlikely that the process I have described will be appropriate, although it has to be borne in mind that the appeal court should look for substance not form and that the essence of the reasoning may be plainly obvious or be available from reading the judgment or reasons

as a whole. If the question to be decided is a key question upon which the decision ultimately rests and that question has not been answered and in particular if evidence is missing or the credibility and reliability of witnesses already heard by the first court but not the appeal court is in issue, then it is likely that the proceedings will need to be remitted to be re-heard. If that re-hearing can be before the judge who has undertaken the appeal hearing, that judge needs to acknowledge that a full re-hearing is a separate process from the appeal and that the power to embark on the same is contingent upon the appeal being allowed, the orders of the first court being set aside and a direction being made for the re-hearing. In any event, the re-hearing may require further case management.

32. The two part consideration to be undertaken by a family appeal court is heavily fact dependent. I cannot stress enough that what might be appropriate in one appeal on one set of facts might be inappropriate in another. It would be unhelpful of this court to do other than to highlight the considerations that ought to be borne in mind.

Application of the conclusion in this case:

33. Mr MacDonald's primary submission is that at least initially Judge Clarke correctly identified what was required of her in this passage of her judgment at [50] that I have cited at [10] above. Later in judgment and perhaps as a consequence of a discussion on the transcript to which this court has been taken, Judge Clarke appeared to conflate the issues she had so carefully identified by regarding McFarlane LJ's analysis in *Re G* at [69] as being a mandatory requirement to re-make a proportionality evaluation where errors are identified which vitiate a first court's analysis. I do not read that part of McFarlane LJ's judgment in that way. He was identifying the logical consequence that errors in the decision making process would necessarily have an effect on the proportionality evaluation rather than that in every case the appeal court should substitute its own proportionality evaluation for that of the first court. The latter formulation would be contrary to the dicta of the majority of the Supreme Court in *Re B*. Had Judge Clarke not been deflected from her task, she would have reached the point where the discretionary decision identified should have been made. Mr MacDonald submits that had she done so, she had all the material she needed to re-make the decision. He submits that the error of the FPC was not critical to the determination because the evidence existed in support of a welfare analysis and a proportionality evaluation that were and are coincident with the orders made by the FPC. To that extent, he says, the judge was able to fill-in the gaps and avoid a full re-hearing that would have involved inevitable delay. He has taken this court through the judge's decision making process in an attempt to support the exercise she undertook.

34. The final evidence of the social worker does not include any welfare analysis or balance. It also fails to deal with why the adoption of B was necessary or required. The local authority's permanence report which was exhibited to their Annex B report in support of the application for a placement order ought to be one of the materials in which a full comparative analysis and balance of the realistic options is demonstrated. I need say no more than that both reports are poor and demonstrate a defective exercise in identifying the benefits and detriments for the child of the realistic long term options for the care of B. That was necessary not just for the court's purposes but also for the local authority's (adoption) agency decision maker whose decision is a pre-requisite to a placement application being made. The revised care plans and statements of evidence filed after the local authority changed its mind contained statements relating to their concerns about whether the parents had the capability to work openly and honestly with them. Beyond that they are devoid of any welfare analysis of the alleged change of circumstances or of the options for the long term care of B. There is no evidence relating to the proportionality of the plan proposed.

35. Although the children's guardian's analysis makes reference to both exercises and supports the local authority's plan for adoption, it likewise does not descend to an analysis of the welfare of B throughout his life except for just one opinion in one of 36 paragraphs where she says: "My own view until very recently was

that this is a finely balanced case; although I had significant concerns about the parents' ability to work in partnership with professionals. I balanced against that the potential loss to [B] of the opportunity to live in the care of his birth family if such an outcome could be achieved. I was particularly mindful of his right to family life and the loss to him of a relationship with his siblings." So far as it goes, that is a relevant opinion, but in my judgment not a sufficient analysis for the purposes of the ACA 2002 or the authorities. There is no evidence directed specifically to why it is necessary to dispense with the consent of the parents to adoption.

36. With the benefit of access to the original evidence that this court has had, it is clear that that evidence could not in itself have supported the conclusions reached by the FPC had it been adopted as the reasoning for the same. In particular, there is no comparison of the benefits and detriments of the realistic welfare options for B upon which the FPC could have relied. In the absence of a sufficient welfare analysis by the FPC, there was simply no analysis at all. Accordingly, there was nothing of substance to be evaluated to decide whether or not it was proportionate. Judge Clarke did not hear any additional evidence with the consequence that the evidential basis for the orders remained as defective in the County Court as it had been in the FPC. No amount of elegant language could disguise that fact. It is of course open to a specialist judge to construct an analysis required by statute from the evidence of fact, expert opinion and evaluative judgment that she has heard and that is a distinct exercise from a professional assessment that is required because it is outwith the skill and expertise of the court: *Re N-B (Children) (residence: expert evidence)* [2002] EWCA Civ 1052, [2002] 3 FCR 259. In this case there was no evidential basis for that exercise.

37. Where the appeal court cannot comfortably fill the gaps in the analysis and evaluation of the first court and where as a matter of substantive or procedural law the decision has been demonstrated to be wrong, the appeal court should allow the appeal and remit the applications to be re-heard. There is a continuum between the functions of the appeal court to review the proceedings of the first court and to conduct discrete decision making functions that fill identified gaps in analysis or evaluation that represents an appropriate exercise provided it not be used so as to create a situation of procedural irregularity. It is not helpful for this court to be prescriptive. Each appeal will have its own matrix of fact and value judgments. In this appeal, the evidential shortcomings could not be corrected by what were no doubt the good intentions of the appeal judge.

38. At the conclusion of the appeal we allowed the appeal with reasons to follow. We set aside the care and placement orders and remitted the proceedings for a re-hearing of the welfare decision relating to B by a different judge in the County Court who had already been allocated to consider the local authority's applications relating to the parents' new baby.

Lady Justice Black:

39. At the conclusion of argument on this appeal, I had no doubt that the appeal should be allowed and the matter remitted for the local authority's applications for care and placement orders to be reheard in full in the county court. I will attempt now to explain shortly why I reached that view.

Definition of terms and other preliminary matters

40. For the purposes of discussion, except where it is necessary to be more precise, in this judgment I will speak in terms of "the welfare decision" which I intend to encompass the entirety of the decision making process which in care proceedings follows once it is established that the section 31 threshold criteria exist, as well as the separate process of determining an application for a placement order.

41. ***Re B (a child)* [2013] UKSC 33**, *Re G (a child)* [2013] EWCA Civ 965 and other decisions made during 2013, which was a particularly active year for family law, have made clear that the decision whether to make a care order (as also the decision whether to grant a placement order) involves not only an exercise of

discretion but also a rigorous consideration of whether the order is necessary or, putting it another way, whether it would be incompatible with Art 8 ECHR (the second element sometimes being referred to as a "proportionality evaluation" or "proportionality test"). I do not intend to go over this ground again given the number of times that it has already been traversed, nor do I intend anything that I say in this judgment to alter or cast doubt on the jurisprudence of the last nine months or so.

The scope of the appeal

42. There was universal agreement that HHJ Clark had been right to conclude that the reasoning of the family proceedings court was deficient. The debate before us centred upon whether the judge was entitled, nonetheless, to uphold the magistrates' orders on the basis that they were in fact "right to decide that the stage has been reached in this case where only care and placement orders will do and that [they] are the only viable options for R at this stage" (Judge Clark §105).

43. In his grounds of appeal to this court, the appellant father asserted that the judge did not have *power* to make the determination that she did and that her finding that the magistrates had failed to undertake a proper welfare balancing exercise and to apply the proportionality test should inevitably have resulted in the appeal being allowed and the case remitted for a welfare hearing before a circuit judge (§5 of the grounds of appeal). At the outset of the hearing before us, however, Mr Weston QC for the father disavowed that argument. He relied instead on what had been his alternative argument, summarised in §6 of the grounds of appeal in this way:

> "In the event that the learned judge did have power to undertake a welfare balancing exercise and to apply the proportionality test, she was wrong to have pursued such a course given the facts of this case."

Discussion

44. Mr Weston's decision not to pursue the argument that an appeal judge has no power to carry out his or her own welfare evaluation and to substitute his or her own welfare decision for that of the court below was, in my view, eminently sensible. There clearly is such a power. The appeal judge (or judges, because the same is true in the Court of Appeal) has all the powers of the lower court (FPR 2010 rule 30.11(1); CPR 1998 rule 52.10(1)) and can "affirm, set aside or vary any order or judgment made or given by the lower court" (FPR rule 30.11(2)(a); CPR rule 52.10(2)(a)).

45. Appeals involve two distinct stages, the first being up to the point at which it is decided that the appeal will be allowed and the second being from that point on. The exercise of the power is perhaps most plainly demonstrated where it occurs at the second stage, after an appeal has been allowed. The decision of this court in ***Re V (children)*** **[2013] EWCA Civ 913** is an example. The issue there was whether the judge in the county court had been right to refuse the local authority's application for placement orders in relation to two girls, deciding that they should remain in long term foster care. We decided that he had failed to give sufficient weight in his conclusion to the continuing difficulties that there were likely to be in relation to the mother's contact and had wrongly taken the view that long term fostering would provide sufficient safety and security for the children. We allowed the appeal, substituting care orders with care plans for adoption and placement orders (*Re V* §99).

46. However, an appeal judge regularly has to engage with the welfare decision at the first stage in the process. The success or failure of an appeal is not necessarily determined by whether or not the reasoning of the trial judge holds water, although it might be. Ultimately, the real focus is the trial judge's conclusion. Was that wrong? An attempt to answer that necessarily involves the judge making some sort of welfare evaluation, albeit possibly only provisional at this stage.

47. We know from the majority in *Re B* (supra) that the task of an appeal judge is (normally) not to rehear the case but to review the first instance decision to see whether it was wrong. However, as Lord Wilson observed, "the simplicity of the criterion should not disguise the difficulty, in some cases, of its application" (*Re B* §47).

48. The features of a trial judge's determination which can discomfit the appeal judge are almost infinitely variable. It may be a combination of a haphazard reasoning process and a surprising outcome. It may be a complete lack of reasoning. Factors may have been wrongly given weight or left out of consideration. There may be unsupportable findings of fact or a failure to find material facts. The law may be wrong. The process may be unfair.

49. The precise path that an appeal takes therefore inevitably depends upon its individual facts. For example, some errors of reasoning are so gross as to lead inexorably to a determination which is glaringly wrong. Failures in process may demand that the case be reheard, even if it looks as if the result may well be the same. On the other hand, it may be that the flaws in a first instance judgment are obviously not significant in the ultimate decision, which can be upheld. And some cases permit of only one answer so that the appeal judge can unhesitatingly conclude that despite a wrong route having been taken by the lower court, the order was the only possible one. Then there are the cases which require a great deal of anxious study. Lord Neuberger set out at §93 of Re B some possible staging posts on the appeal judge's evaluation road, grouped either side of the unenviable condition (his category (iv)) where the appellate judge concludes that he "cannot say [the trial judge's conclusion on proportionality] was right or wrong".

50. In Lord Neuberger's judgment, as in the judgments of the other Supreme Court justices, there is much learning on appeal practice. For me to cover the same ground again would be unnecessary and unwise. I will focus therefore on the situation with which we are concerned here. Judge Clark remained at all times in the first stage of the appeal process, that is to say she was at all times reviewing the decision of the justices to decide whether it was wrong. Her final conclusion was that "the justices were right to make the orders that they did" (§106) and she dismissed the appeal (§107).

51. The justices' findings of fact largely survived intact and the problem was with their analysis. Judge Clark's view, now accepted by all the parties, was that they had omitted "to carry out an appropriate and Convention-compliant balancing exercise by failing to take into account the potential harm to R throughout his life of becoming an adopted person" (§75 of Judge Clark's judgment). She identified also a linear approach to the decision (§69) and a failure to make "any frank acknowledgement of the draconian nature of the order sought" (§70).

52. The judge thought (§75) that she had the "proper information to enable me to carry out that exercise [the Convention-compliant balancing exercise]" "in the holistic manner recommended by Lord Justice McFarlane" in *Re G* and she went on to review "the proportionality issue" from §76 onwards.

53. It has been suggested that a particular paragraph from McFarlane LJ's judgment in *Re G*, §69, may possibly have encouraged Judge Clark to go on to reach a final conclusion about the local authority's applications herself rather than arranging for the case to be reheard. Ryder LJ has set the relevant part of the paragraph out above but I will restate it here for convenience, together with an earlier paragraph which is also relevant:

> "64. It follows that there was a positive duty under HRA 1998, s 6, upon the circuit judge …. to conduct a review of the first instance decision to make a care order in order to determine whether, in terms of proportionality, that decision was wrong.

…..

> 69. ….Where, as here, a circuit judge accepts that the first instance judge has not expressly referred to the welfare checklist and has not expressly weighed up the harm of returning to the mother against the harm if the child went into local authority care, then, on the basis of the positive duty identified by the majority in *Re B*, the judge *must* go on and herself review the proportionality of the order that has been made to determine whether that order is 'wrong'." [my emphasis]

54. I do not take McFarlane LJ to mean that the judge is obliged to dispose finally of the case as opposed to remitting it for rehearing. Indeed, §69 cannot mean that, given that FPR Rule 30.11(2)(c) empowers the appeal court to order a new hearing and the preceding sub-paragraph (b) empowers it to refer any application or issue for determination by the lower court. As I read §69, all that McFarlane LJ intended to say was that the review on appeal is not complete, at least in the circumstances he was describing, without the judge herself reviewing the proportionality of the order to determine whether or not it is wrong. Accordingly, I have no doubt that Judge Clark was right to examine this issue once she had concluded that "an appropriate and Convention-compliant balancing exercise" had not been carried out by the justices. I differ with her only in so far as she concluded that on the material she had, she was in a position to affirm the justices' order rather than giving directions for the matter to be reheard.

55. By now, it might be apparent that the reason why I consider that a rehearing was inevitable has nothing to do with high principle and everything to do with the specifics of this particular case. I therefore need to turn to the facts.

56. Any short summary of the issues in a case like this will be over-simplified but in essence the main concerns were:

> a. there had been domestic violence in the parents' relationship and it was thought, there having been more than one separation, that it may be attended by regular fall-outs and separations, thus exposing R to inappropriate adult behaviour and leaving him in the care of only one parent who, unsupported, may not be able to provide good enough parenting;
>
> b. there was a risk to R of sexual abuse by the paternal grandfather and doubt as to the parents' ability to understand the risk and protect him from it;
>
> c. the local authority considered that the parents had not been open and honest with them, misleading them about the father's contact with the paternal grandfather and withholding information such as the fact of the mother's pregnancy, and feared that the parents would not work with them over the care of R;
>
> d. delay in settling arrangements for R's future would be harmful to him.

57. The context of the local authority's applications was that an assessment of the parents by an organisation called Connect had recommended a return of R to their care by the beginning of March 2013. All proceeded well with the rehabilitation process until staying contact with R was about to commence. Then, in late February/early March, it came to light that the father had been having more contact with the grandfather than either the local authority or Connect knew, including staying overnight at his home. As a result of learning this, Connect no longer recommended rehabilitation and recommended instead that there be further work, such as a "protective carer programme", with the parents. In May, there was a meeting of professionals involved in the case and thereafter the local authority changed its care plan to adoption.

58. The justices heard evidence from various witnesses including the father and the mother. They carefully set out in their reasons the impressions the witnesses had made on them and their resulting findings. However, evaluating the sort of issues that were live here, such as the parents' insight into the risk posed by the grandfather, the implications of the father's overnight stays, the extent to which the parents had failed to be appropriately frank and forthcoming with the local authority, what the future would be likely to hold in terms of their relationship with each other, with R and with social workers, is a sophisticated exercise which more often than not needs to be informed by seeing and hearing the witnesses first hand. Impression and intuition contribute much which cannot be captured in writing and conveyed reliably to another decision maker. These observations have been made before, notably recently in *Re B*, and I need not labour them here. Lord Wilson's remarks at §42 are particularly apposite in this connection. He said:

> "The function of the family judge in a child case transcends the need to decide issues of fact; and so his (or her) advantage over the appellate court transcends the conventional advantage of the fact-finder who has seen and heard the witnesses of fact. In a chid case the judge develops a face-to-face, bench-to-witness-box, acquaintanceship with each of the candidates for the care of the child. Throughout their evidence his function is to ask himself not just 'is this true?' or 'is this sincere?' but 'what does this evidence tell me about any future parenting of the child by this witness?' and, in a public law case, when always hoping to be able to answer his question negatively, to ask 'are the local authority's concerns about the future parenting of the child by this witness justified?'"

59. The justices in the present case had had the advantage of the opportunity to assess the parents and other witnesses first hand but they had not gone on to use it to carry out the evaluation that they needed to do in order to determine what was in R's best interests. Conversely, the judge knew the exercise that had to be done but she had not had the advantage of seeing the witnesses give their evidence. The guardian had repeatedly said and the judge agreed (§104), that the case was "a finely balanced one". It had been proceeding with the balance tipped in the other direction, in favour of rehabilitation, until reversed on the basis of the father's contact with the paternal grandfather. Whilst clearly of significance, this was not an event of the nature and gravity that sometimes inescapably brings an abrupt end to a rehabilitation programme. The judge had identified a number of factors which weighed in the parents' favour, continuing in §104 that:

> "There is much positive evidence in the parents' favour, and I have real sympathy with many of the arguments advanced on their behalf. In particular, it seems to me that there is real weight in the submission that the parents were given some mixed messages about contact with the paternal grandfather, and I also bear in mind that the risk of abuse at the hands of the paternal grandfather has not in fact materialised."

60. In all these circumstances, whether or not she might have been able to make up for any deficiencies in the analysis that had so far been done of the pros and cons of the various options for R, in my view the judge was not in a position to reach a concluded view on the difficult question of whether adoption was appropriate without having heard the evidence, as opposed to read it, whether in the court bundles or as recounted by the justices.

61. Given the emotional (and financial) toll of litigation and the impact of the delay that inevitably attends a remission of a case for rehearing, it is important that I should not be thought to be discouraging the use of by an appeal judge of the power to support a shaky first instance decision on the basis of his or her own welfare evaluation or to substitute his or her own decision in a proper case. I am not even going to attempt to describe here the attributes of "a proper case" because so much depends on the circumstances. There are plenty of examples in the authorities of the approach taken by the Court of Appeal to the problem when hearing first appeals and these are likely to be of assistance in cases of difficulty because there are

considerable similarities between the role of this court in that situation and the role of a High Court judge or circuit judge sitting on appeal in a family case. It might help if I invite attention to two particular examples, one a first appeal and the other a second appeal.

62. First, I want return to *Re V* (supra) in order to draw out certain features which contributed to my view that it was possible there to make a final determination of the issues without remitting the case for rehearing. That too had been described as a finely balanced case by the guardian. It can be seen from §87 of my judgment that, for my part, I took the route that I did only after prolonged and anxious consideration of the case, and making allowance for the judge's immersion in it, and his unique opportunity to assess the parents and the evidence of the professionals during the long hearing that took place in front of him. However, none of the parties argued that the case should be remitted for a further hearing of any kind. The submission of the local authority was that there was only one right answer which was adoption and it was common ground that if we decided that the judge was wrong to have made care orders with a plan of long term fostering and that the appeal should be allowed, we should ourselves make the required placement orders. As I set out at §9 of my judgment in that case, we therefore had to form our own view as to the proportionality of the adoption route because it would be our order that interfered with the parents' and children's family life. The judge's judgment was immensely careful and thorough, indeed so thorough that it was not necessary for us to be taken to the underlying documents in the case so we had a very solid foundation for our decision. The challenge was not to the factual information he provided about the case but to what he made of the facts in determining between long term fostering and adoption.

63. Secondly, in contrast, the decision of this court in *Re H-C (Children)* [2014] 21 March, EWCA Civ is a very recent example of a situation in which the circuit judge hearing the appeal should have remitted the case for a rehearing rather than determining the matter himself. At §38, McFarlane LJ said that no one should readily contemplate a rehearing, which should take place only where it is necessary on the facts of the case and no alternative less burdensome process is available. However, there were a number of significant difficulties with the process before the justices in that case, including that the factual findings that were necessary for the determination of the matter had not been made by them, and a rehearing was therefore inevitable.

64. Returning to the instant case, in summary the reason that I took the view that this appeal had to be allowed and the case remitted for rehearing in the county court was that the judge was in no position, on the basis solely of the written material available to her, to determine the delicate issues that were relevant to the ultimate decision whether adoption was in R's best interests and necessary.

65. I am very conscious that just as family cases all differ from each other, so too do family cases differ from many other types of cases. All that I have said in this judgment is directed at appeals in family cases and is not intended to influence practice in other spheres of the law which may have their own approach, tailored to the particular needs of the discipline.

The Chancellor of the High Court:

66. The Judge correctly determined that the FPC's decision was flawed. I agree, however, with Lord Justice Ryder and Lady Justice Black that, for the reasons they give, the Judge was not in a position in the present case to determine herself whether adoption was appropriate and so she should have remitted the applications to be re-heard. That conclusion turns on the particular facts of the present case. In other family cases involving similar issues, the appeal court, having decided to allow the appeal, may have the material to be able to form its own view without remitting the matter for re-hearing.
