Neutral Citation Number: [2019] EWCA Civ 29

Case No: B4/2018/2341

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CoventryFamily Court
HHJ Watson
Case Number CV/95/17

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2019

Before :

THE PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE KING
and
LORD JUSTICE COULSON

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Re B (A Child) (Post-Adoption Contact)

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Vanessa Meachin QC and Sarah Jennings (instructed by **Bailey Wright & Co**) for the **Appellant (natural parents)**
The Natural Mother was represented by Her Litigation Friend, The Official Solicitor

Justine Ramsden (instructed by **Kundert Solicitors**) for the **1st Respondent (adopters)**

Nicholas Goodwin QC (instructed by **Warwickshire CC**) for the **2nd Respondent**

Matthew Brookes-Baker (instructed by **Johnson & Gaunt**) for the **3rd Respondent (child)**

Hearing dates : 27th November 2018

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Approved Judgment

Sir Andrew McFarlane P:

1. This appeal, which concerns post-adoption contact, is apparently the first case to reach this court following the implementation of Adoption and Children Act 2002 ['ACA 2002'], s 51A which, for the first time, makes provision for post-adoption contact orders.

2. The child at the focus of the proceedings, 'B', was born in April 2017. Most unfortunately, both of B's parents are disabled in respect to their intellectual functioning which, in the case of B's mother, is a very significant disability. Understandably, at the time of the baby's birth the local authority was concerned that, despite their earnest wish to do so, the parents may not be able to cope safely and adequately with her care. Consequently, by agreement, when the child was but a few days old, B moved with her parents to a residential assessment centre. At the same time, care proceedings were commenced in the local family court. Unfortunately, the report compiled by the assessment centre at the conclusion of the family's 12-week stay did not support the parents' continued care of their much-loved daughter. In August 2017 the court sanctioned the baby's removal from the residential centre and she was placed with Mr. and Mrs. X, who were foster parents who had also been approved as adopters.

3. In September 2017 the local authority applied for an order authorising them to place B for adoption under ACA 2002, s 21. On 20 October 2017, at the conclusion of the final hearing, Mr Recorder Norton QC made a final care order and a placement for adoption order. The local authority care plan before the court concluded that ongoing direct contact between the parents and child was not appropriate. At the conclusion of his judgment, having referred to the "no direct contact" element in the care plan, Recorder Norton said:

> "I stress that this is not a case where I have been asked to make any order for direct contact, but I would be reluctant to do so for reasons expressed by the children's guardian in her evidence. There is a risk that if I were to make an order for direct contact that these carers, or subsequent carers, may not wish to accept that. In turn, that may lead to either immediate breakdown, or difficulty in finding B a further placement. I also accept that the direct contact can, in some circumstances, lead to a risk of future breakdown, but I do consider that this is a case where, especially where the carers have expressed a willingness to meet with the parents, and there is no suggestion of malice on behalf of these parents, that some further thought could be given to the issue of direct contact. I am, of course, required to consider contact when making a placement order. I am required under the Adoption and Children Act 2002, to look at the value to B of a continued relationship with her parents, if that can be achieved. I am not invited to make an order, and would not do so, but I do invite some further discussion between local authority, carers and, potentially, these parents, once they have had the chance to reflect upon my decision, to see whether, in the particular circumstances of this case, there is some possibility of ongoing, direct contact, but I go no further than that. It would be inappropriate for me to do so."

4. In accordance with the care plan, the parents' contact with B reduced over the course of the following few weeks with the final visit taking place in early November 2017. In the same month, B's placement with Mr and Mrs X formally became an adoptive placement.

5. Again, in November 2017, a meeting took place, for the first time, between B's parents and the prospective adopters, Mr and Mrs X. By all accounts that meeting went well.

6. In December 2017 Mr and Mrs X issued their application to adopt B. During preliminary directions hearings in the adoption proceedings the parents, who had indicated that they neither consented to nor sought leave to oppose the making of an adoption order, expressed a wish for post-adoption contact. By ACA 2002, s 51A(4)(c), a parent who wishes to apply for post-adoption contact must first obtain the leave of the court to make that application. On 16 May 2018 a district judge granted these parents leave to apply for post-adoption contact under s 51A. The final hearing of that application was conducted before HHJ Watson in August 2018, with judgment being handed down on 6 September 2018. Having conducted a thorough analysis of the issues, HHJ Watson refused the application for post-adoption contact, recorded in a recital the position of the prospective adopters as to the issue of post adoptive contact and stayed the application for and adoption order.

7. B's parents' application for permission to appeal against the refusal of a s 51A contact order was granted by my Lady, Lady Justice King, on 9 October 2018 principally on the ground that there was some other compelling reason for the grant of permission, namely that the implementation of s 51A, together with developing recent research on the issue of post-adoption contact, justified consideration by this court.

8. We are grateful to counsel for each party who have addressed their written and oral submissions with the dual focus of, firstly, the judge's judgment and her decision on the particular facts of this case, and, secondly, the need for, and content of, any general guidance that might now be given by this court in relation to post-adoption contact.

The Statutory Context

9. On an adoption agency being authorised to place a child for adoption (or placing a child for adoption who is less than six weeks old), ACA 2002, s 26(1) provides that any contact provision in a child arrangements order under Children Act 1989 ['CA 1989'], s 8 will cease to have effect; any order for contact to a child in care under CA 1989, s 34 will also cease to have effect in like manner.

10. By ACA 2002, s 26(2)(a), while an adoption agency (in the present case the local authority) is authorised to place a child for adoption, or the child is so placed, no application may be made for a child arrangements order under CA 1989, s 8 containing provision for contact and no application may be made for a contact order under CA 1989, s 34. In such circumstances, by s 26(2)(b), the court does, however, have power to make provision for contact between the subject child and any person named in the order. ACA 2002, s 26(3) gives detail of those who may apply for a s 26 contact order as of right and all others, who must first obtain the court's leave before applying. In addition, by s 26(4), when making a placement order the court may on its own initiative make a contact order under s 26. ACA 2002, s 27 makes further consequential provision as to contact under a placement order.

11. By ACA 2002, s 27(4):

"(4) Before making a placement order the court must:

(a) Consider the arrangements which the adoption agency has made, or proposes to make, for allowing any person contact with the child, and

(b) Invite the parties to the proceedings to comment on those arrangements."

12. The regime established by ACA 2002, ss 26 and 27 is important. It requires the court in every case before making a placement order to consider the proposed arrangements for contact and the views of the parties as to those arrangements. The court is given wide and flexible powers to make arrangements for contact between the child and any other person in the period prior to any placement for adoption and thereafter during the operative period of the placement for adoption order. An order for contact under s 26 can be made in response to specific application or on the court's own initiative.

13. A placement order continues in force until it is either revoked by the court (under ACA 2002, s 24), or an adoption order is made with respect to the child or the child marries, forms a civil partnership or attains the age of 18 years [ACA 2002, s 21(4)]. A contact order made under s 26 may, therefore, cover a relatively short period between the making of a placement order and the subsequent granting of an adoption order, or, potentially for far longer periods if an early placement and adoption are not achieved. The power of the court to make an order under s 26 is not confined to the occasion on which the placement for adoption order is, itself, made, but extends to the entire period "while" an adoption agency is authorised to place, or a child is placed, for adoption [ACA 2002, s 26(2)].

14. Where an application for a full adoption order is, subsequently, made, different provisions relating to contact apply. Prior to 22 April 2014, when ACA 2002, s 51A came into force, any provision for post-adoption contact was made by a CA 1989, s 8 child arrangements order, irrespective of whether the adoption followed formal placement for adoption by an adoption agency, or not. ACA 2002, s51A now provides a statutory scheme for post-adoption contact following a placement for adoption order. Previous authorities, to which reference will in due course be made, must therefore be read in the light of the new statutory scheme, albeit that those authorities, in so far as they apply to cases outside S 51A are likely to remain fully applicable to cases where provision of contact continues to be facilitated by an order under CA 1989, s 8.

15. Irrespective of whether contact may fall to be ordered under CA 1989, s 8 or ACA 2002, s 51A, the court has an obligation to consider the contact arrangements. ACA s 46 (6) provides:

> "(6) Before making an adoption order, the court must consider whether there should be arrangements for allowing any person contact with the child; and for that purpose the court must consider any existing or proposed arrangements and obtain any views of the parties to the proceedings."

16. As this is the first case before this court with respect to the new regime, I will set the relevant parts of ss 51A and 51B out in full:

"*Post-adoption contact*

51A Post-adoption contact

(1) This section applies where—

(a) an adoption agency has placed or was authorised to place a child for adoption, and

(b) the court is making or has made an adoption order in respect of the child.

(2) When making the adoption order or at any time afterwards, the court may make an order under this section—

(a) requiring the person in whose favour the adoption order is or has been made to allow the child to visit or stay with the person named in the order under this section, or for the person named in that order and the child otherwise to have contact with each other, or

(b) prohibiting the person named in the order under this section from having contact with the child.

(3) The following people may be named in an order under this section—

(a) any person who (but for the child's adoption) would be related to the child by blood (including half-blood), marriage or civil partnership;

(b) any former guardian of the child;

(c) any person who had parental responsibility for the child immediately before the making of the adoption order;

(d) any person who was entitled to make an application for an order under section 26 in respect of the child (contact with children placed or to be placed for adoption) by virtue of subsection (3)(c), (d) or (e) of that section;

(e) any person with whom the child has lived for a period of at least one year.

(4) An application for an order under this section may be made by—

(a) a person who has applied for the adoption order or in whose favour the adoption order is or has been made,

(b) the child, or

(c) any person who has obtained the court's leave to make the application.

(5) In deciding whether to grant leave under subsection (4)(c), the court must consider—

(a) any risk there might be of the proposed application disrupting the child's life to such an extent that he or she would be harmed by it (within the meaning of the 1989 Act),

(b) the applicant's connection with the child, and

(c) any representations made to the court by—

(i) the child, or

(ii) a person who has applied for the adoption order or in whose favour the adoption order is or has been made.

(6) When making an adoption order, the court may on its own initiative make an order of the type mentioned in subsection (2)(b).

(7) The period of one year mentioned in subsection (3)(e) need not be continuous but must not have begun more than five years before the making of the application.

(8) Where this section applies, an order under section 8 of the 1989 Act may not make provision about contact between the child and any person who may be named in an order under this section.

51B Orders under section 51A: supplementary

(1) An order under section 51A—

(a) may contain directions about how it is to be carried into effect,

(b) may be made subject to any conditions the court thinks appropriate,

(c) may be varied or revoked by the court on an application by the child, a person in whose favour the adoption order was made or a person named in the order, and

(d) has effect until the child's 18th birthday, unless revoked.

(2) Subsection (3) applies to proceedings—

(a) on an application for an adoption order in which—

(i) an application is made for an order under section 51A, or

(ii) the court indicates that it is considering making such an order on its own initiative;

(b) on an application for an order under section 51A;

(c) on an application for such an order to be varied or revoked.

(3) The court must (in the light of any rules made by virtue of subsection (4))—

(a) draw up a timetable with a view to determining without delay whether to make, (or as the case may be) vary or revoke an order under section 51A, and

(b) give directions for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to.

(4) Rules of court may—

(a) specify periods within which specified steps must be taken in relation to proceedings to which subsection (3) applies, and

(b) make other provision with respect to such proceedings for the purpose of ensuring, so far as is reasonably practicable, that the court makes determinations about orders under section 51A without delay."

17. A number of clear points can be made about the s 51A regime:

i) It only applies where an adoption agency has placed, or was authorised to place a child for adoption and the court is making, or has made, an adoption order [s 51A(1)];

ii) Where the section applies, it is not permissible to make provision for contact under CA 1989, s 8 [s 51A(8)];

iii) An order under s 51A may be made at the same time as the adoption order or at any time thereafter [s 51A(2)];

iv) An order under s 51A may make positive provision for contact to take place [s 51A(2)(a)] or may be an order 'prohibiting the person named in the order … from having contact' [s 51A(2)(b)];

v) A wide range of former blood relatives and others may be named in a s 51A order [s 51A(3)];

vi) An application for an order under s 51A (which can be made either at the time of the adoption or any time thereafter) can be made as of right by the adopters or the child, or by any other person who has obtained the court's leave to apply on the basis established in s 51A(5) [s 51A(4)];

vii) The court's power to make a contact order under s 51A on its own initiative is limited to making an order to prohibit contact under s 51A(2)(b) [s 51A(6)].

The established approach to post-adoption contact

18. The approach that a court should take when there is an issue as to post-adoption contact has been well settled for some time and does not, therefore, need extensive exposition in this judgment.

19. Prior to the CA 1989 and ACA 2002, the court's powers were limited to attaching a conditionto an adoption order if it was necessary to make provision for future contact. The leading authority at that time was the House of Lords decision in *Re C (A Minor) (Adoption Order: Conditions)* [1989] AC 1, in which, having reviewed the then extant caselaw, Lord Ackner stated:

"The cases rightly stress that in normal circumstances it is desirable that there should be a complete break, but that each case has to be considered on its own particular facts. No doubt the court will not, except in the most exceptional case, impose terms or conditions as to access to members of the child's natural family to

> which the adopting parents do not agree. To do so would be to create a potentially frictional situation which would be hardly likely to safeguard or promote the welfare of the child. When no agreement is forthcoming the court will, with very rare exceptions, have to choose between making an adoption order without terms or conditions as to access, or to refuse to make such an order and seek to safeguard access to some other machinery, such as wardship. To do otherwise would be merely inviting future and almost immediate litigation stopped"

20. In *Re R (Adoption: Contact)* [2005] EWCA Civ 1128; [2006] 1 FLR 373, the Court of Appeal reviewed the issue of post-adoption contact some 4 months prior to the implementation of the ACA 2002. In the course of his leading judgment Wall LJ looked back at the House of Lords decision in *Re C*, given some 17 years earlier, with an eye to the new adoption legislation which was about to come into force:

> "[47] It is, of course, the case that matters have moved on very substantially since *Re C*. When *Re C* was decided, the Children Act 1989 was not in force and adoption proceedings were not designated as family proceedings. Accordingly, if there was to be post-adoption contact between siblings or other members of the adopted child's family, the only way that could be enforced was by conditions being written into the adoption order under section 8 of the Children Act 1989. Equally, back in those days it was more common, as Lord Ackner himself points out, for there to be no contact between family members and the adopted child after there an adoption order had been made; although, of course, he recognises that there were exceptions to that rule.
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> [48] We were shown s 1 of the new Adoption and Children Act 2002, which is due in force later this year, which demonstrates the clear change of thinking there has been since 1976, when the Adoption Act was initially enacted, and which demonstrates that the court now will need to take into account and consider the relationship the child had with members of the natural family, and the likelihood of that relationship continuing and the value of the relationship to the child.
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> [49] So contact is more common, but nonetheless the jurisprudence I think is clear. The imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual."

21. In *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535; [2008] 2 FLR 625 the judgment of a court with considerable experience in these matters (Thorpe LJ, Wall LJ and Munby J), returned to the issue of post-adoption contact and, following a full review of the earlier case-law which concluded with the judgment in *Re R*, went on to state:

> "[147] All this, in our judgment, now falls to be revisited under ss 26 and 27 of the 2002 act, given in particular the terms of ss 1(4)(f), 1(6) and (7) and 46(6). In our judgment, the judge in the instant case was plainly right to make a contact order under s 26 of the 2002 Act, and in our judgment the question of contact between D and S, and between the children and their parents, should henceforth be a matter for the court, not for the local authority, or the local authority in agreement with prospective adopters.

> [148] We have already expressed our surprise and dismay that D's contact with her mother was stopped by the local authority unlawfully, and without authority of an order from the court under s 34(4) of the 1989 act. The making of the placement order means, of course, that contact under the 1989 Act is no longer possible, but orders under ss 26 and 27 are not only possible but, in our judgment, necessary."

22. On the facts of *Re P* the Court of Appeal considered that it was necessary for a court to maintain jurisdiction with respect to future contact, in particular between the two siblings who were the subject of the proceedings. The court therefore utilised the new jurisdiction under s 26 to make contact orders for the following reason:

> "[153] We repeat that our reason for taking this view is that the judge's judgment is predicated on the proposition that the relationship between the two children is of fundamental importance, and that the relationship must be maintained, even if the children are placed in separate adoptive placement, or if one is adopted and the other fostered. In the circumstances it is not, in our judgment, a proper exercise of the judicial powers given to the court under the 2002 Act to leave contact between the children themselves, or between the children and their natural parents to the discretion of the local authority and/or the prospective carers of D and S, be they adoptive parents or foster carers. It is the court which must make the necessary decisions if contact between the siblings is in dispute, or if it is argued that it should cease for any reason.
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> [154] We do not know if our views on contact on the facts of this particular case presage a more general sea change in post-adoption contact over all. It seems to us, however, that the stakes in the present case are sufficiently high to make it appropriate for the court to retain control over the question of the children's welfare throughout their respective lives under ss 1, 26, 27 and 46(6) of the 2002 Act; and, if necessary, to make orders for contact post-adoption in accordance with s 26 of the 2002 Act [and] under s 8 of the 1989 Act. This is what Parliament has enacted. In s 46 (6) of the 2002 Act Parliament has specifically directed the court to consider post-adoption contact, and in s 26(5) Parliament has specifically envisaged an application for contact being heard at the same time as an adoption order is applied for. All this leads us to the view that the 2002 Act envisages the court exercising its powers to make contact orders post-adoption, where such powers are in the interests of the child concern."

23. In *Oxfordshire County Council v X, Y and J* [2010] EWCA Civ 581; [2011] 1 FLR 272, the judgment of the court (Lord Neuberger MR, Moses and Munby LJJ) concluded (at paragraph 9) that paragraphs 147 to 154 of *Re P* were not intended to affect the application of the conclusion in the earlier case of *Re R* that "the imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual."

24. Having reviewed the factual context and concluded that the application for contact in the *Oxfordshire* case should be dismissed, the judgment of the court continues [at paragraph 36]:

> "It is a strong thing to impose on adoptive parents, it is "extremely unusual" to impose on adoptive parents, some obligation which they are unwilling voluntarily to assume, certainly where, as here, the adoption order has already been made. Was there a proper basis for taking that extremely unusual step? In our judgment, there was not. The judge found that the adoptive parents were genuine when they express their concerns, so what was the justification for imposing on them something they conscientiously and reasonably objected to, particularly when, as we have seen, they say that they have not ruled out the possibility of letting the natural parents have photographs in the future? As we have said, they are not to be saddled with an order merely because a judge takes a different view. The adoptive parents are J's parents; the natural parents are not. The adoptive parents are the only people with parental responsibility for J. Why, unless circumstances are unusual, indeed extremely unusual - and here in our judgment they are neither - should that responsibility be usurped by the court? We can see no good reason either on the facts or in law. On the contrary, there is much force in the point they make, that they wish their status as J's parents to be respected and seen to be inviolable - not for themselves but in order, as they see it, to give J the best chance for the adoption to be successful."

25. The question of whether or not the judgment of the court in *Re P* moved away from the firm statement of principle made by Wall LJ in *Re R*, which might have been thought to have been settled in the *Oxfordshire* case where Munby LJ, as he then was, was a contributor to the judgment of court as he had also been in *Re P*, must finally have been determined by the decision a few months later in *Re T (Adoption: Contact)* [2010] EWCA Civ 1527; [2011] 1 FLR 1805 where the constitution of the Court of Appeal included Sir Nicholas Wall himself, by then President of the Family Division. The judgment of Wilson LJ, with whom Sir Nicholas Wall and Arden LJ agreed, dealt with the point in plain terms (at paragraph 22):

> "In my view the judge might also briefly have referred to the established principles applicable to a contested claim for contact following adoption by a member of the biological family. In *Re R (Adoption: Contact)* [2005] EWCA Civ 1128, my Lord, then Wall LJ, stated:
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> > 'The imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual'
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> In her energetic submissions Miss Evans suggests that that statement may now not in such absolute terms represent the law; and she cites to us the judgment of this court in *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, in particular at [147]. The judgment certainly heralds somewhat greater flexibility in the attitude of the court to contact following adoption in certain cases. But the problem for Ms. Evans is that my Lord's statement in *Re R* was cited with approval in the very recent decision of this court in *Oxfordshire County Council v X, Y and J* [2010] EWCA Civ 581, at [8] and still reflects the general approach."

26. The central question raised by the present appeal is whether the introduction into law of ACA 2002, s 51A has altered the test from that stated in *Re R* and subsequently endorsed in 2010 by the *Oxfordshire* case and *Re T*.

The judge's decision

27. Before HHJ Watson the parents' application was for direct contact with B for one hour twice each year on the basis that would be more easily managed than indirect, "letterbox" contact which would be particularly difficult for these parents in view of their cognitive difficulties. It was the parents' case that B's young age indicated that such direct contact would neither disturb nor disrupt her placement and would simply become part of her ordinary annual routine.

28. The prospective adopters position was that contact should grow organically from indirect letterbox contact to face-to-face meetings on one occasion a year between the birth parents and the adopters, but not including B at this stage. The adopters considered that a face to face meeting between the adults would enable the parents to be better updated about the child's welfare and development than would be the case if communication was confined to material. The adopters also suggested that the face-to-face meetings would provide an opportunity for a relationship to develop between the adopters and the birth parents so that future meetings might include the child once a trusting relationship had been established.

29. The judge, who had been taken to the earlier case law, heard submissions from the Official Solicitor, acting on behalf of B's mother, to the effect that the legislative change brought by s 51A must be seen in the context of its purpose which, it was submitted, was (in the judge's summary) "to reflect the changing view about the benefits of greater openness in adoption." The judge was referred to recent social work research which emphasised the importance of contact after adoption (*The Role of The Social Worker in Adoption: Ethics and Human Rights: An Enquiry* (British Association of Social Workers 2018)[1]. The judge accepted the broad thrust of that material stating [at paragraph 10]:

> "I accept these findings and factor them into my analysis of the application before me. Each case is very different on its facts because we are dealing with people in a myriad of different circumstances and family dynamics. But what was once a closed door is now very much an open one and any court considering making an order as life-changing as an adoption order must carefully consider whether it would be in the child's best interest to keep this door to the original family open through indirect and direct contact."

30. The judge went on to refer to some observations that I had, myself, made out of court in a speech delivered to the NAGALRO Annual Conference in March 2018[2] . In particular, the judge quoted from the following passage:

> "I would encourage all those involved in adoption planning and decision making to focus more on the issue of contact and to ask, in each case, whether the model of life-story work and letterbox contact is in fact the best for the individual child in the years that lie ahead for her, or whether a more flexible and open arrangement, developed with confidence and over time, may provide more beneficial support as the young person moves on towards adolescence and then adulthood."

31. The judge then reviewed the basic factual background. In doing so she noted the positive account of the very high level of care that the two adopters were providing for

[1] https://www.basw.co.uk/resources/role-social-worker-adoption-%E2%80%93-ethics-and-human-rights-enquiry
[2] https://www.judiciary.uk/announcements/speech-by-lord-justice-mcfarlane-contact-a-point-of-view

this young child. Secondly, she noted that the psychologist who had assessed the child's mother concluded that she had considerable difficulties in processing and understanding information and would require assistance in communicating her thoughts on adoption and that, even with a substantial amount of support, it would be likely that she would continue to have difficulty understanding and discussing the adoption of her child and that she presented as limited in her coping strategies.

32. The psychologist's report, understandably, prompted the judge to observe that there was "a high risk of something inappropriate being said" and that "the parents would be unable to remember information or retain instructions, so agreements put in place to protect B are unlikely to be effective." The judge gave two recent practical examples where, inadvertently, the parents had acted in a way which might be a source of confusion for, or unsettle, a young child.

33. The judge noted a number of positives. Firstly, the one-off meeting between the prospective adopters and the parents had seemingly gone well. Secondly, the hearing before the judge had been conducted with both the adopters and the parents sitting in the courtroom in relatively close proximity. Thirdly, the court had been told that the address of the adopters had been inadvertently revealed to the parents, yet there has been no difficulty caused by this, and it was not suggested that there would be any future deliberate disruption of the placement. Having recited these various factors the judge stated, at paragraph 23:

> "I acknowledge these positive indicators, but the adoption welfare checklist requires the court to have regard to B's best interests throughout her life and that includes her identity and knowledge of her original family, but it also requires the court to look at her integration into her new family and how best that can be achieved. The wishes of her birth parents have to be balanced against the views of her full-time carers."

34. The opinion of the children's guardian was that it was better to build contact up slowly, develop trust between the adults and build on the indirect contact once the adult relationships had been established. She described how contact should move at the child's pace.

35. In moving towards her conclusion, the judge reminded herself of the duty to consider the contact arrangements under ACA 2002, s 46, together with the need to afford paramount consideration to the child's welfare throughout her life. The judge stated [paragraph 26]:

> "I must balance all the factors of the welfare checklist in ACA 2002, s 1(4) but in particular I have to balance the likely effect on the child throughout her life of having ceased to be a member of the original family and become an adopted person against the relationship the child has with relatives, the likelihood of any such relationship continuing and the value to the child of its doing so."

36. The judge noted that the adopters had already started "life story work" and that the social workers would continue to support the parents in undertaking any letterbox contact. The judge concluded, on that point, that she was "quite satisfied that the parents are not, and will not be, disadvantaged in facilitating contact because of their cognitive difficulties and that proper measures have been put in place to support them." The judge

also considered that the adopters' proposal for an annual face-to-face meeting would support the other work done to facilitate indirect contact. The judge reminded herself that the child would now become a member of the adoptive family and that she would become, in the eyes of the law, the adopters' child and that they would have exclusive parental responsibility for and, by law, be trusted to make all the decisions necessary to promote her security and to meet all her emotional, psychological and physical needs.

37. The judge concluded her analysis as follows:

> "29. [The adopters] have engaged with the social worker, the guardian, the court proceedings and are willing to engage fully and regularly with the birth parents once a year throughout B's childhood. This demonstrates an open and empathetic attitude. In my judgment this is evidence of their commitment to meeting B's identity and sense of "other family". That openness is commendable and should be encouraged by allowing them to take full responsibility for developing contact at B's pace.
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> 30. In my judgment [the adopters] have done exactly as Recorder Norton required. They have given "careful thought" to the question of direct contact with birth parents and have decided that now is not the right time. Their position is well reasoned and is not inflexible or blinkered and will be kept under review as B's needs change throughout her childhood. In addition, they will have a direct and personal relationship with B's birth parents to inform the decision as to when would be the right time. I am satisfied they would look again at whether direct contact can take place and it is not necessary to make an order to achieve this. An order would shackle them but not offer a corresponding benefit to B.
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> 31. It is neither necessary, nor appropriate to fetter or seek to control [the adopters] child focused and sensitive approach.
>
> 32. I am quite satisfied that an order in this case is unnecessary and would not be in B's best interests now because it would undermine the position of the adopters, ride roughshod over their good intentions and set in stone arrangements which are better to grow and develop organically to meet the changing needs of be."

38. In response to a request for clarification, the judge provided an addendum to the judgment, however, in my view nothing said there adds to the succinct and clear distillation of the issues that is plainly set out in the judge's original draft.

The Appeal

39. The grounds of appeal and skeleton argument on behalf of the of the parents advanced eight grounds as to why the learned judge was wrong to refuse post-adoption contact, permission having been given on all but one. In oral submissions, given the presence of the natural parents at the appeal hearing and the Court's indication that all documents had been read, three grounds were developed orally. The first being that the judge was wrong in her application of Section 51A Adoption Act 2002 namely that her analysis was based upon a presumption that direct-post-adoption contact should only ordered in exceptional circumstances as set out in the case law pre-dating the enactment of the provision and the second and third grounds addressing the merits of a direct contact order in this case. Vanessa Meachin QC, leading Sarah Jennings, neither of whom

appeared below, argued that the introduction by Parliament of ACA 2002, s 51A indicated an intention by the legislature that more parents would in future succeed in an application for direct contact post-adoption. It was submitted that if no change in the law were intended, then the new provisions would necessarily be redundant. In particular it was argued that the earlier case law, in which some priority was afforded to the views of the prospective adopters, no longer represented the correct approach under s 51A.

40. The Appellants also challenged the judge's conclusion that there was, despite any sign of an intention to do so, the prospect that direct contact would destabilise B's placement or otherwise disturb her. Further it was argued that the judge had given insufficient weight to the benefits to B of ongoing direct contact.

41. In oral submissions the case was pitched at a high level on the basis that, if the present facts did not establish a basis of making an order for direct contact, then it would be difficult to conceive of any other case that might do so.

42. Miss Meachin submitted that, whilst the judge had referred to recent research, her judgment demonstrated that she had simply afforded priority to the views of the adopters, in accordance with the pre-2014 case law. Miss Meachin realistically accepts that it was, however, not for the judge to change the law.

43. On the wider issues raised by the case, and the content of any guidance that might be given by this court, Miss Meachin and Miss Jennings aligned themselves with the submissions made on behalf of the local authority, to which I will turn shortly. It is to be noted that, to a large extent, the local authority submissions at odds with the Appellants' basic case which is that Parliament intended to extend the granting of direct contact to a greater number of cases and that the pre-2014 case law now has to be read in the light of that interpretation of s 51A.

44. The appeal was resisted by the local authority, represented before this court by Nicholas Goodwin QC, who did not appear below, 1st Respondent adopters, represented before this court by Justine Ramsden, who did appear below and the Children's Guardian, represented by Matthew Brookes-Baker, who did not appear below. The local authority case, supported by the 1st and 3rd Respondents, is that the judge's decision should be upheld for the reasons that the judge had given. The determination to refuse to order direct contact was justified by the evidence and the applicable law and there was no ground before the judge for concluding that this very young child's welfare would be served by an order for direct contact. Mr Goodwin argued that the adopters' proposal was commendable, intelligent, flexible and child-focussed and, in many ways, a model example of how the issue of post-adoption contact for a young baby should be managed. It was, he submitted, not possible to hold that the judge had been in error in concluding as she did.

45. On the wider issue of whether or not the introduction of s 51A had changed the previous understanding of the law in relation to post-adoption contact, Mr Goodwin drew attention to the 'Explanatory Note' relating to Part 1 of the Children and Families Act 2014 by which the new provisions were introduced which reads:

> "The Act includes provisions which are intended to… Make changes to the arrangements for contact between children in care and their birth parents, guardians

> and certain others and adopted children and their birth parents, former guardians and certain others *with the aim of reducing the disruption that inappropriate contact can cause to adoptive placements*." [emphasis added]

46. Mr. Goodwin submits that the court should adhere to the language of the 2002 Act without adding any additional gloss. On that basis, he argues that s 51A does not create a presumption either for or against post-adoption contact. He does however point to the fact that, in contrast to the previous position where a parent could apply for a s 8 contact order at the final adoption hearing without the need to obtain the leave of the court [CA 1989, s 10(4)(a)], Parliament has now imposed upon parents the need to apply for the leave of the court before making an application under s 51A [ACA 2002, s 51A(4)(c)]. The need for leave, coupled with both the wording of the Explanatory Note and the fact that the only order that a court may make of its own motion is to prohibit contact, do not suggest, submits Mr Goodwin, that Parliament was intending s 51A to reverse the approach in law as stated in *Re R* or otherwise to encourage courts to make more orders in favour of parents for direct contact and do so against the wishes of adopters.

47. The local authority maintains that in the vast majority of placement for adoption cases, direct contact is terminated at an early stage after the order is made. It is said to be rare to see a ACA 2002, s 26 order for direct contact continuing during the life of a placement order.

48. Mr. Goodwin submits that any discernible movement towards greater openness in adoption should result from debate amongst social work professionals which in turn should inform reasoned and particularised judgments given on the issue of contact on a case-by-case basis.

49. Mr. Goodwin supports the maintenance of the current law, as stated in *Re R*, on the basis that there are sound policy reasons for not imposing direct contact upon unwilling adopters, save in exceptional cases. It is submitted that if adopters are led to believe one thing, but forced to accept another, the pool of potential adopters may shrink.

50. Mr. Goodwin's written submissions concluded with a list of matters which, it was suggested, would benefit from endorsement by this court:

    a) adoption agencies to ensure that all prospective adopters and all adoption social workers fully understand the developing research when undergoing training and approval;

    b) in every case where post adoptive contact is a realistic option, the local authority should file, during the placement proceedings, the best information available as to the pool of "open" adopters nationally and to ensure this is as specific to the subject children as possible;

    c) the social work and children's guardian to consider the significance of the research studies in every case;

    d) the court to provide full reasons on any s 26 contact application;

    e) sibling contact to be considered as an entirely separate exercise to parental contact;

f) an open and frank dialogue between social workers, prospective adopters and birth parents and, if sufficiently mature, siblings about the child's needs, possibly with a face-to-face meeting as in this case.

51. For the prospective adopters, Justine Ramsden, who appeared below, raised a note of caution over the course taken by Mr Recorder Norton in the observations that he made with respect to contact at the time of making the placement for adoption order. Although Ms. Ramsden does not criticise the comments per se, and observes that in the end the outcome has been positive, the fact that such observations had been made caused difficulty for the prospective adopters as they interpreted them as indicating that there was a good chance that the court would make a positive order for direct contact at the final adoption hearing. This state of affairs led to a delay of nearly one year ending in contested court proceedings on the issue of contact. Ms. Ramsden therefore urged caution in what is said at the placement for adoption stage and stressed that there was a need for the court to be clear so as to manage effectively the expectations of each party.

Discussion

52. The starting point for any consideration of this issue must be the settled position in law had been reached by the decision in *Re R*, which was confirmed by this court in the *Oxfordshire* case and in *Re T*. The judgment in *Re R* was, itself, on all fours, so far as imposing contact on unwilling adopters, with the position described by Lord Ackner in *Re C*.

53. As stated by Wall LJ in *Re R*, prior to the introduction of ACA 2002, s 51A, the position in law was, therefore, that "the imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual."

54. Although s 51A has introduced a bespoke statutory regime for the regulation of post-adoption contact following placement for adoption by an adoption agency, there is nothing to be found in the wording of s 51A or of s 51B which indicates any variation in the approach to be taken to the imposition of an order for contact upon adopters who are unwilling to accept it. Indeed, as Mr Goodwin's submissions, in my view, establish, both the Explanatory Note and the fact that Parliament only afforded the court power to make orders of its own motion if such orders are to *prohibit* contact, Parliament's intention in enacting s 51A was aimed at enhancing the position of adopters rather than the contrary.

55. Although Miss Meachin's submissions where based upon the assertion that the new provisions were intended to increase the number of adoption cases where an order is made for direct contact, she was unable to point to any material either within the new statutory provisions or elsewhere to support this assertion. In concluding she adopted the submissions of Mr Goodwin which were to the contrary and she did not submit that the judge made any error of law in the manner in which she approached the issue of contact.

56. The judge in the present case, having referred to *Re R*, noted the parents' submission that s 51A must be given a purposive interpretation in order to reflect 'the changing view about the benefits of greater openness in adoption' before stating that she accepted recent research findings with the result that 'what was once a closed door is now very much an open one'. The judge went on to conduct a conspicuously fair, balanced and

thorough welfare analysis. In so doing, it might have been argued that the judge had fallen into error by moving away from the need to afford priority in the welfare evaluation to the views of the adopters. In the event, as paragraphs 29 to 31 of the judgment demonstrate, the judge did afford very substantial weight to the adopters' position:

> 'An order would shackle [the adopters] but not offer a corresponding benefit to B.'
>
> 'It is neither necessary, nor appropriate to fetter or seek to control [the adopters] child focused and sensitive approach.'

57. Looked at through the prism of *Re R*, the judge's order, which entirely accords with the views of the adopters, is entirely impregnable to challenge on appeal. There are no 'unusual', let alone 'extremely unusual', circumstances in the present case and there is therefore no basis upon which a court would have been justified in overriding the views of the adopters who are, as the judge rightly observed, to have exclusive parental responsibility for B and, by law, to be trusted to make all the decisions necessary to promote her security and to meet all her emotional, psychological and physical needs. In the event, HHJ Watson went further and undertook a full and balanced welfare evaluation which entirely supported the stance taken by the adopters. The quality of this judgment, which, again, is not open to any arguable challenge on appeal, in turn bolsters the soundness of the order for no direct contact.

58. What I have said thus far is sufficient to determine this appeal, which must, as a consequence, be dismissed. It would, however, be wrong, or at least unhelpful, to leave matters there without offering some further guidance as we have been requested to do.

59. ACA 2002, s 51A has been brought into force at a time when there is research and debate amongst social work and adoption professionals which may be moving towards the concept of greater 'openness' in terms of post-adoption contact arrangements, both between an adopted child and natural parents and, more particularly, between siblings. For the reasons that I have given, the juxtaposition in timing between the new provisions and the wider debate does not indicate that the two are linked. The impact of new research and the debate is likely to be reflected in evidence adduced in court in particular cases. It may also surface in terms of advice and counselling to prospective adopters and birth families when considering what arrangements for contact may be the best in any particular case. But any development or change from previous practice and expectations as to post-adoption contact that may arise from these current initiatives will be a matter that may be reflected in welfare decisions that are made by adopters, or by a court, on a case by case basis. These are matters of 'welfare' and not of 'law'. The law remains, as I have stated it, namely that it will only be in an extremely unusual case that a court will make an order stipulating contact arrangement to which the adopters do not agree.

60. Although, for my part, I would not challenge the soundness of each of the suggested requirements that Mr Goodwin has helpfully set out in his skeleton argument, and which are listed at paragraph 50 above, these are very largely matters of social work practice, rather than law; I do not consider that it is appropriate for this court to raise any of the listed matters to the status of being something which the Court of Appeal has stated should now be required in every case. That said, it must be a given that any social worker, children's guardian or expert who is required to advise the court on the issue

of contact, will ensure that they are fully aware of any current research and its potential impact upon the welfare issues in each particular case. Equally, it is already a requirement that courts should give adequate and clear reasons for any orders that are made following contested proceedings.

61. Post-adoption contact is an important issue which should be given full consideration in every case [ACA 2002, s 46(6)]. Whilst there may not have been a change in the law insofar as the imposition of a contact regime against the wishes of prospective adopters is concerned, there is now a joined-up regime contained within the ACA 2002 for the consideration of contact both at the placement for adoption stage and later at the hearing of an adoption application. Further, and in contrast to the situation prior to 2014 where the issue of contact on adoption was determined under s 8 by applying the CA 1989, s 1 welfare provisions, issues under both s 26 and s 51A of the ACA 2002 will be determined by applying the bespoke adoption welfare provisions in ACA 2002, s 1, where the focus is not just upon the welfare of the subject of the application during childhood but throughout their life.

62. A placement for adoption hearing has the potential for having an important influence upon the development of any subsequent long-term contact arrangements. As required by ACA 2002, s 27(4), the court must consider the issue of contact and any plans for contact before making a placement for adoption order. The court's order may well, therefore, set the tone for future contact, but the court must be plain that, as the law stands, whilst there may be justification in considering some form of direct contact, the ultimate decision as to what contact is to take place is for the adopters and that the court will be 'extremely unusual' for the court to impose a contrary arrangement against the wishes of adopters. Although Mr Recorder Norton was plainly most careful in his choice of words when speaking of contact at the time of the placement order in the present case, and I would not criticise him for anything that he said on that occasion, it is of note that his words were interpreted by the adopters as, in some way, flagging up that direct contact would be ordered at the final adoption hearing and that, as a result, the final adoption process has been delayed for a year and the adopters have felt less than fully settled in taking up the care of B as a result. At the placement order stage courts should therefore be careful to stress that, if there is any future issue as to contact, the law, as stated in *Re R*, will apply and, save for there being extremely unusual circumstances, no order will be made to compel adopters to accept contact arrangements with which they do not agree.

63. In conclusion, if My Lady and My Lord agree, this appeal must be dismissed for the reasons that I have given.

Lady Justice King:

64. I agree

Lord Justice Coulson:

65. I also agree