Neutral Citation Number: [2021] EWCA Civ 742

Case No: B4/2021/0081

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT KINGSTON-UPON-HULL
HHJ Whybrow
KH18C10474

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2021

Before :

LADY JUSTICE KING
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE NICOLA DAVIES

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TT (Children: Discharge of Care Order)

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Alex Taylor (instructed by **Ridley & Hall Legal Limited**) for the **Appellant Mother**
Ashley Lord (instructed by **North East Lincolnshire Borough Council**) for the **Respondent Local Authority**
The **2nd and 3rd Respondent Fathers** were not present or represented
Sharon Tappin (instructed by **John Barkers Solicitors Ltd**) for the **Respondent Children by their Children's Guardian**

Hearing date: 6 May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Thursday, 20 May 2021.

Lord Justice Peter Jackson :

1. The mother of six young children has appealed from the refusal of her application for the discharge of care orders in relation to three of the children, now aged 6, 5 and 4. In doing so, she raises arguments about the correct legal approach to applications under s. 39 Children Act 1989 ('the Act'). At the end of the hearing, we informed the parties that the appeal would be dismissed. These are my reasons for agreeing with that decision.

2. The mother, who is in her mid-20s, does not have the care of any of the six children but she currently sees them all for contact. The children have four different fathers. In September 2016, the eldest child was taken to hospital with serious injuries which were found to be the result of sexual abuse by the father of the three children concerned in this appeal (I will refer to him as 'the father'). The children went to live with the mother's mother ('the grandmother'), where they were later joined by the mother. In June 2017, care orders were made and the mother signed a safety plan, which made it clear there was to be no contact between the children and the father. However, the local authority discovered that the mother and father were continuing their relationship and it gave notice to remove the children in June 2018. Information then indicated that the family was preparing to abscond to Spain, and the children were taken into foster care.

3. In July 2018, the mother issued an application for the discharge of the care orders with a view to the children returning to her care. On 27 November 2020, that application, which had evidently been seriously delayed, was refused by His Honour Judge Whybrow ('the Judge') after an eight day hearing. He also made an order for the eldest child to live with her own father, where she had been living since August 2018; that order is not appealed.

4. The mother sought permission to appeal, which I granted in part on 25 March 2021. In doing so, I noted that it was doubtful that any of the grounds of appeal had a real prospect of success, but that there was a compelling reason for the appeal to be heard as it offered an opportunity for this court to consider the correctness of the decision in *GM v Carmarthenshire County Council* [2018] EWFC 36, also reported as *M v Carmarthenshire County Council* [2018] 3 WLR 1126 ('*GM v Carmarthenshire*'). In that decision it was stated that on an application to discharge a care order, while there is no formal requirement on the local authority to demonstrate the continued existence of the statutory threshold under s. 31 of the Act for the making of a care order, something close to a formal threshold requirement applies. It was further stated that a discharge application should not be refused unless it can be shown that the circumstances are exceptional and that the outcome is motivated by an overriding requirement pertaining to the child's best interests. For the reasons given later in this judgment, these statements are not correct and should not be followed.

5. Since the making of the care orders, the mother has had two further children, born in September 2019 and in January 2021. There are ongoing care proceedings in relation to both children, who have different fathers. The fact that the mother was pregnant again at the time of the hearing at the end of last year was unknown to the court. In April 2021, the father was convicted of serious sexual offences against the eldest child and is awaiting sentence.

The judgment

6. The judgment occupies over 40 pages of transcript. The Judge reviewed the history leading to the making of the care orders, and referred to a number of matters discovered since. These included the fact that the mother now admitted that, in an attempt to cover up for the father, she had told very serious lies about what had happened when the injuries to the eldest child were discovered. Then, after the care orders were made, she had repeatedly lied about having separated from the father, and had pretended to believe that the abuse had occurred. More recently, she had represented herself as having no debts when in fact she had such high arrears of rent that an eviction notice had been issued. These lies, and others, were described by the Judge as "a massive breach of trust". On the other hand, he noted that the mother had done a substantial amount of work since 2018 to improve her situation by taking courses and engaging in long-term personal counselling. The question, he said, was whether the work she had done was sufficient to make good the risks that followed from the previous lies.

7. The competing plans for the three children were on the one hand rehabilitation to their mother and on the other for them to remain in long term foster care, that being the plan of the local authority, supported by the Children's Guardian. At an earlier stage the local authority had issued an application for placement orders, but it had withdrawn it in the light of the progress seemingly being made by the mother. It was this feature of the case, which was accompanied by repeated psychological and other assessments, that had led to the proceedings taking so long.

8. The Judge carefully reviewed the evidence of the twelve witnesses, including that of the mother, the grandmother (with whom she had been living), her aunt and her counsellor. He also referred extensively to the evidence of a psychologist, who had reported several times on the mother, and who gave evidence.

9. The Judge found some positives in the mother's evidence in terms of her openness about past mistakes, but he concluded:

> "110. The downside is that I was left with the conclusion that [she] has repeatedly made similar mistakes such that her words cannot be relied on. Whether it is because she is putting her needs first, ahead of the children, I do not know. She said she makes 'stupid mistakes' that she regrets. I think her efforts in the witness box to be honest are positive, but it will take a prolonged period of honesty and reliability and good choices for the court to have any confidence in her decision-making."

Further, for reasons that he explained, the Judge was unimpressed by the evidence of the grandmother and aunt and did not consider that they would offer any level of protection for the children.

10. After reviewing the law in relation to the discharge of care orders – I return to this below – the Judge directed himself about the assessment of risk and about lies and the need to ensure that they did not eclipse other welfare considerations. In doing so, he said this:

> "173. I do not say that this mother and this father lie about everything. This case is not an assessment of credibility about facts. It is an assessment of welfare where the mother has a track record of gross dishonesty. The assessment of the mother is that she still struggles to maintain a true position and has difficulties due to her vulnerability, a vulnerability to the influences of others and her own needs and limitations. She is likely to struggle in the same way again. In a sense, there is a real possibility that she will do the same again if faced with a choice of putting her own emotional needs ahead or behind the emotional needs of her children.
>
> 174. The risk is not simply of her lying but of her exposing the children to physical, emotional or sexual harm due to her vulnerability. She is likely to struggle to see what is happening and that it is harmful; and she is likely to be unreliable to take steps to protect the children, for example, to report harm to the local authority. That such harm is likely to occur is a real possibility which cannot be ignored in view of the gravity of that harm if it were to occur. For example, if the children were to have access to [the father] or another man who poses a risk of abuse.
>
> 175. The steps in mitigation which would reduce this risk would include a reliable safety plan, including local authority and professional visits, family monitoring and surveillance. Sadly here, the court can have no faith that the family as a whole could manage to protect. Local authority visits would not be enough. It would need to be 24/7 surveillance to prevent this mother exposing the children to a risk of harm. I say that would be inadvertently rather than deliberately due to her vulnerability rather than malice. Even if the children were to return home, the local authority would need a care order to monitor this and [they] would need to share parental responsibility [to] enable the children's arrangements to be controlled in so far as they can and to take action, for example to remove the children if that became necessary and to control contact arrangements for the children with others. These are very significant factors in the welfare checklist and I will deal further below with other parts of the checklist. These factors need to be weighed into the overall balance relating to the options before the court."

11. The Judge then addressed the welfare checklist factors and the realistic options in relation to each of the four children. His detailed and balanced analysis, which in the case of the three younger children covered five pages of transcript, came down firmly in favour of approving the local authority's care plan for them to remain in foster care. He noted that there was still some ambiguity in the long-term-arrangements, in that both adoption and rehabilitation to the mother remained possibilities for the future. He expressed his conclusion in this way:

> "210. Overall, the risk of neglect to the children [in] the sense that they could be exposed to physical, emotional and sexual harm plus other forms of neglectful care, inadequate supervision and boundaries, form serious defects in the capacity of the mother to give care to these children if no order is made. Even if the children do return home, it would need to be under a care order for the local authority to share responsibility and to have control.
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> 211. These factors of the checklist, items (e) and (f), predominate and they are not outweighed by the factors which may support rehabilitation, aspects of the needs of the children and the lack of local authority permanency for the younger two children... The risks mean it is necessary to maintain the separation of mother and children and the compulsory care order is to remain in place.
>
> 212. The care order and care plans are proportionate to the risk of harm if the children were in their mother's care. I consider the contact plans of the local authority are reasonable and in the best interests of the children. …"

12. The judgment ends with a postscript concerning the delay in the proceedings, to which it is unnecessary to refer.

The grounds of appeal

13. The grounds of appeal for which permission was granted are that the Judge:

    1. Incorrectly stated the law and misdirected himself as to the test to be applied to an application for the discharge of care orders.

    2. Wrongly suggested that the test applied made no difference to the outcome.

    3. Took an incorrect approach to the question of the risk.

14. I begin with the third ground. Mr Alex Taylor for the mother, submitted to us that the Judge's approach to risk assessment was incorrect in two ways. Firstly, Mr Taylor fastens on the definition of the issue as being "whether the work done by the mother is sufficient to make good the risks which follow from the previous lies". He submits that this led to a failure to consider the risk posed by the mother at the date of the hearing. Her case was that the work she has done has reduced the risk, but the judgment does not adequately address this point. Secondly, when directing himself on the law, the Judge more than once refers to the children's "right to be safe", for example:

> "166. Section 1 of the Children Act should be interpreted to give effect to the Article 8 rights of the parents and the children … Any interference must be proportionate to the harm which is feared. The rights of the child, including the child's safety, their right to be safe, should outweigh the rights of the parent if their rights are in conflict."

Mr Taylor argued that no "right to be safe" exists. Some parents are risky and the proper question was whether the children would be sufficiently safe if the care order were discharged, balanced against the detriments of remaining in foster care subject to a care order. The Judge did not carry out the necessary evidence-based assessment of the nature, extent and gravity of the risks that would exist were the care orders discharged. The case should be remitted for a rehearing before a different judge to allow everything, including the fact of the mother's new children, to be re-evaluated.

15. Responding for the local authority, Mr Ashley Lord emphasised that this was an extremely careful judgment that is to be read as a whole. Considerable attention was given to the assessment of risk and, in particular, to possible sources of mitigation. The Judge was not looking for absolute safety but was concerned about the risk of further significant harm. Ms Sharon Tappin for the Children's Guardian echoed these submissions. The Judge was entitled to find that the risks to the children were not manageable in the light of the past events, the mother's gross dishonesty over a lengthy period, and the absence of dependable family support.

16. In my view, there is nothing in either of Mr Taylor's arguments on this ground. As to the first, the Judge directed himself on the assessment of risk by reference to the decision of this court in *Re F (Placement Order: Proportionality)* [2018] EWCA Civ 2761, which states that a court assessing risk should consider the type of harm that might arise, the likelihood of it arising, the consequences if it arose and the measures that might be take in mitigation. As the passages that I have cited amply show, the Judge squarely reasoned his conclusion with reference to the level of present risk to the children. In referring to "the risks that follow from the previous lies", he encapsulated the fact that the lies were strong evidence of the mother's continuing inability to protect the children reliably from very serious harm. He considered whether that risk was sufficiently reduced by the work that she had done, but he found that it was not. That conclusion was undoubtedly open to him for the reasons he gave.

17. The second element of the complaint does no better. By using the shorthand of the children's "right to be safe", the Judge was not setting up a legal requirement for a risk-free environment before the children could be returned to their mother. Rather, he was illustrating the gravity of the risk in this case, having elsewhere referred to "the horrors" suffered by the eldest child. He asked himself whether there were mitigating factors in the form of the mother's protective capacity or of family and professional support, and he found that there were not. His overall approach to the assessment of risk cannot be faulted and this ground of appeal fails.

Applications to discharge care orders

18. The first two grounds of appeal arise from the Judge's self-direction on the law relating to an application to discharge a care order, which I will set out below. It might be thought that this was a quite straightforward matter but the Judge was presented with detailed submissions about it.

19. Section 39, which is situated in Part IV of the Act, relevantly provides:

> "**39 Discharge and variation etc. of care orders and supervision orders.**

(1) A care order may be discharged by the court on the application of—

(a) any person who has parental responsibility for the child;

(b) the child himself; or

(c) the local authority designated by the order.

(2) –(3B) …

(4) Where a care order is in force with respect to a child the court may, on the application of any person entitled to apply for the order to be discharged, substitute a supervision order for the care order.

(5) When a court is considering whether to substitute one order for another under subsection (4) any provision of this Act which would otherwise require section 31(2) to be satisfied at the time when the proposed order is substituted or made shall be disregarded."

20. Section 1 of the Act relevantly provides:

"**1 Welfare of the child.**

(1)When a court determines any question with respect to—

(a) upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

(2)-(2B) …

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

> (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
>
> (g) the range of powers available to the court under this Act in the proceedings in question.
>
> (4) The circumstances are that—
>
> (a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or
>
> (b) the court is considering whether to make, vary or discharge a special guardianship order or an order under Part IV.
>
> (5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.
>
> (6)-(7) …"

21. The combined effect of these provisions is that on the application of an entitled applicant the court may discharge a care order. Or it may replace it with a supervision order, in which case there is no requirement for the s. 31(2) threshold to be crossed. As the decision concerns a question of upbringing, the child's welfare shall be the court's paramount consideration. As the court is considering whether to vary or discharge an order under Part IV, the court shall have particular regard to the factors in the welfare checklist. As the court is considering whether to make an order under the Act, it shall not make the order unless to do so would be better for the child than making no order at all.

22. Section 3 of the Human Rights Act 1998 provides that so far as it is possible to do so, these provisions must be read and given effect in a way which is compatible with the Convention rights. Section 6 provides that it is unlawful for the court, as a public authority, to act in a way which is incompatible with a Convention right. The salient rights in this context are the Article 8 right to respect for family life and (in the context of the obligation on the state to protect children from severe abuse) the Article 3 right not to be subject to inhuman or degrading treatment. In particular, it is an aspect of Article 8 that the public care of a child should in principle be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and the positive duty to take measures to facilitate family reunification must be balanced against the duty to consider the best interests of the child: *K and T v Finland* (2001) 36 EHRR 18; [2001] 2 FLR 707.

23. Although the Children Act came into effect before the Human Rights Act, it was drafted with the Convention in mind; in any event, since the Human Rights Act the Act must if possible be construed and applied so as to comply with the Convention, and the court must consider any Convention rights before deciding whether to make a substantive

order: *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 at paragraphs 62, 73 and 194. A proper application of the welfare test will normally produce an outcome that is compatible with Convention rights, by having particular regard to the child's background (checklist factor d), his emotional needs (factor b) and any risk of harm (factor e). And, of course, consideration of the position of the child's parents is mandatory (factor f). But on top of this, once the welfare evaluation has been carried out, the court will cross-check the outcome to satisfy itself that it is exercising its powers in such a way that any resulting interference with Convention rights is necessary and proportionate. This cross-check does not alter the fact that the decision turns on welfare and not on rights or presumptions: see *Re W (A Child)* [2016] EWCA Civ 793; [2017] 1 WLR 889, per McFarlane LJ at 70-71. In judicial decisions where the Article 8 rights of parents and those of a child are at stake, the child's rights must be the paramount consideration; if any balancing of interests is necessary, the interests of the child must prevail: *Yousef v The Netherlands* (2003) 36 EHRR 20; [2003] 1 FLR 210.

24. The proper approach to an application to discharge a care order has been considered by this court in two cases, one before and one since the Human Rights Act. In *Re S (Discharge of Care Order)* [1995] 2 FLR 639, Waite LJ said this at 643:

> "Section 39 of the Act allows the court to discharge a care order on the application of (inter alios) a parent. Here the jurisdiction is discretionary from the outset (there being no obligation on the parent to satisfy the court that the threshold requirements no longer apply). The issue has to be determined by the court in accordance with s 1 of the Act, which (by s 1(1)) makes the child's welfare the court's paramount consideration, and (by s 1(3) and (4)) makes it mandatory for the court to have particular regard to the child's wishes and needs, the likely effect on him of any change of circumstances, the capability of his parents to meet his needs, the range of powers available to the court and, specifically:
>
> '(3) . . .
>
> (e) any harm which he has suffered or is at risk of suffering; ...'"

25. *Re C (Care: Discharge of Care Order)* [2009] EWCA Civ 955, [2010] 1 FLR 774 was an unusual case in which a local authority had successfully applied for the discharge of a care order and a parent appealed on the basis that the care order should have continued so as to give the child the benefit of the 'leaving care' provisions. The judgment of Hughes LJ included this passage:

> "[17] The test upon an application for discharge is clearly set out by this court as long ago as 1995 in *Re S (Discharge of Care Order)* [1995] 2 FLR 639 at 643. As Waite LJ put it:
>
> > 'Section 39 of the Act allows the court to discharge a care order on the application of (inter alios) a parent. Here the jurisdiction is discretionary from the outset (there being no obligation on the parent to satisfy the court that the threshold requirements no

> longer apply). The issue has to be determined by the court in accordance with s 1 of the Act, which (by s 1(1)) makes the child's welfare the court's paramount consideration …'
>
> I need not read the remainder.
>
> [18] I entirely agree that the applicant for such an order must make out his case. It does not follow from that that the test is simply a matter of listing potential benefits. Welfare is a more complicated and rounded consideration than that. I am quite satisfied that the judge is entitled to take into account the continuing effect, or in this case lack of effect, of the care order."

In referring to the obligation on an applicant to make out his case, Hughes LJ was responding to a submission that before a care order could be discharged, a positive benefit to the child must be demonstrated.

26. Before coming to *GM v Carmarthenshire*, I would refer to four other first-instance decisions.

27. *Re MD and TD (Minors) (No 2)* [1994] Fam Law 489 is a decision of Wall J, is only reported in summary:

> "(1) The criterion for deciding an application for the discharge of a care order was the welfare test contained in Children Act 1989, s 1(1); and the burden of showing that the welfare of the child requires revocation of the order is on the person applying for the care order to be discharged: the statements in Hershman and McFarlane Children Law and Practice (Family Law, 1991), para C [176], and in The Children Act 1989 Guidance and Regulations (HMSO, 1991), vol 1: Court Orders, paras 3.54-5 are correct. It is logical to require a higher standard (ie the threshold criteria contained in s 31) to be satisfied when making a care order than when discharging it, because when a child is placed in care the court loses the bulk of its jurisdiction over the child; whereas when a child comes out of care the court decides the child's future.
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> (2) It was not correct that the court should only maintain a care order if satisfied that the children's moral and physical health would be endangered by a return to the mother under a supervision order. *Re KD (A Minor) (Access: Principles)* [1988] 2 FLR 139, HL, distinguished."

28. In *Re A and D (Local Authority: Religious Upbringing)* [2010] EWHC 2503 (Fam), [2011] 1 FLR 615, Baker J summarised the approach to an application to discharge a care order in this way:

> "36. … In considering such an application the court applies the following legal principles:

> (1) The jurisdiction is discretionary from the outset. There is no obligation on a parent to satisfy the court that the threshold requirements no longer apply: see *Re S (Discharge of Care Order)* [1995] 2 FLR 639 per Waite LJ.
>
> (2) Insofar as any party asserts a fact on which they wish to rely in support of a submission as to the exercise of that discretion, the burden of proof is on the party making the assertion, and the standard of proof is the balance of probabilities. Generally speaking, however, it is unhelpful and artificial to focus too much on such legal niceties because here the court is exercising an essentially inquisitorial jurisdiction.
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> (3) When determining the application, the court applies the principles in s 1 of the Children Act 1989. The child's welfare is paramount and the relevant factors in the welfare checklist in s 1(3) must be considered and given appropriate weight.
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> (4) In exercising its discretion, the court must have regard to the important principle, acknowledged both in English law and the European jurisprudence, that children should wherever possible be brought up within their natural family and, in particular, by their birth parents, and that, where families are separated by court orders, public authorities, including local authorities and the courts, are under an obligation to take measures to facilitate family reunification as soon as reasonably feasible: see eg *K and T v Finland* (Application No 25702/94) (2001) 36 EHRR 255, [2001] 2 FLR 707 and *Re C and B (Care Order: Future Harm)* [2001] 1 FLR 611."

29. In *Local Authority 1 & Others v AF (Mother) & Others* [2014] EWHC 2042 (Fam), Cobb J directed himself as follows:

> "On an application for discharge of a care order, I am required to apply the principle of the paramountcy of the child's welfare, and have regard to the matters set out in the statutory check-list; the burden is on the parents to demonstrate that such an outcome is in the interests of the children: see *Re S (Discharge of Care Order)* [1995] 2 FLR 639."

30. In *YZ v Leicester City Council* [2018] EWHC 2262 (Fam), Keehan J directed himself in similar terms:

> "4. Pursuant to s.39 of The Children Act 1989 a court may, on the application of a parent, consider the discharge of a care order if it is in the welfare best interests of the children to do so. I have regard when considering this application to the provisions of s.1(1) of the 1989 Act, namely that the children's welfare interests are the courts paramount consideration and I have regard, where relevant, to the provisions of s.1(3) of the 1989 Act: the welfare check list. I have regard to the Article 6 and

> Article 8 rights of the father, the mother and of the children, but I bear in mind where there is tension between the Article 8 rights of a parent, on the one hand, and of the child, on the other, the rights of the child prevail, *Yousef v. The Netherlands* [2003] 1 FLR 2010.
>
> 5. When considering this application, I remind myself that the burden of proof is on the father and the standard of proof is the simple balance of probabilities."

31. In summary, when a court is considering an application to discharge a care order the legal principles are clear:

(1) The decision must be made in accordance with s. 1 of the Act, by which the child's welfare is the court's paramount consideration. The welfare evaluation is at large and the relevant factors in the welfare checklist must be considered and given appropriate weight.

(2) Once the welfare evaluation has been carried out, the court will cross-check the outcome to ensure that it will be exercising its powers in such a way that any interference with Convention rights is necessary and proportionate.

(3) The applicant must make out a case for the discharge of the care order by bringing forward evidence to show that this would be in the interests of the child. The findings of fact that underpinned the making of the care order will be relevant to the court's assessment but the weight to be given to them will vary from case to case.

(4) The welfare evaluation is made at the time of the decision. The s. 31(2) threshold, applicable to the making of a care order, is of no relevance to an application for its discharge. The local authority does not have to re-prove the threshold and the applicant does not have to prove that it no longer applies. Any questions of harm and risk of harm form part of the overall welfare evaluation.

The arguments on this appeal

32. In considering grounds 1 and 2, the relevant passage from the Judge's judgment must be set out in full so that the arguments can be understood:

> "159. I am now going to turn to the relevant law. The long-established test I have to apply is within section 1 of the Children Act 1989, the paramountcy of the children's welfare. This was confirmed, for example, in the early case of *Re S* [1995] 2 FLR 639, Waite LJ at 634 making it clear that a parent does not need to establish that the threshold criteria no longer exists. That decision was followed in *Re C* [2009] EWCA Civ 955 and it has not been doubted since.
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> 160. There is a burden on the applicant to show that the order - that is discharge - is better than not making the order. That follows from section 1(5) of the Children Act. It might be said

that that is an evidential burden on the applicant. In the case of *Re MD and TD* [1994] FL 489 [*sic* – the citation is from *Re S*] it was said that "the previous findings of harm would be of marginal reference and historical interest only and the risk to be considered would normally focus on recent harm and appraisal of current risk". Of course, every case is different and the extent to which a previous finding is historical in the sense of no longer relevant or less relevant will vary case by case.

161. The court also has to take into account the impact of the Human Rights Act, in particular Article 8 of the European Convention on Human Rights. The relevance of that Convention was considered in more detail in a more recent case: *GM v Carmarthenshire County Council and LLM* [2018] EWFC 36. This was the mother's application for discharge of a care order on her eight year old son.

162. Mostyn J in the Family Court, said that the applicable law, having regard to *Re B* [2013] UK SC 33 and Article 8 of the European Convention on Human Rights could be distilled as follows at paragraph 9 of his judgment.

163. Firstly, the pure test is promotion of the child's welfare as the paramount consideration; secondly, the child's welfare will be best served if the child is raised by natural parents unless it can be shown positively that the physical or moral health of the child would thereby be endangered; thirdly, the local authority is under a positive duty from the time the child goes into care to take measures to facilitate the reunification of parent and child and there should be consideration of this in a discharge of care application; fourthly, where the guardian and the local authority, as in that case, had proposed refusal of the discharge and severely restricting contact, this can only prevail if they can show the circumstances are exceptional and can only be justified if they are motivated by an overriding requirement pertaining to the children's interests.

164. It is a very strict test, he said. The judge said at paragraph 34:

> "The relevant question is instead: is there any good reason why the mother cannot resume care of her child?"

Something close to a formal threshold criteria requirement comes into play to justify the continued care order, he said in paragraph 5 of the judgment.

Mostyn J in this case devised a third way (rather than immediate discharge or refusal of the application). He said he would increase the regime of contact over a six-month period, adjourning the proceedings to enable the discharge of care to be

reconsidered after that time. That is a creative way of dealing with a discharge application and I am aware that it is an approach which sometimes happens in other cases too.

165. The result is that section 1 applies, including section 1(3), the welfare checklist. The checklist includes the risk of harm, but there is no formal requirement to reconsider the threshold criteria which were previously established.

166. Section 1 of the Children Act should be interpreted to give effect to the Article 8 rights of the parents and the children. That is the right to family life of the parent and child. Article 8 requires that their right to family life should not be interfered with except in accordance with the law and, so far as necessary, for the protection of the health or morals or the rights and freedoms of others. Any interference must be proportionate to the harm which is feared. The rights of the child, including the child's safety, their right to be safe, should outweigh the rights of the parent if their rights are in conflict.

167. I take into account that the local authority is required to place a looked after child with family, unless it is not in the child's interests. That is section 22C of the Children Act, sometimes known as "the rehabilitation or restoration duty". This is reviewed at every LAC review.

168. However, these provisions do not amount to saying that the test in discharge proceedings is that the order must be discharged if it is no longer necessary. I understand that at times the submissions on behalf of [the mother] were to that effect. I say that this is not the case for a number of reasons.

169. Firstly, this is not an adoption case. It is not one where severance of contact is planned. Contact is to remain of a high level of fortnightly in the local authority's plans. It is not a case in which contact is to be reduced so that the children simply know who their mother is rather than maintain a relationship with her.

170. Therefore, in Article 8 terms, the degree of interference in the right to family life in this case is not as great as it was in *Re B*, the Supreme Court case, and in other cases where adoption plans are before the court. The construction of the implications in this case of Article 8 and the best interests of the children under section 1 of the Children Act must take into account that the plans of the local authority are not of the same order as adoption. It is not a case where a care order will only be made if 'nothing else will do'. I consider the test is that the court will look to be satisfied that it is better for the child for the care order to be in place. If not, it may be better for the care order to be discharged.

> 171. Taking into account the seriousness of the intervention and balancing all the factors in the checklist, including the wishes of the children, the needs of the children, the risk of harm, the court would look to be satisfied that the care order is required in the best interests of the child. Necessity is not a substitute for the best interests of the child as a test in these proceedings. The court will consider whether the interference in the right to family life of the parent - here, [the mother] - is necessary to protect the child. That is part of the equation. It will also balance that right against the right of the children to be safe.
>
> In my view, in this case, in any event, it makes no difference whether one takes the view that this is a simple best interests test or whether there is an element of necessity required to keep a care order in place. In my view, the decision would be the same under either approach."

33. In my view this self-direction is sound in substance, though it is far longer than would have been necessary but for the decision in *GM v Carmarthenshire* (which had not in fact been cited in argument), and the somewhat similar arguments then advanced by Mr Taylor and repeated on this appeal. I will address those arguments next.

34. Mr Taylor submitted that *Re S* remains good law. It was decided before the Human Rights Act 1998 but the principle that the jurisdiction for discharging care orders is discretionary (and does not require consideration of any statutory threshold) is correct. In line with *A and D*, he proposed that little will turn on the notion of a burden. The main thrust of his argument was that, when considering whether or not to discharge a care order, the court must ask whether the child's welfare makes the interference with family life from a continued care order 'necessary' as opposed to 'preferable' or 'for the best'. He described the Convention obligations not only as an overarching check but as a "summation" of the way in which the court should approach its task. Developing this argument, he asserted that the welfare principle does not provide a legally valid test, while the concept of necessity/proportionality does. Simply couching the question in terms of what is better for the child risks losing sight of the court's obligation to act in a way that is compatible with Article 8, and of the court sliding into social engineering. Mr Taylor also explained that in his submissions to the Judge he had, in his words, hung his hat on paragraph 76 of *Re B*, where Lord Neuberger (referring directly to Baroness Hale's judgment at paragraph 198) had said that a care order could only be made – and by analogy, said Mr Taylor, continue – if "nothing else will do". Applying these arguments to the facts, Mr Taylor stated that the Judge should have asked himself "What is necessary?" rather than "What is best?" He did not recognise the Article 8 interference or carry out an effective proportionality crosscheck. He was also wrong to say that it would make no difference to the outcome if Mr Taylor's suggested test was accepted.

35. On this issue Mr Lord responded that the Judge correctly applied s. 1 of the Act, read compatibly with Article 8. He agreed that the concept of a formal burden on an applicant may not add anything as the 'no order' principle in s. 1(5) will, he argued, apply in any case.

36. The simple answer to the mother's submissions on these grounds is that the Judge's approach was very far from being a bald welfare comparison between placement in care and placement with the mother. He did not simply ask "What is best?", but, as can be seen, he recognised the need to check his welfare findings against the mother's Convention rights: see paragraphs 166 and 171. He then went on at paragraphs 187 to 212 to make a thoroughgoing welfare assessment that took into account (at paragraphs 196 and 197) what he described as the downside of the children remaining in care and the immediate positives of them returning to the mother and grandmother. At paragraphs 201 to 212, cited above, he explained why he found the local authority's plan to be proportionate and in the children's best interests. Given the extent of his findings about risk, it is not surprising that he did not consider that his decision turned on the definition of the legal test that he was required to apply. On the facts of the case I would therefore reject grounds 1 and 2.

37. Further, at the level of principle, the fundamental test to be applied to an application under s. 39, and to other applications under the Act, is, as I have said, the welfare principle and not a test of necessity or some other test. The attempt in this and other cases to shift the focus away from welfare is neither helpful nor necessary. A proper welfare analysis and proportionality crosscheck is a dependable bulwark against any tendency towards social engineering.

38. I also do not accept Mr Taylor's reliance upon paragraphs 76 and 198 of *Re B* in the context of this case, nor was that the Judge's approach. As I sought to explain in *Re DAM (Children)* [2018] EWCA Civ 386 at paragraph 42(5), the aphorism "nothing else will do" applies to cases involving a plan for adoption and not to applications for care orders:

> "I reject the argument that a court considering whether to make a care order has to be satisfied that "nothing else will do". A care order is a serious order that can only be made where the facts justify it, where it is in the child's interests, and where it is necessary and proportionate. But the aphorism "nothing else will do" (which, as has been said, is not a substitute for a proper welfare evaluation and proportionality check) applies only to cases involving a plan for adoption. That is clear from the case in which it originated, *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, which concerned an application for a care order with a care plan for adoption. It is clear, where it is not explicit, that all the justices were addressing a situation involving the severance of the parental relationship altogether, and not one involving physical separation under a care order, where the parent retains parental responsibility. That is confirmed by the summary given by the President in *Re B-S*:
>
> > *"22. The language used in Re B is striking. Different words and phrases are used, but the message is clear. Orders contemplating non-consensual adoption –* ***care orders with a plan for adoption, placement orders and adoption orders*** *– are "a very extreme thing, a last resort", only to be made where "nothing else will do", where "no other course [is] possible in [the child's] interests", they are "the most extreme option", a*

> *"last resort – when all else fails", to be made "only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do": see Re B paras 74, 76, 77, 82, 104, 130, 135, 145, 198, 215."* [my emphasis]"

39. I lastly turn to the decision in *GM v Carmarthenshire*. In that case a 5 year old child was taken into care in mid-2015 and a care order was made in February 2016. In August 2016, the child's mother applied to discharge the care order. In November 2017, Mostyn J adjourned the application and directed that there should be a six month contact regime of a kind that he described as conventional in a private law dispute. At the final hearing in May 2018, by which time the child was 8¾ and had been with the foster carers for 2½ years, he granted the mother's application. He described the local authority's objections to the child returning to his family as inconsequential and trivial and he replaced the care order with a supervision order.

40. The decision is clearly one that could have been taken on the basis of established principles, but Mostyn J instead approached s. 39 of the Act as if it was untrodden ground. At paragraphs 3 to 9 of his judgment, he developed a series of propositions based on *In re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806, *Re B*, and the Strasbourg authorities. In the course of this, he observed that:

> "4 It is true that on a section 39 application there is no formal requirement on the local authority to demonstrate the continued existence of the statutory factual threshold set out in section 31 of the Children Act 1989. However, in my judgment something close to that applies…
>
> …
>
> 9 In my judgment, the effect of this jurisprudence in the context of a discharge application is that:
>
> (i) The pure test is that the promotion of L's welfare is my paramount consideration.
>
> (ii) However, his welfare will be best served if he is raised by his natural parent unless it can be positively shown that his physical or moral health would thereby be endangered.
>
> (iii) Further, the local authority has been under a positive duty from the moment that L was taken into care to take measures to facilitate reunification between L and his blood family. Consideration will need to be given as to whether that has happened.
>
> (iv) The proposal by the local authority and the guardian that the discharge application should be refused and that contact should be severely reduced (a) can only prevail if they can show that the circumstances are exceptional; and (b) can only be justified if they are motivated by an overriding requirement pertaining to

> the child's best interests. As Baroness Hale JSC says, this test is "very strict"."

41. In their submissions in the present case, Mr Taylor and Mr Lord agree that this analysis is incorrect. In brief, they note that it does not refer to previous authority on the subject of the discharge of care orders. They submit that it is misleading and unhelpful to suggest that "something close to" a threshold applies to decisions about the discharge of care orders. The construct of a 'near-threshold' is imprecise, does not fit into any statutory framework, and distracts from a full and balanced welfare evaluation and proportionality check. Care orders exist in a wide range of circumstances and the approach to applications to discharge must be broad and flexible. The implication that there is a presumption in favour of discharge in anything other than exceptional circumstances is not right. The overall analysis is not sustained by any of the six decisions cited above, indeed it conflicts with them.

42. With respect to Mostyn J, I agree with these submissions. I would only repeat that the reference in paragraph 198 of *Re B* to a "very strict" test arises, as Baroness Hale stated, in cases involving the "severing of the relationship between parent and child". In the great majority of cases where there is no plan for adoption, there will not be a severance of this kind, and references to a "very strict" test or to "nothing else will do" are not applicable to an application for a care order, still less on an application to discharge such a care order.

43. I would also add that the irrelevance of thresholds to decisions under s. 39 is seen in ss. (5), which allows for the making of a supervision order without proof of threshold.

44. That said, it can be seen that, although the Judge in the present case considered the effect of the decision in *GM v Carmarthenshire* at paragraphs 161-164 of his judgment, he in the end approached the task before him in the correct and conventional way.

45. Finally, there is another aspect to *GM v Carmarthenshire* that must be mentioned. In the course of his judgment Mostyn J made these observations:

> "3 The application is made pursuant to section 39 of the Children Act 1989. Parliament expressly granted a person with parental responsibility the unfettered right to seek the discharge of a care order. In granting that right Parliament must be taken to have intended the right to have a meaningful content. Parliament must surely have intended that a parent who had lost a child to care by virtue of unfitness or incapacity must be given the chance to turn his or her life around and to reclaim the child. The very premise of section 39 is that the parent will not have been caring for his or her child for an appreciable period but that someone else will have been, and with whom the child would, no doubt, have formed a strong attachment. Yet, the stance of the local authority and of the guardian in this case is that the strength of the attachment developed by L with his foster parents over the years he has been in their care, coupled with the lack of a track-record of hands-on parenting by the mother and her partner, Mr M, of themselves mean that her application should fail. If this approach be right then in my judgment it would rob section 39

> of any meaningful content. It would be a largely meaningless provision – a dead letter – accessible, I suppose, only in those cases where the discharge was agreed.

46. An independent social worker instructed with the permission of the court, had provided a report that referred to the child's attachments. Mostyn J was critical of this evidence (paragraphs 16-21), and he described attachment theory as "only a theory" and "a statement of the obvious". At paragraph 17 he stated his understanding that attachment theory is not the subject of any specific recognised body of expertise governed by recognised standards and rules of conduct and that it therefore does not qualify to be admitted as expert evidence, and he concluded:

> "22 In my judgment, in any future case where it is proposed that expert evidence of this nature is adduced I would expect the court to determine the application with the utmost rigour, and with the terms of this judgment at the forefront of its mind."

47. In making these observations, Mostyn J did not refer to other authority about attachment theory. In fact, the subject of attachment and status quo was considered in *Re M'P-P (Children)* [2015] EWCA Civ 584 at paragraphs 47-51. In that case, where a birth family was seeking to recover children from prospective adopters, McFarlane LJ stated:

> "50. In the context of 'attachment theory', the wording of ACA 2002, s 1(4)(f), which places emphasis upon the 'value' of a 'relationship' that the child may have with a relevant person, is particularly important. The circumstances that may contribute to what amounts to a child's 'status quo' can include a whole range of factors, many of which will be practically based, but within that range the significance for the child of any particular relationship is likely to be a highly salient factor. The focus within CA 1989, s 1(3)(c) is upon the 'likely effect on' the child of any change. The focus in ACA 2002, s 1(4)(f)(i) is upon 'the value to the child' of any particular relationship continuing.
>
> 51. It is not my purpose in this judgment to express a view upon the relative importance of attachment/status quo arguments as against those relating to a placement in the family. Each case must necessarily turn on its own facts and the weight to be attached to any factor in any case will inevitably be determined by the underlying evidence. In any event, for reasons to which I have already adverted, it is not necessary to do so in this case as, unfortunately, the judge does not appear to have engaged in any real way with the effect on the children of moving them from the care of their primary, and only, attachment figure or with the value to them of maintaining that relationship."

48. McFarlane LJ returned to the topic in *Re W (A Child)* [2016] EWCA 793, a case in which a child had been with foster carers who were interested in adopting:

> "66. In a case such as the present, where the relationship that the child has established with new carers is at the core of one side of

> the balancing exercise, and where the question of what harm, if any, the child may suffer if that relationship is now broken must be considered. The court will almost invariably require some expert evidence of the strength of the attachment that exists between the particular child and the particular carers and the likely emotional and psychological consequences of ending it. In that regard, the generalised evidence of the ISW and the Guardian, which did not involve any assessment of A and Mr and Mrs X, in my view fell short of what is required."

49. The issue of attachment theory does not directly feature in this appeal, but I refer to it because it was addressed in *GM v Carmarthenshire*. It is one thing to find that a particular witness may not be qualified to give specific evidence about a child's attachments, but it is another thing to question the validity of attachment theory as a whole or to state that it cannot be admissible in evidence. Nor is it correct to say that, if a child's attachment to substitute carers is so strong as to lead a court to refuse an application to discharge a care order, that would deprive s. 39 of meaning. That approach risks looking at matters from the point of view of the parent at the expense of a rounded assessment of the welfare of the child. The decisions to which I have referred in the two preceding paragraphs make clear that the court has to give appropriate weight to all the relationships that are important to a child, and that there may be a role for expert advice about attachment in cases of difficulty. Insofar as the observations in *GM v Carmarthenshire* suggest otherwise, they cannot stand.

Lady Justice Nicola Davies

50. I agree.

Lady Justice King

51. I also agree.
