

FortyTwo Talks:
Future Risk & Proportionality in Public Law Children Proceedings
Harry Simons & Alice Needell

Harry Simons: Hello and welcome to *FortyTwo Talks*, the podcast which takes a deep dive into the legal world, led by the experienced members of 42BR Barristers.

Alice Needell: I'm Alice Needell, a member of the Family Team at 42BR Barristers, and I'm delighted to be joined today by...

Harry Simons: Hello, I'm Harry Simons, also a member of the Family Team.

Alice Needell: Today we're going to be talking about the concept of future risk in public law proceedings and what the court needs to establish about the future risk of harm before that risk can justify removing children permanently from their families.

Harry Simons: To do that, we're going to look at the recent case of F (Children: Placement Orders: Proportionality) 2026 case, the citation is EWCA Civ 990.

It's a case decided by the Court of Appeal on the 29 July 2026, with Lord Justice Peter Jackson giving the leading judgment.

Alice Needell: The case was about two sisters who we'll call D, aged four and a half, and Z, aged one and a half.

The local authority childrens services became involved initially in January 2023 after the mother contacted Women's Aid and made a number of serious allegations of domestic violence against the father, including strangulation.

D was placed on a child protection plan under the category of emotional abuse, and her and the mother were accommodated in a hotel by the local authority.

The mother signed a written agreement that she would not allow the father to have contact with *D*.

Harry Simons: In May 2023, the mother told the local authority that she had lied about the domestic abuse and said that she had in fact been coerced into making the allegations by her father, the maternal grandfather, who lives in Pakistan.

At the time, the parents had an asylum claim running in the background on the basis of a fear of violence from the maternal family in Pakistan.

This claim was later refused by the home office in 2024, and at the time of the Court of Appeal judgment, the parents had launched an appeal against this decision, however, this was adjourned to await the outcome of these family court proceedings.

Alice Needell: The mother engaged well with the local authority for a number of years, and there were no issues with her care of *D*, but the father's bail conditions were then lifted in December 2023, and the parents reconciled, with the father moving to join the mother in her Home Office asylum accommodation in February 2024.

The mother then fell pregnant with *Z*, who was born in October 2024.

On the 26 March 2025, the mother brought *Z*, then aged five months, to the hospital with a swollen left ear, which she said she'd noticed overnight. The doctors concluded this was more likely to be a bruise than an infection, and they also found a bruise on *Z*'s abdomen, for which no acceptable explanation was given.

Harry Simons: Z was discharged from the hospital on the 2 April 2025, and the mother was placed by the local authority, with both children, in a residential assessment unit under constant supervision, the father was to have supervised contact with the children by video and by weekly visits.

In March 2026, the mother said she was ending her relationship with the father, and she maintained at the appeal hearing that she had had no dealings with him since.

Alice Needell: The children remained living with their mother throughout the proceedings. The professionals accepted she was a warm, loving, and attentive mother, and the children were attached to her. There was no suggestion during the proceedings that they should be removed in the interim, and initially, the final care plan of the local authority was for the children to stay with their mother under a care order.

However, after hearing the evidence of the independent social worker at the first attempted final hearing, the judge expressed misgivings about this care plan and undertook a fact-finding exercise in relation to threshold.

Harry Simons: At the first attempted final hearing in October 2025, the court made findings of fact that the mother's original account of multiple assaults, including non-fatal strangulation, was likely to be true and that there was one incident where the father had caused her more injuries than she had admitted and that *D* would've been in her arms or nearby, and so was at real risk of being caught in the crossfire.

Alice Needell: The court also found that the wider paternal family had been abusive towards the mother.

Harry Simons: They found that the mother minimised the violence of the father to reduce perception of risk.

Alice Needell: And that the mother had lied when she had said that her own father had coerced her into making these allegations, and that this lie was told to assist her asylum claim and make it more likely that the father could return to her life.

Harry Simons: The court found that one of the parents, and there was a real possibility of each being responsible, inflicted injuries on Z and the ear and stomach marks were caused by excessive force, such as pinching or squeezing, and that if the father caused these injuries, then the mother had failed to protect Z as the father had likely been in the home far more often than the parents had claimed.

Alice Needell: Crucially, the court also found that both parents had lied repeatedly, not only in these proceedings, but also to the Home Office, the immigration tribunal, the police, social services, and other agencies, and the parents dishonesty had prevented professionals from being able to safely assess or manage risk.

Harry Simons: Following these findings, the local authority concluded that further work needed to be undertaken. In December, they changed their final care plan and applied for placement orders.

Alice Needell: There was another attempted final hearing on the issue of welfare in April 2026. Ultimately, the judge was not satisfied that the analysis of the local authority and the guardian complied with *Re B-S* on the issue of adoption, but she gave a substantive judgment dealing with the issue of risk.

Harry Simons: On risk, the court expressed concern about the likelihood of future harm, as the parents had not accepted the concerns and remained unable to work openly and honestly with

professionals, and there was particular concern that the mother would prioritise her relationship with the father over the safety of the children, including by concealing his involvement and failing to report abuse.

The court reflected on possible consequences for the children of remaining in the family and on possible protective measures but ultimately concluded that without being satisfied that the family would be open and honest with professionals, risk reduction in relation to domestic abuse couldn't be achieved.

Alice Needell: The final welfare determination was made at a final hearing in May 2026. By this point, the mother had filed for divorce, stopped attending contact with the father, and attempted to sever her asylum claim from his.

However, the court expressed that this position was motivated by a fear of losing the children and not by a genuine recognition of risk, so the mother was unlikely to maintain this separation.

Harry Simons: The court ultimately concluded that the risk to the children of being cared for by their mother in the community was too high. The court further concluded that nothing could be done to lessen those risks enough that the children could remain with their mother. The court therefore made care and placement orders for the children to be placed for adoption.

Alice Needell: The mother then appealed on two grounds.

The first ground was that the making of care and placement orders was neither necessary nor proportionate in all of the circumstances, particularly when considering the last domestic abuse episode occurred more than three years ago, the inflicted injuries to Z were

not the most serious in nature, and there was no evidence that it was anything other than an isolated event.

The mother had complied with all professional requirements and safety plans for more than twelve months whilst in residential placement, and also considering the likely emotional harm caused to the children by separation from their mother and potentially each other.

Harry Simons: The second ground was that the judge had conducted a welfare evaluation that was procedurally flawed and amounted to a linear rather than a holistic assessment of the realistic options.

The appeal ultimately succeeds on the first ground and set aside the care and placement orders. The court ultimately did not accept the second ground as being a serious irregularity causing an injustice, although said it would have been better if the court had given a single judgment in May instead of separating out the issue of risk from the final welfare determination.

Alice Needell: It is important to note that the only conclusion reached by the court that was challenged by the mother was the conclusion that the risks to the children could not be reduced by protective measures. The findings made by the court in October 2025 stood, and indeed the Court of Appeal were clear that the trial was entitled to conclude there was a substantial possibility that the children would suffer further significant harm if returned to their mother in the community, this was due to the history of domestic abuse, the injury to Z, and the parental dishonesty.

Harry Simons: The Court of Appeal, however, noted this was an unusual case for adoption as well-attached children and families without many of the markers for harm such as addiction, neglect, mental health, criminality, are not usually adopted on the basis of

findings at the intermediate level of seriousness present in this case. Therefore, the conclusion in relation to risk alone should not have been decisive.

The court should then turn to look at the possible consequences for the children of that harm arising and the extent to which the risks might be reduced or managed.

Alice Needell: The Court of Appeal concluded that the judge fell short in two linked ways.

The first being that there was an insufficient focus on the realistically likely consequences for the children of the harm they were likely to suffer. The Court of Appeal said at paragraph fifty-four, *'The judge was also right to look at the totality of risks, but again, the court must always maintain a sense of proportion and base its risk assessment on conclusions that can fairly spring from the evidence'*.

For example, the original judge said that one risk to the children was death, which was not a conclusion that had any good evidential basis.

The Court of Appeal ultimately could not identify why the trial judge considered the future risks in the parents care made permanent separation necessary.

Harry Simons: The trial judge had made a decision based not on past harm, but on the likelihood of future harm arising from past events and present attitudes, this had to be balanced against the certain harm of the children being separated from their mother, placed with strangers, and then with more strangers, with no guarantee that they would remain together.

On this issue, *Re F* reiterated the approach taken in the earlier cases of *Re H-W (Children)*, a 2022 case, citation UKSC 17, and *Re T (Children: Risk Assessment)* a 2025 case, citation EWCA Civ 93.

Alice Needell: In *Re H-W*, the Supreme Court determined that four questions needed to be asked and answered by a court considering removing a child from their family.

Number one - what was the likelihood that the children would suffer harm in parental care?

Number two - what would be the consequences of such harm arising?

Number three - what are the possibilities for reducing risk or mitigating the consequences?

And number four - what are the comparative welfare advantages and disadvantages of the options presented?

Harry Simons: *Re T* set out an alternatively worded seven questions on the same issue.

Number one - what type of harm has arisen and might arise?

Number two - how likely is it to arise?

Number three - what would be the consequences for the child if it did?

Number four - to what extent might the risks be reduced or managed?

Number five - what other welfare considerations have to be taken into account?

Number six - in consequence, which of the realistic plans best promotes the child's welfare?

And number seven - if the preferred plan involves interference with the Article 8 rights of the child or of others, is that necessary and proportionate?

Alice Needell: The second way the judge fell short was an insufficient recognition of the potential ability of the state to support the children within the family. This could have been done through local authority supervision, a domestic abuse protection order, intervention services, and also from the restrictions in place as part of the parents immigration controls over their places of residence.

The Court of Appeal therefore concluded that the future risk of harm and its ability to be managed did not satisfy the very strict requirements for care and placement orders.

Harry Simons: This case acts as an important reminder to consider what protective measures can be put in place to mitigate risks, particularly when considering adoption, when the court needs to be sure that nothing else will do.

The fact that something bad might happen does not by itself answer the welfare question. The court has to look at risk, likelihood of harm, consequences of that harm, how that risk can be managed, the alternative welfare outcomes, and of course, proportionality.

Alice Needell: If we say removal is necessary, we should be able to explain why does the harm that will result from removal not outweigh what we say about future risk.

Harry Simons: And if we're asking the court to make the most serious order available, we need to demonstrate why less intrusive options really won't do.

Alice Needell: The Court of Appeal has already cited *Re F* in the case of *Re E (A Child) (Special Guardianship Order: Public Law Proceedings)* a 2026 case, citation EWCA Civ 1167, handed down in September 2026 and featuring 42BR's own Mahnoor Javed.

Harry Simons: *Re E* concerned a six-year-old child who had been the subject of previous care proceedings shortly after she was born in 2020 due to concerns about her mother's mental health. These concluded with a special guardianship order in favour of the maternal grandmother, which the mother agreed with.

The mother remained living in the home with the child and grandmother, but the grandmother was the primary carer of the child.

E's father had not been involved at any stage.

Ultimately, *E* was removed from the family home and placed in foster care in March 2024 due to allegations made by a third party, by the time of the final hearing, she had been living with her foster carer for nearly 18 months.

The final care plan of the local authority, supported by the guardian, was a special guardianship order in favour of the foster carer.

The mother and the maternal grandmother, however, sought the child's return to family care, either individually or jointly. The judge ultimately made a special guardianship order in favour of the foster carer.

Alice Needell: The mother and grandmother appealed, the Court of Appeal allowed the appeal and remitted the case for rehearing.

The appeal was about the approach the court should adopt when making an SGO at the conclusion of the care proceedings, particularly when it's an SGO to a non-family member.

One ground of appeal proved determinative, that the judge had misdirected himself on the law by not applying the threshold criteria and not following guidance related to risk, welfare, and proportionality.

The Court of Appeal concluded the judge was wrong to have done this, and that even though he was not making a public law order, this process should have been followed.

Harry Simons: *Re E* reaffirmed the approach taken in *Re F* - adopting his summary of the law as set out in *Re H-W* and *Re T*, demonstrating that approach being taken not just in cases of adoption, but also in cases of non-family special guardianship orders.

Alice Needell: The takeaway from *Re F* and *Re E* is that risk assessment and proportionality are not separate exercises, they interact. The more serious the proposed interference with family life, the more important it becomes that the court can demonstrate precisely why that interference is necessary.

Harry Simons: Thank you for tuning in to *FortyTwo Talks*, we hope you enjoyed the podcast.

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Thank you very much.

Alice Needell: Thank you.