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Case No: CA-2026-000464

CA-2026-000646

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EAST LONDON FAMILY COURT
RECORDER ROCHE KC
ZE24C50116

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 September 2026

Before:

LORD JUSTICE MOYLAN

LORD JUSTICE SINGH

and

LORD JUSTICE PHILLIPS

**Re E (A Child) (Special Guardianship Order: Public Law
Proceedings)**

Chris Barnes KC and Lucy Logan Green (instructed by **Bindmans LLP**) for the **1st Appellant**

Ann May (instructed by **BEU Solicitors**) for the **2nd Appellant**

Mahnoor Javed (instructed by **Family Legal Services**) for the **1st Respondent**

Victoria Roberts (instructed by **Miles & Partners LLP**) for the **2nd Respondent**

Hearing date: 9 July 2026

Approved Judgment

This judgment was handed down remotely at 14.00 on 10 September 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The mother and the maternal grandmother appeal from the Special Guardianship order (“the SGO”) made on 4 February 2026 by Recorder Roche KC (“the judge”). The SGO was made at the conclusion of care proceedings and in accordance with the final care plan in which the Local Authority set out that it was “seeking a Special Guardianship Order (SGO) to be granted to” the child’s foster carer.
2. The child, to whom I will give the initial E (for the purposes of anonymisation), was born in March 2020. The first set of care proceedings were commenced in May 2020. They concluded in July 2021 with an SGO being made in favour of the maternal grandmother (for ease of reference, I will describe her as the MGM) effectively by agreement as there was no final hearing and no judgment.
3. In circumstances which I will deal with further below, E was removed from the family home in March 2024. Care proceedings were commenced and an interim care order was made on the basis that E would live in foster care. At that time, the Local Authority, as part of its case, was relying on a number of serious allegations which had been made by a “family friend” of the MGM, most of which (including the most serious) were not pursued by the Local Authority at the final hearing. E was placed with a Local Authority foster carer. That placement came to an abrupt end when the foster carer was arrested for drink driving in August 2024 and, when interviewed by the police, told them that she had left E alone at home. E was then placed with her current foster carer. By the date of the hearing below, E had, therefore, been living there for very nearly 18 months. At the same time, as set out in the judgment, E has been having “regular contact with her mother and maternal grandmother”.
4. At the final hearing, the Local Authority supported by the Guardian sought an SGO in favour of the foster carer. The mother sought the return of E to her care or to the joint care of herself and the MGM. The MGM sought the return of E to her care or to the joint care of herself and the mother. As I understand it, the mother and the MGM each indicated that they would agree to a supervision order.
5. On this appeal, the mother, who is not entitled to legal aid because of her means, is represented by Mr Barnes KC (who did not appear below and is acting pro bono) and Ms Logan Green (who appeared below and is acting on this appeal with the mother’s solicitors on a reduced cost basis). The MGM is represented by Ms May and the Local Authority is represented by Ms Javed, both of whom appeared below. The Guardian is represented by Ms Roberts, who did not appear below. I am very grateful to all counsel for their respective submissions. E’s father has not been involved at any stage in her life and has taken no part in these proceedings.
6. I would also note that this appeal had to be adjourned for a short period because the foster carer had not, initially, been made a party to this appeal or been invited to make submissions. Having regard to the potential consequences for her of the appeal, an order was made joining her as a party and giving her an opportunity to make submissions. In the event, for understandable reasons, she decided not to make submissions in respect of this appeal.
7. The grounds of appeal raise a number of issues but, for the purposes of determining this appeal, it is only necessary to determine the core issue of whether, as is it expressed in

the MGM's grounds of appeal:

“the judge misdirected [himself] on the law by deciding it was not necessary to apply the s.31 threshold criteria, to establish the factual matrix at the relevant date, or follow judicial guidance in case law relating to risk and the welfare and proportionality evaluations as the LA was not seeking a public law order.”

As sometimes happens, these issues have received far more attention than they received during the hearing below. This may well reflect the fact that a wide range of issues were being addressed at that hearing but, as a result, we have had the benefit of much more extensive submissions on the proper legal approach than the judge received. It is, therefore, perhaps not surprising that, in an otherwise careful and considered judgment, the judge dealt with this issue very briefly.

8. This appeal raises the question of the approach the court should adopt when making an SGO at the conclusion of care proceedings, specifically when the care options before the court are either the child returning to live with her family or the child remaining living with a local authority foster carer pursuant to an SGO. The judge considered that his task was simply “to decide which course will best serve the interests of the child’s welfare” and that it was not necessary for him to address either the threshold criteria in s. 31(2) of the Children Act 1989 (“the CA 1989”) or, although this was not expressly stated, the issue of proportionality.
9. At the conclusion of the hearing, the parties were informed that the appeal would be allowed and the matter remitted for rehearing. This judgment sets out my reasons for agreeing with that decision. In very brief summary, I have decided that the judge was wrong to apply a simple welfare balance and that he should have considered the issue of proportionality as explained, for example, in the cases of *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 (“*Re B* [2013]”) and *In re H-W (Children)* [2022] UKSC 17, [2022] 1 WLR 3243 (“*Re H-W*”). I also consider that, in the circumstances of this case, he was wrong not to determine the threshold criteria in s. 31(2). The very regrettable effect of this is that these proceedings, which were commenced over two years ago, will now be further prolonged.

Background

10. E is now aged six. Her mother is from another European country (which I will call Country A) and came to the UK in 2016. She has remained living here since then. She is in full-time employment.
11. The MGM is also a national of Country A. She first moved to the UK in 2020 in order to be assessed as a carer for E during the course of the previous care proceedings referred to below. She has remained living here since then.
12. The Local Authority first became involved prior to E’s birth following a referral from the maternity unit at the hospital the mother was attending. A number of concerns were identified about aspects of the mother’s life. Shortly after E was born, further concerns were raised on 20 May 2020 by a health visitor which led to a social worker and the police visiting the mother and E. The mother was found to be incoherent and making

threats against E. E was removed into police protection and placed with a foster carer.

13. The local authority issued care proceedings, leading to an interim care order on 29 May 2020 under which E remained in foster care.
14. The mother was detained under the Mental Health Act 1983 and, according to a report obtained for the purposes of these proceedings, she “experienced a puerperal psychosis (psychosis occurring in the postnatal period) and over the course of time, her diagnosis has been amended to bipolar disorder”. The mother was discharged from hospital in July 2020.
15. As recorded in the judgment below, a parenting assessment of the mother concluded that she “was unable to be the sole carer for [E]. ‘Her insight is poor and although she remains engaged with professionals, her reflective capacity about the risks to [E] based on her mental health problems is unchanged. She continues to deny being a risk to her daughter, either in the past, present or future’”.
16. On 6 July 2021 an SGO was made in favour of the MGM, it would appear by consent. The special guardian assessment of the MGM noted that she “had a good understanding of the Local Authority’s concerns” in respect of the mother’s “ability to ensure [E’s] safety as well as her ability to be emotionally and physically available to her”. It is relevant to note that the SGO included the following recital:

“AND UPON it being recorded that, it is agreed that the s.31 threshold criteria were satisfied based on the composite threshold document attached to this order, but the Court and the parties are satisfied that no public law order is required.”

It was also recorded that:

“AND UPON it being the intention of the family that the mother, the maternal grandmother and [E] shall all live together, and the Court commending them for their child focused approach.”

E moved to live with the MGM and the mother in September 2021 and remained living with them until March 2024, as set out below.

17. The mother continued to see her GP, and it was recorded in October 2022 that she was compliant with her medication and that her mental state was stable. In July 2023, the mother wanted to stop taking her medication. Following consultation with her mental health team, it was agreed that her medication would be reduced and then gradually tapered off until it was stopped in October 2023.
18. On 7 March 2024, the local authority received a referral from someone who said he was a friend of the MGM. He made a number of very serious allegations, the majority of which were subsequently disputed by both the mother and the MGM and were not pursued by the Local Authority at the final hearing. However, as a result of the allegations two social workers visited the home. At the time, the MGM was in Country A because her mother had had a heart attack and required assistance. The mother and E had also just visited another European country where her father lived.

19. The social workers were concerned at the mother's erratic presentation and what she was saying as well as what E was saying had happened to her and how she was behaving. This led to them contacting the MGM and asking if she would agree to E being accommodated by the Local Authority. This was another disputed aspect of the history in that there was an issue as to whether the MGM understood what she was being asked and in fact agreed to E being voluntarily accommodated. The Local Authority's case was that the MGM had agreed. In any event, E was removed from the home on 12 March 2024, with the assistance of the police, and placed in foster care.
20. Care proceedings were issued on 14 March 2024. E has remained in foster care pursuant to an interim care order. As referred to above, E had to be moved abruptly to a new foster carer in August 2024 when her then foster mother was arrested for drink driving and revealed that she had left E, then aged four, alone at home. E has remained living with the same foster carer since then. As set out in the judgment below:

“Throughout her time in care she has had regular contact with her mother and maternal grandmother. For most of the first six months or so her contact with her mother was indirect video contact. Thereafter it has been face to face. The contact with the maternal grandmother has always been face to face. The mother's and the maternal grandmother's contact takes place at the contact centre and continues to be supervised.”

Contact was taking place three times each week, once with the mother alone, once with the MGM alone and once with them both.

Proceedings

21. At the commencement of the proceedings, the threshold document prepared by the Local Authority relied on a number of allegations which, as noted in the mother's Skeleton Argument for the appeal, were either inaccurate or were based on allegations made by the MGM's friend which were abandoned during the proceedings. The final threshold document, which was first prepared in November 2024, was much more limited. However, this meant that, for the first eight months of the proceedings, the case being advanced by the Local Authority was very different from its final threshold case.
22. The final amended threshold document relied, in summary, on the following:
 - (a) The potential risks to [E] arising from the mother's mental ill-health;
 - (b) That between September 2021 and March 2024 [E] was exposed to arguments between the mother and MGM, including over aspects of [E's] care. Frequently these arguments caused the mother to have panic attacks and negatively impacted her health. [E] was or was likely to be distressed and caused significant emotional harm by seeing these arguments and their effects on her mother;

(c) The mother had resorted to inappropriate forms of discipline for [E] [shouting, name calling and biting once], likely to cause her distress and significant physical and emotional harm;

(d) Between 10-12 March 2024 the MGM left [E] in the mother's sole care. At that time the mother had been experiencing low moods, mood swings, difficulty focusing, tiredness, and feelings of being overwhelmed. The MGM had noticed the mother to be less calm and more tearful and was aware that she had bitten [E] a few days before. [E] was likely to suffer significant harm as a result of being left alone with her mother whose health was deteriorating.

23. A psychiatric report on the mother was obtained during the proceedings. It was completed in July 2024 with an addendum in September 2024 (which did not involve any updating assessment). Likewise, only one parenting assessment of the mother was obtained. It is dated June 2024. By the date of the final hearing in January 2026, these reports were, therefore, over 18 months old.

24. The psychiatric assessment set out that the mother has bipolar disorder:

“[This] is characterised by recurrent manic or mixed episodes and depression can also occur.

Symptoms of mania have included irritability, pressure of speech, flight of ideas and grandiose beliefs.

The medical notes indicate that [the mother] has not experienced a manic episode since her discharge from hospital in July 2020. However there is indication that her mental health started deteriorating prior to [E] being taken into care as she reported to mental health professionals in April 2024. Her GP and other professionals were concerned about her mental state prior to this. When seen by Dr Shaw for a capacity assessment, she was described as labile in mood. The information points to her being in the early stages of relapse related to medication being reduced from July 2023 and stopped by October/ early November 2023 with medical oversight. In addition she was under stress due to working long hours and attending university.”

The report recorded that, although the mother had not initially been taking her medication regularly, she was compliant at the date of the report. It was the doctor's opinion that the mother's “insight into her diagnosis and the need for treatment was limited”; that when “psychotic or manic, [the mother] will not be able to consistently bear in mind [E's] emotional or physical needs due to preoccupation with her own thoughts”; and that “[e]xposure to such a disturbed mental state will impact on [E's] emotional well-being”. As for treatment, the doctor noted that “treatment with medication will be a long-term way to manage the risk of relapse” and said that the mother would “also benefit from illness awareness work with her care co-ordinator. This will involve education about the nature of the diagnosis, need for treatment, relapse signs and a relapse intervention plan which can be shared with others”.

25. In response to being asked about the prognosis for recovery or relapse, the doctor said:

“[The mother’s] mental health is responsive to medication, which is a positive prognostic factor.

The medical records indicate that [the mother] was largely compliant with medication apart from a period in 2021, when she failed to collect her prescription. She was inconsistently compliant when medication was restarted in March 2024 as she was uncertain of when to take medication but is now compliant albeit with limited insight. *Continued compliance is essential in maintaining recovery.*” (emphasis added)

26. The only additional evidence in respect of the mother’s mental health were two letters from her mental health worker dated 11 August 2025 and 23 December 2025. The former reported that the mother had “been actively engaging with our service and has shown commendable progress in managing her mental health and improving her overall wellbeing”. She was on medications which “have contributed positively to stabilising her mood and enhancing her daily functioning”.

“Her current care plan includes regular mental health support, medication management, and ongoing monitoring of her progress. She has shown a proactive attitude, attending appointments, following treatment recommendations, and recently securing stable employment - an important milestone in her journey toward independence and stability”; and

“We believe that with continued support, [the mother] is well-positioned to provide a nurturing and stable home for her child and to continue building a positive future for herself.”

27. The December 2025 letter reported that the mother had been discharged from mental health services “for over three months with no concerns regarding her mental state. She remains stable and is actively working”. The letter concluded: “*At present, we have no concerns regarding her mental health*” (emphasis added).

28. The parenting assessment of the mother was completed by an independent social worker (“ISW”) who saw the mother three times in June 2024. Her conclusion, in very brief summary, was that “at this stage [the mother] is not in a position where she can safely care for [E] at least in the short term”. Her longer-term assessment was as follows:

“Based on my assessment, I do not consider that mother is able to meet [E’s] short-term, physical, emotional, developmental and care needs. Her understanding of [E’s] developmental needs seems to be limited. Her response to [E] biting her for example shows this. Presently, the way she works means she has quite limited time to spend with [E]. [The mother] states that her mental health does not really affect her parenting and yet she also admits that when unwell she feels very low, depressed and

can get angry. She has said she feels bad for snapping at [E] at times and thinks she is not a good parent. It is likely when mentally unwell how she interacts with [E] would be affected and may be limited. Her ability when unwell to meet [E's] physical and emotional care needs is also likely to be compromised. *I am unable to comment confidently about her ability to meet [E's] needs in the long term. This is because I consider that her challenges can be addressed – her parenting challenges can be addressed through an appropriate parenting course whilst her mental health needs can be addressed through appropriate treatment and therapy. If these issues were to be effectively addressed, then this could mean in the long term she is able to adequately meet [E's] needs.*” (emphasis added)

29. I have emphasised the last passage from the parenting assessment and the sentence in the psychiatrist's report above (paragraph 25) because they were relevant to the question of the mother's ability safely to parent E in the future. I also refer to them because we were told by the mother's counsel that, during the course of the final hearing, a social worker accepted in her oral evidence that, despite this evidence, the Local Authority had “ruled out” the mother at that point (June/July 2024) as a long-term carer.
30. Various parenting assessments were carried out of the MGM. The same ISW who provided the assessment of the mother, carried out an assessment of the MGM in June 2024, with addendum assessments up to January 2025. In her first report, the ISW's summary conclusion was as follows:

“In my view [the MGM] has the capability on her own, with professional support, to adequately care for [E]. This capability is greatly limited by the involvement of [the mother], whom she has a complicated relationship with, which I consider impacts on her ability to safely care for [E].”

In the first addendum report she said:

“As I noted in the last report, whilst [the MGM] deeply cares for [E], she will require support to be able to safely care for [E] alone and in her home. This support is not just around [E's] needs but also around managing her relationship with [the mother], which poses risks to [E's] safety in my view. ”

The final addendum report noted some positives and, although she did not recommend returning E to the MGM's care “at this stage”, she concluded:

“There are strengths with grandmother as I identified from the first assessment. My view however is she needs to access the recommended interventions. She needs to demonstrate an adequate understanding of the concerns raised by social workers, which led to the removal of her grandchild. This way when [E] is returned there is some probability she understands the risks,

can identify the risks and can be protective. This will ensure [E's] wellbeing and stability.”

31. A second ISW was instructed to carry out a further assessment of the MGM which was completed in May 2025. As part of her assessment, she met the MGM several times, including with the mother, and also met the mother on her own. The tone of this assessment is different from that of the earlier assessments and substantially more negative. It stated that the “most significant concerns related to the risk presented by [the mother], particularly in relation to her mental health, as well as allegations of conflict in the relationship between” the MGM and the mother. “There are also concerns that [the MGM] has not made safe decisions and been able to protect [E] above her relationship with” the mother.
32. In August 2025, the foster carer confirmed to the Local Authority that she wished to be appointed as E’s special guardian. The court ordered that a special guardianship assessment and support plan be provided. This was completed in October 2025 and was positive.
33. The guardian’s final analysis is dated 3 December 2025. She did not recommend that E return to the mother’s or the MGM’s care. In brief summary, this was based on the “acute risks and harm to [E] [which] would stem from [E] being exposed to any future deterioration of [the mother’s] mental health”; “serious concerns about [the mother’s] and [the MGM’s] insight and ability to safeguard [E]”; and the Local Authority’s concerns about the mother’s and the MGM’s “complex relationship dynamics”. She endorsed the Local Authority’s plan for E to be cared for by her foster carer under an SGO and that contact be reduced to six times per year.
34. The mother challenged the case as advanced by the Local Authority as to the asserted risks to E from by her mental health and her alleged “lack of insight”. She accepted that she had had “challenges” in the past but asked the court “to focus on my current stability and capacity rather than historic episodes which do not reflect my circumstances today”. She suggested that the Local Authority’s position was based on outdated assessments which did not reflect that her mental health had been stable since 2024 and that she had engaged consistently with her GP and with mental health services. She relied on the letters from her mental health worker as referred to above and said that she and her mother “understood the relapse plan”. She also indicated that she would agree to a supervision order.
35. The MGM said that, contrary to the Local Authority’s case, she was aware of and accepted the mother’s mental health diagnosis and said that she would act appropriately to protect E. She said that the mother was “more open about her mental health difficulties” and that she was “now much more aware of the signs should the mother become unwell in the future”. She said that she was well able to care for E either alone or with the mother. She also said that she would agree to a supervision order.
36. As to the allegation that E had been exposed to arguments between the mother and the MGM, she said in her response to the final threshold statement that “there were occasional disagreements, but they were not extreme or prolonged”.
37. Both the mother’s and the MGM’s primary position was the return of E to their respective sole care. Their second preference was for E to return to their joint care.

The mother's third preference was for E to be placed in the MGM's sole care. If all of those options were refused and E was to remain with the foster carer, the mother and the MGM sought a care order rather than a special guardianship order.

38. At the final, five day, hearing in January 2026 the judge heard oral evidence from the mother, the MGM, both ISWs, a Local Authority social worker, the foster carer, the assessor of the foster carer and the children's guardian.
39. The judge delivered judgment orally on 3 February 2026.

Judgment

40. After setting out the background and the parties' respective positions, the judge summarised the law. As this has been the focus of the appeal, I set it out in full:

“[23] My paramount consideration under s.1 of the Children Act 1989 must be [E's] welfare. In determining any question with respect to the upbringing of the child, the court's task is to decide which course will best serve the interests of the child's welfare. When doing so, the court must take into account all the particular circumstances relevant to that child. However, in the end the court has the single question to determine, namely what is best for the welfare of the child. There is no natural parent presumption in either private law or public law. In order to determine the single question of what is best for the welfare of the child the court must conduct a balancing exercise in which each of the competing options is weighed up against the others with the positives and negatives of each option being given due weight in the balance. The judicial exercise should not be a linear exercise whereby each option other than the most draconian is looked at in isolation. S.1(2) of the Children Act expressly states a general principle that any delay in determining any question with regard to the upbringing of the child is likely to prejudice the welfare of the child. The court must have regard to the Welfare Checklist in s.1(3) of the Children Act.”

It can be seen that the judge did not consider it necessary to address the issue of proportionality.

41. The judge then dealt with the evidence from the various reports and assessments, as outlined above, before setting out the oral evidence at some length.
42. The judge then turned to his analysis, which was structured by reference to the welfare checklist, reflecting what he had said about the legal approach he proposed to adopt, as quoted above. He did not address the issue of threshold because, as he explained when asked for clarification after his judgment, “I did not consider the section 31 threshold expressly in my judgment because I not think it necessary or appropriate to make an order under section 31. I did, however, consider harm and the likelihood of harm”.
43. I propose only to refer to some elements of the judge's analysis, in the order in which they appear in the judgment.

44. He addressed s. 1(3)(b) of the CA 1989, E's physical, emotional and educational needs. E was "developing well" and "has a very strong emotional need for stability as a result of her severely disrupted life to date".
45. When dealing with s.1(3)(c), the likely effect on the child of any change in her circumstances, the judge concluded, based significantly on the Guardian's evidence, that E would suffer considerable emotional harm if she was moved from the foster carer considering "how many changes [E] has had and how happy she is in her current placement".
46. Under the heading of "The harm which [E] has suffered or is at risk of suffering" (s. 1(3)(e)), the judge set out that E had suffered significant emotional harm "as a result of exposure to her mother's deteriorating mental health and to conflict between the mother and the grandmother".
47. In respect of s.1(3)(f), "How capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant is, of meeting her needs", the judge accepted that the mother "has done very well and has been compliant with her medical treatment [but] her insight into her condition is limited and there remains *a* risk of relapse" (emphasis added). Pausing there, I have emphasised the reference to there being *a* risk of relapse because the judgment does not contain any further analysis of how likely this is to occur having regard, in particular, to the updating evidence from the mother's mental health worker and the medical history. The judge also considered that the mother and the MGM "would struggle to live apart from each other".
48. The judge then set out, in four short paragraphs, the "Pros and Cons of a Placement" with the MGM, the mother or both and the "Pros and Cons of Continuing Placement" with the foster carer.
49. As to the former, the judge started by saying that "it was not realistic to consider [E] being cared for by either her mother or her grandmother alone". He referred to the fact that E "has lived with her grandmother and mother before and would be returning to a place she has lived before, albeit not for close to two years". He also noted that she would "have considerable exposure to [her maternal family's] culture ... [and] also have more contact with the wider maternal family [which] would significantly help her sense of identity". The "Cons" were as follows:

"If [E] lives with her mother and grandmother she is likely to be exposed to continuing conflict between them. There is a risk that she will not feel truly safe which may have long-term consequences for her welfare, particularly in the light of her history to date. If the mother suffers a relapse in her mental health there is a significant risk, notwithstanding her knowledge of the relapsed plan and communication with the mother's mental health team, that the grandmother will not take the necessary steps to protect [E]. There is a risk that [E] once again will be removed into foster care."
50. As to the advantages and disadvantages of placement with the foster carer, the judge observed that "this is what [E] wants" and that E "has developed a secure and loving

attachment to” the foster carer “who provides her with appropriate, skill care”. Whilst the foster carer’s religion and culture were “very different to [E’s] family background” this was “not of itself harmful”. There was a risk that contact with the maternal family could break down, if there was not a good working relationship with the foster carer, but the judge considered that this risk was small. He also did not consider that E “needs a care order to safeguard her welfare”.

51. The judge’s ultimate conclusion was expressed as follows:

“[142] In my judgment, taking [E’s] welfare as my paramount consideration, it is in her best interests to remain in her current placement under a special guardianship order. I do not believe that [E’s] best interests would be served by a return to the care of her mother and maternal grandmother even if they were provided with support under a supervision order. The risk of [E] suffering significant emotional harm firstly as a result of the move, secondly while living in the care of her mother and grandmother, and thirdly as a result of the possible breakdown of that placement is too great.”

Submissions

52. I have taken all the parties’ respective, comprehensive, submissions into account.
53. Mr Barnes’ primary submissions focused on the judge’s legal approach, as referred to above. He submitted that this had failed properly to recognise: (i) the context in which the SGO was being made, namely as the outcome being sought by the Local Authority in “compulsive public law proceedings”; and (ii) the significance of the order and proposed intervention being sought, namely one which was intended to place E permanently away from her birth family. The judge had strayed very far from the proper approach required for the determination of care proceedings, where findings are made in relation to threshold, there is a proper analysis of competing options and a need for justification for removing a child permanently from their birth family.
54. What had been required, Mr Barnes submitted, was the approach referred to in *Re B* [2013] and recently reiterated in *Re H-W*. He relied in particular on what Baroness Hale had said in *Re B* [2013], about the important role played by the threshold criteria, and on what Dame Siobhan Keegan LCJ has said in *Re H-W*, about the need for the court to consider whether a proposed order was necessary and proportionate, as quoted below. In summary, and contrary to the judge’s view, the nature of his task was not simply to undertake a welfare balancing exercise as described by him. He had been required to determine whether the proposed placement under the SGO was justified and proportionate as set out in those cases.
55. In addition, Mr Barnes submitted that, even though the judge might not legally have been required to determine the threshold criteria because he did not make a care or a supervision order, it would have been better if the judge had expressly dealt with threshold. This would have provided an appropriate analytical lens, prism or tool through or by which to determine the merits of the proposed options. Indeed, he submitted that there would be few cases in which it would not be appropriate for the court to engage with the s.31 threshold criteria.

56. Mr Barnes also criticised the judge's "bald statement" that there was "no natural parent presumption in either private law or public law", a statement which, Mr Barnes submitted, did not reflect the true nature of the task facing the judge. While there is no *presumption*, there was no recognition in the judgment that the fact that the mother and the MGM are E's natural family was "an important and significant factor in determining what will be best for [E] now and in the future", to adapt what Baroness Hale had said in *In re G (Children) (Residence: Same-Sex Partner)* [2006] UKHL 43, [2006] 1 WLR, at [44]. The judge's analysis had also been "skewed" by his "preponderant focus on the stability of the child's placement with the foster carer".
57. Mr Barnes further submitted that the assessments of the mother, which had formed a substantial part of the judge's analysis, were an inadequate foundation on which to conclude that a return to her care was precluded. As had been submitted below, the "parenting assessment [had] concluded that the mother's challenges could be addressed" with the ISW recommending that "the concerns identified within the assessment which precluded the mother from caring for [E] *in the short-term* could be addressed through (1) a parenting course; and (2) appropriate treatment/therapy for the mother's mental health" (emphasis in original). The Local Authority had "ruled out" the mother from 2024 so that there was no further consideration by them of whether and how E might be returned to the mother. The mother had not been assessed since June 2024, a two-year period during which she been taking her medication, had had no relapse and had engaged to a high degree with her mental health team. She had also undertaken a 13-week parenting programme and held down a demanding job.
58. In addition, the judge's conclusion that there was *a* risk was not a sufficient analysis and reflected a failure properly to engage with these developments and the mother's current circumstances. It also did not comply with the proper approach to the assessment of a risk of future harm as set out, for example, in *L-G (Children: Risk Assessment)* [2025] EWCA Civ 60, [2025] 1 FCR 695, at [18].
59. The final aspect of Mr Barnes' submissions was to challenge, what he submitted was, the judge's failure to make findings in respect of the significant disputed issues, in particular the relationship between the mother and the MGM including the extent of any arguments and the potential risk to E from a relapse in the mother's mental ill-health.
60. Ms May, on behalf of the MGM, also focused her submissions on the legal approach the judge took when determining what order to make. She submitted that this was flawed for the reasons advanced on behalf of the mother. The realistic options included E living with the MGM under the existing SGO, living with the mother or living with them both together. She pointed to the fact that *both* of them had said that they would accept a supervision order.
61. Ms May submitted that, even if not legally required to apply the threshold criteria, the extent of the proposed interference in the family life of E, the mother and the MGM required the approach taken by the court to mirror that set out in s.31(2) of the CA 1989. She submitted that, in failing to determine the threshold criteria, the judge had bypassed a significant bulwark designed to protect children and their families from unjustified state interference. Further, determining the threshold criteria would have made the judge properly appreciate the significance of the proposed interference. She submitted that the SGO in this case *is* a very significant interference in E's, the mother's and the

MGM's family life. She relied on *In re F and another (Children)* [2021] EWCA Civ 622, [2022] Fam 78 and submitted that an SGO has a form of permanence which can be more significant than a care order and is akin to adoption (save that it does not extinguish parental responsibility) such that it requires the court to undertake a similar proportionality evaluation.

62. Additionally, in the present case, by saying that he did not need to consider s.31(2) of the CA 1989 Act, the judge effectively ruled out as options which needed to be considered in his judgment, returning E to the mother and/or the MGM with a supervision order. Ms May submitted that the judge's post-judgment clarification that he "did not consider the section 31 threshold expressly in my judgment because I did not think it necessary or appropriate to make an order under section 31" was back to front. He could not properly determine the latter without having first determined the former.
63. Ms May also submitted, mirroring the submissions made by Mr Barnes, that the judge had failed to make findings in respect of critical issues which underpinned the Local Authority's case.
64. On behalf of the Local Authority, Ms Javed submitted that the judge's decision was properly reasoned and was not manifestly wrong. The task for the judge was, pursuant to [17] of *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ 407; [2022] 4 WLR 42 ("*Re B* [2022]"), to make sufficient findings such that it was clear from what harm E needed to be protected. The judge was not required to consider threshold but the essential question for the court when considering threshold is to be clear what harm the child is being protected from and this was what the judge had done. Accordingly, he had, in effect, determined the threshold criteria. He had come to the clear conclusion that the risk of harm to E if she were to return to the care of the mother and/or the MGM was such that this was not a safe option for E.
65. Ms Javed pointed to the judge's findings in relation to harm and his overarching finding in respect of the risk of future harm, based significantly on the nature of the mother and the MGM's relationship which was linked with the risk of a relapse in the mother's mental health. Whilst the judge did not consider the degree of the risk of relapse as much as the other risks identified, that risk was very much entwined with the judge's findings as to the relationship between the mother and the MGM. These were sufficient to support the judge's decision.
66. Ms Roberts, on behalf of the child's guardian, submitted that the judge did consider threshold, at least impliedly. He used the terminology of significant harm and found that E was likely to suffer significant harm as a result of the parenting provided by the mother and the MGM. When asked by the court whether this reflected what the judge had said when asked for clarification, Ms Roberts accepted that it had been incumbent on the judge to determine whether the threshold criteria were established because the making of a supervision order was included within the mother's and the MGM's proposals. She also accepted that there needed to be some reference to necessity and proportionality although she submitted that an SGO was a lesser form of interference in family life than a care order under which the state holds parental responsibility.

Legal Framework

67. The structure of the Children Act 1989 is well known. In so far as relevant to this appeal, Part I contains the welfare checklist; Part II deals with “Orders with Respect to Children in Family Proceedings” which include special guardianship orders; and Part IV deals with “Care and Supervision”. It is also relevant to note that, when the court is considering whether to make a placement order, the relevant welfare checklist is that set out in s. 1(4) of the Adoption and Children Act 2002.
68. The welfare checklist in the 1989 Act includes at s. 1(3)(e) “any harm which [the child] has suffered or is at risk of suffering”.
69. Section 14 deals with special guardianship orders. Section 14A(6) provides:
- “The court may also make a special guardianship order with respect to a child in any family proceedings in which a question arises with respect to the welfare of the child if -
- (a) an application for the order has been made by an individual who falls within subsection (3)(a) or (b) (or more than one such individual jointly); or
- (b) *the court considers that a special guardianship order should be made even though no such application has been made.*”
(emphasis added)

Accordingly, the court in the present case had jurisdiction to make the SGO even though no application had been made.

70. Section 14A(5) sets out who can apply for an SGO:
- “The individuals who are entitled to apply for a special guardianship order with respect to a child are -
- (a) any guardian of the child;
- (b) any individual who is named in a child arrangements order as a person with whom the child is to live;
- (c) any individual listed in subsection (5)(b) or (c) of section 10 (as read with subsection (10) of that section);
- (d) a local authority foster parent with whom the child has lived for a period of at least one year immediately preceding the application;
- (e) a relative with whom the child has lived for a period of at least one year immediately preceding the application.”

It can be seen, therefore, that a Local Authority cannot apply for an SGO, but that a foster carer can.

71. The effect of an SGO is set out in s. 14C(1):

“The effect of a special guardianship order is that while the order remains in force—

(a) a special guardian appointed by the order has parental responsibility for the child in respect of whom it is made; and

(b) subject to any other order in force with respect to the child under this Act, *a special guardian is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility for the child* (apart from another special guardian).” (emphasis added)

It can be seen, therefore, that an SGO is a very significant order in terms of its effect on a child and on the relationship between a child and her family, notably in the present case, her mother and her MGM. During the course of his submissions, Mr Barnes pointed to material differences between the effect of a care order and that of an SGO, which I do not propose to rehearse in this judgment, but which he relied on as demonstrating that an SGO could be said to be at least as significant as, and he contended in some respects more significant than, a care order.

72. The significant effect of an SGO has been noted in a number of cases. In *Re S (Adoption Order or Special Guardianship Order)* [2007] EWCA Civ 54, [2007] 1 FLR 819 Wall LJ, as he then was, giving the judgment of the court (with Thorpe and Tuckey LJ) noted, at [25], quoting from Guidance issued by the Department for Education and Skills, “the aim of special guardianship was ‘to provide *legal permanence* for those children for whom adoption is not appropriate’” (emphasis added). In *In re M* [2021] EWCA Civ 442, [2022] Fam 53, Peter Jackson LJ (with whom Baker and Elisabeth Laing LJ agreed) said, at [18]:

“The purpose of special guardianship is therefore to achieve permanence for the child. The term “permanence” has a special meaning in care planning, as defined in The Children Act 1989 Guidance and Regulations Volume 2: Care Planning, Placement and Case Review (June 2015) (DFE-00169-2015):

“2.3 Permanence is the long term plan for the child's upbringing and provides an underpinning framework for all social work with children and their families from family support through to adoption. The objective of planning for permanence is therefore to ensure that children have a secure, stable and loving family to support them through childhood and beyond and to give them a sense of security, continuity, commitment, identity and belonging.”

The concept of permanence is also found in the requirement under section 31(3B) of the 1989 Act for a court deciding whether to make a care order to consider the permanence provisions of a care plan. These include provisions setting out the long-term plan for the upbringing of the child and the way in which the plan would meet the child's needs.” (emphasis added)

73. Section 31 provides:

“(1) On the application of any local authority or authorised person, the court may make an order -

(a) placing the child with respect to whom the application is made in the care of a designated local authority; or

(b) putting him under the supervision of a designated local authority.

(2) A court may only make a care order or supervision order if it is satisfied -

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to -

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child’s being beyond parental control.”

It can be seen that there are very significant restrictions on who can initiate care proceedings. Further, it is well established that the threshold criteria in s. 31(2) are a substantive threshold.

74. The Supreme Court addressed the purpose of the threshold criteria in *In re J (Children) (Care Proceedings: Threshold Criteria)* [2013] UKSC 9, [2013] 1 AC 680 (“*Re J*”). Baroness Hale said:

“[1] In a free society, *it is a serious thing indeed for the state compulsorily to remove a child from his family of birth*. Interference with the right to respect for family life, protected by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, can only be justified by a pressing social need. Yet it is also a serious thing for the state to fail to safeguard its children from the neglect and ill-treatment which they may suffer in their own homes. This may even amount to a violation of their right not to be subjected to inhuman or degrading treatment, protected by article 3 of the Convention. How then is the law to protect the family from unwarranted intrusion while at the same time protecting children from harm?

[2] In England and Wales, the Children Act 1989 tries to balance these two objectives by setting a threshold which must be crossed before a court can consider what order, if any, should be made to enable the authorities to protect a child. *The threshold is designed to restrict compulsory intervention to cases which*

genuinely warrant it, while enabling the court to make the order which will best promote the child's welfare once the threshold has been crossed.” (emphasis added)

After setting out the provisions of s. 31(2) of the CA 1989, she said:

“Once that threshold is crossed, section 1(1) of the Act requires the court to treat the welfare of the child as its paramount consideration, having regard to the checklist of factors listed in section 1(3). These include “any harm which [the child] has suffered or is at risk of suffering”: section 1(3)(e). There are therefore three questions to be answered in any care case: first, is there harm or a likelihood of harm; second, to what is that harm or likelihood of harm attributable; and third, what will be best for the child?”

It can be seen that she started this analysis by referring to the compulsory removal of a child from his family *by* the state which, in this context, was principally directed to the exercise by the court of its powers under s. 31 of the CA 1989. However, what Baroness Hale said in the first paragraph is of general application: it is a “serious thing” for the court to use its powers “compulsorily to remove a child from his family of birth”.

Approach to making an SGO at the Conclusion of Care Proceedings

75. The focus of my analysis is on the approach the court should take in the circumstances of a case such as the present, namely when the Local Authority is proposing that the outcome of care proceedings should be an SGO appointing as the child’s special guardian a person who is not a member of the child’s family. However, it may well be that the same broad approach should be adopted in other similar or analogous situations.
76. In summary, as explained further below, I consider that both the context of the proceedings and the intrusive nature of the proposed order are such that the court should adopt broadly the same approach that it would adopt when making a care order. I have arrived at this conclusion in particular because, in *Re H-W* Dame Siobhan Keegan LCJ (with whom Lord Hodge DPSC, Lord Kitchin, Lord Burrows JJSC and Lord Hughes agreed) said, at [45]-[46], that the intrusive nature of the order proposed in that case (a care order for three children with long-term placement in separate foster homes) meant that:

“The principles set out in *In Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911) as to necessity and proportionality clearly apply, *mutatis mutandis*, also to this kind of case”.

In my view, the order proposed in the present case is within the same category of case as referred to in *Re H-W*, which I return to further below.

77. This does not, however, directly answer one of the questions raised in this appeal, namely the role, if any, of the threshold criteria in s. 31(2) of the CA 1989. Clearly, as a matter of law, it did not apply because the court did not *make* a care order or a supervision order. However, although this might be legally correct, I consider that the

court should typically determine whether the threshold criteria under s. 31(2) of the CA1989 Act have been established before deciding whether to make an SGO at the conclusion of care proceedings. I say, typically, because there may well be cases where such a course is neither necessary nor appropriate due to the particular circumstances of that case. Although, as explained below, I consider that in the circumstances of *this* case the court should have done so. My reasons for these conclusions are as follows.

78. First, as submitted by Ms May, it is only at the conclusion of the hearing that the court will be determining what order to make. In the present case, one of the options which was being pursued was E's return to live with the mother and/or the MGM with a supervision order. In order for the court to be able properly to consider those options, the court needed to determine whether the s. 31(2) criteria were established. I can see the force in Ms May's submission that, by saying that he did not need to consider the s. 31(2) criteria in the course of his judgment because he was not making an order under s. 31, the judge could be said to have effectively predetermined that the option of returning E to the mother and/or the MGM with a supervision order was not realistic. This needed to be properly considered and explained in the judgment. The court can, of course, rule out a proposed care option as not being a realistic or viable option before the final determination of care proceedings but there are a number of Court of Appeal authorities which have warned against this being done without proper consideration: see for example, *Re B* [2022], at [43]-[44].
79. Secondly, while this may not be required as a matter of law, the purpose of the threshold criteria, as referred to above is "to protect both the child and his family from unwarranted interference by the state", *Re J* at [44]. Baroness Hale went on to say, at [45]:

"The Review of Child Care Law: Report to Ministers of an Interdepartmental Working Party (1985) (DHSS), which led to the 1989 Act, rejected a broad welfare test, because it would not offer the degree of statutory protection against unwarranted interference which the preceding House of Commons Select Committee Report on Children in Care had considered essential: para 15.10."

This is also reflected in what Baroness Hale said in *Re B* [2013], at [186]:

"However, the reason why the threshold is crossed forms part of the court's reasons for making the order, and these must be "relevant and sufficient". *It is not sufficient that the child would be better off in another family. That is the reason for the existence of the threshold* (which was substituted for the more precise criteria laid down in the Children and Young Persons Act 1969 and the Child Care Act 1980). Furthermore, there is a relationship between this debate and the approach taken to proportionality, discussed in paragraph 197 below, which I believe to be common ground between us. If permanent removal is proportionate if it is the only way of avoiding the identified risk of harm, then it is also important that the threshold of harm is not set at too low a level ..." (emphasis added)

80. The making of an SGO, as in the present case, can, in my view, properly be described as a significant interference by the state in the same general terms as a care order or a supervision order. It may not be as significant as an adoption order but it provides for a form of permanence in a child's living arrangements and family relationships in a manner which constitutes a very significant interference in the family life of a child and her birth family. For example, in s. 14C(1), as set out above, the special guardian exercises parental responsibility to the *exclusion* of any other person with parental responsibility. It is, therefore, an "intrusive" order, using that word in the sense that it is used in *Re H-W*, at 46 (as quoted below). The court's approach, therefore, needs to reflect these elements. Adopting the same or a similar approach to that required by s. 31 would serve to ensure that the court properly recognised the significant effect of the proposed order and sufficiently analysed whether it was necessary and proportionate.
81. Thirdly, I consider that adopting this approach would also serve to ensure that the court's analysis and determination was founded on a sufficient factual foundation in particular in respect of the issue of harm and the *level* of the harm which the child has suffered or is likely to suffer. This would be part of the court's analysis in any event, because harm is a relevant factor in the welfare checklist and, as referred to by Peter Jackson LJ in *K-H (Children)(Care Orders: Proportionality)* [2025] EWCA Civ 1368, [2025] 4 WLR 116, at [59(2)], the court should adopt "the same approach ... when assessing the likelihood of harm for the purpose of the s. 31 threshold and when assessing risk under the s.1(3) welfare checklist".
82. However, adopting the s. 31(2) approach as part of the court's determination would, again, properly reflect the significant, and intrusive, effect of the proposed order and that the exercise in which the court is engaged is more than a simple welfare balancing exercise. The purpose of making threshold findings was explained in Sir Andrew McFarlane P's judgment in *Re B* [2022], at [17]:

"[17] The reason why the former President and this court in these and other judgments have stressed the importance of detailed and clear findings on threshold is not one of form for form's sake. The task of evaluating threshold goes to the core of the judicial exercise in every case. It is, in essence, what the case is about. Unless the court has a clear and detailed understanding of the basis upon which it finds, if it does, that a particular child "is suffering or is likely to suffer significant harm", substantial difficulties will be encountered when the court then moves on, as it must, to evaluate future risk of harm at the welfare stage. Public law proceedings under CA 1989, section 31 are engaged in the business of "child protection". Unless a court has made detailed findings as to what it is that a particular child is to be protected from, in terms of significant harm, it is unlikely that the court will be able to undertake a focused and bespoke evaluation of any plan to protect the child from that harm."

In my view, this applies, by analogy, with the making of an SGO in favour of a foster carer. It is a sound route for determining the issue of harm in this context as well. It would also support the need for the court's approach to adhere to the principles set out in *Re B* [2013].

83. I would add, finally, that it would help ensure that the court properly addresses in its judgment one of the key elements, as referred to by Peter Jackson LJ in *Re B* [2022], at [59(6)], namely making “findings of fact about any disputed matters that are significant for the decision”.
84. As referred to at the start of this part of my judgment, my conclusion rests significantly on the need for the court properly to address the necessity and proportionality of the type of order which the court made in this case. In *Re H-W*, in so far as relevant to the appeal to the Supreme Court, the court was concerned with care proceedings in which the Local Authority had sought, and the first instance judge had made, care orders with the care plan for the three relevant children being placement in separate foster homes. It can be seen that those orders are no more significant in their effect than the SGO which was made in the present case.
85. Dame Siobhan Keegan LCJ dealt with proportionality and necessity as follows:

“Proportionality and necessity

[45] The effect of a care order is to vest parental responsibility for the child in the local authority: section 33 of the Children Act 1989. Thereafter, the parents can exercise their parental responsibility only to the extent that the local authority determines. As this court explained in *In re B*, *that intrusive power clearly engages the article 8 rights of the parents and children*. It follows that a care order can only be made, even if the statutory threshold criteria under section 31(2) are met, if such an order is necessary in a democratic society for the protection of the child(ren)’s right to grow up free from harm. That means that the order can be made only if it is proportionate to the needs of the situation. See especially Lord Wilson JSC, paras 32-34, Lord Neuberger of Abbotsbury PSC, at paras 73-79 and Baroness Hale of Richmond JSC, at paras 194-198. And it follows also that, as Lord Wilson JSC put it, at para 45, a judge considering a care order has an obligation not to act incompatibly with the article 8 rights involved. *In truth, the obligation under article 8 of the Convention, so clearly recognised in In re B, does no more than re-state the longstanding proposition of English childcare law that the aim must be to make the least interventionist possible order*, but the emphasis given to the issue in *In re B* was overdue.

[46] In *In re B* the care order under consideration was one with a care plan for adoption of the children, so that if made it would result in a complete legal severance of the family relationship between natural parent and child. That is, no doubt, the most intrusive form of care order which our law knows. *But a care order of the kind in question here has consequences almost as far-reaching. It will break up the existing family and indefinitely so; it can be expected to last throughout the minority of the children. It will separate them from their parents and also from each other. The principles set out in In re B as to necessity and*

proportionality clearly apply, mutatis mutandis, also to this kind of case.” (emphasis added)

For the same reasons, in my view, as explained above, the principles set out in *In re B* as to necessity and proportionality should apply equally in the circumstances of the present case.

86. I would also note, at [25], Dame Siobhan Keegan LCJ approved the direction which the judge had given himself in that case:

“It is not enough simply to consider that [sic] the paramountcy of the children’s welfare and the matters itemised for consideration in section 1(3) of the Children Act 1989, commonly referred to as the welfare checklist. I have to consider the proportionality of any decision I make to remove a child permanently from their family. In other words, I have to be satisfied that the steps taken or the order made are indeed proportionate to the harm found or feared.” (emphasis added)

87. The approach which the court is required to take and which, in my view, should be applied to the present case has been dealt with in a large number of cases. We were referred at the hearing to the summary in Peter Jackson LJ’s judgment (with which Singh and Warby LJ agreed) in *Re N (A Child: Placement Order: Proportionality)* [2025] EWCA Civ 154, at [39]-[44]. Since we heard this appeal, he has given a further judgment (with which Edis LJ and Sir James Dingemans SPT agreed) in *F (Children: Placement Orders: Proportionality)* [2026] EWCA Civ 990 in which he again summarised the required approach and which I propose to quote in full:

“[46] In Re H-W at [56] the Supreme Court confirmed that, in discharge of the obligations imposed under the Children Act and the Human Rights Act, these questions need to be asked and answered by a court that is considering the removal of children from their family:

- (1) What was the likelihood that the children would suffer harm in parental care?*
- (2) What would be the consequences of such harm arising?*
- (3) What are the possibilities for reducing the risk or mitigating the consequences?*
- (4) What are the comparative welfare advantages and disadvantages of the options presented?*

[47] A structured approach of this kind is also found in a series of decisions of this court, referred to by the judge in the April judgment at [77-78]: Re F (A Child: Placement Order: Proportionality) [2018] EWCA Civ 276; [2018] All ER (D) 94 (Dec); [2019] 1 FLR 779; L-G (Children: Risk Assessment) [2025] EWCA Civ 60; and Re N [2025] EWCA Civ 1541. I made

similar observations in *Re T (Children: Risk Assessment)* [2025] EWCA Civ 93; [2025] 4 WLR 97; [2025] 2 F.L.R. 263, setting out the questions in this way:

- (1) What type of harm has arisen and might arise?
- (2) How likely is it to arise?
- (3) What would be the consequences for the child if it did?
- (4) To what extent might the risks be reduced or managed?
- (5) What other welfare considerations have to be taken into account?
- (6) In consequence, which of the realistic plans best promotes the child's welfare?
- (7) If the preferred plan involves interference with the Article 8 rights of the child or of others, is that necessary and proportionate?"

88. I would also note that the requirement that the court undertake a sufficient proportionality evaluation, specifically when deciding whether to make an SGO in care proceedings in favour of a foster carer, was identified in *Re A (Special Guardianship: Competing Applicants)* [2018] EWCA Civ 2240, [2019] 1 FLR 687. In that case, the Court of Appeal (Lewison, Peter Jackson and Newey LJ) allowed an appeal in part because, as it was phrased in the ground of appeal, at [12(1)], the judge had “failed to undertake [an adequate] proportionality evaluation of the necessity of State interference with the child's rights under Art 8 of the [ECHR] and in particular whether placement outside his birth family was proportionate to his welfare needs”.

Determination

89. Having addressed above what I consider to be the proper legal approach in the circumstances of this case, I can set out my conclusions very briefly.
90. I fully appreciate the pressures that the judge was under to deliver his judgment and to conclude these proceedings which had greatly exceeded the statutory time limit. I also appreciate, as referred to above, that we have been able to focus principally on the right legal approach while the judge had to consider a wide range of issues. However, it will be clear from what I have said above that I have, regrettably, come to the conclusion that the judge's approach was flawed.
91. First, I consider that the judge should have determined whether, and if so how, the threshold criteria were established, which would have included determining the matters relied on by the Local Authority in its final threshold document. This is in part because the care options which required analysis and determination included the making of a supervision order as well as, on the mother's and the MGM's respective cases, a care order. It is, however, also because this should have been included as part of the structure of the judgment so as properly to reflect that the court was determining care

proceedings and that one of the options being considered was an SGO in favour of E's foster carer.

92. Secondly, I consider that the court was required to apply the conventional and well-established principles which apply when the court is deciding whether to remove a child from their family which include whether the order which the court is proposing to make is necessary and proportionate. This, again, was required so as properly to reflect the fact that the court was determining care proceedings and that the order being sought was an SGO in favour of a foster carer, an "intrusive" form of order which, to quote again from *H-W*, "has consequences almost as far-reaching" as an adoption order and certainly not less than those of many care orders.
93. It is not necessary to determine the other elements of the mother's and the MGM's appeals but I consider there is considerable force in many of them, in particular the absence of any assessment of the mother since 2024 and the need for a proper analysis of the risks relied on by the Local Authority if E were to return to the care of the mother and/or the MGM based on clear findings.
94. In conclusion, for the reasons set out above, the mother's and the MGM's appeals must be allowed and the matter remitted for rehearing.

Lord Justice Singh:

95. I agree.

Lord Justice Phillips:

96. I also agree.