Delay and the 26-week time limit

BY KATHARINE BROWN

Delay and the 26-week time limit

1. Care practitioners will be all too familiar with the 26-week time limit imposed by section 14 of the Children and Families Act 2014 and section 32(1)(a)(ii) of the Children Act 1989. It is this limit that has been the cause of pressure on public law children proceedings to conclude by a certain date, often leading to a recommendation by psychologists, psychiatrists, social workers and children's guardians that a parent is unable to make sufficient or sufficiently enduring changes within the children's timescales.

2. It is engrained in the family justice system that delay should be avoided, the principle that delay is to be considered prejudicial to a child's welfare being enshrined in section 1(2) of the Children Act 1989 and the principle that dealing with a case 'justly' means dealing with it 'expeditiously' being set out plainly within the overriding objective at FPR 1.1(2)(b).

3. The origin of the 26-week metric is the Family Justice Review dated November 2011 by David Norgrove (often colloquially referred to as the 'Norgrove report'), which concluded that "delay has become habitual" and recommended that there should be a statutory time limit of 26 weeks for the completion of care proceedings. The 'View from the President's Chambers' of Sir Andrew McFarlane dated 29th November 2022, reiterated this concern in the wake of the pandemic, writing:

> *"What is required is compliance with a statutory obligation that has been imposed for the benefit of children. In that context excuses based on lack of resources and staffing must not prevent the changes that must not occur."*

4. The time limit, and the principles underpinning it, are well established within public child law and were introduced with the aim of upholding the welfare of the child. They have recently, however, been revisited. This article will examine three recent decisions in which delay and the statutory time limit were considered.

London Borough of Enfield v E [2024] EWFC 183

5. This case concerned a girl, E, born in December 2021. The care plan of the local authority was to place E in the care of her paternal aunt in the jurisdiction of Ghana under the auspices of a Special Guardianship Order. Mr Justice MacDonald, in delivering judgment, made clear his concern for the delay in these proceedings. He points out that the case had been ongoing for 2 years when it was reallocated to him in April 2024, and that at the time of handing down judgment it was in week 131, as against the 26 week time limit. He elaborates at paragraph 2:

> *"Prior to the matter being reallocated to this court, the case had been dealt with by no less than nine judges across seventeen hearings. There have been seven Issues Resolution Hearing listings and an adjourned final hearing. Prior to it being re-allocated, the case had passed through the hands of a total of thirty-three different advocates. Having been the subject of proceedings and placed in foster care since shortly after her birth, E is now aged 2 years and 4 months old. The observation of the Children's Guardian in her final report that the proceedings are "significantly beyond the target timeframe for reaching decisions regarding [E's] permanency" is the very definition of an understatement. Whilst this judgment must and will concentrate on the decision that falls to be made for E, I am obligated to deal also in this judgment with the manifest and wholly unacceptable delay for E."*

6. There were a total of four case management hearings, "*four*" appearing in italics in Mr Justice MacDonald's judgment at paragraph 13, in the first 10 days of the proceedings "simply to determine the question of E's interim placement, notwithstanding that a pre-birth referral had been made to the

local authority some 3 months earlier on 14th October 2021." Further, Mr Justice MacDonald questions at paragraph 15 why the local authority at the hearing on 26th January 2022 was searching for an alternative residential assessment where the first had broken down. He goes on to criticise the court's decision in February 2022 to direct a psychiatric assessment of the mother to enable her to have a further residential assessment, in circumstances where no decision as to a residential assessment under section 38(6) had been made, there was no cogent evidence of the mother suffering a significant mental health condition, and the court already had a comprehensive psychological assessment before it. Moreover, Mr Justice MacDonald comments it was only at the sixth case management hearing that an assessment by Communicourt was directed to determine the mother's need for an intermediary during proceedings.

7. The judgment goes on to identify different reasons for delay within the proceedings, including delays in listing and the matter coming before judges who had not previously dealt with the case on multiple occasions. It was at the IRH at week 79 that the court was informed the local authority had changed its care plan and now sought to place E with her paternal aunt in Ghana. She was then joined to proceedings.

8. The court's decision was that it is in E's best interests to be placed with her paternal aunt under an SGO order and for permission to be given for the paternal aunt to remove E from the jurisdiction. As to the issue of delay, Mr Justice MacDonald commented in his conclusion at paragraph 87:

> *"In the foregoing statutory context, there have been multiple examples in this case of a failure by the court, legal practitioners and welfare professionals to comply with the law put in place by Parliament to ensure that children do not suffer damaging delay in the determination of care proceedings brought in respect of them. The failure in this case to comply with law governing delay and the case management of proceedings under Part IV of the Children Act 1989 has led to a new-born child remaining in foster care for over two years whilst the errors and omissions summarised above played out before nine different judges over seventeen*

hearings involving thirty-three different advocates. The adverse impact on E cannot and should not be underestimated."

9. Repeated applications and directions for assessment of the mother despite placement breakdown were singled out as particular features contributing to delay.

Re F (A Child) [2025] EWFC 13

10. Ms Justice Henke delivered judgment on a case concerning a child, F, born in the summer of 2020. She was 23 months old at the time the application was issued and was 4 years and 4 months old at the time judgment was handed down. The final care plan of the local authority was a plan for F to be adopted. These were the second set of proceedings F had been subject to. The first resulted in a supervision order made on 20th October 2021.

11. At the first hearing on 9th August 2022, the local authority had not identified a suitable foster placement. It was not until the third hearing on 28th October 2022 that interim removal was refused and the court endorsed a plan for F to be placed in a mother and baby foster placement with the mother. There were then a series of consent orders relisting the IRH, which eventually took place on 5th April 2023. The final hearing was then adjourned, originally 13th November 2023 and relisted on 13th May 2024. At the final hearing the court refused to endorse the local authority's care plan and invited the local authority to change its plan to one of long term foster care. Once final care orders were made on 3rd June 2024, the local authority sought permission to appeal and this application was adjourned to 11th October 2024. The appeal was heard on 9th August 2024 and judgment was delivered on 29th August 2024. The Court of Appeal allowed the appeal and remitted the application for a public law order and a placement order. Ms Justice Henke concluded that F's best interests throughout her life will be met by an adoptive placement outside her family.

12. Mrs Justice Henke goes on to make comment as to the delay in this case, beginning at paragraphs 71:

> *"I cannot close this judgment without considering the protracted nature of the proceedings before me. The delay in this case is unconscionable. The second public law application was issued as long ago as July 2022. It has taken nearly 30 months to reach a conclusion. Delay is contrary to the interests of all children, and it has been contrary to F's welfare. She has been the subject of social care intervention all her life and within these current proceedings alone has had to wait for more than half her life awaiting a decision about her future. During that time, she has had eight separate placements. F deserved better than that."*

13. She then identified three factors which contributed to delay: the use of consent orders, the professionals at times losing sight of F being the subject of proceedings and her best interests being the paramount consideration, and the pressure on the family court system leading to the lapse of time between the IRH in April 2023 and the final hearing in November 2023. As to the use of consent orders, she cites PD12A paragraph 6.1-6.6 which states that applications for an extension should wherever possible, only be made so that they are considered at any hearing for which a date has been fixed. As to professionals losing sight of F's interests, she acknowledges that the mother is engaging and vulnerable which led to the natural reaction of professionals being to want to nurture her and enable her to effectively parent. In short, the mother was given too many chances to parent.

M (A Child) [2025] EWCA Civ 214

14. Lady Justice King, sitting in the Court of Appeal, dismissed an appeal against a placement order made by HHJ Astbury in respect of a boy, M, aged 18 months. At the hearing of the appeal, M had been subject to care proceedings throughout his entire life, a total of 62 weeks.

15. During the care proceedings in relation to the mother's older children, pre-birth assessments were carried out in anticipation of M's birth in August 2023. M was placed in foster care on 25th October 2023, following his parents not complying with the safety plan. The final hearing of the care

proceedings in relation to M were heard over five days in October 2024. The court made a Care Order and a Placement Order. The aunt and uncle were given party status and were represented at the final hearing. They appealed against the making of the Placement Order.

16. The local authority had commissioned a Children and Families Across Boarders (CFAB) assessment of the aunt and uncle, which concluded that the aunt and uncle "are suitable to be considered to care for the children if they are provided with financial support. If financial support cannot be given to the respective carer, then I am not recommending this placement." The court commented that it is clear that a decision should have been made not to pursue the aunt and uncle as an option for placement upon receipt of the CFAB assessment. This was a view which, on reflection in the course of her oral evidence, was shared by the social worker. The CFAB assessment was received on 4th April 2024, when proceedings had been ongoing for eight months. A number of case management directions were not complied with and the local authority sought further time to consider the aunt and uncle in May 2024.

17. By 1st August 2024, there were continuing issues with the aunt and uncle accessing funding from the local authority. The judge, on 1st August 2024, expressed her concern as to the local authority's "linear outlook on the care planning" and invited it to "ensure it keeps in mind the realistic options available to M balanced with delay for him having permanency." At the hearing on 19th August 2024, the local authority confirmed its plan would be to seek Care and Placement Orders. This meant that when the matter was heard at a final hearing, over fourteen months after proceedings had been issued, visas had yet to be obtained which would take at least six weeks. There would then have to be a detailed assessment over a number of weeks. Negotiations would then have to take place over funding due to the aunt and uncle's financial position. The next stage would have been further court hearings to apply for a Guardianship Order in Pakistan before M moved there. This, in itself, could take six months.

18. At paragraph 34, Lady Justice King commented:

> *"As Mr Styles on behalf of the Children Guardian observed in oral submissions, this uncertain and protracted process was only going to start when the proceedings had already been in train for over a year and in circumstances where there would now be immense challenges for the local authority to obtain approval from the relevant resources committee to fund the placement with the aunt and uncle now that the care plan had been changed to one for adoption."*

19. The judge at first instance made care and placement orders. She concluded that further delay, for an unknown length of time, was contrary to M's needs. The grounds of appeal included, amongst others which are less pertinent to the subject of this article, that the judge was wrong to "fail to consider if a "robust and focused timescale" could have been imposed to lead to an expeditious resolution of proceedings following further assessment of the aunt and uncle".

20. Lady Justice King acknowledged the matters beyond the court's control, including obtaining funding from the Resource Panel, obtaining a visa from the Home Office, and obtaining a Guardianship Order in Pakistan. She ultimately endorsed the trial judge's decision, making the following comments at paragraphs 63 and 64 respectively:

> *"These and other matters which are outside the control of the Court have to be taken into account when deciding whether a further extension of the proceedings are to be permitted. Further, it has to be remembered that "Day 1" for the consideration of acceptable timescales is not by reference to the date that a court agreed to adjourn the final hearing, but is the date on which the care proceedings were issued, as Peter Jackson LJ said in Re S-L (cited above), any court should be "acutely aware that for babies and young children the passage of weeks and months is a matter of real significance"."*
>
> and

"the judge's careful and sympathetic analysis of the application for an adjournment for further assessments of the aunt and uncle cannot be faulted and in my judgment she reached the right decision given the uncertainties inherent in the proposed plan for placement in Pakistan and the urgency of achieving permanency for M."

21. Lady Justice King concludes by agreeing with the trial judge that the decision was a difficult one, but not finely balanced. She comments that delay was one reason, but there were many other reasons why being adopted in the UK was in M's best interests.

Comment

22. Each of these recent decisions make the point emphatically that delay is prejudicial to a child's welfare and that courts and practitioners should guard against it at every stage of proceedings. It is clear that whilst the court's lack of availability to list hearings is one factor contributing to the delayed conclusion of care proceedings, there are many others that practitioners and judges should be alert to, including multiple assessments, a lack of judicial continuity, the use of consent orders and applications being made late in proceedings. It is clear, particularly from the case of M, that avoiding delay sometimes requires the professionals to take a bold stance in favour of the certainty and security of the child's placement as opposed to holding out for parents or family members to be ready to care for a child.

23. Conversely and more broadly, it bears contemplating whether the 26 week time limit truly benefits those for whom it was designed, the children subject to care proceedings. It is this 26 week yardstick that the family court utilises to define 'delay'. Whenever delay is in question in children proceedings, the principle contained within adage that "justice must never be sacrificed on the altar of speed" coined in the well-known case of ***Re NL (A child)*** **[2014] EWHC 270** should be bourne in mind. The Norgrove report was written at a time when the family justice system was under immense pressure and its recommendations were endorsed in statute in an effort to regain control. When the outcome of care proceedings, particularly in a case where a plan of adoption is endorsed, will set the course

of a child's life, does the 26 week limit sometimes preclude a parent or family member from caring when just a little more time would avoid a lifetime of separation from that child's birth family? Is the 26 week limit too process-driven and not fit for purpose? These questions should be grappled with by all professionals involved in care proceedings. For now, however, the 26-week limit, and the pressure it exerts on public child law proceedings, remains.

Katharine Brown
St Ives Chambers

Law is correct as at 7th May 2025