Case Number: ZE19C00405

IN THE FAMILY COURT SITTING AT BROMLEY

10 January 2020

BEFORE:

HER HONOUR JUDGE LAZARUS

BETWEEN:

LONDON BOROUGH OF BEXLEY

Applicant

-and-

MR & MRS B

CHILD A, by her Children's Guardian

Respondents

- **Mr Alex Walker,** counsel instructed on behalf of the London Borough of Bexley
- **Ms Victoria Haberfield,** counsel instructed on behalf of the Mother
- **Ms Susan George,** counsel instructed on behalf of the Father
- **Ms Paulena Panayiotou,** solicitor instructed by A's Children's Guardian

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JUDGMENT

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1. Fortunately, the outcome that I approve for this little girl is an agreed one. The local authority has withdrawn its application for a placement order and its plan for adoption and proposes to continue to care for A in long term foster care under a final care order, with regular direct contact with her family which will be established at a minimum level in an order. The parents, who initially volunteered A into foster care due to their recognition that they cannot meet her needs, agree that she should remain in long term foster care and have agreed changes to a final care plan and a contact order that reflect her needs. The Children's Guardian has shifted her position from an initial support for adoption to support for this amended plan, in particular having heard a number of issues raised in court and during the expansion of the social worker's evidence during cross-examination.
2. The first part of this judgment will address this final order.
3. The second part of this judgment will address the regrettable circumstances which led to the adjournment of the first and ineffective final hearing listed before me last November, and my consideration of whether the local authority should bear the costs of that wasted hearing due to the numerous flaws in its application for a placement order.

THE LAW – CARE ORDER & CONTACT ORDER

4. This application for a care order and an application for an order for contact with a child in care are governed by the Children Act 1989.
5. A's welfare is paramount and no order should be made unless it is in her interests. Delay is to be avoided as inimical to those interests.

6. A requirement before any section 31 care order may be made, is that the court must be satisfied that the threshold test set out in section 31(2) Children Act 1989 is met, either by agreement or by findings, namely: at the time protective measures were put in place and have continued since, in this case on 1 July 2019 when the local authority issued its application for a care order, that A had suffered and/or was likely to suffer significant harm and that harm or likelihood of harm was attributable to the care given to her or likely to be given to her, if an order was not made, not being what it would be reasonable to expect a parent to give her. The phrase 'likely to suffer' should not be equated with 'on the balance of probabilities', but as "in the sense of a real possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case" – *Re H and R (Child Sex Abuse: Standard of Proof) [1996] 1 FLR 80 HL.*

7. In this case, I have seen an agreed Final Threshold document dated 30 October 2019 which briefly summarises the position as follows: "A is likely to suffer significant emotional and physical harm and her needs being unmet as her parents are not requesting her return to their care due to their being unable to meet A's long term complex care needs."

8. I must consider the factors set out in section 1 Children Act 1989, known as the welfare checklist:
    a. *the ascertainable wishes and feelings of the child concerned (considered in the light of her age and understanding);*
    b. *her physical, emotional and educational needs;*
    c. *the likely effect on her of any change in her circumstances;*
    d. *her age, sex, background and any characteristics of her which the court considers relevant;*
    e. *any harm which she has suffered or is at risk of suffering;*

f. how capable each of her parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting her needs;

g. the range of powers available to the court under this Act in the proceedings in question.

9. Each family member's European Convention on Human Rights Article 8 rights to respect for their family life are engaged, and any intervention of the court must be to promote those rights, to balance competing rights, and in doing so to give appropriate precedence to the welfare of the child and ensure that any intervention is necessary and proportionate. It is essential to bear in mind the principle that it is preferable, while also considering and balancing A's needs, for her to be brought up within her own family.

THE FACTS – CHILD A

10. A was born in [2015]. She is now a lively engaging 4 year old girl. She has lived and thrived in foster care since summer 2019.
11. A suffers from a number of complex disorders which result in significant developmental, educational, physical and medical needs. One such is a genetic disorder with wide effects, and the extent to which she experiences physical growth delay and intellectual disability will emerge more fully as she gets older. There is no cure for this genetic disorder, but significant input by carers and professionals can assist in mitigating some of the typical disabilities experienced and may help A to reach more of her potential.
12. She successfully received operative treatment for a heart disorder as a baby. Gastro-oesophageal reflux and an unsafe swallow have required her to be fed by a naso-gastric tube from infancy, and to have gastrostomy surgery when an older baby. She takes no food by mouth, and is fed by a jejunostomy tube extension using a percutaneous endoscopic gastrostomy. Her feeding and weight gain were of concern before she moved into foster care, but this has now progressed well.
13. She has some words, and understands more than she can speak, including a few words in her parents' native languages, but the extent to which she will develop verbal language skills is yet to emerge. She uses some gestures, sounds and facial expressions to communicate. She is doubly incontinent. She experiences some physical disability, currently observed as delayed gross and fine motor skills, foot-dragging when walking, joint laxity and low muscle tone.
14. A is under the care of a speech therapist, physiotherapist, occupational therapist, dietician, continence nurse specialist, orthoptist, community paediatric nursing and consultant paediatrician. Progress in her skills, and appropriate attendance at her numerous medical appointments and following through with therapeutic recommendations, have all improved since moving into foster care.
15. A was born into a large family of European heritage. Her mother is in her 40's and her father is in his 50's. She has five siblings, three of whom are adults and the youngest two of whom are of primary school age. Her adult siblings are each married and have a large number of children between them. Both sets of grandparents live in this country, plus various uncles, aunts and cousins, and with the rest of her very large extended family living in their country of origin.
16. Her family's native languages are a particular dialect of their ethnic group and the language of their country of origin. Her parents speak little English but have successfully settled here over the last 21 years, and her father works as a driver. Her mother is unable to read or

write. Her mother has had a long-standing problem with back pain, and occasional low mood. Her siblings and cousins also speak English and are settled in this country. The younger siblings are in education, her oldest brother works as a driver, and her older sisters are full-time parents whose husbands are also working. There are no health or welfare concerns about any of A's siblings or nieces and nephews.

17. Her family have a lively and devout religious belief, attending their place of worship regularly, and a traditional outlook. Women in the family tend to dress traditionally. Life centres around the family and place of worship. Her family routinely holidays for six weeks each summer to spend time with their extended family and experience life in their country of origin.
18. A's parents always struggled to fully and safely meet and understand A's complex physical and developmental needs. This led to numerous hospitalisations as a baby and very young child, primarily due to her feeding difficulties and consequent chest infections due to aspiration and swallowing problems. A problem particularly arose in summer 2016 when A was left with family members who had insufficient experience of her feeding needs which led to emergency hospital care, and then to A becoming subject to a Child Protection Plan in Bexley under the category of neglect from September until December 2016.
19. Overall, problems were then increasingly observed to be: an inability to grasp and meet A's enhanced care needs; a tendency to under-stimulate by trying to keep her 'safe'; a failure to understand the need to attend all appointments and follow through with all recommendations; a reluctance to step up to A's health and care needs when hospitalised; and difficulty understanding professionals possibly due to language or educational problems.
20. Thus by 2018 a referral was made to another London borough in which the family was then living, due to increasing concerns about A hardly leaving the family home, neglect of her developmental and health needs including turning down a nursery place, poor attendance at appointments, and the parents repeated requests that A be removed from their care as they felt they could not cope.
21. In early 2019 the case was transferred to Bexley as the family had returned to that borough. Efforts were made to engage the family with greater efforts to meet A's needs, but with little success. A Family Network Meeting was held in May 2019 but no potential carers were identified. Her adult siblings felt unable to offer enough care for A given their own circumstances, and supported their parents' request that a foster placement be considered for A.
22. A specialist foster placement was identified in the summer of 2019. The parents visited and have at all times since then expressed their gratitude and appreciation for the excellent care provided for A by her current specialist foster carer. Proceedings were issued in early July and I granted an interim care order in mid-July 2019.
23. The family travelled, as planned, to their country of origin for the summer break and so missed direct contact with A until early September when they returned. They had called her twice per week whilst away using video calling. Since then contact has been regular and very positive, taking place roughly fortnightly. The contact notes reveal very warm and loving relationships between A and her parents, albeit with the parents appearing to need some guidance as to how to enhance their ability to play with and stimulate A. She was noted to recognise her parents after an eight week break over the summer, and has enjoyed playing with her younger siblings and nephew at a recent contact, and to show some sadness at the end of that Christmas contact. Older siblings and some of their children have been able to attend a contact session in November, but that only took place following my observation at the November hearing that sibling contact had been thus far overlooked. She

has also been observed to use words from her family's native languages and to enjoy hearing her family singing traditional songs during contact sessions. It is suggested that A has felt slightly overwhelmed at the larger group contacts, although the notes do not state that, albeit that her foster carer has suggested that A showed some unsettled behaviour following contact with her older siblings. However, as that was a single occasion it is impossible to see any clear detrimental pattern or link between the two.

24. Initially, the local authority's plan was for adoption and to seek an adoptive placement that would be open to direct and indirect contact, but that they would prioritise finding an alternative permanent placement over the promotion of contact. The case was listed for final hearing in November, but had to be adjourned to January 2020 as it became clear that the requirements of a placement application had not been properly fulfilled and that application by the local authority had to be withdrawn. As the local authority still wished to plan for adoption there was no option but to adjourn. I discuss these issues in further detail below.
25. Having directed that a fresh Child Permanence Report (CPR) including a proper balancing exercise and Agency Decision Maker decision (ADM) should be undertaken, if the local authority wished to continue to pursue adoption for A, the final hearing restarted before me this week with a new placement application based upon that fresh CPR and ADM decision. It quickly became clear that while there was a strong emphasis on the advantages that 'permanence' could be argued to offer A via adoption, and a concession that direct contact was in A's interests, the local authority's documentation still lacked critically important considerations of key issues.
26. A further, third, opportunity was given on the first day of this hearing to the local authority to include matters that it said had been considered but just had not been written in to the fresh CPR. An expanded 'balancing exercise' section of the CPR in tabular format was then provided on the morning of the second day of this hearing.
27. Despite this fresh effort, it remained the case that key issues were significantly lacking or wholly inadequately covered, and in particular matters relating to:
    - A's rich national, ethnic, linguistic, cultural and religious identities and heritage;
    - the harms and losses of losing all legal connection and/or meaningful contact with her birth family;
    - the nature of her birth family and the relationships it offers her with many siblings and cousins of a wide range of ages and in particular those near her own age, and their family-centred culture of maintaining close and meaningful relationships with her, both now and into the future;
    - the nature and degree of this family's commitment to A, notwithstanding their admission of their current inability to cope with her developmental needs, and their commitment to co-operation with the local authority and any foster carer, and support for plans for A that meet her needs in long term foster care;
    - the nature and impact of A's particular characteristics and developmental difficulties, especially in relation to her need for direct contact and, by contrast, her ability or inability to benefit from the proposed plan of a maximum of only two direct contacts per year, the use of life story work or book, the use of internet or other resources to support her complex heritage, and indirect contact;
    - balancing the specific advantages and disadvantages of each type of placement in a rounded and comprehensive consideration of her complex welfare needs.
28. During cross-examination on these topics, the social worker conceded that the re-amended CPR did not adequately analyse the issues relevant to A's needs and characteristics and

potential losses, and disproportionately focussed on negatives relating to her family without a balanced analysis, and that as a result she could see why the conclusions of the CPR should not be relied upon. Shortly after this point, the local authority unsurprisingly asked for time to consider its position and ultimately confirmed that it would no longer be pursuing a plan for adoption and sought to withdraw its second placement application.

29. Agreement was then reached following further discussion between the parties and I have seen an amended final care plan. This proposes that A remain with her current foster carer until an alternative long-term specialist foster carer is found. All parties are aware that this may mean a placement outside the local area and possibly at some significant distance.
30. The amended care plan is now a more admirable and comprehensive document which refers appropriately to the need to support A's relationships and heritage, and the prospect of meaningful contact with so many relatives in a close-knit family which may lead to alternative options for her care and relationships as she and they grow older. It raises the prospect of alternative care arrangements including special guardianship if that prospect arises. It is a shame, however, that the local authority has still cavilled with the other parties on wording that would show a wholehearted acknowledgement of the value of this plan for A, and it has been suggested that this betrays a reluctance to acknowledge the full value of this outcome for her. That, I'm afraid, is a suggestion that has some currency given the history of the case.
31. The minimum level of contact in terms of type, frequency and duration was also agreed: monthly direct contact, supervised for two hours, save for during the family's summer break abroad; monthly video-call indirect contact, to regularly intersperse the direct contact and to replace the August direct contact when the family is abroad; two further special occasion contacts in the community around Easter and Christmas; regular reviews to consider contact arrangements, and any replacement direct contact in September following the summer break; a review to be timetabled to take place each September shortly after the first direct contact following the summer break.

THRESHOLD

32. Given the circumstances I have outlined and although it is set out very briefly as I have quoted in paragraph 8 above, I am satisfied that the agreed final threshold document adequately and accurately summarises the likelihood and source of significant harm for A.

WELFARE ANALYSIS

33. A appears to be happy and well settled with her current foster carers. She was not always observed to be happy in her parents' care due to under-stimulation and unmet needs, however she has shown herself to be fond, attached and loving towards them during contact, and to enjoy her time there with her parents and siblings. I consider that I can safely conclude that she wants these positive relationships and experiences to continue, and for her care needs and emotional needs to continue to be met.
34. She began suffering harm at home due to her parents' admitted difficulties meeting and understanding her needs. I note that they still hold beliefs that she may grow out of her difficulties or that God may cure her over time. She would be at risk of further harm if a plan for alternative care were not in place. Her parents are not capable of caring for all her needs, and have admitted as much. Her older siblings are not currently in a position to put themselves forward to do so.

35. As I have already set out, A is a little girl who will be likely to continue to have high dependence on her carers, her medical and other professionals involved in her care, and for longer than most children and possibly also into adulthood. She has far greater developmental, educational, physical and medical needs than a neuro-typical child who does not have A's diagnoses. She will require skilled attuned specialist care from a wide variety of people, including her carer.
36. Her emotional, social and cultural needs will be very similar to those of other children of her age and background, save that it is likely to be harder for her to use a wider variety of means to have those needs met and she is likely to need those around her to provide more direct and appropriate means for her. Good examples are direct contact instead of indirect, and hearing key words spoken in her family's native languages by people known to her rather than using internet or book-based learning.
37. Her background, in combination with the characteristics and difficulties that flow from her diagnoses, are highly relevant. Plainly she belongs to and can benefit from a rich, deep, coherent and well-recognised culture and heritage which is actively pursued and celebrated by her family members.
38. It is also of relevance that she may be likely to develop a less deep understanding of her national, ethnic, linguistic, cultural and religious identities and heritage than a more neuro-typical child. But that does not extinguish its overall importance to her, particularly where those things will help to underpin her family members' relationships with her. It also means that more direct effort will be required to ensure that she has sufficient exposure to and familiarity with her family background and heritage.
39. Another key element of that background, as already mentioned, is the very large family-centred tight-knit active family group that she belongs to. This already holds out the prospect of meaningful relationships with at least 29 individuals in this country in her immediate family (parents, siblings, grandparents, nephews and nieces) let alone the further dozens in the next ranks of her extended family (aunts, uncles, cousins), many of whom are close in age to A. Drifting too far from being able to create and maintain those relationships, and from some familiarity with their traditions, would be highly detrimental to A and the prospects of a future richly populated with loving relatives and their shared heritage. Supporting these aspects, and acknowledging the challenges given her characteristics, is very important to A's long-term welfare.
40. The effect of the proposed plan is to provide a specialist placement where A's complex health and developmental and care needs can be met, while at the same time facilitating these other important aspects of A's welfare. I note that A is a comparatively young child to be in long term foster care, where there is a risk of placement change and the disadvantages of corporate parenting. The local authority does not propose any alternative currently to meet A's needs, given its withdrawal of the placement application.
41. However, I note that appropriate steps and procedures are included that should support the parents' ongoing involvement and meaningful continuity of those family relationships in A's life, including efforts to address the language difficulties, such as ensuring the use of interpreters for meetings and the translation of key documents such as this judgment, the final order and the amended final care plan. This goes some way to meeting aspects of her needs relating to her family and heritage, and the significant potential that offers her into the future of meaningful relationships particularly with close relatives near her own age, while also being likely to mitigate some of the uncertainties that may apply to long term foster care.

42. I have considered and rejected the option of no order or some other order than the care order proposed. There is a clear need for the local authority to share parental responsibility: the parents were unable to exercise their responsibility sufficiently to meet A's needs; they don't fully understand the nature and implications of her diagnoses; they have fundamental language and hence communication difficulties with professional agencies that have been concerned with A's health and development; emergency decisions may need to be made from time to time; and they are absent from this country for some 6 weeks each summer.
43. I also consider that a contact order is preferable than an agreement and no order. It is sought in the context of this local authority having proposed adoption and very little contact, and only during this hearing changing the plan to reflect a broader acceptance of A's needs and circumstances, and with some ongoing reticence from wholeheartedly reflecting the advantages and importance of this option for A.
44. It is an order expressed in terms of minimum levels of contact with regular reviews to keep A's needs at the forefront of all parties' considerations, and should thereby minimise any rigidity associated with a formal order while also providing clear reassurances and ambitions as to the plans for contact and the support for A's relationships.
45. Considering these factors overall, I consider that the plan and proposals and the agreed orders adequately meet A's welfare interests.
46. I note that a care order with this plan and the associated contact order is an agreed outcome, and that therefore while it is still a substantial interference with A's and her family members' rights to respect to their family life, the interference is one that is understood and welcomed. I also consider it to be a proportionate and necessary interference in those rights, bearing in mind A's welfare interests, and in those circumstances, I grant the care order and the associated contact order.

ADOPTION – INITIAL OBSERVATIONS

47. This plan is no longer pursued by the local authority and I do not have to grapple in detail with the necessary balancing exercise. However, it is important to make a few observations at this point, particularly given the local authority's pursuit of this plan until part-way through this final hearing, and the failings relating to its placement applications.
48. The adoption welfare checklist at section 1 Adoption and Children Act 2002 would apply (set out in full below in paragraph 74), requiring consideration of those factors throughout A's life, and including A's particular needs, the effect upon her of becoming an adopted person and ceasing to be a member of her birth family, and the value to A of any relevant relationships:

*f. the **relationship which the child has with relatives** and with any person in relation to whom the court or agency considers the question to be relevant including:*
*i. the likelihood of any such relationship continuing and **the value to the child** of its doing so;*
*ii. the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop and **otherwise to meet the child's needs**;*
iii. the wishes and feelings of any of the child's relatives or of any such person regarding the child.

49. Of particular assistance is the guidance provided in the leading cases of *Re B [2013] UKSC 33*, *Re BS [2013] EWCA Civ 1146*, *Re G [2013]*, *Re R [2014] EWCA Civ 1635*: a '***global***' '***holistic***' approach, **grounded upon a sound and thorough evidential basis**, looking at the pros and cons of the realistic options in terms of A's welfare interests (including being brought up by his natural family), must all be considered, and must take into account what support might be provided to assist and the full range of orders from no order to adoption.
50. Those cases, and *Re BS* in particular, reflected on the case of *YC v UK (2012) 55 EHRR 33* which stated that family relationships should be preserved, families rebuilt and family ties only severed in exceptional circumstances, and that it is not enough to say that a child could have a more beneficial environment for their upbringing elsewhere.
51. In *Re B* the Supreme Court gave guidance in respect of the Court's role when considering a plan for adoption. The case of *YC v UK* was referred to by Lord Wilson as requiring the *"**high degree of justification** which article 8 demands of a determination that a child should be adopted or placed in care with a view to adoption."*
52. Lord Neuburger at para 77 observed as follows in relation to applications for adoption: *'As to Art 8, the Strasbourg court decisions cited by Baroness Hale of Richmond in paras [195]–[198] make it clear that such an order can only be made in 'exceptional circumstances', and that it could only be justified by 'overriding requirements pertaining to the child's welfare', or, putting the same point in slightly different words, 'by the overriding necessity of the interests of the child'. I consider that this is the same as the domestic test (as is evidenced by the remarks of Hale LJ (as she then was) in Re C and B (Care Order: Future Harm), para [34]': "34. … **Intervention in the family may be appropriate, but the aim should be to reunite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child**."*
53. MacFarlane LJ, as he then was, cautioned against an over-simplistic interpretation of the phrase "nothing else will do" in the case of *Re W (A Child)(Adoption: Grandparents' competing claim)* [2016] EWCA Civ 793, where he said:
*"The phrase is meaningless, and potentially dangerous, if it is applied as some freestanding, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare. Used properly, as Baroness Hale JSC explained, **the phrase nothing else will do is no more, nor no less, than a useful distillation of the proportionality and necessity test as embodied in the Convention and reflected in the need to afford paramount consideration to the welfare of the child throughout her lifetime: ACA 2002, section 1**. The phrase nothing else will do is not some sort of hyperlink providing a direct route to the outcome of a case so as to bypass the need to undertake a **full comprehensive welfare evaluation of all of the relevant pros and cons**".*
54. There is also significant case law emphasising the need to look carefully at the advantages offered by adoption as opposed to those offered by foster care, in terms of permanence, security and commitment, but each case turning on its own particular facts, and in every case a careful specific rather than a generic analysis being required, notably: *Re B-P (Adoption or Fostering)* [2018] EWCA Civ 2042, *Re A (Children: Adoption/Long Term Foster Care)* [2015] EWCA Civ 1021, *Re V (Children)* [2013] EWCA Civ 913.

55. It was significant in this case that the social work evidence, despite being given three opportunities to do so, simply failed to carry out that adequate comprehensive evaluation of

the issues relevant to A's welfare, as required by statute and further expanded upon in the above case law.

56. To be clear, there is no criticism of the making of an application for a placement order itself. There would have been scope for this complex and finely balanced argument to be made properly to the court, and for the court to consider all the aspects of the issues applicable to such a serious step in order to determine the appropriate outcome.
57. However, what analysis there was emerged as incomplete, partial, unsupported by sufficient evidence or reasoning. 'Permanence' was lauded above all else, with little rationale or substantiation or research to underpin that claim and the assumptions and assertions made.
58. What analyses there were hardly touched upon the disadvantages to A of adoption and effective severance from her birth family, or the problems posed by her diagnoses in terms of any attempts to mitigate those losses.
59. Negative observations in relation to the family were over-emphasised based on the slightest of evidence, and positive issues for which there was ample and good evidence were hardly mentioned if at all. Whole factors that would not sit easily with the plan for adoption were almost completely ignored. It was a skewed and highly partial approach.
60. Ultimately, such an approach not only undermines the local authority's own case for adoption because the good and substantial evidence and analysis required by the case law is simply absent, but it does not serve the child well nor assist the court.
61. I entirely accept that there are, sadly, many cases where the drastic and life-changing severance of legal and other forms of relationship with birth families are justified. Often it is where the incapability of family members to meet a child's needs or the risks of significant harm are very great, and where the benefits to the child of ongoing relationships with birth family members are scanty, being of poor quality, negative impact or largely non-existent in terms of any obvious positives or likely continuation.
62. Here, the contrast with such situations was very great, with a very large loving connected family group holding positive respectful family values, celebrating a distinct culture and heritage, highly co-operative, admitting their area of parenting failure but otherwise forming a wide group of highly functional happy secure close adult and child family members, and offering consistent positive committed loving relationships to A, and in particular with siblings, nephews, nieces and cousins who are close to A's age.
63. This required careful, nuanced, thoughtful and balanced analysis. Instead, listening to the social worker's oral evidence was a painful experience. Almost none of those benefits and contrasts were touched on at all. No research was referred to in her documents or oral evidence. It was difficult to get her to focus on A's needs and characteristics, as opposed to reciting generalised assertions about adoption. It was clear that she initially thought she had fully reviewed A's welfare interests, even though her document was largely a cut-and-paste copy of the initial CPR with a few further paragraphs added and a slightly expanded tabular discussion of various pros and cons.
64. The process of cross-examination increasingly revealed glaring gaps and distorted arguments. It was telling that, despite the local authority claiming that it grasped that this was a complex and unusual case and that all the relevant issues had been considered, in fact very few of the relevant complexities were set out or analysed in any document and not even in this social worker's re-amended document. It was further telling that, when the possibility of a contact order that would help to support A's family relationships and her

exposure to her culture and heritage was raised with the social worker, her first reaction was not to consider it in terms of A's needs and characteristics but to protest that this would narrow the pool of prospective adopters. A prime example of the tail wagging the dog.

65. Overall, the local authority's evidence was an effective demonstration of confirmation bias. The virtues of the permanence and security of a 'forever family', and which in abstract principle I do not doubt, nonetheless were sketchily asserted and additionally appeared to blind the social workers to the need to address those specific aspects of A's needs and characteristics that did not fit with that proposal, and prevented any real analysis of permanent estrangement from her birth family.
66. In particular, there was no evaluation of how that would work in combination with her likely cognitive difficulties, which would undoubtedly make it far harder if not impossible for her to benefit from sparse or indirect contact, or from using indirect resources such as the internet, language lessons or photographs to keep her in touch with her heritage and her family's native languages and practices. There was no consideration whatsoever that there would be a high likelihood of adoption realistically resulting in an effectively drastic end to A's ability to grasp aspects of her heritage, experience the warmth and breadth of her birth family, speak and understand some words of her parents' native languages, feel and benefit from the sense of belonging to this large loving family with rich and coherent traditions – even if she could not live with them.
67. The local authority's approach was starkly epitomised in the following quotation and sole rationale in the initial ADM report: '*given A's age the only permanency option viable for A is adoption*'. This assertion was made without any supporting analysis, let alone consideration of what other options might exist and how any option does or does not meet A's needs and welfare interests.
68. This flawed approach begs so many questions of this local authority. How is it that adoption appears to have become a kind of orthodoxy that requires inconvenient matters to be ignored and others to be twisted into its support? Is there an endemic automatic approach to a younger child's age which results in a simplistic tick-box response instead of a careful analysis of her particular welfare interests? What sort of positive qualities would a birth family need to offer to be able to dislodge this approach to adoption and trigger a more balanced analysis and a preparedness to consider and address the full range of options? How has this local authority not followed the clear guidance of well-known law, and so failed to provide the evidence with which to ask the court to properly determine such a drastic and serious intervention in the life of this child?
69. Ultimately, even with the further opportunities that the local authority had following the adjournment in November plus the further enhancement of the social worker's written efforts at the outset of this hearing, the exposure of these failings led the local authority to perceive that it had again manifestly failed to meet its obligations and thus it withdrew its second placement application at this adjourned final hearing. The necessary evidence and reasoning that would have permitted this court to carry out the difficult balancing exercise had simply not been properly provided.
70. These observations, and the local authority's failure to meet these requirements of well-known law, become particularly pertinent given the local authority's fundamentally flawed application for a placement order that led to the first final hearing being adjourned.

THE LAW – APPLICATION FOR A PLACEMENT ORDER

71. Certain requirements are stipulated for a local authority to be in a position to seek such a significant and powerful order. In summary, a properly designated social worker must prepare a properly composed Child Permanence Report, which in turn must be considered and will be relied upon by the Agency Decision Maker, and who in their turn must undertake a decision-making process that properly complies with statute, case law and guidance. That material, underpinning a potential application, should then be properly considered by the local authority's legal team to ensure that it complies as required, before an application for a placement order is issued.

72. It is only when the local authority is satisfied that the child ought to be placed for adoption that the duty to apply for a placement order arises under s.22 ACA 2002. A local authority cannot be so satisfied until it has made a decision to that effect under Adoption Agencies Regulations 2005 (AAR 2005) reg. 19, (*Re P-B (Placement Order)* [2006] EWCA Civ 1016, [2007] 1 FLR 1106).
73. Such a decision is no longer referred to an adoption panel but is to be taken by an Adoption Decision Maker (ADM) within the local authority, who must consider the child's 'permanence report' (CPR) and medical reports on the child and his parents (AAR 2005, reg. 19, as amended).

74. Section 1 of the Adoption and Children Act 2002 applies to an adoption agency when it is coming to a decision relating the adoption of a child. This undoubtedly includes making a decision that the child should be placed for adoption. Section 1 provides as follows:

Considerations applying to the exercise of powers

(1) Subsections (2) to (4) apply whenever a court or adoption agency is coming to a decision relating to the adoption of a child.
(2) The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.
(3) …
(4) The court or ***adoption agency must have regard to the following*** *matters (among others) –*
(a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),
(b) the child's particular needs,
(c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
(d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,
(e) any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering,
(f) the relationship which the child has with relatives, with any person who is a prospective adopter with whom the child is placed, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including –
(i) the likelihood of any such relationship continuing and the value to the child of its doing so,

(ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,

(iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

(6) In coming to a decision relating to the adoption of a child, a court or ***adoption agency must always consider the whole range of powers available*** *to it in the child's case (whether under this Act or the Children Act 1989); and the court must not make any order under this Act unless it considers that making the order would be better for the child than not doing so.*

75. In *Hofstetter v LB Barnet and IRM* [2009] EWCA 3282 (Admin) the court set out guidance for the way in which the ADM should approach a case. Although this case refers to the use of adoption panels, which no longer applies, the court identified good practice and appropriate considerations for the decision-maker:
    - list the material taken into account in reaching the decision;
    - identify key arguments;
    - ask whether they agree with the process and approach of the relevant panel(s) and are satisfied as to its fairness and that the panel(s) has properly addressed the arguments;
    - consider whether any additional information now available to them that was not before the panel has an impact on its reasons or recommendation;
    - identify the reasons given for the relevant recommendation that they do or do not wish to adopt; and
    - state (a) the adopted reasons by cross reference or otherwise and (b) any further reasons for their decision.

76. The Statutory Guidance on Adoption 2013 provides:

1.52. Before making a considered and professional decision, the decision-maker will need to consider:

- *the exercise of powers under* ***section 1 of the Act****;*
- ***all the information surrounding the case*** *including the reports submitted to the adoption panel;*
- ***that the author(s) of the reports comply with the AARs****;*
- *the stability and permanence of the relationship of any couple under consideration (regulation 4 of the Suitability of Adopters Regulations 2005)*
- *the recommendation and reasons of the adoption panel and the independent review panel; and*
- *the final minutes of the adoption panel including any minutes from adjourned panel meetings and the independent review panel.*

Where a case has not been referred to an adoption panel, references in this paragraph to the panel are not relevant. Where the decision-maker considers that they have insufficient information, or needs medical or legal advice, they should ask the agency to obtain the information/advice and the agency must comply with this request.

77. This local authority's own internal policy reflects the requirements of the legislation, regulations, guidance and case law referred to above:

5. Agency Decision Maker

The Agency Decision Maker considers recommendations from the Adoption Panel and, in those circumstances outlined in Section 1, Adoption Panel Purpose and Function, also makes decisions about whether a child is suitable to be placed for adoption without reference to the Adoption Panel. The following principles apply to all such decisions.

In reaching his/her decision, the Agency Decision Maker must consider:

- *The **welfare checklist** in Section 1 of the Adoption and Children Act 2002*;*
- ***All the information surrounding the case** including the reports submitted to the Adoption Panel (where applicable), and **that the authors of the reports are appropriately qualified to prepare them** (see Section 7, Reports to Adoption Panel);*
- *The stability and permanence of the relationship of any couple under consideration;*
- *The recommendation and reasons of the Adoption Panel and any Independent Review Panel under the Independent Review Mechanism; and*
- *The final minutes of the Adoption Panel including any minutes from adjourned Panel meetings and the Independent Review Panel;*
    a. **The child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding);*
    b. *The child's particular needs;*
    c. *The likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person;*
    d. *The child's age, sex, background and any of the child's characteristics which the court or agency considers relevant;*
    e. *Any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering;*
    f. *The relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including:*
        i. *The likelihood of any such relationship continuing and the value to the child of its doing so;*
        ii. *The ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs;*
        iii. *The wishes and feelings of any of the child's relatives, or of any such person, regarding the child.*

It is good practice for the Agency Decision Maker:

- *To list the material taken into account in reaching the decision;*
- *To identify key arguments;*
- *To state whether they agree with the process and approach of the relevant Panel(s) and are satisfied as to its fairness and that the Panel(s) has/have properly addressed the arguments;*
- *To consider whether any additional information now available to them that was not before the Panel has an impact on its reasons or recommendation;*
- *To identify the reasons given for the relevant recommendation that they do or do not wish to adopt; and*

- *To state (a) the adopted reasons by cross-reference or otherwise and (b) any further reasons for their decision.*

78. In *Re B (Placement Order)* [2008] 2 FLR 1404 the Court of Appeal (judgment of Wall LJ) set aside a placement order made in circumstances where the local authority had committed a serious and material error, in breach of the 2002 Act and Regulations, in the process leading to the ADM decision. Where the procedure is materially flawed, the ADM cannot properly be satisfied that the child should be placed for adoption, nor can the court rectify deficiencies in the process:

    The adoption agency's error had been not only serious but also material; if the decision of the Agency Adoption Panel (AAP) was flawed in any material respect, then the decision maker could not properly consider the AAP recommendation, and thus could not be satisfied that the child in question should be placed for adoption. The hearing before the recorder at which he approved a care plan for adoption had not, and could not have, rectified the deficiencies in the process. ***Parliament had laid down a careful process for the making of placement and adoption orders, to be respected and scrupulously implemented; the framework could not be bypassed or short-circuited. The Act and the Regulations were to be honoured and obeyed in their entirety****.*

79. It was emphasised again by the Court of Appeal in *Re S (Children) (Adoption proceedings: Guidance on placement order proceedings)* [2014] EWCA Civ 601 that in order for the ADM to make a lawful decision, the Regulations must be complied with:

    Indeed, I would go further: ***in order for the agency decision maker to make a lawful decision that the children be placed for adoption, the Adoption Agencies Regulations 2005 (as amended) must be complied with****. For that purpose, the agency decision maker has a detailed "permanence report" which describes the realistic placement options for the child including extended family and friends. The report describes the local authority's assessment of those options. When a decision is then made by the agency decision maker it is based on a holistic non-linear evaluation of those options. That decision leads to evidence being filed in placement order proceedings. It is good practice for that evidence to include the permanence report used by the agency decision maker, the record or minute of the decision made and a report known as an "annex A" report which is a statutory construct which summarises the options and gives information to the court on the suitability of the adoptive Applicants. All of this permits the court to properly evaluate the adoption placement proposal by comparison with the other welfare options.*

80. Regulation 17 of the AAR 2005 sets out the matters which must be contained in the Child's Permanence Report:

    (1) The adoption agency must prepare a written report ("the child's permanence report") which shall include—

    (a) the information about the child and his family as specified in Parts 1 and 3 of Schedule 1;

    (b) a summary, written by the agency's medical adviser, of the state of the child's health, his health history and any need for health care which might arise in the future;

    (c) the wishes and feelings of the child regarding the matters set out in regulation 13(1)(c);

(d) the wishes and feelings of the child's parent or guardian, and where regulation 14(4)(a) applies, his father, and any other person the agency considers relevant, regarding the matters set out in regulation 14(1)(c);

(e) ***the views of the agency about the child's need for contact with his parent or guardian or other relative or with any other person the agency considers relevant and the arrangements the agency proposes to make for allowing any person contact with the child;***

(f) ***an assessment of the child's emotional and behavioural development and any related needs****;*

(g) an assessment of the parenting capacity of the child's parent or guardian and, where regulation 14(4)(a) applies, his father;

(h) a chronology of the decisions and actions taken by the agency with respect to the child;

(i) ***an analysis of the options for the future care of the child which have been considered by the agency and why placement for adoption is considered the preferred option;*** *and*

(j) any other information which the agency considers relevant.

81. The Statutory Guidance on Adoption provides that information must be accurate and distinguish fact from opinion:

1.17. Reports should be legible, clearly expressed and non-stigmatising. ***The information should be accurate and based on evidence that distinguishes between fact, opinion and third party information****. The information should be checked to ensure that it is accurate and up to date before it is submitted to the adoption panel.*

82. The guidance goes on to explain why the accuracy of the CPR is so important:

2.64. The ***accuracy of the CPR is essential, since it will not only form the basis on which decisions are made about whether the child should be placed for adoption*** *but will also assist the agency in matching the child with an appropriate prospective adopter, and will be the source of the information about the child on which the* ***prospective adopter*** *will rely. In due course* ***the child, on reaching adulthood****, will be able to request a copy of the CPR under the AIR and may have to rely on this document as* ***the principal source of information*** *about their pre-adoption history.*

83. The Court of Appeal has emphasised the legal requirement for the CPR to contain an analysis of all relevant placement options, including the reasons why adoption is the preferred plan. In *Re B (care proceedings: proportionality evaluation)* [2014] EWCA Civ 565, [2015] 1 FLR 884, concerning a successful appeal against a placement order, Ryder LJ observed that the CPR *"ought to be one of the materials in* ***which a full comparative analysis and balance of the realistic options is demonstrated*** *… That was* ***necessary not just for the court's purposes but also for the local authority's (adoption) agency decision maker whose decision is a pre-requisite to a placement application being made****."*

84. In *Re S-F (a child)* [2017] EWCA Civ 964 the Court of Appeal highlighted the need for reasoning to be specifically related to the child concerned:

*The proportionality of interference in family life that an adoption represents **must be justified by evidence not assumptions that read as stereotypical slogans**. A conclusion that adoption is better for the child than long term fostering may well be correct but an assumption as to that conclusion is not evidence even if described by the legend as something that concerns identity, permanence, security and stability.*
*In order to have weight, the proposition that adoption is in the best interests of the child concerned throughout his life and is preferable to long term fostering should be supported by a social work opinion derived from **a welfare analysis relating to the child**. If appropriate, the **conclusions of empirically validated research** material can be relied upon in support of the welfare analysis, for example: research into the feasibility and success of different types of long term placements by reference to the age, background, social or medical characteristics. As this court has repeatedly remarked, **the citation of other cases to identify the benefits of adoption as against long term fostering is no substitute for evidence and advice to the court on the facts of the particular case**.'*

85. Section 94(1) of the Adoption and Children Act 2002 provides that only persons who meet a "prescribed description" (as set out in the regulations) may prepare a CPR and contravention of this is an offence:

*(1) A person who is not within a **prescribed description** may not, in any prescribed circumstances, prepare a report for any person about the suitability of a child for adoption or of a person to adopt a child or about the adoption, or placement for adoption, of a child.*

'Prescribed' means prescribed by regulations made by the Secretary of State after consultation with the Assembly.

(2) If a person –

(a) contravenes subsection (1), or

(b) causes a person to prepare a report, or submits to any person a report which has been prepared, in contravention of that subsection,

he is guilty of an offence.

(3) …

(4) A person is not guilty of an offence under subsection (2)(b) unless it is proved that he knew or had reason to suspect that the report would be, or had been, prepared in contravention of subsection (1).

But this subsection only applies if sufficient evidence is adduced to raise an issue as to whether the person had the knowledge or reason mentioned.

(5) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.

86. The Restriction on the Preparation of Adoption Reports Regulations 2005, regulation 3 sets out the "prescribed description":
<u>A person within a prescribed description</u>
3. (1) A person is within a prescribed description for the purposes of section 94(1) of the Act if

(a)he is a social worker who is employed by a local authority or registered adoption society and who satisfies at least one of the conditions set out in paragraph (2)(a) or (b);
(b)… or
(c)….
(2) The conditions referred to in paragraph (1) are that the person—
(a)has ***at least three years' post-qualifying experience in child care social work, including direct experience of adoption*** *work;*
*(b)****is supervised by*** *a social worker who—*

> *(i)is employed by the local authority or registered adoption society in question; and*
> *(ii)has* ***at least three years' post-qualifying experience in child care social work, including direct experience of adoption*** *work.*

87. The Statutory Guidance on Adoption sets out what is meant by "direct experience of adoption" as follows:

1.13. The necessary experience is at least three years' post-qualifying experience in childcare social work, including direct experience of adoption work. While the AAR do not define 'direct experience of adoption', this should be experience as:

- *a social worker responsible for a child where the agency has decided that the child should be placed for adoption and the social worker has been personally involved in considering whether the child should be placed for adoption, the matching, placement and review stages of the adoption process; and/or*
- *a social worker responsible for the recruitment, preparation, assessment and support of adoptive families.*

88. The guidance also sets out the expectations of the role of the supervisor:

1.15. For those individuals who are being supervised, their work should be supervised in accordance with their particular skills, experience and development needs. It is not necessary for the supervised social worker to be under the direct line management of the supervising social worker.

1.16. Where reports are being prepared by social work students, independent social workers or social workers who do not have the necessary experience, ***the draft report should be considered and discussed during supervision and signed off by a social worker with the necessary experience before the report is submitted*** *to the adoption panel, another agency, or the court.*

1.18. The ***person who prepares the report should sign and date it and indicate how they meet the requirements of the AAR. Where the person has been working under the supervision of a suitably qualified social worker, that social worker should sign the report as well, indicating the capacity they are working in and how they meet the requirements of the AAR****.*

89. The Statutory Guidance also provides that:

1.30. Each agency must appoint at least one agency adviser to adoption panels. Their duties and qualifications are set out in AAR 8.

*1.32. The **agency adviser should maintain an overview of the quality of the agency's reports**, to both the panel and to the decision-maker, and **liaise with team managers to quality assure the child's permanence report**, the prospective adopter's report and the adoption placement report. Where there are concerns about a report, the agency adviser and the panel chair should consider whether it is adequate for submission to the panel. It will be **for the agency adviser alone to decide whether the report is adequate for submission to the decision-maker**.*

ANALYSIS OF THE PLACEMENT APPLICATION

DEFICIENCIES OF THE CHILD PROTECTION REPORT –

90. The initial CPR is dated 2 September 2019. It appears that it was completed before the family returned from holiday in their country of origin. It was suggested that some excuse as to its deficiencies can be found in the shortness of time available to the social worker before the date when final evidence was required from the local authority and the date of the next hearing in late September. This is not a good excuse. If necessary, more time must be sought in order to ensure that such an important document is properly prepared.
91. The local authority, in the statement of its Director of Children's Services dated 9 January 2020, accepts that the CPR was deficient as follows:
'*an inadequate comparative assessment of placements relating specifically to the characteristics of A'*; '*insufficient forensic analysis…to weigh the options available*'; failure to weigh drastic reductions in contact such that her identity may not be maintained against the merits of her needs being met as they have been in foster care; '*the specific need for contact*' being further complicated by '*the extent to which there is a large sibling and extended family group*', which it was accepted was not adequately reflected in any analysis; and that the impact of her disabilities had not been analysed in terms of their impact on her identity needs that '*would likely not be met by ordinary proposals for indirect contact and life-story work*'.
92. In addition to the above acknowledgements, it is also the case that the CPR contains much information presented as fact (for example pages 18-19) even though the local authority should have been aware it was disputed by the parents and it was not pursuing findings in respect of the disputed issues. This is particularly concerning given that paragraph 2.64 of the Guidance emphasises the need for accuracy, and that a CPR is often an important and sometimes sole source of information for a prospective adopter and for the child (see 2.64 set out at paragraph 82 above).
93. Significantly, there is nothing that satisfies the requirement for a "*full comparative analysis and balance of the realistic options*" (*Re B (care proceedings: proportionality evaluation) [2014]* supra). On page 47 which is intended to address the reasons why adoption is the preferred option, the CPR identifies only the child's age and the generic assumption (unsupported by any research or statistics) that adoption provides greater stability; and on page 48, which is intended to address the relative merits of a placement order against other orders, the CPR does not even refer to long-term foster care as an option, let alone consider the merits of that option and compare those merits against adoption.
94. It was these numerous examples of serious deficiency that led to questions being raised as to the authorship, qualifications of that author, and any supervision of the author of the CPR.

CHILD PROTECTION REPORT AUTHOR: PRESCRIBED DESCRIPTION, QUALIFICATION & SUPERVISION –

95. Page 3 of the CPR specifically asks the author to confirm that they are suitably qualified under the Regulations to prepare this report. There is a numbered footnote next to that question, suggesting that further information on that point was available to the author while completing the document. The social worker's response was "*YES*". The social worker has since explained that claiming that she was suitably qualified was simply an administrative error, an oversight. She should have marked NO, as she does not have the requisite experience under the Regulations.
96. When the local authority was asked at court on the first day of the November hearing whether the social worker was in fact appropriately qualified and to provide details of her direct adoption experience the local authority's response was that she does not have the requisite experience but "was supervised".
97. The space provided for details of the supervisor to be given has been left blank, which boxes also appear on page 3. It has been suggested that this is because the form uses a drop-down box format and that in clicking on *YES* the subsequent boxes did not then appear in order to be completed.
98. However, I note that both the social worker and her team manager provided their signatures in the relevant boxes on page 3. They would both have had the opportunity and should have seen on the same page that they were signing, that the relevant boxes in relation to the Name and Signature of the supervisor were blank, and that the social worker had wrongly confirmed that she was a qualified person under the Regulations.
99. I also note that in his statement the Director of Children's Services referred to two individuals said to have supervised the social worker to the satisfaction of the relevant Regulations: her service manager and her assistant team manager. He claims that the supervision involved: '*initial planning… including identifying who needed to be seen and interviewed, reviews of previously completed CPRs to inform the process of completion of the index CPR, and discussions about the conclusions of the same*.'
100. There are no details given of the capacity of either of these two individuals to fall within the relevant supervisor category, or of which of them carried out what supervisory tasks and exactly how that satisfied the regulations. There are no notes or records provided of supervision sessions. Tellingly, there is no assertion in his statement that either of them read the report or considered its contents beyond '*discussions about the conclusions*'. Clearly, neither of them signed the CPR, even though, if supervision were being adequately conducted, they would have expected this to be asked of them.
101. It is clearly possible that the local authority may have committed a criminal offence under section 94 Adoption and Children Act 2002 and the Preparation of Adoption Reports Regulations 2005, but I cannot conclude whether that is the case or not. I note the Director's refutation of this accusation. This is not the tribunal in which a summary offence is tried. I have not been provided with sufficient information to assist with any safe conclusion either way, nor would it be proportionate in the circumstances of this case to conduct an examination of all the background facts and the detailed nature of the supervision said to have been provided.
102. At the very least, this 'oversight' was therefore missed by four people: the social worker, her team manager, her assistant team manager and her service manager. I am driven to suspect, but cannot properly put it higher than suspicion, that this oversight may possibly have been a consequence of ignorance of the requirements, the Regulations and of this offence.

103. Additionally and significantly, adequate supervision should have identified the numerous deficiencies in content and analysis that are now admitted by the local authority.

104. It also remains unclear who in the local authority holds the position of agency advisor as the individual with overall responsibility for quality assurance of the CPR, and whether this document was ever seen by this individual. This again begs the question as to what checking systems are in place, and how such an inadequate report, written by a social worker who did not have the experience required by law to write such a report, was permitted to be submitted to the ADM.

AGENCY DECISION MAKER'S DECISION –

105. Given the manifest failures to comply properly with the Act and the Regulations and applicable guidance and case law in relation to the CPR, it was clearly not possible for the initial ADM to have made a valid and lawful decision based upon that material (*Re B (Placement Order) [2008]* supra, quoted in paragraph 78 above).

106. It is also plain that the ADM in any event in her own right failed to comply with the relevant law and guidance in the decision dated 12 September 2019. The decision is set out in nine paragraphs which summarise the background history and then concludes with a single sentence as the only analysis or rationale for the ADM's decision: *"However, given A's age the only permanency option viable for A is adoption"*.

107. This is shockingly poor and in breach of the relevant law and guidance. In particular:

- The ADM failed to consider whether the social worker was permitted to prepare the report under The Restriction on the Preparation of Adoption Reports Regulations 2005.
- The ADM failed to identify any arguments for or against adoption or long-term foster care, save for A's age, and failed to give any reason for the decision, save for the child's age.
- The ADM's sole reason appears to amount to an orthodoxy or set policy based on age alone and showed the local authority had failed even to consider long-term foster care as an option at all.
- The ADM failed to consider any of the factors in the welfare checklist save for A's age. This excluded any consideration of A's background and identity, the impact of her needs and developmental issues, her relationships with her relatives (not only her parents but siblings and wider family), and the value of those relationships continuing.

108. The Director of Children's Services claims in his statement that the ADM had, in fact, taken the full welfare checklist into account, but had simply failed to record that exercise. He also accepts that the key arguments for and against adoption were not articulated in the report, and concedes that these failures to meet requirements resulted in a flawed placement application. In my judgment, his concessions do not go far enough and do not even reflect the local authority's own guidance that was in existence at the time of the decision.

ISSUE OF FIRST PLACEMENT APPLICATION –

109. It is the local authority's legal team who will have taken the relevant steps to issue the placement application. In doing so, the lawyer handling this case should have read the relevant documents underpinning the proposed application. This should have immediately caused the lawyer to flag concerns relating to the adequacy of the CPR and the ADM decision, and whether the ADM could have made a lawful decision on the basis of the CPR.

110. This should have led to the matter being referred, if it had not been referred already, to the agency advisor for review of the documents in question.

111. It also should have led the lawyer to refer the matter back to the social work team, service manager or other senior member of Children's Services in order to rectify the situation.

112. The issue of a placement application should not become a rubber-stamping exercise, but a rigorous examination of whether the legal requirements for such a serious application have been met.

SECOND PLACEMENT APPLICATION

113. Sadly, the second opportunity granted to this local authority does not appear to have attracted the necessary rigour either. I have referred to the deficiencies of the second CPR already.

114. Additionally, the second ADM decision, of which I have an undated copy and which was an exercise also undertaken by the Director of Children's Services, while it does list the factors in the welfare checklist, and considers arguments in relation to both long term foster care and adoption, and refers minimally to some research on disruption rates, is also flawed.

115. Firstly, it was reliant upon the flawed second CPR, which the social worker herself had to admit in oral evidence was inadequate and should not be relied upon.

116. Secondly, there was very limited consideration of certain key matters, for example: the nature of A's heritage and family background, the positive qualities possessed by her family and the extent of what could be offered by the positive relationships on offer from her family, and the value to her of their continuation; the consequent losses and harms if she were effectively cut off from them; and the difficulties posed in trying to mitigate these losses given her developmental difficulties.

ADJOURNMENT OF THE NOVEMBER FINAL HEARING

117. The attempted final hearing began on 4 November 2019. The concerns arising from the CPR were immediately drawn to the local authority's attention, and time was taken to make further enquiries and consider the position. It was on that day that counsel for the Mother asked about the social worker's qualifications to prepare the CPR.

118. Unfortunately, counsel for the local authority (not Mr Walker, who now represents them) was also busy that day with another hearing, and this is said to have limited time for consideration of the issues. At the end of the first day the local authority wished to have more time to consider, and the other parties were asking for disclosure of the ADM decision.

119. On the morning of the second day the ADM decision was made available, and its inadequacies were immediately apparent. Notwithstanding time granted for discussions, the local authority sought further time until the next day to consider its position and whether it intended to press on with its current applications. The alternative position would be to agree long term foster care. In the circumstances, I required counsel for the Mother to prepare a skeleton argument setting out the principal concerns in relation to the local authority's documents and placement application, and their basis in statute and guidance. That was promptly provided on the morning of the third day. (I note here my gratitude to her and all the advocates for their assistance in this case.)

120. By the third day, the local authority had instructed fresh counsel and following a conference at court sought to adjourn the final hearing as it acknowledged that it could not

proceed on a flawed application for a placement order, but did wish to continue to pursue a plan for adoption for A. The local authority rightly recognised that these matters could not be lawfully remedied during the November final hearing. Given the local authority's position, an adjournment could not be avoided, following *Surrey County Council v S [2014] EWCA Civ 601*, both to avoid unfairness to the parties of a separate placement application but also to ensure that the court had before it proper evidence and analysis. But, inevitably, I was obliged to warn the local authority that the question of their responsibility for the costs of the November final hearing would have to be considered at the adjourned final hearing.

121. The Director of Children's Services acknowledges as much in his statement, which I requested should be filed in advance of the adjourned final hearing. In the event I received it on 9 January 2020, on the fourth day of the adjourned final hearing. I had invited the local authority to review the flawed process of the first placement application, and identify any problems and proposed solutions that might go some way towards mitigating their position.

122. The Director largely acknowledges the various principal flaws in the local authority's documentation, as I have set out earlier in this judgment, albeit incompletely. He gave an appropriate and welcome apology. He also outlined actions taken and planned since the November hearing.

123. He referred to the allocation of a different social worker to undertake the fresh CPR, and the ADM decision taken by himself. I note that it was appropriate that these exercises were undertaken by those not previously involved in the case. However, in describing these as 'comprehensive' reviews, he did not discern the difficulties with this second round of reporting and decision-making which I have referred to earlier in this judgment.

124. He referred to a lengthy legal conference with counsel that had been undertaken to discuss improvements to existing systems. One improvement is now to refer to each welfare checklist factor in the ADM decision form in order to avoid a decision that sets out too narrow a set of considerations. This is a positive step, but it still remains critically important that the substantive discussions in relation to each factor are made up of good quality evidence and reasoning based on holistic and balanced considerations and analyses of issues for and against each option.

125. It is also welcome that there will be noting and minuting of supervision relating to the preparation of CPRs. Again, this is good so long as the supervision is rigorous and well-informed, and not prey to the same confirmations and blind-spots.

126. I particularly welcome the local authority's proposal to set up a specialist seminar for those involved in these decision-making processes in order to update and ensure best practice. From his statement I gather that this would intend to cover more nuanced approaches to post-adoption contact, weighing the relative merits of alternate plans with close reference to the specific characteristics of each particular child, and specialist provisions in particular for children with additional and specialist needs.

127. He also set out the local authority's intention to seek a detailed report from counsel following the conclusion of this case in order to undertake a best practice review of CPRs, and to seek additional training from CORAM, BAAF or similar.

128. Fortunately, the delay caused by this adjournment, although undoubtedly extremely worrying and painful for the family, will not have had any actual effect on A, as she has continued having contact with her family and has remained with her foster carer, and the plan is for her to stay there until an appropriate long term carer is found.

THE LAW – COSTS

129. The Supreme Court set out a comprehensive review of the principles applicable to costs orders in care cases in the case of *Re S (A Child) (Costs: Care Proceedings) [2015] UKSC 20*:

- The general rule that costs follow the event does not apply to first instance Family Court proceedings concerning children;
- The general approach under Civil Procedure Rules r44.2(4) and (5) does apply, although not (4)(b) and here not (4)(c), and so covering the conduct of the parties;
- The costs issue is to be determined as a matter of principle and irrespective of whether any party is publicly funded;
- Two exceptions to the general rule: reprehensible conduct or an unreasonable litigation stance were correctly identified in *Re T (Children)* [2012] UKSC 36;
- There may be other circumstances which justify a costs order in child proceedings;
- A local authority should be in no better nor worse a position than any other party on the issue of costs.

130. Conduct of the parties - CPR 44.3(2):

"(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –

(a) the conduct of all the parties;
(b) …

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

131. In particular, Counsel for the local authority referred me to the following cases covering the making of costs orders against local authorities. In *Re M (Local Authority's Costs)* [1995] 1 FLR 533, Cazalet J stated as follows:

*'I have been urged by Miss Parker to…hold that there is a presumption of no order as to costs in child cases. I do not think that it is necessary to fetter a court's discretion as to costs in this way, by applying presumptions or indeed more specific guidelines. It seems to me that…it would be unusual for a court to make an order for costs in a child case where the conduct of a party has not been **reprehensible**, or the party's stance has not been beyond the band of what is **reasonable**. Accordingly, any court in deciding the question of costs in child cases should, in my view, approach the question against that general proposition, and it would be a matter for the discretion of the court in the light of those criteria as to what order for costs should be made. In considering these questions the court*

will always look in particular at whether it was reasonable for one of the parties to have brought or to have maintained the proceedings...

'As a matter of public policy…where there is the exercise of nicely balanced judgment to be made by a local authority carrying out its statutory duties, the local authority should not feel than it is liable to be condemned in costs if, despite acting within the band of reasonableness…it may form a different view to that which a court may ultimately adopt.'

132. And *Re T (Children)* (supra) restated that the principle of unreasonable conduct as set out in CPR 44.3(5) is relevant to care cases. In such circumstances where a local authority has caused costs to be incurred by acting in an unreasonable manner costs may well be appropriate. There is no bar to costs being awarded in circumstances where all parties are publicly funded.

133. *Re R (Care: Disclosure: Nature of Proceedings)* [2002] 2 FLR 701 concerns a lengthy fact-finding incorporating allegations of sexual abuse which were subsequently abandoned by the Local Authority. In that matter costs were awarded, however on a fixed percentage basis rather than for the entire hearing. The Court took *"… a rough and ready approach. I have toyed with the idea of making an order relating to days of the hearing, apart from the opening day, and saying that it should be X number of days that are paid. I have changed from that to think that I should order a percentage of the costs of each of the first four respondents which covers additional preparation time and involvement of leading counsel."* In assessing costs in that matter, the Court assessed that the local authority was primarily responsible for the waste of time.

134. I am also invited to bear in mind the overriding objective set out in rule 1 of The Family Procedure Rules 2010. The purpose of these rules is to ensure that the court is in a position to deal with cases justly:
(2) Dealing with a case justly includes, so far as is practicable—
(a) ensuring that it is dealt with expeditiously and fairly;
(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
(c) ensuring that the parties are on an equal footing;
(d) saving expense; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

DISCUSSION & CONCLUSION

135. Appropriately, the local authority has recognised that its actions place it at risk for the costs of at least part of the three days of the November hearing. The Respondents' costs are all met by the Legal Aid Agency, and I have taken into account their respective similar positions in defending the funds of that agency and requesting that a costs order is made against the local authority for the three days.

136. It was suggested on behalf of the local authority that these issues should have been drawn to the local authority's attention by others at the Issue Resolution Hearing in late September. I reject that submission. None of these flaws should have been permitted to have tainted the documents and decisions of the local authority in the first place, none of the issues are novel but are well-known aspects of statute, case law and guidance. These were the standard responsibilities of the local authority, and not of the other parties nor the court.

137. Counsel also, ingeniously but unsuccessfully, attempted to suggest that the court should consider that the actions of the local authority were not 'unreasonable' or 'reprehensible' as they were the result of oversights rather than bad faith.

138. The ordinary dictionary meaning of 'reprehensible' is 'deserving censure or condemnation' and derives from the latin verb meaning 'rebuke'. I consider that each and every error identified in the local authority's process deserves censure and could and should have been avoided. It was unreasonable to issue a placement application based on such material and, given the nature of the underlying errors, where the law relating to the standards to expect of evidence and analysis in adoption cases should be so well-known.

139. The starting point here is that without the numerous and egregious errors of the local authority a flawed placement application would have been avoided in the first place and there would have been no need to adjourn the November final hearing.

140. I do not consider that it was inappropriate to propose a plan for adoption and to seek a placement order, but the method by which it was pursued and applied for was riddled with avoidable error and failure to comply with important rules and requirements.

141. Counsel for the local authority also urged upon me the positive steps taken by the local authority since November, and that the local authority could be said to have needed to have taken some significant time to consider the issues arising at the November final hearing and so should only bear the costs of a single day. The first point is a good one, and the second fails given that the errors should never have seen the light of day or gone ahead uncorrected in the first place.

142. I welcome and bear in mind those positive steps outlined by the Director of Children's Services, and consider that they go some way towards mitigating the local authority's position. I have directed that the local authority should write to inform the court of the completion of each step identified by the Director and that I have mentioned in paragraphs 124-127 above.

143. I note that the pressures on the budgets of hard-pressed local authorities is very great, and that any costs order deprives this local authority of funds which can be used to assist children and families in need.

144. In the circumstances, and bearing in mind the overriding objective, although it can quite properly be said that this local authority was responsible for the unnecessary adjournment of a final hearing and the waste of those three days, I am satisfied that it is sufficient censure to point this out in the context of the criticisms of this detailed judgment, to take into account the positive steps that are anticipated will prevent such avoidable errors in future, and to require the local authority to meet the Respondents' costs of one day of the November hearing. Costs will be assessed.

145. Finally, it will be noted that I have not named any single professional employed at this local authority. The local authority, quite properly and as required by case law, is identified. However, the problems appear to be systemic and wide-ranging. The identified problems touch each element of this local authority that has become involved in this case: social work, supervision, management, decision-making, legal advice, internal training, standards and checking systems, and ranging from social worker to lawyer to Director. Accordingly, it would be misleading and would attach too narrow a focus to name any single individual.

(Words marked in bold are my emphasis)

HHJ LAZARUS

27 January 2020