Neutral Citation Number: [2019] EWCA Civ 1966

Case No: B4/2019/1548

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM CIVIL JUSTICE CENTRE
HER HONOR JUDGE BUSH
BM17C00319

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2019

Before:

LADY JUSTICE KING
LORD JUSTICE HENDERSON
and
LORD JUSTICE MOYLAN
- -

W (A CHILD)

- -
- -

Matthew Brookes-Baker (instructed by **Boardman, Hawkins & Osborne Llp**) for the **Appellant**
Vanessa Meachin QC and James Legg (instructed by **the Local Authority's Children's Trust Legal Department**) for the **1st Respondent Local Authority**
Michael Bailey (instructed by **Lillywhite Williams**) for the **2nd Respondent Mother**

Hearing date: 10th October 2019
- -

Approved Judgment

LADY JUSTICE KING:

1. This is an appeal brought by the appellant ("the great-aunt") from care and placement orders made by HHJ Bush on 3 May 2019 at the conclusion of proceedings heard over four days concerning J, a little boy who has just turned two.

2. At the conclusion of the appeal hearing, we informed the parties that the appeal would be allowed. It follows that the care and placement orders will be set aside and the local authority's application, should they wish to pursue it, will be reheard. This judgment contains my reasons for concurring in that decision.

3. The sole ground of appeal is that the judge failed to give an adequately reasoned judgment. The ground was particularised to the extent that three specific alleged deficits were identified namely: (i) a failure sufficiently to analyse the factors set out in the welfare checklists contained in both s.1(3) Children Act 1989 and s1(4) Children and Adoption Act 2002; (ii) a failure to conduct an adequate holistic balancing exercise and to take into account such matters as the appellant's positive attributes; and (iii) a failure to carry out an adequate evaluation of the risk factors and the proportionality of adoption.

4. The question in the present case was, therefore, did the judge, in her short judgment of 8 pages, give a clear description of the factors considered and the reasoning that underpinned her conclusion prior to making a placement order.

Background

5. It is necessary in order properly to consider this appeal to set out the background to the case, together with its lengthy and tortuous progress towards trial as well as to examine in a little detail the assessments carried out on the great-aunt.

6. J's mother, the second respondent in this appeal ("the mother"), is a vulnerable young woman with considerable needs of her own, including learning disabilities. J was born towards the end of 2017 and shortly after, he and his mother went to live at a mother and baby foster placement. The mother soon realised that she was unable to care for her baby and on 10 November 2017, with the mother's consent, J was moved to a foster placement where he has remained ever since. After she left, the mother moved to and continues to live with the great-aunt with whom she had previously lived from time to time. The mother accepts that she is in no position to care for her child, and as long ago as January 2018 identified the great-aunt as a potential long-term carer for J.

7. In March 2018, the court approved the instruction of an independent social worker ("the ISW") to undertake a parenting assessment for either the mother and the great-aunt jointly to care for J or, alternatively, for the great-aunt to be his sole carer. In fact, the only realistic placement has long been considered to be with the great-aunt alone.

8. On 24 May 2018, the ISW filed a substantial report. The assessment did not recommend placement with the great-aunt. That this was a finely balanced decision was undoubtedly the case. The great-aunt's many and varied attributes practically, intellectually and emotionally are discussed within the assessment. In her final analysis, the ISW said:

> "[The great-aunt] is, in many ways, a remarkable woman with a host of admirable talents and commendable qualities. She has much to offer J as a result, but I am concerned about the impact of the vulnerabilities identified above upon her ability to provide him with the consistently safe, predictable and focussed care that he needs.
>
> Weighing up how much significance to attach to the benefits and risks has necessitated a delicate balancing exercise. [The great-aunt] has significant potential as an alternative carer, which it would clearly be in J's interests to realise if this could be safely achieved.
>
> I have carefully considered whether support could be provided to ameliorate and manage the risks identified and enable J to be cared for within this loving and positive family environment."

9. The ISW set out in detail in the form of bullet points the many and varied strengths of the great-aunt which include:

   i) Her commitment to the assessment process and that she is "a kind, devoted life-long carer of others" whose history demonstrates a capacity to cope with the challenges that this can present;

   ii) That the commitment she would show J would be enduring and her resilience would enable her to withstand any difficulty she would face in doing so;

   iii) That when her daughter had been sexually abused she had reported the allegations to the police, worked with them and supported her daughter's recovery;

   iv) That she is intelligent, articulate, capable, resourceful, organised, energetic, enthusiastic, calm, tolerant and patient;

   v) Importantly, it may be thought, the ISW was of the view that the great-aunt's "faith in the good of others and their potential," combined with her gentle, companionate and emotionally attuned style suggests that she should be able to nurture J's emotional wellbeing and their relationship in the longer term if it does not come into conflict with her sometimes limited recognition of risk;

   vi) That she remains committed to supporting the mother to become the best parent she can and promoting J's experience of growing up within "a whole family setting while ensuring his safety" and;

   vii) That the aunt is skilled at managing "the varying and sometimes conflicting needs of her mother, sister and niece within the household; smoothing, soothing and distracting while promoting positive and shared links between the three. She has an inner-circle of close friends that are willing and able to assist. These skills will stand her in good stead when dealing with any similar issues in respect of J."

10. The countering concerns of risk centred around:

i) The great-aunt's many and various commitments both caring commitments, and her work-load outside the home. The ISW was concerned that the business of the household brought with it a degree of "chaos and unpredictability" that might make it more difficult for the great-aunt to retain her focus on providing for J's needs;

ii) The ISW's belief that the great-aunt's compassionate belief in others and their "untapped potential" appeared to cloud her judgement and hamper her ability to recognise risk. This, she believed, could leave J at risk.

iii) A further issue was that the great-aunt had failed to disclose to the assessor the abuse of her daughter as a child and her daughter's subsequent problematic relationships which had resulted in her grandchildren being the subject of child protection plans. This, the ISW felt, raised concerns as to her ability to be open and honest with professionals in order to safeguard J. This conclusion is fleshed out in the main report where the ISW said as follows:

> "[The great-aunt] has recognised and acted to try to protect others from risk in the past. She has done so in respect of [the mother] contacting the doctor when she was concerned about her self-harming, taking her in as a 16- year-old; and in respect of her sister when she was in a violent relationship. She acted sensitively and appropriately in respect of her daughter's abuse and is a generally caring and protective individual. She has considerable and relevant professional experience of safeguarding.
>
> However, it is my impression that [the great-aunt] has difficulty accepting that people she cares about or for whom she feels sympathy, can present risk; by omission or commission, with intent or unintentionally. [The great-aunt] is a kind, empathetic person who I think struggles to separate her feelings of compassion for the perceived victim from her role as the protector and person that is to prioritise J's needs. She struggles to make the distinction between compassion and risk that would help to prevent compassion from clouding her recognition of risk."

11. The ISW felt that, although there had been some improved recognition and acceptance with regard to risk by the great-aunt, she would need to demonstrate that her understanding and recognition of risk permeated all aspects of her thinking and any decision-making that could have an impact on J before it could be considered that "meaningful progress" has been made. The great-aunt would need to show, said the ISW, that she is willing to be open, share information and accept and act on the concerns of professionals for there to be confidence that any gaps in her risk recognition could be bridged by support. The ultimate conclusion was:

> "On balance, therefore, I do not recommend that the great-aunt is approved as a family and friends foster carer for J. Too many uncertainties and niggles remain for me to feel confident that the

> great-aunt will be able to consistently focus on meeting J's needs as his primary carer throughout his childhood."

12. The assessment having been negative, the local authority filed an application in June 2018 seeking an urgent case management hearing; they now sought permanency for J through adoption. The great-aunt, who was and has remained unrepresented throughout the proceedings at first instance, responded by making an application seeking party status, which was adjourned to the next issues resolution hearing.

13. On 5 September 2018, the Guardian filed her analysis. The Guardian felt unable, at that stage, to support the local authority's application for care and placement orders; she could not say, in relation to adoption, that "nothing else will do" and said that there was a need further to explore the "very real potential" in the great-aunt in order to see whether the areas of weakness had been reduced or alleviated with further assessment or support.

14. In the light of the Guardian's view, an application for an addendum report, whilst opposed by the local authority, was granted. The matter was set down for a further issues resolution hearing on 26 November 2018 with a three-day final hearing listed on 17 December 2018.

15. On 15 November 2018 the ISW filed her addendum. This report gave much cause for encouragement to the great-aunt, saying:

> "i) A previous barrier to placement was the limited capacity the great-aunt was able to demonstrate, despite being an experienced parent and grandmother and having had six months of, albeit limited at times, contact with J, to meet his basic needs during contact without prompts, advice and assistance. I am pleased to report that this is no longer a major issue and the great-aunt has used the additional six months of contact to improve her skills and confidence.
>
> ii) The relationship between J and the great-aunt had improved although not yet an attachment he is able to enjoy and respond with pleasure to the great-aunt.
>
> iii) The household is less busy and comprehensive works to improve the property are almost complete.
>
> iv) Previously the great-aunt had not identified suitable carers to ensure J could remain in the family if she was not able to care for him throughout adulthood. She had now done so and three nieces living locally had been identified and would need to be checked via a risk assessment in due course.
>
> v) The great-aunt had made some progress in her recognition and awareness of risk."

16. The ISW's conclusions were that the practical issues which had previously been a cause for concern could no longer be considered as barriers. The great-aunt was now able to

demonstrate "good enough parenting" and her relationship with J was generally positive. The ISW regarded the issues as finely balanced and the answer as to whether it was in J's best interests to live with his great-aunt far from clear cut but, the ISW concluded, there was now potential further to test whether J could be safely placed with the great-aunt. To this end, the ISW recommended further assessment by way of the introduction of home-base contacts which could be increased gradually and lead to a decision for him to be placed with the great-aunt.

17. The ISW discussed this proposal with the social worker and the Guardian. The Guardian was subsequently contacted by the social worker's manager, who said that, should placement be recommended, the local authority would not consider the great-aunt as a foster carer, but rather as a special guardian.

18. On 26 November 2018, the matter came before HHJ Clayton for a further issue resolution hearing. The case management order records the local authority's position at that hearing as:

> "The local authority supports the recommendation of the ISW addendum report and seek for J to be placed with the great maternal aunt, pursuant to a special guardianship order and supervision order. However, in the interim there will be an increase in contact between the great-aunt and J and a transition plan will be devised. The local authority seeks permission to withdraw its placement application lodged on 30 July 2018."

19. The judge considered the application for permission to withdraw the placement order and granted the application. It should be noted that the Guardian was not present at the issues resolution hearing and the case management order records that her view was not known. She had however, as noted above, been aware of the proposals having had a discussion with the ISW. The date for the hearing had been in the diary for some time and there is no indication that she had expressed reservations about the proposals to the court through her solicitor, although this is perhaps unsurprising given the reservations she had expressed in her first report as to the appropriateness of the making of a placement order.

20. It follows, therefore, that following the issues resolution hearing on 26 November, the care plan was that following further work and increased contact, J would move to live with his great-aunt in the same household as his mother under a Special Guardianship Order.

21. A matter of days after the making of the court order the local authority resiled from its stated position. The nearest one can get to ascertaining the reason for the change in position can be found in a proposed draft order filed by the local authority in support of the application which was then heard at short notice on 17 December 2018. In the draft order it is recorded that at a child and care review meeting on 29 November 2018 (three days after the last hearing), the independent reviewing officer declined to ratify the care plan to place J with the great-aunt. The independent reviewing officer wished to speak to the Guardian and the ISW. A proposed recital in the draft order recorded that the local authority had changed its position having considered the order of 26 November 2018 at "which the court raised its concerns in respect of the current care

plan". This, it would appear, refers to some rather unusual recordings found in the order which provide at 12:

> "e) **AND UPON** the Court in trying to obtain further information as to how the local authority came to the decision when seeking a special guardianship Order in respect of J, noting that the Team Manager had made this decision.
>
> f) **AND UPON** the Court expressing its astonishment to note that the Team Manager had not consulted with the allocated social worker in coming to its decision in respect of the final care plan for J."

22. Setting aside for a moment (i) whether it can ever be appropriate to include such recordings in what is a formal court order, and (ii) the clear evidence that the ISW had spoken to the social worker who had spoken to her team manager prior to the suggestion being made of a special guardianship order; the fact remained that, at the hearing on 26 November 2018, the judge had a formal application made by the local authority to withdraw the application for a placement order pursuant to Family Proceedings Rules 2010 r 29.4(1)(b). The judge was clearly, and rightly, proactive in wishing to understand the decision-making process, but ultimately had granted the application to withdraw the application for a placement order, a decision to which the paramountcy principle applies. The judge, therefore, had J's welfare at the forefront of her mind in reaching his decision to grant the application to withdraw the application for a placement order. For my part I do not find it helpful to have matters which were part of the judge's exploration of the merits of the application incorporated into recitals attached to the court order as was done in this case and which, it would appear, led in large measure to the unravelling of the care plan which had been approved by the court.

23. It should be remembered that throughout this confusing shift change on the part of the local authority, the great-aunt remained unrepresented and, for reasons which are not clear, her application to become a party had never been resolved. She was not, therefore, entitled to access to all the papers in the case.

24. The local authority recorded in its proposed draft that J be now placed with the great-aunt under a care order which would require her to be approved as a connected person foster carer. In those circumstances, the fixture of the final hearing of the 17 December had to be abandoned.

25. A lengthy order made on 17 December, again before Her Honour Judge Clayton, identified the future progress of the case which was by now in its 51st week in relation to J who was by now 13 months of age.

26. The order made by the judge on 17 December recorded the local authority's position as follows:

> "The local authority support the recommendation of the ISW addendum report and seek for a plan for an increase in contact between J and the great-aunt, with this being monitored and tested, prior to its final evidence being filed. There will be weekly reviews when the supervision level will be reviewed."

27. The Guardian's position was recorded in this way:

> "The guardian is concerned by the delay and the numerous changes to the local authority plan in this matter over the last month. She supports the further assessment by the independent social worker which will primarily be based on the observations of contact between J and the great-aunt so as to allow her to complete her connected person's assessment with a final recommendation."

28. The Guardian reserved her position until after the assessment was completed. In fairness to the local authority, it should be noted that amongst the numerous, somewhat conversational, recitals attached to the order, it is at least recorded that the local authority apologised to the mother and the great-aunt for its lack of communication of information to them over the preceding weeks and it noted the court's encouragement of the local authority to consider funding independent legal advice for the maternal great-aunt in the event that there was a positive recommendation that J would be placed with her. Given what had happened, it might be thought that the real need for legal representation for the great-aunt would be if the assessment was (as it turned out to be) negative.

29. The matter was listed for a further issues resolution hearing on 19 March 2019 by which time a second addendum report would be available from the ISW with the final hearing listed to between 9-11 April. This order recorded that the great-aunt was to give evidence "if advised" although it is unclear who it was anticipated would be giving her advice as she was still neither a party nor legally represented.

30. As 2018 turned into 2019, the plan appeared to be that further assessment was to centre on increased contact which would be accompanied by regular reviews.

31. A so called "increased contact plan" was served by the local authority setting out a proposed increase of contact between 18 December 2018 and 8 February 2019 to involve 18 contact sessions between the great-aunt and J. The contact was supervised variously by the ISW and DJ. The contact notes for the period between 13 December 2018 and 10 January 2019 were not in the judge's bundle.

32. DJ supervised the majority of the contact between 14 January and 8 February 2019, some 75%, amounting to over 36 hours. It is unfortunate that DJ was not called. It is, in my judgment, no answer for the local authority to say in its defence that the (unrepresented) great-aunt did not require DJ to be called, or that DJ's role was not to assess but to supervise.

33. DJ therefore supervised most of the hours of the contact at this critical period in the assessment process. He wrote full and detailed contact notes which were provided to the local authority. His observations were relevant and of the greatest importance to the outcome of the case, particularly given the Guardian had said that further assessment was to be focused on contact. The judge was put at a distinct disadvantage by on the one hand having an unmanageable number of contact records put in front of her but without a complete set of the most recent and relevant ones.

34. It is unclear why contact did not progress in accordance with the "increased contact plan" or why the reviews which were supposed to take place each Friday in order to confirm and plan progress beyond simply supervised contact, did not happen.

35. DJ made repeated requests in the contact observation notes to progress contact so as to move it into the community. Those requests, the court was told, received no response and no explanation. All this led into the most unfortunate situation, whereby the ISW recorded in her report that there had been seventeen contact sessions over six weeks, but she had only seen five contact supervision notes, plus her own three sessions of supervised contact. A brief glance at some of the contact notes reveal DJ noting positive sessions, "no prompting" required, no issues of concern, and that he did not have to intervene in the contact.

36. It is worth noting that on 8 February 2019, a contact visit intended to be the last on the increased contact plan took place at the home of the great-aunt and was supervised by DJ. DJ recorded that the great-aunt engaged really well, no prompts were required, the great-aunt was reading first word book and the "kids Lion King book", she was noted to engage "really well", J, he recorded, "seems really cheerful and laughing interactive with great-aunt". The basic cares were met at all times and the overall impression was positive, "J seems to be comfortable in the household". There was a further request from DJ that he would like to see the great-aunt out of the house with J.

37. It would seem that there was one further supervised contact session the following week. This is in somewhat stark contrast to DJ, since it lists as an area of concern, (somewhat bizarrely) that "the cats no longer come near J and I wonder if they are all frightened of him" and that, whilst the great-aunt is "proactive in updating her parenting skills", she still requires prompting "such as when taking the table off the high chair before putting J in it and removing it before undoing his straps to take him out".

38. It is hard to see how the picture painted by DJ, but not put before the court, tallies with the final evidence filed by the social worker which says as follows:

> "During the period of the increased contact sessions there were different contact workers supervising and <u>all of them</u> had reported that the great-aunt required prompting on every occasion in relation to health and safety, the cat food and practical tasks such as securing J in the high-chair and car seat." *(my emphasis)*

39. It should be emphasised also that the local authority have a duty to put an even-handed case before the judge. The judge had only evidence that the great-aunt still required 'prompting' at all contact visits. DJ should have been called to give evidence and his notes should have been available to the judge and to the ISW. It is frankly disingenuous to say that DJ's role was mere supervision and that he was not assessing contact in circumstances where he was supervising most of the contact and was writing up a full detailed log in respect of every visit. Even if the outcome was ultimately the same, the result was that the great-aunt might reasonably feel that an uneven picture had been presented to the judge.

The final report

40. The second addendum ISW report was filed on 8 February 2019. The report said that the great-aunt's capacity to meet J's needs had improved considerably and that her relationship with J was now well established with an "apparent attachment". However, the ISW concluded, "Whilst there is really positive progress" it is not "quite enough".

41. The report concluded that "fundamental gaps" remained, leading to the conclusion that the great-aunt was "still not ready or capable of meeting the full range of J's needs on a full-time basis". The ISW refers to what she describes as the great-aunt's doubtful capacity to "meaningfully cooperate and comply and to work openly and honestly with professionals".

42. The report is lengthy and detailed and identifies both strengths and weaknesses in respect of each of the various areas of concern which were identified by the ISW, which included:

    i) Her capacity to meet the full range of J's needs;

    ii) Her ability to build upon the relationship and ensure she is the primary carer and attachment figure;

    iii) Her ability to match his needs alongside her work and caring responsibilities whilst continuing to prioritise J;

    iv) Her capacity to limit the number of unfamiliar people with whom J could come into contact and prevent J's exposure to anyone identified as risk; and

    v) Her capacity to work cooperatively with the local authority and foster carer, accepting and implementing advice complying with any working agreement.

43. Following the filing of the report, the local authority issued a fresh application for a placement order on 13 March 2019. The matter came back before HHJ Clayton on 19 March 2019 for a case management hearing and it was only now that the great-aunt was joined as a party.

44. On 4 April 2019, the Guardian filed and served her analysis which, with respect to the Guardian, is heavily reliant upon the report of the ISW. For my part, having had an opportunity to read all of the independent social reports, I am of the view that for the Guardian to have characterised the great-aunt as having "deeply entrenched reluctance to accept advice and cooperate and communicate openly, honestly and in any genuinely meaningful manner" and to refer to her as being "dishonest, inconsistent" and "quite chaotic" in manging the needs of J, does not seem fairly to reflect the very positive aspects of the great-aunt's care which were highlighted by the ISW and does not in my view adequately reflect just how finely balanced the decision whether or not to place J with the great-aunt had been.

45. The case, having been case managed throughout by HHJ Clayton, came on for trial in April 2019 before HHJ Bush. The judge was in an unenviable position, in that not only was she unfamiliar with all that had gone before, but without hearing from DJ she had an incomplete picture of contact and the chief protagonist was unrepresented. The judge said that the great-aunt had represented herself creditably given the 'considerable

complexities' of the case and that she had been in an 'entirely alien environment'. The mother's counsel, she noted, gave the great-aunt some assistance but, crucially, the great-aunt had the task of cross-examining the ISW, the social worker and the Guardian entirely unaided.

The Judgment

46. The case was heard over four days. The judge's judgment (as was accepted by the local authority), contains very little background or detail of the evidence she heard. There is no record of the proceedings or that the local authority had at one stage, withdrawn their application for a placement order and supported the making of a Special Guardianship order. The judge said:

> "I have, where appropriate, considered and applied the relevant parts of the welfare checklist. I have considered all the evidence that I have heard and read. If I do not refer to something the parties think is important it is not because I have not taken it into account but because it is not appropriate to recite all of the evidence in this judgment. I have considered and, where appropriate, relied on all the evidence I have heard and read."

47. The judge made no further reference to the welfare checklist or to any specific factors contained in either of them in her judgment.

48. The judge dealt first with what she described as the great-aunt's "inability to learn the necessary skills to parent him". She held that, despite her own experience as a mother and grandmother, the great-aunt was unable to "transfer that to actual practical parenting" and that "despite considerable intervention and attempts to provide that knowledge, the transfer of knowledge into actual practice has not improved despite the considerable effort and time devoted to it".

49. The judge does not deal specifically with the oral evidence of the ISW so it is hard to tell from just where the judge drew this evidence. Mr Brookes-Baker, on behalf of the great-aunt, said that these findings would seem to have been drawn from the first substantial ISW report of 24 May 2018. The judge, he submitted, appeared not to have read, or at least taken into account, the later report of 15 November 2018 which said (as set out above) that practical parenting was no longer an issue and that the great-aunt had used the intervening 6 months to improve her skills and confidence. The November report, Mr Brookes-Baker reminded the court, says that the practical issues had been addressed sufficiently for them no longer to be considered as "barriers" to J being placed with the great-aunt.

50. The 8 February 2019 report identified further considerable improvement in the capacity of the great-aunt to meet J's basic needs. The judge's finding, therefore, seems to be wholly contrary to the totality of the written evidence of the ISW who, by November 2018, was of the view that the great-aunt was now able to provide "good enough parenting" in relation to the practical aspects of J's care. This in itself, submits Mr Brookes-Baker, represents a profound defect in the judgment as an absolutely basic requirement for any proposed carer of a baby is their ability to carry out basic practical care to a 'good enough' standard, and absent such skills it is hard to see how placement with the great-aunt could be a realistic option. I agree.

51. The judge laid great emphasis on how busy the household is and J's need to be at the centre of the great-aunt's concerns. The judge was critical of the great-aunt's identification of a large number of people who she said would be there to support her.

52. Mr Brookes-Baker submits that the approach of the judge to the friends who would support the great-aunt was unfair as rather than 'picking them off' one by one, she should have looked at the whole picture and taken into account that the ISW had referred to the great-aunt's "inner circle of close friends willing and able to assist". Mr Brookes-Baker submits that whilst the ISW's written evidence highlighted her concern that the great-aunt would be more heavily reliant on others than would be appropriate, nowhere is there evidence in support of the judge's conclusion that "[The great-aunt's] supporters are about supporting her in her current lifestyle and have nothing to do with what is in the best interests of J".

53. Mr Brookes-Baker rightly points out that no reference is made in the judgment to that part of the assessment which records that the house had become less busy following the death of the great-aunt's mother and the recovery of her sister from an illness and/or that the great-aunt had reduced her workload to improve her capacity to focus on and prioritise the needs of J.

54. The judge found that the great-aunt's busy household was not child focused and that J would "get lost". No reference is made by the judge to evidence which undoubtedly should have been put on to the other side of the scales, that is to say the great-aunt's complete love of and commitment to J and that by February 2019 there was now an attachment between great-aunt and child.

55. The judge turned to the issue of risk, a matter raised as a concern by the ISW due, substantially, to her worry as expressed in the final addendum that the great-aunt failed to understand the need to limit the number of unfamiliar people to with whom J would come into contact and to prevent his exposure to anyone identified as a risk. The judge found that J would be not only at emotional risk in the household but also at "actual risk". The judge does not identify any evidence in support of a finding of "actual risk" which was, as the court understands it, not one sought by the local authority.

56. The judge made no reference, before reaching her conclusion that J would be at risk in her care, (i) to the great-aunt's very considerable knowledge and experience of hands on safeguarding through the running of a martial arts club at her home with a number of coaches each of whom she has required to be DBS checked or, (ii) domestically, to the wholly appropriate and child focused way in which she had dealt with the situation when her daughter was sexually abused.

The Appeal

57. Mr Brookes-Baker's global submission is that the judge failed to give adequate reasons for making a placement order. The judgment, he submits, lacked any proper evaluation of the risks or proportionality of adoption. The absence of any proper consideration led the judge to fail to analyse the relationships J will lose, and what the benefits of those relationships are against any identified risk. Any proper consideration of the proportionality of adoption would, he submits, have led the judge to have considered the reasons which lay behind the local authority's 'U Turn', and what had changed in terms of risk in a matter of weeks, a topic entirely unaddressed in the judgment.

58. On behalf of the local authority, Ms Meachin QC appropriately acknowledged the lack of analysis within the judgment. She submitted, however, that ultimately the judge reached a decision in a finely balanced case, which was supported by both the ISW and the Guardian. There was, she said, sufficient detail for the parties to understand why the judge had concluded adoption was the only order which would meet his needs.

Discussion

59. It is against the well understood and established principles which apply to applications for the making of a placement order that I turn to consider the ground of appeal.

60. The local authority unhesitatingly accept that adoption is, as it was put in *Re B* [77], "the most extreme option" and further that the making of a placement order inevitably impacts upon the Article 8 rights of the parents.

61. In my judgment on the facts of this finely balanced case any court must in that context, have in mind what the European Court of Human Rights said in *YC v United Kingdom 92129* 55 EHRR 967, at para134:

> "..family ties may only be severed in very exceptional circumstances and… everything must be done to preserve personal relationships and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing."

Welfare Checklist

62. It is submitted on behalf of the great-aunt that the brief reference made by the judge to the welfare checklist in the judgment was inadequate as certain important features should have been highlighted and specifically considered in the judgment.

63. In *Re M (A Child: Care Proceedings) [2018] EWCA Civ 240; [2018] 2 FLR 690* in the context of a so called "inadequate reasons" appeal, I had cause to consider the treatment of the welfare checklists in the judge's judgment. I said:

> "63. …..I repeat that it is well established (for example: *Re G (Children)* [2006] 2 FLR 629 HL) that it is neither necessary nor appropriate for a judge slavishly to rehearse every factor set out in the checklists. What is necessary is that important, critical (or even decisive) factors within those checklists are adequately identified and analysed so that it can be seen what part they have played in the overall decision-making process. This is of particular importance, as noted in *Re G*, in cases that are difficult or finely balanced."

64. In my judgment, of particular importance in the context of the present case would be s1(4) (c) and (f) Adoption and Children Act 2002 which respectively provide:

> "(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) …
>
> (e) …
>
> (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."

65. This case is unusual in that the proposed placement for J would have meant that whilst the great-aunt would be his primary carer, his biological mother would be living under the same roof. Adoption would therefore result in J not only losing his attachment with his great-aunt (whose relationship with J is described in the final addendum as "warm, gentle and generally child centred, attuned and responsive") but also his relationship with his mother (described in the same report as: "A particular attachment to his mother is apparent during contact. Jamie is visibly animated in her company, greets her with great enthusiasm and tries to engage her in play").

66. The totality of the judge's analysis of this important factor is found in one sentence:

> "By the making of a Placement and Adoption Order he would lose contact with his family and that is a serious matter."

67. There appears to have been no evidence that the mother living under the same roof as J was a particular difficulty or in any way undermined the application of the great-aunt. The judge said that a time might come when J is "easier to look after" and that the mother may then wish to take a larger part in his care. That, the judge said, would be "undesirable"; but this mother has accepted, from J being a matter of days old, that she is unable to look after him. If something was said by the ISW in oral evidence to undermine the validity of that acceptance by the mother of her limited role in J's life, it should have been in the judgment. There is, however, no summary of the ISW's evidence in the judgment and no one has taken the court to anything in the written evidence which would render the judge's observation as anything more than speculation.

68. In my judgment, the unusual feature of this case, namely that J would be able to live under the same roof as his mother should he be placed with the great-aunt, is a matter of considerable significance as a potential benefit to J and should have been specifically identified and analysed as such as part of the consideration of the welfare checklist.

Positive Attributes

69. The second limb of the ground of appeal is the alleged failure on the part of the judge to take into account the whole picture and, in particular, the great-aunt's positive attributes.

70. The judge was faced with a difficult task. She had not case managed the case with all its twists and turns, there was the volte face on the part of the local authority and, further, she appears to have been given a picture of contact which it might have been felt not to have been even handed. The judge's judgment however focused almost entirely on what were the undoubted concerns held by the ISW in respect of the great-aunt's ability to provide a safe, secure home for J throughout his childhood. Nowhere in the judgment does one find reference to the great-aunt's many strengths which had been identified throughout the assessment process.

71. In my judgment, this feeds into what, with great respect to this busy and experienced judge, is at the heart of this appeal, namely that the judge gave inadequate reasons and failed adequately to analyse important factors. I have reluctantly come to the conclusion that not only did she fail adequately to analyse the evidence generally but, as set out above, when criticising the great-aunt, it would appear that, on occasion, she misunderstood or misinterpreted the evidence, as, for example, in relation to the great-aunt's practical parenting skills.

72. Without a clear consideration of both sides of the equation, the judge cannot hope to reach a proper balanced decision. Further, whatever is the ultimate outcome of the case, where a party has (i) spent a year undergoing assessments, (ii) spent a considerable amount of money in order to make her home suitable for a young child; (iii) made significant (although the judge would say insufficient) changes to her lifestyle; and (iv) is described in an assessment report as " a remarkable woman with a host of admirable talents and commendable qualities…with great potential and much to offer J", that woman should see those positive features being put into the equation by the judge when considering whether adoption is the only course which would serve J's best interests; only in doing so could the great-aunt be confident that those positive features had been taken into account.

Risk

73. Mr Brookes-Baker also takes issue with the judge's analysis and evaluation of 'risk'. Recently Peter Jackson LJ considered the imperative for a court properly to evaluate risk when faced with an application for a placement order. Peter Jackson LJ said in *Re F (A Child: Placement Order: Proportionality)* [2018] EWCA Civ 2761:

> "24. In these circumstances, close attention needed to be paid to the nature and extent of the risks. As foreshadowed at the start of this judgment, there must be (to borrow a phrase from a different context) an intense focus on the *type of risk* that is involved, *how likely* it is to happen, and what the *likely consequences* might then be. Only by carrying out this exercise is it possible to know what weight to give to the risks before setting them alongside other relevant factors. So, for example, the risk of further physical harm to a child who has been severely

> injured by a denying parent is likely to be a factor of predominant weight. By contrast, to borrow from the evidence in this case, where a mother who untruthfully denies drinking goes to a park at night to drink alone, leaving her baby with its grandmother, the court will view that risk with a sense of proportion.
>
> "Similarly, close attention must be paid to the true significance of lies and lack of insight in the context of assessing welfare. Lies, however deplorable, are significant only to the extent that they affect the welfare of the child, and in particular to the extent that they undermine systems of protection designed to keep the child safe. However, as noted by Macur LJ in *Re Y (A Child)* [2013] EWCA Civ 1337, they cannot be allowed to hijack the case. See also Sir James Munby P in *Re A (A Child)* [2015] EWFC 11 at [12]:
>
> > *"The second fundamentally important point is the need to link the facts relied upon by the local authority with its case on threshold, the need to demonstrate why, as the local authority asserts, facts A + B + C justify the conclusion that the child has suffered, or is at risk of suffering, significant harm of types X, Y or Z. Sometimes the linkage will be obvious, as where the facts proved establish physical harm. But the linkage may be very much less obvious where the allegation is only that the child is at risk of suffering emotional harm or, as in the present case, at risk of suffering neglect. In the present case, as we shall see, an important element of the local authority's case was that the father "lacks honesty with professionals", "minimises matters of importance" and "is immature and lacks insight of issues of importance". Maybe. But how does this feed through into a conclusion that A is at risk of neglect? The conclusion does not follow naturally from the premise. The local authority's evidence and submissions must set out the argument and explain explicitly why it is said that, in the particular case, the conclusion indeed follows from the facts."*
>
> Although these observations about lies and lack of insight are directed to proof of the threshold, they can equally be applied to the welfare evaluation".

74. The judge's evaluation of risk was somewhat superficial. In saying this I do not minimise the concerns raised by the ISW in this regard or in relation to her concerns as to whether the great-aunt could be trusted to be open and honest with the local authority. However, the judge needs (as identified by Sir James Munby) to explain why the facts justify a conclusion that the child is at risk of harm.

75. An example in the present case was the great-aunt's failure to inform the assessor that her daughter had been sexually abused. This failure on her part was undoubtedly a potential risk factor, but that bare fact needs then to be considered against: (i) the great-aunt's explanation for this omission, namely that it was just too painful to discuss, an explanation that the ISW understood and had been accepted by the ISW not to have

been part of a calculated plan to prevent her from discovering what had happened; (ii) that on investigation it became apparent that not only was the great-aunt in no way culpable for the abuse having taken place, but she had acted impeccably in protection terms; believing her daughter, calling the police notwithstanding that the culprit was a family member, and supporting her daughter during the criminal trial and thereafter. It would be only by conducting this type of analysis that the court could be satisfied that the fact relied on by the local authority, namely that the great-aunt failed to inform the assessor that her daughter had been abused, justified a conclusion that J is at risk of suffering emotional, let alone actual harm in the care of his great-aunt.

76. The global submission made on behalf of the great-aunt is that that the net result of the omissions highlighted through the particularised grounds was that the judge had failed to give an adequately reasoned judgment.

77. The Court of Appeal has considered the extent of the obligation of a judge to give reasons for his or her findings and conclusions. Most recently, the matter was considered in the context of a finding of fact hearing in *Re V (A Child)(Inadequate Reasons for Findings of Fact)* [2015] EWCA Civ 274; [2015] 2 FLR 1472. McFarlane LJ (as he then was) having considered the cases of *Flannery v Halifax Estate Agencies Ltd (t/a Colleys Professional Services)* [2000] 1 WLR 377, and *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 said this:

> "14. In simple terms, what the law requires is that the losing party needs to know why he or she has lost on any particular point. This court rightly affords a great deal of respect to trial judges who sit in a courtroom for a number of days immersed in the evidence in the case, be it written or oral, and, most importantly, seeing the demeanour of the key players in the courtroom, particularly when they come to give evidence. What I say in this judgment in this case is not, and I repeat not, intended to raise the bar, alter the law or otherwise cause 99.9 per cent of the judges who undertake this work to depart from their current practice. If indeed there is a general move to encourage judges to change their approach in these cases, it is a move towards giving shorter judgments, rather than longer judgments.
>
> 15. In a straightforward fact-finding exercise such as this, there is no need for an elaborate distillation of each and every point. A straightforward case merely demands a straightforward explanation of the key factors that the judge has taken into account and his or her reasons for preferring one part of the evidence over another. Where oral evidence has been given by the key players it will often, if not always, be important to give a short appraisal of the witnesses credibility and, where the testimony of one is preferred over another, a short statement of the reasons why that is so. The trial judge has had the privileged position of seeing the protagonists and using that privileged perspective to inform a conclusion on credibility. For the judge not then to go on in his judgment to offer a brief description of what he has observed and as to how, as a result, he has

> approached credibility robs any recipient of the judgment of knowledge of that important aspect and, in particular, makes it harder for this court to afford the usual weight that is rightly to be given to the fact that the judge has had a ringside seat at the trial.
>
> 16. In summary, the well-established approach of an appellate court in cases such as this is that a basic, short but clear description of the factors considered and the reasoning that underpins any conclusion is all that is required. But it is nevertheless required, and the question in this appeal is whether the judicial analysis offered by [*the judge]* in his judgment falls short of that requirement."

78. I repeat the words of McFarlane LJ in order respectfully to endorse them and to emphasise that in reaching the conclusion that I have in this case I am mindful of the immense burden on care judges and I reiterate that nothing I say is, to rehearse McFarlane LJ's words, "intended to raise the bar, alter the law or otherwise cause 99.9 per cent of the judges who undertake this work to depart from their current practice".

Conclusion

79. In my judgment Mr Brookes-Baker has on behalf of the great-aunt, made good his global submission that the judge failed to give an adequately reasoned judgment and in doing so, has satisfied me in respect of each of the three particular matters upon which he relied as set out at [3] of this judgment. In my judgment it is not possible from the reasons as articulated by the judge for the court to be satisfied that the making of a placement order would be a proportionate outcome for J. It follows, therefore, that both the care and placement orders must be set aside, and J will continue to be in the care of the local authority pursuant to S20 Children Act 1989, pending the matter being reheard.

80. For these reasons, the appeal has been allowed and the matter remitted for rehearing.

Lord Justice Henderson:

81. I agree

Lord Justice Moylan:

82. I also agree