This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

IN THE FAMILY COURT SITTING AT BIRMINGHAM NEUTRAL CITATION: [2019] EWFC 59

8 to 12 July, 15 to 17 July, 23 September 2019

Before:
RECORDER SAMUELS QC
(Sitting as a Deputy High Court Judge)
(In Private)

BETWEEN:

BIRMINGHAM CITY COUNCIL Applicant

- and –

(1) W
(2) Q
(3) K, T and U
(by their Children's Guardian)

Respondents

Mr A. NEAVES (instructed by Birmingham City Council) appeared on behalf of the Applicant.
Miss K. BROWN (instructed by HRS Family Solicitors) appeared on behalf of W.
Mr W. HORWOOD (instructed by Anthony Collins Solicitors) appeared on behalf of Q.
Miss S. TIERNEY (instructed by McDonald Kerrigan LLP) appeared on behalf of the children.

Re: K, T and U (Placement of Children with Kinship Carers Abroad)

JUDGMENT

Introduction

1. This is an application by Birmingham City Council ('the LA'), initially for orders under Part IV Children Act 1989. It relates to three children; K who is now 10, T who is 3 and U who is 2. The mother of all three children is W. The father of all three children is Q. Q's father is C and Q's paternal grandmother (C's mother) is P. C is therefore the paternal grandfather of the children and P is the paternal great-grandmother.

2. I have handed down a separate judgment in this matter to deal with discrete fact-finding issues. I have decided to hand down this second judgment, after consultation with the local FDLJ and DFJ, to record and give consideration to the difficult issues that have arisen in this case surrounding the potential placement of the children with their paternal family members in Bermuda.

3. Given the potential for wider distribution of this judgment, I have anonymised the names of the children and family members. I have already provided a schedule of anonymised names so that anyone working with this family can readily identify the people referred to it the judgment.

4. I have also decided to anonymise any reference to the professionals and experts who provided evidence for the benefit of the court. It is not my intention to cast blame on any single person or group of people for the events that have taken place. My only intention is to provide assistance to others should similar issues arise in other cases in the future.

5. In a similar vein, I record that all the advocates who appeared before me were new or almost new to this case. None of them can therefore bear any responsibility for the way this case has developed. For what it is worth, I also record that I was new to this case as of the hearing listed on 5th July 2019.

6. Inevitably, this judgment is not a comprehensive review of the issues that may arise when considering a potential kinship placement abroad. However, the problems that have arisen are stark and have proved difficult to unravel. One cannot help but feel a sense of despair that, 21 months on from the commencement of proceedings, the welfare outcome for these 3 children remains uncertain.

Background

7. This can be stated relatively concisely. Both W and Q were born and raised in Bermuda. They formed a relationship there and K was born. W has an older daughter X. She would have been around 6 when W and Q met. She is now 18.

8. Q has a very significant history, including having stabbed his father C in Bermuda when aged approximately 15. Q told me in evidence that he fully intended to kill his father. He has served a substantial sentence of imprisonment for offences of dishonesty. He became involved in gang and drug culture whilst living in Bermuda.

9. Q moved to the UK in October 2013. He lived here initially with his half-sister G and G's mother. W and the children moved to the UK to join Q in February 2014. T and U were subsequently born in England.

10. The relationship between Q and W was characterised by severe and repeated violence inflicted upon W by Q. The most serious incident took place in May 2014. W was left unconscious as a result of a brutal assault on her. W says that Q subsequently admitted to her that he had raped her after that assault, whilst she was unconscious. He also admitted to a probation officer that he believed he had killed W. W refused to press charges and resumed her relationship with Q.

11. On 29th December 2017 Q's half-sister G (then aged 13) alleged that he had sexually abused her in 2013/14 when he stayed at her home. Q was arrested but was bailed to the family home with W, X, K, T and U.

12. On 4th February 2018 X, then aged 17, alleged that she had been repeatedly raped and sexually abused by Q since the age of 13. She said that he had raped her approximately 3 times a week. X said Q had also physically assaulted and choked her. K, T and U were removed into foster care under police protection the next day and proceedings were issued by the LA on 7th February 2018.

13. On 30th July 2018 Q pleaded guilty to all charges on the indictment against him on a 'full facts' basis. He therefore admitted the full extent of the sexual abuse as alleged by G and X. He was sentenced on 5th September 2018 to a period of 20 years' imprisonment with an extended sentence of a further 8 years. I am told that the net effect of this is that he will serve at least 2/3 of his original 20-year sentence. Q has denied within these proceedings having committed the offences and says that he only pleaded guilty to achieve a reduction in his sentence.

14. There was no application on behalf of Q to seek to displace the presumption that his criminal conviction for these offences stands as proof that the allegations against him are true for the purpose of these proceedings.

15. In my earlier judgment I resolved the remaining factual threshold issues between the parties. I made findings that W failed to protect X from the sexual and physical abuse perpetrated against X by Q.

16. In those circumstances it is perhaps not surprising that the LA commenced an early search for possible kinship carers for these children. The only such carers identified were C and P. They live in very near to each other in Bermuda.

History of these proceedings

17. From what I have read, the first reference to C as a potential carer for these children is in an order dated 13th June 2018. On 28th June 2018 the court directed 'a viability assessment' of C and P. That assessment was completed on 18th October 2018. It was generally positive of C and P as potential carers for the children.

18. Although the assessment was said to be a viability assessment, it was completed on a CoramBAAF 'Connected Person / Family and Friends Form C' by a local social worker in Bermuda. It was the LA who asked for the assessment to be completed using this form, but I have been unable to ascertain why. It is clearly a much more extensive assessment than would be usual to assess the viability of the potential placement, involving detailed discussions with C and P, the obtaining of medical information, obtaining details of and speaking to referees, etc.

19. Despite the detail contained within that assessment, the LA and Guardian expressed themselves to be disappointed with its quality. On 25th October 2018 the assessor was directed to prepare an addendum report. It was recorded on the face of the court order that the LA and Guardian deemed the report to be "inadequate". The addendum was filed dated 19th November 2018. The conclusions of the assessment remained positive. The LA and Guardian again expressed themselves to be dissatisfied with the report.

20. On 3rd December 2018 permission was given for the LA to obtain "an assessment" from an independent social worker ('ISW'). The ISW was based in Jamaica. She reported on 4th February 2019, so within about 8 weeks of instruction. The document is headed "Special Guardianship Report". Neither the LA nor any other party understands why the report was given this title. The ISW had never been instructed, they say, to produce a special guardianship assessment. Neither the court order authorising the instruction nor the letter of instruction make any reference to an SGO assessment, as far as I can see.

21. The conclusions of that report were again positive about C and P and their potential to care for these children in Bermuda.

22. On 16th March 2019 the LA filed its final evidence. The LA reported that in light of the positive 'Special Guardianship Assessment' prepared by the Jamaican ISW, it believed that the children's needs would be best met *"through them being placed in the care of their*

paternal grandfather… under a Special Guardianship Order…" The LA's *Re B-S* welfare analysis concluded by recommending that an SGO would better meet the children's needs than a child arrangements order. No one can explain to me how or why the LA believed it was in possession of a lawful special guardianship assessment.

23. In her final evidence filed on 26th March 2019 W asserted that the children should be returned to her care. She also strongly opposed the placement of the children in Bermuda. She outlined her concerns about such a placement. She said that access to education in Bermuda is very limited. Gun and knife crime is at a very high level and almost every family is affected by it. Q's brother had been murdered and X had witnessed a shooting. This was one of the reasons she had wanted to move to the UK. She expressed particular concerns about the children's safety given she says that Q was a police informant and there is the potential for gang retaliation. She says it is very easy for young men to get caught in gangs, just like Q did.

24. On 11th April 2019 the Guardian filed his final analysis. He did not at that stage appear to make any positive recommendation. Instead, he highlighted a number of gaps in the evidence, but did not raise any fundamental concern about the assessment process. He said he was concerned about the making of a SGO in favour of C and P given the children had never lived with them.

25. An IRH took place on 11th April 2019. Permission was given at that hearing for instruction of an expert to advise on the status in Bermuda of the potential orders identified namely care orders, special guardianship orders and child arrangements orders, which would be the most effective in securing a placement in Bermuda, what steps would need to be taken in Bermuda to give effect to those orders and what immigration steps would need to be taken to ensure that the children could remain and be resident in Bermuda.

26. An expert was duly instructed to prepare that advice. That expert was a family law barrister practising in England. As far as I can see, he professed to have no expertise or experience in Bermudian law. Nonetheless, he purported to give an opinion as to the form of the application that could be made in Bermuda on behalf of C and P. That could not be an application for a special guardianship order, he said, because such orders are not available there.

27. He also advised that the LA should issue wardship proceedings in respect of these children and that this would be the better method of achieving a placement of the children in Bermuda. He did not consider whether the court in England would be able to make such an order or the practical effect of doing so. He does not adequately explain why such an order would be better than, for example, a placement of the children in Bermuda under an interim care order pursuant to permission granted under Sch 2 para 19 of the Children Act 1989.

28. The LA were also directed to file statements from C and P by 3rd June 2019. They did not comply with that direction.

29. The matter was then listed on 8th April 2019 for an 8 day hearing, ultimately before me commencing on 8th July 2019.

30. On 14th June 2019 the LA filed its amended final evidence. That evidence maintained the LA's position that it sought SGOs in favour of C and P. The LA also filed a support plan. That plan provided for financial support to be paid by the LA to C and P *"for a period of three months… or up until benefits are paid"*. No-one was able to explain to me precisely what that means (is it a maximum of 3 months? What benefits will be available in Bermuda?) or the basis upon which these calculations were made. My sense from the submissions I received was that the question of financial support was seen as a matter entirely within the discretion of the LA.

31. In Q's final evidence he confirmed that he supported the children living with his family in Bermuda. In W's final evidence dated 27th June 2019 she said that she still wished for the children to be returned to her care, but if the court decided that the children were to be placed in Bermuda then she would have no choice but to return there to maintain a relationship with them. In the Guardian's final analysis dated 3rd June 2019 he indicated his support in principle to the children moving to Bermuda under the care of C and P. The concern expressed in his previous report about the making of a SGO in these circumstances was not reproduced in this report.

32. On 2nd July 2019 the Guardian applied for further directions due to concerns that the LA had not made the necessary legal applications to enable the children to be placed outside of the jurisdiction at the conclusion of this hearing. On 3rd July 2019 the LA, prompted by the Guardian, applied under the inherent jurisdiction for wardship orders with respect to all 3 children. Within the body of the application it is said that the paternal family members had been positively assessed by the ISW and *"have been deemed to be suitable candidates to act as special guardians for the children".* That application was listed before me at a telephone hearing hastily arranged for 5th July 2019 with the final hearing due to start on the next working day, 8th July. I gave case management directions at that hearing in an attempt to ensure, as best I could, that the case remained on track.

33. In the immediate lead up to this hearing there appeared to be a developing consensus that the children should move to live with C and P in Bermuda, shortly after the conclusion of the hearing in line with the evidence filed by the LA, Q and the Guardian. Miss Brown on behalf of W emphasised on the first morning of the hearing (not having been counsel instructed on the 5th July) that her client's instructions were that she supported the placement (if the children could not return to live with their mother), but she also raised concerns about whether the assessments of C and P had been sufficiently rigorous.

34. The position as it crystallised on the first days of the hearing was as follows:
(1) Threshold was not agreed. The mother wished to amend and supplement her previous threshold responses. The LA then wished to amend and supplement its threshold allegations.

A composite schedule of allegations and responses was only produced on the 4th day of this hearing.

(2) The LA conceded that a placement of these children in Bermuda under the wardship jurisdiction would most probably be against the case law authorities and would certainly be impractical.

(3) The LA conceded that there was no valid special guardianship report, needs assessment or support plan.

(4) The LA conceded that there was no lawful Reg 22 or 24 Care Planning, Placement and Case Review (England) Regulations 2010 assessment, nor had panel approval been given to place the children with C and P under an interim care order. Accordingly, it was not open to the LA to place the children with C and P under Schedule 2 Para 19 of the 1989 Act.

(5) The LA tentatively suggested that the court could be invited to make final s.8 'lives with' orders in favour of C and P. It was wryly pointed out by others that this was now the 3rd proposed form of legal order within a matter of days. The LA were unable to explain why this was the better form of order, particularly in light of the previous assessments where this had been discounted in favour of a SGO. There was a real sense that given wardship, special guardianship and placement under Sch 2 Para 19 were no longer viable options, this was the best they could come up with. That suggestion was sensibly withdrawn on the same day.

(6) There was no clarity as to how the children were going to be able to leave the UK and enter Bermuda lawfully, and how their immigration status within Bermuda was to be regularised, if necessary. The LA had not even managed to obtain passports for them.

(7) C and P had been invited to come to England for the first week of the 8 day final hearing. I was not able to establish why they had only been invited for this period of time. They had never been provided with any court papers, not least the assessments of themselves or the support or transition plans. They had never been offered any legal advice. No consideration had been given at any stage as to whether they should have party status or attend all or part of the hearing, save that they were listed on the witness template (although no statements had been filed by the LA as I have said). Only very limited contact with the children had been arranged for them during their stay. As became apparent from their conversation with the Guardian they had only the most limited understanding about the proceedings and their role within them.

(8) There was no line of communication between the LA and the Bermudian authorities. Each appeared to be saying that the other was not replying to their emails. There was a palpable sense of confusion, lack of communication and misunderstanding.

35. In the circumstances the Guardian applied for an adjournment of the welfare issues. That application was not really opposed by any party. The reality was that this case was 'a million miles' away from achieving a welfare resolution.

36. There appeared to be a dawning realisation by the LA and Guardian that there may have been issues of relevance that had not been covered or covered adequately in the potential assessments of C and P. For example,

(a) The circumstances in which Q had attempted to murder C;

(b) Whether C, as alleged in some of the social work records, had physically abused Q and had himself been involved within gang and drug culture in Bermuda.
(c) Whether G had told C, her father, and P her grandmother, that she had been sexually abused by Q and whether C and P, as alleged by G, had refused to believe her.
(d) What impact W's expressed intention to move to Bermuda would have upon the stability of the proposed placement. Such questions were highlighted when W told me in her oral evidence that both the social worker and C had told her that she could regain the care of the children once she was settled back in Bermuda.
(e) How contact with W in Bermuda was to be supported / managed.
(f) Whether there was any truth to W's concerns, as set out in her March 2019 statement, that a placement in Bermuda would not be safe or in the children's best interests.

37. During the course of the hearing Miss Brown helpfully produced (at the Court's request) a document highlighting what she said were the deficiencies in the existing assessments. The second assessment had been completed, of course, 5 months ago. The vast majority, if not all, of her complaints arose from the case papers rather than any new information produced during the hearing before me.

38. These issues were ventilated, of course, entirely in the absence of C and P. Miss Tierney on behalf of the Guardian was hastily able to arrange for some legal advice to be provided to them (for which I am grateful) on the 3rd day of the hearing, funded by the LA. On the 6th day of the hearing I received a draft C2 prepared by the solicitor who had been instructed seeking party status for C and P. I accepted the application in draft to prevent a somewhat unseemly squabble as to who was going to pay the issue fee. That application was opposed by the LA and by W. In my earlier judgment I granted C and P party status for the reasons I set out therein.

39. Against that somewhat unfortunate background, the issues that I propose to consider within this judgment are as follows:
(1) Landscape
(2) Threshold
(3) Communication
(4) Assessment
(5) Experts
(6) Orders
(7) Party status
(8) Needs assessments and support plans.

Landscape

40. It is well recognised that placing children with kinship carers can represent an optimal outcome for families where it is not safe to permit the children to return to the care of a parent. For example, s.33C(7) of the 1989 Act provides that in determining which is the most appropriate placement, a local authority must *"give preference"* to a placement with a

relative, friend or other connected person. Article 20 of the UN Convention on the Rights of the Child provides that, *"3… When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."* However, achieving a lawful, safe and supported placement for children with family or friends abroad represents one of the greatest family law challenges for professionals, lawyers and judges.

41. There is some material available to assist, particularly that published by the organisation Children and Families Across Borders ('CFAB'). I have looked in particular at their September 2018 report entitled 'Cross-border child safeguarding: Challenges, effective social work practice and outcomes for children ('CFAB 2018 report') and their 2018 Factsheets on 'UK social workers practising overseas' and 'Placing children with family overseas'. They also have a telephone advice line to provide assistance where needed.

42. The Department for Education has produced relevant guidance namely, 'Working with foreign authorities: child protection and care orders (July 2014), 'Cross-border child protection cases: the 1996 Hague Convention (October 2012)' and 'Placement of looked after children in EU member states' (January 2013). As is said in the CFAB 2018 report, it would be helpful if the DfE guidance could be updated. That is unlikely, I accept, until it is clear what the position is in relation to the UK's decision to leave the European Union.

43. Inevitably, some of the issues that arise are replicated where a family and friends (or 'kinship') placement is proposed within England and Wales. There has been a recent focus on ensuring the safety of these arrangements, particularly after the tragic death of Shi-Anne Downer who had been placed with her eventual murderer under a SGO (coincidentally by this LA). The Serious Case Review into her death, published on 22nd February 2017, made a number of detailed recommendations. In the case of *Re P-S (Children) (Special Guardianship)* [2018] EWCA Civ 1407, [2019] 1 FLR 251 the Court of Appeal highlighted (in a judgment handed down on 18 June 2018) a number of the significant issues that can arise and gave extensive guidance. In March 2019 a comprehensive report was published by the Centre for Child and Family Research at Lancaster University, funded by the Nuffield Foundation, 'The contribution of supervision orders and special guardianship to children's lives and family justice' ('CCFC report 2019'). Even more recently the Family Justice Council has published its 'Interim Guidance on Special Guardianship' and The Public Law Working Group, under the chairmanship of Keehan J, published in June 2019 its draft 'Recommendations to achieve best practice in the child protection and family justice systems' with detailed sections on special guardianship placements.

44. Unlike many countries, child protection functions within England and Wales are delegated to local authorities rather than managed nationally. Individual authorities may, therefore, not have much experience of dealing with placement issues within foreign jurisdictions. There are, as I understand it, informal lines of communication between local authorities but these inevitably fall short of shared experiences. The CFAB 2018 Report found that local authorities were taking various approaches to cross border cases and had

developed their own approaches and interpretations of their responsibilities and duties. The Report called for clearer practical guidance as to how to manage these cases and *"a more consistent and well-informed approach to cross-border cases so that all children in these situations are protected and have their rights upheld."*

45. There may be a perception that a placement abroad will raise more complex issues than a potential placement within the UK or that a placement within a country that is not signatory to BIIa or The Hague Convention 1996 will prove more problematic than a placement to such a country. Different issues are certainly likely to arise, but complexity is likely to exist whichever country is involved. The 2018 CFAB Report highlighted difficulties in securing collaboration with the receiving jurisdiction where the proposed placement was in Scotland and in Northern Ireland. What was said to make the difference was not whether the country was part of the UK, a signatory to Brussels IIa or The Hague Convention, but the attitudes and processes in the other country and the *"ability to establish an effective, direct point of contact".*

46. Equally there may be a perception that a placement abroad will carry greater risk and uncertainty than one within England and Wales. There is currently very little research available to establish or refute that suggestion. I note that the CCFC report concluded that the rate of placement breakdown after the making of SGOs to kinship carers within this jurisdiction was 5%, or 7% when the SGO was coupled with a Supervision Order. The CFAB 2018 report found that placement breakdown occurred in 2 of 21 cases where the child was placed from the UK to another country and in 2 of the 8 cases where the child was placed in the UK. In both of the cases where the placement breakdown was abroad, breakdown occurred because the carers were not able to cope with the child's psychological and behavioural challenges which were present prior to the placement. The report recognised, however, that there is a lack of knowledge of long-term outcomes for children placed abroad because, unless the local authority was providing post-placement support, it would not necessarily be notified of any placement breakdown. There was a call for further research as to long term outcomes.

47. Ultimately, whilst these cases present their challenges, CFAB cite *"many examples where children were protected or able to remain in the care of their family despite the complexity of the cross-border nature of their situations".*

Threshold

48. As I have commented in my earlier judgment on threshold, the composite document that was eventually produced to record the LA's threshold allegations and the parties' responses was unwieldy and somewhat repetitive. It underwent a number of different incarnations before a final version was presented to me on the 4th day of the hearing.

49. I appreciate, as I have said, that all counsel who appeared before me were new or relatively new to the case, I also appreciate that the parties' positions on threshold may

change or evolve during proceedings with the addition of further evidence or disclosure, or with the benefit of additional time to reflect.

50. Nonetheless, it is important to highlight in these complex welfare cases the need to 'keep all the plates spinning'. Ultimately the Court was required to resolve the remaining threshold issues; although the hearing was now17 months on from the issue of proceedings. As is commonly understood, it is the local authority's threshold allegations and such findings as the court makes upon them which underpin both the commencement of proceedings and the removal of these children from the care of their parents. Ultimately it is the threshold findings which empower the court to make welfare orders pursuant to s.31 CA 1989. Parties to Part IV proceedings need to ensure that a proper focus is given to the threshold issues, alongside welfare planning, until they have been determined by the court.

51. The Court of Appeal has emphasised in recent cases the need for the Court to distil and set out clearly the findings made as to threshold (see *S (Children) (Care Proceedings: Threshold Criteria)*, Re [2018] EWCA Civ 1282, [2018] 4 W.L.R. 143 and *W-P (Children)* [2019] EWCA Civ 1120).

52. It seems to me that this is all the more important when placement of children abroad is being contemplated, as it is possible that the Court's findings will need to be considered and understood at some future stage by third parties (in this case C and P), child care professionals within a different jurisdiction and possibly a family court in a different jurisdiction. It is essential in those circumstances that the case concludes with documents that clearly record why child protection measures needed to be initiated and what the court's ultimate findings on these issues are.

53. To assist with this task, it is most helpful that the Court is provided by the local authority with a concise and focussed list of allegations. Ultimately the document that was provided here did not achieve that ambition.

Communication

54. The CFAB 2018 report highlights the importance of good communication between the local authority in England or Wales and the authority in the receiving country. In this case there appears to have been a complete breakdown in communication, with both this LA and the Bermudian authority simultaneously alleging that the other had been unresponsive. Given that Bermuda is a British Overseas Territory and is English-speaking, one would have hoped that such communication issues might not have occurred.

55. As a matter of general common sense, at the outset of these cases the local authority should obtain a point of contact, or indeed several points of contact, with the receiving authority. That contact should be maintained regularly by email and by telephone so that each is kept updated as to the progress of any assessments and placement plans. The court should

be invited, by way of early case management order, to grant permission for any necessary information and documents to be communicated to the other authority.

56. If the local authority does not know how to initiate such points of contact, then CFAB hold lists of relevant professionals in a large number of countries. ICACU will also be able to assist in a case with a European dimension.

57. The advantages of such points of contact is that they will enable to local authority to seek information or consult on a number of matters including:
(1) The best way to arrange for an assessment of the proposed carers;
(2) What consents may be necessary to enable a foreign social worker to visit and, if required, carry out part or all of the assessment (see below);
(3) Any relevant cultural, religious or geographical issues;
(4) How to seek any relevant social care records;
(5) How to seek police, medical, educational and any other relevant third party information;
(6) What support services may be available in the local area and the likely cost;
(7) How to seek financial information including the proposed carer's entitlement to benefits;
(8) What other third party resources may be available, e.g. local solicitors with expertise in out of country placements.

58. There may also be mandatory notification requirements where the child is a foreign national. Unless there are good reasons not to do so, the relevant foreign Embassy should be informed that the child is the subject of court proceedings. If the local authority has not already done so, then the court will direct this should take place without delay (see para 47(iii) *Re E (A Child)* [2014] EWHC 6 (Fam), [2015] 2 FLR 151 per Munby P).

59. In the spirit of fostering good relations, care must be taken to avoid unnecessary or unwarranted criticism or perceived criticism of those working in other jurisdictions. It is important to guard against, and then make allowance for, misunderstandings or a lack of familiarity with court processes in England and Wales. In the present case the criticism by the LA and Guardian of the Bermudian assessment as "inadequate" was both unhelpful but also, in my judgment, unwarranted. The instruction had been to produce a viability assessment and the document produced was most certainly sufficient to meet that instruction.

Assessment

60. In many respects the assessment 'debacle' has been one of the most dispiriting aspects of this case. The LA's failure to obtain the necessary assessments has substantially led to the delays in this case. The net effect of those delays is that the Court will not be in a position to reach any welfare decision until almost 2 years after the children were removed from the care of their parents. Self-evidently, that delay is unacceptable.

61. To state what may seem obvious, a primary purpose of commissioning an assessment is so that, if the assessment is positive, the court can look to place the children with the proposed carers under one of a number of forms of legal order. Whilst I will look at the available orders in more detail below, under the current statutory framework the court will need to decide between a limited number of options. These include placement under an interim care order (pursuant to Schedule 2 paragraph 19 Children Act 1989), placement under a Special Guardianship Order, placement under a Child Arrangements Order and (perhaps) placement under some other form of order, such as wardship. It is hopeless if the eventual assessment does not comply with the relevant regulations so as to prevent the court placing the children under one or more of these possible orders. Should that happen, as it did here, the local authority may be left advancing a sub optimal form of order because it is simply 'the last man standing'.

62. Any assessment produced needs to be rigorous. Para 105 of the Special Guardianship Statutory Guidance provides that *"Local authorities are expected to ensure that the social worker who conducts the investigation and prepares the report to the court is suitably qualified and experienced. In conducting the investigation, the person preparing the report should analyse and consider the information they ascertain from and about the prospective special guardian. The approach should be objective and enquiring. Information should be evaluated, and its accuracy and consistency checked. The safety of the child is of paramount concern and it is vital that the background of the prospective special guardian is checked rigorously."* No lesser standard should be expected when the report is prepared to support a placement abroad under a different form of order.

63. Identifying the right professional to undertake the assessment will be critical. The alternatives are likely to be to undertake the assessment in-house, to commission a report from a social worker working in the relevant jurisdiction or to commission a report from a UK based independent social worker. There may be other options. In this case, an ISW report was commissioned from a social worker practising in a neighbouring country to Bermuda.

64. There will be advantages and disadvantages to each alternative. A social worker employed by the relevant local authority will have a good understanding of the relevant regulations and that local authority's procedures and may have the best chance of obtaining Regulation 22 or 24 approval to enable the court to consider the option of placing the children abroad under an interim care order as well as having knowledge sufficient to enable them to complete a lawful SGO assessment. They will also know the local authority's policy in relation to the provision of support, including financial support. They may not have any or much knowledge of the country involved and may not be able to travel there to assess the family in their home or their support needs. They may not have an understanding of any cultural, religious or locational norms. A local social worker will plainly be able to assess the situation in the relevant country and will have knowledge of any cultural, religious or locational norms, but may never have met the child concerned or other family members. They are unlikely to be able to compile the necessary Reg 22 or 24 and SGO assessment, present the case to the local authority's fostering panel to obtain approval or calculate any

financial support that will be payable. An ISW may be in a position to visit the country concerned as well as the child and other family members within this jurisdiction. They may be able to compile the necessary Reg 22 and 24 and SGO assessments. They are unlikely to have any local knowledge and may not be best placed to present the case to the fostering panel. They may not be aware of the local authority's policy in relation to providing support so may not be able to prepare the necessary support plan.

65. Whatever route is chosen there may, therefore, be gaps in the assessment and planning process. Those gaps can only be filled by active communication and whoever is charged with completing the assessment and relevant plans obtaining the missing information from other professionals. It may just not be practicable for a single professional to undertake all the work that is necessary.

66. The CFAB 2018 Report and the CFAB factsheets contain a number of helpful recommendations for local authorities looking to undertake or commission assessments where the proposed kinship carer lives abroad.

67. The first question when considering instructing a social worker based in the UK (or outside of the foreign jurisdiction) is whether the instructed social worker has the right to work in the country concerned. The CFAB factsheet 'UK Social Workers Practising Overseas' graphically describes the problems than can arise as follows:

> *"A social worker could be working illegally if they do not have the right to work in the country concerned and travels there as part of their employment. It is important to verify if the other country considers entering their country to complete an assessment as working in their country. Thought should be given to the travel documents and visas that the social worker uses to enter the country to ensure that these provide the appropriate permissions to work temporarily in the country concerned, if necessary. In addition, legal issues may arise if a social worker is seen to be practising social work in a country where social work is a protected title and they are not registered with the regulatory body. For example, in South Africa, under the Social Services Professions Act 1978, it is illegal to practise social work unless registered with the relevant body and it would be a criminal offence for a social worker to travel there to complete an assessment.*

68. A social worker who enters a foreign country in breach of that country's criminal law and / or regulatory requirements risks being fined or imprisoned. Proper checks will need to be undertaken in advance and contact may be necessary with the relevant embassy to obtain information about visa, travel documents and relevant permissions as well as with the established social work contact in the other jurisdiction. It is also important to ensure that the social worker has proper insurance in place; tourist travel insurance may not be valid and it may be necessary to arrange insurance which specifically covers work situations. If there are any risks associated with travel to the country, such as becoming caught up in possible family

conflict, these risks may need to be declared in advance. Similar guidance is given in the DfE documents.

69. The position is not necessarily simpler where travel is to take place to an EU or EEA country or to Switzerland. Directive 2005/36/EC may apply and the European Communities (Recognition of Professional Qualifications) Regulations 2007 offers information on how to obtain temporary registration to practice social work in another EU country and who to contact to be allowed to practice there (see CFAB factsheets). Assistance in these cases may also be obtained from the Central Authority. The DfE advice 'Cross-border child protection cases: the 1996 Hague Convention' recommends that ICACU is consulted in the first instance in all such cases. They hold useful information about authorities in other countries and have a wealth of practical experience of cross-border co-operation. They may also be able to obtain information about family members abroad or information about the child's history if they have lived abroad. Of course, there remains at the present time considerable uncertainty as to how the position may be different if the UK leaves the EU as currently planned on 31 October 2019.

70. In *Leicester City Council v S* [2014] EWHC 1575 (Fam), [2015] 1 FLR 1182 Moylan J (as he then was) highlighted specifically *"The need to consider, before they commence such work, whether English social workers are permitted to undertake work directly in another EU Member State."* (para 14(a)). In *Re V-Z (Children)* [2016] EWCA Civ 475 Black LJ (as she then was) commented in relation to a viability assessment of a grandmother in Slovakia conducted by Skype that "*It is doubtful that this course would, in fact, have been permitted by the Slovak authorities but they were not asked in advance as, in my view, they should have been."* As I have said, these issues are certainly not limited to cases with a European element.

71. Even where the relevant permission has been obtained alongside any necessary visa, travel documents and insurance, problems may arise. As the CFAB factsheet outlines, *"A UK social worker practising abroad will not be protected by their professional title and most likely will not understand the domestic laws that dictate the social worker's rights and responsibilities, including data protection and the types of information they can rightfully access"*. If allegations are made about their conduct, these will be subject to the local laws and procedures in that country.

72. Ethical issues can also arise. In some instances, the presence of a UK social worker could create risks for the family and / or stigma for the child. In small communities, a visit from a social worker may well be noticed. A holistic assessment must be able to assess the family's ability to care for the child alongside an understanding of the local environment and the resources available to meet the child's needs. There may be relevant cultural or community aspects to the assessment. In order to access education or support, it may be necessary for there to be an assessment or referral by a local professional.

73. Equally, as I have pointed out, there is a risk that an assessment undertaken by a social worker abroad may not meet UK requirements. As the CFAB 2018 report

acknowledged, *"kinship assessments received from overseas professionals varied in quality and rarely met the requirements of a UK assessment. Assessment reports were generally briefer, with less scrutiny applied and less evidence presented."* The CFAB factsheet comments that *"Notably, there can be long timeframes waiting for information from abroad, misunderstandings in communication, and overseas social workers will not necessarily understand the assessment requirements of UK local authorities and courts."*

74. CFAB have made a number of recommendations to assist local authorities resolve this conundrum. For example, many local authorities supplement the overseas assessment by inviting the carer to the UK for the purpose of further assessment, and particularly so that the relationship with the child or children concerned can be observed. This was identified as good practice by professionals who participated in their 2018 research. The DfE advice 'Working with foreign authorities: child protection cases and care orders' July 2014 is that *"social workers work with colleagues abroad when exploring potential placements for the child with family members abroad." "This may provide a more holistic picture, and help the social worker understand the unique characteristics of a child within their family, cultural, religious, ethnic and community context".*

75. The CFAB Factsheet suggests, as a possible extension of this collaborative approach, the option that the UK social worker would complete the assessment alongside their colleague abroad. Such an option retains the advantages that each would bring to the assessment and removes some of the disadvantages. For example, it may be easier for the UK social worker to arrange and obtain permission to travel to the foreign country if their enquiries are to be conducted jointly with a locally based social worker. This approach would need to be carefully structured in advance so that it is clear *"the role of each social worker, how the recommendation will be formulated and how much time will be taken by each professional in completing joint or solo visits with the family".*

76. This court is well used to situations where there has been a collaborative approach to an assessment process. For example, some hospitals work in multi-disciplinary teams and in complex cases two experts may produce a joint report. There seems to be no reason in principle why such a process could not be adapted to fit this situation. As long as the work undertaken by each social worker is properly demarcated, and it is clear who has formulated the recommendation or whether it has been jointly formulated, then such an approach has much to commend it. Indeed, it is difficult at present to anticipate many disadvantages.

77. In the present case the LA has tried two options, both without success. They commissioned a 'viability' assessment which was in fact completed on a 'connected persons' assessment form supplied, as I understand it by the LA. The LA and Guardian later criticised that 'viability' report. The LA then commissioned a report from an ISW practising in a nearby jurisdiction. That report has now been criticised by Miss Brown as being insufficiently robust and, as I understand it, the LA and Guardian acknowledge those criticisms. The LA proposed, at the hearing before me, a third option, which is the instruction of a UK based ISW.

78. This is a case which cries out for a collaborative approach to assessment between the UK and Bermuda. That now may not be possible because of the, possibly unfair, criticisms that have been made of the quality of the Bermudian assessment and the general lack of any sense of co-operation between the two authorities. I very much hope it is possible.

79. My narrative account as to the background in this case raises two more points of general importance. First, professionals working within a foreign jurisdiction may not understand the concept of a 'viability' report. Indeed, I am not currently convinced that the professionals working within this jurisdiction did. Such an assessment may take many forms, but it best described perhaps by reference to paragraph 67 of *Re P-S* where Sir James Munby said that the question to be answered is whether the proposed carer is *"a runner".* That appraisal will need a solid foundation, *"But the appraisal, assessment or evaluation (call it what you will) need not necessarily be too lengthy or too searching at this stage; what is sometimes referred to as a viability assessment or something similar may well suffice".* The positive assessment from the local social worker took almost 4 months to prepare (5 months if one includes the answers to the supplemental questions) and was highly detailed as I have said. It was plainly not a 'viability' assessment.

80. For these reasons CFAB do not recommend requesting a viability assessment from social workers abroad in most cases (see their 'Placing Children with Family Overseas' Factsheet). Normally, therefore, this will need to be undertaken from the UK after, hopefully, collaboration with social workers in the other jurisdiction.

81. Secondly, the title of each of the assessments produced in this case was misleading. I understand from the LA was that it was never intended that the Bermudian Social Worker should complete a Connected Persons Form C assessment. I am told that the LA's fostering panel would not entertain an application for foster care status presented by the social worker practising outside of the jurisdiction. In those circumstances I do not follow why that form was given to the social worker.

82. Equally, it was never intended that the ISW from the neighbouring jurisdiction should complete a Special Guardianship Assessment. The assessment plainly does not comply with the Special Guardianship Regulations 2005, which set out under Reg 21 and the Schedule to the Regulations, the matters that are prescribed for the purpose of s.14A(8)(b) of the 1989 Act. In other words, the matters that must be dealt with in the report prepared for the court. Those matters were significantly enhanced in 2016 in an attempt to ensure that such assessments were more robust. The parties maintain before me that this error did not come from any information or request that was provided to the ISW. What is most concerning is that once the report was produced no-one questioned its validity, and for 5 months all parties blindly assumed that the report produced did comply with the Regulations. It is simply hopeless if the necessary safeguards are bypassed in this manner without anyone seeming to notice.

83. Parties to proceedings where a potential foreign placement is to be the subject of an assessment need to be clear what the purpose of that assessment and that purpose needs to be recorded in the relevant case management order granting permission. Ultimately whether through a single assessment or a combination of assessments the objective must be to obtain a report that can be placed before the fostering panel (if positive) to seek their approval for placement under Reg 22 or Reg 24 and to obtain a report that complies with the Special Guardianship Regulations. If those objectives are not met, then the process risks, as here, becoming largely pointless.

84. I was grateful to Mr Brown (who appeared in place of Mr Horwood at the hearing on 23rd September) for drawing my attention to the CoramBaaf Guidance Notes for Form C assessments which enable the same basic assessment format to be used to provide both a connected persons assessment and a special guardianship assessment, with the addition of bespoke sections for each.

Experts

85. Where a child is to be placed with family abroad, it is essential to ensure that the placement is legally recognised in that second country. If it is not recognised, the placement can face numerous challenges, including difficulties registering the child in education, for health services or in obtaining financial support. In addition, parents who might pose a risk of harm to the child might be able to seek to interfere in the placement if the UK order is not recognised (see CFAB Factsheet 'UK Social Workers Practising Overseas'). The proposed kinship carers will need to receive proper advice on these issues including legal advice and advice from local professionals.

86. With regard to Special Guardianship, this may or may not be a concept that is recognised in the other jurisdiction. Some countries may require the carer to be registered as a foster carer and others may utilise the inter-country adoption process or the Kafalah system. There may be a need for additional assessments to be undertaken in the other jurisdiction and / or for attendance at parenting courses (see CFAB factsheets and the CFAB 2018 Report).

87. In some countries it may be necessary to obtain 'mirror orders' whereas in others there may be automatic recognition of the UK order. It is important that the kinship carers are provided, at the end of the process, with the correct documentation to show that they are the child's legal carer. Original copies of court orders may need to be provided, translated into the local language, and 'legalised' (e.g. by way of the issue of Hague Apostille Certificates, see the CFAB Factsheet 'Placing Children with Family Overseas'). This will all need to be subject to receipt of expert advice.

88. The expert evidence necessary for each case will depend upon the factual circumstances. However, as a starting point the court may need advice as to:

(a) The immigration status of the children and any relevant adults within this jurisdiction.

(b) What visas or other travel documents may be required for the children to enter the other jurisdiction.
(c) The immigration status of the children and any relevant adults within the other jurisdiction.
(d) What steps will need to be taken to ensure that the children and any relevant adults can reside permanently within the other jurisdiction.
(e) The effect of any order made in England and Wales in that other jurisdiction, the appropriate form of wording for such an order, and whether such an order will be recognised.
(f) What family law orders may be required within that other jurisdiction to ensure that the children remain safe and with the carer with whom they have been placed or to secure other benefits such as access to education, financial support, housing etc.
(g) What documents will need to be supplied to the carers and how these may need to be 'legalised'.
(h) Whether placement under an interim care order requires the permission of the other jurisdiction.

89. These may be complex issues and written evidence may be necessary from one or more experts. Depending on the country involved it may be necessary to instruct an expert practising within that country. Again, the resources I have mentioned above may be able to assist in identifying a relevant expert. The CFAB 2018 Report notes as a good practice example a case where advice was received from a solicitor practising overseas which specified what wording should be used in the UK court order and what documents were required for the placement to be recognised in the other jurisdiction.

90. What is essential is that the expert instructed has the necessary expertise and experience to provide the advice that is required. As Eleanor King J (as she then was) said in a somewhat different context in *A Local Authority v S* [2009] EWHC 2115, it is crucial that an expert stays within the bounds of his or her expertise (para 254).

91. I have seen nothing either in the body of the advice of the expert instructed to advice on Bermudian law in this case, nor within the expert's profile on his website, to indicate that he has any expertise in Bermudian law or experience of practising law in Bermuda. The only information I was given by the LA was that there was an expectation that he would refuse the instruction if it was outside his area of expertise. Whilst that would be my expectation as well, there remains a necessity that the LA should have had confidence in his expertise, and some basis for that confidence, before instructing him in the first place. Without this reassurance it is impossible for the Court to have confidence in the accuracy of the advice he has given.

Orders

92. Identifying the available form of order to secure a placement in a foreign jurisdiction has been one of the more difficult aspects of this case. As I have explained, within the space

of a few days the LA's proposed form of order moved from an SGO, to wardship and then on to a child arrangements order.

93. The LA's task was not assisted by the purported expert's advice that warship would be the best form of order under which to secure the placement. There was no analysis within the advice to explain sufficiently why that order would be best, what the possible disadvantages might be or even whether this form of order was likely to be available to the court on the basis of the existing case-law. As the expert is a practising family law barrister in England one might have expected that the third point at least would have been covered in the advice, particularly as I note that the idea of wardship was introduced in the advice itself and not by way of the letter of instruction.

94. At the directions hearing on 5th July 2019 I raised my concerns about wardship, in particular whether it was available as a legal route for placement of a child abroad by a local authority in light of s.100 CA 1989 and what the practical impact would be of making an order discharging the LA's parental responsibility in this case both in terms of making arrangements for the children's move and also possibly impacting on the level of support that would then be available to the kinship carers.

95. I have been particularly assisted on this issue by Miss Tierney who has drawn my attention to the case of *Islington Borough Council v E* [2010] 3240 (Fam), [2011] 1 FLR 1681. In that case Eleanor King J (as she then was) held that in order to escape the restrictions of s.100 CA 1989, a local authority must demonstrate (i) that they could not achieve what they wished to achieve by way of an order under the 1989 Act; and (ii) that there was reasonable cause to believe that if the court's inherent jurisdiction was not exercised with respect to the child he was likely to suffer significant harm. In that case the judge found that since the local authority could achieve what it needed to under Schedule 2 para 19 of the 1989 Act, the first ground for such an application was not made out. She commented that an interim care order would be the most appropriate order in the child's best interests and *"It would be a highly unusual course to discharge the interim care order and then, in a somewhat contrived manner, bring the care proceedings to a premature end in circumstances where the child is to be placed for assessment overseas and there is a final hearing listed in several months' time".* In any event, *"procedural irregularly apart",* it would be important for the local authority to retain parental responsibility for the child pending the final hearing. This need not be to provide day to day monitoring of the child, but would enable the local authority to take urgent action if something went wrong with the placement without having to make a fresh application to the court.

96. Similar points were made by Christopher Sharp QC sitting as a Deputy High Court Judge in the recent case of *HA*, applying the decision of *Islington Borough Council v E,* which is reported on Bailii. In that case the judge said at para 51:

> *"If I make the child a ward then the interim care order has to be brought to an end. I could replace it with a supervision order, which would maintain the care proceedings*

in place, pending the final hearing, but the local authority would not have parental responsibility. While they would, as an interested party, be able to ask the court to act to protect its ward, they would have no direct locus with a Pakistani court. In reality, however, they intend to exercise continued parental responsibility, and to make the child a ward but to continue with the structure the authority propose would, in my judgment, amount to a fiction and exactly what s.100 was designed to avoid."

He commented that the need to manage contact with the child's mother in the interim was one reason why the local authority needed to retain parental responsibility.

97. The option of making a final care order to secure the placement abroad was considered in the case of *Re P-S.* The difficulties associated with making such an order were identified in the body of the judgment at paras 31-34.

98. Even had the option of making a Special Guardianship Order been open to me because the assessment requirements in the Regulations had been complied with, the difficulties in making such an order in favour of carers abroad share many of the same features as those identified at paras 38-40 of *Re P-S* and in Para 288(iii) of the Public Law Working Group's interim report. The best practice guidance set out at Appendix G of the interim report recommends that an SGO is *"not an order to be made without the most intense scrutiny"* and that *"Where, however, the child does not have a close attachment to and a close relationship with the proposed SG(s), further to analysis of all of the available evidence and of the child's best interests, it is very likely to be in the child's best interests for there to be an opportunity for the child to have lived with the proposed SG(s) for a period of time which is assessed on the evidence before the court to be appropriate, before any SGO is made."*

99. The reality with a placement abroad will be that once such an order had been made, it will be more difficult for the local authority to monitor the placement and to ensure that it is being properly supported. As I set out below the support plan provided gave little confidence that adequate support would be available. The children would be likely in those circumstances to swiftly go 'off radar'. I remind myself in this case that not only had the children never lived with P and C, their contact with P and C had never been observed by any professional. Indeed, T and U had never met P and they had never been to Bermuda.

100. It is interesting in this context to record that the 2018 CFAB Report saw notable differences in the types of legal orders used for international placements which led, in turn, to differences in the provision for post-placement support and follow up. They could see *"no obvious reasons as to why one approach would be applied instead of another"*. They saw that an SGO was used in 5 cases, a CAO in 4 cases, and in 1 case the child was placed under no order, having previously been subject to s.20 care. Where SGOs were granted these included provision for the local authority to continue to provide post placement support including financial payments. In local authorities where CAOs were used *"there is no post-placement support provided as the local authority believed that one the child was outside of*

the UK, the local authority no longer had a role in the case due to the child being in a different jurisdiction."

101. I note that the recommendations made by the Family Justice Council in their interim guidance include the possibility that a child may be placed with a kinship carer under a child arrangements order coupled with an interim supervision order, particularly where Regulation 22 approval had not been obtained for the placement of the child with the proposed carer. I have some concerns about how such a placement would work in the context of kinship carers based abroad. For the reasons set out above, it may be necessary for the placement and contact arrangements to be managed by the local authority, at least in the interim. It may also be necessary for the local authority to be able to act swiftly should the placement break down. I see some difficulty in the local authority being able to intervene in a placement abroad where it has not retained parental responsibility for the children. I would also be concerned that the change of status might also impact on the support services that would be available to the carers, even if a Special Guardianship Order was made subsequently.

102. It is important in this context that the local authority spells out in its final evidence, in *Re B-S* terms, the pros and cons of each form of order and identifies where, if at all, the provision of support services whether now or in the future may differ. By way of example, in April 2016 the Adoption Support Fund was extended to cover therapeutic support for children, living in England, who were previously in care immediately before the making of the SGO. If access to the Fund is not to be available (because, for example, the initial placement is to take place under a child arrangements order) then this needs to be spelled out alongside what proposals, if any, the local authority puts forward to compensate for that loss.

103. Various options for reform in this area have been suggested, including the possibility that the court might be empowered to make an interim special guardianship order (Public Law Working Group interim report). I have also seen the suggestion made that a placement order could be introduced akin to that available in adoption situations (see Harwin and Alrouh – Supervision Orders and Special Guardianship: how risky are they [2017] Fam Law 513). For my part I can see some advantage, where a placement abroad is being considered, to having an order available whereby parental responsibility is retained by the local authority (or the local authority acting as the placement agency).

104. Under the current legislation, the only order available which would enable the local authority to retain parental responsibility would be an interim care order, with permission to be granted under Schedule 2, para 19. If that order was not agreed by a parent, then the court would have to consider whether to dispense with that parent's consent on the basis that the parent is "withholding his consent unreasonably".

105. There was some discussion in the present case as to how the provisions of Regulation 22 and / or 24 of the Care Planning, Placement and Case Review (England) Regulations 2010 can be met in practice. I am told that a placement under Regulation 22 would need to be approved by the LA's fostering panel. The supervising social worker would present their

report, recommending such a placement, to the panel which would then consider its approval, subject to final ratification by the Agency Decision Maker. The process could take up to a month. The difficulties such a procedure raises are, of course, reminiscent of those that beset the adoption process. I was informed, as I said, that the Panel would be unlikely to accept a recommendation made by a social worker from a different jurisdiction. A recommendation made by an ISW might be approved, subject to the confidence that the Panel had in to the particular ISW. In my view this is an area which would benefit from further consideration and guidance.

106. I raise, as a possibility, whether an alternative route to achieving the further assessment of a kinship placement in these circumstances would be by way of making an order under s.38(6) of the 1989 Act (see the decision of Munby J in *Re A (Residential Assessment)* [2009] 2 FLR 443).

107. In any event, the local authority will need to satisfy the requirements of Reg 12 of the 2010 Regulations. These are in place to ensure that adequate arrangements are made for supervising and reviewing the placement.

108. Finally, one practical issue to consider is whether placement under an interim care order requires the consent of the other jurisdiction. Such consent may be required under Article 33 the 1996 Hague Convention and / or Article 56 BIIa. The Office of the Head of International Family Justice has confirmed that Article 56 consent is also appropriate when the court is considering making a SGO to a non-relative carer abroad (*A Local Authority v M and others* [2019] EWFC 36). Further advice on this issue will be available from ICACU and also the DfE publication 'Cross-border child protection cases: the 1996 Hague Convention'. It may also need to be the subject of expert advice as I have indicated.

The question of party status for C and P

109. In my earlier judgment I gave my reasons for joining C and P as parties to these proceedings. In the course of submissions, I was told that counsel were unaware of the case of *Re P-S* or its implications when considering party status for proposed kinship carers. I indicated that publication of this judgment might assist in increasing such awareness.

110. Proposed kinship carers are, of course, entitled to make application to the court for private law orders. Those orders could include Special Guardianship Orders or s.8 Child Arrangements Orders. The process for making such applications are clearly set out within the 1989 Act. More difficult questions of party status arise when the court is asked effectively to make a SGO or a CAO 'of its own motion'.

111. Any application for party status will be made pursuant to Rule 12.3(3) Family Procedure Rules 2010. There is no specific test set out under that rule or any guidance elsewhere within the rules. The court therefore has a broad discretion, applying the overriding objective in Rule 1.1. The paramountcy principle does not apply to this decision.

112. Where a grandparent applies to become a party to care proceedings, the Court of Appeal in *Re B (Paternal Grandmother: Joinder as Party)* [2012] 2 FLR 1358 held that it will be appropriate to refer to the factors in s.10(9) CA 1989, albeit that no order under s.8 is being sought by the grandparent. Section 10(9) does not contain a test; by picking out some factors to which the court should have particular regard, it is acknowledged by implication that there may be other factors the court has to consider and it would be wrong to try to list or limit those. The prospects of success of the proposed application are relevant and leave will not be given for an application that is not arguable. However, the fact that a person has an arguable case might not necessarily be sufficient to entitle him to leave under s.10 or joinder as a party, since there may be other factors that outweigh this. The court has a broad discretion to conduct the case as is most appropriate given the issues involved and the evidence available (see the notes to Rule 12.3 in the Family Court Practice).

113. In *Re P-S (Children) (Special Guardianship)* the Court of Appeal specifically considered the issue of joinder in connection with the placement of children with grandparents under SGOs. In giving the leading judgment, Sir Ernest Ryder, Senior President of Tribunals, said the following:

> *"**[55]** It is difficult to understand why steps were not taken on 3 February 2017 to consider effective access to justice for the grandparents. It was clear from the recordings in the order made that the key issues in the case included whether each of the children should 'reside in a family placement under an SGO'. It may be that the apparent consensus between the local authority, the children's guardian and the grandparents on the ultimate order they all sought obscured the immediate procedural issue before the court. Given the procedural unfairness that undoubtedly was the consequence, I have no hesitation in coming to the conclusion that it was wrong not to have made appropriate provision for the grandparents to obtain effective access to justice at the final hearing. To leave them on the sidelines without party status, without documents and without advice and without any mechanism being identified for the parents of S to cross-examine them on their proposals was unfair in more than one respect. From the children's perspective, it meant that part of their case was assumed to be incomplete when it could have been tested.*
>
> ***[56]** The solution would have been either to direct that an application for an SGO be made so that case management directions on that application relating to party status, disclosure and time for advice could be made or for case management directions to be made that otherwise secured the same procedural protections. At the IRH on 3 February 2017, the facts were such that the grandparents were a realistic option for the care of the children. The direction for an SGO assessment which is a mandatory precondition to the making of an order had been made and the reports were complete. I am accordingly at a loss to understand why directions were neither asked for nor made that dealt with how that application would be considered by the court. The consequence is stark even from the judge's own judgment. The*

grandparents did not know what was happening, did not have the evidence upon which the court was making a decision, were unable to take advice and in the event, in my judgment, did not have effective access to justice. That was not in the interests of the children. The procedure was accordingly unfair."

114. More recently, a national study of Special Guardianship placements has been conducted by the Centre for Child and Family Research at Lancaster University, funded by the Nuffield Foundation. Their report was published in March 2019, entitled, 'The contribution of supervision orders and special guardianship to children's lives and family justice'. The authors of the report interviewed a number of special guardians. Many expressed negative views about the local authority assessment and court processes. They said that they felt that the processes lacked transparency and many reported that they did not have party status or were unclear of their party status or the implications of becoming special guardians. Participation in the proceedings and access to legal advice appeared to be welcomed by those who were interviewed. The authors of the report recommended that *"Debate is needed on how to ensure that special guardians, as a matter of right, acquire party status at the earliest appropriate opportunity to enable their full participation and representation in the proceedings and understanding of the long-term commitment a special guardianship order confers."*

115. In the present case, as I indicated in my earlier judgment, it is highly likely that party status would have been granted to C and P had the issue been raised before the judge at the IRH in April 2019. At that stage the LA relied on the two positive family assessments they had obtained and contended that the children should be placed with C and P in Bermuda. The Guardian had raised a number of questions about the proposed placement, but had not indicated any fundamental opposition to it.

116. On the first day of the hearing before me there was considerable discussion about the appropriate form of legal order for a placement in Bermuda and the adequacy of the support and transition planning. It was highly ironic, I felt, that this discussion took place in the absence of the adults most affected by the resolution of those issues, namely C and P.

117. *Re P-S* does not attempt to set down a blanket rule for all cases but it does draw attention to the dangerous misconception that where the professional recommendation is in favour of a kinship placement, there is no need to involve those potential kinship carers in the decision-making process. As Ryder LJ said in his judgment, in such a situation it is still essential to ensure that the procedure is fair and the proposed carers have effective access to justice. The proposed carers will ordinarily need to be kept fully informed as to what is happening, to have access to all the evidence and to be able to take advice. That is normally to be achieved by granting them party status. Even where there is agreement about the proposed placement there may be issues for the court to consider as to the appropriate form of order, the plan for contact with other family members, the support to be provided by the local authority, etc. It is inconceivable that the proposed carers should be denied the opportunity to participate effectively in that decision-making process.

Needs assessments and support plans

118. As intimated above, a local authority's long-term obligations in terms of financial and other support for a placement abroad may depend upon the eventual form of order.

119. Where a Special Guardianship Order is the eventual form of order, s.14F(1) of the 1989 Act provides that each local authority must make arrangements for the provision "within their area" of special guardianship support services. Under s.14F(2) the power to make regulations "is to be exercised so as to secure that local authorities provide financial support." Under s.14F(3) and (4) there are two classes of prescribed persons, those for whom the local authority must provide an assessment of that person's needs for special guardianship support services and those for whom the local authority may do so. Under Reg 11(1) of the Special Guardianship Regulations 2005 (as amended) ('the 2005 Regulations'), the local authority must provide an assessment where the child "is looked after by the local authority or was looked after by the local authority immediately before the making of a special guardianship order." The matters to which the local authority must have regard are set out under Reg 12 of the 2005 Regulations.

120. Under s.14F(5) of the 1989 Act where, as a result of the needs assessment, a local authority decides that a person has a need for special guardianship support services, they must then decide whether to provide such services to that person. If they do decide to provide those services then, under s.14F(6), the local authority must prepare a special guardianship support plan. There are various consultation and notification requirements set out under Regs 15 and 16 of the 2005 Regulations (and see also paras 72-80 of the Statutory Guidance). These are to ensure that the plan is not drawn up without proper input from the proposed special guardian.

121. Statutory Guidance has been provided by the Secretary of State for Education and the latest version of this was produced in 2017. The effect of the guidance being statutory is that a local authority can only depart from it with good reason. As Sedley J said in *R v Islington LBC ex p Rixon* (1997-8) local authorities are required by s.7 of the Local Authority Social Services Act 1970 *"to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is a good reason to do so, but without freedom to take a substantially different course."* In *R (X) v London Borough of Tower Hamlets* [2013] EWHC 480 (Admin), [2013] 2 FLR 199 Males J said that *"a departure from the guidance will be unlawful unless there is a cogent reason for it, and the greater the departure, the more compelling must that reason be."*

122. The Guidance provides that Assessments for special guardianship support services should follow the guidance set out in, and use the domains of, the Framework for the Assessment of Children in Need and their Families (para 58).

123. Under Para 65, *"In determining the amount of any ongoing financial support, the local authority should have regard to the amount of fostering allowance which would have been payable if the child were fostered. The local authority's core allowance plus any enhancement that would be payable in respect of the particular child, will make up the maximum payment the local authority could consider paying the family. Any means test carried out as appropriate to the circumstances would use this maximum payment as a basis."*

124. Under Para 70, any special guardianship support plan should set out the services to be provided, the objectives and criteria for evaluating success, time-scales for provision, procedures for review and the name of the person nominated to monitor the provision of services in accordance with the plan. Under Reg 71 it is said that *"The result of this process of preparation and consultation should be that social workers, other professionals and the recipient of the services (or the appropriate adult) will be clear what the support services plan is. The plan should be set out in writing in a way that everybody affected can understand."*

125. It seems likely, in my judgment, that the Guidance sets no higher burden that that required with any local authority plan under the existing case law. In particular, the need to set out 'who is to do what and by when'. As Munby J (as he then was) said in *R(J) v Caerphilly County Borough Council* [2005] EWHC 586 (Admin), [2005] 2 FLR 586:

> *"[46] Any judge who sits in the Family Division will be familiar with the depressing inadequacies and deficiencies in too many of the care plans presented to the court for its approval. A care plan is more than a statement of strategic objectives – though all too often even these are expressed in the most vacuous terms. A care plan is – or ought to be – a detailed operational plan. Just how detailed will depend upon the circumstances of the particular case.*
>
> *Sometimes a very high level of detail will be essential. But whatever the level of detail which the individual case may call for, any care plan worth its name ought to set out the operational objectives with sufficient detail – including detail of the 'how, who, what and when' – to enable the care plan itself to be used as a means of checking whether or not those objectives are being met. Nothing less is called for in a pathway plan. Indeed, the Regulations, as we have seen, mandate a high level of detail."*

126. As part of its support plan the local authority will need to identify how services are to be provided. If assistance is to be provided locally, then this needs to be clearly set out. The local authority will need to engage with such issues as how it will make any payments abroad. The 2018 CFAB report alerts practitioners to these sort of problems, explaining how it took one local authority 10 months to work out how to make an overseas payment.

127. It is also important as identified in the CFAB factsheet, 'Placing Children with Family Overseas', that a proper contingency plan is put in place. If, for any reason, the kinship

placement breaks down the local authority must have a plan in order to identify what is to happen including where the child is to be placed in that eventuality and how the child's return to the UK (if that is the plan) is to be secured.

128. The 2005 Regulations appear to have been drafted on the assumption that all special guardianship order placements will be made in the UK. Para 5 deals with services for persons 'outside the area'. Where a placement is made to a special guardian 'outside of the authority's area' then s.14F *"ceases to apply at the end of the period of three years from the date of the special guardianship order except in a case where the local authority are providing financial support under Chapter 2 and the decision to provide that support was made before the making of the order."* The Statutory Guidance provides that *"When the three year period form the making of the special guardianship order has expire, the local authority where the special guardian lives is responsible for assessing and providing support services".* I note, however, that Reg 5(3) of the 2005 Regulations provides that *"Nothing in this regulation prevents a local authority from providing special guardianship support services to persons outside their area where they consider it appropriate to do so."*

129. In the absence of any direct guidance dealing specifically with cross jurisdictional placements, it seems to me that the specific 'out of area' provisions as set out above must apply. The local authority's obligations in respect of a special guardianship order placement will, therefore, continue for a minimum of 3 years. Given that it may be unlikely within some jurisdictions that the relevant authority will take on any obligation to provide support services, the local authority will need to address in its plan how it is proposed that any long term support that is needed will be reviewed or considered once the 3 year period has expired, in accordance with Reg 5(3). Although one cannot be prescriptive in terms of future needs and levels of support, it is important for the local authority to be alive to these issues now and provide clarity to the family members as to how they will be addressed when the time comes.

130. In the present case. The deficiencies in the assessment and planning process were depressingly obvious. For example,

(1) No needs assessment was carried out;

(2) The consultation and notification requirements for the support plan were ignored;

(3) The plan, such as it was, was vague and represented little more than aspiration or good intent. For example, the plan for meeting the children's educational needs in Bermuda was that C *"will provide learning opportunities for his grandchildren and select suitable educational provision local to them".*

(4) Reliance was placed on *"the support network"* but it was never identified within the plan who specifically this was a reference to.

(5) There was no mention of any support over contact with other family members, including the parents.

(6) There was no mention of how C and P were to be supported in the event that W, as she intends, moves back to Bermuda.

(7) It was said that financial support was to be provided *"for a period of three months… or up until benefits are in place"*. As I have already said, no-one was able to explain to me what that meant (i.e. is the backstop 3 months or when benefits are in place?) or indeed what benefits were anticipated to be payable in Bermuda.
(8) No-one was able to explain to me the basis for the payments calculated or why they would be limited to 3 months, based on the Regulations and Guidance as I have set them out above.

131. The impression I had formed was that the LA believed it had a blank sheet of paper in terms of calculating, as a matter of discretion, what it would pay and for how long. It appeared to be unaware of the wealth of material on this issue, some of which I have set out above.

132. I have now given directions to carry the matter forward. It is an absolute necessity that welfare decisions are made for these children, who will have been in care, as I have said, for almost 2 years by the date of the new final hearing. Whilst the issues raised in these types of cases are complex, they are not insurmountable.

Recorder Samuels QC 23rd September 2019