Neutral Citation Number: [2024] EWHC 923 (Fam)

Case No: LE23C50154

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2024

Before :

MRS JUSTICE LIEVEN

- -

Between :

LEICESTER CITY COUNCIL

Applicant

and

THE MOTHER
(M)

First Respondent

and

A
(a Child, through his Children's Guardian)

Second Respondent

- -
- -

Ms Rachel Watkins (instructed by **Leicester City Council**) for the **Applicant**
Ms Emily Thurlby (instructed by **Dodds Solicitors**) for the **First Respondent**
Ms Jane Bacon (instructed by **Straw and Pearce Solicitors**) for the **Second Respondent**

Hearing dates: **3 April 2024**

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Lieven DBE :

1. This case concerns A, born on the 5 September 2023, aged almost 7 months. A's mother is the First Respondent ("M"). The Father is not known.

2. The Local Authority ("LA") were represented by Rachel Watkins, the M was represented by Ms Thurlby and the Guardian was represented by Ms Bacon.

3. The LA issued an application for a care order, to include an interim care order, immediately after A's birth, on 7 September 2023. This hearing will be the seventh hearing and proceedings are in week 30, the timetable for the conclusion of the proceedings having been extended from 26 weeks which expired on 7 March 2024.

4. The issue before the Court is whether to discharge an order for the assessment of the Maternal Aunt as a long term carer for A. The M was released from prison the day before the hearing and was apparently street homeless that night having not attended her probation appointment on time. Her counsel, Ms Thurlby, said she had taken very brief instructions and the M's position was clear, but she did not feel able to participate in the hearing. Given the nature of the issues, and the urgency of the matter from A's perspective, all parties agreed that it was appropriate for the hearing to continue.

5. M's older children were subject to care proceedings and were removed from her care due to concerns of drug and alcohol use, neglect, M associating with risky adults, M being homeless, and domestic abuse.

6. The Father is unknown as M does not have the details of the putative father.

7. There are ongoing concerns regarding M's criminal activity including offences with weapons, lack of engagement with professionals, her mental health, her drug use, and lifestyle, including being homeless. M applied to HMP Peterborough for a place in the Mother and Baby Unit but this was assessed as unsafe for A and the application was refused by the Prison Governor. In the period the proceedings have been ongoing the M has twice been in prison. She was released the day before the hearing on 3 April 2024.

8. The M's engagement in the proceedings has been somewhat sporadic, and she has not formally responded to threshold. However, in the light of her criminal convictions, periods of incarceration and the history of the other children, there cannot be any real doubt that threshold is crossed.

9. The LA has made extensive efforts to find other family members who could care for A. The only family member who has put herself forward and had a positive Interim Viability Assessment is the Maternal Aunt who lives in Switzerland. Although she does not have Swiss citizenship, I am told that she has settlement status in Switzerland and therefore can remain there indefinitely.

10. The LA has gone to extensive efforts for the Aunt to be assessed as a long term carer for A. The history of those efforts is highly relevant for the determination that I have to make. I therefore set out the chronology in full.

Chronology of referral to Child and Families Across Borders

11. Prior to the hearing on 2 October 2023 enquiries were made of Child and Families Across Borders ("CFAB") regarding a full kinship assessment of Maternal Aunt. It was confirmed that the assessment would take between 12 –16 weeks and that it may need to be translated if the report is not written in English, however this would be confirmed upon referral.

12. At the hearing on 2 October 2023 it was directed that the full kinship assessment of the Aunt from CFAB was to be filed by 16 February 2024. The completed referral form was sent to the parties on 23 October 2023 and was agreed.

13. Unfortunately, there was a delay caused by CFAB requiring a purchase order number from the LA before accepting the referral and, due to internal issues, this number was not confirmed until 20 November 2023; the referral was made the same day. On the referral form it was confirmed that the Aunt will require a Somali interpreter.

14. CFAB confirmed receipt of the referral on 22 November 2023 and confirmed that enquiries were made with their partner agency earlier that week to discuss arranging an interpreter and what the associated costs were with this, and upon their response, the LA would need to approve the costs to progress with the referral.

15. CFAB were then chased for updates on the following dates: 28 November, 1 December, 7 December, 13 December, 22 December. Each time the update was that an update was still awaited from the partner agency. At this point the LA enquired if there was any way to escalate matters due to the delay and lack of response from the partner agency.

16. On 27 December 2023 CFAB responded and stated there was no way to escalate the matter because the partner agency was awaiting a statutory agency to respond. CFAB suggested due to the delays that the LA may instead seek to contact ICACU, which is the Central Authority for the 1996 Hague Convention in England, and ask if they could assist with the assessment.

17. On 4 January 2024 the LA asked CFAB if it would assist if the LA could source an interpreter for the assessment, which CFAB confirmed they would try and enquire about, but there is currently no update about this.

18. The LA wrote to ICACU on 3 January 2024 and asked if they could assist with a kinship assessment, and a referral form was sent on 4 January 2024. ICACU confirmed they could assist with the assessment but as the referral to CFAB was still open they could not yet proceed. In order to try and avoid delay, the LA enquired whether ICACU would have a similar issue regarding the interpreters.

19. On 10 January 2024 ICACU responded that they had heard back from the Swiss Central Authority who confirmed that if the formal request was made, they could arrange an interpreter. ICACU advised an assessment would take between 2 – 4 months, to be confirmed upon the referral being accepted, however it could take weeks or even months to commence.

20. On 15 January 2024 the LA called CFAB to ask if there was any update. It was confirmed that they had been informed that the delay was due to the director of the partner agency being on annual leave, however this seemed confusing given the referral had been made 2 months prior.

21. On 23 January 2024 CFAB emailed to say: *"We are still awaiting feedback from our partner agency and they have informed me that they are awaiting approval to handle the request rather than it being channelled through the Central Authorities"*.

22. The LA made an application to the Court for a hearing/re-allocation of judicial level on 26 January 2024 due to the above delays affecting the proceedings timetable. On 9 February 2024 CFAB confirmed there was still no update after an update was requested ahead of the hearing listed on 14 February 2024.

23. A hearing was listed on 14 February 2024 where it was directed for the Swiss Embassy and Central Authority to be invited to attend the next hearing and be sent the relevant documents/assessment plan to comment on how the assessment can be completed.

24. On 15 February 2024 there was a telephone conversation with CFAB who confirmed that the communication issue is with the relevant Local Authority in Switzerland as they are not replying to the third party agency that CFAB instructs, this is the same information that CFAB shared on 14 February 2024. CFAB were concerned about putting the referral through further without a response because this could lead to Leicester City Council being charged a cancellation fee if the Swiss Local Authority continue not to reply or say they cannot complete the assessment. They also confirmed that it is not possible for an Independent Social Worker ("ISW") to go to Switzerland and that the assessment has to be completed by the public services in Switzerland, whom are unfortunately not responding to the requests.

25. The directed documents as well as the hearing details were sent to the Central Authority and Embassy on 19 February 2024 alongside the request for them to confirm availability to attend an advocates meeting. The LA's assessment plan was sent to the Central Authority and Embassy on 20 February 2024.

26. The Central Authority responded on 21 February:

> *"We thank you for your email and hereby confirm reception of the documents you sent us.*
>
> *We understand that the English authorities are considering to place a child with its maternal aunt in Switzerland according to Article 33 of the Hague Child Protection Convention. In order for us to process the request, we would like to draw your attention to the following:*
>
> *Our role as the central authority under the Hague Child Protection Convention is the coordination and support of the central authorities of each canton. The competent cantonal authority will then, in collaboration with the local child and adult protection authority, assess the possibility of placing the child with its maternal aunt and will decide on the matter accordingly. We therefore require the full address of Aunt*

> *in order to forward your request to the competent cantonal central authority.*
>
> *Due to the fact that your request will be assessed by the local child and adult protection authority and several authorities will have to be involved (such as the immigration authorities), Article 33 requests take a considerable amount of time. The processing time of such a request depends on multiple factors and cannot be predicted by our authority.*
>
> *Regarding the invitation to the Advocate's meeting as well as the hearing on 27 February, 2024, our central authority does generally not participate at hearings since we are not a party in those procedures and we have to observe the separation of powers as well as the principle of territoriality.*
>
> *Finally, we would like to draw your attention to the fact, that most documents will have to be translated in the official language of the place the aunt is living."*

27. The Central Authority were sent the Aunt's address as they requested.

28. The LA called the Embassy's phone line on 23 February to chase as there had been no response. The Embassy provided a more direct email but said that the phoneline for that department was not open on Fridays and the LA would have to call back on Monday between 3pm and 4pm. On 23 February the Embassy replied after the correspondence was forwarded to the new email address provided:

> *"I refer to the email from the Federal Office of Justice FOJ, Private Law Division dated 22 March 2024, which in its role as the central authority under the Hague Child Protection Convention has informed you that it will not be attending the hearing. The necessary clarifications are currently still underway.*
>
> *Since the central authority is responsible for the matter noted in the margin, the Embassy does generally not participate at hearings since we are not a party in those procedures."*

29. The sealed Order dated 27 February 2024 was sent to both the Central Authority and Embassy on 4 March 2024 with the recital regarding why they are being invited to the next hearing being highlighted within the email. They were also asked the question regarding CFAB completing the assessment.

30. On 4 March 2024 ICACU emailed to state that because the Central Authority had been approached directly, they would close their file.

31. The Central Authority replied on 5 March:

> *"Due to the fact that the maternal aunt resides in Switzerland, we would like to draw your attention to the fact that the maternal Aunt cannot be assessed by the CFAB or another agency. The assessment can only be requested through a formal request under article 33 and 34 of the Hague Child Protection Convention. The competent cantonal central*

> *authority will then get in contact with the local Swiss authorities who will then proceed to assess the situation accordingly.*
>
> *The assessment of the aunt by the CFAB or another foreign agency is considered an unlawful activity on behalf of a foreign state and is punishable by Swiss law (article 271 of the Swiss Criminal Code).*
>
> *We understand that the assessment of the maternal aunt is an urgent matter and can assure you that the competent local authorities are assessing the situation to the best of their ability."*

32. On 7 March the Central Authority emailed:

> *"We can confirm that we have forwarded the request to competent cantonal central authority who are currently processing the request. Unfortunately, we cannot confirm the timescales as we are not able to predict on behalf of the local authorities how long the assessment will take.*
>
> *Regarding the invitation to the advocate's meeting and hearing, our central authority does not participate at hearings since we are not a party in those procedures and we have to observe the separation of powers as well as the principle of territoriality."*

33. On 8 March the Central Authority were again reminded that they were not being invited to the hearing as a party. The LA also enquired whether it would be possible for an ISW within Switzerland to complete the assessment. They were asked on 11 March if they could share the contact information for the authorities in Switzerland should it be possible for enquiries to be made from the LA side.

34. Due to the above email, and this being the first time this issue had been raised that an assessment by CFAB would be considered unlawful, the LA contacted CFAB on 8 March to enquire whether they knew this was the position regarding Switzerland and their response was:

> *"We have had assessments completed, by our partner agency, on behalf of CFAB and Local Authorities in the past.*
>
> *I do apologise about this and the delay that this has caused; I will be feeding back this email to CFAB's Service Manager so that we are aware of this.*
>
> *Because of this update, we will remove this case from our list of cases pending allocation."*

35. However, on 11 March CFAB then emailed to clarify:

> *"I have discussed this update with CFAB's Service Manager – I do just want to take the time to clarify that CFAB does not complete the assessment ourselves but that we refer it to our partner agency to arrange/complete."*

36. The Embassy had not replied to the email sent on 4 March, this was chased on 11 March by email and phone. Via telephone, the Embassy said they would not be involved in the case because the request would be progressed by the Central Authority.

37. At the hearing on 14 March 2024 the Court directed that the Central Authority be made a party to the proceedings and answer a list of questions regarding the proposed assessment of the Aunt. Due to waiting for the sealed Order, the Central Authority were sent the directions from the Order on 19 March 2024 and informed that they have been made a party to the proceedings.

38. On 19 March 2024 the LA wrote to the local canton in Neuchâtel where the Aunt lives, to ask for timescales for the assessment.

39. On 18 and 19 March 2024 the LA contacted various Swiss solicitors to ask for quotes for advice. On 19 March 2024 the LA also contacted the firm Dawson Cornwell in London as they are experienced with international issues, however they confirmed they do not have experience regarding Switzerland.

40. On 21 March 2024 the canton in Neuchâtel responded (in French, translated using Google Translate) that timescales were dependent upon the situation. If it was an emergency the assessment could start within 3 – 4 weeks and the assessment would take between 6 and 9 months. If it were not an emergency, the timescales were not specific as there is a high demand for assessments in that canton so there would likely be a waiting period. Regarding the assessment format shared by the LA, the canton stated the assessment would be more of a broad assessment.

41. On 21 March 2024 the Central Authority responded that they would not be attending the next hearing as they required a summons and 2 months notice and confirmed they had transmitted the request to the cantonal central authority. They also confirmed any documents must be sent through diplomatic channels, although this had not been raised previously, and, to date, they have not yet confirmed the method for this.

42. On 25 and 28 March 2024 the Children's Guardian solicitor responded asking what would constitute an emergency given the only alternative care plan is adoption and for timescales. No response has yet been received.

43. On 28 March 2024 the LA wrote to the Central Authority and confirmed they were discharged as a party to the proceedings but the request for assessment remained open.

44. On 28 March 2024 ICACU emailed and stated that the referral had not been sent through to the Central Authority and it needed to be sent by them. This was confusing as it was understood from the above that the Central Authority had accepted the referral and ICACU had closed the case. To avoid any issues the LA asked ICACU to also 'transmit' the referral from their end. ICACU did not confirm whether or not the referral had already been accepted by the Central Authority given the above. The Central Authority were also included in this email.

45. The Aunt has remained highly committed to the process and has effectively done everything asked of her. Although she did not attend the hearing on 14 March 2024,

she did attend the hearing on 25 March 2024 and made herself available for discussions with the Team Manager, post-hearing. The Aunt confirmed that she continued to seek to be assessed and was unable to attend the hearing on 27 February 2024 due to internet issues. The Aunt subsequently confirmed that she would be happy to come to the UK for 1 week and would be able to stay with family in Leicester during this time. The Aunt's youngest child is 16 years of age and would remain in Switzerland during this time. The Aunt was not sure whether she would require a visa and that she would be able to come to the UK in about a month's time.

46. In summary, the factual position is that for a legally effective assessment to be carried out in Switzerland it must be carried out by the cantonal authorities in Neuchâtel where Aunt lives. This will take 6-9 months, and it is not clear when it would commence because it is still not clear whether the matter would be treated as an emergency. A UK social worker cannot carry out the assessment. Although the Aunt is prepared to come to the UK for a short period, such a UK based assessment, even if it was adequate, which it would not be, would not meet the requirements of the Swiss authorities. The LA would not be able to complete anything akin to a proper assessment during this limited window. The Aunt would be able to meet with A but there would be no time for A to be able to form a relationship with, or any attachment to, the Aunt and for this to be assessed. In addition, there would be no assessment of the Aunt's home environment, local amenities, support network in Switzerland, the dynamic between the Aunt and her children in the household alongside the impact of any other demands upon the Aunt. Police and medical checks would also remain outstanding.

47. In those circumstances, the LA has come to the view that any assessment of the Aunt on the basis of the current timescales provided by the Neuchâtel canton are outside those of A and therefore seek for the assessment of the Aunt to be discharged.

Legal Framework

Children and Families Act 2014

48. The court's control of expert evidence and assessment in children's proceedings is governed by s.13 Children and Families Act 2014 ("CFA"). When deciding whether to grant permission the court is to have regard to the factors at s.13(7) namely:

> *"(a) any impact which giving permission would be likely to have on the welfare of the children concerned, including in the case of permission as mentioned in subsection (3) any impact which any examination or other assessment would be likely to have on the welfare of the child who would be examined or otherwise assessed,*
>
> *(b) the issues to which the expert evidence would relate,*
>
> *(c) the questions which the court would require the expert to answer,*
>
> *(d) what other expert evidence is available (whether obtained before or after the start of the proceedings),*

> *(e) whether evidence could be given by another person on the matters on which the expert would give evidence,*
>
> *(f) the impact which giving permission would be likely to have on the timetable for, and duration and conduct of, the proceedings,*
>
> *(g) the cost of the expert evidence, and*
>
> *(h) any matters prescribed by Family Procedure Rules."*

Family Procedure Rules 2010 ("FPR")

49. The court must have regard to the overriding objective (FPR 1).

50. The decision to revoke a direction for assessment is a case management direction and therefore Part 4 FPR applies. The court has power to revoke an earlier direction for assessment pursuant (FPR 4.1(7)).

51. The powers of the court are flexible. The timetable must be drawn without delay. The court must consider the impact on the child of any revision or extension to the timetable. (Practice Direction 5).

Authorities

52. In *Re B-S (Children)* [2013] EWCA Civ 1146 per Munby J sets out the approach to the making of placement orders:

> *"5. Care orders are made in accordance with section 31 of the Children Act 1989. Placement and adoption orders are made in accordance with sections 21 and 46 respectively of the 2002 Act.*
>
> *6. The court cannot make a placement order unless either the parent has consented or the court is satisfied that the parent's consent should be dispensed with: section 21(3). The court cannot dispense with a parent's consent unless either the parent cannot be found, or lacks capacity to give consent, or the welfare of the child "requires" the consent to be dispensed with: section 52(1). In deciding whether or not to make a placement order the paramount consideration of the court must be the child's welfare "throughout his life": section 1(2). The court must have regard to the 'welfare checklist' in section 1(4). So far as material for present purposes a placement order continues in force until it is revoked under section 24 or an adoption order is made: section 21(4).*
>
> *...*
>
> *29. It is the obligation of the local authority to make the order which the court has determined is proportionate work. The local authority cannot press for a more drastic form of order, least of all press for adoption, because it is unable or unwilling to support a less interventionist form of order. Judges must be alert to the point and must be rigorous in exploring and probing local authority thinking in cases where there is*

any reason to suspect that resource issues may be affecting the local authority's thinking.

…

Adoption – essentials

33. Two things are essential – we use that word deliberately and advisedly – both when the court is being asked to approve a care plan for adoption and when it is being asked to make a non-consensual placement order or adoption order. (Proper evidence and an adequately reasoned judgement.)

…

44. We emphasise the words "global, holistic evaluation". This point is crucial. The judicial task is to evaluate all the options, undertaking a global, holistic and (see Re G para 51) multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option. To quote McFarlane LJ again (para 54):

"What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options."

45. McFarlane LJ added this important observation (para 53) which we respectfully endorse:

"a process which acknowledges that long-term public care, and in particular adoption contrary to the will of a parent, is 'the most draconian option', yet does not engage with the very detail of that option which renders it 'draconian' cannot be a full or effective process of evaluation. Since the phrase was first coined some years ago, judges now routinely make reference to the 'draconian' nature of permanent separation of parent and child and they frequently do so in the context of reference to 'proportionality'. Such descriptions are, of course, appropriate and correct, but there is a danger that these phrases may inadvertently become little more than formulaic judicial window-dressing if they are not backed up with a substantive consideration of what lies behind them and the impact of that on the individual child's welfare in the particular case before the court. If there was any doubt about the importance of avoiding that danger, such doubt has been firmly swept away by the very clear emphasis in Re B on the duty of the court actively to evaluate proportionality in every case."

53. *London Borough of Tower Hamlets v D, E, F* [2014] EWCH 3901 (Fam) per Hayden J:

"8. I should observe that, to my mind, even the prescient architects of the Children Act 1989 could not have envisaged the considerable cultural changes that were to take place in the United Kingdom in the 23 years that followed the implementation of that Act. British society is now multicultural. Assessing parents and family members may, quite frequently does, involve considering individuals based anywhere in the world. I do not believe that the obligation to explore the family option for a child is weakened in any way by geography, although it can provide real challenges to already overstretched resources. The viability of these options must, from the outset, be evaluated rigorously and reviewed regularly. The need for such assessments must be addressed at the very beginning of proceedings. Late identification of potential family carers abroad may bring two fundamental principles of the Children Act into conflict, namely the desirability, if possible, of a child being brought up in its extended family (where parents are for some reason unable to care for the child themselves) and the need to avoid delay in planning for a child's future. Neither principle should be regarded as having greater weight. The recent reforms to the family justice system have sought to emphasise why it was that the avoidance of delay was given statutory force by the Children Act and the real and lasting harm delay causes to children, particularly in public law care proceedings. There will, in my judgement, be occasions when the obstacles to assessment of family members abroad create such delays that to pursue the option will be inconsistent with the child's own timescales. These are taxing and exacting decisions but they require to be confronted with integrity and without sentimentality."

54. <u>*Re W (A Child)*</u> [2016] EWCA Civ 793 per McFarlane LJ:

*''**Nothing else will do***

68. Since the phrase "nothing else will do" was first coined in the context of public law orders for the protection of children by the Supreme Court in Re B, judges in both the High Court and Court of Appeal have cautioned professionals and courts to ensure that the phrase is applied so that it is tied to the welfare of the child as described by Baroness Hale in paragraph 215 of her judgment:

"We all agree that an order compulsorily severing the ties between a child and her parents can only be made if "justified by an overriding requirement pertaining to the child's best interests". In other words, the test is one of necessity. Nothing else will do."

The phrase is meaningless, and potentially dangerous, if it is applied as some freestanding, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare. Used properly, as Baroness Hale explained, the phrase "nothing else will do" is no more, nor no less, than a useful distillation of the proportionality and necessity test as embodied in the ECHR and reflected in the need to afford paramount consideration to the welfare of the child throughout her lifetime (ACA 2002 s 1). The phrase "nothing else will do" is not some sort of

hyperlink providing a direct route to the outcome of a case so as to bypass the need to undertake a full, comprehensive welfare evaluation of all of the relevant pros and cons (see Re B-S [2013] EWCA Civ 1146, Re R [2014] EWCA Civ 715 and other cases).

69. Once the comprehensive, full welfare analysis has been undertaken of the pros and cons it is then, and only then, that the overall proportionality of any plan for adoption falls to be evaluated and the phrase "nothing else will do" can properly be deployed. If the ultimate outcome of the case is to favour placement for adoption or the making of an adoption order it is that outcome that falls to be evaluated against the yardstick of necessity, proportionality and "nothing else will do".

Natural family presumption/right

70. With respect to them, it is clear to me that both the Children's Guardian and the ISW fell into serious error by misunderstanding the need to evaluate the question of A's future welfare by affording due weight to all of the relevant factors and without applying any automatic "presumption" or "right" for a child to be brought up by a member of her natural family. The extracts from the reports of both of these witnesses indicate that they determined their recommendation for A on just that basis. Mrs Fairbairn repeatedly described the child as having a "right" to be brought up by the natural family where there is a viable placement available. The Guardian advised that adoption is not in A's best interests because the grandparents can provide her with a home. Putting the correct position in lay terms, the existence of a viable home with the grandparents should make that option "a runner" but should not automatically make it "a winner" in the absence of full consideration of any other factor that is relevant to her welfare; the error of the ISW and the Guardian appears to have been to hold that "if a family placement is a 'runner', then it has to be regarded as a 'winner'".

71. The repeated reference to a 'right' for a child to be brought up by his or her natural family, or the assumption that there is a presumption to that effect, needs to be firmly and clearly laid to rest. No such 'right' or presumption exists. The only 'right' is for the arrangements for the child to be determined by affording paramount consideration to her welfare throughout her life (in an adoption case) in a manner which is proportionate and compatible with the need to respect any ECHR Art 8 rights which are engaged. In Re H (A Child) [2015] EWCA Civ 1284 this court clearly stated that there is no presumption in favour of parents or the natural family in public law adoption cases at paragraphs 89 to 94 of the judgment of McFarlane LJ as follows:

'89. The situation in public law proceedings, where the State, via a local authority, seeks to intervene in the life of a child by obtaining a care order and a placement for adoption order against the consent of a parent is entirely different [from private law proceedings], but also in this context there is no authority to the effect that there is a

> *'presumption' in favour of a natural parent or family member. As in the private law context, at the stage when a court is considering what, if any, order to make the only principle is that set out in CA 1989, s 1 and ACA 2002, s 1 requiring paramount consideration to be afforded to the welfare of the child throughout his lifetime. There is, however, a default position in favour of the natural family in public law proceedings at the earlier stage on the question of establishing the court's jurisdiction to make any public law order. Before the court may make a care order or a placement for adoption order, the statutory threshold criteria in CA 1989, s 31 must be satisfied (CA 1989, s 31(2) and ACA 2002, s 21(2)).*
>
> *As is well established, the existence of "family life" rights under Article 8 is a question of fact. It must be beyond question, as a matter of fact, that the relationship that now exists between Mr and Mrs X and A is sufficient to establish family life rights that justify respect under Article 8 in relation to all three of them. It does not, however, follow as night follows day, that the paternal grandparents have any Article 8 family life rights with respect to A at all. They have never met her. She does not know of their existence. They have no relationship whatsoever. Their son, A's father, has never had parental responsibility for A. The same is likely to be the case with respect to family life rights of A with respect to her grandparents. It may well be, however, that A has some "private life" rights with respect to her natural family. [Para 79]."*

55. Assuming European Convention on Human Rights ("ECHR") Article 8 rights are engaged, in the event of conflict the rights of the child must prevail.

The position of the parties

56. The LA makes the application, relying on the submissions set out above.

57. The Mother continues to wish the Aunt to be assessed. Ms Thurlby points out that this is a decision which will have life long consequences, and the delay should be seen in that context.

58. The Guardian supports the LA's application. Ms Bacon in a very helpful Position Statement sets out the pros and cons of the two options before the Court. She submits that any further delay created by allowing the assessment to take place and ultimately, a final decision for A's long-term care will be prejudicial to him. In the words of Hayden J, the obstacles to the assessment of the Maternal Aunt in Switzerland will be inconsistent with A's timescales:

- He is already 7 months old and has only known a life in care.
- If the assessment is to take place he will remain in the care of a foster carer unless and until there is a positive assessment of his Aunt.
- Preliminary introductions to the Aunt will be difficult due to the geography and her known availability to visit the UK.

- There is the potential for A to move foster placement the longer he remains in care.

- Although he is being well cared for, he will not have the chance to form attachments to a primary carer who will care for him throughout his childhood and beyond.

- There is no clear and confirmed timescale for the assessment to be completed.

- There is no certainty that the full assessment will be positive nor

- That the Swiss authority's will ultimately agree to him being placed with his Aunt.

- The Guardian notes that the Aunt indicated to the LA that she can only visit the UK for one week subject to having the necessary travel documentation.

- There is the potential for a level of ongoing contact with the extended family if not placed in the Aunt's care which would need to be explored as part of the long-term planning.

- There is no presumption or right for a child to be brought up by his natural family. Arrangements will be determined by paramount consideration to his welfare (s.1 CA and ss.1ACA) throughout his life (*Re W (A Child)* [2016] EWCA Civ 793 (para 71)).

59. This all needs to be balanced with the potential positives in the court sanctioning a delay for the assessment to take place:

- There is the potential for the full assessment to be positive.

- This may enable A to be placed with an extended family member (the court would have to consider any competing options such as adoption).

- The existence of a viable home with the Aunt may make it a runner, but will not make it a winner in the absence of full consideration of any other factor relevant to his welfare (*Re W (A Child)* [2016] EWCA Civ 793 (para 70)).

- The placement would be a cultural match as his Aunt shares the same heritage as his mother.

- There is the potential for an ongoing relationship with members of his extended family and even his mother (indirect/direct).

Conclusions

60. This is a difficult decision to make because if I discharge the assessment of the Aunt, then there will be no potential for A to be placed with a family member. This may well mean that A is ultimately placed in a placement that is not just a non-family placement, but also one that is less culturally appropriate for him. It will be not easy to find a long term placement, whether adoptive or long term foster care, in a Somali family. As Ms Thurlby points out, the decision will have life long consequences for

the child. Equally it will be necessary when he is older to explain to A why he was not brought up by his family, even though his Aunt wanted to care for him.

61. However, it is inevitable that if the Aunt is to be assessed this will involve at least 9 months of further delay in this young child's life. As Ms Watkins submits, it is likely that an Issues Resolution Hearing could not take place until at least January 2025 and it might well not be possible for A to move to the care of the Aunt, assuming she is ultimately positively assessed, for 12 months. This is a very long time in the life of a young child and would make his bonding process with a new family significantly more difficult. There are a large number of hurdles to be gone through, the outcome of which is at this stage unknown. Therefore there is a real possibility that a final decision could be delayed for many months whilst the Aunt is assessed, but he cannot ultimately be placed with the Aunt.

62. I have reached the conclusion that it is not in the best interests of the child to continue the quest for the assessment of the Aunt, despite all the disbenefits that flow. It is in his best interests that this case proceeds as speedily as possible to the making of final orders so that a permanent placement can be found for A.

63. After the hearing, on 4 April 2024, a further email was received by the LA from ICACU which appeared to offer a further offer of forwarding the matter to the cantonal authorities. However, in my view this does not change the position because the referral has already been received by the canton, and they have indicated the timescales which I have dealt with above.