



Neutral Citation Number: [2018] EWHC 3625 (Fam)

Case No: : ZW17C00503

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2018

Before :

HER HONOUR JUDGE ROBERTSHAW

Between :

RE A

Applicant

Mark Twomey QC and Rebekah Wilson (instructed by the **London Borough of Enfield**) for the **Applicant local authority**
Rima Baruah (instructed by **Barnes and Partners Solicitors**) for the **Respondent mother**
Greg Davies (instructed by **Williams & Co**) for the **Respondent father**
The Foster Carer Ms GG appeared in person
Monifa Walters-Thompson (acting pro bono) (instructed by **Miles and Partners Solicitors** also acting pro bono) for the **4th Respondents Mr and Mrs H**
Darren Howe QC and Maggie Jones (instructed by **Wilson LLP Solicitors**) for the **Child's Guardian**

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
HER HONOUR JUDGE ROBERTSHAW

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.

Her Honour Judge Robertshaw :

Her Honour Judge Robertshaw :

Introduction

1. A is a little boy, now 14 months of dual British / Ghanaian nationality and heritage. He is much loved by his natural family, seven members of which have attended each day of this hearing and by his foster carer who has cared for him since he was six days old. The focus of this hearing has been to determine who should now care for A : members of his extended natural family, Mr and Mrs H, in Ghana, or his foster carer, Ms GG, here in England. It is not possible for either of his parents, his grandmother or any other family member to look after him here.
2. This is the second final hearing in public law proceedings concerning A brought by the London Borough of Enfield. The first final hearing concluded with the making of a special guardianship order ('SGO') in favour of GG. The local authority successfully appealed that decision. The SGO was discharged by the Court of Appeal on 16 October 2018 and the matter was remitted for rehearing before me. The judgment of Jackson LJ is reported at *Re A (A Child) 2018 EWCA Civ 2240*.

The parties' positions

3. The local authority's case remains that A should be placed under a special guardianship order with remote members of his natural family, Mr and Mrs H, A's second cousins (previously described as his aunt and uncle) in Ghana.
4. A's mother, FA, supports his being placed with Mr and Mrs H if she is unable to care for him. A's father, JK, is only able to contemplate a return of A to his joint care with the mother. Neither the mother nor the father, both of whom suffer with significant mental health problems, has pursued a positive case for the return of A to their care. Each recognises that the only realistic options now before the court are for A to be placed with the H's in Ghana or with GG in England.
5. Mr and Mrs H were joined as parties following the appeal which they attended and have remained in England pending the outcome of this hearing. They continue to offer themselves as long term carers for A in Ghana; in this they are supported by their adult daughter, H. The SGO assessments of them are positive. Since the appeal hearing, A has had contact with Mr and Mrs H and H and a warm relationship has developed between them.
6. GG is also a party to these proceedings. She asks the court to make a SGO in her favour. She remains committed to caring for A and to ensure, so far as it is within her power, continuing and regular contact between A with his siblings, his parents, grandmother and members of his family in England.
7. A's guardian, CP, is opposed to A being placed in Ghana and strongly supports a SGO being made in favour of GG, the foster carer.

8. There remain, therefore, as was the position at the first final hearing, two contenders for a SGO, one supported by the local authority and the maternal family and the other by the guardian. As Jackson LJ made clear in his judgment in remitting the case for rehearing, my task has been to look at the matter entirely afresh and independently to determine the appropriate arrangements for A's future.

This hearing

9. All parties, save GG, have been represented by specialist members of the Family Bar: the local authority and Guardian by Leading and Junior counsel and Mr and Mrs H by Ms Walters-Thompson (on a pro bono basis) who clearly had command of her papers. GG, was not entitled to public funding and represented herself. She has done so with considerable skill, dignity, courage and with respect for everyone. Mr and Mrs H were assisted by a friend who acted as an interpreter, the Court having been informed shortly before the hearing began that it had not been possible to secure the services of a court interpreter. With the agreement of all parties, I permitted the maternal grandmother, MA ('the grandmother'), supported by her sister, H, the adult daughter of Mr and Mrs H and a friend to support GG to be present.
10. The hearing lasted five days during which I heard extensive oral evidence from:
 - the local authority's social worker, MM
 - her team manager Mrs W
 - GG
 - Mr and Mrs H
 - H
 - A's Guardian, CP.
11. The various assessments of the mother and father concluded that it is not possible for either of them to care for A. The SGO assessments of Mr and Mrs H and Ms GG were positive. No party sought to challenge any of these assessments. Consequently no one required the mother, father or any of the assessors to give evidence.

Brief factual background

12. A is the mother's third child. He is the second child of the mother and the father. Their first child together and A's full sibling, M, (3yrs) and the mother's first child, SJ, (13yrs) are cared for by the grandmother under SGOs. SJ wishes for her brother, A, to be raised by the family in Ghana. She has written a letter to the Judge hearing this matter so that her concerns for her brother and her wishes can be heard. This letter reflects and was influenced by the views, feelings and wishes of the grandmother with whom she lives.
13. The grandmother is the matriarch of the family and holds a highly influential and dominant position in the maternal family. She came to London from Ghana in the 1960s and says that at some stage in the future, perhaps when M is 11, she intends to

retire 'home' to Ghana. She is 73 and suffers with high blood pressure and arthritis. She relies on a crutch to walk. She is not able to take on the care of A in addition to SJ and M but is determined to see him raised within the extended family in Ghana. She is strongly opposed to A's remaining with GG, although this has not always been her position.

14. A's maternal family speak Ga and most speak English. Mrs H has very limited spoken English and could not manage to give evidence without an interpreter. Mr H has a reasonable command of English. Their daughter, H, is fluent in English. The paternal family speak Twi. Apart from the father the paternal family are in Ghana but there is no contact between them and the maternal family; although Mr and Mrs H expressed the hope that some contact with the paternal family could be established if A lives with them.
15. The father arrived in the UK from Ghana as a tourist six years ago and is an over-stayer. As Jackson LJ observed, his immigration status is precarious. If the father is deported, the mother says she will leave the UK with him. Although she has only visited Ghana once, (and Mrs H told the SGO assessor that the mother found life difficult there), it is a real possibility that both parents will be leaving the UK for Ghana in the foreseeable future. Even if they do not, the mother still wishes for A to be brought up with Mr and Mrs H in Ghana.
16. A's foster carer, GG, is a single British woman of Afro-Caribbean origin. She is a professional state foster carer and is also fostering an Eastern European 15 year old boy on a long terms basis for the local authority. Before seeking a SGO, GG and the maternal family enjoyed a positive relationship. She and the grandmother got on extremely well and shared confidences. GG looked on the grandmother as a mother and the grandmother on GG as a daughter. They live close to each other and Ms GG supported regular contact between A, the maternal family and the siblings in the grandmother's home which she also attended. Initially the grandmother was very supportive of A remaining in GG's care under a SGO. The guardian described the grandmother and foster carer as "euphoric" when this possibility was suggested to them by her. The grandmother later withdrew her support for A remaining with GG: she wished A to be brought up within his natural family. The relationship between the GG and the maternal family thereafter soured and became very hostile; to the extent that the grandmother refused to see A or support contact between A and his siblings in her care. SJ, reflecting the views of her grandmother, refused to see A and is said to have expressed negative views about GG. In evidence the grandmother repeatedly spoke of feeling betrayed, let down by GG and the lack of trust that now exists between them. She sees no hope of their relationship's being restored.

Litigation history

17. The local authority issued its application for an interim care order under s31 Children Act 2018 on 12 October 2017. During the course of the proceedings when placement of A in Ghana with Mr and Mrs H became a realistic option, the local authority sought

specialist legal advice about the enforcement of an SGO made in the UK in Ghana. This advice has not been challenged.

18. I do not need to set out the progress of the proceedings leading to the first final hearing in detail, other than to observe that at a hearing before HHJ Karp on 22 March 2018 the mother indicated that she supported A going to be with the family in Ghana. The court order reflected that it *“anticipated that a SGO will be made in favour of Mr and Mrs H and that he would travel to Ghana and later reside in Ghana with the maternal family”*.¹ This part of the order was communicated to Mr and Mrs H who obtained independent legal advice about how best to secure A’s permanency with them with the assistance of their daughter, H, who works at a law firm. On 5 April 2018 further orders were made so that A could obtain a Ghanaian passport. The guardian later supported an adjournment of the final hearing to allow for an assessment of the father’s cousin and the paternal family members in Ghana advanced by the father. They subsequently withdrew from the assessment and the direction for an assessment of them was discharged. At that hearing the guardian supported exploring whether A’s foster carer could be an alternative option for A. The SG assessment subsequently undertaken of GG was positive.
19. On 28 April 2018 a meeting took place within the maternal family (but not including the mother) to which GG was invited. The grandmother and GG have differing views as to the outcome of this meeting. The grandmother understood that GG had agreed to withdraw her application for a SGO. GG believed that there was mutual respect for their respective positions and that she had not agreed to withdraw. In any event, there was consternation and considerable unhappiness within the maternal family when it became plain that GG was continuing to seek a SGO.
20. A complete breakdown in the family’s relationship with GG occurred when HHJ Karp was giving judgment and it became clear that she would be making a SGO in favour of GG. The maternal family, led by the grandmother, reacted vehemently: they were in considerable distress in the courtroom. The local authority later made luke warm attempts to persuade the grandmother to enter into mediation but there was no real enthusiasm for this and the grandmother’s refusal was taken at face value. Having heard from the grandmother, however, I am satisfied she would have continued to reject mediation; even if more strenuous efforts had been made.
21. Until the final hearing which concluded in July 2018, A was having regular and positive contact every fortnight with his siblings and the maternal family in the grandmother’s home with GG. Following the hearing the grandmother refused to permit any contact between SJ, M and A and refused to attend any meetings. At one point A’s maternal aunt wanted to facilitate sibling contact and GG made arrangements for this but the aunt then withdrew.

Events following the appeal hearing

¹ B59

22. When the SGO was discharged the local authority sought to introduce contact between Mr and Mrs H and A. GG responded positively to the proposal and suggested that the meetings could include sibling contact but the grandmother continued to oppose this. Her continuing negative influence against GG was such that she interfered in the arrangements being made for GG to be involved in the contact Mr and Mrs H were having with A. The grandmother wrongly informed the local authority that Mr and Mrs H did not agree to GG's being present during their contact. I am quite satisfied, having heard the evidence of the guardian and Mr and Mrs H, that the guardian has accurately recorded Mr and Mrs H's views at her meeting with them on 23 October 2018 and that their later change of mind was a direct result of the negative influence of the grandmother.
23. Despite not having met A before, Mr and Mrs H's contact with A has been very positive. A has responded well to them and they to him: a very warm relationship between them has begun to develop.
24. GG has remained committed at all times to doing whatever has been required to restore sibling contact, to support Mr and Mrs H's contact with A, to build bridges with the maternal family (albeit her efforts have been rejected by the grandmother) and to prioritise the welfare needs of A. The criticism levied at her during the hearing, for example, regarding the arrangements for A's 1st birthday and his feeding regime during contact, were unfounded and unnecessary.

The relevant law : Jackson LJ's bespoke guide

25. As Mr Twomey submits, one advantage arising on a re-trial is that the parties have, in the form of the judgment of Jackson LJ, a bespoke guide to the legal principles that are to be applied in this case: *Re A (A Child)* [2018] EWCA Civ 2240 [14-22; 28-29]

The welfare checklist

14. At the risk of stating the obvious, where a court is considering whether to make an order such as a SGO it "*shall have regard in particular*" to the matters that appear at s.1(3) Children Act 1989. The provision is therefore obligatory, flexible and open-ended, providing the decision-maker with a workbench and tools with which to devise a proper welfare outcome.
15. The welfare checklist can be helpful in several ways. In the first place, paying attention to it tends to ensure that all important considerations are taken into account. As Baroness Hale put it in *Re G (Children)* [2006] UKHL 2305 at [40]:

“My Lords, it is of course the case that any experienced family judge it is well aware of the contents of the statutory checklist and can be assumed to have had regard to it, whether or not this is spelled out in a judgement. However, in any difficult or finely

balanced case, as this undoubtedly was, it is a great help to address each of the factors in the list, along with any others which may be relevant, so as to ensure that no particular feature of the case is given more weight than it should properly bear.....”

16. Next, it’s neutral content is a reminder that the assessment of welfare is not driven by presumptions. As McFarlane LJ said in *Re W (A Child)* [2016] EWCA Civ 793 at [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”

17. Then, the open ended nature of the checklist allows the court to take account of other matters that may bear upon the individual decision. For example, although the present case is not concerned with adoption, the lifelong significance of the decision might reasonably prompt the court to have regard to the matters appearing in the Adoption and Children Act 2002 at s1(4) (f)²

18. Lastly, the substantive nature of the entire process was described by Sir James Munby P in *Re F (Children)* [2016] EWCA Civ 546 at [22]:

“Like any judgement, judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass on examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have

² 1(4) The court or adoption agency must have regard to the following matters (among others) –

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

won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgement is sustainable. The judge need not slavishly restate either the facts, the arguments or the law”

What is instead called for is a real analysis that descends into as much detail as the decision demands. As McFarlane LJ said in *Re G (A Child)* [2013] EWCA Civ 793 at [71]:

“What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh it]s own internal positives and negatives and each option is then compared, side-by-side, against the competing option or options”

Proportionality

19. Art. 8 of the European Convention on Human Rights of course provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

20. Orders of the present kind are made in accordance with law and with the legitimate aim of promoting the welfare of the child. The additional questions that is addressed by the proportionality evaluation is whether the proposed interference is necessary in the first place and if so whether it goes any further than it must to achieve its purpose. In *CM v Blackburn and Darwen BC* [2014] EWCA 1479, Ryder LJ put it this way at [36]:

“The whole purpose of a proportionality evaluation is to respect the rights that are engaged and cross check the welfare evaluation i.e. the decision is not just whether A is better than B, it is also whether A can be justified as an interference with the rights of those involved. That is of critical importance to the way in which evidence is collated and presented and the way in which the court analyses and evaluates it.”

21. In every case heard in the Family Court, the children and (with occasional exceptions) the adults will hold rights under Art. 8(1). Where there are competing outcomes, the choice of one outcome over another will commonly entail some degree of interference with those rights. It is well-established under European and domestic law that where there is a conflict between the welfare of the child and the rights of an adult, the child's interests will predominate. What is necessary in the individual case is to identify the nature of rights that are engaged and the extent of the proposed interference. This cross-check prevents the choice of an unnecessary interference or one that is disproportionate to the problem.
22. The importance of identifying the actual rights that are engaged is illustrated by the facts of the present case. Without deciding the matter, it would seem that [A] has 'family life' with his foster carer, qualified by the fact that she has been a professional carer providing a neutral, holding placement. He also has important family life rights with his parents, grandmother and siblings. As to the H's, they are the only viable placement within the birth family, but he has never met them, and he might therefore be said to have a right to private life in their regard with the potential for it to develop into family life if he was placed with them. It is therefore important to identify not only what rights are engaged but also their short, medium and long-term significance, before going on to consider the justification for any proposed interference. This exercise is of particular importance when the choice is between a placement with relatives and a placement outside the family, certainly where the decision is finely balanced.

The statutory framework when considering competing proposals for SGOs

26. In *Re A Jackson* LJ went on to consider the statutory framework for the making of SGOs:

The statutory framework

28. Although it did not feature in the proceedings below, we invited to parties to address us on the statutory framework within which the court was considering the competing proposals for SGOs. Section 14A of the Act provides two routes by which a SGO can be made:
- The first is under ss. (3), where an order can be made on the application of an individual (a) who is entitled to make it, or (b) has obtained leave of the court to make it.
 - The second route is under ss. (6) where an order can also be made in any family proceedings following (a) an application made via ss.

(3), or (b) where the court considers that an order should be made even though no application has been made

In this case, no application having been made, the court was following the second route and its order was made under ss. (6)(b).

29. It is worth noting the provisions that govern the entitlement to apply for a SGO. These appear in ss. (5), which includes two subparagraphs relevant to the present case.

- Subparagraph (c) entitles a person to apply if they come within s.10(5)(b) or (c). Section 10(5)(c)(ii) refers to a person who has the consent of the local authority where the child is in the care of a local authority. The definitions in sections 105 and 31(11) provide that a child is in the care of a local authority subject to a care order or, as here, an interim care order.
- Subparagraph (d) entitles a local authority foster carer to apply if the child has been living with them for at least one year immediately preceding the application

Consequently, the H's would have been entitled to apply for an SGO with the consent of the local authority, while the foster carer would have required the court's permission under s. 14A(3)(b). Given the support of the Guardian, that permission would surely have been granted if it had been requested. It is nonetheless the case that the Act contains a specific provision for relatives on the one hand and for foster carers on the other, including under s. 22(c), which sets out the priorities for local authorities when seeking placements for children in their care.

Mr and Mrs H

27. Mr and Mrs H are in their early 60s and will have the support in caring for A of their adult sons who live with them. Their daughter, H, who lives with her family about an hour's drive away, will also support her parents in caring for A. She will take over his care in the event that they become too fragile to continue to do so. Mr and Mrs H are described by the ISW, Ms C, who carried out the SGO assessment of them, as *"experienced and competent parents who have the time and the skills to provide A with good quality care."*³ Their home is warm and loving. H and her children visit every weekend. There is a nursery nearby which A will attend. Mr and Mrs H have a comprehensive understanding of the difficulties which led to these proceedings and are aware that A may require support for his mental health in the future. They are

³ SGO Assessment E80

supportive of direct contact with the maternal and paternal family in Ghana and in the UK which they are willing to supervise. The local authority support package now includes an increased allowance of £1,000 per annum towards the expenses of A's returning to the UK to see his family. Mr and Mrs H confirmed in evidence their commitment to returning at least once a year and probably twice. The SGO assessment recommended the making of a SGO order, concluding that *"this is a family placement whereby the proposed care-givers would wish for [A] to maintain contact with both maternal and paternal families....The [Hs are] competent experienced parents who are able to offer [A] a high level of nurture and stimulation.....Placement with the [Hs] will mean that A will be raised on a different continent than his maternal siblings. This may impact their relationship as adults in respect of face to face contact with the family in the UK. This is likely to be greatly reduced if [A] is placed in Ghana. That said this placement offers [A] the opportunity to grow up in his family of origin."*

4

28. Mr and Mrs H are good, genuine people who are fully committed to caring for A. Mr H described with real warmth the games he played with A in contact, including a 'high five', chuckling with joy as he remembered doing this and seeing A's reaction. There can be no doubt that if A is placed with Mr and Mrs H, they will embrace him as a full member of their family: they will love him and nurture him and will ensure that all his needs are met to a high standard. Although Mrs H is unlikely to speak English to A, he will have good exposure to the English language. It is spoken at the nursery and schools he will be attending and Mr and Mrs H's family speak more English than Ga. Mr and Mrs H confirmed to me that they would have no difficulty in working closely with GG (whom Mr H described as "a nice lady") during any transition period. There is clearly no ill feeling from Mr and Mrs H towards GG.
29. The social worker, Ms M, confirmed that, so far, there have been about ten contact sessions and that Mr and Mrs H had interacted very positively with A. Supervisors had remarked how impressed they had been with the quality of the contact. Ms M described how A has already developed a special bond with Mr H and holds out his arms to go to him.

GG

30. GG began her evidence by saying she did not mean to offend the family in anything she said. She was plainly conscious of and sensitive to the family's wishes and feelings which she respected, but did not share; whilst prioritising what she believes to be the best interests of A. She confirmed she did not stand by the view she had expressed in her statement that Mr and Mrs H would act in a way that was not in A's best interests⁵. She explained that, in this respect, she had been misled by a degree of miscommunication about Mr and Mrs H by the local authority.

⁴ SGO Assessment E126

⁵ C157 para 52

31. The SGO assessment confirms that GG has provided a consistently high standard of care for A and is meeting all his needs.⁶ She is committed to maintaining sibling contact and contact with the maternal family and will do all she can to rebuild her relationship with the grandmother and maternal family.
32. As I have acknowledged at the beginning of this judgment, GG has represented herself with enormous dignity and courage. She was at all times polite and courteous. Her evidence was plainly truthful and honest (and where there are differences between her evidence and that of the grandmother, I prefer that of GG). There can be no doubt about GG's commitment to A and the high quality of the care she has given and would continue to give to him if he remains in her care.

The grandmother

33. The grandmother, MA, has selflessly taken on the full time care of two of her grandchildren, SJ and M, in circumstances where the very poor mental health of her daughter meant that, even with support, it was not possible for her to care for them. The grandmother provides these children with a warm and loving home: the standard of her care is high. Were it not for her age and health she would have willingly stepped in again and taken on the care of A. The grandmother explained in the clearest of terms how important the family say it is for A to be brought up within his natural family, even if this means being with the extended family in Ghana. She said the decision in favour of GG was a "big blow" to her and to the family. They are a close knit family who want very strongly to care for A themselves.
34. During the first part of her evidence the grandmother was not supportive of sibling contact continuing if A remains with the foster carer. She shifted when she resumed her evidence saying she would allow contact, even in her home, which she would supervise and would not want to cut him off. She is not willing however to engage in mediation with GG and referred to her throughout her evidence as "the carer", rarely using her name.
35. The grandmother's evidence occasionally verged on the dramatic. She was not a reliable or, at times, an honest witness. She prevaricated in answering questions; for example, as to whether or not she would allow contact to take place, repeatedly saying she did not trust the foster carer and, when pressed, gave the appearance of crying and let out a big wail. But there were no tears.
36. The grandmother is genuine in her desire for A to be brought within the family, even though this means he will be placed in Ghana. She is a dominant woman with a strong influence over the family. She has already deliberately frustrated sibling contact and there is a real risk that GG will continue to be viewed with hostility within the grandmother's home if A remains in her care. This has already had an adverse impact on SJ who has adopted her grandmother's views and it is likely that M will do likewise.

⁶ SGO assessment E226

Whether the grandmother acted tactically or not in refusing to permit contact, the reality is that her actions and attitudes did not prioritise A's welfare and have had a negative impact on sibling contact. If this continues or if the grandmother shifts again and refuses to support sibling contact, the benefits hoped for by GG and the Guardian of a *"sibling shared lived experience"* will not materialise or will be damaged and even lost.

The Guardian

37. The Guardian canvassed GG about the possibility of her keeping A under a SGO after the positive assessment of Mr and Mrs H and at a time when plans were being made in March 2018 for A to be transferred to their care. She did so because she was concerned at the prospect of A's growing up away from his family in England and, in particular, from his siblings. She continues to support the making of a SGO in favour of GG and strongly so. In her reports, she highlights her concerns about the placement with Mr and Mrs H but her focus for much of her final report was on what has happened since the final hearing and the appeal hearing.
38. In evidence the Guardian summarised how she saw the advantages and disadvantages of each option and confirmed that she stood by the recommendation in her report. She considered the greatest advantage of A being placed in Ghana will be that *"he wouldn't be exposed to any negativity from his maternal grandmother to his primary carer"*. The primary disadvantage of such a placement is that A will not grow up alongside his siblings. She hoped that contact between the siblings could be built up to staying contact. She did not believe that indirect contact with direct contact for one or two months each year would *"compare at all in any sense to that lived experience"*. She remained concerned as to who would be caring for A in Ghana and the limited exposure she believes he would have to the English language.
39. So far as the advantages of A remaining with GG are concerned, the Guardian said she he would not have to experience the loss of his foster carer and his high quality parenting by her would continue. She described A as being *"incredibly comfortable"* in his home environment with her and how he is a very different child when with GG. The disadvantages of a placement with GG included the fact that A would not be brought up by members of his immediate family, that he would not be living in the same household as his brother and sister and that he would not be part of the Ghanaian culture on a day to day basis.
40. When cross-examined by Mr Twomey about her analysis and the basis of her concerns and conclusions, the Guardian struggled to make sense of her own reasoning and was quite unable at times to explain how she had reached the conclusions and views she had. She was unable to answer some questions at all. She disagreed with Mr Twomey that the benefit to A of growing up embedded in his ethnic Ghanaian culture, that the opportunity to remain in touch with close family members by visiting and the fact that the placement with Mr and Mrs H had the support of A's maternal family were powerful arguments: she said she preferred to described them as strong, but not

powerful, despite having had the opportunity to consider the judgment of Jackson LJ and being referred to paragraph 55 where these “powerful arguments” are set out⁷. The Guardian was also unable to explain why she had not recorded in her final report the advantage for A of being brought up by his natural family if he was placed with Mr and Mrs H.

41. When asked by Mr Twomey to spell out in detail the welfare advantages to A of being brought up within his family, the Guardian paused for a very long time before referring to A knowing about his family history and cultural norms, his family norms and the experience of getting to know broader family networks. She acknowledged that A would get to know the day to day life of living in Ghana with his family members and that he will know that he is loved by them. He would know that the placement was supported the family and that M joining him in Ghana could be an advantage to him. The Guardian summarised the advantages to A as “*the family being wrapped around him*”. Only when it was suggested to her by Mr Twomey did the Guardian agree that A’s identity goes to the heart of his emotional stability.
42. The Guardian was unable to explain why she had not provided in any of her reports or earlier evidence the detail she had now provided in cross examination on the 4th day of this final hearing about the advantages to A of being placed with Mr and Mrs H. She also struggled to explain how she had reached some of the conclusions she did and why there were important omissions in her report. Her reasoning for concluding that there is a high risk, as opposed to a raised risk that a move from GG to Mr and Mrs H would “*negatively impact upon his overall development and ultimately his mental health in his adult years*”⁸ was clearly flawed and she had to concede that there was no evidence to support her assertion. The Guardian conceded there was a conflict in her conclusion that an advantage of A going to Ghana would be that he would avoid the negative influence of the grandmother on his primary carer whilst at the same time saying she was relying on the grandmother to underpin sibling contact if A stayed with GG. Further doubt was cast upon the validity of the Guardian’s analysis and reasoning by her inability to explain what she meant by “African/English”⁹ and the reference in her report to the carers ability to respond to “cultural norms”¹⁰.
43. At the end of her evidence the Guardian agreed that it would have been very difficult for SJ not to have been aware of the very strong views and feelings of the grandmother and that if the M made negative comments to A, this would be very damaging for him and harmful to M and SJ. It would also be damaging for the children to be involved in court proceedings if disputes occurred over contact. The Guardian’s optimism that the grandmother would support contact and that no order was necessary was patently misplaced.

Assessment of the competing options and the welfare checklist

⁷ A55

⁸ E333 para 67

⁹ E334 para 68

¹⁰ E265 para 35

44. It is obligatory to have regard to the welfare checklist at s1 (3) of the Children Act 1989. It provides me with a workbench and tools with which to devise a proper welfare outcome¹¹. Given the particular circumstances of this case, although this is not an adoption case, I have also taken into account the factors under s1(4)(f) of the Adoption and Children Act 2002. My consideration of all these factors is reflected in my assessment and analysis of the advantages and disadvantages of the competing placement options:

Placement with Mr and Mrs H

Advantages of this placement

- (a) A will be brought up within his natural family and thereby benefit throughout his life from:
- (i) promotion of his identity and thus his emotional security
 - (ii) the placement having the support of his maternal family¹²
 - (iii) the security and love which comes from being wanted by his own family
 - (iv) having *“the family wrapped around him”*¹³
 - (v) having a deeper and better understanding of his life history and why it was not possible for him to be brought up by his parents

As many children in Ghana are brought up by extended family, being brought up by Mr and Mrs H would be an accepted norm for A

- (b) A will avoid the detrimental impact of not being brought up by his family and thereby avoid:
- (i) the risk to his emotional security /emotional wellbeing by the challenge to his fundamental identity and the loss of the advantages under (a)
 - (ii) the risk he will blame himself or others in his natural family for this predicament
 - (iii) the risk that he may blame his foster carer for this predicament
 - (iv) the *“potential disadvantages to A of growing up between two households with different cultural backgrounds, particularly if ‘contact’ was to become fraught or even break down”*¹⁴.
- (c) A can grow up *“embedded in his ethnic Ghanaian culture of origin”*¹⁵. This will include for him:
- (i) a rich understanding of his heritage
 - (ii) a knowledge of Ga, Twi and English and, consequently, the ability to communicate with all members of his family in Ghana and in the UK

¹¹ Re A [2018] EWCA Civ 240 Jackson LJ [14]

¹² Re A [2018] EWCA Civ 240 Jackson LJ [31]

¹³ Oral evidence of the Guardian

¹⁴ Re A [2018] EWCA Civ 240 Jackson LJ [31]

¹⁵ A55 Re A [2018] EWCA Civ 240 Jackson LJ [31]

- (iii) a deeper and better understanding of his family history, including an intimate knowledge of family stories and the cultural components that make up his own British / Ghanaian heritage and ancestry
- (d) A will receive a high standard of care where all his holistic welfare needs will be met :
 - (i) He will be cared for by family members who can provide excellent nurturing care and stimulation for him
 - (ii) He will be cared for by family members who will love him and who are fully committed to him
 - (iii) His carers will meet his physical, emotional, educational and social needs and have sound, reliable back-up from other family members should anything prevent Mr and Mrs H from continuing as A's primary carer
 - (iv) A will have the benefit of two parent figures with a very strong supportive network, particularly of family members
 - (v) The maternal family *"has shown itself capable of making very satisfactory arrangements for the older two children"*¹⁶ and there can be a high degree of confidence that A's welfare needs will be met throughout his minority and beyond
- (e) A will have the *"the opportunity to remain in touch with close family members"*¹⁷. In particular:
 - (i) He will have the significant advantage of living for one to two months each year in the same home as his siblings in the supportive, warm and natural environment of his maternal grandmother's home. There is little risk that these relationships will not endure, albeit in a different way than if A was in the UK, and at times be a lived shared and intimate experience.
 - (ii) He will have the opportunity to spend time with his parents for as long as they remain in the UK and, if his father or both parents move back to Ghana, A will be able to enjoy more regular time with them
 - (iii) He will be able to spend time with his maternal aunt and other members of the extended family based in the UK
 - (iv) 'Contact' with family members is unlikely to become fraught or break down. A is unlikely to experience conflict over the time he spends with his family.
- (f) A will have the opportunity of contact with the extended paternal family members in Ghana and, therefore, the possibility of a relationship with them.
- (g) The security of the placement and A's emotional strength within it will be promoted by the knowledge that it has the support of the maternal family and, in particular, his mother and by (a) – (f) above.

Disadvantages of this placement

¹⁶ A55 Re A [2018] EWCA Civ 240 Jackson LJ [31]

¹⁷ A55 Re A [2018] EWCA Civ 240 Jackson LJ [31]

- (a) A will be grow up at a distance from his close family
- (b) The time A spends with his siblings and grandmother will be much less and will not comprise a shared, lived experience in the same way that he would enjoy if he lived in the UK. The 'contact' A has with his siblings will be qualitatively different but this is not necessarily a disadvantage. The potential disadvantage must be considered in the light of the likely repeated conflicts that would exist in contact arrangements between the maternal family, the grandmother in particular, and his primary carer.
- (c) A will experience short term distress and harm caused by the loss to him of disruption in separating from GG, his primary carer, to whom he is closely attached. But:
 - (i) The harm will be mitigated by the strength of A's attachment bond with his foster carer, the high quality of care he has received from her, his tender age and the likelihood of him being able to transfer his positive attachment to Mr and Mrs H
 - (ii) the high standard of Mr and Mrs H's parenting abilities, their sensitivities to A's loss and their ability to support him during the period of distress

This is a typical consequence of moving a child from state care to a permanent placement

- (d) A will lose his relationship with the other foster child in his current placement. This is not a family relationship or would that would be expected to endure. It is not akin to A's relationships with his siblings and other family members.

Placement with Ms GG

Advantages of this placement

- (a) A would continue to receive the exceptionally high quality care she has provided for A since his birth.
- (b) He would be cared for by someone who is deeply committed to him, who loves him, who would prioritise his welfare and who has much to offer.
- (c) He would not experience short term distress that would occur in being separated from her.
- (d) His close relationship with the other foster child will continue for the time being.
- (e) He would be living in close proximity to his siblings, grandmother, parents (whilst they remain in the UK) and other members of the maternal family. It is likely that

he would attend the same school as his siblings. This advantage needs to be considered in light of the matters set out under (f).

- (f) GG is ready and willing and is committed to doing all she can to promote and secure inter-sibling contact; but:
- (i) the approach, attitude and influence of the maternal grandmother has been equivocal and, for significant periods, oppositional, negative and hostile
 - (ii) the grandmother is extremely emotional and is likely to remain deeply unhappy and resentful that A is being cared for outside of his natural family: in her eyes, for no good reason.
 - (iii) contact is likely to be fraught and may need to be supported by local authority involvement, mediation, further court proceedings and court orders
 - (iv) contact may break down and not take place at all.
 - (v) there is a real risk that SJ will not go along with contact or, alternatively, that she may say or do something harmful to the relationship between A and GG, reflecting the views and influence of her grandmother with whom she lives
 - (vi) there is a real risk that even a ‘throw away’ comment from the grandmother might have significant deleterious consequences for the security and stability A’s placement with GG and for A’s emotional wellbeing
- (g) GG is willing to take A to Ghana to spend time with his extended family and Mr and Mrs H expressed a willingness for her to do so and said they would offer her hospitality in their home, but:
- (i) The influence of the matriarchal grandmother is likely to undermine attempts by GG to visit Ghana with A
 - (ii) There is a real risk Mr and Mrs H will not feel able to support ‘contact’ and will change their mind about this, as they did in relation to the contact arrangements following the appeal hearing
 - (iii) There is little prospect of contact and developing relationships with the wider paternal family who speak Twi

Disadvantages of this placement

- (a) The advantages associated with a family placement with Mr and Mrs H, set out above, will be lost to A.
- (b) A will be the only member of his family to grow up outside it.
- (c) Any contact with his siblings will involve a shared experience of a deeply upset grandmother and other family members who were wholly opposed to A’s foster carer being his primary carer.

- (d) There is a very real possibility that A will learn from other children, more likely his own brother, of the family opposition of him being placed with GG and that this will impact negatively on his emotional wellbeing.
- (e) The ill feeling by the family towards the foster carer will undermine not only A's placement but also his relationships with his siblings and natural family.
- (f) There is a very real possibility of further litigation for A and his siblings and natural family members, if placed with his foster carer. This would be damaging for A. Contact with his siblings and maternal family in the UK, particularly regular natural contact, lacks any real certainty and is potentially fraught with difficulties.
- (g) GG will struggle to promote his Ghanaian culture. In evidence she could only identify the fact that Ghana is "*a beautiful country*" as a positive.
- (h) The opportunity for A to have contact with and develop relationships with the extended paternal family is likely to be lost to him permanently.
- (i) GG does not have supporting back up in the event that she is unable to care for A for any reason. If the placement could not continue for any reason there would be uncertainty for A, but there is no evidence to suggest this is likely to happen.
- (j) GG cannot meet A's private life rights in the same way that they can be met and promoted by a placement with Mr and Mrs H.

Proportionality

45. Is it proportionate to place A with a non-family member, notwithstanding the availability of not only a suitable but also a good family placement? Is it necessary for A to grow up with his foster carer when such a placement with his natural family is available to him? As Mr Twomey submits, this is not a case where a sibling will lose contact with his brother or sister if he is placed with the extended family in Ghana or a case of a life long relationship being lost as the consequence of the placement. It is in reality, a comparison of the nature and quality of the contact A will have with his siblings and maternal family. Each form of contact has its own benefits, advantages and disadvantages. If placed with Mr and Mrs H, A will enjoy contact with his siblings and maternal family in the UK for extended concentrated periods during school holiday times (the school holidays in Ghana and the UK coincide).

46. In considering A's rights to family life under Article 8 Mr Howe drew my attention during his closing submissions to The 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life' (updated 31 August 2018), and in particular to paragraphs 269, 235, 283 and 284, and to *Moretti and Benedetti v Italy*¹⁸. As he submits, of less significance but still of a positive nature, is

¹⁸ 16318/07

the relationship between a child and a grandparent and between a child and an aunt and an uncle.

47. A's rights in the short, medium and long term must be taken into account. A currently has an established family life with GG and there is potential for this to develop. His contact with Mr and Mrs H has been positive. Whilst it could be said that A now has some family life with them, this is embryonic and it more accurate to say that A has the right to private life in their regard, with the potential for this to develop into family life if he is placed with them. A has also retained a family life right with his siblings, grandmother and aunt.
48. A's rights that are engaged, therefore, are his right to family life with GG (albeit arising as a consequence of a neutral holding placement in state care) which is to be set against his right to private life with Mr and Mrs H with the potential for this to develop into family life with them.
49. Having considered the welfare checklist and balancing the advantages and disadvantages of each placement, the welfare balance in this case rests heavily in favour of the family placement with Mr and Mrs H and I can find no welfare imperative that necessitates A being placed away from his natural family. Even if, exceptionally, balancing the welfare benefits of A remaining with Ms GG with those of a family placement with Mr and Mrs H fell in favour of Ms GG, it would not survive the proportionality cross check. A has his whole life ahead of him and this should be a life with Mr and Mrs H.
50. I am satisfied that the only placement that can meet A's Article 8 rights to family and private life is a placement with Mr and Mrs H in Ghana who will best meet his welfare interests throughout his minority and beyond.
51. In granting a SGO in favour of Mr and Mrs H, I am departing from the recommendations made by A's guardian. I have made some observations about her evidence and analysis earlier in this judgment. It is disappointing that, despite the length of these proceedings and despite an informative judgment from the Court of Appeal, the Guardian failed to consider the matters drawn to her attention and highlighted by Jackson LJ, particularly at paragraph 31 of his judgment¹⁹. The Guardian's written and oral evidence shows that she failed to engage with the most significant and prominent advantages to A of a placement with Mr and Mrs H and that she failed to consider and analyse equally the risks and positives of each placement. She has given insufficient consideration, for example, to A's identity needs, the importance of his Ghanaian heritage and cultural background and the strong support for the placement from the maternal family. And she has placed too much weight and optimism on good sibling contact resuming if A remains with GG. Significant parts of the Guardian's written evidence central to her analysis were flawed and did not withstand scrutiny in her oral evidence²⁰. Overall the guardian was not able to assist me with which placement would best meet A's best interests throughout his minority

¹⁹ A55

²⁰ See observations about this earlier in this judgment regarding E333 para 67 E334 para 70 and E265 para 35

and beyond. Consequently I am unable to rely upon her analysis and recommendations.

52. In her evidence, the grandmother spoke strongly and movingly not only about the ability of A's family to make decisions for the children in their family, including A, but also of their right and entitlement to do so. That is their culture. Mr Twomey invites me to consider what she said in the context of the compelling words of the Convention of the Rights of the Child²¹ and Article 5²² but, as McFarlane LJ made abundantly clear in *Re W*, a child does not have a 'right' to be brought up by his or her natural family and no presumption to that effect exists. The words of McFarlane LJ in *Re W* (*supra* para 16)²³ bear repetition and emphasis. I refer again to this to make it clear that I have not determined the outcome of this case on the basis of any "rights" the maternal family believe themselves to have to decide A's future but on my application and consideration of the legal principles set out in what I have described as Jackson LJ's bespoke guide.

53. I referred at the outset of this judgment to the high quality care that Ms GG has given to A. With her, he has had the very best start in life he could possibly have had, the foundations of which will now stand him in good stead, not only for his move to Ghana with Mr and Mrs H but also for the rest of his life. Ms GG is a gentle and caring woman of integrity with a strong Christian faith. She is a foster carer of the highest calibre who has found herself, through no fault on her part, ostracised by A's family and treated with disdain and distance by the local authority. Foster carers of the calibre of Ms GG are a rare resource and should be valued and supported. I hope that Ms GG, though very bruised by the experience she has had with A and this local authority, will feel able to reflect on her decision to stop fostering. I trust that the local authority too will reflect and recognise the immense contribution Ms GG can make to other children in need of the high quality care she can offer. Without making any statement of policy or guidance, I would encourage guardians to think and long and hard before canvassing and encouraging a state foster carer who is holding a child in a neutral interim position, to apply for a SGO when there is a good placement available within the natural family. This is particularly so where, as in this case, there is a family placement available with a glowing assessment, a recommendation for placement of the child with that family member and where the placement has the support of the child's mother and immediate family. Each case will turn on its own facts. There will, of course, be cases where it is right for a child to remain with his or her foster carer on a long term basis, sometimes under a SGO or, exceptionally, even with an adoption order being granted in their favour. This is not such a case.

²¹ *Convinced that the family, as the fundamental group of society and the natural environment for the growth and well being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community*

²² *States parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognise in the present Convention*

²³ *Re W (a Child)* [2016] EWCA Civ 793 McFarlane LJ [71]

54. I conclude this judgment as I began, recognising that A is a child who is much loved by his natural family and by his foster carer. It would benefit A enormously if the maternal family and the foster carer can now work harmoniously together to enable A to have as smooth a transition as possible to his new home with Mr and Mrs H.

Her Honour Judge Robertshaw
10 December 2018