Neutral Citation Number: [2019] EWFC 10

Case No: LS18C00597

IN THE FAMILY COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 14/02/2019

Before:

THE HONOURABLE MR JUSTICE COBB

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Re H (Care and Adoption: Assessment of wider family)

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James Hasson (instructed by **JWP Solicitors**) for the Local Authority
Rachael Hughes (instructed by **GWB Harthills**) for the Mother
Aelred Hookway (instructed by **Grange Appleyard**) for the Father
Jill McCurdy (solicitor advocate from **Ramsdens Solicitors**) for the Child (H)

Hearing dates: 4 February 2019 (Sheffield)

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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.

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THE HONOURABLE MR JUSTICE COBB

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.

The Honourable Mr Justice Cobb:

Introduction

1. In public law proceedings under *Part IV* of the *Children Act 1989* ('*CA 1989*'), social work assessments are commonly undertaken of members of the subject child's wider family or friends who are proposed as potential carers in the event that the child cannot be safely placed with parents. The issue which arises in this case is whether a local authority is required, by statute or otherwise, to notify wider family members of the existence of the subject child, and/or assess them, when they are *not* proposed by parents as potential alternative carers, and where the parents (or either of them) specifically do *not* wish the wider family to be involved.

2. The application concerns a baby boy, now aged 5 months, H. He is currently in foster care, and subject to an interim care order, public law proceedings having been launched in respect of him as soon as he was born. He is the third child born to these parents. He has an older sister, F, and an older brother, G. He has multiple maternal half-siblings, and two paternal half-siblings. Both F and G have been placed for adoption, as indeed have a number of his maternal half-siblings.

3. These proceedings are being case-managed to a contested final hearing. The parents are being assessed as to their suitability to care for H; they wish to care for him together as a couple, but the indications are not currently altogether positive – both parents have a long history of substance misuse and alcohol abuse, and there is a history of alleged domestic violence, including an alleged incident in the last few days. An application for a placement order (*Adoption and Children Act 2002*: '*ACA 2002*') is contemplated, but not yet issued.

4. The Agency Decision Maker of the local authority (a senior social worker with responsibility for making decisions on whether a child should be placed for adoption, the suitability of prospective adopters and with whom a child should be placed for adoption) wishes to know whether, in the event that the parents are assessed as unsuitable to care for H, there are other family members who may be suitable, and may wish, to care for H.

5. The wider maternal family apparently know of the existence of F, G and H, but do not wish to be considered as carers for H. The paternal family do not apparently know of the existence of H, nor of his older siblings F and G. The father has made it clear that he is opposed to the local authority notifying his family of the existence of H; he has confirmed that he would rather that H be placed for adoption than for his parents know of the existence of H.

6. The local authority seeks guidance from the court on whether it should take steps to track down the paternal family, and notify them of the existence of H (and necessarily of F and G), with a view (potentially at least) to assessing them. On 10 January 2019 it issued an application under *Part 19 Family Procedure Rules 2010* ('*FPR 2010*') (as contemplated in these circumstances in *Re RA (Baby relinquished for adoption)* [2016] EWFC 25, [2017] 1 FLR 1610 at [50]) seeking the following relief:

> "… Notwithstanding the father's objection to the local authority taking steps to locate his family, and contacting

> them, the local authority seeks confirmation from the Court that it can and should notify the father's wider family of the existence of H, and, as appropriate, elicit their views as to plans for H's future, and if relevant assess them as carers for H." (The wording is not as it appears in the application, but was refined at the hearing).

7. At an earlier hearing, I considered this application and gave case management directions; specifically, I directed statements from the parents as I wished to know directly from them on this issue. I required them to attend the hearing; the father filed a statement, but the mother did not. Neither parent attended the hearing.

The parties' cases

8. The local authority wishes to contact the paternal family, specifically the paternal grandparents, to notify them of the existence of H; it particularly wishes to establish whether the wider family may be in a position to care for H. It submits that the circumstances which obtain here are distinguishable from the cases where a court permits a parent and adoption agency to make discreet and confidential arrangements for the adoption of a 'relinquished' child.

9. The Children's Guardian supports the local authority, arguing that "the court should be slow to ignore the potential for investigation into a possible family placement given the extreme and draconian plan for adoption". In considering this submission I bear in mind that the Children's Guardian has a wide-ranging duty in public law proceedings such as these – see *section 41* of the *CA 1989* – which includes a "duty to safeguard the interests of the child in the manner prescribed by such rules" (*section 41(2)(b)*). Under the *Family Proceedings Rules 2010, rule 16.20*, the Guardian has "the duty of safeguarding the interests of the child", and this is buttressed by *PD16A, Pts 3 and 4* which contains the following responsibilities:

> "6.1 The children's guardian must make such investigations as are necessary to carry out the children's guardian's duties and must, in particular –
>
> (a) contact or seek to interview such persons as the children's guardian thinks appropriate or as the court directs; and
>
> (b) obtain such professional assistance as is available which the children's guardian thinks appropriate or which the court directs be obtained.
>
> 6.6 The children's guardian must advise the court on the following matters –
>
> … (e) the options available to it in respect of the child and the suitability of each such option including what order should be made in determining the application; …" (emphasis by underlining added).

10. Pursuant to my direction, the father filed a statement in which he says this:

> "I do not believe that anyone in my family would be able to offer [H] a home … [having described his parents' health and circumstances he adds] I do not want to burden them with the knowledge that their grandson is subject to court proceedings and might be adopted when there is nothing they can do about it."

He refers, then, to a half-brother and sister with whom he has little current contact, and who would, inferentially, be unsuited to care for H. By contrast to this account, the local authority social work assessment for the relevant Adoption Panel records the following:

> "[the father] talks of a strong family unit and he continues to visit his family on a weekly basis, however [the father] was reserved in disclosing his parents views of his lifestyle as it appears that his parents are not aware of the births of [G] or [H] and he is adamant that he does not want them to know and would rather his children be adopted then them know…
>
> …[The father] recalls a happy childhood and he said there was no domestic abuse, no mental health, no illicit drugs or alcohol. He recalls going on family holidays… his father worked… his mother stayed at home to care for the children. He can remember his mother taking them to school and reading with them and being supportive with their homework. [The father] explains that his family is a traditional, strong family unit which continues to date. [The father] continues to visit his parents"

11. Until recently the local authority had no means of tracing the paternal family, and there would be no obvious power for me to compel the father to reveal their identity or whereabouts. However, in the last few days, the local authority has obtained the father's birth certificate, which contains his parents' names. It is acknowledged that this information should materially assist in locating the father's parents.

12. During the adoption processes concerning F and G, the father was not formally identified as the babies' parent, and the issue currently before the court did not arise.

13. During these proceedings concerning H, the relevant local authority has contacted the *maternal* family

> "… but unfortunately, none of them have wished to put themselves forward for [F], [G], or [H] and were in agreement of the local authorities' plan of adoption. Additionally, they did not want to be part of any life story work".

14. Counsel for the father and mother concede that were I to refuse the local authority's application, and grant the father the relief he seeks, this would materially extend the

relatively small class of exceptional cases contemplated by the 'relinquished baby' caselaw (see below at [33]). Mr Hookway, for the father, indeed asserts in his position statement: "clearly this is not a relinquished baby case… even if the principles established could be extended to the present situation it is difficult to conceive how the circumstances in which the [father] seeks to restrict enquiry into his side of the family can be described as exceptional." Ms Hughes, for the mother, acknowledges that "it cannot be argued that the reasons the father puts forward for withholding information about [H] fall within the exceptional category".

The duty to assess?

15. The submissions of all the parties proceeded upon an *assumption* that the local authority has a general duty to assess the wider family in these circumstances. In this regard, I was referred to the decision of Theis J in *Royal Borough of Greenwich v Adopters* [2018] EWFC 87, in which she said this at [11]:

> "What this case has highlighted is the critical importance of a local authority having effective systems in place from an early stage in care proceedings to ensure that the wider maternal/paternal families are considered as possible placement options for the children. Whilst it is recognised that the parents should put forward any names they want to be considered, that does not absolve the local authority of the enquiries they should independently be making. The continued retort by the local authority that the parents had failed to put anyone forward failed to recognise these are parents who failed to provide the basic care for their children or provide basic co-operation within the care proceedings, this local authority should have undertaken their own enquiries." (emphasis by underlining added).

16. I do not read Theis J's comments as establishing, or specifically referring to, any free-standing duty to assess wider family who are unaware of the existence of the child. Indeed, the specific issue arising for determination here caused me to question from where counsel's assumption about the obligation derives, how far it extends, and what policy or other guidance informs how far it should be applied.

17. **Statute**: It seems to me that the assumption referred to in [15] and [16] draws heavily on one of the key principles of the *CA 1989*, namely that children are generally best looked after within their own family, save where that outcome is not consistent with their welfare, with their parents playing a full part in their lives and with least recourse to legal proceedings. This principle, underpinning many parts of the statute, is most clearly expressed in *section 17 CA 1989* which imposes a general duty of every local authority (in addition to other duties imposed on them) (a) to safeguard and promote the welfare of children within their area who are in need; and (b) so far as is consistent with that duty, "to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs." The definition of a child in need in *section 17(10) CA 1989* is a broad one. This duty is buttressed by the provisions of *Schedule 2, para.8 CA 1989* which sets out the duties on local authorities "as they consider appropriate" to make provision of services to children in need "while they are living with their families".

18. The general duty towards a child in need is reinforced by *section 22C CA 1989*, which requires local authorities who are looking after such a child to "make arrangements for [the child] to live with" a parent, or (following a hierarchy of options) to be placed in a "placement with an individual who is a relative, friend or other person connected with [the child]" (emphasis added: *section 22C(6)(a)*). *Section 22C* reflects the principle that all children, including looked after children, should wherever possible be cared for by their families and friends. This section is also intended to ensure that children placed with relatives are still offered the protection of a 'looked after' status, confirming the Court of Appeal's approach in *R(SA) v Kent County Council* [2011] EWCA Civ 1303, where a child living with a grandparent in an arrangement initiated by the authority, was a looked after child and, as such, the grandparent was entitled to financial provision from the authority.

19. Both the *CA 1989* and the *ACA 2002* include specific provisions designed to involve wider family members in decision-making. *Section 1(3)(f) CA 1989* requires the court when making an order under *section 8, section 14* or *Part IV CA 1989* to have regard to the question of: "how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs" (emphasis added). *Section 1(4)(c)/(f)(ii)/(iii) ACA 2002* (when read with *section 1(1)*) provides that:

> "… whenever a court or adoption agency is coming to a decision relating to the adoption of a child… the court or adoption agency must have regard to: … (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person… (f) the relationship which the child has with relatives, … (f)(ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs, and … (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child." (emphasis by underlining added).

20. Where adoption is being considered for a child, the *Adoption Agencies Regulations 2005* ('*AAR 2005*') are engaged. In this context, *regulation 14* imposes a duty on the adoption agency "so far as is reasonably practicable" to ascertain the wishes and feelings of the parent or guardian of the child and, of any other person the agency considers relevant, regarding the child, and the placement of the child for adoption, and contact; under *regulation 15 AAR 2005* the adoption agency is required ("so far as is reasonably practicable") to obtain the information about the child specified in *Part 1 of Schedule 1* to the *AAR 2005* (which includes at para.3: "the ability and willingness of the child's parent or guardian or any other person the agency considers relevant, to provide the child with a secure environment in which he can develop, and otherwise to meet his needs"), and under *regulation 16* certain specific prescribed information about the child's family (name, sex, date and place of birth, nationality and address of the "child's other relatives") is required. These obligations are discussed in the *Statutory Guidance on Adoption* (2013) issued by Department for Education ('DfE'), under *Section 7* of *Local Authority and Social Services Act 1970*

('*LASSA 1970*') in which the importance of the wider family understanding what is proposed by adoption, and the implications of adoption are underlined (see [2.37]).

21. The Public Law Outline ('PLO') (*PD12A FPR 2010*) reinforces these statutory provisions, requiring, at the point at which the proceedings are commenced, that "[t]he current assessments relating to the child and/or the family and friends of the child to which the Social Work Statement refers and on which the LA relies" should be available. The PLO is reinforced by Good Practice Guidance issued by the Association of Directors of Children's Services which emphasises the need for "consistent, focused work with family, including multiple agency inputs where appropriate, to ensure children's needs are met and that they can be brought up within their family wherever possible; FGCs/family meetings to identify wider support available and potential carers; Planned interventions and support offered reflect evidence-informed practice and clear view of the child's needs" (ADCS: Pre-Proceedings Practice: Good Practice Essentials).

22. What is clear from paragraphs [17]-[21] above is that while there are strong indicators of the importance of wider family engagement in the processes contemplated by this child-centred legislation, there are no provisions of either the *CA 1989* or the *ACA 2002*, the *AAR 2005*, or associated Practice Direction, which absolutely require or place a duty on a local authority to inform, consult, assess or otherwise consider members of the wider family of a child in circumstances such as these.

23. **Guidance**: The published guidance in this area complements the statutes by emphasising the unique role which family and friends can play in enabling children and young people to remain with people they know and trust if they cannot, for whatever reason, live with their parents. Security of attachment and continuity of care are recognised as important factors in children's long-term well-being, and the capacity of family and friends' placements to deliver these is a strong theme in the research supporting the relevant guidance. The publication '*Working Together to Safeguard children, a Guide to Interagency Working to safeguard and promote the welfare of children*' (2018) emphasises that a high quality assessment is one which involves *the family* ([51] p.27), and which considers "the impact and influence of *wider family and any other adults living in the household*" ([52] p.28) (my emphasis).

24. 'Family and Environmental Factors' feature prominently as one of the three essential and inter-related domains of the standard 'Child Assessment' Framework which was introduced in 2000. In this domain, the assessor would be expected to consider 'family history and functioning', and the 'family's social integration'.

25. In the Department for Education Guidance '*Court Orders and Pre-Proceedings*' Volume 1 (2014), under the section on 'Pre-Proceedings' chapter 2 para.2 the following is to be found:

> "The *Children Act 1989* is based on the principle that, where consistent with children's welfare, local authorities should promote the upbringing of the child by their families. Where concerns do arise and are identified by a local authority, the local authority is under a duty to act. The guidance in this chapter highlights the requirement that local authorities work closely with families to ensure that key steps are taken to help

> parents address problems in a timely way. Where a child cannot remain living with his or her parents, the local authority should identify and prioritise suitable family and friends' placements, if appropriate. Where possible, this identification should take place before care proceedings are issued, as it may avoid the need for proceedings."

And later at Chapter 2, para.22:

> "It is important that wider family members are identified and involved as early as possible, as they can play a key role in supporting the child and helping the parents to address identified problems. When problems escalate and children cannot live safely with their parents, local authorities should seek to place children with suitable wider family members where it is safe to do so."

And at Chapter 2, para.24:

> "Enabling wider family members to contribute to decision making where there are child protection or welfare concerns, including where a child cannot remain safely with birth parents, is an important part of pre-proceedings planning."

26. Important guidance published in February 2017 by the Family Rights Group (FRG) ('*Initial Family & Friends Care Assessment: A Good Practice Guide*'), with endorsement from, among others, the Family Justice Council, Cafcass, Association of Directors of Social services, and the Association of Lawyers for Children, makes this point somewhat more strongly (para.1.1, page 5):

> "Where a child cannot remain in the care of their parents, research has consistently found that children placed in kinship care generally do as well, if not better, than children in unrelated foster care, particularly with regard to the stability of the placement. So it is essential that if a child may not be able to live safely with their parents, practitioners identify potential carers from within the child's network of family and friends and determine whether they will be able to provide safe care to meet the child's needs until they reach adulthood." (emphasis added).

27. The FRG authors speak further of the importance of enabling wider family members to contribute to decision-making, including deciding when the child cannot remain safely with their parents (para.2.2, page 12):

> "Where a child cannot live with their parents, it is the duty of local authorities to work in partnership with parents and relatives to identify whether there is anyone within the child's network of family and friends who can provide the child with safe and appropriate care. Parents may suggest

> potential alternative carers and some family members may come forward themselves once they become aware there is a possibility that the child may not be able to remain in the parents' care. In some cases local authorities may be faced with a large number of potential carers. In these situations, it is helpful to ask the parents and family and kinship network to identify a smaller number of carers who they feel would be most appropriate to be assessed to care for the child. Family group conferences are not a legal requirement; however, they are recognised as a valuable process for involving the family early so that the family can provide support to enable the child to remain at home or begin the process of identifying alternative permanence options." (emphasis by underlining added).

28. The '*Family and Friends Care: Statutory Guidance for Local Authorities*' which was published by the DfE in 2010 (under *section 7 LASSA 1970*) requires local authorities to publish a policy setting out its approach towards meeting the needs of children living with family and friends' carers. Such a policy should be designed (para [4.5]) to "promote permanence for children by seeking to enable those who cannot live with their parents to remain with members of their extended family or friends". This Guidance contains this further important passage:

> "[2.18] … voluntary arrangements for the provision of services to children and families, including the consideration of potential alternative carers, <u>should always be fully explored</u> before any application is made under *section 31* of the *1989 Act* for a care or supervision order. Statutory *Children Act 1989* guidance on court orders requires that a local authority should take steps as soon as possible, perhaps through a family group conference or other family meeting, to explore whether care for the child can be safely provided by a relative or friend, assessing the suitability of possible arrangements and considering the most appropriate legal status of such arrangements."

29. **Caselaw**: The issue for determination here arose in somewhat similar circumstances in *Birmingham City Council v S, R and A* [2007] 1 FLR 1223. In that case, the father did not wish his devout Muslim parents to be informed of his child's birth, fearing ostracism from his family; he sought a declaration that the local authority and guardian "be forbidden to disclose directly or indirectly to the paternal family any detail that the father is in fact the father of [the child]". In refusing the application, Sumner J said this:

> "[73] Adoption is a last resort for any child. It is only to be considered when neither of the parents nor the wider family and friends can reasonably be considered as potential carers for the child. To deprive a significant member of the wider family of the information that the child exists who might otherwise be adopted, is a fundamental step that can only be justified on cogent and

> compelling grounds. I find that there are no such compelling grounds here.
>
> [78] The court would wish to preserve the father's position within his own family, and to avoid upset to him and them, if that is in A's best interests and her rights permit it. Here for reasons I have endeavoured to give I am satisfied it is not. If the mother is unable to care for A, the only prospect she may have to grow up within her own family, and retain links with both her father and mother, is if her father's family can care for her.
>
> [79] The importance of that for her has to be balanced against the breach of the father's rights to respect for his family life, and the risk of rejection for him and A by his family. That may be the result. I consider it less likely. Whilst the paternal grandmother may be willing to take on the care of A, I bear in mind that for a grandchild to be adopted outside of a strict Muslim family may be something they would not wish to contemplate.
>
> [80] The risk of rejection by the family is possible. But my assessment is that it is unlikely. If it happens then whilst it is damaging for A when she learns of it in the future, it is less damaging for her than losing the opportunity to remain in the care of her family."

30. The suite of cases which followed the Supreme Court's decision in *Re B (A Child)* [2013] UKSC 33 ['*Re B (A Child)*'] is relevant to the issue under consideration (see *Re B-S* [2013] EWCA Civ 1146 ['*Re B-S*'], *Re R (A Child)* [2014] EWCA Civ 1625 ['*Re R*'], *Re S (A Child)* [2015] EWCA Civ 325 ['*Re S*']). While these decisions do not specifically address whether authorities have a duty to pursue options which are not advanced by the parents (focussing instead on the options which are 'on the table' and actually available for review) they nonetheless underline the importance of holistic evaluation of the "realistic" options where adoption is being considered, so that an adoption agency, and/or a court can satisfy itself, before pursuing adoption, that "nothing else will do".

31. It is unnecessary for me to rehearse at any length the judgments in these cases: they are well-known. It is sufficient, I hope, for me to record that in formulating my response to the question under consideration I am inevitably strongly influenced by the clear ordinance from the appellate courts that a care order with a plan for adoption (against parental wishes) should be "a last resort", where no other course is possible in the child's interests (per Lord Neuberger in *Re B (A child)* at [74], [76], [77], [82], [104], [130], [135], [145], [198], [215], and Sir James Munby P in *Re B-S* at [22]). As these appeals make clear, the interests of a child (H in the instant case) in the UK legislation and under *article 21* of *UNCRC* would self-evidently require that he be brought up by a member or members of his natural family, ideally his natural parents, and that his relationship with his natural parents should be maintained unless no other course is possible in his interests.

32. That said, the courts have been keen to emphasise that if family members are identified as potential carers, it is not contemplated that the local authority duty to

consider them extends to a duty to "uncover" every stone nor "exhaustively examine" the ground before concluding that a particular option is not realistic (*Re R* at [65]). The cases make clear that the court is concerned only with "realistic" options. In *Re R*, at [59], it was said:

> "*Re B-S* does *not* require that every conceivable option on the spectrum that runs between 'no order' and 'adoption' has to be canvassed and bottomed out with reasons in the evidence and judgment in every single case. Full consideration is required only with respect to those options which are "realistically possible"."

The case for confidentiality

33. There is another side to this debate. There are cases where the court has been prepared to direct that a plan for adoption for a child can be pursued without the need for the notification of a parent's wider family. These are often known as the 'relinquished baby cases' where often (though not invariably) the mother, or the parents, decide prior to the birth, or very quickly upon the birth, that they wish nothing more to do with the baby, and wish the authority to make discreet, confidential, and swift arrangements for the baby's placement with a permanent substitute family. I was referred to the collection of cases in which the court has made such declarations including *Re JL & AO* [2016] EWHC 440 (Fam), *Re RA* [2016] (see above), *Re TJ* [2017] EWFC 6, *Re M & N (Twins: relinquished babies: Parentage)* [2018] 1 FLR 293, and *A Local Authority v the mother and another* [2017] EWHC 1515 (Fam), *Re A (Relinquished Baby: Risk of Domestic Abuse)* [2018] EWHC 1981 (Fam).

34. Taking the first of these cases, Baker J (as he then was) commented in *Re JL & AO* at [47], that the parental decision to relinquish a baby for adoption:

> "…is usually a decision taken only after a great deal of thought and anguish, by parents who realise that they cannot look after the baby and wish to give the baby the best opportunity to grow up in a loving home. Where a child has been relinquished for adoption, the wishes and feelings of the parents are therefore likely to be an important consideration, although they must be considered in the context of the other factors in *s.1(4)* and the child's welfare generally."

35. The caselaw is reflected in some degree by the DfE *Statutory Guidance on Adoption* (2013) (see [20] above), and the following passage is particularly apposite:

> "[2.38] Where the parents wish to conceal from members of their family the fact of the child's existence, or the fact that they are seeking their adoption, the agency will be faced with a conflict between the parents' right to privacy and the child's right to know, and perhaps the chance of being brought up by their extended family. Where the agency considers that it is likely to be in the child's interests to be

> given this opportunity, it should encourage the parents to consider the matter from the point of view of the child. Generally, the courts have been reluctant to override a parent's determination for the extended family not to be informed but as with fathers without parental responsibility, agencies should avoid giving parents any undertaking that the birth or the proposed adoption will be kept secret. Each case will have to be considered on its own facts. See the cases of *Z County Council v R* [2001] 1 FLR 365 and *Re C (A child) v XYZ County Council* [2007] EWCA Civ 1206."

36. In the case of *Z County Council v R* [2001], referred to in the Guidance cited immediately above at [35], Holman J attached significance to respecting the confidentiality of the mother for fear that if this respect were:

> "… now to be eroded, there is, in my judgment, a real risk that more pregnant women would seek abortions or give birth secretly, to the risk of both themselves and their babies." (page 367).

In *Re C v XYZ County Council* [2007] EWCA Civ 1206, [2008] 1 FLR 1294, at [41] the Court of Appeal urged the court to examine "critically" what a parent says about the wider family in these circumstances, but reinforced, in every case, the priority which should be attached to the best interests of the individual child:

> "[43] I do not consider that this court should require a preference to be given as a matter of policy to the natural family of a child. *Section 1* does not impose any such policy. Rather, it requires the interests of the child to be considered. That must mean the child as an individual. In some cases, the birth tie will be very important, especially where the child is of an age to understand what is happening or where there are ethnic or cultural or religious reasons for keeping the child in the birth family. Where a child has never lived with her birth family, and is too young to understand what is going on, that argument must be weaker. In my judgment, in a case such as this, it is (absent any application by any member of the family, which succeeds) overtaken by the need to find the child a permanent home as soon as that can be done." (emphasis added).

37. For ease of reference, I summarise the cardinal principles from these cases again, as I summarised them at para.19 of my judgment in *Re A (Relinquished Baby: Risk of Domestic Abuse)* [2018] (citation above):

i) Each case is fact-sensitive (*Re RA* at [31]);

ii) The outcome contended for here is "exceptional" (*A Local Authority v the mother* at [1]/[7])

iii) The paramount consideration is the welfare of A; *section 1(2) Adoption and Children Act 2002* (‘*ACA 2002*’)

iv) The court must have regard to the welfare checklist in *section 1(4) ACA 2002*;

v) It is a further requirement of statute (*section 1(4)(f)(iii) ACA 2002*) that the court has regard to the wishes and feelings of the child’s relatives;

vi) Respect can and indeed must be afforded to the mother’s wish for a confidential and discreet arrangement for the adoption of her child, although the mother’s wishes must be critically examined and not just accepted at face value; overall the mother’s wishes carry “significant weight” albeit that they are not decisive (*Re JL and AO* at [47], [48] and [50], and see also *Re RA* at [43(vi)]);

vii) *Article 8* rights are engaged in this decision; however, in a case where a natural parent wishes to relinquish a baby, the degree of interference with the *Article 8* rights is likely to be less than where the parent/child relationship is to be severed against the will of the parent (*Re TJ* at [26]];

viii) Adoption of any kind still represents a significant interference with family life, and can only be ordered by the court if it is necessary and proportionate (*Re RA* at [32]);

ix) A high level of justification is still required before the court can sanction adoption as the outcome, and a thorough ‘analysis’ of the options is necessary (*Re JL & AO* at [32]); ‘analysis’ is different from ‘assessment’ – a sufficient ‘analysis’ may be performed even though the natural family are unaware of the process (*Re RA* at [34]). As I said in *Re RA* at [38]:

> “in order to weigh up all of the relevant considerations in determining a relinquished baby case it may be possible (it may in some cases be necessary) and/or proportionate to perform the analysis without full assessment of third parties, or even their knowledge of the existence of the baby. The court will consider the available information in relation to the individual child and make a judgment about whether, and if so what, further information is needed.”

Article 8 ECHR

38. The case was not argued before me with specific reference to the *European Convention on Human Rights* (*ECHR*), although it is clear that the *Article 8 ECHR* rights of the father and of H are engaged, or at least potentially engaged, on these facts. The father invites me to respect his right to his private life, free from interference from the state; he asserts a right to protection of his family life with his son and with his own family. The parents implicitly assert H’s right to respect for his ‘family life’ with them, in asking the court to direct his rehabilitation to their care. While there is an argument that H’s right to family life could include a right to be with his wider family, in their capacity as supporters of the parents. It is however

highly questionable that H has a right to 'family life' with his grandparents or wider family independent of his relationship with his parents.

39. The existence or non-existence of "family life" for the purposes of *Article 8* is essentially a question of fact and degree, depending upon the existence in the individual case of a relationship and/or personal ties which have sufficient constancy and substance to create *de facto* "family ties" see: *Lebbink v The Netherlands* [2004] 2 FLR 463, ECHR. The relationship between grandson and grandparent *can* be sufficient to establish 'family life' for the purposes of the Convention "since such relatives play a considerable part in family life" (para 45): see *Marckx v Belgium* (1980) 2 EHRR 330. Where however the assertion of 'family life' concerns only a *potential* relationship (such as that between H and his grandparents in the instant case), I would find it hard to conclude that H has any, or any obvious, right to family life with them. Through no fault of their own (because they are unaware of his existence), there has been no "demonstrable interest in and commitment by" the grandparents in H either before or after his birth (*Lebbink* at [36]) (and see also *K and T v Finland* (2000) 31 EHRR 484, [2000] 2 FLR 79). The comments in *Lebbink* above coincide with those expressed in *Anayo v Germany* (1998) EHRLR 342, in which the European Court of Human Rights concluded that family life could extend to the *potential* relationship that may develop between a child born out of wedlock and her father, but this depended on the level of interest and/or commitment shown by the father in the child before and after the birth.

40. As Munby J (as he then was) said in *Singh v Entry Clearance Officer, New Delhi* [2004] EWCA Civ 1075, [2004] 3FCR 72, [2005] 1 FLR 308 at [57]-[80] but most notably for present purposes at [72]:

> "… the Strasbourg court has never sought to identify any minimum requirements that must be shown if family life is to be held to exist. That is because there are none. In my judgment there is no single factor whose existence is crucial to the existence of family life, either in the abstract or even in the context of any particular type of family relationship. It may be useful for present purposes, however, to focus attention on one particular aspect of the Article 8 jurisprudence."

41. While not seeking to minimise the role of the grandparents in the current situation, it is at least arguable (though it was not argued in this case) that H's *potential* for family life with his grandparents is almost as significant as his *potential* for family life with an adoptive family ("the relationship between an adoptive parent and an adopted person is in principle of the same nature as a family relationship protected by *Article 8* of the Convention": see *Pini et al v Roumania,* (unreported, decision of 22 June 2004) at para 140), save that the grandparental relationship has the important additional component of a blood-tie.

42. On the facts, therefore, this is not one of those cases where H possesses an *Article 8* right which serves to prevail over the rights of his parents: see *Yousef v The Netherlands* [2003] 1 FLR 210.

43. Quite apart from the application of the Convention rights, on a wider plane, the European Court of Human Rights has spelt out the stark effects of the proportionality requirement in its application to a determination that a child should be adopted. In *YC v United Kingdom* (2012) 55 EHRR 33, the court held that the child's best interests will be served by his ties with his family being maintained, except in cases where the family has "proved particularly unfit", adding:

> "[134] It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. However, where the maintenance of family ties would harm the child's health and development, a parent is not entitled under *article 8* to insist that such ties be maintained."

Conclusion

44. The simple but not unimportant issue raised in this case has given me cause to conduct a reasonably widely-drawn review of statute, guidance and case-law. Drawing the strands of this review together, I have reached the conclusion that I should accede to the application of the local authority. I propose to give the father an opportunity to inform his parents himself of the existence of H. He should be supported in this exercise by a social worker or by the Children's Guardian, should he ask for it. If he chooses not to notify his family himself, I shall authorise the local authority to do so. My reasons, in conclusion, are as follows.

45. First, repeating a point made earlier (see [22]), none of the provisions of statute, regulations or rules to which I have referred, impose any absolute duty on either the local authority or the Children's Guardian, or indeed the court, to inform or consult members of the extended family about the existence of a child or the plans for the child's adoption in circumstances such as arise here. However, the ethos of the *CA 1989* is plainly supportive of wider family involvement in the child's life, save where that outcome is not consistent with their welfare.

46. Secondly, this is not a situation, given the absence of a *de facto* relationship between the grandparents and H, in which I can find support for the relief which the local authority seeks by reliance on *Article 8 ECHR* (see [39] above); this is not a case in which I can point to "the real existence in practice of close personal ties"(*Lebbink*) between H and his grandparents or wider family. H has no Convention right to assert.

47. Thirdly, while recent appellate case-law offers clear guidance on the route by a court or adoption agency should reach a decision to place a child for adoption in the face of parental opposition ([30]-[32]), it offers no clear steer on this particular issue.

48. Consequently, the court, and/or the local authority or adoption agency, is enabled to exercise its broad judgment on the facts of each individual case, taking into account all of the family circumstances, but attaching primacy to the welfare of the subject child.

49. In exercising that broad discretion, I would suggest that the following be borne in mind. There will be cases (if, for instance, there is a history of domestic or family abuse) where it would be unsafe to the child or the parent for the wider family to be involved in the life of the child, or even made aware of the existence of the child. There will be cases where cultural or religious considerations may materially impact on the issue of disclosure. There will be further cases where the mental health or well-being of the parent or parents may be imperilled if disclosure were to be ordered, and this may weigh heavy in the evaluation. But in exercising judgment – whether that be by the local authority, adoption agency or court – I am clear that the wider family should not simply be ignored on the say-so of a parent. Generally, the ability and/or willingness of the wider family to provide the child with a secure environment in which to grow (*section 1(4)(f)(ii) ACA 2002*) should be carefully scrutinised, and the *option itself* should be "fully explored" (see [28]). The approach taken by Sumner J in the *Birmingham* case more than a decade ago, to the effect that "cogent and compelling" grounds should exist before the court could endorse an arrangement for the despatch of public law proceedings while the wider family remained ignorant of the existence of the child (see [29] above), remains, in my judgment, sound. This approach is in keeping with the key principles of the *CA 1989* and the *ACA 2002* that children are generally best looked after within their own family, save where that outcome is not consistent with their welfare, and that a care order on a plan for adoption is appropriate only where no other course is possible in the child's interests (see *Re B (A child)* and *Re B-S*).

50. As the DfE and FRG and associated guidance makes clear (see [25]-[27] above), good social work practice requires the early identification of family members who may be able to provide safe care to meet the child's needs, and/or contribute to the decision making in respect of the child where there are child protection or welfare concerns; the FRG rightly refers to a "duty" on local authorities to work in partnership with parents and relatives. It was this exercise which Holman J in *Z County Council v R* [2001] described when, at p.375 ibid., he referred to the fact that "there should normally be wide consultation with, and consideration of, the extended family; and that should only be dispensed with after due and careful consideration" (my emphasis by underlining).

51. As I said in *Re RA*, and again above, a high level of justification is required before the court can sanction adoption as an outcome for a child particularly where this follows contested process. Even in an *un*contested process a thorough 'analysis' of the options is necessary (*Re JL & AO* at [32]); while 'analysis' is different from 'assessment' (a sufficient 'analysis' may be performed even though the natural family are unaware of the process (*Re RA* at [34])).

52. I am not insensitive to the fact that the father feels some embarrassment and shame about his lifestyle (see [10] above), and/or the fear of possible rejection or ostracism from his family should they know about his life, and his children; I recognise that he is entitled to respect for his right to privacy. But I cannot allow his discomfort or embarrassment or the risk of rejection to dominate this decision; all that I know about his family, as a strong unit, indicates the improbability of rejection.

53. As I have indicated above ([48]), in the final analysis, any court or statutory agency faced with this dilemma must place the child's best interests at the centre of its decision making. It must be the life-long best interests of H which determine the

decision. In this case, I am influenced by the fact that it is possible that, contrary to his expectations, the father's family may actually be able to offer the mother and father support in caring for H. It is also possible that, contrary to his expectations, the father's family may be in a position to offer H a home themselves. That the father belongs to a 'strong' family unit (described in [10] above) offers some hope that they may indeed have something positive to offer H, and if they are not able to offer H a home, it is that same strength of family bond which should equip them well to support the father and each other if H's future is to be secured through adoption.

54. I am satisfied that if H were to be adopted, he would benefit from knowing, as he grows into adulthood, that his parents sought to care for him, even if they are adjudged unable to do so. He would further benefit from knowing that his wider birth family – his grandparents – were aware of his existence, and were given the opportunity to claim him and care for him, even if in the event they are unable to do so. While there is a risk that he may feel abandoned or let down by a family unable or unwilling to claim him, I am of the view that it is better for H if he is adopted that he knows they were aware of his situation and considered it than they lived in ignorance of him. In my judgment the worst outcome for H is that he would learn, many years down the line, that his father was too awkward or ashamed or embarrassed to reveal his existence to his family, and that the court – without cogent or compelling reason – condoned arrangements to keep his birth a secret from those who would have had an interest in him and might actually have claimed him.

55. By notifying the wider family of H's existence now they will have the chance to contribute to life story work for H, even if they cannot care for him. This will enable those who raise H through adoption (if that is his fate) to help him to make sense of his life's journey.

56. A subsidiary but not unimportant factor weighing in my evaluation is that the maternal family are aware of H's existence. While there is no evidence before me that the maternal and paternal family have contact with each other, there is a risk that for as long as information about H's existence exists within the wider family and community, that information would leak across to the paternal family in any event. Were this to happen, it would be likely to cause greater shock and distress to the wider paternal family, with potentially much graver implications for the relationship between the father and his parents, than if this news were imparted now in a managed and I hope sensitive way.

57. The line of 'relinquished' baby cases discussed above ([33] *et seq*.), where the court is prepared to offer discreet and confidential arrangements for the adoption of a child, all emphasise the exceptionality of such arrangements; in those cases, the court is only ever likely to authorise the withholding of information in order to give effect to a clear and reasoned request by a parent to have nothing to do with the child, usually from the moment of birth. In those cases, the local authority, adoption agency and the court seek to maintain the co-operation of the parent in making consensual arrangements for the child (a key feature of the decision in *Z County Council v R* (Holman J)) which is greatly to the child's advantage.

58. That is my judgment.