Neutral Citation Number: [2019] EWHC 850 (Fam)

Case No: BM17C00283

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
SITTING AT BIRMINGHAM DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2019

Before :

MRS JUSTICE LIEVEN

- -

Between :

BIRMINGHAM CITY COUNCIL	**Applicant**
- and –	
SQ	**1st Respondent**
-and -	
MN	**2nd Respondent**
-and-	
JN	**3rd Respondent**
(A child by her guardian Joanne Gospel	

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Jonathan Evans (instructed by **Birmingham Children's Trust**) for the **Applicant**
Cyrus Rashvand (instructed by **Brendan Fleming Solicitors**) for the **1st Respondent**
Rebecca Franklin (instructed by **Glaisyers Solicitors**) for the 2nd **Respondent**
Dewinder Birk (instructed by **Cartwright King Solicitors**) for the **3rd Respondent**

Hearing dates: 28 and 29 March, and 1 April 2019

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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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MRS JUSTICE LIEVEN

Mrs Justice Lieven :

1. This case concerns a 16-month-old girl JN. The applications are made by Birmingham City Council ("the Council") and are for a care order under s.31 of the Children Act 1989 and a placement for adoption order under s.22 Adoption and Children Act 2002.

2. The case was listed for a 7-day hearing, with the first day as a reading day. The parents and paternal grandmother (SA) were to join the hearing by video link from Pakistan, and with translators in the courtroom.

3. Up until the hearing the position of the parents had been that although they did not put themselves forward as carers for JN, they proposed that she be cared for by the paternal grandmother (SA) in Pakistan. However, on the morning of the first day of the hearing I was told that the position of the parents had changed, and they were now not opposing the making of the orders, albeit they were not actually consenting. They were no longer proposing SA as the carer for JN.

4. Both parents were on the video link on Friday, with an interpreter present in the courtroom. Both were represented by experienced lawyers, Mr Rashvand for the Mother, and counsel, Ms Franklin for the Father. Their representatives were clear that they had withdrawn their opposition to the orders being made. They invited me to explain to their clients over the video link that I was intending to make the orders and that in my view they were justified. I did so, in language which I believe was clear and straightforward, making it entirely clear that the orders were going to be made. In the light of that position I said that I would make the orders, but given that the parents were not consenting I reserved judgment to Monday to set out my reasons. I explained to the parents on Friday that I thought the orders should be made and I did not need to hear oral evidence. The other reason to reserve judgment was that the Council were drawing up the final care plan. The witnesses were released, and Dr Farooqi (Dr F) who was intending to give evidence on Monday was told she did not need to attend. The social worker, Ms Dodwell had been programmed to give evidence on Friday, but obviously was not called.

5. However, on Monday morning at about 11am, I was told by Ms Franklin that the Father had changed his position and now wanted to again oppose the orders and give oral evidence. This was simply on the basis of his having changed his mind. There was no suggestion that there was any material change of circumstance or any new

evidence, merely that the Father had changed his mind. The position of the Mother was that although she did not want to agree to the orders she was very concerned that there be no delay as that would be contrary to JN's interests (for reasons I will explain below). Mr Rashvand therefore said, very fairly, that she would not oppose the orders if that meant the case would go beyond the coming Friday (5th April), which should have been the final day of the hearing.

6. Mr Evans, for the Council, opposed my reopening the matter, or in the alternative argued that I should determine the applications without calling oral evidence. He pointed to the fact that the parents had made a decision on the basis of legal advice, and that there was no change of evidence, or other circumstances. He strongly relied on the detriment to JN from any delay in making the orders. It was his submission that if the case now went ahead it would be virtually impossible to finish it on Friday, and thus there would inevitably be delay.

7. I am clear that I made my decision on Friday, before the case was adjourned. Indeed, I explained the decision and why I did not need to hear oral evidence, in brief outline to the parents. Mr Evans, Ms Birk (for the Guardian) and Mr Rashvand all agreed that I had given my decision on Friday. In those circumstances although it is open to me to change my mind, as it is up to the moment when the order is sealed see ***Re L and B (Children)*** [2013] UKSC8, my overarching duty is to ensure that the case is dealt with justly. I would have to take the view that there were good grounds to depart from the decision I had made. It is clear from ***Re L and B*** that all will turn on the circumstance of the particular case.

8. Here I have to balance the Father's interests in advancing his case, against JN's interests in a decision being made quickly. JN's interests are paramount under the CA, but I must ensure that any interference with the parents' article 8 rights are proportionate and that their article 6 rights are protected.

9. On the Father's interests, he has been represented throughout by solicitors and counsel. They will have fully advised him as to the proceedings and as to the consequences of not opposing the orders being made. He completely freely changed his position on Friday to one of non-opposing, and I understand this was after receiving full legal advice. I do not of course seek to go behind that legal advice, for reasons of legal professional privilege. However, there is no reason to believe that he did not fully understand the position on Friday. Further, he was present on the video link on Friday (and was being communicated with via WhatsApp so that the court could be confident he and the Mother could hear and understand what was happening). I am therefore confident that he fully appreciated the position and made his decision on the basis of full information. The Father has had every opportunity to have an article 6 compliant hearing that fully protected his article 8 rights.

10. Ms Franklin suggested to me this morning that he did not have new evidence to present, but rather that he would say in oral evidence, if given the opportunity, that he would do whatever it would take to look after JN, including selling his house; or arranging for SA to come to the UK to look after JN until she could return to Pakistan. I have to say there is a strong element of unreality about the Father's position. As I set out below, the parents now have another child who is living with them, and the ability of SA to come to the UK ultimately rests on the Home Office, who have currently refused her a visa.

11. On the other side of the balance are JN's interests. As I explain in detail below, JN is profoundly deaf and has been diagnosed as being suitable for cochlear implants. She has already missed the optimum time for these, largely I believe because of these proceedings, but she needs to have them within the next 2-3 months to maximise the benefit. If she does not have them within this window then the benefits to her will diminish, and this will impact upon her for the rest of her life. This is a case where the principle in s.1(2) of CA that delay is likely to harm the welfare of the child applies particularly strongly.

12. It is Mr Evans' position, and I am inclined to agree with him, that if I now allow this matter to be reopened because of the Father's change in position, then it is unlikely that we will be able to finish the trial this week. This is because we have now lost 1.5 days of the 6 hearing days, when we should have heard Ms Dodwell's and at least half of Dr F's evidence. Dr F has been released, and I am told cannot now attend this week. It might be possible to proceed without Dr F giving oral evidence, but in the light of the Father's position I think that would now be very difficult. Further, there is also a significant problem with the video link which means that oral evidence from Mother, Father and SA is likely to take considerably longer than planned. Therefore, in terms of the timetabling if I do agree to reopen the matter I think it will be very difficult and in practice unlikely, to finish by Friday. Therefore, allowing the Father to change his position, and to reopen the hearing will probably lead to a significant delay (the case was listed for 7 days), which given the difficulty of listing a 7 day (or even 5 day) case, could run into months.

13. There is also an issue as to whether I could continue to hear the matter, given that I have already stated that I intend to make the orders. Neither Ms Franklin nor Mr Rashvand ask me to recuse myself, but that must be at least partly because they realise that if I were to do so there would inevitably be significant delay. Bias, including predetermination, is not a matter that can be waived by the parties. I find it difficult to see how a judge who has already given her decision can then consider the matter with an open mind, when there is no new evidence, new caselaw, nor any material change of circumstance. As I have said I have already determined this matter, and no new material is being put in front of me. In that situation going through the hearing of oral evidence would be entirely about the Father's perceived need to have an oral hearing and to be seen publicly to actively object to the orders, rather than a genuine forensic exercise.

14. I might have been tempted to simply have the oral hearing, in order to ensure the Father felt his concerns had been listened to it, if it had not been for the potentially very severe and life-long effects of delay on JN.

15. I did consider whether I should just hear from the Father on why he now thinks the orders should not be made, but in my view this would make the matter much more procedurally complex. If I am going to reopen the matter and hear oral evidence then I must hear all the oral evidence, otherwise there is no fairness in the process, and again the hearing becomes mere window dressing.

16. I have taken the view that in balancing the competing interests, but always having in mind the child's interests as being paramount, the correct thing to do is not to reopen my decision on Friday. I will make the orders sought without hearing any oral evidence, on the basis of the parents' agreed position on Friday.

17. I have applied the approach in *Re L and B* 2013 UKSC 8 at para 27 as to the circumstances in which a judge may change his/her mind after making a decision. The overriding objective must be to deal with the case justly, and there is no exceptionality test. In my view to deal with this case justly and preserve JN's interests, I will decline to change my mind from the decision I gave on Friday.

18. The second way to consider this matter is for me to decide that I do not need to hear oral evidence in any event. In *Re B (Minors) Contact* 1994 2 FLR 1 at p. 6, Butler-Sloss LJ set out the considerations for the court when deciding whether to hear oral evidence. In *Re B (Case Management)* Black LJ made clear that the case management powers in FPR r22.1 include the power to exclude evidence that would otherwise be admissible and in *Re C (Family Proceedings Case management)* [2012] EWCA Civ 1489 Munby LJ said that those powers included that to hear no oral evidence. I will go through each of Butler-Sloss LJ's factors in turn.

(i) Whether there is sufficient evidence upon which to make the relevant decision. For the reasons that I set out below it is my view that the written evidence in this case is both clear and overwhelming.

(ii) Whether the proposed evidence, i.e. here the evidence of the Father, is likely to affect the outcome. In my view it is not. As I explain below I think the evidence in favour of the orders is overwhelming, but more critically for this factor, the Father's evidence that Ms Franklin outlined him wanting to give had a lack of realism and indeed a lack of concern for JN's best interests. In my view this evidence has no likelihood of affecting the outcome.

(iii) Whether the opportunity to cross examine the witnesses is likely to affect the outcome. The most unequivocal evidence here is that of Dr Hanvey, and the parents are not proposing to cross examine her. Indeed no one has requested her to give oral evidence, and if they had I would have declined, as there is no challenge to her evidence.

(iv) The welfare of the child. This factor points extremely strongly towards not allowing oral evidence and delaying this matter.

(v) The prospects of success. As I explain below it is my view that the prospects of the parents' succeeding are so limited, even with oral evidence, that this counts strongly against further delay.

(vi) The justice of the case does not require oral evidence.

19. I should add that *Re B* predates the Human Rights Act 1998 and there is therefore no consideration of articles 6 and 8. However, it has been applied in subsequent cases, eg *Re P&N (Section 91(14) Application for Permission to Apply:Appeal)* 2019 EWHC 421 (Fam). In any event the article 6 considerations would be bound up in the six considerations, and the parents' article 8 rights would now fall within consideration (6) i.e. does the justice of the case require a full investigation.

20. Therefore, even if I had decided that it was appropriate to reopen my decision, I would have taken the view that there was no reason to hear oral evidence. As I set out below the evidence in favour of making the orders is overwhelming.

21. My substantive reasons are as follows.

Background and Evidence

22. Both parents and the paternal grandparents now live in Pakistan. The Father and his parents are Pakistani citizens. The Mother and JN are UK citizens. The parents were married in October 2014. After the marriage the Mother returned to the UK whereas the Father remained in Pakistan. The initial intention was that he would move to the UK. However, he had to pass an English test and get a visa. His visa was not granted and he has never left Pakistan. Therefore, he has never actually met JN.

23. It should be noted at the outset that the parents are not putting themselves forward as carers for JN, but rather proposing that the paternal grandmother (SA) is her carer. Therefore, the Council's case on the inability of the Mother to look after JN is not challenged.

24. I should note at this point that the nature of the Council's concerns about the Mother's ability to care for JN and meet her needs have evolved somewhat during the course of proceedings. The original grounds for making the interim care order, and the focus of the threshold criteria was the Mother's own inability to care for JN without very significant help, and it was that concern which led to the alleged significant risk of harm. However, as I explain below given JN's subsequent diagnosis of profound deafness and the implications thereof for her care, that factor has become a major focus of the reasons for making the orders and the Council's strong view that SA cannot meet the child's care needs. It is for that reason that I will say relatively little below about the Mother's family, and the Mother's own learning difficulties. I should however note that the Council do also consider that SA is inappropriate for other reasons I will refer to below.

25. JN was born in November 2017. The Council had received a referral from the family's support worker prior to JN's birth due to concerns about the Mother and her family relationships. The Mother has mild learning difficulties and can struggle to understand information given to her. She also has chronic health issues which impact on her parenting capabilities. There is clear evidence that she has been subject to physical, emotional and financial abuse from her own family in the UK. She is described in many of the reports as being vulnerable and requiring support and safeguarding in her own right.

26. The Council's concerns included the fact that the Mother had accessed antenatal services late, and had not fully engaged with those services during the pregnancy. There were also concerns about the wider family; the Council's Children's Services had been involved with the Mother's twin sister (SQ) and her child was subject to Care and Placement Orders. There was a history of domestic violence at the Mother's home and of financial abuse of the Mother.

27. A strategy meeting was held at the Hospital very shortly after JN's birth and it was decided to keep the baby in hospital for a few days. The Council was concerned that if JN was discharged into the care of the Mother, who at that stage was living at home with the maternal grandparents, there was a risk of significant harm. The Council recommended that the Mother and JN moved to a residential assessment unit. The Mother initially refused and the Council applied for a care order on 23 November

2017. The Mother then did agree to go to the unit, and an interim care order was made on 27 November.

28. The Mother and baby moved to the Crown House Residential Unit on 28 November and remained there until March 2018. Crown House drew up a detailed assessment report and an addendum report, which sets out the Mother's progress throughout her time there, and gives their recommendations. The Mother initially made sufficient progress for the assessment to continue. However, the final addendum report dated 2 March 2018 concluded that the Mother could not consistently parent JN to a good enough level, and therefore it would not be safe for her to return to the community in the sole care of the Mother.

29. It is very obvious to me having read the Crown House assessment that the Mother very much loves JN and wanted to look after her. The report suggests that they had developed a strong emotional bond at that time. However, the difficulty was that the Mother has very considerable needs of her own, and she found it difficult to cope with JN's needs particularly when she was herself was not feeling very well, which was quite frequently the case. This does not mean that she does not love JN, and is not very sad that she is having to give her up.

30. The Council made an urgent application for JN to be removed from the Mother and placed in foster care. The Mother resisted this. There were various interim hearings, and other family members were assessed to care for JN, including the maternal grandparents, an aunt, and the Father and paternal Grandmother in Pakistan. Assessments in respect of the family in Pakistan were commissioned through CFAB. I note at this point that the Father did not put himself forward as the principle carer, having always been clear that he saw his role as being the money earner for the family. On 15 February 2018 the threshold under the Children Act 1989 was agreed. There was a hearing before DJ Mian on 9 March 2018 at which she expressed concerns about the potential delays in assessment. It is an unfortunate feature of this case, and one that has not served JN well, that there has been a year since DJ Mian's comments.

31. It is not necessary to set out all the procedural stages in this case. On 20 March 2018 an independent social worker, Dr F was instructed. She has filed three reports for the court.

32. On 10th April 2018 the Mother left the UK for Pakistan, for what was described at the time as an extended holiday.

33. By May the only extended family member who was being put forward as a carer for JN was SA in Pakistan.

34. In June 2018 JN was diagnosed as being profoundly deaf. I will set out more details of her condition below.

35. In July 2018 the social worker filed a report which set out her concerns after speaking to the mother's sister IQ. The social worker had been shown a series of WhatsApp messages which suggested that the Mother might have been subject to domestic violence in Pakistan including financial abuse. The Mother subsequently denied this

and said that she had only been joking with her sister. In the light of the matters that I refer to below it is not necessary to make findings of fact regarding this issue.

36. Dr F's third report is dated 1 November 2018. Dr F has met the family in Pakistan, including SA and the Father. All her reports suggest that SA could be an appropriate carer. She recommends that SA comes to the UK to be subject to a special guardianship assessment. However, SA has not managed to obtain a visa from the Home Office, so it has not been possible for this proposal to progress.

37. It is noteworthy that Dr F's reports pre-date the detailed report of Dr Hanvey; rely on SA's ability to come to the UK, even though at the present time the Home Office have refused a visa and it is unknown if and when that position might change; and predate the birth of JN's brother and thus the realisation that the parents and SA have been actively deceiving the local authority and the Guardian.

38. Throughout this period JN has been living with a foster carer. The reports indicate that she is very well settled and generally seems happy and has bonded well with the foster carer. However, JN is profoundly deaf and has very particular needs because of that. Her deafness has made electronic contact with Mother and Father difficult because JN is generally not aware that they are there on the video, and of course cannot hear them. The Guardian reports that very sadly the contact has increasingly little or no meaning for JN. I note that SA has not participated in these sessions, and therefore effectively has had no contact with JN whatsoever.

39. It is also the case that JN now appears to be experiencing developmental delay. Although the full extent and implications of this are at this stage not clear.

40. There are a series of letters and short reports in the bundle relating to JN's deafness. However, these culminate in the report of Dr Hanvey dated 26 March 2019. Dr Hanvey is the Head of Department at the Midlands hearing implant programme – children's services. She explains that JN has been under assessment for cochlear implants. JN has congenital bilateral profound sensor-neural hearing loss, along with Auditory Neuropath Spectrum Disorder. Dr Hanvey explains that there are two parts to the implants, the implant itself and a sound processor which is worn near the ear. The processor has to be maintained for the implant to work. The optimum time for the surgery is 10 months but that does not mean that JN is too old. However, the longer she waits the less benefit she will gain, and the aim is for her to have surgery within the next 2-3 months.

41. Dr Hanvey makes clear that the Hospital will not offer implants to a child who is going to leave the UK imminently after surgery, because of the necessary steps thereafter. She explains that there is a very long period of aftercare which is critical to the success of the implant and the child's future. The child and her family must learn sign language; there is a real risk of post-operative infection which must be monitored; the sound processor needs to be frequently programmed; and the Hospital provides fortnightly therapy sessions to ensure that the child makes progress.

42. Dr Hanvey then sets out the costs of the implants and the running costs which can she says easily run into £1000s per annum. She says that she is aware of a cochlear implant service in Pakistan but it is privately run, and therefore families have to pay.

It was in the light of this report that the parents changed their position at the start of the hearing. It is a great pity that this report was not obtained earlier.

43. On 21st February 2019 the Council became aware that the Mother had had another child (MN) in Pakistan on or around 1 January 2019. The fact that the Mother was pregnant and had then given birth was deliberately kept from the Council (and indeed Dr F) by the parents and SA. The parents and SA say they did this because they were so concerned about what actions the Council would take in respect of the baby. It is very easy to see that this strategy is wholly counter-productive because what it has done is destroy trust between the Council and the parents (and SA) , and has led the Council to take the view that it is going to be very difficult to be confident in anything that was said to them by the extended family in Pakistan.

44. The Council's position, as set out in the social worker's written report, is that it is not in JN's best interests to be cared for by the paternal grandmother. The concerns can be summarised as follows. Firstly, SA failed to produce full evidence to show that she (and the wider family) would be able to afford the medical expenses that looking after JN will involve. This concern has become even greater in the light of Dr Hanvey's report. Secondly, SA had shown no commitment to looking after JN, and this was exhibited by the fact that SA had not participated in any of JN's video contact. It is important to note that SA has never met JN, and thus has no bond or relationship with her, save through the simple matter of being a blood relation. Thirdly, SA had not been honest with the Council over the Mother's pregnancy and the birth of the new baby. They say she has shown no insight into the concerns of the Council, and in fact does not accept those because she continues to consider that the parents could look after JN. It is noteworthy that the parents accept that they cannot care for JN, but SA does not appear from her written statement to actually accept this.

45. The Mother and Father both put forward SA as the carer for JN. They are to some degree supported by Dr F. However, Dr F's report was written before Dr Hanvey's report, and she accepts that there is little evidence as to how the family will pay for the medical treatment that JN needs. She seems to assume that the Council would pay for JN's aftercare in Pakistan, but the Council have certainly not agreed to this, and are exceptionally unlikely to do so (even if it was lawful for them to do so). Further Dr F's recommendation is that SA comes to the UK for a Special Guardianship Assessment. However, as she has not been given a visa by the Home Office, it is wholly speculative as to whether she would be able to do this. In my view this is a fatal flaw in Dr F's evidence. There is no doubt as to the urgency of a decision as to where and with whom JN is to live, but there is absolutely no known timescale for when, if ever, SA might be able to come to the UK.

46. The parents and SA suggested in their written evidence that there were facilities in Pakistan where JN could receive the appropriate treatment. However, firstly, the one specialist they approached, Dr Lodhi at Shifa International Hospital, declined to produce a report setting out either a treatment programme or indicative costs for JN; and secondly, there was very scant evidence of how the family could afford what was obviously going to be very significant costs. Even before Dr Hanvey's report there was a very obvious discrepancy between the family's income and the likely cost of JN's treatment and care for her deafness.

47. The Father has now made a plea through Ms Franklin that he will do whatever it takes to meet JN's needs. However, there is no further evidence of financial means, or of any treatment options. The lack of detailed evidence of the family's finances has been raised on many occasions through the course of this litigation, and has never been properly answered.

48. The Guardian strongly supported the Council's position and the making of the orders. The Guardian reports that JN currently has her needs met to a high standard, with constant stimulation and emotional warmth. She emphasises JN's needs in respect of her deafness, and says that wherever she is placed there must be assurance that her care plan can continue unabated.

49. The Guardian opposes SA as a carer in part because there is insufficient evidence she can meet JN's needs, but also because she cannot be relied upon to work with professionals open and honestly. This is in the light of the deception over the M's pregnancy. The Guardian is firmly opposed to placement with SA.

50. The Guardian supports adoption so that JN has the opportunity to become an integral part of a family and her long term needs can be met in a consistent and reliable fashion.

The law

51. I asked the parties to draw up an agreed list of applicable legal principles which they have very efficiently done, and I am very grateful to them. I will largely adopt them.

52. There are two orders being sought

    a. A care order under s.31 of the 1989 Act; and a
    b. Placement order under s.41 the 2002 Act.

Care Orders

53. It is for the Local Authority to prove on the balance of probabilities, that the threshold criteria in *s.31(2) Children Act 1989* are made out. The Local Authority must prove not only the facts it seeks to rely on, but demonstrate why on the given set of facts, the child is at risk of significant harm.

54. The 'threshold criteria' state that the court can only make a care or supervision order if it is satisfied:

    a) that the child concerned is suffering, or is likely to suffer, significant harm; and

    b) that the harm, or likelihood of harm, is attributable to—

        (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

        (ii) the child being beyond parental control

55. Simply because threshold is crossed does not make it inevitable that a care order is made. Such an order must be necessary and proportionate, as it represents an interference in the parents' and child's Article 8 right to a family life.

56. Any order must be made with reference to the 'welfare checklist' set out at s.1(3) of the *1989 Act*. The child's best interests are always paramount (s.1(1)).

Cases with a Plan for Adoption

57. In *re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33, [2013] 1 WLR 1911*, Lady Hale at para 77 confirms that as required by section 1(3)(g) of the 1989 Act and section 1(6) of the 2002 Act, the court "must" consider all the options before coming to a decision.

58. In *Re BS (Children) 2013 EWCA 1146*, emphasises the decision in *Re B*, that the Court should only endorse a care plan of adoption "in exceptional circumstances and where motivated by *overriding requirements* pertaining to the child's welfare, in short, where nothing else will do".

59. In a case where the care plan is that of adoption. Sir James Munby P set out 'fundamental principles' in ***Re A (a child)*** [2015] EWFC 11, [2016] 1 FLR 1, which the Court of Appeal approved in ***Re J (a child)*** [2015] EWCA Civ 222, in which Aikens LJ summarised at [56]:

    a. In an adoption case, it is for the local authority to prove, on a balance of probabilities, the facts on which it relies and, if adoption is to be ordered, to demonstrate that "nothing else will do", when having regard to the overriding requirements of the child's welfare.

    b. If the local authority's case on a factual issue is challenged, the local authority must adduce proper evidence to establish the facts it seeks to prove. If a local authority asserts that a parent "does not admit, recognise or acknowledge" that a matter of concern to the authority is the case, then if that matter of concern is put in issue, it is for the local authority to prove it is the case and, furthermore, that the matter of concern "has the significance attributed to it by the local authority".

    c. Hearsay evidence about issues that appear in reports produced on behalf of the local authority, although admissible, has strict limitations if a parent challenges that hearsay evidence by giving contrary oral evidence at a hearing.

    d. The formulation of "Threshold" issues and proposed findings of fact must be done with the utmost care and precision. The distinction between a fact and evidence alleged to prove a fact is fundamental and must be recognised. The document must identify the relevant facts which are sought to be proved.

    e. It is for the local authority to prove that there is the necessary link between the facts upon which it relies and its case on Threshold. The local authority must demonstrate why certain facts, if proved, "justify the conclusion that the child has suffered or is at the risk of suffering significant harm" of the type asserted by the local authority. "The local authority's evidence and submissions must

set out the arguments and explain explicitly why it is said that, in the particular case, the conclusion [that the child has suffered or is at the risk of suffering significant harm] indeed follows from the facts [proved]".

f. It is vital that local authorities, and, even more importantly, judges, bear in mind that nearly all parents will be imperfect in some way or other. The State will not take away the children of "those who commit crimes, abuse alcohol or drugs or suffer from physical or mental illness or disability, or who espouse antisocial, political or religious beliefs" simply because those facts are established. It must be demonstrated by the local authority, in the first place, that by reason of one or more of those facts, the child has suffered or is at risk of suffering significant harm. Even if that is demonstrated, adoption will not be ordered unless it is demonstrated by the local authority that "nothing else will do" when having regard to the overriding requirements of the child's welfare. The court must guard against "social engineering".

g. When a judge considers the evidence, he must take all of it into account and consider each piece of evidence in the context of all the other evidence, and, to use a metaphor, examine the canvas overall.

h. In considering a local authority's application for a care order for adoption the judge must have regard to the "welfare checklist" in s 1(3) of the Children Act 1989 and that in s 1(4) of the Adoption and Children Act 2002. The judge must also treat, as a paramount consideration, the child's welfare "throughout his life" in accordance with s 1(2) of the 2002 Act. In dispensing with the parents' consent, the judge must apply s 52(1)(b) as explained in ***Re P (Placement Orders, parental consent)*** [2008] 2 FLR 625.

60. In the event that a parent does not consent to the making of a placement order, pursuant to s.47 of the Adoption and Children Act 2002, the Court may dispense with their consent. The test is set out at S.52(1)(b) of the 2002 Act, which states '(1) The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that (b) the welfare of the child requires the consent to be dispensed with'.

61. In ***Re P*** [2008] EWCA Civ 535 (above) at [114] - [131], the Court of Appeal addressed the meaning of the phrase 'the welfare of the child requires the consent to be dispensed with':

a. S1 of the Adoption and Children Act 2002, plainly applies when the court is deciding whether or not to dispense with parental consent to a placement order, which is manifestly 'a decision relating to the adoption of a child'.

b. s1(2) requires the court to treat the child's welfare throughout his life as its paramount consideration, which means a consideration that 'rules upon and determines the course to be followed'.

c. In this context, welfare throughout the child's life plainly means welfare as determined by the court or adoption agency, having regard to the matters in the s1(4) checklist, which is far wider than that provided in s 1(3) of the 1989 Act.

d. The word 'requires' in s52(1)(b) is a perfectly ordinary English word. Judges approaching the question of dispensation under the section must ask themselves the question to which s52(1)(b) gives rise, and answer it by reference to s1 of the same Act, and in particular by a careful consideration of all the matters identified in s1(4).

e. The best guidance is to advise judges to apply the statutory language with care to the facts of the particular case.

f. If the Article 8 right to respect for family and private life is not to be breached, any placement or adoption order made without parental consent in accordance with s52(1)(b) of the 2002 Act must be proportionate to the legitimate aim of protecting the welfare and interests of the child.

g. In assessing what is proportionate, the court must always bear in mind that adoption without parental consent is the most extreme interference with family life. Cogent justification must therefore exist if parental consent is to be dispensed with.

h. The word 'requires' has the connotation of the imperative: what is demanded, rather than what is merely optional or reasonable or desirable. What has to be shown is that the child's welfare 'requires' adoption as opposed to something short of adoption.

i. This does not mean there is some enhanced welfare test to be applied in cases of adoption. The vital difference is simply that between s1 of the 1989 Act and s 1 of the 2002 Act: firstly, that s1(2) of the 2002 Act requires a judge considering dispensing with parental consent to focus on the child's welfare throughout his life; and secondly, the more extensive welfare checklist in s 1(4) of the 2002 Act, and in particular s1(4)(c) (likely effect on the child throughout his life) and s1(4)(f) (relationships with relatives).

j. The judge must make findings of fact which properly support the need to make placement orders and dispense with parental consent: the underlying facts, properly analysed, must support the judicial conclusion.

Analysis

62. I have absolutely no doubt that it is JN's best interests for a care order and a placement order to be made.

63. In this case the threshold criteria are agreed to be met.

64. The fact that the threshold is crossed does not of course mean that I should necessarily make the orders sought. I then have to consider the welfare criteria. I will summarise my overall conclusions and then go through the checklists. I need to consider the welfare checklists both in the 1989 Act and the 2002 Act.

65. My conclusion that the orders should be made are based on two separate but interrelated reasons. The first set of reasons relate to JN's deafness. She is a child who is profoundly deaf and who needs cochlear implants as soon as possible. This

necessarily entails a large amount of aftercare to ensure that she obtains the benefits of the implants for the rest of her life. She will suffer significant long-term harm if she does not have the implants, and does not have them within a relatively short period of time, preferably the next 2-3 months.

66. It is entirely clear from Dr Hanvey's report that she would not be given the implants if she were to move shortly to Pakistan. It is equally apparent that her parents, and extended family, are not in a position to ensure that she can obtain the appropriate treatment and aftercare in Pakistan. Indeed, I understand them now to accept that they could not afford the very extensive treatment that would be involved. The Father now suggests that he will sell his house, or take other steps but (a) there is no evidence on what funds this would raise; (b) there is nothing to explain where he, the Mother and MN would then live. I consider the Father's position to be unrealistic, but also not to take into account JN's best interests. I note that the Mother, who knows JN and lived with her for the first four months of her life is more prepared to prioritise the child over her own wishes.

67. In respect of the family's finances, they had a long period to put in bank statements or other financial details, but they did not do so. In my view there is wholly insufficient evidence to establish that they could afford to meet JN's needs.

68. Although the process of putting in the implants could be done without making the orders sought, for JN's long term care and best interests she needs to be in the UK and remain here. Otherwise the implants will not deliver the benefits she needs. There is no family member in the UK who is being suggested as an appropriate carer for JN. In any event, Dr Hanvey makes entirely clear that JN will not be given the implants unless she is going to stay in the UK for the after care, or perhaps there is an absolutely secure aftercare package in a third country, which there certainly is not here.

69. For these reasons JN's medical needs overwhelmingly point to the making of the orders.

70. Secondly, the parenting assessment at Crown House established that the Mother could not meet JN's needs without very extensive support. This is not challenged by the parents, who do not put themselves forward as carers. The parents have instead put forward SA to care for JN. However, quite apart from the financial impossibility of meeting JN's needs, I would not have considered that it was in JN's interests to be cared for in Pakistan by SA. SA has chosen not to participate in the contact sessions with JN. She has never met JN, and JN has no actual relationship with her. It is not at all clear how SA would cope with a profoundly deaf child with developmental delay, and whether she could meet JN's needs. I cannot see how it could possibly be in JN's interest to move her from a foster carer with whom she is very well settled, and a well worked out package of treatment and support in the UK, to an entirely new environment with a principle carer who she does not know. This would be particularly damaging to JN given that it would not be possible (certainly at the present time) to ensure gradual transition to being cared for by SA.

71. I appreciate that this conclusion is contrary to Dr F's view that SA should undergo further assessment. Because SA was not given a visa she could not undertake the special guardianship assessment that Dr F had recommended, and that this also

prevented her from getting to know JN. However, at the forefront of my consideration must be JN and her interests. There is no timescale of when, if ever, SA might get a visa and it cannot be in JN's interests for her to have to wait some indefinite period. The same point goes for the Father's proposal that SA move to the UK to look after JN. There is no evidence that she would get a visa to do this, nor any evidence as to how she would live in the UK, a country where she has never lived. This is again a completely unrealistic approach.

72. I also take into account and give considerable weight to the fact that SA, along with the parents, have chosen to hide from the Council the fact that the Mother was pregnant and then gave birth. I agree with the Council and the guardian that this gives very little confidence in SA's commitment to work with the professionals involved and to prioritise JN's interests over other members of the family. This would have been critical if I had been seriously considering placing JN with her, or requiring a further assessment.

73. This is a case where the welfare interests of making the care order align closely with the grounds for making the placement order. It must be strongly in JN's interests to do whatever possible at an early age to improve the chances of limiting the impact of her deafness, through the cochlear impacts. It is in her lifelong interests for this to be done and then for her to be in a position to maximise the benefits by the best possible aftercare.

74. I fully take into consideration the fact that by making these orders I will be allowing the removal of JN from her birth family, and to an unknown degree possibly from her heritage. However, the very real benefits of her getting the best possible medical care, and being in a stable and known environment in the UK, in my view outweigh these factors.

75. In making the placement order I have to consider all the options and ensure that I am satisfied that nothing else will do. I am so satisfied. Every possible family member has been considered and for various reasons rejected as a carer for JN. In my view the reasons given, which I have referred to above, are all strong ones. There is no family member who is still being advanced as a potential carer, other than SA who I have dealt with above. As the Guardian explains, long term fostering will be much less beneficial to JN than placing her in a permanent family.

76. I turn to the S.1(3) welfare checklist;

    a. JN is too young for her wishes and feelings to be expressed.

    b. Her physical and emotional needs require that the orders be made.

    c. The likely effect on JN of moving her from her foster placement to live in Pakistan with SA who she does not know, in circumstances where her needs are unlikely to be met will be highly detrimental to her.

    d. The most relevant factors here are age and her hearing and developmental needs. These factors militate strongly in favour of making the orders.

e. As is accepted in the threshold criteria, she is at risk of suffering significant harm if she is placed in the care of her parents, or SA, by reason of their inability to meet her needs.

f. The parents accept they cannot meet JN's needs, and in my view SA cannot meet JN's needs.

77. The key additional factors under the 2002 Act, are at s.1(2) to consider the child's welfare throughout her life, and at s.1(4)(f) the relationship the child has with her relatives.

78. I think an order leading to adoption is necessary for JN because it is strongly in her interest to have a permanent and stable home in the UK, where her medical and developmental needs can be fully met. These needs will be lifelong for JN, and as such require a permanent placement in the UK. In terms of her relationship with her relatives, there are no relatives in the UK who are in a position to care for her. Sadly, she is in a situation where the value to her of her family relationships is limited.

79. This is a case where it is appropriate to dispense with the consent of the parents. The reality of the situation here is that the parents are not in a position to meet JN's needs.

80. I therefore make the orders sought