Neutral Citation Number: [2014] EWFC 47 (Fam)

Case No: SE 24/14

IN THE FAMILY COURT
AT SHEFFIELD

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2014

Before:

MR JUSTICE HOLMAN

(sitting in public)

Between:

A and B	**Applicants**
- and -	
Rotherham Metropolitan Borough Council	**Respondents**
and	
The mother	
The genetic father	
The aunt	
Miss D	
The child	

- -
- -

Mr Nicholas Power appeared on behalf of A and B
Mr Charles Prest appeared on behalf of Rotherham Metropolitan Borough Council
The mother was served but was not present or represented
Miss Caroline Ford appeared on behalf of the genetic father
Mr Andrew Wynne, generously acting pro bono, appeared on behalf of the aunt
Miss Dawn Tighe, generously acting pro bono, appeared on behalf of Miss D
Miss Alison Hunt appeared on behalf of the child's guardian

Hearing dates: 17 – 21 November 2014, sitting at Sheffield

- -

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.

.....

MR JUSTICE HOLMAN

In this judgment:

A and B are the applicants for an adoption order.

C is the child concerned.

The mother is C's birth mother.

The father is, unless the context otherwise requires, C's genetic father.

The aunt is the father's sister (and therefore C's aunt).

D or Miss D is the father's long term, but non-residential, partner.

E or Mr E is the man currently named on C's birth certificate as his father.

F is the joint child of Miss D and the father.

G is the child of the aunt.

(The above letters are merely alphabetical from A – G and are not actual initials of any of the persons concerned.)

The court directs that no report of, or reference to, this case in the press, media or elsewhere, including any form of electronic or telephonic or broadcast communication, may name or otherwise identify any of the above persons or their addresses or (save to the extent described in this judgment) whereabouts. (Persons who are specifically named in this judgment may be named.)

Mr Justice Holman:

Introduction

1. I have been a full time judge of the Family Division for almost twenty years. In all that time, apart from cases concerning serious ill health, I have rarely heard a more harrowing case. The hearing was a very painful one for all concerned, and I sincerely thank all parties and the professional witnesses for their attention, dignity and, to the extent possible, good humour. I know, and deeply regret, that my decision will cause intense grief. After hearing all the evidence and argument, and after due consideration, I am, however, clear as to the outcome, which I do not reach narrowly or marginally.

2. As well as thanking the parties and witnesses, I thank all six advocates for the sensitive, balanced and skilled ways in which they presented their respective clients' cases. I particularly thank Mr Andrew Wynne and Miss Dawn Tighe and their instructing solicitors, who have acted pro bono, that is, entirely free of charge. As the case occupied five long days in court, as well as requiring considerable out-of-court work and preparation, they have shown great public service.

3. The facts and circumstances of this case are unusual, and this is a very fact specific judgment and decision. Without any opposition by or on behalf of any party, I conducted virtually the whole hearing in public, except for a short period towards the end when the applicants returned to the court room from the private room in which they had been watching and listening by video link. At that point I went into private sitting so as to protect the confidentiality of their identity while, essentially, I said goodbye, although no member of the public was actually present. I now hand down this freely publicly available, but anonymised, judgment. In order to protect confidentiality I have deliberately omitted, or generalised (but not distorted), some detail which is well known to all parties but not significant to outcome. I have no doubt that public reaction to this judgment and decision is likely to be polarised, with some agreeing and some strongly disagreeing with what I have decided. It is vital to open justice and accountability in a free and democratic society that the public are enabled to know what decisions their courts and judges reach, and the reasons for them. There is only true openness and public accountability if the public are permitted, if they wish, to see the courts and judges at work, not merely to read the account, which may be sanitised, that the judge chooses to present in judgment. However, I direct that no report of, or reference to, this case in the press, media or elsewhere, including any form of electronic or telephonic or broadcast communication, may name or otherwise identify any of the persons listed above, or their addresses or (save to the extent described in this judgment) whereabouts. Persons who are specifically named in this judgment may be named.

The case in outline

4. A baby was, for good reasons, removed from his mother at the hospital of his birth, and fostered. The identity of the birth mother was, of course, known. Social workers, the guardian, and later apparently the court, all accepted the mother's assertion that her then partner was the genetic father. Soon there was an unopposed care order and placement order. When he was aged 7 months, the baby was placed for adoption with A and B who have been described as "perfect adopters". Three

months later, A and B issued the present application to adopt him. Another man then came forward claiming that he might be the true genetic father and it was quickly proved that he is. Although he could not care full time for a small child himself, he strongly seeks that his son should now move to live with his sister (the child's aunt) so that the child can grow up within his birth family and have the opportunity to enjoy a normal legal and psychological relationship with his father, paternal half sibling, and other members of his extended, genetic paternal family, throughout his life. The father and the aunt also emphasise that they and their family are black African (the father's choice of ethnic description); the child is of mixed race (the father's choice of description) and clearly has dark (although not black) skin and negroid features; but A and B are both white. The aunt has been assessed as a good parent to her own son, who is only a little older than the child, and as a suitable carer for the child. The child is now aged 20 months. He has lived with A and B for 13 months and is very well attached to them. The essential question (but at this stage simplifying the issues and analysis) is whether his welfare throughout his life is better safeguarded and promoted by now leaving him with A and B, to whom he is so well attached, and making the adoption order; or by declining to make the adoption order and promoting the move of the child from A and B to live with the aunt.

5. It is accepted by all concerned in this case that if the father had come forward and the true paternity had been established at any time up to the moment when the child was actually placed with A and B, then he would not have been placed with them and, after due assessment of her, would almost certainly have been placed with the aunt.

6. The agony which A and B (and their wider families) must have experienced since they first learned of these facts and the opposition to adoption last March cannot be overstated, and must have been, and still be, appalling. Yet they have continued selflessly to care for the child with love and devotion to an exemplary standard. They have also said that if I decide that the child should indeed move, they will co-operate and participate fully in a process of phased introductions between him and the aunt, and a phased process of moving him from them to her. That is very selfless of them and underlines their love for the child and that they will do everything possible for him.

7. The case and dilemma has provoked divergent professional opinions. The front line social workers for each of the child and A and B support the making of an adoption order. A child psychologist who was jointly instructed to perform a "paper exercise", but has not met anyone concerned, favours the making of an adoption order. The Director of Safeguarding Children and Families and interim Strategic Director Children's Services of the local authority (equivalent to the Director of Social Services in this field), who is the decision maker and who expresses the considered opinion and case of the local authority, firmly resists adoption and advocates that the child moves to live with the aunt. The child's guardian also strongly advocates that outcome.

The legal framework

8. On 2 August 2013 a circuit judge in Sheffield placed the child in the care of Rotherham Metropolitan Borough Council (Rotherham) and also made a placement order pursuant to section 21 of the Adoption and Children Act 2002 (the Act), authorising Rotherham to place the child for adoption. By virtue of section 29(1) of

the Act, the care order does not have effect at any time when the placement order is in force (which it currently is). The sole application currently before the court is the application for an adoption order issued on 31 January 2014 by A and B, with whom the child was placed.

9. The placement order expressly named Mr E as the father of the child and dispensed with his consent as well as that of the mother to the making of an adoption order, for at that stage Rotherham, the guardian and the court all proceeded on the basis that Mr E was indeed the father and that he shared parental responsibility as he is named on the child's birth certificate. In the unusual circumstances of this case, now that the true facts are known, all parties, including the applicants, have accepted that I should simply hear, as I have done, the genetic father and the aunt on the question whether or not an adoption order should be made, without the need to give prior leave to them to oppose the making of an adoption order. (Section 47 (3) and (5) of the Act are in any event not in point since neither the father nor the aunt is a "parent" or guardian of the child for the purposes of the Act.)

10. All the formal requirements and pre-conditions for making an adoption order are satisfied in this case. Accordingly, in deciding whether or not to make an adoption order I must apply all the relevant provisions of section 1 of the Act as currently in force, since the amendments made to it with effect from 25 July 2014. That requires by section 1(2) that " The paramount consideration of the court … must be the child's welfare, **throughout his life**." (My emphasis). By section 1(6) of the Act, the court "… must not make any order under this Act unless it considers that making the order would be better for the child than not doing so." (It should be noted that section 1(5) of the Act is not applicable to this case. It now applies only in Wales, and is a duty upon an adoption agency in placing a child, not upon the court in deciding whether or not to make an adoption order.)

11. Section 24(4) of the Act provides that "If the court determines, on an application for an adoption order, not to make the order, it may revoke any placement order in respect of the child."

12. On the particular facts, and in the particular circumstances, of this case it is common ground that if (applying the correct test and approach, see paragraphs 14 and 15 below) I consider that the child should remain with the applicant adopters now and into the foreseeable future, then that must be on an adoptive basis and I should make the order. In opposing the making of an adoption order, Rotherham (through their Director of Safeguarding Children, and by their counsel, Mr Charles Prest) have made quite clear, and the guardian advocates and supports, that if I determine not to make an adoption order and then revoke the placement order pursuant to section 24(4) of the Act, so that it ceases to be "in force" and the existing care order once again "has effect", Rotherham will, under the care order, progressively move the child in a planned way to live with the aunt. All parties agree or accept that if I do determine not to make an adoption order I should indeed exercise the discretion under section 24(4) of the Act to revoke the placement order.

13. Thus I have to make a binary decision which is simple to state although complex and heartrending to decide: either make an adoption order; or determine not to make an adoption order and, accordingly, revoke the placement order. This will have the effect that the child does move, in a planned way, to live with the aunt under the care

order. In due course that care order might be discharged and the status of the child with the aunt secured by a family arrangements order or a special guardianship order.

14. The legal framework as I have so far described it is agreed by all the advocates in the case, including that I must apply all the relevant parts of section 1 of the Act. In their written skeleton arguments and written final submissions, as well as in their brief oral final submissions, there has been some debate between the advocates as to whether, in applying section 1, I should adopt the approach that I should only make an adoption order if "nothing else will do". This led to some brief examination of the judgments of the Supreme Court in Re B (a child) [2013] UKSC 33, and some later judgments of the Court of Appeal in which that court appears to have been exercised by what the Supreme Court actually meant by what they said in Re B (most recently the judgments delivered by the Court of Appeal only two weeks ago on 18 November 2014 in CM v Blackburn with Darwen Borough Council [2014] EWCA Civ 1479).

15. In my view that is a debate and territory into which I need not and should not enter. The legal and factual situations in those cases were different. In the present case, the child has already been lawfully and appropriately placed for adoption with A and B for over a year. A range of rights under Article 8 of the ECHR is engaged. There is a continuing legal relationship between the child and his paternal genetic family, with whom he has a father, grandmother, aunts, uncles and a paternal half sibling, but no current psychological relationship. He has never met any of them. (He also has several cousins but they are outside the definition of "relative" in section 144 (1) of the Act.) In this case the child unquestionably also has a private and family life and a home with A and B, and they with him, for which all three of them have the right to respect under Article 8. With so many Article 8 rights engaged and in competition, it does not seem to me to be helpful or necessary in the present case to add a gloss to section 1 of only making an adoption order if "nothing else will do". (Indeed Mr Nicholas Power might have argued on behalf of A and B, but wisely chose not to do so, that there could now be no interference with the Article 8 rights as between A and B and C mutually except if "necessary" within the meaning of Article 8(2).) Rather, I should simply make the welfare of the child throughout his life the paramount consideration; consider and have regard to all the relevant matters listed in section 1(4) and any other relevant matters; and make an adoption order if, but only if, doing so "would be better for the child than not doing so", as section 1(6) requires. If the balance of factors comes down against making an adoption order, then clearly I should not make one. If they are so evenly balanced that it is not possible to say that making an adoption order would be "better" for him than not doing so, then I should not do so. If, however, the balance does come down clearly in favour of making an adoption order, then, in the circumstances of this case, I should make one. I do not propose to add some additional hurdle or test of "nothing else will do".

16. I add, for the avoidance of misunderstanding, that the genetic father does not currently have parental responsibility for the child in this case. He is not named as the father on the birth certificate (but Mr E, who was an informant jointly with the mother, is so named). The father has not been given parental responsibility by a court order. I have not been pressed to give him parental responsibility at this hearing, nor would I do so in view of his current lack of any psychological relationship with the child (he has never seen him) and the fateful lack of commitment which he showed between March 2013 and March 2014, as I will later describe. Accordingly, the consent of the

father (or its dispensation) is not a pre-condition to the making of an adoption order. He is not a "parent" for the purposes of the Act; but he is a "relative" for the purposes of section 1 (see section 1 (8)).

17. There is one further "legal" matter which it is convenient to mention in this section of this judgment. At times during the hearing, when longer term risks or advantages were being mentioned or considered, Mr Power referred, understandably but somewhat dismissively, to "speculation". Advocates, and also judges, often do dismiss points as speculative or speculation. However, in relation to adoption, the Adoption and Children Act 2002 very clearly does require courts (and adoption agencies) to speculate. It requires, as the overarching duty, that the paramount consideration must be the child's welfare throughout his life. This child is still less than two. He is healthy, and his normal life expectancy may be around a further 80 years. It is probable (but speculative) that he and his half sister, F, and his cousin, G, will outlive all the adults in this case by many years. I am required by statute to take a very long term view, but I cannot gaze into a crystal ball. I can only speculate. More specifically, the court is required by section 1(4) (c) of the Act to have regard to "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." Whilst that paragraph requires the court to consider only the "likely" effect, any such consideration involves speculation; and (speaking generally) the further ahead one looks (and one must envisage a whole lifetime) the more speculative such consideration necessarily becomes. My decision in this case does include speculation. That is what Parliament has told me to do.

The facts in more detail

18. I will incorporate my findings on disputed matters into this narrative.

19. The mother is a young woman of white ethnicity who is still in her very early twenties. She has had problems with both alcohol and drugs. While a teenager she had already had two children by different fathers. They are now aged about 5 and nearly 4. They were removed into care and have since been adopted together by one adoptive family. (I will refer to them later as the adopted maternal half siblings.) The mother began a relationship with Mr E. He, too, has had an unstable past and has a criminal record for a range of offences of both violence and dishonesty, and a recorded history of drug abuse. In March 2013 the mother gave birth to C. He was a normal, healthy baby, and is now a normal, healthy young child. As had already been pre-planned by Rotherham, care proceedings were immediately commenced and the baby was removed from the mother five days after his birth and placed with foster parents. Neither the mother nor Mr E engaged with the care proceedings nor, effectively, with the local authority. However, the mother and Mr E jointly registered the birth on 18 April 2013, jointly stating and signing that Mr E was the father to the best of their knowledge and belief.

20. The child's social worker, from the end of March 2013 and still now, is Miss Claire Fogwill. She did not know or meet Mr E for some time. She did, however, see the baby. I have seen photographs taken of him shortly after his birth, including the original colour photograph which is part of the later formal application form for the placement order. Although not black, the baby is very obviously very brown and has obvious negroid features. These are not racist comments. They are relevant facts.

As all concerned with the case agree, he very obviously appeared to be of mixed race. Miss Fogwill said in her oral evidence that "when [she] first saw him as a baby he seemed obviously to have a black parent or at any rate a strong black/negroid genetic strain." Miss Fogwill was finally able to meet Mr E, who was in prison, on 22 May 2013. She said that she was expecting to meet a black man and "was quite shocked" when he came into the room, since he appeared to be an entirely white man. She asked him whether he was the biological father. He said that he was. (It is, of course, entirely possible that the mother had assured Mr E that he was the father, if she had never confessed to him that she had been having sex on the side with the actual father. As I have no evidence at all from either the mother or Mr E, I simply do not know.) Miss Fogwill questioned Mr E further and, according to Miss Fogwill, he told her that the baby was very brown because he, Mr E, had a Burmese mother, and added that the baby would become paler with age. Neither Miss Fogwill nor, so far as I am aware, anyone else, took any steps to seek to verify whether in truth Mr E has a Burmese mother. I personally do not have the slightest idea. Miss Fogwill claimed that she was "not able to meet the mother again to ask her about paternity", but in truth she made little effort to do so, and she made no enquiries of the mother's own mother whose whereabouts were settled and known.

21. Miss Fogwill made reports to Looked After Reviews on 12 April, 13 May and 11 July 2013. Also present at, and chairing, these reviews was the Independent Reviewing Officer (IRO). The minutes of the first two reviews record that the child "… is a child of mixed heritage. His mother is white British … the social worker is, to date, unclear of father's ethnicity and has asked [sic] father to clarify this …" The minutes of the review on 11 July, also chaired by the IRO, record that "… the social worker has clarified with father that he is dual heritage as his mother is Burmese … the parents wished for the child to be referred to as White British, despite his presentation not reflecting this. Father [viz Mr E] informed the social worker that he expected the child's skin colour to change with age …" There is no hint in those minutes that the IRO queried the account of paternity or suggested that further enquiries should be made. I do not make a criticism of the IRO for she has not been involved in this hearing and has had no opportunity to state her own point of view, but I accept the point made by Mr Prest that the responsibility of Miss Fogwill appears to have been shared with others. Miss Fogwill has, however, accepted that she made a serious error in swallowing the explanation of the Burmese mother (i.e. the child's grandmother) and not investigating paternity further, and she has apologised from the witness box to both the true paternal family and the applicants for adoption. Miss Fogwill's formal report to the court dated 28 June 2013 in support of the application for a placement order depicts a photograph of the child as I have already described, and refers to his having black hair and brown eyes and a dark complexion. It continues that the mother is white British and Mr E is half white British and half Burmese as his mum was Burmese and father white British. "[C's] skin is quite dark however [Mr E] states that as [C] becomes older his skin will become paler. [Mr E's] skin is white."

22. The present guardian, Mrs Sheila Hassall, also acted in the care and placement proceedings. In her report dated 19 July 2013 she describes Mr E as "White British Burmese" and says at paragraph 12 "[C's] paternal grandmother is Burmese, although I understand his father [viz Mr E] views himself as white British. At present [C] has the appearance of a baby who is not white British …" As I understand it, the

guardian herself never actually met either the mother or Mr E. So she merely accepted the story via the social worker. She said that she only ever saw a blurred black and white photocopy photograph of the child. She said that she visited the baby once at the home of the foster mother. However he was asleep, face downwards, with his head largely covered. She only saw one arm sticking out. The arm looked brown but she did not examine the baby further. Mrs Hassall accepted her share of responsibility. She said during her oral evidence: "I make a heartfelt apology we are in this situation. I feel desperately sorry for all those involved."

23. I have already referred to the report to the court for the application for a placement order. I do not know whether the circuit judge saw the original with the colour photograph which, as I have described, very clearly depicts a brown child of mixed race with negroid features; or whether he saw a black and white photocopy, one version of which I have seen, which shows the child's face as a barely distinguishable large black blob like a large blob of spilt ink. At all events, the judge appears not to have raised any question about true paternity at the, probably short, hearing when he made the care and placement orders. So a last opportunity seriously to question paternity and consider obvious avenues of further enquiry was lost. I accept, of course, that such enquiries might not necessarily have uncovered the true father, but they well might have done, for the affair between the true father and the mother was well known in the community and circle within which they lived. The mother's own mother certainly knew the true facts, as will later appear.

24. Once the placement order was made on 2 August 2013 Rotherham set out to identify suitable adopters. A and B had already been thoroughly assessed by the adoption social worker, Miss Elizabeth Lancaster. They were entirely suitable to adopt a young child and in due course were matched with C. Miss Lancaster said during her oral evidence that nothing alerted her to the possibility that C had a black father. "It was discussed that the paternal father was half Burmese." She appears to have accepted that position without further enquiry; but it was not her responsibility to make further enquiries, since she was (as she remains) the social worker for A and B, not for the child.

25. After a period of introductions C began to live full time with A and B in late October 2013 when he was exactly 7 months old. He has lived with them continuously ever since. They issued their application to adopt C on 31 January 2014.

26. On 6 March 2014 the aunt first contacted the social services and said that her brother might be the father of the baby. Miss Fogwill was shocked and surprised by this news. She and a more senior colleague interviewed the father on 14 March 2014. She then immediately arranged for DNA sampling and testing of the baby and the man, and a report dated 24 March 2014 established a 99.9999 per cent probability that he is indeed the father. All parties including A and B accept that he definitely is the father and the case has since proceeded on that basis. The father is a black African who was born and brought up in that continent. He is now aged 32. His own father died when he was young. He himself travelled to England in 2001 and claimed asylum. He has lived here ever since and has indefinite leave to remain. He is the seventh of a large family of eight children. His own mother, now aged 64, now lives in the Midlands. Two brothers live in the Midlands and South Wales. A sister lives in East Anglia, and his youngest sister, the aunt, lives in the Home Counties. The brothers and sisters in England and Wales have between them eight children who are

paternal first cousins of C. Some of them are of mixed race, having also a white parent. The father's three other siblings live variously within Africa and Canada. There is, therefore, a considerable extended paternal family, mostly located within England and Wales.

27. For about 10 years the father has been in a relationship with Miss D (who is white) whom he describes as his partner. Miss D has a child by another man, and that child is now aged 10. She has a daughter, F, by the father and that child was born in May 2012 and is now aged 2½. The father and Miss D spend a lot of time together and the father frequently stays at the home of Miss D; but he has always chosen to retain also his own council flat where he actually lives. He says, and I accept, that he visits the home of Miss D almost every day where he very regularly sees, and is in a good fatherly relationship with, their daughter F.

28. At the time when he had regular sexual intercourse with the mother, the father was, effectively, cheating and being unfaithful to Miss D, with whom he continued to have a sexual relationship at the same time. That probably explains his evasiveness about the circumstances. The evidence of the father about his relationship with the mother was conflicting, and he has told many lies or half truths, both to Miss D and to his sister (the aunt) and within these proceedings, including when he first gave oral evidence. Miss D, on the other hand, was a very straightforward and transparently honest witness. A combination of the oral evidence of Miss D, Miss Fogwill's evidence and contemporary notes, and the final oral evidence of the father (after he was recalled and certain records were put to him) satisfies me that the essential facts are as follows.

29. Whilst continuing his relationship with Miss D, the father also had a sexual relationship with the mother over several months in the spring of 2012 through to at least the end of June, around which time the child was conceived. The mother visited and stayed at his flat several times a week and sexual intercourse took place regularly and frequently. During part of the time Mr E was in custody. The father did not use any contraception and he said that he was not aware of the mother using any. Miss D soon became perfectly well aware of what was going on, for it was the subject of gossip and reports amongst her acquaintances. Miss D had known the mother for several years since the mother was at school with Miss D's younger sister. There was also at least one occasion in the local pub when Miss D effectively saw what was going on with her own eyes. She later confronted the father. He denied it, but she knew he was lying to her. Miss D also knew that the mother was sleeping with someone else (additional to Mr E and the father) as well.

30. I accept that the affair had ended before the father actually knew that the mother was pregnant, However, during the pregnancy he had a chance encounter in the street with the mother and her own mother. The mother was obviously pregnant. The mother herself said nothing, but her mother said words to the effect that "it's yours." Although the father later claimed that he did not take that seriously, it must have been obvious to him that there was a real possibility of him being the father due to the history of frequent unprotected sexual intercourse around the likely time of conception.

31. Soon after the child was born someone showed Miss D a photograph of the baby. She could see that the colour and the features looked like her own daughter, F, and

also like the father. She told him "I really think he is your child." He continued to deny to her that he had had sex with the mother and that, therefore, he could be the father.

32. When he was recalled and Miss Fogwill's notes of her initial assessment on 14 March 2014 were put to him, the father finally admitted as follows: "The mother came round to my flat about two or three weeks after the baby was born (viz in the first part of April 2013). She showed me some photographs of the baby. I could not tell whether he was white or black or mixed race. But the mother said that I was the only black guy she had slept with and that I was the father. She said that because she must have known that the baby appeared to be of mixed race."

33. This evidence as a whole satisfies me that, within a very few weeks of the birth at the latest, the father knew perfectly well that it was highly likely that he was the father of the baby. He could not of course be certain, since he knew also that the mother had had other sexual partners. But she told him, in effect, that the baby was half black and that he had been her only black partner. Short of DNA testing, the likelihood was obvious.

34. He took no action at all. He showed no real interest in the baby, or even much interest in seeing him, although he did ask the mother if he could do so. I do not know why not, but it was probably due, at least in part, to his continuing stance of denial to Miss D. Whatever the reason, it is a significant part of the history of this case that for almost a year the father showed no interest at all in, or commitment at all to, the child, and denied rather than asserted that he was the father. So as well as the responsibility of Rotherham, the guardian, and possibly the court, for not investigating paternity further, a very heavy responsibility for events lies upon the father. If he had shown any real interest in the baby and put himself forward in any way as the likely father, then the true facts would probably have emerged much earlier and the baby would never have been placed with A and B.

35. A separate and distinct question is when the father first learned that the baby was in care. His case is that he learned this for the first time at the beginning of March 2014. He said that he saw the mother's mother in the town. He asked her where the child was. The mother's mother said that he was in care and that the mother had lied to him. He then immediately spoke to and told his sister, the aunt, and at his request she immediately contacted the social services. He says that in the first weeks after the birth he had indeed asked the mother if he could see the baby and she had fobbed him off by saying that the baby was staying with her mother or sister. She also misled him into thinking that she was caring for the baby by asking him on a few occasions for money for nappies.

36. To the very end of his evidence, even when recalled and admitting what I have recorded above with regard to his knowledge of paternity, the father remained adamant that it was only around early March 2014 that he first learned that the baby was in care, and that he at once informed the social services and requested that he or his family could care for the baby.

37. This appears to be contradicted by the handwritten note made by Miss Fogwill on her first meeting with the father on 14 March 2014. This includes the following: "1st found out might be in care about a month after born." Miss Fogwill fairly said that

she could not now remember the precise words used, but she stood by her note. The father remained adamant that he did not say, and would not have said, that. He remained adamant that the first time he found out the baby was in care was the same time he contacted social services, viz March 2014. He said there must have been a misunderstanding between him and Miss Fogwill with regards to dates. On behalf of the father, Miss Caroline Ford fairly makes the point that although he now speaks good English his first language is Shona. Further, it is certainly the case that he is a very quietly spoken and unassertive man whose answers, at any rate in the witness box, were not always easy to hear and follow without checking.

38. One small straw of evidence upon this issue is that of Miss D. She said, and I accept, that she knew (because her friend told her) about two weeks after the birth that the baby had been taken into care. But she also said that she did not tell the father. So although his partner, Miss D, knew, she did not tell him and he could not, therefore, have learned from that source.

39. I have to decide whether I am satisfied on a balance of probability that the father knew that the baby was in care as early as about April 2013, as the local authority allege; or only in early March 2014, as he himself claims. On this issue there is force in the point Miss Ford makes on the third page of her written closing submissions dated 21.11.14, and as she elaborated orally. The father's case is that he first learned that the baby, of whom he was likely to be the father, was in care in early March 2014. He immediately contacted the social services (initially via his sister) and has, unquestionably, strenuously sought the move of the child to live with him or his family ever since. It was only later that he learned that the child had actually been placed for adoption or that there was a current application to adopt him. So, as Miss Ford puts it, his conduct by contacting social workers in March 2014 can only be explained by his having only recently learned that the child was in care. No other event or trigger has been identified as to why, having done nothing and shown no interest for so long, he suddenly did then make the contact which he did. Miss Ford asks, rhetorically: Assuming that he had known that the child was in care from, say, mid or late April 2013, why did he suddenly do something and with such resolve in March 2014? She submits that the activity in and after March 2014, for which there is no known other explanation, is really only consistent with his having recently learned in March 2014 that the child was in care.

40. I take into account the demeanour of the father in the witness box when he was recalled. At the same time as now admitting that soon after the birth the mother herself had told him that he was the father, he maintained his account, apparently convincingly, that he only knew that the baby was in care almost a year later, and said that the social worker must have misunderstood him. I also accept the force of Miss Ford's point as described in the previous paragraph. There was room for misunderstanding, and I am not satisfied on a balance of probability that the father knew that the baby had been taken into care earlier than early March 2014, when he took action at once.

41. Since March it has been the sustained and consistent case of the father that the child should be brought up within his genetic paternal family, either by himself, or by his sister, the aunt, or by Miss D. All three of them have been rigorously assessed as potential carers.

42. The conclusion of the assessment dated 8 September 2014 of the father, now at bundle page D 70, is that "Whilst it is thought that [he] may be able to provide basic care for [C] … the assessment session has not provided confidence of [the father] being able to meet [C's] emotional needs. He does not appear to grasp the need for [C] to have secure and consistent environment and regular main care givers. It seems that [the father's] main agenda is for [C] to be in the care of his family … I am not convinced that [the father] as [C's] sole carer would be able to provide [C] with the level of care that he requires." Although the father visits the home of Miss D almost daily and spends time there caring for F, his life is essentially that of a single man who would indeed be the "sole carer" for C if he lived with him. The father has accepted the conclusion of that assessment and no longer puts himself forward as the sole or primary carer.

43. Miss D is not, of course, herself related to C. The particular advantage to C if he lived with her would be that he was living and being brought up in the same home as, and in daily close contact with, his half sister, F. The assessment of Miss D, also dated 8 September 2014 and done by the same social worker, was very positive. The conclusions, now at bundle page D 82, include the following: "[D] was found to be very child focussed and had a current knowledge of child development and showed an incredible level of insight to the emotive issues of this situation for all involved … From the time spent with [D], it is my opinion that she does have the ability to meet another child's holistic needs." During the hearing the father and the aunt both stayed at the home of Miss D. They discussed the issues during the preceding weekend. They reached a joint decision (which I consider was a wise and appropriate one) that the aunt rather than D would be put forward as the proposed carer, with D remaining "in reserve" (my phrase, not theirs) as an alternative carer if some reason later emerged which ruled out the aunt or made her inappropriate as a carer. No such reason has emerged. Accordingly, the consistent case which has been presented at the hearing by all three of the father, the aunt and Miss D is that adoption should be refused and that the child should move to, and make his permanent home with, the aunt. I am quite satisfied that there is a good relationship between the aunt and Miss D. The aunt and Miss D both regard Miss D and her children as part of the paternal family. Miss D's own 10 year old daughter has, for instance, stayed with the aunt at her home in the South. They have interacted well throughout the hearing. There is no contest, and there are no barriers, between them. For so long as the aunt continues to live in the South, a considerable journey away by public transport, there may be practical difficulties about very frequent contact between C, if he lives with his aunt, and Miss D and F; but there would be no emotional or other barriers between Miss D and the aunt.

44. The case has, therefore, now narrowed to a straight choice between C remaining with A and B and being adopted by them, or moving, in a planned and phased way, to live with the aunt.

A and B, and C's attachment to them

45. A and B were, as is normal, very thoroughly assessed as a prospective adoptive couple before C was even matched, let alone placed, with them. They are not currently married to each other, but that is no longer a requirement of the adoption legislation, provided they are living as partners in an enduring family relationship – see section 144(4) of the Act. They were very positively assessed in May 2013 by

the adoption social worker, Miss Elizabeth Lancaster. Her report from May 2013, now at bundle D 1-50, concludes at D 45: "… They have accessed appropriate resources and have clearly developed their understanding and knowledge of looked after children. They have a stable and loving relationship and are financially secure and can offer the permanency that a child for adoption needs … I would support ... that A and B are suitable to adopt one child between the ages of 0 – 2 years."

46. Some focus was placed during the oral evidence upon a passage at pages 22 and 23 of Miss Lancaster's report (now D 22 and 23) which discusses the cultural heritage of any child to be placed with them. It records "A and B recognise that the area in which they live is predominantly white British and English speaking and raised concerns that although they promote acceptance their wider community may struggle to accept a child with a different ethnic background … and raised concerns that a child that did not mirror A and B's own identity [both white British] may face discrimination … accepting a placement of a child who differs from their own ethnicity may be potentially difficult for the child in future …" This note of reservation about accepting a non white British child does not influence me one iota in the circumstances as they now are. A and B themselves have no discriminatory thoughts or beliefs. They lovingly accepted C when he was matched with them despite his obvious mixed race appearance. They were given and accepted the Burmese grandmother explanation, and read books to him about Burma and promoted his "Burmese" ethnicity and heritage until they learned the true fact of his African ethnicity and heritage. They now read books to him about, and promote the heritage of, the country from which his father came. Whatever A and B indicated at the time of pre-placement assessment, as recorded in Miss Lancaster's report and briefly quoted above, the fact that C has a black African father and mixed race appearance simply is not an issue at all for A and B now.

47. Even before C was matched with them, A and B prepared themselves very thoroughly as prospective adopters. They read widely. They attended courses. They learned about the importance of attachment, stimulation and other parenting qualities. This stood them and him in good stead. I accept unreservedly the current assessment by Miss Lancaster that A and B are the "perfect" adoptive couple. She said in her oral evidence that in spite of all the challenges they are remarkable people. They are excellent adopters doing a remarkable job. If she could paint the ideal adopters they are not far from the mark. They have an excellent understanding about attachment, about which they were trained. The have a very good understanding about the impact of loss and trauma. They have great appreciation of the kind of parenting styles that work well.

48. I accept unreservedly that C is now very well attached to A and B. He feels, and is, secure with them. They provide an excellent home. They are also undoubtedly deeply attached to him. B said very movingly "He is such a happy, settled, loving little person who knows who we are … I am so proud of him. I love him so much. I will always love him. He will always be my son." C is also a familiar and much loved member of the extended families of both A and B.

49. There is no doubt that if the true paternal family had not emerged and put themselves forward in the way that they have, an adoption order would have been made several months ago.

The assessment of the aunt

50. The aunt has also been very thoroughly, and positively, assessed; primarily by a social worker independent of the applicants or child, Mrs Louise Atkinson.

51. The aunt is now aged 29. She came to England at the age of 12 and has lived here ever since. She was formerly in a relationship with the father of her son, G, although they did not live together. He is an Afro Jamaican. They have now completely separated, but G's father keeps in touch and sees him from time to time. The aunt laughed dismissively at the suggestion that she might form a new relationship with any man in the foreseeable future, and I accept that she will not. She puts herself forward, therefore, as a single parenting figure for C, in contrast to A and B who are a couple. She herself was cared for by her own aunt, her mother's sister, between the age of 12 to 18, and it is common within their African culture for relations such as aunts to parent children in this way. She is, however, in a good relationship with her own mother and speaks to her on the 'phone every day. She wishes to move closer to either her mother or her brother (the towns in which the mother and brother live are about 45 miles apart) and is on the waiting list for a council house exchange in either town.

52. Mrs Atkinson spent six full days assessing the aunt during July. Her report dated 11 August 2014 is now at bundle pages D 129 – 160. It is very thorough and requires to be read in full. I can only quote briefly from the conclusions at bundle pages D 159 and 160 (internal pages 31 and 32). "Based on [this] kinship assessment and the references provided, it would appear that [the aunt] has many positive attributes and skills that would enable her to provide a loving family home for [C]. From speaking to [the aunt] and other family members, it is apparent that kinship care is more the norm than the exception with the African culture so this is something that [the aunt] and her family have experienced all their lives; for [the aunt], she has experienced kinship care from a birth child's point of view and from a child in a kinship care arrangement. [The aunt] and her family could provide [C] with a secure loving family home with his paternal birth family. This would be a good match culturally; it would give him a sense of belonging and a sense of identity where he could have access to first hand information and knowledge about both sides of his heritage … He would know his paternal half sister [viz F, the child of the father and Miss D] and have contact with her … Upon completion of this assessment I would conclude that [the aunt] could offer [C] a caring loving home. She would appear to have the knowledge and skills necessary to be a good parent/carer and more importantly knows how to find out what she needs to know and is pro-active in seeking help, support and informations [sic] she needs to enable her to be the best parent she can be …"

53. During her oral evidence Mrs Atkinson said that she thought "strongly" that the aunt could offer a good, stable and loving home for C. With regard to some issues raised (entirely theoretically) by the psychologist, Dr Ben Harper, at paragraph 2 of his report, now at bundle page D94, to which I refer in paragraph 71 below, Mrs Atkinson said that nothing would lead her to believe that the aunt has "an insecure attachment style". She has really good attachments with her own son. Mrs Atkinson does not believe that the aunt has any "unresolved childhood difficulties." She does <u>not</u> have "a poor understanding of a child's emotional needs." She has a good understanding of her own child's needs. She meets them very well.

54. My own impression of the aunt was very favourable. She is much more articulate than her brother, the father. She appeared to be thoughtful and flexible, and insightful and understanding of the issues in this case. She said that she has prepared her own son, G, for the possibility that he might be joined by another, younger, boy. She talks to G about C, and G would not be surprised if C became part of their family. She said that G himself is a lovely boy, very caring and very sharing, who plays very well with other kids. She paid generous and sincere tribute to A and B although of course she has never met nor seen them. She said she was just so grateful for what they have done. It is beautiful. They have taken very good care of him.

55. The aunt said frankly that she thought her brother could have done better towards C, but he is a very quiet person, just a very caring father and very caring brother.

56. She made quite clear that she is very receptive to advice and guidance from social workers and others with regard to all issues such as the pace and method of introductions; attending courses or instruction in attachment theory and how to handle the transfer of attachments; and when and how to introduce C to his father and other family members, although her own thinking is to defer that until C had been settled with her for a least three months.

The professional evidence

57. As already indicated, the professional evidence is divergent.

Miss Lancaster

58. Appropriately, and probably inevitably, the adoption social worker for A and B, Miss Lancaster, very strongly supports and urges the making of an adoption order. It is she who first assessed A and B as suitable to be adopters; she who was involved in the first introductions of C to A and B; she who observes them as perfect adopters; and she whose responsibility it has been, and is, to support them throughout the journey, first when it was joyful, and more recently when it has become little short of a nightmare. She knows C well, but has not met any member of the paternal family (save across the courtroom during the hearing).

59. Miss Lancaster said in her oral evidence that her personal opinion is that C should stay with A and B. This is a child who has not experienced what the social services would remove a child for. He has experienced loving care. She thinks that any move would be very traumatic for him. She repeated that "this is not a child who has experienced the things we would move a child for." Any move would be absolutely detrimental to his life. The more moves a child has, the harder it becomes to settle. He has a secure attachment to his adopters and another move would interrupt that.

60. In answer to some questions from Mr Andrew Wynne on behalf of the aunt, Miss Lancaster agreed that social workers do regularly prepare children for moves (such as a move from a fostering to an adoptive family) but said that "it is a very small step for such a big thing." In answer to questions from Mr Power, Miss Lancaster said (as I unreservedly accept) that she has no concerns that A and B will not promote C's Afro heritage throughout his lifetime. They have memory boxes and "have gone to town on this." There is a photograph of his mother in his room and they would be willing to have one of his father.

61. In answer to questions by Miss Alison Hunt on behalf of the guardian, Miss Lancaster said that the most likely time for adoption disruption is the adolescent and teenage years.

62. Pausing there, I mention at this stage two points from that evidence. First, the references in Miss Lancaster's answers and approach, to C not having experienced the things social services would remove a child for. That, of course, is correct. He is not a child who has been neglected, abused or otherwise ill-treated. That, however, is a somewhat narrow approach to the circumstances and situation in the present case, in which what is under consideration is not removal from, but uniting with, the genetic paternal family. Second, in common with other professional witnesses in this case, and in line with my own experience of similar evidence over many years, Miss Lancaster makes the point that the more moves a child has, the harder it becomes to settle. This child was fostered with good foster parents within five days of birth and has, so far, had one move, from them to A and B.

Miss Fogwill

63. The child's own social worker, Miss Fogwill, also clearly feels that he should not now be moved. At the close of her evidence in chief she said she had "found herself pulled in both directions on outcome", and she did not at that stage come down either way. (That was a perfectly tenable position for her to take. Since she already knew the position of her department, from the written statement of the Director, Ms Jane Parfrement, it was not incumbent upon her, as the front line social worker, to express a view, although she was entitled to do so.) However, during questions from Mr Wynne, who was hoping she might come off the fence in favour of his client, the aunt, Miss Fogwill effectively made clear that, on balance, she favours adoption. She said that the parenting qualities of the aunt, although good, are "not to the same standard as the adopters give to him." She said that the adopters are very child focussed and there is not the same kind of atmosphere in the aunt's home. I mention, however, that it was not Miss Fogwill but Mrs Akinson who carried out the detailed and in-depth assessment of the aunt, over six full day visits, and Mrs Atkinson reports that the aunt <u>is</u> very child focussed. Miss Fogwill said that the aunt has not been tried and tested, and asked, can she manage the trauma of a potentially very distressed child? She did say, however, that she "sees the advantages of the birth family." In answer to some questions from Mr Prest, Miss Fogwill said that the adopters and the aunt have different parenting styles and the adopters' style is what C knows. A and B go beyond what she would expect of them.

Ms Parfrement

64. The Director of Safeguarding Children and Families and interim Strategic Director of Children's Services of Rotherham, Ms Jane Parfrement, made a written statement dated 10 November 2014 and also gave oral evidence. It must be stressed that she personally has not met anyone concerned in this case. She reaches her opinion after considering all the reports and documentation. That is what senior officers do. She wrote in paragraph 5 of her written statement, now at bundle page C 66, that "The nature of my role is to stand back from the matter and to review it in the light of the information gathered by others." She makes a point at paragraph 6(3) of her statement that "whatever decision the court makes, we will never know for certain

whether in fact [C] would have done better "throughout his life" if a different decision had been made."

65. At a directions hearing in Leeds on 4 November 2014 I had made clear, and made express in the formal order, that neither Rotherham nor the guardian were "required or expected at this stage of a finely balanced case to make any actual final recommendation in advance of the evidence, unless they or she [were] very clear as to outcome." However Ms Parfrement analysed and weighed factors for and against adoption in her written statement and came down firmly against adoption. It is important to stress that in her written statement Ms Parfrement adopted an approach (see in particular at paragraphs 12 and 15) that the decision of the Supreme Court in Re B requires that an adoption order can only be made if it is necessary and nothing else will do. She said at paragraph 11 that were she simply to have to weigh the advantages and disadvantages, she might well say that the matter was finely balanced and that she would probably gratefully accept the opportunity offered by the court not to make a final recommendation at that stage.

66. As I have made clear in paragraph 15 above, I am not adopting or applying the added test that "nothing else will do." However, during her oral evidence (by which time, amongst other matters, it was known that the aunt was the proposed carer, not Miss D) Ms Parfrement made clear that even if she was merely balancing the advantages and disadvantages to C of adoption or moving to live with the aunt, without any added test or hurdle of necessity or nothing she will do, she considered that the balance was against adoption and in favour of a move to the aunt.

67. Amongst other answers, Ms Parfrement said that she agrees that ethnicity in itself is not an issue. But she said that the reality is that his ethnicity will become more and more apparent to him. The life story to him would have to be that his natural paternal family came along too late. But it is not a fantasy in this case (as it would be for most adopted children) but a reality that his birth family could give him proper care. She said that it is not at all uncommon within the African culture for children to be brought up by an aunt or the extended family. If he was brought up by his aunt he would not see that as rejection by his father. In any case his father has not rejected him. He has come forward and is seeking a relationship with him. Ms Parfrement did not accept that there is a risk of significant harm to him from a move, although she accepts that there are some risks.

68. In paragraph 33 of her final report dated 12 November 2014, the guardian, Mrs Hassall, stressed the need for a new carer (viz, now, the aunt) to receive help and support at building attachments and that "… I would expect Rotherham to be proactive in ensuring such services are provided … if necessary [by] funding provision of private resources such as theraplay."

69. Although she had no personal responsibility at the time, for she was only appointed in August 2014, Ms Parfrement clearly recognises and accepts the responsibility of Rotherham for what she described as "this heart breaking situation." She assured me and the parties that she holds the budget and that she gives a commitment to make the right provision for C and to fund it. She commits to commissioning and funding appropriate work and services for the aunt and C if he moves to her. In the light of that commitment from Ms Parfrement herself, I will assume that if C does move to his aunt no reasonable expense will be spared in this case in giving all the training and

support, and putting in all the resources reasonably necessary, to minimise the impact of a move upon C and maximise its prospects of a good and securely attached outcome.

The psychologist, Dr Ben Harper

70. By an order made on 26 August 2014 a circuit judge authorised the instruction of a named child psychologist, Dr Ben Harper, to carry out a "paper based assessment" in accordance with certain questions annexed to the order. The psychologist was to be jointly instructed by all parties (viz at that stage the applicants, Rotherham, the father and the guardian, the mother having been served but not participated throughout), with the solicitor for the guardian being the lead solicitor. In fairness to the judge, I should stress that all parties were agreed on this approach and to some extent she was being asked merely to approve that which they had already agreed. But I have to say that I do not consider that a "paper based" exercise of this kind was appropriate or justifiable, and certainly not "vital" as the order stated. It is not suggested that C currently has any psychological or psychiatric or developmental disability, disorder or delay. He is a normal, psychologically healthy young child. The psychologist was not asked to see, and did not see, anyone concerned in the case. His report is, therefore, entirely theoretical; and the court order and the report perpetuate the regrettable historic tendency of adding the expertise of a psychologist giving a theoretical opinion to the expertise of social workers and a guardian, and indeed the experience of specialist family judges. Although the facts and circumstances of this case are unusual, in that it contemplates a possible move of a child from carers by whom he is very well cared for and with whom he is very well attached, almost any decision with regard to a child has an emotional and psychological component and effect. Section 1 of both the Adoption and Children Act 2002 and the Children Act 1989 both require courts and others to assess and weigh emotional and psychological effects. "Paper based" exercises of this kind are neither necessary nor justifiable nor, frankly, affordable. An actual assessment (seeing all concerned) by a psychologist might be enormously helpful in many cases, but that is now a mere pipe dream in our under-resourced family justice system. I stress that I do not say this in any way critically at all of Dr Harper. He merely did what he was asked and instructed to do.

71. Dr Harper's written report dated 10 October 2014, now at bundle page D 92, begins at paragraph 2 with a helpful "Summary of conclusions" in which he said:

> "2.1 The assessment indicated that it would not be within C's best interests to remove him from his current stable family environment to place him with unknown adults (albeit birth family) without further comprehensive psychological assessment.
>
> 2.2 It would not be in C's best interests to place him in a placement with a care-giver(s) with an insecure attachment style, those with unresolved childhood difficulties and those with a poor understanding of child's emotional needs.
>
> 2.3 However, it should be acknowledged that the process of further assessment may be extremely disruptive for C and his prospective adoptive parents. The pressure of these

> proceedings could have a significantly detrimental impact on the prospective adopters' emotional wellbeing which could negatively impact upon their ability to remain psychologically available to C."

72. That paragraph reflects paragraphs 6.10.7 – 6.10.9, now at bundle page D 103, which are substantially to the same effect.

73. As I have already recorded, Mrs Atkinson, who intensively assessed the aunt, was asked in her evidence about each of the matters there raised and highlighted by Dr Harper – insecure attachment style, unresolved childhood difficulties, and poor understanding of a child's emotional needs – and she negatived them all in relation to the aunt (see paragraph 53 above).

74. In his oral evidence Dr Harper said that from what he had read the aunt has the motivation to care for the child. There is no evidence in what he had read that she has any of the issues identified in paragraph 2.2 of his report. On what he has read he does not have reasons to have concern about the aunt's attachment style or mental health or emotional availability for a child. He said that any further assessment by him seeing the parties (which he could not complete until sometime in January 2015) would create delay and should only take place if absolutely necessary. He himself did not advocate it, and no party at the final hearing invited me to adjourn for the purpose, although I had specifically stated at the outset of the hearing that I remained open to possibly adjourning the hearing and, if asked to do so, would finally decide that in the light of all the evidence.

75. Dr Harper said that the decision in this case is not necessarily a psychological issue if all relevant adults have a secure attachment capacity (which they do), and the outcome then becomes a matter for the court.

76. Helpfully, Dr Harper stressed the need, if C is to move to her, for the aunt to receive quite intensive training and support on the principles of attachment, both before and after actual placement with her. This is because her actual experience is limited to bringing up her own son from birth. She has no experience of receiving a child after a move. It is that training and support which Ms Parfrement has committed to provide.

77. Dr Harper explained that children carry with them their personal experience of attachment and security "as a blueprint". Consistently with what Miss Lancaster had said, and Ms Parfrement had written at paragraph 16(1) of her written statement, and with evidence I have heard to the same effect in other cases over many years, Dr Harper explained (what may seem a paradox or counterintuitive) that generally a child who is already securely attached (as C is) is "much more likely to be able to transfer their internal world as a blueprint." In other words, possibly paradoxically, it is likely to be less damaging (although still damaging) for a child, who already experiences security and is well attached, to move and make new attachments (provided the new carer has a good attachment style), than for a child who has experienced perhaps several moves and is not well attached. Dr Harper said that by 20 months the "blueprint" is probably very "embedded" in C.

78. It is a cruel paradox, but a psychological fact, that precisely because A and B have cared for C so well and he is so secure and well attached to them, a move now to another carer with a good attachment style (such as the aunt is) may be less damaging to him than if he had had several moves already or was not so securely attached.

79. Dr Harper gave one answer that I found rather curious and difficult to accept. Ms Parfrement had written at paragraph 9(7) of her statement (now at bundle page C 68) that a benefit of C living with the aunt or Miss D is that C would grow up with his father also being able to play a role in his life. Dr Harper's comment on that was that "I do not see that contact with a father who is unable to meet the psychological needs of a child as a full time carer should be used as a reason for a family placement." Many fathers, or indeed mothers, who are unable to meet the needs, including psychological needs, of a child as a full time carer, may, and do, nevertheless have much to contribute to a child on a less than full time basis or by forms of contact. If C is able to move to the aunt and form a secure attachment with her, it could be a bridge to a relationship with his father which, in my view, could be beneficial. The reason given by Dr Harper for his above comment appeared to be that "the child may later feel a sense of rejection if he learns that neither of his parents was able to meet his needs as a full time carer." Later he said that "psychological rejection from his birth parents would not necessarily be placated by placement with an aunt." I understand that point – it would not necessarily be placated; but I do not understand why it should be made worse. If he grows up with A and B he may also later feel a sense of rejection by his parents, and Dr Harper himself said that at middle childhood he is likely to be distressed by the fact that he is not placed with his birth family (meaning one of his parents). I cannot see that any sense of rejection by his parents is likely to be greater if he is living with his aunt rather than with A and B, and to my mind it is likely to be less if he is living with his aunt and having regular contact and a relationship with his father. He would know that he had not been rejected by his father; in any event, living with someone such as an aunt is part of the cultural pattern of his African family. So I disagree with Dr Harper's view and comment that the possibility of a relationship and contact with his father is not a reason for living with his aunt.

80. Although he did not say so in express terms, it would, I believe, be correct and fair to regard Dr Harper as, at least on balance, favouring adoption to a move, and I so treat him.

The child's guardian, Mrs Hassall

81. Mrs Sheila Hassall, the guardian, was also clearly told by me that she did not need to make any recommendation in advance of the hearing, but she, too, chose to do so, feeling "able" to do so. Her written report dated 12 November 2014 is a very careful and thorough analysis over many pages of the issues and competing factors and considerations in this case, and is not easy to summarise. In essence, she considered that the long term advantages of living within, and in contact with, his paternal birth family outweigh the risk of harm to him from a move now from the applicants with whom he is securely attached. At paragraph 26 she made clear that the factor of his African heritage weighed more with her as a factor than it did with Dr Harper, who was rather dismissive of it in both his written report at paragraph 6.7.2 (bundle page D 101) and in his oral evidence, when he said that in his opinion it is a popular myth that some people will feel more secure and attached with people of the same ethnic mix.

He said that there is no evidence to support that. Mrs Hassall, on the other hand, focussed not on the mere point of "the same ethnic mix" but on the actual shared heritage with his African family of origin. She wrote "His African heritage is less accessible in his current placement. In spite of the outcomes referred to by Dr Harper, I think that it has to be better for [C] to have relationships of quality with family members who share his African heritage and can promote his awareness of his origins on a day to day basis, rather than carers who provide this knowledge second hand, via resources through literature and the media."

82. In her oral evidence at the conclusion of the hearing, and after all the other evidence, the position of the guardian remained unchanged. At the very end of the hearing, and after all other submissions, I expressly asked Miss Alison Hunt, on behalf of the guardian, whether there was any change in the guardian's position or the firmness with which she held it. Upon the express instructions of the guardian, who was present, Miss Hunt told me, as the guardian's last word, that "it is the clear, considered opinion of the guardian at the conclusion of all the evidence and all the argument that an adoption order should not be made and that C should move, under the revived care order, to live with his aunt." The word "clear" was used with deliberation and care. Miss Hunt had also written in her own Closing Submissions that "The guardian considers there would be significant benefits for C in placement with [the aunt]. There are profound long term benefits – personal, emotional, psychological, social and cultural." I asked Miss Hunt expressly to confirm with the guardian the use of the words "significant" and "profound" in that passage, and the guardian expressly did so. During her oral evidence Mrs Hassall had made clear that she is not approaching the case from a test of necessity or nothing else will do. She is simply forming an opinion as to which is the better outcome for C, and in her view it is to move to the aunt.

83. During her oral evidence the guardian said that C has a natural family who have been assessed as able to care for him (viz the aunt). His longer term needs include a need to be with his family of origin if that is possible. In the short term A and B are meeting his needs. The concern of the guardian is that when he becomes older and learns that he could have had, but has been deprived of, a life with his natural family, that will have a negative psychological impact, although she recognises that moving him will be a very difficult experience and may cause significant emotional harm. The guardian said his ethnicity may be an important issue for him, but is not her main reason. The point is that A and B are not his natural family. His natural family can, at first hand, share their and his history and experiences with him. His father and aunt were born and brought up in their country in Africa and can directly share their and his ethnicity and origins. The guardian, who has met the aunt, considers her an intelligent and capable woman and agrees with the assessment by Mrs Atkinson. The guardian expressly agreed with the point made by Ms Parfrement at paragraph 13(1) of her written statement, now at page C 70, that "the fact that [C] seems to be securely attached to A and B means that there is a strong likelihood that he will be able to form a similar attachment with a different carer." This is consistent with the evidence also of Dr Harper with regard to the embedded blueprint. Mrs Hassall also expressly agreed with the comment in paragraph 16(3) of Ms Parfrement's statement that "whilst recognising that this has been an adoptive placement and not a foster placement and so the relationship between A and B and [C] may be qualitatively different, social care often, in practice, have to move children of this age on from one

set of carers to family or adopters and, in most circumstances, is able to do so successfully." Mrs Hassall pointed out that C has no disabilities or special needs which might require especial parenting skills.

Analysis and outcome

84. As required by recent authorities of the Court of Appeal, this case has now been the subject of intense analysis. Mr Power, for A and B, Mr Wynne, for the aunt, and Miss Hunt, for the guardian, all attached "balance sheets" to their respective final written submissions which I now reproduce.

i) **For A and B:**

"The factors which support the making of an adoption order are:-

- A and B's application, although opposed by the paternal family, is not opposed on the basis that he is to be placed with a parent wishing to care for him;
- C was placed for adoption by RMBC with A and B and all have been primed to form attachments as a permanent family;
- C is 20 months old and has lived with A and B for 13 months – 2/3rds of his life. He is happy, content, settled and developing well in a stable, secure, tried and tested family home environment;
- As a result he has formed secure attachments and sees A and B as his parents and their family as his family – they are his psychological parents;
- C's "internal world" or "blueprint" is enmeshed and his reality is his home with A and B (as per Dr Harper);
- A and B are "perfect adopters" (as per Clare Fogwill, Elizabeth Lancaster, Jane Parfrement and Sheila Hassall) who go above and beyond what would be expected of them to meet all of C's holistic needs to an excellent level;
- The severance of that attachment brings with it significant emotional harm which has the potential to have lifelong negative effects (to include long term attachment difficulties and disorders notwithstanding the existence of previous secure attachments);
- Moving C from A and B is not the same as moving a child from foster care to a permanent home as the relationships, dynamics and attachments involved are significantly different ;

- Although the assessment of the aunt is positive her ability to parent C and meet his specific needs which will arise upon the severance of that attachment and its establishment with her is untested;
- Clare Fogwill's evidence was that A and B are better placed to offer C the parenting that he needs;
- A and B accepted C as a dual heritage child and continue to do all that they can to promote his heritage;
- C's heritage is equally represented in the home of A and B and the home of the aunt;
- There is no robust evidence to suggest that children raised outside of their heritage have any worse outcomes (Dr Harper and CG);
- Concerns that C may have emotional difficulties in the future when he discovers that he could have been brought up by the aunt is speculative and unknown and is countered by A and B's positive promotion of C's history and lifestory;
- A and B have demonstrated that they have the skills to deal appropriately with C's journey into adulthood in the specific circumstances of his case;
- A placement of C with the aunt also differentiates him as he remains a child not living with his birth parents but where his ½ sister does "live" with the father in the sense that he spends most days with her;
- The reality of a move to the aunt is that contact with A and B will end, whereas by remaining with A and B there is the potential for direct contact with the paternal family;
- A and B are open to such a prospect and their good faith in this regard is supported by their exploration of contact with other adopted siblings (which it is accepted is seen on a different footing) and the evidence of all social workers. The guardian's evidence must be seen in this context and the court has had the benefit of hearing from A on this issue;
- If C moves to the aunt he will lose the opportunity of a relationship with his adopted ½ siblings;
- C has no relationship with his paternal family which has arisen as a result of the father's actions – it is clear that he knew C was likely to be his son within

weeks of his birth, that he was aware that there were risk factors associated with his mother and her other children have been removed;

- C's family life is with A and B;
- Neither of the social workers working with C advocate that he should be moved.

The factors which militate against the making of an adoption order are:-

- There is a birth aunt who is willing to care for C and the assessment of her ability to parent him "on balance" recommends that she is able to meet his needs although there is no evidence that she is able to meet those needs better than A and B;
- A placement with the aunt would enable C to have a greater level of contact with the father and F (although the extent of this contact appears likely to be relatively limited and he would not have the benefit of living with his ½ sister);
- His legal ties with his paternal family would be maintained (although he has, and never has had, any actual relationship with them)."

ii) **For the aunt:**

Prospective adopters	Aunt
Positive viability – no concerns re ability to care for a child/children	No concerns
No concerns of emotional care/support	Moving to the aunt will require careful and gradual thought – ameliorated by preparatory work/'saying goodbye' – ameliorated as per Dr Harper 6.2.1
Ability to develop relationship with adopters and their families	Ability to meet birth family (both immediate and wider) including father, siblings, and relatives of mixed and dual heritage.
iii) Problems with enabling contact with birth (half) siblings of C	Ease with which contact can be promoted with all family members of C
Ability to learn about heritage from secondary perspective. NOT birth family	Ability to learn about heritage first hand, greater sense of identity from birth family
Promotion of African heritage	Carer with personal knowledge of African background
As child grows, knowledge that he is not with birth family, but that they exist and sought to care for him permanently	Knowledge that adult carer is his birth family, with significant access to family members. Ability to understand reasons why A&B cared for him due to failures of RMBC and other professionals and not because of negative attributes of A&B

iii) **By the guardian:**

The aunt	**A & B**
No concerns re general care – physical, home conditions, education etc	No concerns re general care – physical, home conditions, education etc
Emotional care gives rise to risk as result of C having been removed from settled home with A&B. No concerns re emotional care of G. RMBC will provide training & support to reduce risk – the aunt will fully co-operate with this.	No concerns re emotional care
Opportunity to develop relationships with his Father, with G & with paternal grandmother & extended paternal family, including white & dual heritage relatives; to learn family history	Opportunity to develop relationships with extended families of A&B; to learn family history
Carer with understanding and experience of racial discrimination	Carers with understanding but no experience of racial discrimination
Opportunity to develop relationship with F in context of extended family and its shared experiences	Potential opportunity to develop relationship with F in context of "contact sessions"
	Opportunity to develop relationship with adopted maternal half-siblings
Living with carer & in family who have personal knowledge & experience of Africa [and Shona language]	Willingness and ability to promote C's knowledge of Africa

85. I have read and re-read those "balance sheets" and all the written closing submissions, and I have all the points listed there in mind. Judges frequently use the language of "balance" and "balance sheets" (and I do myself. I think lists such as the above are indeed very helpful). But the analogy with balancing scales may be misleading. When weights or objects are put on either side of a scale, their individual precise weights are known, or ascertainable. You can put four objects in one scale pan and seven in the other, and the scales will come down one way or the other due to the aggregate of the individual precise and ascertainable weights on each side. In a case such as this, however, none of the factors have precise weights. All that may be said of any individual factor is that, as a matter of judgment, it is more or less important or weighty than another. Mr Power's list is long on the advantages of adoption and short on the disadvantages. It is not, however, the number of factors which counts but their respective importance. The Adoption and Children Act 2002 does not itself use the language of balance. It requires the court to "have regard to" all relevant matters, including those specifically referred to in section 1(4). The effect of section 1(6) is that the court must then make a judgment (applying section 1(2) and the

paramountcy of welfare throughout the child's life) whether making (in this case) an adoption order "would be better for the child than not doing so."

86. The matters of most importance seem to me to be the following (referring to, but not following the order of, the paragraphs in the check list in section 1(4) of the Act).

87. (Paragraph (d)). The child is a boy, now aged 20 months. His age, and the length of time he has been with A and B (now 13 months), is a very significant matter in this case. The older he is and the longer he has been with them, the more potentially damaging it is to move him. It is, however, possible to move children at his age, and social workers frequently do do so, as Ms Parfrement and the guardian both said. It is relevant, as Dr Harper stressed and Ms Parfrement acknowledged, that his situation is not the same as that of a child who has been fostered for 13 months. Foster parents are trained to avoid becoming closely attached, as they know the child must or may move on. A and B were trained even before placement to form lasting attachments, and they have done so. But as Dr Harper and other professional witnesses also said, the blueprint of attachment and security is embedded in him and (the paradox) he may be less damaged by a move now than if one had not been. His personal background is the experience of 7 months of high quality care by his foster parents, and 13 months of exceptional care by A and B and their extended families, with all of whom he is well integrated. It is, however, also part of his genetic background that he has a paternal family who do wish, and are able, to provide a good and secure home for him. It is one of his characteristics that he is of mixed race with a black father, and does display obvious mixed race and negroid skin colour and features.

88. (Paragraph (a)). C is too young to have ascertainable wishes as such. His feelings currently are undoubtedly to remain living in the familiar home with the familiar people, A and B, with whom he is so securely attached. But those are current feelings with regard to the here and now. A child of his age still lives for the present (infused by his past experiences). He can have no concept of adoption, or of the future, or of any of the matters I have to consider.

89. (Paragraph (b)). Every child has a need for love, security, and good quality care, with a carer or carers to whom he is well attached. So does C. He does have a need to be brought up in a way which acknowledges, respects and nurtures his ethnicity and his black African heritage. He is a healthy child of apparently normal, healthy, age appropriate physical, mental and psychological development. As the guardian commented, he has no disabilities or special needs which might require especial parenting skills.

90. (Paragraph (e)). C has not to date suffered any harm, within the meaning of the Children Act 1989. He did have to move from his foster family to A and B at the age of 7 months. It is clear that he was able to attach very well to A and B, and there is no report or evidence that he suffered any discernible or lasting harm as a result. There is harm which he is or may be at risk of suffering. If he is moved from A and B it is predictable and likely that he will suffer short term emotional and psychological harm, and certainly distress, as his attachments to them are broken. The severity and permanence of any harm or damage is less predictable. Dr Harper considers it would be "significant". Ms Parfrement did not agree that it would necessarily be "significant". All professionals agree that the already embedded blueprint is likely to enable him better to attach to the aunt than if he had not already

experienced such good attachment and security, which tends to mitigate or lessen the risk of enduring or significant harm. There is also harm which he is at risk of suffering if he remains with A and B. This is more speculative but must be factored in to the decision. That is the harm which he may suffer in his adolescence, teenage years, or adult life as he increasingly learns and appreciates that he is an adopted child who could have been brought up within his own genetic paternal family, who wanted to care for him and who, in the case of the aunt, was well able to care for him. It is possible that there could be some contact, indirect or possibly even direct and face to face, between him and members of the paternal family. It is uncertain whether the long term effect of such contact would be to mitigate the harm or, indeed, to intensify it as he acquires a growing awareness of what he has missed.

91. (Paragraph (c)). This ties in with consideration of the likely effect upon C throughout his life of having ceased to be a member of his original family and become an adopted person. The point needs to be made that, whatever the outcome of this hearing, he has already ceased to be a member of his maternal original family. He does, however, have a real and entirely viable opportunity to become a psychological member of his paternal original family. I accept the point made by Mrs Hassall, and referred to in paragraph 83 above, that when C becomes older and learns that he could have had, but has been deprived of, a life with his natural paternal family, that is likely to have a negative psychological impact on him. He could be told (in sensitive and age appropriate ways) that his father showed little interest in him during the first year of his life. But he would need also to know (if only by one day reading this judgment, if he wishes to do so) that from the age of about 12 months his father was fighting hard for him to be cared for within his original paternal family.

92. (Paragraph (f)). C's relatives include his father (for the purposes of section 1, see section 1 (8)), his aunt (and the several other aunts and uncles), his paternal grandmother, and his half sister, F. Currently he has a legal relationship with all of them but no psychological relationship with any of them. His father and the aunt have a very clear and strong wish regarding him that he be brought up within, and in contact with, his extended paternal family. The aunt, who is a relative, does have the ability and willingness to provide him with a secure home and environment in which he can develop, and strongly desires to do so. She can be given, by or through Rotherham, the intensive training and support she would need as C transfers his embedded attachments from A and B to her. If he lives with the aunt, there is a high likelihood of psychological relationships being created and then continuing between C and his father, his half sister, F, his paternal grandmother and other paternal relatives, and these relationships are likely to have real value to him. Although A and B have said that they are open to considering forms of contact, including possibly direct contact, between C and members of the paternal family, including his father, such contact is likely to be infrequent, closely supervised, and not such as to create any real psychological relationship.

93. A particular point does arise concerning half siblings. As well as his paternal half sister, F, C does have two other genetic half siblings, being the adopted maternal half siblings. These are no longer in any legal relationship with him, having been adopted, but the genetic connection of course remains. A and B have said that they are in communication with the adopters of those two children and that they envisage that if C is adopted by them there may be some contact between him and those

adopted maternal half siblings. It is highly unlikely that there could be contact between him and them if he moves to live with the aunt, since (although they have not been asked) the adopters (about whom I know nothing) of those two children might feel that any such contact was a threat to their confidentiality and security. The loss of some possible occasional contact with his adopted maternal half siblings is, in my view, clearly outweighed by the gain of less structured and more natural relationships within the extended family with his paternal half sister, F.

94. At paragraph 2 of his skeleton argument at the outset of this hearing Mr Power wrote that "… the existing attachment [to A and B] is the overriding welfare factor." I cannot agree. It is a very important factor but it is not "overriding", although it might be if C was older.

95. This case clearly requires taking both a short term and a long term view. C is currently very well placed with "perfect adopters". They are a well trained couple with whom he is very well attached. He is of mixed race. They are both white and share with him that half of his ethnicity. A and B are "tried and tested" as has been said. His aunt and the principal members of the paternal family are black and share with him that half of his ethnicity. The aunt is a single person. She has not been "tried and tested" as a carer for C, but she has been observed as a carer of her own child, G, and thoroughly assessed as entirely suitable to care long term for C. There would be likely to be short, and possibly long term harm if he now moves from A and B to the aunt, but that is mitigated by his embedded security and attachments with A and B, and can be further mitigated by specialist training and support for the aunt, which she will gladly accept. The unquantifiable but potentially considerable advantage of a move to the aunt is the bridge to the paternal original family.

96. It is my firm judgment and view that it is positively better for C not to be adopted but to move to the aunt. In any event, I certainly do not consider that making an adoption order would be better for C than not doing so. Accordingly I must, as I do, determine not to make an adoption order and must dismiss the adoption application. Pursuant to section 24(4) of the Act, I exercise a discretion to revoke the placement order made in respect of the child on 2 August 2013.

97. The care order made on 2 August 2013 now once again has effect. Rotherham, in whose care C again now is, must engage intensively with all the relevant parties, and file and circulate within three weeks a written care plan setting out their plan for C and how they will implement, in the least damaging way, the process of his move from A and B to the aunt. It is impossible for me or any court to micro-manage that plan and process, and inconsistent with the respective roles and duties of the local authority and the court that I or the court should attempt to do so. If (as I sincerely hope will not be the case) any further resort to the court is necessary, application must be made locally to the designated family judge in Sheffield. A copy of this judgment must be given to, and read by, the Independent Reviewing Officer and all social workers having any continuing role with these families.

98. I have found this decision extremely painful, for I sincerely and deeply appreciate the intense grief it will cause to A and B and to their extended families and friends. But I have not, in the end, found it difficult; and, as I said at the outset of this judgment, it is not one which I reach narrowly or marginally. At the directions hearing in Leeds, when I had read few of the papers (and there were several key documents still to

come) and before I had heard any of the oral evidence or argument, I described this as a finely balanced case. By the end, I do not think that it is. I am clear that the welfare of C throughout his life decisively requires that he is not adopted but moves to live with the aunt. It is my duty to make that welfare paramount.