P (A Child) [2014] EWCA Civ 888

Appeal against care and placement orders, in respect of a young child whose parents had relocated to England from Poland prior to her birth, concerning comments made by the judge about the possibility of the child being cared for by members of the extended family in Poland. Appeal allowed.

This was an appeal against care and placement orders in respect of a young child whose parents had relocated to Warrington from Poland prior to her birth. At the age of five months, the child, P, had suffered a non-accidental head injury and at a fact-finding hearing it had been determined that the only possible perpetrator was her father. The care order and placement order were made at the subsequent welfare hearing.

Unusually, however, this appeal focused on an earlier case-management hearing when the judge had made certain comments about the possibility of the child being cared for by members of the extended family in Poland. These comments included:

"MR SEFTON: Your Honour, we have raised with the Local Authority as well as other family members putting themselves forward. The paternal and maternal grandparents have put –

THE JUDGE: Whereabouts are they?

MR SEFTON: They are based in Poland.

THE JUDGE: Yes. There are certain practical difficulties here.

MR SEFTON: Of course, there are practical difficulties.

THE JUDGE: Because, as in the next case, – the parallels are remarkable – without giving you any details, the next family are not from this country, the father has vanished very conveniently and the mother is saying, "He did it. I did not. Let me have my children back" and it might be that they are on the next bus to whether it is Paris, Berlin, Rome, whichever country they are from, where, miraculously, the father will spring up. So England will not wash its hands of children who are here. The [sic] applies to this child as well as in the next case. That is one huge difficulty about considering family members who are natives of and residents in Poland. If you do not like it, there is always the Court of Appeal. Good luck."

MS ROBINSON: Your honour, clearly, a lot of work is going to have to be done in terms of the timetabling of this matter. However, with regards to the extended family members, the Guardian is anxious that there is at least some enquiry made of them because this little girl is Polish and there are going to be significant cultural considerations that have to be borne in mind by this court. I understand that both sets of grandparents are due to visit this country over the course of the next few weeks and the Guardian would like for both sets to at least be spoken to and for some enquiries to be made. I also understand that there was a direction made by you earlier in these proceedings with regards to information from Polish Social Services regarding the father's elder child and that information has, as yet, not been made available. Again, I would ask that that is chased and that that information is available as soon as applicable.

THE JUDGE: Yes.

MS ROBINSON: I do not think there is anything more that I can add at this stage.

THE JUDGE: I am sure what I was saying to Mr Sefton is not lost on you, Ms Robinson, but the Children's Guardian must not think that the panaceatic remedy will be the unimpeachable grandparents from Poland. Poland is one short hop away from Merseyside and I very much doubt that I will be entertaining that as a solution should I come to the conclusion that this injury was non accidental, that it was perpetrated by one or both of the parents, that the other failed to protect or is lying through his or her teeth and in circumstances whereby it is not safe to reunite the family. If it is not safe in this country, it would not be safe in Poland. So, if anybody has the notion that the solution is rehabilitation to a member of the extended family in Poland, I would not share that sentiment in those circumstances. There we are.

MS ROBINSON: But your honour would not be opposed to the Local Authority making enquiries of the grandparents when they are in this country in terms of –

THE JUDGE: No, but what I am saying is, and I direct my remarks to Ms Williams as I do to you, this is a game of

chess, not draughts. Any fool can play draughts and move one step at a time. It takes rather more skill to play chess where you have to think several moves ahead. That is what I am saying. If it sounds like a crude exposition, then I apologise but that is what I have in mind."

The Children's Guardian supported the parents' appeal on the basis that the judge had effectively ruled out the possibility of any placement in Poland at this hearing and the case had subsequently proceeded on this basis. The local authority opposed the appeal and attempted to argue that this had been a misunderstanding and that the judge had not in fact ruled out such a placement at this point. It argued that the local authority had not conducted itself in a manner as to suggest such a placement had been ruled out. However, the unanimous view of the Court of Appeal was that the views expressed by the judge were so firm and sufficiently clear that it was inevitable that the case would subsequently proceed, as it had, on the basis that a placement in Poland was ruled out from this point. The meaning of the judge's words was plain and that was that he had formed a concluded view at this hearing.

The second aspect of the appeal focused on the way in which the local authority had conducted itself. They had failed to meet the maternal grandparents when they had visited the Warrington area, despite telling the court that they would do so. They had then written a letter to the maternal grandparents when they had returned to Poland to invite them to a meeting in Warrington that was to take place three days after the date of the letter. The maternal grandmother had responded to the letter when it was received (which was after the date for the meeting had passed) in an e-mail via the mother but the court had been left with the impression that she had not responded. This was described by McFarlane LJ, giving the lead judgment, as "all in all…. an unsatisfactory process".

The appeal therefore succeeded. The care and placement orders were set aside and an interim care order substituted and the case was transferred to a different hearing centre for a re-hearing of the welfare stage of the proceedings.

Summary by Sally Gore, barrister, **Fenners Chambers**

Neutral Citation Number: [2014] EWCA Civ 888

B4/2014/0667
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT
SITTING AT LIVERPOOL

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 30 April 2014

B e f o r e:

LORD JUSTICE McFARLANE

LADY JUSTICE ARDEN

LORD JUSTICE McCOMBE

IN THE MATTER OF P (A CHILD)

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(Official Shorthand Writers to the Court)

Mr Martin Downs (instructed by Ison Harrison Solicitors) appeared on behalf of the **Appellant**
Ms Frances Heaton QC and **Ms Lisa Houghton** appeared on behalf of the **Local Authority**
Mr T Bannon (instructed by FDR Law) appeared on behalf of the **Children's Guardian**

J U D G M E N T
(As approved by the Court)

1. **LORD JUSTICE McFARLANE:** This is an application for permission to appeal brought by the parents of a child who is still very young. The child a girl, initial A, was born on 1 September 2012 and, therefore, now some 18 or 19 months of age.

2. Until 14 February 2013, there was no concern about the care that A was receiving in the home of her parents. Both of her parents are Polish nationals, but they moved to take up home in England in August 2011 and had become settled here by the time A was born. On 14 February 2013, A was taken to the local hospital in Warrington where subsequent investigations identified that she had sustained a left sided parietal haematoma together with a small subdural haematoma. The conclusion at the time was that this probably was a non accidental injury caused as a result of significant blunt trauma to the baby's head.

3. Arrangements were made for A to be cared for in foster care once she was discharged from hospital. Care proceedings were commenced in the local court by the local authority. The end of the proceedings resulted in the judge, HHJ Dodds, sitting ultimately in the Liverpool County Court, making an order placing A in care of the local authority and authorising the local authority to place her to be adopted. That order was made on 17 December 2013. It is against that order that the parents now seek permission to appeal.

4. The application for permission was considered on paper by Ryder LJ who, given the paucity of information available to him on that occasion, adjourned the case to be heard by the full court as a permission application with the full appeal to follow if permission were granted. That is what my Lady, my Lord and I have undertaken this morning.

5. What is the case about? Well, the case is not about a challenge to the judge's determination as to the factual background. The judge found that the injury sustained by A was indeed a non accidental injury and it had been caused by someone applying blunt force to her. He also found on the facts of the evidence as it was before him that the only possible perpetrator was the father and that it was the father who had inflicted this injury. The judge also found that the parents had been dishonest to the health authorities, to the social workers and ultimately to the court in the way that they had given accounts and then evidence as to the circumstances around the time of A's injury.

6. Albeit that there had been a parenting assessment of the parents which had been so positive that at an early stage the local authority, notwithstanding the injury, had considered rehabilitating A to their care. Notwithstanding those positives, there is no challenge to the judge's decision that A could not and should not be returned to the parents' care at the end of this process.

7. The challenge comes in relation to the judge's and the local authority's approach to the alternatives within the family to provide a home for young A. The judge's order rules out any alternative family placement. The case developed. Unusually for cases under the system, there were a series of almost monthly case management hearings before HHJ Dodds. The chronology shows, as I will develop in short terms, the question of whether or not the paternal grandparents or alternatively the maternal grandparents, both of whom live still in Poland, should be considered as carers was raised at an early stage.

8. The focus of the hearing before this court has been upon a particular hearing conducted before HHJ Dodds on 26 July 2013 at which the possibility of one or the other set of grandparents caring for A in Poland was raised and at which the judge made a number of, on any view, robust observations.

9. The basis of the appeal is put by the parents on the basis that at that hearing, the judge ruled out the possibility of any consideration of any placement in Poland. Alternatively, it is submitted that if the judge simply gave indications of a preliminary view, those were misunderstood and that that misunderstanding led to the subsequent investigations of options being limited to those based entirely within the jurisdiction of England and Wales.

10. Secondly, the appeal seeks to argue that irrespective of the judge's role, the local authority had a responsibility to look to see what family placement options were available and to investigate any that seemed to be potentially viable, particularly whereas here it is common ground now that the maternal grandmother indicated at an early stage that she would wish to be considered as a carer. It is submitted on behalf of the Appellant that the local authority failed in that duty.

11. Having set the scene, I would take up the chronology of the various hearings at 15 April 2013. The order there

records that the father had put his mother forward as what is described as a "kinship carer" and the mother also requested at that hearing that her parents be assessed. At that stage, as I have indicated, the local authority were, in fact, proposing for A to be rehabilitated to the parents' care so there was not a pressing need to consider a plan B placement with other relatives.

12. The judge, however, indicated at the next hearing on 24 June that he was not prepared to allow the local authority to take that course without a fact finding hearing. The parenting assessment was then available. That was positive. At that stage also by the middle of July, the parenting assessment was indicating that both sets of grandparents had requested to be assessed as carers.

13. The court has been told, but has not seen, about an e mail sent from the maternal grandmother to the local authority some time in July. It is said that that was in Polish. It was understood that it indicated that the maternal grandmother was putting herself forward as a carer. The local authority told the court about the e mail and indicated that they were intending to have it translated.

14. It is, in my view, both surprising and regrettable that this rather important document, given that the context of this appeal is about the grandparents and whether or not they did press an application to be considered as carers, is not in the bundle before this court and has not even been seen by the legal team representing the local authority before the court today.

15. We then come to the hearing on 26 July. During the course of that hearing, first of all, the Applicant counsel for the mother raised the question of investigations of relatives in Poland with the judge and then the solicitor for the guardian did so:

"MR SEFTON: Your Honour, we have raised with the Local Authority as well as other family members putting themselves forward. The paternal and maternal grandparents have put

THE JUDGE: Whereabouts are they?

MR SEFTON: They are based in Poland.

THE JUDGE: Yes. There are certain practical difficulties here.

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"MS ROBINSON: Your honour, clearly, a lot of work is going to have to be done in terms of the timetabling of this matter. However, with regards to the extended family members, the Guardian is anxious that there is at least some enquiry made of them because this little girl is Polish and there are going to be significant cultural considerations that have to be borne in mind by this court. I understand that both sets of grandparents are due to visit this country over the course of the next few weeks and the Guardian would like for both sets to at least be spoken to and for some enquiries to be made. I also understand that there was a direction made by you earlier in these proceedings with regards to information from Polish Social Services regarding the father's elder child and that information has, as yet, not been made available. Again, I would ask that that is chased and that that information is available as soon as applicable.

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THE JUDGE: No, but what I am saying is, and I direct my remarks to Ms Williams as I do to you, this is a game of chess, not draughts. Any fool can play draughts and move one step at a time. It takes rather more skill to play chess where you have to think several moves ahead. That is what I am saying. If it sounds like a crude exposition, then I apologise but that is what I have in mind."

I will return to the interpretation of that passage in a short time.

16. The order made on 26 July following that hearing includes the following passage under the heading "Identification of person(s) to be assessed as potential alternative carer(s)":

"The local authority has been contacted by the maternal grandparents. It is understood that the maternal grandmother and paternal grandmother will be visiting the UK in August/September this year and the local authority will arrange to meet with them."

17. The chronology moves on. It is apparent that the maternal grandmother did come to England in September 2013, but the paternal grandmother did not. The grandmother attended one of the mother's contact visits. The local authority seem to have been taken by surprise by that and stipulated that there should be no further contact. Indeed, the mother was told that if the grandmother was brought to contact again in the future, the police would be called to remove her.

18. It is common ground that the local authority did not seek to meet with the maternal grandmother as indicated in the order, but equally, the local authority point out to this court that the maternal grandmother took no step to set up a meeting with the local authority. She then went back to Poland.

19. On 1 October, the local authority wrote a letter to the grandparents. It is accepted that the maternal grandmother received such a letter. The letter was sent on 1 October and it is said to have been received by the grandmother in Poland on 8 October. Again, regrettably, no party has submitted a copy of that letter to this court. That would seem to me to be a crucial document for any court at appellate level to consider when the issue is why the grandmother did not take particular steps in the proceedings and what the local authority were offering to do at that stage.

20. The only information we have comes from Mr Downs on his instructions from the grandparents who he has met this morning for the first time when they have attended this court, all four of them. He has been told that the letter received on 8 October invited the grandparents to a meeting in Warrington at the Social Services' office on 4 October.

21. Again, the fact that we do not have that letter is, in my view, striking, but if it is the case that the local authority, having known that the grandmother was physically in their parish, as it were, for a week or two in September, should write on 1 October and invite her to come to a meeting in their office three days later would seem to me to be a counter productive step and one unlikely to move matters further forward.

22. To take the chronology on, the fact finding process was conducted before HHJ Dodds on 9 October. He concluded as I have indicated. The order includes this reference to the grandparents:

"The maternal grandparents have been written to and contacted by e mail, but have failed to respond."

23. We have been told this morning that that is not necessarily a complete account of the situation. It will be recalled that it was 8 October, the day before the hearing on 9 October, that the grandmother says she received the letter from the Social Services.

24. We have now been told about an e mail sent on 8 October by the mother to the social worker in English which seems to be the result of some form of electronic translation process, but in terms draws attention to the fact that the letter was received and looked to establish a meeting on 4 October, which obviously had not been viable because of the passage of time spent in dispatch. So it was not correct, in my view, for the court to have been given the understanding that the grandmother had failed to respond to the letter sent to her.

25. Although I fully accept that the legal team representing the local authority on 9th and maybe even the social worker

if she had not checked her e mail inbox on the morning of the hearing were unaware of the response. The fact that the grandmother had responded in those terms via the mother does not seem to have been communicated to the court at a later stage so that the understanding expressed in that order was corrected.

26. But it is certainly the case that from that time onwards, 9 October, the Polish grandparents, if I can call them that indicating their geographical location, did not seek or did not make any direct contact either with the court or the local authority to seek to be assessed as carers.

27. What did happen was that the parents fought their case on a parallel basis, first of all seeking, despite the findings, to have A rehabilitated to their care, but also to ask for an uncle who did live in England to be considered as a possible option with his wife as a carer. That came to nought when he and his wife withdrew. The final fallback position was that the paternal grandmother put herself forward as a carer in England, offering to move from Poland, which has always been her home, to Warrington to undertake that task.

28. At the final hearing, the judge, as I have indicated, ruled out any option other than a move for A towards adoption. He made the final care and placement for adoption orders that I have described. We have now been told, as we sit here five months later, that a placement and, indeed, a culturally appropriate placement has been identified for A. That has been put on hold awaiting the outcome of this appeal.

29. Having set the scene, it is necessary now to go back to what seems to me the pivotal hearing, which is 26 July 2013, and the passage within it that I have already set out that fell from HHJ Dodds. The submissions that we have heard are from the parents and from the guardian to the effect that this was a very clear decision from the judge, albeit in short terms, that he would not contemplate a placement outside England and Wales. To counter that, Ms Heaton submits that that was not the judge's intention. That was not the purport of what he had to say, but that what might have happened was that there was a misunderstanding.

30. Looking at the words as they appear to me solely from the transcript, which, whilst it sets the words down, does not, of course, give the flavour and manner of delivery, the meaning is plain. It is hard to consider an alternative view for the judge at two or three places expresses a final view against countenancing placement of this child in Poland.

31. In particular, at the earlier issue where the judge compares this case to another case in his list, he says that there is a huge difficulty about considering family members who are natives of or resident in Poland. He then says this:

"If you do not like it, there is always the Court of Appeal. Good luck."

Statements of that sort indicate that he has formed a concluded view and that the only way of revisiting that issue is to go to this court.

32. Again, later in the passage in which the judge has engaged in submissions from the advocate for the child, he is plain:

"The children's guardian must not think that the panaceatic remedy will be the unimpeachable grandparents from Poland."

"If it is not safe in this country, it would not be safe in Poland."

He then concludes that by saying:

"There we are."

33. Finally, the passage in which the judge indicates that he regards the process as being a game of chess rather than a game of draughts with the court having to "think several moves ahead". That again, to my mind, although less clearly, is the judge indicating that he is looking at the end game, as it were, and looking at the prospects of ever contemplating a placement in Poland.

34. Ms Heaton for the local authority accepts that if the judge had ruled out the option of placement with grandparents, whether be they be in England or Poland, at this early stage of the process, he would have been in error and the intervention by the judge at that stage would not be supportable. I agree that it would be a fundamental error for a judge to give such a very firm conclusion at this early stage, as it was, of the process.

35. Ms Heaton makes the attractive submission that this was a misunderstanding. She relies upon a number of factors in making that submission. First of all, she says on instructions that the social workers never understood the judge to be ruling Poland out. Secondly, the order itself on that day, as I have already described, indicates that the local authority will be meeting the grandmothers when and if they come over to Warrington during the course of August and September. Thirdly, they wrote to the grandmothers to try and engage them in the process in October. Fourthly, without any limitation, each of the orders of the court both before this hearing and subsequently, records that the family should be putting forward anybody that they wish to have considered as alternative carers and that if the judge had ruled Poland out, then the order would reflect it.

36. I understand those submissions. They are there to be made, but equally, the evidence also includes the fact that from the beginning of October onwards these grandmothers, particularly the maternal grandmother, who had been putting themselves forward simply stopped doing so. They took no further step. Then very strikingly in a way that led my Lord McCombe LJ to describe it as bizarre, the paternal grandmother contemplated dislocating her entire life to come to live in Warrington to care for the child. It is really very hard to understand why she would have put herself forward for that option unless she had understood that placement outside England and Wales had been ruled out.

37. This morning Mr Downs has taken instructions from the grandparents. They have confirmed to him that after the July hearing they had understood that only English options would be considered.

38. Finally in this context, we have the submissions by Ms Bannon on behalf of the children's guardian. I quote from her skeleton. Referring to the July hearing, Ms Bannon says this:

"The judge made it clear to all that rehabilitation of the child to Poland was not an option and this set the backdrop against which all placement options were considered."

39. Now, that description of the guardian's position is, we are told, a surprise to the social workers. Equally, Ms Bannon tells us that the social workers' surprise at what she has said is also a surprise to the guardian.

40. Be that as it may, even if I am wrong in interpreting the judge's words as describing a clear predetermined and concluded view on the matter, it is plain that there was at the very least a misunderstanding about it. Some misunderstandings in proceedings are inevitable. Where, however, the misunderstanding leads to potential carers for a very young child who are members of her family not being considered as possible long term providers of a home for her and she moves on to adoption, it is hard to underestimate the significance of the impact of that misunderstanding, particularly given that the judge on the information before him took as a base plate the fact that they were "unimpeachable" grandparents.

41. So it seems to me that the parents succeed on the main basis upon which their appeal is argued; namely, that the process that was undertaken on 26 July was substantially in error and led to the case being conducted in a manner which was inappropriate and had ruled out at an inappropriately premature stage an option which should have been given normal assessment and full consideration.

42. Of course, nobody appealled what they understood to have been the judge's determination in July. The parents did not appeal and the guardian did not appeal. With hindsight, the guardian readily says that she would probably or should probably have considered an appeal at that stage. It is regrettable and it is an object lesson for the future for parties who find themselves in such a position that a prompt, early appeal on this sort of point at that stage is to be seriously considered. But despite the delay in appealing, in my view, it would be wrong for this court simply to nod through what seems to me to have been a fundamental error in the conduct of the case management stage of the proceedings.

43. Moving more swiftly to the second part of the appeal; namely, the role of the local authority. The case as presented in the skeleton argument on behalf of the local authority and indeed developed early on in her submissions by Ms Heaton before us is in straightforward terms that simply the maternal grandmother and paternal grandmother failed to put themselves forward as carers to the local authority. The skeleton says this:

"There has been no approach to the local authority by the grandparents putting themselves forward as carers of A in Poland or on their behalf by the parents' solicitors."

44. The chronology that I have described shows that that is not a correct description of the situation. The grandmothers had put themselves forward at the early stage I have described and, indeed, there was then the attempt to engage them by e mail and letter that took place in the summer and early autumn.

45. Given the importance of seeing whether, on the local authority's case, a judge, on their case, had not ruled out

whether Poland and the grandparents in particular were an option, it is plain to me that the local authority fell well short of what was required of them. Having told the court in explicit terms in the order that they would meet the grandparents if they came over to this country in August or September, they failed to do that.

46. The chain of correspondence, meagre as it is, was something that was designed to fail. To send a letter to Poland on the date of 1 October to try and set up a meeting in Warrington on 4 October was never going to produce an effective result. It came after the golden opportunity of the lady being present in Warrington had only ceased to exist a week or two earlier.

47. Finally, the local authority in their submissions rely upon the fact that the parents were not putting the grandparents forward in the autumn hearings before HHJ Dodds. But part of the local authority's case was that the parents were in denial about the injury, that they were unreliable and they were dishonest. Considering that the whole process is designed to plan for the life of a vulnerable young baby, for the local authority to rely upon the parents' engagement in the process and do nothing themselves to take up the interest that had been shown by the grandparents is, in my view, a failure on their part to deliver what this young child required.

48. So all in all, very regrettably this was an unsatisfactory process, both in court in front of the judge and out of court in terms of the local authority's actions. Given the status of what is involved, namely, the future planning for the entirety of this young person's life, it seems to me inevitable that this appeal should be allowed. The care order and the placement for adoption order should be set aside and replaced for the time being by a fresh interim care order.

49. During the course of submissions, we have been helped by each counsel in contemplating how matters should move on from today. It is agreed that there will have to be a complete rehearing of the welfare stage of these proceedings, the findings of fact having been the issues focused upon assessment of the grandparents.

50. It is accepted that because of the perception that the grandparents and the parents will now have about the approach of HHJ Dodds, the process should be conducted before a different judge and at Circuit Judge level. For my part, I am persuaded by Mr Downs, again, as a matter of perception, that it would be better that rehearing were conducted at a different court centre from the centre at which HHJ Dodds sits. Conveniently, Manchester is not that far away.

51. I would direct that the case be transferred to the Manchester County Court initially to be placed on paper before the designated family judge at Manchester, HHJ Hamilton, for him to allocate the case to a judge who will be the case management and hearing judge for the process and for that judge to undertake a case management hearing in the case, if possible by the Friday of next week, which is 9 May. For my part, if my Lady and my Lord agree, I will communicate this afternoon with HHJ Hamilton to alert him to that.

52. So far as the parties are concerned, there is plainly a need for them to communicate with each other in the next day or two, and perhaps today given that they are at court, to identify what steps need to be taken to plan any assessment process.

53. In addition, we are told that the four grandparents who are here in court intend to remain in England for the next few days, presumably in the Warrington area. This would seem to provide a very good opportunity for the social workers in England to engage directly with the grandparents and also for the guardian separately to do so before they return to Poland. Much can be achieved this week both forensically and in terms of contact with the grandparents. It needs to be achieved because the impetus must be to come up finally with a settled plan for this child as soon as possible.

54. For the reasons I have given, I would allow the appeal and make the orders I have described.

55. **LORD JUSTICE McCOMBE:** I entirely agree with what has fallen from my Lord.

56. I cannot, however, leave this case without expressing my disappointment with the turn of events at the hearing on 26 July 2013. There are many pressures in various fields of litigation, none perhaps more so that in family proceedings, for speed and efficient use of resources. However, there are proper limits to robust case management.

57. In my judgment, it is regrettably all too clear from the transcript that we have seen of the hearing on that day that, unfortunately, this judge appears to have closed his mind to any solution for this child's future in Poland. My Lord has referred to the relevant passages of the transcript. There is a distinction properly to be drawn between case management and premature jumping to conclusions. Unfortunately, it seems to me that the judge's conduct of the hearing on 26 July fell very much on the wrong side of that line.

58. For the reasons my Lord has given, however, I agree with the course that he proposes.

59. **LADY JUSTICE ARDEN:** I agree. I accept Mr Downs' submission that "The reality is that two willing sets of grandparents were overlooked because the judge set his face against a placement out of England and Wales".

60. The local authority submits that the social workers thought that the option had not been closed out, but if that is what they thought, then it appears they made no efforts to find out whether there was any possibility of a placement within the wider family in Poland. Nor does it appear from the evidence that they asked what should have been an obvious question: why was the maternal grandmother was proposing to come and live in Warrington on her own in order to be the carer for the child? What was to happen about all her other family commitments in Poland and how long was she proposing to stay?

61. In making these points, I am impressed by the fact that the guardian's solicitor, Miss Robinson, pressed the judge at the hearing in July to no avail, that the guardian herself was present at that hearing and that she formed the view that the judge had closed out the option. At the very least, it suggests that Mr Downs' interpretation was not an unreasonable one.

62. I do appreciate that the local authority have great burdens put upon them, but they are, as Mr Downs submits, subject to a positive obligation under Article 8 to consider ways of retaining a child within the family. That positive duty is owed also by the court. Mr Downs has not cited any authority, but the principle is well known. It is reflected in the decision of the Grand Chamber of the European Court of Human Rights in *TP and KM v the United Kingdom* (Application No. 28945/95). I sat as the UK ad hoc judge on this case.

63. At paragraph 71 of its judgment, and in the context of Article 8 and the margin of appreciation in relation to a local authority's duty to disclose relevant information to the parent of a child who had been taken into care, the Grand Chamber held:

"71. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation, in particular when assessing the necessity of taking a child into care. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child would be effectively curtailed (see, amongst other authorities, the *Johansen v. Norway* judgment of 7 August 1996, Reports 1996 III, p. 1003, § 64)."

64. The judge's observations give insufficient weight to the Convention jurisprudence. Judges have to be very careful in the way in which they express themselves. So if what they are really intending to do is to express a provisional view only to help the parties, they have to underscore, underline and make it clear that it is a provisional view only.

65. This case still has a very long way to go, sadly, before a permanent decision is made about the child's future care and no one is predicting what that decision will be.

66. Finally, I agree with the directions which McFarlane LJ has proposed.

67. I would, therefore, allow the application for permission, allow the appeal and make those directions.