

IN THE EAST LONDON FAMILY COURT

11, Westferry Circus,
LONDON,
E14 4HD

Date: 31st January 2020

Before :

HER HONOUR JUDGE CAROL ATKINSON
(sitting as a Deputy High Court Judge)

Between :

London Borough of Barking and Dagenham

Applicant

- and -

TAN's mother

Mr B

TAN (A Child)

(by his Child's Guardian)

Respondents

Lucy Cheetham for the Applicant Local Authority
Mark Twomey QC and Shaun Murphy for the 1st Respondent (Mother of TAN)
Clive Redley for the Intervenor, Mr B (partner of Mother and proposed Special Guardian)
Marcia Hyde for the 3rd Respondent Child (TAN)

Hearing dates: 28th -29th January 2020

JUDGMENT

HER HONOUR JUDGE CAROL ATKINSON :

Introduction

1. TAN is now just over 4 years old. He has lived in foster care since October 2017. In December 2018 I made findings that his mother had inflicted a traumatic injury upon another child in her care at the time, a baby called Kim. Kim died because of her injuries. This event prompted the removal of TAN into foster care and the issue of these proceedings. Prior to this tragic incident the family were not on the local authority radar. There was no suggestion that TAN was anything other than properly cared for.
2. In July 2019 the mother was convicted of manslaughter after a trial. She was subsequently sentenced to a 6-year term of imprisonment. She is currently serving that term.
3. TAN's father has played no active role in these proceedings. The male figure who featured in TAN's life before he was placed in foster care has been joined as the third respondent, Mr B. He is the mother's partner and has been for some time. He has stood by her throughout these events and significantly has offered himself as an alternative carer for TAN.
4. After the fact finding hearing I found the threshold crossed in relation to TAN. The issue remaining is what orders, if any, I should make to secure TAN's future welfare.

Position of the parties

5. There is now complete agreement between the parties as to the best outcome for TAN. All parties agree that TAN should be placed in the care of Mr B who has been fully and comprehensively assessed. The appropriate means of securing that placement is also agreed. I am urged to make a Special Guardianship order supported with a Supervision Order for 12 months. All parties, save the Guardian, urge me to make the order today. The Guardian does not oppose the making of an order, if I consider that it is in the child's interests to do so. Certainly, she agrees that it is. Her position is that she cannot formally 'recommend' an order is made today because certain checks are incomplete and it is not open to her to make such a recommendation in those circumstances. She argues that I can, however, make the order if I consider it appropriate to do so. Recognising the urgency of the situation, she does not seek an adjournment, nor does she argue that the formalities that she says are absent would present a bar to my making an order.

Decision

6. As I have indicated already, I am quite satisfied that TAN's welfare needs will be best met through his placement into the care of Mr B. The appropriate order to secure the placement is, in my view a special guardianship order. I consider that I must make this order as soon as possible to have the best chance of securing TAN's future with Mr B in this country. The evidence before the court complies with the requirements for making a special guardianship order. If there is anything lacking in terms of DBS checks, I consider that any risks flowing from that are outweighed by the time imperative and the risks flowing from a failure to make this order before 31st January 2020. I do not consider that any other formalities are absent. I also agree that I should make a supervision order for 12 months to secure for them the advice, and assistance of the LBBB during what will be, for TAN and Mr B, a difficult but crucial first 12 months. Let me explain why.

The law

7. The statutory threshold is crossed. TAN's welfare is now my focus and my paramount consideration. I am guided in my assessment of his welfare by the following:

- a. The factors in the welfare checklist;
 - b. The principle that further delay in making a final determination will be contrary to his welfare;
 - c. The obligation to observe the Art 8 rights to respect for family life owed to TAN, his mother and probably also Mr B, given his previous relationship with TAN, and in doing so to make the least interventionist order that the circumstances of the case demand.
8. Although there is complete agreement as to placement, it is nevertheless my obligation to carry out a 'global holistic analysis' of the realistic outcomes for TAN in terms of placement balancing the options one against the other and determining what best meets his welfare needs. Likewise, the making of any orders necessary to secure the position.
 9. It will be convenient to gather the unchallenged evidence together under the headings of the welfare checklist to which I now turn.

TAN's age, sex, background and any characteristics of relevance

10. TAN is only 4 years of age. He has been separated from his mother now for more than half of his life. He was present during the events that led to the issue of proceedings. In the immediate aftermath of T's collapse, he was removed from everything that he knew and loved and placed in foster care. Whilst the foster carers in this case have been excellent, we cannot escape the fact that for this child the placement must have been initially very confusing and distressing. The language and cultural differences will have added to that confusion. He must have been afraid.
11. Having said that, he has settled in that placement and learned to trust his carers. He has formed attachments to them and looks to them to meet his needs. He is described as a happy and placid little boy who dislikes change. He is bright and curious and has a wide range of interests. He attends nursery which he enjoys and is set to start school in September 2020.

TAN's physical, emotional and educational needs

12. TAN needs are the same as any 4-year-old. He needs to be loved, cherished and cared for in a stable and secure placement. From that secure placement he needs to access education and be stimulated to be able to develop physically, socially and emotionally. He cannot remain in his current placement and so he will have to transfer his attachments to another safe adult.
13. It is high amongst TAN's needs that this move of carer should be his last. I have already described the trauma that he must have suffered with the loss to him of his mother. It took him time to settle in his current placement. We have seen the impact upon him of having to temporarily leave the home of his foster carers, to which I will return. The emotional stability of this child is dependent upon him being able to trust that his next placement will be his last.
14. TAN has cultural needs which can only be fully met in a culturally matched placement. During these proceedings the loss to him of his mother and community meant a swift and almost catastrophic loss of his native language; the language used to communicate with his mother, Mr B, his grandmother and the whole of his community. It has taken focused work, and the use of online tools to try and recover some of that lost language but it has not been entirely successful.
15. TAN needs an understanding of his history and he also needs to see his mother and understand that she is not lost to him. In the detailed and comprehensive report containing the essential information required for the making of a special guardianship order, the ISW

assessor highlights the importance to TAN of his native language and the need to develop it further.

TAN's wishes and feelings

16. TAN is too young to express his wishes and feelings. I expect that now, aged 4, were he able to do so he would express a wish not to leave his foster carer but that would be without understanding the implications of such a choice in the longer term and the significance to him as he matures of his mother and his birth family.

Likely effect on TAN of any change in his circumstances

17. The impact upon TAN of having to leave the home of his foster carer will be profound and cannot be ignored. Even though he is moving to the care of Mr B, the man he calls 'daddy', he will equate this move in his mind to yet another loss. We have seen already how he reacts to being without his foster carer. In Sept 2019 he was placed into a respite foster placement for reasons that are not necessary to rehearse. What is important was his reaction to this. He was observably sad and was constantly asking after his foster carer; asking to return to her home. When he did return, he was clingy, following her around obsessively, sniffing her clothes and hair to satisfy himself of her presence. His reaction was such that the local authority provided him with play therapy after the event. It is likely that his reaction will be similar when he moves to Mr B.
18. Of course, the circumstances of that respite care were such that it might have been difficult to provide him with reassurance that he was to return to ameliorate the effect of this loss. In this situation I expect that he will be properly prepared. It will be explained that he is going to live with Mr B and recognising the importance of the foster carer to TAN, Mr B has agreed that contact with her will continue. She will assist with the transfer. All of this will, it is hoped, reduce the distress but it will not remove it completely.

Capability: The mother

19. TAN's mother is now serving a 6-year term of imprisonment. As this was a determinate sentence, she will serve half of that term in prison before she is eligible for release. On her release she will be subject to licence conditions until the end of the term. I cannot predict what those conditions will be but it would not be surprising if they included restrictions around children, given the nature of her conviction. The mother also faces the prospect of automatic deportation once she is released into the community. The automatic deportation is capable of challenge, but it is far from simple and there is no certainty that she will succeed.
20. What this means is that she is physically unavailable to care for TAN and will be for some time, certainly during his timetable. Further, once she is released, her future lacks the certainty needed to secure TAN. It is on this basis that she does not put herself forward as a carer for TAN realising that she is not able to do so.
21. I should add for completeness that there is still a live issue in the case as to the capabilities of this mother to provide care for TAN were she physically available to do so. That issue revolves around the risks that it is said she poses to TAN because of her conviction and the findings that I have made. That issue is a complex one with arguments on both sides regarding the extent to which it is possible to manage the risks safely. I have not been invited to consider that issue, nor could I. The point at which this issue may well need to be considered is too far into the future and beset by too many uncertainties. Nor is it necessary for me to decide it given the other barriers to her being able to care for her son.

Capability: Mr B

22. Mr B has been subjected to a rigorous process of assessment. He has been carefully observed by this local authority during the whole of the proceedings. Initially he was on the side-lines as the focus was on the injuries suffered by Kim and who perpetrated those injuries. Although he was never implicated in the tragic events that led to her death he was investigated by the police and subjected to scrutiny by the local authority as it managed TAN's interim care.
23. Mr B has been the focus of multiple assessments of his parenting capacity. The first in August 2018 was a joint assessment of him and the mother together. Subsequently, he was assessed as a sole carer for TAN. That report was completed in April 2019 but at a time when the couple still hoped that the mother would not be sent to prison. At the same time, he was the subject of a psychological assessment by Dr Derry dated May 2015. Following the mother's incarceration there was another addendum parenting assessment of Mr B completed in November 2019 as he faced the reality of parenting alone. That assessment was swiftly followed by a Special Guardianship Support Package assessment and most recently, there has been a Special Guardianship support plan.
24. These assessments have been largely positive. There has been no suggestion made that he would be unsuitable as a carer for TAN or unsuited to the role of Special Guardian. What stands out about Mr B is his quiet but solid commitment to this little boy with whom he is rebuilding his bond. He is a capable carer who recognises that his parenting skills can be improved and is prepared to learn. Contact has been observed and contained in the reports there are touching descriptions of the developing relationship between Mr B and TAN. He was a father figure for TAN but at a time that TAN probably barely recalls. The challenges that Mr B faces are around the likely reaction of TAN to a move away from his foster carer and the practicalities of his financial, housing and immigration status. I deal with those matters further below. However, I can say that I am satisfied that these are matters that can be managed and are not so pressing as to prevent me from concluding, as I do, that Mr B is a capable, committed and child focused carer who has demonstrated genuine love and affection for this little boy.

Capability: The maternal grandmother

25. The maternal grandmother lives in a country in south east Asian. She travelled to this country to make herself available for the completion of her assessment and to show her commitment to caring for TAN. She has attended court over the last two days. Despite her positive assessment she does not seek to put herself forward in opposition to Mr B. I want to simply record that it was good to be able to see her here supporting Mr B and her daughter and giving TAN the opportunity to see her face to face. I am sure that going forward she will join with the other friends from their community and provide emotional and such practical support as she is able to provide for Mr B as he cares for her grandson.

Any harm TAN has suffered or is at risk of suffering

26. The move to Mr B is not without risk. Those risks, however, are largely practical issues and the need for continued support through what is likely to be a challenging time for TAN.

Housing and finance

27. The LBBB has worked hard on this case. In an entirely child centred fashion, having determined that TAN's best interests were most likely to be met through being placed with Mr B, they have worked tirelessly to create a situation in which he, someone who has no recourse to public funding or support, is able to deliver.

28. The LA has put together a plan for financial support and committed to it. Mr B has virtually nothing of his own and none of the hardware necessary to make a basic life for a child. The LA will assist him in securing funding for essential though basic items. The LA has located a flat for Mr B to live in with TAN. That flat is a studio flat. It is the best that it can provide for the time being.
29. For the avoidance of doubt, the task that Mr B has taken on will not be an easy one. As I observed to him before we parted, it will be very hard. Whilst he will have the support of the foster carer and the LA to affect the best possible transition to his care, we know that TAN will be upset and confused by what is going on. Getting through this transition period will be crucial to the success of the placement. Whilst I would not go so far as to say that without larger more suitable accommodation it will be impossible (because in those circumstances I might not be making an order), I am able to say that the process will more than likely be easier to manage and cope with if the two are able to have space of their own. TAN has his own room at the foster carers. He will be adjusting to the loss of that and of his main attachment figure whilst living with a new carer in very close and potentially oppressive quarters. Likewise, for Mr B to be able to adjust to not working and being in the company of a needy child for most of his time, being able to close a door and have his own space is not a luxury, it is an essential.
30. It has been explained to me, and I completely accept, that the LA cannot find anything larger in its already pressed housing stock. There are many other families in LBBB with similar difficulties and equally pressing housing needs. I accept that too. The LA has assured me, however, that it will keep this situation under review. I am grateful for that and I accept the LA at its word.

Immigration status

31. By far the greatest risk to the safety, security and wellbeing of this child, however, is the uncertainty of his and his carers immigration status.
32. TAN was born in the UK. He is the holder of a UK passport. The evidence that I have, admittedly from the mother, is that TAN's father abandoned her when TAN was a matter of months old. He was a British passport holder. Before abandoning her, he secured a British passport for TAN. She met Mr B when TAN was about 7 months old.
33. In these proceedings, the mother told me that she had approached TAN's father to see if he would come forward and help. I was told that he refused. Despite the issuing of the passport, presumably upon evidence that was accepted at the time, the Passport Office has now raised queries about paternity. It may be that in due course TAN's passport will be withdrawn. This father has been unwilling to step forward to assist knowing that his son is in local authority care. It seems likely to me that he will fail to co-operate with the Passport office. It does not necessarily follow that this is because he is not actually TAN's father though doubtless that is the suggestion that will be made and it is something that TAN can do nothing about. This is an unnecessary and worrying development.
34. The situation is made worse by the fact of Mr B's lack of immigration status. I have had the benefit of excellent expert advice from Kathryn Cronin, of Counsel, supplemented with a document prepared overnight at my request by Ms Abigail Evans, a solicitor from Bindmans. I offer my grateful thanks to them both. In an enormously detailed piece of work concerning an unbelievably complex area of law, made more complex by the uncertain impact of our exit from the EU, I have come to understand the following:
 - a. The loss to TAN of his British Passport will make the securing of both TAN and Mr B's right to remain here more difficult;

- b. If TAN suffers the loss of his British passport as a result of his birth father's reluctance to assist, he will likely be unable to secure nationality of his mother and father's country and be rendered stateless.
- c. Depending on TAN's status, Mr B will be able to avail himself of a number of different routes to secure his permanence here, including the use of the *Zambrano* exception.
- d. There is no certainty as to the impact of the current EU withdrawal timetable on so called *Zambrano* carers who do not hold EEA residence documents;
- e. **Any application for status (as in this case) must be made as soon as possible and if possible, before 31st Jan 2020 (in two days).**

I understand that Ms Evans is ready to start the process as soon as I make my decision. Clearly, if I am to place the child with Mr B then I should do so immediately.

35. Happily, I am also advised that there are good reasons to suppose that Mr B will be successful in his application for permanent status in this country allowing him to remain and care for TAN. However, this is a risk to TAN whilst it remains outstanding. In the event that Mr B is unable to secure his status and he is removed from this jurisdiction, TAN would be left with no one to care for him in this jurisdiction. Being without a permanent carer is a devastating loss for any child but for this child it will be one more in a succession of ever more damaging losses to him and the consequences could be severe.

Contact

36. Contact between TAN and his mother is currently once a month in addition to which when there are special celebrations, additional arrangements are made. That contact is currently supervised at the prison by the social worker. Indeed, I am told that professional supervision of contact is a necessary condition so far as the prison is concerned. The social worker in this case has committed to continuing to supervise that monthly arrangement during the life of any supervision order. I am very grateful to her for that commitment and to LBBB. Yet more evidence of the commitment to support this child after the making of orders placing him in the care of Mr B.
37. If the supervision order expires before the mother is released or Mr B wishes to take TAN to see his mother on a special occasion, or, in due course, more frequently than once a month, the policy in place at the prison will prevent this from happening. That is, unless it can be relaxed. I completely understand the necessity for safe policies and procedures in prisons where there are potential risks to a child. However, I would invite the Governor to consider whether in this instance, after a period of transition, there might be a relaxation of the requirement for professional supervision. I can confirm that from everything that I have read about Mr B and my own observations of him combined with my extensive knowledge of the facts of the case and the events which led to the death of Kim, I am satisfied that he will be capable of supervising contact between the mother and her son. That is what will be required of him when she is released. There is nothing to suggest that having him supervise would heighten the risk to TAN, particularly in the confines of the prison.

Guardian's position

38. After expressing the view at the outset that the best outcome for TAN might be a care order, the Guardian has now amended her position and agrees that the best welfare outcome for TAN is placement with Mr B. Her position is that she cannot 'recommend' an order is made today because certain checks are incomplete and it is not open to her to make such a recommendation in those circumstances, even though, as I understand it, she agrees that this is the best welfare outcome for the child on the current evidence and she agrees the urgency

of the situation. I am not invited to adjourn the case and it is not suggested that the matters raised form an insuperable barrier to the making of an order.

39. The outstanding matters raised by the Guardian are these:
- a. An incomplete DBS check;
 - b. References have not been taken up;
 - c. The SGO assessment should be in 'the prescribed format'.
40. Pursuant to s.14A(6) Children Act 1989, I am entitled, in an appropriate case, to make a special guardianship order even though no application has been made. This provision is referred to in the case of *P-S (Children) [2018] EWCA Civ 1407* as the 'residual power' to make an order of its own motion. It is described as such because this provision empowers the court to make a special guardianship order without the necessity for the applicants to observe the procedural requirements set out earlier in the same section. The point is made by Lord Justice Ryder (at paragraph 54) that the use of this route should not be the norm but there are times when it may be appropriate. This provision adds the special guardianship order to the menu of orders available to the Judge in any family proceedings but it is best practice when the possibility of a special guardianship order arises in care proceedings for those formalities to be observed and if no application is made for the local authority and the court to proceed as if it has.
41. Whilst I can make an order without an application, pursuant to s.14A(11), I 'may not' make a special guardianship order unless I have received a report dealing with the matters referred to in s.14A (8). Those matters are:
- a. The suitability of the applicant to be a special guardian;
 - b. Such matters as may be prescribed by the Secretary of State
 - c. And any other relevant matters
- The matters prescribed are set out in Regulation 21 and the Schedule to the Special Guardianship Regulations 2005 as amended by the Special Guardianship (Amendment) Regulations 2016.
42. In this case, it is right that despite the extensive information and assessments filed in respect of Mr B, there is no document which bears the title 'Special Guardianship Report'. There is such a document filed in respect of the maternal grandmother and others assessed as special guardians. I assume that this is what the Guardian means when she refers to the 'prescribed format'. However, whilst that format is helpful because it is a template for a report which includes all necessary matters, I do not believe that it is the format of the document that is prescribed. It is the content of any report that is prescribed.
43. As to the content or 'matters' prescribed by the regulations I can confirm that I have been through each and every element in order to satisfy myself that I have the information set out in the schedule (as amended and added to by the 2016 regulation). I am content that subject to the points made below about references, I do have all prescribed information within the papers.
44. The taking up of references is specifically highlighted by the Guardian. In fact, it is the reporting of the interviews of those people offering to provide references for him that is the prescribed information. Mr B does not have access to the sort of referees that would ordinarily be available to people whose lives have followed a more usual course. His friends, supporters and the people who know him best and can speak to his commitment and qualities are the people from the south east Asian community with whom he and the mother have surrounded themselves. Some of them have lived below the radar due to immigration

concerns. As observed in the interview of at least one of them, people from within their community fear authority and are reluctant to talk. Despite this there have been extensive interviews with a number of people from this community. Those interviews have begun as assessments of each of them as potential special Guardians for TAN. Once the plan began to emerge for Mr B to take on this role, these individuals have lined up behind him and attended meetings at which their support for him has been the subject of discussions. In an email exchange on this issue between myself and Counsel for the LA, three names were proffered as referees for Mr B on the basis that sufficient material is to be found in the papers to meet this requirement in respect of each. Given the urgency of the making of this order, I invited any objections to this as a way forward. None were made and I can confirm that I am satisfied therefore that the local authority has investigated and interviewed referees in accordance with their obligation under the regulations.

45. Finally, the DBS check. The availability of a full DBS check is not a prescribed piece of information for the purposes of the Reg 21 report. However, it is an unusual case in which one proceeds absent such information. In this case there are very exceptional factors which combine to satisfy me that the order can be made absent a formal 'full DBS check' by which the Guardian means, I assume, an enhanced check.
46. An enhanced DBS certificate will show both unspent and spent convictions, as well as any cautions, warnings or reprimands the applicant has. Enhanced checks are also passed to the local police authority to give them the opportunity, if they deem it relevant, to include any additional information about the applicant that they hold – so called 'soft' intelligence. Checks are also made against various vetting and barring lists to which the police also have access.
47. Mr B is 29 years of age. He has been in this country for 8 years. He came here to study but once his visa expired, he became and remains an overstayer. He has lived below the radar since then as the work that he was doing was illegal. As I have said before, this is the way in which people within his and the mother's community often live. It does not automatically follow that they have more than their illegal status to hide.
48. There have been extensive enquiries made into Mr B's background circumstances. The LA has sought the assistance directly of the MPS from whom all the information contained in the enhanced check is available. The disclosure officer has indicated that there was no trace in police records of Mr B. They have no match for his details at all. It is agreed by everyone that there is little chance that any further information will be revealed through a formal DBS check. Indeed, the parties go further and suggest that it may not be possible to complete and successfully submit an application because of Mr B's status. So, I am not likely to get any more information about him than I already have.
49. Standing back and looking at everything that I know about him, there is nothing that would suggest involvement in criminality (other than the illegal nature of his work). During a lengthy police enquiry into the death of Kim, he was under the police spotlight. There was nothing about him discovered by the police which would cause any concern. It is always a risk proceeding without a DBS check but in this case, I consider that we are unlikely to discover anything more. I consider the risks posed to the child of proceeding with the information in this form to be minimal.
50. I finish by observing that I can only assume that the Guardian was herself satisfied that there were no real risks posed by these matters or else I would have expected her to have made an application to adjourn.

Welfare analysis

51. There is only one option for the placement of this child put before the court. That is placement with Mr B. A placement with Mr B will meet TAN's needs for a loving, committed and competent carer and will enable him to retain his relationship with his mother. He will return to the south east Asian community of which he was originally a part and be able to learn the importance of his culture and its language.
52. I have considered whether a 'live with' order would suffice. I do not think that it would. It seems to me that a special guardianship order is the proper order here. It will give Mr B the right to exercise parental responsibility for TAN to the exclusion of others. It marks out the significance of his role with regard to the child now and in the future. It also brings with it a support package from the local authority and continued involvement quite apart from any separate statutory order.
53. I do, nevertheless, consider it appropriate to make a supervision order in this case for 12 months. The risks that I have set out are in my view manageable. These are practical matters which can and must be resolved and I am satisfied that the local authority has these matters in hand. I am also confident that the local authority has a good plan for the transition of this little boy into the care of Mr B and is alive to the likely stress and strain on both TAN and Mr B of such a significant move for them both. The local authority is committed to supporting Mr B and TAN but I consider that the making of a supervision order to formally fix the LA with the obligation to advise, assist and befriend Mr B and TAN will ensure that there is a continuous focus on the resolution of these problems and by that means a steady eradication of these risks.
54. I endorse the plan for monthly contact as being appropriate initially to ensure that TAN sees his mother but at the same time has the emotional reserves to transition from his foster placement to Mr B. In the fullness of time Mr B may consider that this should increase but that will be a matter for him to manage, with the interests of TAN in mind. I have every confidence that he will have TAN at the centre of his decision making. As I have said, it will be tough going and possibly for a considerable time. However, it will also be a joy. I wish him luck.

See Also: [2020] EWFC B3