In the matter of K (a minor)
Royal Court
16th July, 2014

JUDGMENT
34/2014

Appeal against a decision of the Juvenile Court granting a Community Parenting Order supported by a child's plan which recommended that the child be placed for adoption.

Anonymised Text
16.07.2014

IN THE ROYAL COURT OF GUERNSEY
ON APPEAL FROM THE JUVENILE COURT

IN THE MATTER OF K (a minor)

Hearing date: 23rd and 24th April 2014
Judgment handed down: 13th June 2014
Before: Richard John Collas, Esq., Bailiff

Advocate for the First and Second Appellants:	**Advocate P M Grainge**
Advocate for the First Respondent:	**Advocate K E Hill-Tout**
Advocate for the Second Respondent:	**Advocate S J Bailey**

Legislation, Cases and References relied upon in this Judgment

The Children (Guernsey and Alderney) Law, 2008

The Human Rights (Bailiwick of Guernsey) Law, 2001

In re H and others (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563

In re S-B (Children) (Care Proceedings: Standard of Proof) [2010] 1AC 678

Re R (Care Order: Threshold Criteria) [2010] 1 FLR 673

Herschman McFarlane Children Law and Practice C944.

The Children's Act 1989

In re B (Children) (Care Proceedings: Standard of Proof) [2009] 1 AC 11

In re O (Minors) (Care: Preliminary Hearing) [2004] 1 AC 523

Re L (Guernsey Juvenile Court) (unreported)

In re M (A Minor) (Care Orders: Threshold Conditions) [1994] 2 AC 424

Kennedy v B [1973] SLT 38

In re B (A Child) (Care Proceedings: Threshold Criteria) (SC(E)) [2013] 1 WLR 1911

Kirk v Blackwell (4.GLJ.65)

A v The States of Guernsey and T and K (14 November 2012)

Re G (Children) [2006] 2 FLR 629

ReB [2009] UK SC5

Re G [2003] EWCA 965

Introduction

1. This is an appeal against a decision of the Juvenile Court granting a Community Parenting Order supported by a child's plan which recommended that the child be placed for adoption. In the appeal, the parents of the child raise a number of issues and challenge a number of the Court's factual findings. They also contend that the Court had insufficient regard to the recent progress they had made in addressing their use of illegal and non-prescribed drugs; that the Court was wrong in finding that unless protective measures were put in place, the child was likely to suffer significant impairment to his health and development; that they should have been given a further chance to demonstrate that they could safely parent the child and provide adequate care, protection, guidance and control for him; and that the child's plan was inappropriate and paid insufficient regard to the risks of breaking the relationship between the child and his natural birth family.

2. The parents were represented by Advocate Grainge. Advocate Hill-Tout represented the Department and Advocate Bailey the child, acting through his Safeguarder. Both the Department and the Safeguarder opposed the appeal and asked that the order of the Juvenile Court be upheld.

The Juvenile Court Order

3. On 3 December 2013, the Juvenile Court (Judge McMillen) made an Order under Section 49 of The Children (Guernsey and Alderney) Law, 2008 ("the 2008 Law") that a Community Parenting Order be granted in favour of the States of Guernsey Health and Social Services Department ("the Department") in respect of [an infant] child (to whom I will refer as "K"). In doing so, the Court approved the contents of a child's plan for K dated 25 September 2013, the overall aim of which was stated to be (at para 1.1):

"1.1 The overall aim of the Care Plan is to ensure [K]'s needs will be met now through to adulthood. This plan will enable [K] to be placed with permanent long term carers in a stable, secure and safe family environment where his needs will be consistently met enabling him to reach his full potential."

and at para 1.4:

"1.4 The Department is seeking a Community Parenting Order for [K] on the basis of a care plan for permanence by way of adoption."

4. The parents of K, who I describe as the "Mother" and "Father" respectively and together as "the Parents" filed a Notice of Appeal dated 9 December 2013, followed by an Amended Notice of Appeal and a Further Amended Notice of Appeal dated 25 March and 4 April 2014 respectively. In this judgment, unless stated otherwise, references to the "Notice of Appeal" and to the "Appeal" refer to the Further Amended Notice of Appeal.

Family background

5. It is helpful to note at the start of this judgment that Judge McMillen was already familiar with much of the background circumstances of this family, having delivered a lengthy judgment, handed down on 30 November 2012 ("the earlier judgment"), following a hearing involving three older children referred to as C, J and A. Two of them were half-siblings of the child K and the third was a sibling of the full blood. The Judge's findings in the earlier judgment helped to inform her decision and she quoted at length from the earlier judgment.

6. At the hearing from which the present appeal arises, the Department was also seeking a CPO in respect of A based on a child's plan that he be placed in a permanent alternative family or for adoption, along with his brother K. The Mother's parents were a party to that application as they sought a Residence Order in respect of A. The Judge granted the grand-parents' application which is not the subject of the present appeal and the grand-parents are therefore not a party to this appeal.

The 2008 Law

7. The 2008 Law introduced a significant new legal regime for the protection and care of children. The purpose and objects of the Law are set out in Section 1:

*"**Purpose and objects.***

1. *(1) The principal purpose of this Law is to reform, in respect of Guernsey and Alderney, the law relating to children and their families, in order that suitable provision may be made –*

(a) to protect children from harm, and

(b) to promote their proper and adequate health, welfare and development.

(2) Without limiting the generality of the principal purpose under subsection (1), this Law has the following specific objects:-

(a) the creation of obligations concerning the provision of services for children in need and for children who require care, protection, guidance or control,

(b) the prescription of the duties, powers and rights of parents and others caring for children,

(c) the establishment of a Child, Youth and Community Tribunal, and

(d) the setting of standards, and creation of conditions, which will enable there to be ratified on behalf of Guernsey and Alderney, such international agreements concerning children as the States or the States of Alderney, as the case may be, may resolve."

8. Section 3 imposed a number of duties and responsibilities on a public authority carrying out any function in respect of a child under the 2008 Law. Section 122 of the 2008 Law defined

"public authority" by reference to section 6 of the Human Rights (Bailiwick of Guernsey) Law, 2001 and it therefore includes a court or tribunal. Section 3 of the 2008 Law is as follows:

*"**Welfare of the child and the child welfare principles.***

3. (1) Subject to subsection (3), when a public authority carries out, in respect of a child, any function under this Law, that authority shall –

(a) take into consideration such of the child welfare principles set out in subsection (2) as may be relevant to the circumstances or matter in relation to which the function is being carried out, and

(b) having taken those principles into account, carry out the function, having regard to the overriding principle that the child's welfare is the paramount consideration.

*(2) The principles (the "**child welfare principles**") for the purpose of subsection (1) are –*

(a) that a child's welfare is normally best served by being brought up within his own family and community,

(b) that, where it is not possible for a child to be brought up within his own family or community, his welfare is normally best served by maintenance of regular contact with his family and community,

(c) that no compulsory intervention shall be made in respect of a child, unless it is necessary for the effective provision to the child of care, protection, guidance or control,

(d) that any delay in determining a question about a child's upbringing is likely to be prejudicial to the child's welfare,

(e) that irrespective of age, development or ability, a child should be given an opportunity to express his wishes, feelings and views in all matters affecting him,

(f) that, except where it is shown to the contrary, it is presumed that a child is capable of forming a considered view from the age of 12 years,

(g) that a child in the care of the States is entitled to be provided with, and may expect to be subject to, insofar as is practicable, similar levels of care, protection, guidance and control as would be expected to be provided or exercised in respect of a child by reasonable parents,

(h) that in any case involving criminal activity, or the risk of criminal activity, by a child, the primary purpose of any compulsory intervention shall be the prevention of such activity in both the short and long terms,

(i) that it is expected that parents and any others responsible for a child's welfare will consult and co-operate with one another, and where possible resolve matters by agreement, in an atmosphere of openness and non-confrontation, with recourse to formal proceedings (whether court or tribunal) only as a last resort,

(j) that it is normally in the best interests of a child to have ongoing contact with both parents and it is the responsibility of the parents and any public authority to take reasonable steps to promote such contact, and

(k) that in determining any issue under this Law there shall be no discrimination by any public authority on the grounds of gender, marital status, ethnic or cultural origin, religion, disability, age or sexual orientation.

(3) Subsection (1) does not apply –

(a) where the carrying out of a function in accordance with subsection (1) is likely to cause an immediate risk to the health and safety of any person, in which case the public authority by whom the function may be carried out, shall carry out the function, in such manner, as appears to the authority in question to be reasonable in all circumstances, having regard to –

(i) the requirements of subsection (1), and

(ii) the need to minimise that immediate risk,

(b) where a relevant court makes a variation order under section 97, or

(c) where the function is a decision relating to the prosecution of any criminal offence."

9. Section 4 of the 2008 Law established the child welfare checklist:

*"**The child welfare checklist.***

4. (1) When determining any issue concerning -

(a) the upbringing of a child under this Law, or

*(b) the application of the child welfare principles, a public authority shall,, in particular, have regard to the matters set out in subsection (2) (the "**child welfare checklist**").*

(2) The matters for the purposes of subsection (1) are -

(a) the child's wishes and feelings (in the context of his age and understanding),

(b) the age, gender, ethnicity, cultural background, language, religion and any other relevant characteristics of the child,

(c) any harm the child has suffered or is at risk of suffering,

(d) the child's physical, emotional and educational needs,

(e) how capable each of the parents (or any other person looking after or having parental responsibility for the child) is of meeting the child's needs,

(f) the importance and likely effect of contact between the child and his parents, siblings, relatives and any other people significant to the child, and

(g) the effect or likely effect of any change in the child's circumstances, including the effect of the child's removal from Guernsey or Alderney."

10. Part II of the 2008 Law introduced the concept of Parental Responsibility as defined in Section 5:

*"**Definition of "parental responsibility".***

5. Parental responsibility in relation to a child consists of -

(a) the duties –

(i) to safeguard and promote the child's health, education, development and welfare,

(ii) to provide care, direction, guidance and control, in a manner appropriate to the age and understanding of the child,

(iii) to determine all aspects of the child's upbringing,

(iv) to provide a home for the child or otherwise regulate where the child shall live,

(v) to maintain regular relations and direct contact with the child, if not living with the child,

(vi) to act as the child's legal representative, and

(vii) to safeguard, preserve and otherwise deal with the child's property,

(b) the obligation to perform the duties described in paragraph (a), but only so far as performance of the duties is -

(i) practicable,

(ii) in the interests of the child, and

(iii) consistent with the evolving capacities of the child, and

(c) the right to exercise such powers as are reasonably necessary to discharge the obligation described in paragraph (b), without

interference from any person or public authority except in accordance with this Law or any other enactment."

11. Part VII of the Law entitled "Children Requiring Care, Protection, Guidance or Control", starting at section 35, deals with the circumstances where public authorities may intervene in respect of a child.

12. The next section of relevance to this appeal is Section 35 of the 2008 Law entitled "Compulsory intervention":

*"**Compulsory intervention.***

35. (1) The question of whether compulsory intervention may be needed in respect of a child shall only arise if -

(a) there is, or appears to be, no person able and willing to exercise parental responsibility in such a manner as to provide the child with adequate care, protection, guidance or control, and

(b) at least one of the conditions referred to in subsection (2) is satisfied, in respect of that child.

(2) The conditions for the purpose of subsection (1) are, that on a balance of probabilities -

(a) the child has suffered, or is likely to suffer, significant impairment to his health or development,

(b) the child has suffered, or is likely to suffer, sexual or physical abuse,

(c) the child has -

(i) misused drugs or alcohol, or

(ii) deliberately inhaled a volatile substance,

(d) the child is exposed, or is likely to be exposed, to moral danger,

(e) the child -

(i) has displayed violent or destructive behaviour and is likely to become a danger, to himself, or others, or

(ii) is otherwise beyond parental control,

(f) the child, being of 12 years of age or more, has committed -

(i) a criminal offence, or

(ii) what would be a criminal offence if the child had the necessary capacity, or

(g) the child (being under the upper limit of the compulsory school age) is failing to attend school without good reason.

13. The provisions relating to Community Parenting Orders ("CPO") are in Sections 48 to 54. The meaning and purpose of a CPO is set out in Section 48:

*"**Meaning and purpose of a community parenting order.***

48. (1) A community parenting order is an order made by a relevant court granting the Department parental responsibility for a child.

(2) The purpose of a community parenting order is -

(a) to protect the child from harm and promote his proper and adequate health, welfare and development, and

(b) to enable the Department to make plans for the care of the child until -

(i) he attains the age of 18,

(ii) where appropriate and in accordance with regulations made under section 26(1)(b), he has completed any course of study or training upon which he is engaged after he has attained the age of 18, or

(iii) in the case of an interim community parenting order, the order expires.

(3) An application for a community parenting order may only be made by the Department.

14. Section 49, the section under which the Department's application was made in the present case ("the Department's Application") is entitled "Circumstances in which a community parenting order may be made". In fact, the section does not detail in positive terms the circumstances in which a CPO may be made. Instead, it is expressed in a negative fashion: "a relevant court shall not make a community parenting order unless" … (emphasis added). Consequently, it is not mandatory for a court to make a CPO in any specified circumstances; the court always retains a discretion. The section reads:

*"**Circumstances in which a community parenting order may be made.***

49. (1) A relevant court shall not make a community parenting order in respect of a child, unless -

(a) it has first approved the contents of a child's plan for the child, and

(b) the circumstances described in subsection (2)(a) or (b) apply.

(2) The circumstances for the purposes of subsection (1)(b) are -

(a) where -

(i) at least one of the conditions set out in section 35(2) is satisfied, and

(ii) there is no reasonable prospect of -

(A) the child's parents, or

(B) any other member of the child's family,

being able, and willing, to provide adequate care, protection, guidance and control for the child, or

(b) where, in respect of every person who has parental responsibility for the child -

(i) that person consents to the making of the order, or

(ii) that person -

(A) is not known,

(B) cannot be found, or

(C) is incapable of giving consent."

15. Although section 49 (1) (a) refers to a "child's plan", there is no detailed statement as to what a child's plan must contain. The term is defined in the Interpretation section, section 122, by reference to section 44 (1) (b) of the 2008 Law. Section 44 (1) (b) does not explain what such a plan must involve. The section deals with further provisions in respect of a care requirement that may be imposed by the Child, Youth and Community Tribunal ("the Tribunal") a body created by Part VI of the 2008 Law to perform functions conferred upon it by the Law (see Section 33 of the 2008 Law). Section 44 (1) (b) states:

*"**Further provisions in respect of a care requirement.***

44. *(1) A care requirement may only be made in respect of a child where –*

(a) after consideration of the child's case, the Tribunal is satisfied that -

(i) the question, of whether compulsory intervention may be needed, arises under section 35,

(ii) compulsory intervention is necessary to ensure the provision of adequate care, protection, guidance or control for the child,

(iii) the provisions of subsection (4) are met, and

(b) the Tribunal has approved a child's plan for the child which sets out such arrangements for the child as may be specified by rules of the Tribunal.

16. It may have been intended that the Tribunal would produce some rules detailing what a child's plan must contain but I am told that it has not yet done so.

Applying the legal provisions to the present case

17. In the present matter, the Court had:-

    a) to approve the child's plan;
    b) to establish that one of the conditions in section 35 (2) was satisfied namely that K had suffered, and/or there was a likelihood of K suffering in the future, significant impairment to his health or development;
    c) to be satisfied that there was no reasonable prospect of K's parents or any other family members being able and willing to provide adequate care, protection, guidance and control for him in the future. In fact, no other family members were put forward so the Court was only asked to concern itself with the Mother and Father's abilities and willingness to provide what was required; and
    d) to exercise a discretion whether to grant the order requested, taking account of The Human Rights (Bailiwick of Guernsey) Law, 2000 and the ECHR.

18. If all other facts were established, the Court had a discretion to exercise in deciding whether to make a CPO. The discretion arises from the wording of section 49 of the 2008 Law which, as I have said, does not specify that the court shall make a CPO if any of the criteria and conditions are satisfied, despite the misleading heading in the statute. In exercising that discretion, the Court must have regard to sections 3 and 4 of the 2008 Law namely the child welfare principles and the child welfare check-list having regard to the overriding principle that the child's welfare is the paramount consideration. The Court must also have regard to Article 8 of the Human Rights Convention; the right to respect for private and family life.

Section 35(2) of the 2008 Law

19. In the present Appeal, there are two legal issues on which I asked counsel to address me, notwithstanding that they were all in agreement with the legal interpretation adopted by Judge McMillen. The issues relate to section 35 (2) of the 2008 Law:

    i) the standard of proof required to prove the likelihood of future impairment to the child's health and development; and
    ii) the date at which the facts need to be established.

20. Regarding the former, Judge McMillen said the following at paragraph 30 of her judgment:

"30. I am satisfied that the burden is on the department to satisfy me on a balance of probabilities that the facts are made out, (as per Re S-B (Children) [2010] 1 FLR 1161). I concur with the parents' submissions in this regard and also that the phrase "likely to suffer" should not be equated with the balance of probabilities. This was an issue that I have previously determined in fact in the (finding of fact) judgment relating to C J and A that I handed down in November 2012 and I have applied the law as set out in paragraphs 342 and 343 therein:-

> 342. *I am satisfied that the standard namely the "balance of probabilities" has to be applied to the wording "has suffered" in s35 (2) (a) and (b) and also to any facts that the convenor must prove before the court considers whether the child is "likely to suffer" (the events as defined in S35(2) (a) and (b)) but if the court considers that the facts on the balance of probabilities have been established then the next stage is to consider whether those facts mean that there is a "real possibility" that the events referred to in S35 (2) (a) and (b) will occur in the future.*

> 343. *I am satisfied that the meaning of likely is "real possibility "of future harm applying the facts having been determined to the standard of balance of probabilities."*

21. (The reference to three other children, C, J and A, is a reference to the two half siblings and one sibling of the full blood of the child K.) The legal analysis in that earlier judgment is at paragraphs 331 to 345 thereof. The Judge had been referred to, and had accepted, the interpretation of similar English legislation considered in In re H and others (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, In re S-B (Children) (Care Proceedings: Standard of Proof) [2010] 1AC 678, Re R (Care Order: Threshhold Criteria) [2010] 1 FLR 673 as well as commentary in Herschman McFarlane Children Law and Practice C944.

22. The question of the standard of proof required to establish the conditions specified in Section 35 (2) of the 2008 Law has not previously been considered by the Royal Court (as far as counsel and I are aware). It is however an important issue and I asked counsel to address me on it even though none of them was taking issue with Judge McMillen's decision in this regard.

23. The English cases cited were concerned with the correct interpretation of section 31(2) of The Children's Act 1989 ("the Act"):

"A Court may only make a care order or supervision order if it is satisfied –

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

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

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

(ii) the child's being beyond parental control."

24. Whereas the relevant part of section 35 (2) of the 2008 Law reads:

"(2) The conditions for the purpose of subsection (1) are, that on a balance of probabilities -

> *(a) the child has suffered, or is likely to suffer, significant impairment to his health or development,*
>
> *(b) the child has suffered, or is likely to suffer, sexual or physical abuse,*

(I have omitted sub-sections (c) to (f) as they are not relevant to the present appeal.)

25. There are differences in the wording, including:-

(a) the 2008 Law includes the words "on a balance of probabilities";
(b) the Act used the present tense "the child is suffering" where the 2008 Law used the past tense "the child has suffered";
(c) the Act refers to "harm" and "significant harm" where the 2008 Law refers to "significant impairment to his health or development"; and

(d) the Act requires the Court to be satisfied that the child's suffering is attributable to the care given, or likely to be given to the child or the child being beyond parental control. Instead, section 35 (1) (a) provides that the question of compulsory intervention shall only arise if "*there is, or appears to be, no person able and willing to exercise parental responsibility in such a manner as to provide the child with adequate care, protection, guidance or control".*

The standard of proof

26. Section 35 (2) requires proof of facts establishing either historic, or a future likelihood of, impairment to health or development or abuse. The facts have to be established by the Department (being the only person who can apply for a CPO, as per section 48(3)). The standard of proof is the civil standard. As the House of Lords held in In re B (Children) (Care Proceedings: Standard of Proof) [2009] 1 AC 11:

"that since care proceedings were of a civil nature, intended not to punish or deter but to protect a child from harm, and since the consequences for the child of a wrong decision were equally serious either way, the standard of proof applicable in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act was neither more nor less than the balance of probabilities , irrespective of the seriousness of the allegations or of the consequences". (I quote from the headnote at page 11H).

In section 35(2) of the 2008 Law, the legislature expressly inserted a reference to the balance of probabilities but, in my view, that merely confirms what the position would have been in any event and does not alter the well-recognised legal position.

27. As far as historic suffering is concerned, the application of the standard of proof to a set of facts is easily understood by judges and lawyers. To establish *"on a balance of probabilities the child has suffered…"* is the type of fact-finding activity in which courts are engaged on a daily basis.

28. However, as far as the risk of the child suffering future harm is concerned, the requirement to find that *"on a balance of probabilities a child is likely to suffer …"* is a phrase capable of two meanings. The more obvious meaning is that suffering is "more likely than not" to be inflicted in the future. That is how I read it at first and I believe is how Judge McMillen initially understood the sub-section according to what she said in paragraph 339 of the earlier judgment referred to above.

29. However, it is capable of a second interpretation, as Lord Nicholls explained in Re H (Minors) at page 584G:

"In everyday usage one meaning of the word likely, perhaps its primary meaning, is probable, in the sense of more likely than not. This is not its only meaning. If I am going walking on Kinder Scout and ask whether it is likely to rain, I am using likely in a different sense. I am inquiring whether there is a real risk of rain, a risk that ought not to be ignored. In which sense is likely being used in this subsection?

In section 31(2) Parliament has stated the prerequisites which must exist before the court has power to make a care order. These prerequisites mark the boundary line drawn by Parliament between the differing interests. On one side are the interests of parents in caring for their own child, a course which prima facie is also in the interests of the child. On the other side there will be circumstances in which the interests of the child may dictate a need for his care to be entrusted to others. In section 31(2) Parliament has stated the minimum conditions which must be present before the court can look more widely at all the circumstances and decide whether the child's welfare requires that a local

authority shall receive the child into their care and have parental responsibility for him. The court must be satisfied that the child is already suffering significant harm. Or the court must be satisfied that, looking ahead, although the child may not yet be suffering such harm, he or she is likely to do so in the future. The court may make a care order if, but only if, it is satisfied in one or other of these respects.

In this context Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not. Strictly, if this were the correct reading of the Act, a care or supervision order would not be available even in a case where the risk of significant harm is as likely as not. Nothing would suffice short of proof that the child will probably suffer significant harm.

The difficulty with this interpretation of section 31(2)(a) is that it would draw the boundary line at an altogether inapposite point. What is in issue is the prospect, or risk, of the child suffering significant harm. When exposed to this risk a child may need protection just as much when the risk is considered to be less than 50-50 as when the risk is of a higher order. Conversely, so far as the parents are concerned, there is no particular magic in a threshold test based on a probability of significant harm as distinct from a real possibility. It is otherwise if there is no real possibility. It is eminently understandable that Parliament should provide that where there is no real possibility of significant harm, parental responsibility should remain solely with the parents. That makes sense as a threshold in the interests of the parents and the child in a way that a higher threshold, based on probability, would not.

In my view, therefore, the context shows that in section 31(2)(a) likely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case."

30. Lord Goff and Lord Mustill concurred with the speech of Lord Nicholls, with Lords Browne-Wilkinson and Lloyd dissenting. However, in the later decision In re S-B, re H (Minors) was applied without dissent, having previously been confirmed In re O (Minors) (Care: Preliminary Hearing) [2004] 1AC 523. In In re S-B at page 695E, Baroness Hale held that:

"a prediction of future harm has to be based upon findings of actual fact made on the balance of probabilities. It is only once those facts have been found that the degree of likelihood of future events becomes the "real possibility" test adopted in In re H".

31. Despite there being other differences between the two sections in respect of the standard of proof, I gladly adopt the reasoning of Lord Nicholls quoted above and the other English decisions to which I have referred. Thus the second limb of the test in section 35 (2) requires the court to be satisfied *"on a balance of probabilities that there is a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity"* of the feared significant impairment (in respect of 35 (2) (a)) or of the feared abuse (in respect of 35 (2) (b)). Expressed in that way, the test sounds rather clumsy but, the legislature having qualified section 35(2) by expressly inserting into it "the balance of probabilities", that is how it must be read. What the court is required to do is to *"evaluate the element of chance. For an event to be 'likely', there does not need to be at least a 50 percent chance of its occurrence"* (paragraph C944 of Hershman McFarlane Children Law and Practice).

32. Before the court can consider the risk of future impairment, the court has to have established, on the balance of probabilities, the facts that found the degree of likelihood. That is how Judge McMillen interpreted the section and she was, in my view, correct to do so. I am grateful to counsel for assisting me in reaching the same conclusion.

The relevant date

33. In the Juvenile Court, the parties accepted, and the Court agreed, that the relevant date for establishing the facts to show that either the child has suffered or is likely to suffer impairment to health or development (and the same date would apply if abuse was alleged) was not the date of the hearing but the date when protective measures were first taken. On the facts of this case, the latter was one of three possible dates: (a) the date of K's birth, ["B-day"]; (b) [a date nine days later, being] the date on which the Parents gave undertakings not to remove K from the hospital, ["B-day +9"]; or (c) [or two days later, being] the date the first Interim CPO was granted,[B-day+11]. It was agreed that nothing material changed between those dates so the Judge did not have to choose between them.

34. The choice of relevant date was not raised by any of the parties as an issue on this appeal; they all agreed the Juvenile Court had taken the correct approach. However it was raised by me for several reasons: the issue had not previously been considered by the Royal Court or any higher court; also, I interpreted a passage in the earlier judgment, at paragraph 60, as an invitation for the Royal Court to look at the question; and because the Parents' main contention in the case was that there had been a material change in the intervening period between [those dates] and the date of the hearing principally in their attitude to drug taking, it was a potentially material question in the present appeal.

35. In taking the earlier of the two possible dates, the Juvenile Court was following the approach it had adopted in the earlier judgment and in an unreported case in the Juvenile Court referred to as Re L which I understand it has followed in other similar cases. It is based on decisions of the English courts in relation to care proceedings brought under the 1989 Act, the leading decision being In re M (A Minor) (Care Orders: Threshold Conditions) [1994] 2 A.C. 424 where their Lordships held that:

> *"where a local authority applied under section 31 of the Act of 1989 for a care order on the basis that a child was suffering or was likely to suffer significant harm after making interim arrangements for his protection which had been continuously in place and were still in place at the date of the disposal of the application, the relevant date at which section 31(2) required the court to be satisfied of the existence of the threshold conditions was the date on which the local authority initiated the protective arrangements; but that it was not possible to look back to that date where, after the initiation of protective arrangements, the need for them had terminated".*

36. It could be argued that Re M is distinguishable from the present case and the Law in Guernsey. The child concerned had been taken into protective care and removed from the source of the risk alleged. The question was whether it could be said he "is suffering" in the present tense (being the tense used in section 31(2)). Lord Templeman expressed the issue in the following terms at page 440A: *"This preoccupation with the present tense involves the proposition that if a child suffers harm and is rescued by the local authority, a care order cannot be made in favour of the local authority because it can no longer be said that the child is suffering harm and if the parent who has caused the harm is dead or in prison or disclaims any further interest it cannot be said that the child is likely to suffer harm."* It was because of the use of the present tense in section 31 of the Act that the courts had to interpret it as they did or they would have frustrated the whole purpose of taking interim protective measures on behalf of a child at risk.

37. The Law of 2008 does not use the present tense in section 35(2); the requirement that has to be proved is that the child **has suffered**. It may be that the intention of our legislature in altering

the tense was to avoid the very difficulty that in England had had to be resolved by the highest court in the land. In my view, the change of tense means that the English decision is not necessarily persuasive so that we are free to interpret the Law of 2008 in such manner as is best for Guernsey.

38. Should Guernsey take the relevant date to be the date protective measures were taken or the date of the hearing? The difference is only significant if there has been a material change in circumstances in the meantime. It was potentially relevant in this case because of the Parents' submission that they had not used non-prescribed drugs during that period of time and had made progress with the professionals in improving their personal circumstances. In fact, it made no difference to the outcome because the approach of the parties and of the Judge was to take those factors into account when looking at the section 49 factors.

39. For those reasons, the issue is not relevant to this appeal but nevertheless, having raised it with the parties I will express a view. It is to be noted that the difference in the dates would be relevant if circumstances changed between the two dates and instead of having improved, they had deteriorated. There could be a case where the Department may be unable to prove on the balance of probabilities the facts required to establish that when protective measures were taken the child was suffering or was likely to suffer impairment or abuse and thus unable to establish the section 35 requirement but the Department may be able to prove other facts that have occurred during the intervening period that prove that as at the date of the hearing the child has suffered and is likely to suffer impairment or abuse.

40. The Juvenile Court was referred to a Scottish case: Kennedy v B 1973 SLT 38, Lord Justice-Clerk (Grant) was quoted:

"The first question raised by this appeal is whether the Sheriff was right in considering the situation as it existed when he heard the case. As his decision was based on a fundamental change of circumstances between 9th August and 13th September 1971, this is a matter of major importance. In many cases no such change may be alleged and the question becomes academic – for example if the ground at section 32(3)(g) is "he has committed an offence", that is a ground which, if factually true at the date of referral, can hardly have altered four weeks later. However, here, however, we are concerned with a situation where the allegation is that the lack of care "is likely" (i.e. in the future) to have certain results. As a general principle I should have thought that in any case where the future welfare of a child is being considered (as it is here) the court should make its decision on the most up to date information that can be laid before it."

Judge McMillen referred to that Scottish case in the earlier judgment but was not minded to follow it because she was not satisfied that the Scottish legislation was sufficiently similar to be persuasive in this jurisdiction. For my part, I have not received full argument from the parties and have not been able to study the Scottish legislation in detail. However I accept the Judge's conclusion in view of her experience in this area of the law.

41. In my view, this aspect of the Guernsey Law of 2008 can be interpreted without recourse to Scottish cases but I recognise that in other instances Scottish law may be helpful given that some parts of the 2008 Law were modelled on the Scottish system. The key to understanding the section lies in the opening words of section 35: *"The question of whether compulsory intervention may be taken in respect of a child shall only arise if…."* Compulsory intervention in the care and upbringing of a child is a significant step; some may say a draconian step to take. It is not to be undertaken lightly.

42. Lord Templeman said in Re M, at page 440B: *"A local authority cannot apply for a care order unless at the date of the application the child is suffering or is likely to suffer significant*

harm. Once the local authority has grounds for making an application, the court has jurisdiction to grant that application". The same is true in Guernsey. The legislature has bestowed certain powers and duties on the Department and on the courts but they can only be exercised if in fact the child is living in circumstances that justify compulsory intervention under section 35 (emergency child protection orders are dealt with in sections 55 onwards to which a different test applies). If such factual circumstances do not exist then neither the Department nor the court have jurisdiction under section 35.

43. If the Department were unable to establish the factual circumstances that justify compulsory intervention under section 35, for example if it could not prove that a child is suffering or likely to suffer abuse at the date protective measures were taken, it could not ask the court to make a CPO on the ground that the child had suffered abuse after protective measures were taken and at a time when the child was in the care of the Department.

44. In short, when the court approaches the section 35 test, it is not answering the question "is the child suffering or likely to suffer as at the date of the hearing". The question for the court is whether the Department and the court have jurisdiction; had the need for compulsory intervention arisen at the date when protective measures were taken under that section? Therefore, in the present case, the relevant date for establishing the facts required to show that K was suffering or was likely to suffer impairment to his health or development was the date when an interim CPO was first applied for, namely B-day+11.

45. For those reasons, I am satisfied that the parties were right to agree that the relevant date was [between B-day and B-day+11] and that the Judge was correct to accept that as the date. The Court correctly looked at whether there had been an improvement in the Parents' ability to care for K in the intervening period prior to the date of the hearing when it addressed section 49 of the 2008 Law.

46. I should perhaps add that I agree with Advocate Hill-Tout's submission made on behalf of the Department that when seeking to establish the section 35 facts it may rely upon evidence that comes to the attention of the Department after protective measures were taken if the evidence relates to the factual situation on and prior to that date. If a wholly new supervening fact has arisen after protective measures were taken the Department cannot rely upon that fact to establish the section 35 test and will have to consider whether to make a fresh application for a new compulsory intervention.

47. Such a situation might arise where (i) a child is taken into care and CPO proceedings are commenced on the basis of a suspicion that the resident parent is neglecting or abusing the child, (ii) whilst the child is in care the resident parent meets a new partner who starts cohabiting and (iii) the Department learns that the child will be at risk if returned to the home because the new cohabitee has a criminal record for sexually abusing children. When the case comes for a final hearing, the court might decide that there was insufficient evidence of neglect and abuse at the relevant date and, if so, it will be unable to proceed to a CPO. That would be the case even though the court will have found that the child is at risk of future abuse because of the supervening fact. Such cases are likely to be rare and can be addressed as and when they arise by, for example, having a separate fact-finding hearing following which the court might discharge any interim CPO but the Department could apply for a fresh interim order based on the new set of supervening facts and apply for a CPO on that basis.

Meaning of "impairment"

48. As I have said, another difference between our Law and the English statute is that the Act refers to "harm" and "significant harm" where the 2008 Law refers to "significant impairment to his health or development"

49. In paragraph 243 of the judgment, Judge McMillen said:

"243. In coming to this decision I have had regard to the parents' advocate final submissions and including the definition of 'significant harm' as set out in "Working together to safeguard children" ."

50. The document referred to was produced to the Court by Advocate Grainge in the earlier hearing involving the other three children and was referred to by Advocate Grainge in her closing submissions in the present hearing. In paragraphs 329 and 330 of the earlier judgment, Judge McMillen said:

"329. The 2008 law does not define 'significant impairment' and I am grateful to Advocate Grainge for referring me to the definition of "significant harm" in "Working together to safeguard children 2010"

"consideration of the severity of ill treatment may include the degree and extent of physical harm, the duration and frequency of abuse and neglect, the extent of premeditation, and the presence of degree of threat, cohesion, sadism and bizarre or unusual elements. Each of these elements has been associated with more severe effect on the child, and/or relatively greater difficulty in helping the child overcome the adverse impact of the maltreatment. Sometimes, a single traumatic event may constitute significant harm, e.g. a violent assault, suffocation or poisoning. More often, significant harm is a compilation of significant events, both acute and longstanding, which interrupt, change or damage the child's physical and psychological development. Some children live in families and circumstances where their health and development are neglected. For them, it is the corrosiveness of long term emotional, physical or sexual abuse that cause impairment to the extent of constituting significant harm. In each case, it is necessary to consider any maltreatment against the child's own assessment of his or her safety or welfare, the family's strengths and support, as well as an assessment of the likelihood in capacity for change and improvements in parenting and the care of the children and young people …

330. Under S122 of the law, "development" is defined as "physical, intellectual, emotional, social or behavioural development"."

51. For the sake of completeness and whilst it is not relevant in the present case, it should also be noted that "health" is defined in section 122(1) of the 2008 Law as meaning "physical, emotional or mental health".

52. In section 31(9) of the Children Act 1989, "harm" is defined as meaning *"**ill-treatment or the impairment** of health or development [including, for example, impairment suffered from seeing the ill-treatment of another]"* (emphasis provided) and "ill-treatment" is defined as including *"sexual abuse and forms of ill-treatment which are not physical"*. In the 2008 Law, the ill-treatment aspect is covered by section 35(2)(b) which specifies sexual or physical abuse.

53. Thus it is clear that when comparing the 2008 Law with the 1989 Act, the words "impairment to health or development" are not to be equated with "harm". In the present case, the Judge was aware of the difference and referred to the definition of "significant harm" quoted above for the purpose of helping to inform her decision on the interpretation of section 35(2); she was not suggesting that the two were synonymous. I agree that the explanation to which she referred is of assistance in that regard.

The section 49(2) (a) test

54. The Juvenile Court had to decide whether one of the circumstances described in section 49(2) of the 2008 Law applied. On the facts of the case, as presented, the question was whether the Parents were *"able, and willing, to provide adequate care, protection, guidance and control for the child".* Judge McMillen correctly looked at that question as at the date of the hearing and thus took account of any improvements in the Parents' circumstances in the period after the commencement of the proceedings, most importantly, in respect of their use of non-prescribed drugs.

55. Judge McMillen noted at paragraph 261 of the judgement that:

"The crux of the case is whether the department have satisfied me ***by applying the tests in section 3 and 4 of the law*** *as to whether the parents are able to provide adequate care, protection, guidance and control for K* ***within a timescale that is suitable to his needs****."*

I have added emphasis to two passages on which Advocate Grainge addressed me on behalf of the Parents.

56. She submitted that the Juvenile Court was wrong to apply the tests in section 4 of the 2008 Law to the section 49(2) question which she said was to be decided solely on the evidence and on the balance of probabilities. She said that sections 3 and 4 and Article 8 of the ECHR should be considered only at the discretion stage of the decision if all other tests supported the making of a CPO as sought.

57. In response, Advocate Hill-Tout drew attention to the definition of "function" in section 122(1) of the 2008 Law as including "a power and a duty". She said that every determination the court makes pursuant to the legislation, including a pure finding of fact as well as an evaluative decision and an exercise of discretion, is a function. Section 3 applies to any public authority, including a court or tribunal, carrying out a function. Hence, she submitted, sections 3 and 4 apply to each and every determination of the court, including findings of fact, and are pervasive.

58. For my part, I fail to see why and how the court would take account of the child welfare checklist when making a pure finding of fact. A fact is a fact, whatever the child's needs. I can however see why the child welfare checklist will help to determine the facts that the court will need to establish in order to decide whether a child is, or is likely to suffer, impairment or whether his parents can adequately provide for his care and guidance.

59. Take by way of example a hypothetical allegation by the Department that a child's parents are, inter alia, not providing for the educational needs of a child because the child never attends school on a Friday afternoon in the winter. The parents' response is that they, and the child, are orthodox Jews who strictly observe the Sabbath and require the child to return home at lunch time on the Friday in order to enable the family to complete their religious rituals before sunset. Having regard to the checklist, the court will have to make findings as to both the religious background of the child and its educational needs. Having made those findings, it applies the checklist when evaluating whether the child is suffering impairment to its development and whether the parents can adequately care for it in the future. Those evaluative decisions will involve a balancing exercise, balancing competing elements of the checklist. The court will have to state that it has had regard to sections 3 and 4 of the Law and to explain how it reached whatever conclusion it decides is in the interests of the child.

60. If Advocate Grainge's submission is correct, sections 3 and 4 are only to be considered at the final, discretion, stage of the court's decision-making exercise. The court would decide that the child has suffered and is likely to suffer impairment to his development by never attending Friday afternoon school and that the parents are unable to provide adequate care because they will never send him to school. Then, at the final stage of the process, it would decide, in its discretion, that there is no requirement for compulsory intervention because, taking account of the child welfare checklist, the child is an orthodox Jew and on balance intervention would be wrong. Such an approach must, in my view, be wrong. The correct approach must surely be for the court to have regard to the checklist and to the child's religion both when deciding whether he is suffering or is likely to suffer impairment to his development and also when considering whether the parents can adequately provide for his care, as well as at the discretion stage.

61. In other words, I agree that sections 3 and 4 are pervasive in that they apply to every evaluative decision the court must make and they apply to its exercise of discretion. But, I do not see how they apply to a pure finding of fact other than in the sense of helping the court to decide which facts are relevant. For those reasons, I make no criticism of the approach taken by the Juvenile Court in the present case.

62. As for the second issue raised by Advocate Grainge on paragraph 261 of the judgment namely whether it was correct to insert into the legal test under section 49(2)(a) the words "within a timescale suitable to his needs", no ground of appeal is raised by her. She does not take issue with it The reference to timescale comes from an earlier decision of Judge McMillen sitting in the Juvenile Court, reported in an edited form as In the Matter of 2 children (the S children), Judgment 13/2010. In that case the mother of the children had taken issue with the insertion of the wording as it was not in the statute.

63. I respectfully agree with Judge McMillen that it is right to import such wording where it is relevant. In my view, it is implicit in the legislation. Take another hypothetical example: the Department relies upon agreed evidence that the parents are heroin addicts who have neglected their children and will continue to do so for as long as they remain addicted which they agree they are at the date of the hearing but the parents oppose the making of a CPO supported by a child's plan for a permanent placing or adoption on the ground that are going to a rehabilitation clinic in the near future and that sometime within twelve months they will be drug free. If the court accepted that they would be drug free within that time scale, it would have to consider whether the time frame is suitable to the child's needs.

The legal test for appeal

64. A right of appeal from the Juvenile Court to the Royal Court arises under section 99 (2) of the 2008 Law. The Court's powers are set out in section 104 (2):

"*(2) Where the Royal Court is seised of any matter sitting in an appellate capacity under section 98(1), 99(2), 100(1), 101(1), 102(2) or 103, it may by order confirm, reverse, vary or substitute the decision of the Magistrate's Court, the Court of Alderney or the Juvenile Court, as the case may be, against which an appeal has been made, and –*

(a) remit the matter back to the Magistrate's Court, Court of Alderney or Juvenile Court, as the case may be, or

(b) make such other order in the matter as it thinks fit."

65. In In re B (A Child) (Care Proceedings: Threshold Criteria) (SC(E)) [2013] 1 WLR 1911, the Supreme Court reviewed the circumstances in which an appellate court may intervene in a judge's decision to make a care order under the 1989 Act. In paragraph 199 of the judgment, Baroness Hale said:

"The judgments involved in care proceedings are of (at least) three different types. First are the decisions on the facts: for example, who did what to whom and in what circumstances. Second is the decision as to whether the threshold is crossed …. In the Court of Appeal in this case, Black LJ was also inclined to categorise it "as a value judgment rather than as a finding of fact or an exercise of discretion": para 9. I agree and so, I think, do we all. It is certainly not a discretion and it will entail prior findings of fact but in the end it is a judgment as to whether those facts meet the criteria laid down in the statute. Third is the decision what order, if any, should be made. That is on the face of it a discretion. But it is a discretion in which the requirements, not only of the Children Act 1989, but also proportionality under the Human Rights Act 1998, must be observed."

66. The parties agree, and I accept, that in relation to the first of those categories of decision namely findings of fact, the test to be applied on appeal is the same in respect of appeals from the Juvenile Court to the Royal Court as in appeals from the Royal Court to the Court of Appeal. As Scriven, LB said in A v The States of Guernsey and T and K (14 November 2012):

"It is agreed that the proper approach for the Royal Court when sitting as an appeal court in civil cases is that adopted by the Court of Appeal, that is to say, it should not interfere with findings of fact made by a Magistrate unless it is satisfied that there was no evidence before it on which the Magistrate could reasonably have arrived at those findings, or that for any other reason the finding of fact of the Magistrate was perverse (Domaille v Harris – Requetes 14.1.88; GLJ No 6 para 164."

67. As for the second category, evaluative findings, I quote from the headnote in In re B (A Child) at page 1912E:

"[the judge] had been making a value judgment, not exercising a discretion;that, accordingly, the appellate court should only intervene where it was satisfied that his decision was wrong; and that, having regard to the conclusions reached by the judge, he had been justified, for the reasons he had given in determining that the threshold had been crossed."

68. In relation to the third category, the exercise of a court's discretion, I quote again from the headnote, at page 1913B:

"his decision as to the proportionality of a care order was an evaluative judgment with which an appellate court should not interfere unless satisfied that his decision was wrong."

69. I conclude from the above that, except in relation to the Juvenile Court's findings of fact, the Royal Court shall only interfere with a finding of the Juvenile Court that the threshold was crossed or a decision as to the disposal of the case if the Court's decision was wrong.

Legal chronology

70. K was born on B-day. Application was made for an Emergency Child Protection Order on B-day+3. On B-day+9 the Juvenile Court adjourned the Department's application for an Interim CPO until the following day upon undertakings being given by the Mother and the Father that they would not remove K from the Princess Elizabeth Hospital until 6.00 pm five days later. On B-day+11the Juvenile Court ordered that an Interim CPO be granted in favour of the Department until 9 April 2013 with a review on 5 February 2013.

71. On 5 February 2013 the Juvenile Court made an order granting leave to instruct a psychologist subject to all parties agreeing the identification of that expert and the Court listed the application for a final hearing commencing 17 September 2013. In the meantime the Juvenile Court granted an Interim CPO to the Department to 30 April 2013 and adjourned the matter for review on that day.

72. On 25 February 2013, the Juvenile Court gave leave to the child's Advocate to instruct Dr Emma Fox, a psychologist.

73. On 30 April 2013 the Juvenile Court granted an Interim CPO in favour of the Department to 30 July 2013, it gave certain procedural directions in respect of the filing of the report of Dr Fox and the filing of other evidence, reports and contentions by the parties. The Court ordered a further review on 14 May 2013.

74. On 16 May 2013, the Juvenile Court made an order that supervised contact between K and A shall take place at Swissville for one hour on each Wednesday commencing 22 May 2013.

75. On 5 June 2013, the Juvenile Court adjourned the matter for review on 30 July.

76. On 30 July 2013, the Juvenile Court made orders granting an Interim CPO in favour of the Department until 27 September 2013, granting leave for Dr Bryn Williams, Consultant Psychologist to prepare a report and leave to the parents to file drug test reports and results from Cellmark, together with certain other procedural directions.

77. On 10 September 2013, the Juvenile Court gave certain directions in respect of the written advice of Diana Okoeva and leave to the Safeguarder to disclose papers on an ongoing basis to Dr Fox.

78. The hearing of the application for a CPO in respect of K and of applications concerning A commenced on 18 September 2013. Evidence was heard on 7 days up to and including 27 September 2013. Final written submissions were filed on 8 October 2013. On 22 October 2013 Judge McMillen communicated her decision to the parties. The judgment, which is the subject of this appeal, was handed down on 21 November 2013.

The Threshold Criteria

79. The document entitled *"Section 35(2) Agreed Threshold Document"* set out the following conditions of referral that had either been accepted by the Mother and Father or found by the Court during the earlier hearing in relation to K's three siblings in respect of which judgment was handed down on 30 November 2012. (To enable this judgement to be circulated to persons other than the parties, I have anonymised the references to the children and the Parents. In so doing, I have referred to "the Father" even though he is not the father of the two older children):

"1. Between February 2010 and June 2011 [C] and [J]'s names were on the child protection register as a result of concerns that the mother and [the Father]'s lifestyle was chaotic, that inappropriate visitors were present in the family home with regard to their drug use.

2. Between February 2010 and 25th April 2012 [C] and [J] resided for the majority of the week with their maternal grandparents. During this period they spent four nights a week with their maternal grandparents and three nights a week with the mother and [the Father]. They spent parts of each weekend day with their maternal grandparents and parts with the mother and [the Father].

3. On or around 25th April 2012 the mother resumed full care of [C] and [J]. The children's names had been removed from the child protection register in June 2011. The mother resumed full care despite concerns expressed by the professionals working with the family. A shared care arrangement, however, was reinstated on or about 7th May 2012. [J] was on a school trip in England on 30th April to 4th May 2012.

4. Both [the Father] and the mother have a longstanding history of substance misuse.

5. Both the mother and [the Father] are on drug substitution programmes which are monitored by the community drug and alcohol team. Between January and May 2012 the mother failed to attend five appointments arranged with the CDAT team.

6. Up until June 2011 the mother misused other substances whilst subject to her drug substitution programme. [The Father] has also misused other substances whilst subject to his drug substitution programme. They accept that on 15th May 2012 [the Father] tested positive for amphetamine and on 18th May 2012 the mother tested positive for amphetamine. They also accept that they have both tested positive for cannabis.

7. On 18th October 2011 during a police search of the family home, two syringes were found. The mother states that the syringes were not hers and that she does not know where the syringes came from.

8. On or around 10th December 2011 police officers found the following items within [A]'s pushchair: a small black zipped bag containing four opened needle packet; four used syringes and a medical tourniquet belt. The mother has stated that these items belonged to a friend of hers and she was returning them to drug concern at his request and on his behalf.

9(a) On Friday 1st June 2012 at approximately 7.30 am police and customs officers attended at the family home to execute a drugs warrant. During the search a small lump of resinous substance and drug related paraphernalia was found. [The Father] was charged with possession and has pleaded guilty. The mother has not been charged with any offence relating to this incident.

(b) At 1700 on 1st June 2012 the mother presented as though she was under the influence of substances, although it is not known which.

(c) [C], [J] and [A] were within the family home at this time.

10. During [the Father] and the mother's relationship there have been two reported incidents between them involving domestic abuse;

(a) on or around the 4th April 2009 at around 5am an incident occurred within the family home which resulted in a knife wound to the ear. [The Father] put his arm around the mother's throat resulting in a number of marks on the mother's neck.

(b)(i) On or around 18th October 2011 police officers attended at the family home following reports of a domestic disturbance at the address. The mother was observed to be shouting and screaming at someone within the property. [A] was present during this incident.

(b)(ii) the mother continued to shout and swear at police officers while holding [A] and threatened to cut them. The mother was seen to be holding a knife which she stated she had picked up from the floor which she had put in a kitchen drawer. [A] was not to be seen in her arms at this point.

11. Both [the Father] and the mother have a number of criminal convictions. In November 2009, the mother received a sentence of 10 months imprisonment for offences of handling stolen goods and burglary and theft. In October 2009 [the Father] received a sentence of 2 months imprisonment, suspended for two years, for an offence of possession of an offensive weapon.

12. On 25th May 2012, [A]'s name was placed on the child protection register under the category of emotional abuse.

13. On Friday 1st June an emergency child protection order was made by the Juvenile Court in respect of [A] and his brother and sister.

14. [The Father] and the mother are unable or unwilling to recognise and acknowledge the concerns from professionals involved in the care of her children.

15(a) The mother's reactions to situations are sometimes extreme and she has on occasions struggled to manage and control her emotions.

(b) At these times the mother is unable to prioritise [A] and his siblings' needs. The children have on occasion been exposed to these emotional reactions and have been distressed by them.

16. Since mid April 2012 Le Rondin School has reported a significant deterioration in [J]'s behaviour at school.

17. As a result of the mother and [the Father]'s lifestyle and drug misuse, the children individually have or are likely to suffer significant impairment to their health or development."

80. The additional fact stated by the Department was at paragraph 9 of the statement *"by three days after birth [K] was showing signs of drug withdrawal due to the Mother's drug use during pregnancy."* The comments of the Mother and Father in relation to that paragraph were as follows:

"the first and second respondents agree paragraph 9 of this document save that they say that [K] was showing signs of mild drug withdrawal by [three days after birth] due to the mother's drug use during pregnancy."

81. There were two other paragraphs with which the Mother and Father did not agree namely paragraph 5 *"the Department submits that the section 35 (2) criteria are met on the basis of The Threshold facts set out below."* and paragraph 10 *"for all of the reasons above, pursuant to section 35(2) (a) of The Children (Guernsey and Alderney) Law, 2008, at the time protected measures were put in place on the balance of probabilities [K] had suffered significant impairment to his health or development or was likely to suffer significant impairment to his health or development unless protective measures were put in place."* In relation to the latter paragraph, the Mother and Father stated at paragraph 13 *"the first and second respondents* ***do not accept*** *that [K] had suffered or was likely to suffer significant impairment to his health and development at the time protective measures were taken as a result of these facts."*

82. Thus, on the face of the document, there was only a narrow dispute on the primary facts namely the extent of the signs of drug withdrawal shown by K following his birth and whether or not they were "mild". The principle dispute related to the conclusions to be drawn from those primary facts as to the impairment to the health or development of K that he had suffered or was likely to suffer unless protective measures were put in place.

83. The Department adduced much background evidence that had not been available to the Court at the earlier hearing as it was not known to the Child Convenor.

84. A substantial part of the evidence focussed on an issue that was not highlighted in the Threshold Document namely allegations of the consumption of non-prescribed drugs by the Mother and the Father after the commencement of the earlier proceedings in June 2012. The Judge found that there had been such consumption by both Parents and that they had lied about their drug use to some of the professionals involved. In her judgment, those findings had an important bearing on their ability to provide adequate care, protection guidance and control to K.

85. In this Appeal, the Mother and Father challenge the factual findings made by the Judge in this regard.

86. It is necessary to set out the relevant findings:

(a) in the earlier judgment, Judge McMillen's findings included that both the Mother and the Father had a longstanding history of drug misuse up to and including the 1 June 2012 when the Father was arrested for possession of cannabis, to which he pleaded guilty and the Mother presented as though she was under the influence of substances;

(b) on 12 June 2012 the Father tested positive for cannabis (a fact he admitted);

(c) on 10 July 2012 the Father tested positive for amphetamines;

(d) on 7 September, 21 September, 1 October and 20 November 2012 and on 12 February 2013 the Father tested positive for benzodiazepines (during a period when he was not prescribed benzodiazepines);

(e) the Father tested positive for diazepam from the beginning of June 2013 until the end of August 2013;

(f) in February 2013 the Mother attended with a CDAT worker who identified a mark on her arm that indicated the site of an intravenous injection, not the site of a cannula inserted when she was in hospital for the birth of K, as she had alleged;

(g) at around February 2013 the Mother was associating with another client of CDAT who was testing positive for illicit drug consumption around that time;

(h) on 13 February 2013 the Mother refused to provide a urine sample one day after the Father had tested positive for benzodiazepines;

(i) from at least the beginning of May 2013, and throughout the Summer of 2013, the Mother was using diazepam at a time when she was engaging in achieving coping strategies arrived at helping her to not engage in illicit drug consumption.

(see paragraphs 224 to 236 of the judgment)

87. Based on those findings, Judge McMillen concluded at para 237:

"237. I therefore find that both parents have consumed drugs not prescribed to them on a regular basis (in relation to the father since June 2012 and in relation to the mother since at least February 2013) including inter alia but not exclusively during the summer of 2013 and that both have persistently lied to professionals about the nature of their drug consumption."

88. Many of those findings are the subject of appeal in paragraph 10 of the Notice of Appeal:

"10. The Appellants also seek to appeal the following findings of fact made the Juvenile Court which, it is contended, wrongly influenced the findings made in relation to whether the Section 49 test was met and the exercise of the judicial discretion to grant a community parenting order:

a. Paragraph 226 – that when the father tested positive for amphetamines on 10 July 2012 that was a correct test;

b. Paragraph 228 – that the father as well as the mother was asking the court to accept that the drug tests from CDAT were "false positives" and could not be relied upon;

c. Paragraph 230 – that the parents were "topping up" their benzodiazepine prescription in the belief that if they were tested positive for benzodiazepines no-one would know in fact that they were consuming other drugs which had not [been] prescribed to them;

d. Paragraph 234 – that the marks seen by the CDAT worker on the mother's arm in February 2013 was more likely than not to be the site of an intravenous injection rather than the site of a cannula from her period in hospital;

e. Paragraph 234 – that the mother refused to provide a urine drug sample on 13 February 2013 and that she was likely either topping up or misusing the drugs that she had been prescribed by injecting them;

f. Paragraph 236 (and paragraph 285(ii) at paragraph 102) – that the mother did not realise that in fact Cellmark would be testing for specific drugs rather than generic groups of drugs and that the mother thought she could evade the truth by likely having dyed her hair, whilst denying the same and secondly, by both of the parents not understanding that the hair strand tests would test for certain specific drugs and they believed that the results would show only positive for generic drugs that they had been prescribed;

g. Paragraph 237 – that both parents have consumed drugs not prescribed to them on a regular basis (in relation to the father since June 2012 and in relation to the mother since at least February 2013) including inter alia but not exclusively during the summer of 2013 and that both have persistently lied to professionals about the nature of their drug consumption."

89. Before dealing with each of those contentions, I make some general comments. At the start of the appeal hearing Advocate Grainge, appearing on behalf of the Parents, advised me that they both admitted having lied in the hearing before the Juvenile Court in respect of their consumption of non-prescribed diazepam, in the case of the Mother, between May and August 2013 and in the case of the Father, between June and August 2013. She told me that they both now admit that during those periods they took diazepam that had not been prescribed to either of them and she said they apologise to the Court for having done so.

90. It is important for me to state the significance of that admission at this stage in the proceedings. First of all, I am not able to treat it as new evidence. The circumstances in which fresh evidence can be admitted on an appeal are well established; see for example the Royal Court's decision in Kirk v Blackwell (4.GLJ.65). An admission of having given false evidence cannot satisfy the requirements of the relevant test; the truthful evidence would have been available at the earlier hearing if the Mother and Father had not lied to the Court.

91. I also take note of the fact that the admission was delivered through the mouth-piece of their Advocate. It was not given under oath and was not tested in cross-examination. Significantly, as I am not in a position to receive fresh evidence and as I am not a finder of fact, it is not for me to decide whether the admission is true or, more importantly, whether it amounts to the whole truth in the sense that I could assume that all the other evidence given by the Mother and the Father under oath was true and that the only false evidence they gave has now been corrected, which is how the Parents Advocate

sought to present their case by repeatedly submitting that the Judge failed to give any or any sufficient weight to the Parents' evidence in respect of matters other than their use of non-prescribed diazepam.

92. If the Mother and Father had chosen to give truthful evidence at the hearing before the Juvenile Court, the outcome of the case might have been different but that is mere speculation. In reviewing the sufficiency of the evidence in this appeal, I must have regard to the limited circumstances in which an appellate court will interfere with the findings of fact of an inferior tribunal, as considered in the authorities cited earlier in this judgment.

93. Recurrent themes that run through most of the grounds of appeal are the contentions that the Juvenile Court disbelieved the Parents' evidence; attached insufficient weight to their testimony; gave undue consideration to their alleged use of non-prescribed drugs; and gave inadequate credit to the Parents for the progress they had made in their personal lives, particularly in addressing their drug misuse. Those contentions now have to be viewed on the evidence that was presented to the Juvenile Court but also in the light of the admission by the Parents, through their Advocate, that they perjured themselves in respect of their denial that they were taking diazepam that had not been prescribed to them during the summer of 2013.

94. The admission shows that the Judge in the Juvenile Court was correct in criticising the credibility of the Father and Mother and in not believing all the evidence given by them. It is correct that a judge may accept some parts of the evidence of a witness whilst rejecting other parts of their evidence and specifically that a judge must address his or her mind to the possibility that some parts of the evidence may be believable even though he or she may not believe other statements by the same witness. However, in the present matter, it is not open to me in my review of the evidence to assume that the Judge should have rejected the evidence in respect of the non-prescribed diazepam and accepted all the other evidence given by the Mother and Father as being true. On the contrary, the Mother and Father have both instructed their Advocate to ask me to approach this appeal on the basis that they have lied under oath. In doing so, they may have hoped that they would enhance the credibility of their other evidence. However, such an admission does not make it any easier for them to argue successfully that there was no evidence before the Judge on which she could make findings of fact adverse to the Mother and Father on those issues where their credibility was relevant. To put it briefly, whether or not they had made such an admission, if the Judge heard conflicting evidence on a matter and decided not to prefer the evidence of the Mother or Father, it is most unlikely, that the Appellants can successfully argue that the Judge was wrong to do so.

95. Any impact that the admission of giving false evidence had on the grounds of appeal is considered further below. I will begin by addressing the specific factual findings that the Appellants criticised in paragraph 10 of the Notice of Appeal. The Appellants singled out a number of factual findings in that paragraph which they challenge and contend that they wrongly influenced the Judge's findings in relation to the section 49 test and her exercise of discretion in deciding to grant the CPO. I will address each of the findings that are challenged in the Notice of Appeal. They have to be read in the context of the Judge's earlier findings in relation to these Parents, their long history of drug misuse and the dishonesty and deception associated with such misuse. The admission that they lied to the Court at the hearing in these proceedings could be said to be further evidence of their continuing dishonesty and deception although, as I have said, it is not for me to be making my own factual findings. My consideration of the factual circumstances is restricted to the written and oral evidence that was laid before Judge McMillen and whether there are grounds for interfering with her decision based on such evidence. In her oral address to me, Advocate Grainge submitted that with the exception of the non-prescribed diazepam, all Judge McMillen's findings in relation to drug misuse were wrong. However, I have to consider whether there was evidence before the Judge on which she could reasonably have reached her findings.

<u>Ground 10 (a)</u>

96. To show that the Judge was mistaken, the Appellants referred me to the drug test results at File 3 page J33 which record that the sample collected on 10 July 2012 from the Father tested positive for benzodiazepines, **cannabis** and buprenorphine. At paragraph 95 of her judgment,

Judge McMillen stated that he had tested positive on that day for benzodiazepines and **amphetamine**. She also said (correctly) that he had tested positive for buprenorphine as a consequence of taking suboxone which had been prescribed for him. The incorrect reference to a positive test for amphetamine was repeated by the Judge at paragraph 226 of her judgment. The Department admits that the Judge was mistaken in that finding. I agree that the Judge's finding was incorrect but for the reasons given later in this judgment, I do not regard that error as being sufficient to set aside her conclusions.

97. I note in passing that whilst the Father tested positive to cannabis on that date, he had admitted in his statement (File 3 D2, paragraph 5) that he had taken cannabis at that time.

Ground 10 (b)

98. In paragraph 228, the Judge said:

"228. However, and in addition, the father tested positive for diazepam – a drug that he had not been prescribed, from the beginning of June 2013 until the end of August 2013. Both he and the mother asked the court to accept that the drug test results from CDAT were 'false positives' and could not be relied upon and that further the test results from Cellmark were also without foundation."

99. The Department's Advocate asked me to read that in conjunction with paragraph 232, where the Judge said:

"232. The father has accepted in part that he had consumed drugs not prescribed to him – although he did not accept the more recent hair/strand test results from Cellmark. In contrast, the mother has been adamant that any drug results showing positive for drugs not prescribed to her are wrong and therefore 'false positives' and cannot be relied upon."

100. In order to put the Parents' contention in context, it is necessary to review the relevant evidence. The CDAT (Community Drug and Alcohol Team) drug test results relating to the Father were presented attached to a letter from the Community Mental Health Nurse (Substance Misuse) at Tab J in File 3 starting at page 32. CDAT test urine samples and the results for the Father show positive tests for cannabis dated 12 June and 10 July 2012 which were admitted to be correct by the Father in both sets of proceedings before the Juvenile Court. He also tested positive for benzodiazepines on 7 and 21 September, 1 October, 20 November and 17 December (stated to be equivocal) 2012 and 12 February, 13 March and 4 April 2013. In his statement to the Juvenile Court and in Court, the Father admitted those were all correct but he was prescribed Temazepam form 5 March 2013 so he said that the latter results relate to prescribed, not non-prescribed drugs. On 10 June 2013, a routine mouth swab was taken by a social worker which tested positive for methamphetamines. He asked for that to be retested and it was shown to be a false positive. The only other relevant test was a hair strand test analysed by Cellmark in August 2013 at the Parents' request which showed non-prescribed diazepam usage from June to August 2013. There is no finding by the Juvenile Court that the Father thought he could avoid the truth of the hair strand test unlike the Mother who thought she could do so by dyeing her hair. Equally there is no finding that the Father had dyed his hair.

101. The CDAT results in respect of the Mother were presented in a report from the Convenor starting at page J11 at Tab J in File 3 and a letter from the Clinical Nurse Specialist Substance Misuse and the Specialist Services Manager at Tab C, page 37 in the same file. They included three positive tests for cannabis and one positive test for tricyclic that the Mother asked the Court to find were all false positives. A positive test for cannabis dated 11 July 2012 had been

admitted by the Mother as a true result. The results that she contested were dated 6 March, 10 April and 1 May 2013 in respect of cannabis and 17 April 2013 for a tricyclic. As a response to the CDAT findings, the Mother asked for hair tests to be carried out by Cellmark. The Cellmark tests (starting at File 3, Tab C, page 41) show non-prescribed diazepam usage from May to August 2013 but do not show any cannabis usage. The Cellmark report commented on the use of hair treatment, noting that the Mother had *"declared that the hair sample had not been subjected to chemical treatment, such as with dye or bleach. For information, the use of chemical treatment such as bleach, dyes or permanent waves is known to damage the hair shaft. The single use of, or use of a low dose or purity of some drugs may not be detected in hair that has been extensively treated, where it may have been detected in untreated hair. In cases of regular drug use, it has been found that drugs are still able to be detected; however at a lower level than if the hair had not been treated."* (Page C45). That remark gave rise to an issue of whether the Mother had been dyeing her hair. The Judge found it was likely that the Mother had dyed her hair in order to evade the truth (page 102 of the judgment).

102. The Appellant's Advocate submitted to me that the Juvenile Court did not express any finding as to whether the cannabis test results were correct or not correct and that in failing to do so it misdirected itself. It was contended in the appeal that the Court implied that the Mother was asking that they be treated as false findings and consequently the Mother feels aggrieved. (Cellmark did not test for tricyclic as they do not currently do so (page C51).)

103. The reliability of the drug tests was called into question. Cellmark were asked in correspondence to comment on the reliability of their tests. They said *"The absence of any drugs in a hair sample does not necessarily mean that an individual definitely has not used a drug as the use of that drug may have been infrequent or the drug used may have been of a low purity. They are also other factors involved such as the use of chemical treatment."* (File 3 Tab C, pages 50 and 51.) The Juvenile Court received no direct evidence of the reliability of the CDAT tests other than that CDAT say that the results of their tests are not to be used for medico-legal purposes.

104. In the Parents' final written legal submissions to the Juvenile Court (File 5 Tab A page 6) they submitted (at paragraph 26):

"The parents accept that the Cellmark tests indicate usage of Diazepam in [Mother's] case from early May to early August 2013 and, in [Father's] case, from early June to early August 2013. [Mother] gave evidence that she volunteered for the hair strand testing to prove that she had not taken any non-prescription drugs. The parents were clear in the evidence they gave to the court that they had not taken Diazepam and ask the court to believe their evidence. The parents also ask the Court to take into consideration the fact that no test can be entirely certain."

105. Judge McMillen stated a number of times in her judgment that she had found the Cellmark tests to be reliable and that she accepted them (see for example paras 229, 233 and 258). As Cellmark had found no evidence of cannabis usage, it is implicit that the Judge accepted that during the period covered by the hair samples, neither of the Parents had used cannabis. She appears to have made no finding as to whether the positive test results for cannabis found by the CDAT tests carried out on the Mother in March, April and May 2013 were false or true and, if the latter, whether they were not detected by Cellmark either because of the likely hair dyeing or because the use of cannabis may have been infrequent or such a low dose that it was not capable of being detected in a hair sample. If indeed she found that the CDAT cannabis test results were false, she would not have been critical of the parents for asking her to find that to be the case.

106. I do not view the Court's failure to make a specific finding in relation to cannabis usage as being a misdirection. It is apparent form the judgment that Judge McMillen was more concerned about the Parents' general approach to the misuse of drugs and the deceit that inevitably accompanied such misuse. She referred to their failure to comply with their prescribed drug regimes prior to 1 June 2012, to the Father's non-compliance since that date and to the Mother's failure to comply with her prescribed drug regime since the commencement of these proceedings. The Judge placed particular emphasis on the Cellmark findings of the use of non-prescribed diazepam in the summer of 2013, in relation to which she could not have been criticised on the evidence before her even if the Parents had not subsequently admitted that they had taken the drug without a prescription.

107. In paragraph 258(2) in the context of the importance of being honest with the professionals working with the Parents, the Judge said:

"I have found that I can rely upon the Cellmark hair test/strand results and that I have found that both of the parents have consumed benzodiazepines over and above the benzodiazepines that they have been prescribed, this has led me to conclude that the parents' relationship with their substance abuse workers and their psychiatrist is based upon deceit….

I find that both parents have lied in court throughout their evidence and have also lied to the professionals and to their family to whom they have maintained the deceit they have been drug compliant. So that there is no doubt and it is important that the maternal family understand the importance of this as an issue, both of the parents have consumed drugs over and above those that have been prescribed to them and they have also presented as being manipulative in trying to convince all the professionals that that is not the case. In fact, ironically it was the mother who sought that the hair strand tests be obtained, because firstly I believe that the mother thought that she could evade the truth by likely having dyed her hair, whilst denying the same and secondly, by both of the parents not understanding that the hair strand test results would test for certain specific drugs such as in this case diazepam and they believed that the results would only show positive for generic drugs that they had been prescribed i.e. benzodiazepines."

108. The passage I have cited in the previous paragraph and indeed other passages in the judgment demonstrate that the Judge was focussed on the illicit use of drugs generally (and the implications of their consumption especially the dishonesty involved) and was not specifically differentiating between the different types of drug that had been consumed unlawfully. If the Parents had admitted in the lower court, as they have done through their Advocate in this Appeal, that they had used non-prescribed diazepam during the summer of 2013, it would have been necessary for the Juvenile Court to treat diazepam separately and to make specific findings in relation to all allegations of cannabis use but that was not how the Parents chose to present their case.

109. There was sufficient evidence of the non-prescribed use of diazepam to justify the conclusions reached by the Judge.

<u>Ground 10 (c)</u>

110. The finding by the Judge in paragraph 228 was a conclusion that she was entitled to draw from the evidence before her. She had found that the parents were taking diazepam that had not been prescribed; a fact that they have subsequently admitted through their Advocate. It was a feature of their case that they denied such use; a denial that they maintained even in the face of persistent cross-examination. For example, the Mother was cross-examined about the presence of diazepam in her hair sample at page 417 et seq. She had no adequate explanation for it; all she did was to contend that the test result was false.

111. It was a feature of the Parents' case that they concealed their illicit use of the drug. The Parents requested the Cellmark hair strand tests to demonstrate that they were not using cannabis. There is no adequate explanation as to why they would have done so if they believed their diazepam would be detected by such tests. It was therefore a conclusion open to the Judge to find that they believed no one would know that they were taking diazepam to top-up their prescribed benzodiazepines.

Ground 10 (d)

112. The evidence of the track mark being present on the Mother's arm, in February 2013 was given by Michelle Aldridge, a clinical nurse specialist for the Community Drug and Alcohol Team. It is summarised in a letter to Advocate Grainge dated 27 September 2013 at Volume 3, Tab C, page 89 (the letter was written after the nurse had given her evidence to the Court):

"[The Mother] was seen on Monday 18th February 2013 following the inability to provide a UDS on the previous Wednesday. There were marks on her arm that appeared to be intravenous marks covered by makeup. [The Mother] denied this and said they had been canular marks from when she was in hospital. Her arms were checked on 16.01.13 and 30.01.13 and no marks were observed. There was no evidence of any non prescribed medication in her UDS taken that day (18.02.13). There was no change in her positive behaviour."

113. During the hearing, the nurse was questioned by Advocate Hill-Tout starting at page 610 of the transcript. During the course of the questioning, she acknowledged that *"it was possible that it could have been a cannula"*(page 611B) and she made a similar comment at page 593B when questioned by Advocate Grainge. However, in her contemporaneous note of what she had seen, she had written that *"There was a track mark on her on her right forearm."* Despite expressing the possibility that it could have been caused by a cannula, she never denied the possibility that it was a track mark.

114. The Mother strenuously denied that the mark was a track mark (the evidence in-chief is at page 310 and the cross-examination at pages 432 -435).

115. On appeal, the Parents have contended that the Court placed too much emphasis on the evidence that the Mother was associating with another person who was known to be injecting Subutex. The Mother's relationship with this other person was the subject of questioning of both Parents and of the social worker who raised the issue in her evidence. The Mother and the Father both denied the extent of the relationship. The Parents' contention is that in finding that the Mother was topping up or injecting drugs, the Juvenile Court placed too much weight on the evidence.

116. The evidence is considered by the Judge at paragraph 148. She concluded that she did not accept the Mother's evidence. At paragraph 234 she was very explicit when she said of the Mother's explanation *"I did not believe the mother's evidence in that regard and indeed I was satisfied that she was lying to me in this respect."* The Judge heard the oral evidence and had to decide which evidence to prefer and which to reject. She clearly thought that the Mother was lying and I cannot criticise her for doing so. I believe that she based her decision largely on the evidence of what the nurse recorded that she had seen of the track mark and that she had not seen it on the two previous occasions she had examined the Mother since her discharge from hospital. I would not be able to interfere with the Judge's decision to accept the nurse's evidence in preference to that of the Mother, even if the Mother had not subsequently admitted through her Advocate that she perjured herself in respect of her evidence as to her use of

diazepam. To summarise, there was evidence before the Judge on which she could base her finding and the finding was not perverse.

Ground 10 (e)

117. The evidence of the missed drug sample on 13 February 2013 begins with the note made by the Substance Misuse Nurse dated 26.02.13 (Volume 3, Tab B, page 281) in which she recorded that *"[The Mother] was asked to provide a UDS on 13.02.13 prior to auricular acupuncture or after the group, she said she had appts in the afternoon and was unable to provide a sample that day."* The Mother was questioned at some length about the missed drug test (in evidence-in-chief at page 307-308 and in cross-examination at pages 423-426).

118. The evidence was considered by the Judge at paragraph 146 where she said:

"On the 13th February 2013, the mother failed or refused to provide a urine sample in order that she could be tested. I received evidence about how it came about that the mother did not provide a urine sample on the 13th February 2013. I found her explanation convoluted and difficult to understand, but more importantly, unbelievable. The department highlight the fact that during this period of time they believed the mother was associating with another person who was providing positive drug tests and the department, in effect, do not believe that it was a coincidence that at the same time the father was testing positive for drugs that he should not have been consuming, the mother had refused or failed to give a drug test."

119. Again, this was a factual matter for the Judge to decide. The contention on appeal is that the evidence was insufficient to support her finding. However, the legal test I must apply is that either there was no evidence before the Juvenile Court on which it could reasonably base its findings or that for any other reason the finding of fact was perverse. That test is not satisfied; there was evidence before the Court on which it could reasonably base its finding and the decision was not perverse; the Judge's reason were clearly explained and articulated.

Ground 10(f)

120. This ground is effectively a repeat of the contention at ground 10(c) that I dealt with above.

121. It is also contended that the Court was speculating when it found that the Mother thought she could evade the truth of the hair strand drug test by dyeing her hair. The evidence of dyeing was given by the social worker (pages 121 to 123 of the transcript). The Mother denied that she had done so. Again, this was an issue where the Judge was entitled to reject the Mother's evidence and to prefer that of the social worker if she was so minded. In her judgment she showed that she accepted the latter's evidence when she said that it was likely the Mother was dyeing her hair.

Ground 10(g)

122. The finding made by the Judge at paragraph 237 of her judgment, to which this ground relates flows from her earlier findings that I have reviewed above, the only one of which I find is not reasonably based on the evidence that was before the Juvenile Court is the one mentioned in paragraph 226 relating to the Father testing positive to amphetamines on 10 July 2012. However, that error did not affect the conclusions the Judge drew from the evidence which, as I have said are largely based upon the misuse of other drugs and, in particular, the use of non-

prescribed diazepam by both of the Parents during the summer of 2013 which was a finding the Judge was entitled to reach on the evidence before her and which the Parents have now admitted to be correct.

123. I turn next to the Grounds of Appeal that are pleaded in paragraph 11 of the Notice of Appeal, sub-paragraphs (a) to (u).

Grounds 11 (a) to (c)

"a. That in making the findings and exercising the discretion as set out in paragraphs 9 and 10 above, the Guernsey Juvenile Court failed to give adequate weight to the evidence of the parents;

b. That the Guernsey Juvenile Court misdirected itself in light of the evidence available in finding that the parents had lied consistently to the court about their drug consumption throughout their evidence so the court cold rely on very little of what they had said in evidence.

c. That the Guernsey Juvenile Court placed undue and unreasonable weight and was unreasonably influenced by the hearsay evidence the court heard in relation to the First Respondent's interaction with Christina White."

124. There is little to add to what I have said above. The legal test as to when an appeal court may interfere with the findings of fact of a lower court is as I set out above in the citation from A v The States of Guernsey and T and K. The legal test was further explained in In re B [2013] 1 WLR 1911from which Advocate Hill-Tout, appearing for the Department referred me to paragraph 108 on the judgment of Lord Kerr and paragraph 200 in the judgment of Baroness Hale whose views were summarised by Lord Neuberger at paragraph 53:

"53 As Baroness Hales JSC and Lord Kerr of Tonaghmore JSC explain in paras 200 and 108 respectively, this is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals on fact can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence so a second, different, opinion is no more likely to be right than the first)."

125. The Parents have now admitted through their Advocate and apologised for lying to the Juvenile Court as to their use of non-prescribed diazepam in the summer of 2013 but that admission does not improve the credibility of their evidence. Had they told the truth in the lower court, the Judge's view of their evidence might have been different but that is mere speculation. I have to decide the appeal on the basis of the evidence heard by the lower court, whose factual findings cannot be criticised (except for the reference to amphetamines in the test results of 10 July 2012).

Ground 11(d)

"d. That the Guernsey Juvenile Court in relation to Dr Williams' evidence:

i. placed undue and unreasonable weight and was unreasonably influenced by the evidence he gave in relation to the Cellmark drug tests;

ii. failed to adequately take into account the protective factors or "strengths" of Dr Williams phrased it in the Appellants' parenting capacity; and

iii. placed undue and unreasonable weight on the conclusion given by Dr Williams namely that "the risk is too great" to place K in his parents care, bearing in mind the level of involvement Dr Williams had had with the parents (and K) since his report dated 31 October 2012."

126. Dr Williams is a Consultant Clinical Psychologist who regularly gives evidence in child matters in the Guernsey Courts. He presented a Psychological Report dated 31 October 2012, an Addendum Report of 5 December 2012 and an updated report dated 30 August 2013. He also gave oral evidence to the Juvenile Court.

127. The Cellmark hair strand drug test results were shown to Dr Williams shortly before he gave his evidence. The Parents contend in support of their appeal that his reaction was that the results amounted to *"the final nail in the box"* and that nothing in the Parents' behaviour would change (paragraph 26B of the transcript). Yet he went on to say at page 61D:

"The one thing I'm really struggling with Madam, and it may well be contaminating my evidence, and I'm quite happy to go home and come back and for you to tell me if you want me to look at it again, but I'm, I'm really struggling to give you a balanced view, because of this, this drug result."

The Parents now allege that he was disappointed by the drug test result and that his disappointment tainted his evidence.

128. It is necessary to look at his evidence, both in his reports and in his oral testimony. In his updated Report dated 30 August 2013, at paragraph 6.8, Dr Williams said *"From my analysis of the data I was left somewhat confused about whether [the Mother] and [the Father]'s description of being drug free since June 2012 was indeed accurate."* In his evidence, at page 25E of the transcript, he said;

"how can I sit there with somebody as a psychologist charged with thinking about protecting a child from exposure to the kind of risks that were described in the Judgment, how can I do that with somebody who, who can look me in the eye and say, if they have taken this un-prescribed Diazepam, and tell me that they haven't.

I actually almost don't mind if she has, which is a bizarre thing to say, but, but it was… the transparency isn't there.

Four children, all this intervention, the latest psychological, psycholog.. psychiatric treatment in the Island, the advocacy from the Health Service saying that the changes are made, and then to discover, if it is true, that this in fact hasn't changed at all. It would leave me feeling very worried. (pause) Worried for the children, I mean, it's clearly my role here."

129. Dr Williams was cross-examined by Advocate Grainge about the issue starting at page 41C where it is apparent that he was concerned as to what was the truth. At that stage in the proceedings, the information he had was what had been said to him. The question of the Parents' drug taking was an important issue because it had led in the past to what he called "*inadequate and harmful parenting experiences".* He had questioned them in August about their drug taking when they had asserted that they were clean and *"have not used a thing in over a year".* It was important to him that they had given that assurance to him as a clinician who was being asked to support them in taking their child back. He described it as *"a major breach for me"* and went on say that he was not personally affronted if they had told him a lie but was concerned at the risks it would present to the children. He then made it clear that he

did not know whether the test results and the allegations were incorrect because that would be a matter for the Court to decide.

130. No doubt it would have been easier for Dr Williams if the Court had been able to reach a finding as to whether the Parents had both taken non-prescribed Diazepam during the summer of 2013 but that was not possible until the end of the case. Giving an opinion in the absence of such a finding made his evidence difficult because it was such a crucial issue. However, the totality of the evidence shows that Dr Williams was clear that any future illicit drug use would be significant because of the consequences for the Parents' parenting abilities for which there was past evidence to support his concerns. Of even greater concern was the impact that it would have on their relationships with the professionals working with them if they could not be believed. In those regards, his views were clear. They were addressed in the judgment at pages 102 to 103:

"The professionals whose priority is the welfare and interests of the children, namely the social worker (along with her colleagues in the department), Dr Williams, Dr Fox and the safeguarder all independently were of the view that if the court concluded that the parents had continued abusing drugs during the currency of these proceedings and indeed post the commencement of the CYCT proceedings, whilst denying the same, then they were pessimistic as to the future of any child in their care.

In her report the safeguarder highlighted the historical cyclical pattern of the parents being drug compliant for various periods of time but then inevitably returning or lapsing or relapsing to the consumption of drugs not prescribed to them. The position in relation to the parents' current drug consumption is no different to the previous history of either or both of the parents.

When Dr Williams re-assessed the parents, he was unequivocal that they had told him that they had been abstinent in relation to the consumption of drugs since June/the summer of 2012. The father, whilst not accepting that he said such a thing to Dr Williams (and in this regard I prefer the evidence of Dr Williams), accepts that he has intermittently used benzodiazepines at least during part of 2012. Dr Williams was unequivocal in this evidence that if the court found that the parents have not been compliant with their prescribed drug regime then the associated lifestyle as evidenced by the parents' previous histories and chronology presented a risk for the future of K in their care. Dr Williams and the social worker acknowledged that drug addicts were not per se unable to parent, but those who were not compliant with their prescribed drug regime and therefore sought out illicit drugs from those who sold them who did not necessarily have children's interests at the forefront of their mind, and in addition that lifestyle was also associated with aggression and violence as exemplified in this case - and I refer to the incident on the 18th October 2011 and the parents' arrest and the events of the 1st June 2012. During the court proceedings I received from the parents, photographs of their home which presented well and did not present as a family who currently live a life associated with a drug lifestyle – however, the facts speak differently and I am satisfied that both of these parents have either jointly or separately, sourced drugs from others whose role is to financially benefit from dealing in drugs and that therefore they have both retained contact with a way of life that is contra indicatory to the welfare of a child.

Further and as importantly, the parents have lied consistently to the court about their drug consumption and unfortunately this means that I can rely on very little that they have told me. In her evidence, Michelle Ayres said that the lapse of the parents in relation to the consumption of non-prescribed drugs was "a minor matter". For the avoidance of doubt I do not agree and in this regard I concur with the safeguarder and Dr Williams and Ms O'Sullivan. It may or may not be a minor matter in terms of a perception by professionals dealing with the adults' drug continuing dependency on substances, but when dealing with the issue of welfare of the children, it is crucially important. There is no evidence before me that any professional in the future will be able to rely upon the integrity of what either of the parents says to them without there being independent corroborative

evidence. I have no confidence whatsoever in either of the parents either becoming drug-free (which seems in my view unlikely at the current time), or most importantly, or at the very least remaining compliant with their prescribed drug regime."

131. Regarding the contention that the judge did not adequately take into account the highlighted strengths or protective factors identified by Dr Williams, it is apparent from the judgment that Judge McMillen had regard to the totality of the expert and professional evidence presented to her see, for example, the detailed analysis of the issues in relation to the parents starting at paragraph 258 of the judgment. I agree with Advocate Hill-Tout's submission that it is not necessary for a Judge to consider each specific issue in turn. It is apparent from the judgment that the negative aspects greatly outweighed the positive aspects identified by Dr Williams, especially in light of the Judge's finding that the Parents had lied about their drug consumption.

132. The inter-subjectivity issue was raised by Dr Williams and by the social worker. It is considered by Judge McMillen in paragraph 258(13) of the judgment. She said that she concurred with their assessment based not only on their evidence but also on the evidence that she had heard at the earlier hearing. She thought the Mother had improved, become more regulated and less impulsive but nevertheless she remained concerned. Her observations show that she had regard to all the evidence but did not base her conclusion solely on the evidence of Dr Williams. It is not possible to say that she placed undue importance on his evidence alone. Her conclusions were clearly based on the totality of the evidence available to her.

133. The parents draw attention to Dr Williams' lack of involvement with the family since his report of 31 October 2012. I note that he had seen them in order to prepare his updated report for these proceedings. The main factor the Parents submitted had changed during that period was their alleged compliance with their prescribed drugs regime and the progress they were making with the professionals who were helping them. But it is a central feature of Dr Williams' evidence that he was very concerned at their continuing use of non-prescribed drugs if that were to be the finding of the Court, not just because of the effect of the drugs themselves but because of the deceit and dishonest that breached the clinical relationship between them and those who were trying to help them. In the light of that fact, I am not persuaded that his conclusion would have been any different if he had spent more time with the parents and heard even more lies from them.

Ground 11(e)

"e. That the Guernsey Juvenile Court placed undue and unreasonable weight and was unreasonably influenced by the evidence of the safeguarder and her recommendation that K not be placed in the care of his parents bearing in mind the shortness of time the safeguarder had personally been involved in the case."

134. In the Safeguarder's written report to the Court, she said that she had taken over the case from another Safeguarder who had held it for a significant amount of time in June 2013. In paragraphs 2.1 and 2.2 of her report (at Volume 3, Tab F, page 13-14 of the trial bundle) she said she had spent a large amount of time familiarising herself with the case by reading the bundles filed in respect of the finding of fact hearing and she detailed the additional enquiries, meetings and observations she had undertaken since becoming involved. She gave her evidence at the end of the hearing, having listened to all the oral evidence. The Parents did not challenge her lack of involvement with the case in the earlier hearing. In the circumstances,

the Judge was entitled to attach such weight to the Safeguarder's evidence as she thought appropriate.

Grounds 11 (f) – (n)

"f. That the Guernsey Juvenile Court in its approach exhibited a bias against persons dependent upon drugs and subject to drug substitution programmes in terms of their ability to parent and the presumption that an individual would necessarily be able to detoxify from drugs;

g. That the Guernsey Juvenile Court placed undue and unreasonable weight on the single question of whether or not the parties had taken non-prescribed drugs during the currency of the proceedings and failed to give full consideration as to whether this question should have been determinative;

h. That the Guernsey Juvenile Court placed undue and unreasonable weight and was unreasonably influenced by:

i. the fact that the court found the parents to have been con-compliant with their prescribed drug regime from at least the commencement of the proceedings and in the Second Appellant's case, between 1 June 2012 and prior to and since the issue of the proceedings;

ii. the fact that the Court had found that the parents had lied to the court and to the professionals and to their family by maintaining that they had been compliant with their prescribed drug regime;

iii. the fact that the Guernsey Juvenile Court found that the First Appellant believed that she could evade the truth of the hair strand tests by likely having dyed her hair, whilst denying the same and secondly, by both of the Appellants not understanding that the hair strand test would test for certain specific drugs such as in this case diazepam and they believed that the result would only show positive for generic drugs that they had been prescribed ie benzodiazepines.

i. That the Guernsey Juvenile Court misdirected itself by failing to give any consideration as to the reasons why the parents may have not been completely honest about their use of non-prescribed drugs during the currency of the proceedings;

j. That the Guernsey Juvenile Court misdirected itself by failing to give any consideration as to the nature of the non-prescribed drug usage by the parents during the currency of the proceedings;

k. That the Guernsey Juvenile Court failed to give adequate weight to the evidence of Dr Gore Muchemenye, Michelle Aldridge and Michelle Ayres in relation to the commitment the parents had shown to compliance to their prescribed drug regime and the positive interaction of the parents in therapeutic intervention;

l. That the Guernsey Juvenile Court failed to adequately take into account the evidence of Michelle Aldridge that the First Appellant was in the action stage of change and that, notwithstanding the results of the hair strand test, on balance Michelle Aldridge's opinion was that the First Appellant was still in the action stage of change;

m. That the Guernsey Juvenile Court failed to give adequate weight to the evidence of Dr Muchemenye in relation to drug treatment models;

n. That the Guernsey Juvenile Court failed adequately to take into account the evidence of Dr Muchemenye that the use of non-prescribed drugs per se would not alter the Appellant's prognosis in relation to their drug dependency."

135. It is in my view correct to say that the Parents' non-prescribed drugs use was a determinative factor for the Juvenile Court. However, it is apparent from a number of passages in the judgment that any concerns the Judge had about the drug-taking itself were overshadowed by

her concerns about the associated dishonesty and deceit involved with such activity. I give a few quotes by way of example:

At page 101: *"However, that progress* [in complying with their prescribed drug regime] *is only progress if it is based on the partners (sic) demonstrating honesty with those working with them….. the Cellmark hair/test strand results…[have] led me to conclude that the parents' relationship with their substance abuse workers and their psychiatrist is based on a deceit."*

At page 102: *"I find that both parents have lied to the court throughout their evidence and have also lied to the professionals and to their family to whom they have maintained the deceit they have been drug compliant."*

And later on the same page: *"The professionals whose priority is the welfare and interests of the children…..all independently were of the view that if the court concluded that the parents had continued abusing drugs during the currency of these proceedings, whilst denying the same, then they were pessimistic as to the future of any child in their care."*

At page 103: *"Further and as importantly, the parents have lied consistently to the court about their drug consumption… There is no evidence before me that any professional in the future will be able to rely upon the integrity of what either of the parents says to them without there being independent corroborative evidence."*

Paragraph 267: *"I have no confidence that anything has particularly changed in the medium to long-term despite some evidence of recent positive changes – although those changes are offset by the parents' continued deceit and manipulation of family, friends and professionals working with them in relation to their drug misuse."*

136. In the face of the Parents' denials that they had taken non-prescribed drugs, the Judge cannot be criticised for not giving more weight to the reasons why they took such drugs or the nature of the drugs they had taken. If they had been truthful in their evidence, they could have given an honest explanation as to why they were doing so, and the Judge would have considered such explanations and given them such weight as she considered appropriate.

137. Dr Muchemenye is a psychiatrist specialising in general adult psychiatry and substance misuse psychiatry. He was called as a witness on behalf of the Department. He gave evidence of his treatment of both Parents. Michelle Aldridge is the clinical nurse specialist for the Community Drug and Alcohol Team and Michelle Ayres is a cognitive behavioural therapist also working for the Department. They were both called by the parents and gave evidence of their work with the Parents. At the time of giving evidence they did not know that the Court would make a finding that the parents had taken non-prescribed drugs and had lied to their professionals about the same.

138. In most of Dr Muchemenye's evidence, he assumed that the Parents had complied with their drug regime. However he was questioned about the Cellmark results at pages 380 to 382. He was hesitant in his answers but acknowledged that if there had been non-compliance with the drug regime and lies about it, it would affect the long-term prognosis. Mrs Aldridge was questioned about the Cellmark test results, principally by the Judge at pages 616 to 618. She was reluctant to say that it would have altered her opinion that the Mother was in what she called the action stage of change but she admitted there was a possibility of a risk of her resorting back to illicit drug use. Mrs Ayres said (starting at the foot of page 652) that if the Mother was taking non-prescribed drugs it would not be her speciality.

139. The Judge referred specifically to the evidence of these three witnesses at page 101 of her judgment. She took it into account but the weight she could attach to it was reduced because

of the dishonesty associated with the use of non-prescribed drugs. That was a matter for her to judge and is not one with which I can interfere on appeal.

Grounds 11 (o), (p) and (q)

"o. That the Guernsey Juvenile Court placed undue and unreasonable weight and was unreasonably influenced by the hearsay and historic evidence of Dr Gill's report dated 25 November 2009;

p. That the Guernsey Juvenile Court failed adequately to take into account the evidence given by Michelle Ayres, Michelle Aldridge, Dr Muchemenye, [and three other witnesses] of the significant changes the First Appellant had in particular effected in her life and her changed behaviour and demeanour;

q. That the Guernsey Juvenile Court failed in particular to give adequate weight to the progress the First Appellant in particular had made in the therapeutic work she had undertaken."

140. Dr Gill, a Locum Associate Specialist prepared a report on the Mother dated 25 November 2009 that was mentioned in the judgment as part of the factual chronology (paragraph 80 of the judgment) but there is nothing in the judgment to suggest that the Judge was unreasonably influenced by the content of the report.

141. There are references in the judgement showing that the Judge had regard to the progress that the Parents, and the Mother in particular, had made with the assistance of the therapists with whom they had been working and the resultant changes in their presentation. The positive indicators from that work were assessed by the Judge in the light of all the other evidence presented to her. The weight to attach to that evidence in the balancing exercises the Judge had to perform was a matter for her to decide. There is nothing in the judgment to indicate that an appeal court could interfere with her conclusions.

Ground 11(r)

"r. That the Guernsey Juvenile Court failed to adequately take into account or at all the positive reports from the Contact Centre concerning the Appellants relationship with K."

142. The Parents acknowledge that the Juvenile Court recognised that contact had been positive, in general terms. However, they highlight the fact that the Judge said *"I accept that those contact visits have been positive but the reality is they are for a short period of time and there is no evidence before me that the parents can translate that capacity in a short contact visit to being able to parent over a long period of time."* The contention is that the judgment is silent as to whether the Court gave any consideration to whether or not it would be in the child's best interests to allow for a further assessment of the Parents' capacity to care for K and following on from that contention, that the Court failed adequately to into account, or at all, the positive reports from the contact centre concerning the Parents' relationship with K.

143. The Court's concern that the contact sessions were for a short period of time only was valid in light of the finding at paragraph 258(4) that *"neither of the parents have been able to provide consistent care for any one of the children for any sustained period of time…. And in respect of the mother, this has been longstanding".* To say that the Court failed to take account of the positive reports of the contact visits is unjustified when they were specifically mentioned at paragraph 258(12) of the judgment. The amount of weight to attach to those reports was a matter for the Judge in light of the totality of the evidence she had heard.

144. The criticism that the Judge failed to give consideration to a further period of assessment needs to be viewed against the background that the Parents did not request such assessment at the hearing. However, the Judge said in paragraph 272 that she had considered whether

"there could be support afforded to the parents by the department even over a lengthy period in order to assist the aim of the child being cared for by his parents but have concluded that I can have no confidence at all that such support would be based on the parents working in partnership with the department and in fact I have concluded that I cannot have any confidence in the integrity of the parents to work with the department in an open and frank manner which is the least that is required for the extensive support that is necessary, to have a positive impact on K's development.

273. I have taken this into account when coming to my decision."

That passage demonstrates that the Judge gave consideration to the possibility of further work being carried out with the parents to enable them to care for the child but she reached the conclusion that would not be possible.

Grounds 11 (s) and (t)

"s. That the Guernsey Juvenile Court failed to adequately take into account the evidence of the parents that the Department had made it clear to them from the outset of the proceedings that the Department had no intention of changing its mind in relation to the child's long-term plan whatever the parents did in terms of changing their behaviour so that the Department failed to properly factor in or factor in at all the positive information received from the adult services team in relation to the parents and their behaviour and their engagement with the adult services team;

t. That whilst conducting that a placement at home would not be sustainable with support being afforded by the Department, the Guernsey Juvenile Court was wrong not to consider whether there should be a further period of assessment of the parents' ability to care for K before the draconian and exceptional step of separating K from his birth family was taken."

145. The social worker said in her evidence at page 152B and also at pages 265E and 270B of the transcript that there is nothing the Parents could have done that would have changed the Department's mind. The Parents criticised the Department for having failed to offer a parenting course or a mother and baby placement to the Mother in relation to K. The social worker was not sure why that was not offered although she believed it had been considered (pages 161 to 163 of the transcript).

146. Whatever view the Department may have held as to the Parents' prospects of caring for K, it was for the Judge to make her own assessment on the evidence before her. It is apparent from the long and detailed reasons in her judgment that she was not just following the Department's wishes but she was reviewing the evidence for herself; all of the evidence whether it was adduced by the Department or by the Parents or other parties. She formed her own views, independently of the Department's attitude.

147. As Baroness Hale said in In Re B (Children) [2009]1 AC 11, at paragraph 57,*"It is important to keep separate the roles of the court and the local authorities in the protection of children from harm".* In this jurisdiction, the legislature has conferred separate duties on each of the Court, the Department and the Safeguarder Service and it is important to keep all the different roles separate and distinct from each other.

148. The Judge acknowledged that she was being asked to take a decision that amounted to a draconian step. She said at paragraph 260 of the judgment: *"To separate a child from his natural family is a draconian step and to be taken exceptionally."* She came to her decision by applying the law as required of her and based upon on the totality of the evidence presented

to her including all the evidence presented by the Department and by the Safeguarder and by doing so she reached her own independent conclusions.

Ground 11(u)

"u. That beyond stating that the separation of the child from his natural family is a draconian step and to be taken exceptionally, the Guernsey Juvenile Court when considering the evidence before it failed to adequately take into account the detriment to K in losing contact with his birth family. The Guernsey Juvenile Court failed to properly balance the risk to K in losing that relationship with his birth family against the risk to K of returning to the care of his parents."

149. The Parents' contention is that when balancing all the factors relevant to the decision the Court had to make, the Judge failed to take into account that a CPO leading to an adoption would involve a loss of K to his family; and that there were losses inherent in adoption including potential adoptive placement breakdown. The Juvenile Court was referred to the case of Re B [2013] as to the requirement that adoption be an option of last resort and must be a proportionate response to the harm which is feared for the child. The Court was also referred to Article 8 of the European Convention on Human Rights and the need to take account of the risk of the loss of the child to the birth family.

150. In my view, such criticisms of the judgment are not justified. The Judge considered the relevant factors in her concluding assessment at paragraphs 260 onwards when applying the factors in sections 3 and 4 of the 2008 Law and, in particular, in her application of the child welfare checklist. When considering section 4 (2) (g) of the checklist *"The effect or likely effect of any change in the child's circumstances, including the effect of the child's removal form Guernsey or Alderney"*, the Judge referred specifically to the cases of Re G (Children) [2006] 2 FLR 629, ReB [2009] UK SC5, Re G [2003] EWCA 965 and Re B [2013] UK SC 33. From those cases and from what she wrote in the judgment, it is apparent that the Judge took account of the risk of the loss of contact between K and his birth family and considered the Article 8 rights of the parties.

Conclusion

151. In conclusion, I have found that Judge McMillen was correct in her understanding and application of the law to the facts of this case. She gave a thorough, reasoned and comprehensive judgment. With the exception of the incorrect finding that the Father had tested positive for amphetamines on 10 July 2012 which was no overall consequence, there are no grounds for interfering with her factual conclusions. As to the evaluative findings in respect of the crossing of the threshold and the disposal of the case, it cannot be said that the Judge's decisions were wrong. For all the reasons given in this judgment, I dismiss the appeal.

152. I wish to express my gratitude to counsel for their presentation of their respective submissions and, in particular, for assisting me with the points of law that I raised with them and with which they would not otherwise have taken issue.

