

Application under Section 18(1)(a)(iii) of the Children (Guernsey and Alderney) Law 2008 as amended for leave to apply for a contact order under section 17 of the Law in relation to a biological child.

**[2024]GRC091**

**ANONYMISED FOR PUBLICATION**

**IN THE ROYAL COURT OF GUERNSEY**

**Between:**

**X**

**Applicant/  
Birth Mother**

**-v-**

**MR & MRS A**

**Respondents/  
Adoptive Parents**

**Date of hearing: 11<sup>th</sup> October 2024  
Judgment handed down: 11 November 2024**

**Before: Jessica E Roland, Deputy Bailiff**

**Counsel for the Applicant: Advocate C J Fletcher**

**Counsel for the Respondents: Advocate S Mallett**

**Cases, legislations and texts referred to:**

The Adoption (Guernsey) Law 1960 (as amended)  
Human Rights (Bailiwick of Guernsey) Law 2000 (as amended)  
The Children (Guernsey and Alderney) Law 2008

The Children 1989 Act

The Adoption and Children Act 2002

Morton v. Paint (1996) 21 GLJ 61.

Re U and U (minors) Magistrate's Court 16 July 2010

Re T (Minors) (Adopted Children: Contact) [1996] Fam 34

Re S (adopted child: contact by sibling) [1999] 1 FCR 169

Re R [2005] EWCA Civ 1128

Re B (A Child) (Post-Adoption Contact) [2019] EWCA Civ 29

**Introduction**

1. This is an application by X (“Applicant”) under Section 18(1)(a)(iii) of the Children (Guernsey and Alderney) Law 2008 as amended (“the Law”) for leave to apply for a contact order under section 17 of the Law in relation to her biological child, C (the “Application”). The Respondents to this application are Mr and Mrs A who are C’s adoptive parents. X is not amongst the classes of people who are, by operation of law, entitled as of right to apply for a contact order in respect of C.
2. ...
3. ...
4. ...
5. ...
6. ...
7. ...

## The Law

8. Section 18(1)(a)(iii) provides that “with leave of the relevant court, any person .....” is entitled to apply for a Section 17 Order in respect of a child. In *Re U and U (minors) Magistrate’s Court 16 July 2010*, Judge McMillen in the Magistrate’s Court considered what criteria to apply for applications for leave to apply for a Section 17 Order. She was satisfied that she should apply the criteria and principles set out in Section 3 and Section 4 of the Law.
9. Section 3 states that when a public authority carries out, in respect of a child, any function under the Law, that authority shall 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 having taken these principles into account, carry out the function, having regard to the overriding principle that the child’s welfare is the paramount consideration.
10. The Child welfare principles set out at section 3 (2) 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 on 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 such 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."*

11. Section 4 states:

- "(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) namely 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), the age, gender, ethnicity, cultural background, language, religion and any other relevant characteristics of the child,*
- (b) any harm the child has suffered or is at risk of suffering, the child's physical, emotional and educational needs,*
- (c) 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,*
- (d) the importance and likely effect of contact between the child and his parents, siblings, relatives and any other people significant to the child, and*
- (e) 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."*

12. This court is a public authority and in considering the application under Section 18(1)(a)(iii) of the Law, I am satisfied I am carrying out a function under this Law. Although I am not bound by the judgment of Judge McMillen, nevertheless, the parties agreed, and I am satisfied that in considering this case I should apply those criteria and principles that are relevant.

### **Submissions**

13. Advocate Fletcher urged me to take an approach to adoptions that reflects the English adoption regime. She submits that the CPO is the closest equivalent that this jurisdiction has to a Placement Order, which is an order under the Adoption and Children Act 2002 (as amended) ("ACA 2002"). The requirements of section 27 of the ACA 2002 are that the court, in every case before making a Placement Order, must consider the proposed arrangements for contact and the views of the parties, as to those arrangements. The court is given wide and flexible powers to make arrangements for contact between the child and any other person in the period prior to any placement for adoption, and thereafter, during the operative period of the placement for an adoption order. An order for contact can be made in response to a specific application or on the court's own initiative. She says, in this case, the expectation of the Care

Plan put forward in support of the CPO was that reciprocal indirect contact would take place by way of the letterbox contact. Section 46 of the ACA 2002 also requires the court to consider whether there should be arrangements for allowing any person contact with the child; and for that purpose the court must consider any existing or proposed arrangements and obtain any views of the parties to the proceedings. Section 51A(a) allows for post-adoption contact. Advocate Fletcher says that although the adoption law is different in this jurisdiction, in considering the application for leave, I should take into account the purpose behind the English legislation and the recognition of the importance of contact with birth parents that this reflects.

14. She argues that it is in the welfare of C for C's biological mother to have leave to make an application for indirect contact given the understanding and expectation, at the time of the Adoption Order, was that twice yearly indirect contact between C and C's biological parents was in C's welfare, and this has been stopped by Mr and Mrs A without any reason which would justify the cessation of indirect contact. It is important for C to understand C's life story and to have a connection with C's birth mother. The letterbox contact X provided was good quality and thoughtful indirect contact for C and for C not to receive this is detrimental to C's welfare. It is also important that X receives information regarding C to maintain an effective mutual link between her and C throughout C's childhood which will enable this to be maintained beyond C's childhood, if C so wishes.
15. Advocate Fletcher also submits that C's and X's ECHR Article 8 rights to a private and family life need to be respected and protected. In these particular circumstances, X's applications are appropriate and proportionate, and therefore, X should be given leave to make her application for indirect contact.
16. Advocate Mallett submits that the English position does not assist X on the facts of this case. In dealing with post-adoption contact, Section 51A(5) of the ACA 2002 specifically refers to the court taking into account any risk there might be of the proposed application disrupting the child's life to such an extent that he or she would be harmed by it (within the meaning of the Children 1989 Act) along with the applicant's connection with the child, and any representations made to the court by the child, or a person who has applied for the adoption order or in whose favour the adoption order is or has been made. She relies, in particular, on paragraph 54 of Re B (A Child) (Post-Adoption Contact) [2019] EWCA Civ 29 where Sir Andrew McFarlane says:

*“54. Although s 51A has introduced a bespoke statutory regime for the regulation of post-adoption contact following placement for adoption by an adoption agency, there is nothing to be found in the wording of s 51A or of s 51B which indicates any variation in the approach to be taken to the imposition of an order for contact upon adopters who are unwilling to accept it. Indeed, as Mr Goodwin's submissions, in my view, establish, both the Explanatory Note and the fact that Parliament only afforded the court power to make orders of its own motion if such orders are to prohibit contact, Parliament's intention in enacting s 51A was aimed at enhancing the position of adopters rather than the contrary.”*
17. Further, the position in law which is more reflective of the Guernsey regime, is as articulated in Re R [2005] EWCA Civ 1128 that *“the imposition on prospective adopters of orders for contact with which they are not in agreement is extremely and remains extremely, unusual”*.
18. Advocate Mallett submitted, on behalf of Mr & Mrs A, that they have been charged with deciding welfare issues for the balance of C's minority and that they are best placed to make decisions around the nature, delivery and level of contact and that there is nothing sufficiently contrary to the best interests of C (considering the application is for X to receive photos and information – they are not suggesting that X cannot provide information for the child for the future, although they will not give it to C yet), nor is the position sufficiently unreasonable to merit leave being granted to X, in this instance.

## Discussion

19. As I have said above, the information I have in relation to the CPO and the adoption is very limited. I do not know the basis upon which the CPO was made. It was not a condition of the adoption that contact should take place, nevertheless, whilst I do not have the Care Plan nor the documents that were before the court for the adoption itself, both parties confirmed that when the adoption was made there was the expectation of twice yearly indirect contact but subject to ongoing review by Mr and Mrs A as to whether it was in C's welfare. Both parties say I do not need any further information to determine leave.
20. As this is a leave application which I should not treat as a substantive application, I am satisfied that I can consider the application without more detailed information about the circumstances of the CPO and the adoption order. Nevertheless, because I consider that sections 3 and 4 of the Law apply to the question of leave, as well as the substantive hearing if leave was granted, and as such C's welfare is my paramount consideration.
21. Contrary to the arguments of Advocate Fletcher, I do not consider that I can treat Guernsey law as if the ACA 2002 is in force. Nor am I persuaded that this is an area for jurisdictional intervention, in accordance with the principles set out in *Morton v-Paint* (1996) 21 GLJ 61. There are fundamental differences in our respective adoption regimes which includes amendments made to the Guernsey law since the English law was significantly changed by the introduction of the ACA 2002, but where the States did not take the opportunity of incorporating or reflecting these changes. Further, the States of Deliberation have approved a Policy Letter entitled 'Review of Adoption Law — Second Phase' (the 2016 Policy Letter - Billet d'Etat VII of 2016). In those circumstances, I take the view that the proper course is to await the enactment of any legislation following that review and this court should not, in the meantime, be tempted to fill any perceived gap.
22. Nevertheless, it is notable that although the law in England & Wales has changed significantly, as Sir Andrew Macfarlane made clear in *Re B* in the paragraph I have set out above, the principle non-imposition of contact upon adopters has not changed. Further, at paragraph 62 of *Re B* (*ibid*) he says:
- “..... the ultimate decision as to what contact is to take place is for the adopters and that the court will be 'extremely unusual' for the court to impose a contrary arrangement against the wishes of adopters. Although Mr Recorder Norton was plainly most careful in his choice of words when speaking of contact at the time of the placement order in the present case, and I would not criticise him for anything that he said on that occasion, it is of note that his words were interpreted by the adopters as, in some way, flagging up that direct contact would be ordered at the final adoption hearing and that, as a result, the final adoption process has been delayed for a year and the adopters have felt less than fully settled in taking up the care of B as a result. At the placement order stage courts should therefore be careful to stress that, if there is any future issue as to contact, the law, as stated in *Re R*, will apply and, save for there being extremely unusual circumstances, no order will be made to compel adopters to accept contact arrangements with which they do not agree.”*
23. The English Courts are not required to apply the child welfare principles on the consideration of leave to apply for contact, due to the wording of the Children Act. However, despite this difference I have come to the conclusion that it is appropriate that, nevertheless, I can take into account the principles and guidance outlined in the cases where leave is being sought to make an application for contact before the 2002 Act came into force. In *Re T (Minors) (Adopted Children: Contact)* [1996] Fam 34 the court considered the issue of informal arrangements which the adopter considers no longer to be appropriate. Balcombe LJ in the lead judgment envisaged that a simple explanation in non-legal terms of why they had a change of heart was

“all that is necessary”. In the case of *Re S (adopted child: contact by sibling)* [1999] 1 FCR 169 Charles J sets out, in some detail, previous cases where the issue of contact after adoption has been considered, including *Re T (ibid)*. He refers to the judgment of Sir Ralph Gibson in *Re T (ibid)* where after agreeing with the reasoning of Butler-Sloss and Millett LJ, Sir Ralph Gibson says:

*"but the proper response to any change in circumstances should be left to the decision of the adoptive parents and the discharge of their responsibility for the child. If their decision should be demonstrably against the best interests of the child, then the natural parent can apply to the court for leave to seek an order for contact. Such procedural requirements as exist are imposed for the proper protection of the child and the adoptive parents against unnecessary disturbance."*

Charles J then in considering this passage says:

*"In my judgment, in the passage I have cited Sir Ralph Gibson is not seeking to formulate a test, and his reference to a decision of the adopters being demonstrably against the best interests of the child is an example. But with the guidance given by this passage, and having regard to the authorities referred to above, in my judgment the applicant for leave must satisfy the court at the leave stage that, having regard to the relevant changes in circumstances, the decision of the adopters is sufficiently contrary to the best interests of the child, or sufficiently unreasonable, to warrant the court overriding the discretion conferred on the adopters by the adoption order to determine whether what is proposed by the applicant for leave (e.g., as here, contact with a sibling) should be permitted, by giving itself the jurisdiction and discretion to determine this in section 8 proceedings."*

*This approach is not one where the court asks what the court making the adoption order would have considered to be in the best interests of the relevant child, or children, at the time the adoption order was made if the present circumstances had then existed, but is one that recognises that the relevant adopters could not have had an adoption order on terms forced upon them and thus that the discretion and freedom of action given to them by the adoption order to safeguard and promote the welfare of the child should be respected."*

*The particular circumstances of each case will be important. For example: (a) where the adoption order was made on a particular understanding the adopters may well have to show good reasons for departing from that understanding to avoid leave being granted because the understanding places a limit on, or a starting point to their freedom and discretion as adoptive parents (see *In re T. (Minors) (Adopted Children: Contact)* [1996] Fam. 34 and *In re T. (Adoption: Contact)* [1995] 2 F.L.R. 251; but see also *In re E. (Adopted Child: Contact: Leave)* [1995] 1 F.L.R. 57, which was not referred to in the judgments in the two *In re T.* cases); whereas (b) in cases where there is no such understanding, or other matter, which limits the freedom and discretion of the adoptive parents to decide what is in the best interests of their child, in my judgment the court would have to be satisfied that it appeared that the decision of the adoptive parents was outside the range of decisions that a reasonable adoptive parent in their position could take because, for example, it was clearly not in the best interests of the child, or for some other reason."*

24. Contact with a child's birth family and the value of that relationship is something that the court takes into account when considering the adoption. As I have set out above, this adoption was made on the voluntary assumption of letterbox contact, subject to review by the adopters, but it was not a condition of the adoption. In this case, the statement filed by Mr and Mrs A shows that their decision not to provide further letterbox contact is not arbitrary or capricious. The decision taken by Mr and Mrs A to review the letterbox contact was in the context of having received the information that they did from the RCT. Whilst X may have regretted making the comments that

she did to the RCT as she was upset, nevertheless, I have come to the conclusion that it was a reasonable decision of the adopters when faced with the information that they had to terminate the letterbox contact in C's best interests. They have shown a good reason for departing from the understanding that was in place at the time the order was made. The understanding had built into it a recognition that their views on whether it was in C's best interests to continue might change. They make clear that their priority is C and that the decision to cease providing the letterbox contact to the birth parents (X can continue to provide her information although it will not be passed on until C is 18 or they decide it is in C's best interests) is because that is what they believe is currently in C's best interests. They want to provide C with a stable, loving home that meets all C's needs. The information received from the RCT about X's knowledge about C and her intentions for contact with C (even if she says she would not act upon them) have already caused changes in C's life, even if C has limited or no awareness of them. For this court not to respect Mr and Mrs A's views, in these circumstances, places the adoption at risk of disruption.

25. In the circumstances and taking into account sections 3 and section 4 of the Law, and taking into account the respective human rights of the parties and C, I can see no good reason either on the facts, or the law in this case, for usurping the parental responsibility conferred on Mr and Mrs A when they adopted C. I consider that the appropriate order that is in the best interests of C is to dismiss the application for leave by X and to respect the status of Mr and Mrs A, as C's parents.