Case No: B4/2013/2048 & B4/2014/0198

Neutral Citation Number: [2014] EWCA Civ 128
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
FAMILY DIVISION
(HIS HONOUR JUDGE TURNER QC)

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Tuesday, 21 January 2014

B E F O R E:

LORD JUSTICE RIMER

LORD JUSTICE McFARLANE

LORD JUSTICE VOS

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IN THE MATTER OF C (A CHILD)

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Mr Frank Feehan QC and **Miss Francesca Conn** (instructed by Moss & Coleman) appeared on behalf of the **Appellant Father**
Ms Ruth Cabeza (instructed by Moss Beachley Mullem and Coleman) appeared on behalf of the **Appellant Mother**
Ms Angela Burstow (instructed by the Local Authority) appeared on behalf of the **relevant Local Authority**
Ms Kelly Webb (instructed by Miles & Partners) appeared on behalf of the **Children's Guardian**

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J U D G M E N T

1. LORD JUSTICE McFARLANE: This is a case in which the father of a young girl, born on 16 August 2012 and therefore now still aged only 17 months seeks permission to appeal. The first initial of her first name is A. The mother also, late in the day, has issued an application for permission to appeal. Both have been listed for consideration of the permission application with the appeal to follow if granted.

2. In the event, there is consensus among all the parties, including the local authority, that the two appeals should be given permission and should be allowed, with the result that the case should be remitted for a first instance rehearing. It is, therefore, not necessary for me in the course of this judgment to rehearse all of the detail that sits behind the circumstances that I have just described. It is, however, I think, common ground between the parties in the case that it would be useful for this court to identify the particular difficulties that have arisen in this case and offer at least some guidance as to how those matters might be dealt with in similar cases in the future.

3. The difficulties to which I refer arise separately from the individual abilities and disabilities of these two parents. The mother is a young woman of 22 years of age who is of Turkish Cypriot origin. She is said to have a low level of cognitive functioning and she also has a degree of speech and hearing impediment, although she can hear and speak in English without the need of an interpreter. The father, a 35-year-old man who originates from the Angolan Portuguese community but came to this country from Portugal when he was seven, is profoundly deaf. He communicates by using British Sign Language.

4. A was born to this couple, and immediately the caring professionals, particularly at the hospital, identified deficits in the couple's ability to provide ordinary day-to-day care for A. On 22 August 2012 when A was only six days old, by social workers communicating as best they were able to do, the parents ostensibly gave consent under section 20 of the Children Act 1989 for A to be accommodated by the local authority in foster care.

5. It is of note that no professional interpreter was present at the meeting at which both these parents gave their consent under section 20, and the local authority used the only available resource, namely the mother, who herself, as I have indicated, has learning disabilities, to communicate to the father just what was involved in giving consent under section 20. Be that as it may, A was accommodated under that arrangement for about two weeks before the parents withdrew their consent. That withdrawal triggered the local authority applying to the court for a care order. An interim care order was granted on 7 September and A has been looked after away from her parents' care since then for much of that time in local authority foster care.

6. The proceedings were undertaken in the Principal Registry of the Family Division, and in their latter and more important stages they were conducted by His Honour Judge Turner QC. At an issues resolution hearing on 18 April 2013, amongst other steps that were accomplished, a document was drawn up recording concessions by each of the two parents as to the threshold criteria under CA 1989, s 31 in the case. Complaint is made on behalf of the father that that concession was achieved under pressure from the court for something to be put down in writing acknowledging that the section 31

threshold was established in this case; limited time was given for that process over the lunch adjournment, and the father was not assisted sufficiently by the timescale and the level of interpretation available to understand the process and give any informed consent to the schedule that was drawn up.

7. The final hearing was undertaken over the course of I think five days or more before Judge Turner in early June. He delivered himself of a full and reasoned judgment on 3 June. At the conclusion of the judgment, he made the watershed conclusion that it was not in A's best interests to be brought up by either of her parents, either in combination or individually, and, there being no other family resource available, the only course open for her future care was for her to move through the care system and on towards adoption. He therefore made a full care order, dispensed with the parents' consent to adoption and made a placement for adoption order. It is against those orders that the two parents now seek to appeal.

8. Within the court process, steps had been taken to provide the court with expert opinion upon the impact of the father's profound deafness, both on his ability to care for A and work in partnership with the professionals who might give him advice, but also on his ability to communicate what he wanted to say and involve himself in the proceedings. In particular, a psychologist who was herself deaf was instructed, Dr O'Rourke, and a deaf social worker professional. Both of those in the course of detailed reports expressed profound concern as to the provision of interpretation support to the father in the lead-up to the proceedings and the early stages of the proceedings.

9. By the time the case came on for its final pre-trial hearing before Judge Turner on 2 May, a need for a further parenting assessment of both parents had been identified. The local authority offered what might be called an ordinary parenting assessment undertaken by a social worker from the local authority team, assisted by a sign language interpreter for the father, and because no other resource was available and because the final hearing had been fixed to start effectively four weeks later, the court sanctioned that process. Significant criticism was voiced by Dr O'Rourke in particular, and also the independent social worker, of this local authority parenting assessment, conducted (as they advised it had been) without any adequate provision to accommodate the father's disability and therefore communicate in any meaningful way his response to the assessment process.

10. The threshold criteria, as the judge indicated in the course of his contribution to the evidence in the case, was passed on a modest basis. In the end, the two factual matters against the father that were recorded there did not form part of the judge's reasons for deciding that the father in particular could not provide a caring role for A in the future. The judge's conclusions about the father were based primarily upon his lack of insight into the incapacity that the mother presented because of her disability to be an effective carer for A, and the father's seeming lack of commitment at times to prioritise A's needs over his known, not to "step up", as the phrase was used, to intervene to take over the care of A at times, and the father's decision to reduce the number of contact sessions that he attended with A when he wished to prioritise his desire to obtain employment.

11. It should be said, as part of the list of the attributes of these parents, that in addition to the disabilities that I have mentioned, the father particularly is noted to be a man of significant intelligence to degree level and who, as a matter of intelligence, is not at all at any disadvantage in these proceedings. It is also the case that all of the professionals that I have seen recorded on paper, and particularly the judge, speak of the parents in positive terms in terms of their gentle and appropriate presentation to the court. This was not a case where all the issues pointed one way.

12. The appeal mounted by the father was issued some six weeks after the judge's decision, yet here we are, some seven months after the judge gave his judgment, hearing the appeal which in the event has been resolved by consent. This period of some 30 weeks to determine an appeal at a time when cases at first instance now must, unless there are exceptional reasons, be undertaken from start to finish within 26 weeks, is untenable. It is not necessary or helpful for me to descend into detail in describing quite how it is that we are where we are in the timetable. Part of the reason for the delay was delay in extending public funding for the father to mount his appeal. Part of the reason is that I refused permission to appeal on paper. That permission decision was revisited by Ryder LJ in October and he granted permission to appeal.

13. In doing so, Ryder LJ focussed on the particular element of the father's profound deafness, and, with his experience of other cases, Ryder LJ considered that the father's application to the judge, which had been refused at the final hearing, for permission to instruct a further expert, a Dr Cornes, should have been granted. Ryder LJ at that interlocutory permission to appeal hearing, whilst not granting permission to appeal, nevertheless gave permission for Dr Cornes to provide a report. I, and I think my Lords, are very grateful to Dr Cornes for undertaking that task within a tight timetable and producing a comprehensive report which has changed the climate of the case. The local authority now see what is said about the father in the light of advice from an expert who, whilst not deaf himself, has had a lifetime of experience in matters of communication between deaf people, the fact that that expert identifies substantial detriments in the process undertaken by the local authority and by the court has led to the state of agreement that exists between the parties resulting in the consensus that the appeal should be allowed.

14. In the mother's case there is also consensus, but on a different basis. The perspective that required prominence in evaluating her case and her response to the proceedings, namely her learning disability compounded with her hearing disability, had not been adequately provided for before the County Court, and that therefore there is, as with the father, a need to revisit the mother's potential with a targeted and suitable expert assessment. There is agreement, as I understand it, that two named individuals recommended by Dr Cornes should be instructed to undertake work with both of the parents.

15. So the outcome of the appeal, again by agreement, is that the case will be remitted for a complete rehearing before a different judge. Enquiries are to be made as to what level of judge is most likely to be available to take the case on in a prompt timescale, because the only thing that is absolutely clear in this case is that young A has waited for the

professionals, the adults and the judges to decide where her future should be and she has waited for that decision since August 2012.

16. I need say no more than what I have said to determine the appeal, but I will accede to the request made, I think by all counsel, to offer some guidance as to some lessons that might be learnt from this case. What I will say now is not at all intended to be comprehensive guidance, because my Lords and I have not engaged in the nitty-gritty of this case, and I would not profess to have extensive experience of these cases from other proceedings in other contexts, but it does seem to me that some guidance is helpful.

17. In preparing what I might offer by way of guidance I am assisted to a large extent by the judgment given by Baker J in Wiltshire Council v N and Ors [2013] EWHC 3502 (Fam), handed down on 1 July 2013. That case concerned an individual with very significant learning disabilities, but what Baker J says from paragraph 74 onwards to the end of that judgment can be adapted to the circumstances of this case.

18. Before descending into detail, I would make this observation. It is crucial for professionals and those involved in the court system, in particular judges, to understand one profound difference between the ordinary need in cases where parties to the proceedings may speak a different language for there to be “translation”, and the need for a different character of professional intervention in these cases. This need is not solely or even largely one of "translation" as would be the case in the straightforward translation of one verbal language to another; the exercise is one of “interpretation” rather than translation. Communication between a profoundly deaf individual and professionals for the purpose of assessment and court proceedings involves a sophisticated, and to a degree bespoke, understanding of both the process of such communication and the level and character of the deaf person's comprehension of the issues which those in the hearing population simply take as commonplace. For a profoundly deaf person, the "commonplace" may not be readily understood or accessible simply because of their inability to be exposed to ordinary communication in the course of their everyday life. What is required is expert and insightful analysis and support from a suitably qualified professional, and the advice this court has in the reports we have, a suitably qualified professional who is themselves deaf, at the very earliest stage.

19. Descending to some detail, it is no doubt the general understanding of those in the general population that sign language is simply sign language. But it has been made clear to us in the papers before this court that there are differences between British Sign Language, which is, as I understand it, an ordinary form of communication, and English Supported Sign Language, which is a different and far more structured, in grammatical terms, process. Different people from the population who have a hearing disability will use one or both or neither; they may have their own individual way of communication.

20. A second matter which has become plain to me, which was not something that I had understood previously, is the opportunity to use what is called Deaf Relay Interpretation. That is not to describe the ordinary course of events where the onerous task of interpreting these matters in court proceedings is taken on by a team of two or

three professionals who take it in turns to pass the baton, as it were, of interpretation in 20-minute periods one from the other. Deaf Relay Interpretation is an entirely different process. A relay interpreter is a deaf person who acts as an "intermediary" between the qualified sign language interpreter and the deaf person. The purpose is for the Deaf Relay Interpreter to provide a specialist service and approach the communication with the deaf person from a deaf perspective, breaking down issues and providing, what one report we have read refers to as, "cultural brokerage".

21. The family courts are now more familiar in recent times with the concept of "an intermediary" being involved in cases where an individual may have learning disabilities. What is described here by Deaf Relay Interpretation seems to me very much the same form of intervention. In her report, Dr O'Rourke stresses the value of this process and I propose to quote briefly from three passages in her report. She says this:

> "In my view, any work undertaken with [the father] is unlikely to succeed unless Deaf professionals are involved. To clarify this; the provision of interpreters alone is not sufficient."

Then later:

> "The use of a Deaf Relay Interpreter for formal court proceedings is recommended. This is an individual who works with the interpreter but can adapt the communication more flexibly to meet the needs of the Deaf person."

22. Later, in her second shorter report, Dr O'Rourke adds this:

> "Interpretation is not merely a matter of word-for-sign equivalence; cultural brokerage is required which is far more effective if the hearing professional has some knowledge and experience of the Deaf community."

23. Having explained those particular matters, which, it seems to me if there is a case involving an individual who has these unfortunate disabilities must be considered in every case, and looking at the guidance that Baker J offered from paragraph 74 onwards, I would adapt that guidance in these terms:

(1) 24. First of all, it is the duty of those who are acting for a parent who has a hearing disability to identify that as a feature of the case at the earliest opportunity.

(2) 25. Both those acting for such a party and the local authority should make the issue known to the court at the time that the proceedings are issued. Baker J says this:

> "The new PLO envisages that in those circumstances the court should give directions for special measures at the case management hearing to take place by day 12 of the proceedings."

That should apply in this case just as it does to the cases which are the target of Baker J's guidance.

(3) 26. It should, in my view on the basis of the information this court has, be a matter of course for the provision of expert advice on the impact of the deaf person's disability in the particular circumstances of the case to be fully addressed at the case management hearing. An application for expert involvement for the purpose, if nothing else to advise the court and the professionals how they should approach the individual, should be the subject of a properly constituted application for leave to instruct the expert under Part 25 of the Family Procedure Rules 2010. Baker J says this, and I endorse his words in our present context:

> "In addition, the legal representatives should normally by the date of the case management hearing identify an agency to assist their client to give evidence through an intermediary or otherwise if the court concludes that such measures are required."

I adopt those with necessary change of language to refer to Deaf Relay Interpreter.

(4) 27. The issue of funding needs to be

28. grappled with at the earliest stage before the case management hearing and during the case management hearing. The difficulties in funding the sort of intervention that I have described to assist a deaf person, which are even more complicated than those facing someone who has a language imbalance with the language of the court or who has learning disabilities. The provision of assistance for a deaf person will come from three publicly funded sources: first of all the Legal Aid Agency will be responsible for funding interpretation to assist the taking of instructions and other legally-based occasions that require interpretation. But, they do not cover the provision of interpreters in the court; that is the role of the Court Service, HMCTS. Thirdly, the local authority are likely to be responsible for providing the appropriate interpreter during meetings between social workers and a parent and in the course of any assessment work that is undertaken. All three of those bodies need to be appraised of the particular needs of the particular party at the earliest opportunity, partly as a matter of good practice but also partly because the cost of the sort of intervention that I have described is likely to be higher than simply providing someone to translate the language of one party to another, and so approval for funding at the higher level is likely to be required, certainly by the Legal Aid Agency and the Court Service. The sooner the application is made and more generally, the more readily those agencies understand that these cases are different from simply providing a translator and they may need a higher level of funding to be approved, the better. Going back to Baker J's guidance, he stresses that the importance of addressing the funding issues at the earliest opportunity cannot be underestimated.

29. Finally, it may be helpful to simply list the occasions in these proceedings at first instance where the guidance that I have described has not been followed and where the parties, particularly the father, have been at a disadvantage, but even more importantly A was at a disadvantage because the judge was at a disadvantage in understanding the

issues in the case as he may have done if the appropriate interpretation and assessment had been provided. The first is this, and I have mentioned it already: there was no provision for interpretation when the father made the important step of agreeing to his baby daughter being accommodated under section 20 of the Children Act. To rely upon the mother who, even if she did not have the unfortunate cognitive disability she has, to interpret complicated matters such as section 20 of the Children Act and the authority being given to the local authority to the father was to put an undue burden on her. Once one understands that she does have these disabilities, it seems to have been wholly inadequate for her to act as an interpreter for him at that crucial meeting.

30. Secondly, I think it is accepted that at many of the early meetings with the parents, the local authority did not provide any interpreter for the father other than the mother.

31. Thirdly, although the court had the very clear reports from Dr O'Rourke and the deaf independent social worker, the submission made by Mr Feehan QC, which, without having heard argument about it I accept, is that those materials were not fully understood and were not given sufficient weight and importance. Had those been available at the very beginning of the case, as the guidance I have just offered suggests they should have been, the whole shape and structure of the case and the level of professional intervention should have been different and should have accorded with the unchallenged advice, in particular of Dr O'Rourke.

32. Fourthly, a feature of the case which is not uncommon in some care proceedings, particularly where there is no single significant assault or event relied upon, is that the local authority was not able to be precise about the factual allegations they relied upon in proving the threshold criteria. That too, as I would understand it, impeded the father's ability to understand what was going on and what he was being required to accept or needed to challenge.

33. Fifthly, the Legal Aid Agency, apparently for some significant time, refused to allow funding at a level above what would ordinarily be paid to language translators, and it took time to obtain necessary authority for that. Similarly, there were difficulties that I have heard of in this case in achieving funding from the Court Service.

34. Sixthly, from the experience in the present case, it would seem that further training, which alerts the judges who undertake these cases to the particular need for an intermediary, a Deaf Relay Interpreter, is necessary to avoid other judges in the future unwittingly being drawn into a process which later, as this process has been, is found to be a process which has failed to meet the disability needs of the parties and failed to produce an effective evaluation of the parents' potential to look after their child.

35. Finally in terms of the list of particular matters in this case, there was an unrealistic timescale afforded to the assessment process. It will be all too easy for courts now to be driven by the 26-week deadline by which care cases should be concluded, but if there are particular aspects of the case that indicate that the timescale for assessment simply cannot provide an effective and meaningful process because of the disabilities of one or more of the individuals involved, that would seem to me to be a reason for extending the timetable for the case by a modest degree, rather than squeezing the

assessment in and taking whatever assessment is available within that timescale. The result of that option being chosen by the court in the final directions hearing has been that the appeal now, all these months later, is being allowed by consent.

36. Finally, in drawing these matters together, all that I have said is not simply good practice in order to achieve a more informed and focused result for a child. The court as an organ of the state, the local authority and CAFCASS must all function now within the terms of the Equality Act 2010. It is simply not an option to fail to afford the right level of regard to an individual who has these unfortunate disabilities.

37. Having said all of that, I think it is common ground that the appeal of the mother and the father should be allowed; the placement for adoption order should be set aside; the full care order should be set aside, but replaced with an interim care order, which will be reviewed by the first instance court. Steps will now be taken by the parties to agree basic directions and we will make further enquiries to see what is the optimum level of judge and, if possible, the identity of the judge who is now to take on the task of reconsidering this case.

38. LORD JUSTICE VOS: I agree.

39. LORD JUSTICE RIMER: I also agree