Neutral Citation Number: [2014] EWCA Civ 70

Case No: B4/2013/1675

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PRINCIPAL REGISTRY (FAMILY DIVISION)
MR JUSTICE KEEHAN
IL12C00748e

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2014

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE AIKENS
and
LADY JUSTICE MACUR DBE

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Re C (A Child)

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Ms Rachel Wingert (instructed by **Kyles Legal Practise**) for the **Appellent**
Ms Martina Van Der Leij (instructed by **L.B. of Lewisham**) for the **Respondent**

Hearing dates : 23 January 2014

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Judgment

Lady Justice Macur DBE :

1. This is the mother's adjourned application for permission to appeal, with appeal to follow if successful, the placement order made by Keehan J on 7 June 2013 in respect of S, a 5 year old male child, the learned judge having allowed the appeal of the London Borough of Lewisham ("the local authority") against that part of the order of District Judge Simmonds on 22 February 2013 which refused such an order. At the conclusion of the hearing, the Court granted permission and allowed the appeal. These are my reasons.

2. CPR 52.13 applies. In order to obtain permission to proceed in a "second" appeal the mother must satisfy this court that (a) the appeal would raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it.

3. The mother's Counsel, Ms Wingert, in her skeleton argument in support of the application, sought to rely upon three matters which she contends constitute "an important point of principle or practice". These may be described briefly as: 1) the making of a placement order in the absence of legal representation for the parents; 2) the interplay between orders made in relation to concurrent applications for care and placement orders; and, 3) the first appeal court's failure to consider the position of J, the (then) 14 year old brother of S and the mother and father in respect of ongoing contact as required by section 27(4) of the Adoption and Children Act 2002 when a placement order is made.

4. For my part I am not satisfied that these are, individually or collectively, "important point[s] of principle or practice" yet to be established. However, I am satisfied that the facts disclose some "other compelling reason for the Court of Appeal to hear it." That is, I adjudge that there was significant procedural irregularity so as to render the hearing of the first appeal unfair and, with respect to Keehan J, that the judge incorrectly exercised his appellate function. Permission to appeal thus followed.

5. In the circumstances, the background facts need scant reference. The mother is a serving prisoner. The father has served a prison sentence in relation to his participation in one of the fraudulent enterprises which she appears to have initiated. Both face the prospect of deportation. Prior to the parent's incarceration, the children were undoubtedly neglected albeit not physically ill treated. They were accommodated by the local authority in July 2011, having lived with an aunt for less than four weeks after the father's arrest, and although initially placed by the local authority with another relative, she ceded their care and they were placed together in April 2012 with foster parents where they have remained and thrived. Incontestably, they are both now rightly subject of care orders, whether full or (as this court has already directed in S's case) interim in favour of the local authority.

6. The age difference between the two boys alone augurs the different needs which they may have going forward but it is also apparent that S has required speech

and behavioural therapy, happily so far with some good effect. Nevertheless the brothers appear to have a close and supportive relationship. This inevitably points to the difficulties faced by any court called upon to consider their individual future care arrangements.

7. District Judge Simmonds of the Principal Registry heard the case in February 2013. The applications before him were primarily for care orders in respect of each of the boys and a placement order in relation to S. He was also obliged to consider the issue of contact.

8. The hearing lasted five days. There was a significant amount of documentary evidence and a significant amount of it obviously subject to challenge in cross examination of the witnesses as indicated in part in the transcribed ex tempore judgment delivered on 22 February 2013. However, there was also oral evidence heard from a member of the Family Finding Team despite the absence of any written statement, the learned district judge expressing surprise "given the case the local authority advanced". This is of some significance as will become apparent below.

9. The first of his judgments comprised 51 paragraphs and concluded that care orders would be made but the placement order refused. The District Judge indicated that a draft order would be circulated.

10. Counsel for the local authority e-mailed the district judge timed at 3.33 am on 25 February seeking to "clear misunderstandings" as to the thrust of her closing submissions which had apparently not been accepted. The district judge responded at 9.07 in short order restating the pertinent bases of the decision reached and indicating that the order would follow. Remarkably, and with great temerity in my view, Counsel then responded "with the greatest of respect, I do not agree with your analysis". Having re-iterated shortly the basis of his decision the district judge quite properly made clear that he was "not prepared and [would] not deal with this matter in e-mail correspondence."

11. Whilst other advocates were copied into the second e-mail and the first e-mails disclosed to them subsequently, apparently have made no complaint and may well regard it to be orthodox procedure, I regard this to be an entirely inappropriate, unacceptable and unsatisfactory practice. Not only was this an unwarranted ex parte approach by unconventional medium but it is a practice that lends itself to accusations of taint, bias, closed door justice and "stitch up" in the absence of an adequate and reliable method of recording what transpired. In the circumstances, the district judge was extraordinarily restrained in his responses.

12. Nevertheless, in light of the 'objections' voiced by the local authority as to the nature of the appropriate order, a further hearing was convened on 4 March, 2013. After hearing submissions, District Judge Simmonds gave another ex tempore judgement explaining why he refused to make other than a final care plan in S's case on the basis that he considered he had had before him "both in written form …also in oral evidence a clear, unfolding care plan."

13. And so the local authority came to lodge its notice of appeal. This was listed before Keehan J for permission to appeal.

14. The proceedings thereafter did not run smoothly. The case was listed in May on two occasions for 30 minutes in order to hear the application for permission to appeal and give any consequent directions. On each occasion the parents, both at that time in prison and both without legal representation (because of withdrawal of non means tested legal aid to which they had been entitled in respect of care proceedings at first instance) were not produced. The matter was then listed for 7 June.

15. There is no order that I have been able to find which records that Keehan J did give the local authority permission to appeal but by virtue of the listing on 7 June and the time allocated to it, I imply that he did. Whether an order drawn which accurately reflected this would have resulted in the parents obtaining legal funding I am uncertain but it would undoubtedly have assisted. In any event the parents were unrepresented at the hearing of the appeal.

16. The fact that parents comprise the vastly increased number of litigants in person which appear before the courts in child public law cases since they do not qualify for non means tested legal aid is all too apparent and unavoidable as a consequence of the present regime. As here, non represented parents will often be ranged against legally qualified advocates opposing them. They have access to justice in accordance with their "Article 6 rights" but are often daunted by the process and feel understandably outgunned. In itself, this fact does not found a meritorious ground of appeal but necessarily it comprises a context for the other complaints that are raised in this application. I have every reason to expect that, if they had been legally represented by a competent advocate, this appeal may never have seen the light of day.

17. The local authority was supported in the appeal by the Children's Guardian. Both were represented by legally qualified advocates. The Notice of Appeal listed six grounds of appeal. The first five amount to a challenge of the district judge's right to make an order in the face of the written care plan. The sixth challenged the "exercise of his discretion when deciding that adoption was not in S's best interests", relying on ten matters said to constitute either failure to accord due weight to certain aspects of the evidence, ignoring others, or affording too great weight to yet others. The nature of this latter challenge was necessarily ambitious in accordance with long standing jurisprudence very recently reviewed in part by the Supreme Court in RE B (A CHILD) (CARE PROCEEDINGS:THRESHOLD CRITERIA) [2013] UKSC 33.

18. At the conclusion of the hearing Keehan J summarised the appeal as consisting of five points:

> "(1) That [District Judge Simmonds] wrongly interpreted and assessed the evidence of Dr Bourne, a child and adolescent psychiatrist, who gave evidence before him.
> (2) The Learned Judge was wrong in his conclusions about the ability of the current foster carers to provide a long term home for S.

> (3) [District Judge Simmonds] fell into error in appearing to assume that he had the power to direct the Local Authority that, once a care order was made, he could decide where the child should live.
> (4) [District Judge Simmonds] was wrong to impose a care order upon the Local Authority which did not reflect the plan put before the Court by the Local Authority.
> (5) In this case the Learned Judge fell into error in reaching the conclusion that the Local Authority were putting before the court two alternative care plans: (i) a care plan for adoption and (ii) a care plan for long term fostering."

19. In the following five paragraphs of his judgment Keehan J deals with the points in turn. In every respect he upheld the submissions of the local authority. Having allowed the appeal and in accordance with Rule 30.11 of the Family Proceedings Rules (2010) he went on to consider whether he should remit the case to the District Judge or determine the appropriate orders. He took the latter course and made a placement order.

20. It is quite obvious that Keehan J was concerned at the delay in planning for S's future care needs, which delay is statutorily recognised as inimical to the welfare of the child (Children Act 1989, s 1(2)). Unfortunately, his understandable desire to move the matter forward appears to have blinded him to the significantly defective appeal bundle created and provided by the appellant which actually rendered him incapable of proceeding with the hearing on the notice of appeal filed, let alone providing the necessary evidence to support the making of a placement order. Put shortly, there were no transcripts of evidence and some of the documents before the district judge had been removed from the bundle.

21. Keehan J's judgment was that the district judge "misconstrue[d] the evidence of Dr Bourne", "was wrong to conclude that [an option] was viable or available…because the social worker gave evidence to him…"; reached "a conclusion which…he was [not] entitled to reach on the totality of the evidence before him"; and, that in relation to the care plan "was plainly wrong to come to that judgment and assessment". He concluded that "The care plan of the local authority was entirely clear". In my judgment, these findings and conclusions simply cannot subsist in the absence of a critical appraisal of all the evidence that was before the district judge (rather than relying on such statements as he had and the summary within the district judge's judgment. Oral evidence will necessarily colour the picture otherwise presented by the statements and reports prepared before hearing. As is obvious from the judgments of District Judge Simmonds, that is precisely what happened in this case.

22. In challenging Counsel for the Respondent local authority as to the absence of any transcript of evidence before Keehan J when hearing the appeal, her response clearly reflected the position taken by the local authority in the first appeal. That is, that transcripts were unnecessary since the district judge had specifically summarised the oral evidence as was obviously relevant to the judgment.

23. This submission reflects an inability to recognise the failures of the local authority in the first appeal process which I would otherwise have hoped may have occurred to its legal advisers after reflection upon the contents of the present appellant's notice and recourse to notes of evidence. It also flies in the face of paragraph 9 of District Judge Simmonds' first judgment, vis:

> "The fact that I do not mention something in this judgment does not mean that I have not fully considered it, but it is impossible to set out in this judgment everything that I have heard and read. My analysis of the evidence and findings, although made after each witness, are on the basis of hearing and reading the entire evidence and analysing the evidence in its totality."

24. This observation is entirely consistent with the well established principle derived from the speech of Lord Hoffmann in *Piglowska v Piglowski [1999] 1 WLR 1360* at p 1372:

> "The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc v Medeva plc [1997] RPC 1 , 45:
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> The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

25. Over time, inevitably and regrettably, this conspicuously articulated wisdom is diminished by familiarity and may often, as in Keehan J's judgment, become eroded by a concisely expressed but imprecise phrase. Lord Wilson's judgment, endorsed in this respect by Lord Neuberger in RE B (A CHILD) (CARE PROCEEDINGS:THRESHOLD CRITERIA) above is a potent reminder of the need for all appellate courts to do more than pay lip service to the doctrine. At paragraph 42, after quoting Lord Hoffmann in Piglowska he said:

> "Lord Hoffmann's remarks apply all the more strongly to an appeal against a decision about the future of a child. In the Biogen case the issue was whether the subject of a claim to a patent was obvious and so did not amount to a patentable invention. Resolution of the issue required no regard to the future. The Piglowska case concerned financial remedies following divorce and the issue related to the weight which the district judge had given to the respective needs of the parties for accommodation. In his assessment of such needs there was no doubt an element of regard to the future. But it would have been as nothing in comparison with the

> need for a judge in a child case to look to the future. The function of the family judge in a child case transcends the need to decide issues of fact; and so his (or her) advantage over the appellate court transcends the conventional advantage of the fact-finder who has seen and heard the witnesses of fact. In a child case the judge develops a face-to-face, bench-to-witness-box, acquaintanceship with each of the candidates for the care of the child. Throughout their evidence his function is to ask himself not just "is this true?" or "is this sincere?" but "what does this evidence tell me about any future parenting of the child by this witness?" and, in a public law case, when always hoping to be able to answer his question negatively, to ask "are the local authority's concerns about the future parenting of the child by this witness justified?" The function demands a high degree of wisdom on the part of the family judge; focussed training; and the allowance to him by the justice system of time to reflect and to choose the optimum expression of the reasons for his decision. But the corollary is the difficulty of mounting a successful appeal against a judge's decision about the future arrangements for a child. In In re B (A Minor) (Adoption: Natural Parent) [2001] UKHL 70, [2002] 1 WLR 258 , Lord Nicholls said:
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> "16 ...There is no objectively certain answer on which of two or more possible courses is in the best interests of a child. In all save the most straightforward cases, there are competing factors, some pointing one way and some another. There is no means of demonstrating that one answer is clearly right and another clearly wrong. There are too many uncertainties involved in what, after all, is an attempt to peer into the future and assess the advantages and disadvantages which this or that course will or may have for the child.....Cases relating to the welfare of children tend to be towards the edge of the spectrum where an appellate court is particularly reluctant to interfere with the judge's decision."

26. This court has the benefit (which Keehan J did not have) of being able to read the transcript of Dr Bourne's evidence, as ordered to be produced by the single Judge. Examination reveals that it bears out the district judge's record of evidence and, to my mind, demonstrates that he does not misconstrue its application. When pressed, Counsel for the Respondent local authority acknowledged this to be the case but unfortunately repeatedly resorted to the mantra that "but it was based upon the answer to a hypothetical question".

27. That "hypothetical question" apparently concerned the ability/ willingness of the foster carers to continue to care for J and S. District Judge Simmonds considered that he had the evidential basis to be optimistic on this front (as is clear from paragraphs 12 and 44 of his first judgment).

28. In the absence of the transcript of her evidence, his evaluation of the social worker's evidence is incapable of challenge. I regret that, in substitution, Keehan J wrongly elevated the submissions of Counsel relating to the foster parent's position at the time of the appeal into the status of evidence, of which the parents would have no prior knowledge or opportunity to challenge. The mischief of this approach is highlighted by the fact that in two recent statements from the foster mother (the first ordered by the single Judge considering the mother's written application and the second by this Court in preparing for the

hearing of these applications) are ambiguous as to her intent in continuing to provide a home for J and S in the future.

29. References in the two judgments of District Judge Simmonds to the effect of oral evidence given before him negate points 1, 2 and 5 detailed in paragraph 18 above. Necessarily, if his view of the oral evidence which supplemented the written care plan was correct, point 4 is undermined entirely. As to the third point, there is nothing in the order made, or in the judgments delivered which can sustain the assertion. On the contrary, in his second judgment the district judge remarks at paragraph 3 : "If S is not available for adoption – which having refused the placement order he is not – then the plan is long term fostering either with his current carers or, if that is not possible then with someone else. I cannot in any way control the local authority as regards these current foster carers. Of course… I know …this local authority will act in the best interest of S and …will take a view on all the evidence…looking at S and his welfare that if he can remain with these carers then of course he should: if he cannot then of course he cannot and they will act accordingly and his welfare….in finding… a very good foster placement for him."

30. With respect to Keehan J, the judgments of District Judge Simmonds appear to me to be comprehensive, lucid and cogent. I discern no error of law on the findings and evaluations he made of the evidence as he indicated them to be. He did not impose a care plan upon the local authority if he is correct in adjudging the written plan to have been amended in oral evidence. He was not obliged to make the placement order if he made a care order and gave his reasons for refusing to do so. They are not demonstrably wrong.

31. There was an obvious lacuna in the materials presented to Keehan J in his appellate capacity to dispose of the appeal, still less to subrogate his own assessment of the facts in making a placement order. (See paragraph 8 above). I know that he would now only too readily acknowledge that his expressed reasoning in deciding that it was right to do so is insufficient and does not comply with the subsequently reported Re B-S (CHILDREN) 2013, EWCA Civ 1146.

32. In the circumstances, I would allow this appeal, set aside the placement order, substitute an interim care order in respect of S and remit the matter to District Judge Simmonds with a direction that the local authority shall produce a revised care plan in accordance with current circumstances and the dismissal of their application for a placement order. In doing so I do not adjudge that the district judge was wrong in his assessment of the social worker's evidence as to the care plan since I am not in a position to verify the same or otherwise. However, the present care plan is inadequate and must be clarified. In light of previous events I would require judicial oversight of the same before the making of a final care order.

33. The mother is now legally aided. However, during the preparation for this appeal it appears that there were periods when it was withdrawn. In any event, the mother apparently is at risk of future recoupment from the Legal Aid Agency. She applies for costs of the appeal. Written submissions and revised cost schedules have been submitted.

34. The local authority relies on Re T (Costs: Care Proceedings: Serious allegation not proved) [2012] UKSC 36 to resist the application. It argues that it has not adopted an unreasonable stance or been guilty of reprehensible behaviour. For the reasons above I believe that the position that it has taken to have been unreasonable. In the alternative, it cites London Borough of Sutton v Davis (Costs) (No 2) [1994] 1 WLR 1317 as authority to the effect that this court should not make an assessment but should order costs to be paid in a sum assessed by the director of the LAA. This proposition is based upon the obiter dicta remarks of Wilson J, as he then was. He urged reform of the then current legal aid regulations. They do not endure in the light of the 2010 Standard Civil Contract entered into between the mother's solicitors and the Legal Aid Agency, section 1, General Provisions 1.50B of which provides: "This paragraph represents our authority pursuant to section 28(2)(b) of the Act, for you to receive payment from another party….and to recover those costs at rates in excess of those provided for in this Contract or any other contract with us. This court must address the claim for costs with a view to the context in which it arises. The director of the LAA is not in a position to assess whether the same have been unreasonably incurred.

35. The necessity for this appeal emanates from the local authority's failures to address the issues correctly in front of Keehan J. I would order them to pay the costs of the mother claimed in the sum of £22,756.68

Lord Justice Aikens:

36. I agree with the reasons given by Macur LJ for allowing this appeal and I agree with the order proposed. I would particularly like to associate myself with the remarks that Macur LJ has made at paragraphs 11 and 16 of her judgment. The attempt to get the District Judge to change his judgment and order after the he had delivered his judgment was quite unjustified and inappropriate. Counsel should know better than to attempt such an inappropriate exercise, even if the client urges it. (I do not say that happened in this case; I do not know).

37. The fact that the parents were faced with an appeal before Keehan J without any professional representation because their legal aid had been withdrawn must have been a factor which unfortunately led the judge to be persuaded to act as he did, despite the fundamental procedural failure of the respondents' lawyers. This was, of course, their failure to produce on appeal the transcripts of the very oral evidence which the appellant alleged that the first instance judge had misconstrued/misunderstood. As Macur LJ has commented, if the parents had been represented by competent counsel this failure would doubtless have been pointed out and the appeal may never have seen the light of day. As it is, further public expense has been incurred because of the need for a further appeal to this court. What might have been saved in legal aid fund costs has been lost by incurring public expense on another (but related) part of the public purse.

The President of the Queen's Bench Division:

38. I agree with both judgments. Having seen the judgments in draft, Ms van der Leij has expressed concern about the comments at paragraphs 10-11 of Macur LJ and paragraph 36 of Aikens LJ dealing with the e-mail exchanges subsequent to the hearing. She observes that "it is by no means unusual for practitioners in the Principal Registry to e mail district judges directly seeking clarification of matters raised in a hearing". It is one thing, if invited, to make submissions in relation to the terms of an order provided that every communication is copied to every party; it is another to express dissent and seek to engage in further argument. If that is not unusual, it is important that the problems which it generates should be recognised and that the practice should cease. First, it suggests (even if it is not the case) that advocates can go behind the scenes to resolve issues in favour of their clients and, as Macur LJ observes, will give rise to allegations of 'stitch up'. Secondly, it will encourage litigants in person (who do not have the same understanding of the law or practice) to adopt a similar approach thereby disrupting the finality of the judgment of the court and generating continued uncertainty.