

Neutral Citation Number: [2014] EWHC 3901 (Fam)

Case No. IL13C00752

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Date: Wednesday 13th November 2014

Before:

MR. JUSTICE HAYDEN

(In Private)

B E T W E E N :

LONDON BOROUGH OF TOWER HAMLETS Applicant

- and -

(1) D

(2) E

(3) F

Respondents

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APPEARANCES

MS. R. CABEZA (instructed by Legal Services Department) appeared on behalf of the Applicant.

MR. A. BANKS (Solicitor, Edwards Duthie Solicitors) appeared on behalf of the Respondent mother.

MR. O. MILLINGTON (of counsel) appeared on behalf of the Respondent father.

MS. C. GASKIN (Solicitor, Philcox Gray & Co. Solicitors) appeared on behalf of the Respondent maternal grandfather.

MS. C. PERRY (of counsel) appeared on behalf of the Children's Guardian.

JUDGMENT

MR. JUSTICE HAYDEN:

1 This is an application made by the London Borough of Tower Hamlets during the course of public law care proceedings. The proceedings concern two children: S who was born on **13th April 2010** and who is therefore now 4 years old, and T, his sister who was born on 9th February 2012 and who is therefore now **2 years 4 months old**.

2 This hearing was listed yesterday to determine the question of what further assessment, if any, there should be of the father, who asserts that he wishes to care for these two children. The pertinent provisions relating to the court's control of expert evidence and of assessments in children proceedings is s.13 of the Children and Families Act 2014 which provides *inter alia* at s.13(1):

"A person may not without the permission of the court instruct a person to provide expert evidence for use in children proceedings."

s.13(5) provides:

"In children proceedings, a person may not without the permission of the court put expert evidence (in any form) before the court."

s.13(6) provides:

"The court may give permission as mentioned in subsection (1), (3) or (5) only if the court is

of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly [the key words there are plainly “necessary” and “justly”].”

3 When evaluating how to address that subsection, guidance is found in s13.(7):

“When deciding whether to give permission as mentioned in subsection (1), (3) and (5) the court is to have regard in particular to –

- (a) any impact which giving permission would be likely to have on the welfare of the children concerned, including in the case of permission as mentioned in subsection (3) any impact which any examination or other assessment would be likely to have on the welfare of the child who would be examined or otherwise assessed,
- (b) the issues to which the expert evidence would relate,
- (c) the questions which the court would require the expert to answer,
- (d) what other expert evidence is available (whether obtained before or after the start of the proceedings),
- (e) whether evidence could be given by another person on the matters on which the expert would give evidence,
- (f) the impact which giving permission would be likely to have on the timetable for, and duration and conduct of, the proceedings,
- (g) the cost of the expert evidence, and
- (h) any matters prescribed by Family Procedure Rules.”

By way of completeness I should also add that pursuant to the Family Procedure Rule 25.1, expert evidence should be restricted to that which is “necessary” to assist the court to resolve the proceedings.

4 Though relatively sparse, the authorities that have addressed the language of these provisions since their inception enable one to conclude, as Mr. Millington on behalf of the father submits, that the word “necessary” carries simply the ordinary meaning of that word i.e. it has “the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable”. Those concepts foreshadowed in *Re P (Placement Orders: Parental Consent)* [2008] 2 FLR 625 were reviewed recently by Sir James Munby (P) in *Re H-L (Expert Evidence: Test for Permission)* [2013] EWCA Civ 655.

2. We now have to decide what is meant by 'necessary.'

*3. The short answer is that 'necessary' means necessary. It is, after all, an ordinary English word. It is a familiar expression nowadays in family law, not least because of the central role it plays, for example, in Article 8 of the European Convention and the wider Strasbourg jurisprudence. If elaboration is required, what precisely does it mean? That was a question considered, albeit in a rather different context, in *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625, paras [120], [125]. This court said it "has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand", having "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable." In my judgment, that is the meaning, the connotation, the word 'necessary' has in rule 25.1.*

Per Sir James Munby (P)

5 I approach the task by identifying three principles:

- i) every opportunity should be made to explore the potential for a child being cared for by a parent;
- ii) this obligation (for it is nothing less) is a facet of both the child's and the parents' rights pursuant to Article 8 ECHR;
- iii) in evaluating the reality of the available options and the ambit of the assessment that needs to take place, it is the welfare of the children that remains the paramount consideration.

6 Weighing the measures required actively to promote the upbringing of a child by his or her parents will be a matter which is inevitably sensitive to the facts of the individual case. It will not always be “necessary” for there to be, for example, a comprehensive assessment of a parent. There will be cases where from the outset the obstacles to a parent's wish to care for a child, no matter how genuine or profoundly expressed, will be so substantial as to make it obvious that other options require exploration as a priority eg: another family member.

7 Whether an assessment is “necessary” will therefore depend on the facts. Here the Local Authority, supported by the children's guardian, submit that for a wide variety of reasons the father cannot and need not be assessed. The father, who is living in Somaliland, cannot obtain access to the U.K. but is represented

by Counsel. Mr Millington, on his behalf, has endeavoured to address the obstacles that the father faces.

8 Before turning to the respective arguments, I should observe that, to my mind, even the prescient architects of the Children Act 1989 could not have envisaged the considerable cultural changes that were to take place in the United Kingdom in the 23 years that followed the implementation of that Act. British society is now multicultural. Assessing parents and family members may, quite frequently does, involve considering individuals based anywhere in the world. I do not believe that the obligation to **explore** the family option for a child is weakened in any way by geography, although it can provide real challenges to already overstretched resources. The viability of these options must, from the outset, be evaluated rigorously and reviewed regularly. The need for such assessments must be addressed at the very beginning of proceedings. Late identification of potential family carers abroad may bring two fundamental principles of the Children Act into conflict, namely the desirability, if possible, of a child being brought up in its extended family (where parents are for some reason unable to care for the child themselves) and the need to avoid delay in planning for a child's future. Neither principle should be regarded as having greater weight. The recent reforms to the family justice system have sought to emphasise why it was that the avoidance of delay

was given statutory force by the Children Act and the real and lasting harm delay causes to children, particularly in public law care proceedings. There will, in my judgement, be occasions when the obstacles to assessment of family members abroad create such delays that to pursue the option will be inconsistent with the child's own timescales. These are taxing and exacting decisions but they require to be confronted with integrity and without sentimentality.

9 The court must also be alive to the dangers of slipping into cultural relativism. The fact that a family member may live in a country where there are high levels of crime for example, or terrorism, corruption, or civil unrest will undoubtedly be relevant to the overall evaluation of the factors set out in s.1(3) of the Children Act 1989, but to my mind they will rarely, if ever, be determinative in and of themselves. It is the care offered by the individual that weighs most heavily and not the challenges faced by the State in which he lives. In any event these will often be facets of the child's own cultural inheritance.

10 As the arguments have evolved during the course of this hearing it has become clear (as is so often the case in family proceedings) that the breadth of the issues cannot easily be confined within the compass of a single assessment.

Rather, they require a holistic assessment of the children's past and present circumstances and a survey of the broad canvas of the evidence so far obtained. Whilst that exercise may **not always** be necessary when considering such an application, it frequently is and certainly it is here.

The Background History

- 11 The background against which I come to consider this case is tragic and extremely distressing to read. S and T had a sister, W who was born on 18th May 2013 and who died on 4th October 2013. On 4th October 2013 when W was 4 ½ months old an ambulance was called shortly after 4:30 p.m. and W was transferred to hospital arriving shortly before 5 p.m. At 6:45 p.m. she was declared dead. Both the paramedics who attended at the mother's home that day from where W was retrieved were strongly of the view that W had already died by the time they had arrived at the scene. Nonetheless, and in accordance with good paramedic practice, they instituted full resuscitative measures and then transferred her to hospital. Resuscitation was continued in the accident

and emergency department but abandoned once it became clear that it was quite hopeless.

12 One of the paramedics observed that whilst it was immediately obvious that W was skinny, he was profoundly shocked when upon cutting off her top she looked, as he put it, “Like something from Auschwitz”. She was extremely malnourished, very underweight and she was profoundly dehydrated. Her eyes were sunken into her head. She was of a very pale colour. Her top was soaked through and smelt of urine, and she had a dried liquid congealed under her nose and above her top lip which he took to be vomit. Her skin was so dry that it had lost its elasticity due to dehydration. This was a baby in a condition beyond which this experienced paramedic had ever seen before. It is a poignant fact that her weight on 4th October was very similar to her initial birth weight.

13 The mother had already become pregnant with W when she returned to the United Kingdom in October 2012. She had received maternity care from the Universal Maternity Services and, from the medical point of view, the pregnancy progressed entirely normally with a normal delivery of a healthy baby in good condition at birth.

14 Observations of the mother appeared to indicate that she was coping well. Her first Gateway midwifery appointment was on 13th February. A complete history of her circumstances is recorded there, including the fact that she had been married in Somaliland at either 14 or 13 years of age. She had been taken out of school by her mother here in the U.K. and taken to Somalia. She was the eldest of five children who were all taken by the mother and a marriage was contracted for her which, by virtue of her age and by the standards of this country, is abusive. She had had her first child at 15 and her second child at 16. She has made consistent claims that her husband was physically abusive to her. She made those claims to the British Embassy and they helped her to escape with the children. She has had no contact with her ex-husband subsequently.

15 It is clear that sometime in the summer of 2013 she received a telephone call which caused her very considerable distress. It is disputed, but the assertion of the mother (which has been consistent) is that she was being pressured to accept her husband into the United Kingdom. There is no doubt that in or around this time there was a very significant deterioration in the mother's mental health. There is a good deal of evidence to suggest that prior to that time she had been providing perfectly satisfactory care for her children with support. However, by late summer 2013 she found herself isolated,

unsupported and with deteriorating mental health. This was the context to the discovery of W in October 2013.

16 S and T were of course also living in that house at this period. On the day that W died a neighbour took charge of the two older children. She was shocked by their condition. They were both extremely dirty. Their clothes were filthy and both smelt extremely strongly of stale urine, particularly T. The children were described as looking like, “tramps with dirty faces”, smelling of dirt and underdeveloped. T was sitting in a cot with a glazed expression as though dazed and S had a look of anxiety in his eyes.

17 Nobody who has seen these children has ever had any experience of seeing children in such a state of neglect. One of the officers who took charge of the children described how she was hit and overwhelmed by the smell. The mother was herself in a similar condition. The children were photographed and those photographs, as will be obvious from what I have said, are extremely disturbing.

18 W died of her malnutrition and it seems obvious that it would not have been long before T and S themselves were at great risk, ultimately saved by the intervention of the paramedics. It is not easy to contemplate the children’s

experiences in those months in the summer of 2013, it is too harrowing for human empathy. Ultimately we can only hope that T and S have the resilience to recover from the ordeal to an extent that enables them to realise their potential in life.

- 19 Dr. Peter Ehrhardt, an extremely experienced consultant paediatrician, who filed a report in the criminal proceedings that followed, is highly critical of some of the agencies who, in his view, ought to have played a more active role in supporting this mother. In particular he says:

“The circumstances in which she came to the United Kingdom ought to have triggered a greater surveillance of her welfare by the Forced Marriage Unit.”

He may very well be right but this is not an issue in this application that is necessary for me to determine, it is outwith the proportional scope of this Court’s enquiry.

- 20 The children were taken into foster care and I have been told, through Counsel, that although they were initially unsettled and extremely indiscriminating in the display of their affections, they have begun to thrive. It has also been

possible for them to have some limited contact with their mother whilst she is in custody. The mother has pleaded guilty to permitting the death of her child and to neglect and she is to be sentenced shortly. However, it is clear from the children's subsequent behaviour that there were some very positive aspects to the care they received from their mother, reinforcing my conclusion that she appears to have suffered a profound psychological breakdown which disempowered her entirely from caring either for herself or for her children.

- 21 I have already alluded to the background of the mother's marriage and her claims, contested by the father, that there was violence during the course of that marriage. Allegations of domestic violence are sadly a regular feature of the cases heard by this court. Where it is possible those allegations have to be investigated during the course of the forensic process, put to the assay by cross-examination and ultimately adjudicated upon by the judge. The mere fact of the allegation self-evidently does not obviate the need for an assessment of the alleged perpetrator of the domestic violence as a carer for the children.

The Parties attempts to address the International Obstacles

22 Earlier in these proceedings the local authority, guided no doubt by counsel, Ms. Cabeza, proposed to identify a Somali speaking social worker and dispatch her to Somaliland to undertake an appropriate comprehensive assessment, no doubt tailored to the particular cultural features of the father's own domestic situation. However it quickly emerged that Somaliland would be too dangerous for the social worker to travel to. That information came from two sources: firstly, the Foreign Office and Commonwealth Office (F.C.O) secondly from C.F.A.B. (Children and Families Across Borders) formerly, International Social Services. The Foreign and Commonwealth Office advised against all travel to Somaliland except two cities, Hargeisa and Berbera, to which the F.C.O. advise only "essential" travel. The F.C.O. offers guidance to British nationals, that is part of its function. It recommends that any British nationals in areas of Somalia to which it advises 'against all travel' should also leave. Similarly, any British nationals in the two towns that I have referred to, who are not there for "essential purposes", are also advised to leave.

23 There is a 'high threat' in Somalia from terrorism including kidnapping. Terrorist groups have made recent threats against westerners and those working for western organisations. The FCO believes that this is a "constant threat", and according to its intelligence there are terrorist plans "in existence" to attack westerners in Somaliland. It considers that terrorist attacks could be

entirely indiscriminate. They could take place in crowded areas or at high profile events. They could involve government officials and places frequented by foreigners. As is known internationally, there is also a significant threat of piracy in the Indian Ocean and in the Gulf of Aden.

24 The FCO advises that all areas in Somalia are suffering from significant food shortages and as a consequence there has been displacement of thousands of Somali people. The consensus understanding of the guidance is that where it refers to Somalia it also incorporates Somaliland, Somaliland itself not being internationally recognised. As a result of the food shortages there is a profound problem with food security which has led to dangerous levels of criminal activity not infrequently by armed militia. There have been murders, armed robbery and a number of incidents of kidnapping.

25 That already complex picture is further complicated by regular outbreaks of what is referred to “as inter-clan related violence”. There is particular tension on the Somali and Puntland border in the Sool and Sanaag regions which, on the map I have been shown, can be seen to be not far from where the father lives. That is the essence of the guidance given by the F.C.O. CFAB largely follow that guidance and advise that they have no international social services provision available at all in Somaliland.

26 Having considered that body of compelling evidence, the local authority inevitably concluded (rightly to my mind) that they could not send a social worker as they had originally envisaged. However they have been able to speak to the father on the telephone. All of this has informed their approach to the father's desire to care for the children. On 2nd June Mr. Brian Sharpe filed a statement. Mr. Sharpe is the Local Authority's court work case manager. He has oversight of all the Local Authority's public law applications and his role is to work with social workers and their managers to improve standards and support good practice in their work with children who are the subject of care and supervision proceedings. In his statement Mr. Sharpe sets out, in a succinct and accessible way, the structure of the Local Authority's reasoning informing its ultimate decision not to send a social worker to assess the father of the children.

27 Firstly, Mr. Sharpe emphasises (as in my view he is right to do and as I have already outlined) that the Local Authority had initially been prepared to send a U.K. social worker from a Somali background to undertake the assessment. He further stresses that their commitment to the assessment was evidenced by the fact that they had identified three Somali social workers working in the UK before in fact selecting a particular social worker. In addition they had

explored the possibility of instructing an external, independent social worker. Mr. Sharpe set out how, on receiving the advice of the FCO and CFAB, the authority came to the conclusion that it would be simply unsafe for a social worker to visit Somaliland. The decision was taken by the Local Authority's interim head of Children's Services. Mr. Sharpe says that is an indication of the extent to which this Local Authority has subjected this matter to scrutiny, conscious as it is of its obligation to the children to explore, wherever possible, the option of children being brought up by their father. The conclusion was that it would be simply "reckless" to send a social worker to the area. A visiting professional perceived to be acting for the UK government was likely, on the available evidence, to be at increased risk. In the Local Authority's view that was an unacceptable risk and, had that worker come to harm, Mr Sharpe considered "the Local Authority would be justly censured for acting against FCO advice". I agree.

28 Plainly that placed the father in some difficulty and Mr. Millington, on his behalf, sought to address the difficulties that the FCO had identified. In relation to the FCO website entry which has been downloaded, copied and filed within these proceedings, Mr. Millington accepts that the advice is, "Against all travel to Somalia including Somaliland ...". However, he submits, the court should consider that the FCO advice is specifically tailored to British nationals

and/or westerners generally. Mr. Millington said this is clear from the content of the website:

“Any British nationals in the area of Somalia to which the FCO advised against all travel should leave.”

29 Mr. Millington says the advice is directed to westerners and those working for western organisations. The constant threat of terrorist attacks identified in Mogadishu and the evidence before me of the existence of extant violence against westerners in Somaliland, is, it is said, really confined to westerners. To address this Mr. Millington identifies an independent social worker who is not, “a westerner” but has dual nationality, both British and Nigerian. This person, a Ms. Coker, has indicated that notwithstanding the parlous situation in Somaliland she would be content to travel there, undertake the assessment and do so on her Nigerian passport. However, there is no evidence at all upon which to substantiate the assertion that she would be less likely to be at risk as apparently a non-westerner whose purpose in Somaliland could be kept covert.

30 Furthermore, it is said that Ms Cole would be undertaking the assessment at the behest of the English court and therefore there should be no reason for anyone outside of the father’s immediate circle to be aware of this. I have been told

that she has been referred to the CFAB and FCO guidance and is nonetheless still willing to travel. It is further submitted that if the court were to determine that there should be no further assessment of the father in Somaliland then given the likely problems with obtaining a visa, such a decision would effectively have the consequence of ruling him out of the children's lives permanently as a long-term carer. Accordingly, it is submitted that so crucial is the assessment that it plainly falls within even the narrowest concept of "necessary" within the provisions to which I have alluded.

- 31 The local authority opposes any assessment of the father by an independent social worker. Mr. Sharpe did not accept the assertion that Ms. Coker was necessarily at lower risk than any British national merely by virtue of her dual nationality. Moreover he outlines some real practical issues: Ms. Coker would not be able to communicate directly to the father in his own language. He would require an interpreter and Mr. Sharpe says (in my judgment with some force) that the mere presence of the interpreter in these circumstances would draw attention to their situation and would heighten the risk to her. Logically, Mr Sharpe observes that it would therefore expose at least two people to risk: the social worker and the translator. In addition, it is said, the use of an interpreter will undermine the effectiveness of the assessment in the country. To my mind that is not a strong point. It will of course very much depend on

the quality of the interpreter but the Family Court is used to taking evidence through interpreters, and to evaluating the nuances of language through translation.

32 More significantly, to my mind, it is also contended that there is an ‘irrevocability’ about any assessment undertaken in the circumstances contended for on behalf of the father. In the U.K., where assessments of prospective carers are undertaken with interpreters, the social work team aims to communicate with and to forge a working relationship with the family. The unfolding nature of this process, to paraphrase Mr. Sharpe, often provides an ongoing and continuing assessment throughout the course of the litigation itself. That simply would not be possible in these circumstances.

33 Moreover, it is submitted, that the pre-requisite to any recognised assessment model, however tailored to the particular circumstances (culturally and otherwise) of the case, is that there should be some background checks eg: in relation to what is on offer educationally, police checks and an assessment of what is available in healthcare and support. Mr. Sharpe considers these enquiries to be unrealistic and also suggests that they will further attract attention to the independent social worker and her translator and thus heighten risk.

34 I have come to the clear conclusion that it would be no more appropriate for me to authorise Ms. Coker travelling to Somaliland to assess the father than it would be for me to sanction or encourage any other British national. However, to my mind, that is not the end of the matter, other options could be considered. More importantly in my view, is the obligation upon the parties and the court at this very early stage to look at the real viability of any proposals that the father seeks to advance through counsel.

The Broader Picture

35 I have taken some time to set out the circumstances in which the children were discovered in October 2013 because to my mind it is important not to divorce the facts relating to the requested assessment from the wider canvas of these children's lives. Although they are coping well, they have been subjected to a profound trauma, not only the direct experience to themselves but the experience of losing their sibling. The ordeal they have endured is not merely one of truly profound physical neglect, it is also one of acute emotional deprivation.

36 Having likely received good care from their mother in the past it must have been very difficult for the children to comprehend why such care was no longer available from her. I do not require a psychologist or a therapist to tell me that it is likely that this period in their lives will take a long time to assimilate and for them to understand, if indeed they ever do. They are already being provided indirectly with therapeutic support via the foster carers who I have been told are providing an outstanding level of care, largely intuitively, as they are not specialist foster carers. The children are very lucky to have them, they have shown real insight.

37 In due course and when their futures have been settled by a decision of this court there is, I am told, to be a referral to Child and Adolescent Mental Health Services (C.A.M.H.S.). Conventionally, that will involve an initial assessment and most likely some program of specialist therapeutic intervention. This court also regularly hears that trauma in the early lives of young children often surfaces in adolescence where reactivation of mental health support and services is often required. This may be relevant when considering the legal framework for the longer term.

38 All this reveals a situation where the children face considerable challenges for the future. In evaluating the issue of assessment I also have to consider what is

ultimately contemplated by the father's application. Even if it were possible to surmount all the other obstacles identified, the proposal would be to take these children to a country and culture entirely alien to them and one in which the kind of therapeutic support they will need will be unavailable. The theoretical is ultimately eclipsed by the practical, the children's needs and timescales cannot be accommodated by the father's case. Logically, it is at this stage that the wider backdrop of the civil unrest in Somaliland becomes relevant, as part of the overall balancing of the factors in s.1(3) of the Children Act 1989.

39 I would not wish to discourage the father from applying for a visa if he chooses to do so. I am surprised that he has not already applied; Mr. Millington tells me that this is as a consequence of a misunderstanding on the father's part and that he thought his solicitors would have applied for the visa. I have already expressed some scepticism about that explanation. Nonetheless, if he were to be able to obtain a visa to attend the hearing and to be available for assessment, I have no doubt that the local authority would and indeed should speak with him and assess in whatever framework available, such material as they can, in order that the father is provided with the maximum advantage to advance his case on behalf of his children.

40 I should like to take the opportunity to express my thanks to all the advocates in this case. They have displayed a collaborative approach to assessing what has been undoubtedly a difficult issue. I am also pleased to be able to pay tribute to the Authority for the care and professionalism with which they have investigated the issue.
