Neutral Citation Number: [2017] EWCA Civ 1121

Case No: B4/2017/0238/CCFMF

ON APPEAL FROM THE FAMILY COURT SITTING AT WATFORD
HIS HONOUR JUDGE WILDING
WD1600101

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 July 2017

Before :

THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE McFARLANE
and
LORD JUSTICE LEWISON

- -

Between :

Re N-S (Children)

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Elizabeth Isaacs QC and **Hilary Pollock** (instructed by **Hecht Montgomery Solicitors**) for the **Appellant Father**
Mark Twomey QC and **John Church** (instructed by **Hertfordshire County Council**) for the **First Respondent Local Authority**
Matthew Stott (instructed by **Reeds Solicitors**) for the **Children's Guardian**

Hearing date : 29 June 2017

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Judgment Approved

Lord Justice McFarlane :

1. The present appeal, essentially, raises two related questions. Firstly, what is the extent of a judge's responsibility to provide reasons in support of orders made at the conclusion of public law children proceedings? Secondly, where there has been a failure to give reasons, but there can be no challenge on appeal to the substantive orders made, what steps, if any, should the appellate court take to redress the lack of adequate reasoning?

2. The proceedings, which were heard by His Honour Judge Wilding sitting in the Watford Family Court, concerned seven of the eight children born to their mother and her previous partner, who is the father of the elder four, and her current partner, who is the father of the younger four. The case, which was based on allegations of neglect and emotional harm, arose from a history of extensive local authority involvement with the family stretching back to 2000 around the time of the birth of the second child. Despite that history, and to the credit of the mother, the children's fathers, and the Social Services, the arrangements for the care of the children had been maintained within the family, albeit with extensive support, until the instigation of the present care proceedings in 2016. Indeed, the seven children remained in the care of the mother and her partner until the making of the final order in January 2017.

3. By the conclusion of the final hearing there was agreement by all parties as to the factual basis upon which the CA 1989 s.31 threshold criteria were satisfied. Consequently, the sole issue for the judge was to determine the best outcome for the future care of the seven children who ranged in age from 16 years down to 9 months. Before the court, the parents accepted that alternative care arrangements should be made for the oldest three children. The primary area of dispute, therefore, related to the four youngest children, a girl, S, who is now aged 7 years, and three boys, now aged, respectively, 4, 3 and 15 months, who are all the children of the mother and her current partner ('the father'). The parents' case was that all four of these children should be returned to their care. The local authority case, which was supported by the children's guardian, was that all four children should be subject to a care order together with an order authorising the local authority to place them for adoption. It was accepted by the local authority that finding an adoptive home for all four children together and, in any event, finding an adoptive home for 7 year old S, would be a challenge. In addition, the emotional harm and neglect that the children had experienced over a period of years, with the consequent impact that that had had upon their ability to form attachments with their parents and with each other, indicated a need for a three-month in-depth assessment of the individual personalities, relationships, and needs of these four young people in order to identify the type and number of adoptive placements that might best meet their respective needs.

4. The final hearing occupied nine days in October and November 2016. The judge issued a draft judgment on 6 January 2017 which, following a short process of consultation with counsel and modest revision (to which I will turn), was handed down on 13 January 2017. The judge concluded that these four children were now in need of more than good enough parenting and that, despite the undoubted love and commitment demonstrated to the children by the parents, no amount of therapy, instruction or support, could enable the parents to provide that level of care for their children either together or individually. The judge therefore made care orders and placement for adoption orders with respect to each of the four children.

5. The main body of the extensive reserved judgment (paragraph 33 to paragraph 128) contains the judge's detailed account of the oral evidence that he had heard. That passage is followed by seven paragraphs which record the judge's reasons for rejecting placement with the parents as a viable or safe option for the future. No point is taken in this appeal by the appellant father against the judge's rejection of rehabilitation to the parents' care, and it is not therefore necessary to rehearse that detail in this judgment.

6. Rather than challenging what is said in the judgment, the appellant draws attention to what he submits is missing from it and, in doing so, he points to the fact that the judge moves straight from the seven paragraphs rejecting the parents as viable carers to a simple announcement of the orders that were to be made (paragraphs 135 and 136):

> "135 I will be making orders in respect of each of the children and in respect of [the four children] I will make care orders and placement orders. I am satisfied that their welfare throughout their lives requires that the orders be made and that the parents' consent be dispensed with.
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> 136 In the complicated circumstances of this case I consider that the local authority plan to conduct the sibling assessment after the children are settled offers the best opportunity for the children to be placed according to their needs. I acknowledge the considerable difficulty in placing the children and ensuring that they maintain a relationship after adoption. [The social worker] said that whilst it would be difficult to place all four children together they would try to do so but wouldn't prioritise the need for the children to attach to a new primary carer as soon as possible. (sic)"

7. On 2 March 2017 I granted permission to appeal on one ground, namely, that the judge had erred in approving care plans for adoption and in making final care and placement orders in that no reasons were provided for the decisions that (a) the four youngest children should be placed for adoption rather than moving to long term fostering, and (b) nothing but "closed" adoption would do. In presenting the appeal before this court, Miss Elizabeth Isaacs QC, who did not appear below, leading Ms Hilary Pollock, who did, confirmed that the appeal was a "reasons" challenge, fair and square, and that, in particular, there was no realistic prospect of successfully challenging the placement for adoption orders made with respect to the three younger children (the position being reserved with respect to the eldest child, S).

Lack of judicial reasoning raised with judge

8. On 6 January 2017 HHJ Wilding circulated the draft of his judgment to counsel in the case, inviting any observations "on the usual terms" by 11 January.

9. On 9 January, in addition to suggesting minor typographical errors, Mr John Church, counsel for the local authority, made the following substantial observation in an email to the judge:

> "The last two comments I make are in relation to issues in the case.

> Firstly, (the mother and father) say that there is a gap in the evidence. As I read your judgment you do not accept this proposition. It might be helpful for the parents if you were able to set out your conclusions as to this issue in more detail and why you reject the suggestion that there is a gap in the evidence.
>
> Secondly, the (parents) request that the youngest four children be returned to their care. As I read your judgment you do not consider it safe for any of the children to be returned to the care of (the parents) as they would be likely to suffer significant harm. Please would you set out your conclusions/reasoning so that the parents are able to understand why the court does not accept their first position and has chosen adoption for the youngest four children."

10. Further, at the conclusion of the document submitted by Mr Church with his email of 9 January the following appears:

> "Para 131 (the parents) seek the return home of the four youngest children. Perhaps the court could set out what it considers to be the realistic options and the Re BS factors and the conclusions reached in this paragraph??"

11. Two days later on 11 January, Mr Church sent a further email to the judge in the following terms:

> "Dear Judge
>
> Further to the email and attachment below (the email of 9 January) I have re-read the judgment again.
>
> As set out below the (parents' case) was that the four youngest children should be returned to their care. The (parents) would be assisted in understanding the court's rejection of their case if the judgment was to set out that each of the children's needs has been considered individually and collectively against the parents' ability to meet those needs.
>
> The parents need to be able to read the judgment and see why, if they are not able to have all the four youngest children returned to their care, why one, two or three of the children cannot return to their care."

12. On 11 January counsel for the children's guardian sent a short email to the judge which read as follows:

> "I have recently seen Mr Church's emails suggesting that it might be helpful to the (parents) to see the reasons set out as to why the youngest four children cannot be returned to their care and should be adopted. I agree with Mr Church, particularly in view of these parents' difficulties, this would be helpful in enabling them to accept the decision. I also agree with Mr Church's other comments set out in the documents attached to his email."

13. Also on 11 January Ms Pollock, for the father, sent a short email stating:

> "I have no additional amendments to propose in relation to the draft judgment."

14. On the afternoon of 11 January the judge issued a revised draft judgment which, in addition to accepting suggested typographical corrections, inserted two new paragraphs into the seven paragraph section setting out his conclusions for rejecting the parents as carers. No change was made to introduce an account of the judge's reasoning in support of adoption. In his covering email the judge said:

> "In addition I have made some changes to the body of the judgment in an effort to save requests for clarification on Friday (the hand down date). The changes are to the last few paragraphs."

15. On 13 January all parties were represented before the judge at a short hearing fixed for the handing down of the judgment. Various short submissions, unconnected with the substance of the judgment, were made before the judge gave a short ex-tempore summary of his conclusions. The transcript shows that this was no more than a brief summary of the more detailed written judgment, which was then circulated. The judge did not use the opportunity of the short oral judgment to meet the deficit in his reasoning that had been identified by counsel for the local authority and the children's guardian and which is now the subject of this appeal.

16. Once the judge had given his judgment and following other incidental submissions made by counsel, Ms Pollock on behalf of the father, applied for permission to appeal:

> "Ms Pollock: Your Honour, one other point arises. I know that on Tuesday or Wednesday counsel for the local authority invited the court to augment the judgment in relation to two specific points, the "gap in the evidence" point and also the "why adoption?" point.
>
> Judge: I thought I dealt with it.
>
> Ms Pollock: Your Honour, I have to say that having read the version that was circulated in the latter part of yesterday afternoon regarding the point about placement orders, I had anticipated on the basis of the local authority's email, that any additional paragraph would include a "why adoption? as opposed to long term fostering", and indeed "why closed adoption?". Your Honour, I apologise if I have simply overlooked the relevant sentence but I cannot see any elaborated or expanded wording in that regard.
>
> Judge: I have accepted the analysis of the guardian and the other experts that the children's welfare requires that they be placed in a permanent place and that, given their ages, the best placement for them will be in an adopted placement."

The appeal

17. In presenting the father's appeal Ms Isaccs inevitably relies upon the list of well known cases dealing with the need for judges to give adequate reasons. It is not my

intention in this judgment to add to the jurisprudence on this point which is well settled. It is not therefore necessary to quote extensively from the cases; it being sufficient simply to refer to the following extracts.

18. In *English v Emery Reimbold & Stirick Ltd* [2002] EWCA Civ 605, Lord Phillips MR, having stressed at paragraph 12 that Article 6 requires that "a judgment contains reasons that are sufficient to demonstrate that the essential issues that have been raised by the parties have been addressed by the domestic court and how those issues have been resolved" went on at paragraph 19 to say:

> "19. It follows that if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues, the resolution of which, were vital to the judge's conclusions should be identified and the manner in which he resolved them explained."

As I shall explain in due course, in the context of family proceedings, the identification in each welfare judgment of the realistic options, and therefore the issues to be determined, is an important and useful discipline. If, having identified the realistic options, they are then adequately addressed in the judgment, a challenge based on lack of reasons is unlikely to be sustained.

19. In *Re T (Contact: Alienation: Permission to appeal)* [2002] EWCA Civ 1736, the Court of Appeal held that the general requirement to give reasons, as described in *English v Emery Reimbold*, applied to child care proceedings, as did the need for parties to invite a judge to amplify his reasons if they are not thought to be sufficiently clear.

20. In *Re M (Children)* [2008] EWCA Civ 1261, Wall LJ made it plain that counsel is under a duty to raise the issue with the judge in such cases:

> "38. I wish to make it as clear as possible that after a judge has given judgment, counsel have a positive duty to raise with the judge not just any alleged deficiency in the judge's reasoning process but any genuine query or ambiguity which arises on the judgment. … The object, of course, is to achieve clarity and – where appropriate – to obviate the need to come to this court for a remedy."

21. Miss Isaacs relies upon three separate aspects in which she submits the reasoning in the judge's judgment is deficient. They are:

    a) Analysis of why, in circumstances where these children could not be returned to their parents' care, nothing but adoption "would do" in terms of meeting their welfare needs and thereby making it a requirement that the parents' consent should be dispensed with (in short, "the *Re BS* analysis" – *Re BS (Children)* [2013] EWCA Civ 1146);

b) Consideration of long term fostering, as opposed to adoption, as an option for one or more of the children;

c) Justification for refusing all but indirect contact between the four children and their natural family after adoption.

22. Taking each of those three aspects in turn, Miss Isaacs accepts that at paragraphs 28 – 32 the judge gives a short, but entirely accurate, self-direction as to the relevant law by listing the central cases, including *Re BS*, and referring to the welfare checklists in CA 1989, s.1(3) and Adoption & Children Act 2002, s.1(4), together with the need to apply ACA 2002, s.51(1)(b) when dispensing with parental consent. Miss Isaacs' criticism is that when, 95 paragraphs later, the judge comes to present his reasoned analysis that analysis amounts to no more than a factually based rejection of the option of parental care. There is no indication that the judge has undertaken an overall welfare evaluation in which adoption is weighed against any other option. At no stage in the judgment does the judge describe how he has applied the case law to which he had previously referred or the welfare checklist. No reasons are given to explain why the welfare of each of these four children 'requires' that parental consent to adoption be dispensed with.

23. Although the option of long term fostering for the children, and in particular 7 year old S, had not been formally raised on behalf of the parents, it was, submits Miss Isaacs, a matter that the judge should have considered as a realistic option as part of his overall analysis.

24. The issue of post-adoption contact, and the possibility of some direct contact, had been raised in closing submissions on behalf of the father and, in a case where this large group of siblings and half-siblings had lived together until the final judgment, it was, submits Miss Isaacs, necessary for the judge to conduct his own analysis of the issue of contact; it being a statutory requirement for the court to consider the arrangements for contact before either a care order or a placement for adoption order is made [CA 1989, s 34(11) and ACA 2002, s 27(4)].

25. Miss Isaacs submits that this is not a case in which counsel, collectively, can be criticised for failing to raise these issues with the judge or a case where it is now appropriate for the Court of Appeal to refer the matter back for the judge to give further reasons. In support of that submission, Miss Isaacs points to the fact that counsel for the local authority in two separate emails expressly drew the judge's attention to the absence of formal reasoning relating to adoption and that that was fully endorsed by counsel on behalf of the children's guardian. Further, when Ms Pollock on behalf of the father, raised the absence of reasoning on "the adoption point", the judge considered that he had dealt with that issue and, in relation to long term fostering and closed adoption, the judge stated that he had accepted the analysis of the guardian and the other experts as to the children's welfare. Miss Isaacs argues that this simple statement of reliance on the analysis of others falls well short of what is required from a judge.

26. In their skeleton argument on appeal and in support of the Respondent's notice Mr Mark Twomey QC, who did not appear below, and Mr Church, accept that the judge's judgment is deficient in the following terms:

> "The local authority accepts that the written judgment is inadequate in that:
>
> (a) there is no express analysis of the advantages and disadvantages of the care plan of adoption for each child;
>
> (b) there is no express explanation why care plans of adoption meet the welfare best interests of each child as opposed to, for example, placement with their parents."

Mr Twomey submits, however, that a judge is entitled to rely upon counsel to put their case. At the hearing the parties only placed two options before the court, namely rehabilitation or adoption, and the judge cannot now be criticised for failing to address long-term fostering (which was not raised) or direct contact (which was only referred to briefly in closing submissions). Mr Twomey also draws attention to the fact that it was counsel for the local authority and the guardian who alerted the judge to a need for further reasons, whereas the Appellant's counsel, who was under a duty (per Wall LJ in *Re M*) to do so, made no separate request to the judge.

27. The local authority case on appeal is that, in circumstances where it is accepted that there can be no substantive challenge to the placement for adoption order for the three younger children and where the judge has clearly stated that he relied upon and agreed with the analysis of the children's guardian and other experts, the reasons for the judge's determination are sufficiently clear with the consequence that this appeal should be dismissed.

28. On behalf of the Children's Guardian, Mr Matthew Stott, who did not appear below, opposes the appeal. He supports the case of the local authority and submits that the judge's reasons, when looked at as a whole, are sufficient to explain the orders that were made.

29. In response, Miss Isaacs pointed to the transcript of Miss Pollock's cross examination of the guardian in which the question of a plan for long-term fostering for S was discussed on the basis that such a placement would need to be considered if an adoptive home were not found within six months.

Discussion

30. The need for a judge to provide an adequate explanation of his or her analysis and the reasoning that supports the order that is to be made at the conclusion of a case relating to children is well established. Not only is the presentation of adequate reasoning of immediate importance to the adult parties in the proceedings (in particular the party who has failed to persuade the judge to follow an alternative course), it is also likely to be important for those professionals and others judges who may have to rely upon and implement the decision in due course and it may be a source of valuable information and insight for the child and his or her carers in the years ahead. In addition, of course, inadequate reasoning is a serious impediment to any consideration of the merits of the judge's decision within the appellate process.

31. The balance in the present judgment between the very significant space afforded to setting out a record of the oral evidence given during the hearing, on the one hand,

and the absence of any description of the judicial analysis leading to a decision to favour adoption, on the other, is clearly striking. The judge's short, but entirely correct, self-direction on the law at paragraphs 28 to 31 is not complemented by any description of the application of the legal requirements to the factors relating to the welfare of the four individual children whose future was before the court. The finding against rehabilitation of the children to their parents is simply followed by the announcement of the orders that the judge has determined should be made, coupled with a bald statement that the children's welfare requires that outcome. Despite the judge being invited by the local authority on two occasions to set out his reasoning, he declined to do so.

32. When measured against the requirement identified by Lord Phillips in *English v Emery Reimgold* that 'the issues, the resolution of which, were vital to the judge's conclusions should be identified and the manner in which he resolved them explained', this judgment plainly falls short.

33. The ground for Miss Isaacs' criticism of the judgment is therefore plain to see; that criticism is, at least to a degree, well justified and, indeed, is accepted in part by the local authority. The question for this court is whether the absence of reasoning on the issue of placement for adoption in the circumstances of the present case is sufficient to require that the placement for adoption orders be set aside and the case be remitted for rehearing before a different tribunal.

34. Consideration of the deficits in the judgment must be set against the reality of the case before the court as it was at the close of the hearing. As is accepted, the evidence justified the judge ruling out rehabilitation of any of the four children to their parents. That finding resolved the issue which had been, by far, the predominant focus of the hearing. As is accepted, the reality for the younger three children was that, if rehabilitation to their parents was ruled out, the only tenable care plan to meet their respective welfare needs was adoption. In relation to the placement for adoption orders for those three children, therefore, whilst it was certainly preferable, if not a requirement, for the judge to set out his reasoning in relation to those orders, the reasons are easy to identify and effectively flow from the decision to rule out rehabilitation.

35. In relation to long-term fostering for S and direct contact, the position is effectively the same. Although it is correct that the guardian was asked two or three short questions relating to long-term fostering, that was in the context of the fall-back care plan for S in the event that an adoptive home could not be found for her, rather than as a root and branch alternative to adoption. In like manner, although the court was under a duty to consider the contact arrangements generally, the question of any continuing direct contact did not feature clearly as an issue for the judge to determine. Although judges may determine issues that have not been raised by any party, if they are contemplating doing so it is normally incumbent on them to raise the issue with the parties and to invite submissions on the point. The reality in the present case is that neither long-term fostering for S nor direct contact was being actively run by any party as an issue, and they were not topics that the judge himself saw fit to raise. In the circumstances, the absence of consideration within the judgment of these two topics is understandable and does not represent a material irregularity in the overall conduct of these proceedings.

36. There is, however, a lesson that may be learned from this case and it relates to the importance of clarity in the minds of the parties and the court as to the live issues that need to be determined at any hearing. Given the potential for child care proceedings to generate a range of side issues, such as placement options or questions of future contact arrangements, in addition to the set-piece major question(s) falling for determination, it plainly makes good sense for the advocates to identify each issue, great or small, that they consider should be determined at the hearing and to do so at the start of the hearing. The agenda can then be reviewed at the close of the case so that it may form a list of issues for the judge to address in the judgment. The aim of the exercise being that every party and the judge can be clear as to what is, and what is not, being determined at that hearing.

37. When it comes to the judgment itself, prudence would suggest that a judge could usefully cross check his or her conclusions against both the list of issues and any self-direction as to the law so as to ensure that the judicial conclusions touch ground, to such proportionate degree as may be necessary, with the requirements of the case. I would venture to suggest that had the simple practice that I have described been followed in the present case, this appeal would have been wholly unnecessary.

38. For the reasons that I have given, and despite being persuaded by Miss Isaacs' submissions as to the lack of adequate judicial reasoning, I am satisfied that there has been no overall error or deficit in the judge's determination. In the narrow circumstances of this case, the justification for adoption, when considering the life-long welfare of each of these four children, is clear and flows from the judge's more detailed findings. This court was informed that the window during which a possible adoptive placement might be found for all four children (including 7-year-old S) was still open. At the conclusion of the oral hearing we therefore announced our decision to dismiss the appeal; we did so for the reasons that are now explained in this judgment.

Lord Justice Lewison:

39. I agree.

The President of the Family Division:

40. I also agree.