B4/2015/1757

Neutral Citation Number: [2015] EWCA Civ 880
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WEST LONDON FAMILY COURT
(HER HONOUR JUDGE KARP)

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 10th June 2015

B E F O R E:

LORD JUSTICE RICHARDS

LORD JUSTICE McFARLANE

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IN THE MATTER OF

F-T (A CHILD)

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Official Shorthand Writers to the Court)

Ms R Cabeza (instructed by Corporate Legal Services) appeared on behalf of the **Applicant**

Mr D Sharpe & Mr R Beddoe (instructed by {L"Defendant Solicitor}) appeared on behalf of the **Respondent**

J U D G M E N T
(Draft for Approval)

LORD JUSTICE RICHARDS: McFarlane LJ will give the first judgment.

LORD JUSTICE McFARLANE: This appeal comes in the course of recently issued care proceedings with respect to a very young child, a girl, "E", who was born on 21st May 2015 and so is not yet three weeks old.

The issue before this court is whether Her Honour Judge Karp was justified in making an order directing that E and her mother and father be placed in a residential assessment unit. That order was made at a hearing that was concluded before the judge on Tuesday 26th May. The hearing had originally started the previous Friday but had been adjourned, and during the course of the second day, 26th May, the father, through his legal team, was able for the first time to put forward the proposal that a residential assessment unit should be engaged to provide accommodation and an assessment for the mother, father and the child.

As I have indicated, that was the order that the judge made. She did so after a process of hearing and occasionally the parties outside the court negotiating. It is of note that we have been told that the judgment given by the judge was given at the very end of the day at around 6 pm, therefore well after the time for concluding proceedings.

In summarising the procedural history, it is right to take matters forward. The local authority issued its notice of appeal on 2nd June. I considered the case on paper on 4th June, granted permission to appeal on the basis that I will describe in a moment, and this court is extremely grateful to the advocates and to the listing office in this building for arranging an extremely prompt inter partes hearing of the appeal itself today, 10th June.

Before focusing in on the issue, it is right to summarise the background of the proceedings. They make for difficult reading because they chronicle the early life of E's mother, who is even now a young woman only of the age of 25. She has two older children, one aged nine and one aged seven, who are accommodated by the authorities in her home country of

Bulgaria; she being a Bulgarian Turk. She left Bulgaria in 2009 and came to this country in circumstances which I will not repeat in this judgment, but which generate a great deal of sympathy. She is a young woman with very, very modest internal resources. She has a very profound learning disability: her IQ has been measured in the course of previous proceedings at a level of 33 on the global scale. In this jurisdiction she gave birth to two other children, aged six and five. They were in her care for a number of years, but the local authority had developing concern as to the mother's ability to care for them. In the end care proceedings were issued in 2013, and on 30th September 2013 those two children were made the subject of care orders and for each of them an order authorising the local authority to place them for adoption. The basis of those orders were findings of physical abuse and neglect.

The mother subsequently started a relationship with the gentleman who is the father of E, the subject of these proceedings. He is not the father of any of the mother's four older children. He is a gentleman of Turkish origin and he is nearly 50 years of age. There is no apparent chronicled local authority history of concern about children he has previously had in his care, who are now either adults or fast approaching that stage.

As I have indicated, E, the subject of these proceedings, was born on 21st May of this year and, because of the local authority's knowledge of the mother's profound learning disability and the previous findings in the earlier proceedings, care proceedings were issued the day after her birth. E and her mother remained in hospital pending the court's determination of the local authority's application for an interim care order.

That matter was the matter considered by Her Honour Judge Karp. Fortunately, that judge was no stranger to this family. She had undertaken a hearing with respect to the ultimate adoption of the two older children who had been placed in the care of the local authority

here in England and those proceedings had been undertaken in the spring of 2015, culminating in a hearing in April 2015. So the judge brought her knowledge of this mother and the proceedings to the court room when considering the interim care application.

A further important matter, which does not in fact play into the merits of this appeal but it is right to place it on record within this judgment, is that because of the mother's learning disability she had in the previous proceedings been declared to lack litigation capacity and she had been represented by the Official Solicitor, instructing local solicitors and counsel. These proceedings are too recent in origin for such a finding of capacity to be made, and it is anticipated, we are told by Mr Sharpe (counsel who acts for the mother before us, as he did before the judge), that it is anticipated that there will be a certificate about capacity later this month. Despite the uncertainty as to the mother's capacity, we are grateful, as no doubt Judge Karp was grateful, for Mr Sharpe doing the best he can to represent the point of view of the mother before the court.

The point in the appeal relates to the judge's approach to the twin issues that had to be determined. The first of those two issues was whether or not the court should make an interim care order with the result that the mother and father should be separated from their young baby. The second issue was whether or not the family should move to be placed in the residential unit that had been identified.

The principal ground of appeal of the local authority is that the judge conflated both of those two issues and, in consequence, came to fall into error by ordering placement in a residential assessment unit without having gone through the necessary consideration of the statutory criteria set out in Children Act l989,section 38(6), 7A and 7B (“CA l989”).

Before looking at what the judge had to say about these matters, it is necessary to look at the legal context within which these two issues fall to be decided.

As is well known, this court has on a number of occasions stressed the test for a court deciding to make an interim care order, the effect of which is to separate a child from his or her family. The test has been set out in a number of authorities. In Re L-A (Care: Chronic Neglect [2010] 1 FLR 80, it was stressed that a child should not be separated from his or her parents unless "the child's safety requires interim separation", and subsequent authority has clarified that the word "safety" does not simply refer to physical safety but may include emotional safety and other similar matters.

The parameters with respect to ordering an assessment are contained within the CA 1989 in its present form following amendment as a result of the Children and Families Act 2014. The relevant provisions now read:

> "(6) Where the court makes an interim care order, or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child; but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment.
>
> ...
>
> (7A) A direction under subsection (6) to the effect that there is to be a medical or psychiatric examination or other assessment of the child may be given only if the court is of the opinion that the examination or other assessment is necessary to assist the court to resolve the proceedings justly.
>
> (7B) When deciding whether to give a direction under subsection (6) to that effect the court is to have regard in particular to -
>
> (a) any impact which any examination or other assessment would be likely to have on the welfare of the child, and any other impact which giving the direction would be likely to have on the welfare of the child,
>
> (b) the issues with which the examination or other assessment would assist the court,
>
> (c) the questions which the examination or other assessment would enable the court to answer,

(d) the evidence otherwise available,

(e) the impact which the direction would be likely to have on the timetable, duration and conduct of the proceedings,

(f) the cost of the examination or other assessment, and

(g) any matters prescribed by Family Procedure Rules."

Those provisions are in precisely the same terms as the over-arching provisions governing any form of assessment in these proceedings, which are set out in section 13 of the Children and Families Act 2014 in these terms:

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

...

(3) A person may not without the permission of the court cause a child to be medically or psychiatrically examined or otherwise assessed for the purposes of the provision of expert evidence in children proceedings.

...

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

(6) 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.

(7) When deciding whether to give permission as mentioned in subsection (1), (3) or (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 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."

The key word in those new statutory provisions is the word "necessary", and the key phrase is for any assessment to be "necessary to assist the court to resolve the proceedings justly". The definition of the word "necessary" has been given clarification by Sir James Munby, the President, in the case of Re H-L [2013] 2 FLR page 1434. There is no need for me to repeat that definition in this judgment today.

The judge, in her judgment, summarised the background to the proceedings, which it is not necessary to repeat, but insofar as she described her approach to the issues before the court, she said this:

"1. This is an extremely difficult case, in which I have no hesitation in finding that the interim threshold is crossed, and that the local authority need to share parental responsibility to ensure the baby's immediate safety. What I have been grappling with is whether or not the child's immediate safety demands removal from the parents.

...

8. I have to decide whether or not, in the light of the assessments that I have, bearing in mind that Mr [T] has, it appears, brought up his own family without extensive involvement of social services, this baby's immediate safety demands removal. This is in the context of a mother with a profound learning disability who was able to care for her two children, whose cases I dealt with in the previous proceedings for the first few years of their lives,

and who were found to have suffered significant neglect, and who were then removed.

9. I am concerned about pre-judging this case by making a decision today to separate the baby, when it appears that a residential placement may be the appropriate forum in which to assess these parents, with their particular disabilities, in a safe way, with the involvement of Symbol.

10. I am going to disclose the papers to Symbol, as a matter of urgency, in this case. I want to know from them whether they are able to accept the family today, and how they propose to deal with the language issue in this case in particular, the length of time of any assessment which would need to be informed by the cognitive assessment that Janine Breier is able to carry out within a week.

11. As long as Symbol [the unit] are able to take this family, I find that the immediate separation is not a necessity. Should their assessment once they have seen the papers differ, then the local authority's current care plan for foster care is one that I will reconsider in the absence of any alternate unit being able to take the family for a residential assessment. I am satisfied that at this stage the baby's immediate safety would be compromised by a return to the father and mother caring together, in the light of the assessments that have been carried out by the local authority, and I am not satisfied that the option of the baby being cared for by Mr [T]'s daughter has been fully explored to be safe, particularly in the light of the dynamics of how the parents would interact with the child at this early stage.

12. Whilst I am going to continue the interim care order that I made on Friday, I do not approve the current care plan."

The local authority raise three grounds of appeal in relation to the judge's determination. As I have indicated, the principal ground of appeal is that there has been an absence of consideration of the statutory test, either section 13 of the 2014 Act or section 38(7A) and (7B) of the 1989 Act. Secondly, the local authority argue that the direction that there should be placement in a residential assessment was wrong as a matter of law, and, thirdly, that the judge was wrong to abdicate the decision as to the appropriateness or otherwise of a residential assessment to the assessment centre itself.

If I can deal with that third ground first of all, it arises from the words used by the judge in

paragraph 11 of her judgment, which I have set out above, and in particular the sentence "Should their assessment once they have seen the papers differ" providing for an alternative plan. Miss Cabeza submits that the words:

> "As long as Symbol are able to take this family, I find that the immediate separation is not a necessity. Should their assessment once they have seen the papers differ, then the local authority's current care plan for foster care is one that I will reconsider..."

constitute the judge handing over to the residential unit the determination of the question of whether or not immediate separation of the child from the parents was a necessity.

I do not read that passage in that way. It seems to me to be no more than what is commonplace in cases of this sort where the residential unit have only had limited information passed to them down the telephone and there is to be a further process of them reading the relevant court papers, probably discussing the case with the social worker and the guardian and maybe meeting members of the family, before they, as a professional organisation, agree to take on the case.

The core of the local authority's challenge is to the judge's approach to the decision as to whether or not to order a residential placement, and Miss Cabeza's submission is powerful, short and clear. It is that at no time did the judge refer to the statutory test in section 38 of the 1989 Act, at no stage did she say in terms that she found such an assessment to be "necessary", and the judge, on the contrary, was driven by a perceived imperative to do what she could to avoid separating the child from the parents and used the residential assessment unit as a placement to avoid separation, rather than a necessity to obtain a required assessment for the purposes of the hearing.

It is certainly possible to look at the judge's judgment and understand the interpretation that

Miss Cabeza seeks to put upon it, and indeed it was on that basis that I granted permission to appeal, but an important part of the material before this court is something that I have not mentioned thus far, it is the detailed court order issued following the hearing on 26th May before the judge. That, we have been told, is an order that was agreed to by the advocates that were present. It is of particular note that we were told that it was drawn up initially for agreement by the advocate for the local authority, and it is an order that has been approved by the judge and issued by the court, with the court seal upon it. The relevant parts of the order for the purposes of this appeal are as follows. At paragraph 5 under the heading "THE APPLICATION(S)", the following appears:

> "The Father today made an oral application for a Residential Assessment by Symbol Residential Home."

Then at paragraph 11, under the heading "THE KEY ISSUES IN THE CASE ARE", at subparagraph c) the following appears:

> "What further assessments are necessary to assist the Court to justly resolve this case."

Later, the court records the orders under the heading "THE COURT ORDERS", and then under the heading "EXPERTS" the following appears:

> "a) An application was made today for the instruction of an expert and the application was granted.
>
> b) The type of expert whose instruction was allowed by the Court was Symbol Residential Facility.
>
> c) The date by which the report is due is 15 July 2015."

The text of the further terms of the order include provision for the local authority to fund the

placement of Symbol, and then at paragraph 9 of the final sections of the order the following appears:

> "Any party wishing to make a further Part 25 application for assessment in the case shall file and serve ..."

The reference to Part 25 being an application for an expert assessment and the wording of the order indicates that the court had already made a determination on a Part 25 application.

It seems to me, having now considered this matter in some detail, that the judge in the course of her judgment did at least come very close to holding that the residential unit assessment was "necessary". The judge certainly does say that "it appears that a residential placement may be the appropriate forum in which to assess these parents, with their particular disabilities, in a safe way". It is common ground amongst the parties before this court that everybody accepted that there needed to be some assessment of the parents, particularly of the new element in the family unit, namely the father. The question was what form of assessment should be granted.

The wording of the judge's judgment does not indicate that, in the terms of the judgment, she engaged with section 38 at all. We have been told by those counsel before this court who were before the judge that no reference was made at all during the entire hearing either to CA 1989, s 38 or s 13 of the 2014 Act. It was, according to Mr Sharpe, "simply not mentioned", and according to Mr Metaxa, "the phrase ‘section 38(6)’ was not mentioned all day".

That is a surprising turn of events given the high priority that has been afforded to publicising the change in the test for authorising expert assessments in these cases, and the requirement for any direction authorising expert assessment only to be made if the terms of section 38(6) and 7A, or as it may be section 13 of the 2014 Act, are satisfied. But Mr Metaxa tells this

court -- in a manner which is unchallenged by the other three seasoned family advocates acting before us and I therefore readily accept -- that courts dealing with cases that will involve the separation of a young child from his or her family, focus almost to a singularity on the guidance about avoiding such a course unless the child's safety requires immediate separation, and that it is not uncommon for the section 38(6) criteria not to be considered in such cases, and that, we are told, explains why the advocates did not raise the matter with the judge and why the point does not surface in the judge's judgment in the way that one would have expected. If what we have been told is correct, it is clearly a demonstration of a misunderstanding of the approach that should be taken in such cases.

There were two separate questions to be determined by the judge in these proceedings. One question was whether an expert assessment in the form of a placement in a residential unit should be directed. The determination of that issue has to be undertaken by deploying the statutory requirement for necessity and by considering the check list which appears in section 38(7B). That is a statutory, mandatory requirement before such an order can be made. The second, discrete and separate consideration is whether a child should be separated from a parent under an interim care order, and there the test set out in the case law is the test to be deployed.

There has been some discussion between the court and counsel during the course of this hearing as to whether one of these two questions should and must be considered first before the other. Having taken part in that discussion, it seems to me that there is no right answer to that as a matter of structure, but what is important is that the two questions should be considered separately. If the section 38(6) application is considered first, and it is granted in favour of keeping the parent(s) and child together, then it must follow that there is no need to go on to consider whether the child should be separated from the parent(s): no

separation will occur because they will all travel together to the residential unit. If the section 38(6) application is refused, then there is a need to look at alternative care arrangements and, if necessary, grasp the nettle of whether immediate separation is required having regard to the child's safety. On the other hand, it is perfectly possible to adopt the course submitted by the local authority before us that the question of separation should be considered first under the umbrella of whether or not an interim care order is to be granted. If the facts of the case do not justify separating the child from the parents, then it may well be that any question of a residential assessment will not arise on the facts of the case in any event. But be that as it may, the message from this judgment is that both issues have to be considered within the legal context applicable to each of them and the judge must consider them separately.

What is to be done in the present case? The judge's decision was made in circumstances where all parties were agreed that some form of assessment of the parents was "necessary"; the question for determination was, therefore, limited to the category of assessment. In those circumstances, the judge's conclusion that a residential placement was, to use her phrase, the "appropriate forum" can properly be read as her choice on this issue, it already having been established that some form of assessment was 'necessary'. I also bear very much in mind the circumstances of this case, the circumstances in which judgment was given, the fact that no advocate took the judge to section 38(6) and the relevant test. Each of those factors have led me to to afford a degree of tolerance to my consideration of this determination by this judge on this particular day in these particular circumstances. In addition, the matter is made clearer by the terms of the order to which I have already made reference, and in particular the fact that this order was drawn up by the local authority advocate. The terms of the order are plain. They indicate, first of all, that the court was

seised of an application for a residential assessment; secondly, that the court understood that one of the key issues of the day was whether such an assessment was "necessary to assist the court to justly resolve the case"; thirdly, that the court did authorise the placement at the residential unit, not as some aspect of the care plan, but as an expert assessment, the order is plain about that; and, finally and fourthly, that the court knew that it was dealing with a "Part 25 application" because of the wording in the final part of the court order indicating that any "further Part 25 application" would be dealt with in a particular manner.

For all of those reasons, in my view the local authority have failed to establish before this court that the judge fell into error in the manner in which she came to her conclusion on this important issue, and for my part I would dismiss the appeal.

LORD JUSTICE RICHARDS: I agree.

In those circumstances there is nothing further we need deal with.

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POSTSCRIPT:

LORD JUSTICE McFARLANE:

Having now read the transcript of this ex tempore judgment, I feel it necessary to stress that the focus of this appeal was solely upon the court's powers and jurisdiction in the context of making an interim care order sanctioning separation and, separately, considering whether to order a residential assessment. Nothing that I have said in this judgment is intended to have any impact upon the ordinary responsibility that is placed upon a local authority by ECHR, Art 8 and domestic case law to maintain a child within his or her own family.