[2011] EWCA Civ 258

Case No: B4/2010/2433

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHESTER COUNTY COURT
(HIS HONOUR JUDGE KEVIN BARNETT)
Lower Court No: CH10C00604

Royal Courts of Justice
Strand, London, WC2A 2LL

31st January 2011

B e f o r e :

LORD JUSTICE PILL
LORD JUSTICE WILSON
and
LORD JUSTICE RIMER

Between:

In the matter of F (A child)

(DAR Transcript of
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Official Shorthand Writers to the Court)

Mr Clive Heaton QC and Mr Bansa Singh Hayer (instructed by their legal department) appeared on behalf of the Appellant Local Authority
Mr Anthony Hayden QC and Miss Lorraine Cavanagh (instructed by Hibberts, Crewe) appeared on behalf of the Respondent Mother.
Mr Anthony Hayden QC and Mr Karl Rowley (instructed by Poole Alcock LLP, Crewe) appeared on behalf of the Respondent Father.

HTML VERSION OF JUDGMENT

Lord Justice Wilson:

1. Cheshire East Borough Council ("the local authority") appeal against an order made by His Honour Judge Barnett in the Chester County Court on 16 July 2010 by which he dismissed their application for a care order in respect of a child. Apparently of his own motion the judge granted the local authority permission to appeal.

2. The local authority do not seek to persuade us to allow the appeal. They concede, in my view inevitably, that decisions of the House of Lords and of the Supreme Court, being binding on this court, require it to dismiss the appeal. Accordingly I propose that we should dismiss it. The purpose behind the local authority's doomed appeal to this court is to put them in a position whereby, if they are permitted to do so, they can appeal against our decision to the Supreme Court and can try to persuade the Supreme Court to modify the law stated in previous decisions in such a way as to lead it to allow the appeal against our order and to set aside the judge's dismissal of the application for a care order. Thus the argument put before us today has related to the application, which rightly they first make to this court, for permission to appeal to the Supreme Court.

3. In the light of the limited issue for our consideration today the child, by his Children's Guardian, has not been represented at it. A skeleton argument has, however, been filed on

his behalf by which the guardian expresses her support for the local authority's application for permission to appeal to the Supreme Court. Thus the shape of the oral hearing today has been one of short submissions by Mr Heaton QC on behalf of the local authority in support of the application for permission and of equally short submissions by Mr Hayden QC on behalf of the parents, who express neutrality in relation to the application for permission.

4. By this judgment I will express the reasons for my view that we should refuse the local authority's application for permission to appeal.

5. The child at the centre of the proceedings is a boy, C, who was born on 27 June 2010. His parents are engaged to be married and they live together. Early in the pregnancy the parents notified the local authority of it and they referred the local authority to the existence of care proceedings in 2004 to which the father had been a party and in which he had been the subject of certain findings to which I will refer. The local authority conducted a pre-birth assessment and determined that, in the light of findings in the previous proceedings, they should apply for an interim care order in relation to the child, once born, on a plan that he should reside with the mother only if the father were to leave the family home and to undergo a risk assessment. When the parents indicated that such a plan was not acceptable to them, the local authority issued their application for a care order within a day, or at most two days, of the birth and they sought an immediate hearing of their application for an interim care order to be made on the plan to which I have referred.

6. What then happened shows that, at any rate in the Chester County Court, the family justice system is still working extremely well. The judge was able to conduct a substantial hearing as early as 30 June 2010, i.e. only three days after C's birth. Counsel, publicly funded, were instructed to appear for each of the parents. A guardian was in place on behalf of C and a solicitor appeared for him acting by her. It is clear that the judge received legal submissions of high quality on all sides. At the end of the hearing he announced his decision, namely that he would dismiss the application for a care order, but he reserved his judgment. Only 16 days later he handed down what, if I may say so, was an immaculate written judgment.

7. The local authority contended, of course, that there were reasonable grounds for believing that circumstances with respect to C were as mentioned in s.31(2) of the Children Act 1989: see section 38(2). Of course they did not contend that there were reasonable grounds for believing that C *had* suffered or *was* suffering significant harm within the meaning of s.31(2)(a). They contended that there were reasonable grounds for believing that he was *likely* to suffer significant harm within the meaning of that subsection. In that regard they referred only to the proceedings in 2004 to which the father had been a party.

8. The earlier proceedings had taken place in the Stoke County Court and had related to a boy, J, who in October 2003 had been born to the father by a different woman. The proceedings had resulted in the making of a care order in relation to J on a plan that he should reside with the father's parents and have contact with the father under their supervision. It seems that that plan remains operative.

9. In the course of those proceedings His Honour Judge Orrell had considered two fractures of the right leg which J had sustained on separate occasions in April 2004, i.e. when aged six months. The judge had found that he had sustained both of them non-accidentally but he was not able to identify the perpetrator of either of them. He had found only that the perpetrator was either the father or J's mother and so he consigned both of them to a pool of possible perpetrators. In relation to the second fracture he had indicated that he regarded J's mother as somewhat more likely than the father to have been its perpetrator. In relation to that fracture he had also found that whichever parent had not been the perpetrator had failed to protect J.

10. Such were the findings laid before the court on 30 June 2010 as material by which the threshold for the making of an interim care order referable to C was crossed. The judge held that he was bound to conclude that the material did not enable the threshold to be crossed, as a result of which he dismissed the application for a care order.

11. The local authority did not rely upon Judge Orrell's findings in relation to the failure to protect J from the second fracture. I suppose that they might have tried to submit that, on the assumption -- favourable to the father -- that he did not perpetrate the fracture, it had been proved that he failed to protect J. But such, no doubt, was considered to be too slender a

thread by which to cross the threshold: for example there was nothing to indicate that the mother in the present proceedings is an abusive mother, against which C is in need of that sort of protection. The local authority appear to have pressed the judge only with the fact that Judge Orrell had consigned the father, along with J's mother, to a pool of possible perpetrators of the two fractures.

12. There is no doubt that the reference in section 31(2)(a) to the child who is *likely* to suffer significant harm is a reference to a child in respect of whom there is at least a *real possibility* that he will suffer significant harm. But it has been established in law for 15 years that, to quote Lord Nicholls in In Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 at 590C,"there must be facts from which the court can properly conclude that there is a real possibility that the child will suffer harm in the future". That proposition has been carried seamlessly through more recent decisions of the House of Lords and of the Supreme Court. It was, for example, firmly restated by Baroness Hale in In Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35, [2009] 1 AC 11, at [22] and [23].

13. The only established facts able to be collected from the judgment of Judge Orrell is that J suffered two non-accidental injuries. Put that way, it is only too clear that those facts could not found a conclusion that there was a real possibility that C would suffer significant harm. Such a conclusion might certainly have been drawn from an established fact that the father had perpetrated at any rate one of those non-accidental injuries: but such was the conclusion which Judge Orrell had specifically declined to reach.

14. Mr Heaton wishes to argue to the Supreme Court that, where in relation to one child there has been a finding of non-accidental injury and the only uncertainty relates to the identity of its perpetrator, there should be a relaxation of the principle which requires the real possibility of future harm to a second child to be founded only on a further proven fact in relation to the identity of the perpetrator. But that the principle operates with full force even in that area has been demonstrated first by the decision of this court in Lancashire CC v B [2000] 2 AC 147, at 155F, being a conclusion which was not disturbed on the further appeal to the House of Lords. Moreover the principle was in particular applied to our very situation by the Supreme Court as recently as in In Re S-B (Children) (Care Proceedings: Standard of Proof) [2009] UKSC 17, [2010] 1 AC 678, at [49]. It is strictly true that the reasoning in that paragraph is *obiter:* for the court directed a fresh fact-finding enquiry on the basis that the trial judge had applied too high a standard of proof. But the court there proceeded as follows:

> "There is a further reason to remit the case. The judge found the threshold crossed in relation to William on the basis that there was a real possibility that the mother had injured Jason. That, as already explained, is not a permissible approach to a finding of likelihood of future harm ... a prediction of future harm has to be based on findings of actual fact made on the balance of probabilities. It is only once those facts have been found that the degree of likelihood of future events becomes the 'real possibility' test..."

In my view the strict status of that passage as *obiter* carries very little significance in circumstances in which it is all of a piece with a number of earlier, yet also recent, decisions of the House of Lords.

15. Mr Heaton contends, and Mr Hayden concedes, that the reasoning so clearly set out in In Re S-B, at [49], has caused great consternation among local authorities, among other professionals who work in the area of public law and among academic commentators. Mr Heaton's aspiration is to persuade the Supreme Court to modify its demand for proven factual foundation in uncertain perpetrator cases. Take, says he to us this morning, a case of two parents who are consigned to a pool of possible perpetrators of non-accidental injuries to their child; and who then separate; and who each, with other partners, produce a further child, who together become the subject of conjoined care proceedings. Are both those applications for care orders required to be dismissed even though before the court is, on any view, a perpetrator of injuries to that older child? No doubt there are hard and worrying cases. But the requirement of proven factual foundation is a bulwark against the state's removal of a child from his family, which I consider very precious. I also applaud the Supreme Court's regular acknowledgement of the fact that, although it can depart from its previous decisions, the exercise of departure is highly unsettling for the law and should be undertaken only with great caution.

16. For those reasons I would not wish us to foist upon the Supreme Court a full appeal in circumstances in which it had not itself had the opportunity to consider whether to accept it.

17. I have raised in court this morning another reason why the present proceedings might be an inapt vehicle for the contentions which Mr Heaton wants to place before the Supreme Court. Following the judge's dismissal of the application for a care order the local authority discovered that the parents were caring for C while under the influence of drugs. So they issued a fresh application for a care order; and that application is pending. On 16 September 2010 HHJ Barnett held that the threshold to the making of an interim care order had been crossed. He made his order upon a plan that C should forthwith return to live with the parents under close local authority and other supervision. It seems that the parents had admitted to the court that, in the weeks prior to the issue of those proceedings, they were taking drugs, as indeed they had been prior to the birth. In those circumstances one might think, at any rate *prima facie* (and this was certainly Mr Heaton's submission to us this morning), that the factual foundation necessary for the crossing of the threshold to the making of a *full* care order would in due course be as much established as that necessary for the crossing of the threshold to the making of an *interim* care order. In those proceedings, therefore, it may very well be that the threshold requirement to the making of a full care order will be met; and the court is likely to move into the realms of its welfare-based enquiry into the optimum arrangements for C.

18. In relation to that enquiry there has been an interesting short discussion in court today. In conducting their risk assessment of the parents for that purpose the local authority wish among other things to weigh the placement by HHJ Orrell of the father into the pool of possible perpetrators of the fractures to J. Of course such presents a practical difficulty which has exercised me for some years, namely that of gauging the degree of risk properly to be attributed to an adult not found to have been the perpetrator but only placed into a pool of possible perpetrators. But that is one species of difficulty. What the discussion this morning has surrounded is whether, in a case where the *threshold* is crossed for other reasons, the *welfare* enquiry can include consideration of the significance of the father's placement into a pool of possible perpetrators. Over the weekend, for example, I thought that I had located in the speech of Lord Nicholls in Re O and N; Re B [2003] UKHL 18, [2003][1 FLR 1169, at [26], [27] and [31], authority for the proposition that, where the threshold is crossed, that sort of consideration can indeed -- with whatever degree of difficulty for those charged with performance of the exercise -- be weighed. In our discussion this morning I therefore put first to Mr Heaton and then to Mr Hayden that it might very well be that if in these second proceedings the threshold were, by reference to the other material, to be crossed, the local authority would be at liberty to place all the findings made by HHJ Orrell into the risk assessment to be presented to the court at the welfare stage. In the event, however, the discussion proved to be one for which, understandably, neither Mr Heaton nor Mr Hayden was fully prepared: for it is to the side of the issue of whether permission for an appeal to the Supreme Court should be granted. Moreover neither counsel -- and both have enormous experience in the field of public family law -- was prepared to accept that, if the threshold were to be crossed for other reasons, HHJ Orrell's findings could be placed before the court at the welfare stage of the enquiry. It would be quite wrong for me to say more about that point in this judgment. I put it to one side. I have raised it. I raise it in parenthesis in this judgment. But the result is that I can reach no firm conclusion on that matter and that I therefore do not consider that it would be appropriate to say definitively that this case is in any event an inapt vehicle for the further appeal which Mr Heaton has in mind.

19. It is for those other reasons, already articulated, that I would refuse permission.

Lord Justice Rimer :

20. I agree that this appeal must, as the appellant local authority accepts, be dismissed. I also agree that this court should decline to give permission to appeal to the Supreme Court and should leave to that court the decision as to whether any such permission should be given. As regards Wilson LJ's further observations as to whether, in the circumstances he mentions, this case would in any event be a suitable vehicle for an appeal to the Supreme Court, I too would not express any view as to whether or, if so, to what extent and with what weight the findings of HHJ Orrell in relation to J could or might form relevant considerations in any future welfare based inquiry carried out in relation to C in the second set of proceedings.

Lord Justice Pill:

21. I also agree that the appeal should be dismissed and permission to appeal to the Supreme Court refused for the reasons given by Wilson LJ. Especially having heard the clear reservations expressed by both leading counsel, I would also expressly leave open one question raised during the hearing. That is whether, in new care proceedings in which the threshold for an interim care order has been crossed in relation to F but for reasons unconnected with the father's treatment of a child by a previous relationship, it would be open on a welfare-based inquiry to take into account that the father was in the pool of possible perpetrators of injuries to that other child.

Order: Appeal dismissed

Permission to appeal refused