[2011] EWCA Civ 1009

Case No: B4/2011/1676

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WATFORD COURT
(HER HONOUR JUDGE HARRIS)

Royal Courts of Justice
Strand, London, WC2A 2LL

7 July 2011

B e f o r e :

LADY JUSTICE BLACK
and
LORD JUSTICE THORPE

IN THE MATTER OF H (Children)

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Official Shorthand Writers to the Court)

Mr R Wilson QC and Mr J Gibson (instructed by Oldhams Solicitors) appeared on behalf of the Appellant mother.
Mr B Coleman (instructed by Hertfordshire County Council Legal Services) appeared on behalf of the First Respondent, the local authority.
The Second Respondent did not appear and was not represented.
Mr R McCarthy QC and Ms D Fottrell (instructed by Eskinazi & Co Solicitors) appeared on behalf of the Third Respondent, the Children's Guardian.

HTML VERSION OF JUDGMENT

Lord Justice Thorpe:

1. There are ongoing public law proceedings in Watford County Court which focus on the ability of mother to provide safe and adequate parenting for a little girl. The local authority have held interim care orders since January and most recently mother and daughter have been placed in a safe environment, it being manifest to all that the child would not be safe in the unsupervised care of her mother within the community.

2. The story that we have reviewed commences with a hearing on 19 June, when HHJ Harris on a fact-finding and interim care order act application gave a written judgement in which she recognises the local authority's general entitlement to a continuing interim care order, but plainly disapproves of their plan to separate mother and daughter, removing the child into foster care. The judge specifically says in paragraph 70 of her written judgement (this is the concluding paragraph):

> "At this stage and, prior to the LA's reconsideration of their care plan, it is my judgement that a removal of [the child] from her mother's care will be a breach of her Article 8 rights and neither a necessary nor proportionate interference with her right to respect for her family life."

3. So on that the judge required the local authority to amend their care plan. The local authority's response to that invitation was swift. Expressed on the following day, they declined the judge's plea and sought a further listing to press their application for the interim care order which had not been approved on the 19 June. That hearing took place on the following day, 21 June, and the judge expressed herself as being in classic conflict with the local authority

on their immediate management. She conceded that in the light of authority she had no alternative but to grant the interim care order despite her strong disapproval of the care plan. Mr Gibson, who appeared for the mother on that occasion, made it plain that he was relying upon Article 8 rights and specifically that he wished to address an argument under section 8(1) of the Human Rights Act 1998, that the judge had jurisdiction to injunct the local authority from separating mother and child and that she should in the exercise of her discretion exercise that jurisdiction. We do not have a transcript of the judgement from 21 June but in a note approved by the judge the judge specifically recognises in a final coda that she was willing to hear such an application for injunctive relief under the Human Rights Act 1998 if it was properly brought before the court. She made it plain that she did not regard herself as being *functus officio* and therefore free to grant that application if pursued.

4. Mr Gibson, having considered the *ex tempore* judgement of the 21 June, decided that his proper course was first to seek amplification since, as noted, the judge did not seem to have comprehensively addressed his Article 8 submissions. The judge circulated her written amplification on the following day, saying that her consideration of the Article 8 submission was implicit from all that she had said on the previous day. That led Mr Gibson to issue an application by the lodging of a skeleton argument in which he sought the judge's ruling on an application for a section 8(1) injunction, the application which the judge had on 21 June indicated that she was prepared to entertain. Mr Gibson's application was heard on the following day and it was dismissed. The judge in her *ex tempore* judgement said, essentially:

> "I don't understand where the jurisdiction comes from -- I cannot give with one hand and take away with the other -- it rides a coach and horses through part 4 of the children act."

5. So Mr Gibson failed at the first fundament: was there jurisdiction? The judge decided not. Accordingly there was no exercise of discretion. Mr Gibson then filed his appellant's notice in this Court on the same day. I listed his application for oral hearing and last week further adjourned the application for an oral hearing on notice with appeal to follow if permission granted. I extended the stay granted by the judge until the determination of the application. The further direction that I gave for the adjourned hearing was that it should be before a three judge court to include a family law judge and a judge with human rights expertise. It does not prove possible to achieve such a constitution and the adjourned hearing is listed today before myself and my Lady alone. It would have been impossible for this Court to have resolved the sophisticated arguments advanced in outstanding skeleton arguments that have been written by Mr Richard Wilson QC and Mr Gibson for the mother, Mr Bruce Coleman for the local authority, and Mr Roger McCarthy QC and Ms Fottrell for the guardian. As has been said, the issues raised by those skeletons are important and manifestly demand a suitable three judge constitution. However, it is open to us to deal with this case as we are presently constituted in the light of a concession made by Mr Coleman for the local authority that the judge misdirected herself in concluding that she did not hold jurisdiction to consider in the exercise of her discretion the application for a section 8(1) injunction.

6. We are much indebted to Mr McCarthy for his very clear appraisal of the points of law. I accept his ultimate submission that at the interim stage there is authority plain enough in the judgement of Hale LJ in the case of W [2001] EWCA Civ 757 and in the very recent decision of this court in Coventry City Council [2011] EWCA Civ 729 that there is plainly jurisdiction. I would like to make it absolutely plain that in accepting that submission, and accordingly in concluding that HHJ Harris misdirected herself, I make no criticism of her whatsoever. Far from criticising her, I would like to record the outstandingly effective way in which she has dealt with this case in her court. She has plainly gone to extreme lengths to make the judicative function of the court available to the parties at the shortest notice. Through several twists and turns she has been put at disadvantage in that she was not asked to consider the application for a section 8(1) injunction at one and the same time as the application for an interim care order. She took these points in turn and I fully understand why she felt by 23 June that she had effectively decided the question and although not strictly *functus* she could not as it were reverse the direction that she had taken two days earlier.

7. However, having paid tribute to the outstanding application and dedication that she has given to this case, the consequence must be that the discretion that she did not exercise on the 23 June must be exercised by her at the earliest possible date and we are relieved to know that this case will be the subject of expert reports to be submitted on 15 July and it is already listed

for her on 19 July. That date is plain from the interim care order, made on 21 June which is specifically to run until 19 July. So on 19 July she will have more information than is available to this court. There will be reports which may bear upon the exercise of the discretion. Until that date plainly there must be no removal of child from mother. That can be achieved easily by the extension of the stay or alternatively, perhaps more properly, by saying that we grant interim relief until such times the judge can exercise her discretion. So that is the disposal that I would propose for today.

Lady Justice Black:

8. I would like to endorse what my Lord has said about HHJ Harris's very careful conduct of this case. She found herself facing a dilemma in practical and legal terms which all family judges recognise and which gave rise to very difficult issues of law. She did not appreciate that she had the power to grant an injunction under the Human Rights Act 1998 in circumstances such as those in this case. She therefore did not go on to look at the facts of the case in the context of such an application and to exercise her discretion.

9. All that this Court intends to do is to grant an interim injection to hold the status quo as it is pending HHJ Harris being able to consider whether to exercise the discretion which it is now conceded she has to grant an injunction under the Human Rights Act.

10. I emphasise once more that whilst we have had the benefit of extremely helpful skeleton arguments from all counsel, we have not heard argument developed orally or examined the authorities as we would wish to have done on an important issue such as this. We have simply arrived at our decision as a pragmatic solution to an urgent problem and I certainly am not intending that anything I say in this judgement should lay down either principles or guidelines for this type of case. I should also make clear that I am not intending to determine in any way the mother's arguments that the judge's granting of the interim care order in the first place was wrong, as we were not pressed to determine that in the light of the pragmatic solution which has just been explained in the course of our two judgements and which was floated during the course of this short hearing.

Order: Application granted.