Case No: B4/2013/0341

Neutral Citation Number: [2013] EWCA Civ 476
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Principal Registry of the Family Division
HHJ Cryan

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/05/2013

Before :

LORD JUSTICE MAURICE KAY
Vice President of the Court of Appeal, Civil Division

LADY JUSTICE RAFFERTY

LORD JUSTICE RYDER

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Between :

LB	**Appellant**
- and -	
The London Borough of Merton (1)	**Respondent**
-and-	
CB (A Child) (2)	
By her Children's Guardian	

- -
- -

The Appellant was in person
Ms Marks with Ms Gore for the **Local Authority**
Ms Orchover for the **Child**

Hearing dates: 10 April 2013

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Judgment

Lord Justice Ryder:

1. CB was born on 30 April 2008. She is now 4 rising 5 years of age. Her mother, LB, is the Appellant and the Respondents to this appeal are the London Borough of Merton and the child, by her children's guardian. CB's father lives in Latvia and has played no part in the proceedings or this appeal.

2. This is an appeal from a decision of His Honour Judge Cryan who on 8 October 2012 dismissed mother's appeal against a placement order made by District Judge (Magistrates Court) McPhee in the Inner London Family Proceedings Court on 10 July 2012. It is, therefore, a second appeal. Permission for the appeal was granted by McFarlane LJ in the following terms:

    a) whether it was legally permissible for the local authority to present the case to its Adoption Panel and issue an application for a placement for adoption order in circumstances where the child was not subject to an interim care order but was simply accommodated under CA 1989, s20;

    b) whether, in the above circumstances, the court had jurisdiction to entertain and grant an application for placement for adoption;

    c) what consideration, if any, was given by DJ McPhee and HHJ Cryan to the requirements of Adoption and Children Act 2002, s1 and s52.

3. CB has been continuously in the care of the local authority since 5 March 2010 when she was taken into police protection on being found to be 'home alone' and in a neglected condition. Mother was subsequently arrested and cautioned. CB was placed with a foster carer. Although mother continues to dispute the facts, it is plain that on 8 March 2010 she orally consented to the accommodation of CB under section 20 of the Children Act 1989 (the 1989 Act) and that consent was confirmed in writing on the following day when mother had the assistance of an interpreter.

4. Although mother intimated more than once that she wished to end the section 20 accommodation, she never acted on her intentions before the local authority issued public children (care) proceedings on 15 June 2011. It appears that mother suggested a number of dates for the return of her daughter but on each occasion extended the accommodation while she searched for suitable housing for herself and CB.

5. The background circumstances can be taken quite shortly from the judgments in the courts below. Mother came to the United Kingdom from Latvia on 1 January 2008 and was joined here shortly afterwards by a daughter, MZ who was then 16. At the time of mother's immigration she was 5 months pregnant with CB. CB's father remained in Latvia and is said to have a child by another partner.

6. At 1 a.m. on the 4th September 2009 the police responded to a report to discover mother intoxicated and walking barefoot with her daughter in a buggy in the middle of a road in the London Borough of Merton. Mother was arrested and CB was placed in the care of MZ. Mother was subsequently cautioned for the offence of being drunk in charge of a child under the age of seven.

7. The local authority undertook an assessment which was not completed until 18 January 2010. The author expressed the opinion that mother's behaviour was out of character, that CB was usually well cared for and loved by her mother and sister and that on the basis the incident was a mistake, CB would be well cared for in the future.

8. In February 2010 there was an anonymous referral to the local authority's children's services department reporting that CB was "up all hours, running and screaming around the flat at 2 a.m. nearly every night". The landlord called the police to the family home on 5 March 2010. The police found CB at home without an adult at the age of only 21 months. The police officer's description of the neglect of CB is important and I shall repeat it below. CB was immediately taken into police protection.

> "I then heard a whimpering sound from the door directly in from of me. Once I opened the door I saw a room. In the left hand corner of the room was a wardrobe and there were toys all over the floor. In the right hand corner of the room against the window was a double bed that looked very soiled. On the wall beside the bed was a large area of damp in the wall and the wallpaper was coming away. There was a very strong and overpowering smell of urine and faeces in the room. I saw the child curled in an almost foetal position on the bed lying on a pillow. She sat up when we came into the room and she was holding an empty pink bottle. I went towards the child. She stood up and came towards me. I saw that her clothes were wet and that she was wearing a nappy that had fallen off between her legs. Once in a different room I could see the child's clothes were wet and she was shivering. The strong smell was coming from her and it was clear that she had not been changed or cleaned all day. I removed the child's nappy to find dried and fresh faeces. The nappy was so swollen with urine that the child was unable to walk properly. There was also dried faeces on the child's body and her skin was soaked in urine that had leaked from her nappy and gone through her clothes."

9. On examination at hospital CB was found to have contact dermatitis related to her soaking condition. From police protection she was placed with local authority foster carers with the consent of mother under section 20 of the 1989 Act. CB remained accommodated until care proceedings were issued because, despite mother's repeatedly expressed intentions, her new housing did not materialise and her existing home was in a very poor state: effectively unfit for a child.

10. In early December mother successfully completed a 'strengthening families' parenting course. However, on 26 December 2010 she was again detained by the police on suspicion of being drunk and disorderly.

11. Care proceedings were issued on 15 June 2011. By then, there had been an encouraging assessment of mother by a family centre on 3 August 2010 but discouraging evidence about CB from more than one medical source. CB was assessed to have significant delays in all aspects of her development. The issue of the causation of this delay, whether by sensory deprivation and neglect or otherwise, was squarely before the court.

12. The local authority's care plan was for the permanent removal of CB from mother with a view to a subsequent adoption. Mother asked for further assessment with a

view to the rehabilitation of CB to her or in the alternative that CB should be cared for in the extended family by CB's sister, MZ.

13. At the substantive hearing before the Inner London Family Proceedings Court mother was represented by counsel. She did not seek to argue that the threshold criteria in section 31 of the 1989 Act were not satisfied. District Judge McPhee heard evidence over four days including from mother, CB's sister, the social workers, children's guardian, and a consultant child and adolescent psychiatrist. In addition, there was unchallenged evidence from the paediatrician who had diagnosed developmental delay and from mother's adult clinical psychologist.

14. In a closely argued, detailed and most careful judgment, District Judge McPhee considered all of the evidence. He made findings of fact and exercised his discretion in a way which is clear. He identified the correct legal principles to apply and applied them to the facts as found. I can detect no error of law and nothing that can be described as plainly wrong. The conclusions he came to both as respects the witnesses and their evidence are coherent, consistent and well within the broad ambit that is to be afforded to a first instance judge.

15. The same level of care is evident in the conduct of the first appeal by His Honour Judge Cryan. Judge Cryan dealt with an appeal by mother and also an appeal by CB's sister, MZ. He likewise took four days and reserved judgment over a weekend. The judgment is a model of clarity and analysis. It takes every ground asserted, analyses the evidence, sets out all of the positives and the negatives and applies the appellate test to the findings and to the exercise of discretion by District Judge McPhee. Both appeals were dismissed and Thorpe LJ refused permission for MZ to bring a second appeal to this court.

16. It is important to understand that neither judge accepted the local authority's case without criticism. There was expressed disquiet about the local authority's management of the case and a careful critique of the apparently encouraging assessments. Those assessments were described as over optimistic, superficial, lacking analysis and insight and insufficiently rigorous in the context of the medical evidence about the child and mother's approach to her daughter's best interests while in care, which was described at best as expedient and lacking in motivation.

17. It is appropriate to observe that the medical and psychological evidence relied upon by District Judge McPhee was effectively unchallenged and was described as compelling. The child and adolescent psychiatrist's opinion was that CB's developmental delay was attributable to the care given to her by her mother, i.e. it was caused by physical and emotional neglect. According to District Judge McPhee, mother's own clinical psychologist concluded that

> "…….the mother did not meet the diagnostic criteria for a personality disorder, but appeared to present with maladapted personality traits. These included histrionic narcissistic traits, a reliance on defences of denial and repression and generally employing an avoidant coping style. These personality traits, he said, are likely more pronounced in periods of crisis or at a time of threat to her psychological integrity, making her more prone to denial and repression and they manifest in heightened emotion and a struggle to problem-solve. At such times she may rely on avoidance strategies such as the use of alcohol or reliance on

fantasy. During periods of stress or anxiety she may struggle to appraise the impact that she has on others including her daughter. His conclusion is that she is capable of basic childcare but it is more likely that that is interfered with during extreme stress or crisis. He concludes that therapy may assist her with her psychological deficits and so reduce any risk she may pose to her child."

18. It is unsurprising, therefore, that before this court the attempt by mother to characterise both District Judge McPhee and Judge Cryan as being plainly wrong on the facts or in the exercise of a discretion had no prospects of success. Likewise, there is no discernable error in the principles of law identified or their application by either judge. In any event, permission was not granted on these general bases and no application was made to this court to renew the application for permission on any alternative ground.

19. That is not to say that mother, ably assisted by her McKenzie Friend, Mr. H, did not advert to their complaints about the previous decision making. The court had a very significant volume of materials expressing their strong opinions on the factual evidence, the opinions of the experts, the validity of the section 20 accommodation agreement, the pre-proceedings poor practice of the local authority, various internet based conclusions on the psychologist's opinions and their assertions that procedurally and substantively the judges were plainly wrong and thereby erred in law. I regret that in light of the conclusions of District Judge McPhee which were not dislodged on appeal before Judge Cryan, these complaints taken individually or together do not survive scrutiny. The conclusions of District Judge McPhee are unassailable and Judge Cryan was right to uphold them.

20. Turning then to the discrete issues in respect of which permission has been given:

    a) was it legally permissible for the local authority to present CB's case to its adoption panel and issue an application for a placement for adoption order in circumstances where the child was not subject to an interim care order but was simply accommodated under section 20 of the 1989 Act?

    b) did the court have jurisdiction to entertain and grant an application for placement for adoption? and

    c) was consideration given to the requirements of sections 1 and 52 of the Adoption and children Act 2002 by District Judge McPhee and Judge Cryan?

21. The context for these questions is that when permission was given the court did not have the benefit of the separate judgment by District Judge McPhee on the local authority's application for a placement order. Furthermore, as can be ascertained from Judge Cryan's judgment and as has been confirmed by counsel who were present, District Judge McPhee's reasoning in respect of the placement order was not challenged before Judge Cryan. In that circumstance and in the absence of any material error on the face of District Judge McPhee's placement judgment, there can be no criticism of Judge Cryan for not referring to the requirements of sections 1 and 52 of the 2002 Act. Before this court no error of law was pursued as respects the considerations in the 2002 Act. I have had the benefit of being able to scrutinise

District Judge McPhee's separate judgment on the placement application. By reference to his findings and conclusions in the care proceedings he analyses the tests in sections 1 and 52 and applies the principles to the facts. I can detect no error in his approach and indeed I commend his practice of separating out the placement application and giving a separate judgment which specifically refers to the different factors that must be taken into consideration by a court when such an application is made.

22. The local authority presented its case in respect of CB to the adoption panel on 9 March 2012. Although at the time CB was accommodated that was because mother had not opposed her continuing accommodation within the care proceedings which by then were almost 4 months old. It had not been necessary for the court to make an interim care order having regard to the 'no order principle' in section 1(5) of the 1989 Act.

23. In accordance with good practice, the local authority were planning for the child's future in what is sometimes described as concurrent or parallel planning. This is not the place to elaborate upon the distinction, but where a local authority have come to the conclusion that their plan for a child is adoption, then in order to make an application for a placement order they need a decision to be made by the 'agency decision maker'. At the time this decision was being made, the regulations then in force required the local authority to present the case first to the panel who make a recommendation which is then to be considered for decision by the agency decision maker. One of the purposes of such planning is to provide the family court with evidence of the reasoned assessment of each of the options for the permanent placement of a child at the earliest opportunity in care proceedings. Such a practice is not only fair to parents, so that they may know the case they have to meet, but is child centred i.e. it tends to expedite the proper determination of a child's long term future.

24. An application for a placement order cannot be issued without a prior decision having been made by the agency decision maker and it is accordingly good practice for those decisions to be timetabled so far as is practicable to allow the concurrent or near concurrent hearing of care and placement order applications to minimise delay for the child. Such timetabling is fundamental to the welfare of the child not least by reason of section 1(2) of the 1989 Act and section 1(3) of the 2002 Act. The prejudicial effect of delay is a statutory factor in the consideration of welfare and leads directly into the court's obligation to timetable care proceedings in section 32 of the 1989 Act.

25. The statutory scheme is as follows. Section 22 of the 2002 Act states:

> "22 Applications for placement orders
>
> (1) A local authority must apply to the court for a placement order if -
>
> (a) the child is placed for adoption by them or is being provided with accommodation by them,
>
> (b) no adoption agency is authorised to place the child for adoption,
>
> (c) the child has no parent or guardian or the authority consider that the conditions in section 31(2) of the 1989 Act are met, and

(d) the authority are satisfied that the child ought to be placed for adoption.

2. If –

(a) an application has been made (and has not been disposed of) on which a care order might be made in respect of a child, or

(b) a child is subject to a care order and the appropriate local authority are not authorised to place the child for adoption,

the appropriate local authority must apply to the court for a placement order if they are satisfied that the child ought to be placed for adoption."

26. The Adoption Agencies Regulations 2005 (the 2005 Regulations) prior to their amendment on 1 September 2012 by the Adoption Agencies (Panel and Consequential Amendments) Regulations 2012 i.e. in the form applicable to these proceedings were as follows. By regulation 19 (1):

"(1) The adoption agency must take into account the recommendation of the adoption panel in coming to a decision about whether the child should be placed for adoption."

By regulation 18 (1):

"(1) The adoption panel must consider the case of every child referred to it by the adoption agency and make a recommendation to the agency as to whether the child should be placed for adoption."

And by regulations 18 (3) and 18 (3) (b):

"(3) Where the adoption panel makes a recommendation to the adoption agency that the child should be placed for adoption, it must consider and may at the same time give advice to the agency about –

(a) ……

(3) (b) Where the agency is a local authority, whether an application should be made by the authority for a placement order in respect of the child."

27. The process thereby described is mandatory. Where a child is accommodated by a local authority and the authority consider that the conditions in section 31(2) of the 1989 Act are met i.e. the threshold is satisfied, it must apply to the court for a placement order. It follows from the fact that the local authority had issued an application for a care order on the basis that the threshold was satisfied (and the court had not dismissed the same for want of jurisdiction) that the local authority considered that the threshold conditions were met for CB who was a child accommodated by them. In any event, that was certainly the circumstance in this case.

28. On any basis and whatever the position may have been before the care proceedings were issued, once issued and in the absence of an interim care order, CB was a child provided with accommodation by a local authority and thereby a 'looked after child'

in accordance with section 22(1)(b) of the 1989 Act. She was also a child in respect of whom a care order had been applied for which had not been disposed of. That provided an alternative mandatory basis upon which the local authority were required to apply for a placement order by reason of section 22(2) of the 2002 Act.

29. There is no suggestion in the statutory scheme that looked after children who are accommodated but in respect of whom parental responsibility has not been vested in a local authority by the making of an interim or full care order, are to be excluded from the placement order decision making process. It would be surprising if that were to be the case given the imperative to provide long term placements for children as quickly as possible. In any event, no argument from first principles has been developed before this court to suggest that it is wrong for a local authority to make preparations for an accommodated child which include adoption with all the necessary investigations and protections that such a step should involve and which are provided for in the regulations. No one has suggested that the need to place a child's future before an adoption panel was an exclusive incident of parental responsibility. For my part, I do not think that it was.

30. Having regard to the requirement in the statutory scheme to make an application for a placement order in the circumstances which applied to CB, it follows that the regulatory scheme relating to the making of such applications must be followed.

31. The local authority were obliged to obtain a decision from their adoption agency decision maker and that required a recommendation to be made by the adoption panel. There can be no criticism of this local authority for the fact that they asked their panel for a recommendation which subsequently led to a decision and an application for a placement order. Accordingly, I can answer all three questions posed in the affirmative which will inevitably lead to the appeal being dismissed.

32. It should be noted that on 1 September 2012 the 2005 Regulations changed. On that date a new provision in regulation 17(2) came into force which prevents local authorities referring children to an adoption panel.

> "(2) In a case where –
>
> a) the adoption agency is a local authority and is considering whether the child ought to be placed for adoption, and
>
> b) either paragraph (2a) or paragraph (2b) applies,

the adoption agency may not refer the case to the adoption panel.

> "(2A) This paragraph applies where –
>
> a) the child is placed for adoption by the adoption agency or is being provided with accommodation by them,
>
> b) no adoption agency is authorised to place the child for adoption, and
>
> c) the child has no parent or guardian, or the agency consider that the conditions in section 31(2) of the 1989 Act are met in relation to the child.

(2B) This paragraph applies where –

a) an application has been made, and has not been disposed of, on which a care order might be made in respect of the child, or

b) the child is subject to a care order and the adoption agency are not authorised to place the child for adoption.

33. This new regulation did not apply to CB. It is not the purpose of the new regulation to prevent a local authority from making preparations for a placement order in respect of an accommodated child. The purpose is to expedite decision making in respect of a child so that the agency decision maker is able to make a decision that permits a placement order application to be made without waiting for a panel recommendation.

34. The local authority's referral of CB to its adoption panel and thereafter to its agency decision maker was lawful and accordingly, the procedural requirements having been complied with, the court had jurisdiction to consider the placement applications. In its determination of that application the requirements of the 2002 Act were properly considered. For these reasons, I would dismiss the appeal.

Lady Justice Rafferty

35. I agree

Lord Justice Maurice Kay

36. I also agree