Neutral Citation Number: [2024] EWCA Civ 694

Case No: CA-2024-000863

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Ms Justice Russell
FD24P00075

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2024

Before :

LORD JUSTICE LEWISON
LADY JUSTICE KING
and
LADY JUSTICE FALK

- -

Between :

THE FATHER	**Appellant**
- and -	
WORCESTERSHIRE COUNTY COUNCIL	**Respondent**

- -
- -

The Father appeared in person
Christopher Poole (instructed by **Worcestershire County Council**) for the **Respondent**

Hearing date : 19/06/2024

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Approved Judgment

This judgment was handed down remotely at 2.00pm on 20/06/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison, Lady Justice King and Lady Justice Falk:

1. This is the judgment of the court.

2. On 9 June 2023, following a hearing and a lengthy judgment DJ Solomon, sitting in the Family Court at Worcester, made an order under section 31 (1) of the Children Act 1989 placing the children with whom we are concerned in the care of Worcestershire County Council. She did so having found on the facts that the threshold in section 31 (2) had been crossed. It is unnecessary to go into great detail about her factual findings for the purposes of this appeal; but they included a history of domestic violence, the father's criminal history, and drug and alcohol abuse. The operative part of the order reads:

> "It is ordered that the children are placed in the care of Worcestershire County Council."

3. That order remains in force. The children are currently living with foster parents. The father, however, applied to the Family Division for an order of habeas corpus for the purpose of securing the return of the children to his care. That application came before Russell J, sitting in the applications court, on 15 April 2024. The judge gave no judgment, but we have a transcript of what took place.

4. The transcript begins thus (we have anonymised the names):

> "Mrs Justice Russell: Mr [X]
>
> Mr X: Good morning. I'm a bit hard of hearing.
>
> Mrs Justice Russell: What is it you're asking me to do?
>
> Mr X: I'm asking for the writ of habeas corpus.
>
> Mrs Justice Russell: You cannot have it.
>
> Mr X: What?
>
> Mrs Justice Russell: You cannot have it. It is an ill-conceived application.
>
> Mr X: Why is it ill-conceived?
>
> Mrs Justice Russell: Because it has no application in this case. The orders have been made lawfully. If you wish to deal with these orders, you appeal or you make other applications under the Children Act. The writ of habeas corpus is hardly ever used anymore, because there is statutory provision that you have to use first.
>
> Mr X: Well, I've tried everything.
>
> Mrs Justice Russell: No, you haven't appealed or tried to appeal.

> Mr X: Every appeal that I filed was turned down, my Lady.
>
> Mrs Justice Russell: Well, doesn't that tell you something? You are not getting a writ of habeas corpus. It is inappropriate, it is wrong, it is not the correct process."

5. It must be acknowledged that the applications court is often very busy and that judges who sit there are under considerable pressure to get through an overloaded list. For that reason a judge may seek to drill down into the essentials of an application; and reasons for a decision one way or another may be brief. Nevertheless, a line must be drawn between a short and robust hearing and no effective hearing at all. The interchange we have quoted demonstrates a complete failure of proper judicial process. The judge had clearly made up her mind before the father had said anything; and the father was hardly allowed to say a word thereafter. As Lord Neuberger MR said in *Labrouche v Frey* [2012] EWCA Civ 881, [2012] 1 WLR 3160 at [22]:

> "It is a fundamental feature of the English civil justice system, and indeed any civilised modern justice system, that a party should be allowed to bring his application to court, and make his case out to a judge."

6. He added at [24]:

> "But what a judge cannot properly do, however much he believes that he has fully read and fully understood all the documents and arguments before coming into court, is to dismiss the application without giving the applicant a fair opportunity to make out his case orally. It is vital that justice is seen to be done, but that is by no means the only, or even the main, reason for this. It is also because it is vital that justice is done. Any experienced judge worthy of his office will have had the experience of coming into court with a view, sometimes a strongly held view, as to the likely outcome of the hearing, only to find himself of a very different view once he has heard oral argument."

7. If we may add to that something Lewison LJ said in *Re S-W (Care Proceedings: Case Management Hearings)* [2015] EWCA Civ 27, [2015] 2 FLR 136 at [43]:

> "It has long been a fundamental principle of English law that justice must not only be done, but must be seen to be done. Where a judge has apparently made up his mind before hearing argument or evidence that principle has undoubtedly been breached. A closed mind is incompatible with the administration of justice. But in such cases it is always possible that justice itself has not been done either."

8. In this case the judge unquestionably failed to adhere to that fundamental principle.

9. In addition to her blatantly unfair conduct of the hearing, the judge also failed to give adequate reasons for her decision in terms that would have been intelligible to a litigant in person.

10. The father, acting in person, brings this appeal pursuant to section 15 of the Administration of Justice Act 1960. He is entitled to do so without requiring permission to appeal: CPR Rule 52.3 (1) (a) (ii).

11. Since the hearing was unfair, we have no real alternative but to set aside the judge's order. In *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455 Lord Wilson said at [48]:

> "What order should flow from a conclusion that a trial was unfair? In logic the order has to be for a complete retrial. As Denning LJ said in the *Jones* case [1957] 2 QB 55, cited in para 40 above, at p 67, "No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it". Lord Reed PSC observed during the hearing that a judgment which results from an unfair trial is written in water. An appellate court cannot seize even on parts of it and erect legal conclusions upon them."

12. That was, of course a trial on the facts. This case, by contrast, raises a question of law. The father has now had the opportunity to present his argument in favour of the order that he seeks.

13. Although the father raised a number of matters in the written material he placed before the court, his fundamental point is that the order of DJ Solomon, placing the children in the care of the local authority, was made without jurisdiction because the threshold condition in section 31 (2) of the Children Act 1989 had not been satisfied. This was not an argument that the judge allowed him to present; and we have considered it with care.

14. Because the father's challenge to the District Judge's jurisdiction, as articulated to this court, is that the threshold condition had not been met, his challenge is necessarily a challenge to her factual findings. The order that the District Judge made is therefore an order of a kind which stands unless and until set aside or discharged by following the procedures contained in the Children Act and the Family Procedure Rules. The father said that he did not appeal against the order because he thought that it would mean that he accepted the order. That is in our view a misconception. An appeal against an order means that the party appealing does not accept the order but that, on the contrary, asserts that it was wrong. Further, as Munby J explained in *S v Haringey LBC* [2003] EWHC 2734 (Admin) (recently endorsed by this court in *Re AB (a child) (Habeas Corpus)* [2024] EWCA Civ 105) a child living with foster parents under a care order is not detained but is simply living in the same type of domestic setting as any other child of their age would be. That is not the kind of detention at which the writ of habeas corpus is aimed.

15. We do not consider that these problems can be overcome. In our judgment, if there had been any prospect that a different outcome could be reached, we would have been compelled to set aside the judge's order and remit the father's application for

rehearing. But having now heard the argument, we are satisfied that, as a matter of law, the judge's ultimate conclusion was correct. CPR Rule 52.20 (1) provides that in relation to an appeal the appeal court has all the powers of the lower court. The lower court had power to dismiss the father's application for a writ of habeas corpus and accordingly so do we. We therefore set aside the judge's order on the ground that the hearing was unfair; but exercise the power given to this court by CPR 52.20 (1) to dismiss the father's application.

16. We were told by Mr Poole, appearing for the local authority, that discussions are ongoing for increased contact between the father and the children; and that the "direction of travel" is aimed at returning the children to their father's care. Nothing that we have said in this judgment affects that process.