



IN THE FAMILY COURT

Case Number: WD19P00131

6th March 2020

Before His Honour Judge Middleton-Roy

Between:

FF

Applicant

- and -

BM

Respondent

Miss Rima Baruah, Counsel, instructed by the Appellant
Miss Nadia Raphael, Solicitor, instructed by the Respondent

Hearing date: 6th March 2020

JUDGMENT

This judgment was delivered in private. The Judge has given leave for this version of the judgment to be published on condition that, irrespective of what is contained in the judgment, in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

His Honour Judge Middleton-Roy:

1. In line with the Practice Guidance of the President of the Family Division issued in December 2018, the names of the children and the adult parties in this judgment have been anonymised, having regard to the implications for the children of placing personal details and information in the public domain. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of Court and may result in a sentence of imprisonment.
2. These proceedings concern “C” who is a 3-year-old boy.
3. His father, “FF” applies for an extension of time to file a Notice of Appeal, in which he seeks to appeal the decision of Lay Justices of 18th December 2019. Although in the Appellant’s Notice he seeks permission to appeal, this being an appeal against the decision of Lay Justices, permission is not required.
4. On the 18th December 2019 at a final hearing in Children Act proceedings in which the Appellant sought a Child Arrangements Order to define the time the child spends with him, the Lay Justices determined that the child and his older siblings should have only indirect contact with their father by way of letters, cards or gifts. No direct, face-to-face time between the child and his father was permitted by the Order. The frequency of such indirect contact was not specified in the Justices’ Order. Both the mother and the father were legally represented at the final hearing before the Lay Justices, the father having instructed different Counsel in this appeal.
5. The father seeks to appeal the decision that the child should have no direct contact with him. The father does not seek to pursue an appeal in respect of the older two children, having regard to their expressed wishes and feelings. Accordingly, this appeal relates only to youngest child.
6. The date of the decision of the Justices which is the subject of this appeal is 18th December 2019.
7. The time limit for filing an Appellant’s Notice against the decision of the lower Court is 21 days.
8. The 21-day time limit for filing an Appellant’s Notice runs from the date on which the lower court pronounces its decision, not the date when the Order is later prepared or served.

9. The 21-day time limit for filing an Appellant's Notice in this case expired on 8th January 2020.
10. The Appellant filed his Appellant's Notice with the Court on 26th February 2020, being 7 weeks out of time.
11. No prior application was made to extend the time for filing the Appellant's Notice.
12. A retrospective application for an extension of time, analogous to an application for relief from sanctions, was made within the Appellant's Notice.
13. A party who is out of time for filing an Appellant's Notice is subject to an implied sanction, namely the loss of the right to pursue an appeal. Where an application is made to extend time and that application itself is made out of time, the Court should approach it on the basis that it is an application for relief from sanction.
14. Family Procedure Rule 4.6 provides that, on an application for relief from any sanction imposed for a failure to comply with any Rule, Practice Direction or Court Order, the Court will consider all the circumstances including -
 - (a) the interests of the administration of justice;
 - (b) whether the application for relief has been made promptly;
 - (c) whether the failure to comply was intentional;
 - (d) whether there is a good explanation for the failure;
 - (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol
 - (f) whether the failure to comply was caused by the party or the party's legal representative;
 - (g) whether the hearing date or the likely hearing date can still be met if relief is granted;
 - (h) the effect which the failure to comply had on each party; and
 - (i) the effect which the granting of relief would have on each party or a child whose interest the court considers relevant.
15. In *Denton and Others -v- TH White limited* [2014] 1 WLR 3926 the Court of Appeal identified a 3-stage approach to applications for relief from sanctions in the context of the Civil Procedure Rules. Such approach is of assistance also in respect of applications for relief from sanction in the context of family proceedings.
16. The first stage is to identify and assess the seriousness or significance of the failure to comply with the Rule, Practice Direction or Court Order which engages the sanction. If a Judge concludes that a breach is not serious or significant, then relief from sanction will usually be granted and it will be unnecessary usually then to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance.

17. The second stage is not derived from the express wording of the rules but it is nonetheless important particularly where the breach is serious or significant. The Court should consider why the failure or default occurred.
18. The third stage requires that in every case, the Court will consider all the circumstances of the case, so as to enable it to deal justly with the application. All the circumstances include but are not limited to those factors expressly set out in Family Procedure Rule 4.6.
19. On the facts of the case, the failure of the Appellant to file an Appellant's Notice in time was plainly a serious or significant failure to comply with the Court rules.
20. In seeking to explain the reasons for that significant failure, the Appellant asserts that, immediately following the final hearing, he was advised by Counsel orally that there were no grounds for appealing the decision of Court. No written advice was provided. The Appellant asserts that he then had difficulty in obtaining legal advice over the intervening public holiday period. The Court is informed that Appeal Counsel was then identified, Miss Baruah helpfully providing the Appellant with advice on the appeal and drafting the Grounds of Appeal on a pro bono basis. The Court is told that the Appellant then borrowed money to instruct his new solicitors to file the Appellant's Notice. On the evidence before me, I am not satisfied that good reason has been provided by the Appellant for the failure to file the Appellant's notice in time.
21. I turn to consider the third stage in the application for relief from sanction by giving consideration to all the circumstances of the case so as to enable the Court to deal with the application justly. In considering all the circumstances, regard is also had to the merits of the appeal.
22. In summary, the Appellant's Grounds of Appeal assert that:
 - (a) the Justices misunderstood the significance of a letter from the Home Office dated 21st November 2019 which clarified the father's immigration status, and that the Justices misunderstood the impact of that evidence when undertaking their welfare analysis in respect of the child, the Justices wrongly assuming that the father would be deported from the United Kingdom. The Home Office letter recorded that the father's application for Leave to Remain in the United Kingdom had been refused and that he was subject to a 6-month extension to allow the conclusion of the Children Act proceedings; and
 - (b) the Justices failed to properly apply the welfare checklist under section 1(3) Children Act 1989 when considering whether it was in the child's best interest to spend direct time with his father, the Justices incorrectly considering that the father's immigration status was determinative; and
 - (c) the Justices attached too much weight to the father's immigration status; and
 - (d) the Justices heard no evidence from the parties and gave inadequate reasons why they considered that no oral evidence was required.
23. There is considerable weight to each of the Appellant's Grounds of Appeal.

24. The Justices had the benefit at the Final Hearing of a welfare report relating to the child prepared by a Cafcass Family Court Adviser pursuant to section 7 Children Act 1989. The report recommended direct contact to take place between the child and his father under a Child Arrangements Order, progressing from supervised contact in a contact centre, to contact in the community and thereafter progressing to overnight contact at the father's home.
25. At the final hearing in December 2019, the father produced the November 2019 letter from the Home Office, which recorded that his application for Leave to Remain in the United Kingdom had been refused.
26. The Justices' written reasons make plain that the direction of the final hearing changed following receipt of that letter from the Home Office. The reasons record the following:

"In light of the letter from the Home Office Cafcass was invited to address the Court as to whether they had changed their recommendation as set out in the Section 7 Report. We heard that the Father's immigration status was unclear at the time the Section 7 Report was prepared...The original recommendations were based on the status having been confirmed...Given the likelihood that the Father will be deported at the end of the extended period of leave, Cafcass would not recommend the commencement of any direct contact. This is due to the fact that [the child "C"] would suffer abandonment and emotional distress which could trigger mental health issues if the contact suddenly ceased."
27. It is plain that the Justices misunderstood the significance of the information reported by the Home Office and wrongly assumed that the Father will be deported at the end of the period of his Leave to Remain in the United Kingdom.
28. There is a public interest in the maintenance of effective immigration control given force through extensive immigration, asylum and nationality legislation, the Immigration Rules and policy guidance. If a person is not a British citizen or a national of the European Union, that person is subject to immigration control, even if that person has been present in the United Kingdom for many years and has indefinite leave to remain.
29. Under current rules and legislation, a person may be liable to deportation if a foreign criminal or someone whose deportation is deemed by the Secretary of State for the Home Department to be conducive to the public good. If deported, that person is then banned from returning to the United Kingdom for 10 years.
30. 'Overstayers' are the subject of administrative removal, not deportation. Currently, if a person is administratively removed, that person may apply to return to the United Kingdom in 1-5 years depending on whether they leave the United Kingdom voluntarily and if so, how quickly they leave. The length of exclusion may be an important factor when undertaking a welfare analysis in respect of a child.
31. Section 117B of the Nationality, Immigration and Asylum Act 2002 sets out public interest considerations which apply, having regard to the right to private and family life under Article 8, Human Rights Act 1998. There shall be no interference by a

public authority with the exercise of the right under Article 8, except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

32. Section 117B (6) provides that, in the case of a person who is not liable to deportation, the public interest does not require that person's removal, where that person has a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect the child to leave the United Kingdom.
33. Had the Justices correctly understood the evidence provided by the Home Office in its letter relating to the Appellant's immigration status, the Justices could not properly have concluded on the evidence that the Appellant was liable to deportation. The Justices' conclusions that the child, if permitted to have direct contact with a father who was then deported would suffer, "*abandonment and emotional distress which could trigger mental health issues if the contact suddenly ceased,*" is not a finding that was open to the Justices to make on the evidence then before the Court.
34. The reasons provided by the Justices refer to Article 8 only in so far as they record that the Justices have "considered" the right to family life. No reasons were provided at all as to why the Justices considered that the refusal of all direct contact between the child and the father was a proportionate interference with the *child's* right to private and family life and to the *father's* right to private and family life. In making the proportionality assessment under Article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. It is plain that the Justices gave inadequate consideration to that significant issue.
35. Furthermore, whilst the Justices set out each of the factors required in the statutory checklist provided by section 1(3) Children Act 1989, scant consideration was given to each of those factors.
36. A decision of this kind calls for the evaluation and balancing up of factors relevant to the child's welfare. That task was entrusted to the Justices and only where their conclusion is shown to be wrong because evidence has been ignored or misunderstood, or evaluated and weighed up so inadequately that the conclusion is perverse, will this Court interfere. Whilst the Justices may have been inadvertently misled by the oral evidence of Cafcass Family Court Adviser whose recommendation for comprehensive direct contact was re-evaluated incorrectly in light of a misunderstanding of the evidence relating to the father's immigration status, the Justices were required to undertake their own analysis in respect of the welfare of the child. Ultimately, the Justices fell into the same error as the Cafcass Family Court Adviser. The decision of the Justices not to allow oral evidence from the parties, hearing only the oral evidence from Cafcass, was procedurally irregular and compounded the problem.
37. The conclusion of the Justices has been shown to be plainly wrong. The evidence contained in the letter from Home Office has been entirely misunderstood or misevaluated and weighed up so inadequately that the conclusion reached must be regarded as perverse. The Court is compelled to interfere.

38. Having regard to all the circumstances of the case so as to enable the Court to deal with the application for relief from sanction justly, including having regard to the merits of the appeal, the paramount consideration being the welfare of the child, this Court must conclude that the Appellant be granted relief from sanction. The Court is compelled to extend the time for the Appellant to file his Appellants notice.
39. Having granted an extension of time for the filing of the Appellant's Notice, I turn to deal with the appeal.
40. Family Procedure Rule 30.12(3) provides that an appeal may be allowed only where the decision was wrong or unjust for procedural irregularity.
41. There is no argument in respect of the law which applies in this appeal. Like any judgment, the reasons provided by the Justices must be read as a whole and having regard to their context and structure. The task facing the Justices was not to pass an examination or to prepare a detailed legal or factual analysis of all the evidence and submissions heard. Essentially, their task was twofold: to enable the parties to understand why the decision was reached and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable.
42. Where, as in this case, there is a discretion in which various factors are relevant, the evaluation and balancing of those factors is a matter for the Court at first instance. Only if that decision is so plainly wrong that too much weight to a particular factor was given or a factor was not taken into account when it ought to have been, is the appellate court entitled to interfere.
43. For the reasons already articulated in this judgment, regrettably this Court must conclude that the decision of the Justices was both wrong and unjust for procedural irregularity.
44. Accordingly, the appeal must be allowed.
45. The matter must be remitted for re-hearing and the matter re-allocated from Lay Justices to a District Judge.

HHJ Middleton-Roy