



Neutral Citation Number: [2019] EWCA Civ 583

Case No: B4/2019/0565

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT SITTING AT NORTHAMPTON
(HIS HONOUR JUDGE WICKS)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 28 March 2019

Before:

LORD JUSTICE DAVIS
and
LORD JUSTICE PETER JACKSON

IN THE MATTER OF O (A Child): Interim Care Order

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(Official Shorthand Writers to the Court)

Ms C Meredith (instructed by LGSS Law) appeared on behalf of the **Appellant Local Authority**

Mr D Howe, QC (appearing Pro Bono) and **Ms H Mettam** (instructed by PS Law) appeared on behalf of the **Respondent Mother**

Ms H Vissian (instructed by Wilson Browne) appeared on behalf of the Child's Guardian

Judgment

(Approved)

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LORD JUSTICE PETER JACKSON:

1. This appeal by Northamptonshire County Council arises out of a decision to discharge an interim care order during the course of ongoing proceedings. The case concerns a little boy aged six, to whom I will refer as O. His mother and he lived together until August of 2018, at which point O went into foster care, where he remains.
2. The decision under appeal is that of HHJ Wicks made on 8 March 2019. On that occasion he replaced an existing interim care order with an interim supervision order, with the effect that O would have been in a position to return within a few days to his mother's care. The local authority immediately sought to appeal that decision, and on 13 March I granted permission to appeal and stayed the judge's order. Before this court, the children's guardian supports the appeal; the mother opposes it but during the course of his submissions Mr Darren Howe, QC leading Ms Mettam, trial counsel, realistically accepted a number of difficulties with the judge's approach.
3. The history of the matter is that O is the mother's fifth child, some of her older children now being adults. There have been court applications in relation to those children stretching back to 2001. The issues ranged across neglect, domestic violence in many of the mother's relationships, and concerns about the mother's wellbeing and use of drugs.
4. O is a child who has certain particular needs, having been born prematurely. He has some learning difficulties and behavioural difficulties and needs an unusual amount of supervision and support. The current proceedings are the third set of proceedings that concern him. In January 2014 a twelve-month supervision order was made about O and two of his siblings. In January 2017 a six-month supervision order was made.

Unfortunately, by the summer of 2018 the local authority had once again decided to hold an initial child protection conference with a view to putting into place a child protection plan. The original longstanding concerns had escalated, and there were difficulties with the mother's engagement with professionals, as it was said, and also her relationship with some of her older children. A particular focus of anxiety was the fact that a cousin of the mother's, a Mr S, had been living in the property, having been bailed there on at least one occasion from prison. Mr S has a very extensive criminal history relating to drugs, violence and firearms. In July 2018 it is said that his former partner reported that she was being held at the mother's address against her will. On 5 August 2018 he was investigated for arson involving an incident when it is said that sleeping children were put at risk.

5. A conference was therefore fixed for 15 August, but before that could take place the mother was arrested on 9 August, along with Mr S, for attempted murder, the incident having taken place at the family home between 7 and 9 August. The victim, a man known to the mother, had been found in a shopping trolley in a local park with serious injuries; there was blood all over the mother's property, which she had tried to clear up. Arising from that incident, Mr S has been convicted of causing grievous bodily harm under section 20 of the Offences Against the Person Act 1861 and in February 2019 he received a sentence of three and a half years imprisonment.
6. At the time of the incident, the mother was arrested and O was taken into police protection. The local authority quite rightly took immediate care proceedings, and an interim care order was made on 13 August 2018 unopposed. On 25 January 2019 the mother was informed that she would not herself be charged in relation to this incident.

7. Returning to the family proceedings, there have somewhat extraordinarily been no fewer than eight further hearings between the making of the interim care order and the order now under appeal. Most or all of those hearings have been conducted by HHJ Wicks. The matters that have come before the court have included arguments about the legality of O's initial removal, about the number of his foster placements, the effect of separation from his mother, complaints about the local authority's performance, changes of social worker, delays in parenting assessments and contact arrangements. It is only fair to the mother to make clear that the local authority has accepted (as it is perhaps bound to have done) a good number of shortcomings in the way that the matter has been handled.

8. To take up the narrative, at a hearing in November when some police disclosure was eventually obtained, the mother acknowledged that the threshold for a section 38 interim order was met, and she did not seek to challenge the continued separation. At a later hearing on 29 January 2019 an independent social work report was commissioned because of concerns about the turnover of social workers at the local authority; the independent social worker was to report by 25 March, including on the mother's situation and her parenting capacity. At the 29 January hearing the judge himself apparently questioned the appropriateness of O's continued placement in foster care now that the mother was not to be charged and the parties were directed to file statements on that issue.

9. So, when the matter came before the judge on 8 March, he had position statements from the local authority, the mother and the guardian. For present purposes the guardian's position is in my view of significance, and it is conveniently recorded in an annex to the order that the judge went on to make:

"The guardian takes the view that if O is returned to his mother's care at this time he will be at risk of immediate harm. Hence, despite the mother not being faced with criminal proceedings, the guardian remains concerned as to the mother's association with risky adults and her lack of insight as to risk and poor decision-making which led to O being placed at risk in the first instance. The guardian has visited O in the foster placement, and it is her view that although there have been some issues in respect of his behaviour, he is happy and settled in his placement and, on balance, there will be a greater risk of harm to him by returning him to his mother's care immediately than any harm that he may be perceived to be suffering in foster care."

10. The judge heard submissions from the parties. The possibility of him hearing evidence had been raised at various points during the hearing, but it was never brought to the point of decision and the matter was dealt with on submissions rather, it seems, by default. In my view nothing now turns on that issue.

11. I turn to the judgment, which was delivered *ex tempore* at the end of what was clearly a busy day following other matters in the judge's list. He began by setting out the history and then came to the issue that faced him, and continued:

"4. The mother now says that in light of that change of circumstances [being the fact that the mother was not to be charged] O's continuing separation from her is no longer justified. The local authority disputes this and says that for other reasons unconnected with the incident in early August, O cannot safely be returned to his mother's care at this interim stage. This is a position supported by O's guardian. I have heard no evidence on this application which has been dealt with on the basis of submissions on the basis of my reading of the papers that have been put before me in two lever arch files.

5. As to the law, there is no dispute between the parties that the threshold for making an interim order under section 38 of the 1989 Act is crossed. The issue is O's welfare, which of course must be my paramount concern under section 1 of the 1989 Act, and I must have particular regard to the matters set out in section 1(3). I have considered all of those matters, but it seems to me that two are of particular relevance at this stage are O's wishes and feelings, as

they can be determined from the papers before me, and the mother's capability as a parent. It is clear from the authorities which are referred to in the mother's position statement -- and I think not dissented from by any other party -- that any interim order must be one that holds the balance between the parties and is not intended to confer and advantage on any party. Any such order has to be proportionate to the risks of harm in a particular case. The authorities also make it clear that interim separation is only to be justified if the child's safety, understood in an emotional, psychological and a physical sense, requires it. The question that the court has to consider, particularly in a case such as this, is: is the child's continued removal from his parents proportionate to the risk of harm to which he would be exposed should he return to his parents' care."

12. At this stage I note that the local authority points out that in relation to the judge's statement at paragraph 4, its case was not only based upon "other reasons unconnected with the incident in early August", and it is clear from the transcript of the hearing that that much was made clear by Ms Meredith, who represented the local authority then as now.

13. The judge went on to deal with a narrative of the history and to consider O's particular needs and the difficulties that had arisen in relation to his school attendance and the mother's association alleged with risky adults. He went on in this way at paragraph 10:

"... It is my opinion, having considered those other concerns, that they would not on any reasonable view warrant interim separation of the child from his mother. It cannot be said in relation to the concerns that were expressed regarding the mother's inconsistent parenting and regarding his school attendance that those were matters which were so serious that O's immediate removal from his mother's care would be justified. What justified O's immediate removal from his mother's care was the fact that at the time when the order was made, the mother was facing a serious charge which would carry a substantial custodial sentence if the mother was convicted.

11. I have heard a number of submissions on behalf of both the guardian and the local authority that are addressed it seems to me to

the longer-term issues about the mother's capabilities, which are in the process of being assessed. Those submissions, with all due respect, miss the point of an interim hearing, which is to consider whether the child's welfare requires or justifies continued separation from the parent."

14. The judge went on to note that the mother is for whatever reason deeply suspicious of the local authority, and he then approached his decision in this way:

"13. What is also clear from the papers is that O continues to suffer in foster care emotionally. I have read the foster care logs and I do not for one moment criticise or detract from the care that these foster carers are giving to O. However, it is abundantly clear from reading the notes the foster carers have prepared that O desperately misses his mother, is profoundly upset by being apart from his mother and that this upset has resulted in his displaying behaviour which the mother says -- and this is to some extent borne out by what O's school says -- was not displayed at home.

14. Thus it seems to me it is a matter of balancing the risks of harm -- the harm that O may be at risk of if he returns to his mother's care in the light of the other concerns which the local authority has about the mother against the harm that O is suffering and is likely to suffer if he remains separated from his mother.

15. It is I think a finely balanced case, but I have already identified that had this case come before me simply on the other concerns identified by the local authority in their amended threshold and within the other documents, I would have required a considerable amount of persuasion to separate O from his mother at that interim stage. As I have said, what undoubtedly must have tipped the balance in favour of interim separation was the fact that the mother was the subject of a police investigation into a serious offence.

16. I have to say, considered in the round, that the harm which O may be at risk of suffering were he to return to his mother's care at an interim stage is outweighed by the harm that he suffers in foster care by being apart from his mother. I do not see on any realistic view of the evidence and without making any findings one way or the other (and without indeed making any determination as to what might be the likely outcome at a final hearing) that O's separation from his mother at this stage is justified now, and in those circumstances I do not consider that the continuation of the interim care order is justified or proportionate in all of the circumstances of the case.

17. I therefore discharge the interim care order with immediate effect and replace it with an interim supervision order."

15. And finally at paragraph 18 the judge said:

"I make it absolutely clear that I am in no way determining the likely outcome of any final hearing, but at this stage I cannot see on welfare grounds that O's separation from his mother is justified."

16. That judgment has attracted a number of grounds of appeal from the local authority, supported by the children's guardian. Briefly, it is said that:-

- (i) the judge has minimised significance of the August incident;
- (ii) he was wrong to depart from the professional views without hearing from them or giving reasons for departing;
- (iii) it was premature for him to have made a decision when the parenting assessment was due two to three weeks later;
- (iv) he did not carry out a true balancing exercise;
- (v) he took the local authority's allegations piecemeal rather than globally; and
- (vi) that he did not apply the welfare checklist.

17. Overall, Ms Meredith submits that it was manifestly wrong for the judge to return the child to his mother when the independent social work assessment was due, that the judge effectively ignored the incident in August and the views of the professionals that the child

was relatively settled. Those submissions are supported by Ms Vissian on behalf of the guardian, who submits that the judge failed to address the real issues in this case.

18. On behalf of the mother, Mr Howe refers to the failings on the part of the local authority and says that the judge was entitled to regard the fact that the mother would not be facing a lengthy prison sentence as a relevant change of circumstances. He argues that the judge dealt with the case in the way that the arguments were presented to him. The parenting assessment is, he says, aimed at the long term rather than the mother's short-term care. There is, after all, no risk from Mr S as he is now back in prison. The evidence of harm to O in foster care is, he says, compelling. Lastly, Mr Howe argues that the local authority should have returned to the judge for additional reasons rather than appealing.

19. Those broadly being the arguments, I turn to my conclusions. This court will not readily intervene in relation to a decision taken at an interim stage of proceedings, particularly where, as here, the judge has extensive knowledge of the case. However, it must do so where it has been clearly shown that a decision is wrong. Regrettably, I consider that this is such a case and that the decision to discharge the interim care order was mistaken. There were in my view four difficulties, any one of which would be fatal to the decision.

20. Firstly, the necessary balancing exercise was not undertaken. Indeed, on the state of the evidence it could not have been undertaken. In a case where the interim threshold had been crossed, the judge correctly directed himself to the question of whether the child's continued removal from his mother was proportionate to the risk of harm to which he would be exposed should he return to her care. That approach was endorsed by Wall LJ in this court in *Re B (Care Proceedings: Interim Care Order)* [2009] EWCA Civ 1254 at

paragraphs 31 to 32. However, the judge did not then go on to balance these risks in any meaningful way. On one side of the scales, he completely left out of account the incident in the home in August. In the course of the argument he had acknowledged the significance of this event, but it did not find its way forward into his eventual reasoning. He appears to have treated the decision not to prosecute the mother as if it drew a line under that appalling event when in fact the factors that led to it happening in O's home in the first place plainly required the most careful assessment; nor, even if the judge had appreciated the need to take those risks into account, did he yet have any basis on which he could have made that assessment. The mother has not yet provided the court with a statement of what has taken place and the extent to which she and O were involved; still less has her account been tested. The absence of such a statement in a case now many months old is to my mind extraordinary. On the other side of the scales, the judge placed what he regarded as the harm suffered by O in foster care, but there was no sound evidence upon which a conclusion that such harm had occurred could be based. The view of the guardian was that O was relatively happy and settled, though naturally missing his mother. Those views and those of the social worker are not referred to in the judgment; still less are reasons given for departing from them, as is required. But even if the judge was right to describe O as desperately missing his mother and being profoundly upset by being apart from her, there was no evidence that this amounted to harm in the context of a placement that had been made for his own protection. The foster carer notes describe a child with behavioural difficulties, but that is what O has. The fact that they may currently be more pronounced could not be a decisive factor; nor could concerns about the performance of the local authority, however well justified. Therefore, had the judge approached the matter correctly, he would not have considered the matter to be finely balanced but would have been bound to find that the scales fell unmistakably in favour of

O remaining in foster care until these matters had been properly investigated and understood.

21. Secondly, when forming what is inevitably a provisional view about a child's welfare at the interim stage, it is necessary to look at the evidence as a whole and to address the situation as it is. The judge I think led himself into error by posing the hypothetical question of whether he would have sanctioned O's removal had the August incident not taken place. The local authority credibly asserted that the incident arose from deep-rooted, longstanding risk factors within this family. By taking a compartmentalised approach, the judge deprived himself of a broad view of the real issues.

22. Thirdly, the judge singled out as an issue the mother's capacity to meet O's needs but, having done so, he reached no conclusion about it. This is not surprising, as he had no reliable evidence about it. He had commissioned an independent social work report which was to become available shortly. The local authority and the guardian had major unresolved concerns about the mother's situation. Her capacity to meet O's needs was unassessed. It was I think unwise of the judge to pre-empt the outcome of the assessment, both as a matter of principle and also as a practical matter where a negative assessment from the independent social worker might mean that a decision for O to return home would have to be immediately reversed, described by Ms Meredith as a risk of yo-yoing. The issue of a change of circumstance does not appear to have received the necessary attention where the judge was considering whether or not to continue the interim care order.

23. Lastly, the judge's conclusions about the risk or absence of risk on either side of the scales seems to me to have impermissibly pre-empted findings that ought to have awaited a final hearing and that realistically could only have been made at that point.
24. For completeness, I would not accept Mr Howe's argument that the local authority and the guardian should have asked the judge for amplification of his reasons. The judge's reasoning was perfectly clear, but it is not sustainable.
25. I am very conscious of the burdens upon judges dealing with these difficult cases, and in this particular instance the learned judge was making a decision about this child in the middle of a busy list, but, nevertheless, for the reasons that I have given, my conclusion is that his order cannot stand. If my Lord agrees, paragraphs 1, 2 and 5 of the order must be set aside, with the effect that the interim care order is restored. For those reasons I would allow the appeal.

LORD JUSTICE DAVIS:

26. I do agree. But I will add a few observations of my own. It is quite clear from paragraph 10 of his judgment, which my Lord has read, that the judge was of the firm view that the interim care order made in August 2018 could not have been justified were it not for the fact that the mother at that particular time was facing a serious criminal charge. The plain inference is that the judge thought that once the prospect of that criminal charge had disappeared any further justification for an interim care order ceased to exist. But plainly matters had to be viewed on a far wider basis than that. The involvement, if any, of the mother in the incident of violence in the house, the circumstances in which Mr S had been

permitted to be in the house, what O himself had experienced and seen, what the mother's insight was into the whole situation: all those were clearly relevant further considerations.

27. Further, although the judge at some stages described this as a finely balanced case, it is reasonably clear from paragraph 16 of his judgment (which, again, my Lord has read) that he did not really see it as finely balanced at all. Instead he baldly asserted that the harm which O may be at risk of suffering were he to return to his mother's care at an interim stage is outweighed by the harm that he suffers in foster care by being apart from his mother. The judge gave no assessment of just what harm O might be at risk of if returning to his mother's home. Indeed, he probably was in no position to do so on the state of the evidence before him. The judge also does not explain precisely what the harm was that O was suffering whilst in foster care and being apart from his mother. Indeed, he was again not really in a position to do so on the state of the evidence before him; and in fact his view departed from the view, on the face of it perfectly reasonably held, by the guardian and the local authority.

28. It seems to me that, with all respect to the judge, this approach does vitiate his conclusion. Moreover, I have to say, speaking for myself, that in many ways the judge's remarks seem to read as though he was almost reaching a final determination of matters. But this was at an interim stage. I find it particularly surprising that the judge thought it appropriate to proceed as he did when it was known that a report of an independent social worker was due at the end of March: and that prospectively stood to cast considerable and revealing light on the whole issue. In the overall circumstances, this situation surely called for the maintenance of the status quo at this interim stage.

29. I fully appreciate that in these circumstances the child would continue to be separated from mother, mother would continue to be separated from child. Of course, in human terms, that is a sad situation. But the question of risk will have to be confronted. I agree with my Lord that the judge's balancing exercise at this interim stage was flawed and the exercise of his discretion wrong.

30. I too therefore would allow the appeal. I agree with my Lord's reasoning.

Order: Appeal allowed