Neutral Citation Number: [2021] EWCA Civ 469

Case No: B4/2021/0555

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT KINGSTON-UPON-HULL
His Honour Judge Jack
KH18C00209

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 March 2021

Before :

LORD JUSTICE PETER JACKSON
and
LADY JUSTICE CARR

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F (A Child : Adjournment)

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Philip Goodall (Solicitor Advocate, Higher Courts Civil, instructed by **Pepperells Solicitors**) for the **Appellant Mother**
Naomi Madderson (instructed by **North Lincolnshire Council**) for the **Respondent Local Authority**
Alan Carnie (instructed by **SBB Law**) for the **Respondent Father** (written submissions only)
David Phillips (instructed by **BRR Law**) for the **Respondent Child by his Children's Guardian** (written submissions only)

Hearing date : 30 March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Wednesday, 31 March 2021.

Lord Justice Peter Jackson:

Introduction

1. This is a mother's appeal from the refusal of her application for the adjournment of an imminent final hearing in care proceedings. This court rarely entertains, still less allows, appeals from case management decisions of this kind, but the present appeal is one of those rare cases. At the conclusion of the hearing, we informed the parties that this appeal would be allowed. These are my reasons for coming to that conclusion.

2. The proceedings concern J, a boy approaching three years of age. He has had a particularly uncertain start in life. His mother was only 19 when he was born and she was not living with his father. Proceedings were issued in August 2018, and have, extraordinarily, not yet concluded. When they began, the mother was living with a Mr K. J suffered a number of injuries while in their care and was removed into foster care. It was not possible to establish which of the two adults was responsible for the injuries, but at a hearing in August 2019 His Honour Judge Jack ('the Judge') made findings that the mother had suffered serious abuse at the hands of J's father. That hearing was intended to be the final hearing, but the local authority changed its care plan of adoption to one of moving towards rehabilitating J to the care of his mother and her latest partner, Mr M. On 30 November 2020, J was finally placed in their care, subject to an interim care order and a written agreement. By that time it was known that the mother was pregnant with Mr M's baby, with the birth expected in May 2021. Unfortunately, the placement lasted for a few days only. On 6 December 2020, there was a violent incident (the exact facts are in dispute) between Mr M and the mother in the presence of J, as a result of which the police were called and J was returned to his previous foster carer, where he remains.

The decision under appeal

3. In the light of these events, the local authority revived its application for a placement order. The case came before the Judge on 18 February 2021. He dealt with a range of applications: by the mother to discharge the interim care order; by the mother for an assessment by an independent social worker and further assessment by the previously instructed psychologist; by the father for assessment by an independent social worker; and by the maternal Grandmother for a further assessment. The applications were all refused, and those decisions have not been the subject of an appeal.

4. As to the onward listing of the case, the Judge directed that there should be a 10 day final hearing on the first available date after 1 April. That is a very long time estimate for a case of this nature and it does not appear that close consideration was given at that stage to the format of the hearing, or of the detail of the issues to be decided, or the length of the witness evidence. Later discussions between the parties and the court identified available dates in April (before a deputy Circuit Judge) and in late June/early July (before the Judge), but the parties were unable to agree. On 22 February, counsel then acting for the local authority filed the draft order and informed the Judge in an email copied to the other parties that the mother (whose due date was by then known to be 5 May) argued for the later date and the other parties for the earlier date. The Judge's response, favouring the April date, was sent on 1 March and the court sent out a notice of hearing for a hearing beginning on 8 April and running until 21 April. The local authority issued an application for directions on 2 March and

the mother issued an application of her own on 4 March, seeking an adjournment of the hearing as fixed.

5. The applications concerning the trial date came before the Judge on 12 March. The mother's case was set out in a written submission by her solicitor Ms Snowdon, which included this passage:

> "18. The mother's position is that… her pregnancy with J, the subject child within these proceedings was not one that went without difficulty which resulted in her being induced to give birth a week early due to J stopping growing. She is extremely concerned that the proposed dates for the final hearing would fall within a period where she would be heavily pregnant, would not be able to take as active a part as she would wish in the proceedings and in short that a fair hearing could not take place in those circumstances.
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> **The Law**
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> 19. The Court is referred to the Equal Treatment Bench Book, new edition 2021, and in particular chapter 6 of that document at page 170 deals with pregnancy, maternity leave and breastfeeding.
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> 20. The Court is referred to paragraphs 29 and 30 which are set out in full below:
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> > *"29. Consideration should always be given to accommodating pregnant women and new and breastfeeding mothers in any proceedings, whether they are parties, witnesses or representatives. This may require sensitive listings, start and finish times, and breaks during the proceedings, sometimes resulting in a case going part-heard.*
> >
> > *30. A woman who is heavily pregnant or has just given birth should not be expected to attend a court or tribunal unless she feels able to do so. Although every woman is different, this is likely to apply at least to the month before the birth and at least two months after the birth. This period would be longer if there were complications at birth. Even a telephone hearing may be too difficult if the woman is looking after the baby on her own. This may mean that a hearing has to be adjourned."*
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> To assist the Court a copy of the full section dealing with pregnancy is also attached to this skeleton argument.
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> 21. It is to be acknowledged as set out in paragraph 2 of guidance at page 5 in the document, the document does not express the law. It does make it clear it would be argued on

behalf of the mother that the Court should take this into account wherever applicable. Paragraph 2 of the preface is set out below and a copy of the appropriate section in the guidance is also attached so this can be considered in context:

> *"2. Although the Bench Book does not express the law, judges are encouraged to take its guidance into account wherever applicable. It is increasingly cited in judgments and by practitioners as to the approach to be adopted."*

22. It must be acknowledged on the part of the Respondent mother that these proceedings have been going on for a considerable period of time certainly well in excess of the 26 weeks timetable which proceedings would normally be expected to conclude, this has been in part not assisted by the difficulties caused over the last 12 months by the Covid pandemic.

23. However, a desire to complete these proceedings at this stage should not override the mother's right to a fair hearing. There are other potential difficulties with the hearing proceeding on the basis proposed, the first is that the Judge will be a different Judge from the Judge that dealt with the decision to promote the rehabilitation plan having heard evidence from [name], the Psychologist.

24. If the Court was to take the view that the matter could be dealt with by a different Judge then it would be argued on behalf of the mother that at the very least the Judge dealing with the case should be provided with the transcript of the evidence of the psychologist upon which the Judge made his decision to support a rehabilitation plan and a copy of the agreed note of his Judgement.

25. Those documents should also be made available to any Advocates that would need to take over conduct of the case as certainly the Solicitor Advocate instructed by the First Respondent mother is not available for the proposed hearing in April and it is understood that other Advocates may not be also. Although that is not the basis that this application is made, it is made on the basis of the mothers pregnancy, it is however another matter that the Court is asked to take into consideration."

6. The local authority, supported by the father and the Children's Guardian, opposed the application. The local authority's position statement, prepared by counsel then instructed, included this passage:

> "12. The position of the Local Authority is that the hearing as listed in April should go ahead. The case is ready for a final hearing. There is no necessity to extend these proceedings any

further and the Court will have all the information it needs at that stage to make decisions in this case. These proceedings have now been ongoing for some 2 years and 7 months and the question here really is, how many more years can this case be expected to continue?

13. The paramount consideration for the Court is the welfare of the child (section 1(1) Children Act 1989) and any delay in determining the questions in the case is detrimental to the welfare of the child (section 1(2) Children Act 1989).

14. Whilst it is appreciated that it is far from ideal for the final hearing to proceed whilst the mother is some 8 months pregnant, this must be balanced against the prospect of a delay of another 4 months for this child and proceedings hitting the 3-year mark. It is in the interests of justice for this final hearing to proceed without delay.

15. If the adjournment is granted, further applications are likely to be made by the mother for further adjournments before the next listed final hearing. The Local Authority would submit that the needs of J of stability and certainty in his life should be the paramount consideration, and in the Local Authority's submission, the child's right to a private and family life out of proceedings outweighs the mother's case for an adjournment.

16. It is the Local Authority's position that the mother would receive a fair trial, and simply being pregnant is not a reason to suggest that she would not. No medical evidence has been provided to the Court to suggest that the mother has any particular difficulties with this pregnancy as suggested within the skeleton argument by reference to the early delivery of J.

17. There are a number of participation considerations that can be given to the mother. Namely, that the mother give evidence over video link and attend from the comfort of her own home. The mother to not be expected to attend Court in person (paragraph 30, Equal Treatment Bench Book). The mother can also be afforded regular breaks throughout Court days. It is not anticipated that the mother's evidence would last any longer than an absolute maximum of one day even with regular breaks. It is anticipated that the mother would give evidence on Day 3, namely the 10th April, which is nearly 1 month away from her due date.

18. The Equal Treatment Bench Book is not law. It is guidance that the judiciary are encouraged to take into account, and in the Local Authority's view, the above participation considerations do take that guidance into account when balancing the mother's pregnancy against the Court's paramount consideration and the interests of justice. The delay

> would be detrimental to J and an extension of proceedings should be granted only if necessary and if the Court is not equipped to make decisions (*Re B-S*)."

7. The Guardian's position was that, from J's point of view, the hearing should go ahead. He accepted that a final hearing concluding just two weeks before the mother gives birth would not ordinarily be chosen and understood the mother's concerns. Also, J is with a foster carer who may become his long-term placement. However, if the hearing did not take place in April, it would have to be adjourned for many months. On balance, considering the length of the proceedings already and the need to avoid further delay, the Guardian supported an April hearing.

8. The Judge refused the mother's application for an adjournment and made a number of case management directions for a hearing in April. His ruling is recorded in an agreed note:

> "Yes, it is a difficult one. Certainly not an easy decision. I'm just reminding myself again of what was in the LA's position statement. This case has run far too long already, not the fault of anyone. Not in J's interest to continue to run and run. Whilst taking on board all of the arguments raised on behalf of Mother, I do take the view that it is desirable, if at all possible, that the hearing should be completed before she gives birth. Also, mindful there are risks with starting a hearing in April, highlighted by Miss S [mother's solicitor], and yes, it may go wrong but overall, I take the view that attempt should be made to hear the case. There's no guarantee it'll work but it's important to try to make it work for that to be attempted. Of course, Mother's best interests need to be considered, there will have to be breaks, if worst comes to worst, hearing may need to go off. My view is that on balance, it is right it should proceed in April and it is important to try and make this work for J and on balance the hearing should proceed.
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> Everyone will have to do their best to try make sure that that works. That is my decision in relation to that. Indeed, if it can be done, Mother may not see it in that way now, but it is likely to be better for her to have these proceedings over and done with before giving birth."

The recital to the consequent order read:

> "AND UPON the Court determining in an ex tempore judgement that it was desirable for the proceedings to be completed before the mother gives birth, that it was important for J given the delay in this case for matters to be concluded without delay, and that although the listing was not without risk, it was sufficiently important to make matters work and consideration should be given to the mother throughout that hearing by providing regular breaks accordingly."

The appeal

9. The mother applied for permission to appeal, which I granted on 25 March. The grounds of appeal are that the Judge's decision was wrong (1) because he placed insignificant weight upon the manner in which the mother's pregnancy would affect her ability to partake in a final hearing, and (2) because he placed too much weight on the need for the case to be finalised without further delay.

10. Before us, Mr Goodall for the mother repeats the arguments made to the Judge. He argues that in the circumstances of the case, the hearing should have been adjourned.

11. On behalf of the local authority, in a position supported by the Guardian, Miss Naomi Madderson similarly reiterates arguments made to the Judge by counsel then instructed. She argues that the Equal Treatment Bench Book does not, by its own account, create an automatic bar to heavily pregnant women being able to participate in proceedings. Some women will be content to take part in proceedings late on in pregnancy and in any case, allowances can be made by way of breaks in the hearing. The availability of remote attendance may lessen the burden of the hearing for the mother here. She had been asked before the hearing on 12 March to produce medical evidence showing any specific reason to prevent her being able to participate fairly (with accommodations) but none was provided. Mothers can and do attend interim care removal hearings after birth, and there is no possible prejudice to this mother in circumstances where all necessary adjustments will be made. The Judge reached a decision that was within his wide discretion.

12. In a written submission on behalf of the father it is asserted that a departure from the Bench Book guidance does not equate to a breach of the mother's article 6 rights. The Judge, who had case-managed this case since June 2019, was uniquely well-positioned to balance consideration of the mother's pregnancy and prejudice to the welfare of the child cause by any further delay. The balance he struck took into account the mother's pregnancy and gave paramount consideration to the welfare of the child.

13. In the course of the hearing, we asked the advocates about the state of planning for the hearing, whenever it is to take place. It became apparent that many of the preparations are even now – a week before trial – incomplete. By that, I mean definition of the issues, the identification and timing of the witnesses and the ground rules for the hearing, such as who is expected to attended court in person and who will attend online.

Conclusion

14. The decision not to adjourn the trial was a case management decision. In *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583 at [3], this court emphasised, in the context of remote hearings, that:

> "The decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the

> ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceeding that were open to the court and is, therefore, held to be wrong."

15. Applying that standard, the Judge's decision was in my view wrong, for the following reasons:

(1) The court's first task was to get its legal bearings. The welfare paramountcy principle under ss. 1 (1) of the Children Act 1989 applies when a court determines any question with respect to the upbringing of a child. It does not apply to case management decisions. The touchstone for case management decisions is justice, not welfare, though in a family case welfare plays an important part in the assessment. That is made clear by the terms of the overriding objective in Rule 1 of the Family Procedure Rules 2010, which requires the court to deal with a case *justly, having regard to any welfare issues involved*. That includes *ensuring that it is dealt with expeditiously and fairly*. (The delay principle under s. 1 (2) Children Act 1989 does apply to case management decisions, as of course does the 26 week timetable set by s. 32 for disposing of an application for a care order.) In the present case, it is unclear whether the Judge was influenced by incorrect submissions about the welfare principle, but he did not state that he was applying a test of fairness, or indeed what test he was applying.

(2) The Equal Treatment Bench Book, whose most recent edition was published in February 2021, is the product of serious thought about fairness in the conduct of legal proceedings. It is written by judges for judges. Its guidance should be taken into account wherever it is applicable. It was applicable here, and the Judge was squarely referred to it, but he did not mention it. It advises the court to achieve *sensitive listing*. It advises that a woman in the last month of pregnancy *should not be expected to attend a court or tribunal unless she feels able to do so.* Whether that refers to physical attendance or to participation, the Judge should have addressed the fact that his order was not in accordance with the guidance. Instead, he adopted a "try it and see" approach of the kind that the guidance clearly aims to avoid. It is also there to protect women from the argument, made in this case, that there is no medical evidence of any particular risk to the pregnancy. It was not for the mother to put forward additional medical reasons to justify her request for postponement; if such evidence exists it may add to the picture, but its absence does not weaken the guidance.

(3) The final hearing will be of very considerable importance for this family. It will determine J's future and will very likely influence the future of the unborn child, for whom proceedings are also contemplated. A hearing in these circumstances is bound to be exceptionally stressful for a person in this young mother's position, and her experience of her first pregnancy can only exacerbate matters. Her evidence will doubtless be significant, and she will face cross-examination. The Local Authority has suggested that she need not attend court in person and that she could give evidence by video link and attend the rest of the hearing "from the comfort of her own home". This overlooks the important fact that a party participating in a court hearing remotely is still attending court and should be able to engage fully with the process. The mother is in any event entitled to expect that

she could attend for the whole of the hearing in person if she wants, and certainly that she should be able to choose to attend court to give evidence: indeed we are told that the court was willing to accommodate that.

(4) The Judge did not sufficiently grapple with these matters. The difficulty began when the court imposed a date, despite being told of the mother's situation and that of her advocate. At the hearing itself, the starting point was to identify the likely practical arrangements for the hearing, but that did not happen. A general intention to allow breaks in proceedings, whatever their format, does not remedy the position if the hearing should not be taking place at all. Then, no adequate consideration was given to the mother's anxiety, expressed with moderation, at the prospect of having to participate in such a heavy hearing during her last month of pregnancy. Rather than engaging with her concerns, the Judge told her that it would be better for her if the hearing went ahead, and he did not refer to the fact that she would be doing so without her advocate of choice in a case with a long history. The approach taken was that a person in her position could accommodate the court process, provided allowances were made. Ground 1 is made out.

(5) There was obvious good reason to be concerned about the impact on J of the disturbing length of these proceedings, which, after 2½ years, are now in week 135. However, the court needed to consider the actual consequences of further delay for him. The fact that he is in a familiar and potentially permanent foster placement was clearly of some relevance. There are some family cases that must be heard although a party is at a disadvantage. For example, interim care orders at the time of a new birth are sometimes inevitable for the protection of the baby; there will also be cases where short, procedural hearings can quite properly take place when substantial trials cannot. This hearing does not have that complexion. The Judge did not explain why avoidance of further delay was such an overriding consideration. Ground 2 is also made out.

16. Any postponement in this highly overdue case is regrettable, and making arrangements for a hearing in J's case after the birth of the baby will not be easy. Planning for J's future will be further delayed. How significant that will be for him will depend on what the plans are. But, as was said in *Re A* at [12], in addition to the need for there to be a fair and just process for all parties, there is a separate need, particularly where the plan is for adoption, for a child to be able to know and understand in later years that such a life-changing decision was only made after a thorough, regular and fair hearing. For the reasons I have given, the decision in this case fell outside the range of reasonable ways of proceeding that were open to the court. There was no good reason to require the mother to participate in this important hearing at such an advanced stage of her pregnancy and her application to adjourn the hearing should have been granted.

17. For these reasons, we allowed the appeal, set aside the Judge's order and vacated the hearing in April. The matter is remitted to the Judge for an early case management hearing and for a new trial date to be set, to start no sooner than early July. Among the matters that may benefit from consideration at the early hearing is the current time estimate, which the parties rightly consider is capable of being significantly reduced.

Lady Justice Carr:

18. I agree.

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