Neutral Citation Number: [2019] EWCA Civ 1714

Case No: B4/2019/1841/1842/1846

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HHJ GREENSMITH
LIVERPOOL CIVIL AND FAMILY COURT
LV19CO1677

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2019

Before:

LORD JUSTICE FLOYD
LADY JUSTICE KING
and
LORD JUSTICE MOYLAN

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Re C (A Child) (Schedule 2, Paragraph 19, Children Act 1989)

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Mr R Howling QC (instructed by **Wirral Borough Council**) for the **Appellant**
The Mother in Person
The Father in Person
Miss G Irving QC (instructed by **Nyland and Beattie Solicitors**) for the **Child's Guardian**

Hearing date: 8th October 2019

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Approved Judgment

Lord Justice Moylan:

Introduction:

1. The Local Authority appeals from the orders made by His Honour Judge Greensmith on 5th and 9th July 2019 by which, in essence, he refused to give the court's "approval" to the Local Authority arranging for the child C to live in Scotland in a residential home in which he had been placed.

2. A Local Authority may only arrange for a child in their care to live outside England and Wales with the approval of the court: paragraph 19(1), Schedule 2 to the Children Act 1989 ("the 1989 Act"). The court can only give its approval if a number of conditions are satisfied: paragraph 19(3). One of these is that the child "has consented to living in that country".

3. At the date of the judge's orders, C did not consent to his being placed in Scotland. However, paragraph 19(4) provides that the court can give its approval, even though the child does not consent, if the court "is satisfied that the child does not have sufficient understanding to give or withhold his consent" *and* "if the child is to live in the country concerned with a parent, guardian, special guardian, or other suitable person".

4. The Local Authority's appeal originally focused on the judge's approach to the first issue in paragraph 19(4), namely whether C had the requisite "sufficient understanding". However, following the filing of a Respondent's Notice on behalf of the Guardian, the focus of the appeal became whether placement in a residential home was capable of satisfying the second condition in paragraph 19(4). In simple terms, whether the words "live in the country concerned with … a suitable person" included living in a residential home.

5. The Local Authority is represented by Mr Howling QC and the Guardian by Ms Irving QC, neither of whom appeared below. The father is neither represented nor present (we were told that his application for legal aid had been unsuccessful). The mother is not present or represented but has provided the court with a full written presentation of her position.

6. This case, therefore, raises two issues: (i) Do the words "other suitable person" enable the placement of a child subject to a care order made by a court in England and Wales in a residential home in Scotland; and (ii) Was the judge's approach to the issue of "sufficient understanding" flawed.

7. In summary, on (i), Ms Irving submits that the provisions of paragraph 19 do not enable the court to approve a child in the care of a Local Authority being placed in a residential home in Scotland when the child does not consent to that placement. It is her case that the words "other suitable person" mean a natural person. Mr Howling

submits, relying principally on the Interpretation Act 1978, that “other suitable person” includes “persons corporate or unicorporate”.

8. As to the judge’s approach to issue (ii), during the course of the hearing it became clear that both Mr Howling and Ms Irving effectively agreed that the judge did not adequately address this issue.

9. At the end of the hearing we informed the parties that the appeal would be dismissed. These are my reasons for agreeing with that decision.

Background

10. C is a young teenager. He was first accommodated by the Local Authority in 2017 under section 20 of the 1989 Act. Care proceedings were then commenced and a care order was made early in 2018. These proceedings were determined by a District Judge but involved the same solicitor and Guardian who are involved in the current proceedings.

11. C was placed in a residential home in England until March 2019 when he was placed by the Local Authority in a residential home in Scotland. I do not propose to set out the details of what had happened prior to this but they included C repeatedly absconding from his placement and the Local Authority obtaining recovery orders which were made by His Honour Judge Greensmith.

12. The placement in Scotland was undertaken without the court’s approval having been obtained. The Local Authority sought to remedy this by making an application dated 21st May 2019 for the court’s approval. This application was supported by a statement from a social worker. This set out that C did “not want to be placed in Scotland”, although he had more recently indicated “some willingness to stay” there. The statement also raised questions about why he was saying this, including that he was considered to be “vulnerable to exploitation”.

13. On 23rd May 2019, HHJ Greensmith, made an order on the papers. He made the child a party and directed that a Guardian be appointed. He also gave interim consent to C’s placement in Scotland.

14. At the first hearing on 30th May 2019 the judge again gave interim consent, until 5pm 9th July 2019. He also made a number of directions including that the Guardian should provide her analysis by 4pm 4th July 2019. A hearing was listed on 9th July.

15. The mother provided a statement which set out her support for the placement in Scotland as “the best placement” for C. This also stated that C had said he was “happy being in Scotland” but didn’t want to be there. In his statement the father did not agree that the placement in Scotland was in C’s best interests.

16. C's Social Worker provided a further statement dated 27th June 2019. This set out that C had been inconsistent about whether he consented to being in Scotland. It also contained a number of paragraphs under the heading of "sufficient understanding". In these the Social Worker explained why he was "concerned that C does not have sufficient understanding to consider the questions put to him about his placement". In a Report dated 2nd July 2019, the Social Worker said that C "continues to struggle to understand risk and the consequences of his actions".

17. On 27th June 2019 the solicitor for the Guardian made an application for an urgent directions hearing. No statement was provided in support of this application which relied on the information contained in that section of Form C2 which invites "brief details (of) your reasons for making the application". These were that C "no longer consents" to living in Scotland and that he had sufficient understanding to give or withhold his consent.

18. A hearing took place on 5th July 2019. It was, understandably, a brief hearing which had been listed quickly. The judge heard submissions on behalf of the Local Authority, the mother, the father and the Guardian. The Local Authority's position was that the court should deal with C's placement at the hearing listed on 9th July. It was submitted that this would enable the matter to be addressed in more detail including, it appears, by obtaining assistance from the Guardian who had not yet provided her analysis.

19. The solicitor for the Guardian told the judge that he had visited C and had left "with clear instructions that C didn't consent to the placement". The solicitor had then been told that C was reconsidering his decision. In a subsequent telephone call with the solicitor, C said that he wanted to speak to the social worker before making his decision. After this, again in a telephone conversation, C was "adamant" that he no longer consented to his placement in Scotland. Although the solicitor used the word "instructions", and without criticising the solicitor in any way, I would just note that C was in fact represented by his Guardian and was not instructing the solicitor directly.

20. The solicitor also told the judge that, in his submission, C clearly had sufficient understanding to give or withhold his consent. The solicitor made clear that, understandably, it was this assessment which had led him to make an urgent application because he was concerned that C's continued placement in Scotland was not lawful.

21. Both parents consented to C's placement in Scotland.

22. In a short judgment, the judge set out that C did not consent to his placement in Scotland and was "fully aware of the possible consequences of withdrawing his consent". In those circumstances, he decided that he should no longer approve the placement. He discharged the order of 30th May 2019, giving interim consent to the placement in Scotland, and indicated that he expected the Local Authority to arrange for C to be returned to England that day. The matter remained listed, "for directions", on 9th July 2019.

23. The Social Worker filed a further statement dated 8th July 2019. He again addressed the issue of whether C had sufficient understanding and set out his reasons for concluding that C did not have sufficient understanding. These included that C had "not rationalised his decision" and that he was not able "to evaluate the risks and consequences of saying no".

24. At the hearing on 9th July, counsel for the Local Authority sought to persuade the judge to reconsider his decision on 5th July including because the social worker had "serious concerns" about C's understanding, as set out in his evidence. The judge declined to do so largely because he accepted the Guardian's solicitor's assessment that C had the ability to make the decision not to consent and fully understood the consequences of doing so. The judge also refers to the Guardian's assessment as being to the same effect although, in this court, counsel were not sure of the source of this understanding as the Guardian had not provided any analysis pursuant to the previous order.

25. In his judgment on 9th July, the judge set out his conclusion that there was "no cogent evidence before the court that C is incapable of making a decision" about consenting or withholding consent to being placed in Scotland. The judge also said that the Local Authority had not adduced any evidence that C was "incapable of making his own decisions". The judge's order required C to be returned immediately to England.

26. Although the debate in this court has centred on the meaning of paragraph 19(4), we were told that the judge was not specifically referred to its provisions, in particular as to the issue of whether it could apply to C's placement in a residential home in Scotland.

Legal Framework.

27. Schedule 2 to the 1989 Act contains a number of provisions dealing with "Support for Children and Families provided by Local Authorities in England. Paragraph 19 contains "Arrangements to assist children to live abroad".

28. Paragraph 19 provides as follows:

> 19(1) A local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court.
>
> (2)A local authority may, with the approval of every person who has parental responsibility for the child arrange for, or assist in arranging for, any other child looked after by them to live outside England and Wales.
>
> (3)The court shall not give its approval under sub-paragraph (1) unless it is satisfied that—

(a) living outside England and Wales would be in the child's best interests;
(b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;
(c) the child has consented to living in that country; and
(d) every person who has parental responsibility for the child has consented to his living in that country.

(4) Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard sub-paragraph (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian, special guardian, or other suitable person.

(5) Where a person whose consent is required by sub-paragraph (3)(d) fails to give his consent, the court may disregard that provision and give its approval if it is satisfied that that person—

(a) cannot be found;
(b) is incapable of consenting; or
(c) is withholding his consent unreasonably.

(6) Section 85 of the Adoption and Children Act 2002 (which imposes restrictions on taking children out of the United Kingdom)] shall not apply in the case of any child who is to live outside England and Wales with the approval of the court given under this paragraph.

……

(9) This paragraph does not apply —

(a) to a local authority placing a child in secure accommodation in Scotland under section 25, or

(b) to a local authority placing a child for adoption with prospective adopters."

Sub-paragraph (9) was inserted by the Children and Social Work Act 2017 (the 2017 Act) consequent on the amendments made by that Act to section 25 of the 1989 Act to enable children to be placed in secure accommodation in Scotland pursuant to an order made by a court in England and Wales.

29. There appear to be no authorities dealing specifically with the meaning of "sufficient understanding" in paragraph 19(4). There are, however, a number of authorities which address this issue in other contexts. Because we decided, for the reasons set out below,

that paragraph 19(4) could not apply in the circumstances of this case, we did not explore these authorities in any detail during the hearing. I, therefore, very briefly mention that we were referred to *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 and *CS v SBH and Others* [2019] EWHC 634 (Fam). The first of these is, of course, the seminal case on when a child has the right to make their own decisions because he or she has "a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision"; Lord Scarman at p.186 D. Later Lord Scarman made clear that this is an issue of fact and, at p.189 C/E, that "there is much that has to be understood by a girl under the age of 16 if she is to have legal capacity to consent to" contraceptive advice and treatment.

30. In the latter case, Williams J was dealing with the question in the context of Family Procedure Rules 2010, r.16.6 which governs the circumstances in which a child may conduct proceedings without a guardian or litigation friend. In the course of his judgment, he referred to what Black LJ (as she then was) had said in *Re W (A Child) (Care Proceedings: Child's Representation)* [2017] 1 WLR 1027, at [27]: "What is sufficient understanding in any given case will depend on all the facts". Also relevant is what she said, at [36], namely that the "judge will be expected to be guided by the guardian and by those solicitors who have formed a view as to whether they could accept instructions from the child. Then it will be for the judge to form his or her own views on the material available". Williams J set out, at [64], that when determining the issue he needed to consider a "range of factors",

31. Turning to the question of what is meant by "live with a suitable person", the Interpretation Act 1978 ("the 1978 Act") provides that the word person "includes a body of persons corporate or unincorporated". As is made clear in *Bennion on Statutory Interpretation*, 7th Edition, the definitions in this Act "apply to Acts in general", paragraph 19.1(1). Specifically, in respect of the definition of the word "person", *Bennion* states that this definition "does not apply if the contrary intention appears, whether expressly or by implication"; a number of cases are then cited as examples to support this proposition, paragraph 19.5. Reference could also be made to the *ejusdem generis* principle of construction, which is dealt with in *Bennion* in Chapter 23.

32. On this aspect of the case, we were referred to *Re X and Y (Secure Accommodation: Inherent Jurisdiction)* [2017] Fam 80, in which Sir James Munby P said, at [29],

> "It is difficult to see how the requirements of paragraph 19 of Schedule 2 to the 1989 Act will ever be satisfied where the child is to be sent out of the jurisdiction for the purpose of being placed in secure accommodation; and in the present cases they certainly are not. In the first place, unless dispensed with in accordance with paragraph 19(5), the consent of every person with parental responsibility is required. Secondly, unless dispensed with in accordance with paragraph 19(4), the consent of the child is required, and the child's consent cannot be dispensed with unless

> "the court is satisfied that the child does not have sufficient understanding to give or withhold his consent", and even then only if the child is to live "with a parent, guardian, special guardian, or other suitable person"—wording which, in my judgment, and notwithstanding Mr Rowbotham's submissions to the contrary, cannot include being placed in an institution such as a secure accommodation unit. "Person" here does not, in my judgment, extend to a corporate or other organisation or body. It means a natural person."

As referred to above, the difficulty envisaged by Sir James Munby in respect of secure accommodation has been addressed in the 2017 Act.

33. I would additionally note that The Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013, as the title states, make provision for the manner in which a care order made by a court in England and Wales is given effect if the child is to live in Scotland. It requires the local authority for the area in which the child is to live to notify the court in England and Wales, through the Principal Reporter, that it agrees "to take over the care of the child", reg. 3(1)(c).

Submissions

34. I am grateful to counsel for their succinct but comprehensive submissions.

35. Mr Howling stressed the "practical need" for some children subject to care orders made by courts in England and Wales to be placed in residential units in Scotland. He relied on the 1978 Act and submitted that this court should interpret paragraph 19 so as to enable this practical need to be met. He pointed to the benefit which it appeared C had gained by being placed there and submitted that, absent any legal obstacle, this placement would be in C's best interests.

36. On the issue of "sufficient understanding", he submitted that the judge appears to have overlooked the fact that there was evidence from the Social Worker which could support the conclusion that C lacked sufficient understanding in respect of his placement in Scotland. In his submission, the judge adopted too narrow an approach and should have undertaken a more extensive analysis of the evidence and should have waited for the Guardian's evidence. The judge should not simply have determined the issue by reference to the solicitor's view that C had sufficient understanding.

37. Ms Irving submits, simply, that the words "other suitable person" are confined to a natural person. She relies on *Re X and Y*. In her submissions, Ms Irving touched on the possible reasons for the wording in paragraph 19(4) by reference to the provisions they replaced and the need to ensure historic injustices were not repeated. Based on these she further submitted that, for a person to be within this provision, they had to have parental responsibility or decision-making capacity for the child.

38. On the issue of "sufficient understanding", Ms Irving sensibly effectively accepted that the judge's consideration of the issue had not been sufficient although she stressed the considerable experience of the solicitor instructed by the Guardian as providing the context for the judge accepting his assessment of whether C was, as the judge phrased it, "competent to give his consent".

Determination

39. I would first record that, as the Local Authority recognised, C should *not* have been placed in Scotland without the Local Authority having first sought and obtained the court's approval to the proposed placement. This was not merely a technical failing; it was a substantive failing. I would expect this Local Authority and, indeed, all Local Authorities to be aware of this obligation.

40. On the first issue, (i), paragraph 19(4) applies *only* if the child is "to *live* ... *with* a parent, guardian, special guardian or other suitable person". As Floyd LJ observed during the hearing it is not easy to see how a child could live *with* a company or an unincorporated "body of persons". For example, while a child can live in a residential home which might be owned by a company it would be difficult to argue that, as a result, the child was living with a person. Further, when this is added to the fact that the words "other suitable person" follow a list comprising natural persons, I do not consider it is possible to interpret this provision as meaning other than that it is confined, as decided by Sir James Munby P, to natural persons. Whilst I recognise that there might well be a practical need, as submitted by Mr Howling, this cannot counter the factors referred to above and such a need alone would not provide a legitimate basis for the proposed statutory interpretation.

41. The result of this conclusion is that, when a child does not consent, and regardless of whether they do or do not have sufficient understanding, the court is not permitted to approve their placement in Scotland other than with a natural person. The consequence is that a local authority cannot "arrange for, or assist in arranging for, any child in their care", who does not consent, to live in a residential home in Scotland (or, indeed, anywhere else outside England and Wales).

42. Given the limited submissions we heard on the history which might lie behind this particular provision and on the broader potential ramifications, I do not propose to address Ms Irving's additional submission as to whether the term "other suitable person" might be further confined. All I would say is that a court would clearly need to establish who would have parental responsibility or, in broader terms, legal responsibility, for a child before that child could be placed outside England and Wales. One of the problems that has been a feature of some care cases (and still can be judging by the very recent judgment of *Re K, T and U (Placement of Children with Kinship Carers Abroad)* [2019] EWFC 59) is a regrettable failure to address at an early stage of

the process the legal issues which require to be resolved to enable such a placement to take place in a manner which safeguards the child's best interests.

43. As to the second issue, (ii), we only heard very brief submissions because we had already decided that the legal point raised on behalf of the Guardian was correct. This is not, therefore, a case in which it would be appropriate to provide detailed guidance, if such is in any event required. I would, however, make the general point that the answer to the question of whether a child has "sufficient understanding" requires consideration of all the relevant information and evidence and involves a broad assessment of the child's intelligence, maturity and understanding of the factors relevant, in the context of paragraph 19(4), to the proposed placement outside England and Wales.

44. This need not be an extensive investigation or analysis but in my view, in the circumstances of this case, it required a more extensive consideration than that given by the judge. I fully accept that the judge was being given the opinion of a very experienced solicitor but there was also evidence from the Social Worker with which the judge needed to engage. It was a decision for the judge to make and not one which depended simply on the solicitor's opinion. It might, further, have been better to wait until the analysis which the Guardian had been ordered to file had been provided. Subject to the legal obstacle present in this case, it would have been open to the judge to give interim approval pending determination of the issue of whether C had sufficient understanding. I say this in the particular context of C having already been placed in Scotland.

45. Finally, I recognise the force of the submission made by Mr Howling as to the potential practical need for children to be placed in residential units in Scotland. This may be a "gap" in the legislative framework similar to the situation that previously existed in respect of secure accommodation. I, therefore, propose that this issue be brought to the attention of the President of the Family Division for his consideration.

Lady Justice King:

46. I agree.

Lord Justice Floyd:

47. I also agree.