Neutral Citation Number: [2019] EWCA Civ 894

Case No: B4/2019/0918

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM OXFORD COMBINED COURT CENTRE
Her Honour Judge Owens
CX19C000028

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 May 2019

Before :

LORD JUSTICE PETER JACKSON
and
LORD JUSTICE BAKER

- -

Between :

J-S (Children)

- -

Edward Devereux QC and Alex Forbes (instructed by **Reeds Solicitors**) for the **Appellant Father**
Charles Geekie QC and Andrew Leong (instructed by **Oxfordshire County Council**) for the **Respondent Local Authority**
Andrew Bagchi QC and Emma Hudson (instructed by **Brethertons Solicitors**) for the **Respondent Mother** (written submissions only)
Maria Savvides (instructed by **Wilson Solicitors**) for the **Respondent Father** (written submissions only)
Pamela Scriven QC and Cherry Harding (instructed by **Oxford Law Group**) for the **Respondent Children through their Guardian** (written submissions only)

Hearing date: 23 May 2019

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Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. On 15 March 2019, Oxfordshire County Council removed five children from their mother under an emergency protection order. Interim care orders were then obtained and the case was listed for a contested hearing before Her Honour Judge Owens on 10 April. The threshold for interim orders was not disputed, but the local authority's plan to keep the children in foster care was. The judge continued the interim care orders and listed a fact-finding hearing for three days on 29 May. The father of the youngest child challenges that outcome on two grounds. The first concerns the justification for making the orders: the judge refused permission to appeal, and this court's permission is now sought. The second ground of appeal, for which the judge herself gave permission, concerns the power to order electronic tagging in a case of this kind.

2. The background is that in 2009 the father (as I shall call the appellant) was found to have caused 17 fractures to a baby son by a previous relationship. In 2012, he was sentenced to 33 months imprisonment for inflicting grievous bodily harm on the child and for neglect. In mid-2017, he began a relationship with the mother of the older four children. The local authority told the mother about the father's history and a written agreement was made which barred him from attending the family home. In January 2018, a psychiatric report advised that the father posed a serious risk to any child and that he is not treatable. In May 2018, the local authority issued proceedings in relation to the older four children on the basis of neglect and failure on the mother's part to protect them from unsuitable adults. That summer, the youngest child was born. In October 2018, a social work report on the father referred to his "eruptive anger". In December 2018, the court made a supervision order for 12 months on the basis that the children would remain with their mother. The parents and the local authority made a written agreement that the father would have no unsupervised contact.

3. In March 2019, two of the children made statements that the father had been staying at the family home, and this was apparently corroborated by one of his former partners. The children were then removed under the emergency protection order. The parents accepted that the threshold for intervention was met because there were reasonable grounds for believing that the father had been at the home, but they denied that it had in fact happened. That issue, which is central to the current proceedings, will be resolved at the imminent fact-finding hearing.

4. Ahead of the contested decision, both the mother and the father offered to be tagged so that their physical separation could be monitored, allowing the children to return to their mother. Information from Electronic Monitoring Services, the agency responsible for tagging, was gathered. The matter came before the judge on 5 April, when there was no time for it to be heard. It was appreciated that only a High Court judge could make a tagging order, but Judge Owens directed that at a hearing fixed for 10 April she would conduct the welfare evaluation and refer the making of a

tagging order to a High Court judge if she concluded that such an order should be made in principle –a course of action that was in itself not without potential difficulties in my view. She also invited the Ministry of Justice to attend the hearing, or to provide written submissions on the question of who would bear the costs of tagging.

5. By agreement, the hearing on 10 April was decided on submissions. The parents pressed the issue of tagging, saying that it would sufficiently mitigate the risk of what was accepted to be severe harm. The local authority argued that the risks were not manageable because, even with tagging, the father could lose his temper quickly and before help could be mobilised. A letter was received from HM Prison and Probation Service (part of the MoJ) explaining the parameters and procedures for tagging. The author stated that the MoJ would not be responsible for the costs of tagging and monitoring and expressed the view that the case was for a number of reasons unsuitable for a tagging arrangement.

The judge's decision

6. The judge reviewed the history, the common ground, the disputed issues and the need for a fact-finding hearing. She correctly directed herself that the question was whether the children's immediate safety required their continued separation from their mother. She concluded that there were reasonable grounds for believing that the father poses a very high risk of physical, psychological and emotional harm to the children unless carefully supervised. She considered possible mitigation measures and rejected the effectiveness in this case of orders under the Family Law Act 1996 or of prohibited steps orders. Next she considered tagging in some detail and concluded that it would not provide an immediate response sufficient to protect the children: it was not a suitable safeguard in this case. She noted the distress of the children in foster care, and the fact that they would face a further change of foster placement, but concluded that allowing them to go home would expose them to a very high risk of physical, psychological and emotional harm. The best remedy was for the proceedings to be swiftly progressed.

The grounds of appeal

7. The grounds of appeal contend (1) that the judge was wrong to conclude that the continued separation of the children was proportionate, and (2) that there is a need for guidance on the availability of tagging in a "standard" care case that does not involve the risk of abduction. Such guidance could cover the procedure where the judge is not a High Court judge, the question of who should bear the cost, and the question of whether the existing guidance on electronic tagging, *Tagging and Electronic Monitoring in Family Cases*, issued by HMCTS in April 2015, applies in cases of this sort.

8. We have heard submissions on behalf of the father from Mr Devereux QC and Mr Forbes, and on behalf of the local authority from Mr Geekie QC and Mr Leong. We have also had the benefit of substantial written submissions from Mr Bagchi QC and Ms Hudson for the mother and from Ms Savvides for the older children's father, in each case supporting the appeal, and from Ms Scriven QC and Ms Harding for the Children's Guardian, opposing it.

Ground 1

9. The first matter for decision is whether permission to appeal should be granted on ground one. As to that, Mr Devereux submits that the judge's overall assessment of risk was flawed. She directed herself with reference to authority on the need to consider the gravity of the likely harm, the likelihood of harm occurring, and the availability of protective measures. She was entitled to find the gravity to be serious, but she did not properly consider the likelihood of it occurring. She placed too much weight on the threshold concession, and did not take account of the fact that the parents denied breaking the agreement. Nor did she properly weigh up the protective possibilities of tagging. Had she done so, she would have been bound to refuse the application for interim care orders. Instead, she was unduly influenced by expressions of opinion in the letter from the MoJ.

10. In response, Mr Geekie and Ms Scriven argue that the judge was right about the risks and the inability to mitigate them.

11. I am in no doubt that the judge was right to refuse permission to appeal and that we should do likewise. The judge approached the issue correctly in law in a case in which the threshold was crossed. Moving forward, she carefully evaluated the risks and was fully entitled to find that even if tagging could be put in place it would be insufficient to mitigate them. Reading the judgment as a whole, it is plain that she considered that there was a significant likelihood of unsupervised contact taking place in the future. The evidence for that was amply sufficient for a risk assessment at the interim stage. There is no sign that she placed undue weight on opinions expressed in the MoJ letter, as opposed to its basic factual contents. Furthermore, this court will rarely interfere with an interim order, all the more so where in this case the central disputed issue is just about to be resolved. There is no prospect of this court finding the interim care orders were wrongly made. We therefore informed the parties during the course of the hearing that permission to appeal on this ground would be refused.

Ground 2

12. Turning then to the appeal on ground two, the local authority and the Guardian submit that the court should not entertain it as it is academic in the light of the judge's core decision that she would not order tagging in any event. For his part, Mr Devereux advanced this ground of appeal with moderation in the light of the outcome on ground one.

13. In relation to academic appeals, we have been referred to the statement of principle in *Hutcheson v Popdog Ltd. (Practice Note)* [2012] 1 WLR 782, where Lord Neuberger MR held that, save in exceptional circumstances, this court may only entertain an academic appeal where three conditions are met: (1) where the appeal raises a point of some general importance; (2) where the respondent agrees to it proceeding, or is at least completely indemnified on costs or is not otherwise inappropriately prejudiced; and (3) where the court is satisfied that both sides of the argument will be fully and properly ventilated.

14. Here, none of the conditions for hearing an academic appeal is satisfied. In the first place, this court is not aware of any pressing request from judges or practitioners for further guidance at this stage on the availability of tagging in cases of the present

kind. In *Re X & Y (No. 1)* [2015] 2 FLR 1487, Sir James Munby P reviewed the availability of tagging in a case involving feared travel to Syria. At paragraphs 80-85 and 100 he referred to previous authority and to the HMCTS guidance, which notes that orders may only be made in the High Court and that states the question usually arises where there is a real risk of abduction. He noted that cases raising the issue of tagging are infrequent. At this hearing, we were referred to just four reported cases since 2003 and an anecdotal account of one other case. I do not consider that there is a pressing need for guidance on electronic tagging from this court at the present time. Cases where the issue may arise will be unusual and the decision will be case-specific.

15. As to Lord Neuberger's second requirement, the local authority and the Guardian do not consent to the appeal going ahead and there is no realistic form of costs protection that could be devised. Mr Geekie argues with good reason that it would be particularly inappropriate for guidance to be formulated without a real-life context that raised the hard practical issues that would have to be confronted.

16. Thirdly, for the issue to be fully argued out, the court would need to hear submissions from the Ministry of Justice and the Legal Aid Agency and possibly from other organisations as well. The expense and delay of an adjournment for this to happen would be disproportionate.

17. Returning to the present case, the priority now must be to further the children's welfare by conventional means, rather than digressing into subsidiary issues such as tagging.

18. For all these reasons, as we informed the parties at the conclusion of the hearing, we decline to offer further guidance on electronic tagging and we dismiss this appeal.

Permission to appeal decisions

19. Lastly, I note that after what was otherwise a very proper decision, the judge was persuaded to grant permission to appeal on the basis that there was a compelling reason for the appeal to be heard. The outcome of the appeal shows that it would have been preferable for the judge to have left the issue of permission to appeal on ground 2 to this court, as she did with ground 1.

20. CPR r.52.3(2) and its equivalent for appeals within the Family Court, FPR 30.3(3), provide that an application for permission to appeal must be made to the lower court at the hearing at which the decision to be appealed was made or to the appeal court in an appeal notice. It is good practice to make the initial application to the lower court: *Re T* [2003] 1 FLR 531. Under CPR r.52.6(1) and FPR 30.3(7) permission to appeal can only be given where (a) the court considers that the appeal would have a real prospect of success, or (b) there is some other compelling reason for the appeal to be heard. So there is no doubt that the father was right to apply to the judge and that she had the power to grant permission to appeal. However, permission is rarely granted by the trial judge in a family case and there are good reasons for that. As Thorpe LJ put it in *Re O (Family Appeals: Management)* [1998] 1 FLR 431:

> "Exceptionally, there are family appeals that raise a difficult point of law or principle. There the judge at first instance may

> well wish to grant leave himself. But if the proposed appeal seeks only to challenge the exercise of his judicial discretion in a family case, it would generally be helpful to this court if the judge at first instance was to leave to this court the decision as to whether or not the appeal should be entertained."

A similar point was made by Butler-Sloss LJ in *Re R (A Minor)* [1996] Lexis Citation 2264:

> "This was undoubtedly a very difficult case. But in an impeccable judgment, the Judge was in error on one matter only. He should not have granted leave to appeal. … In this sort of case it is particularly important that leave to appeal should not be granted because it only gives to the appellant a false hope in a hopeless appeal."

21. Here, the judge gave permission under the "compelling reason" limb. In my view, there is a need for at least as much, and possibly more, caution on the part of a first instance family judge when deciding whether to grant permission to appeal under that limb as under the first limb, particularly where there is a possibility that the appeal may turn out to be academic. Overall, judges should not be deterred from exercising their power to grant permission to appeal in a proper case: where, for example, the decision has turned on a choice of conflicting authorities, or where for some reason it is likely that this court would grant permission to appeal itself, or where an immediate permission decision has clear advantages. But in most cases it would be better for a decision to grant permission be left to this court as, apart from anything else, significant and avoidable costs may be run up by the parties having to prepare for a full appeal.

Lord Justice Baker:

22. I agree.