NC NUMBER: [2019] EWCA Civ 1779

Case No: B4/2019/1903

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
(HER HONOUR JUDGE CRONIN)

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

Wednesday, 9 October 2019

Before:

LORD JUSTICE SIMON
LORD JUSTICE DAVID RICHARDS
LORD JUSTICE BAKER

IN THE MATTER OF G (CHILDREN)

Transcript of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS
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This judgment was delivered in public but it is ordered that in any published version of the judgment no person other than the advocates or the solicitors instructing them and other persons named in this version of the judgment shall be identified by name or location and that in particular the anonymity of the children and members of their family must be strictly preserved.

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Miss Lorna Meyer QC (instructed by **the Local Authority Legal Services**) appeared on behalf of the **Appellant Local Authority**

Mr Hugh Merry (instructed by **Wansbroughs**) appeared on behalf of the **Respondent Mother**

Judgment

(Approved)

Lord Justice Baker:

1. This is an appeal by a local authority against an order made by Her Honour Judge Cronin, on 29 July of this year by which she discharged a care order in respect of six children.

2. For the purposes of this judgment, it is only necessary to summarize the facts in outline.

3. The respondent mother has a total of 11 children, aged between twenty and two and three-quarters, by four different fathers. The family has been receiving assistance from social services for many years, with regular referrals from other agencies about a number of issues which gave rise to concern about the children's welfare, including domestic violence, physical injuries sustained by the children, and neglect. On a number of occasions during the past 12 years, some or all of the children have been the subject of child assessment investigations under s.47 of the Children Act 1989, and on other occasions subject to child protection plans.

4. Finally, in May 2018, care proceedings were started in respect of the ten younger children. One of those children was placed in a residential unit in the course of the proceedings and has stayed there subsequently under a full care order. The other nine children remained in the care of the mother. At the final hearing of the care proceedings, on 21 December 2018, the threshold conditions for making a public law care order under s.31 of the Children Act were agreed. In short, the court found that (1) the mother had struggled to supervise the children, as a result of which they had suffered physical injuries on a number of occasions, (2) she had struggled to provide essential parental guidance for the children, (3) she had missed some health appointments for the children, (4) school attendance for the children had been low, (5) there had been domestic violence between the mother and her partners, (6) there was a risk of sexual abuse, and (7) the mother had found it very difficult to engage with professionals.

5. At the conclusion of the hearing, Recorder Leong placed all nine children under care orders on the basis of care plans which provided for the children to remain at home with their mother. In his judgment, according to an agreed note prepared for subsequent proceedings, the Recorder said:

> "The mother should be under no illusions. She was very close to losing her children. I was not impressed or convinced at all about the reasons she gave for her inadequate parenting. She needs to know the time for excuses is over. This is her last chance. If no significant improvement is shown over the next three months, as recommended by the independent social worker, the local authority must and I daresay will seriously consider whether the children remain in her care. The mother must know there is a chance she will lose some or all of them. The plans are put in place despite the long history of it not working and hostility from the mother. She must realise how lucky she is that professionals are prepared to come to court and defend their position that she should be given this chance even when she hasn't attended many of the hearings. I urge her to take the opportunity because it is her last one. The consequences for her and the children if she doesn't take this chance and effect significant improvements in their care will be dire. I word this brutally so there can be no misunderstanding of the seriousness of the situation. The plans must be complied with fully and without excuse."

6. According to the local authority, however, the mother, following the hearing, did not comply in full with the requirements under the care plan. Attempts were made on a number of occasions to put in place further support. The local authority asserts that this was without success. After several months, the local authority decided that the six younger children could not safely remain at home. On 17 June 2019, the local authority wrote informing her that the children would be removed from her care on 1 July, with five of them to be placed in foster care and the sixth, who has learning difficulties, with a family member. The letter summarised the local authority's concerns as being (1) that the children's emotional needs were not being met, (2) that there was a lack of supervision leading to physical injuries to the children, (3) that medical appointments were not being kept, (4) that the children were suffering neglect, (5) that correct medication was not being obtained or administered, (6) that children were continuing to attend school on an insufficient number of occasions and were getting little support for their education from home, and (7) that there was difficulty in engaging the mother with professional support. In accordance with guidance set out in the case law, the letter advised the mother to seek legal advice immediately if she wished to challenge the proposed placement. The mother duly consulted a solicitor and decided to issue proceedings to discharge the care orders. Following discussions between legal representatives, the local authority agreed to postpone the removal of the children until the first hearing in the forthcoming proceedings.

7. On 4 July, the mother issued her application for discharge of the care orders. The application was in respect of all nine children who were subject to the care orders. In the notice of application, the mother also applied for an order preventing the children's removal by the local authority under s.8 of the Human Rights Act 1998. The applications were listed for an urgent preliminary hearing on the following day before the local designated family judge. At that hearing, the local authority indicated that it sought the removal of the six younger children, with the older three remaining at home under the care order. The judge adjourned the application to a day later in the month and gave various case management directions. He further ordered the local authority not to remove the children from the care of the mother prior to that hearing unless circumstances arose which would justify the making of an emergency protection order or the children were removed by the police under their police protection powers.

8. The mother came back to court on 29 July before a different judge, HH Judge Cronin. We have the benefit of a transcript of the hearing and the judgment. At the outset, the mother's counsel raised the question whether the hearing was to be a final hearing on the discharge application or whether further assessments would be needed before the court was able to make a decision. He pointed out that no up-to-date assessments had been carried out. The judge stated that the options before her were to discharge the care order or dismiss the application. When counsel referred to the application for an injunction under the Human Rights Act, the judge stated that she did not think that she had jurisdiction to make an injunction under that Act as she was not a s.9 judge (that is to say, a judge authorised to sit as a deputy High Court judge) and did not have any inherent jurisdiction. After further discussion, the judge reiterated her view that she did not have the power to make an injunction under the Human Rights Act and therefore concluded that she had there and then to decide the application whether or not to discharge the care orders. She then proceeded to hear evidence over the course of the day, hearing from the social worker, the mother and the children's guardian. The guardian supported the local authority's proposal to remove the children, saying that, in the months since the care order had been made, there had been no significant improvement in the quality of parenting. She referred back to the Recorder's comments in his judgment on 21 December when making the care order, observing:

> "That judgment on the last hearing was so clear and so concise that I don't think anyone left that court with any illusion of what was expected and we're still in a position whereby the children are sustaining injuries on a daily basis. We've got a child who's attempted self-harm. We've got another child who's saying quite clearly that he feels unloved and unwanted in his family environment. We've just these continued low-level concerns. So I'm not in any way saying there's been this immediate risk of harm that precipitates this event. I'm just saying it's not improving."

9. In closing submissions, Mr Merry for the mother made a further passing reference to the possibility of an adjournment of the application with the injunction being extended or, alternatively, an undertaking by the local authority not to remove the children until the final decision. The judge again indicated that she did not have the power to deal with the injunction. The options were, in her view, either to allow the order to continue, with the result that the children would be removed into foster care, or discharge the care order, which would remove the local authority's parental responsibility and require it to start fresh proceedings if it continued to think that there were grounds to seek the children's removal into care.

10. At the conclusion of the evidence and submissions, the judge delivered an ex tempore judgment. She reiterated her view that she was not a judge authorised to make injunctions under the Human Rights Act. She then expressed some reservations about the observations of the Recorder in his judgment when making the care order and expressed the view that he may have been imposing an impermissible condition on the care order. She stated that she considered that all the children were still at risk, to some extent, of harm in the mother's care. She described the options open to her in these terms:

> "The range of powers I have are to dismiss the application, in which case the children remain in care and they are all removed this evening, or to allow the application in respect of all or some of the children, in which case that child or those children stay at home. I am concerned that the decision I am being asked to make today in one day, with some limits on the material available to me, is a very significant one that will affect the children's future for a long time."

11. She then considered the evidence, noting some signs of improvement in the children's circumstances. She concluded that she was not satisfied, on the evidence, that the

mother's care of the children had deteriorated since December when the care orders had been made. She expressed some criticism of the local authority for failing to fulfil aspects of its care plan, in particular by failing to provide a family support worker to go into the home with the aim of modelling better behaviour. She expressed concern about dismissing the application and thereby allowing the children to be removed into urgent placements in foster care, which were not necessarily appropriate. She noted that the paternal grandparents had been approved as special guardians for one of the children – the child suffering from learning difficulties – but the special guardian report had not been adduced in evidence before her. She said that she had considered placing some of the children in care, noting that some might benefit from the individual attention they would receive in foster care, but felt unable to do so in the absence of psychological or social work advice about the consequences of separating the sibling group.

12. In conclusion the judge made this observation, at paragraph 72:

> "This has all the feeling of a case which was not ready for determination or at least not on the basis of the local authority's plans. I'm going to allow mother's application to discharge the care orders unless the parties are able to come to some other scheme, leave the children at home and meet their various needs, which would seem to me to involve now having that home help, dedicated family support worker, actual modelling work and some form of report from the two talking therapists who the mother has engaged, but that would then only be on the basis that the application was adjourned. It might be that the parties prefer to have the care orders dismissed so they can revert to children being in need."

13. After the judgment there were further exchanges between counsel and the judge, in which the parties sought some clarification of the judgment. It should be noted that this exchange took place at about 6.45 pm at the end of a long and difficult court day. Counsel for the guardian sought clarification of the concluding words in the judgment. The judge suggested that further discussion should take place away from the court room and indicated that she would be available later in the week to approve any agreement reached between the parties. The local authority applied to her at the conclusion of the hearing for permission to appeal her order discharging the care orders but that application was refused.

14. At some point (I am not exactly clear when) the transcript of the judgment was produced, at which point the judge added this coda to her judgment:

> "The transcript does not include the additional comments made in response to counsel's further submissions which were to the effect that:
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> the local authority has a care order on the basis of the plan approved by the court for the children to remain at home and it now proposes to remove the children from their mother's care. In my judgment such a significant change of care plan requires a proportionate change in the adequacy of care being provided under that care plan and that has not been established in evidence. The decision for the court is whether to discharge the care order, which has the effect of maintaining the practical plan that was approved by the court on the basis of a contested hearing with evidence and assessments, or to maintain the care order, which would have the effect of removing the children from their home, in circumstances in which there is no evidential basis for saying that the care afforded to the children has deteriorated in a way which is proportionate to removal and at a juncture at which the local authority admits it has not been able to assess what the right plans for the children would be with a guardian who expects the children will return home in due course. Given the local authority's intentions, it must be right that I discharge the care order."

15. On 7 August, the local authority filed its notice of appeal accompanied by an application for a stay of execution pending appeal. The reason for the application for the stay was that the local authority wished to ensure that it had access to the children while they remained in the mother's care pending appeal. The local authority added that it accepted that, if the order was stayed, the injunction previously made by the designated family judge prevented the local authority removing the children should also continue. The following day, 8 August, Moylan LJ granted a stay of the order pending determination of the application for permission to appeal and also extended the injunction pending determination of the permission application. On 6 September, I granted permission to appeal and extended the injunction on the same terms, to last until the determination of the appeal.

16. The case of the local authority at the appeal hearing today has been presented with thoroughness and clarity by Miss Lorna Meyer QC, who did not appear below. In summary, the local authority submits that the judge was wrong to treat the hearing on 29 July as a final hearing. As the judge herself recognised at various points in the

judgment, the evidence was incomplete and the case not ready for determination. It is submitted by the local authority that the judge was wrong to say that she had no jurisdiction or power to extend the injunction under the Human Rights Act. Given her view that the case was not ready for determination, she should have adjourned it and, if appropriate, extended the injunction.

17. The local authority further submits that, having decided to proceed to hear the application, the judge was wrong to discharge the care order on the evidence then available. It is submitted that her decision that the children could be cared for safely by the mother without the local authority having parental responsibility under the care order failed to take into account the lengthy history of inadequate parenting and neglect and the consequential harm suffered by the children. There had not been a clear and sustained improvement in the quality of parenting which would have justified the discharge of the care order.

18. The local authority appeal is supported in written submissions filed on behalf of the guardian. It is submitted that the judge did not give sufficient consideration to the guardian's opinion, which was all the more significant given the fact that she had represented the children in the previous care proceedings. The local authority and the guardian therefore invite this court to allow the appeal, set aside the discharge order, reinstate the care orders and list the matter for reconsideration of the mother's application for an extension of the injunction.

19. The mother's case was presented to this court by Mr Merry, who appeared before Judge Cronin below. His principal submission was that the judge's decision to discharge the care order was one she was entitled to make on the evidence before her and it was not open to this court to interfere with that decision. In the alternative, Mr Merry submitted that, in the event the court decided to allow the appeal, on the grounds that the judge was wrong to determine the discharge application at that stage, this court should proceed to reimpose the injunction under the Human Rights Act, to last until the final hearing of the discharge application. He contended that the judge's thorough analysis of the merits of the proposal to remove the children was something that this court could safely rely on in support of extending the injunction through to the final hearing.

20. I have considerable sympathy for the judge, who was faced with what she considered to be a binary choice between either discharging the care order, thereby removing the local authority parental responsibility granted only a few months earlier on the basis that a care order was necessary to safeguard the children's welfare, or dismissing the mother's application, with the result that the six younger children would be removed immediately from the family home and placed in a number of foster placements. Manifestly, the judge did not consider either option to be fully consistent with the children's best interests. She was plainly concerned that she did not have sufficient information to make such an important and potentially life-changing decision for these six children. But she felt she had no choice.

21. In my view the judge's error was her belief that she had no power to extend the injunction granted by the designated family judge preventing the local authority removing the children save in an emergency until the conclusion of these proceedings. She was under the impression that the power to grant injunctions was only available to a judge authorised to sit in the High Court. But, as the authorities make clear, the power to grant injunctions in these circumstances arises not under the High Court's inherent jurisdiction but under the Human Rights Act: see *Re DE* [2014] EWFC 6 sub nom *Re E (A Child) (Care Order: Change of Care Plan)* [2015] Fam 145 approved by this court in *Re S* [2018] EWCA Civ 2512.

22. The power to grant relief under the Human Rights Act may be exercised by all courts since under s.6(3) all courts are "public authorities" under the Act. Under s.7(1)(b) of the Act, a person claiming to be a victim of an unlawful infringement of human rights by a public authority may rely on the Convention rights in any ongoing legal proceedings. Under s.8(1), a court can grant such relief or remedy or make such order within its powers as it considers appropriate. It has been held in the family law field that the court has the power, in appropriate circumstances, to grant injunctions under the Human Rights Act in the course of care proceedings to prevent a local authority unlawfully interfering with Article 8 rights: see *Re S, Re W* [2002] UKHL 10, *Re V (Care Proceedings: Human Rights Claims)* [2004] EWCA Civ 54 and *Re S (Care Proceedings: Human Rights)* [2010] EWCA Civ 1383. Judge Cronin was clearly under the mistaken impression that she was not authorised to hear an application under the Human Rights Act. No counsel

appearing before her was able to correct her error, although it seemed that some of them were taken by surprise by her firm assertion that she did not have the power to extend the injunction. Had she realised that she did have that power, it seems to me highly likely that she would have exercised it. She was concerned the local authority was proposing to remove the children without carrying out an essential further assessment. She thought that taking that course was unjustified. In those circumstances, it is highly likely that she would have concluded that the removal of the children was an unlawful interference with the family's Article 8 rights so as to justify extension of the injunction. In that way, the court could have ensured the children remained at home until the discharge application was ready for final decision. That is, I surmise, the outcome that she was hoping the parties would agree, looking at her comments in the exchanges following judgment. Accordingly, I would allow the appeal on that ground.

23. I find it difficult to judge whether, having decided to continue with the hearing, the judge was wrong to discharge the orders. I think there is considerable force in the submissions of the local authority and the guardian that, given the long history of neglect and the size and complexity of this family, to remove parental responsibility from the local authority so soon after care orders were made was not justified, particularly as it was contrary to the views of the guardian. On the other hand, having read the transcript, it is plain that the judge carefully considered the evidence before her and took all relevant matters into consideration. Ultimately, I do not feel it necessary to express a view on that matter. Indeed, as the consequence of the appeal succeeding will be that the matter will shortly be reheard, I think it would be unhelpful for me to express any further view on the merits. The judge who ultimately determines the application must do so on the evidence as it exists at that point.

24. Although I think it likely that the judge would have extended the injunction had she realised she had the power to do so, I do not for my part think it right for this court to re-impose the injunction to last through until the final hearing of the discharge application. The question whether the local authority's proposal to remove the children immediately is an unlawful interference with Article 8 rights is not a straightforward matter and requires determination on the facts as they exist at the time the issue is determined. We do not have up-to-date information about the children's circumstances. There are six

children here, with a range of different needs. The issue whether or not they should be removed or whether the injunction should be extended on an interim basis needs to be determined after careful analysis of the circumstances of each child.

25. Accordingly, if my Lords agree, I would allow the appeal, set aside the order discharging the care orders, remit the discharge application for a case-management directions hearing, and extend the injunction in similar terms to those imposed before but only to last until that next case management hearing.

26. The terms of the order should, in my view, be that the local authority shall not remove the children from the care of the mother unless (a) circumstances arise which would justify an application for an emergency protection order if the care order did not exist; or (b) the police exercise their powers under s.46 of the Children Act, the said order to remain in force until the case management hearing or further order. In my view, without in any way criticising Judge Cronin's assessment of the merits of this case, it would not be right for the further hearings to be conducted by the same judge. I would propose that the matter be remitted to the family division liaison judge for the Western Circuit, Roberts J, who has more information about judicial resources and will be better able to decide on the allocation of these proceedings.

Lord Justice Simon:

27. I agree.

Lord Justice David Richards:

28. I also agree.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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