Neutral Citation Number: [2020] EWCA Civ 281

Case No: B4/2020/0081

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (FAMILY DIVISION)
Mr Justice Newton
FD19P00623

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2020

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE NEWEY

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I (Children: Child Assessment Order)

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Leslie Samuels QC and Kyri Lefteri (instructed by **Machins Solicitors LLP**) for the **Children's Guardian**
Penny Howe QC and Saiqa Chaudhry (instructed by **Luton Borough Council**) for the **Respondent Local Authority**
Mark Twomey QC and Chris Barnes (instructed by **Burke Niazi**) for the **Respondent Father**
Nkumbe Ekaney QC and Richard Jones (instructed by **Bindmans LLP**) for the **Respondent Mother**
Hannah Markham QC and Ramanjit Kang (instructed by **Crane & Staples LLP**) for the **4th to 6th Respondent Children**
Amean Elgadhy (instructed by **Creighton and Partners**) for the **7th Respondent Child**

Hearing date: 18 February 2020

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Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. This appeal concerns the court's power to make a child assessment order under s.43 of the Children Act 1989. It arises in relation to a family with five children. The children, whose ages range between 18 and 9, are making excellent progress and have impressed everyone who has met them. Why then are they the subject of proceedings? The answer lies in their father's conviction under the Terrorism Act 2000, for which he received a substantial prison sentence. His offences consisted of addressing meetings to encourage support for or further the activities of Islamic State. He had for many years been associated with extremist beliefs and has a previous conviction for violent disorder arising from a sectarian assault, for which he served a term of imprisonment in 2014. In January 2015 he was made the subject of an ASBO arising from earlier violent demonstrations. In December 2015 he was arrested for the terrorist offences.

2. Following the father's arrest, there was concern about the impact of his beliefs and activities on the family. It was found that one or more of the children had been taken to meetings at which the father had spoken, and an image of a beheading was found on one of the children's phones. More recently, evidence emerged showing one or more of the children holding placards at a demonstration in support of the Caliphate. In early 2017 the local authority in whose area the family lives therefore carried out an investigation under s.47. At that stage the mother was assessed as recognising the risks and acting protectively. There was no evidence of her being implicated in the father's views and activities. The local authority's plan was for further assessment when the father was due to be released from prison.

3. The father was released on licence in late 2018, and was placed in a hostel. A further s.47 assessment was undertaken by the local authority. By contrast with the earlier assessment, this raised considerable concerns about the mother's protectiveness. She said that the father had strong views but that they were not criminal. She referred to the undercover officer whose evidence had led to the father's conviction as a "snitch". The assessment, completed on 13 March 2019, concluded that: a Child in Need plan was required (as the father wanted to go home); the Probation risk assessment should be obtained to identify the father's current view of his offending; the father should be interviewed; an Intervention Provider should be instructed to talk to the children; fuller work should be carried out to provide the children with clear information about their father's offending; the father's interaction with the children should be observed.

4. The mother opposed these interventions, describing them as a collective punishment driven by religion and not genuine concern. The local authority convened a Child Protection Case Conference on 20 May and the children became subject to Child Protection Plans. A referral was made to Prevent so that the case could be discussed within the Channel Panel, a multi-agency panel designed to safeguard individuals at risk. In June, the parents consented to direct work being done with the children but later that month they withdrew that consent. The mother declined to meet a representative from Prevent or engage with a parenting assessment. As a result, the Probation Service advised that the father's licence conditions had been changed so that the mother was no longer approved to supervise contact. At the Channel Panel

meeting on 5 July it was decided that the children should be assessed by an Intervention Provider to establish whether they required mentoring with the aim of increasing theological understanding and challenging extremist ideas that may be used to legitimise terrorism. The parents declined to consent to this assessment.

5. These events added to the local authority's concerns. On 22 July, it initiated the process leading to public law proceedings (the PLO process) by sending formal letters to the parents, as a result of which they qualified for legal representation. Then, on 20 August, the father's licence was revoked due to a breach of his licence conditions. He remains in custody and his release date is not known.

6. A PLO meeting took place on 5 September. The mother attended on her own. She refused to consent to unannounced visits, a parenting assessment, direct work with the children, or to work being carried out by an Intervention Provider. Further details of the parenting assessment and the direct work proposed were provided to the mother by letter but on 23 September she responded by saying that she did not consent to any work being carried out.

7. On 7 October, the local authority decided to apply for a child assessment order, with a view to an assessment being carried out by an Intervention Provider. It issued its application on 4 November. Directions were given by Newton J on 13 November and the final hearing took place on 4 December. The application was opposed by both parents and by the four older children, who were separately represented (the eldest has since turned 18 and is no longer the subject of proceedings). It was however supported by the Children's Guardian. He considered that it is not known whether the children have been exposed to the risk of radicalisation by their father's actions and beliefs, or whether their mother is fully protective. The family's unwillingness to work with the local authority has prevented it from assessing either the level of risk or what support can be offered.

8. The judge handed down a written judgment on 18 December, refusing the local authority's application. The Guardian, supported by the local authority, now appeals, with permission granted by me on 17 January.

Child Assessment Orders

9. Section 43 is the opening section of Part V of the Children Act 1989, entitled "Protection of Children". It is in these terms:

> "**43 Child assessment orders.**
>
> (1) On the application of a local authority or authorised person for an order to be made under this section with respect to a child, the court may make the order if, but only if, it is satisfied that—
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> (a) the applicant has reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm;
>
> (b) an assessment of the state of the child's health or development, or of the way in which he has been treated, is

required to enable the applicant to determine whether or not the child is suffering, or is likely to suffer, significant harm; and

(c) it is unlikely that such an assessment will be made, or be satisfactory, in the absence of an order under this section.

(2) In this Act "a child assessment order" means an order under this section.

(3) A court may treat an application under this section as an application for an emergency protection order.

(4) No court shall make a child assessment order if it is satisfied—

(a) that there are grounds for making an emergency protection order with respect to the child; and

(b) that it ought to make such an order rather than a child assessment order.

(5) A child assessment order shall—

(a) specify the date by which the assessment is to begin; and

(b) have effect for such period, not exceeding 7 days beginning with that date, as may be specified in the order.

(6) Where a child assessment order is in force with respect to a child it shall be the duty of any person who is in a position to produce the child—

(a) to produce him to such person as may be named in the order; and

(b) to comply with such directions relating to the assessment of the child as the court thinks fit to specify in the order.

(7) A child assessment order authorises any person carrying out the assessment, or any part of the assessment, to do so in accordance with the terms of the order.

(8) Regardless of subsection (7), if the child is of sufficient understanding to make an informed decision he may refuse to submit to a medical or psychiatric examination or other assessment.

(9) The child may only be kept away from home—

(a) in accordance with directions specified in the order;

(b) if it is necessary for the purposes of the assessment; and

(c) for such period or periods as may be specified in the order.

(10) Where the child is to be kept away from home, the order shall contain such directions as the court thinks fit with regard to the contact that he must be allowed to have with other persons while away from home.

(11) Any person making an application for a child assessment order shall take such steps as are reasonably practicable to ensure that notice of the application is given to—

(a) the child's parents;

(b) any person who is not a parent of his but who has parental responsibility for him;

(c) any other person caring for the child;

(d) any person named in a child arrangements order as a person with whom the child is to spend time or otherwise have contact;

(e) any person who is allowed to have contact with the child by virtue of an order under section 34; and

(f) the child,

before the hearing of the application.

(12) Rules of court may make provision as to the circumstances in which—

(a) any of the persons mentioned in subsection (11); or

(b) such other person as may be specified in the rules,

may apply to the court for a child assessment order to be varied or discharged.

(13) In this section "authorised person" means a person who is an authorised person for the purposes of section 31."

10. The child assessment order falls within the scheme of duties and powers conferred by Parts IV and V of the Act:

Under Part V

(1) The duty of a local authority under s.47 to make enquiries necessary to enable it to decide whether to take action to safeguard or promote a child's welfare where it has reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm.

(2) The power of the court under s.43 to make a child assessment order where the local authority has reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm.

(3) The power of the police under s.46 to remove a child in an emergency where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm.

(4) The power of the court under s.44 to make an emergency protection order where there is reasonable cause to believe that the child is likely to suffer significant harm if he is not removed.

Under Part IV

(5) The power of the court under s.38 to make an interim care or supervision order where there are reasonable grounds for believing that the child is suffering or likely to suffer significant harm.

(6) The power of the court under s.31 to make a care or supervision order where the child is suffering or likely to suffer significant harm.

11. Each of the measures is in very frequent use, except for the child assessment order. Despite being on the statute book for 30 years, it is seldom encountered. There is no reported case directly concerning the power, and counsel have found only three references to orders having been made in the course of proceedings that were reported for other reasons:

(1) *Re C* [2009] EWMC 1 (FPC) at [8], a neglect/special needs case where a child assessment order made by magistrates was not complied with, leading to the child's removal within days;

(2) *An NHS Trust v A* [2014] EWHC 1135 (Fam) at [8], where an application had been made for scientific testing of a 12-year-old child whose parents were HIV positive: the application was withdrawn and the child was made a ward of court;

(3) *DAM (Children)* [2018] EWCA Civ 386 at [22], where a child assessment order had been made in respect of children who were being withheld from school by a parent thought to be HIV positive: the order for scientific testing was not complied with and care proceedings were issued within days.

12. There has also been occasional reference in authority to s.43 in order to illustrate the principle of proportionality and to draw attention to the graduated thresholds that must be crossed for each of type of intervention:

(1) *X Council v B and others (Emergency Protection Orders)* [2004] EWHC 2015, [2005] 1 FLR 341 at [43], where Munby J gives the making of a s.43 child

assessment order, rather than an EPO, as an example of the court applying the least interventionist approach.

(2) *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, [1996] 2 WLR 8, [1996] 1 FLR 80, where Lord Nicholls considered whether suspicion is sufficient to satisfy the threshold criteria under s.31:

> "90. There are several indications in the Act that when considering the threshold conditions the court is to apply the ordinary approach of founding its conclusion on facts, and that nothing else will do. The first pointer is the difference in the statutory language when dealing with earlier stages in the procedures which may culminate in a care order. Under Part V of the Act a local authority are under a duty to investigate where they have 'reasonable cause to suspect' that a child is suffering or likely to suffer harm. The court may make a child assessment order if satisfied that the applicant has 'reasonable cause to suspect' that the child is suffering or likely to suffer harm…"

(3) *Re B (Children)* [2008] UKHL 35, [2008] 2 FLR 141 where Baroness Hale referred to this passage and said at [39]:

> "He found several indications in the Act that this, the ordinary approach, was to be applied. First, when dealing with investigations and child assessment orders, the Act uses the term 'reasonable cause to suspect (ss 47(1)(b) and 43(1)(a)), and when dealing with emergency protection orders, police protection and interim care orders, it uses the term 'reasonable cause to believe' (ss 44(1)(a), 46(1) and 38(2)), that the child is suffering or likely to suffer significant harm. This is the sensible approach to child protection before the stage of a final order is reached. But the language of section 31(2) is different: the court must be 'satisfied… that the child… is suffering, or is likely to suffer, significant harm;…' 'This is the language of proof, not suspicion, however reasonably based (p.590H).

Apart from one other passing reference to s.43(8) in a recent decision about s.38, to which I refer below, that is all.

13. Guidance published in 1991 at the time the Children Act came into force (The Children Act 1989, Guidance and Regulations, Volume 1, Court Orders) gave the new child assessment order equal prominence with emergency protection orders and police powers of protection. The guidance on child assessment orders ran to 21 paragraphs, including:

> "4.4 The child assessment order is emphatically not for emergencies. It is a lesser, heavily court-controlled order dealing with the narrow issue of examination or assessment of the child in specific circumstances of non-cooperation by the

> parents and lack of evidence of the need for a different type of order or other action.
>
> …
>
> 4.6 … Its purpose is to allow the local authority or authorised person to ascertain enough about the state of the child's health or development or the way in which he has been treated to decide what further action, if any, is required. …
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> …
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> 4.8 The principle conditions are very specific. The order is for cases where there are suspicions, but no firm evidence, of actual or likely significant harm in circumstances which do not constitute an emergency; the applicant considers that a decisive step to obtain an assessment is needed to show whether the concern is well founded or further action is not required, and that informal arrangements to have such an assessment carried out have failed. …
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> 4.9 A child assessment order will usually be most appropriate where the harm to the child is long-term and cumulative rather than sudden and severe. …
>
> …
>
> 4.23 A number of important practice issues arise. One is that as far as possible the child assessment order should be used sparingly. Although a lesser order than others in Parts IV and V of the Act, it still represents substantial intervention in the upbringing of the child and could lead to yet further intervention. It should be contemplated only where there is reason for serious concern for the child. … Any proposal to apply for a child assessment order and the arrangements to be discussed with the court for the assessment should be considered at a case conference convened under local child protection procedures. …"

So, while the architects of the Children Act envisaged the order being used sparingly, they cannot have envisaged its present Cinderella status.

14. The statutory guidance has most recently been replaced in April 2014 ("Volume 1: statutory guidance about court orders and the roles of the police and the Children and Family Court Advisory and Support Service"), which is along the same lines:

> "**Child Assessment Orders**
>
> 5. A child assessment order enables an assessment of the child's health or development, or of the way in which s/he has been treated, to be carried out where significant harm is suspected. Its use is most relevant in circumstances where the

> child is not thought to be at immediate risk, to the extent that removal from his/her parents' care is required, but where parents have refused to cooperate with attempts to assess the child. This may be where the suspected harm to the child appears to be longer-term and cumulative rather than sudden and severe.
>
> …
>
> 7. A child assessment order may be appropriate where insufficient information is available to justify an application for a care or supervision order and an assessment is needed to help establish basic facts about the child's condition.
>
> 8. Before making an application to the court, the local authority should always make enquiries into the child's circumstances. The nature of the case will dictate the manner in which enquiries should be carried out and the degree of urgency. If possible, before an application is made, the child should recently have been seen by someone who is competent to form a judgement about the child's welfare and development. When considering an application for any order, the court will expect to be given details of the enquiries made including, in particular, details of the extent to which, if at all, the enquiries have been frustrated by the failure or refusal of the parents to co-operate with them."

And several other paragraphs follow.

The present case

15. Faced with the parents' refusal to allow an assessment of the children by an Intervention Provider, the local authority responded with the present application. It provided supporting evidence in two statements by the social worker, setting out the history and the local authority's concerns with exemplary clarity. It gave full details of how the assessment would be carried out, and identified these questions as being relevant:

    (1) Have the children been impacted by any direct or indirect exposure to their father's violent extreme ideology?

    (2) What is the children's understanding of their father's offences and does their understanding pose any cause for concern?

    (3) What is the children's understanding of their faith and are there any concerns or areas that need support?

    (4) Are the children resilient enough in their understanding of their faith to minimise the risk of future radicalisation?

    (5) Anything else the Invention Provider deems necessary to explore.

Details about various Intervention Providers were given, and the local authority's preferred choice was identified.

16. The parents were given the opportunity to file evidence, but they chose not to do so.

17. So, why did the application fail? And why, even in a case of some sensitivity, did this relatively limited issue turn into this battle royal, and all at public expense? The judge was faced with no fewer than ten counsel divided into two camps and he was at the outset presented with a distracting legal argument that asserted that he had no power to make the order at all. It is to that argument (which he accepted) that I now turn.

The judge's conclusion on jurisdiction

18. The challenge to the court's powers was pursued by both parents before the judge. However, on the appeal neither the mother (following a change of leading counsel) nor the children sought to uphold the judge's decision in this respect and it was left to Mr Twomey QC and Mr Barnes to pursue it. The argument runs like this. The effect of ss. (1)(a) and (b) is that the local authority must have reasonable cause to suspect harm or likelihood of harm and the assessment must be required to enable it to determine whether harm or likelihood of harm exists. The local authority must, they say, demonstrate that it has "a suspicion (and no more)". In this case, the local authority could only have decided to place the children on child protection plans and to activate the PLO process if it had already judged there to be the existence or likelihood of harm: Working Together to Safeguard Children 2018, page 45. Its state of mind was therefore one of belief, not suspicion, and accordingly the test under (a) is not satisfied. Nor, for the same reason, can the local authority meet the test under (b) because the assessment is not *required* to enable it to determine whether or not the children are suffering or likely to suffer significant harm: it already believes that they are. Even though as a matter of normal statutory interpretation, the greater includes the lesser (so here belief includes suspicion), that approach does not apply as this provision concerns the state of mind of the local authority.

19. In oral argument, Mr Twomey asserted that as a matter of law the consequence of any one of local authority's actions in calling the child protection conference, making child protection plans, or initiating the PLO process was to make an order under s.43 unavailable to the local authority and the court. It would not be open to the case conference to decide that an application under s.43 was an appropriate course to safeguard the children. Put another way, if the local authority wanted to seek an order under s.43, it was obliged to go to court before calling a child protection conference. Once it had reached the stage of 'belief' the only options open to it were (a) doing nothing, (b) continuing to seek the parents' consent, or (c) issuing care proceedings. These outcomes are, he said, mandated by the plain words of ss.(1), but he was unable to suggest any good sense to this interpretation, either in terms of child welfare or good social work practice. In particular, he was unable to rebut the local authority's argument that it would be fundamentally contrary to good social work practice and to statutory guidance for a local authority to apply for a court order before seeking to work with the parents by less interventionist means.

20. The judge set out these and other arguments at some length, before stating his conclusion in a single paragraph:

> "36. Generally, as a matter of construction, the greater includes the lesser. In looking at the Act however, there is a gradual proportionate and cumulative incline in what is required to permit interference in a family's life by the state. Section 43 is founded on a reasonable cause to suspect. Section 38(2) is founded on reasonable grounds for believing. Section 31(2) is founded on the court being satisfied. Each tier has available to it a raft of supporting powers proportionate to the level of inquiry and a possible conclusion. For that reason, it seems to me that the submissions made in respect of this point (the lesser not being included in the greater) are well founded, since I examining the local authority's state of mind."

21. With respect to the judge, I consider that he was wrong to reach this conclusion for these reasons:

(1) Section 43 must be read in the context of the legislation as a whole. As Mr Samuels QC and Mr Lefteri submit, the scheme of the Act points to the child assessment order as forming part of the initial stages of investigation and assessment. As Ms Howe QC and Ms Chaudhry say, the purpose of the section is to enable proper assessment to establish whether there is a need and justification for any further action. This is also the effect of the statutory guidance quoted above.

(2) The condition at ss.(1)(a) provides a relatively low threshold of reasonable suspicion. This is a threshold to be crossed, not a target to be hit. The normal rule of statutory construction applies to this provision as to any other. The reason given for departing from it, namely that the court is examining the local authority's state of mind, has no logical foundation.

(3) The only restriction on the use of s.43 where the threshold is crossed is that provided by ss.(4) which prevents the making of a child assessment order when an emergency protection order should instead be made.

(4) The condition in ss.(1)(b) plainly exists to ensure that an assessment can only be ordered if it is required, i.e. necessary. However, a determination of whether a child is suffering or likely to suffer harm is not confined to a 'yes' or 'no' answer. The assessment is designed to provide a range of information, identifying not only whether harm may exist, but also describing its nature and extent. Nothing less will allow the local authority to understand the child's situation and determine how best to proceed. The narrow interpretation of the provision accepted by the judge overlooks the essential qualitative character of the assessment process. It also fails to connect with his own description of the underlying question as being "under what circumstances might the parents' religious views and activities result in harm to the children's physical and emotional health and wellbeing?" That was the question to which the assessment would be directed.

(5) The suggested interpretation does not provide "the sensible approach to child protection" spoken of by Baroness Hale. It conflicts with good social work practice and needlessly limits the flexibility with which the powers under the

> Act should be exercised. It is clear from the guidance that it is not the intention of the legislation to push the local authority into making an application under Part IV in order to obtain an assessment. That might then lead to substantial litigation and an application for the proceedings to be withdrawn, as happened in the radicalisation cases *A Local Authority v A Mother and others* [2017] EWHC 3741 (Fam) and *In re A and others (Children)(Withdrawal of Care Proceedings: Costs)* [2018] EWHC 1841 Fam; [2018] 4 WLR 146. This would fly in the face of the principle of proportionality and if it were correct it would effectively render s.43 redundant.

22. For these reasons I would unhesitatingly conclude that as a matter of law the court had the power to make a child assessment order in this case.

The judge's conclusion on the merits

23. I turn then to the more meaningful question facing the judge, namely whether or not to make the order on the facts. At the outset of the judgment, he rightly identified the importance of freedom of thought and religion, and identified the underlying question in the way just described (see paragraph 21(4) above). He accepted the difficulty of evaluating whether the father's views had changed and he said that he deliberately stood back and considered the overall picture. He then considered the matter more fully, in case he was wrong about the extent of his powers:

> "37. Even if I were wrong about that, considering the history of this case from 2015 to date, [it] is such that I would not grant the order on the current state of the evidence. Even on a superficial appraisal of what was known or could have easily been ascertained in 2015, or later, it might be considered by a reasonable citizen that it was completely reasonable to be at least be suspicious that the children, or some of them, had been caused or were likely to suffer significant harm, but 4 uneventful years have now elapsed."

An indication of what the judge had in mind is given by his earlier reference to submissions made by counsel then representing the mother:

> "33. Ms Fottrell QC makes some important additional points. The burden of proof in respect of the threshold falls on the local authority. The court is asked to have regard to the context of the case, whereby the local authority contends that the threshold has been met in circumstances where there is no evidence in support of its case at the date of issue and where, on the local authority's case, the children are doing very well."

The judge was critical of the approach taken by the local authority:

> "35. The lack of any current evidential basis to justify its stance by the local authority I consider significant, it being unable to form the foundation for any form of forensic analysis. The generic manner in which the local authority has put its case is illuminating:

> "The children are practicing Muslims and there has been no exploration of whether their understanding of their faith or their worldview in general has been impacted by their fathers view.""

I note that this extract from the local authority's initial position statement continued:

> "It is not something that can be meaningfully explored without input from a professional who understands Islamic ideology. Without this work being completed, there is a grey area around whether any of the children are resilient to an extreme message which is of greater significance in this case due to their Father's offending."

At all events, the judge continued:

> 40. By 2015 the core facts were known, and in the public arena. Surprisingly I have no evidence of the degree of information sharing between the police and the local authority. … The authority today submit that only now is more detailed information available which puts the father's activities in a clearer perspective. That may be so, but the information could and should have been obtained in 2015… Then was time to act, to assess the risk, not years down the line when the father is about to be, or was in fact, released from prison.
>
> 41. The authority even now has failed to gather the vital core information from the Probation Service, or from prison interventions to inform the court of the father's perspectives, or on the other hand from Dr [A] (on the subject children), who has been guiding them in respect of their faith. Such assessment is has occurred concludes:
>
> > …"It is unknown if the children were impacted by any direct exposure to violent extremism and if this has impacted their own views, and how this might influence their sense of identity and decision making process in the future."
>
> I do not consider that that satisfies the test. It is not cured by a lack of questioning enquiry in 2015, or righted by the passage of time, and quite extensive involvement in this family, or indeed by current evidence which is or should have been available. Having regard to the children's welfare nor is it now a proportionate response.
>
> 42. For all these reasons I refuse the application."

24. The judge then went on to consider the views of the older children:

> "43. Finally, there is the additional point of s.43(8). Four of the 5 children, separately represented, who are competent, all object, that is they say they do not wish to comply with the assessment proposed. Whilst the Court should not be deterred from making an order because a child "objects", those objections, especially as they have a statutory basis, require evaluation. It is argued that "an attempt should be made". Here the children have historically cooperated with the assessments which have been carried out. They have expressed their views.
>
> 44. Dealing with that point, there is no current available evidence of radicalisation or more pertinently that they have been affected by their father's views and perspectives. An assessment is sought when the primary evidence (about the father) as I have already recorded, is absent … Although not determinative, if I make the order they will no longer be represented. They are respectful, law abiding citizens, they may be potentially placed in a situation which is unfair.
>
> 45. On the current state of the evidence such compulsion seems heavy handed and to my mind disproportionate. Whilst the guiding light of protecting each child (and society at large) is crucial, there must be something other than the now historic foundation to justify this application and limiting their protected position and rights. A delay of 4 years when the authority had full knowledge of the core issues, and were involved, is a significant impediment to there being a rational connection to the proper objective of protecting the children on the one hand but, undermined by the already extensive inquiry which did not represent compulsory intervention.
>
> 46. If all that is so, endeavouring to compel the 4 older children to participate into a further enquiry, will more likely result in no better information being now available in respect of each of them."

In refusing permission to appeal, the judge said that in the very unusual circumstances it would be "overbearing" to make an order.

25. As to the position of the Guardian:

> "47. Self evidently in refusing the application I decide against the opinion and submissions of the Guardian, but I have done so largely because of the lack of current evidence and analysis on the part of the authority. Although not part of my decision, I think there may also have been some confusion by him as to the test to be applied (reasonable cause to suspect/reasonable cause to believe)."

26. The judge then concluded:

> "48. The evidence and legal principle in this, as in other such cases, is complex and has to be considered on a case by case basis. Applying well established principles to the evidence that has been available to the Court, I am satisfied that the authority in this case has not satisfied the provisions of s.43.
>
> 49. Once the absent evidence has been obtained, even at this belated stage, further urgent decision making will be required about whether or not it is appropriate that there needs to be intervention and of what sort. The approach of the family will obviously be an important part of that analysis."

27. Because the judge did not express himself with reference to the terms of the statute, it is not easy to be precise about his reasons for refusing the local authority's application, but they would seem to be these:

    (1) He had no power (as above).

    (2) It is too late. There were probably reasonable grounds for suspicion in 2015, and the local authority should have acted then. After "4 uneventful years" now is not the time to assess the risk.

    (3) (Though not said in terms) the local authority does not have reasonable grounds for suspicion. The application needed more than a "historic" foundation. The failure to gather available evidence about the father from the probation and prison service means that there is no current evidence of the children having been affected by their father's views.

    (4) Alternatively, and for the same reasons, the assessment is not required.

    (5) In any case, an order would be disproportionate.

    (6) It is unlikely that the older children will participate in an assessment. Endeavouring to compel them to be assessed would be heavy-handed, disproportionate and possibly unfair.

    (7) Given the children's stance, an assessment would not be likely to produce better information than is presently available.

    (8) The local authority can think again once it has more information.

28. The arguments presented by the Guardian and the local authority on this aspect of the judge's decision are as follows:

    (1) The judge's fundamental error of principle about his powers must have affected his approach to the merits. The decision cannot stand and must be reconsidered in its entirety.

    (2) The court placed too much weight on the local authority's decision not to take action in 2015. It was not able to investigate the reasons for that, and the focus should have been on whether the statutory test was satisfied in 2019, not whether action should have been taken sooner. Had the judge's focus been

correct he would have seen that there were ample grounds for the order. As it was, his dissatisfaction with the local authority invaded his overall assessment.

(3) When considering proportionality, the court failed to take account of the fact that intervention under s.43 was the least draconian intervention, and it failed to balance the risks flowing from non-intervention. This was not an application under Part IV and it was overstating the position to describe the assessment as 'heavy handed' or 'disproportionate'. The court ignored the risks of the children being caught up in the father's radicalisation and any future unlawful activities. The alternative course is for the local authority to take no further steps, leaving the family unassessed, unsupported and unprotected once the father is released again.

(4) The court gave no proper weight to factors supporting the making of the order:

(a) The father's release.

(b) The mother's hardened stance.

(c) The increasing lack of co-operation on the part of both parents.

These were important factors that explained why the local authority had growing concerns about this family, but there is little or no reference to them in the judgment.

(5) The court placed too much weight on gaps in the evidence when the assessment was designed to fill one of these gaps. Although further information could have been obtained, this was not a final hearing of s.31 proceedings and the court was not in a position to know what information the Probation Service would be willing to give the local authority. The whole purpose of the application was to gather further information to inform the local authority's assessment and analysis. If the parents had wanted to put forward positive information from the Probation Service or Dr A they could have done so. The question for the court was whether the information provided by the local authority satisfied the statutory test under s.43. The fact that other information could have been provided (by any party) could not be determinative, given the very early stage of the court process.

(6) The court was wrong to rely on the lack of evidence of actual harm where the father's history, the children's previous involvement in his activities and the mother's minimisation clearly raised the risk of radicalisation. Whilst further information may come to light about the father's current thinking, e.g. from the Probation Service, the judge himself acknowledged there would always be a question mark over the reliability of such information, given it would be self-reported. The father's long-standing involvement in extremist ideology, his previous involvement of the children and the mother's recent minimisation created a clear risk of radicalisation sufficient to warrant further assessment.

(7) To the extent that the court relied on the children's views, that did not provide a reason for refusing to make an order. As the judge acknowledged, these were

children who had historically cooperated with assessments, so there was every possibility that, once the order had been made, they would accept that decision.

(8) In any event, s.43(8) could not provide a reason for refusing to make an order with respect to the youngest child.

(9) The court gave no sufficient reason for departing from the view of the Guardian. The reference to a misunderstanding on the Guardian's part is not understood, despite a request for clarification, unless it refers to the Guardian differing from the judge on the court's powers.

29. In response the parents and the older children argue that the judge undertook a careful assessment of all relevant matters that took proper account of the views of the children and should be upheld. The judge mentioned all the developments in the case and was entitled to note the actual evidence of the children's positive presentation. In a submission that is scarcely consistent with his submissions in relation to jurisdiction, Mr Twomey argued on behalf of the father that the local authority did not have grounds for reasonable suspicion but rather unsubstantiated speculation. On behalf of the mother it is said that she is entirely within her rights to resist further intervention by the local authority. She has cooperated with investigations that support only one conclusion, namely that she is providing good care and the children are developing appropriately and achieving well in education. The mother's position is informed by the views of the children and in the context of the history it is reasonable and justified. By relying on the absence of evidence, the local authority is reversing the burden of proof. The judge was right to dismiss the application

30. With regard to the children's views, the making of the order would leave the children in a vulnerable position as their access to legal representation would come to an end. As to their age and competence, reference is made to *Re Q (Child: Interim Care Order: Jurisdiction)* [2019] 2 WLR 1161. In that case, Gwynneth Knowles J considered the jurisdiction to make an interim care order in respect of a 17-year old child. In the course of a detailed review, she noted the recognition throughout the Children Act of the developing autonomy of older children. She referred to child assessment orders in *obiter* remarks:

> "21. Emergency public law intervention is not however confined to those below the age of seventeen (or sixteen if married). A child assessment order may be made with respect to a child, that is a young person under the age of 18, but if the child is of sufficient understanding s/he may refuse to submit to a medical or psychiatric or other assessment: see section 43(7). In practice, the latter provision means that such an order is unlikely to be made with respect to an older child who is "Gillick competent"."

31. Mr Twomey invites us to dismiss the appeal, but if it is allowed, he argues that the decision should be remitted.

32. This aspect of the appeal is from an evaluative decision of a trial judge and it can only succeed if the decision is one that the judge could not reasonably have reached on the

evidence before him. That is a high hurdle, but I conclude that it has been cleared in this case for these reasons:

(1) The judge's approach to the two questions that faced him was inherently inconsistent. Having decided the question of law on the supposition that the local authority was overprovided with information, he based his evaluative decision on the conclusion that it had insufficient evidence for its concerns.

(2) The circumstances of this case present a clear basis for serious concern about the welfare of these children, which their good progress alone could not dispel. Risk of this kind can never be regarded as "historic" until it has been positively shown not to exist, but the judge gave little or no weight to the obvious risks inherent in the father's long-held views, which were only magnified by the family's more recent withdrawal of cooperation. The alignment of position between the parents was a further troubling development.

(3) In contrast the judge gave disproportionate weight to his view of the local authority's approach. In effect he substituted for the requirement for reasonable suspicion a test of whether the local authority had acted reasonably. And even if it was appropriate to criticise the decision to await the father's release before refreshing its assessment (and for my part I can see no reason to regard that approach as unreasonable) the court was obliged to deal with the case on the facts as they were, not as they might have been.

(4) The judge was plainly unimpressed by the inter-agency working in this case. He considered that information about the father's current mindset was necessary and should have been obtained before assessing the children. But even if dependable information about that could be obtained from other agencies, it would only fill in part of the picture and an assessment of the children was likely to be necessary in any event. The argument that an assessment should not be ordered because there are gaps in the evidence is circular.

(5) In any event, the judge appears to have accepted that all the information was needed (see paragraph 49 of his judgment). If he considered more information about the father was a precondition to an assessment of the children, he could have given directions for that information to be obtained. The absence of evidence from the parents is also something that should have been noted. Having taken the position that the judge did, the appropriate response was not to dismiss the application but to adjourn it.

(6) The level of past cooperation by the mother or children could not be of much significance if they have withdrawn cooperation before the local authority has the information that it needs to plan its child protection strategy.

(7) The proportionality exercise in this case went awry. The description of the assessment proposal as heavy-handed, disproportionate and overbearing cannot be sustained. High-performing, law-abiding children are not immune from the insidious lure of extremism. The proposed assessment was by no stretch of the imagination disproportionate to the risk in this case. The submission that the children would be left in a vulnerable position without legal representation or that they might be placed in a situation that was unfair is a misreading of the

nature of the child protection and litigation processes. Social workers and intervention providers are not threats from whom the children must be protected, but public servants who are seeking to protect these children by means of the least intrusive intervention. The children's committed lawyers (both those they instruct directly and those representing the Children's Guardian) will surely not become unavailable to them at the moment the order is made, in the face of an imminent brief assessment.

(8) Even if the reasons for refusing an order in the case of the older children could be sustained on the basis of their views, that would not warrant a refusal to make an order with respect to the youngest child.

33. A yet further argument was presented by Mr Twomey. He suggests that s.43 does not permit an assessment of the children's religious faith as that is not a facet of their health, development or treatment by their parents. That argument is self-evidently unsound. What is being assessed is not the children's religious faith but their vulnerability and resilience in the face of extremist propaganda masquerading as religious faith.

34. I would however hold that the judge was right to find that the opposition of the older children was not an obstacle to the making of an order. In this respect, his approach is to be preferred to the *dicta* in *Re Q* (see paragraph 30 above). As can be seen from the statutory guidance, it is not strictly correct to characterise a child assessment order as an emergency intervention. Nor as a matter of principle is it unlikely that a child assessment order will be made with respect to a competent child who may refuse to submit to assessment: it will depend on the circumstances.

35. Drawing matters together, a child assessment order allows for a brief, focussed assessment of the state of a child's health or development, or the way in which he or she has been treated, where that is required to enable the local authority to determine whether or not the child is suffering, or is likely to suffer, significant harm and to establish whether there is a need and justification for any further action. The purpose of the assessment is to provide a range of information, identifying not only whether harm may exist, but also describing its nature and extent. It is part of the process of gathering information so that any child protection measures can be appropriately calibrated. It is the least interventionist of the court's child protection powers and is designed to enable information that cannot be obtained by other means to be gathered without the need to remove the child from home. It is not an emergency power and it may be particularly apt where the suspected harm to the child may be longer-term and cumulative rather than sudden and severe. The order is compulsory in relation to parents but not for a competent child who refuses to participate. The views of an older child are an important consideration when a decision is taken about making an order, but it cannot be said that opposition makes an order unlikely: it depends on the facts of the case and the nature of the risk and the assessment.

36. Seen in this light, the circumstances of this case might be seen as a paradigm example of a case for which s.43 was intended. More than that, I would conclude that the evidence so clearly pointed to the making of a child assessment order that the judge's contrary conclusion cannot stand. The outcome, by which the local authority was told to go away and think again after a process that had already hung over the family for a full year since the father's release, fails to address obvious risks that now require

careful assessment. The only remaining way in which the assessment can be made without the issuing of care proceedings is by means of a child assessment order. There is no purpose in remitting the decision, and I would therefore allow the appeal and make the child assessment order in the terms now helpfully drawn up by the parties.

37. Finally, we would like to address the young people at centre of this case. We know that you will give the same serious attention to this order and the reasons for it that you showed when three of you, one now being an adult, attended the appeal hearing. Our order has only one purpose: to help to keep you safe. We know that the order is not what you wanted, but we believe that it is the very best way of resolving the present situation and of allowing you to get back to the things that you have been doing so well. Three of you have the right to say no, but we hope that you will allow the assessment to take place, as it will do for the youngest one of you, and that you will all do your best.

Lord Justice Newey

38. I agree.

Lord Justice Moylan

39. I also agree.

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