Neutral Citation Number: [2010] EWCA Civ 1365
Case No: B4/2010/2115/FAFMF

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Slough County Court
His Honour Judge Hamilton
SL10P00142

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 02/12/2010

Before:

SIR NICHOLAS WALL THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE LAWS
and
LORD JUSTICE TOULSON

- -

Between :

Re K (Children)

- -

Catherine Hirst (instructed by Clifton Ingram LLP) for the Appellant
Caroline Willbourne (instructed by Atherton Godfrey) for the Respondent

Hearing dates: 10 November 2010

- -

Judgment

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Sir Nicholas Wall P :

1. With permission granted by Wilson LJ on paper on 7 October 2010, a mother of children aged 7 and 3 appeals against an order in private law family proceedings under the Children Act 1989 (the Act) made by His Honour Judge Donald Hamilton sitting in the Slough County Court on 12 August 2010. The Judge was hearing an appeal by the children's father against an order made by District Judge Jones on 13 May 2010. By paragraphs 1 and 2 of her order, the District Judge had dismissed the father's application for contact to the two children and had directed, under section 91(14) of the Act that no further applications were to be made by the father in relation to the children for a period of 1 year from the date of the order.

2. The Judge set aside those two paragraphs, but did so, as paragraph 2 of his order states (in somewhat Delphic fashion): "on the ground only of the circumstances of this (second) application for a contact order as described by counsel for (the father)". What this means, in real terms, was that the Judge was allowing the father's application for contact to proceed. He thus went on, in paragraph 2 of his order, to list the father's application for contact for "a fact finding hearing before a Circuit Judge at Reading County Court" in December of this year.

3. In paragraph 54 of his judgment, the Judge said in terms: "On the material before the District Judge I am quite satisfied that her order was properly reached and is wholly unappealable". However, on the same material, he went on to allow the appeal, stating in paragraph 60 of his judgment:

   "My decision to allow the appeal, therefore, may be said to fall outside the proper scope of the rules which apply to this appeal but my paramount consideration has to be the welfare of these two young children… I propose to allow the appeal for the sake of the children's welfare, to give them a last and final chance of growing up with a real knowledge of their father, and, if it be the case that he is not the demon who he fears may be presented to them, an opportunity of knowing that."

4. This being a second appeal, the Judge's formulation led Wilson LJ to identify an important point of principle or practice, namely:

   "….whether, even though on ordinary principles the appeal against the district judge's discretionary decision fell to be dismissed, the welfare of the children was the circuit judge's paramount consideration and entitled him instead to dispose of the appeal in accordance with his view of where their welfare lay (emphasis supplied) …."

The facts

5. I can take these very shortly. The parents are married. Late in 2008, the father returned from a visit to Afghanistan to find that his wife and children had left home. He did not know where they were, and issued proceedings in his local court on 12 December 2008. Following his discovery of their whereabouts, the father issued an application for contact and the proceedings were transferred to the Slough County Court on 13 January 2009.

6. On 6 May 2009 there was an order that there should be no interim contact, and in the light of allegations of domestic abuse raised by the children's mother, a fact finding hearing was fixed for 9 and 10 July 2009.

7. On 25 June 2009, the father, though solicitors, suggested that the matter should be put back to allow him to investigate the possibility or reaching some agreement through a process of mediation within the family. On 1 July 2009 the mother, though solicitors made it quite clear that the father could do as he wished, but that her position would not change. The father thereupon sought permission to withdraw his application, and the finding of fact hearing was vacated.

8. On 2 February 2010 the father issued a fresh application for a contact order. He was ordered by the district judge to file and serve a statement setting out in detail his reasons for his previous withdrawal of his application and why a further application should

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proceed. It was that application for contact which came before the District Judge on 13 May 2010.

The judgment of the District Judge

9. It is plain from the judgment of the district judge that, to put the matter colloquially, she took a dim view of the father's conduct. She did not hear oral evidence, and whilst stating in terms that she was not making - indeed could not properly make - any findings of fact, concluded in paragraph 11 of her judgment: -

   "At this stage, I say that this application should not proceed, and as I say, I do not think that it has any reasonable prospect of success, and I think it is, effectively, it is an abuse of the mother to allow it to proceed at this stage. It is grossly unacceptable to behave in this way, and then effectively to come back to court as it nothing had happened, as I have already said, and I am repeating myself, with no adequate explanation at all, no explanation that apparently would satisfy anybody and certainly is not going to satisfy a court. It is not just acceptable in any way. "

10. For my part, and for the purposes of this appeal, I am content to assume that the district judge was right when she said that the father had not given a satisfactory explanation for his conduct, and moreover, that his litigation conduct was unacceptable. It does not follow, however, in my judgment that his application for contact had no reasonable prospect of success, not least because contact involves the paramount welfare of children, and the district judge had heard no oral evidence.

11. The District Judge then went on, following oral argument, and not as part of her judgment, to impose a one year bar under section 91(14) of the Act on further applications by the father. Mrs. Hirst, for the mother, accepts both that there was no formal written application under section 91(14) before the court and that the period of 1 year was, in effect, unreasoned.

The father's appeal

12. The father appealed to the judge. He raised some 16 grounds of appeal, which the judge dealt with seriatim, finding no substance in any of them. I do not propose to repeat that exercise in this judgment. I have already summarised the judge's conclusions in paragraph 3 above.

Discussion

13. A great deal of erudition was on display in both the skeleton arguments placed before the court, but in my judgment, this appeal turns on a narrow point neatly articulated, if I may say so, by my Lord, Laws LJ in argument. The Judge set aside paragraphs 1 and 2 of the District Judge's order. It must follow that he thought the district judge had been wrong to make those orders. There is, accordingly, an inherent contradiction in the two statements which I have cited from the judgment in paragraph 3 above.

14. In my judgment, Miss Wilbourne encapsulates the point neatly in paragraphs d and e of her respondent's notice filed on the father's behalf:

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d. The District Judge was, in particular, plainly wrong to make an order that would have the effect of there being no contact in circumstances where the mother had not at that stage demonstrated why there were compelling reasons for depriving the children of a relationship with their father;

e. The District Judge was plainly wrong to impose the section 91(14) bar where it was not necessary …

15. The Judge was hearing an appeal from the District Judge. If he thought the District Judge's order wrong, it was his duty to say so. In my judgment, the District Judge's order was plainly wrong. She had, in the Judge's words, deprived the children of "a last and final chance of growing up with a real knowledge of their father" without hearing oral evidence, contrary to authority and in what, in my judgment, represented a plain breach of the father's ECHR Article 6 rights. That, in my judgment, was plainly wrong, and the judge should have said so.

16. There will, of course, be appeals against discretionary decisions of District Judges in which the circuit judge may disagree with the District Judge's exercise of discretion but nonetheless respect it and dismiss the appeal because the exercise of discretion by the District Judge falls within the well established ambit of reasonable disagreement and is not plainly wrong. That is not, however, this case. Here, the judge plainly thought the orders made by the district judge were plainly wrong. In my judgment, he should have said so, however much he sympathised with her.

17. In these circumstances, it does not seem to me that the potential dilemma identified by Wilson LJ comes into play. His premise, which I have italicised in paragraph 4 above does not arise on the facts of the case.

18. It is, of course, correct that an experienced tribunal hearing a family case enjoys a broad discretion as to how that case proceeds – see *Re B (minors) (application for contact)* [1994] 2 FLR 1 per Butler-Sloss LJ. At the same time, however, the hearing must be ECHR Article 6 compliant, and the process fair. Equally, where the parties are represented, it is not strictly necessary for there to be a formal application under section 91(14) of the Act in place before an order under that sub-section can be made: - see the decision of this court in *Re C (a child)* [2009] EWCA Civ 674. Neither proposition seems to me to be relevant here, since – as the judge recognised - it was plainly wrong for the district judge to dismiss the father's application for contact in limine as she did

19. For these reasons, I would dismiss the appeal for the reasons advanced in the respondent's notice

Laws LJ:

20. I agree.

Toulson LJ

21. I also agree.

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