Neutral Citation Number: [2021] EWCA Civ 1221

Case No: B4/2021/1152

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
HHJ Wood
NE21C00257

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/08/2021

Before:

LADY JUSTICE MACUR
LORD JUSTICE BEAN
and
LADY JUSTICE KING

- -

Between:

The Mother	**Appellant**
- and -	
Northumberland County Council	**1st Respondent**
B (Children)	**2nd Respondent**

- -
- -

Mr Martin Todd (Instructed by **Wollens**) for the **Appellant**
Mr Frankie Shama (Instructed by **Northumberland County Council)** for the **Local Authority**
Ms Susan Boothroyd (Instructed by **Richard Reed Solicitors**) for **B (Children)**

Hearing date: 4 August 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be on Friday 13 August 2021 at 10am.

Macur LJ:

Introduction:

1. The Appellant is the mother of B, a female child who is nearly 3 and C, a male child who is nearly 5 months old. B and C are subject to care proceedings initiated on 4 May 2021 and are presently in foster care. B and C are represented by their Children's Guardian. C's father is party to the proceedings. This appeal is brought against the order of HHJ Wood, sitting as a judge of the High Court on 24 June 2021, which refused the mother's application for permission to dispense with the requirement for the local authority to give notice of the proceedings to 'S', the biological father of B in the circumstances I describe below.

2. FPR Practice Direction 12C – '*Service of Application in Certain Proceedings'* supplements FPR 2010 rule 12.8, in relation to the service of documents that must be served by the applicant and when in proceedings including those for a care and supervision order pursuant to section 31 of the Children Act 1989. FPR rule 12.3 specifies that the respondents to an application for a care or supervision order will be "every person whom the applicant believes to have parental responsibility for the child". FPR PD 12C, 3.1 provides that subject to 3.2 (the Court's direction that such notification is not required), the applicant must also serve 'every person whom the applicant believes to be a parent without parental responsibility for the child' with a copy of Form C6A (*Notice of proceedings/Hearings/Directions Appointment to Non-Parties*). That person may then seek to be joined as a party to the proceedings using the procedure set out in FPR Part 18 and PD18A, although there is no obligation upon them to do so.

Proceedings in the Court at first instance

3. In a witness statement served in support of her application the Appellant asserts that B was conceived during one of several incidents of non-consensual sexual intercourse and that S's reaction on becoming aware of the pregnancy was so abusive, aggressive, and threatening as to cause her to fear for her and B's physical safety if he is alerted to the proceedings. The Appellant says that S demanded that she have a termination or that he would kill the child. He said he did not want children. In a text message that he sent about this time he said that if anything was said to alert his wife to the situation that "you will see a very, very different side of me". In another text message he said, "Do whatever you want but keep me the hell out of it otherwise I will make it my life's job to fuck your life up". He then blocked the Appellant's telephone number and has played no part in B's life. The Appellant concludes her statement by saying: "It concerns me that if [S] was to become involved in [B's] life she would be in danger as he threatened her life before she was born and clearly has a lot to lose by his wife and family finding out what happened. I am also concerned about my safety given the sexual violence and threats of physical violence."

The Judgement under review

4. The judge accepted that the mother's evidence should be taken at face value for the purpose of determining her application. (at [10]). He observed that the mother's relationship with S arose in the context of her employment and that S was in a senior position to her. He described the circumstances of the non-consensual sexual intercourse as "plainly very nasty, very abusive behaviour of its type". (at [5] and [6]). The mother said that she had engineered her dismissal from her employment in 2018 to distance herself from S and that 'there is no evidence that she has ever come into contact with him since'. There was information from the police that revealed cautions in 2004 and 2008 for assault occasioning actual bodily harm and a public order offence respectively recorded against S. There may have been two child concern notifications in 2020, and reference to domestic abuse in 2011. He had recently undergone DBS checks in order to carry out work with contact to children or vulnerable adults. (at [9]).

5. The Judge proceeded on the basis that S "(at [12]" "has no parental responsibility…has no relationship with his daughter and the evidence is of intimidation, control and sexual exploitation." The Judge said he had been taken to leading authorities in relation to dispensing with service on a birth father, perhaps the most recent and most often cited one, that of MacDonald J in Re *A local authority v B (Dispensing with Service)* [2020] EWHC 2741, which he considered related in significant measure to cases involving adoption. He had been invited to regard the decision in *CD (Notice of care proceedings to father without PR)* [2017] EWFC 34 and *Re M (Notification of Step-parent Adoption)* [2014] EWHC 1128 as indicating a 'rights-based' approach. It had been submitted that S had no Article 8 or 6 rights, and on the balancing of risk to the mother and B of him being told as against his notification of the proceedings, the balance should fall squarely in favour of dispensing with service upon him. (at [12]).

6. The Judge referred to the factors identified by the Court in Re *A* and in particular the need for "(at [13]" "*rigour in analysing the risk and the gravity of the harm that is feared before taking, and I am using his words, this exceptional 'last resort' step*" denying S an opportunity to participate in the proceedings. This fell to be considered alongside the identified need "*for there to be strong countervailing factors that would prevail over notice to a birth father in such circumstances.*" (See *Re H, re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646.)

7. The Judge considered that the factual circumstances of the authorities to which he had been referred related to "really very significant violence and abuse over sustained periods of time". There was no 'corroboration' in this case other than the threats made via social media. The threats needed to be viewed in context. S would not be the first putative father to demand the pregnancy be terminated. The principal motivation appeared to be to ensure that his wife was not alerted. Nothing had occurred following the threats. S had made no attempt to contact the mother. The work relationship had ended. There had been no social contact, contrived or accidental since. There were 'significant measures' that could be put in place 'to protect'. (at [15] – [18])

8. The Judge also took into account B's article 8 rights and her welfare generally. B was living under a 'false prospectus' regarding her paternity, and one that was going to be 'increasingly difficult to maintain given that she would appear to be a child of mixed-race heritage'. A genetic assessment had not been ruled out. There could be placement applications outside the family. (at [14] and [19] – [21]).

9. The Judge concluded that:

> "22. *In weighing all these factors together, I am not satisfied that this is an exceptional case. I am not satisfied that the risk in this instance is of such an order that it cannot be managed, and appropriate measures put in place. In the circumstances, for the reasons I have endeavoured to give, I am satisfied that the application should be refused. What I want to add is this: clearly notification to S needs to be handled with great sensitivity. If he remains married, living with a family, the capacity to cause him great embarrassment is obvious, and I would like some imaginative thought put into how he be approached and contacted and his wishes in terms of the litigation and potentially playing any part in his daughter's life understood in a way that can cause him the least embarrassment."*

The Appeal

10. There are two grounds of appeal. First that the Judge had failed to take into consideration the fact that S had not acquired any article 8 rights regarding family life with B. Second that the Judge erred in the balancing exercise he performed since: (a) he applied a higher test of exceptionality to justify non service of form C6A which is unwarranted in the case of a parent without parental authority; (b) had failed to take into account the interference with the article 8 rights of the mother and the child; and (c) wrongly assessed the level of risk.

11. The Local Authority and Children's Guardian did not seek permission to dispense with service of a C6A notice upon S and were described by the Judge to "have sought to take a broadly neutral stance". Both seek to uphold the Judge's decision on appeal. In summary, they argue that the Judge did not attribute article 8 rights to S and consequently he did not misdirect himself as to the need for a 'higher exceptionality' before dispensing with the need to serve him with notice of the proceedings, and conducted the balancing exercise having regard to all relevant facts, reaching a determination that was reasonable in all the circumstances.

Discussion

12. Mr Todd, who represents the Appellant but did not appear below, drafted the grounds of appeal as a matter of urgency without the ability to consider a transcript of the judgment. He was readily deflected from the necessity to distinguish between fathers with parental responsibility and those without, and fathers who had acquired Article 8 rights and those who had not. There is no issue in this case, but that S does not have parental responsibility for B, and he has not acquired any Article 8 rights in so far as his family life with B is concerned. Simply put, he has had nothing to do with B whilst en ventre sa mere or since birth. There was no need for Mr Todd to set up a straw man and there is no doubt on reading the judgment that the Judge did not proceed under any misapprehension in this regard. There is no merit in ground 1 of the appeal.

13. There will obviously be cases where the issue of Article 8 rights will take considerably more examination. The erstwhile family ties that are recognised by designation of parental responsibility do not always march hand in hand with the exercise of those rights as to demand the protection of Article 8 and, as a corollary, Article 6, of the HRA and vice versa. However, the statutory framework provided by the Family Procedure Rules differentiates between a father with and those without parental authority even if they do have Article 8 rights. In the former case the father is an automatic party, in the latter, he must be notified of the proceedings. The imperative text in FPR Part 12, rule 12 and FPR PD 12C recognises the importance of the father, or other parent's, participation in the family proceedings beyond, I would suggest, for reasons of procedural fairness. However, in either case, the Court in accordance with FPR rule 6.1 and 6.36 may dispense with service upon him/her if in the circumstances it is necessary to safeguard the welfare interests of another predominant party and/or the child.

14. It is not unusual for courts at first instance to have occasion to consider whether to exercise this discretion, as the numerous reported authorities demonstrate. This Court has considered the issue on several occasions, more often in the context of adoption proceedings.

15. In *Re A (Adoption Notification of Fathers and Relatives)* [2020] EWCA Civ 41, Peter Jackson LJ extensively reviewed the domestic law with specific reference to relatives in adoption cases in [45] – [79]. Having done so he considered "*that there is a broad consistency in the court's general approach to the issue of notification of fathers and relatives. In my judgement, the balance that has been struck between the competing interests in these difficult cases is a sound one and there is no need for any significant change of approach*".

16. I respectfully agree. It is unnecessary for this judgment to add to the list of factors that should be considered, nor do they call for any gloss. It is sufficient to gratefully adopt Peter Jackson LJ's industry in the review of the authorities, noting as he said at [89] (7) when drawing the strands together:

> ". *It has rightly been said that the maintenance of confidentiality is exceptional, and highly exceptional where a father has parental responsibility or where there is family life under Article 8. <u>However, exceptionality is not in itself a test or a short cut</u>; rather it is a reflection of the fact that the profound significance of adoption for the child and considerations of fairness to others means that the balance will often fall in favour of notification. <u>But the decision on whether confidentiality should be maintained can only be made by striking a fair balance between the factors that are present in the individual case</u>*." (Emphasis provided)

17. However, what is perhaps necessary, and the reason to emphasise the parts of the judgment in the paragraph above, is to address the use of the word 'exceptional'. In this case, Mr Todd has submitted that the Judge erred in applying a test of higher exceptionality, which should be the reserve of those with Article 8 rights, rather than exceptionality. As my Lady, King LJ observed in discussion with Mr Todd and Mr

Shama, who appeared on behalf of the Local Authority and addressed us upon "exceptionality", this is to raise the spectre of resurrecting such difficulties that ensued in evaluating the different degrees of 'wrong' and 'plainly wrong' until conclusively consigned to desuetude by the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33. This differential derives from expressions used, including by Peter Jackson LJ as I quote above, but also other authorities that he reviewed and an authority to which the Judge in this case referred which followed on, namely *Re A local authority v B (Dispensing with Service)* [2020] EWHC 274. But they arise when the expression is read in isolation.

18. In *Re A local authority v B (Dispensing with Service)* [2020] EWHC 274, MacDonald J when dealing with an application by the Local Authority to dispense with service of the proceedings seeking a declaration authorising deprivation of his liberty on the father of 17-year-old B helpfully listed the seven legal principles which he said he derived from the authorities and applied in the exercise of his discretion. He listed them in [32] of his judgment. I do not repeat them in their entirety here for they are uncontroversial and readily accessible. As an aside, they appear to me to be equally applicable to a non-party's participation in child care or matrimonial proceedings, but I draw attention to the final two to highlight the point of 'exceptionality'. That is, he said:

> "vi) Authorities in the Strasbourg jurisprudence put a high bar on excluding a parent with parental responsibility. In this context, where a parent has parental responsibility or a right to respect for family life under Art 8, a high degree of exceptionality must be demonstrated by strong countervailing factors to justify their exclusion from participation in the proceedings.
>
> vii) It must be remembered that exceptionality is not, in itself, a test or a short cut and a fair balance must be struck between the factors that are present in the individual case."

19. These two last principles are undoubtedly rightly drawn, but I would venture to suggest that unless (vi) is read as necessarily subject to (vii) and the two are seen to ride in tandem, that the question of what is exceptional as opposed to highly exceptional will detract from the essential task of balancing fact specific features in every case. It will become 'the test' or 'the short cut'.

20. The balancing exercise will inevitably reveal that some features are heavily weighted against dispensation of service, for example in the case of a parent with parental responsibility who has established strong family ties with the subject child. But this will not be determinative, for there could be a feature, or accumulation of features, of greater weight to dislodge what should be the default position in all cases where party status would otherwise be assured or a form C6A served. These features may not necessarily relate to physical or psychological harm, and as the authorities make clear the list of factors is non exhaustive. Different combinations of factors will apply in every case. Different weighting will be merited by the circumstances. It will not be sensible to attempt a comparison of the seriousness of harm by extraction from other cases save in

the most general of senses. That which appears objectively minor in comparison to other cases of harm may have greater impact because of other features in the case.

21. I think the judgment *in re X (a Child) (Care Proceedings: Notice to Father without Parental Responsibility)* [2017] 4 WLR 110 which involved a father without parental responsibility and without protection of Article 8 encapsulates the overall position very well. HHJ Bellamy sitting as a High Court Judge said at [46]:

> *"46. Each year local authorities issue care proceedings in the Family Court in which the fathers of the children concerned do not have parental responsibility and who, though not parties, are nonetheless entitled to receive a copy of Form C6A. Until they receive Form C6A some fathers are in a state of ignorance about the existence of their child. Others are aware of the existence of the child and of the fact that they are the child's biological father but have thus far shown no interest in the child's life. For the children involved it is important that attempts are made to engage with their birth father and perhaps also his wider family. The starting point must be two-fold. First, that it will normally be in the interests of the child that her birth father should receive a copy of Form C6A thereby enabling him to apply for party status so that he can participate in the proceedings. Second, that the child and her mother should not be put at risk of harm as a result of seeking to engage the father in the proceedings. It is a matter of balance and that is the case whether or not the father is entitled to the protection of Article 8 and Article 6."*

22. Turning then to the second ground of appeal which concerns the way the judge performed the balancing exercise.

23. Mr Todd's alighting upon the word 'exceptional' as used by the Judge in [22] of his judgement highlights the problem I signify in the preceding paragraphs. An interrogation of the degrees of 'exceptional' provides a golden opportunity to dissect the semantic but in this case was being used in the more mundane fashion to indicate that the facts of the case were assessed not to be so out of the ordinary to dispense with the necessity of service which should be the default position; that is, service of the form C6A should take place and an attempt made to engage S.

24. I make clear at the outset that I can see no valid criticism of the way the Judge exercised his discretion. There is nothing that Mr Todd can identify that the Judge wrongly failed to take into account or wrongly took into account which he should not. The complaint in reality concerns the Judge's assessment of the weight to be given to the risk that S posed.

25. As to this, the Judge was entitled to view the nature of the risk in terms of the context in which the threats were issued, the terms that were used, the motive behind them and the absence of any subsequent behaviour. The physical and sexual assaults described by the Appellant took place in a different scenario. S's criminal record was negligible and, mostly, considerably before his encounter with the Appellant. S has not sought to

contact the Appellant since the news of the pregnancy. It was he who 'blocked' her telephone number. It was the Appellant who 'investigated' the identity of S's wife on Facebook. The Appellant had moved house and was in a relationship with another man, the father of C. B was in the Local Authority' care. The Judge was aware of the range of orders that could facilitate the Appellant and B's security.

26. The Appellant's Article 8 rights, as claimed, were not ignored. The reality is that those family ties are already the subject of state intervention and the court's ultimate determination as to whether the care order which the Local Authority seeks is a proportionate response to the circumstances affecting B and C. The Appellant's fear of S may have endured, but the Judge was satisfied that her position could be safeguarded.

27. B's prospective family ties in the present circumstances of her care, knowledge of her paternity and mixed heritage called for greater regard, as did the fact that a genetic inquiry may be in the offing. The Judge found these features to be influential factors to attempt to engage S, rightly in my view.

28. The Judge had well in mind the relevant legal principles that he must and demonstrably did apply. He proceeded to conduct the balancing exercise based on the Appellant's case taken at its highest. Mr Todd has shown skill and great tenacity in putting the Appellant's case but fails to satisfy me that the Judge was wrong.

29. Subject to my Lord and my Lady these are my reasons to dismiss the appeal.

30. By way of post script, it is necessary to record my concern regarding the lack of thought has been given to the actual process of serving S to observe, as the Judge required, all necessary sensitivities in so far as S's confidentiality is concerned. It is not for this Court to case manage the ongoing proceedings, but the Local Authority and Guardian's hastily assembled suggestion for the manner of service as presented to the Court after the short adjournment in response to a question we posed, did not reassure me. By way of example, I do not understand why once S's whereabouts are discovered and he can be approached when alone that a social worker with knowledge of the case cannot serve Form C6A and provide necessary and relevant information whilst protecting the identity of both the Appellant and B's whereabouts and reassuring S of confidentiality. I see no reason why S's private details should be made known to all the parties in the case. But this is a matter that is best raised with the Judge who will hear the case if there is any doubt as to the clear lead he gave as to the way forward in this regard.

Bean LJ:

I agree.

King LJ:

I also agree.

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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
HHJ Wood case number NE21 C00257

BETWEEN

SB

Appellant

And

NORTHUMBERLAND COUNTY COUNCIL

First Respondent

And

B (A Child)

Second Respondent

Before Macur LJ, Bean LJ and King lJ
Sitting at the Royal Courts of Justice, on the 13.8.21

Upon the Court hearing in person from :
Counsel for the Appellant, Martin Todd
The First Respondent, Mr Frankie Shama
And The Second Respondent Susan Boothroyd;

And upon it being recorded for the legally assisted parties, that the court required attendance by the advocates from 09:45 hours;

And that the hearing concluded at 14:30, with the parties being asked to work over lunch;
And for 60 mins after the hearing time, for the preparation of the draft order.

Upon the Court hearing Counsel for the Appellant and both Respondents;

IT IS ORDERED

1. The appeal is dismissed;

2. Further, the Local Authority shall not act to serve the C6A notification on the birth father, prior to approval of the allocated Judge in this matter, HHJ Wood, as to how this service is to be effected;

3. No order for costs, save detailed assessment of the legally assisted parties' costs;