IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Case No: FD19P00611

Neutral Citation Number: [2020] EWHC 1474 (Fam)

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 20th May 2020

Before:
THE HONOURABLE MR JUSTICE MOSTYN

B E T W E E N:

CS

and

FB

MR E BENNETT appeared on behalf of the Applicant
THE RESPONDENT appeared In Person
MR J NIVEN-PHILLIPS appeared on behalf of the Child through the Guardian
MS N WISEMAN appeared on before of the local authority

JUDGMENT
(Approved)

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR JUSTICE MOSTYN:

1. I am concerned with VC, a girl born on 4 April 2013, who is, therefore, seven years old. The applicant is her father; the first respondent is her mother. The child was born in Brazil, and both her parents are Brazilian nationals. In the year following her birth the parents separated. On 16 September 2015 a final custody order was made by a court in Brazil providing for VC to live with her mother but to spend time with her father on alternate weekends.

2. In the summer of 2016 the mother asked the father's permission for the child to be removed from Brazil for a holiday in Belgium. The father agreed to that and he last saw VC on 25 September 2016. However, when the mother and child left Brazil she did not go to Belgium but rather went to London, and she has been in this country ever since living principally in Hertfordshire.

3. Since her arrival here the mother has had a further daughter, R, who was born on 3 July 2017. Her father is not the applicant.

4. It took a long time for the father to lodge an application for VC's return with the Brazilian Central Authority although the evidence suggests that from late 2016 onwards he was making urgent enquiries with police and immigration authorities as to the whereabouts of his daughter. He made his application for VC's return on 11 April 2019. That was transmitted to the central authority here, and the father's solicitors were directly instructed by ICACU, and legal aid secured, in October 2019, leading to this application being made on 28 April 2019.

5. It is not necessary for me to give the full details of the litigation since. Suffice to say that by virtue of orders of the court VC was located, and the matter came before me on 22 April 2020. On that occasion I heard Mr Bennett, ~~who~~ representing the applicant then, as he does today, and the mother in person by telephone. The mother told me, as she had stated to those representing the father, that she had no issue with VC being returned to her father's care in Brazil.

6. I have to say that I was extremely surprised by this. The ramifications of a separation of VC from her mother and her sister, and being placed in the care of her father, who it must be assumed is a complete stranger to her, were obviously very grave indeed. One would have expected the mother to have been articulating resistance to the proposal. However, the mother's stance as expressed to me, and, indeed, to those representing the father, raised questions as to the mother's capacity to litigate, and also as to whether VC should be separately represented. Therefore, recital No. 4 to my order reads: 'The father's legal representatives raised the issues of (a) the mother's capacity or otherwise to litigate, and (b) separate representation of the child'. Recital No. 5 provided:

> 'The father's legal representatives indicated that (a) the mother was provided with contact details of specialist international children law

solicitors who could potentially assist her but had elected not to contact them, and (b) given the particular circumstances of this case, offering to speak with Messrs Brethertons with a view to their contacting the mother to explore whether they would or could assist her'.

7. Recital No. 6 states:

> 'Having been addressed by the mother and having considered Practice Direction 15B FPR 2010, the court was satisfied that the question of the mother's capacity to litigate or make decisions relating to which jurisdiction the child lived in required investigation as a matter of urgency'.

8. I then went on to make the following orders. Paragraph 11 provided: 'The Official Solicitor is invited as a matter of urgency to investigate whether the mother has capacity to litigate and/or make decisions relating to whether the child returns to Brazil, and, if not, to act as her litigation friend in these proceedings'. Paragraph 13 gave permission to the father's solicitors to disclose to the Official Solicitor the papers in the proceedings and the recording of the hearing.

9. Following that order a number of events have occurred. First, pursuant to a disclosure order made by me the Home Office has communicated with the court in a letter dated 30 April 2020 in the following terms:

> 'The subjects' (and that is the mother and VC) 'have no valid leave to remain in the United Kingdom, and no basis of stay. There is no trace on Home Office records of any applications being made by or on behalf of the mother or VC to regularise their stay in the United Kingdom. Home Office records show at this current time there is no schedule of deportation of the above-named subjects from the United Kingdom'

10. I was told today by Ms Wiseman, who represents Hertfordshire County Council, the local authority for the place where the mother and children live, that Hertfordshire has today received an email from the Home Office giving the mother a final opportunity to make an application to regularise her position in the United Kingdom, failing which her case would be referred to the deportation team. The mother has told me today that she will be unlikely to resist deportation, and is, in fact, prepared voluntarily to return to Brazil. This, again, is in the circumstances a surprising stance for her to take.

11. The next development was the receipt of a letter from Rachel James, the family social worker from Hertfordshire County Council, written to, 'Whom it may concern' on 11 May 2020. The letter reads as follows:

> 'This letter is in respect of VC. VC is currently subject to a child in need plan with Hertfordshire Children's Services. I write this as VC's allocated social worker since 11 March 2020. VC and her sibling R have been known to Hertfordshire Children Services since 11 May 2019. This was following a referral received firstly from VC's school when she did not return to school after the holidays, and they were unable to contact FB. A second referral was received from the police on 23 September when the

> family were found living in a shed in the grounds of a hotel. The family were accommodated temporarily in a property in Luton on 24 September where they continue to live. A child and family assessment and Section 17 checks were completed, and the children were placed on a child in need plan under Section 17 of the Children Act 1989 after it was established by the Home Office that FB did not have any valid leave to remain in the UK, and she, therefore, did not have any recourse to public funds. It is understood that FB arrived in the UK with VC from Brazil on 6 September 2016 on a tourist visa, which has subsequently expired. There were concerns that FB did not display insight regarding the instability her children would have experienced or would experience without ongoing financial support from Children's Services. FB was also not open and honest with professionals regarding the family's financial circumstances or the identity and location of the children's fathers. On 7 November FB completed an online form with the assistance of Children's Services agreeing to return voluntary to Brazil. On 11 November 2019 there was a police callout to the family home following a report the children were left alone. The police attended at 10.50am and found the children alone. FB returned home at 12.06pm. A conversation was had with FB by the assessment team social worker around safeguarding the children and the risks of leaving them alone. FB said that she had made a mistake and would not do so again. Further concerns have been raised more recently, 6 and 22 April 2020 and 3 May 2020 with police calls from neighbours stating FB had left the children alone. The police attended on 3 May, however, on arrival FB was at the home. Furthermore, on 11 April 2020 FB contacted Luton Children's Services stating she wished to relinquish the care of the children as they were not sleeping, and she has been thinking of taking this action for the last four months. Luton Children's Services struggled to get in touch with FB and completed an unannounced visit on 16 April. The social worker was concerned that FB presented as very flat and low in mood, and was unable to provide clear answers, and was repeating herself. There have been ongoing concerns in regard to FB's engagement with professionals with her often being vague and evasive. VC's school raised concerns regarding FB presenting as low in mood. The health visitor completed a PHQ-9 assessment of FB. This assessment did not show any signs of depression. Children's Services are in the process of seeking support from our in-house adult psychology to seek a mental health screening'.

I do not need to read from the rest of the letter.

12. The next development since the matter was before me was the receipt on 19 April 2020 of a letter from the Official Solicitor. I quote from that letter as follows:

> 'I set out below the steps the Official Solicitor has taken to investigate this.
> Legal representation: I have been in contact with both ICACU, Panel Solicitor, and the family social worker at Hertfordshire County Council. [A] solicitor at Brethertons, agreed on a *pro bono* basis to speak to FB about the case. With the assistance of the family social worker Ms Lehal was able to speak to FB by telephone. However,

FB was not willing to agree to Ms Lehal representing her in these proceedings. As a result of their conversation Ms Lehal has said that she has concerns about FB's capacity to conduct the proceedings. I understand the local authority have similar concerns.

Assessment: in the light of the above the court may wish to direct that FB's capacity to conduct these proceedings be assessed by an independent psychiatrist. The Official Solicitor suggests that a psychiatrist is needed as they should be able to say if FB is suffering from an impairment or disturbance of the mind, the diagnostic part of the test under the Mental Capacity Act 2005. If FB is willing to undergo assessment, and if the court directs this, I would hope that she would engage with assessment. The local authority have said that it is willing to assist in facilitating the meeting. However, there is the question of how this assessment can be funded. Whilst I understand that FB should be financially eligible for legal aid, FB is not willing to instruct a solicitor, and so an application for legal aid cannot be made at this time. So, this does not provide a route for funding the assessment. I have asked the local authority if it is able to provide funding, but it has said that this is not possible. The assessment is for the purpose of these proceedings and they are not a party to them. The Official Solicitor is not in a position to meet the capacity assessment. I do not know if it is possible for the assessment to be funded by the applicant's legal aid. I have raised this with Dawson Cornwall, who represent the father, and they were going to look into whether this was possible. I hope that Dawson Cornwall will be able to inform the court of the outcome of their enquiries. If funding can be secured by this route or if another means of funding is identified the Official Solicitor is willing to assist by identifying an expert, drafting the letter of instruction, and liaising with the local authority about arranging for FB to meet with the expert.

Possible further steps: should the experts assess FB as lacking capacity to conduct the proceedings and the court determines that FB is a protected party, the Official Solicitor would propose instructing Brethertons to apply for legal aid to be able to represent FB, and if legal aid is granted the Official Solicitor should be in a position to consent to act as FB's litigation friend'.

13. Dawson Cornwall representing the father made the enquiries suggested by the Official Solicitor. The answer from the Legal Aid Agency was a flat categorical no. The court is, therefore, left in a curious Catch-22 situation. It is suggested that the court cannot determine that the mother lacks capacity to conduct these proceedings unless there has been expert evidence to that effect. However, that expert evidence cannot be funded until she has been declared to lack capacity. One can, therefore, see that the argument is entirely circular.

14. Mr Bennett has helpfully suggested a solution, which I shall come to in a minute, but before I do so I should outline the relevant parts of the Family Procedure Rules. Rule 15.2 of the Family Procedure Rules states that, 'A protected party must have a litigation friend to conduct proceedings on that party's behalf'. A protected party is defined by Rule 2.3(1) as

a party or an intended party who lacks capacity within the meaning of the 2005 Act to conduct proceedings. Rule 15.3(1) states that, 'a person may not without the permission of the court take any step in proceedings except (a) filing an application form; or (b) applying for the appointment of a litigation friend until the protected party has a litigation friend'. Therefore, if a party is a protected party there is a complete halt of any steps, apart from the two that are mentioned, until the protected party has a litigation friend. The requirement of a protected party to have a litigation friend is repeated in Practice Direction 15A paragraph 1.1. Practice Direction 15B paragraph 1.2 states:

> 'Any issue as to the capacity of an adult to conduct the proceedings must be determined before the court gives any directions relevant to that adult's role in the proceedings. Where a party has a solicitor, it is the solicitor who is likely to first identify that the party may lack litigation capacity. Expert evidence as to whether a party lacks such capacity is likely to be necessary for the court to make a determination relating to the party's capacity to conduct proceedings. However, there are some cases where the court may consider that evidence from a treating clinician, such as a treating psychiatrist, is all the evidence of lack of litigation capacity which may be necessary. There may be cases where it will be clear that a party does not have litigation capacity such as where the party is in a coma, minimally conscious, or in a persistent vegetative state. In those cases the court may well consider that a letter from a treating doctor confirming the party's condition is sufficient evidence of lack of litigation capacity and not need a report from an expert'.

15. Therefore, to declare on a final basis that a party does not have capacity to conduct the proceedings is unquestionably a very serious matter, intruding into the freedom of a person to conduct litigation in the manner in which they think fit. It is for this reason that the threshold of incapacity is set relatively high. However, more capacity is plainly required to conduct proceedings, such as the proceedings before me, than is, for example, to enter into a simple commercial transaction like buying an item in a shop. Plainly there are different levels of capacity for different function. The test that has to be applied is set out in Section 2 of the Mental Capacity Act 2005, which provides that:

> '(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of the mind or brain.
>
> (2) It does not matter whether the impairment or disturbance is permanent or temporary.
>
> (3) A lack of capacity cannot be established merely be reference to (a) a person's age or appearance, or (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
>
> (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities'.

16. In the case of *Baker Tilly v Makar* [2013] EWHC 759 (QB) Sir Raymond Jack emphasised how momentous it was a for a court, without the benefit of expert evidence, to make a final determination of incapacity. However, what Sir Raymond Jack does not address is the solution which has been proposed by Mr Bennett, which is that this court should on the available evidence make an interim declaration of lack of capacity thereby enabling for the Official Solicitor to be appointed as the mother's litigation friend and legal aid secured. Once that has happened it would then be possible and appropriate for the Official Solicitor, with the benefit of legal aid, to investigate for final determination the mother's capacity to conduct these proceedings. Under FPR 20.2(1)(b) the court has power to make an interim declaration; and, indeed, under its general powers the High Court has power to make final declarations, but that latter power is not necessary in this case at the present time.

17. I, therefore, propose to consider making on the available evidence an interim declaration that the mother lacks capacity to conduct these proceedings.

18. Would such an interim declaration be justified on the evidence before me? In my judgment, the answer is a clear yes. The evidence before me from various sources demonstrates a very concerning attitude by the mother to the very serious ramification of these proceedings. Her decision not to engage with them, or to seek the benefit of legal advice, signifies to me, at least on an interim basis, that she lacks the necessary capacity.

19. I, therefore, make the interim declaration that has been proposed. The consequence of that will be that the Official Solicitor will be appointed the litigation friend of the mother. The Official Solicitor will then take the steps that I have mentioned to determine, with the benefit of expert evidence, whether the interim declaration that I have made should be converted into a final declaration.

20. That concludes this judgment.

End of Judgment

Transcript from a recording by Ubiqus
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