Neutral Citation Number: [2021] EWCA Civ 605

Case No: B4/2020/2152

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE FAMILY COURT**
**KINGSTONUPON HULL**
**HHJ Jack**
**101/2020**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 April 2021

**Before:**

**LADY JUSTICE MACUR**
**LORD JUSTICE MALES**
and
**LORD JUSTICE PHILLIPS**

S (A Child)

**ES** (litigant in person) for the **Appellant**
**Ms Gail Farrington** (instructed by **Hull City Council**) for the **Respondent**

Hearing date: 22 April 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 10.30am on Thursday 1 April 2021.

**Macur LJ:**

1. This appeal arises from the order of HHJ Jack on 19 November 2020 which refused the application made by the Appellant mother ("mother") pursuant to s.47 of the Adoption and Children Act 2002, for leave to oppose an adoption order in respect of her 5 (now nearly 6) year old son Z. The mother is a litigant in person. The Respondent Local Authority ("LA") is represented by Mrs Farrington, who did not appear in the court below.

2. The nature of the appeal was restricted, by virtue of the limited permission I granted in March 2021, to scrutiny of two procedural issues and the consequent impact upon the fairness of the hearing. The question for this court was whether the mother had been afforded due process; as such, we did not consider the merits of her application and would not have been in a position to do so as I indicate below.

3. At the conclusion of the hearing, we allowed the appeal and gave directions for the rehearing of the mother's application, mindful of the need for expedition, with reasons to follow. These are the reasons why I concluded, subject to my Lords, that the appeal must be allowed.

Background

4. The mother has six children, none of whom live with her. Care proceedings were issued by the LA in respect of Z and his four elder siblings on 22 February 2018, following concerns of neglect, domestic upheaval, and emotional harm. On 1 February 2019, HHJ Heaton QC made final Care Orders in respect of all five children and a Placement Order in respect of Z.

5. The mother last saw Z on 24 March 2019. Z was placed with prospective adoptive parents on 16 September 2019.

6. In the meantime, the mother applied for permission to appeal against the making of the Care Orders, and by extension the Placement Order in respect of Z. This application was dismissed in July 2019 for failure to comply with procedural requirements. The mother's application for permission to reinstate the request for leave to appeal was dismissed on the merits on 22 October 2020.

7. Prior to this, the mother's youngest child, by a different partner, was the subject of separate care proceedings which concluded in November 2019. HHJ Heaton QC made a residence order in favour of the child's father subject to a Supervision Order and a Child Arrangements Order. The mother's application to revoke the Placement Order made in respect of Z was heard at the same time by HHJ Heaton QC. Her application was dismissed.

8. Thereafter, on being notified of the application for an adoption order in respect of Z, the mother filed an application for permission to oppose the adoption order before the scheduled hearing date in September 2020. The application was heard by HHJ Jack on 19 November 2020; HHJ Heaton QC had by then retired from the bench.

Statutory Framework and interpretation

9. Section 47(1) of the Adoption and Children Act 2002 ('the 2002 Act') provides that an Adoption Order can be made if the subject child:

a. has been placed for adoption by an adoption agency with the prospective adopters in whose favour the order is proposed to be made (s.47 (4) (a)).

b. was placed for adoption under a Placement Order (s.47(b)(ii)); and, subject to section 52 of the Act,

c. the parent's consent is dispensed with.

10. Section 47(5) provides that a parent or guardian may not oppose the making of an Adoption Order under s.47(4)(c) without the leave of the Court. By virtue of section 47(7), the court cannot give leave unless satisfied that there has been a change in circumstances since the placement order was made.

11. The test set out in s.47(7) of the 2002 Act was considered by this court in *Re P (A Child) (Adoption Order: Leave to Oppose Making of Adoption Order)* [2007] EWCA Civ 616 @ [19] which determined that a judicial decision upon a parent's application for leave to oppose an Adoption Order is:

> "a *decision relating to the adoption of a child' for the purposes of s.1(1) of the 2002 Act with the result that '[t]he paramount consideration of the court…must be the child's welfare, throughout his life' (s.1(2) of the 2002 Act)."*

12. Thereafter, in [26], the court set out the now familiar two-stage process for the consideration of applications pursuant to s.47(5) of the 2002 Act, as follows:

> *"In our judgment, analysis of the statutory language in sections 1 and 47 of the 2002 Act leads to the conclusion that an application for leave to defend adoption proceedings under section 47(5) of the 2002 Act involves a two-stage process. First of all, the court has to be satisfied, on the facts of the case, that there has been a change in circumstances within section 47(7). If there has been no change in circumstances,*

> *that is the end of the matter, and the application fails. If, however, there has been a change in circumstances within section 47(7) then the door to the exercise of a judicial discretion to permit the parents to defend the adoption proceedings is opened, and the decision whether or not to grant leave is governed by section 1 of the 2002 Act. In other words, "the paramount consideration of the court must be the child's welfare throughout his life.""*

13. The court went on to clarify that the change in circumstances, which need not relate to the circumstances of the parents, must have arisen since the placement order was made and *"must …be of a nature and degree sufficient, on the facts of the particular case, to open the door to the exercise of the judicial discretion to permit the parents to defend the adoption proceedings."*

14. The second of the two stages is a welfare analysis conducted by reference to s 1(3) and the so called 'welfare check list' contained s.1(4) of the 2002 Act.

15. The nature of the hearing required to determine applications for leave to oppose under s.47(5) of the 2002 Act was considered at [54] and [56]. Specifically,

> *"'[T]he fact that a judge is taking the welfare of a child as his paramount consideration does not mean that he must conduct a full welfare hearing with oral evidence and cross-examination in order to reach a conclusion.'"*
>
> *[At each stage of the process] 'the judge has a discretion whether or not to hear oral evidence. It would be perfectly proper, for example, for the judge in an appropriate case to assume as true the facts asserted by the parents, and equally proper for him to dismiss the application on the ground that it was not in the interests of the child for the parents to be given leave to defend the proceedings. It is not necessary for the judge to conduct a full welfare hearing unless the issues which arise for decision positively require such a hearing or require oral evidence in one of more particular respects."*

16. In *Re B-S (Children)* [2013] EWCA Civ 1146, Sir James Munby P generally endorsed the reasoning of the court in *Re P (A Child)* but also added the following further considerations which apply to the second stage (i.e., the welfare analysis):

> a If the court decides at the first stage that there has been a change of circumstances for the purposes of s.47(7) of the 2002 Act, at the second stage it is necessary to consider two inter-related questions. The first is the parents' ultimate prospect of successfully resisting the making of an Adoption Order if given leave to oppose. The second is the impact on the child if the parent is, or is not, given leave to oppose the making of the Adoption Order – for which the welfare of the child is paramount ([74]).
>
> b The judge must 'consider very carefully indeed whether the child's welfare really does necessitate the refusal of leave', keeping at the forefront of his or her mind that adoption is a measure of last resort
>
> *c* 'As a general proposition, the greater the change in circumstances (assuming, of course, that the change is positive) and the more solid the parent's grounds for seeking leave to oppose, the more cogent and compelling the arguments based on the child's welfare must be if leave to oppose is to be refused.' ([74](vi)).

<u>The mother's application at first instance.</u>

17. The mother relied on a number of changes in her circumstances, which were challenged by the LA as either inaccurate, insufficient or, in some instances, because they had already been taken into account by HHJ Heaton QC when he dismissed the mother's application to revoke the Placement Order in November 2019.

18. In giving judgment, HHJ Jack said:

> *"[4] I was not the judge who conducted those care proceedings and I have not seen the judgment, or indeed, the reasoning why a placement order was applied for in respect of [Z]*
>
> …
>
> "[*6] …Those proceedings came before His Honour Heaton in November of last year. At the same time there was an application by [mother] to revoke the placement order in respect of [Z]. As part of the hearing of the application to revoke the placement order, Judge Heaton will have had to consider whether the mother had shown any changes, as that is the basis of any application for revocation of a placement order. He must have concluded that there had been no changes, or none sufficiently significant, to warrant revoking the placement order".*
>
> *"[7] Miss Owst has pointed out in her skeleton argument, some of the changes, indeed, for example, the counselling which Mother has engaged in, some of those changes had already taken place before the hearing in November last year before His Honour Judge Heaton, and so he must have taken those into account and concluded that they were not sufficient to warrant revoking the placement order. Certainly, some of the changes that Mother now refers to had taken place before the hearing which took place in front of Judge Heaton in November last year."*

19. HHJ Jack accepted that the mother had made changes and produced evidence in support of them; he commended her in this regard but concluded that:

> "*the amount of change that [the mother] has achieved is not such as will enable me to exercise my discretion as to whether she should have permission to go ahead and oppose the making of the adoption order.*"'

20. However, he proceeded to consider whether, assuming she "had made sufficient changes, she would then have had a reasonable prospect of succeeding in opposing the adoption application.' He did so, indicating that

Z's welfare was central to that assessment, that he had had regard to the necessary 'welfare check lists', and specifically addressed the mother's argument which was effectively directed to s 1(1)(4)(c) of the 2002 Act, that is, to the likely effect on Z throughout his life of having ceased to be a member of his original family and become an adopted person.

21. HHJ Jack concluded:

> "[*24] In this case, I have had the benefit of what is called an Annex A report, which is a welfare report, written for the purpose of the adoption proceedings. In this case, it was written by Miss Dhamrait, the Social Worker, who is on this call, together with her colleague, Miss Whitworth. That is a very thorough document, which goes through not only the history of the birth family, to some extent, and it deals with the child in some detail and deals with the prospective adopters.*
>
> *25. I thank Miss Dhamrait and Miss Whitworth for it; it is very reassuring to me and I hope it will be to the parents also, although they will not have seen it because it is a confidential document. ...I am greatly reassured in this case that this is one of the most positive Annex A reports that I have, I think, ever seen.*
>
> *…*
>
> *[27] If that report had been less positive, then there might have been some prospect of Mother succeeding, if I had granted permission to oppose the making of the adoption order. But, as I say, that report is very positive indeed. As I say, that is a factor which would weigh with me considerably if I had found that the mother had made sufficient changes to warrant me considering the exercise of my discretion'.*

## The Appeal

22. The mother has limited permission to appeal as I indicate above, and I see no purpose in referring to those matters of which she otherwise complained in her application for permission to appeal and which I found to have no real

prospect of success. Indeed, the mother, to her credit, did not seek to extend the remit of the appeal and conducted herself throughout with appropriate decorum, focusing on the two points which I identified in the grant of permission namely: (i) the absence of a transcript relating to the making of the Placement Order on 1 February 2019; and (ii) that she had not seen any part of the Annex A/Section A report upon which HHJ Jack stated he placed great reliance.

23. Mrs Farrington on behalf of the LA relies on the great experience of HHJ Jack and the affidavit of the social worker and information provided by the skeleton arguments produced in the court below, to remedy the deficiency of lack of the transcript of judgment in relation to the making of the Placement Order. In her written submissions she suggests that HHJ Jack *'had considered all the papers, including the background papers in respect of the care case and the application for revocation'* and in any event, the Local Authority submits that *'the burden fell to [the mother] to provide the court with such information as required to support her case, and by extension, a transcript of His Honour Judge Heaton QC'.*

24. Mrs Farrington submits that the judge correctly identified the two-stage analysis and faithfully conducted the same. His reasoning cannot be impugned. As to the mother's inability to access the Annex A/Section A report, this is a confidential report pursuant to rule 14.11 FPR 2010. The report concerns the suitability of the potential adopters and is not relevant to the Appellant's application for leave to oppose the Adoption Order. In addition, the Local Authority argues that if the Annex A report were disclosed to the

Appellant it would need to be redacted to such an extent as to render it "unreadable" and of no "value to the mother".

Analysis and conclusions

25. As this case reveals, a parent or guardian has several opportunities and the statutory right to challenge the making and continuation of a placement order.

26. Pursuant to section 21(2) of the Adoption and Children Act 2002, the court can only make a placement order in strictly specified circumstances, including so far as relevant here, that the relevant child is subject to a care order, or the court is satisfied that the conditions for making a care order pursuant to section 31 of the Children Act 1989 are met, and that the parent's consent to the child being placed for adoption should be dispensed with. Further, the court will only make such an order if it is justified by reference to the child's welfare throughout their life, having regard to the matters specified in section 1 of the Adoption and Children Act 2002 and only when all other avenues of rehabilitation to their biological family have been reasonably explored. The mother opposed the making of the final care order and placement order. She subsequently, but unsuccessfully, sought leave to appeal.

27. She made an application to revoke the placement order in November 2019. An application pursuant to section 24 of the 2002 Act can only be made with leave of the court and prior to the child's placement for adoption. There is no time limit before which an application can be made, but the court cannot give leave unless satisfied that there has been a change of circumstances of a nature and degree sufficient to reopen the order. When considering whether to grant leave, unlike an application for permission to oppose the adoption order, the

court will not be governed by the paramountcy of the child's welfare but will necessarily take it into account in determining whether in all the circumstances leave should be given.

28. The application was heard by HHJ Heaton QC, who had presided over the care and placement proceedings nine months before, and who heard the application made by the LA for protective orders in relation to the mother's subsequently born child at the same time. He dismissed the application, although in the absence of a judgment it is impossible to know the reason/s why. In the absence of any information to the contrary, I presume that the mother did not seek to appeal. I do not say this critically, but only to demonstrate a further opportunity that presents itself to parents in her circumstance to seek to challenge the process.

29. Finally, in September 2020 the mother applied for permission to oppose the adoption pursuant to section 47 of the 2002 Act. The relevant process is described above. The time limit for making such an application is prescribed by the fact of placement and the issue of the application for adoption. The first stage of the process mirrors that of the application to revoke a placement order. The second stage requires the court to consider whether the parent/s have a more than fanciful prospect of successfully opposing the adoption order, which inevitably requires it to consider whether to do so would adversely affect the welfare of the child, which is paramount. The mother, as was her right, and as we have determined with good reason, appealed the refusal of her application.

30. Clearly, continuous applications seeking to overturn the placement order, or to oppose the adoption order disrupts the future planning and placement of individual children and may result in repeated hopeless applications, not least because of the potentially very short time intervals between them. Such applications may be readily disposed of at an early stage of the proceedings since, if listed before the judge who has had conduct of the case throughout, he/she may legitimately conclude on the facts found by them when making the placement order, that the degree of the change in circumstances required would be impossible to achieve in the time that has elapsed. As indicated in the authorities to which I refer above, the nature and extent of the hearing will be case specific.

31. In my view, the mother has a legitimate sense of grievance that, however sympathetically the judge approached her application, it was not determined properly. The consequences for her, and Z, are far reaching. It is trite to say that, however inevitable it may be, a disappointing result reached without procedural integrity will fuel a sense of injustice.

32. The absence of a transcript of HHJ Heaton QC's judgment leading to the making of a Placement Order on 1 February 2019, or otherwise any evidence of the findings he made, meant that HHJ Jack could not know what the baseline was against which to assess a change in circumstances. That placed him in a very difficult position. The LA, directed to lodge the bundle for this appeal, have still failed to produce the same. The information provided by the social worker's affidavit which HHJ Jack referred to in his judgment, does not give any of the necessary detail to supply this omission and neither does

Counsel, Ms Owst's, skeleton argument. Further, there is nothing to suggest having regard to the index of the documents before HHJ Jack, which I also ordered to be produced by the LA, that the "court papers from the care proceedings relating to Z" would assist him in this regard. The standard form index refers to "Care Plans"; "Expert and other reports" and "Other" but there is no page allocation to any such documents. The only documents that are identified in the index post-date 4 September 2020 despite HHJ Jack's order on 23 October 2020 directing that court papers from the care proceedings be filed.

33. The social worker who filed the affidavit in the instant application was not involved in the care and placement proceedings. She says at [23] that she is aware of "the legal test for a placement order to be revoked", rather than for leave to oppose the adoption order. Whilst there is no difference in the first stage of the test, it is perhaps indicative of the lack of attention to the detail of the documents that were filed before the judge who had not hitherto had substantive dealings with the case.

34. Unsurprisingly, the affidavit sets out the position as seen by the LA and contains a necessarily subjective assessment on whether the changes to the mother's circumstances are sufficient, but it provides no appropriate base line against which the judge could assess the mother's asserted change in circumstances, other than by reference to the unsuccessful application for permission to revoke. In this regard, the fact that HHJ Heaton QC may, or may not, be revealed to have taken certain factors of change into account does not mean that they lose a cumulative relevance.

35. I do not overlook the fact that, whatever the inevitable shortcomings in the first part of the court's assessment of the mother's application, HHJ Jack proceeded to consider the second stage on the alternative premise, that there had been a sufficient change in her circumstances. In doing so and bearing in mind that his paramount consideration was Z's welfare and best interests, it is perhaps unsurprising that he concluded that the mother's opposition would not succeed. Z is 'older' than most children placed for adoption; he has been living with his prospective adopters for a significant period of time and they are said to be committed to him; he has had no contact with his mother since May 2019. Her domestic position is alleged by the LA to remain precarious.

36. In other circumstances, an adverse determination in relation to the second stage may obviate any defective process in the first, but here the problem is compounded by the judge's stated 'heavy' reliance upon the Annex A, section A report which he acknowledged the mother had not seen. Although it is clear that his reference to the positive nature of the report was made in an attempt to reassure the mother that Z's prospects with his adoptive parents would be good, the fact remains that the report deals with the position of the birth family and that, because she had not seen it, the mother was not in a position to challenge anything which it said about her.

37. Mrs Farrington is right in saying that an Annex A, section A report, which reports on the suitability of the applicant/s to adopt the child, are confidential in accordance with 2010 FPR 14(6). However, she did not refer to FPR 14.13, which enables the court to direct that the report be disclosed to a party in the proceedings. When considering disclosure, the court should bear in mind the

principle to be derived from in Re D (Minors) Adoption Reports: Confidentiality) (1995) 2 FLR 687, in which the House of Lords indicated that:

> *"It is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party. This principle applies with particular force to proceedings designed to lead to an order for adoption, since the consequences of such an order are so lasting and far reaching.*

38. Whilst this 'fundamental principle' may in exceptional cases be trumped by what the court may determine to be the risk of significant harm to the child, that is unlikely to be the situation here. The contents of the Report are prescribed by the Practice Direction 14C; the information concerning the prospective adopter and the child being but one section of six. It is simply wrong to suggest that the degree of redaction required would render the report unreadable or of no value to the mother.

39. Neither Mrs Farrington nor this Court, have seen the report, described so positively by the judge, but it matters not for the purpose of this appeal. The mother had no opportunity to challenge any information that it contained about her circumstances, or the "other relevant information" which had been included about her.

40. There is no provision in the 2010 FP Rules that requires a party to be notified that an Annex A report has been filed. Family practitioners will be aware of the necessity imposed upon the local authority/ adoption agency to do so and will know to contact the court to make an appropriate request for inspection,

but many a Litigant in Person will not appreciate that one must be filed nor the information they hold. It is unlikely that this mother would do so, but for the judgment of HHJ Jack.

41. This leads me to express some surprise at the stance taken by the LA in regard to what it asserts to be the failures of the mother in lodging a transcript of the judgment and, presumably, for not seeking a copy of the redacted Annex A, section A report. She is said to be responsible for the shortfalls which lead to this appeal, and which should therefore dispose us against allowing the same.

42. The mother, as applicant, does of course bear the burden of establishing the basis for leave to oppose the adoption application to be granted, but the LA were well aware of the test that the court must apply and were well aware of the absence of the necessary judgments from the papers that had been lodged with the court and that the application was to be heard by a judge other than HHJ Heaton QC. It was the LA who applied for release of the "court papers" into the proceedings and it was the LA who sought to rely upon the affidavit filed, when they ought to have appreciated that it did not contain the necessary detail. The LA was also aware that the mother had made no application to obtain the relevant parts of the Annex A/ Section A report upon which the LA relied and had failed to raise this with the court to ensure no untoward delay or adjournment of the proceedings.

43. All legal representatives owe a duty to the court to assist in its delivery of justice. What is more, the LA has at least a vicarious interest on the part of the child in ensuring that any decision regarding their future is made timeously and with due process.

44. Before leaving this judgment, and whilst implicitly critical of the process he adopted, I think it pertinent to note that HHJ Jack, although unfavourable to the mother's application, clearly dealt with her compassionately and was understandably pragmatic in his approach. His recital of the law was irreproachable, and he addressed the welfare of Z appropriately. He was obviously acutely conscious of Z's predicament (including the urgency of the decision on his future) and no doubt of the prospective adoptive parents too. His 'conversational' style of judgment of which the mother complained in her application for permission to appeal, but more likely described as such by her McKenzie friend in the court below, was an attempt to reassure her that he recognised the strength of her commitment to Z and that her child was well placed. It is his commendable transparency in approach in disclosing that which he had not seen, and that which he had, that provides the vehicle for this successful appeal, but it is appears that in his obvious concern to be fair to all concerned he did not appreciate the significance of the points to which I have referred.

45. When announcing our decision to allow the appeal, we explained to the mother, and she confirmed that she understood, that the hurdles she faces in seeking leave to oppose the adoption are high ones. The outcome of the rehearing may be the same but, if so, this must be the result of a fair hearing in which the necessary documents are before the court and she has an opportunity to make her case . What is more, it is as much in the long-term interests of Z that any decision regarding his future should be free from taint. For these reasons I would allow this appeal.

## Males LJ:

46. I agree

## Phillips LJ:

47. I also agree.