



Neutral Citation Number: [2019] EWCA Civ 2264

Case No: B4/2019/3007

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE FAMILY COURT AT EAST LONDON**  
**Her Honour Judge Reardon**  
**ZE19C00645**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17 December 2019

**Before :**

**LORD JUSTICE PATTEN**  
**LORD JUSTICE PETER JACKSON**  
**and**  
**LADY JUSTICE ASPLIN**

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**K (Children)**

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**Julia Queen** (instructed by **London Borough of Newham**) for the **Appellant Local Authority**  
**Peter Fortune** (instructed by **Samuel Ross Solicitors**) for the **Respondent Mother**  
**and**  
**Alexandra Itari Wills** (instructed by **Victory at Law Solicitors**) for the **Respondent Father**  
(by written submission only)  
**Christopher Poole** (instructed by **Lawrence & Co Solicitors LLP**) for the **Respondent**  
**Children by their Children's Guardian** (by written submission only)

Hearing date: 17 December 2019  
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**Approved Judgment**

**Lord Justice Peter Jackson:**

1. This is a local authority's appeal from the refusal of its application for interim care orders in relation to two children, O (aged 8) and M (aged 6). The appeal is opposed by the children's parents but supported by their Children's Guardian. The central issue is whether the Judge was entitled to the view that she took about the level of risk at an interim stage of the proceedings.
2. The background is that the children came to this country with their mother to join their father in April 2018. This is the second set of care proceedings since then. On 22 November 2018 the children were removed from home after the school reported injuries to O. He had been seriously assaulted by his mother in the home the previous day. She hit him several times with a phone charger cable, causing bruising and linear marks to his back and face. His hand was injured after being trapped in a door when he tried to get away. The parents did not get medical attention and gave false accounts of how the injuries had been sustained. The mother suggested to O that he give a false account.
3. The family was then living in a different borough and that local authority took proceedings. The parents worked cooperatively with professionals to secure the return of the children. The mother undertook therapeutic work and attended a parenting course to increase her understanding of the physical and emotional impact on the children of physical chastisement. Detailed parenting and psychological assessments were carried out. Assessments of the children identified that M has probable ADHD and oppositional defiant disorder. They remained in foster care until 7 July 2019, when they were returned home.
4. In criminal proceedings, the mother pleaded guilty to ill-treatment of a child and causing actual bodily harm, and on 6 August 2019 she received a sentence of 12 months imprisonment, suspended for two years.
5. The first local authority filed its final evidence in the care proceedings on 18 September 2019 and on 11 October 2019 a supervision order was made and allocated to the present local authority, into whose area the family had moved.
6. The event that led to the present proceedings occurred about three weeks later on 5 November 2019. The mother attended a parents' evening at the children's school. When the time came for her to take them home, they could not be found. She went to wait in the playground, which is covered by CCTV. The recording shows her sitting in a shelter for three minutes before the children were ushered out of the school building by a teacher who then went back inside. The children approached their mother. When they reached her, she immediately and without warning hit 6-year-old M on the face, knocking him several paces backwards. She then stood up and threw his bag or coat on the ground and walked out of the playground without looking back, leaving the children to pick up their belongings and run after her. The nature and suddenness of the assault on M can be seen by the reaction of O, who shrank back, and by the reaction of another child who was crossing the playground at the time. The mother then took the children back into the school, and went to the safeguarding lead. She complained at the lack of support she was receiving and reported what had happened. Fortunately, M does not appear to have suffered any injury.

7. The children were again removed to foster care under police protection on the same day, the parents having refused to consent to them being accommodated. On 8 November, interim care orders were made. On 18 November, M told the Guardian that *'It was a hard slap'* and that *'I was crying'*. To which, O said *"No, it's a lie. It is only once. You [M] think it was a hard slap but it wasn't."* The foster carer told the Guardian that the children were unsettled and bedwetting and that there were difficulties in the relationship between the two boys. Both children have said to the social worker that they love their mother and don't want her to be in trouble and that they want to live at home.

8. In her response to threshold, the mother said:

"... after [the meeting with the teacher] both children ran away from her for about 10-15 minutes. During this time Mother sat outside the school building waiting for them to return as they had gone out of sight. She was extremely worried for their safety. She instructs that when they returned she used both hands to chastise M on his cheek for running away. Mother instructs that this was not severe/excessive."

9. The parents challenged the interim care orders and a contested hearing took place before Her Honour Judge Reardon on 3 December. She received an initial statement (7 November) from the social worker and an initial analysis (20 November) from the Guardian, who had also acted in the previous proceedings. Both professionals supported the children remaining in foster care. The Guardian stated:

"I do not support the boys being returned to the parents' care. I am concerned that there has not been a sustained improvement in the mother's parenting and that the children remain at risk of physical and emotional harm if they are returned into her care."

10. The Judge viewed the CCTV footage and heard evidence from the mother and submissions from all parties. Her decision was to discharge the interim care orders and make interim supervision orders, with the effect that the children could be returned home. The local authority indicated an intention to appeal, and a short term stay was granted. Permission to appeal was granted by Baker LJ on 5 December and the children have remained in foster care. The next relevant step in the proceedings is that a case management hearing is listed for 7 January 2020, at which point applications for expert assessments will be made. Meantime, the mother was due to be interviewed by the police on 10 December and updating police disclosure is being sought.

11. In her extempore judgment, the Judge directed herself correctly on the law. She noted that the background was unusual in that the application came very swiftly after the previous proceedings. She surveyed the course of those proceedings and the information gained within them. She noted that the incident on 5 November had occurred before the present local authority had engaged with the family and continued:

"20. The mother's case is that the incident in November was a one-off and should not warrant the removal of the children

from her care. She says she has consistently asked for support, particularly around M's behaviour in school, but that has not yet been implemented. I heard the mother give brief evidence as to the circumstances of the incident on 5 November. There is very little dispute about what happened. It is shown on the CCTV but what was important about the mother's evidence is that she explained to me what had led up to the slap to M. She explained her fear for the children when they had gone missing and she expressed in emotional terms her remorse for having slapped one of the children again. She vehemently denied that she had slapped any of the children at any other point since the children were rehabilitated to her care in July."

12. The Judge recorded the Guardian's enquiries and her recommendation. She found the interim threshold to be crossed

"... primarily on the basis of emotional harm caused to both children by the physical chastisement given their history and that this is likely to impact their safety."

She then turned to the welfare balancing exercise, focusing on the Guardian's concerns and the question of whether the risk to the children's physical and emotional safety (which she acknowledged) justified immediate separation. She stated:

"The evidence that supports this risk is the incident on 5 November 2019."

And later:

" So my focus is on the incident of 5th November 2019. I take into account that there is no evidence before me of ongoing physical chastisement of the boys since they were returned home in July 2019."

She noted the boys' presentation and behaviour:

"I fully accept that these are boys with additional vulnerabilities and needs. But this was very much the position before the court when the Supervision Order was made and [this local authority] designated."

13. The Judge took into account that there was no evidence of any other physical chastisement of the boys and the mother's evidence, expressing remorse and understanding of the effect of the impact on the boys. She also took account of the impact of continued removal from their parents' care:

"32. ... These are vulnerable boys who have experienced a lot of disruption in their short lives over the past year. They do have on the whole however good relationships with their parents and in fact in M's case his attachment with the mother is said to be consistently strong. The parenting assessment

indicated that work done with the mother had improved her relationship with O and it may be that O's more settled presentation at school is evidence of that."

14. Finally, the Judge stated her decision in these terms:

"33. Taking all of these factors into account and balancing the risk of harm to the children if they are returned to their parents' care against the risk of harm to them of ongoing separation from their parents, I have come to the conclusion that this is not a case where the children's removal is proportionate to the risk of harm and they should be returned to their parents.

34. The issue comes down of course to the weight I put on the incident on 5 November. The local authority's case is that this is evidence of a significant deterioration of the mother's parenting capacity and an increasing risk to the children. It seems to me it is just as likely to have been a one-off relapse brought about by stress and, in particular in that moment, the stress of the children going missing. In the absence of any other information indicating a more significant deterioration in the home it seems to me that I must err on the side of least intervention approach on the basis that the evidence is capable of supporting a conclusion that this was a one-off and is unlikely to be repeated."

In discharging the interim care orders, the Judge noted that there was a clear need for further information to be gathered to inform the court as to the longer term position for the children.

15. The local authority sought permission to appeal, including on the ground that the court was acting before it had enough information. The Judge refused permission to appeal, saying on this issue that:

"In terms of the need for further information, it seems to me to be an error of the interpretation of the law. In every case when Court is considering interim separation there is always a need for further information but that cannot of itself justify immediate separation. The Local Authority's case has not evidenced or sought to suggest a more serious underlying risk of harm other than the most recent incident. It seems that the Local Authority are suggesting that this should happen the wrong way around [i.e. if there is not enough evidence for immediate separation then that ought to be sanctioned pending further information.]"

16. The local authority's grounds of appeal that can be distilled under the broad proposition that the Judge did not properly assess and balance the risks and benefits to the children of returning home. In the first place, Ms Queen argues that the Judge did not adequately assess the mother's evidence. She refers to the threshold response set out above, given before the CCTV evidence was available. Even when it was

available, the mother gave oral evidence that she had given M ‘a tap’ and had been ‘pushing him on the face’ and she said that it ‘definitely wasn’t hard.’ She repeatedly said that ‘it wasn’t excessive’. That, it is submitted, is not accurate and the Judge was therefore wrong to say that there was no real dispute about the facts. Secondly, the determination of risk will be a fundamental issue at the final hearing in these proceedings. The court will have all the evidence, including police evidence, together with the further assessments undertaken during the course of proceedings. The Judge was wrong to prejudge this issue and to accept the mother’s account that it was a “one-off” caused by stress. Thirdly, the Judge gave no proper consideration to the previous history, which had led to the children spending nine months in foster care and the mother receiving a suspended prison sentence, and which showed a deeper rooted problem. Instead she placed disproportionate weight on the mother’s apparent remorse in oral evidence. Fourthly, the Judge did not have good reason to depart from the professional advice, and particularly that of the Guardian, who had so recently agreed that the children could return home under a supervision order.

17. On behalf of the mother, Mr Fortune submits that the Judge did not need to focus on any discrepancies in the evidence given by the mother as there was a CCTV recording of the incident. She was not misled about the nature of the incident and she knew the context from the previous papers. She was best placed to assess whether the mother’s remorse was genuine. She was aware that the mother had gone straight to the school’s safeguarding lead and self-reported and that there was no other evidence of chastisement. She was entitled to find the mother’s remorse to be genuine, and remorse can mitigate risk. As there was no other real evidence required for the final hearing, the decision was not pre-emptive: in any case, as the Judge said, children do not have to be in care in every case where an assessment is to be carried out. Each case depends on its facts, and the Judge was entitled to take a view of the effect on the boys of remaining in foster care. Her decision was faithful to the evidence before her.
18. Submissions filed on behalf of the father support those of the mother, it being added that if the appeal is allowed, this court should consider making an interim care order with a home placement or remit the matter for rehearing.
19. The Guardian, through the written submissions of Mr Poole, supports the appeal. The Judge did not approach the balance of harm correctly. The incident has to be seen in the wider context of the history and it was not correct to say that there was very little dispute about it. The Judge reached a pre-emptive conclusion. The fact that it was now M, with whom the mother apparently has a good relationship, who was struck was an additional feature. The Guardian, who had a continuous involvement over the past year, made a clear recommendation but the Judge departed from it without hearing from her or engaging with her assessment.
20. There is no issue about the applicable law. In *Re C (A Child) (Interim Separation)* [2019] EWCA Civ 1998 at [2], I sought to summarise the proper approach in cases such as the present:

“(1) An interim order is inevitably made at a stage when the evidence is incomplete. It should therefore only be made in order to regulate matters that cannot await the final hearing and it is not intended to place any party to the proceedings at an advantage or a disadvantage.

(2) The removal of a child from a parent is an interference with their right to respect for family life under Art. 8. Removal at an interim stage is a particularly sharp interference, which is compounded in the case of a baby when removal will affect the formation and development of the parent-child bond.

(3) Accordingly, in all cases an order for separation under an interim care order will only be justified where it is both necessary and proportionate. The lower ('reasonable grounds') threshold for an interim care order is not an invitation to make an order that does not satisfy these exacting criteria.

(4) A plan for immediate separation is therefore only to be sanctioned by the court where the child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur.

(5) The high standard of justification that must be shown by a local authority seeking an order for separation requires it to inform the court of all available resources that might remove the need for separation.”

Reference has also been made to *Re O (A Child): Interim Care Order* [2019] EWCA Civ 583, which shared a number of the features of the present case.

21. We have seen the documents that were before the judge and have viewed the CCTV recording. We also have a transcript of the mother's evidence.
22. Here, with the interim threshold plainly crossed, the core issue for the judge was whether the children's physical and emotional safety demanded continued separation. This court will only disturb an interim decision of this kind if it is shown to be one that was not open to the judge. Having heard the arguments, I consider that this is such a case.
23. The first difficulty is that the assessment of risk that occurred at this interim stage effectively predetermined the ultimate issue in the proceedings. That issue was not '*What happened on 5 November?*' – the court was well able to reach a conclusion about that. Rather it was '*What is the significance for the children's physical and emotional safety of what happened on 5 November?*' That was not something that the court was in a secure position to assess. When all the evidence is available, any risks arising from a return home may be shown to be acceptable, but that cannot be known at this stage. The Judge was of course right to say that there is no general rule that children must be removed simply because assessments are being carried out – the general rule is the very opposite. However, the causes of the mother's behaviour are not yet fully understood, despite the extensive previous assessments. Careful assessment is required before it can be said that behaviour of this kind is "*a one-off relapse*" and "*unlikely to be repeated*". That conclusion is not one that could be drawn by assessing the mother in the witness box; however sincere her latest expressions of remorse, remorse had not so far been protective for these children.

24. Secondly, the Judge’s analysis of risk focused heavily on the latest incident and had no sufficient regard to the noteworthy history. The mother had accepted in the previous proceedings that over-chastisement had occurred on many other occasions, including with implements, and O had said that he had been hit many times. This showed a parent with a capacity for significant abuse who had received considerable support to help her exercise self-control: yet this further incident occurred, it was not insignificant, it related to a different child, and it was in a school playground. Moreover, it was minimised by the mother, both in her written and oral evidence in which on five or six occasions she described what she had done on 5 November as “*not excessive*”. The Judge did not factor in the significance of this apparent lack of insight. Moreover, her acceptance that the assault had arisen from stress and anxiety caused by the children going missing overlooked the fact that the mother had done no more than sit apart and wait until they were brought to her. The worrying history and the nature of the mother’s response to the recent episode fully justified the position taken by the social worker and the Guardian, but it was not reflected in the Judge’s assessment.
25. Thirdly, on the other side of the scales the Judge placed “*the risk of ongoing separation*”. There was evidence that the children were unhappy to be separated from their parents but that did not establish that the separation was harmful in the context of a placement in foster care that had been made for their own safety. The Judge’s concern about this aspect of the matter needed to be explored further if it was to become a predominant feature in her decision.
26. Lastly, the requirement to give reasons for departing from core professional advice is a valuable discipline because it requires the court to identify why it is taking a different view and ensure that it has a solid evidential foundation for doing so. Here the Judge made reference to and accepted the evidence of the Guardian, but she did not explain why she was departing from the advice that it contained.
27. Overall, I conclude that if the Judge had recognised the limits to the assessment that she was able to undertake, and correctly identified the main elements of the balancing exercise, she would have been bound to conclude that the present priority must be to keep the children safe from the physical and emotional risks arising from their mother’s behaviour. Interim supervision orders cannot do that. The parents’ application to discharge the interim care orders should have been dismissed and, if my Lady and my Lord agree, we will so order.
28. Finally, I would add that the children are clearly in need of an early decision. There is in my view no reason why the Judge should not continue to hear the case so that it can be brought to a conclusion as soon as possible.

**Lady Justice Asplin**

29. I agree.

**Lord Justice Patten**

30. I also agree.
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