Neutral Citation Number: [2024] EWCA Civ 189

Case No: CA-2023-001917

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM TRURO FAMILY COURT
HHJ RICHARDS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 February 2024

Before:

SIR ANDREW MCFARLANE
President of the Family Division

LORD JUSTICE LEWISON

AND

LADY JUSTICE KING

- -

Re T (Adoption Hearing: Involvement of Applicants)

- -
- -

The Appellants appeared In Person
The First Respondent and **Second Respondent** did not attend
Ms S Daulton (instructed by **Cornwall Council Legal Service**) for the **Third Respondent**

Hearing date: 30 January 2024

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Approved Judgment

This judgment was handed down remotely at 11am on 14 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Andrew McFarlane P:

1. The degree to which applicants for an adoption order should be involved in court hearings to determine whether or not their application should be granted is complicated by the need for the subject child's birth parents to be engaged in the court process, whilst, at the same time, maintaining strict confidentiality around the identity of the prospective adopters. Down the years, guidance from the President of the Family Division has been given on the topic, the most recent being issued on 10 April 2018 ['the President's Guidance']. It is understood that adopters are normally advised that they do not need to attend court hearings, and that, when so advised, they do not seek to do so. The present appeal has arisen because an adoption applicant did want to attend the hearing of his application, or at least be given a detailed account of what had taken place during it. In the event, the court failed to give him notice of the court hearing, refused his request to be able to attend, either in person or over a remote and anonymous link, and then refused his application for a transcript of the hearing.

The adoption proceedings

2. In early 2023, a child then aged 7 years, was placed with prospective adopters ['the As'] by Cornwall Council ['the local authority'] under a placement for adoption order [Adoption and Children Act 2002, s 22] made the previous year. In June 2023 the adopters issued an application under ACA 2002, s 49 to adopt the child.

3. On 26 June 2023, the Family Court in Truro ['the court'] issued an order setting the application down for a hearing on 31 August, which, it was indicated, might be the final hearing. That order giving notice of the hearing was not sent to the As, who were told of the date by their social worker in an email on 26 July.

4. On behalf of both applicants, on 7 August, Mr A first telephoned the court saying that he had not received a copy of the order. Mr A says that the court staff told him that that was correct because 'we never serve adoption applicants.' He then asked if he could attend the hearing and was told that that was a matter for the judge. Mr A, therefore, then sent an email to the court stating that he understood that the rules permitted him to attend should he choose to do so, but asking for confirmation that he would be permitted to attend the hearing on 31 August.

5. On 8 August, in an email the court office recorded that the matter had been referred to the Designated Family Judge, HHJ Richards, who had replied:

> 'The prospective adopters are not permitted to attend the adoption hearing. This is usual practice.'

6. On 17 August, solicitors instructed by the applicants wrote to the court repeating Mr As request to attend the hearing and explaining that Mr A felt an obligation to attend so that in time to come he may tell the child that he had done so in the event that an adoption order were made. It was made plain that, if required, Mr A could attend remotely so as to maintain anonymity.

7. On 24 August the court office replied to Mr A direct by email setting out the judge's response:

> 'The court does not consider that the reason for the request to attend the court hearing is a valid one.'

8. On 31 August, at a hearing before HHJ Richards, the As adoption application was adjourned. The court order issued with respect to that hearing states:

> 'THE COURT ORDERS THAT:
>
> 1. The Mother shall file a statement setting out the changes she seeks to rely on by 4pm on the 25 September 2023

> 2. The Father shall file a statement setting out the changes he seeks to rely on by 4pm on 25 September 2023
>
> 3. The Local authority shall file and serve its response by 4pm on 28 September 2023
>
> 4. The matter shall be listed for a hearing on 29th September …with a time estimate of 2 hours. This shall be listed as an attended hearing.'

9. The order does not record the attendance of any party or legal representative, but its terms suggest that both parents attended the hearing and that the court had been told that they were applying for permission to oppose the adoption on the basis that there had been a 'change of circumstances' within the terms of ACA 2002, s 47. In the event, Mr and Mrs A, who did not see the order of 31 August until January 2024, were unaware of its terms. They received no communication from the court following the 31 August hearing of their application and were told nothing of what had taken place until, on 6 September, an email from the social worker reported that the adoption order had not been granted because the judge had not been satisfied that the parents had been served with the court papers and been given opportunity to oppose. They were told that the next hearing date was 29 September.

10. Pausing there, this court was told by Ms Daulton, on behalf of the local authority, that, on 31 August, the local authority had been represented by a solicitor, who was not a member of the authority's legal department, and who had made no note of the hearing. It is not therefore clear what source of information the social worker had for her account of what had taken place on 31 August as she had been away on annual leave on that date. Be that as it may, for the solicitor not to prepare a note or memorandum of the hearing was a serious failure. In *Hertsmere Borough Council v Harty* [2001] EWCA Civ 1238, Sedley LJ set out the position in clear terms:

> 'The want of an adequate note is a breach of both counsel's and solicitor's obligations. It needs to be said very clearly that both counsel and solicitor (but if

> counsel is there primarily counsel) have an obligation to take the fullest possible manuscript note of a judgment even where it is known that an official transcript will eventually be available, precisely because of the possibility that a decent note of the judge's reasons will be required before the transcript can be provided.'

That obligation applies just as much to the need for a record of the circumstances and outcome of a short hearing where, as is probably the case here, no formal judgment was given.

11. On 6 September, Mr A filed a formal request on Form EX107 seeking a transcript of the 31 August hearing. In the box setting out the reason for requesting a transcript, Mr A said: 'To understand what happened at the hearing of a case to which I am a party.' On the 14 September, the court office responded to the transcript request as follows:

> 'As this matter was held in private it is necessary for the judge to give his permission for the transcript to be released. The file and the application have been referred to HHJ Richards who on this occasion has refused the application but has stated that you may have a copy of the order made on 31 August which should provide all the information needed.'

It is the judge's decision to refuse the request for a transcript of the 31 August hearing which is the subject of this appeal.

12. Mr A did not renew his application to attend court hearings and a final adoption order was made on 29 September 2023 in favour of Mr and Mrs A. They were told of the outcome on 6 October by the social worker.

13. Notice of appeal against the refusal to permit a transcript was filed on 13 October 2023 and permission to appeal was granted by King LJ on 20 December. King LJ's order recorded that the judge's refusal to permit Mr A to attend the hearing of his application, either in person or remotely, would also found a proper ground of appeal and the appellants were invited to amend their grounds of appeal to that effect.

<u>Attendance at an adoption hearing: the rules and guidance</u>

14. The procedural rules providing for adoption proceedings are contained in Family Procedure Rules 2010, Part 14 [‘FPR 2010’]. In particular, r 14.3 provides that ‘the prospective adopters’ are to be the applicants in proceedings for an adoption order and that they are parties to the proceedings.

15. By r 14.15 the court is required to give notice of any hearing of the adoption application to ‘the parties’, and therefore to the adoption applicants:

> ‘14.15 Notice of final hearing
>
> A court officer will give notice to the parties, any children's guardian, reporting officer or children and family reporter and to any other person to whom a practice direction may require such notice to be given –
>
> > (a) of the date and place where the application will be heard; and
> >
> > (b) of the fact that, unless the person wishes or the court requires, the person need not attend.’

It is of note that the default position under r 14.15(a) is that, unless a person served wishes or the court requires, a party to whom notice is given need not attend the hearing. The wording is permissive, as opposed to prohibitive, giving a party the opportunity to attend if they wish, but not giving the court power to prevent them from doing so.

16. Attendance at the final hearing of an adoption application is provided for by r 14.16:

> ‘14.16 The final hearing
> (1) Any person who has been given notice in accordance with rule 14.15 may attend the final hearing and, subject to paragraph (2), be heard on the question of whether an order should be made.
>
> […]
>
> (4) The court may direct that any person must attend a final hearing.
>
> (5) Paragraphs (6) and (7) apply to:
> > (a) an adoption order;
> > [….]
>
> (6) Subject to paragraphs (7) and (8), the court cannot make an order unless the applicant and the child personally attend the final hearing.

> (7) The court may direct that the applicant or the child need not attend the final hearing.
> (8) In a case of adoption by a couple under section 50 of the 2002 Act, the court may make an adoption order after personal attendance of one only of the applicants if there are special circumstances.
>
> […]'

The wording of r 14.16 is in clear terms. Any person who has been given notice under r 14.15, and therefore the applicant, may attend the final hearing. Indeed, the default position is that the court cannot make an adoption order unless the applicant and the child personally attend the final hearing, save where the court has directed that they need not attend. Again the phrase 'need not' is permissive, and leaves the option of attendance open to the applicant. Further, whilst the court may direct that any person 'must attend' a final hearing, the rule does not give the court power to prohibit an applicant from attending the hearing of their application.

17. The current guidance, 'President's Guidance: Listing Final Hearings in Adoption Cases' ['PG'], was issued by Sir James Munby on 10 April 2018. It makes extensive provision for the conduct of final adoption hearings. In the context of the present appeal, the following passages are of particular note (with my emphasis):

    1) '***First Directions Hearing***': 'Once an application for an adoption order is issued, notice will be given to those identified in r 14.3 … The obligation is on the court to ensure that each respondent to the application is thereafter given notice of each hearing and that they are kept informed of the progress of the application.' [PG para 5];

    2) '***Notice of final hearing***': 'Section 141(3) of the 2002 Act and r 14.15 place <u>an obligation</u> on the court officer to give to the persons listed in r

14.3 … notice of the date and place of the final hearing of an adoption application'. [PG para 10];

3) 'The requirement to give notice is mandatory … Notice of the final hearing must be given to any person listed in r 14.3. …By r 14.16 any person who has been given notice under r 14.15 has the right to attend the final hearing and, except where r 14.16(2) applies, to be heard on the question of whether an adoption order should be made'. [PG para 10];

4) '***Practical arrangements for the final hearing***': 'In some cases, the welfare of the child will require arrangements to be made to ensure that the birth parent(s) and the applicant(s) or the child do not meet at or in the vicinity of the court. This will apply particularly in proceedings in which a serial number has been assigned to the applicant under r 14.2(2). Rule 14.2(5)(b) provides that, in such a case, the proceedings will be conducted with a view to securing that the applicant is not seen by or made known to any party who is not already aware of his identity except with his consent'. [PG para 15];

5) 'Rule 14.16(6) provides that the court cannot make an adoption order unless the applicant and the child personally attend the final hearing. However, rule 14.16(6) is subject to rule 14.16(7), (8), which give the court a discretion to direct that the applicant (or one of them) or the child need not attend the final hearing; this provision permits the court, where appropriate, to direct that the attendance of the applicant or the child or both of them at the final hearing is not required. Special arrangements

can of course be made for the attendance of the applicant(s) and/or child (see further para 19 below).' [PG para 16];

6) 'In proceedings in which a serial number has been assigned to the applicant under r 14.2, it will generally be appropriate to excuse the attendance of the child at the final hearing. It is likely also to be appropriate to excuse the attendance of the applicant, to ensure that confidentiality is preserved. Where in such a case the attendance of the applicant is required, arrangements must be made to ensure that the applicant is not seen by or made known to any party who is not already aware of his identity.' [PG para 18];

7) 'In any case in which a direction is given that the applicant or the child need not attend the final hearing, the order and any notice of hearing issued by the court must state clearly that the applicant or the child, as the case may be, should not attend'. [PG para 19];

8) 'If an adoption order is to be made, it should ordinarily be pronounced at the conclusion of the listed final hearing, but may be deferred for example to enable the applicants to attend in person.' [PG para 23].

18. Separate provision is made in the Presidents Guidance in paragraphs 25 to 29 for an 'adoption visit' to take place following the making of a final adoption order at which the applicants and child may attend court for a 'celebratory occasion'.

<u>Application for a transcript of the 31 August hearing</u>

19. FPR 2010, r 27.9 makes provision for the recording and transcription of proceedings. By r 27.9(1) any hearing in family proceedings will be tape or digitally recorded unless the court directs otherwise. So far as transcripts are concerned r 27.9(3) provides that:

> '(3) Unless the court directs otherwise, a person to whom paragraph (4) applies may require a transcript of the recording of any hearing in proceedings to be supplied to them, …'.

Paragraph (4) applies to 'a party to the proceedings'. Any other person may only be provided with a transcript 'with the permission of the court' [r 27.9(5)].

20. In passing, and in contrast to the position under the FPR, it is of note that the companion provision in the Civil Procedure Rules 1998, r 39.9(3), does not provide for the court to 'direct otherwise' in the case of a request by a party for a transcript:

> 'Any party … may require a transcript or transcripts of the recording of any hearing to be supplied to them, upon payment of the charges …'

That position was confirmed by Coulson LJ at paragraph 32 of his judgment in *Anwen v Central Bridging Ltd* [2022] EWCA Civ 201 who observed that '…if the requesting party is prepared to pay for the transcript of a judgment or hearing, he or she is entitled to it as of right'. The difference between the two provisions might be explained by the need for the Family Court to retain some control over the provision of transcripts in part because most of its proceedings are held in private and, in part, regrettably because of the nature of the content of transcripts in some cases involving abuse.

21. The standard procedure, which was followed by the applicant in the present case, is for the application for a transcript to be made using Form EX107.

<u>The grounds of appeal</u>

22. The grounds of appeal, including ground 3 for which we granted an extension of time and permission at the start of the hearing, are:

    1: the judge erred in law in holding that his permission was required to provide the transcript to the appellants given that they were parties to the proceedings.

    2: alternatively, if the judge did have discretion to refuse permission, he should have allowed the transcript to be released.

    3: the judge erred in refusing the appellants permission to attend the final hearing either in person or remotely.

23. Mr A, who has acted in person throughout, plainly has a sound grasp of procedural matters. He prepared a very clear and succinct skeleton argument and assisted the court with similarly well-constructed oral submissions at the hearing. The local authority, which appeared on appeal through counsel, Ms Daulton, supported Mr As submissions in full and assisted the court with an account of the normal process applied in adoption cases at the Family Court in Truro.

Discussion and conclusions

24. As the court is essentially in agreement with the submissions made by both parties, I will move directly to an analysis of the issues and my conclusions.

25. Chronologically, it is sensible to take ground 3, dealing with attendance at the hearing, first before dealing with issues relating to the transcript. The right of an individual who has made an application to a court to a fair trial must, self-evidently, include the right to attend any court hearing held in the court proceedings. Whilst a court will retain a degree of discretion and control over its own processes, for the court to prohibit an

applicant from attending, or otherwise observing or engaging in, a hearing of his own application must be an exceptional course. Even where the safety of the other parties, court staff or the judge may be at risk, and the court may prohibit an applicant from physical attendance at a hearing, arrangements will normally be made for attendance over a video-link or other remote connection. It is, therefore, no surprise that the statute and the court rules do not afford any power to the court to prohibit the applicant in adoption proceedings from attending a hearing of their adoption application.

26. Where an adoption application has been issued, the applicants will be parties [FPR 2010, r 14.3] and the court must give them notice of any hearing, although the default position is that they are not required to attend unless the court otherwise directs [r 14.15]. The applicants may attend the final hearing and be heard on the question of whether an order should be made [r 14.16(1)]. Further, the court cannot make an adoption order unless the applicant(s) and the child personally attend the final hearing, unless the court has directed that they 'need not' do so [r 14.16(6)+(7)]. The careful wording of r 14.16(7) gives permission to the applicants and child not to attend, but does not afford jurisdiction to the court to prohibit them from doing so; the choice is left up to the applicants. The statement made in the President's Guidance at paragraph 19, that when a 'need not attend' direction is made under r 14.16(7) 'any notice of hearing issued by the court must state clearly that the applicant or the child, as the case may be, should not attend', is not supported by any statutory provision. Insofar as the guidance suggests that the court has a general power to prohibit an adoption applicant from attending the hearing of their adoption application, it is in error and made without authority.

27. Where an applicant wishes to attend the hearing of their adoption application, the court must make appropriate arrangements for them to do so. A difficulty, of course, arises in a serial number case, where there is a requirement for the court to maintain confidentiality around the identity of the applicant, and where a parent or another member of the child's birth family are also due to attend the court hearing. In such cases practical arrangements should be made to allow the applicant to engage in the court process anonymously. In years gone by, in London, the applicants would normally simply listen to the proceedings over the court recording equipment by sitting in the 'mechanical recording room'. In modern times, where courts have access to an online system, it will normally be possible for applicants to observe a hearing remotely over a video-link with their microphone and camera switched off.

28. Turning to grounds 1 and 2 with respect to the provision of a transcript of a hearing, r 27.9(3)+(4) establishes that a party to the proceedings may 'require' a transcript to be supplied to them 'unless the court otherwise directs', subject to payment of any charges. Whilst the court has a discretion to direct otherwise, that discretion should be exercised judicially and on reasonable grounds.

29. The court's response to the applicant's application for a transcript of the hearing of 31 August was in error in three respects. Firstly, whilst it is correct that the hearing, like the vast majority of family proceedings, was heard in private, that did not reverse the position established under the rules so as to require the applicant to obtain judicial permission for provision of a transcript. Secondly, no reason is recorded for the judicial decision to direct that there should be no transcript. Thirdly, the statement that the court order would provide all the information needed was in error in that the order did not record who had attended the hearing or why the application had been adjourned.

Matters were compounded in that the court did not apparently send a copy of the order to the applicants, who did not see a copy of it until January 2024.

30. Further, it must a fortiori be the case that, where the court has prevented a party from attending a hearing and that party requests a transcript of the hearing, the request should be granted unless there are clear and specific reasons for refusal.

31. Drawing matters together, in the present case the court in Truro acted in error by:

1) Failing to give the applicants notice of the 31 August hearing;

2) Stating that the adopters were 'not permitted' to attend the hearing. Whilst it might be the 'usual practice' that adopters do not normally attend, the court does not have any general power to prohibit them from doing so;

3) Replying to the applicant's solicitors letter on 21 August on the basis that it was for the applicant to establish a 'valid reason' to attend the hearing of their application;

4) Whilst correctly noting that the birth parent(s) may attend the hearing, the court failed to refer in any manner to the applicant's suggestion that they could join the hearing remotely;

5) Failing to send a copy of the order of 31 August to the applicants;

6) Failing to send the applicants notice of the 29 September hearing;

7) Failing to provide the applicant with a transcript of the hearing of 31 August, without good reason.

32. The applicant's appeal therefore succeeds on all three grounds and must be allowed. As the final adoption order has been made, and the focus of the appeal has been upon preliminary process and case management, no further orders, save for that allowing the appeal, are required.

33. Before leaving this case, however, I will set out the steps that should have been followed in the present case to avoid the errors that occurred. In doing so, I am conscious that, whilst the court in Truro has been in focus in this particular case, the culture and practice demonstrated in that court's approach to adoption applicants is likely to be replicated, in one form or another, in many other courts in England and Wales. We were told that, to the recollection of the long-experienced adoption team in Cornwall, this is the first occasion that an applicant has asked to attend court hearings. It was conceded that this may, in part, be due to the advice that is regularly given by social workers to the effect that it is not necessary for adopters to attend. Ms Daulton told the court that, on reflection, the local authority acknowledged that this advice could be perceived by adopters as an indication that they should not attend. The local authority is to review its future practice in this respect.

34. Over many years, a laudable practice has developed of offering adopters and children an occasion on which they may attend court for what has become known as a 'celebratory visit'. Such a visit is fixed for a time after the adoption order has been made, and after the time for any potential appeal against the final order has passed. In the light of this practice, in most cases there will be no need for prospective adopters to attend the formal hearings in their application, and any possible risk of encountering the birth family at a court hearing is thereby avoided. In part, the 2018 President's Guidance, and its predecessors, was intended to describe the approach to be taken to

underpin this practice. Nothing in this judgment is intended to change arrangements for celebratory visits, but the welcome development of this sensible practice cannot be at the expense of adherence to proper process within the adoption application itself.

35. If the professional approach, by local authorities, the judiciary and court staff, has developed to the point where prospective adopters are being actively discouraged from attending hearings in their own adoption application, that is a matter of concern. It is also concerning that, as we were told, some courts, as in this case, treat the local authority as the de facto applicant, with the result that, as this appellant experienced, the court does not seek to engage with the applicant by giving notice of hearings or serving copies of orders. Rare though it may currently be, to my mind, this appellant's wish to be present (physically or remotely) during the hearings is an entirely understandable one. In terms of 'life-story' information, attendance at these court hearings may be the only first-hand experience an adopter will have of the birth parents. Also, the importance that this applicant attached to being able to say to his child in years to come that he had been to the court hearings is easy to understand. Given the life-changing nature of the proceedings for all involved, one might ask, rhetorically, why any adopter would not want to attend the hearings of their own application, provided suitable and safe arrangements are made to protect anonymity. I would urge each local adoption centre to review its current practice. In addition, I intend to invite Mrs Justice Judd, as chair of the President's Public Law Working Group, to conduct a review of the 2018 President's Guidance.

36. Turning then to the specific steps that should have been taken in this case, on receipt of a serial number adoption application that court should, in addition to such other steps which are not relevant to the substance of this appeal:

1) The court must give notice to applicant(s) of the date and place each hearing at which the application will be heard [FPR 2010, r 14.15];

2) The court may direct that the applicant(s) and the child need not attend any hearing [FPR 2010, r 14.16(7)], but the court cannot prohibit the applicant(s) from attending;

3) As a matter of good practice, where the court order directs that the applicant(s) need not attend a hearing, the court should ascertain, either by direct communication with them or via the local authority, whether an applicant does intend to attend a hearing;

4) Where an applicant has indicated that they do wish to attend a hearing the court should give directions for the proper conduct of the hearing so as to maintain the applicant's anonymity in the event that a member of the child's birth family also attends. Regard should be had to r 14.2(5)(b) so that the proceedings are conducted with a view to securing that the applicant is not seen by or made known to any party who is not aware of their identity;

5) The practical options available will vary from court to court, but it should normally be possible for an applicant to join any hearing remotely, from a site away from the court building, using online technology, with their camera turned off;

6) A copy of the court order following any hearing should be sent to the applicant(s) by the court and the court should give the applicant(s) notice of each hearing and keep them informed of the progress of the

application (in like manner to that required for respondents by paragraph 5 of the President's Guidance);

7) Where an applicant, who did not attend a hearing of the application, requests a transcript of that hearing, then, subject to compliance with any requirements relating to the cost, a transcript is to be supplied to them unless the court directs otherwise [FPR 2010, r 27.9].

In addition, as I have observed (paragraph 25), paragraph 19 of the current President's Guidance is in error in assuming that the court has a general power to direct that an applicant should not attend a hearing. That paragraph requires amendment. Paragraph 5 also requires amendment to include any applicant in addition to the respondents in the requirement for the court to give them notice of any hearing and informing them of progress. More generally, the court's ability to accommodate remote online anonymous attendance has developed out of all recognition in the period since the 2018 guidance was promulgated.

Lord Justice Lewison:

37. I agree.

Lady Justice King;

38. I also agree.

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