Neutral Citation Number: [2021] EWFC 15

Case No: BM20C00223 &
BM20C07010

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2021

Before:

MR JUSTICE MOSTYN

- -

Between:

SZ

Applicant

-v-

BIRMINGHAM CITY COUNCIL

First Respondent

- and-

DK

Second Respondent

-and-

BD and SD
(children acting by their Guardian)

Third and Fourth Respondents

- -
- -

Ms Evelyn Bugeja (instructed by Crosse & Crosse Solicitors LLP) for the Applicant
Ms Adele Cameron-Douglas (instructed by Birmingham City Council) for the First Respondent
The Second Respondent did not appear and was not represented
Mr Narinder Singh of Anthony Collins Solicitors LLP for the Third and Fourth Respondents

Hearing date: 25 February 2021

The case was heard remotely using Microsoft Teams

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Approved Judgment (Corrected)

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This judgment was delivered in private. Permission has been granted for this anonymised version of the judgment to be published. Save for the name of the local authority, the names of the parties is not to be disclosed.

Mr Justice Mostyn:

1. I have before me the applicant-father's application dated 22 September 2020 for contact with his children B, now aged 16¾ and S (known as K) aged 14¾. Both children are in the care of Birmingham City Council ("the local authority"). B lives with the second respondent ("the mother"). K lives in a care home, but regularly visits his mother and sister.

2. I also have before me the local authority's application dated 28 October 2020 to discharge the care order in respect of B.

3. This case has a lengthy and dispiriting history. Care proceedings in relation to B and K were allocated to me. I gave four substantial judgments between November 2012 and January 2015. The mistreatment meted out by the father to members of his family was extreme. It is described in my principal fact-finding judgment of 30 November 2012.

4. The care proceedings concerning B and K concluded with my order of 6 September 2013 whereby I placed both children in the care of the local authority and made an order pursuant to s.34(4) of the Children Act 1989 granting the local authority leave to refuse contact between the children and their father.

5. B and K have not had contact with their father since 2012.

6. The subsequent history was summarised in a further judgment I gave on 14 April 2020 in relation to an application by the father for permission to seek contact with another child of his, ED.

7. I refused the application. That judgment is reported as *SZ v DG & Ors* [2020] EWHC 881 (Fam).

8. The history is well known to all the parties and does not need to be repeated here. It is extremely disturbing. ED's mother, LM, is the half-sister of B and K. B and K are aunt and uncle to, as well as half-siblings of, ED. I only need to state this for an understanding to be gained of just how miserable this case is.

9. As just mentioned, the father and LM have produced three further children. Overall, the father has eight children. The father and LM have split up. As explained in my judgment in *SZ v DG*, the father's three younger children have been placed with him

in the Czech Republic. B and K are aunt and uncle to, as well as half-siblings of, those children also.

10. The father was deported from the UK in 2017. In his witness statement he says that he understands that he is the subject of a lifetime ban on re-entry to the UK. However, the letter dated 25 May 2017 written on behalf the Secretary of State does not, in fact, appear to impose such a lifetime ban. It may be that the ban is contained in some other document.

11. The second respondent mother in these proceedings has remarried and has had another child now aged five.

12. The father's application dated 22 September 2020 seeks contact with B and K, but did not specify the form of such contact. However, inferentially it only seeks indirect contact as the father states in his application that he is unable to enter the UK. The case management order dated 13 October 2020 recorded that the father was seeking only to establish indirect contact with the children. The father's witness statement of 23 November 2020 said only that he wished to "keep in touch with the children" and that he would wish for his three youngest children in his care to be able to exchange photographs and drawings with their older siblings in the UK.

13. The case management order dated 3 November 2020 drew attention to my order of 6 September 2013 under s.34(4) of the Children Act 1989 and stated that the father's application for contact must be preceded by an application to discharge that order. That application was duly made on 23 November 2020.

14. The order of 3 November 2020 at para 9(b) required the local authority to serve a statement in response to the father's application together with a plan setting out what steps are necessary for the assessment of the father in respect of his contact application "**if it is determined that the father's application should proceed after the next hearing**" (my emphasis). That next hearing was fixed before me for directions on 25 February 2021.

15. It is clear, therefore, that on 3 November 2020 the local authority must have made it abundantly clear that at the next hearing before me they intended to apply for the father's application to be summarily stopped. That intention was clearly prefigured in para 9(b)(ii) of the order of that date.

16. The social worker statement from Ms Kapur was some time in preparation and an extension of time had to be obtained from me. It was served on 11 February 2021. It recorded how extremely fearful both children were of their father. For example at para 8 it stated:

> "Through all the work completed with K he has said his biggest fear is his father finding him and killing him. His wishes and feelings are sought routinely by the care staff and he continues to report the same fear. B would not travel independently due to the same fear of her father. On one occasion she became very frightened as she saw a man that she thought was her father. At the age of sixteen her mother had to travel on the bus with her to escort her to school as she was afraid to travel alone."

17. The existence of the father's applications has not been revealed to the children for fear of traumatising them further. The statement says:

> "Both B and K are not emotionally ready at this stage, I have spoken with the care workers who have built good relationships with S, I have spoken to previous Social Worker's TESS worker and the Independent Reviewing Officer. All share the view that even just telling the children about this application could have a detrimental affect on their emotional regulation and home stability."

18. The inferential conclusion is that the children would unquestionably refuse to agree to any such contact, even indirect contact. That inference was based on the children's repeated expressions of deep apprehension and fear at the prospect of having any form of contact with their father. Thus, the statement concludes:

> "Considering the welfare and best interests of B and S, Birmingham Children's Trust neither supports the children being informed of the father's application or any form of contact between B, K and their father. Birmingham Children's Trust request the Sec 34 order made to refuse contact remains in place. Birmingham Children's Trust are not proposing any further assessment of the father for the purpose of contact."

19. The Guardian has gone along with this policy. In the position statement written by Mr Singh, solicitor for the children, he stated:

> "The Children's Guardian and the writer recognise the reasoning behind the local authority recommendation that the children are not informed of the applicant father's request for contact. It is against that context that the Children's Guardian has not sought to ascertain directly from the children their wishes and feelings in respect of the application."

20. The social worker's statement could not have been more clear as to the perceived lack of merit of the father's application. Taken with the terms of the order of 3 November 2020 the father, and those advising him, cannot have doubted that the local authority would be applying for a summary dismissal of his application for contact at the next hearing before me. Unfortunately, it took some time to translate the social worker's statement into Czech, and it was only seen on 24 February 2021 - the day before the hearing - by the father. Further, on Tuesday, 23 February 2021 at the advocates' meeting counsel for the local authority explicitly stated that at the hearing before me in two days' time a summary dismissal of the father's contact application would be sought.

21. In *Wyatt v Vince* [2015] UKSC 14 the Supreme Court held that there was no power under r.4.4(1) to strike out a statement of case on the ground that it has no real prospect of success. However, that rule does not apply to any proceedings governed by FPR Parts 12 to 14, that it to say proceedings relating to children. There is no rule within those Parts permitting a strike out, or summary dismissal, of proceedings relating to children on the ground of lack of prospect of success. However, it has been

held that such a power exists. In *Re C (children)* [2012] EWCA Civ 1489 Munby LJ held at [14]:

> “It is important to recognise the nature of the proceedings before Judge Cliffe. These were family proceedings, not ordinary civil proceedings where the function of the judge is in large part to act as the umpire determining the competing cases put before him by the litigants. In ordinary civil litigation the circumstances in which a judge can prematurely stop a case are limited, albeit less limited now in accordance with the Civil Procedure Rules than was once upon a time the case. But these are not ordinary civil proceedings, they are family proceedings, where it is fundamental that the judge has an essentially inquisitorial role, his duty being to further the welfare of the children which is, by statute, his paramount consideration. It has long been recognised – and authority need not be quoted for this proposition–that for this reason a judge exercising the family jurisdiction has a much broader discretion than he would in the civil jurisdiction to determine the way in which an application of the kind being made by the father should be pursued. In an appropriate case he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter. He may determine that the matter is one to be dealt with on the basis of written evidence and oral submissions without the need for oral evidence. He may, as Judge Cliffe did in the present case, decide to hear the evidence of the Applicant and then take stock of where the matter stands at the end of the evidence.”

22. Therefore, notwithstanding the complete absence of any such power in the rules themselves, the court has a wide power to dismiss summarily an application where it is satisfied that it lacks enough merit to justify it being pursued.

23. Although the father’s application and witness statement had been very unspecific as to the form of contact that was being sought, his counsel Ms Bugeja was able to tell me that the father was seeking no more than to keep the door open to re-establishing contact with his children. A principal objective was for the father to be able to write a letter to the children via the Guardian. Counsel therefore put in writing the directions that she sought in order to take this case to the next stage, namely an Issue Resolution Hearing. These were:

> “1. LA to file statement within 14 days setting out its risk assessment as to the basis upon which the children would suffer harm if even told about the application, to include primary evidence relied upon.
>
> 2. F to file a statement within 7 days thereafter setting out his proposals for contact including the letter he says should be shared with them;

> 3. Initial analysis from the Guardian within 21 days thereafter to include if and how the children should be told about the application and how their wishes and feelings might be obtained."

24. As prefigured, Ms Cameron-Douglas, counsel for the local authority, strongly urged summary dismissal of the father's applications. She pointed out that the risk assessment from the local authority sought in the proposed directions has already happened through the medium of the social work statement. The exercise would be entirely repetitious. Further, there is nothing in law which prevents the father from sending to the local authority a letter for the children. It would then be for the local authority to consider, rationally and reasonably, whether to pass that letter on to the children. The father has already filed a statement in accordance with case management directions setting out his case about contact. His proposal now is no more than a second bite of the cherry.

25. I observed during the hearing that Mr Singh, solicitor for the children, seemed to sit on the fence as to whether the father's application should be stopped now or allowed to proceed to an IRH or final hearing. On balance Mr Singh appeared to favour allowing the case to proceed. This was because he regarded the period of notice that was given at the advocates' meeting of the intention to seek at this hearing a summary disposal as not sufficiently long to satisfy the requirement of procedural fairness. However, this view overlooked the fact that summary disposal was clearly prefigured in para 9(b)(ii) of the case management order of 3 November 2020.

Conclusions on the father's applications

26. In my judgment the father's applications should be summarily dismissed at this stage on the ground that they have no real prospect of success. This decision is for the following reasons.

27. First, although the children have not had the existence of the father's applications explicitly revealed to them, it is clear that were that to happen they would unambiguously refuse to engage in any form of contact with him. These children are now aged nearly 15 and nearly 17: they are both Gillick-competent. As such, in relation to an issue concerning the contact that they have with their parents, their subjective decision, if not objectively foolish or unreasonable, will almost invariably be decisive: see *AS v CPW* [2020] EWHC 1238 (Fam), [2020] 4 WLR 127 at [15] – [22] and *NHS Trust v X (In the matter of X (A Child) (No 2))* [2021] EWHC 65 (Fam) at [30].

28. It is my judgment on the evidence before me that these Gillick-competent children are each to be taken to have made a clear decision, which is neither foolish nor unreasonable, not to engage in any form of contact with their father. That should be the end of the matter. It is true that the decisions are not actual decisions but are, rather, constructive decisions but to my mind that is a distinction without a relevant difference.

29. Further and separately, it is my judgment, on the evidence before me, that it would not be in the children's best interests for there to be any form of contact at the present

time between them and their father. I accept the evidence of Ms Kapur. I am not satisfied that the decision I made for no contact in 2013 should now be encroached.

30. Second, the effect of my order under s.34(4) of the Children Act 1989 is to relieve the local authority of its duty under s.34(1) to allow the children actual reasonable contact with their parents. It does no more than that. It does not relieve the local authority of its wider duty to promote and maintain contact between a child and his/her family. This duty is set out in Schedule 2 Paragraph 15(1) of the 1989 Act which states:

> "Where a child is being looked after by a local authority, the authority shall, unless it is not reasonably practicable or consistent with his welfare, endeavour to promote contact between the child and his parents."

If the father were to send to the local authority a letter for his children, then the local authority will have to make its decision as to whether to pass on that letter to them or otherwise apprise them of their father's concern. In so doing, it would have to apply the duty set out in paragraph 15(1). It could only refuse to do so if it were objectively and reasonably satisfied that promotion of contact was either not reasonably practicable or was not consistent with the children's welfare. Thus, I agree with Ms Cameron-Douglas's argument that the relief that is being sought by the father adds nothing to the reasonable expectations which accrue to him from the local authority's duty as set out above.

31. I agree with Ms Cameron-Douglas that the father's application is premature. What he needs to do is to write the letter that he says will get the ball rolling. The local authority is then under a public law duty to consider that letter conscientiously and to decide whether to pass it on the children. A really carefully drafted letter written in sensitive and emollient terms, which expresses regret and contrition for the nine-year silence as well as for past misdeeds, might well be difficult to justify rejecting. I would expect that the local authority would wish to take on board the advice of the Guardian before reaching a decision. It could be argued that it would not be reasonable for it to fail to take such advice .

32. If the local authority declines to pass on the letter then the father could commence, <u>at that point</u>, an application for contact under s.34(3). He should not commence judicial review proceedings because there is a statutory alternative remedy. He could <u>at that point</u> also apply for discharge of the order made by me on 6 September 2013 under s34(4). Although a literal reading of the two provisions arguably allows orders under s.34(3) and s.34(4) to coexist, I agree that there would be a strong appearance of inconsistency which should be avoided in the interest of clarity.

33. If this second reason were the only reason in play then I would not dismiss the father's applications but would rather adjourn them to see whether he wrote the letter and whether the local authority rejected it. However, the first reason is independently decisive. Taken with the second reason the case for a summary halt to the father's applications becomes overwhelming.

34. I therefore agree with the submission that the father's applications, were they to proceed to a final hearing, would be bound to fail. Thus they should be brought to a halt now.

The local authority's application

35. I now turn to the application by the local authority to discharge the care order in favour of B. This application has to be decided applying the paramountcy principle in section 1 of the 1989 Act. However, it seems to me to be a truism that if a local authority, an organ of the state, has decided for good and rational reasons that it does not wish to keep a child in its care any longer, then the court should, almost invariably, agree to discharge the care order as no child should be kept under the authority of the state for a minute longer than is necessary.

36. It is true that there have been regrettable delays in the formulation and pursuit of the discharge application. Even now, the impact of delay has meant that there has been no contribution from the Guardian as to the merit of the proposal. However Mr Singh did not mount any objection to the discharge and appeared to accept that the evidence filed in support of the application justified its grant. Ms Cameron-Douglas succinctly summarised the evidence in support of the application as follows:

> "a. M has sustained positive changes since the final care order was made;
>
> b. M's engagement has always been good and continues to be so. She is accommodating of the LA's involvement;
>
> c. B has lived with M since 2018 and is settled there. The home environment M has created is stable, warm and B is observed to be happy and comfortable there;
>
> d. M has a good level of insight and provides B with good care;
>
> e. B herself has expressed that she is ready to live a normal life without social work involvement;
>
> f. the LA are confident in M's ability to seek support in the future if required; and
>
> g. the LA's only concern relates to F – a situation which is mitigated by way of F residing in the Czech Republic, and that Interpol have been alerted and F has informed the court that he is unable in any event to travel to this country."

37. This summary fairly reflects the evidence and amply justifies the conclusion that discharge of the care order is in B's interests.

38. Such an order will therefore be made.

39. That is my judgment.