[2011] EWCA Civ 34

Case No: B4/2010/1401 & 1885

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SWANSEA COUNTY COURT
HER HONOUR JUDGE MIFFLIN
LOWER COURT NO: SA09C00194

Royal Courts of Justice
Strand, London, WC2A 2LL

26/01/2011

B e f o r e :

LORD JUSTICE RIX
LORD JUSTICE WILSON
and
LORD JUSTICE STANLEY BURNTON

Between:

Re D (A Child)

Mr JD	**First Appellant**
- and –	
Mrs JD	**Second Appellant**
- and -	
City and County of Swansea	**First Respondent**
KD (A Child by her Children's Guardian)	**Second Respondent**

Mr Michael Keehan QC (instructed by Cameron Jones Hussell and Howe, Port Talbot, on behalf of the First Appellant and by Paton and Carpenter, Llanelli, on behalf of the Second Appellant)
appeared for the Appellants.
Mr Stephen Bellamy QC and Mr Philip Harris-Jenkins (instructed by The City and Council of Swansea on behalf of the First Respondent and by Messrs T Llewellyn Jones, Neath, on behalf of the Second Respondent), appeared for the Respondents.
Hearing date: 14 December 2010

HTML VERSION OF JUDGMENT

Crown Copyright ©

Lord Justice Wilson:

1. On 14 December 2010 my Lords and I heard an appeal by parents against a care order made in relation to their only child, K, by Her Honour Judge Mifflin in the Swansea County Court on 7 May 2010. K was born in November 2007 and has thus recently attained the age of three. She is living with the mother. The father is living separately but the two parents, who are married, wish to resume married life and together to care for K. In making the care order, however, the judge endorsed a care plan, supported by the Children's Guardian, to the effect

that K should continue to live with the mother provided that the father both continued to reside elsewhere and to have only supervised contact with K. The unspoken assumption was that, were the mother nevertheless to resume married life with the father, K would be removed from her and placed into an alternative home. Such will not occur because the mother has always made clear that, rather than suffer the removal of K from her, she will accept permanent separation from the father. In effect, therefore, the judge's decision was to require the permanent breakdown of the marriage of the parents as well, of course, as to provide that K's future relationship with the father should be of a highly attenuated character. On any view the judge's order was to *interfere* substantially with the rights of K and her parents to respect for their personal and family life under Article 8 of the ECHR but, so the judge held, the care order did not *infringe* those rights because it was necessary to the service of K's safety while a minor.

2. Following a short hearing, in the course of which we were treated to advocacy of high quality both by Mr Keehan QC on behalf of the parents and by Mr Bellamy QC on behalf of the local authority and of the guardian, we announced our unanimous decision, namely that the judge had been plainly wrong to have reached a final decision, with such adverse consequences for the family as a whole, at the stage at which she had chosen to do so. We announced that we would set aside the full care order and instead make an interim care order; and we articulated other directions which are better understood if set out at the end of this judgment.

3. I now give my reasons for having subscribed to the decision which we announced at the end of the hearing.

4. In my experience one of the most difficult tasks which faces the family judge is to translate serious, indeed sickening, paedophile offences committed by a father or other adult on the internet into an assessment of the risk which he therefore poses to his own child. In making that translation judges need all the expert help that they can get.

5. In September 2004 the father was convicted of four serious offences, namely distributing indecent photographs of a child, attempting to incite another to distribute an indecent photograph of a child, making an indecent photograph or pseudo-photograph of a child and attempting to incite another to procure a girl under the age of 21 for the purposes of unlawful sexual intercourse. The most grossly serious offence was the fourth in that, on the face of it, the father was attempting to incite another person (with whom he was corresponding by email) to procure an underage girl for the purposes of his actually having sexual intercourse with her. The father was not aware that his correspondent in that regard was an undercover police officer. The email correspondence between the father and the police officer was placed before the judge and indeed before this court in order that no doubt about its gravity should remain. The correspondence proceeded between about December 2002 and February 2003 and in it the father made clear that he wished his correspondent to arrange for a meeting between him and a girl aged between about 11 and 14, in a hotel room, where either full intercourse or oral intercourse might take place.

6. When in February 2003 the father terminated the correspondence – on the basis that "for all I know you could be part of a law enforcement … agency" – he was arrested; and a search of his computer established that he had viewed 432 images of an indecent nature which depicted young girls.

7. Following his convictions the father, who had married the mother in 1999, was sentenced to a term of imprisonment of two years, reduced on appeal to 15 months. Between November 2004 and April 2005, while in prison, he underwent the Sexual Offenders' Treatment Programme. The report was that he had made generally significant progress. In May 2005 he was released from prison but he remains on the Sexual Offenders Register and is subject to conventional restrictions.

8. Following his release the parents resumed married life; changed their surname; and moved from England to Wales.

9. In 2007, to the surprise of the parents, the mother became pregnant. In about May 2007 they informed the Public Protection Unit ("the PPU") of the pregnancy. If the information was relayed to the children's services department of the City and County of Swansea ("the local authority"), they certainly did not follow it up. Again in October 2007 the parents raised the mother's pregnancy with the PPU. The local authority thereupon completed a pre-birth

assessment and resolved that there should be a formal risk assessment. On 23 November 2007 K was born but it was not until October 2008 that the local authority commissioned the Lucy Faithfull Foundation to undertake the risk assessment. On 11 November 2008, apparently before that assessment had begun, the father at once responded to a request on the part of the local authority that, at any rate for the time being, he should leave the family home. Thus it was that, for almost the first year of K's life, the parents had cared for her jointly; and there is no suggestion that she had suffered any harm.

10. Since then the father has continued to reside separately from the mother and K. Until the time when the judge made the care order, his contact with K was, with the approval of the local authority, supervised only by the maternal grandmother, who lives close to the family home. In her judgment, however, the judge indicated that she was not satisfied with supervision of his contact only by the grandmother and, since then, a contact supervisor has apparently also been in attendance.

11. In February 2009 the local authority issued care proceedings in relation to K. By then the Lucy Faithfull Foundation had provided a risk assessment in the form of reports both on the father, and, in terms of her ability to protect K, on the mother. The reports were broadly favourable to the aspiration of the parents to be allowed to resume life together with K. They suggested that the father presented a minimal risk of a contact offence against his own child; that in any event the mother had the makings of being able to protect her; but that short pieces of work should be done with each of them. When, at an early stage of the proceedings, the reports were placed before her, the judge indicated that, while the suggested work might be carried out, as indeed it later was, the court would not be able to rely to any significant extent upon the reports. She indicated that she regarded it as necessary for a risk assessment to be conducted by a clinical and forensic psychologist. Thus it was that Dr X, who has those qualifications, was instructed. I will refer to her only as Dr X because, as I will explain, the judge was critical of her, in particular of her methodology, and because, as I have discovered with some concern, criticisms of experts repeated in judgments of this court, before which they have no opportunity to rebut the criticisms, can sometimes have an unfairly negative effect upon their future practice.

12. In August 2009 Dr X made her report. She considered that there was only a low risk that the father would commit a sexual offence in the future and that, while she could not exclude the possibility of some type of offence, one which did not include contact with a child was more likely than one which did include it. It was her view that, in the light of the progress which the father had made in pursuing the treatment programme in prison and, more recently, in undertaking the work recommended by the Lucy Faithfull Foundation, there was no need for further intervention in order to address the risk. Dr X considered that the father had a comprehensive understanding of the risk which he posed and of how to manage it in the future.

13. Dr X's report seems to have been drawn to the attention of the judge at a hearing for directions in November 2009. She ruled, however, that the management of the risk which the father posed required further study. It was in such circumstances that, with her approval, the parties instructed Mr Cullen, a former probation officer and an experienced practitioner specialising in the assessment of risk posed by sexual offenders. It is important to note that Mr Cullen was invited to work on the hypothesis put forward by Dr X, namely that the father presented a low risk of committing a further sexual offence.

14. On 28 February 2010, namely 15 days prior to the start of the substantive hearing before the judge, Mr Cullen made his report. It was his provisional view that a system for the protection of K could successfully be put into place in a home occupied by both parents.

15. There were two main recommendations in the report of Mr Cullen, one being short-term and the other long-term. The short-term recommendation was that, prior to his offering a final assessment, the mother and the father should undergo a short piece of work. In the case of the father it was to focus on risk-taking and its link to attachment problems and adult relationships; and in the case of the mother it was to focus on what Mr Cullen described as "healthy scepticism", i.e. the inculcation in her of a better recognition of the subtle strategies to which an offender will resort in order to overcome protective systems. He suggested that the work with the father would take place for 16 weekly sessions and that the work with the mother would take place for up to 12 such sessions; that most but not all of the sessions

should be with each parent separately; and that a social worker should be present at all the sessions with the mother and at all the joint sessions. Mr Cullen explained that, were he ever to become convinced that the work was unlikely to be successful, he would terminate the programme earlier than originally planned.

16. Mr Cullen's long-term recommendation, subject to the short piece of work and to final assessment, was for a programme which would on any view make great demands on the family. It was a programme which the parents would have to adopt throughout K's minority. It was not only that the mother and the father himself should closely monitor his mood and honestly address symptoms of change. It was also that he should not at any time be allowed to participate in the intimate care of K, such as bathing her, dressing her or changing her on the beach, and that he should not spend long periods of time with her alone or baby-sit for her when the mother was absent. The programme was to require a degree of ongoing involvement with the family on the part of the local authority, indeed not only when the mother requested it, and to require the father to undergo further psychological testing about every five years. Mr Cullen did not shrink from stating that, in the light of the restricted role for the father in the family home, some of the family's friends, in particular those with children, would need to understand the reason for it.

17. When, on 15 March 2010, the substantive hearing began, it was made clear on behalf of each parent that, notwithstanding the obviously unpalatable features of parts of Mr Cullen's long piece of programme, they were willing, in the interests of reunification of their family, fully to comply with it and, in the first instance, to participate in the short piece of work which he had recommended. Surprisingly the parents contended, at any rate for part of the substantive hearing, that the threshold set by s.31 of the Children Act 1989 to the making of a care order had not been crossed; inevitably the judge held that it had been crossed. But their main submission, apparently maintained throughout the hearing, which took place on a few days beginning on 15 March and on another few days beginning on 14 April 2010, was that there should be an adjournment of up to 16 weeks so that Mr Cullen could undertake the work which he had recommended.

18. In her judgment the judge was severely critical of the local authority, indeed not merely for their failure to take steps to protect K during the first year of her life. Their line at the substantive hearing was simple but, so the judge considered, irresponsible, namely that, even if Dr X's verdict that the risk was low, it was unmanageable. The judge found that the local authority had refused even to engage with the provisional suggestion of Mr Cullen that the risk was manageable. They had also indicated that they lacked the resources with which to fulfil the role which Mr Cullen's long-term programme required of them. The judge said:

> "They have set their face against any proper analysis in the situation, and have not even adhered to the basic practice of keeping written records of their decision-making. This is in my judgement shambolic and an unacceptable way to deal with these difficult issues."

19. During the adjournment of the hearing between March and April 2010 the guardian made her position clear. It was that there was no safe alternative to the court's approval of the care plan and thus of the permanent separation of the parents.

20. Although, in the context of risk to K, they had made a favourable impression on the officers of the Lucy Faithfull Foundation, on Dr X and on Mr Cullen, each of the parents made, in the course of their apparently quite extensive oral evidence, a seriously unfavourable impression upon the judge. Her findings in relation to them, which, as Mr Keehan acknowledges, must stand for the purposes of all future consideration of the case, were pivotal in her decision to proceed to make a full care order and thereby to end the proceedings. The father had sought to persuade the judge that his emails to the police officer were sent for the thrill of it, or as a fantasy or indeed merely to obtain photographs, and that he would never have proceeded to have contact with the girl or girls under discussion. The judge roundly rejected the father's evidence in that regard and found that the emails represented a sustained attempt on the part of the father actually to procure a child for sexual intercourse. Generally she found that, while the father could "talk the talk", his evidence was dissembling. In relation to the mother, the judge found that, while she would not stand by and see K hurt, her ability to protect her was undermined by too great a reliance on the absence of problems in the first year of K's life and too small an appreciation of the problems attendant upon Mr Cullen's long-term programme

and upon the changing nature of the risks as K grew up. The judge was much struck by the mother's evidence that she could get through the day only by refusing to believe that the father would have acted upon the arrangements sought to be made in the emails: in the judge's view such was good evidence of the failure on the part of the mother to confront the scale of the risk.

21. The judge also referred to two specific matters which concerned her. The first was that, during that first year of K's life when the father was living in the home, the parents had set up a webcam in her bedroom to allow images of her to be captured and sent to the extended family. The judge was surprised that, in the light of the father's convictions, neither the mother nor any member of the extended family, nor indeed the social worker who was then making occasional visits to the home, had been concerned that photography of the baby in her bedroom was taking place. The second matter was that the guardian had recently witnessed an occasion of contact between K and the father in which she had kissed the father on the lips. Apparently the father had done nothing to deflect the kiss, for example on to the cheek, and there had been no reaction to the event on the part either of the mother or of the grandmother. In my view it was open to the judge to articulate concern about those matters.

22. In her judgment the judge was, as I have indicated, critical of the report of Dr X; and, although in this appeal the parents had aspired to challenge the judge's criticisms of her report, this court had, prior to the hearing before us, ruled that they should not be permitted to do so. It was the judge's view that Dr X had placed too little weight on the nature of the father's offences and too much weight on the therapeutic interventions which had followed. The judge considered that the escalation of the level of his offending to his attempt to procure a child for direct sexual activity had been insufficiently considered by Dr X who, when belatedly she had received a copy of the emails, should in the judge's view have sought to reinterview the father about them. She was also of the view that Dr X had done too little to validate the responses of the parents to her to the effect that they understood the symptoms of possible relapse and were communicating with each other better than in the past. The judge observed that, as a result of the cross-examination delivered to each parent, she was in a better position to appraise the parents than had been Dr X. The judge said:

> "It is likely, given the tenor of [Dr X's] evidence, that the additional information would have served to produce results in respect of risk which may have been higher. Therefore, for the purposes of considering the issue of risk …, the court is unlikely to have before it another assessment which is more favourable to the parents than that produced by [Dr X]."

23. It appears that, in the course of the final oral submissions of counsel, the judge raised with them the possibility that, were she to reject the report of Dr X, she might adjourn for the commission of a second psychological report upon the level of risk. Presumably as an alternative to their continued espousal of the recommendation of Mr Cullen for adjournment for a period of up to 16 weeks for further work to be done, counsel for each parent adopted the judge's tentative suggestion. In the event, however, she dismissed it in the course of her judgment. She did so in terms similar to those in the quotation set out above. For she said:

> "However, this court has come to the conclusion that, for the purposes of considering risk, [the father] is unlikely, given the matters raised by the court, to have a more favourable report than that already provided by [Dr X]."

24. Having thus twice concluded that further expert evidence was unnecessary in that it could not yield a conclusion more favourable for the parents than that of Dr X to the effect that the risk posed by the father to K was "low", the judge inevitably proceeded, or said that she proceeded, on the basis of Dr X's assessment, namely of low risk. In the crucial paragraph of her judgment she said:

> "This court has made a decision on the basis of the risk identified by [Dr X] as being low and has made findings that, even on that basis, neither [of the parents] are properly able to support the model suggested by Mr Cullen; or indeed any model that would properly secure this child's safety within the home. In those circumstances it appears to the court that there is little point in a second expert assessing risk, since the court's findings about the parents will stand. Similarly in my judgment, bearing in mind the body of the findings in the judgment, there is no room for any further work towards reunification …"

Although she did not make it entirely clear, I infer that the judge's rejection of the possibility of "any further work towards reunification" was a rejection of the sustained contention on behalf of each parent that the court should adjourn for about 16 weeks in order that Mr Cullen should undertake his proposed work.

25. Following oral delivery of the judge's reserved judgment on 7 May 2010, the mother, by her solicitors, wrote to the judge and sought further explanation in specified respects. Reasonably enough, the judge chose to delay any response until the transcript of her judgment was before her. At that point she decided, at any rate in part, to answer the enquiries posed on behalf of the mother. Asked to explain the reasons why she had concluded that reunification of the family was impossible, the judge wrote that she had found that the father presented "a considerable risk to the child"; that he had been unable to show any real insight into the nature and extent of his offending behaviour; that he posed a risk which was "dynamic" as well as "significant", i.e. was likely to change from time to time; that the mother's poor insight into the father's offending and her minimisation of the difficulties which it presented for the family disabled her from protecting K from the risk; and that accordingly it could not be managed.

26. The mother had also asked the judge to explain why the request for time to be given for Mr Cullen to conduct the short piece of work had not been granted. In this regard the judge wrote:

> "For the detailed reasons set out in the judgment the court took a different view to that taken by Mr Cullen and [Dr X] as to the level of risk posed by [the father] and [the mother's] ability to manage that risk. In light of the detailed findings there was no evidential basis for any further assessment."

27. I pull together the threads of the forensic history of these proceedings as follows:

> (a) The judge elected at an early stage of the proceedings in effect to attach no significance to the reports of the Lucy Faithfull Foundation. The parents accept that the judge's decision in that regard reflects water which has long since passed under the bridge and they do not invite this court to conclude that the judge was otherwise than entitled to put that evidence to one side.
>
> (b) The judge then directed the commission of a risk assessment by a clinical psychologist, namely Dr X. She did so because she regarded that evidence as necessary to her determination of the proceedings.
>
> (c) Dr X's assessment was that the risk posed to the father to C was low. For reasons which this court has not allowed the parents to challenge, the judge rejected Dr X's methodology.
>
> (d) Nevertheless the judge was prepared, at any rate in her substantive judgment, to proceed on the basis of Dr X's conclusion that the risk was low. It was on that basis that she rejected the possibility of adjournment for a further psychological report.
>
> (e) Dr X's opinion that the risk was low had been directed by the judge to be the foundation of an enquiry by Mr Cullen whether such a risk could be managed. She had directed him to become involved in the enquiry because in her view his report on management of it was necessary to her determination of the proceedings.
>
> (f) In that, at any rate in her substantive judgment, the judge proceeded on the basis, recommended by Dr X, that the risk was low, the judge did not jettison the assessment of risk upon which Mr Cullen had founded his report and in particular, his recommendation to be allowed to do a short piece of work with the parents for up to 16 weeks.
>
> (g) The judge rejected the request of the parents for an adjournment for that purpose by reference, and only by reference, to her assessment of the significance of her own factual findings about the parents. In particular, no doubt, the judge had in mind her firm finding that the father had intended to have actual sexual relations with the girl or girls who had been under discussion in the emails.
>
> (h) In twice stressing, in reference to the possibility of a second psychological report, that the father could do no better than a reassertion of the conclusions of Dr X, the judge surely ignored that, were the second report to lack the methodological flaws

discerned by the judge in Dr X's report but, nevertheless, to reach the same conclusion about the level of risk, the father could indeed have done better.

(i) But it was surely for Mr Cullen himself to assess whether the judge's findings about the parents rendered his recommendation for a short piece of work other than worthwhile. In attractively realistic submissions which are the trademark of his advocacy Mr Bellamy conceded before us that, were the judge to have been invited upon delivery of her judgment in May 2010 to authorise its communication to Mr Cullen, with a view to his reporting whether in his view the short piece of work remained worthwhile, it would have been difficult for the local authority and the guardian to oppose it and for the judge to reject it. Thereupon, of course, we asked Mr Bellamy to explain why, if such had been a proper course to be taken in May 2010, it was no longer a proper course to be taken by the time of the hearing before us in December 2010. Mr Bellamy made clear that he did not deny that it remained a proper course but that a short adjournment in order only to consult Mr Cullen should be the limit of any such course now to be taken.

(j) Lastly, notwithstanding that the transcript of her judgment was in front of her when the judge wrote her supplementary responses, there is a substantial discrepancy between the express basis of the judgment, namely that the risk posed by the father was low, and the suggestion in the supplementary response that the judge had taken a different view about the level of risk posed by the father from that taken by Dr X and therefore by Mr Cullen. Constrained to acknowledge the contradiction, Mr Bellamy sought to play down its significance. In my view, however, the supplementary response dislodges the basis of the judgment. If, in fact, the judge was paying only lip-service to the level of risk appraised by Dr X, and inherited by Mr Cullen, and if in fact she was proceeding on the basis that the risk to K was at a higher level, then she was proceeding without expert endorsement and she was rejecting the idea of a further psychological assessment on a false basis, namely that she would in any event adopt the level of risk assessed by Dr X.

28. In the course of the hearing I asked counsel whether it was relevant that at no point in the judgment had the judge addressed the effect upon the mother, and thus in particular upon her parenting of K, in the event that her marriage to the father was to be the subject of an enforced breakdown. Counsel responded that, notwithstanding the apparent depth of the commitment between the parents, the judge had never been asked to consider the effect of her order upon the mother. In those circumstances the judge can in no way be criticised for failure to do so. It is clear, however, that, in requesting the adjournment of about 16 weeks, the parents had, by counsel, pressed upon the judge the relative absence of prejudice to K attendant upon such an adjournment. For K would continue to live with the mother alone and to have only supervised contact with the father, i.e. would continue to live under the arrangements which even the local authority and the guardian regarded as optimum. In her judgment the judge failed to address the relative lack of prejudice to the child consequential upon adjournment; but in my view such was a major factor in the decision whether, in the light of the judge's findings, to revert to Mr Cullen.

29. The judge recognised that her full care order, cast upon the care plan filed by the local authority, represented "a significant inroad" into the rights of K and the parents under Article 8. Let me, albeit with some hesitation, proceed on the footing that those words are adequate to convey both the deprivation of K of an upbringing with both her parents and the enforcement upon the latter of the breakdown of their marriage. On any view, however, and whether addressed through the prism of Article 8 or simply under s.1(1) and (3) of the Act of 1989, the judge's decision had to be one of last resort. Having ruled that contributions from Dr X and Mr Cullen were necessary, the judge in effect jettisoned them; appears, in the light of her supplementary response, to have proceeded by reference to a level of risk unsupported by expert evidence; and spurned the chance of further assistance from Mr Cullen which could have been obtained without significant detriment to K. In this profoundly difficult field the judge was, I was driven to conclude, plainly wrong to have proceeded at that stage, unsupported by the experts, to close down the enquiry into the prospects of achieving an acceptable level of management of such risk as the father posed to K.

30. It was for the above reasons that I subscribed to our decision to allow the parents' appeal against the full care order, to make instead an interim care order over K and to give the following directions:

> (a) that forthwith the local authority should send to Mr Cullen copies of the transcript of the judge's judgment dated 7 May 2010 and of her supplementary response dated 8 July 2010 and that, as soon as practicable, they should send to him our own judgments, once handed down;
>
> (b) that Mr Cullen should report in writing to all parties as to whether, in the light in particular of the judge's findings of fact about the parents and the decision of this court, it would in his view remain worthwhile for the piece of work for up to 16 weeks which he had recommended to be undertaken;
>
> (c) that, were he to report that it remained worthwhile to undertake the work, Mr Cullen should, subject to any contrary direction given pursuant to (d) below, proceed to conduct it for as long as he continued to consider it to be worthwhile;
>
> (d) that, upon receipt of Mr Cullen's report, each parent, the local authority and the guardian should each be at liberty to apply urgently to the court identified in (e) below for further directions; and
>
> (e) that the judge to hear any application pursuant to (d) above and, in any event, to conclude the hearing of the local authority's application for a full care order should either, if practicable, be Mr Justice Roderic Wood, the Family Division liaison judge for Wales, in which event the proceedings should be transferred to the High Court, Family Division, Swansea District Registry or, if not practicable, be another circuit judge in the Swansea County Court. I should add that Mr Bellamy strongly argued that HHJ Mifflin should retain conduct of the proceedings; but it was on balance my view that, notwithstanding the experience and high reputation of the judge, it would place her in an uncomfortable position to be required in the present circumstances to proceed with a case which she had resolved should be concluded in a particular way.

Lord Justice Stanley Burnton:

31. I agree.

Lord Justice Rix:

32. I also agree. My Lord, Lord Justice Wilson, has admirably expressed the reasons for which I joined in our decision at the end of the hearing to allow this appeal and make the directions as set out above.