Re Z (A Child) [2010] EWCA Civ 448 (19 February 2010)

Case No: B4/2010/0320

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION

HIS HONOUR JUDGE RICHARDS

Royal Courts of Justice

Strand, London, WC2A 2LL

19th February 2010

B e f o r e :

LADY JUSTICE ARDEN

LORD JUSTICE SCOTT BAKER

and

LORD JUSTICE LEVESON

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IN THE MATTER OF Z (A CHILD)

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Ms Dormenge (instructed by Messrs Pannone) appeared on behalf of the Appellant.

Ms D Eaton QC and Ms Fass-Ann Amaouche (instructed by Messrs Alexander Marks Llp) appeared on behalf of the Respondent.

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HTML VERSION OF JUDGMENT

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Lord Justice Scott Baker:

This appeal concerns a little boy, to whom I shall refer as Z, who was born on 6 October of last year and is therefore just four-and-a-half months' old. The mother appeals against a contact order made on 28 January this year by HHJ Richards sitting in the Principal Registry in London.

The matter was ordered in urgently before us last Friday by Hughes LJ on an application for permission to appeal, with appeal to follow if permission granted. My Lady indicated at the commencement of the hearing that we were minded to grant permission to appeal and the hearing therefore has proceeded as a full appeal.

The background to the case, in brief, is this. The mother and the father are both English of Pakistani origin. The mother is 33 and the father is 43. The mother is the full time carer for the child and lives in Manchester. The father is a general practitioner and lives in Ilford. It is said that the mother and the father underwent a religious ceremony of marriage in January of 2008 while the father was still married to someone else. That marriage, however, appears to have been dissolved in early 2009.

The mother and the father lived together at the house owned by the father in Ilford. The marriage ran into difficulties. Each side makes allegations against the other. These allegations remain completely undetermined by a court. Whether any findings, when eventually made, have a bearing on the future welfare of Z is something that remains to be seen. There is no purpose in my describing in any detail the allegations made by each side in the course of this judgment. The police were apparently involved with this family in December of 2008 and the social services in September of 2009.

Unfortunately Z was born with a serious physical disability commonly known as "clubfoot" and he has to wear orthopaedic appliances. When the mother returned home after Z's birth the relationship between the mother and the father deteriorated. Matters came to a head and the mother left in mid-November and has, since that time, lived with Z in Manchester which is her home city.

The father last saw Z on 23 November of 2009, at which time Z was seven weeks' old. There is an issue as to the circumstances in which the father has not seen Z and that is something that it is not possible for this court to resolve at this hearing.

On 14 January of this year the father applied for contact and for a prohibited steps order. District Judge Bowman, sitting in the Principal Registry, made an ex parte prohibited steps order in the following terms:

"The Respondent [that is the mother] is forbidden until further order to remove or attempt to remove the child [Z] from the jurisdiction of this court, […] or to instruct or encourage any other person to do so, without the prior consent of the Applicant Father given through Solicitors, or the permission of the court."

The District Judge further ordered that the matter be listed for a half hour hearing at 11.00, one week later on 21 January. He ordered that the mother must attend the hearing. That was an ex parte order

and it is not apparent that the District Judge had in mind the kind of difficulties that there might be for the mother of a four-month-old child -- or three months as he then was -- going from Manchester to London to attend the hearing. The mother filed an acknowledgement shortly afterwards in a form C7; she was then dealing with the application for contact and the hearing had been ordered by the District Judge on 14 January. This document includes allegations against the father and expressed concerns about the risk of Z being abducted. She asked for a residence order and said that supervised contact would be acceptable.

On 21 January, at the adjourned hearing, the mother did not attend but she was represented. HHJ Richards heard the matter on that occasion and made an order, which is to be found at page 28 and following of the bundle, which included the following material provisions: that the mother's application to transfer the proceedings to the Manchester County Court or the Bury County Court be refused; that there should be an interim shared residence order in favour of the mother and the father, and that there should be interim staying contact with the father for one week (seven nights in each and every four week period); each period of contact to commence between 1 and 2pm on a Saturday and end between 1 and 2pm on the following Sunday; such contact to commence on Saturday 23 January and the next period to commence on 20 February and such cycle to continue thereafter until further order. The father was to be responsible for collecting Z from the mother's house and returning him at the end of the relevant period. But the thrust of the contact order was that the father was to have Z with him at his home in Ilford during the contact period.

A penal notice was attached to the order in the light of the mother's failure to attend. The respondent mother was forbidden to remove Z from the jurisdiction until further order, and a similar order was made in respect of the father, but in his case by consent, and the usual orders were made about mother and father not applying for a passport for the child.

The judge further ordered that the mother should file a sworn statement by 4 February setting out her proposals for when each parent should care for Z, and any allegations that she asserted were relevant to the determination of that issue and there was a provision for the father to file a sworn statement in reply by 17 February. The matter was then listed for further review before a circuit judge sitting in the Principal Registry on 26 February with a time estimate of 30 minutes, and the mother was directed to attend on that occasion and that, in default of her attendance, the court would make such orders as it deemed appropriate.

This order of 21 January is not the subject of the present appeal because it was overtaken by the order of 28 January which is the subject of the present appeal. However, there are, in my judgment, a number of very unsatisfactory features about HHJ Richards' order of 21 January. First, no application for shared residence was made. Ms Eaton, who has appeared before us for the mother, points out that under Section 10 of the Children Act of 1989, in particular Section 10(1)(b), the court is able to make an order that it thinks is appropriate, even though no such application has been made. That is all very well, but, as my Lady pointed out during argument, making an order for which there has been no application is one thing, making an order for which no notice has been given to the other side is a quite different matter. No notice was given to the mother that the court would deal with residence and contact at the hearing on the 21st and no opportunity was given to the mother to prepare and deal with those issues. The mother was not present at the hearing. The answer to that, it is said, is that she was ordered to be present but it is unclear what the circumstances were that prevented her attendance, and that is not, in my judgment, a complete answer to these points.

Furthermore, there were allegations that were potentially relevant to contact. The mother had sought an order for supervised contact. Z was a baby in the primary care of the mother and, for whatever reason, the father had not seen the child since 23 November, and the final unsatisfactory feature of the order is that there was a letter before the judge from the general practitioner, which is at D16 in the bundle, which said that Z was receiving therapy for the clubfoot and that he had orthopaedic appliances and was unable to travel to London because of discomfort from his appliances. He is receiving treatment for clubfoot at the Royal Manchester Children's Hospital. It may be that the doctor was putting matters somewhat high by saying that Z was unable to travel to London, but the judge did not give any indication as to what, if any, attention he paid to this letter.

The mother was so concerned about the order that she went to London on the following day 22 January. HHJ Richards read a statement of the mother and decided to stay parts of his order dealing with residence and contact. That order is at B31 and stays paragraphs 2, 3, 4 and 5 of the previous order until the conclusion of the hearing on 28 January. At paragraph 2 was the interim shared residence, paragraph 3 was the interim staying contact and paragraph 4 was the collection of Z and paragraph 5 was the penal notice. For some reason the father was not served with the order. He did not know about the stay.

An unfortunate incident occurred at the mother's house on 23 January. The police were called and the father was bailed on condition that he was not to have any contact with the mother. That bail condition continues. The court is in no position to consider the rights and wrongs of the incident that took place on Saturday 23 January. The father's application for contact was relisted on 28 January and it came back before HHJ Richards. The order is at pages 32 and following and is an order that was made, in substantial part, by consent and through negotiation between the parties at the hearing, but that part which is not by consent relates to the contact order, which was in these terms. The judge first of all

transferred the matter to the Bury County Court where a two-day hearing was to take place of the main matter on 4 and 5 May of this year, and in the meantime the judge ordered that the mother was to make Z available for staying contact at noon on 15 February, on 1 March, on 15 March, 12 April and 26 April until 3pm of the week in question, namely Friday 19 February, 5 March and so on, and the mother was to make arrangements for handing over Z to be done by her sister at the David Lloyd Leisure Centre in the Trafford Centre in Manchester.

I think it is unnecessary to go in any more detail into the remainder of the order but it is, however, necessary to say that the judge in this case -- and this is apparent from his judgment -- was under a very considerable degree of pressure with the other cases that he had to hear and deal with. There was therefore very limited time for him to deal with the issues in the present case. Unfortunately that is a problem which besets family cases at the present time, and HHJ Richards was not alone in the difficulties faced in finding time to deal with all urgent cases. He gave his judgment in the following terms. He said at paragraph 6 that he wanted to make it clear that Z's welfare is, and remains, of paramount consideration. He said he had regard to the welfare checklist in Section 1(3) of the Children Act 1989. He said he had listened to counsel's submissions and that this small child needed to know his father and it was an important time in his development. That, he said, was why there needed to be contact. It would be difficult to take exception with anything the judge said up until this point, but he went on:

"7. The issues were whether it should be a day's contact as the mother proposes, alternate weekends, or as the father proposes, effectively, a shared residence order on five occasions, between now and when there could be a hearing on evidence in this case. That he has [Z] for an extended period of five days; effectively, Monday to Friday so it would be quite that long."

And then the critical finding in the next two paragraphs:

"8. Given that I have formed the view that contact is important for [Z], that he has an opportunity to get to know his father and be with him, I ask myself, given that I cannot form a view about the truth or otherwise of what the mother tells me, whether it would be safe for [Z]. The documents that I have seen show that the parents cannot get on and the risk to [Z] that I can see on the papers and that which I have been told is that he will be, as I think I have described it earlier, caught in the crossfire of arguments between his parents. That is the danger-time for him.

9. I think, in a sense, there is an illogicality in the mother's position because if the father was going to do something not least, for example, abduct the child, he could do it as easily from Manchester as he could from Essex. That is the reality of the situation. I ask myself what other risk there is to [Z]. I am satisfied that the father, who is a general practitioner, is more likely than not to have the skills to be able to look after a baby. It is something that modern men perhaps do more than they did a generation ago.

10. Accordingly, I have formed the view that arrangements need to be made for contact to meet [Z's] needs to know his father and to be done in a safe environment. Accordingly, I have come to the view that I favour the father's proposals for contact and that the way in which it should be realised is for [Z] to spend extended time with his father, Monday to Friday on the dates that I have identified."

The judge said that he had the welfare checklist in mind, but it seems to me that he approached the matter very much on the basis that this father ought to have a very large amount of contact to the child -- about a quarter of the child's time -- and that he should have it at his home in London, but the judge did not take account of a number of other important factors or give the sufficient weight to them, as he should have done, that should have fallen to be considered under the checklist.

He assumed that the father had good parenting skills because he was a general practitioner and because he had paediatric experience. It seems that there was little evidence to support this conclusion because the father had had no other children and had had very little opportunity to care for Z since his birth. The judge does not appear to have given any weight to the fact that the mother was not only the primary carer but at that time the sole carer, or that Z was a very small child, and that taking him away from his mother for a number of days at a time was likely to have a very unsettling effect upon him; nor did he key into the equation the child's health needs or that he regrettably suffers from a clubfoot.

We have heard that the mother is still partially breastfeeding the child even today, and that is a matter which, if it had been fully and properly explored before the judge, would have been bound to be something that the judge would have had to give very considerable weight to in deciding what was an appropriate order. Further, the judge did not give weight to the obvious anxiety that an order of this kind would create in a mother of a young child, in particular this mother, and that is obviously something which is likely to reflect adversely on Z. Further, submits Ms Dormenge, the judge did not explain why, in his view, the order that he made was going to provide a better solution for Z's needs and why they could not sufficiently be met by day contact.

I have considerable sympathy for a judge in the position of HHJ Richards in the present case. He had to do the best he could in the time available but he had to bear in mind that he did not have an opportunity of considering evidence before he made his conclusion, and in my judgment, therefore, what he should have been concentrating on was to make the kind of order that was as neutral as possible from the point of view that it did not prejudice the position of either side when it came to the full hearing on 4 and 5 May. Ms Eaton submits that the order that Ms Dormenge seeks would very strongly prejudice the father because it was effectively deciding the whole case in the mother's favour. Ms Dormenge, for the mother, submits that the order the judge made has done exactly the opposite and has effectively decided the case in the father's favour. For my part, I think there is considerable force in that submission. In my judgment, the judge was wrong to make the order that he did; he did not, in the manner I have explained, properly apply what to me seemed to be the most relevant

features of the checklist in this case, not least that this is a very young child indeed, who is still being breastfed by the mother who has been his sole carer since his birth.

On the other hand, it seems to me that the order that is sought by Ms Dormenge would go too far the other way. It is, in my judgment, very important that the father has proper contact to Z between now and the full hearing. This is only an interim order, but one has to do the best that one can in the circumstances to try and hold the ring between the mother and the father until the issues can be explored in detail at a full hearing. Accordingly, I would be minded to allow the appeal and would substitute the order with an order in the following terms.

The father works fully for one week and has one week off. Therefore when he is not working it is easier for him to have contact than it is during the week that he is working. During the week that he is working I would order two two-hour periods of contact at the contact centre in Manchester, and, in the week that he is not working, I would order on the Saturday and Sunday either two hours if it is possible, or one hour if it is not possible. That would cover the first two weeks from now. Thereafter, I would direct two overnight stays per fortnight with the father staying in Manchester in the circumstances that he has advocated in the argument put before us by Ms Eaton. That would, I think, be between 2pm on one day and 11.30am on the following day, and that order should continue until the full hearing.

I would transfer the proceedings to the Manchester County Court as soon as possible and direct that the full hearing takes place by the designated family judge, HHJ Hamilton, or such other judge as he directs. The contact during the first two weeks should be for one or two hour periods between 1.30 and 5.00 in the afternoon. It seems to me that it is best left to the parties to work out the precise details of the order that I would propose. I would envisage that the mother would provide on these contact visits all necessary matters for Z, including, if possible, expressed milk, and other food and feeding facilities and bottles and so forth be given to the father. It seems to me that the handover for contact should, if this can be arranged, be by the mother's sister, because, certainly at the moment, there is a bail condition restricting the father from contact with the mother.

Accordingly, I would allow the appeal and substitute the order that I have indicated.

Lord Justice Leveson:

I agree with the judgment of Sir Scott Baker and with the order which he proposes. I wish only to emphasise that this approach does not in any way prejudge the numerous issues that plainly exist between the mother and the father; it is intended to allow the father to reintroduce himself to his son and to seek to develop a relationship with him appropriate to his very young age. As a consequence the father should suffer no disadvantage, and is intended to suffer no disadvantage, purely as a result of his lack of contact over the last few months.

Lady Justice Arden:

I agree with both judgments, which entirely express my sentiments in this matter also, and my views.

Order: Appeal allowed with conditions