[2010] EWCA Civ 1383

Case No: B4/2010/1363/PTA+A

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Leeds County Court
Her Honour Judge Finnerty
LS09C05584

Royal Courts of Justice
Strand, London, WC2A 2LL

07/12/2010

B e f o r e :

SIR NICHOLAS WALL THE PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE ARDEN
and
LORD JUSTICE WILSON

RE S (A CHILD)

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Sally Bradley QC and Lindy Armitage (instructed by a Local Authority) for the Appellant
Sarah Singleton QC and Vicki James (instructed by Switalskis) for the Respondent
Guy Swiffen (instructed by Stuart Gordon, Solicitors and Advocates) appeared for the Child's Guardian
Hearing dates: 2 November 2010

HTML VERSION OF JUDGMENT

Sir Nicholas Wall P:

Introduction (1)

1. This application for permission to appeal, and the consequential appeal, arise as a result of a judgment given by Her Honour Judge Finnerty sitting in the Leeds County Court as long ago as 11 December 2009. The judge was (and still is) hearing care proceedings relating to a small female child, whom I will identify only by the initial S. As the proceedings are ongoing, reporting restrictions will be imposed, and nothing must be published with identifies any of the participants in the case, apart from the judge, the local authority and the lawyers.

2. On 11 December 2009 the judge made an Interim Care Order (ICO) in relation to S under section 38 of the Children Act 1989 (the Act). In so doing, however, she made a number of findings of fact which were critical of the local authority. Subsequently, albeit within the care proceedings, S's mother issued proceedings under sections 7(1)(b) and 8(1) of the Human Rights Act 1998 (HRA) in which she sought, *inter alia,* a declaration, based on the judge's earlier findings, that the local authority had acted in breach of both her and S's ECHR Article 6 and 8 rights.

3. When the local authority sought to defend those proceedings, the judge, in a separate judgment delivered on 6 May 2010, took the view that the local authority, which had not sought to appeal against the ICO, was bound by her previous findings, and that, if it wished to defend the HRA claim, it needed to seek permission to appeal against the findings of fact she

had made on 11 December 2009. The Judge, however, refused permission to appeal - hence the application to this court.

4. I confess that when I first read the papers, my reaction was that the HRA claim was misconceived, but that in any event there could be no issue estoppel between a judgment in interim care proceedings and an action brought under HRA. Thus, if the HRA proceedings were to go ahead, the local authority should be at liberty to defend them and to file whatever additional evidence it needed in order to rebut (and thus re-open) the findings made by the judge. If this was right, the appeal was both unnecessary and inappropriate.

5. On analysis, however, and following a helpful discussion with counsel, this assessment turned out to be wrong. Miss Sarah Singleton QC, for the mother, persuaded me that the HRA application was properly made within the care proceedings, and that, pursuant to CPR rule 52.10(2) and the decision of this court in ***Re S (Minors)*** [2010] EWCA Civ 421 reported as ***Re S*** (***Authorising Children's Immediate Removal)*** [2010] 2 FLR 873 (***Re S***), this court had jurisdiction to entertain an appeal against Judge Finnerty's judgment of 11 December 2009 even though the local authority did not seek to appeal against the ICO made on that day.

6. We accordingly proceeded to hear the appeal. Although Miss Singleton did not formally concede that permission to appeal should be granted, she took no point on the application being out of time, and we heard argument as though on the substantive appeal. For the avoidance of any doubt, however, I wish to make it clear that I regard the matter as being of considerable importance. I would, accordingly, grant permission to appeal.

Introduction (2) HRA applications in care proceedings

7. As I pointed out during argument, it is trite law that ECHR Articles 6 and 8 are engaged in every application for an ICO particularly where, as here, the local authority seeks the sanction of the court for the removal of a baby from a mother's care. Accordingly, I do not criticise the judge's formulation of the test for the making of such an order (the threshold criteria having rightly been conceded by S's parents). The judge said: -

> ….The removal of a child at an interim stage is a draconian act which can only be justified where on a proper application of the welfare checklist a child's safety requires such removal pending a final determination of the application for a care order.

8. See also ***Re S*** (supra) at paragraph 32 per Wilson LJ. Speaking for myself, however, I prefer the test formulated by His Honour Judge Donald Hamilton and approved by this court both in ***Re B (Care Proceedings: Interim Care Orders*** [2009] EWCA Civ 1254, [2010] 1 FLR 1241; and in ***Re B (interim Care Order)*** [2010] EWCA Civ 324, [2010] 2 FLR 283. Judge Hamilton had posed the test thus: -

> "whether the continued removal of (the child) from the care of her parents is proportionate to the risk of harm to which she will be exposed if she is allowed to return to her parents' care."

9. The reason I prefer this approach is that it immediately focuses the mind of the Tribunal on ECHR Article 8. If (and it is not a practice which I wish to encourage) parties are to make HRA applications in care proceedings, it would, I think, be helpful if those hearing such cases were to focus on ECHR when making or refusing to make interim orders. Thus if – as here – a judge plainly takes the view that the conduct of the local authority represents a breach or breaches of a party's ECHR Article 6 and 8 rights he or she will; (a) be able to invite argument on the point then and there; and (b) will be able to make appropriate findings in the context of the application before the court. Much time and expense could thereby be saved.

10. Judge Finnerty was faced with the fact that S had been removed from her mother's care and took the view that she had – in effect – no option but to make an ICO. I wish to make it very clear in this judgment that I have considerable sympathy for the position in which the judge found herself. Apart from anything else, her judgment was given – and had to be given - extempore late on a Friday evening. In these circumstances, it would be wrong and unfair to subject the judgment to over-rigorous analysis, or to emphasise semantic points. This is not least, of course, because this court has given itself the luxury of reserving judgment, and has had the benefit of skilful argument from leading counsel on both sides.

11. Furthermore, I would like to make it as clear as possible that this court - as a matter of policy – is likely to be both sympathetic to, and supportive of, any circuit judge or recorder who has had to make a finely balanced decision at short notice, and often on inadequate information.

12. At the same time, any such sympathy and support have, in my judgment, consequential or "knock-on" effects. The judge was deeply critical of the actions of the local authority in removing S from her mother's care. On analysis this turns on a particular decision made in good faith and out of office hours by a social worker whose evidence to the judge was that she felt constrained so to act in order to protect the child, and who did not believe that she was causing anything other then the most temporary separation of mother and child. In my judgment, the case has to be analysed in that context.

13. Thus in the same way that judges or magistrates who make permissible but courageous discretionary decisions are entitled to look for support to an appellate court, the court itself needs to be very sure of its ground before condemning a local authority which, or a social worker who, acts in good faith to protect a child.

Introduction (3) Events since the hearing before the judge

14. At the time of the hearing before the judge, the mother was serving a sentence of imprisonment for offences of dishonesty. We were told at the bar that the mother was released on licence in May 2010 and that since 18 September 2010, she has been looking after S. The final hearing of the care proceedings is scheduled for 10 December 2010. The local authority's case, we were told, is that the mother has lapsed and has resumed taking heroin. There was, therefore, a hearing fixed for 12 November 2010 and the local authority was reserving its position (depending, as I understood it on the outcome of drug testing on the mother) as to whether or not it was going to argue before the judge that there should be a further separation.

15. However, by letter from the local authority dated 12 November 2010, the court was informed as follows: -

> "On 9 November 2010, the family's social worker attended at the family home to take (the mother) for a drugs test. He discovered that the family had moved out of the address and another family were moving in. The mother and father did not answer their phone, and did not respond to messages left. As a result the child was reported missing to the Police, who located her at another address in the …. area with her mother. The child was removed and is currently in local authority foster care"

16. Against this background, I wish to make it as clear as I can that this judgment is strictly limited to an analysis of the judge's judgment given on 11 December 2009, and expresses no view of the ultimate merits, which will be a matter for decision on 10 December 2010.

The facts

17. The mother and the father originate from the Czech Republic, and came to this country in 1995. They have, altogether, four children, a girl aged 7, a boy of 5, another girl of 3. and S, who was born on 29 August 2009. S was thus coming up to 12 weeks old when she was removed from her mother's care during the evening of 19 November 2009.

18. Unfortunately, the mother has - or has had - an addiction to heroin, and has served sentences of imprisonment for dishonesty. In addition, we were told that when the mother was pregnant with the three year old, there were references made to social services relating to the couple's cramped living conditions, over-chastisement of the children, substance misuse and domestic violence. All three of the oldest children are in the care of the local authority and living apart from their parents.

19. On 5 June 2009 the mother was remanded in custody charged with theft and on 29 June 2009 she was sentenced to a term of 15 months imprisonment, which she was serving in a local prison when S was born. S showed signs of drug withdrawal at birth, and remained in hospital for a fortnight. The local authority, however, decided that it would support the mother and S in the mother and baby unit at the prison, and on her discharge from hospital, S was reunited with her mother in prison.

20. On 22 October 2009, the mother was convicted on a further count of theft, and 9 months were added to the sentence she was already serving. The mother's wish on completing her

sentence was to be reunited with her two oldest children (who were living with foster parents) and the local authority agreed to an assessment of the mother, S and her two oldest children to be carried out by a Family Centre.

21. The Centre concluded its assessment on 30 October 2009. Its report was negative. It recommended that the two oldest children should not be returned to their mother's care and that S should be removed, with long term plans apart from their parents being recommended for all the children.

22. On 3 November 2009, the local authority instituted care proceedings in relation to S in the local family proceedings court. It sought an ICO, and 9 November was fixed. That date was subsequently vacated, and the hearing fixed for 19 and 20 November 2009.

23. Unbeknown to the local authority at the time, the mother had (1) been placed "on report" by the prison authorities on 5 November 2009 for "intentionally [failing] to work properly. Or, being required to work, [refusing] to do so"; and (2) more importantly for present purposes, she had been observed "prop feeding" S on a number of occasions. It needs to be remembered, as the evidence to the judge showed, that S was a very small baby, with a weak cry.

24. There are, in our papers, three reports by prison officers of occasions when S had been "prop fed" by her mother. They are as follows: -

> (1) At 15.00 on 16 November 2009 a prison officer called JH wrote : "***On 10 November 2009*** (S) was observed laid in her pram with the bottle of milk propped in her mouth with the aid of a blanket. (The mother) was in the kitchen washing up. (S) was seen to start being sick and because she was laid on her back could not remove the sick from her mouth. I immediately picked up (S) and laid her in my arms on her tummy allowing her to continue being sick without choking. Potentially this was a very dangerous situation and had I not been walking past the pram could have resulted in (S) choking. I spoke to (the mother) who saw me remove (S) from her pram ***and explained how dangerous this was and she said she would not do it again.*** Since this incident (the mother) has been warned about this on several occasions by myself SS and PT (Nursery Nurses) and CS [the Health Visitor]. Obviously, she does not see the danger and continues to carry out this very dangerous act despite all the warnings." (Emphases supplied).
> (2) At 17.50 on the following day, 17 November 2009 another officer, HS wrote: - "At approx 17.10 hours (S) was in her pram with a baby bottle 'propped' in her mouth. (The mother) was sat on the sofa at the other end of the room and could not observe (S) from where she was. ***(The mother) has been told on numerous occasions by nursery staff and officers about the dangers of choking."*** (Emphasis supplied)
> (3) At 13.00 hours on 18 November 2009, Officer JH wrote: "At approximately 12.45 hours on 18 November 2009 I looked into (S's) pram and once again (the mother) had propped the bottle on a blanket and was feeding (S) in this way. (S) was not even in sight of (the mother). (The mother) has now taken to turning the pram in order to prevent staff from seeing this. ***Despite numerous warnings (the mother) continues to carry out this very dangerous and potentially fatal act.*** (Emphasis supplied)

25. On 18 November 2009 the local authority was informed by Email from the prison (dated that day) not only about the prop feeding but of other aspects of the mother's behaviour in prison. EB, the social worker, immediately took legal advice, but was advised that the matter was in court the following day, and as a result took no action. She told the judge that, in retrospect, she felt she should have gone to the prison on 18 November. In the event, as I shall relate, she went the following day when the first day of the local authority's application for an ICO was ineffective, and it was after a further discussion with the relevant governor of the prison (PH) that she instructed the prison authorities to call the police to separate S from her mother under a police protection order. That is what happened. I propose to set out EB's reasons for taking that course when I describe her evidence to the judge.

The letters from the local authority and the guardian

26. On 19 November 2009, EB took with her to the prison a letter from the local authority dated the same day, in which it expressed its grave concern about the recent information it had received from the prison (the Email dated 18 November) which, as I have stated, contained reports relating to earlier dates but which were seen by the local authority social workers for the first time on that day. The local authority's concerns related in particular both to the mother's prop feeding of S and to the delay in the provision by the prison of information to social services. The letter concluded by instructing the prison to contact the police should staff become concerned that S was at immediate risk of harm.

27. The guardian, through solicitors, also faxed a letter dated 19 November to the prison. That letter referred to the governor's Email of 18 December and asked for confirmation whether or not the governor was of the view that the prison was able sufficiently to manage and monitor the level of risk identified.

28. After talking to the governor (PH), EB added to the local authority's letter the following manuscript addition –

> "Due to recent information given to the local authority by (the prison) the (local authority) are in favour of separating (S) from (the mother). (PH) has informed (EB) social worker that they are unable to supervise and monitor (the mother's) care of (S) & informed them that (the mother) will have sole care of (S) for long periods of time extending to hours. In light of this (the local authority) have requested that staff at (the prison) to call the Police or request that (S) is taken into police protection. The matter is before Leeds FPC on 20 / 11 / 09 where (the mother) will have the opportunity to contest the making of an ICO (Interim care order)."

29. The addendum was signed by EB and by RT, team manager, at the prison. It is plain to me that at that time EB genuinely anticipated that the ICO application then pending before the family proceedings court would go ahead on 20 November.

The hearing before the justices

30. As we now know, there was no hearing before the justices on 19 November, the first of the two days set aside. We have the legal adviser's note of what occurred on the second day (20 November 2009), together with the justices' reasons. The case ceased to be an application for an ICO and became instead an application for an Emergency Protection Order (EPO), which the justices grated until 25 November, when the local authority's application for an ICO was to come before the county court. Speaking for myself, I do not regarded the transformation of the hearing from ICO to EPO as in any way sinister, or in breach of the mother's ECHR Article 6 rights. It appears to have occurred largely because of the limited time available. An EPO can, of course, be heard ***ex parte*** and the justices did not hear the mother. As I have already indicated, however, their order was limited in time, and for my part I do not see the EPO (at which both the parents and the child were represented) as a breach of the mother's right to a fair hearing.

31. The justices' reasons contain the following paragraph:

> "We have heard evidence from (EB) who expressed serious concerns regarding information received from the prison that (the mother) was prop feeding (S) and was leaving her unattended. This has occurred on more than one occasion despite warnings by staff. It has been observed that (the mother) is now turning the pram away to prevent staff from observing what is going on. Following a meeting with the Governor about how this risk could be managed, it was explained to the social worker that the prison were unable to provide additional support and supervision to manage this risk. This would mean that both mother and baby would be unsupervised for long periods of time, particularly at night, including feeding time."

32. The view of the justices was that, whilst the order was draconian, they were satisfied that there was reasonable cause to believe that S was likely to suffer significant harm if she was not removed to accommodation provided by the local authority, and, using the language of ECHR Article 8, they were satisfied that "the making of such an order today is a necessary and proportionate response to the current position".

The evidence heard by the judge

33. The judge heard oral evidence from HS and SS. HS is a prison officer: PS is a family support worker at a local children's centre, but was seconded to the prison. The judge also heard PH, a governor at the prison, EB the local authority's social worker, and the mother. In addition, she had written statements from EB (2) and the mother (2) . She also had a position statement from the guardian, together with a number of other documents, including the reports from the prison, to the most relevant of which I will refer in due course. Unfortunately, JH, who had observed S being sick, was not available to give evidence

34. HS and SS confirmed that they had seen S being prop fed; they told the judge that the mother had been told not to continue the practice, and that she had promised not to do it again. PH told the judge that she had informed social services about the prop feeding on 18 November. She told the judge in examination in chief: -

> "Social services were gravely concerned when I informed them on 18 November and they contacted me to say that they'd sought legal advice and based on the fact that they were already in court on the following day for an interim care order proceedings they said that they at that point would take no action given that it was so late on that day and they were already in court the next day, but as the interim care order proceedings on 19 November were adjourned they came in to see me at the prison on that day and I also received a fax from the children's guardian on the same day both asking me to safeguard and guarantee (S's) safety overnight, which was something I told them I couldn't do based on the staffing levels of our mother and baby unit, and at that point we contacted _____ police who came in to action a police protection order. "

35. PH also told the judge that the prison was becoming increasingly concerned at the mother's behaviour and was itself contemplating the separation of mother and child. During PH's evidence, the judge read to her part of the Email PH had sent to the local authority on 18 November, which was in these terms: -

> "We were becoming increasingly concerned abut (the mother's) care for (S) on the unit. If the interim care order does not go ahead and (the mother's) behaviour continues in this vein then we may be forced to consider separation at some point anyway, but I will await the outcome of the hearing."

36. The following questions from the judge and answers from PH then occur: -

> "Judge: So from your perspective you were waiting for the court to make a decision?"
> PH; … because of the rules around mother and baby units, had we made a decision to separate (the mother) from (S) it would've been (a) quite a long winded process, but (b) it would've been based on (the mother's) as well as the relationship between the mother and the child. But obviously the decision to grant (the mother) a place on the unit had been supported by social services, so obviously we were involving them in this process…
> Judge; So the information that was being fed though to you from … the prison, the nursery workers and the officers in relation to the prop feeding was not as extreme as the reaction of social services?
> PH; That is correct, and it was based on that information that, although we were alarmed by the behaviour and concerned, and as I've said there, if it continued and we weren't able to stop it, then we would be concerned for (S's) welfare and therefore we might have gone down that route. It wasn't something that in our mind caused us to raise in terms of immediate removal.

37. PH confirmed that there could be a space for the mother and S in another unit somewhere in the country and that apart from the prop feeding, the prison authorities had no anxieties about the mother's care of S: indeed, the evidence is that the mother was gentle and loving towards S. However, in cross-examination PH said: -

> "Q. So I assume that the person in charge overnight does regular checks, to check everything is…..?
> A: ……there is nothing to state that they have to observe the prisoners at any given point during the night. It's considered good practice, but there's nothing to say that they have to do that. It's quite normal for a prisoner in any unit, unless they were on

one of these ACCT documents [that is potential suicide or self-harm] to be unobserved throughout the complete overnight period."

38. The critical evidence, however, comes from EB, the social worker. She confirmed that she had taken legal advice on 18 November, but confirmed she had been told that because the matter was in court on the following day it would wait until then. Her evidence, as I have already recorded. was that she felt, in retrospect, that she should have gone to the prison on that day.

39. In cross examination of EB by counsel for the father, the following exchange occurs: -

> "Q. You were not at that stage saying we must find out whether you can look after this child properly overnight, were you?
> A: Well, we were saying that. That was why we went to the prison and that was very much also asked of us by the guardian who was very, very anxious about (S's) welfare overnight. So it was not just social care. We conferred with the guardian. She felt the same. We went. We wanted (S) to remain in (the mother's) care overnight. Unfortunately, the information we received was that they couldn't safeguard her, or they couldn't guarantee that she would be safeguarded and therefore we felt that the best interests of (S) would be to be removed.
> The judge then intervenes:
> Q. Where is the analysis of risk?
> A. Again, this is a management decision and I think that a manager would have to be answerable to that. Prop feeding…… you know, the wording on the referrals was that it was a potentially life threatening thing to do.
> Q. That was from a prison officer. Those were her words. A prison officer, not a nursery nurse, not anyone trained in child protection. A lay person. The phrase of a lay person was adopted to remove a baby from a mother without any planning whatsoever. Now, as a social worker, how would you assess that when one looks at the welfare of a child?
> A. I have to be very honest here that I feel that the prop feeding was very serious and while others may not agree with me, I think the fact that (the mother) had been asked [not?] to do it and had continued to do it quite indicative really of the way that (the mother) has behaved in the past historically with her other children.
> Q. Lack of planning?
> A. I don't feel that this was a lack of planning. I feel that it was responding to a potentially crisis situation and ensuring her well being overnight."

40. When it was put to her that she had blown everything out of proportion, EB's answer was the same:

> "I don't think I have, no. I wouldn't want to think that (S) would have been at risk of choking. She may not have choked, but that's because there was somebody to intervene and that may not've been the case overnight and she may well have choked and I would not like to have that on my conscience or to think that I could've taken steps to safeguard a baby and didn't. I do feel she was at risk and I do feel she was at risk of significant harm. So, no, I don't feel it's blown out of proportion.
> Once again, the judge intervenes.
> Q; That is not, in fact, the basis for a police protection order, risk. So that was your position that you felt she was at risk?
> A; No, I think she had already suffered significant harm by the very fact that she was born addicted and has already suffered significant harm being prop fed."

41. The mother's evidence was to the effect that although she had prop fed S, she had not been told that it was dangerous, and her view was that S fed better that way, as she finished her bottle. She had never been told – this was in answer to a question from the judge – that if she prop fed S, the latter would be taken away.

The grounds of appeal

42. The question for this court, accordingly, is whether or not, on the facts, the judge was right to express "dismay" at the actions taken by the local authority and to take the view, as she did, that by removing S from her mother on 19 November 2009 the local authority had "effectively

usurped the authority of the court". Specifically, as the grounds of appeal argue, was the judge wrong to find: -

> (1) The Key Social Worker and her Team Manager caused (S) to be removed from her mother because the prison where (S) and her mother were residing on a Mother & Baby Unit could not guarantee "24 hour supervision".
>
> Paragraphs 26, 29 and 30 of the judgment;
>
> (2) (S) was never put at any distress or discomfort or risk by the incidents of prop feeding" save for "the occasion on 10 November".
>
> Paragraph 31 of the judgment;
>
> (3) The Local Authority should have balanced the risks identified against the risk of removing this tiny baby from her primary carer.
>
> .
>
> Paragraph 32 of the judgment;
>
> (4) I am not satisfied on the evidence that the risks identified by the Local Authority were of such gravity as to justify the immediate removal of the child.
>
> Paragraph 32 of the judgment;
>
> (5) I am satisfied and find that those actions [of the Local Authority] effectively usurped the authority of the Court.
>
> Paragraph 33 of the judgment.

There was a sixth ground of appeal on which we did not hear argument and which I

will discuss when I have dealt with grounds (1) to (5)

The case for the local authority

43. I propose to take each of the grounds set out in paragraph 42 above in turn. For ease of reference, I will repeat the ground before setting out the local authority's response:

> "(1) The Key Social Worker and her Team Manager caused (S) to be removed from her mother because the prison where (S) and her mother were residing on a Mother & Baby Unit could not guarantee "24 hour supervision".

44. The local authority acknowledges that this is a serious finding. However, it submits that it is a finding which has no foundation in the evidence. Mrs Bradley QC on its behalf submits that the local authority's evidence to the judge was clear. It did not seek 24 hour supervision of the mother and S. It asked the prison, on 19 November 2009 if "additional supervision" could be put into the mother and baby unit to "ensure S's wellbeing immediately". Furthermore, Mrs. Bradley argues, the local authority had been made aware that the mother and S would be without any supervision at all for lengthy periods. It was that concern, she argues. rather than the absence of 24 hour supervision which triggered the decision to request a Police Protection Order (PPO).. In short, the local authority's anxiety was that the mother and S could have been unsupervised for up to 12 hours if the PPO had not been made.

45. The second ground of appeal criticises the judge's finding that: -

> (2) S was never put at any distress or discomfort or risk by the incidents of prop feeding" save for "the occasion on 10th November".

46. As to this, Mrs. Bradley points to the evidence from the prison staff relating to incidents of prop feeding which I have set out at paragraph 24 above. She submits that there is nothing within the judgment which suggests that the evidence of the prison staff was rejected by the judge. She also relies on the fact that throughout the evidence there was never any challenge made to the suggestion that prop feeding, per se, was an unsafe practice which posed a risk to infants. It cannot therefore be correct, she argues. to state that there was no risk attached to the incidents of prop feedings on days other than 10 November 2009. The finding is, Mrs. Bradley argues, simply wrong. Prop feeding was an unsafe practice which posed a risk to S. Indeed the judge seemed to accept, in the following paragraph that such a practice did pose a risk by her description of the practice as "wholly inappropriate".

47. The third ground addressed the judge's finding that:

> (3) the Local Authority should have balanced the risks identified against the risk of removing this tiny baby from her primary carer

48. As to this, Mrs. Bradley argued that the evidence of EB made clear that the events of 18, 19 and 20 November 2009 were prompted by the local authority examining the risks posed to S by the knowledge of the repeated incidents of the unsafe practice of prop feeding. She submitted that the attempt to ascertain whether adequate supervision could be provided and the wish to ensure that S could remain on the mother and baby unit speaks very clearly of the local authority balancing the need to keep S safe with the preferred course of her remaining with the mother whilst proceedings were pending. In support of this argument, Mrs Bradley relied on the passages from the transcript of EB's evidence.

49. Ground 4 related to the judge saying: -

> "I am not satisfied on the evidence that the risks identified by the Local Authority were of such gravity as to justify the immediate removal of the child."

50. As to this, Mrs Bradley submitted that there was a body of evidence from the governor of the prison and from social services that S was at risk remaining in the care of her mother on the mother and baby unit. She summarised that evidence by pointing to (1) the incidents of prop feeding per se; (2) the incident on 10 November 2009 when S was seen to choke; (3) the fact that the mother had been told on more than one occasion that prop feeding was dangerous, yet she persisted in exposing S to the practice; (4) the knowledge that the prison could not provide adequate supervision so as to guarantee S's safety overnight; (5) the information from the prison that there had been an increasing concern about the care being afforded to S by the mother whilst on the mother and baby unit; (6) the fact that the prison had previously expressed concerns that the mother was not prepared to follow advice and had shown a disinclination to adhere to prison rules and regulations; and (7) the evidence from the prison that it was quite normal for a prisoner in any unit to be unobserved throughout the complete overnight period and that S could be alone with the mother for approximately 12 hours overnight. Mrs. Bradley repeated that the issue for the local authority was the immediate safety of S. The risks, she argued, were manifest. Having explored the prospect of managing the risks the position, she submitted, was clearly stated to the local authority by the prison; S's safety could not be guaranteed. It followed, she argued, that the judge's finding was flawed and had no evidential basis.

51. Finally, Mrs Bradley addressed the judge's finding that:

> "I am satisfied and find that those actions [of the Local Authority] effectively usurped the authority of the Court."

52. Mrs Bradley denied that this was the case. Rather, she argued, a set of circumstances had arisen whereby issues of safety had demanded that the local authority act to protect S. It had never been the intention of the local authority to handicap the mother in her challenge to the local authority, hence the manuscript addendum to the letter of 19 November 2009 (which I have set out at paragraph 28 above) where it was expected that the mother could indeed challenge the removal of S on 20 November 2009.

53. Mrs Bradley submitted that this was a profoundly serious finding which implied either that the local authority had made its decision to remove S in a deliberate and calculated manner in order to restrict the power of the court, or that the decision to remove was wholly unjustified and outside the ambit of what was reasonable or permissible.

54. Mrs. Bradley accepted that it might have been the case that the family proceedings court could have concluded that if there had still been a place on the mother and baby unit, and if the prison had agreed that the mother could return to the mother and baby unit; and if there had been a higher level of supervision on the mother and baby unit, then the preferred course would have been not to separate the mother and S pending the final hearing of the care proceedings. However, it was her submission that the circumstances which faced the court had not been engineered or manufactured by the local authority. Such a theory was never alleged against it. The circumstances had been brought about by the local authority receiving child protection information on 18 November 2009 and acting responsibly and transparently on 19 November 2009. The finding was thus misconceived, Mrs. Bradley argued.

The case for the mother

55. The case for the mother was skilfully advanced by Miss Singleton. She accepted that prop feeding was - in the words of her skeleton argument – "a poor, potentially dangerous and

inappropriate childcare practice". However, her submission was that it did not, in this case, on any basis justify the separation of the mother and S, not least because, in all other regards, the mother was caring well for S. Miss Singleton also complained that the local authority compounded its misconduct by refusing to support the mother's attempts at reunification in the mother and baby unit.

56. Miss Singleton also submitted that the local authority's argument that it was simply concerned with the position overnight was specious. The mother's primary submission was that the term "24 hour supervision" could conveniently be attached to what was in fact being sought from the prison overnight on 19 November. The fact that the local authority was not intending or meaning a regime of constant scrutiny did not dilute the force of the finding that the regime in fact wanted – conveniently labelled 24 hour supervision – was neither necessary nor reasonable; nor was its absence a justification for separation at all – let alone an emergency separation.

57. Miss Singleton also pointed out that on the judge's findings of fact the local authority's case, at its highest, involved only one observation of S (itself adduced by way of hearsay) suffering discomfort or distress as a result of being prop fed.

58. The judge was right, Miss Singleton submitted, to find that the local authority had not carried out an appropriate balancing exercise or undertaken any planning. The judge had in effect found, and been right to find, that an effective balancing exercise between the harm to be done on the one hand by separation at all - and precipitate separation in particular - and, on the other, the risk of the mother ignoring a direct prohibition upon prop feeding, reinforced by information that such a practice would inevitably result in separation , would not and could not have resulted in a determination that such a separation was necessary.

59. It was the judge, Miss Singleton observed. who had asked the governor about the positive Board reports. The local authority ignored that evidence. The mother's other breaches of prison rules were immaterial to the issue. The judge had conducted the appropriate balancing exercise and found that removal was not justified. Hers was the right approach.

60. The judge had been right, Miss Singleton argued, to find that the local authority had usurped the authority of the court. It presented the family proceedings court with a *fait accompli*. Once a separation had been effected and the opportunity for S to remain with her mother lost, the court lost its power to refuse to make an ICO. In essence, therefore, whatever the primary intention of the local authority, the effect of its action was to usurp the authority of the court, and the judge had been right so to find.

61. Miss Singleton also argued that when the court was dealing with an ICO, the approval of the court to the local authority's care plan ought necessarily to carry more power and influence. In such circumstances, as she put it, responsibility for the child and her welfare rested principally in the hinterland between parental responsibility on the one hand and administrative responsibility on the other – the hinterland being the areas where the court holds control. - see ***Re F*** [2010] EWCA Civ 431.Thus, she submitted, the power of the court to bring about a change in care planning under interim orders is necessarily greater than under final orders when the court's alternatives are limited to permitting the lead parental role to be taken either by the local authority or by the parent.

62. In oral submissions, Miss Singleton sought to demonstrate the inappropriateness of the local authority's behaviour by posing the rhetorical question: how many children are removed from their mothers because they are prop fed? Her basic submission was very simple. The judge had been fully entitled to make all the findings of fact which she had made, and the local authority had not only over-reacted by separating mother and child, but had breached both the letter and spirit of the Act and the relevant authorities in so doing. The evidence was that, prop feeding apart, no possible criticism could be made of the mother's care of S: indeed, there was evidence from the prison that she was gentle with S and that, generally, there were no other concerns about her care of S. Furthermore, the mother had never been told that if she went on prop feeding, S would be removed, and there was no reason to disbelieve her evidence that if she had been given such a warning, she would have heeded it. The failure to support the mother's application for an immediate restoration of her place with S in the mother and baby unit of the prison or some other available unit in another women's prison had compounded the error.

The case for the father and for the guardian

63. Although he did not appear before us, the father put in a skeleton argument supporting the stance taken by the mother. He laid particular emphasis upon his belief that the local authority had given the judge and the parties the clear impression that they would be planning to reunite mother and baby pending the final determination of the care proceedings.

64. The guardian did appear before us by counsel. Whilst anxious to defend her own position, and whilst expressing some anxieties at the conduct of the social worker and team manager, the guardian broadly supported the stance taken by the local authority.

Discussion

65. I have to say at once that I do not accept Miss Singleton's submission that there is a dichotomy between the role and influence of the court at the interim and final stages of care proceedings. I accept that they are different stages of the proceedings, to which different criteria apply. The question, however, for this court remains in my judgment, whether or not the judge was right to express the criticisms she did of the decision taken by EB on the evening on 19 November, and to make findings of fact based on those criticisms.

66. It is also right to say, I think, that the separation of mother and child under an ICO in care proceedings is for good reason, usually a judicial as opposed to an administrative decision. The court is the parent's safeguard against arbitrary or inappropriate action by a local authority. This in the overwhelming majority of the cases, it will be for the judge or magistrates to make the decision. I can thus readily understand Judge Finnerty's view that both she and the FPC were – inappropriately - being presented with a *fait accompli.*

67. For the local authority to succeed in this appeal, therefore, the facts have to be regarded as wholly exceptional. Had the justices, for example, been in a position to start the case on 19 November 2009, the local authority could and should have informed the court of the Email received on the previous day. In these circumstances, it is, at the lowest, arguable that steps could have been taken to protect S overnight without separating her from her mother.

68. In anything other than wholly exceptional circumstances, the rule must be that it is for the court to make the relevant decision unfettered by events which effectively curtail its powers. The question, therefore, is whether or not the current case can be said to be "wholly exceptional".

69. Although we are not directly concerned with whether or not the local authority's actions constituted a breach of the rights of the mother and S under ECHR Articles 6 and 8 it is, I think, nonetheless salutary to remind myself that ECHR Articles 6 and 8 rights are enjoyed by ***Everybody*** (my emphasis). The facts that this mother is a Czech Roma, has used heroin and was in prison for offences of dishonesty at the material time are immaterial. She is a human being. The corollary is equally obvious. ***Everybody*** includes S. S has both a right not to be subjected to significant harm (or the likelihood of it), and a right not to be separated from her mother unless her welfare demands that such a separation takes place. I also remind myself that the mother's rights under ECHR 8 are qualified, There would, accordingly, be no breach of ECHR Article 8 if the local authority's action in removing S falls within ECHR Article 8.2.

70. The critical question, however, was whether or not the judge was right to make the findings identified in paragraph 42 above, and now challenged by the local authority. She was plainly right to make an ICO, albeit that her power to do so was, effectively, circumscribed by events.

71. I have not found this an easy matter to resolve. In my judgment, however, this appeal succeeds for the reason at which I hinted in paragraphs 12 and 13 above. EB, in my judgment, was placed in a very difficult position. On the one hand are the considerations which weighed with the judge, and which I have already set out. On the other was the perceived need to protect S from harm. In my judgment this is a classic case of a social worker who is damned if she does, and could equally have been damned if she did not.

72. The matter can be tested by asking a very simple question. What would an impartial observer be saying if EB had left S with the mother in prison overnight, and she had died, or suffered significant harm through being prop fed? I think the answer is obvious. EB would have been

severely criticised for taking an unwarranted risk with S's safety. It is for this reason, in my judgment, that this is pre-eminently a case of a social worker being damned if she does, and damned if she does not.

73. It is not, however, necessary to put the matter in such dramatic terms. In my judgment, EB's decision to separate S from her mother's care falls to be assessed in the same way that I would assess a courageous discretionary decision made by a judge with which I disagreed. EB was faced with a very difficult choice. Did she act or did she not? Whatever she did was liable to be attacked. In my judgment, she cannot be properly criticised for acting as she did

74. In ***EH v London Borough of Greenwich, AA and A (Children)*** [2010] EWCA Civ 344. [2010]2 FLR 661 at paragraph 109, I said: -

> "I yield to nobody in my appreciation of the difficult tasks which social workers are called upon to undertake and the pressures under which they are constrained to work. I am very conscious of the criticism that social workers are damned if they do and damned if they do not. At the same time, their duties under Parts III and IV of the Children Act in care proceedings are plain. Their aim should be to unite families rather than to separate them."

75. To my mind it is significant that EB went to the prison with no intention of separating mother and child. It was put to her by counsel that she had gone to the prison to investigate the allegations of prop feeding, She agreed. It was then put to her that there was no indication of any plan to separate S from her mother overnight at that point. She told the judge: -

> "No, we went to the prison really to see if we could safeguard her and we went very much with the view that we wanted S to stay with (the mother). That was part of the reason that we wrote that letter to ask for additional support to be put in place. Unfortunately, because they couldn't guarantee her safety we were very concerned and, again, a management decision was made by two senior managers that it would have to be that she'd be removed to ensure that she wasn't prop fed overnight when there was limited supervision."

76. In my judgment, these considerations are very important, and distinguish the case from - say - ***Re F (Placement Order)*** [2008] EWCA Civ 439, [2009] 2 FLR, 550, where all three members of this court were highly critical of a local authority which, although believing that it was acting in the best interests of a child, nonetheless took a deliberate decision to place the child in question for adoption, thereby frustrating a father's application to set aide the placement order made earlier in relation to the child.

77. Thus, in my judgment, if EB had gone to the prison and had caused S to be removed from her mother's care knowing or even believing that by so doing she would effectively frustrate the mother's resistance to the prospective ICO, EB could indeed be criticised on the basis that she had usurped the function of the court.

78. Miss Singleton asked rhetorically: how many children have been removed because their mothers have prop fed them? It is a good advocate's question, if "removal" means ***permanent*** removal. Even then, the answer may be: if a parent persistently prop feeds a child, and continues to do so even though he or she has been told to stop the practice, the child will need to be removed.

79. However, in the context of this case, the question is. in my judgment, the wrong one. S was not being permanently removed. She was being removed overnight – as EB believed - because of what was perceived by EB – and in my judgment reasonably perceived – as an unacceptable risk of further significant harm..

80. I therefore regard the circumstances as wholly exceptional. Of course, in an ideal world it could be argued that the local authority should have made itself aware much earlier on that the supervision of the mother and S in prison was inadequate; and that EB should have reasoned with the mother and told her in terms that if she prop fed again, S would be removed. The evidence, however, is that the information did not come to the local authority's attention until 18 November, and in my judgment it was entitled to rely on the prison up until that time. Had EB been able to talk to the mother (as to which there was no evidence, but for present purposes I am prepared to assume was possible) there can be no guarantee that the mother would have heeded what she said. She had, on the evidence, promised JH that she

would not prop feed again (see paragraph 24(1) above). On any view, in my judgment, a hypothetical promise by the mother not to prop feed on pain of removal would not have been sufficient to render EB's actions unreasonable.

81. It follows, in my judgment, that, for these reasons and for the reasons Mrs. Bradley advances, and on the evidence available to her, the judge was wrong to make the findings she did. I would set those findings aside, whilst leaving the ICO, which was rightly made, in place.

The additional ground in the Grounds of Appeal

82. The grounds of appeal also include a criticism by the judge that the local authority gave her the "clear impression" on 11 December 2009 that it was planning to re-unite mother and baby pending the final determination of the care proceedings. The local authority argues that such an "impression" was not a reflection of the local authority's true position.

83. We did not hear argument on this point because it seemed to us that although the judge was indeed under such an impression; (a) it was not in December 2009 in the local authority's power to "re-unite mother and baby pending the determination of the care proceedings" and; (b) the proposition that it was proposing such an outcome is not an accurate reflection of what junior counsel for the local authority told the judge.

84. We have the advantage of a transcript of what occurred, and it is clear that, at the conclusion of the evidence and before submissions, the judge made plain her dissatisfaction with the local authority's conduct, and made it equally clear that she would not have approved a care plan for the removal of S from her mother's care. Junior counsel for the local authority was then granted a short adjournment to take instructions, in the judge's words: "so that you can inform me whether I am correct in my conclusion that there is nowhere for this court to go other than to approve a care plan that this child remains separate from the mother".

85. When the court resumed, counsel made the point that one of the difficulties faced by the local authority in S being in her mother's care was the Placement with Parent Regulations. He then said: -

> "What is being suggested by the local authority is that this matter is stood down part heard today, that ….. before the matter is next to come back on (11) December, that we put a plan together with regard to an evaluation of mother's understanding of the danger of prop feeding and proper methods of feeding……. It is possible, if we come up with a plan for that evaluation that it may be that the evaluation of the mother's care, of feeding of (S) could take place during the day at maybe (the prison). I do not know, we would have to make enquiries with (the prison). But if that took place during the day then placement with parent regulations would not have to be signed off. "

86. Later, counsel says that the local authority will produce an interim care plan for the adjourned hearing, and adds: -

> "In relation to, bearing in mind your honour's comments, what they could accommodate **eventually** to get to placing (S) in a signed off placement with parent regulations, which is their problem." (Emphasis supplied)

87. In my judgment. what counsel was saying was plain enough. There was to be a further assessment of the mother. Depending on the outcome of that assessment it might be possible to re-unite mother and child eventually. If the judge was under the impression that the local authority was planning to reunite the mother and S in prison, she was mistaken.

88. In my judgment, the matter is put beyond doubt when counsel for the mother intervenes to ask for clarification of what the local authority intends to do. She wanted to know "whether they are proposing that the child is taken to the prison daily and also who is going to carry out the assessment". Counsel for the local authority replies that it is the social worker is to carry out the assessment, and that the local authority accepts no criticism of "actual social work assessments from this social worker or this team".

89. Although counsel for the local authority goes on to say "… it will be the position of the local authority to put a proposal forward which finds acceptance from everybody" it is plain to me that the judge is mistaken in her belief that the local authority had given the plain impression that it was planning to re-unite mother and baby pending the determination of the care

proceedings. Such a plan was not only not within the local authority's power; it was not what counsel was proposing.

90. It was for these reasons that we did not hear argument on this part of the appeal, which in any event seemed to us peripheral to the main issue.

91. For all these reasons, I would allow the appeal and set aside the judge's findings.

Lady Justice Arden

92. I agree

Lord Justice Wilson

93. I also agree