

# In the matter of B (A Child) [2013]

**[2013] UKSC 33**

12/06/2013

## **Barristers**

Alex Verdán KC  
Julia Townend

## **Court**

Supreme Court

## **Practice Areas**

Public Children Law

## **Summary**

Appeal to the Supreme Court by parents concerning the application of the criteria for making a care order under section 31 of the Children Act 1989 when the risk is of future psychological or emotional harm, and the role of the appellate courts once the trial judge has made an order. Appeal dismissed (Baroness Hale of Richmond dissenting).

## **Facts**

The case concerns the application of the criteria for making a care order under section 31 of the Children Act 1989 when the risk is of future psychological or emotional harm and the role of the appellate courts once the trial judge has made an order. The child concerned was removed from her parents at birth under an interim care order. The mother was for many years in an abusive relationship with her stepfather. She also has criminal convictions for dishonesty and a history of making false allegations. She has been diagnosed with somatisation disorder, a condition which involves making multiple complaints to medical professionals of symptoms for which no adequate physical explanation can be found. In the course of the proceedings she was also diagnosed with factitious disorder, a related psychiatric condition involving the deliberate exaggeration or fabrication of symptoms and the recitation of a false medical history. In 2009 she escaped the abusive relationship with her stepfather, leaving behind their ten year old daughter, and quickly formed a relationship with the father of this child, who has been convicted of many serious offences. He has four older daughters, with whom he has an amiable relationship but his involvement in their lives has been marginal, not least because of the many years he has spent in prison.

While the child was in interim care, the parents visited frequently and formed a good relationship with their daughter. They had shown their commitment to her 'in spades'. The trial judge found that, if placed in her parents' care, there was a risk that the child would be presented for and receive unnecessary medical treatment, that she might grow up to copy her mother's behaviour, and at the very least be confused at the difference between the real world and her mother's dishonest presentation of it. There would have to be a multi-disciplinary programme of monitoring and support to avert these risks and the

parents would not be able to co-operate with such a programme because of their fundamentally dishonest and manipulative approach towards social workers and other professionals whom they perceived to be challenging of their points of view. Accordingly, there was no other way in which the feared harm to the child could be prevented than by a care order with a view to adoption. The Court of Appeal upheld that judgment. Both parents appealed to the Supreme Court.

## Held

The Supreme Court by a majority of 4:1 (Lady Hale dissenting) dismissed the appeal.

## REASONS FOR THE JUDGMENT

The High Court judge was entitled to conclude that the threshold conditions for the making of a care order had been satisfied in this case [48, 64, 131]:

- Before a care order may be made under section 31 of the 1989 Act, the judge has to be satisfied that: (a) the child is suffering or is likely to suffer significant harm; and (b) the harm or likelihood of harm is attributable to the care likely to be given to the child if a care order is not made, not being what it would be reasonable to expect a parent to give to the child, or to the child's being beyond parental control [23, 177].
- A "likelihood" of significant harm means no more than a real possibility that it will occur, but a conclusion to that effect must be based upon a fact or facts established on the balance of probabilities. "Harm" means ill-treatment or impairment of health or development, and development includes emotional development. Whereas the concept of "ill-treatment" is absolute, the concept of "impairment of health or development" is relative to the health or development which could reasonably be expected of a similar child [24, 25, 178].
- Courts should avoid seeking to explain the meaning of the word "significant". However, the severity of the harm required is inversely correlated with the likelihood of the harm, i.e. the less likely the harm is to occur the more serious the harm will need to be [26, 56, 188]. Article 8 of the ECHR is not engaged when a court assesses whether or not harm is "significant" for these purposes; that provision will only be engaged in a case such as this if there is an interference with the right to respect for family life, which can only occur at the stage of determining whether or not a care or supervision order should be made [29, 62, 189].
- The character of the parents is relevant at every stage of the inquiry, including the assessment of whether the threshold conditions set out in section 31(2) of the 1989 Act have been satisfied because the character of the parents may affect the quality of their parenting [31, 71]. The conduct of the parents giving rise to harm or the likelihood of harm is not required to be intentional or deliberate; the harm or likelihood of harm need only be "attributable" to the care given by the parents or the care likely to be given by them not being what it would be reasonable to expect a parent to give to the child [31].
- A determination as to whether the threshold conditions for a care order have been satisfied depends on an evaluation of the facts of the case as found by the judge at first instance; it is not an exercise of discretion. An appellate court may interfere with such a decision only if it is "wrong", but it need not have been "plainly wrong" [44, 61, 110, 139, 203]. In determining whether the threshold conditions for a care order are satisfied and whether it is appropriate to grant a care order, an appellate court must have regard to the advantages which the judge at first instance had over an appellate court, including the judge's ability to assess what may happen to the child in the future on the basis of the oral evidence given by the candidates for the care of the child [40-42, 58-60].

The High Court judge was also entitled to conclude that the making of a care order in relation to Amelia, with a view to her being adopted was necessary and did not violate the rights of Amelia, M, or F to respect for their family life under article 8 of the ECHR [48, 98, 131-133]:

- A high degree of justification is needed under article 8 if a decision is to be made that a child should be adopted or placed in care with a view to adoption against the wishes of the child's parents. Domestic law runs broadly in parallel with article 8 in this context: the interests of the child must render it necessary to make an adoption order. A care order in a case such as this must be a last resort [34, 74-78, 82, 130, 135, 198, 215].
- Section 6 of the Human Rights Act 1998 does not require an appellate court to determine afresh issues relating to Convention rights; an appellate court, including the Supreme Court, is required only to conduct a review of the lower court's decision [36-37, 83-90, 136]. The making of a care order, however, is not a purely discretionary decision; a trial judge has an obligation under section 6 of the 1998 Act to ensure that he/she does not violate article 8 of the ECHR. Accordingly, it is not appropriate for an appellate court reviewing such a decision to apply the test normally used when reviewing a purely discretionary decision, i.e. whether the lower court exceeded the generous ambit within which reasonable disagreement is possible [45]. The appropriate test is whether the lower court was "wrong" [47, 91-92, 139]. Lady Hale and Lord Kerr disagree with this analysis, taking the view that an appellate court reviewing whether a care order violates article 8 of the ECHR must consider that issue for itself on the basis of the material put before it (whilst attributing appropriate weight to the reasons given by the lower court) [115-120, 204-205].
- There are a number of features relative to the personalities of Amelia's parents, and to the psychiatric conditions of M, which raised a real possibility that, in their care, Amelia would suffer impairment of her emotional development. The key feature of this case which justified the judge's decision not only that the threshold conditions for making a care order were satisfied but that such an order was appropriate was that Amelia's parents were unable to offer the elementary cooperation with professionals that her safety in their home would require. Adoption was the only viable option for Amelia's future [48, 99-100, 132, 106].

Lady Hale took the view that this was a case based on the mere possibility that the child would suffer psychological harm in the future. There was no risk that these parents would neglect or abuse their child. Even if this were sufficient to cross the threshold laid down in section 31(2) of the Children Act 1989, it had not been demonstrated that a care order with a view to adoption was necessary to protect the child – that 'nothing else would do' – when nothing else had been tried. The care order was not, therefore, a proportionate response to the harm which was feared.

## Permission

Family Law Week 