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Re I (Children: Child Assessment Order)

[2020] EWCA Civ 281

28/02/2020

Barristers
Chris Barnes

Court
Court of Appeal

Practice Areas
Public Children Law
Appeal concerning the court's power to make a child assessment order pursuant to s.43 CA 1989. A paradigm example of a case for which s.43 was intended.

Background
The case concerned five children, aged 9-18 at the time of the appeal. The LA was involved with the family due to concerns arising from the father's conviction for offences under the Terrorism Act 2000 and the impact of his beliefs and activities upon the family. The children presented well and an investigation in 2017 found that the mother was acting protectively.

A s.47 investigation upon father's release on licence in late 2018, raised concerns about the mother's protectiveness and recommended a CIN plan. Mother opposed the interventions. The children were made subject of child protection plans in May 2019. In June 2019, the parents revoked their consent to direct work being done with the children. The mother declined to meet with Prevent or engage with a parenting assessment.

In July 2019, a Channel Panel meeting recommended assessment by an Intervention Provider. The parents refused consent. Thereafter the PLO process was initiated. Father was recalled to prison in August 2019 and remained in prison. The mother declined the work proposed under the PLO.

First Instance
The LA applied in November 2019 under s.43 for the children to be assessed by an Intervention Provider. The parents and the four older children, who were separately represented, opposed the application. The guardian supported the application.

Newton J heard the case at first instance. He accepted the legal argument that, as the LA had placed the children on CP plans and activated the PLO process, its state of mind was one of belief, not suspicion, and therefore the test under s.43(1)(a) was not satisfied. Further, s.43(1)(b) was not satisfied as the assessment was not required for the LA to determine if the children were suffering harm as it already believed they were.

Newton J refused the application, determining that he did not have jurisdiction to make the order and refusing the case on the merits. The guardian, supported by the LA, appealed.

Appeal

Peter Jackson LJ gives the lead judgment. He observes that s.43 is seldom encountered and considers the few references to it in the case law, as well as the statutory guidance [paras 9-14].

On appeal, only father sought to uphold the judge's decision on jurisdiction. He asserted that, as a matter of law, the consequence of the LA's actions, such as the calling of a CP conference, was to make s.43 unavailable. The Court of Appeal held that Newton J was wrong [para 18-22]:

– S.43 must be read in the context of the legislation as a whole. The purpose of the section is to enable proper assessment to establish whether there is a need for further action;

– S.43(1)(a) provides a relatively low threshold of reasonable suspicion. This is "a threshold to be crossed, not a target to be hit".

– The normal rule of statutory construction that the greater includes the lesser applies. The proposed reason for departing from it – that the court is examining the LA's state of mind – has no logical foundation;

– The only restriction on the use of s.43 is as per s.43(4) when an EPO should be made instead;

– An assessment can only be ordered if it is required, i.e. necessary (s.43(1)(b)). Determination of whether a child is suffering or likely to suffer harm is not confined to a yes/no answer; there is an essential qualitative character to the assessment process.

– The interpretation suggested by father conflicts with good social work practice, flies in the face of proportionality and would effectively render s.43 redundant.

On the merits of the application, it was difficult to be precise as to Newton J's reasons. The Court of Appeal found that he could not reasonably have reached his decision on the evidence before him [see para 32]. Of note, Newton J had, in effect, substituted for the 'requirement for reasonable suspicion test' a test of whether the LA had acted reasonably. The proportionality exercise had gone awry.

The Court of Appeal rejected the father's contention that s.43 does not permit an assessment of the children's religious faith as it is not a facet of their health, development or treatment by their parents as "self-evidently unsound". The assessment was of the children's vulnerability and resilience in the face of extremist propaganda masquerading as religious faith.

The Court preferred Newton J's approach that the opposition of the older children was not an obstacle to the making of an order to the obiter remarks of Knowles J in Re Q [2019] 2 WLR 1161. The views of an older child are an important consideration, but opposition does not make an order unlikely: it depends on the facts of the case and the nature of the risk and the assessment.

The key points from the statute and guidance are helpfully distilled at paragraph 35.

Decision

The appeal was allowed. The Court of Appeal made the child assessment order. They expressed the hope that the children would engage with it, noting that the older children had the right to refuse.

To read the full judgment click here.

Permission