Case No: C1/2009/0207

Neutral Citation Number: [2010] EWCA Civ 317
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE SILBER
(LOWER COURT No. CO/8654/2008)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 22nd February 2010

Before:

LORD JUSTICE WALLER
and
LORD JUSTICE WILSON
- -

Between:

The Queen on the Application of Ravinder Singh Kang
Applicant

- and -

Children and Family Court Advisory and Support Service
Respondent

- -

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Mr Rambert De Mello (instructed by Messrs R J Hawksley and Co) appeared on behalf of the **Applicant**.

The **Respondent** did not appear and was not represented.

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Judgment

Lord Justice Wilson:

1. Mr Kang makes a renewed application for permission to appeal against the refusal of Silber J, sitting in the High Court, Queen's Bench Division, Administrative Court, on 22 January 2009, to grant him permission to apply for judicial review. The defendant to his proposed claim is the Children and Family Court Advisory and Support Service (Cafcass).

2. The claimant has been a party to long-running and highly acrimonious family proceedings in relation to his two children. Those proceedings have been brought either by him against their mother, being his wife or former wife, or by her against him. In those proceedings an order was made that the children should be represented by a guardian ad litem; and in due course Mrs Sivills, a Cafcass, officer was appointed to fulfil that role. The present proceedings arise out of the claimant's dissatisfaction with the way in which she performed it.

3. As a family lawyer, I can confirm that the way in which an aggrieved parent usually expresses dissatisfaction with the content of a guardian's report, including of course the conduct of its author in relation to its preparation, is by cross-examination and submission in the family proceedings. In these present proceedings something of a veil has been drawn over the family proceedings. But we are told today that, as one would expect, counsel for the claimant in the family proceedings did, at the final "outcome" hearing of the proceedings which took place in July 2009, press the claimant's complaints by cross-examination of the guardian and final submission to the court; it remains unclear whether, and if so to what extent, the judge in those proceedings upheld his objections.

4. This claim arises out of the way in which, following receipt of a complaint by the claimant about the conduct of the guardian, Cafcass operated its complaints procedure. The argument put before Silber J, which is different from the argument presented to us today, is that, in relation to the claimant's complaint, a particular determination made by Cafcass in the course of operating its complaints procedure was irrational; and, as I will indicate at the end of this judgment, a very wide, fresh, dimension of argument is now put forward. At all events, the argument presented to the judge was, so he held, unarguable.

5. In order to prepare her report for the court in the family proceedings the guardian made three visits to the home of the claimant. She visited on 27 September 2007 and interviewed him in the presence of the claimant's mother and sister; and (omitting an intervening visit which is immaterial) she visited again on 6 October 2007 and conducted a further interview with him, at which the claimant's mother and sister were again present but so also, on this occasion, was the claimant's brother.

6. By letter to Cafcass dated 7 November 2007 the claimant made a complaint about the perceived bias of the guardian against him, both as a father and as a Sikh, as allegedly demonstrated by her during these visits. Whether, by 7 November, the guardian had

served her report is unclear. The claimant's letter, which was detailed, complained of cultural ignorance and insensitivity on the part of the guardian and, in particular in relation to the first visit, attributed to the guardian unusual and arresting statements such as that "Indian fathers do not look after their children anyway".

7. Thus the Cafcass complaints procedure began to be operated. It has various stages, as set out in a leaflet issued by Cafcass entitled “Your Views Count”. A complaint is registered under stage one; is considered by the line manager of the officer complained about under stage two; *may* proceed to an independent panel under stage three; and can even reach a stage four. Stage two of the process was conducted by the guardian's line manager, Mr McGinty, who was a service manager of the Cafcass High Court team. Nothing turns on his handling of stage two. Suffice it to say that on 8 January 2008 Mr McGinty met the claimant, his brother and his sister, in Guildford; the meeting lasted for almost four hours; and its purpose was to enable Mr McGinty fully to understand the claimant's complaints against the guardian.

8. By letter to the claimant dated 14 January 2008 Mr McGinty explained in detail, across eight pages, how he appraised the numerous complaints which the claimant had made about the guardian. He upheld one complaint, namely about an ill-advised reference on the part of the guardian, in the presence of the assembled company on 6 October, to the abnormal failure of one of the mother's breasts to have developed. It was Mr McGinty's view that, without the prior consent of the claimant, the guardian should not have raised that delicate matter in the presence of his sister or mother. Mr McGinty offered him an apology on behalf of Cafcass in that regard. But the numerous other complaints, the most significant of which he rightly took to be the alleged comments of the guardian on 27 September, he refused to find established. He also observed, correctly from a family law point of view, that at an interim hearing which had apparently taken place, the complaints about the guardian had curiously not been articulated on behalf of the claimant.

9. Then, in a prompt response by the claimant to Mr McGinty by letter dated 21 January 2008, there was a curious development. The claimant therein explained, for the very first time, that, during the visit of the guardian on 6 October, his brother had, at that time unknown to him as well as to the guardian, tape-recorded all or at any rate most of the discussion. The claimant stated that, upon learning what his brother had done, he had not at first been entirely happy about it but that he now considered that his brother had behaved correctly. He enclosed transcripts and discs relating to the brother's recording of the meeting and he quoted three or four remarks of the guardian which he had collected from the transcripts, in particular that "no man should get married until he’s at least 30; that’s what I think". He also quoted an exchange in which, after he had said that he would be killed by the mother's family if he went to India, the guardian had responded "I shouldn’t be smiling but …have you ever been to India?".

10. By his letter dated 21 January 2008 the claimant asked Cafcass to operate stage three of its complaints procedure. Stage three provides for an investigation if the regional complaints manager of Cafcass considers that such should be set up; and any

investigation under stage three is conducted by two independent persons and one Cafcass officer. The Cafcass leaflet indicates that, in considering whether to direct a stage three investigation, the manager will consider various specified factors, including whether more could be achieved by carrying out an investigation, the seriousness of the complaint, whether the investigation would be in the best interests of the children and whether evidence about the behaviour of a Cafcass officer suggests that an investigation is necessary.

11. It is the refusal of Cafcass to set up a stage three investigation of the claimant's complaint which is the decision sought to be made subject to judicial review.

12. By letter to the claimant dated 20 March 2008 the regional complaints manager of Cafcass notified him that she had rejected his request that she should set up a stage three investigation. She set out the factors which particularly fall to be considered in reaching such a decision; referred to the thorough investigation of Mr McGinty; and suggested that his investigation had been congruent with the level of seriousness of the complaint.

13. By letter dated 22 March 2008 the claimant was swift to exercise his right to seek a review of her decision. But the result of the review was adverse to him. By letter dated 12 June 2008 Miss Philipson, Head of Service at Cafcass Eastbourne, upheld the decision to refuse to set up an investigation. She referred to a judgment of the High Court in the family proceedings, apparently then recent; again set out the factors relevant to the setting up of an investigation, as particularised in the leaflet; and concluded that they had been weighed fairly and reasonably by the regional complaints manager. Miss Philipson, however, recorded not only that the claimant had the right to raise with the Ombudsman any concerns about the handling by Cafcass of his complaint but also that, so she understood, he had already done so.

14. The situation therefore is that, notwithstanding the facility, indeed the forensic necessity, to raise complaints about the quality of a guardian's analysis, thus including the nature of her preceding investigations, with the court in the family proceedings, and notwithstanding also the facility to complain to the Ombudsman about the handling by Cafcass of a complaint, the claimant chose, instead or, as it appears, additionally, to seek to challenge, by way of judicial review, the lawfulness of the decisions dated 20 March and 12 June to refuse to set up an investigation under stage three.

15. The claimant's case before Silber J was that such refusal was irrational. In the light of the different way in which today the claimant's argument is put, I proceed to observe only that, as the judge held, it is unarguable that the decision was irrational.

16. Counsel who had represented the claimant before the judge drafted grounds of appeal to this court, and a skeleton argument in support, in which he persisted in the contention that the decision of Cafcass had been irrational. When, however, on 16 November 2009 Wall LJ considered on paper the application for permission to appeal to this court against the order of Silber J, he wrote that, particularly in the light of the

detailed analysis of the claimant's complaints by Mr McGinty, the writers of the letters dated 20 March and 12 June 2008 had acted lawfully in refusing to set up an investigation under stage three and that, accordingly, an appeal against the decision would not stand any prospect of success.

17. Thus it is my view, inevitably, that the claimant accepts that his previous contention before the judge cannot further be maintained in the proposed appeal.

18. So now it is new counsel, namely Mr De Mello, who enters the fray on behalf of the claimant. In a skeleton argument filed pursuant to paragraph 4.14 A(2) of the Practice Direction appended to Part 52 of the CPR, Mr De Mello entirely recasts the nature of the claimant's challenge to the lawfulness of the two Cafcass decisions, particularly the later one. The new argument is that, in reaching their decisions, particularly the later one, not to set up an investigation under stage three, Cafcass, as a public authority, infringed the rights of the claimant under both article 6 and article 8 of the European Convention on Human Rights.

19. Mr De Mello's skeleton argument is dated 26 January 2010. The claim for judicial review had been issued on 11 September 2008. So the challenge to the lawfulness of the Cafcass decisions is now, more than 14 months later, cast upon a basis which entirely replaces the basis addressed by Cafcass in its grounds for contesting the claim and, more particularly, by the judge in rejecting its arguability. The notes in the White Book to CPR 52.8.2 refer to the authorities which, for reasons which do not need explanation, stress the reluctance of this court to allow an appeal to proceed upon a basis foreign to that upon which it proceeded below.

20. Let me, however, in deference to the industry of Mr De Mello, briefly consider the new points.

21. Mr De Mello invokes first Article 6 and alleges that the decision impugned, namely not to set up the stage three investigation, represents a determination of the claimant's civil rights and that, in all the circumstances, it was unfair. He alleges that the guardian so exercised her functions as to result in a "decision" in relation to the separation of the claimant's children from the claimant and that, therefore, such was a decision affecting his civil rights. Had that argument set out in the skeleton remained as it stood, I would have been unclear whether Mr De Mello was imputing the relevant "decision" to the guardian or, perhaps, to the family judge who, in the light of the guardian's report, may have reached some determination adverse to the claimant. Later in his written argument Mr De Mello did seem to me to make clear that he was imputing to the guardian an administrative "decision" about the welfare of the children. Today, however, Mr De Mello accepts that the nature of the guardian's role is not to make any "decision" about the welfare of the child and that her recommendation may or may not be influential in the "decision" made by the judge. Indeed, when this morning in the course of our quite lengthy hearing of Mr De Mello's arguments, I put to him that it would be straining language to impute to the guardian a "decision" (in the sense of a decision as to what she should recommend to

the judge) Mr De Mello was kind enough to agree that that would indeed be a stretch of language and a concept too far.

22. In respect of Article 6, I see no arguable ground for concluding that, in refusing to hold a stage three investigation, Cafcass was determining the claimant's civil rights or obligations. Thus in my view under that article, Mr De Mello does not even reach the stage at which, with whatever degree of difficulty, he could argue that the "hearing" afforded to the claimant was unfair within the meaning of the article. Speaking as a judge who happens to have had the burden, over the past two months, of studying numerous decisions, both of our domestic courts and, in particular, of the court in Strasbourg, as to the autonomous meaning of "civil rights and obligations" within article 6, perhaps I can say, albeit sweepingly, that the refusal of Cafcass to proceed to stage three in relation to the claimant's complaints about the guardian cannot possibly amount to a determination of his rights and obligations and cannot possibly engage article 6. The one authority cited by Mr De Mello in his written argument, namely R (Wright) v Secretary of State for Health [2009] UKHL 3, [2009] 2 WLR 267, relates to a determination about the entry of persons on a list of those not permitted to work with vulnerable adults and thus is, with respect, entirely irrelevant.

23. As for article 8, I am certainly prepared to assume that, in performing her functions, the guardian, as an officer of a public authority, had a duty to respect the private and family life of the claimant and indeed of course also of his children. But I cannot see how that right, and the corresponding duty, translate into any right, and into any corresponding duty, referable to the decisions of Cafcass not to set up a stage three investigation. So, in respect of those decisions, I am clear that that article 8 is also not engaged.

24. I should add that today Mr De Mello has made clear something which was not entirely clear to me in his written skeleton argument, namely that he has had an enlarged aspiration in this proposed appeal in relation to his deployment of articles 6 and 8 of the Convention of 1950: he has made clear to us today that his argument would be not only that the Cafcass scheme, as operated in this case by Cafcass, infringed the rights of his client under the two articles but also that the scheme itself was not compliant with those articles. He has referred to the unconscious bias which any line manager working under stage two would allegedly bring to bear in favour of the subject officer and against the interests of the complainant; and, in response to the probing of my Lord, Mr de Mello has ultimately suggested that the scheme would be compliant with the articles only if it provided that, in relation to any serious factual issue between the claimant and the officer, a stage three investigation *had to be* set up.

25. Apart from the fact that it is to my mind inconceivable that, in these proceedings, at this stage, this court would allow argument to be raised, for the first time, about the wholesale compliance of the Cafcass scheme with articles 6 and/or 8, my conclusion about the non-engagement of articles 6 and 8 in this particular case will serve to explain why I, for my part, would not consider it arguable that the scheme is thus not compliant with the compliant.

26. It is for those reasons that I would refuse permission to appeal.

Lord Justice Waller:

27. I agree.

Order: Application refused