Supreme Court hands down landmark judgment in Re B

The Supreme Court has delivered judgment in **Re B [2013] UKSC 33** which has wide-ranging implications for all public law children cases. Specific consideration was given to the threshold criteria and the meaning of significant harm, the engagement of parents' Article 8 rights, proportionality and the test to be applied by appellate courts. Spanning 224 paragraphs and 140 pages, five separate judgments were handed down by a Court comprising Lord Wilson, The President Lord Neuberger, Lord Kerr, Lord Clarke and Lady Hale (dissenting).

Following a first instance hearing which lasted 20 days, His Honour Judge Cryan concluded that it was unsafe for "Amelia" (the pseudonym afforded to the subject child by the Supreme Court) to be placed with her parents and that it was necessary and in Amelia's interests that she should be adopted. The nature of the harm which concerned HHJ Cryan in what he described as this "highly complex case" was the likely emotional harm to Amelia caused by the mother's somatisation disorder and factitious illness disorder, the parents' personality traits, the mother's lying, the father's active, but less chronic, tendency to dishonesty and vulnerability to the misuse of drugs as well as the potential for physical harm to Amelia which could not be discounted (for example by excessive or inappropriate treatment by doctors). HHJ Cryan had heard earlier care proceedings in respect the mother's elder child (referred to as "Teresa").

The parents' appeal to the Court of Appeal (**Re B [2012] EWCA Civ 1475**) was dismissed. Black LJ gave the leading judgment with which Rix and Lewison LJJ concurred whilst both recognising the troubling nature of this case with its evaluation of subjective moral and emotional risk.

Following a hearing on 25 February 2013, the Supreme Court by a majority of 4:1 (Lady Hale dissenting) dismissed the mother's appeal. It was unanimously accepted that threshold had been crossed in the case (albeit not without some hesitation on the part of Lady Hale).

In examining threshold the Supreme Court Justices unanimously stated that there was no interference with Article 8 rights when a trial judge concludes that the threshold criteria have been met. The contention of the mother that threshold is not crossed if the deficits relate only to the character of the parents rather than the quality of their parenting was rejected. Also rejected

was the submission that harm suffered or likely to be suffered by a child as a result of parental action or inaction only satisfies the threshold criteria if the parents are deliberately or intentionally found to have caused or are likely to cause such harm: the Supreme Court holding that section 31 of the Children Act 1989 contains no such 'mens rea' style test and it is simply a matter of causation/attributability.

The meaning of 'significant harm' within the section 31(2) Children Act 1989 framework was specifically explored but it was decided that there should be no 'gloss', encumberance or 'encrustation' on the statutory formulation. Notably the President did emphasise that the concept of significant harm is interrelated with the likelihood of it being suffered. Lady Hale's observation in In re S-B (Children) (Care Proceedings: Standard of Proof) [2010] 1 AC 678 that the more significant the harm, the less the required level of likelihood (and vice versa) was approved.

The Supreme Court explored the proper approach once threshold has been crossed and the engagement of the right to respect for private and family life in the context of a care plan for adoption. The consensus was that domestic law meets the demands of the Strasbourg jurisprudence. Domestic law requires that the "interests of the child must render it necessary to make an adoption order", that such a care plan should be endorsed only "where nothing else will do" and as a last resort in exceptional circumstances. The Court reminded that it is not enough that it would be better for a child to be adopted than to live with his or her natural family. The level of justification required to interfere with Article 8 rights by way of adoption therefore remains high.

Fundamentally the Supreme Court considered the issue of when it is proper for an appellate court to interfere with the decisions of a trial judge who has heard and read all the evidence and reached his conclusion after careful cogitation following days of hearing in court and face-to-face contact with the people involved. The Supreme Court Justices unanimously held that an appellate court can interfere in such children cases if satisfied simply that the judge was 'wrong' (or there has been serious irregularity); a test which reflects the wording of Rule 52.11(3) of the Civil Procedure Rules 1998. The adverb 'plainly' was said to add nothing to the test.

When examining the issue of appeals in cases concerning the proportionality of the interferences with the European Convention on Human Rights, the majority held the view that section 6 of the Human Rights Act 1998 does not mandate a fresh appellate determination of a Convention-related issue and instead the appellate exercise is that of conventional review. Lord Kerr and

Lady Hale disagreed with the majority: they held the view that decision-makers at all levels must starkly confront the question of whether an interference is necessary.

The landmark decision in **Re B** will have ramifications at all levels. Some clarity has been provided in terms of satisfying the threshold criteria, whilst leaving intact the necessarily elastic terminology of 'significant harm'. Emotional harm has been recognised as equally significant as physical harm. The Supreme Court explored the implications of Article 8 when ratifying care plans for adoption of children, reiterating the high level of justification required for such intervention but finding that domestic law and Strasbourg jurisprudence are consistent. The majority also held that section 6 of the Human Rights Act 1998 does not require an appellate court at each stage to address directly whether the making of an order is proportionate. This stance expressly recognises the benefit of a first instance judge's findings and that such are often surrounded by a penumbra of imprecision as to emphasis, weight, qualification and nuance. The unanimous decision that an appellate court can interfere with a decision if it is 'wrong' is an interesting development. Whether this may be seen as a lower test or lead to a perception that the appeal hurdle is easier to surmount remains to be seen.

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