Re A (A Child) [2012]

[2012] EWCA Civ 1477

16/11/2012

Barristers

Jo Delahunty KC

Court

Court of Appeal (Civil Division)

Practice Areas

Public Children Law

Summary

Application for permission to appeal a refusal to re-open a fact-finding hearing on the basis that the injuries to the child were caused by rickets. Application refused.

Facts

The child, C, was twenty-three days old when taken to hospital suffering from bleeding into his nappy, a swollen scrotum and penis, a cut to the base of his penis and bruising to the perineum and left outer thigh. Doctors thought this was probably due to an infection and so released C to the parents with a prescription for antibiotics. There were, however, no clinical signs of infection, that is, C's temperature and blood tests were all normal.

Four days later C was returned to hospital with a swollen right leg. X-rays showed a total of twelve fractures: fractures of C's ribs, fractures to his tibia and fibula with a transverse fracture of his right femur.

A fact-finding hearing was held on 5th July 2010 for which the parents had been given full rein by the court to identify and instruct whichever relevant medical experts they might consider able to assist the court with assessing how C came by these symptoms and injuries. All of the experts instructed for the fact-finding hearing agreed that the groin symptoms and the fractures had been inflicted on C at some time after his birth. HHJ Carr made findings that C had been injured after birth and before the final presentation at the hospital and that the mother and/or the father were the only possible perpetrators of the injuries.

In June 2012 the parents sought to re-open the fact-finding process with twenty-six factors which the parents believed ought to be reconsidered due to recent developments in medical understanding or because they had not been given sufficient prominence at the original fact-finding hearing. The parents sought to demonstrate that it was possible for an unborn child to develop a Vitamin D deficiency that would render the baby's bones soft or be symptomatic of congenital rickets. The mother had low Vitamin

D levels and iron levels during her pregnancy. C was given formula milk with a Vitamin D supplement at birth. C's Vitamin D levels were not measured until he was more than a month old and, at that point, were normal.

C had abnormal liver functioning, a matter which had been dealt with at the fact-finding hearing. In the case of *London Borough of Islington v Al Alas and Wray* [2012] EWHC 865 (Fam), Professor Nussey, an endocrinologist at St George's Hospital, Tooting had been instructed. The parents in this case had sought to instruct him in June 2012 on the basis that Professor Nussey would be able to clarify the relevance of abnormal liver function readings in this case as he had in the *Wray* case. Permission was given in September 2012 to the parents to instruct Professor Nussey. Professor Nussey's conclusions were:

"[W]hilst it is recognised that the quantities of vitamin D in formula feeds are calculated to prevent rickets rather than to optimise bone mineralisation it is, on the balance of probabilities, unlikely that vitamin D played a significant role in bone fragility predisposing the fractures which C presented".

In addition to this, it was argued that rickets would require active treatment as it was not a condition which would treat itself. No treatment had been given at any time and there had been no sign of rickets.

Counsel for the child also argued that the absence of other fractures which would be present in the case of rickets was relevant. There were not multiple fractures of multiple ages, but fractures on only two dates; there were no fractures to the skull or shoulders as would be the case if there was bone fragility in-utero and the fracturing had been caused by the birthing process; and there were no fractures to the parts of the body which were most handled in changing nappies, bathing and dressing.

Counsel for the child also argued that there were no radiological signs of rickets such as wormian holes or oesteopenia; that a deficiency in Vitamin D would affect the whole nervous system and would have made C vulnerable to seizures with an increased susceptibility to infection with a decreased ability to recover from infection. In addition to this, the biochemistry results did not demonstrate that there was a deficiency of Vitamin D.

Held

McFarlane LJ held that the parents had "no reasonable prospect of persuading the full Court of Appeal to overturn HHJ Carr's refusal of their application to re-open the fact-finding process" on the bases that the parents had been given and had taken the opportunity to present all of the experts they chose in order to make their case. They had all, including the most recently instructed expert Professor Nussey, come to conclusions which were adverse to the parents' case. No evidential basis had been put before the court to assert that low Vitamin D led to C having congenital rickets at birth and no evidence had been put before the court that C's bone formation was detrimentally affected by a lack of Vitamin D prior to birth.

McFarlane LJ further stated:

"Once a court has been persuaded to take the step of putting the previous court's orders on hold so that the applicants are permitted to instruct the expert of their choice for the purpose of investigating and analysing the primary theory that is said to support their application for permission to appeal, and once the result of that process is a wholly adverse conclusion, which entirely knocks out one of the primary planks of the applicant's case (the liver readings) and expresses a clear conclusion that, despite vitamin D deficiency being present at birth, there is no medical condition identifying a cause for the fractures, it becomes very difficult for the applicant to persuade a court to adjourn further so that additional investigation take place."

Permission

Family Law Week [x]