



Neutral Citation Number: [2022] EWCA Civ 1439

Case No: CA-2022-001242

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Recorder Beck / Mr Justice Peel
FA-2021-000316

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 November 2022

Before :

SIR ANDREW MCFARLANE, PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE PETER JACKSON

and

LORD JUSTICE COULSON

B (A Child)

Chris Barnes and Charlotte Baker (instructed by **Goodman Ray Solicitors**) for
the **Appellant Mother**
Daniel Attridge (instructed by **B.A. Chappell & Co.**) for the **Respondent Mother**

Hearing date : 25 October 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 2 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Sir Andrew McFarlane, President:

Introduction

1. This is the judgment of the court.
2. This appeal arises from a case management order in the Family Court that provided that allegations of domestic abuse made by a party in private law proceedings should not be investigated at a final hearing.
3. Our decision is that the appeal will be allowed in part and that the issue will be remitted to the Family Court for redetermination by the judge who has recently been allocated to the case. We allow the appeal because of contradictions in the reasoning for the decision under appeal, and we do so only in part because it is not necessary for us to reach a conclusion on the appellant's argument that the decision was wrong. We remit rather than remaking the decision ourselves because it is a decision that is best retaken in accordance with established principles by the judge who will be conducting the final hearing. We therefore express no view as to the outcome and will say no more than is necessary to explain our decision.

The facts in outline

4. The proceedings concern V, a girl aged seven. In 2010, her parents began a relationship and in 2014 they began to live together. By 2018, the mother was showing signs of an alcohol problem that was to become acute. In August 2019, she left the family home, taking V with her. For the time being she continued to be V's main carer, with contact taking place with the father. At this point the local authority became involved, with V considered to be a Child in Need.
5. These care arrangements changed when the mother's condition deteriorated to the point where she needed two periods as a hospital inpatient undergoing detoxification. The first began in February 2020 and lasted for two months. During this time V was placed with a maternal uncle and aunt, with the agreement of her father and social services, and contact with the father continued.
6. Between October 2019 and April 2020, the father had a relationship with Ms A.
7. In March 2020 the father began the proceedings, seeking an order that V should live with him, and a FHDRA was listed for June. However, at the end of March and shortly before the mother left hospital, the father retained V at the end of a period of contact and, as things have turned out, she has remained with him ever since. The mother immediately issued an application for V's return to her care, and this was adjourned to the hearing in June.
8. In May 2020, the mother relapsed and in July she returned to hospital for a further three weeks of detoxification. She states that she has remained sober since her discharge. A succession of court orders provided for her to have increasing contact with V, and she now looks after her overnight for five nights each fortnight.
9. The ultimate decision for the court will be where V's main home should be. The father argues that she is now settled and doing well and should remain with him. The mother's case is that she was always V's main carer and that since the second half of 2020 she

has been in a position to resume that role. On the basis of allegations of domestic abuse to which we now turn, she argues that she is the parent who is better placed to give V a secure and healthy emotional upbringing. At the same time, both parents are agreed that V will have substantial unsupervised contact with the other parent.

The domestic abuse allegations

10. The mother's case, first articulated to the local authority in 2019, is that she was subjected by the father to a pattern of controlling and coercive behaviour that caused or contributed to her alcoholism and led her to leave the relationship. The father denies the allegations. It is unnecessary to set them out in detail as it is common ground that they fall within the definition of domestic abuse contained within FPR PD12J.
11. Tracing the proceedings, the allegations were raised in the mother's application in April 2020 and in the Cafcass safeguarding letter. In June 2020, the court directed the local authority to provide a s.7 report, which was filed in September 2020 and made brief reference to the allegations. In October 2020, the magistrates refused the mother's request for a fact-finding hearing but directed her to file a statement and said that it would be a matter for the court at the final hearing to decide whether it needed to adjudicate on any allegations. A 2-day final hearing was fixed for 31 March 2021. On 23 March 2021, the mother filed a long statement setting out her case. On 30 March 2021, this court's judgment in *Re H-N (Children) (Domestic Abuse - Finding of Fact Hearings)* [2022] 1 WLR 2681; [2021] EWCA Civ 448 was handed down. In consequence the magistrates found that the final hearing could not go ahead and reallocated the case to a District Judge.
12. The matter came before a deputy District Judge on 28 May 2021. He determined that "a fact-finding hearing on the allegations of domestic abuse was not necessary for the purposes of the court's assessment of risk in the light of the other evidence available to the court and the parties' respective positions as to the child arrangements". A further s.7 report was ordered and directions were given for a PTR in November and a final 3-day hearing in December 2021. There was no appeal from this decision.
13. However, in October 2021, the mother filed an application seeking fresh consideration of whether there should be a combined fact-finding and welfare hearing, and seeking permission to file a statement from the father's former girlfriend Ms A. In the statement Ms A (who said she had never met the mother but had come to hear about the proceedings from a mutual friend) gave an account of domestic abuse towards her during her own relationship with the father, allegations that echoed those made by the mother. Ms A also gave an account of the father's attitude towards the mother and her family and his planning the retention of V in 2020.
14. At the PTR in November 2021, the 3-day final hearing in December was adjourned and the mother's application was listed for determination on the first day along with other matters. The required s.7 report had not been filed and the local authority was directed to provide an explanation. When it was filed, it raised no current safeguarding concerns and in the light of the court's ruling it made no reference to the issue of domestic abuse.

The decision under appeal

15. The matter came before Recorder Beck on 6 December 2021. He dismissed the mother's application for a composite fact-finding/welfare hearing and refused permission for Ms A's statement to be filed. He transferred the case to a more local court, and ordered a DRA hearing on a date after 18 April 2022 and a 3-day final hearing, before the same judge if possible, on the first available date after 2 May 2022. Concerningly, this only led to the listing of a final hearing in November 2022. The Recorder also ordered a further s.7 report on the basis that recent report was inadequate for want a welfare checklist analysis or any recommendations.

16. The resulting order included this recital:

“[T]he Court applied PD 12J and *Re H-N* (2021) and determined that findings of fact are not required on the allegations of domestic abuse. This was on grounds that it is not necessary in light of other evidence available to the court and would in any event be disproportionate having regard to the parties' respective positions as to the child arrangements and that matters regarding how the final hearing should be conducted should be considered by the Judge at the PTR/DRA which the Court hoped would be reserved before the same Judge for judicial continuity. A short extempore judgment was delivered.”

17. In that judgment, the Recorder noted PD12J and *Re H-N*. He correctly stated that the allegations fell squarely within 12J but that not every allegation required a judicial finding and the court had to determine the relevance, proportionality and necessity of determining particular allegations in light of its overarching obligation to consider what is in V's best welfare interests. He referred to the issue of delay and noted that the issue of fact-finding had been considered in October 2020 and May 2021. In giving his decision, he said this:

“23. This case is a Children Act case about [V]; this is not a case about the quality of relationship between the parties. The mother has made allegations of domestic abuse against the father and they will, no doubt, need to be taken into account by the Court as part of its final assessment; those allegations have also been noted to the Local Authority.

24. However, to extend the scope of the Court's analysis of the evidence to include third party evidence that dates after this relationship between the mother and father came to an end is not directly relevant to the father's care of [V]; it is not in the view of the Court, a proportionate response.

...

28. I am not at all convinced that the admission of this additional piece of evidence is going to assist the Court and the mother has clearly set out her position in relation to the allegations of the abuse she says she suffered at the hands of the father and they

would be far more directly relevant to the welfare interests of [V] because her allegations span the period of both before [V] was born and afterwards and those would be the relevant issues that the Court should look at in the final hearing.”

18. The mother appealed, and permission was given by Morgan J on the basis that:

“In excluding the statement, the judge focussed narrowly on one aspect of the case (the respondent’s care of the child). The evidence has however relevance to the wider issues of patterns of coercive behaviour (if established) when considering future risk to the child and/or the evaluation of appellant’s own allegations of past behaviour. Absent a fact finding component to the final hearing, the court will not have an opportunity to reach conclusions [about] the allegations made and their relevance to decisions for the child’s future.”

19. The appeal was heard on 14 June 2022 by Peel J. By this time there was a further s.7 report, which again raised no safeguarding concerns and referred only briefly to the mother’s allegations. The judge dismissed the appeal for these reasons: the child had lived with the father for two years and there were no current concerns; the mother’s case depends far more on her recovery than on her allegations; the mother accepts that the father should have unsupervised time with V; an enquiry into domestic abuse would require the case to be “completely recast”; a fact-finding hearing would not be of such relevance as to justify it being undertaken; the court had refused to order fact-finding twice before; Ms A’s evidence went to the probity of the mother’s evidence rather than to the question of whether fact-finding was necessary; fundamentally, the Recorder’s decision was not outside the range of reasonable outcomes available to him, showed no error of law or principle or procedure, and a case management decision properly reached by a conscientious judge should not be interfered with.
20. On 21 July 2022, permission for a second appeal was granted by Peter Jackson LJ.
21. To complete the procedural picture, on 29 July 2022, the District Judge at the new court directed that the case remains listed on 7 November 2022 as a DRA.

Fact-finding about domestic abuse allegations

22. The principles governing the court’s approach to whether it should make findings of fact about allegations of domestic abuse are now well-established. Grounded in FPR PD12J, they are explained in the decisions of this court in *Re H-N* and *Re K (Children)* [2022] 1 WLR 3713; [2022] EWCA Civ 468 and summarised in the President’s Guidance of 5 May 2022.
23. PD12J para. 1 provides that the Practice Direction applies to “any family proceedings... in which an application is made for a child arrangements order, or in which any question arises about where a child should live, or about contact...” The decisions in *Re H-N* and *Re K* arose from applications made by allegedly abusive parents with whom the children were not living. The present case is factually different, but it is not suggested that the same principles do not apply to it.

24. We need say no more than that the court was called upon to apply the framework set out in para. 17 of PD12J in the light of the guidance in the case law:

“17 In determining whether it is necessary to conduct a fact-finding hearing, the court should consider –

- (a) the views of the parties and of Cafcass or CAFCASS Cymru;
- (b) whether there are admissions by a party which provide a sufficient factual basis on which to proceed;
- (c) if a party is in receipt of legal aid, whether the evidence required to be provided to obtain legal aid provides a sufficient factual basis on which to proceed;
- (d) whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;
- (e) whether the factors set out in paragraphs 36 and 37 below can be determined without a fact-finding hearing;
- (f) the nature of the evidence required to resolve disputed allegations;
- (g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and
- (h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.”

We consider that the last two questions are of particular relevance in the present case, though it has not been suggested that any fact-finding needs to be conducted at a separate hearing.

This appeal

25. On behalf of the mother, Mr Barnes and Ms Baker argue that the court will have to make a significant determination about where V’s main home should be. The fact that the mother accepts that there will be unsupervised contact does not negate the need for her allegations to be investigated in circumstances where there has been no inquiry into them by the local authority. The risk to V is that if the father is her main carer, she will be exposed to his attitudes towards women and towards her maternal family. The mother’s experience of domestic abuse is central to a judgment about which home will be safer and which parent is better able to promote the child’s welfare and relationships. It is unclear what the “other evidence” relied on by the court is, but it does not concern domestic abuse. The Recorder did not employ the structured approach required by PD12J para. 17 and his order is irreconcilable with his reasons, which do not justify shutting out the mother’s case. Mr Barnes contends that the application about Ms A’s evidence should stand or fall with the decision about whether there should be fact-finding at all.

26. On behalf of the father, Mr Attridge submits that the Recorder's order should be upheld. He had been entitled to refer to "other evidence" in the form of the s.7 reports that showed that there was no sign that V had been affected by any domestic abuse. The dispute between the parents is now a narrow one; indeed it is academic in the same sense as the individual appeal in the case of H in the *re H-N* appeal, since in both cases there is no dispute about unsupervised contact. There is a competing risk for the court to consider, namely the risk of a relapse on the mother's part. A fact-finding hearing would occasion further delay and exacerbate bad feeling.
27. Mr Attridge advanced a separate argument in relation to Ms A's statement. He submitted that it should be excluded even if there was to be fact-finding about the mother's allegations. He referred to the decisions in *R v P (Children - Similar Fact Evidence)* [2020] 4 WLR 132; [2020] EWCA Civ 1088 and *O'Brien v Chief Constable of South Wales* [2005] 2 AC 534; [2005] UKHL 26. In essence he argued, relying on paragraphs 45 and 56 of the latter case, that there is a principle that similar fact evidence should not be admitted unless it is likely to be reasonably conclusive of the issue to which it relates.
28. We do not accept this argument, which is in any event contradicted by paragraph 46 of *O'Brien*. Although it will be a matter for the judge carrying out the rehearing, we think that the authorities are likely to lead to the conclusion that if there is to be fact-finding at all the evidence of Ms A should be admitted.

Conclusion

29. In this case the decision about whether there should be fact-finding turns on the question of whether the allegations made by the mother and Ms A are relevant to the issue between the parties and capable of having an impact on the final decision. As the Guidance of May 2022 puts it, "The fundamentals are relevance, purpose, and proportionality".
30. We make full allowance for the fact that the Recorder was dealing with a series of applications of which this was just one and that he was rightly giving his reasons there and then. Even so, we are not satisfied that the mother's application received the analysis required by PD12J. The order, from which this is an appeal, provides that there is to be no fact-finding into the allegations made by the mother and Ms A. However, the recital to the order, having stated that findings of fact are not required on the allegations, states that there is other evidence available to the court. This must be a reference to Para 17(d) ("other evidence available to the court that provides a sufficient factual basis on which to proceed"), but in our view this is intended to relate to other evidence on the question of risk arising from abuse and not to evidence about other matters. The recital then goes on to say that "matters regarding how the final hearing should be conducted should be considered by the Judge at the PTR/DRA". This somewhat reflects the approach found in the judgment, which is that, while the admission of Ms A's statement would be disproportionate, the mother's allegations "will, no doubt, need to be taken into account by the Court as part of its final assessment". The Recorder's reference to the court taking the allegations into account does not appear to be a slip as it is repeated shortly thereafter: "the allegations of the abuse ... would be far more directly relevant to the welfare interests of [V] because her allegations span the period of both before [V] was born and afterwards and those would be the relevant issues that the Court should look at in the final hearing." It is not,

however, clear how the relevance of the allegations could be assessed without the court making findings of fact.

31. There is therefore a discrepancy between the order and its underlying reasoning. While the order precludes any fact-finding the reasoning focusses on the evidence of Ms A and the Recorder appears to have assumed that the mother's own allegations would still form part of the welfare assessment in some way. It is also hard to see how a 3-day hearing could be justified if there is to be no fact-finding on the issue of domestic abuse. We are not satisfied that the Recorder dealt effectively with the full breadth of the application before him.
 32. We are therefore driven to allow the appeal to the extent that we remit the decision to the trial court so that it can be decided swiftly and afresh by the judge who will be conducting the final hearing.
-