Neutral Citation Number: [2024] EWCA Civ 1384

Case No: CA-2024-001022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT REEDLEY
Recorder Gough
PR23C50111

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 November 2024

Before :

LORD JUSTICE SINGH
LORD JUSTICE BAKER
and
LORD JUSTICE DINGEMANS

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T (FRESH EVIDENCE ON APPEAL)

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Karl Rowley KC and Paul Hart (instructed by **Forbes Solicitors**) for the **Appellant**
Louise MacLynn KC and Sarah Probert (instructed by **Local Authority Solicitor**) for the **First Respondent**
Edward Flood (instructed by **Cooper Nimmo**) for the **Second Respondent**
Suzanne Hargreaves (instructed by **Forresters Solicitors**) for the **Third Respondent by her children's guardian**

Hearing date : 31 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 12 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE BAKER :

1. In this case, we are concerned with an application for permission to appeal brought by a father against care and placement orders made in respect of his daughter, hereafter referred to as T, who is now 20 months old. The basis of the application is that, since the hearing before the lower court, the father has been given a diagnosis of autistic spectrum disorder. He asserts that, as the court was unaware of the diagnosis, the orders were unjust because of a serious procedural irregularity. In support of his application, he seeks to rely on a report about the diagnosis as fresh evidence.

2. T's parents both have difficult personal backgrounds. The mother was abused as a child and has a history of alcohol abuse. The father also has a longstanding problem with alcohol and a number of criminal convictions. Their relationship started in 2014. In addition to T, they have two older children, born in 2015 and 2016 respectively, both now living with their paternal grandmother under special guardianship orders following care proceedings. In respect of the eldest child, the father was not assessed as a carer. The mother underwent an assessment at a residential unit which concluded that the child should not be placed in her care. In respect of the second child, both parents underwent an assessment which recommended that the child should not be placed with them.

3. In addition, the father has three other children; two older children living with their respective mothers, and a third conceived and born in 2017 while he was separated from the mother. That child was also made subject to care proceedings following birth and, after the father had again been assessed negatively as a carer, was made subject to care and placement orders.

4. The local authority's children services became involved again when the mother became pregnant in 2022. During pre-birth assessments, the parents said that they did not wish to keep the baby and no other family member came forward to care for the child. After T was born in March 2023, she was accommodated by the local authority under s.20 of the Children Act 1989. Very quickly, however, the parents changed their minds and asked to be assessed as carers. During family contact, social workers made some positive observations about their care of the baby. Meanwhile, the local authority had started care proceedings and, at a case management hearing in May 2023, the court made an interim care order on the basis of a plan for a residential assessment of the parents and baby. Thereafter, the family moved into a residential unit ("the A Centre") for fourteen weeks.

5. In August 2023, the final report from the A Centre recommended that T should not remain in her parents' care. The assessors concluded that, whilst the parents were able to offer T care and emotional warmth on occasions, they were unable to do so consistently. The mother was found to be unable to meet T's needs as a sole carer. Although the father was seen as being able to meet T's care needs and offer stimulation "when he wants to", he was also described as offering little or no support to the mother, exhibiting controlling behaviour towards her, failing to engage openly and honestly with professional staff, and not listening to advice. It was reported that the father thought that there were no concerns about his parenting. There were concerns about their feeding of the child who as a result suffered weight loss. The parents had offered limited stimulation to the baby, not worked together, and failed to communicate with

each other around T's needs. The assessors concluded that, if T returned home, she would be at risk of suffering neglect and emotional harm.

6. Despite this negative outcome, the local authority agreed to a further residential assessment at a different unit ("the B Centre"), with the father to be assessed as the primary carer. On 22 August, the parents and T moved into the B Centre and, at a hearing on 30 August, the court approved an amended interim care plan. In September 2023, a cognitive assessment of the mother disclosed that her IQ was in the borderline range and it was proposed that she should undergo a PAMS assessment. On 8 November, however, the mother moved out of the B Centre, leaving T in the sole care of the father.

7. In the final report from the B Centre, the assessment social worker, KW, reported that, despite undergoing 26 weeks of assessment, with access to support, role modelling and teaching, there remained "a high number of vulnerabilities in the care giving provided to T from the father". There were continuing deficiencies in basic care provision, including bathing, feeding and stimulation. Although there had been promising early indications, there had been difficulties with consistency of care and implementation of advice. The assessor reported that the father's "predisposition to exaggeration and misrepresentation of facts also further complicates the issue, as his presentation of information can often appear to be an attempt at manipulating the outcome". Difficulties in the parents' relationship had added to the concerns about the father's ability to provide safe and adequate care for T. The report concluded that the father did not have the ability to care for T without long-term, fulltime oversight support. If T remained in the father's care, she would be "at risk of significant neglect".

8. At the conclusion of the assessment, T was placed in foster care. The local authority agency decision maker concluded that T should be placed for adoption and the local authority filed an application for a placement order.

9. The final hearing of the care and placement order applications took place over four days in April 2024. The parents were separately represented and, in addition, the mother was assisted by an intermediary. There were regular breaks in the hearing and the topics for cross-examination were submitted to the intermediary in advance. The local authority's applications were supported by the children's guardian. The father sought the return of T to his care, under whatever order the court thought appropriate, or alternatively an extension of the proceedings for a further assessment. The mother supported the father's position and did not seek the return of T to her care. Oral evidence was given by the family's health visitor, KW, the B Centre assessor, the allocated social worker, the mother, the father and the guardian.

10. In her judgment, the recorder summarised the background, the relevant legal principles, and the evidence. She described the father as "a less than satisfactory witness", who had "lied … blustered and deflected his way through cross-examination". She continued:

> "On the whole his evidence was to blame others. He blamed the health visitor, KW, the social worker, the staff at both assessment centres, and tellingly the mother for his two unsatisfactory parenting assessments. The father demonstrated in his evidence what the assessments have said about him, that

> while he has potential he is dishonest. He believes that he knows best, and he is unwilling to contemplate his own failings as a parent….I found the father's account that the assessment centres omitted evidence or wrote false accounts about his behaviour as completely lacking in credibility."

11. In her ultimate evaluation of the evidence, the recorder noted that professionals agreed that the father could be attentive to T's needs but could not do so consistently. He had failed to provide sufficient emotional warmth and stimulation, deficiencies which evidence showed were "known to severely impact on a child's physical and emotional development". He had a longstanding history of alcohol abuse and, although recent tests had shown that he had abstained from drinking, the recorder concluded that there was a "prevailing risk" that he would relapse when stressed or under pressure. The relationship between the parents had been "unhealthy" and the father had been "domineering and manipulative" towards the mother. Although they had now separated, the recorder found it "more probable than not" that they would resume their relationship, that they relied on each other for emotional support and that their lives were enmeshed. She had no confidence that they would tell the local authority that they had resumed their relationship. That would leave T "exposed to conflict [and] neglectful parenting which would impact on her emotional wellbeing, particularly as the mother is still drinking and was drinking to excess during the assessment period".

12. The recorder found that the father had "told wholesale lies about important aspects of his life", including his care of T. He had been unable to demonstrate in the assessment centres that he could meet the child's needs on a consistent basis. Instead of taking on advice, he has "railed against it, viewing it as criticism". She concluded that it was more probable than not that he would be unable to cope in the community and that only 24/7 supervision and monitoring would safeguard T in his care. That was not a realistic option. The only realistic alternative was adoption. Having identified the advantages and disadvantages of adoption, she concluded that it was the only option which would meet T's needs and that her welfare required her to dispense with the parents' consent to the making of a placement order.

13. On 16 May 2024, the father, then acting in person, filed a notice of appeal against the care and placement orders. He put forward two grounds of appeal. Under the first ground, he argued that the judge had placed undue weight on the recommendations of the second residential assessment without considering what took place at the assessment centre. The second ground was expressed in the following terms:

> "It was suggested by the intermediary supporting the mother during the lengthy final hearing, that in her professional opinion, I was presenting with what may have been traits of an Autistic Spectrum Disorder. This was not something that had been raised previously and I do not yet have a diagnosis of this nature. Following this being raised I have now sought the assistance of my GP in making a referral for an assessment in respect of this to ensure that I am properly supported moving forward. If indeed, I do need additional support which was not available to me during the course of these proceedings and this 5 day final hearing, I would also suggest that this raises the issue of procedural irregularity and unfairness to the extent that it renders

> the decision unjust."

14. On 3 June 2024, the father was assessed by Ms D, a CBT psychotherapist, who subsequently prepared a report on the assessment dated 5 July 2024. The assessment was arranged privately, not as a result of a referral from the father's GP. The father filed a copy of the report in support of his application for permission to appeal.

15. On 12 September 2024, I made an order in the following terms:

> "The application for permission to appeal is adjourned to an oral hearing at which the application to adduce fresh evidence will also be considered. If permission is granted, the appeal will be heard in full at the same hearing."

16. Subsequently, public finding was extended to cover the costs of representing the father at the hearing before this Court. We were greatly assisted by submissions made on behalf of all parties. We are particularly grateful to Mr Edward Flood of counsel, and his instructing solicitor Mr John Nimmo, for representing the mother pro bono at the appeal hearing.

17. Before considering the arguments put before us, it is important to set out the rules governing the admission of fresh evidence on appeal.

18. Under CPR 52.11(2),

> "Unless it orders otherwise, the appeal court will not receive...
> (b) evidence which was not before the lower court."

19. Prior to the introduction of the Civil Procedure Rules, the requirements for the admission of fresh evidence on appeal were expressed in the form of three criteria identified by Denning LJ in *Ladd v Marshall* [1954] 1 WLR 1489:

(1) the evidence could not with reasonable diligence have been obtained for use at the trial;

(2) the evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); and

(3) the evidence is apparently credible though it need not be incontrovertible.

20. After the CPR came into force, in *Terluk v Berezovsky* [2011] EWCA Civ 1534 at paragraph 32, Laws LJ observed:

> "The impact of the CPR on the established approach set out in *Ladd v Marshall* has been considered in a number of cases. It is clear that the discretion expressed in CPR 52.11(2)(b) has to be exercised in light of the overriding objective of doing justice (see for example *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318 *per* Hale LJ as she then was at paragraph 35, *Sharab v Al-Sud* [2009] EWCA Civ 353 *per* Richards LJ at paragraph 52). The *Ladd v Marshall* criteria remain important ("powerful

> persuasive authority") but do not place the court in a straitjacket (*Hamilton v Al-Fayed (No 4)* [2001] EMLR 15 *per* Lord Phillips MR as he then was at paragraph 11). The learning shows, in my judgment, that the *Ladd v Marshall* criteria are no longer primary rules, effectively constitutive of the court's power to admit fresh evidence; the primary rule is given by the discretion expressed in CPR 52.11(2)(b) coupled with the duty to exercise it in accordance with the overriding objective. However the old criteria effectively occupy the whole field of relevant considerations to which the court must have regard in deciding whether in any given case the discretion should be exercised to admit the proffered evidence. It seems to me with respect that so much was indicated by my Lord the Chancellor (then Vice-Chancellor) in *Banks v Cox* (17 July 2000, paragraphs 40 – 41):
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> > "In my view, the principles reflected in the rules in *Ladd v Marshall* remain relevant to any application for permission to rely on further evidence, not as rules, but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the Court below."

21. In exercising a welfare jurisdiction, where the process is quasi-inquisitorial rather than adversarial, an appellate court may adopt a more flexible approach to the admission of fresh evidence. In *Re G (A Child)* [2014] EWCA Civ 1365, Macur LJ observed (at paragraph 16):

> "The overriding objective of the CPR does not incorporate the necessity to have regard to "any welfare issues involved", unlike FPR 1.1, but the principle and benefits of finality of decisions involving a child reached after due judicial process equally accords with his/her best interests as it does any other party to litigation and is not to be disturbed lightly. That said, I recognise that it will inevitably be the case that when considering outcomes concerning the welfare of children and the possible draconian consequences of decisions taken on their behalf, a court may be more readily persuaded to exercise its discretion in favour of admitting new materials in finely balanced circumstances."

Citing this passage in *Re E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447, Peter Jackson LJ (at paragraph 25) summarised the approach to be followed in these terms:

> "A decision whether to admit further evidence on appeal will therefore be directed by the *Ladd v Marshall* analysis, but with a view to all relevant matters ultimately being considered. In cases involving children, the importance of welfare decisions being based on sound factual findings will inevitably be a relevant matter. Approaching matters in this way involves proper flexibility, not laxity."

22. In her report, Ms D stated that she was accredited to administer "gold standard" diagnostic tools for the evaluation of children and adults with suspected autism spectrum disorder ("ASD"), namely the Autism Diagnostic Interview – Revised (ADI-R) and the Autism Diagnostic Observation Schedule (ADOS / ADOS-2). For the purposes of her assessment, she interviewed the father and administered the testing tools. She also interviewed his mother. She recorded their reports that other members of the family had been diagnosed with autism. Ms D concluded that the father met the criteria for a diagnosis of ASD "with Level One needs", indicating that he required "support, with a particular emphasis on various aspects of executive function". She described him as being of average cognitive ability, and continued:

> "[The father] has a number of significant needs related to ASD. He displays functional limitations in understanding some social communication, social participation, social relationships, repetitive behaviours and sensory issues. Other difficulties: [he] has some clear difficulties in relation to various aspects of executive function. He requires order and routine disruptions cause distress in the individual."

Ms D pointed out that a diagnosis of ASD confers rights under the Equality Act 2010. She gave details of problems commonly experienced by persons with ASD, in the areas of communication, social interaction, restricted interests, repetitive behaviours, sensory interests and avoidance, and stated that a number of these difficulties were present in the father's case.

23. On behalf of the father, Mr Karl Rowley KC and Mr Paul Hart, neither of whom appeared before the recorder, submitted that the application to admit Ms D's report satisfied the test under CPR 52.11(2), including the three criteria in *Ladd v Marshall*. It was argued that the evidence could not have been obtained with reasonable diligence at trial. The possibility that the father had ASD was first raised in conversation by the mother's intermediary, whereupon the father acted promptly in obtaining an assessment. It was further contended that the report would probably have an important influence on the outcome of the proceedings. The diagnosis and Ms D's description of the father's functions undermined the reliability of all relevant assessments and analyses of, and professional interactions with, the father since none of them had been tailored to his specific needs nor undertaken with the benefit of reasonable adjustments. Mr Rowley further submitted that the diagnosis called into question the fairness of the court process in which the judge had arrived at findings contrary to the father without knowing the extent to which his words and actions may have been mediated by neurodiversity. Given the lifelong consequences of the placement order for T, her welfare required the court to be in possession of all relevant information before concluding that placement with the father was not a realistic option and that only adoption would meet her needs. It was argued that there could be no doubt that the fresh evidence was credible, given Ms D's qualifications, and the fact that the assessment was prompted by a professional intermediary.

24. Turning to the grounds of appeal, Mr Rowley focused on the second ground, which, on the basis of Ms D's report, he submitted was plainly made out. The fact that the extensive process of assessment and the final hearing had been conducted in ignorance of the father's diagnosis amounted to a serious procedural irregularity rendering the decision unfair and unjust. The need for fairness applies to proceedings as a whole, not

just the trial, and extends to the way evidence is obtained and taken: *Mantovanelli v France* (1997) 24 EHRR 370. Being unaware of the diagnosis, professionals had not addressed the questions whether identified areas of parenting weakness were attributable to ASD or whether they could be ameliorated by teaching and support adapted to the father's needs. Mr Rowley further argued that many of the recorder's findings about the father were undermined by the fact that she was unaware of the diagnosis. These included not only the findings based on her acceptance of the B Centre assessment but also her observations about and conclusions from his evidence. Mr Rowley contrasted the present case with the decision of HHJ Middleton-Roy in *A Local Authority v M, F, U and ABCDE (Children)* [2020] EWFC B18 in which the court had concluded that assessments of the mother carried out without reference to her ASD could not be relied on when making final decisions about her children's future.

25. The father's application was supported by the mother, represented by Mr Edward Flood. On behalf of the local authority, Ms Louise MacLynn KC, leading trial counsel Ms Sarah Probert, submitted that this Court should decline to admit Ms D's report, in particular because it would not have an important influence on the outcome of the proceedings. This position was supported by Ms Suzanne Hargreaves for the children's guardian who also argued that the report was not reliable. Their powerful arguments have satisfied me that the report should not be admitted, for the following reasons.

26. *Ladd v Marshall* does not require fresh evidence to be incontrovertible. But it does require it to be credible, or rather, in this context, reliable. I accept Ms Hargreaves' submission that there are several reasons for doubting the reliability of Ms D's report.

27. First, for understandable reasons as the father was at that point acting in person, it was not obtained in compliance with the important procedures in Part 25 of the Family Procedure Rules 2010 and Practice Directions 25B and 25C governing the instruction of experts in family proceedings in general and children's proceedings in particular. It did not include the statement required by FPR 25.14(2) that the expert understands and has complied with the expert's duty to the court, the further statement required by paragraph 9.1(i) of Practice Direction 25B, or the statement of truth required by paragraph 9.1(j) of that Practice Direction.

28. Secondly, because the report was obtained without the court's prior permission, as required by paragraph 5.1 of Practice Direction 25B, neither the court nor the other parties had an opportunity to scrutinise Ms D's credentials prior to the assessment. As noted above, the report states that Ms D is a psychotherapist "accredited to administer" diagnostic tools for the evaluation of persons with ASD. Ms Hargreaves submitted that the fact that Ms D was neither a psychiatrist nor a psychologist undermines the reliability of her evidence. There is certainly no basis for challenging Ms D's statements as to her accreditation. But equally there is no basis for evaluating whether she was the appropriate professional to assess the father's neurodevelopmental condition in the context of the issues arising in these proceedings.

29. Thirdly, again because the report was obtained without the court's prior permission, neither the court nor the other parties had an opportunity to consider or endorse the terms of her instructions. The formal procedure stipulated in FPR 25.7 requires a party seeking the court's permission to instruct an expert in children's proceedings to file a formal application inter alia identifying the issues to which the expert evidence is to relate and stating the questions which the expert is to be required to answer. Paragraph

4.1 of Practice Direction 25C requires the party responsible for instructing the expert to prepare a letter of instruction that complies with the detailed provisions of that paragraph and is drafted in agreement with the other parties.

30. Fourthly, there is nothing in Ms D's report to indicate that she had access to the father's medical records. It is clear from a psychiatric report prepared prior to earlier proceedings in 2015, and included in the court bundle, that the father has a significant mental health history dating back to childhood. Any court asked to authorise a psychological assessment of the father under Part 25 would have ensured that the expert had access to the relevant records. In her submissions, Ms Hargreaves referred us to guidance published by the National Institute for Health and Clinical Excellence which advised that a practitioner carrying out a comprehensive assessment of suspected autism should take into account and assess the possibility of differential diagnoses and coexisting disorders or conditions. There is nothing in the report to indicate whether Ms D complied with this guidance and in any event, without access to the father's medical records, she was seemingly in no position to do so.

31. Finally, any information given to Ms D about the context of her instruction came from the father himself. Any court asked to authorise a psychological assessment of the father under Part 25 would have ensured that the expert had access to relevant information about the proceedings and the issues in the case so that the report could be tailored for the court's purposes. It is evident from Ms D's report that it was based on self-reporting by the father, supplemented by a discussion with his mother. Given the recorder's finding about the father's lack of honesty, which was supported by extensive evidence from witnesses, there are significant reasons to question the reliability of information provided by the father. In that context, it is relevant to note that the psychiatrist who assessed the father in 2015 identified concerns that he "may have a tendency to confabulate, including exaggeration of symptoms". Any instruction for a psychological assessment of the father authorised by the court under Part 25 would have identified this as an issue to be considered by the expert. I accept, as Mr Rowley pointed out, that self-reporting is a component of the ADI-R assessment tool. But in this case, apart from the tests she administered and her discussion with the mother, Ms D had no other material on which to base her assessment.

32. In response, Mr Rowley, whilst conceding the deficiencies in the instruction, submitted that they did not undermine the diagnosis of ASD, particularly given the apparent family history of autism. He argued that, after receiving the report, it had been open to the respondents to seek further information from Ms D, who had expressly offered to answer any further queries. Ms MacLynn responded that it would have been open to the father to take that course. Faced with a situation of this kind at first instance, it is possible that a judge reading Ms D's report would have given permission for an assessment to be carried out in accordance with Part 25. But as an appellate court, we have to deal with this application to admit fresh evidence in accordance with the rules governing appeals, as interpreted in the case law cited above. Taken together, the deficiencies in the report identified above give rise to substantial reasons to doubt its reliability as evidence in these proceedings.

33. Of greater importance in this case, however, is the second criterion in *Ladd v Marshall*, requiring that the evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive). I accept that, in this context, "probably" should not be equated with "on a balance of

probabilities". As my Lord Singh LJ observed during the hearing, Denning LJ's words are not a statute. In this case, I would express the question as whether there is a real possibility that, if admitted, Ms D's report would have an important influence on the outcome of the proceedings. That approach was proposed by Mr Rowley and seems to me to be consistent with the element of flexibility required in children's appeals.

34. In this case, the recorder's decision was based in part on the outcome of the assessments carried out at the A and B Centres. If the father had been diagnosed beforehand as having ASD, those assessments would have been crafted to take into account difficulties he might have in understanding, social communication, participation, and executive function. On behalf of the local authority, Ms MacLynn pointed out that the way in which both residential assessment units were set up was entirely based on routine with a view to supporting and assessing the father's parenting capacity. She submitted that, even though the assessors at the units were not aware of the father's diagnosis, the work they were doing with him - working to a routine, providing support on a 24/7 basis, assisting with tools such as whiteboards and other technology to support the routine – was all in line with the type of support which would be provided had they been aware of the diagnosis. There is some force in that submission, but Mr Rowley is right to say that, had a diagnosis of ASD been made before the assessments, they would have been structured and tailored with the diagnosis in mind, focusing on the specific type of support required by a parent with the disorder.

35. Furthermore, the recorder's decision was also based in part on her impression of the father's oral evidence. If the father had been diagnosed beforehand as having ASD, the court would have followed the procedure set down in FPR Part 3A and Practice Direction 3A which makes provision for vulnerable persons to participate and give evidence in family proceedings. Ms Hargreaves reminds us that all advocates in the case had been trained with the Advocates Toolkit in the cross-examination of vulnerable witnesses, but when the father gave evidence they were unaware of his potential vulnerability. Furthermore, Mr Flood for the mother reminded us that the Toolkit includes processes specifically designed for witnesses with ASD which would have been used here had the advocates been aware of the diagnosis. Had a diagnosis been made prior to the hearing, the recorder would of course have considered whether any measures or adjustments were required by the diagnosis and taken it into account when assessing the father's evidence.

36. In some cases, a failure to identify cognitive difficulties before a parenting assessment or to make appropriate directions to facilitate the giving of evidence will amount to a serious procedural irregularity – see for example *Re S (Vulnerable Party: Fairness of Proceedings)* [2022] EWCA Civ 8. In giving the judgment of the Court allowing the appeal in that case, however, I observed that not every failure to comply with the provisions about the evidence of vulnerable persons will amount to a serious procedural irregularity so as to render the decision unjust, noting (at paragraph 44):

> "In some cases, there will be other evidence supporting the findings so that a flawed assessment of a witness's evidence will not warrant any interference with the decision."

37. In my view, this is just such a case. As demonstrated in the summary of the judgment set out above, the recorder made a number of significant findings based on evidence

which are not materially compromised by the fact that the court was unaware of the possible diagnosis.

38. First, there was extensive evidence to support the finding that the father had "told wholesale lies about important aspects of his life". This finding was based not only on the lies told by the father in evidence but also in the evidence from the assessment centres, the social worker, and the father himself, who admitted, for example, that he had lied about his employment record. There were extensive references to his dishonesty in the social services evidence, stretching back at least to 2015 when, as already noted, a psychiatrist assessing the father referred to concerns that he "may have a tendency to confabulate, including exaggeration of symptoms". He had told lies about the care he had given to T at the B Centre – specifically, about her bathing and feeding. This was an important element in what the recorder described as his "deeply entrenched behaviours" which left him unable to provide T with consistent and safe parenting without full-time supervision and monitoring. This finding is not undermined by the suggestion that he may have a diagnosis of ASD.

39. Secondly, there was clear evidence to support the findings that the father's relationship with the mother posed a risk to T, that there was a "lack of emotional warmth between them", and that the father had been "domineering and manipulative" towards the mother. The recorder accepted that the couple had now separated, but concluded on the evidence that it was "more probable than not that the relationship will resume", that "they rely on each other for emotional support", and that "their lives are still enmeshed". Given the father's history of dishonesty, the recorder found that he could not be trusted to inform the local authority if the relationship resumed. In those circumstances, T would be "exposed to conflict [and] neglectful parenting which would impact on her emotional wellbeing". None of those serious findings are undermined by Ms D's diagnosis that the father has ASD.

40. Thirdly, there is the recorder's finding about the father's drinking. The evidence showed that his misuse of alcohol dated back to when he was aged 18 and that he had lied about the extent of his drinking before entering the A Centre. She accepted that subsequent testing indicated that he had abstained from drinking or had low levels of alcohol, although this had been at a time when he was "under the spotlight". She therefore concluded that there was "still a prevailing risk that, when stressed or under pressure, the father may relapse back into drinking". There has been no appeal against this finding which was plainly open to the recorder on the evidence. Again, it is not undermined by the subsequent diagnosis of ASD.

41. Finally, as both Ms MacLynn and Ms Hargreaves emphasise, the evidence from both the A Centre and B Centre assessments, accepted by the recorder, was that the father had initially been able to assimilate and demonstrate knowledge about providing basic care for T but failed to do so throughout the periods of the assessments so as to show that he had the ability to prioritise T's welfare needs consistently. The weight attached by the recorder to this evidence is also not materially affected by the subsequent diagnosis.

42. I therefore accept Ms MacLynn's submission that, while the father's diagnosis may have had a bearing on some of the risks identified in this case, the majority and the most serious identified risks are not linked to autistic spectrum disorder.

43. Ms Hargreaves further submitted that the evidence could have been obtained with reasonable diligence for use at trial because the father had been legally represented throughout the proceedings in the course of which the guardian proposed a psychological assessment of the father alongside that of the mother, a proposal which was not supported by the father or any other party and therefore withdrawn. But, as Mr Rowley pointed out, the professor of psychiatry who assessed the father in 2015 had not identified evidence of ASD. For my part, I am therefore unpersuaded that the first criterion in *Ladd v Marshall* was not met. But the other criteria are plainly not satisfied.

44. As noted above, under CPR 52.11(2), although they are no longer primary rules, the criteria, to repeat Laws LJ's words in *Terluk v Berezovsky*, "effectively occupy the whole field of relevant considerations to which the court must have regard". I bear in mind the more flexible approach to be adopted when considering applications to admit fresh evidence on appeals in children's cases. But in circumstances where the appellant has failed to establish either that the evidence is credible or that it would have an important influence on the result of the case, I conclude that the report should not be admitted for the purposes of this proposed appeal.

45. There is therefore no basis for the second ground of appeal and no merit in the first ground. In those circumstances, I would refuse permission to appeal.

LORD JUSTICE DINGEMANS

46. I agree.

LORD JUSTICE SINGH

47. I also agree.