B4/2014/3025

Neutral Citation Number: [2015] EWCA Civ 1025
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NORTHAMPTON COUNTY COURT AND FAMILY COURT
(HIS HONOUR JUDGE WAINE)

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 29 July 2015

B E F O R E:

LORD JUSTICE ELIAS

LORD JUSTICE McCOMBE

LORD JUSTICE RYDER

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IN THE MATTER OF:

P-G (CHILDREN)

(DAR Transcript of
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Ms Sian Gough (instructed by the Bar Pro Bono Unit) appeared on behalf of the **Appellant Father**
Mr Andrew Powell (instructed by Fullers Family Law) appeared on behalf of the **Respondent**

J U D G M E N T
(Approved)

1. LORD JUSTICE RYDER: On 8 August 2014 His Honour Judge Waine, sitting in the Family Court at Northampton, determined nine findings of fact at a split hearing set up for that purpose in private law children proceedings brought under the Children Act 1989. The allegations were made by the mother of the children concerned against the father. The children are both young girls, now aged seven and four rising five. The parents are separated and their relationship is acrimonious.

2. The proceedings began with an application issued by the mother for a prohibited steps order and a residence order (now a child arrangements order) under section 8 of the 1989 Act on 7 May 2013. On 11 February 2014, the children's father issued cross applications for the same orders. The children were joined as parties on 28 February 2014 and a CAFCASS children's guardian was appointed to represent their interests.

3. The allegations on which findings were sought included sexually inappropriate conduct towards the mother; controlling behaviour such that the mother lost contact with her family and friends and which was also hostile and intimidating; verbal abuse; shouting and swearing at the mother, sometimes in front of children; throwing a "lump of cheese" at the mother, which hit a wall; swearing at and kicking the family dog; and swearing and shouting at the older child. The gravamen of the allegations is denied, and it should not be assumed from the terminology used that where incidents were admitted to have occurred they match the language used to describe them.

4. The import of this appeal, for which permission was given on 5 March 2015 by Black LJ, is that the judge's findings of fact were wrong, ie they were perverse. That is a high hurdle for an appellant to surmount for all the reasons that are now conveniently summarised by Lord Wilson in Re B (Care proceedings appeal) [2013] UKSC 33; [2013] 2 FLR 1075 at paragraphs 41 and 42.

5. This case has many of the features that would be captured by the statements of principle expressed in the authorities cited with approval by Lord Wilson. The judge heard both parents give evidence about the allegations and formed a strong impression about the reliability and credibility of each of them. The judge had contextual written materials from both parties that was apparently corroborative. Critical to the grounds of appeal, he also had the reports of a local authority social worker appointed under section 7 of the Act to report to the court on questions relating to contact between the father and the girls. Finally, he had the advice of a children's guardian, albeit that the children's guardian did not cross-examine the witnesses and took a neutral position on fact-finding.

6. That brings me to the heart of this appeal. In his judgment at paragraph 4, the judge sets out the starting point for his analysis in these terms:

> "In addition to that live evidence, I have read in particular the two section 7 reports from [the social worker] and the analysis and report from the guardian. I appreciate that those reports are of greater importance in

terms of what will happen next and with whom the children will live. However, there are, in my view, significant aspects of each report which are relevant to the fact finding."

7. In an extended commentary over the first 17 paragraphs of his judgment, the judge elaborates upon his impression of the parties. I do not criticise him for this. It is very helpful to have pen pictures of witnesses whose evidence is to be weighed in the balance, so as to understand why some evidence is given weight whereas other evidence is not. The judge formed an adverse view of the father and a favourable view of the mother.

8. It is important to understand that the father did not deny all of the mother's allegations. His case was much more nuanced than that. He met most of the allegations by a partial admission, an explanation of what happened and the expression of an opinion as to why, from his perspective, the mother was exaggerating, elaborating or taking the incident out of context. The judge did not accept the father's evidence. He held that the father's attitude blinded him to the reality of his inappropriate behaviour vis-à-vis the mother.

9. The judge specifically rejected any suggestion that the local authority section 7 reporter had colluded with the mother in a conspiracy to adduce false evidence. That could not be a controversial conclusion on the facts of an "ordinary" case and without cogent evidence in support of such an assertion. What this court now knows, however, is both surprising and fatal to the factual conclusions to which the judge came.

10. The father pursued two complaints about the section 7 reporter with the local authority. The local authority subsequently accepted the conclusions of an independent reviewer, inter alia that: (a) the reporter had a biased approach; (b) there had been a failure to provide a fair, just and investigative process; (c) the report was neither objective nor evidence-based, in that it included knowingly false statements; (d) the reporter had failed to involve the father fully in the assessment process; (e) an injustice had been caused to the father for which financial compensation should be considered; and (f) the local authority had failed to provide the father with a copy of the addendum section 7 report which was submitted to the court.

11. The terms of the complaints that were upheld go to the content of the two section 7 reports which were before the judge. Those reports dealt with the mother's allegations as if they were fact, ie the local authority social worker believed the mother without checking or analysing the source material or setting out the father's contrary case or explanation. The judge took the section 7 reports as read. He relied upon them in a way that is not susceptible of analysis by this court. It is implicit in the grounds of appeal that the judge did not adequately reason what he accepted and what he rejected by reference to the evidence that he had heard and read.

12. There is, in my judgment, some substance in that complaint. I have been left wondering whether any particular finding was made on direct evidence, or as an inference to be drawn from the judge's conclusion about the father's attitude, or as a consequence of the material set out in the section 7 reports. It ought to be possible to

understand a court's reasoning about what is accepted and what is rejected. In this case, the judge's reasoning does not permit scrutiny by this court so as to be able to conclude whether there was untainted evidence upon which the judge relied which would underpin the findings of fact.

13. The nature and extent of the conclusions of the independent reviewer are such that there is a strong prima facie perception of unfairness. That perception cannot be addressed and, in my judgment, it is necessary for this court to intervene to preserve the integrity of the court's process. I cannot accept the submission that there is any sufficient basis for the findings to stand in the circumstances I have described, and accordingly I would set them aside.

14. In coming to the conclusion that I have, I read the independent reviewer's materials and the local authority's acceptance of those materials without prejudice to whether they should be admitted on an application by the father to this court to adduce additional evidence. Given the circumstances I have described, it cannot be argued that the new material, which of its very nature was not and could not have been available to the court below and which is of material significance to the findings, should not be considered by this court. I would admit the same.

15. As part of that additional material, there is a subsequent assessment of the older child which deals with the father's contact with her. That child is described in the assessment as being happy and content in his company. Furthermore, the assessment identifies that although it is said by the mother and others that the older child is behaviourally and/or emotionally affected by the proceedings and/or the father, a school nurse and a psychologist appear to have concluded to the contrary. It ought also to be recorded that videos of contact sessions which the father has not so far been permitted to adduce apparently demonstrate a positive relationship between the father and his children. This material raises questions which demand to be decided.

16. I would allow this appeal, set aside the findings of fact and remit the applications to the designated family judge for allocation to a judge other than Judge Waine who can provide urgent case management, the opportunity for an interim child arrangements hearing within one calendar month of today, and judicial continuity thereafter.

17. By way of a footnote, I would make one further observation. It is not the case that all factual disputes between parents need to be resolved as a precondition to the issue of contact being determined by the Family Court. That simplistic formulation leads to unnecessary hearings and interminable delay for the children concerned. An acute scrutiny is necessary during case management of the disputes that the parties want to resolve. There may be an imperative of protection that needs to be considered or provided for a victim or a child, and Practice Directions 12B and 12J of the Family Procedure Rules 2010 are written with that imperative in mind. Nothing I say is intended to suggest otherwise. That said, there are many private law children cases where protection is not the critical issue. The findings of fact proposed will add little or nothing to the value judgment that the court has to undertake but will cause the child to lose the quality of a relationship with one of her parents that should exist.

18. This is arguably one such case. The nature and extent of the findings of fact, even if made, would not, in my judgment, prevent direct contact between the children and their father, and no real protective steps beyond those that were obtained under the Family Law Act are now thought to be necessary. The need for a split finding of fact hearing, with all the delay that entails, was arguably never there and has now gone. If I may respectfully suggest to the case management judge who will now be allocated, this may be a case in which a further finding of fact hearing is not necessary.

19. LORD JUSTICE McCOMBE: I agree. I cannot comment with the experience of my Lord, Ryder LJ, as to the generality of cases of this type. However, I have been concerned as to the likelihood of the fact-finding exercise conducted in this case providing any sensible information as to the desirability of contact between father and his children and/or the nature of that contact. I will say no more about that.

20. I agree entirely with what my Lord has said about the import and importance of what we now know about the section 7 reports, but I should also add that I have been troubled by the points taken by Ms Gough in her skeleton argument about features of the evidence that were not considered and/or dealt with by the judge in his judgment, that included questions about the Facebook entries, text messages and a blog, which seem to have been available for the learned judge's consideration but without any consideration of them appearing in his judgment for one reason or another.

21. For all those reasons, I agree with my Lord that this appeal should be allowed and I would agree with the directions that he has proposed.

22. LORD JUSTICE ELIAS: I also agree, and I too have found it difficult to understand why this expensive and time-consuming fact-finding exercise, raking over particular incidents in an acrimonious relationship between the parents, has any real bearing on the question of contact between the father and his children.