IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

(On Appeal from HHJ Patel

Sitting at the Family Court at Leicester)

[2023] EWHC 1161 (Fam)

No. FA-2022-000279/LE-22P00550

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 16 March 2023

Before:

SIR ANDREW McFARLANE

(The President of the Family Division)

(**In Private)**

Re S (CA 1989, s 91(14))

MISS J RENTON (instructed by Dawson Cornwell LLP) appeared on behalf of the Appellant.

THE RESPONDENT did not appear and was not represented.

J U D G M E N T

(via Microsoft Teams)

SIR ANDREW McFARLANE P:

1 This is an appeal against an order made by Her Honour Judge Patel on 27 September 2022 , sitting at the Family Court in Leicester, hearing an application made by the father in long-running proceedings for leave to issue a child arrangements order so that he can spend time with his children who he has not seen for years. There is a deal of history to this matter and the court papers before me today only contain some of the more recent highlights of that history.

2 The reason the application had to be made was that, back in 2017, at the Family Court in York, District Judge Wildsmith, who had conducted a full fact-finding hearing with respect to allegations of domestic abuse made by the mother against the father, had made certain findings (and they must have been relatively serious findings) of domestic abuse and he imposed a filter upon the father making any further applications under the Children Act 1989 by making an order under s.91(14) , initially for a period of twelve months. That was subsequently extended following further contested proceedings heard by His Honour Judge Harold Godwin, by then in Leicester, to where the mother had apparently moved from Yorkshire. At the conclusion of that process, Judge Godwin dismissed the father's applications for contact, renewed the s.91(14) orders and directed that they would remain in place until the youngest child was sixteen, which is as far in the future as 2031.

3 The father has come back to court in more recent time (last year, 2022) and made an application for leave to have his contact application considered by the court now and for, therefore, the filter under s.91(14) to be lifted. There is a deal of history leading up to that application: in short terms the father, for reasons wholly unconnected with this case, as I understand it, received a substantial prison sentence for an offence of violence which he served, serving, I think, something like four years, and from which he was subsequently released.

4 Part of the judgment of District Judge Wildsmith, back in 2017, was to indicate a number of steps that the judge expected the father to undertake in order, if he wished to do so, to put himself in a position to be reconsidered as a candidate for contact with the children in the future. One of those was for the father to obtain a full psychological report on his level of behaviour and functioning. The father has obtained that report from a Dr D, who is a chartered psychologist. It is a very full report and, although it is relatively favourable to the father, it is a report written, seemingly, with the psychologist's eyes wide open to what has gone before and with some knowledge of the father gleaned from the assessments and exercises that were undertaken during the course of her work. The father relies upon the fact that he has got a report as meeting one of Judge Wildsmith's requirements; but, more importantly, he says, and he says to me through his counsel today, that the content of that report shows a number of positives that are to be looked at as indicating that he is in a more favourable position now to be a candidate for contact and that these represent a real change in his demeanour and presentation from that which the mother, seemingly, will have experienced a decade or so ago.

5 In addition, while in prison, the father has undertaken some half a dozen or more courses. All but one were voluntary and all of them are relevant in one way or another to addressing his previously anti-social and abusive behaviour. Again, that is important. A further change in circumstances is that, both before he was sentenced to prison and since, the father has established a new relationship with a partner and her child and now has his own child with that lady. He lives with them and the implication certainly is that that is a positive experience and one that is proceeding without the need for court orders or protection of any sort. The father holds down a regular job. So, bit by bit, the father is able to put together a

picture which his counsel, Miss Renton, submits is significantly different to that which would have been presented to the court in 2017 and before and, one assumes, in 2019.

6 The application for leave to bring proceedings and have the s.91(14) embargo lifted came on for hearing before Judge Patel on 27 September. It is plain, having read the transcript and, indeed, the judge's judgment, that it was a far from satisfactory hearing. The intention had been for there to be an online video hearing, but that never got off the ground. The father then joined by telephone link, but, as the transcript shows, right from the start he had difficulty hearing. I do not know what the equipment was, but I assume it was the usual court equipment with a star module in the courtroom and the judge and the clerk addressing it from wherever they were sitting in the court. Much of the hearing seems to have been conducted fairly well, with to and fro between the father and the judge, but it was very much to and fro. The two were interrupting each other throughout the process and Miss Renton tells me that her instructions are that that was, in part at least, because the father was not aware that the judge was talking when he was talking. The line would go in and out and, as soon as the judgment started, he interrupts again saying he cannot hear. So, I am prepared to accept that the technology was not functioning correctly.

7 Also, the father is an individual who is unlikely to be used to conducting court proceedings down a telephone and they are not easy. The ordinary structure and ordered process of one party speaking and another one answering and another one speaking takes place with ease when everybody is in the same room because they can see each other and they can see when someone is about to open their mouth, and, indeed, they can hear when someone is speaking. It is altogether different down the phone and the phone encourages more of a conversation than a hearing. Again, in the father's favour, I accept that that will not have been conducive to the proper hearing. Indeed, there was not a proper hearing. He never, seemingly, got the chance to put his case forward in any coherent way. At no stage was he able to say the points in his favour which I, albeit in very short terms, have summarised a short time ago. He focused, understandably, on the existence of the report, but there was much more to be said in his favour than that.

8 So, it seems to me that this was not a proper hearing or a fair process. This was not simply an incidental hearing. This was a very important hearing. The outcome was either for the father to be put back under the extensive s.91(14) order which has another eight years still to run; or to be given leave to start up the process again, with all the implications that that has for the involvement of the mother and the children. So, this was an important decision and it did not have an adequate hearing before the judge. In making those observations, I do not wish to be critical of the judge. I think the situation was just untenable as a set-up, given the issues involved, given the technical difficulties, and given the fact that the father , as a litigant in person who was clearly geared up for the hearing, keen for it to take place, was unable to engage in an effective way.

9 During the hearing, the judge did offer to adjourn so that they could meet again in person at a court hearing on a later date. The father declined that as he wanted to get on with. Of course, at that stage, he would not have known that the hearing would have carried on in the way that it did and it is understandable that a litigant would want to get on with it. In the end, the judge was in control and it might have become obvious to the judge, as the hearing went on, that this was simply not a tenable exercise in terms of affording a fair hearing to the father for the application.

10 Be that as it may, I am satisfied that the first ground of appeal, which is the fairness of the process, is made out and that the exercise has to be undertaken again.

11 That is enough to determine the appeal, but it is right to address the second ground in which Miss Renton, who represents the father together with the solicitors Dawson Cornwall on a *pro bono* basis (and certainly the court is very is grateful to them for doing that) has mounted a legal challenge to the test adopted by the judge. Both Miss Renton and the judge, as is apparent from para.12 of her judgment, considered that the test to be applied was the ordinary test for someone not connected, not a parent of the children, applying for leave to apply for an order, under section 10(9) of the Children Act. During the course of the hearing this morning, I have drawn attention to a relatively recent authority, namely the decision of Cobb J in the case of *Re P v N* [2019] EWHC 421 (Fam), in which, helpfully, Cobb J reviews the existing Court of Appeal authority on the question of the test for leave when someone applies to be released from a s.91(14) embargo. The test is set out and settled finally in a decision of *Re S* [2006] EWCA (Civ) 1190, a decision in which both Wall and Thorpe LJJ took part:

> "78. ...Thorpe LJ's test in *Re A* [1998] 1 FLR 1 set out at paragraph 53 above: ('Does this application demonstrate that there is any need for renewed judicial investigation?') and Butler Sloss LJ's test in *Re P* [1999] 2 FLR 573 at paragraph 54 above: ('The applicant must persuade the judge that he has an arguable case with some chance of success'). In our judgment the two complement each other. A judge will not, we think, see a need for renewed judicial investigation into an application which he does not think sets out an arguable case....
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> 79. It is self-evident that a party who is the subject of an order under section 91(14) [of the Act] which has been made because of particular conduct by that party must have addressed that conduct if his application for permission to apply is to warrant a renewed judicial investigation or to present an arguable case..."

12 So, rather than applying a more formulaic test, namely the one in s.10(9), it seems to be settled Court of Appeal authority, to establish , that what has to happen is a lower standard, which is simply the need for renewed judicial investigation based upon an arguable case. The earlier decision of Butler Sloss LJ, to which reference had been made, includes this observation by that tribunal: that the test "is not a formidable hurdle to surmount." Nor should it be. This is a filter rather than a barrier and it should be approached in that way.

13 As a further gloss, and I think since the decision of the Her Honour Judge Patel in September, Parliament has amended the Children Act to introduce s.91A. Section 91A(4) reads:

> "Where a person who is named in a section 91(14) order applies for leave to make an application of a specified kind, the court must, in determining whether to grant leave, consider whether there has been a material change of circumstances since the order was made."

So, it seems to me that if the application were being decided now, the test would be that identified by the Court of Appeal in *Re S*, together with now s.91(14).

14 In terms of a challenge to Judge Patel's decision, the engine room of the judgment of this point is shortly stated at paras.12 and 13. Because the appeal is being allowed on another basis, I do not need to determine that issue. But, in passing, and this is no doubt partly as a result of the unsatisfactory hearing that had taken place, Her Honour Judge Patel does not set out the terms of s.10(9), which she thought was the test that should be addressed, and she

focuses solely on the fact that the father has obtained a psychological report and that he, seemingly, thought that this was a tick box exercise which would almost automatically lead to contact being restarted. That is a perfectly sensible observation for the judge to make, but it was by no means all the case. This is a far more complicated and important decision than simply that, and, because the way the hearing was conducted, the judge had not put herself in a position and did not have regard to all the range of factors that should have been considered. In any event, as I have already indicated, it seems that she adopted the wrong test.

15 So, a decision as to whether leave should be granted has to be taken again. As I sit here today, I do not have a copy of the fact-finding judgment of District Judge Wildsmith and there is no transcript of the judgment that I presume Judge Godwin will have given in 2019 when he made a very substantial extension to the order. Those seem to me to be essential reading for any judge determining an application for leave. I have very much the father's side of matters and that has a relatively positive hue. But it would be wrong to determine the leave application without having full sight of the reasons that led to the s.91 order being made in the first place.

16 In any event, as the decision of Cobb J in *Re P v N* demonstrates, it is well settled that an application for leave under s.91(14) should be heard on notice to the other party. No doubt there will be exceptions, but that is the normal approach. A gloss is put on that so that the process that has been adopted in this case should be the first stage, namely a judge should look at it at a without notice hearing; but then, if it gets through that stage, then notice has to be given to the other side and an *inter partes* hearing conducted on the question of leave.

17 I am sufficiently satisfied, as I anticipate my positive comments earlier in this judgment will have indicated, that the father gets past that first stage and, therefore, there now needs to be a further hearing of which notice is given to the mother and at which the judge has the full file, including the important judgments of District judge Wildsmith and His Honour Judge Godwin to which I have made reference.

18 I agree with Miss Renton that, certainly at this stage, the application should remain in the High Court. I do not think it needs to be reserved to me and there is merit in it being heard by the Family Division Liaison Judge for the Midlands, Lieven J, so that, if leave is granted, she can then determine whether she keeps the case, allocates it to another judge at High Court level or remits it for hearing by judges at Leicester. All of this is for the future.

19 I give the father leave to file a fresh statement, if he is advised to do that, and I direct that when the matter is listed Lieven J is asked whether there should be service upon those who represented the children in the earlier stages of the proceedings, so that, if the judge considers that is necessary, they could be heard at the leave stage. But that is a decision that Lieven J should take and I leave that entirely open to her.

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