



Neutral Citation Number: [2023] EWHC 2896 (Fam)

Case No: WV22P00622

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 November 2023

Before :

MRS JUSTICE LIEVEN

Between :

SK (FATHER)

Applicant

and

RO (MOTHER)

Respondent

Ms Louise MacLynn KC (instructed by Sabz Solicitors) for the Applicant
Ms Sharan Bhachu and Mr Baldip Singh (instructed by Duncan Lewis Solicitors) for the
Respondent
Mr Aaron Moss (instructed by West Midlands Police)

Hearing date: **24 October 2023**

APPROVED JUDGMENT

Mrs Justice Lieven DBE :

1. This is an interlocutory decision in a private law family case concerning a 6 year-old boy XX. The Applicant, SK, is the Father, and the Respondent, RO, the Mother. The issue before the Court is whether a Special Advocate (“SA”) should be appointed and, closely associated with that decision, who should pay for the SA.
2. Louise MacLynn KC represented the Father, Sharan Bhachu represented the Mother, and Aaron Moss represented West Midlands Police (“WMP”). The Special Advocates Support Office (“SASO”) attended through Mr Sussman.
3. The background for these purposes can and needs to be stated shortly and in general terms. The parents are both of Indian heritage. They were married in 2010 and moved to England in 2015. XX was born in 2017.
4. The parents separated in February 2018 when the Mother says she was forced to flee the family home to protect herself and XX. After a period the Father located the Mother, he says because he needed to know his son was safe, and the Mother says she was so frightened that she had to relocate on more than one occasion.
5. The Mother applied for an order that XX live with her. At a final hearing in March 2022, an order was made that XX live with the Mother and a Prohibited Steps Order was made preventing the Father from removing XX from her care. In those proceedings the Mother made serious allegations of domestic abuse against the Father, and a Non-molestation Order was made. However, no findings of fact were made by the Court.

6. The Father issued the present application for a Child Arrangements Order on 18 May 2022, seeking direct contact with XX. The District Judge ordered that a Scott Schedule be prepared by the Mother and responded to by the Father.
7. The Mother's Schedule lists a series of very serious allegations against the Father. These include that he fractured her finger in July 2016 during an argument when he became enraged and she tried to lock herself in the bathroom to protect herself. A physical assault in 2017 when she was pregnant. The police were called and took no further action. After she left the family home, that the Father has threatened the Mother that he will pay someone to find her and then that he will come after her. In March 2021 the Father had come to her house late at night and the neighbours called the police.
8. On 5 July 2022 Cafcass produced a safeguarding letter in which they record that the Mother alleged that domestic abuse was a feature of the relationship (including physical, emotional and controlling behaviour). She also alleged she had been assaulted by the paternal grandparents who removed XX from her. Cafcass recommended a fact finding hearing and that there should be no interim contact given the seriousness of the allegations and the lack of any existing relationship between XX and the Father.
9. Police disclosure was received on 12 December 2022 and a letter from Cafcass. In the light of this material the Mother's representatives applied for the matter to be transferred to a High Court (or section 9) judge. The Mother has made allegations which she does not wish to be shared with the Father. These allegations include, but are not limited to, a risk of honour based violence. The application was adjourned and HHJ Picken transferred the matter to the High Court.

10. The Father denies all allegations of domestic abuse and says that any injuries were caused in the course of arguments when he was trying to calm the Mother down. He says that he had tried to contact the Mother after they separated, but his solicitor's letters received no reply. He went to her property because he was concerned about XX given the lack of information that he had received.
11. The case first came before me on 16 February 2023. At that hearing I heard the Mother and the Police in a CLOSED hearing, and then invited the Father and his legal team to join for an OPEN hearing. I ordered WMP to be joined and to attend the next hearing.
12. On 26 April I had a further hearing at which the issue of how the Court should handle the non-disclosure of material, both from the WMP and from the Mother, should be handled. I ordered that the Mother and Father's legal teams apply for exceptional funding from the Legal Aid Agency ("LAA") to cover the cost of a SA and to make enquiries of SASO. At the hearing the WMP agreed to pay a proportion of the costs of a SA in light of the fact that some of the material which the Court had ruled could not be shown to the Father emanated from the Police.
13. The LAA have now rejected the application for exceptional funding. At a further hearing in June 2023 I indicated that in my view the case was sufficiently complex as to justify exceptional funding. The parties appealed the LAA's decision, but the appeal has also been rejected. So the only further step possible in relation to Legal Aid is to judicially review the LAA.
14. SASO have written to the Court on 3 October 2023 indicating that they are not minded to appoint a SA. Firstly, the Attorney General is not prepared to appoint a SA until the question of funding has been resolved. Secondly, this is not a case

concerning classified information or where vetting would be required. SASO suggested that a confidentiality ring approach might be appropriate whereby the Father's lawyers are given the information but not the Father. SASO estimated that the costs of a SA might be £20-30,000; the WMP offer is to pay 50%, i.e. £15,000.

15. I held a further hearing on 24 October 2023, at which the WMP and SASO were represented.
16. This case raises a clear tension between ensuring the Father's Article 6 and fair trial rights, and ensuring the protection of the Mother and XX, pursuant to the Court and the State's positive obligations under Articles 2 and 3 of the European Convention on Human Rights ("ECHR"). I also have to have regard to all parties' Article 8 rights.
17. I have had close regard to the decision of Cobb J in Re R (Closed Material Procedure: Special Advocates: Funding) [2017] EWHC 1793, where he had to grapple with similar issues.
18. It is important to be clear that there is no perfect solution in a case such as this, and some compromises will have to be made. Fairness requires that a party knows the case against him or her and has the opportunity to respond to it, see Al Rawi v Security Service [2012] 1 AC 351 per Lord Dyson at [12]. However, that basic principle is subject to a number of caveats, including where limited disclosure is necessary following a proper balancing of the competing ECHR rights involved, Re B (Disclosure to Other Parties) [2001] 2 FLR 1017. Disclosure will also be subject to public interest immunity where it would be harmful to the public interest, R (Chief Constable of West Midlands Police) ex p Wiley [1995] 1 AC 274.

19. In *Re T (Wardship: Impact of Police Intelligence)* [2010] 1 FLR 1048, McFarlane J (as he then was) proposed adopting the following approach when determining applications for non-disclosure by the Police in family proceedings, at [112]:
- a. Full disclosure to the court of all material relevant to the allegation and its investigation at the earliest possible stage (para 112(i));
 - b. Disclosure, again at the earliest stage, to the open parties of as much of the police material as is not rendered confidential by PII (para 112(ii));
 - c. Thereafter, establish a process, again at the earliest stage, to evaluate the PII claim and, if appropriate, arrange for the disclosure of further material to the open parties either in a full, gisted or redacted form (para 112(iii));
 - d. In parallel, full disclosure to the police of as much of the family proceedings evidence as is not rendered confidential by PII (para 112(iv));
 - e. Thereafter a co-operative process between the police and the family court whereby reasonable requests for further police investigation are considered and implemented (para 112(v));
 - f. Consider, at an early stage, requesting the Attorney-General to appoint a special advocate for the party to whom full disclosure of sensitive, but highly relevant, material may not be made (para 112(viii));
20. Both *Re T* and the subsequent caselaw suggests that the Court should view appointing a SA as being very much a final option.

Closed Material Procedure and Special Advocates

21. It has been well-established since the decision of *Re T* that it is open to the court hearing family proceedings concerning the welfare of children to adopt a CLOSED material procedure involving the use of SAs.

22. There has been some uncertainty as to whether this procedure takes place pursuant to Statute, or as a part of the court’s inherent jurisdiction. The Justice and Security Act 2013 (“JSA 2013”) provides a framework for the adoption of such a procedure in civil proceedings. Section 6(1) provides that the court may make a declaration (on the application of the Home Secretary, any party to the proceedings, or of its own motion) that the proceedings before it ‘are proceedings in which a closed material application may be made to the court’. It may only do so if two conditions are met:

“(3) The court may make such a declaration if it considers that the following two conditions are met.

(4) The first condition is that—

(a) a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings), or

(b) a party to the proceedings would be required to make such a disclosure were it not for one or more of the following—

(i) the possibility of a claim for public interest immunity in relation to the material,

(ii) the fact that there would be no requirement to disclose if the party chose not to rely on the material,

(iii) section 56(1) of the Investigatory Powers Act 2016 (exclusion for intercept material),

(iv) any other enactment that would prevent the party from disclosing the material but would not do so if the proceedings were proceedings in relation to which there was a declaration under this section.

(5) The second condition is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.”

23. Section 6(11) JSA 2013 provides that ‘relevant civil proceedings’ include those in the High Court (but not the Family Court).

24. Section 9 JSA 2013 permits the Attorney General to appoint a SA to ‘represent the interests of a party’ in any proceedings to which a section 6 JSA 2013 declaration applies.
25. Pursuant to the JSA 2013, CPR Part 82 sets out the procedure governing proceedings to which a section 6 declaration applies. However, this does not apply to family proceedings (per Macdonald J in *Re X, Y and Z (Disclosure to the Security Service)*, at [93]). Nevertheless, as Cobb J stated in *Re R (Closed Material: Procedure: Special Advocates: Funding)* [2017] EWHC 1793 (Fam), at [17]:

“Currently, there are no family procedural rules equivalent to Part 82 of the Civil Procedure Rules 1998 (CPR) dealing with these situations in family cases; Part 82 was inserted into the CPR in 2013, at the time of the implementation of the Justice and Security Act 2013 to deal with closed material procedure issues. Nonetheless, procedures have been adapted in the family court to replicate as appropriate the arrangements for a closed material process, to achieve fairness, and ensure the protection of the Art 6 rights of the parties.”

This echoes former President’s Practice Guidance (Family Courts: Radicalisation Cases) [2017] 1 WLR 4452, which envisages the instruction of SAs in family proceedings.

26. If the court determines that the instruction of a special advocate is necessary, it should at the same time determine who will bear the costs of the instruction (President’s Guidance: The Role of the Attorney-General in Appointing Advocates to the Court of Special Advocates in Family Cases (March 2015)). That guidance states that there is no reason why the Attorney General should bear those costs.
27. In *Re R* Cobb J determined that the relevant Police Force, to which the sensitive material belonged and who was seeking to withhold it, should be responsible for meeting the costs of the instruction of a special advocate. At [28]–[29], he stated that:

“[28] In the absence of clear or authoritative steer from statute, guidance or otherwise, and relying therefore on the arguments marshalled before me, I have reached the conclusion that I should direct the agency which holds the sensitive material, namely the police, to fund the Special Advocate for the father in this case...

[29] The police have exclusive ownership of the sensitive material. The police wish to ensure that (a) the court is in possession of that material and that (b) the court is aware of the reasons why disclosure of that material would be contrary to the public interest; it proposes that the sensitive information is therefore presented to the court exclusively in closed session, and that its disclosure to the parties should be closely and rigorously controlled. In my judgment, the police, having taken this position (which I emphasise has been approved as reasonable and appropriate thus far), should be required to broaden its obligations to ensure that those who are most affected by the information are given the fullest and fairest opportunity to have the case for non-disclosure tested...I am further influenced in reaching my conclusion in this case by the fact that the local authority plays no part in the closed material process, and has no intention of doing so; it does not possess, or otherwise have access to, any sensitive material.”

28. Cobb J declined to impose any costs cap or other limitation on the order.

Conclusions

29. The first issue is whether a CLOSED procedure is necessary or whether I can properly determine the case solely on the OPEN material. Ms Bhachu on behalf of the Mother submits that I must consider the CLOSED material if I am to fairly consider the Mother’s case. I am severely constrained in what I can say about this in an OPEN judgment. However, I am satisfied that in order to determine what is in XX’s best interests I have to have regard to the entirety of the Mother’s allegations and the police disclosure. If I do not do so there is a real possibility that I will not properly assess the safeguarding issues that go to XX’s best interests.
30. The next stage is whether there is an alternative to appointing a SA. SASO have suggested a confidentiality ring, such as might be used in a commercial case.

However, in my view that would place the Father's lawyers in a professionally unacceptable situation. They would be potentially privy to allegations against their client which they could not share with him. In my view it would not be possible for them to meet their professional obligations to him whilst having this information.

31. However, if the Court has the CLOSED material, but there is no process by which anyone acting on behalf of the Father can challenge that material, that will significantly impede the fairness of the proceedings. In all CLOSED material cases there is some infringement on the fairness of the process for the party who is excluded. Therefore, some compromises have to be made. Necessarily the nature of those compromises will greatly vary depending on the facts of the case, the risks involved and the nature of the CLOSED material. There are no hard and fast rules. The issues in this case lead me to the view that the Father's ability to challenge the case being put against him in CLOSED necessitates the appointment of a lawyer who can represent his interests in that part of the hearing.

32. The lawyers do not have to be DV vetted given that this is not a national security case. However, there are significant procedural advantages in using SASO and counsel from the Attorney-General's Special Advocate Panel given that they are familiar with this type of proceedings and the rules and challenges that go with it. The Mother has raised serious risks to her and XX by reason of the Father's conduct, and it is therefore apparent that issues concerning the State's positive obligations under Articles 2 and 3 may arise. Again, it is not possible to set out details of this in an OPEN judgment, but given the context of the case I consider it appropriate and pragmatic to request the Attorney-General to appoint a Special Advocate to represent the Father's interests with the assistance of SASO.

33. The most difficult issue is how the SA is paid for. I have no difficulty with the parties pursuing judicial review against the LAA. However, it is not possible to know whether that will be successful, and it might entail very long delay. Neither the Father nor the Mother can afford to pay privately.
34. This case is materially different from *Re R* because the Police do not have exclusive ownership of the sensitive material [29]. Some of the CLOSED material is held by the WMP but much is held by the Mother alone. It is therefore less easy to justify ordering the Police to pay the entire or uncapped costs of the SA.
35. In *Re R* Cobb J declined to impose a costs cap, see [34], because he was loathe to restrict the autonomy of the SA's work. I fully accept that this is a problem with setting a cap. However, the grounds for making the Police pay unrestricted costs are much less strong than in *Re R* because much of the information is not held by them. Further, I think it is wholly realistic that the SA's costs can be limited here to £15,000. There is not a large amount of CLOSED material, and therefore the preliminary gisting exercise will be a limited one. Further, the factual issues that arise in this case are not especially complex and I have no doubt the case can be finished easily within three days, even with a SA. Given that SAs are paid on Government Legal Department hourly rates, £15,000 goes a very long way. I appreciate the sum also covers the solicitor's costs, but these are also on Government rates.
36. Balancing the need of XX and the parents to move forward to a final conclusion of this case, and the limited funding possibilities, I consider that ordering the WMP to pay the SA's costs capped at £15,000 is the most proportionate order. It will entail very strict cost budgeting by SASO, but cost budgeting is a feature of civil cases, so I am optimistic it can be adopted here.

37. I will set the matter down for a three-day final hearing on 8-10 January 2024.