Neutral Citation Number: [2024] EWHC 1450 (Fam)

Case No: NG22C50215

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2024

Before :

MRS JUSTICE LIEVEN

- -

Between :

A LOCAL AUTHORITY — **Applicant**

and

AZ (THE MOTHER) — **First Respondent**

and

BX (THE FATHER) — **Second Respondent**

and

CX
(a Child, through their Children's Guardian) — **Third Respondent**

- -
- -

Ms Sara Davis (instructed by A Local Authority) for the Applicant
Mr Paul McCandless (instructed by Hawley and Rodgers Solicitors) for the First Respondent
Mr Stephen Williams (instructed by Jackson Quinn Solicitors) for the Second Respondent
Ms Anne Buttler (instructed by Tallents Solicitors) for the Third Respondent

Hearing date: **29 April 2024**

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

This judgment was handed down remotely at 10.30am on 8 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

MRS JUSTICE LIEVEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Lieven DBE :

1. This is an application by the Local Authority ("LA") for me to recuse myself from the final hearing in a care case. The application is supported by the Guardian and opposed by the parents. The proceedings commenced on 11 November 2022, and will be in week 79 at the date of the final hearing on 14 and 15 May 2024.

2. I initially refused the application on the papers as a case management decision and indicated that the LA could renew its application at the start of the hearing. However, the LA sought a written judgment on the issue and, in those circumstances, it seemed to be more efficient to hold a separate hearing on the issue and then issue this judgment having heard full arguments.

3. The LA was represented by Sara Davis, the Father was represented by Stephen Williams, the Mother was represented by Paul McCandless and the Guardian was represented by Anne Buttler.

4. On 14 August 2023, after a 5 day fact finding hearing, I made various serious findings against the Father, including that he had very seriously sexually abused his daughter, DZ, from the age of 10 to 16 years old; that he had physically abused her; he was highly controlling of the family, including in particular the Mother and DZ; and that DZ had been placed under enormous pressure by her family to retract her allegations.

5. The proceedings concluded in respect of the older children, DZ and FX, on the 1 September 2023 by the making of a 12 month Supervision Order with both children remaining in the sole care of their mother. The proceedings in respect of the youngest child, CX, did not conclude and were timetabled to an Interim Resolution Hearing ("IRH") which took place on 5 March 2024 before myself.

6. The LA has filed its final evidence and it recommends that CX remains in the care of his mother together with his older siblings, to the exclusion of the Father, and that the Father has supervised contact with CX a minimum of once a month. The LA's position is supported by the Guardian. The Father seeks to return to the family home to resume the care of his children alongside the Mother. The Mother, ideally, would like the Father to return to the family home, if possible, however, if this was not considered to be appropriate, the Mother confirmed to the court that she would abide by any safety plan considered to be reasonable.

7. At the IRH on 5 March 2024 I had the final evidence of all the parties, the case summary of the LA and a position statement from the Father.

8. There is an agreed note of the IRH, and the following are extracts from comments I made during the hearing:

> "The case was called on at 9:30 am. Neither the court nor parents' solicitors had booked interpreters for their respective clients. In any event, Mrs Justice Lieven wanted to share her thoughts on the case to assist with out of court discussions. She said:
>
> *'I don't know whether there is any scope for movement. I have read the position statement filed on behalf of the Father and I am not convinced*

that there is a burden on anyone at the welfare stage. The burden goes to findings of fact. I don't think there is a burden in strict legal terms.

If the court sanctions the plan for the Father to keep away from the family home it will be a significant interference of the Article 8 rights of the parents and the children and I would need very clear justification for doing so. I share the Father's concerns about the risk assessment. I have made findings against the Father. There is a significant difference about him posing a risk to [DZ] and to [CX].

There's an impasse and there's no way of breaking it. The Father denies the findings made against him. He can't accept them because he'd be deported if he did. The LA and the Guardian are asking the court to sanction a plan which results in keeping the family apart for the next 15 years. I can't force the Mother to accept the findings and separate from the Father, although I had hoped the Mother would after the fact finding hearing. I am not making any pre-determinations. What am I going to hear at a final hearing that I don't already know? There may be some genius cross examination by Mr Williams of the social worker and the Guardian or by Ms Davis of the Father but where is that going to take me? I know the parameters of this case. I think that probably this Father needs to be allowed home. There is a massive difference in risk between a 10 year old girl and a 3 year old boy. I don't see how any court can justify keeping the Father out of the family home indefinitely and until [CX] is 16 or 18 years old.

If it can't be agreed it will have to wait to list for a final hearing. I can't force the LA and the Guardian to agree, but I invite the LA and the Guardian to search their consciences and consider what a final hearing will achieve. I don't say this with much pleasure but I need an answer as to what is going to change? Where does this case go if the Father is separated from the children for the next 15 years?' What I am saying can't come as a surprise. It's difficult to see what use a safety plan would be if the Father returns to the family home but some thought could be given to some safeguards.

I consider the Mother to be a safety factor, a protective factor. I made a finding that the Mother failed to protect [DZ] but she did try to protect her. Probably. The LA need to get its head round the difference between when something is going on under the surface and, like in this case, where clear findings of fact have been made. The Father comes home into a different environment.'

The case was stood down whilst instructions were taken and when it was called back on the judge was invited to timetable the case to a final hearing, which she did.

Mrs Justice Lieven asked Ms Davis: *'Have the findings I made against the Father been disclosed to the DBS? I made very serious findings about the Father's contact with a child and he's in a job where he is in contact with children.'"*

9. It is on the basis of those comments that the LA submits that I have pre-determined the outcome of the case and should recuse myself.

The law

10. There are a huge number of cases on bias. The basic principles are summarised as set out below.

11. The test to be applied on the issue of apparent judicial bias is set out in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 at [102/103]:

> *"The court must first ascertain all the circumstances which have a bearing on the suggestions that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased."*

12. *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 at [37]: *"Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he had to resolve."*

13. *Helow v Secretary of State for the Home Department* [2008] UKHL 62:

> *"A fair minded and informed observer is neither complacent nor unduly sensitive or suspicious. They know that fairness requires that a judge must be, and must be seen to be, unbiased. They are someone who takes a balanced approach to any information they are given, takes the trouble to inform themselves on all matters that are relevant, is the sort of person who takes the trouble to read the text of an article as well as the headlines, who always reserves judgment on every point until they have seen and fully understood both sides of the argument".*

14. In *Locabail (UK) Ltd v Bayfield Properties Ltd and Another* [1999] EWCA Civ 3004; [2000] QB451, at [25] the Court of Appeal gave a wide set of examples in the circumstances in which bias might occur but states that: "*it would be dangerous and futile to define factors which may give rise to a 'real danger of bias…where there is real ground for doubt about the ability of the judge to try the matter objectively then that doubt should result in recusal."*

15. *Serafin v Malkiewicz* [2020] UKSC 23:

> *"The root of the appeal is whether a party can have a fair trial. The basis of the application, bias or unfairness, will be different. The concern with fairness is the same. The definition of bias in Porter v Magill and ensuing cases is quite narrow. Accordingly, it cannot be the sole test for recusal. It is necessary to consider the whole of the proceedings to determine whether the judge's approach to the aggrieved party has been biased or more generally unfair."*

16. There is no suggestion, nor could there be in the light of the fact finding judgment, that the Court was biased in favour of the Father. The issue here is whether I pre-

determined issues at the IRH, and as such gave the impression that the LA and the Guardian would not have a fair hearing.

17. The caselaw on pre-determination by a Court engaged in multi-staged litigation was considered in detail by Mr Justice Peter Fraser in Bates v Post Office Limited (no 4) (Recusal) [2019] EWHC 871. At [29] he referred to Otkrities International v Urumov [2014] EWCA Civ 1315 where at [13] Longmore LJ said:

> *"There is already a certain amount of authority on the question whether a judge hearing an application (or a trial) which relies on his own previous findings should recuse himself. The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasise, that the issue of recusal is extremely fact-sensitive."*

And

> *"[32] Usually this court will be astute to support judges exercising what I have called "this delicate jurisdiction" of recusal. But it is also important that judges do not recuse themselves too readily in long and complex cases otherwise the convenience of having a single judge in charge of both the procedural and substantial parts of the case will be seriously undermined . Of course, if the judge himself feels embarrassed to continue, he should not do so ; if he does not so feel, he should."*

18. The leading case considering pre-determination in the Family Court context is Re Q (children) (fact finding hearing: apparent judicial bias) [2014] EWCA Civ 918. One of the central matters raised by the mother was a complaint that at an early case management hearing the judge displayed apparent judicial bias by making a number of clear indications that he had formed a concluded view as to the validity of the mother's allegations and her credibility. It was submitted that the judge had done so during a process which itself was conducted in an unfair manner. The mother's case was that this premature adverse conclusion infected the judge's approach to these proceedings. Lord Justice MacFarlane said:

> *a. "A judge hearing a family case has a duty to further the overriding object of dealing with cases justly (having regard to any welfare issues) by actively managing the case [FPR 2010 rr 1.1(1) and 1.4(1)] which include identifying the issues at an early stage and deciding promptly which issues need fully investigation and hearing and which do not." [44]*
>
> *b. "Family judges are encouraged to take control of the management of cases rather than letting the parties litigate the issues of their*

choosing. In undertaking such a role, a judge must necessarily form, or at least a preliminary, view of the strengths and/or merits of particular aspects of the case. The process may well lead to parties reviewing their position in the light of questioning from the judge and, by agreement, issues being removed form the list of matters that may fall to be determined." [45]

c. *"Despite having to adopt a 'pro-active' role in this manner, judges must, however, remain very conscious of the primary judicial role which is to determine, by fair process, those issues which remain live and relevant issues in the proceedings. As the IRH label implies, it is intended that some, if not all, of the issues will be resolved at the IRH stage. The rules are however plain [PFR 2010, PD12A] that 'the court resolves or narrows issues by hearing evidence' and 'identifies the evidence to be heard on the issues which remain to be resolved at the final hearing." [46]*

d. *"The task of the family judge in these cases is not an easy one. On the one hand he or she is required to be interventionist in managing the proceedings and in identifying the key issues and relevant evidence, but on the other hand the judge must hold back from making an adjudication at a preliminary stage and should only go on to determine issues in the proceedings after having conducted a fair judicial process." [47]*

e. *"There is, therefore, a real and important difference between the judge at a preliminary hearing inviting a party to consider their position on a particular point, which is permissible and to be encouraged, and the judge summarily deciding the point then and there without a fair and balanced hearing, which is not permissible." [48]*

f. *"Expressions of judicial opinion, given the need for the judge to manage the case and be directive, are commonplace and would not be supportive of an appeal to this court based upon apparent judicial bias. The question in the present appeal is whether the other observations made by the judge, and the stage in the overall court process that those observations were made, establishes circumstances that would lead a fair minded and informed observer to conclude that there was a real possibility that the judge was biased in the sense that he had formed concluded view of the mother's allegations and her overall veracity." [50]*

g. *"I am clear that a fair minded and informed observer would indeed have concluded that there was a real possibility that the judge had formed such concluded view at the hearing. I am also concerned that the process adopted by the judge during the hearing prevented there being a fair and balanced process before the judge came to his apparent conclusion." [51]*

h. *"I am keenly aware of the need to avoid criticising a judge who is doing no more than deploying robust active case management. There is, as I have described, a line, and it may be a thin line in some cases, between case management on the one hand and premature adjudication on the other. The role of a family judge in this respect is not at all easy and I would afford the benefit of the doubt to a judge even if the circumstances were very close to or even on the metaphorical line. Here, I am afraid, the words of the judge to which I have made reference, both separately and when taken together take this case well over the line and indicate at least the real possibility that the judge had formed a concluded view that was adverse to the mother's allegations and her veracity." [54]*

i. *"I am clear that the process conducted at the CMH on 20 March was seriously flawed, as it was, it was used by the judge to reach any conclusion as to the state of the mother's allegations. It was not a fair process and it was not an evidentially sound process." [56]*

j. *"The judge strayed beyond the case management role by engaging in an analysis, which by definition could only have been one-sided, of the veracity of the evidence and of the mother's general credibility. The situation was compounded by the judge giving voice to the result of his analysis in unambiguous and conclusive terms in a manner that can only have established in the mind of a fair minded and informed observer that there was a real possibility that the judge had formed a concluded and adverse view of the mother and her allegations at a preliminary stage in the trial process." [57]*

19. Mr Williams submits, and I agree, that the fundamental vice in *Re Q* was that the Judge had expressed a very clear view about the mother's credibility before hearing any evidence. That then had a necessary impact on an objective observer's view of the Judge's approach to the final hearing.

The submissions

20. The LA's position is that an objective observer would consider that I had effectively pre-judged the outcome of the welfare hearing, and would not give the LA and the Guardian's case a fair hearing.

21. Ms Davis and Ms Buttler particularly focused on the passage where I said: *"I invite the LA and the Guardian to search their consciences and consider what a final hearing will achieve"*. In her Position Statement Ms Davis suggests that I should have reminded myself of the findings that I had made against the Father. She suggests that I have summarily decided the issue against the LA.

22. Mr Williams, supported by Mr McCandless, submits that my comments at the IRH were in line with the purposes outlined by the President of the Family Division for an IRH. The Court did not make any determinations and was seeking to provide a

judicial steer on the basis of having read the final evidence, and undertaken the fact finding hearing.

23. He submits that there can be no question of the Court being biased in favour of the Father and against the LA if the conduct of the proceedings as a whole is considered. I had found virtually all the preliminary case management decisions against the Father, in particular deciding to hold a fact finding hearing despite DZ having withdrawn her allegations. Further, the terms of the fact finding judgment point to any suggestion of bias being *"preposterous"*.

Conclusions

24. The principles I take from the caselaw referred to above, are as follows:

    a. Bias is an attitude of mind by the Court that prevents objective determination, *Locabail*;

    b. It is necessary to consider the whole of the proceedings and not simply one decision, *Serafin*;

    c. A judge should not recuse themselves unless either they think they cannot objectively determine the case, or a reasonable observer would so think, *Okrities*;

    d. There must be substantial evidence to support a finding of pre-determination, *Okrities*;

    e. The necessary dynamic of Family Court cases means that judges need to manage and be directive, including at IRH, *Re Q*;

    f. However, judges must hold back from making summary adjudications without hearing the evidence, *Re Q*.

25. I have no hesitation in making clear that I am confident that the first part of the *Okrities* test is not met. I can, and will, determine the issues at the final hearing in an objective manner taking into account all the evidence, written and oral, presented to the Court.

26. The only issue here is whether a fair minded observer would consider that I could not do so in the light of the comments I made at the IRH.

27. As is clear from *Re Q* there is a particular issue in Family Court cases around the need for effective case management. There is a need, both at IRH and FHDRA (First Hearing Dispute Resolution Appointment in private law), for a judge to be able to narrow issues, and encourage the parties to find a way to an agreement where appropriate. It would be exceptionally unfortunate if judges felt constrained in doing this by the fear that they would then face recusal applications. The need for effective case management and to "make cases smaller" and make "every hearing count" has been clearly endorsed by the President of the Family Division in his Case Management Guidance 2022.

28. There is an important benefit, to all parties, in the same judge conducting the fact finding hearing, the IRH and the final hearing. Judicial continuity ensures that the judge is familiar with the facts and the parties, and can manage the case in an effective and proportionate manner. It is notable that children's cases, whether public law or private, have not gone down the line of the Financial Remedies Court, with a dispute resolution hearing being conducted by a different judge from the final hearing.

29. In the present case I agree with Mr Williams that it is fanciful to suggest that an objective observer who was familiar with the entirety of the proceedings would consider I was in any way biased in favour of the Father. No reader of the fact finding judgment, or the earlier case management decisions, could rationally reach such a conclusion.

30. In respect of the comments at the IRH, I note that I specifically said that I was not making any pre-determination of any issues. Ms Davis submits that I failed to remind myself of the fact finding judgment but, with respect, that is an issue of form over substance. Self-evidently, having spent 5 days listening to the case, and having written a detailed fact finding judgment, I had the facts that I had found closely in mind.

31. Most importantly, taking into account the words of MacFarlane LJ in *Re Q*, I made no determinations whatsoever and I ordered a final hearing with evidence from the LA and the Guardian. This case is quite different from *Re Q* because credibility is not in issue, so there was no pre-determination of either any issue or in respect of the credibility of any witness, other than the parents whose credibility I had already considered in the fact finding judgment and made adverse findings about.

32. It is the case that I expressed myself "robustly" and to some degree I must have done so too "robustly" or this application would not have been made. I do, however, agree with Mr Williams that it is useful to consider what would have been the position if I had expressed myself equally robustly in comments adverse to the Father. I suspect the LA and the Guardian would have said that this was good case management, that narrowed the issues. It must be the case that a judge is entitled at the IRH to firmly challenge the professional judgments of the social worker and Guardian, so long as they remain able to properly consider the final evidence if the case gets that far.

33. For those reasons I do not consider that the tests set out in the caselaw are met, and I refuse the application for me to recuse myself.