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Case No: GU08P00833

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2013

Before :

MRS JUSTICE PAUFFLEY

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Re A (a Child) (Vulnerable Witness)

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The applicant, mother, appeared in person
The first respondent, father, appeared in person via a telephone link
Mark Twomey represented the first intervenor, Surrey County Council
Sarah Morgan QC and Andrew Bagchi (pro bono) represented X, the second intervenor
Paul Storey QC and Camille Habboo represented A by her Children's Guardian

Hearing date: 12th June 2013

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Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment is consists of 46 paragraphs. The judge hereby gives leave for it to be reported. The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mrs Justice Pauffley:

Introduction

1. Once more in these long running private law proceedings it is necessary to consider competing Convention rights so as to strike the right balance between, on the one hand, achieving justice and, on the other, protecting a vulnerable young woman from

the potential for further and perhaps very considerable physical as well as psychological harm. The key question is as to whether, imminently, steps should be taken which could lead to the giving, in some form or another, of oral evidence by that vulnerable individual.

2. Miss Morgan QC, on behalf of the potential witness, accepts the issue is relatively narrow. It is nonetheless of great importance to her client and also, it has to be said, to all of the lay parties as well as the subject child.

3. The hearing which included the oral evidence of a consultant forensic psychiatrist occupied a full day on Wednesday 12th June when I was mid way through a week as the Urgent Applications' Judge. Because of the time constraints for this case, hard up as it now is against a substantive hearing, and particularly so that a start could be made in instructing an Intermediary Service known as Communicourt, it was necessary to announce my decision at the end of the day last Wednesday.

4. Thus, this judgment comes just a few days after the hearing last week but before the next, scheduled for Thursday, 20th June when the Intermediary's preliminary work will be considered. I expect to be able then to put in place detailed plans for the giving and facilitation of Miss Morgan's client's evidence.

5. The hearing which will lead to findings one way or the other as to whether her allegations are true is scheduled to begin on Monday 1st July with a time estimate of 7 days, so in a fortnight from now.

6. In so far as it may be necessary, I would wish to emphasise that my decision is perforce limited. There is a great deal to be done between now and the start of the substantive hearing in terms of preparation, discussion of the logistics and final decisions as to how responses to questions may be given. All I did at the end of the hearing on 12th June was to sanction the instruction and involvement of Communicourt with a view to confirming the feasibility of requiring X to give evidence as well as to advise upon the 'special measures' which will be needed. To that end Ms Habboo's draft order, submitted early on Friday morning, has been amended slightly so as to make the position clear.

Essential background

7. The history leading up to the hearing in the Supreme Court requires no repetition here. It is fully described between paragraphs 2 and 12 of the 12th December 2012 judgment.

8. Since then, there have been five or so orders made by Peter Jackson J. He has dealt with a range of matters including interim indirect contact between A and her father, several issues in relation to disclosure and the commissioning of a report from a forensic psychiatrist to assess X. He also listed the matter before me both for final hearing and so that I was able to take the decision as to whether X should be required to give evidence.

9. The most significant development in the period since December and now has been the involvement of Dr B, Reader and Honorary Consultant Forensic Psychiatrist at St George's, University of London and HMP Holloway. Her report of 26th April

confronts a number of issues – X's current psychiatric state and mental health, her understanding of the special measures which might assist her in giving evidence, her capacity to participate in the court process with appropriate support and, lastly, the likely effects upon X of being required to give evidence.

Parties' positions

(i) X

10. The parties' positions may be distilled to the following. Miss Morgan's introductory document makes clear X's recognition that the allegation of sexual abuse by A's father is not made by anyone other than her so that if evidence is to be given about it so as to evaluate the risk, if any, to A that evidence can only come from X. X also recognises she is compellable; and that the court will proceed in making decisions about A upon the basis of the binary system.

11. X resists the inferred applications that would require her to give evidence. Miss Morgan refers extensively to the content of Dr B's report, to the overall summary of the potential risk to X (health and social, including academic) and, in particular, to the change in X's presentation and the extent of her distress when there was discussion of the exercise of giving evidence.

12. Interestingly, as Miss Morgan accepts, X did not, as might have been anticipated, respond to the discussion with Dr B by giving a flat and complete refusal under any circumstances. The potential is postulated of written responses where the answers required are minimal and the questions needed to elicit such responses are careful, closed and permitting of 'yes' or 'no' answers. Miss Morgan draws my attention to that part of Dr B's reported discussion with X from which it emerges that she would appear to labour under a psychologically complex prohibition to do more than respond in that fashion.

13. Accordingly, submits Miss Morgan, if I were to accept that no other way of receiving X's evidence is (a) likely to be effective and (b) justifies the risk to her physical and psychiatric health then I may wish to go on to consider whether closed and carefully posed questions of the type identified by Dr B are conceivable and of potential forensic value.

14. For the avoidance of doubt, Miss Morgan does not postulate a positive case that there should be written questions and that X's participation should be as outlined. Her primary and strongly urged position is that she should not give evidence.

15. Overnight, before the hearing last Wednesday, X sent a message telling her legal team she "cannot do this anymore." She "cannot cope with the impact upon her studies" and she is "no longer able to go on." As an aside, it seems to me to be altogether likely that I am required to make this decision precisely because X cannot; and I would understand completely if that is the unspoken situation.

16. In response to the suggestions made by Mr Storey QC on behalf of the guardian for the involvement of an Intermediary such as Naomi Mason of Communicourt. X's view is, as reported by Miss Morgan, that she does not see how an Intermediary

would make things any better; nor does she believe it would make her any less troubled.

(ii) A's mother

17. The position of A's mother (M) is consistent with her approach throughout this inordinately lengthy legal process. She asks me to do everything required so as to establish the truth, to ensure that A receives the protection to which she should be entitled, if that be needed, whilst ensuring so far as possible that her niece, X, is not subjected to any further distress than is absolutely necessary to achieve those objectives. M asks me to put in place whatever arrangements are required to enable X to give her evidence because "it is quite clearly going to be impossible to get to the truth by any other means."

18. M also refers to her strongly held view, as X's aunt and someone who cares deeply about her as well as her younger sister that the best outcome for both of them would be to address this issue now, to get it out in the open and dealt with so that each can put the matter behind them and focus on regaining their health. M's explicit response on hearing about Communicourt is that it sounded like "a very good idea."

(iii) A's father

19. A's father, (F) expressed his satisfaction with the suggestion of involving an Intermediary. It has always been his position that X should give evidence.

(iv) the Children's Guardian

20. A's guardian, represented by Mr Storey QC and Ms Habboo, adopt a 'one step at a time' or staged approach consistent with the Supreme Court's judgment. They argue that I should strive to receive X's evidence in the best possible form so that I am able to assess its reliability.

21. At the outset of the hearing, Mr Storey told me there had been contact between the guardian's legal team and Communicourt, particularly Naomi Mason. She had indicated she was prepared to take the case, could work within the court's timetable, would envisage about three meetings with X prior to the hearing and suggested a 'ground rules' hearing. She also indicated she was able to be present at the time when X is scheduled to give evidence over one or possibly two days in July.

22. By the end of the day, arrangements had been made so that the papers would be with Communicourt by the following day, Naomi Mason could see X next Tuesday, would report on Wednesday and be at court on Thursday. After the 'ground rules' hearing, there are plans for a couple more 'rapport building' meetings between Ms Mason and X prior to 1st July.

23. So much then for the parties' positions. I move to discuss the various matters which impinged upon my decision, leading as they did to the announcement made at the end of the hearing last week.

Discussion

24. There is no better starting point than the judgment given in these proceedings by the Supreme Court in November 2012; and I should associate myself at once with the concluding sentences of paragraph 36 of Lady Hale's judgment – "*The court's only concern in family proceedings is to get at the truth. The object of the procedure is to enable witnesses to give their evidence in the way which best enables the court to assess its reliability. It is certainly not to compound any abuse which may have been suffered.*"

25. I am acutely aware of the guidance which applies whenever a court is considering in the exercise of its discretion whether to order a child to give evidence: see *Re W (Children) [2010] UKSC12*. X, of course, is no longer a child but by reason of her particular frailties and relative youth – she is 21 years old – it seems to me altogether appropriate to consider in particular the overarching question set out within paragraph 24 of Lady Hale's judgment as well as the various factors of relevance to decision making discussed between paragraphs 25 and 26. Moreover there are extremely helpful observations between paragraphs 27 and 28 about the various steps which might be employed so as to improve the quality of the evidence whilst at the same time decreasing the risk to the child witness.

Psychiatric advice

26. The potential for harm to X arising out of any evidence giving exercise is, I entirely accept, at the most severe end of the spectrum. Dr B's evidence resonates very strongly with the advice offered to the court by Dr W in January 2012. It is broadly consistent with the views expressed by X's GP as set out within a letter dated 10th April 2013.

27. There may be, opines Dr B, an increase in X's level of depression and suicidality as was evident under the strain of court proceedings earlier in the year. It is credible that she may experience an increase in post traumatic reliving experiences, triggered by court content and aspects of process which would be both distressing and interfere with her sleep pattern and ability to concentrate. She may, says Dr B, deteriorate in terms of her physical symptom profile as it is in part generated by intra-psychic conflict. In fact – and I emphasise this part of Dr B's concluding paragraph – both the giving and not giving of evidence run the risk of making her intra-psychic conflict worse as both have potential negative consequences for the wider family. She is aware of this.

28. The final sentences of Dr B's written report convey this particularly stark warning – "Exacerbation of either or both her level of disability (including hospitalisation) and overt low mood, poor concentration and / or suicidality could jeopardise her university place. Given the importance of university life to her, the loss of this option on health or academic grounds would be a serious concern and should be considered an essential aspect of understanding her long term risk of completed suicide."

29. In her oral evidence, Dr B described three scenarios, as follows – (i) If X is able to speak (give evidence) and contribute to a process so as to resolve issues there may be a positive benefit. She sees that but it is not her own consideration. (ii) If she is required to give evidence and is not able to speak, because she is a 'pro-social' individual (law abiding and with strong moral values), she would find her inability to comply "extremely personally difficult." (iii) If there was a decision she should not

give evidence, there would be many imponderables. She would be both released from the demand and would not contribute. It would not be "unequivocally good."

30. There is, therefore, from the psychiatric perspective no right answer to the question as to whether X should participate by giving oral evidence. Risks exist in either situation. Significantly, perhaps, Dr B did not venture an opinion as to whether the danger is greater if X does give evidence or does not. I strongly suspect it would be impossible to make that assessment.

31. In that situation, it seems to me that the balance comes down decisively in favour of striving to devise a set of circumstances in which X can be assisted to make a personal contribution to the hearing in some form or another. Hence I decided to pursue the suggestion of involving Communicourt and Naomi Mason.

Other factors

32. But beyond the psychiatric evidence component, there are other matters which impelled me to conclude as I did. In headline form, they are as follows –

- The importance of the issue as to whether or not X's allegations are true. Findings one way or the other are pivotal to resolving the dispute between F and M in relation to A.

- Putting the matter bluntly, there must be a possibility that justice cannot be achieved for A unless X participates by providing evidence. There is no ABE interview. Such 'evidence' as exists is sketchy; many questions arise as to its overall quality.

- Doing the best I can to forecast the way in which the hearing will / could proceed, I envisage X's contribution to be central. The more she is able to say, indicate and participate the better able will I be to achieve a just result for A.

- It is a pity that X was unable to discuss the Intermediary options as fully with Dr B as she might. That arose principally it would seem out of Dr B's lack of familiarity with the ways of the family justice system. As she said in evidence, she has not before assessed vulnerable witnesses "to any great extent"; this has been "an unusual case" for her; she has not been in court when a witness has been represented by an Intermediary, though her work at Holloway means that she is very regularly assessing the capacity of individuals so as to advise the criminal court. Hopefully, as the result of Naomi Mason's intervention tomorrow, X will be better informed as to the assistance she might receive.

- As X doubtless knows resulting from the advice she's already received from her immensely experienced legal team, if she does not give evidence then less weight will attach to the information she has supplied thus far. It must be a real possibility that justice will not be achievable.

- The extent of X's participation is a matter which will be kept under constant review. Currently, as Miss Morgan is right to point out, I am not faced with diametric opposition. Nothing is fixed in stone. I will respond as necessary to what I fully expect will be a developing situation.

33. Added to all of those factors, I would add just this derived from personal experience of seeing young and vulnerable witnesses give evidence over several years now – the

first in July 2007, the last during February this year and at several memorable intervals in between. It is that no one, professional or otherwise, can provide an accurate prediction of how the individual will actually respond whilst giving an account to the court or, significantly, in the aftermath. Judges as well as practitioners are, I would suggest, constantly surprised by the actuality. A young person who is expected to find the process immensely difficult manages well, or far better, than expected. Another, with no apparent pre-identified problems, struggles or descends into such a state of distress that it becomes necessary to stop the process. The variables are as plentiful and differing as the variety of human life itself.

34. Almost exactly two years ago now in June 2011, coincidentally, Miss Morgan, Mr Storey and Ms Habboo were all three involved in a case before me where grave fears had been expressed by the Official Solicitor about the psychological consequences for a particular child witness if she were to be required to give evidence. There was a contest as to whether she should be called which I resolved against the Official Solicitor. That young person gave evidence with the assistance of Naomi Mason, described by me in the subsequent judgment as "a highly skilled and experienced intermediary who attended to her task with the utmost professionalism."

35. There was no suggestion, in that case, that on any occasion when Ms Mason intervened during evidence, she did so inappropriately. Her assistance was valued by all of those who asked questions and by me. Whereas it had been thought that the young person might not have been able to deal with questions put by more than one person, particularly men, in fact she managed perfectly well giving evidence over a video link, answering questions posed by Counsel on all sides – three Silks and two junior members of the Bar, three of them men

36. As I said in that case, the length of time over which that vulnerable witness was to give evidence, interspersed as it was planned to be by adequate breaks, was a matter which – along with everything else – I intended to keep under constant review. I went on to say, "*That is my job. I watch, assess and make constant judgments as to the utility, fairness and impact upon the witness of continuing. I seek to strike a balance between on the one hand enabling a fair process and on the other protecting the vulnerable. My role is inquisitorial and also paternalistic. I have never found the combination in the least difficult to manage*."

37. Though, perhaps, I would not have expressed myself in this way, I was describing a process of balancing and rebalancing Article 6 rights with those described in Article 8 and also, to an extent, Article 3. In this instance, as Miss Morgan identifies, Article 2 would also seem to be engaged, in both situations – where X does give evidence and where she does not.

38. There are several matters I should make clear in an attempt to reassure X following on from what I've just said. The first thing is about my interest in ensuring her welfare. Throughout the hearing I alone will be in charge of what happens. I will be constantly on alert to ensure fairness, relevance, clarity of purpose and adequate protection. It is immaterial to me that X is an adult rather than a child. I will do everything in my power to protect her whilst the court process is ongoing and afterwards, as appropriate. She will be in the same position as every witness who comes to give evidence before me whether they are in their teens, twenties or their nineties. I will not permit a process to unfold which is anything other than I have described. I have an

undoubted and ever present responsibility to be at all times vigilant so as to ensure the wellbeing of every individual participant at all hearings.

39. It would be futile to speculate in advance of Naomi Mason's involvement but some specific protective measures would seem to be entirely likely. X can be shielded from F in many ways. It is not a requirement, as was pointed out in the Supreme Court, that F should be able to see her face. Nor is it necessary for her to hear his voice or vice versa. A myriad of possibilities exist so as to afford proper protection. I am sure it is right to repose complete trust in Naomi Mason to consider the various possibilities with X.

Finally – three points for X's consideration

40. Finally, and for X's consideration, I should make three points, each of which seems to me to be of substantial importance. First, I am painfully aware of X's perception that her initial disclosure set in motion a chain of events which has left her feeling distrustful and lacking in confidence in processes which should have afforded her protection. She was led to believe she would not be asked to speak of her allegations again. It is scarcely surprising that she experiences 'all of this' as a massive breach of trust.

41. Her confidence in 'the system' has been undermined to a very significant degree. I regret very much that X was given a set of assurances and promises which have had to be broken. It will have been enormously disadvantageous to her psychological well being to have been confronted with a different and developing set of parameters, of that I am all too aware.

42. The second factor is that the timeframe during which these matters have unfolded within the court arena is nothing short of woeful. Lady Hale voiced her disquiet at the length of time taken for the first instance disclosure application to be determined. She ended her judgment by observing that contact arrangements ordered in February 2009 had been interrupted and it was still not possible to say when the matter will be resolved.

43. For X the worry and anxiety of what will / may happen has been ever present; and I would imagine that with every passing month the situation and her perception of it has become more intrusively troubling. She may not altogether trust that when she is told there will be a hearing in July 2013 that is true. And I could altogether understand her scepticism given what has gone before – empty promises, assurances given and then broken, a process which seemingly has no end and from which there is no escape.

44. If I am able to convey anything during the concluding paragraphs of this judgment it is that the hearing fixed for 1st July will be effective. I can conceive of no basis at all for any adjournment. I fully intend to end this lengthy exercise, and decisively, at that hearing.

45. Thirdly and finally, I would wish to emphasise this, because I believe it could be beneficial to X in the days ahead. For as long as there is continuing uncertainty about the allegations, it seems likely she will continue to be caught in the vortex of enormous physical and psychological distress so poignantly described by Dr W and Dr B and from which hitherto, seemingly, there has been no escape.

46. The hearing on 1st July offers X an end point. It is highly likely to represent a 'watershed' for X and all of those who are close to and feel great affection for her. I doubt she has been able to contemplate what life may be like on the other side of the hearing. There will be consequences not only for A but also for X, her younger sister and all the other members of the families. The prospect of a brighter future in which uncertainty and doubt will have been removed by a full, fair and protective process is something to which I would hope X will give active consideration.