Neutral Citation Number: [2019] EWCA Civ 1997

Case No: B4/2019/2175

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM GUILDFORD FAMILY COURT
Her Honor Judge Raeside
GU18C00195

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2019

Before:

LADY JUSTICE RAFFERTY
LADY JUSTICE KING
and
LADY JUSTICE ASPLIN

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N (A CHILD)

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Joanne Porter (instructed by **Boys & Maughan Solicitors**) for the **Appellant**
Andrew Shaw (instructed by **the County Council**) for the **1st Respondent Local Authority**
Sara Chalk (instructed by **Biscoes Law**) for the **2nd Respondent Child's Guardian**
Damien Stuart (instructed by **Blackfords Llp**) for the **3rd Respondent Father**

Hearing date: 5th November 2019

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Approved Judgment

Lady Justice King:

1. This case concerns the challenges presented to a court when seeking to ensure that a vulnerable parent is able to give their best evidence during the course of care proceedings. Achieving this outcome is necessary in order both to protect the Article 6 rights of the parent to a fair trial and to ensure that the court has the benefit of the most reliable evidence possible with which to inform its decisions.

2. There is an urgent need for decisions to be made regarding the future arrangements for the children in this case. Therefore, the court, having heard oral arguments, indicated to the parties that the appeal would be allowed and the case remitted for a rehearing. Below are my reasons for allowing this appeal.

Background

3. On 15 March 2019, HHJ Raeside gave judgment at the conclusion of a fact- finding hearing which had taken place over four days. The hearing was listed in order to determine: (i) the cause of 14 areas of bruising on a little girl ("S") who is now 2 years 8 months old; and, (ii) to identify the possible perpetrator, or perpetrators, of the injuries in the event that some, or all, of the bruises were found to have been caused non-accidentally.

4. The hearing was unwieldy as, in addition to the mother who was a party, there were six Intervenors including the mother's partner ("PE") together with other family members and the "maternal grandparents". None of the Intervenors had the benefit of legal representation and two were vulnerable witnesses requiring the assistance of an Intermediary.

5. At the conclusion of her judgment, the judge, having considered what she described as a "rather complex timeline" [29], found some of the bruises to have been caused non-accidentally. The judge exonerated each of the Intervenors, save for PE, from responsibility before making a so called 'uncertain perpetrators' finding, having decided on the balance of probabilities that either the mother or PE had caused the injuries and that the non-perpetrating party had been aware of the other's culpability [86-90].

6. In June 2019, the appellant ("the mother") gave birth to a second child, L. There are separate care proceedings in respect of L. The threshold criteria will inevitably be formulated on the basis that L is at risk of future harm as a consequence of the findings made in the proceedings concerning S, the subject of this appeal.

7. The mother, who at the time of the fact-finding hearing was represented by experienced solicitors and counsel different to those now representing her, gave oral evidence. During the course of her judgment, the judge made a number of observations as to the manner and content of the mother's evidence, for example:

    (i) In relation to the mother's oral evidence generally [40]:
    "I became concerned whilst hearing her evidence, that she may have issues with cognitive functioning; she clearly has trouble with recalling dates and times, and I noticed that at times she appeared to have understood a question, but on checking she had not in fact done so I was concerned that there had

> been no cognitive assessment of her, and no intermediary assessment of her. Even trying to make allowance for those matters, I found her evidence very unsatisfactory. She was unforthcoming with information, she contradicted herself frequently, there were numerous contradictions between what she said to staff at the hospital, to the police and in her statement and in what she said to me..."

(ii) In relation to the injuries that were seen by the mother, PE and maternal grandparents, the mother's evidence "was so muddled as to be worthless".

(iii) When considering the mother's evidence regarding the involvement of the Intervenors [43], the judge said that "it was impossible to treat the mother's evidence with any certainty. I struggled to make sense of some of what she was saying: it was very unsatisfactory".

(iv) When considering the mother's various accounts of events [45] :

> "Comparing the various accounts of the events of the preceding days given by the mother to the hospital, to the police, in her witness statement, and in court, emphasises the huge discrepancies between them as to what bruises the mother saw, when she was them, what conversations she had about them and with who, I found it impossible to trust her."

8. Having given her judgment, the judge went on to give comprehensive directions in preparation for the welfare hearing at which the future of S would be determined. The directions included an order for the preparation of a full psychological assessment of the mother to be prepared by Dr Shaun Parsons, a forensic psychologist. His report is dated 12 April 2019.

9. Dr Parsons assessed the mother's full-scale IQ as being in the borderline range at 70. Significantly, however, he found:

> "…the confidence intervals, that is the variation in testing that can occur on any given day, due to a number of extraneous factors, overlaps with the upper end of the extremely low range of intellectual ability. [The mother] has a highly variable cognitive profile with a significant defect in her verbal ability and slight relative strength in her ability to process non-verbal information, a relatively poor working memory but somewhat paradoxically a significant strength relative to her overall profile in terms of her ability to process information correctly."

10. Dr Parsons concluded that the mother's profile is best interpreted by reference to the variation rather than the full-scale IQ, given that she "has significant difficulty in terms of her ability to both understand and express herself verbally". Later in the report, Dr Parsons reemphasised the point, saying:

> "I would again stress that she has a particular weakness in terms of her verbal ability. This weakness is to the extent that

> when compared to other aspects of her functioning, it will be noticeable in every day conversation and, in my opinion, it was noticeable in the clinical assessment itself."

11. In his conclusions, Dr Parsons reverted to the mother's verbal intelligence, saying that it is in the "extremely low range of intellectual ability". He highlighted the danger of the reliability of her evidence being significantly reduced given this feature, together with her difficulties in following long or complex questions. Finally, Dr Parsons noted that a feature of the mother's presentation is that she initially presents as far more cognitively able than is the case. This is a phenomenon referred to as "the cloak of competence" and should, Dr Parsons says, not be seen as deception on her part, but as an adaptive skill developed by a person to help cope with daily life.

12. Unsurprisingly, in the light of Dr Parson's report, an Intermediary assessment of the mother was obtained on 14 July 2019 from Ms Lucy Turner recommending that the mother have the assistance of an Intermediary. On 19 July 2019, the judge considered an application made on behalf of the mother for either permission to appeal the findings of fact themselves, or for a rehearing of the fact-finding in the light of a report of Dr Parson and the assessment of Ms Turner.

13. The judge accepted the recommendation of Ms Turner, she however took strong exception to the fact that Ms Turner had acted as Intermediary to the mother's brother and his fiancé in the proceedings at the finding of fact hearing. The judge felt that Ms Turner could be said to have had a conflict of interest, and therefore, ordered a further Intermediary assessment. This was prepared by Ms Jean Mattalia and is dated 27 August 2019.

14. Whether or not it was inappropriate for Ms Turner to conduct an assessment is irrelevant for present purposes as both reports were unequivocal in concluding that the mother requires an Intermediary to assist her at all stages in the court process. Ms Mattalia concluded that the mother's difficulties meant that without adaptations, she was unlikely to understand the court proceedings and this would impact significantly on her ability to provide her own evidence.

15. The mother described her perception of the fact-finding hearing to both Ms Turner and Ms Mattalia. She told Ms Mattalia that the trial had been: "Just horrible […] I was just getting confused about what everyone was saying. I couldn't think" and that "I just didn't understand what was going on".

16. The contents of these reports, having precipitated the application made by the mother to re-open the finding of fact hearing, the judge, in a reserved judgment, refused the application and subsequently refused permission to appeal from that decision.

17. Peter Jackson LJ granted permission to appeal on a renewed application, on the basis that he regarded it as arguable that the fact-finding hearing was not fair to the applicant as she did not have the benefit of an Intermediary which deficit could not be cured by providing assistance after significant findings had been made against her.

18. It is the appeal against the judge's refusal to order a rehearing with which this court is concerned.

The Judge's Judgment

19. The judge handed down a written reserved judgment in respect of the application for a rehearing. The judge set out the details of the fresh evidence together with reference to the report of an independent social worker who, it seems, had not read the judgment of the fact-finding hearing before filing her report.

20. The judge referred to the three-stage test in *Re B* and *Re ZZ* [2014] EWFC 9 and to *Re M (a Child)* [2012] EWCA Civ 1905, a case to which I will refer later in this judgment, which dealt specifically with the provision of special measures and Intermediaries.

21. I have considerable sympathy with the judge, who expressed her dismay in her judgment that those representing the mother had not appreciated the mother's difficulties, particularly as she (the judge) "… became aware of the difficulties fairly quickly when the mother's evidence started". The judge said that she had facilitated frequent breaks during the course of the hearing, given the number of unrepresented Intervenors and that she had, as was undoubtedly the case, done all that she could to ensure that the questions put to the mother were appropriate. The judge said, and I accept completely, that had she had any doubts about the mother's ability to give reliable, safe or meaningful evidence, she would have stopped the trial notwithstanding any delay or inconvenience.

22. In her judgment, the judge referred to the inconsistencies in the mother's evidence and the delay and stress which would be caused to all parties if a retrial was ordered, before concluding that the *Re B* and *Re* ZZ test had not been met. This was on the basis that there was "no real reason to believe that the earlier findings require revisiting. Mere speculation and hope are not enough. There must be solid grounds for challenging". In this context, the judge relied on the fact that the mother's account of the events under scrutiny by the court continued to be muddled, that she continued to blame the family members for causing the injuries to S, and that she put forward no new evidence that would assist the court in making alternative findings.

23. The judge specifically considered the submission made on behalf of the mother, that the absence of an Intermediary to assist her at trial had breached her Article 6 rights. The judge distinguished *Re M* on the facts as, in that case, the judge had failed to rule on an application for an Intermediary which was before the court at the commencement of the trial, notwithstanding that there were three psychological assessments recommending the appointment of one, and that the trial had then continued without either a ruling or special measures being put in place.

24. The judge dismissed a submission that, where it was subsequently discovered that a party should have been provided with special measures, the hearing should be set aside and a re-hearing directed. That, she held, was too dogmatic an approach; the test, she said, is that in *Re B* and *Re ZZ*, the court needs to have real reason to believe that doubt is cast on the accuracy of the findings made. The judge accordingly refused the application and permission to appeal.

The Appeal

25. The appellant mother seeks to challenge the findings via two alternative routes:

i) Ground 1: that the judge, having confirmed that an Intermediary was necessary for the mother properly to participate in future proceedings, was wrong in concluding that the findings already made against her in the absence of an Intermediary could stand; or alternatively,

ii) Ground 2: that, in the light of fresh evidence, the court should allow a direct appeal against the findings made against the mother.

26. Each of the parties agree that if the appellant succeeds on Ground 1 then Ground 2 falls away.

Fresh Evidence

27. The reports of Dr Parsons, Ms Turner, Ms Mattalia and the ISW, Ms Gillard are each fresh evidence obtained since the fact-finding hearing. Accordingly, the permission of the court is required in order for the appellant to rely upon them in relation to Ground 2 (the direct appeal against the findings of fact made). No such permission is required in respect of Ground 1, as the judge ordered the reports which led to, and were central to, the application to reopen the findings of fact.

28. Quite properly, no objection is taken by any of the parties to the evidence being now admitted. Whilst it is arguable that the first limb of *Ladd v Marshall* [1954] 1 WLR 1489 has not been satisfied (as it might be said that the evidence could previously have been obtained with "reasonable diligence"), this is precisely the type of case Peter Jackson LJ must have had in mind in *Re E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447 (*Re E),* when he said:

> "25. A decision whether to admit further evidence on appeal will therefore be directed by the Ladd v Marshall analysis, but with a view to all relevant matters ultimately being considered. In cases involving children, the importance of welfare decisions being based on sound factual findings will inevitably be a relevant matter. Approaching matters in this way involves proper flexibility, not laxity".

29. For my part, even had the reports not already been before the trial judge, I would have no hesitation in allowing the application to file this evidence, which goes to the heart of the case.

Applications to reopen findings of fact

30. The Court of Appeal has had cause to consider applications to reopen findings of fact on a number of occasions over recent years. In August of this year (2019) in *Re E*, Peter Jackson LJ carried out a comprehensive review of the law in relation to the reopening of findings of fact. Peter Jackson LJ considered, amongst other things, whether an application to reopen findings of fact should be the subject of an appeal or of an application for a rehearing made to the trial judge. That is not an issue which arises in the present case as an application was made to the trial judge who refused to reopen her findings. Permission to appeal has now been granted against that refusal and comes before this court for consideration. In any event, the route adopted on behalf of the mother was held in *Re E* to be the preferred route:

> "17…the family court has the statutory power under s. 31F(6) Matrimonial and Family Proceedings Act 1984 to review its findings of fact in all of these circumstances. I also consider that it will generally be more appropriate for the significance of the further evidence to be considered by the trial court rather than by way of an appeal…"

and:

> "45…. I would further suggest that, other things being equal, an application to the trial court is likely to be a more suitable course than an appeal. The trial court is likely to be in a better position than this court to assess the true significance of the further evidence, its advantage being all the greater if the findings are relatively recent, and if the matter can be considered by the judge who made them, as should always be the case if possible. Another reason for preferring an application to an appeal is that it is likely to be dealt with more quickly and at less expense."

31. Peter Jackson LJ, having recognised that the fact-finding element of a split hearing is a preliminary determination whose outcome is subject to revision at a subsequent hearing, went on:

> "34. It should nevertheless be recalled that the ability to challenge a finding of fact always depends on the finding being one that has potential legal consequences. It is not open to a party to appeal a finding simply because they do not like it: see Lake v Lake [1955] P 336; Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd [2002] EWCA 1142 at [27-28]; and Re M (Children) [2013] EWCA Civ 1170 at [21]. Whether the court is prepared to entertain an application to reopen a finding will depend upon whether it is satisfied that the finding has actual or potential legal significance: in other words, is it likely to make a significant legal or practical difference to the arrangements that are to be made for these or other children?"

32. Peter Jackson LJ went on to consider the well-known line of cases of *Birmingham City Council v H (No. 1)* [2005] EWHC 2885 (Fam) (Charles J); *Birmingham City Council v H (No. 2*) [2006] EWHC 3062 (Fam) (McFarlane J); (*Re B)* and *Re ZZ* [2014] EWFC 9 *(Re ZZ)* (Sir James Munby P). Summarising the approach as follows, he said:

> "49. These decisions establish that there are three stages. Firstly, the court considers whether it will permit any reconsideration of the earlier finding. If it is willing to do so, the second stage determines the extent of the investigations and evidence that will be considered, while the third stage is the hearing of the review itself.

> 50. In relation to the first stage, these decisions affirm the approach set out in Re B (see para. 28 above). That approach is now well understood and there is no reason to change it. A court faced with an application to reopen a previous finding of fact should approach matters in this way:
>
> (1) It should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly-based welfare decisions on the other.
>
> (2) It should weigh up all relevant matters. These will include: the need to put scarce resources to good use; the effect of delay on the child; the importance of establishing the truth; the nature and significance of the findings themselves; and the quality and relevance of the further evidence.
>
> (3) Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial." There must be solid grounds for believing that the earlier findings require revisiting.
>
> 51. I would also draw attention to the observations of Cobb J in Re AD & AM (Fact Finding Hearing: Application for Rehearing) [2016] EWHC 326 (Fam) about the care that must be taken when assessing the significance of further medical opinions at the first stage (para. 71) and as an example of the need to control the identification of issues and gathering of evidence at the second stage (paras. 86-89)."

33. Save for *Re M (A child)* [2012] EWCA Civ 1905 (discussed below), the reported cases that were brought to our attention concerned in each case, situations where the party seeking to reopen the findings of fact relied upon fresh evidence that went directly to the findings. In *Re E* itself, the mother sought to adduce fresh expert medical evidence that could potentially provide an innocent explanation for cigarette burns on her child. Another common situation is where there has been an acquittal in criminal proceedings of a party that had been held by the family court to be the perpetrator of non-accidental injuries. A third category is found where, following the fact-finding hearing, one party wishes to change the account he or she gave on paper and to the court in the fact-finding trial.

34. In cases where a party seeks to adduce evidence that they submit will go directly to the heart of the findings, the court will consider all relevant matters highlighted at [31] above when carrying out the balancing exercise as rehearsed by Peter Jackson LJ. However, they will "above all" want to consider whether a rehearing is likely to result in different findings and there must be solid grounds for believing that to be the case.

35. Understandably, in the present appeal, Mr Shaw on behalf of the Local Authority, and Ms Chalk on behalf of the Guardian, placed heavy emphasis upon this. Each stated

that the outcome of the case would not have differed, even had the mother had the benefit of an Intermediary.

36. The judge, Mr Shaw submits, was appropriately conscious of the mother's vulnerability and limitations at the hearing. The mother, Mr Shaw reminds the court, has not provided a further statement or given a new account with regard to the timings or the injuries (although, it would be for the judge to give permission for the mother to adduce such a statement). The judge was right, Mr Shaw says, to have said:

> "31. If, with the help of an intermediary and her new solicitor, evidence is produced to the court from the mother which throws new light on the cause or timing of the injuries, or provides a credible explanation for the injuries, then I will consider that evidence carefully and review the case at that point. No final decision has yet been made (although that time is fast approaching) and the case remains open as to final placement. At present however, there is no 'real reason to believe that the earlier findings require revisiting."

37. Ms Porter on behalf of the mother, submits that the findings of fact were made following an unfair trial and are, therefore, unjust because of a serious procedural irregularity CPR rule 52.21 (3). The impact of the mother not having the assistance of an Intermediary is, Ms Porter says, that the court was unable to undertake the essential assessment of the mother as a witness. This, she says, is because the judge was deprived of the opportunity properly to consider the mother's credibility, away from concerns as to her cognitive ability, her understanding of the evidence, and the questions put to her. The mother's inability fully to engage in the proceedings meant that she was unable to have a fair hearing. As a consequence, Ms Porter submits, not only were the mother's Article 6 rights undermined, but so too was the court's ability to ensure that S's welfare is paramount in its considerations. Further, Ms Porter questions how the court will be able to fairly consider the welfare of L, the mother's second child, as her proceedings are to be based on the findings made by the judge in relation to S.

Discussion

38. The facts were stark in *Re M*. In *Re M*, psychological and Intermediary reports were available to the court before trial, and those representing the vulnerable parent had applied for an adjournment in order for special measures, including the appointment of an Intermediary, to be put in place. However, in my view, the critical point made by Thorpe LJ remains relevant to this case:

> "21…I only observe that that general duty [to achieve targets] cannot in any circumstance override the duty to ensure that any litigant in her court receives a fair trial and is guaranteed what support is necessary to compensate for disability."

39. Thorpe LJ recorded counsel's submission with seeming approval, namely that:

> "…that actual prejudice to the father is a completely irrelevant question. His right to Article 6 protection is absolute, and, as Mr Storey put it in his third point of reply:

> We simply do not know how much better the father would have done in the witness box had he had the support to which he was plainly entitled."

40. In the two years following *Re M,* the recognition of the need to ensure that vulnerable witnesses are in a position to give their best evidence gathered pace. In *P v Cheshire West and Others* [2014] UKSC 19, Lady Hale said:

> "[Disability] places upon the state (and upon others) the duty to make reasonable accommodation to cater for special needs of those with disabilities."

And McFarlane LJ (as he then was) in *Re C (A Child)* [2014] EWCA Civ 128 said:

> "The court as an organ of state, the local authority and CAFCASS must all function now within the terms of the Equality Act 2010. It is simply not an option to fail to afford the right level of regard to an individual who has all these unfortunate disabilities."

41. The move to put in place some form of formal procedure so as to protect the Article 6 rights of vulnerable parties and witnesses, was finally initiated by the then President of the Family Division, Sir James Munby, who said in his 12th *View from the President's Chamber,* published on 4 June 2014:

> "[T]here is a pressing need to address the wider issue of vulnerable people giving evidence in family proceedings, something in which the family justice system lags woefully behind the criminal justice system."

42. To this end, Sir James set up the Vulnerable Witness and Children Working Group (the Working Group), headed by Hayden J and Russell J. The final report of the Working Group was published in February 2015. Relevant to the present appeal is the following:

> "31. The WG considered it is necessary to focus on reform in public law and on private law cases involving domestic abuse where the difficulties are most apparent and the need for equality of arms most acute. The former concerns the state's intervention in the lives of families, often with lifelong effects; the latter concerns persons who are likely to be victims of abuse and intimidation. In all family proceedings the lack of appropriate support and assistance for witnesses, whether they are parties, the children and young people or interveners would amount to a denial of justice. Failure to provide sufficient and adequate support for vulnerable or intimidated witnesses whether they are children, young people or adults results in a concomitant failure in their ability to give their best evidence, in turn directly undermining the likelihood of the judge or

> tribunal reaching a fair decision; it is justice denied. In the year that Magna Carta is the subject of much public celebration it is appropriate that steps are being taken to reform the manner in which the evidence of vulnerable and intimidated witnesses and parties, including children and young people."

43. The Working Group's recommendations were in due course incorporated, as of 27 November 2017, into FPR 2010, Part 3A and PD3AA, which makes provision for "Vulnerable Persons: Participation in Proceedings and Giving Evidence".

44. By rules 3A .4 and 3A.5 respectively, the court is under the following duty:

> "(a) The court must consider whether a party's participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.
>
> (b) The court must consider whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions."
>
> The duties established under Part 3A apply as soon as possible after the start of the proceedings, and continue until the resolution of the proceedings (r 3A.9). Those duties apply equally to the parties as to the court (PD 3AA):
>
> "1.3 It is the duty of the court… and of all the parties to the proceedings to identify any party or witness who is a vulnerable person at the earliest possible stage of any family proceedings"
>
> It is also the duty of all parties to work together to assist the court in complying with the requirements of Part 3A.

45. If Part 3A.4 and rule 3A.5 apply, the court must consider whether to make 'participation directions' (r 3A.1); and, where a court has decided that a vulnerable party or witness is to give evidence, it must then hold a 'ground rules hearing' (PD3AA 5.2) prior to the substantive hearing. At the ground rules hearing, directions will be given as to the conduct of the hearing, the role of advocates, the mode in which evidence is to be given, the topics for questioning and various other matters, all of which are set out in PD3AA.5.

46. The obligation on the advocates, as set out in the Practice Direction, extends to an expectation that they are familiar with the techniques employed by "the toolkits and the approach of the Advocacy Training Council" (PD3AA.5.7). The 'toolkits' provide advocates with good practice guidance when preparing for trial in cases involving a witness with communication needs. The use of the toolkits has been endorsed in a criminal context by the Lord Chief Justice in *R v Lubemba* [2014] EWCA Crim 2064, para 40, and should be considered on a par for these purposes.

47. Toolkit 4 sets out best practice when "planning to question someone with a learning disability" and ties into Toolkit 16 - Intermediaries. Toolkit 4 goes far beyond mere guidance as to how to deal with the court setting and evidence and provides invaluable information and guidance as to types of learning disabilities and how learning difficulties can affect communication.

48. In considering whether the mother had a fair trial, Part 3A sits side by side with Article 6 of Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") which embodies the right of access to a court for determination of civil rights and obligations (see *Golder v UK 524,* para.36: (1979-1980) 1 EHRR).

> "Article 6 – Right to fair trial
>
> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

49. In *Re L (Care: Assessment: Fair Trial)* [2002] 2 FLR 730, Munby J, as he then was, considered the issue of what amounted to a fair trial. In relation to Article 6, he said as follows:

> **"[92]** I return to Art 6. The starting point is the court's recognition in Golderv UK ….(paras 35–36) that what Art 6 confers is an effective right of access to a court.
>
> **[93]** That said, the fundamental principle is clear. As the court said in Mantovanelli v France (1997) 24 EHRR 370, at 383 (para 34):
>
> > The court has […] to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair."

50. In *P,C and S v UK (ECHR)* [2002] 2 FLR 6, the court confirmed that Article 6 embodies the right to access to a court, and went on:

> "**[91]** Secondly, the key principle governing the application of Art 6 is fairness. In cases where an applicant appears in court notwithstanding lack of assistance of a lawyer and manages to conduct his or her case in the teeth of all the difficulties, the question may nonetheless arise as to whether this procedure was fair (see, for example, McVicar v UK (unreported) 7 May 2002, paras 50–51 (to be published in EHRR)). There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, inter alia, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Art 6, the seriousness of what is at stake for the

> applicant will be of relevance to assessing the adequacy and fairness of the procedures."

51. In my judgment, Part 3A and its accompanying Practice Direction provide a specific structure designed to give effective access to the court, and to ensure a fair trial for those people who fall into the category of vulnerable witness. A wholesale failure to apply the Part 3 procedure to a vulnerable witness must, in my mind, make it highly likely that the resulting trial will be judged to have been unfair.

52. Reverting then to the present appeal, the judge, quite properly, held ground rules hearings in respect of two of the litigants in person who, in compliance with Part 3A, then had the benefit of an Intermediary. Their Article 6 rights were therefore both engaged and protected.

53. Given that the mother's (then) legal team did not identify the mother's difficulties, no participation directions were given, and there was no ground rules hearing in relation to her. The mother was therefore deprived of the protection due to her as a vulnerable witness. A ground rules hearing would have put in place special measures which would have allowed her to give her best evidence in a carefully considered and bespoke form, the structure of which would have been facilitated by the reports of Dr Parsons and the Intermediary assessments.

54. It is most unfortunate that those then representing the mother did not recognise the extent of her difficulties, such that they could have at least sought a psychological assessment of her, although in fairness to that legal team, Toolkit 4 specifically sets out that people with borderline learning disability "may not have been formally diagnosed and may be difficult to identify". It is nevertheless worth highlighting the duty under PD3AA 1.3 for legal representatives actively to consider whether their client may be a vulnerable witness. This is particularly so following the Working Group having observed (at Paragraph 10. Footnote 12) that, as of 2008, 72% of mothers in a sample in a *Case Profiling Study* by *Masson et al* experienced one or more difficulties with mental illness, learning difficulties, substance abuse and domestic abuse.

55. The judge could not have been expected to have identified the mother as a vulnerable witness prior to her going into the witness box. I have no doubt that once her concerns as to the quality of the mother's evidence were raised, she did all that she could to ameliorate the inevitable difficulties. I accept completely that the judge would have adjourned the case had she felt that her interventions and case management (breaks etc) during the trial were insufficient in order to allow the mother to do herself justice in the witness box. With the benefit of hindsight, despite the delay, it would, in my judgment, have been better, once the mother started giving evidence and her difficulties were exposed, if the judge had listened to the 'grey thoughts' she had had during the course of the evidence and which she subsequently expressed in her judgment and had stopped, or adjourned, the trial in order to have a cognitive assessment of the mother carried out.

56. At the end of the day, the judge's efforts were not enough to enable the mother to give her best evidence, as is apparent from the reports of Dr Parsons and the Intermediaries. As a consequence, the mother did not have a fair trial. The report of Dr Parsons and the Intermediary (as set out above), identify the mother's disability

and her need for an Intermediary but, critically for this mother giving oral evidence in a fact-finding trial, Dr Parsons highlighted and emphasised her "extremely low" range of verbal ability and her significant difficulty in terms of her ability to both understand and to express herself verbally.

57. Mr Shaw, with considerable skill, took the court to passages in the transcript and elsewhere in the evidence, which he submitted revealed an ability on the mother's part to give a narrative account, if she chose to do so. Equally, to his great credit, he accepted that there were many questions, particularly towards the latter part of the mother's evidence, which were very long, multi-faceted and which would have been challenging for even the most able witness to have tackled. Mr Shaw submitted that there was no reason to suppose that the mother would, with the benefit of an Intermediary, give a different account from that already found in her statement and in oral evidence. The judge had done, Mr Shaw said, all she could to assist the mother in giving her evidence. There was no solid basis which would enable those representing the mother to assert that the outcome would be any different following a retrial, an outcome which would only cause delay and be inimical to the welfare of both S and the new baby, L.

58. With respect to Mr Shaw, that may well be right but is not the point. This is not a case where 'fresh evidence' is produced which goes directly to the facts of the case. In those circumstances, the judge can conduct a critical assessment of the new evidence in accordance with *Re B* and *Re ZZ,* and reach a view as to whether the evidence, if admitted and a retrial ordered, will, or may, result in a different outcome. This case is about unfair process and about this mother, who stands to lose both her young children, having been deprived of the detailed and rule-based assistance to which she was entitled as a vulnerable witness during the fact-finding trial.

59. Mr Shaw's submissions were supported by the father and now by the Guardian who had been neutral at the application for a rehearing before the judge.

60. In my judgment, it would go too far to say that a rehearing is inevitable in all cases where there has been a failure to identify a party as vulnerable, with the consequence that no ground rules have been put in place in preparation for their giving evidence and no Intermediary or other special measures provided for their assistance, but the necessity for there to be a fair trial must be at the forefront of the judge's mind. In such a case, whether there should be a retrial must depend upon all the circumstances of the case, not only, or principally, upon the likely outcome of a rehearing. I set out again for convenience, the observation of the ECHR in *P,C and S v UK:*

> "There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, inter alia, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Art 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy."

61. In my judgment, there was undoubtedly a fundamental breach of the mother's Article 6 rights and she was denied a fair trial. Put another way, the decision was "unjust because of a serious procedural or other irregularity in the proceedings in the lower court" per CPR 52.21.(3)(b).

62. One knows not whether Mr Shaw is correct in his assertion that the outcome will ultimately be the same, but in the circumstances of this case, it matters not. This mother was denied the very protection which has been put in place to ensure that she, as a woman with learning difficulties, has a fair trial. The stakes could not be higher; she faces the permanent loss of her two infant children. In my judgment, the fact that the mother will have the assistance she requires for the balance of the proceedings cannot make up for the fact that she was without that help in the crucial hearing, the findings from which will form the basis for all future welfare decision in respect of these two children.

Outcome

63. For these reasons, notwithstanding the inevitable and regrettable delay which will result, this court indicated to the parties that the appeal must be allowed on Ground 1 and the case remitted for rehearing. The form and extent of such a hearing will be a matter for Moor J, the Family Division Liaison Judge for the area, who has indicted that he will bring the matter in for directions at the earliest possible opportunity.

Lady Justice Asplin:

64. I agree

Lady Justice Rafferty:

65. I also agree