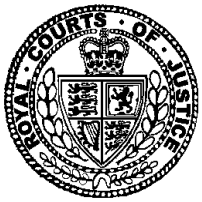

Neutral Citation Number: [2019] EWCA Civ 1346

Case No: B4/2019/0635 & 0635(B)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL FAMILY COURT
His Honour Judge Oliver
ZC18C00402

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2019

Before:

LORD JUSTICE PATTEN
LORD JUSTICE RYDER (THE SENIOR PRESIDENT OF TRIBUNALS)
and
LADY JUSTICE KING

- -

P (A CHILD)

- -
- -

Ann May (instructed by **Oliver Fisher Solicitors**) for the **Appellant**
Jane Hayford (instructed by **Duncan Lewis)** for the **Respondent mother**
Christopher Poole (instructed by **the Royal Borough of Kensington and Chelsea**) for the **Respondent Local Authority**
The Child and the Children's Guardian were not represented but written submissions were provided by Shrutee Dutt of Creighton and Co

Hearing dates: 19th June 2019

- -

Approved Judgment

Lady Justice King :

1. This appeal arises out of an order made by HHJ Oliver on 13 February 2019 by which the judge made findings of fact against the appellant intervenor (the intervenor) in care proceedings concerning a child, P, who was born on 12 October 2015. The intervenor is the former fiancé of P's mother (the mother). The intervenor seeks an order whereby the challenged findings are substituted by an amended threshold document limited in its terms to matters in respect of which he has, consistently throughout the proceedings, made admissions.

2. Neither the local authority nor the children's guardian seek to uphold the judgment and therefore neither oppose the appeal being allowed. They each accept that the threshold is crossed in the terms of the intervenor's proposed amended threshold and they do not invite the court to remit the case for a fact-finding hearing in respect of the findings which are the subject of this appeal.

3. The mother, whilst accepting that the judge's judgment contains what Miss Hayford, on behalf of the mother, described as "gaps", seeks to persuade the court that the judgment should be upheld and the findings, at least to some extent, remain.

4. In order to avoid any further delay in the making of decisions for P, the parties were informed at the hearing that the appeal would be allowed and that no further fact-finding hearing would be necessary. What follows are my reasons for allowing the appeal.

Background

5. The mother, having known the intervenor as a child, re-established contact with him via the internet at a time when she was living in Switzerland. The mother has two significantly older children from previous partners, each of whom live with their respective fathers. The mother moved to live with the intervenor in the United Kingdom with P in February 2018. Upon her arrival in London, the couple became engaged almost immediately, planning to marry in November 2018. The mother and P moved into the intervenor's accommodation, a residence which was little more than a bedsit. Notwithstanding the size, also living there was a Mr V and a third man named D. Mr V has criminal convictions dating from the 1970s for sexual offences against boys.

6. The home conditions were therefore poor, described by the social worker, and accepted by both the intervenor and the mother, to be "appalling" and "squalid". P, then about 2yrs 5 months old, shared a bed with Mr V. The judge described this situation, in what might be thought to have been a significant understatement, as: "not have (sic) been a very good environment in which to leave P".

7. On 30 May 2018, the intervenor went to see his general practitioner, conscious that he was having mental health difficulties. He told his GP that he had kicked the mother that morning and admitted to "lashing out" at P when she did something wrong by "tapping her bottom". The doctor made a referral to social services. Social workers accordingly went to the property to speak to the mother and to the intervenor on 5 June 2018. During that visit, the mother and the intervenor told the social workers he had a "temper" and would "explode". They further admitted that the intervenor had

caused bruising to P by smacking her when she had no nappy on, and that he had kicked the mother, they also told the social workers that P was sharing a bed with Mr V. The intervenor admitted to having sexually touched his own sister when he was 16 and she was 5 years old.

8. The following day on 6 June 2018, a child protection medical examination was undertaken by a Dr Ahmad. The doctor noted "a number of bruises, a scratch mark in a linear scar"; eleven injuries in total. The doctor considered the marks could be consistent with the explanation and mechanisms which had been described by the mother, namely that they had all been caused by the intervenor. The mother was interviewed by the police on 6 June 2018 in which she repeated that the intervenor had been violent towards both her and P. She made no allegation of sexual violence and said that she was not scared of him as he had "promised not to hurt P again". The intervenor, when interviewed under caution, admitted to kicking the mother, throwing items which hit her, shouting, causing bruising to P's bottom, and "shunting" P with his legs when she was "annoying the dog".

9. The mother twice rejected the local authority's offers to move her and P to safe, alternative housing. Given the circumstances, the mother's refusal meant that the police felt that they had no alternative but to exercise their powers of protection in relation to P, and P was placed in foster care on 6 June 2018. On the same day, the local authority issued care proceedings and an interim care order was made. This child, still only 3 years 8 months, has therefore been subject to proceedings and in a short-term foster placement for 12 months of her short life.

The proceedings

10. The intervenor was joined as a party on 9 July 2018. He filed a statement in the same terms as his admissions to the police. He accepted that P had suffered significant harm as a result of the care that he and the mother had provided and that the home environment was unsuitable. Subsequently, on 13 July 2018, the police interviewed both the mother and the intervenor under caution on suspicion of child cruelty and neglect.

11. On 2 August 2018, the mother was again interviewed under caution. During the course of that interview the mother was challenged about the state of the premises and the fact that she was letting P "sleep with a 70-year-old man" (Mr V). The mother said that she "stayed awake all night watching them". The police pressed the mother, asking her why she did not simply put P into bed with her. The mother's response was that the intervenor would want sex and wouldn't want P in the middle. There then followed this passage:

> "Q. So would you be having sex then when your daughter's in bed next to you?
>
> A. No, I didn't even want to.
>
> Q. So you didn't want to?
>
> A. No, I didn't want. He was forcing me sometimes to do it and when I don't want to.

> Q. So he was forcing you to have sex? What, did you consent to have sex?
>
> A. I didn't want it but he kept forcing me sometimes.
>
> Q. So did he rape you then "is that what you're saying".
>
> A. Sometimes maybe he is.
>
> Q. Sometimes yes?
>
> A. Because when I don't feel like…. don't feel it, he forces me to do it.
>
> Q. So your saying your saying that F has raped you in the past?
>
> A. I'm only saying sometimes I don't want to do it, he forced me, that's all I'm saying."

12. As a consequence of this exchange, a new investigation, now of rape, was opened.

13. The court had before it a document known as CRIS Live. This document records details of the investigation into the alleged rape(s). The investigation sheets record the considerable efforts to which the police went in order to progress the investigation between 2 August 2018 and December 2018. The mother was difficult to contact but, eventually, arrangements were made by the police to meet her at locations which would be familiar and convenient to her. Attempts were also made to arrange a VRI (Video Recorded Interview). Miss Hayford, on behalf of the mother, accepts that the mother failed to keep any of the appointments which were made by the police and which would have allowed the police properly to investigate the case.

14. Inevitably, given the mother's singular fail to cooperate, the police took no further action.

15. Meanwhile, the care proceedings progressed. By 13 December 2018, the court had the benefit of a cognitive assessment of the mother which had been prepared by a psychologist, Dr Gary Taylor, who found the mother's full-scale IQ to be 72, putting her in the borderline range of intellectual functioning with a reading age of 10 years. The court also had a phycological report prepared by a Dr Julia Heller, a consultant forensic clinical psychologist, dated 24 July 2018. Dr Heller is an expert specialising in the field of personality disorder and risk assessment; she diagnosed "dependant personality disorder" in respect of the mother. It is not necessary for the purpose of this judgment to go into the detail of that report, but simply to observe that Dr Heller said:

> "The essential feature of this disorder is a pervasive need to be taken care of that leads to submissive behaviours and fear of separation. The disorder is characterised by passivity and a reliance on others to make decisions. People with this diagnosis often have difficulty expressing disagreement with other individuals, especially those on whom they are dependent."

16. Finally the court had before it a lengthy multi-disciplinary family assessment of the mother dated 15 October 2018. The report, whilst very significantly redacted, was written on the basis that the assessors were fully well aware of the mother's additional allegations, both of rape and the mother's allegation that the intervenor was guilty of controlling and coercive behaviour. The assessment (as yet untested by cross-examination) paints a tragic picture of the unmitigated brutality of the mother's own upbringing which, it says, has left her wholly unable to offer her child a safe and secure environment. The assessment unequivocally concluded that P could not safely be returned to her mother's care. A particular concern highlighted within the assessment was what was described as the "plausible way" in which, in at least two instances, there had been, on the part of the mother, a "complete disavowal of third-party information", that is to say, times when the mother had completely denied factual matters which, in each case, were conclusively substantiated by independent objective evidence.

17. In the conventional way, the local authority filed a Scott Schedule of findings sought. It included the rape allegation, controlling behaviour and findings that all the bruising seen by Dr Ahmed had been inflicted by the intervenor. The intervenor responded on 26 November 2018 admitting domestic abuse to M and to causing some, but not all, of the bruising to P. He accepted that P had suffered significant emotional and physical harm. The concessions made were largely in line with the account that the intervenor had been giving since his very first appointment with the general practitioner some months before. The mother also accepted the threshold was crossed.

18. As a result of these concessions, at a case management conference on 13 December 2018, the local authority told the court that it accepted the intervenor's admissions and was not seeking any additional findings. The intervenor argued that a fact-finding hearing was not therefore necessary but the mother and guardian disagreed and the case was adjourned until 20 December 2018. The further case management hearing took place a week later on 20 December 2018, by which time both the guardian and the local authority had seen the mother's and intervenor's response to local authority's revised schedule of facts sought. The local authority, supported by the intervenor, confirmed to the court that a finding of fact hearing was unnecessary and that the threshold, as conceded by both the mother and the intervenor, was sufficient, not only to satisfy the threshold criteria but to inform considerations as to welfare and the care plan.

19. The mother opposed this proposed route and sought a full trial in relation to the allegation of rape, controlling behaviour and the bruising to P. The Guardian supported a fact finding to establish a factual matrix of the child's lived experiences.

20. There is no separate judgment identifying the reasons for the judge's decision, but he accepted the mother's submissions and those of the guardian's , and ordered the mother to file and serve her own independent schedule of allegations. The judge ordered matters now to proceed to a specific fact-finding hearing on these outstanding issues. The judge in doing so split off the "welfare" aspect of the case to be relisted later in 2019. With the benefit of hindsight, the decision to order a so called "split hearing", in circumstances where extensive assessments had been carried out and where the recommendations (subject to the outcome of the finding of fact hearing)

were up to date, seems a surprising one, particularly given the very young age of P and that proceedings had already been ongoing for some six months.

21. Meanwhile, the case management orders reveal a further thread which the intervenor powerfully submits to this court is highly relevant to the mother's credibility in relation to her allegations. These, the intervenor submit, provide yet another example of the mother's "complete disavowal of third-party information", or just plain lying, as identified in Dr Heller's assessment.

22. In the lead up to the trial, the local authority were becoming increasingly convinced that the mother was, once again, pregnant. The mother was challenged about this and denied it. The local authority raised the matter at court and in the case management order of 13 December 2018 it is recorded that the mother had told the court that she had attended her GP and had in her possession a letter confirming that she was not pregnant. The mother was to give the same to her solicitor. This was followed up in a further recording in the order made a week later on 20 December 2018, now saying that the mother had informed the court that she did not have a letter from the GP but gave permission for the social worker to speak to her GP about whether she was or was not pregnant. The mother, however, subsequently failed to attend a number of appointments arranged for her by the local authority in order for it to be ascertained whether she was or was not pregnant. The mother completely denied being pregnant in her oral evidence at the finding of fact hearing.

23. The mother gave birth to a child approximately four weeks prior to the hearing of this appeal, she was, therefore, approximately 5 months pregnant at the time of the fact-finding hearing.

Additional Evidence

24. By an application dated 8 April 2019, the intervenor sought permission to adduce fresh evidence in relation to two matters. All parties agreed that the evidence satisfies the *Ladd v Marshall* test and accordingly permission was granted.

25. The first topic relates to a further child protection medical examination which took place on 25 February 2019 when P was presented with substantial bruising. Seventeen areas of bruising and marking were noted. A cluster of five bruises were regarded as typical of finger tips of an adult hand, and a further bruise on the inside of the right knee was regarded as likely to have been caused non-accidently.

26. P has been removed from the care of the foster carers and an investigation is taking place.

27. The intervenor and the children's guardian properly brought this to the attention of the court together with the medical opinion that many of these bruises could have been caused during significant tantrums or could represent a lack of appropriate supervision. The intervenor submit that this is highly relevant given the unsatisfactory conditions in which P as a toddler was living, when a total of eleven bruises were noted at the child protection medical following the intervenor's attendance at the general practitioners. This additional evidence reinforces the local authority's view that they had reached the correct decision in accepting the

intervenor's consistent admissions as to which of the bruises seen on P had been caused by him.

28. The other fresh evidence relates to the recent birth of the new baby. This, it is submitted, is relevant information going to the mother's credibility and goes to the fact that the Court's attention was specifically drawn to Dr Heller's evidence about the mother denying third-party information in an apparently convincing way, which evidence was not considered or referred to in the judgment.

The order for a fact-finding hearing

29. The judge decided that a finding of fact hearing was necessary on the basis that the concessions made by the intervenor were "not enough to satisfy the mother". In my judgment, this in itself raises some issues. It is for the judge to decide whether it is appropriate to have a finding of fact hearing, notwithstanding that certain parties may wish to peruse certain issues for their own reasons. There is often a tension between the local authority and parents in cases where it inevitable that the threshold criteria will be established. Parents will, for entirely understandable reasons, wish to make concessions which will 'just' satisfy the threshold criteria, whilst local authorities may feel the need to insist on concessions/findings which they believe more properly reflects the harm they perceive the child to have suffered or is likely to suffer.

30. The law is well established in this regard. In *A County Council v DP* [2005] EWHC 1593 (Fam), McFarlane J, as he then was, summarised the law in a case where it was said that no order at all should be made but the same principles apply:

> "21. If it is lawful for the court to conduct a fact finding exercise despite the fact that at this stage no party is seeking a public law order, it is common ground that the court has a discretion whether, on the individual facts of each case, it is right and necessary to do so.
>
> 22. The relevant case law is to be found in the following decisions:
>
> *Re G (A Minor) (Care Proceedings)* [1994] 2 FLR 69 [Wall J]
>
> *Stockport Metropolitan BC v D* [1995] 1 FLR 873 [Thorpe J]
>
> *Re B (Agreed Findings of Fact)* [1998] 2 FLR 968 [Butler-Sloss + Thorpe LJJ]
>
> *Re M (Threshold Criteria: Parental Concessions)* [1999] 2 FLR 728 [Butler-Sloss LJ and Wall J]
>
> *Re D (A Child)* (9 August 2000) [Schiemann, Thorpe and Mummery LJJ]
>
> 23. It is not necessary to read substantial parts of this case law into this judgment. Indeed I note that, in a former life, I was myself rightly discouraged in *Re M* from taking the Court of

> Appeal through the authorities because the law on this point is not in any particular doubt [see p 731B].
>
> 24. The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:
>
> a) The interests of the child (which are relevant but not paramount)
>
> b) The time that the investigation will take;
>
> c) The likely cost to public funds;
>
> d) The evidential result;
>
> e) The necessity or otherwise of the investigation;
>
> f) The relevance of the potential result of the investigation to the future care plans for the child;
>
> g) The impact of any fact finding process upon the other parties;
>
> h) The prospects of a fair trial on the issue;
>
> i) The justice of the case."

31. McFarlane J then went on to itemise the factors for and against there being a finding of fact hearing. [26-27].

32. This court was told that none of the relevant case law was brought to the attention of the judge and the question of whether there should be a finding of fact hearing was not considered in any substantive way, let alone as a stand-alone preliminary point. As a consequence, the judge did not have the opportunity to consider the factors identified by McFarlane J as part of a structured analysis before deciding in his discretion, whether or not to conduct a fact finding exercise.

33. At the hearing on the 20th December 2019 the court was informed that there was an outstanding connected persons assessment and therefore the case was not ready for final hearing and the local authority sought to adjourn the final hearing but proposed using the time listed for the fact-finding hearing. None of the advocates appearing in court today appeared at the hearing on 20 December 2018, when the court decided to list a separate fact-finding hearing, but it appears that none of the relevant case law was brought to the attention of the judge and the question of whether there should be a finding of fact hearing was not considered in any substantive way, let alone as a stand-alone preliminary point. As a consequence, the judge did not have the opportunity to consider the factors identified by McFarlane J as part of a structured analysis before deciding in his discretion, whether or not to conduct a fact finding exercise.

34. It is not for this court to say how the judge would have exercised his discretion had the issue been formally considered.

The Finding of Fact Hearing

35. The judge decided to hear evidence drawn from the mother's schedule of allegations in relation to the extent of the responsibility of the intervenor for any bruising, whether the mother had been subject to controlling and coercive behaviour and whether the intervenor had raped the mother. It was obvious that the credibility of each of the intervenor and the mother was of critical importance to the outcome of the judge's determination.

36. In March 2018, the mother had travelled to Switzerland. On her return she had placed a further significant sum of money into the intervenor's account. Part of the intervenor's case was that if "things were so bad why had she returned", clearly, he said, she had money and P was with her so there was absolutely no imperative for her to return. If, the intervenor said, he was controlling, "why would he have agreed for her to go on the trip in the first place?"

37. During the trial, the mother vehemently denied having been in Switzerland at all. It was only when the intervenor was able to show the judge at a late stage in the trial an email confirming the booking with the airline and had also managed to find the luggage label which had been attached to the mother's luggage, that it became clear she was lying, although the judge put it more generously as "it became obvious that perhaps she was not telling the truth". So far as one can tell, no enquiries were made as to why she was denying the trip or how it came about that, as an unemployed woman, she returned with a substantial amount of cash. The judge recorded the various lies that the mother had told about the purpose of the trip to the intervenor, but made no adverse findings in that regard before saying:

> "I think I was as surprised as perhaps everyone else was, to find that she had gone to Switzerland and the evidence was there and supported."

38. As to why she had returned to this country at all, the mother told the judge that the friend she was allegedly visiting had "told her to return". The judge's conclusion was:

> "I find that difficult to understand why, if she was worried about things and unhappy about things, she did come back, but come back she did."

39. So far as the bruising was concerned, the judge took the view that the intervenor had caused all the bruising to P and that he was satisfied that the mother would not have done it herself.

40. The judge went on to make the following findings as to credibility:

> "49. It will have become apparent by now that I am accepting the evidence of [the mother] where it disagrees with [the intervenor] in nearly every aspect. Obviously there is the trip to Switzerland, which is clearly a lie by [the mother], but I believe from the evidence I have heard that her recounting of what happened in the flat is accurate and that [the intervenor] became a controlling man, that that control might have been exacerbated by his mental health difficulties and that [the mother] was in a difficult situation being relatively unable to get out of the property or speak to anyone."

41. On the back of this assessment, the judge went on to deal with the rape allegation. The judge said that he:

> "found it difficult to understand for what purpose [the mother] would have in making up allegations of rape given that, as I have already indicated, their sex life was frequent and enthusiastic….So the only reason I can think that she has said what she said is because it is true."

42. The judge went on:

> "54. Of course, as is often the case, it was suggested to her in respect of the sexual assault allegations, "well, why did you not tell the police or go to pursue it" and [the mother] said that she was waiting for the police to call her back, which may or may not be true, but certainly if they were going to phone her it was rather than keep on pushing but not getting through. She was waiting for them that has a ring of truth about it."

43. This later finding is of particular concern as the most cursory glance through the CRIS documents reveal that, far from there being a 'ring of truth' about the mother's account that she was waiting for the police to "come back to her", she had wilfully failed to co-operate with their investigation, a fact sensibly accepted on her behalf by Miss Hayford. These quotes represent the totality of the judge's analysis of the allegation of rape made by the mother. There was, for example, no analysis of the circumstances in which the allegation came to be made as set out in [11] above when she was being interviewed under caution and being pressed as to why P was sharing a bed with Mr V. This evidence would then have been considered against the backdrop of the mother's subsequent failure to co-operate with the police investigation.

44. It goes without saying that a finding of rape is a finding of the utmost seriousness. It equally goes without saying that it has long, and rightly, been recognised that rape can, and does, take place in a domestic setting. In my judgment however, where a court is making a finding where credibility is of central importance, whether of rape or something less serious, it is necessary for the judge to explain in his judgment why he prefers the evidence of one party over the other and how he has reconciled the conflicting extraneous material with his credibility finding.

45. The judge then moved on to consider the allegation of control [55]. With respect to the judge, the analysis is sparse both as to the evidence and the findings. He held that the intervenor was controlling on this basis:

> "59. These are small elements, but they are elements of control. They are elements of being the dominant person within the relationship within the house, what is sometimes called the alpha male."

46. Finally, at the conclusion of his short judgment, the judge summarised his conclusions as follows:

> "70. [having found that [the intervenor] did do what was alleged, what happens next is a matter for the police, but I do bear in mind and say that this decision was reached on the balance of probabilities…..I think I find all the allegations that are in dispute proved because I do not think there is anything else that is there which I have not already touched upon.
>
> 71. I have not gone into the minute detail of the evidence I heard. It is so difficult to do that without taking several hours to give judgment. What I did was take the broad brush approach and put it all together…. and to rely upon the credibility of the witnesses. I am afraid once you start the credibility on one element of it the credibility becomes clearer as one come through."

47. I completely agree that the judge cannot be expected to comb through every piece of evidence and deal with every submission. I am also conscious of the considerable pressure judges hearing care cases are under to hear an ever increasing volume of cases and to make their decisions in relation to children within a reasonable time scale. However, where a judge is making a finding he must still demonstrate that he has taken into account all the relevant evidence in relation to that aspect of the case.

Discussion

48. The judge agreed to allow the mother to press for findings which had been regarded as unnecessary by the local authority. The mother's oral evidence clearly impressed the judge and I bear in mind the considerable advantage a judge at first instance has over this court by having seen and heard the witnesses However, in reaching his conclusions in respect of the allegations made by the mother, the judge, in my judgment, fell into error by failing to consider all the evidence, in whatever form, when making his critical credibility findings. All the surrounding written evidence which was available to the judge should have been metaphorically packaged together with the oral evidence of the mother and considered in its totality. In my view, the judge's findings could not withstand scrutiny when examined against the backdrop of the whole of the evidence available.

49. By way of example, at no stage did the judge mention, factor in or pursue the mother's complete failure to comply with the court's directions which, had she done so, would have revealed her pregnancy. Miss Hayford says in defence of the mother

that, although there had been a positive pregnancy test by the time of the trial and she had failed to attend the doctor's appointments arranged for her on 'a few occasions', the mother had only denied being pregnant at the trial as she did not believe she was in fact pregnant. Valiant though Miss Hayford's attempted defence of her lay client was, I cannot accept that as an explanation on any level.

50. The evidence before the judge included Dr Hellier who spoke of the 'plausible way' in which the mother 'disavowed third party information', as well as the mother's deliberate misleading of the court in respect of the suspected pregnancy, the brazen lies she told about the trip to Switzerland and her failure to co-operate with the police investigation. In my judgment, the absence of consideration of any of these features so undermines the findings, that the appeal must be allowed, and the findings be set aside.

51. Ms Hayford urges the court to allow the judge's findings of controlling and coercive behaviour to stand. In my judgment, there is no basis upon which the court can distinguish between those findings and all the other findings. The judge's conclusions were anchored in his credibility assessment and if I conclude, as I do, that the judge fell into error in respect of his approach to credibility, then the findings in respect of 'control' must equally be set aside.

52. In the light of our indication that the appeal would be allowed, the parties have agreed a revised threshold and the matter will now move on to a welfare hearing to determine P's future without the necessity for a further finding of fact hearing.

53. These are the reasons which led to the appeal being allowed.

Senior President of Tribunals:

54. I agree

Lord Justice Patten:

55. I also agree