Court of Appeal: Civil Division

30 March 2021

PRESS SUMMARY

Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448

JUDGES: Sir Andrew McFarlane, President of the Family Division, Lady Justice King, Lord Justice Holroyde.

The court was concerned with 4 appeals from orders made in private law Children Act 1989 proceedings each of which involved allegations of domestic abuse. As well as deciding each of the appeals upon well-established legal principles, the court took the opportunity to give some guidance about a number of matters which commonly arise in the Family Court in such cases.

In view of the importance of the issues, the court permitted the intervention of a number of interested parties, namely: Cafcass (First Intervener); Rights of Women, Women's Aid Federation of England, Welsh Women's Aid and Rape Crisis England & Wales (Second Intervener); Families Need Fathers (Third Intervener); and Association of Lawyers for Children (Fourth Intervener).

At present there are a number of initiatives aimed at reviewing the approach to domestic abuse in private law proceedings dealing with applications for 'live with' or 'time spent' (contact) orders made by a parent in relation to their child or children. These initiatives include a Ministry of Justice Report of June 2020: *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: ('The Harm Panel Report')* and the *President of the Family Division's 'Private Law Working Group'* report dated 2 April 2020. *("the Reports").* Recommendations from these reports are currently being implemented.[20 – 23]

In addition to the work now being carried out in the light of the recommendations made by the two reports, the Domestic Abuse Bill is currently before Parliament.

Given these developments the court limited its guidance to a number of specific issues, and had in mind that there is properly a limit on what the court should say in relation to matters which do not strictly arise in the appeals.[2]

Domestic Abuse

The court set out as background the statistics in relation to private law cases, explaining that in 2019/2020 over 50,000 private law applications were made. In approximately 40% of those applications allegations of domestic abuse were made. Over 4000 magistrates and Family judges hear cases with issues of this nature. The Family Justice system is overborne with work exacerbated as a result of the Covid 19 pandemic.[56]

The court was satisfied that the modern approach to domestic abuse discussed in the judgment at [24 – 34] is well understood and has, through experience and training, become embedded with the vast majority of judges and magistrates sitting in the Family Court. There is, however, no room for complacency and the Family Court is engaged in a continuing process aimed at developing and improving its procedures [14]. A judge who fails properly to determine the issues before him or her is likely to be held on appeal to have been in error.[54]

The Guidance

The Guidance was given against the backdrop *of Family Proceedings Rule 2010: Practice Direction 12J- Child Arrangements and Contact Orders: Domestic Abuse and Harm* (PD12J) which sets out what a court is required to do in domestic abuse cases.[10]

It is accepted by the court, the parties and within the two reports, that PD12J remains fit for the purpose for which it was designed, namely *to provide the courts with a structure enabling the court first to recognise all forms of domestic abuse and thereafter on how to approach such allegations when made in private law proceedings*. The present appeals demonstrate that difficulties have, however, arisen in interpretation and implementation.[29]

The court focused upon the fact that central to the modern definition of domestic abuse is the concept of coercive and/or controlling behaviour. Such behaviour can cause harm to children living in a household [32-33]. The Family Court has to consider whether there has been a pattern of such behaviour as part of its approach to domestic abuse cases.

Specific guidance was given by the court in relation to:

i) Whether there should be a finding of fact hearing. The proper approach is set out at [38] which emphasises the need to consider the nature of the allegations, the relevance to the decision to be made in relation to the child, and the need for the court to decide if a fact-finding hearing is 'necessary and proportionate';

ii) The use of Scott Schedules [42]. The court endorsed the view of the parties and of the authors of the Harm Report, that the time has come for there to be a move away from Scott Schedules as a means of identifying issues to be tried by the Family Court. Scott Schedules, which identify specific factual incidents tied to a particular date and time, are at risk of failing to focus on the wider context and whether there has been a pattern of coercive and controlling behaviour;

iii) The approach to controlling and coercive behaviour [51]. The court emphasised the need to evaluate the existence or otherwise of a pattern of coercive and controlling behaviour without significantly increasing the scale and length of private law proceedings, in circumstances where delay is inimical to the welfare of a child and the courts;

iv) The relevance of criminal law concepts [61]. Whilst the Family courts and the parties who appear in them should not shy away from using words such as 'rape' in the manner in which they are used in ordinary speech, the law is clear that criminal law concepts should not be imported to the Family court. There is a distinction between judges

needing to understand the potential psychological impact of sexual assault on a victim on the one hand and the importance of Family judges avoiding being drawn into an analysis of factual evidence based on criminal law proceedings on the other [64]. A free standing sexual assault awareness training programme is in place for Family judges and it is a mandatory requirement for all Family judges to complete the programme.

The Appeals:

Re B-B: An appeal against the making of a consent order granting a father contact with his child was allowed. The judge made a number of wholly inappropriate comments to the mother at a hearing which was adjourned, the trial being unable to proceed as listed. The issue before the court was whether, notwithstanding the fact that the consent order was made a number of months later at a further hearing, the impact of those comments was such that the court could not be satisfied that the mother's consent to the order had been 'genuinely and freely' given.

The court held that, notwithstanding the pressure the judge was under and the failure of the parties to comply with the court's case management orders for the preparation of the case, the impact of the judge's comments upon a young mother must not be under estimated.

Re H: An appeal against an order made in September 2019 was dismissed. The judge found an allegation of rape to be 'not proven' and declined to determine allegations of financial and emotional abuse. The judge made an order for contact. Extensive unsupervised contact has continued until the present and has recently been confirmed following a second fact-finding hearing, before a different judge, when further allegations against the father were held to be unfounded. The Local Authority wrote to the Court of Appeal to stress the importance to the child of continuing contact. The mother does not wish contact to stop and was unable to tell the court what, in those circumstances, the purpose would be in remitting the case for a retrial. The appeal was dismissed as being academic. The court emphasised that had there been a purpose to hearing the appeal, it would not have hesitated to do so.

Re T: An appeal against the making of an order for contact was allowed. At trial, the judge did not find allegations of anal rape to have been proved and held that a number of incidents of violence on the part of the father against the mother had been minor. The issue was whether the judge should: (i) have made the finding sought of anal rape; and (ii) whether she had failed properly to recognise the significance of admitted incidents of violence as evidence of a pattern of controlling and coercive behaviour. The court held that the judge had been entitled to conclude that the allegation of anal rape had not been made out, for the reasons she gave. However, having determined that the allegations of anal rape were not made out, the judge did not then step back and appreciate the significance of the matters which she did find to have been proved. As a consequence, the judge failed to appreciate the true significance and seriousness of the father's behaviour or to consider whether the findings established a pattern of coercive and/or controlling behaviour.

Re H-N: An appeal was allowed against case management orders made consequent upon the judge having declined to make a finding of rape and having indicated that certain admitted incidents of abuse against the mother should not be taken into account. The issue was whether the judge had failed to look at the pattern of control and the abuse which were demonstrated even on the basis of the father's admissions alone. It was held that the judge had discounted the father's admissions of domestic abuse perpetrated over a significant period of time and had underestimated the significance, both for the mother and for H-N, of the fact that the father had wrongfully retained H-N abroad for a period of 8 months.

NOTE: This summary is provided to assist in understanding the Court of Appeal's decision. It does not form part of the reasons for the decision. The full judgment of the Court of Appeal is the only authoritative document. The full judgment can be found at [2021] EWCA Civ 448 and the judgment and a copy of this media summary will be made available at www.judiciary.uk