Neutral Citation Number: [2022] EWCA Civ 584

Case No: CA-2022-000144

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT GUILDFORD
HH Judge Nisa
GU21C00043

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 May 2022

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE BAKER
and
LADY JUSTICE ANDREWS

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C (A CHILD) (FACT-FINDING)

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Ranjit Singh (instructed by **Rosewood Solicitors**) for the **Appellant father**
Peter Horrocks (instructed by **Local Authority solicitor**) for the **First Respondent local authority**
Sharan Bhachu (instructed by **Owen White and Catlin LLP**) for the **Second Respondent mother**

Hearing dates : 24 March 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 4 May 2022.

LORD JUSTICE BAKER :

1. This is an appeal by a father against some of the findings made by a circuit judge in care proceedings involving his daughter, A, now aged 14. At the end of the hearing before this Court, we informed the parties that the appeal would be dismissed for reasons to be given at a later date. This judgment sets out my reasons for joining in that decision.

2. The background to this appeal can be summarised briefly. Following the breakdown of her parents' relationship in 2011, A lived with her father for over nine years until February 2021 when, aged 12, she was found alone at home by the police and removed to a family placement. In the course of a section 47 investigation, she informed a police officer and social worker that she had been left alone frequently, that her father drank excessively and that he physically assaulted her. As a result, he was arrested on suspicion of child neglect. In a police interview on 28 February, after his solicitor had read out a prepared statement, the father answer "no comment" to all questions. On 24 March 2021, A was interviewed on video. In the course of the interview, which lasted 48 minutes including two breaks, she repeated her allegations of neglect and physical abuse, referring to notes she had made prior to the interview.

3. A few days later, A showed a social worker a further note in her notebook in which she had written that her father had lifted her top and "hit my boons [sic]". For reasons which are unclear, this allegation was not followed up by the police or social services for several weeks. Meanwhile, the local authority started care proceedings asserting that the threshold criteria were satisfied on the basis of A's allegations of neglect and physical abuse. A was made subject to an interim care order. On 24 April 2021, the father filed a statement in the proceedings denying the allegations which he said had been fabricated by A under the influence of her mother and grandmother.

4. Over the next few months, A moved placement four times, including a brief but unsuccessful placement with her mother. During this period, her behaviour was very disturbed, and she took an overdose on two occasions. On 21 May 2021, A was visited at school by police officers and a social worker investigating the additional entry in her notebook. In the course of a conversation with the investigating officer, when the other officer and social worker were waiting outside, A alleged that the father had touched her breasts, threatened her with a knife if he did not let him touch her, and threatened to strangle her. When the police officer asked the other officer and social worker to come into the room and read back the note she had taken of the allegations, A became very distressed and ran to be comforted by the social worker.

5. For various reasons, including the amount of disruption A had been experiencing, there was then a further delay in the investigation. Eventually, on 3 September 2021, A took part in a second formal interview which lasted 28 minutes including two breaks. In the course of this interview, which was again recorded on video, A made further allegations against her father, including that he had touched her breasts and threatened her. On this occasion, A did not take any notes with her into the interview room.

6. Following these further allegations, the local authority filed an expanded threshold document setting out 25 findings it was seeking, principally against the father but including some against the mother. The father's legal representatives applied for an order that A give evidence at the fact-finding hearing. At a case management hearing

on 20 September, a district judge directed the children's guardian to prepare a report as to whether A should give evidence and listed that issue for a "*Re W*" hearing before the trial judge on 29 November. The parents filed responses to the local authority's revised threshold document. In his responses, the father denied all the allegations and asserted, in respect of the sexual abuse allegations, that that they were "entirely fabricated" and that he believed that A had been "brainwashed" into making them so that the police could extend his bail conditions. On 4 November, the guardian filed a report recommending that A should not give evidence "in any form". At the hearing on 29 November, the judge directed that A should not give evidence but asked the guardian to consider whether she should provide answers to limited written questions. In response, the guardian recommended that she should not be required to answer any further questions.

7. The fact-finding hearing took place over seven days in January 2022. The judge watched the video recordings of A's two interviews. The local authority called a number of professional witnesses including those involved in the investigation and interviews of the child. The mother attended the hearing and gave evidence. The father refused to attend court or give evidence via a video link, notwithstanding the judge's warning that an adverse inference might be drawn. There was no application to the judge to reconsider her decision that A should not give evidence.

8. At the conclusion of the hearing, the judge gave an ex tempore judgment. She started by identifying the relevant legal principles, referring to an agreed note of the law prepared by counsel and citing a number of authorities, including:

   (a) the observations of this Court in *Re JB (Child: Sexual Abuse Allegations)* [2021] EWCA Civ 4 about the approach to interviews conducted under the Achieving Best Evidence ("ABE") Guidance;

   (b) the principle in *R v Lucas* [1981] QB 720. although she added that "no one has asked that I apply that to any of the evidence";

   (c) the observations of this Court in *Wiszniewski v Greater Manchester Health Authority* [1988] PIQR 324 concerning the drawing of adverse inferences.

9. The judge proceeded to summarise the evidence given by the professional witnesses called by the local authority - police officers and social workers - whom she described variously as clear, consistent, accurate, truthful and reliable. She set out in some detail their evidence concerning the statements made by A about her father during the various conversations and interviews that took place in the course of 2021. The judge then considered the evidence given by the mother, concluding that, whilst she loved A, her volatile behaviour was likely to cause her emotional harm and that she lacked the insight and understanding to care for her daughter safely.

10. The judge then addressed the father's failure to attend the hearing or give evidence. She said:

> "I understand that the reason given by him is that, if A is not attending court, then he is not attending court either. I think that is an absolute ridiculous reason for an adult to give as to their non attendance. Mother is clearly in court. I do not see why the

> father should not be in court. There are serious allegations that are being levied at the father. His response is a simple denial and saying that the mother or the grandmother or both have put A up to making these allegations against him."

She proceeded to consider the father's limited written response to the findings sought by the local authority. She went through the allegations of neglect and verbal and physical abuse, and concluded that she was satisfied by the local authority's evidence, and proceeded to make the findings as sought, save for some which she decided were a repetition of others.

11. The judge then turned to the allegations of sexual abuse. At paragraphs 98 to 101 of her judgment, she said:

> "98. It is clear that in the ABE interviews she has not been prompted. The interviews I would say have been in accordance with the guidelines, despite the fact that the second interview, the truth and lie test was not recorded on the tape, I am satisfied that the interviews conducted this test. The ABE interviews have considerable weight attached given the disclosures made, the demeanour of A at those interviews and the fact that she has not been prompted.
>
> 99. In fact, she has been left very much to her own devices and my observation is that in the first interview, which is recorded, A has considerable notes in her hand. She seems very confident when she is looking at her notes: great reminders for her as to what she wants to talk about and she moves on from one note to another and you can see the way she moves the pages in doing that. Nobody is prompting her at all. Very few questions are asked of her and I would say that that is very appropriate, otherwise the criticism would be that she is being probed and she is being prodded and she is being led. She certainly has not. The second interview, she reveals, I would say, very serious allegations, more serious than the first interview and she is more withdrawn. She does not have the use of the notes in the same way as she did before, but she is able to demonstrate by using a drawing that was made for her to indicate where her father had touched her. It is quite clear that she is incredibly uncomfortable in making these disclosures.
>
> 100. It is to be noted that the first interview happened in March 2021. The second interview happened in September 2021. Between those two dates, she had moved to five different placements in total and two attempted suicides by her. That, quite clearly, from her demeanour, I would say, has affected her considerably. She appeared to be a different person from the first interview to the second and the allegations are far more serious and no doubt the effect on her is grave, as can be seen: the young bubbly girl able to talk more freely using her notes in the first interview, to the second interview where she is very distressed.

> You can see she is visibly distressed. She had been crying. She took a break as soon as that difficult issue was raised. She came back very upset and carried on but did not want to disclose anymore because of her distress.
>
> 101. She was, in my view, able to give as much information as she could at that time. It may be that at some later date further disclosures are made. I do not rule that out either. But I cannot say that the ABE interviews should not have significant weight. They do, but not on their own. Looking at all the other evidence, all the other disclosures to the professionals, the notes she has made, all added together paints a picture that this child is telling the truth."

12. The judge described the father's assertion that A had been brainwashed into making the allegations so that the police could extend the bail conditions as "ridiculous" adding that it had "no evidential basis". She then returned to his failure to attend court or give evidence.

> "107 …. The least I would have expected was the father to have come to court to be cross-examined on his evidence. He has not given the opportunity to anybody to cross-examine him. He has simply denied it and not attended court.
>
> 108. My view is that that is totally unacceptable. He had his warning at the beginning of the hearing that if he did not attend court to give evidence that an adverse inference may be drawn and findings may be made against him. He was given the opportunity to attend by video link on the basis that he had Covid. He was not prepared to attend whatsoever. He has had the opportunity to. He has been given the warning to and all of these allegations, very serious allegations, where he has not been able to stand in the well of the court and rebut those in any meaningful way.
>
> 109. I would find it [unbelievable] if A would be making such serious allegations against her father in the manner that she is putting. It would be [unbelievable] if she fabricated them. She does not seem, from my assessment of her evidence and her interviews, to be someone who would be making these up. She was incredibly distressed at the second interview and has been distressed at various times when she has made disclosures to the social work team. That distress, I would say, is indicative of the way in which the father has treated her. I accept her evidence in that regard and the disclosures made and so I will make those findings ….
>
> 110. Father, out of his own choice, has chosen not to attend court and that has certainly led me to draw the inference that he is not telling the truth and is simply denying everything rather than attending court and facing the very serious allegations that

> have been made against him. I can only draw that inference from his non-attendance and his denials, particularly the serious nature of some of these allegations. He should have been in court."

13. After the judgment, Mr Horrocks for the local authority reminded the judge that there had been evidence that A had not always been truthful. He cited a false statement she had made about cutting her stomach. Mr Horrocks invited the judge to reconsider whether a ***Lucas*** direction was appropriate because "although she may have told untruths on certain occasions or not being totally honest, nonetheless that does not mean that she was not telling the truth as to matters which you have found established." The judge responded by reciting evidence given by the social worker about A's allegation concerning the cuts and continued:

> "It was clear that A understood that that did not happen, but it was something that she thought had happened in her head. To say that she actually lied is very difficult, but it is quite clearly something that has not happened, and she thought it did, but there is a plausible explanation that she was traumatised at the time. That I do not hold against her in terms of saying that, because that is something that is factually incorrect, the rest of her evidence are lies or untruths…."

14. Following judgment, a further case management order was made in preparation for a final hearing, to which was appended a schedule of the findings in the following terms:

> "(1) A was left alone and unsupervised by the father at her home address between about 9pm on 27 February 2021 and about 5am on 28 February 2021.
>
> (2) During this time the door to the property was unlocked, the windows were left open and the property was cold.
>
> (3) A had been provided with inadequate bedding to keep her warm.
>
> (4) The physical condition of the home was untidy, dirty, had cat litter throughout the property and was unacceptable for a child.
>
> (5) A was instructed by the father to say if anyone called at the property in his absence that she was 14 years old although her actual age at the time was 12 years.
>
> (6) A was scared while alone at the property when the police attended there at about 5am, banging on the door and shouting loudly.
>
> (7) The harmful experiences during this incident of being left alone and the police attending caused her to have nightmares subsequently.

(8) A was left alone at home by the father on a very frequent basis for long periods in the evening and sometimes overnight, causing her anxiety, fear and difficulty with sleeping.

(9) The father on several occasions returned home in the early hours of the morning intoxicated after being out drinking with friends.

(10) The father was at the relevant date consuming chronic excessive levels of alcohol.

(11) A was regularly spoken to by the father when angry in offensive, gratuitous and upsetting terms including 'little bitch', 'cunt' and 'twat'.

(12) A was subjected on multiple occasions to physical abuse by the father.

(13) On an unknown date the father told A to get milk from the fridge and when she had done so pulled her hair, dragged her into the living room, hit her on the head and used the words 'If you don't hurry up you slow cunt'.

(14) On the 9th March 2021 A had 4 bruises on her legs when seen on medical examination, which had been caused by the father kicking her.

(15) On an unknown date the father:

(a) pushed A on to the bed;

(b) hit her head on more than one occasion;

(c) stroked her breasts;

(d) pulled up her top and stroked her breasts.

(16) On frequent occasions the father made A get in bed with him when he returned home drunk.

(17) During some such incidents:

(a) A tried to leave but he dragged her back by her hair.

(b) The father locked his bedroom door and windows so that the child could not leave.

(c) The father asked for 'a cuddle' and pulled the child's top up.

(d) The father touched A's breasts and outer thighs whilst in his bed.

> (e) The father threatened to strangle A when she indicated that she wished to leave the room.
>
> (f) On one occasion the father did put his hands round her throat in this manner.
>
> (g) The father threatened to use a pocket knife on A if she did not let him touch her.
>
> (h) On one occasion the father held the knife against A's neck.
>
> (18) The mother displays signs of a borderline personality disorder and fits the criteria for an emotionally unstable personality disorder.
>
> (19) The mother had difficulty in coping when A was placed in her care between 1 April 2021 and 21 May 2021 and displayed a lack of insight into the situation and her ability to care for A and an inability to work with professionals.
>
> (20) A's distress in the mother's care at this time and the overdose taken by the child on 10 May 2021 is evidence that at the relevant date (29 March 2021) there was a likelihood that she would suffer significant emotional and/or physical harm in the care of the mother arising from the mother's excessive and frightening shouting or volatile behaviour or derogatory remarks about the father and that there was a realistic possibility she might self-harm."

15. An application for permission to appeal was refused by the trial judge. On 7 February, a notice of appeal to this Court was filed seeking permission to appeal against findings 11 to 17 in the schedule quoted above. Permission to appeal was granted by me on 21 February.

16. Two grounds of appeal were advanced in the notice of appeal:

(1) (i) The judge was wrong to accept A's evidence, which arrived before the court via a flawed ABE process that did not meet the burden of proof or adequately provide the father with sufficient opportunity to explore the inconsistencies in a fair way. (ii) Furthermore, the judge was wrong to reject the father's reasoning for not giving evidence (that the process of investigation had been an unfair one) and to go on to draw adverse inferences and make the findings numbered [11-17] set out in the schedule to her order.

(2) Although having rejected the application for the child to give evidence at an earlier hearing (a decision that has not been appealed), the judge should have kept under review whether she needed to hear from the child in circumstances where it was apparent that the ABE process was flawed or that the inconsistencies in A's account had not been properly investigated and/ or the process of investigation had been unfair.

At the outset of the hearing, however, Mr Singh informed us that, in the light of the decision of this Court in *Re E (A Child) (Family Proceedings: Evidence)* [2016] EWCA Civ 473 and in particular the observations of McFarlane LJ at [65], and the fact that no party invited the judge to review her decision that A should not give evidence, the second ground of appeal would be withdrawn. The appeal therefore proceeded on the first ground, although as summarised above it consisted of two separate though linked points.

17. In support of the contention that the judge was wrong to accept A's evidence, Mr Singh made a series of submissions directed principally at the conduct of the interviews recorded on video. In doing so, he relied on the summary of principles set out by this Court in *Re JB* , supra, including the observation made by MacDonald J in *Re P (Sexual Abuse: Finding of Fact Hearing)* [2019] EWFC 27 at paragraph 856 (approved in *Re JB* at paragraph 11):

> "The ABE Guidance is advisory rather than a legally enforceable code. However, significant departures from the good practice advocated in it will likely result in reduced (or in extreme cases no) weight being attached to the interview by the courts."

It was Mr Singh's contention that, given the poor quality of the overall investigation in this case, the departures from the practice recommended in the Guidance were on a scale which should have led the judge to attach no weight to the interviews.

18. With regard to the first interview, he pointed out that it was apparent from the video recording that, during the early stage in the interview intended for "free narrative", A had in fact been reading from notes she had written before the interview. Mr Singh accepted that the ABE Guidance permitted the use of props in the course of an interview and that pre-written notes could in some circumstances be used without undermining the reliability of the account given by the interviewee. In this case, however, he argued that A relied on the notes to such an extent that there had been no "free narrative" at all. Furthermore, Mr Singh submitted that the supplementary questions asked during the first interview had been very limited. As a result, the evidence achieved during the first interview was unreliable and the judge should have attached no weight to it.

19. With regard to the second interview, Mr Singh submitted that the evidence obtained was again unreliable, for several reasons. First, although A had made allegations of sexual abuse on 26 March 2021, shortly after the first interview, she was not interviewed again for over five months. Mr Singh submitted that this was an unacceptable gap which undermined the reliability of, and weight to be attached to, anything said during the second interview. Secondly, the conversation between A and the investigating officer on 21 May 2021 was a breach of the Guidance which provides that interviews in the course of investigations of this kind should be formally recorded. Thirdly, during the second interview, the investigating officer had not addressed the differences between the new allegations made by A and those made during the first interview. As a result of this omission, the serious allegations of sexual abuse had not been properly investigated to the standard necessary to allow the judge to give any weight to the evidence. Fourthly, during the second interview, there was no "rapport" stage recorded on camera. The evidence was that this had been completed before the interview. Mr Singh submitted that the judge should have concluded that this was an unacceptable breach of the Guidance. Fifthly, Mr Singh drew attention to a leading

question asked during the second interview when the officer asked: "just to clarify, when you're talking about your chest, do you mean your breasts?"

20. Mr Singh therefore submitted that there had been significant breaches of the ABE guidelines and that the overall standard of the investigation was poor. Furthermore, the judge had failed to attach sufficient weight to the evidence that A had fabricated an account of harming herself. In circumstances where the child's evidence had not been properly tested, either through a fair investigation or cross examination, the judge had been wrong to make the findings.

21. With regard to ground (ii), Mr Singh cited the observations of Brooke LJ in *Wiszniewski v Greater Manchester Health Authority* [1988] PIQR 324 in summarising the correct approach to the drawing of inferences from a failure to attend or give evidence:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

Mr Singh submitted that the father had been entitled to a fair hearing and his belief that a process in which he had not had an opportunity to challenge A's allegations was unfair amounted to a satisfactory reason to remain silent. Accordingly, the judge had been wrong to draw an adverse inference from his failure to attend the hearing and give evidence.

22. Despite Mr Singh's carefully crafted submissions, I was wholly unpersuaded by his criticisms of the investigation and the judge's analysis.

23. This is not the occasion for any further general comment about the ABE Guidance. This Court has considered appeals based on failures to comply with the Guidance on a number of occasions in recent years, most recently in *Re JB*, supra. For present purposes, the key point is that made by MacDonald J in *Re P*, endorsed in *Re JB*, and recited above. Significant departures from the Guidance are likely to result in reduced, and in extreme cases no, weight being attached to the interview. It is for the judge to consider the interviews, and the extent to which they comply with or depart from the

Guidance, in the context of all the other evidence. The approach of the appellate court to this exercise is no different from every other appeal against findings of fact. The assessment of evidence, and the apportionment of weight to be attached to each piece of evidence, are matters for the judge at first instance. An appeal court will only interfere with findings of fact by trial judges where there is a very clear justification for doing so.

24. In this case, it is plain that the judge was fully alive to the criticisms made of the investigation. Dealing with the specific points raised by Mr Singh, it is clear, first, that the judge was aware that A had referred extensively to notes during the course of the first interview. It was the judge's clear impression from watching the video that the notes were "reminders for her as to what she wanted to talk about" and that this was a form of free narrative in the sense that it was unprompted by anything said by the officers. It was also the judge's impression that very few questions were asked in the course of this interview, although it is clear from the transcript that a number of follow-up questions were put to the child after she had given her account based on the notes. I see no basis for this Court concluding that the judge's evaluation of the first interview was flawed.

25. With regard to the second interview, the judge was again plainly aware of the gap of several months between the allegation of sexual abuse first being made in March 2021 and the second video interview in September. She looked carefully at the evidence given by the investigating officer about the conversation in May 2021. She noted the fact that the rapport stage, and in particular the "truth and lies" discussion recommended in the Guidance, had not been recorded. She was entitled to conclude that this omission did not undermine the weight to be attached to A's statements during the interview. It is correct that she did not refer to the leading question identified by Mr Singh. To my mind, however, that error by the investigating officer, which she candidly accepted in her oral evidence, was manifestly not significant in the overall context of the interview. Furthermore, I do not accept Mr Singh's criticism that the evidential weight to be attached to the second interview in September should have been reduced because the interviewing officer did not challenge A about the differences between the allegations she was now making and those made in the earlier interview in March. As Peter Jackson LJ observed in the course of the hearing, there is a distinction between different accounts and inconsistent accounts. There were no or no substantial inconsistencies between the two interviews. Mr Singh's submission really amounts to a proposition that the reliability of the allegations in the second interview is undermined by the fact that A did not mention them during the first. The judge's analysis of the differences between the two interviews was careful and measured. Her interpretation of the development of A's allegations was based on her evaluation of all of the evidence. As with the first interview, I see no basis for this Court concluding that that her analysis of the second interview was flawed.

26. There is no merit in Mr Singh's submission that the judge's analysis was flawed because she failed to take into account the fact that A had fabricated an allegation of self harming. It is correct that the judge overlooked this point when delivering her ex tempore judgment but she comprehensively addressed it when properly reminded by Mr Horrocks. I am wholly unpersuaded that this minor omission undermined her judgment in any way.

27. I turn finally to the argument about adverse inference. The summary of the principles in *Wiszniewski* is consistent with observations in earlier authorities, including that of Lord Lowry in the House of Lords decision of *R v IRC and another, ex p T.C Coombs and Co* [1991] 2 AC 283 at page300 F to H:

> "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."

But as Holman J observed in *Re U (Care Proceedings: Criminal Conviction: Refusal to Give Evidence)* [2006] EWHC 372 (Fam), [2006] 2 FLR 690 at paragraph 30, in a passage approved by this Court recently in *Re T and J (children); A mother v A Local Authority and others* [2020] EWCA Civ 1344, Lord Lowry's observation does

> "no more than describe and illustrate the very broad discretion of the court to draw adverse inferences, which must be exercised in a very fact-specific context."

28. As the citation from paragraphs 107 to 110 of her judgment shows, the judge considered the father's refusal to attend the hearing in order to give evidence in the context of the facts of the case. She found the appellant's explanation for refusing to attend "ridiculous". She was entitled to come to that view. In effect, she was saying that his reason for not giving evidence was not credible. In those circumstances, she was entitled as a matter of law to draw an adverse inference.

29. In short, this was a case in which the judge carefully considered the evidence and set out her findings, and the reasons for making them, in a judgment which, although delivered ex tempore, was comprehensive and thorough. This was not a case in which the limited departure from the ABE Guidance was on a scale which undermined the reliability of the child's allegations. The judge was plainly aware of the details of the investigation, and took into account all the submissions made about it on the father's behalf. In those circumstances, there is no justification for this Court interfering with her findings. For those reasons, I concluded that the appeal should be dismissed.

LADY JUSTICE ANDREWS

30. I agree.

LORD JUSTICE PETER JACKSON

31. I also agree.