



Neutral Citation Number: [2023] EWCA Civ 706

Case No: CA 2023 000479

**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**ON APPEAL FROM THE FAMILY COURT SITTING AT SWINDON**

**Her Honour Judge Wright**

**SN22C50114**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/06/2023

**Before:**

**LADY JUSTICE KING**

**LADY JUSTICE ASPLIN**

and

**LORD JUSTICE BAKER**

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**S (A CHILD)**  
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**Jennifer Swan** (instructed by **Bevirs Law**) for the **Appellant**

**Tracey Hennessey** (instructed by **the Local Authority**) for the **First Respondent**

**Neil Johnstone** (instructed by **Wilson Solicitors**) for the **Second Respondent**

**Andrew Bond** (instructed by **Reeds Solicitors**) for the **Third Respondent**

Hearing date: 8 June 2023  
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## Approved Judgment

This judgment was handed down remotely at 11.00am on 20 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lady Justice King:**

1. This is an appeal brought by a biological father without parental responsibility ('the father') against the decision of HHJ Wright made on 20 February 2023 whereby she refused his application to be joined as a party to care proceedings in relation to his son ('S').
2. The issue before this court is whether the judge, in deciding whether to join the father as a party to the care proceedings, applied the wrong test and, as a consequence, fell into error in concluding that there was a justifiable reason for dismissing his application.
3. In order to ensure that a listed Issues Resolution Hearing can proceed the following week, we informed the parties of our decision to:
  - i) Allow the appeal;
  - ii) Join the father as a party;
  - iii) Remit to the judge at the Issues Resolution Hearing all questions as to the extent and form of the father's involvement in the proceedings including the disclosure and redaction of documents.
4. The following are my reasons for allowing the appeal.

*Background*

5. The appeal concerns S, aged 11, who has a number of physical, emotional and neurodevelopmental issues. S's mother ('the mother') is the Second Respondent. S was born as a consequence of a consanguineous relationship between the mother and the father, as whilst the father is S's biological father, he is also the paternal uncle of the mother. The father is not named on S's birth certificate and does not have parental responsibility for him. S believes that the father is his uncle.
6. The mother conceived S when she was 17 and living with the father who had assumed a parental role following the death of her own father. In December 2019, after a little over 8 years of the mother, father and S living as a family, the mother left the family home and moved to a different part of the country. At the same time, she made allegations of rape against the father to the police, including an allegation that S was conceived following rape. The father has now been charged with two counts of rape and one of sexual assault. His plea hearing took place on 19 May 2023.
7. As a result of concerns which were unrelated to the father, S was made the subject of a Child in Need plan in early 2022. S was then made the subject of a child protection plan under the category of neglect in August 2022 and on 26 October 2022, the local authority issued care proceedings.
8. The father was given notice of the proceedings in November 2022 and made an application to be joined as a party as soon as was practical on 2 December 2022. A hearing was listed on 9 January 2023, at which the court gave directions and listed a contested hearing for 20 February 2023. At that hearing, the father's application for joinder was opposed by the local authority, the mother and the Children's Guardian. As already noted, the judge dismissed the father's application to be joined as a party.

### *The Legal Framework*

9. The law in relation to the joinder of fathers who have not got parental responsibility has long been settled and there is no dispute between the parties as to the proper approach. The issue in the present case is not whether the judge went beyond the wide discretion afforded to judges in relation to such case management decisions, but whether the judge applied correctly the principles underpinning the decision she had to make.
10. Under r.12.3(2) of the Family Procedure Rules 2010 ('FPR 2010'), an applicant has an automatic right to be made a party to proceedings if he or she has parental responsibility for the child concerned. Since the father does not have parental responsibility, the application is made under r.12.3(3)(a) FPR 2010, which provides that the court 'may at any time direct that any person or body be made a party to proceedings.'
11. There is no guidance in the FPR 2010 or the Children Act 1989 as to the factors that the court should consider when exercising its discretion under r.12.3(3)(a) FPR 2010. The court must, however, apply the overriding objective in r.1.1 FPR 2010.
12. There are a number of guiding principles set out in the authorities:
  - i) The child's welfare is important but not paramount: *North Yorkshire County Council v G* [1993] 2 FLR 732.
  - ii) Where a father without parental responsibility applies to be joined as a party to care proceedings concerning the child, there is a presumption in favour of granting the application unless there is a 'justifiable reason' for refusing it: *Re B (Care Proceedings: Notification of Father without Parental Responsibility)* [1999] 2 FLR 408 ('*Re B*'); *Re P (Care Proceedings: Father's Application to be Joined as a Party)* [2001] 1 FLR 781 ('*Re P*').
  - iii) There is no requirement for a father without parental responsibility to show 'an arguable case' or even to have a specific application to make. Holman J said in *Re B* [p 413]:

"So joining the father as a party does not really depend upon the existence of 'an arguable case' at all. The father may not have any particular application that he wishes to make, but nevertheless in my judgment, ought ordinarily to be able to be heard, if he wishes to be, before major decisions are made."
  - iv) What amounts to a 'justifiable reason' to rebut the presumption in favour of a father being joined as a party is a matter for the discretion of the judge having considered and put into the balance all relevant matters.
  - v) There is no requirement to consider the factors in s.10(9) Children Act 1989 which relates to the joinder of persons in relation to section 8 Children Act 1989 private law proceedings.

vi) The court must consider the parties' Article 6 and 8 rights, including those matters set out in *Re CD (Notice of care proceedings to father without parental responsibility)* [2017] EWFC 34 at [29] (*'Re CD'*) which are:

“(a) the determination of whether family life exists is essentially a question of fact;

(b) family life is not confined solely to marriage-based relationships; however,

(c) mere biological kinship is not of itself sufficient to constitute family life;

(d) cohabitation, though not a pre-requisite, is an important factor to be taken into account when considering the existence or otherwise of family life; however,

(e) other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto family life;

(f) there must be evidence of a close personal relationship, a demonstrable interest in and commitment to the child.”

13. Even without parental responsibility, the father is treated under the Children Act 1989 as a legal parent and is entitled as of right to apply for any orders in respect of his child. Further, if his child is in care, the father is entitled under s.34(1) Children Act 1989 to reasonable contact with his child subject to a court giving the local authority permission to refuse it.
14. Given the father's status as a legal parent, it is unsurprising that the starting and often finishing point when considering whether a father without parental responsibility should be joined as a party, is the presumption in favour of his being granted party status regardless of whether he has or has not a good arguable case. It follows that, before refusing a father's application, the court must find on the facts that there is a justifiable reason **not** to join the father and not that the father must establish a justifiable reason to be joined.

*Potential mitigation of the impact of the joinder of a natural father*

15. As is often the case in relation to well established law, the authorities are relatively old. I would for my part bearing in mind the most recent iterations of the FPR 2010 add one further matter to be placed in the balance where a court is faced with an objection to a father being joined as a party in care proceedings. In my view, the presumption in favour of a father being joined to the proceedings should not be displaced if the concerns of the other parties (often the mother) can be properly mitigated by the court making use of the extensive tool kit now available to it in the form of its general case management powers and its powers in relation to vulnerable parties.
16. Under r.4.1(b) FPR 2010, the court has the power, *inter alia*, to make such orders for 'disclosure and inspection, including specific disclosure of documents as it thinks fit'.

In *Re R (Children: Control of Court Documents)* [2021] EWCA Civ 162, Peter Jackson LJ reviewed the court's power to control documentation at paras. [13 – 15]. He went on at para. [19] to consider the exercise of that power, emphasising that the power should only be used when 'strictly necessary' with the court 'being rigorous in its examination of the feared harm and careful to counterbalance any resulting disadvantages to ensure a fair trial'. Peter Jackson LJ went on to refer to *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017, a case which was concerned with keeping sensitive documents in care proceedings away from a father at the request of a mother. On the facts of that case, the interference with the father's rights was justified by the need to protect other rights.

17. In my view, the use of such a power would undoubtedly be 'strictly necessary' if the alternative was to deprive a natural father of the opportunity to be a party to the care proceedings in relation to his child.
18. In the present case, each of the parties have agreed that, in the event of the father being made a party, they would intend to agree a list of documents (or, if not agreed, to be determined by the judge) which would be disclosed to the father appropriately redacted. Those documents would be limited to those necessary in order for the father to have a full picture of S's circumstances and welfare needs and of the proposals put forward by the parties to meet those needs. Disclosure would not however include highly personal and sensitive information such as that which would be found, for example, in the psychological assessment of the mother. It was further agreed that the father would not be given copies of any documents but would be able to go through them at the office of his solicitor.
19. The use of such general case management powers would in most cases ameliorate any perceived harm in relation to the management of disclosure. Those same case management powers importantly also allow the court to make directions as to the management of hearings, reinforced if necessary by the extensive measures which can be put in place by the court as set out in r.3A and PD3AA FPR 2010 for the participation in proceedings and the giving of evidence by vulnerable persons.

#### *The Judge's decision*

20. As is appropriate in a contested case management decision, the judgment is brief. The judge starts her analysis with a correct statement of the law saying:

“5. The law that I need to apply in relation to this application is that I should consider the overriding objective and deal with the case in an expeditious, fair and proportionate way. The welfare of S is important but it is not paramount.

6. [The father] does not have parental responsibility; he is not an automatic party. There is a presumption of joinder in relation to fathers without parental responsibility unless there is a justifiable reason.”
21. However, she follows this by saying:

*“I have a broad discretion but I should consider the prospect of success in relation to [the father's] application for joinder. He should*

*have some kind of arguable case, particularly given that there is objection raised on behalf of the parties to these proceedings.’……., the real issue is that there should be a justifiable reason for joinder, given the concerns that have been raised on behalf of the existing parties to the proceedings. I should also consider the rights of both [S] and [the father] under both Articles 6 and 8 of the European Convention on Human Rights.”*

(my emphasis)

22. The judge went on to make her decision to refuse the father’s application, setting out seven matters which she had taken into account. The judge noted that the local authority had agreed to provide the father with some general information, but the focus of her analysis was the impact that allowing the father’s application would have upon the mother and her view that the father had to justify being joined to the proceedings in circumstances where, in the judge’s view, he had no case to put and was not involved in the issues which related to the threshold criteria.
23. The judge said that she had considered the father’s right to a fair trial but concluded that he had ‘no family life with [S] and [S’s] mother considers [the father] to pose a significant risk to herself and [S]’.
24. In dismissing the application, the judge said:  
  
“8. I have determined it is not appropriate to permit [the father] to be joined as a party to these proceedings. The father has no part to play in these proceedings. The local authority will give him appropriate information as to [S’s] welfare. It is justifiable, given the concerns that have been raised both on behalf of S but also on behalf of the mother and the local authority that [the father] should not be joined to these proceedings.”

*Grounds of Appeal and the position of each of the parties*

25. The father was granted permission by Macur LJ on 2 May 2023 to appeal the judge’s refusal to join him as a party on the following grounds:
  - i) The judge applied the incorrect test for joinder to care proceedings of a father without parental responsibility in that she:
    - a) wrongly considered that she ‘must consider the father’s prospect of success’ and ‘must have some kind of arguable case’.
    - b) wrongly considered that the concerns about the father’s capacity and/or cognitive difficulties effectively precluded him from putting forward a position and participating in the proceedings, despite there being no proper assessment of his ability to do so.
  - ii) The judge failed to have proper regard to the father’s Article 8 rights and his wish to have an input in the proceedings.

- iii) When considering whether there was a ‘justifiable reason’ to refuse the application, the judge failed to assess the necessity and proportionality of excluding the father or to consider whether steps could be taken to mitigate the potential impact of joinder on the mother and S.
26. Neither the local authority nor the children’s guardian oppose the appeal. They each accept that the appeal must be allowed on each of the three grounds on the basis that the judge fell into error in: (a) holding that the father had to demonstrate an arguable case; (b) reversing the burden of proof by holding that it was for the father to justify joinder; (c) holding that the father had not established an Article 8 right to family life and accordingly had no Article 6 rights to a fair trial; and (d) failing to consider whether the impact of joining the father could be sufficiently ameliorated by making a case management decision of the type identified in paras. [15-19] above.
27. The mother maintained her opposition to the father being joined as a party. Mr Johnstone on behalf of the mother was instructed at very short notice and I am grateful to him for his concise skeleton argument and the realistic way in which he put his case in oral argument. Mr Johnstone conceded that the appeal must be allowed on Ground 1 (a) and (b). The judge, he accepts, said in terms that not only should she consider the father’s prospects of success but that he should have ‘some kind of arguable case’. He sought, however, to maintain that the father had not established family life and Article 6 therefore had no application.
28. The main plank of Mr Johnstone’s submissions was that the judge initially directed herself correctly on the law and, whilst she had said in error that the father needed to show a good arguable case and to justify being joined as a party, on a proper reading of the judgment as a whole it could be seen, he submitted, that she had in fact applied the correct test. That this is the case, Mr Johnstone said, is demonstrated in the final paragraph where the judge said that: ‘It is justifiable.... that the father should not be joined to these proceedings’. The judge had therefore found there to be a ‘justifiable reason’ not to join the father. She had been entitled to reach this conclusion, submitted Mr Johnstone, taking into account in particular the distress the involvement of the father would cause to the mother, together with the necessity for her to be able to be involved in the proceedings, to participate in assessments and to be open and honest with professionals.

### *Discussion*

29. In my judgement, attractively though Mr Johnstone put his submissions, his argument that the judge had rebutted the presumption in favour of the father being joined as a party rather than having placed the burden of justifying joinder on him is not sustainable. On any reading of the judge’s analysis, it is clear that, notwithstanding what she said in the final paragraph, she had approached the application on the basis that the father had to have a good arguable case and also had to justify to the court his application to be joined as a party. I have no doubt that the judge (and the local authority and children’s guardian) were focused on the importance of this extremely vulnerable young woman being supported in such a way as would enable her to play a full part in the proceedings and to give her best evidence. The judge’s decision appeared to be coloured by the nature of the relationship between the father and the mother and the fact that the events upon which the threshold criteria relied had occurred long after the parties had separated. These concerns, however important they may be to the overall



picture, do not mean that a biological father, particularly one with Article 8 and therefore Article 6 rights, should have to justify why he should be joined as a party to care proceedings relating to his child.

30. The judge further said that the father ‘has nothing to contribute; and [the father’s] limited family life in relation to S; he has no family life with S.’ In my judgement, upon a proper application of the general principles as enumerated in *Re CD*, this father had undoubtedly established family life as is now conceded by both the local authority and the children’s guardian. Whatever the nature of the relationship as between the mother and father, they had lived together as a family with S for over 8 years before the separation. Further, although the father had not had contact with S following the mother’s relocation, he made his application to be joined to these proceedings within weeks of being given notice of them.
31. The father’s Article 8 rights having been established, it follows that he also has an Article 6 right to a fair trial. Such a right incorporates, in relation to a biological father without parental responsibility, a presumption that he will be entitled to be joined as a party to care proceedings.
32. The judge therefore, in my judgement, failed to take into account the Article 8 and Article 6 rights of the father. The heart of her error, however, was that she held not only that the father had to establish a ‘good arguable case’ but that ‘there should be a justifiable reason for joinder’. This approach unfortunately infected her overall analysis. For example, she said: ‘The first issue is the basis for [the father’s] application for joinder given the justifiable concerns as to [the father] relating to the safety and welfare of both S and his mother. Given those justifiable concerns there should be some reason for the joinder’.
33. The judge also held that the father had ‘no case to put’ and had ‘nothing to contribute to the proceedings’ but, with respect to the judge, that is to miss the point because, as Holman J said in *Re B*, a biological father ‘ought ordinarily to be able to be heard, if he wishes to be, before major decisions are made’.
34. It may be that, had the judge been asked to consider possible mitigations as part of her decision making process, she would have maintained her initial, entirely correct, legal analysis rather than her understandable concern for the mother and the potential impact upon her of the father becoming a party becoming the sole focus of her analysis, resulting in the father having to justify being a party in the care proceedings relating to his child.

### *Conclusion*

35. For these reasons, as I indicated to the parties the appeal will be allowed on each of the Grounds of Appeal. In order to avoid any further delay for S, who is old enough to be conscious of the proceedings and will undoubtedly be anxious to know the outcome as soon as possible, we did not remit the issue of joinder, but rather joined the father as a party and remitted only issues of disclosure and participation to the HHJ Wright or if reallocated to the District Bench where the case started, to the District Judge to whom the case is ultimately allocated.

**Lady Justice Asplin:**

36. I agree.

**Lord Justice Baker:**

37. I also agree.