Neutral Citation Number: [2024] EWFC 14 (B)

Case No: ZE23F00041

IN THE FAMILY COURT, EAST LONDON
SITTING AT THE ROYAL COURTS OF JUSTICE

Date: 1st February 2024

Before:

Mr Recorder Adrian Jack

BETWEEN:

- -

AS
Applicant
- and -

AB
Respondent

- -

The Applicant Husband represented by **Mr Scott** of counsel instructed by **Gans & Co, solicitors**
The Respondent Wife represented by **Dr Wilson Diriwari** of **Wilsons Solicitors**

Hearing date: 25th January 2024

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Judgment

This judgment was handed down by the Judge remotely by circulation to the father and the mother's representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 12 noon on 1st February 2024.

1. This is an application by the husband for permission to appeal against a decision of District Judge Sawetz made on 4th October 2023.

2. The parties married in 2008. They have four children born between 2013 and 2019. The parties latterly lived in a four bedroom house in Dagenham. In addition, the family has a house in London E1 which is currently rented to private tenants.

3. On 17th January 2023, the husband issued an application for a non-molestation order and occupation order against the wife. The wife had made a complaint to the police who had asked him to leave the family home. This he had done and was sleeping rough. On 27th January 2023 the wife issued a cross-application for a non-molestation order and an occupation order against the husband. The two matters were consolidated and listed for hearing before Recorder Hudson on 21st February 2023.

4. On that occasion the recorder made orders against both parties not to molest each other. The father was permitted to live in the upstairs loft-conversion bedroom, which had an en suite bathroom, on the basis that he undertook not to enter the wife's part of the home. It is common ground that he broke that undertaking on one occasion by going into the forbidden part of the house, albeit when the wife was not in. Apart from that the parties appeared to have been able to live in the same house without incident.

5. On 4th October 2024 District Judge Sawatz heard the matter remotely. The husband was represented by Sourour Bassiri-Dezfoli of counsel; the wife by Jacqueline McIntosh of counsel. After hearing evidence remotely from the parties and counsel for both parties, the learned judge made a non-molestation order with the following recitals:

> "8) And upon it being recorded the Court, the court making the following findings in relation to the allegations against the Applicant that he
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> (a) Subjected the Respondent… to domestic abuse.
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> (b) He slapped the Respondent on her face causing injury to her eardrum.
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> (c) He sent abusive text messages to the Respondent… causing emotional harm to [the wife].
>
> (d) He subjected the Respondent… to coercive and controlling behaviours.
>
> 9) It being recorded by the Court, that the court determined the allegations made by the Applicant against the Respondent… were not proved."

6. She then made an extensive non-molestation order against the husband and by a separate occupation order ordered that he vacate the Dagenham property by 6pm on 6th October 2023, in other words two days later. The non-molestation order against the wife was discharged. (No appeal is brought against this discharge.)

7. The husband sought to appeal and Her Honour Judge Suk gave directions for him to obtain a transcript of the judgment of the learned district judge. It seems that, because the hearing was heard remotely, the district judge was inaudible on the recording. The Court has a backup recording, but this too was inaudible. The unavailability of any

recording was only finally determined on 17th January 2024. Since then investigations have been made as to whether any full note of the judgment was made. It transpires that Ms Bassiri-Dezfouli had not made a useable note. Despite efforts by the wife's counsel and messages sent to her chambers and indeed via her head of chambers, it has not been possible to ascertain whether Ms McIntosh took a full note of evidence. I proceed on the basis that she did not. So far as the judge is concerned, it is not reasonable to expect a judge, nearly four months after delivering an extempore judgment, to recall precisely what she said without assistance from a contemporaneous note taken by the parties' representatives.

8. FPR PD 30A provides:

> "5.23 Where the judgment appealed has been officially recorded by the court, an approved transcript of that record should accompany the appellant's notice…
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> Note of judgment – When judgment was not officially recorded or made in writing a note of the judgment (agreed between the appellant's and respondent's advocates) should be submitted for approval to the judge whose decision is being appealed. If the parties cannot agree on a single note of the judgment, both versions should be provided to that judge with an explanatory letter. For the purpose of an application for permission to appeal the note need not be approved by the respondent or the lower court judge…
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> 5.25 Advocates' brief (or, where appropriate, refresher) fee includes –
> (a) remuneration for taking a note of the judgment of the court;
> (b) having the note transcribed accurately;
> (c) attempting to agree the note with the other side if represented;
> (d) submitting the note to the judge for approval where appropriate;
> (e) revising it if so requested by the judge,
> (f) providing any copies required for the appeal court, instructing solicitors and lay client; and
> (g) providing a copy of the note to an unrepresented appellant."

9. In the past, when Court proceedings were not audio-recorded, it was well understood to be the duty of counsel to take a full note of an extempore judgment. With the advent of audio-recording, however, I have not found any reference in the Bar Code of Conduct to counsel having such a duty in cases where an audio-recording is normally made. Para 5.25 could be read as putting such a duty on counsel, but an alternative reading is that, in cases where there is no audio-recording, counsel cannot charge separately for a preparing a full note of the judgment.

10. CPR rule 39.9(5) provides:

> "At any hearing, whether in public or in private, the judge may give appropriate directions to assist a party, in particular one who is or has been or may become unrepresented, for the compilation and sharing of any note or other informal record of the proceedings made by another party or by the court.

11. This, however, provides for the sharing of such a note as has been made. It does not create a duty on a represented party to prepare a note. Making a full note of a judgment is onerous. In my judgment it is a matter for counsel how full a note they should make

of a judgment. It is only in cases where they know no recording will be made of a judgment that an exception should be made, so that counsel are under a duty to make a full note.

12. The significance of this is that no blame can in my judgment be attached to the husband's counsel's failure to make a full note of the judgment of District Judge Sawatz. Accordingly, the failure to be able to provide a note of the judgment should not be laid at the door of the husband.

13. This leads to the question of what is to be done with the husband's application for permission to appeal. It should be recalled that the husband has a right of appeal. He requires permission. FPR rule 30.3(7) provides:

> "Permission to appeal may be given only where –
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> (a) the court considers that the appeal would have a real prospect of success; or
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> (b) there is some other compelling reason why the appeal should be heard."

However, under FPR rule 30.3(7)(a) permission is not discretionary. If there is a real prospect of success, the Court must grant permission.

14. I turn then to what I consider the main uncertainties in the Order of 4th October 2023. The Order states that the husband subjected the wife to domestic abuse. The difficulty here is that the Order does not state the severity of the abuse. Her Honour Judge Vincent in *Re R (A child)* [2020] EWFC B57 at [98] in my judgment accurately summarised the law when she held:

> "Case law suggests I should consider the severity of the domestic abuse. The father argues that it is minor and took place a long time ago, and after which the parties reconciled. The mother would say this was serious abuse and has had long-standing consequences. In my judgement the focus of the Court should be on the consequences of the abuse. The evidence is that the *impact* of the abusive relationship continues to impact the mother in a significant way and this is only exacerbated by the father's continuing attitude towards the mother. It is not an attractive argument to have caused harm to the mother in the way I have found the father did and then to criticise her for failing to be robust enough or failing to have found a way to recover herself so as to be in a position to deal with her abuser." (The judge's emphasis.)

15. As I noted in *Re Cala and Daib* [2024] EWFC 1 (B), there are significant differences in the statutory definitions of domestic abuse in section 76 of the Serious Crime Act 2015, in FPR PD 12J para 3 and in section 1 of the Domestic Abuse Act 2021. Dealing with the issue of the father's contact with the children where domestic abuse is proved, I said:

> "34. Thus, it is not necessary for the Family Court to determine whether (in this case) a father demonstrates 2015 behaviour. Nonetheless, if the Court is satisfied on balance of probabilities that the father has behaved that way, the Court will necessarily consider that that behaviour is very serious. Although a finding of 2015 behaviour will not inevitably result in a refusal of contact, it

> may well be that, unless remedied, 2015 behaviour will be such that the risk to the children is so serious that direct contract is contra-indicated. A similar conclusion is likely in relation to 12J behaviour, unless the perpetrator can show significant improvement in his or her behaviour.
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> 35. By contrast, 2021 behaviour, which is neither 2015 behaviour nor 12J behaviour, may not be such a high bar to the perpetrator having contact with their children. It may do, or it may not do."

16. The Order in the current case recites an incident of physical abuse which resulted in damage to the wife's eardrum. The husband says, however, that this was a very old incident. It is not clear to what extent that was common ground. The husband says one incident dated to 2008. The husband points to the fact that the parties continued to live under the same roof between February and October 2023. His case is that the abuse was at the lesser end of the spectrum.

17. These considerations feed into the next two points. Firstly, the effect of the exclusion order was very significant for the husband. He was left homeless and has been sleeping rough in the back of a van. He says that his health has suffered. Secondly, the family had another house in London E1. No consideration appears to have been given to giving notice to the tenants living there, so that the husband could be rehoused. Neither of these matters are mentioned in the recitals to the Order.

18. It is arguable in my judgment that the learned district judge erred in the way in which she exercised her discretion by failing to take these matters into account and that the question as to whether it is proportionate to make the husband homeless stands to be reconsidered. It follows that the appeal has a realistic prospect of success. Accordingly I grant permission to appeal.

19. This leads to the question whether permission should be granted generally and what approach should be taken on the appeal to the evidential lacunae which result from the unavailability of a transcript of the judgment at first instance. FPR rule 30.12 provides:

> "(1) Every appeal will be limited to a review of the decision of the lower court unless –
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> (a) an enactment or practice direction makes different provision for a particular category of appeal; or
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> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
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> (2) Unless it orders otherwise, the appeal court will not receive –
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> (a) oral evidence; or
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> (b) evidence which was not before the lower court.
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> (3) The appeal court will allow an appeal where the decision of the lower court was –
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> (a) wrong; or
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> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
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> (4) The appeal court may draw any inference of fact which it considers justified on the evidence.

> (5) At the hearing of the appeal a party may not rely on a matter not contained in that party's appeal notice unless the appeal court gives permission."

20. No transcript of the judgment is available. Nor (in the light of the recording difficulties) is any transcript of the evidence heard by the learned district judge likely to be available. In these circumstances, this is in my judgment one of those rare cases where under FPR rule 30.12(1)(b) it is in the interests of justice for the appeal court to hold a rehearing. (See *Audergon v La Baguette Ltd* [2002] EWCA Civ 10, [2002] CP Rep 27, cited in Civil Procedure 2023 at para 52.21.1 the relevant principles.) The extent to which any oral evidence stands to be given under FPR rule 30.12(2)(a) or updating evidence under FPR rule 30.12(2)(b) is a matter for the judge hearing the appeal, but the parties should make themselves available to give oral evidence if the Court so orders.

21. Accordingly, I grant permission to appeal, the appeal to be held as a rehearing pursuant to FPR rule 30.12(1)(b). The extent to which oral or fresh evidence is adduced is a matter for the judge hearing the appeal.