Neutral Citation Number: [2014] EWFC 44

Case No: DX13P00730

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 November 2014

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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Re C (A Child) (No 2)

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- -

Mr Julien Foster (appearing pro bono instructed by the Bar Pro Bono Unit) for the father
Ms Lucy Reed (instructed by Battrick Clark) for the mother
Ms Donna Cummins (of Lyons Davidson) for the child

Hearing date: 12 November 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was delivered in open court

Sir James Munby, President of the Family Division :

1. This matter first came before me on 7 July 2014. Following that hearing I handed down a judgment on 6 August 2014: *Q v Q, Re B (A Child), Re C (A Child)* [2014] EWFC 31. That judgment dealt with two other cases, *Q v Q* and *Re B (A child)* as well as with this case, referred to in that judgment, and here, as *Re C (A Child)*.

2. There is no need to repeat here what I said in my previous judgment. I set out the facts (paras 38-41). I considered the relevant law (paras 58-79). I discussed the way forward (paras 83-88). The essential problem was that the father's application for "exceptional" funding in accordance with section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), made as recently as 1 July 2014, had, hardly surprisingly, not yet been determined. I said this (para 88):

> "If the father's application for public funding under LASPO is successful, then all well and good. If it is not, then I will have to consider what, if any, further order to make. I am inclined to think that, for all the reasons already indicated, the father in *Re C* requires access to legal advice beforehand and representation at the fact-finding hearing to avoid the very real risk of the court being unable to deal with the matter justly and fairly and of his rights under Articles 6 and 8 being breached. I am inclined to think, therefore, that, if he is unable to afford representation and pro bono representation is not available, and if there is no other properly available public purse, the cost will have to be borne by HMCTS."

3. In accordance with the order I made following the hearing on 7 July 2014, the matter came before me again on 29 September 2014.

4. The father's application for "exceptional" funding had not been determined. A letter dated 29 September 2014 to the court from the Public Law Project (PLP), which was assisting the father in his application for "exceptional" funding, gave a detailed and illuminating account of the process which the Legal Aid Agency (LAA) had adopted in considering the father's changing financial circumstances. This culminated in the following letter from the LAA to the PLP dated 26 September 2014:

> "Please note that the means assessment in respect of your client was based on his financial circumstances at the application. Following the change in his financial circumstances, it was incumbent on your client to complete fresh means assessment form to reflect his current position. In addition, your client will need to provide a letter from his landlord confirming what he currently pays as rent on a weekly or monthly basis. We also need a letter from the relevant Local Authority stating that his Housing Benefit Entitlement has ceased and that he is no longer in receipt of this Benefit. We have requested this additional information because whilst your client has provided us with a receipt a proof of rental payment, the receipt does not indicate

> what the payment relates to. Neither does it confirm that Housing Benefit is no longer being paid.
>
> As reiterated in our letter of 8 September, your client will also need to submit a fresh application for Exceptional Funding."

5. I record without comment the observation of the PLP in its letter to the court:

> "It is therefore the position of the LAA that [the father], having first applied for funding on 1 July 2014 and having cooperated fully with the submission of all financial information requested of him and having demonstrated his prima fade financial eligibility, is now no further along with the application process than as if that application had never in fact been made. At no point during this process has the LAA addressed the merits of [his] case, or considered whether funding should be granted in view of the requirements of fairness and [his] Convention rights."

6. Following the hearing on 29 September 2014 I made an order giving various directions. The order recited the mother's position as follows:

> "Counsel for the Mother informed the court (upon her client's express instructions) that the Mother states she cannot contemplate being present in the court room whilst the Father is present and that she cannot contemplate being asked questions directly by him, and that as such she will be unable to give evidence or to prove her allegations unless a) there are special measures in the form of a video link in place and b) the father is able to cross examine through a professional advocate. It is therefore the Mother's position that should the fact finding hearing proceed without the father having secured legal representation for the fact finding hearing the article 6 rights of the mother and child would be breached, and that should the mother be compelled to give evidence and be asked questions directly by the Father her article 3 rights not to be subjected to inhuman or degrading treatment would be breached (notwithstanding any right to refuse to answer specific questions on the ground of self-incrimination)."

7. The order also contained the following recital:

> "The court expressed concern at the level of delay to date in this case as a result of the difficulties securing representation for the Father, noting that it is now not possible to fix this matter for hearing until 5 January 2014, and confirmed that it is imperative that this fixture is effective."

8. I listed the matter for a further hearing before me on 12 November 2014 for further directions and to determine, inter alia, the issue:

> "Whether or not Her Majesty's Courts and Tribunals Service ought to be directed to fund all or part of the costs of the Father's legal representation and if so on what basis".

I directed that a copy of the order was to be served by the President's Office upon Her Majesty's Courts and Tribunals Service and the LAA. That was done. I also invited the Bar Pro Bono Unit to indicate in writing whether or not it was able, pending resolution of the father's legal aid application, to provide a representative to advise and/or assist him regarding certain specified matters, notwithstanding that it might not be able to provide him with representation at the fact finding hearing.

9. On 29 October 2014 my office was notified by an official in the Ministry of Justice that the father had been granted legal aid, conditional on his acceptance of it. The information was communicated to the parties by the PLP on 3 November 2014 in an email which said that the father had been offered exceptional case funding, subject to his agreeing to pay a monthly contribution. I was told at the hearing that he had agreed. In these circumstances the problems identified in my previous judgment fell away. There was, accordingly, no need for me to determine the issue referred to in paragraph 8 above. It is better that I say nothing more on the point. It should be determined, if it has to be, in a case where the matter has not been resolved, as here, by the grant of legal aid.

10. In the circumstances, there was no need for the Bar Pro Bono Unit to answer the questions I had posed for its consideration. Very helpfully, it arranged for the father to be represented before me, pro bono, by Mr Julien Foster. I am immensely grateful to Mr Foster (and, in relation to the previous hearing, Ms Janet Bazley QC) as also to the Bar Pro Bono Unit, for everything they have done to assist the father and the court. They deserve recognition and praise, as also Ms Francesca Wiley who appeared for the father pro bono at an earlier stage in the proceedings.

11. In my previous judgment (para 15) I set out certain statistics helpfully provided by the Bar Pro Bono Unit.[1] In a letter to the court dated 5 November 2014 it has provided up-dated information, for which I am grateful. It says that:

> "… in the first 8 months of 2014, the Unit received a total of 1491 applications (compared with 1019 in the same months of 2013). 350 of those applications were family law children cases, which compares with 291 similar applications over the whole 12 months of 2013 (the 2013 figure, in turn, representing a 70% increase from the 171 children applications in 2012) … 96 of the 206 pieces of work which could not be placed [in the first 8 months of 2014] were family law children cases … These 96 family law children cases were … considered by Unit reviewers as deserving of assistance, but … no assistance could be provided."

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[1] I said this: "In 2012 … it received 171 applications for assistance in family law children cases, in 2013, 291 applications and, in the first five months of 2014, 205 applications. The Unit, I am told, is usually unable to help in cases where the work involved extends beyond three days (including preparation time). It is unable to meet the demand. In the first five months of 2014, it was unable to place 49 family children cases."

The profession is doing what it can to help – and that needs to be recognised and applauded. But it is unable to meet the demand. And in any event, I repeat what I said more recently in *Re D (A Child)* [2014] EWFC 39, para 31:

> "It is unfair that legal representation in these vital cases is only available if the lawyers agree to work for nothing."

12. The funding issues having been resolved, all that was left for me to do at the hearing on 12 November 2014 was the giving of directions to ensure that the fact finding hearing could proceed. That done, I remitted the matter for hearing in the Family Court by His Honour Judge Wildblood QC.

13. Ms Lucy Reed, on behalf of the mother, had prepared submissions at a time when it was not yet clear that the funding issues had been finally resolved. She raised a number of important points on which there is no need for me to rule and which, as I have already said, are best left for decision if and when the need arises. That said, I think there may be advantage in setting out, in an Annex to this judgment, the core of her submissions. I do so merely to place them on the record, as I have already placed on the record, in paragraph 6 above, the mother's stance at the previous hearing on 29 September 2014. I express no views whatever as to whether or not they are well-founded.

Annex: Ms Reed's submissions on behalf of the mother

> "24 The failure of the court to progress and resolve the proceedings, and the adverse impact of them upon the mother is a continuing interference with the Article 8 rights of both mother and child to their private and family life. Insofar as it is caused entirely by the absence of the father's legal representation this interference is neither proportionate nor necessary in a democratic society.
>
> 25 Self evidently, the failure for an entire year to put the mother in a position where she is permitted to attempt to prove her allegations and get these proceedings over and done with is a breach of her Article 6 rights to a fair trial – firstly because she has been afforded no trial at all, and secondly because the delay causes irremediable prejudice to the mother's case through twin effects of the fading of memory and of chronic litigation stress and emotional exhaustion upon the mother's ability to give her best evidence. The longer the delay the worse the breach.
>
> 26 If the court is unable to resolve matters today and the fixture in January is lost the breaches of the mother's substantive rights will be compounded.
>
> 27 Conversely, if the court were to proceed with the fact finding hearing *without the father being represented* the mother would seek to rely upon her convention rights in arguing that the court was proposing to act unlawfully.

28 The breaches that the mother alleges would flow from any such direction would be caused through two mechanisms:

a Firstly, through the lack of proper notice to the mother of the father's case in reply, of the evidence he seeks to present or of any counter allegations made against her (notice),

b Secondly, through the father's direct cross-examination of the mother as a litigant in person (cross-examination).

29 The failure to give proper notice of the father's case would amount to a breach of Article 8 and 6 insofar as the mother is entitled to a fair trial of her allegations in order to protect her Article 8 rights and those of the child.

30 The mother understands and accepts that the father is entitled to challenge her evidence through cross examination. However, she is absolutely clear that she is unable to countenance the father directly questioning her through cross-examination in person. She does not feel able to give evidence in these circumstances. If she is unable to give evidence this would amount to a breach of Article 8 and 6 insofar as the mother is entitled to a fair trial of her allegations in order to protect her Article 8 rights and those of the child.

31 If the mother were able to give evidence (or were compelled either by the court or force of circumstance to do so) she is clear that she would be unable to give her best evidence. This is particularly significant (as in so many instances of domestic / sexual abuse) where there is limited independent evidence and the burden is upon the mother as complainant. Placing the mother in a situation where she would be compelled to attempt to give evidence in order to protect herself and her child from the father's future involvement would amount to a breach of Article 8 and 6 insofar as the mother is entitled to a fair trial of her allegations in order to protect her Article 8 rights and those of the child and a fair trial includes enabling a vulnerable witness to give her best evidence. Further, it would amount to a breach of Article 3 in that the cross examination of her as a victim of a serious sexual assault by the perpetrator of that assault would amount to inhuman or degrading treatment. Such an experience would be prohibited by statute for victims of such crimes in the context of criminal proceedings. Articles 6 and 3 are of course absolute rights.

…

35 Further, the experience of cross examination would itself grossly humiliate the mother and would cause her to act against her will in facing the father and being subjected questioning by him directly – that is to say that the act of cross

examination in person would not just be a failure of the state to *respond appropriately* to inhuman or degrading treatment in the form of rape, but *would itself amount to further instance of inhuman or degrading treatment*.

36 For the avoidance of doubt the mother says that there are no special measures short of the legal representation of the father by a competent advocate that would alleviate this difficulty. Those avenues have been exhaustively considered and discounted at previous hearings."