Neutral Citation Number: [2020] EWCA Civ 987

Case No: B4/2020/1148

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**
**Mrs Justice Judd**
**ZC19C00482**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2020

**Before:**

**LORD JUSTICE BEAN**
**LADY JUSTICE KING**
and
**LADY JUSTICE NICOLA DAVIES**

- - - - - - - - - - - - - - - - - - - - -

**C (A CHILD)**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Alison Greif QC and Tara Vindis** (instructed by **Charles Paulin & Co**) for the **Appellant**
**Damian Woodward-Carlton QC and Oliver Millington** (instructed by **a Local Authority**) for the **1st Respondent**
**Samantha King QC and Kevin Gordon** (instructed by **Wainwright & Cummins LLP**) for the **2nd Respondent**
**Jonathan Sampson QC** (instructed by **Reeds Solicitors**) for the **4th Respondent**

Hearing date: 24th July 2020

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

**Lady Justice King giving the judgment of the Court:**

1. This is an appeal from an order made by Mrs Justice Judd on 21 July whereby she refused to accede to an application that she recuse herself from continuing to hear care proceedings in respect of a boy, E, now aged 16 months.

2. The care proceedings before the judge arose out of the death of A, the 18 month brother of E, the son of the Appellant and the 1st Respondent. At a time of A's death the children were living with the Appellant and the Intervenor, the Appellant and 1st Respondent having separated before the birth of A.

3. The cause of A's death was a catastrophic head injury accompanied by significant bruising. The hearing with which this court is concerned is the fact finding hearing listed before the judge which was intended to establish whether A had died of inflicted injuries and, if so, to identify if possible the person who had caused the injuries to A which had led to his death.

4. The trial started on 1 July 2020. It was decided that the trial would be conducted by way of a so called 'hybrid' hearing. This is a form of trial which has been developed during the current Covid -19 pandemic to enable trials to take place safely. They represent a balance between avoiding delay for the child or children in care on the one hand, whilst on the other ensuring that the parties to the proceedings receive a fair trial by being able to give their evidence in person before the judge.

5. In this case, the hybrid hearing was conducted in the following way; from 1 July until 13 July when the numerous medical witnesses were giving evidence, the case was conducted wholly remotely by Zoom. On Tuesday 13 the time came for the Appellant to give evidence. At this stage, although certain parties and their legal representatives continued to attend remotely, the hybrid hearing provided for the Appellant (and in due course the Intervenor) to be physically present in court together with their legal team and, subject to appropriate social distancing, to give their evidence in person before the judge.

6. On Tuesday 13 and Wednesday 14 July, the Appellant gave evidence wearing a mask which she pushed down when she was speaking. On the Wednesday, cross-examination was not completed as the Appellant had said that she felt unwell with back pain and blurred vision. On Thursday 16 July, the Appellant told the court that she had developed a cough and was, for that reason wearing her mask fully. Whilst the Appellant did not ask to leave court, unsurprisingly, and completely appropriately, the judge with the agreement of counsel sent the Appellant home. As the appellant had given two days of evidence 'live' it was agreed that she could conclude her evidence remotely.

7. The court accordingly rose to allow arrangements to be made. An associate took the judge's closed laptop through to her room but, unbeknownst to the judge, the remote link to the court room remained open. The judge was therefore overheard having a private conversation on the telephone with her clerk about the Appellant by a number of people who still remained on the call.

8. During the course of that conversation, the judge's frustration at what represented a further delay in a case which was already substantially overrunning its three week time estimate, manifested itself in a number of pejorative comments made by her about the

Appellant including that she was pretending to have a cough and was trying 'every trick in the book' in order to avoid answering difficult questions. It should be made clear that the judge at no time expressed a view as to the circumstances surrounding the death of A.

9. Once the judge was alerted to what had happened, the parties re-joined the hearing. The judge indicated that it would be understandable if an application was made for her to recuse herself from the case and that if arrangements for another judge to hear the case were required, then she would arrange for enquiries to be made as to the availability of a different judge to rehear the case.

10. The judge heard the Appellant's application that she recuse herself the following day. The Local Authority, father and Children's Guardian were each neutral. The Intervenor opposed the application. The judge refused the application and reserved her reasons over the weekend.

11. The judge, having given her reasons on Monday 20 July, refused permission to appeal her judgment and for a stay of the proceedings pending the making of an application for permission to appeal. The judge directed the Appellant to resume giving her evidence, which she did. The application to appeal came before this court the next day, Tuesday 21 July, when I granted permission to appeal and a stay of the trial pending the appeal hearing which was listed for today, Friday, 24 July. I am grateful to the parties who have, therefore, prepared for this appeal without complaint at very short notice.

12. What happened is an example of the hazards of such hearings. It would appear that the judge's laptop was taken into her room closed but with the call not having been exited. It is to the credit of those that overheard the judge's conversation with her clerk that they did everything they could both to draw the judge's attention to the situation and indeed to speak over and distort the conversation. It was a couple of minutes however before the usher's attention was gained who then immediately left the court and made the judge aware that she could be heard in court.

*The Law*

13. The law is well established and it is unnecessary to rehearse it in this short judgment. The test for actual or perceived bias is that set out in *Porter v Magill* [2002] 2 AC 357 at [102]; namely whether the fair minded and informed observer, having considered the facts, would conclude that there is a real possibility that the judge was biased. If so, the judge must recuse him or herself.

14. I mention only in addition to that paradigm formulation that in *Ansar v Lloyds TSB Bank plc* [2006] EWCA Civ 1462, *(Ansar),* Waller LJ adopted a list of 10 points (originally set out by Burton J) which includes:

> "6. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without something more found a sustainable objection.

> "10. In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal."

15. The question for the judge in determining the recusal application was on which side of the line did her undoubtedly negative observations about the Appellant and her honesty fall. The question for this court on appeal is whether the judge was wrong in concluding that those comments did not fall on the wrong side of the line.

16. The judge concluded that, although her comments were (as she described them at para.19) 'robust' 'critical' and 'absolute in their terms' which together conveyed a 'negative view of the Appellant', when other matters were taken into consideration they did not 'cross the line'. The judge concluded at para. 28 that whilst she greatly regretted what had happened and understood the hurt her comments must have caused to the Appellant, the fair minded and informed observer, having considered the facts would conclude that there was no real possibility of bias on her part.

17. The matters which the judge weighed in the balance included:

    i) That the comments were made privately to a person not directly involved in the case while she was trying to manage a very heavy work load and, in particular, those other judges who would have to take on her listed work occasioned by further delay. Such thoughts spoken aloud do not, she said, have the same status as what is said by a judge in court.

    ii) The issue as to whether the Appellant had a genuine cough or, as earlier in her evidence, backache was of relatively limited value in assessing her overall credibility.

    iii) That her unfiltered comments did not refer to the evidence on substantive issues in the case or suggest any premature conclusion as to outcome, and her comments did not suggest she had come to any conclusion in relation to the Local Authority's allegations.

18. The judge, to her great credit, in reaching her decision not to recuse herself did not on any level try to dilute the nature or tone of her comments. She said that the matter, which had given her the greatest hesitation in reaching her decision, was the terms in which she had expressed herself, which she described at para. 26 as 'outspoken in absolute terms and in very critical language'.

## Submissions

19. The Local Authority, the 1st Respondent father, and the Children's Guardian were, and remain, neutral in this appeal.

20. The Intervenor submits that the case should go on.

21. Ms Grief QC, on behalf of the Appellant, submits that comments by a judge, even made in private, are capable of giving rise to a real possibility of bias. It is, she submits, the effect or likely effect of the comments on the perception of bias and whether it gives

rise to a real possibility of bias which counts irrespective of the manner in which they were uttered.

22. Ms Grief QC goes on to submit that the situation was compounded by the fact that the Appellant was given no opportunity to address the judge's views, namely the genuineness of her cough or of the other physical (non Covid type) symptoms manifested earlier in the Appellant's evidence. The effect of the judge's comments was that she had concluded that the Appellant was actively misleading the court in an effort to avoid answering difficult questions. That, Ms Grief QC submits, is demonstrative of a 'closed mind'.

23. Mr Sampson QC, on behalf of the Intervenor, points out that ordinarily a judge's private thought-process as to a witness's presentation will remain private although Mr Sampson QC does accept that where such private thoughts are spoken out loud to a third party, they are capable of demonstrating bias.

24. Mr Sampson QC submits that on the facts of this case and for the reasons given by the judge, it was not necessary for the judge to have recused herself. He emphasised that her 'off the cuff' remarks must not be viewed in isolation and that there should be some acceptance by this court that unfortunate or intemperate remarks are sometimes made by judges.

*Analysis*

25. There is no suggestion that at any time prior to these comments the judge had demonstrated any bias or that she had conducted this difficult hearing with less than scrupulous fairness.

26. Nevertheless, in our judgment the judge's initial instinctive reaction which had been to anticipate the recusal application and to offer to find a fresh judge was the right one.

27. What happened is undoubtedly a consequence of the tremendous pressure under which family judges at all levels find themselves at present. All over the country judges are trying, against powerful odds, to 'keep the show on the road' during the pandemic for the sake of the children involved. They are faced daily, as are the court staff and practitioners, with all the difficulties, technological and otherwise, presented by remote hearings generally and hybrid hearings in particular.

28. The judge's judgment shows how greatly she regrets what happened and it is clear that this hardworking judge genuinely believed that the process of a fair trial had not been undermined and, as had been reflected in her exemplary conduct over the previous three weeks, that she could conclude the trial with her expressed views of the Appellant forming only a limited part of what was inevitably an evolving picture.

29. We find that a particularly troubling aspect is whether the fair-minded observer might consider that the judge had formed an unfair view of the Appellant on the basis of something that could have been but which was never put to her; namely, that she was inventing a cough in order to avoid having to answer difficult questions.

30. We have considerable sympathy with the judge. We have, however, no hesitation in concluding that her comments did indeed fall on the wrong side of the line. The fact

that the comments were intended to be private does not salvage the situation in circumstances where those comments were, unhappily, broadcast across the remote system and were made during the course of the Appellant's evidence. We agree with Ms Grief that unfiltered comments as an expression of frustration at a situation (here, further delay in an already delayed case) are different from negative and pejorative language about a party in the case, all the more so when made while that party is in the witness box at the time..

31. As Mr Sampson QC submits, the level of upset and distress which was undoubtedly caused to the Appellant is not to the point. We emphasise that it is necessary only to go back to the objective test: "would a fair minded and informed observer, having considered the facts, conclude that there is a real possibility that the judge was biased". The case could not be more serious. The Appellant is accused of either causing the death of her toddler or of failing to protect him from the man who caused his death. The judge made highly critical remarks about the Appellant's honesty during the course of her evidence, remarks which we believe a person looking in from the outside could not do other than think would colour the judge's view of that witness and demonstrate a real possibility of bias.

32. The judge found it to be a difficult and finely balanced decision but in our judgment here there was, in the words of *Ansar, "*real ground for doubt" and therefore that doubt should have been resolved in favour of recusal.

33. Accordingly, the appeal must be allowed and the case remitted to the Family Division, for the Acting President of the Family Division to give directions for the future conduct of the proceedings before a fresh judge of the Division.

**Lady Justice Nicola Davies:**

34. I agree.

**Lord Justice Bean:**

35. I also agree.