Case No: B4/2015/0036

Neutral Citation Number: [2015] EWCA Civ 409
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM FAMILY COURT
HHJ Plunkett
BM14Z09592

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2015

Before :

LORD JUSTICE MOORE-BICK
VICE PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION
LORD JUSTICE McFARLANE
and
LORD JUSTICE VOS

- -

Re: D (Children)

- -

Ms Ruth Cabeza (instructed by Birmingham City Council) for the **Appellant**
Ms Vanessa Meachin (instructed by Anthony Collins Solicitors LLP) for the **First Respondent**
Mr Guy Spollon (instructed by Brendan Fleming Solicitors) for the **Second Respondent**
Ms Rhiannon Davies (instructed by Osborne Solicitors LLP)for the **Third and Fourth Respondents**

Hearing date: 4th March 2015

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Judgment

Lord Justice McFarlane:

Introduction

1. This appeal, which relates to two young children, is brought by Birmingham City Council in order to challenge the decision of His Honour Judge Plunkett who, on 5th December 2014, allowed an appeal by the children's parents against care orders and placement for adoption orders that had been made by a district judge in June and November 2014.

2. Although it has been possible in short terms to describe the immediate procedural context for this appeal, the wider proceedings within which this appeal sits are altogether more complicated. Initially, Birmingham City Council commenced care proceedings in 2013 with respect to five children who were: a girl, N, born February 1998, another girl, C, born March 1999, a boy, B1, born November 2000, another boy B2, born October 2001 and a baby, L, born 25th May 2013. Subsequently a further child, another boy, T, was born on 6th May 2014, who was the subject of separate proceedings that followed on from the main case. This appeal relates to the two youngest children, L and T who, at the conclusion of the proceedings relating to each of them, were, as I have indicated, made the subject of a full care order and an order authorising the local authority to place them for adoption.

3. The factual background supporting the initial issue of proceedings rested almost entirely upon allegations that had been made in various terms by the four older children (N, C, B1 and B2) of physical abuse by way of over-chastisement. All of those children were aged between 12 and 15 at the time that the allegations were made.

4. On 25th October 2013 District Judge Maughan, sitting at the Birmingham County Court, made findings of fact which were largely in accordance with the children's allegations. On the basis of those findings the threshold criteria in Children Act l989, s 31 were proved. There then followed an extensive period of adjournment during which the four older children "voted with their feet" and moved to live with, or be based around, their parents. Those four children were subsequently made the subject of supervision orders. The parents, however, had never accepted the validity of the original allegations or the judge's findings of fact. Consequently, with respect to the baby L, by the time of the final hearing on 27th June 2014 the parents' rejection of the court's findings was central to the judge's overall conclusion that the potential for harm to her was such that only placement for adoption would meet her welfare needs. As a result final orders were made authorising her move to adoption. Finally, on 7th November 2014, the district judge made similar orders with respect to baby T on the same grounds.

The parent's "appeal"

5. Just over three weeks after the making of the placement for adoption order on 27th June 2014 regarding L, the parents issued an application for permission to apply to revoke that order. In short terms the reasons relied upon within the application form describe how, in different ways and on different occasions, each of the older children had purported to retract, or water down, the allegations which had led to the original findings of fact being made.

6. At a hearing on 22nd September 2014 DJ Maughan, apparently with the agreement of the parents who were acting by then as litigants in person, re-cast the application for permission to apply to revoke the placement order into an application for permission to appeal against that order. The district judge refused permission to appeal. It then seems that the parents approached the court office with the result that the office issued an "Application Notice" using standard Form D11, which is designed for use within proceedings for divorce, nullity or judicial separation. Inside Box 3 on Form D11 under the heading "What order are you asking the court to make and why?" the parents stated:

> "Appealing the judge's decision regarding my daughter [L's] adoption. The judge refused to consider our revocation order or hear any evidence. The evidence we had proved that the allegations against us are false."

7. The parents' "Application Notice" is dated October 8th and was apparently issued on October 14th and the case was listed as a matter of some urgency before His Honour Judge Plunkett on 21st October. The transcript of the hearing indicates that the judge treated the parents' application as an application for permission to appeal against the final orders made by the district judge on 27th June 2014. Only limited paperwork seems to have been available to the circuit judge at that hearing. It was therefore not possible to progress the application for permission to appeal to any great degree. The application was adjourned to 21st November with a direction for the local authority to provide a transcript of the judgment of 27th June 2014. Both the local authority and the children's guardian were directed to file a skeleton argument in response to the appellant's Notice of Appeal (ie the Form D11 Notice) prior to the resumed hearing. It is to be noted that no formal "Grounds of Appeal" are included in the parents' "Notice". They do, however, make specific reference to occasions when the older children have apparently retracted or altered their allegations.

8. On 21st November 2014 HHJ Plunkett conducted a more extensive hearing; by that time the judge had the two key judgments of DJ Maughan namely those delivered in October 2013 and June 2014. Very shortly before that hearing the parents had issued a Notice of Appeal, in proper form, seeking to challenge DJ Maughan's decision with regard to the youngest child, T, made on 6th November 2014. The application for permission to appeal with respect to T was not formally listed before the judge on 21st November, although he was told of its existence during the course of the hearing. The grounds of appeal complained that the district judge should have adjourned the hearing to permit, inter alia, investigation of the children's apparent retractions and, secondly, that the district judge should have directed a further assessment of the parents. No direct attack was made upon the 2013 fact finding determination.

9. On 21st November the local authority and the children's guardian were represented by counsel. Initially the parents were unrepresented but after the short adjournment, counsel, who had acted for the father with respect to T before the district judge, was able to attend court and offer some assistance.

10. The transcript of the hearing of 21st November indicates a process by which the judge, assisted by the lawyers and the parents, sought to gain a more detailed understanding of the papers in the case. In the course of doing so, as I shall explain in more detail in

due course, the judge came to identify additional matters that concerned him relating to the original fact finding decision which might justify consideration on appeal.

11. At the conclusion of the November hearing the judge adjourned the case to a further hearing at which he indicated that he might hear additional submissions or move straight to judgment. The relevant parts of the court order for 21st November are in these terms:

> "Upon the application for permission to appeal in relation to the child (T) being listed today and heard at the same time as an application for permission to appeal in relation to the child (L); and upon hearing the appellant parents, first respondent local authority and the second respondent child; and upon the court having heard submissions on behalf of all parties in relation to the applications for permission to appeal and inviting further written submissions;
>
> It is ordered that:
>
> 1) By 2.00 p.m. on 25 November 2014 the parties shall file and serve any further written submissions in relation to the application for permission to appeal.
>
> 2) The application is listed for judgment hearing…on 5 December 2014…."

12. As I shall explain, further submissions were filed on behalf of both the local authority and the children's guardian, however neither of these documents touched upon the grounds that came to form the basis of the judge's decision to allow the appeal.

13. When the case came back on 5th December the transcript indicates that the court did not receive any further oral submissions. The judge simply handed down a written judgment in which he concluded that the fact finding determination made by the district judge in October 2013 was not sustainable, primarily because the district judge had not considered whether one or more of the children who were making the allegations should be called to give oral evidence at the hearing. HHJ Plunkett was also critical of the district judge's failure, both in October 2013 and June 2014, to take any account of the information about retractions made by one or more of the children with respect to their allegations. At the conclusion of the judgment HHJ Plunkett therefore granted permission to the parents to appeal and went on immediately to allow the appeal with the consequence that the final care orders and placement for adoption orders were set aside in relation to both L and T. Consideration was then given to a complete re-hearing of the local authority's applications.

HHJ Plunkett's judgment

14. The appeal that has been heard in this court has not focussed upon the detail of the children's allegations. The local authority's criticisms of the judge relate to (a) the procedure by which the parents' appeals were progressed in the lower court; and (b) the judge's decision to allow the appeals on the basis that the district judge was obliged to determine whether or not the children should give oral evidence. It is not

therefore necessary for me to refer to the detail of the children's allegations in the course of this judgment.

15. So far as the procedure adopted with respect to the first instance appeal is concerned, the judge summarised the procedural history up to and including the hearing on 21st November. He then described his approach in the following terms at paragraph 1(m) and (n) of his judgment:

> "(m) in the end I treated the appeal hearing as dealing with all points arising from both the L and the T cases.
>
> (n) given that the Guardian was unable to attend the hearing on 21st and the nature of the appeal evolved during that hearing, I allowed anyone who wished to, to file further written submissions by close of play November 25th."

The judge then stated that he had received submissions from the local authority and the Guardian.

16. Thereafter the judge immediately progressed to analyse the key issues under a number of headings firstly, "Issues arising (i): children giving evidence (L proceedings)." Under that heading the key sub-paragraphs are as follows:

> "(d) In the instant case, the threshold facts related entirely to the complaints of the children. Any court considering such an evidential base is obliged to consider whether children should give evidence – in accordance with the principles set out in *Re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12. In essence, the court is required to examine the advantages that the children giving evidence will bring to the determination of the truth, and the damage giving evidence may do to the children's welfare (*ibid*, para 24).
>
> (e) In the instance (sic) case I can find no record of any decision being taken by the court as to whether the children should give evidence. Counsel have been unable to find such a ruling in a court order, and there is no note of such a judgment on the file. (Father) believed he and (Mother) had wanted the children to give evidence, but that the Guardian and BCC had not wanted them to give evidence. It may be that in the face of such a position the advocates for the parents made no application. I do not know.
>
> (f) However, since this is a question of observing the article 6 and article 8 rights of the parents and the children, it is not an issue that is dependent on an application. The court is obliged to make such a determination, and to record its decision. Such a decision may be straightforward and require few reasons in some cases, but it is still an exercise the court must perform.

> (g) If the court has not performed that exercise, then I struggle to see how the hearing could properly said to be article 6 compliant…"

(At (h) the judge summarised the key features relevant to deciding whether to call oral evidence from a child highlighted by Baroness Hale in *Re W* at paragraphs 25 to 30.)

> "(i) In this case, these were children who were, or who were very nearly, 14, 13 and 12. The case depended almost entirely on what they had said – there was little or no objective evidence to support their complaints. Their complaints were the totality of the threshold facts "pleaded". There were no concurrent criminal proceedings. I do not know, but consider it unlikely, that the children would have been unwilling to give evidence, since they seemed quite willing to discuss first the allegations and then their retraction with adults. If a case depended upon their account, if the case were confined to their account, and if their account were in part or in whole retracted, then there would be very clear advantages in their giving evidence in determining the truth.
>
> …
>
> (k) I cannot now, and do not, make a decision as to whether the children should have given evidence. That the issue was not addressed by the court, in a case in which the objective advantages of the children giving evidence are considerable, and the detriment to them not obviously significant, in which, therefore, a *Re W* compliant analysis might be expected to yield the answer that they should give evidence, seems to me to raise significant concern in relation to the procedure in fact adopted. In any event, in the alternative, the district judge does not address how she approached the hearsay nature of the evidence before her, or comment as to how she weighed that evidence in light of its not being tested in cross-examination."

17. HHJ Plunkett then went on to make a number of discrete and more detailed points about the content of the evidence itself.

18. The further issues considered by the judge were taken more shortly. He observed that there was no "treatment of the children's retraction" in either the judgment of October 2013 or June 2014. With respect to the proceedings relating to young T the judge is additionally critical of a paragraph in which the district judge apparently accepted an explanation given for B2's retraction which was proffered by the Guardian. The judge says this:

> "This paragraph highlights the difficulties that arise in a case in which the children are not called to give evidence at the primary fact finding hearing, and subsequently change their account. The reason for the change of account in B's case alighted on by the Guardian is supposition, it has never been

> put to B. If B had given evidence, this matter could be put to him, and explored. He is, after all, a child with rights, and with views – whether as a victim, or as a sibling of children affected by the court's procedure. He deserves respect. Not hearing from him, and allowing others to speculate on his behalf is a very old fashioned way of showing him respect. I struggle to see how it is *Re W* compliant."

19. Under a final heading of "Consequences" the judge considered that in some cases a failure to consider calling the children to give oral evidence might not taint the overall outcome. However, in the present case, given that the only evidence of complaint came from the children, the judge concluded that the current outcome was "unsustainable" and the findings of threshold fact were inadvertently evaluated in a manner which did not comply with ECHR Article 6. The importance of the point, in the judge's view, was underlined by the fact that the parents' failure to accept those findings was apparently the primary cause of the negative outcome of their parenting assessment. The judge therefore granted permission to appeal, allowed the appeal and set aside the substantive orders.

The local authority's appeal to this court

20. Ms Ruth Cabeza, who did not appear below, presents the local authority's appeal to this court on a number of distinct grounds. Under the heading 'Conduct of the Appeal' complaint is made of:

    a) a lack of consideration of the fact that more than a year had elapsed before any question of an appeal against the fact finding judgment was raised;

    b) serious procedural errors arising from the fact that the appellant parents had not at any time:

        i) served a properly constituted Notice of Appeal;

        ii) identified the orders under appeal;

        iii) served grounds of appeal regarding L; or

        iv) identified the basis upon which they sought leave to appeal out of time with respect to L.

    c) The judge's decision to allow the appeals principally on the ground that the district judge failed to conduct an analysis under *Re W* of the question of whether any of the young people should give oral evidence, although this point had never been raised by the parents (either formally on paper or during the oral hearings) and without the judge ever indicating to the other parties that he wanted to have submissions from them on the point.

21. Separately, under the heading 'The judge's decision on appeal', Ms Cabeza submits that the judge was wrong as a matter of law to hold that ECHR, Art 6 and/or *Re W* established a mandatory requirement on the district judge to consider the question of

the children giving oral evidence, whether or not the point was specifically raised by any of the parties. It is also argued that, on the facts of this case and the manner in which the parties approached the hearing, this criticism of the district judge was not valid.

22. The appeal is opposed by the parents, who argue that, both procedurally and as a matter of substantive law, the judge was entitled to conduct the proceedings and arrive at his conclusion as he did. For the mother, Miss Vanessa Meachin does not accept that the local authority's procedural points have any validity. Miss Meachin submits that the transcript shows that the local authority must have been well aware of the issues that were concerning HHJ Plunkett. It was open to the local authority to make submissions to the judge on these issues, but, for whatever reason, they decided not to do so. Miss Meachin further submits that the judge was entitled to hold that it was incumbent upon the district judge to determine whether the children should be called as witnesses, although her researches have not disclosed any direct authority for that proposition.

23. The children's guardian has assisted the court with matters of clarification, but otherwise has adopted a neutral position on the appeal.

The procedural criticisms: discussion

24. On any view HHJ Plunkett presided over a process which departed to a marked extent from the procedure laid down by Family Procedure Rules 2010, Part 30 for appeals from a district judge to a circuit judge in the Family Court. Permission to appeal is required (FPR, r 30.3(1)) and, where the application is made to the appeal court, the application for permission is to be made in an appeal notice. FPR, r 30.4 provides that an applicant for permission to appeal must file an appellant's notice within 21 days of the date of the decision complained of, in the absence of any direction by the lower court establishing a different period. FPR, r 30.6 provides that 'the appeal notice must state the grounds of appeal' and r 30.9 provides that an appeal notice may not be amended without the permission of the appeal court. FPR, r 30.12(5) states that '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'.

25. Although the parents were acting as litigants in person when they instigated the process that became the appeal in L's case, and some procedural latitude may be justified to accommodate such a litigant, the appeal procedure established by FPR, Part 30 is neither complicated nor onerous. It simply requires pleaded grounds of appeal, permission to appeal granted on stated grounds followed by the determination of the appeal on those grounds at a hearing. A substantial (and therefore impermissible) departure from the Part 30 requirements may well establish a situation in which one or more of the parties is denied a fair hearing.

26. In relation to the appeal in L's case, the process adopted by HHJ Plunkett did not come close to that which is required by FPR 2010, Part 30. The D11 Notice filed by the parents did not contain any grounds of appeal, other than the bare assertion that the children had retracted allegations. The Notice was stated to be challenging the judge's decision regarding L's adoption and the judge's refusal to allow the parents to apply to revoke the placement order (ie the 2014 determinations) whereas the judge moved on to allow an appeal against the order made on the 2013 fact-finding hearing.

Other than to note the point, at no stage did the judge engage with the fact that this un-pleaded 'appeal' was over a year out of time. The grounds upon which the judge eventually came to allow the appeal emerged in the process of free flowing to-and-fro communication between the judge and counsel during the hearing on 21st November. The following extracts from the transcript not only illustrate what was said on the central point of *Re W* and, in the judge's view, the requirement for the district judge to consider whether the children should give oral evidence even if the issue had not been raised before her, but also represent the entirety of what was said on the topic during that hearing.

27. At an early stage [transcript page 4], where the judge is 'just trying to draw out the different strands', he states:

> "The material in relation to recanting by the children wouldn't found a revocation application, it would found an appeal either against the October 2013 findings on the basis of fresh evidence and/or against the making of the orders in June 2014."

Some time later [t/s p 10] the question of the children giving oral evidence is raised by the judge for the first time (following a passage dealing with the children retracting their evidence):

> "There is nothing in the fact find judgment about any consideration being given to the children giving evidence."

Counsel for the local authority and the guardian (neither of whom appeared at the fact finding hearing) and the judge then discuss the lack of information about the course of the hearing, which leads the judge to observe:

> "The short point is there's no treatment in [the judgment] of the question of whether the children should give evidence. … The judge has to make a determination, and it's not application-driven, it's for the judge to make an article 6 determination."

Counsel are not invited to respond to that judicial assertion and, equally, the point is not taken any further by counsel at that, or any other, stage of the hearing.

28. Later [transcript page 15] the following appears:

> "[Judge]: The judge has not in either of the judgments directly addressed the suggestion that the children had, to whatever degree, recanted.
>
> [LA Counsel]: There's no specific reference to that, on the paragraph that I have already drawn your Honour's attention to and the difference in two accounts.
>
> [Judge]: There is no treatment of the question of whether the children should give evidence."

There then follows an exchange in which the judge is told of the father's recollection that the parents raised with their lawyers the question of having the children called but they were told that the local authority and the children's guardian were opposed to them giving oral evidence. To which the judge responded:

"All right. I may have to find out when that was considered. Thank you."

29. During the second half of the hearing, following the arrival of Mr Spollon, HHJ Plunkett sought to explain to Mr Spollon his view of matters at that stage [transcript page 21] in these terms:

> "That is what I have spent some time looking at because it seems to me in relation to [L] the appeal really had two strands, and what came to me as an appeal had two strands. One was the question as to whether the retractions merited another look at the facts and the other was what advances [the parents] had made in terms of their ability properly to parent the children. … In looking at the original fact find … there are one or two things that I have been concentrating on. There doesn't appear to be a treatment in the fact find judgment of what was then the partial retraction by [C] and/or [B1]. [LA Counsel] may correct me in respect of [B1]. There is nothing in that judgment to address the point of whether the children should have given evidence, although [Father] told me that there had been an application made that the children should give evidence, opposed by the guardian, opposed by the local authority, ruled on by the judge that they shouldn't. But if that is a decision that was made then the record of it doesn't appear in the judgment on the fact finding."

Counsel for the local authority then clarified her instructions which were that the issue of the children giving evidence was never raised before the judge, but that it may have been mooted by the parties outside court, to which the judge responded:

> "No. Again what I said I will repeat for Mr Spollon's benefit: the question of the children giving evidence is one for the judge, whether or not raised by the parties, so it has to be adjudicated on at some point even if everyone agrees with what is being done, even if no-one opposes the route taken, and it troubles me in this case that there is no record of it now."

Again, the judge's assertion that the district judge was obliged to adjudicate upon the topic of oral evidence from the children is not followed by any submissions, or even response, from counsel on the point.

30. More generally, in the context of the way in which the parents' application had developed during the hearing on 21st November, the judge made the following observations [transcript page 25]:

> "The other difficulty in managing this appeal is that it has evolved, and I acknowledge this as a difficulty for the local authority and the guardian responding to it. It came to me as one thing. I looked at the papers I then had and was concerned about a different thing, which was the treatment of the holistic analysis in the judgment, and it has now become a very different thing, which is a much more fundamental question about the fact finding, leaving aside the questions of [the parents] making progress since. So what I am trying to manage at the moment is what I do with this appeal is not necessarily definitively in terms of outcome but how I properly allow people to participate in the hearing to make this hearing Article 6 compliant, because [LA counsel] might justifiably say to me: 'I am trying to shoot at a moving target. Would you just stand still for a minute?'"

Later, after counsel for the child explained that she was in difficulty in responding to matters that day due to the absence of the children's guardian, the judge responded:

> "If there are points, as there are in this case, that trouble me deeply, that call for some form of resolution and judgment by me but might be any one of a number of different things, what opportunity do you want on [the guardian's] behalf to participate in this hearing?"

Following discussion to which all counsel contributed concerning dates and further submissions the judge concluded in these terms:

> "All right. What I am going to do is take a little bit of time to think. I'm not going to give you an outcome today. So what I will try and do is list this case in the next two weeks or so for a hearing at which, if there are any other points upon which I want submissions, I will receive them. I will give you notice in advance if there are such points or I will give judgment."

31. The extracts from the transcript to which I have drawn attention arise within a hearing of substantial length. As I have already indicated, these extracts comprise the totality of the discourse concerning the question of whether or not the district judge was required to consider whether the children should give oral evidence. Whilst the judge acknowledged that he had been developing potential points of appeal as the hearing moved on, and that the local authority counsel was being required to address something of a 'moving target' which 'might be any one of a number of different things', at no stage did the judge crystallise the matters that concerned him into definitive points or solicit submissions at that hearing on those points from counsel for the local authority or the guardian. At no stage was any consideration given to drawing up or amending Grounds of Appeal.

32. The order drawn up following the hearing on 21st November (set out at paragraph 11 above) is of note in that the applications before the court on that day are described as 'the applications for permission to appeal' in the case of L and the case of T. The parties were afforded the opportunity to file 'any further written submissions in relation to the application for permission to appeal' and 'the application' was to be listed for judgment on 5th December 2014.

33. The wording of the order of 21st November is in my view plain; it relates solely to the issue of permission to appeal and the judgment to be given on 5th December was, therefore, to be upon the application for permission to appeal. In accordance with that order counsel for the local authority and counsel for the guardian filed supplemental written submissions. These submissions are themselves of note in that neither document contains even a passing reference to the substance of the 2013 fact finding hearing and judgment. The local authority document deals only with the parents' appeal relating to T, addresses only the grounds of appeal that had been formally pleaded in that Notice of Appeal and the written submission is plain that it is confined to addressing the issue of 'permission to appeal'. It is in no manner apparent from these two documents, drawn by counsel who had appeared before HHJ Plunkett on 21st November, that either of them had understood:

    a) that the judge was in fact engaged upon evaluating a potential appeal against the 2013 fact finding determination;

b) that the judge was contemplating that the district judge's apparent failure to conduct her own evaluation of whether the children should give oral evidence was now a 'ground of appeal'; and

c) that the judge was not only determining the issue of permission to appeal but was going to determine the substantive appeals themselves.

34. Despite receiving the supplemental submissions from the local authority and the guardian, the judge did not apparently question why it was that neither party had engaged in any way with the issue that he considered that he was deciding. At the hearing on 5th December the judge simply handed down his prepared judgment with its conclusion that the appeals were allowed and the fact finding made by the district judge was set aside.

35. At this stage in my judgment it is right to stress the very clear view that I have formed from reading the transcript of the hearing of the 21st November which is that all parties, but particularly the judge, were motivated by the best of intentions. The discourse between all three counsel and the judge demonstrates a cooperative and sensible approach which was initially designed to assist the judge in absorbing the background detail of the case. This laudable spirit of positive cooperation between Bar and Bench should rightly attract praise, particularly in the context of a family case, but the manner in which this process was allowed to develop and then occupy the entirety of what the judge apparently considered was the hearing of the full appeal must inevitably also attract criticism in this case. The discourse between counsel and the court, which ran throughout the 21st November hearing, lacked any structure in the context of an appeal. No grounds of appeal were ever properly identified. The judge did not receive any submissions from any of the parties (even the appellant parents) on the topic that he went on to identify in his judgment as the main ground of appeal. There was no clarity, indeed there was clear confusion, as to the stage that the proceedings had reached and whether the court was considering permission to appeal or the appeal itself.

36. Although litigants in person as applicants for permission to appeal have always been a feature of appellate justice, in modern times in family cases the litigant in person applicant has become the norm. Circuit judges, High Court judges and Lords Justices of Appeal are regularly required to process and analyse applications for permission to appeal in family cases by litigants in person. Such applications inevitably lack the forensic focus and legal analysis that would be commonplace if the application were made by a lawyer. There is, however, a danger that the judge may become drawn into the process of analysing the case to see if there is some thus far un-noticed and un-pleaded merit in a potential appeal that he loses sight of the structure of the appeal process and his or her role within that structure. It is my view that that danger became a reality in the present case. In seeking to unpick the process in the lower tribunal in order to identify whether matters had gone awry there, the judge presided over a process which, in the end, was neither fair nor effective.

37. I have already described the appeal procedure established by FPR 2010, Part 30 as neither complicated nor onerous. Part 30 is similar in structure to CPR 1998, Part 52 which governs civil appeals to the Court of Appeal. It is a statutory requirement that family appeals in the family court or the High Court are conducted by adherence to the Part 30 provisions [FPR 2010, r 2.1]. The short and trite point therefore is that

appellate judges hearing an appeal in the family court are bound to apply the provisions of Part 30. I would, however, go further and hold that, rule or not, utilisation of the simple structure of Part 30 is likely to assist the parties and the judge to process a challenge to a first instance decision in an effective and straight-forward manner. The three core elements - grounds of appeal, permission to appeal and appeal hearing – should enable all involved the proceedings to know with clarity what the issues are and what stage the process has reached at any particular time.

38. Adherence to the requirements for the appeal notice to state the grounds of appeal [FPR, r 30.6] and for there to be no amendment of an appeal notice without the permission of the court [FPR, r 30.9], rather than being arid and empty procedural stipulations, provide both flexibility and clarity to enable the basis of an appeal to develop (as was the case on 21st November before HHJ Plunkett in the present case) but, at the same time, ensure that at each stage all those involved know what is, and what is not, a live issue that falls to be addressed within the appeal. If permission to appeal is granted on a basis outside the pleaded grounds, then those grounds should be amended by permission under r 30.9 and the appeal can proceed with all parties fully aware of the situation.

39. In *R (Dinjan Hysaj) v The Home Secretary* [2014] EWCA Civ 1633 my Lord, Moore-Bick LJ, giving the main judgment in a combined appeal relating to applications for extensions of time under the Civil Procedure Rules, Part 52 (relating to appeals), considered whether or not the requirements of the rules fell to be applied differently where the party concerned was acting as a litigant in person. At paragraph 44, my Lord said this:

> "The fact that a party is unrepresented is of no significance at the first stage of the enquiry when the court is assessing the seriousness and significance of the failure to comply with the rules. The more important question is whether it amounts to a good reason for the failure that has occurred. Whether there is a good reason for the failure will depend on the particular circumstances of the case, but I do not think that the court can or should accept that the mere fact of being unrepresented provides a good reason for not adhering to the rules. …. Litigation is inevitably a complex process and it is understandable that those who have no previous experience of it should have difficulty in finding and understanding the rules by which it is governed. The problems facing ordinary litigants are substantial and have been exacerbated by reductions in legal aid. Nonetheless, if proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules. In my view, therefore, being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules.'

That approach, with which I am in full agreement, must apply to family appeals just as it does to all other forms of civil appeal.

40. The fact that an applicant for permission to appeal is a litigant in person may cause a judge to spend more time explaining the process and the requirements, but that fact is

not, and should not be, a reason for relaxing or ignoring the ordinary procedural structure of an appeal or the requirements of the rules. Indeed, as I have suggested, adherence to the rules should be seen as a benefit to all parties, including litigants in person, rather than an impediment. Ensuring that a litigant in person's appeal is established in a manner which is compatible with the rules, that the grounds of appeal are accurately drawn to include the points that the court is going to be asked to consider on the permission application and that all parties know what stage in the process the application has reached, are steps that are each likely to support, rather than hinder, the litigant in person in their interaction with the court and the other parties.

41. It would, thus, have been perfectly straightforward for HHJ Plunkett to ensure that the Notices of Appeal were amended once he had become sufficiently concerned to consider that an appeal might succeed (a) against the 2013 decision, which was not a pleaded target of the Notice of Appeal, and (b) upon a basis outside the currently pleaded grounds of appeal. The failure of the judge to ensure that the pleadings kept pace with his developing thoughts, much more than simply being a slip in sticking to the rules, led in this case to a process which was unclear and unfair to the parties and gave rise to genuine confusion (as evidenced by the supplemental submission filed by the local authority and the guardian).

42. The lack of due process also caused the judge to by-pass the need to consider whether or not to extend time to permit an appeal against the fact-finding decision nearly 12 months prior to DJ Maughan deeming the parents' application to be an application for permission to appeal. In the present case the parents had been legally represented at the fact-finding hearing, yet the issue of calling any of the children to give oral evidence had not been raised with the district judge and it was not, apparently, considered to be a matter to be brought on appeal immediately following the fact finding hearing. The question of whether the parents should be given an extension of time a year later to bring the point by way of appeal therefore plainly arose. In the absence of a process that required the parents' appeals on this point to be properly pleaded, the issue of an extension of time, it would seem, never sufficiently crystallised so that it was addressed by the parties or the judge.

43. The rules and FPR 2010, PD30A establish a clear distinction between the two stages of the appeal process. The permission to appeal stage is primarily one which only engages the applicant and the court; the respondent is given notice of a permission hearing, but is not required to attend unless requested to do so by the court [FPR, PD30A para 4.15]. It is only once permission to appeal is granted that a respondent is expected to respond to the appeal by filing a skeleton argument [PD30A, para 7.9]. Consideration of the question of permission to appeal is normally taken as a preliminary determination either on paper or at an oral hearing where only the question of 'permission' falls for consideration. An alternative course of listing the permission to appeal application with the full appeal to follow on at the same hearing may be appropriate in some cases, but where that course is followed clear notice that that is what is to occur should be given to all parties.

44. In the present case it is all too plain that the procedure followed departed so radically from the requirements of the rules that the process taken as a whole cannot be regarded as either fair or effective. It is only just possible with the aid of the transcript to trace the development of the judge's thoughts upon the ground that was to become

the basis upon which he ultimately allowed the appeal and set aside the fact finding decision. At no stage did any party, even the parents, make any submissions to the court on this ground. At no stage did the judge state that he was engaged upon hearing both the application for permission and the appeal itself during the 21st November hearing. The court order expressly states that the only issue being considered was that of permission to appeal. The supplemental written submissions and the judge's judgment demonstrate that the advocates and the judge were totally at cross purposes as to the procedural status of the process in which they were currently involved.

45. It is therefore my conclusion that the process adopted by the judge failed to afford a fair or proper hearing of the parents' appeals with the result that the judge's orders must be set aside. Permission to appeal was granted to the parents by HHJ Plunkett with respect to both of their applications. The Access to Justice Act 1999, s 54(4) provides that no appeal may be made against a decision to give or refuse permission to appeal; in consequence the permission granted stands and the appeals regarding L and T will now have to be reheard, inevitably before a different tribunal, in a manner which adheres to the letter, the spirit and the structure of the rules.

The 'duty' on a judge to consider calling a child to give oral evidence: discussion

46. In the light of the conclusion that I have just expressed, and in the knowledge that the parents' appeals will now have to be reheard, I intend to deal solely with the question of law which the judge's decision raises with respect to the oral evidence of children.

47. The judge's reasoning on the issue of the potential for one or more of the children to be called to give oral evidence is clear and shortly stated:

    i) Where, as here, the threshold facts relate entirely to complaints from the children, 'any court … is obliged to consider whether children should give evidence';

    ii) This is not dependent upon a party making a specific application for oral evidence, the court is obliged to make such a determination and to record it;

    iii) There is no record of the district judge having made any determination on the issue;

    iv) If the district judge did not consider oral evidence from the children then the hearing is unlikely to have been Article 6 compliant;

    v) In the alternative, the district judge in any event failed to analyse her approach to the hearsay nature of the children's complaints.

48. I am entirely at one with the judge in identifying the potential importance of the issue of children giving oral evidence in a case such as this. A judge who adopted the practice that he describes would be beyond reproach and would have demonstrated a sound and sensible approach to the evidence. Where I differ from the judge is in his elevation of this aspect of good practice to a free-standing obligation upon the court,

breach of which establishes, almost of itself, that the whole fact finding hearing was conducted in breach of Article 6.

49. No authority, either domestic or ECHR, is cited for this principle. The judgment of the Supreme Court in *Re W* describes how the task of evaluation is to be undertaken, but their Lordships do not state that such an evaluation is a requirement in every case where key evidence arises from a child or young person. The nearest that the judgments in *Re W* come to the point is at paragraph 31 in the judgment of Baroness Hale SCJ:

> 'Finally, we would indorse the suggestion made by Miss Branigan QC for the child's guardian, that the issue should be addressed at the case management conference in care proceedings or at the earliest directions hearing in private law proceedings. It should not be left to the party to raise. This is not, however, an invitation to elaborate consideration of what will usually be a non-issue.'

My reading of that paragraph is that it is no more than an endorsement of counsel's suggestion of good practice; it does not establish a legal obligation in every case, breach of which will, or is likely to, render the whole proceedings unfair. Such an approach is also in line with the observation of Black LJ in *Re B (Child Evidence)* [2014] EWCA Civ 1015 at paragraph 29:

> 'The Supreme Court [in *Re W*] did not consider that their decision would lead to children routinely giving evidence, predicting that the outcome of the court's balancing exercise, if it was called upon to adjudicate upon such matters, would be a conclusion that the additional benefits in calling the child would not outweigh the additional harm it would cause him or her.' [emphasis added]

50. For my part I consider that the judge has overstated the position and has done so without the support of any authority. Whilst the approach taken by the district judge to the children's complaints must fall to be considered as part of an analysis of the proceedings as a whole in the context of any fresh appeal, this one aspect, taken in isolation, did not of itself establish a breach of Article 6 as a matter of law and justify allowing the appeal on that ground alone.

51. I would also question the validity of the judge's approach, having identified this issue, in reaching his conclusion on this point in the appeal without coming to a concluded view as to whether the district judge should have required the children to give evidence. Surely, if, once the issue is bottomed out, the conclusion is that the children should not, or would not, have been called as witnesses, that is a material factor in assessing whether the hearing that actually took place before the district judge was 'unfair'.

52. It follows that, insofar as the judge considered that, as a matter of law, the district judge was obliged to make her own determination on the question of oral evidence from the children, and that a failure to do so was, of itself, sufficient to render the proceedings unsafe and unfair, I would hold that he acted in error. I would therefore allow the appeal on this second ground.

Conclusion

53. If my lords are in agreement, the outcome is that the local authority has succeeded in its appeal on both bases. The order of HHJ Plunkett is to be set aside and the parents' appeals with respect to L and T will now have to be reheard by a different tribunal.

Lord Justice Vos:

54. I agree

Lord Justice Moore-Bick:

55. I also agree.