England and Wales High Court (Family Division) Decisions

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98. The father submitted that, although a successful ground of appeal was the procedural unfairness caused by the failure to make participation directions in respect of the mother's evidence, it could not possibly be said that none of could be treated as relevant. If, at the second fact-finding hearing, the mother gave inconsistent evidence on any important factual matters, the father was entitled to explore any inconsistency during cross-examination. Whilst it would be open to the mother to seek to explain any inconsistency by reference to the procedurally compromised nature of the first fact finding hearing, it would be unfair to the father to exclude the transcripts of evidence. Mr Tyler QC submitted that the transcripts of evidence should be included and referred to as necessary. Any party should be able to object to or to seek to explain any particular issue arising from the transcript material as it arose during the course of the second fact-finding hearing.

99. Both the mother and the children's Guardian opposed the inclusion of the transcript evidence into the future trial bundle. In circumstances where an appellate court had concluded that the trial process had been tainted by the failure to consider and make participation directions for the mother's benefit, both submitted that the transcript evidence as a whole could not be relied upon during any rehearing.

100. The mother did not have the benefit of participation directions during the first fact finding hearing. In circumstances where an appeal judgement found that the failure to abide by the procedural rules with respect to the management of the mother's evidence was so serious that all the court's findings could not be maintained, it is difficult to accept that the transcript of the mother's evidence has anything to offer a court rehearing the allegations in dispute. My concerns about the inclusion of the transcript of the mother's evidence are reinforced by the expert report from Dr Jones. Not only does her report highlight the linguistic difficulties the mother may have had – in immensely stressful circumstances whilst in the witness box and when assisted by an interpreter – in spontaneously sourcing words and conveying meaning but it also highlights the manner in which her then unrecognised vulnerabilities may have impacted on her oral evidence. Dr Jones proposed a wide ranging suite of participation directions, the vast majority of which are agreed by all the advocates as necessary for the mother to give her best evidence. If those measures are necessary now, their absence at the first fact finding hearing emphasises the caution with which this court should approach any consideration of the transcript of the mother's evidence.

101. I recognise that, as Mr Tyler QC submitted, it is part and parcel of the forensic process to compare and contrast an earlier account of an incident with one given later for, in so doing, inconsistencies and evasions may become apparent and so inform the court's assessment of a witness's credibility. Indeed, the father will have ample opportunity to undertake precisely that exercise by reference to the mother's written evidence (amounting to some 10 statements). Reference to the transcript of the mother's evidence either to highlight inconsistencies in submissions or to put inconsistencies to her during cross examination is of marginal benefit given the difficulties with that evidence to which I have already referred. Further, there is a real danger that any second hearing would be derailed by submissions as to probative weight and fairness on each and every occasion that the father's advocate sought to deploy material from the transcript of the mother's evidence at the first hearing. Thus, for all of those reasons, I direct that the transcript of the mother's evidence should not be placed in the trial bundle as little if any probative value can be ascribed to it.

102. What of the transcripts of the evidence given by the other witnesses at the first hearing? The appeal judgement made no criticism of the arrangements made in respect of the other witness evidence and so it may be thought that transcripts of that evidence should be available to this court at the future fact-finding hearing. However, that is to misunderstand the effect of the profound procedural unfairness relating to the mother's evidence on the evidence of all the other witnesses. The evidence given by the mother, contaminated by procedural unfairness, will have impacted upon the questions put to other witnesses and the answers that other witnesses gave. The entire process has thus been contaminated by the unfairness occasioned by the failure to take account of the mother's vulnerabilities and to make the necessary participation directions. If it were otherwise, there would be no need to hear the witness evidence of most of the other witnesses, save in respect of any new allegations now advanced. Were the transcripts of the other witness evidence to be contained in the trial bundle, the same danger of derailing the hearing with submissions as to probative weight and fairness which I identified with respect to the mother's evidence would also apply to the transcript evidence of the other witnesses. Hence, I direct that the transcript evidence given by the other witnesses should not be placed in the trial bundle.

Statement from the Father's Former Wife

103. The father submitted that he should be permitted to file a statement from his former wife as to their sexual relationship to counter the allegations made by the mother of coercion and control, sexual violence and the father's arousal from non-consensual sexual activity. With the greatest respect to Mr Tyler QC, I cannot see how such a statement would assist the court to come to a view about the dynamics of the sexual relationship between the father and the mother. A person may behave very differently with one partner than he or she does with another and, furthermore, sexual experiences/behaviour after a relationship has ended may shape the sexual experience with a new partner in a manner quite different to that in a former relationship. In his statements, the father does not seek to lay the foundation for the admission of a statement from his former wife by, for example, explaining that his sexual conduct or experiences with his former wife was similar to those he allegedly had with the mother. The probative value of evidence from his former wife struck me as limited and I thus decline to direct the statement sought by Mr Tyler QC.

104. For the avoidance of doubt, the father is permitted to file a further statement from his other adult son who was said to have been present in the house when the mother was allegedly raped and screaming in pain.

Conclusion

105. The timely delivery of this judgment has been hampered by the need for counsel to assist the court by scrutinising the schedules of intimate images; and by waiting for a response from the mother's legal team. When that response was eventually forthcoming on 12 April 2022, I was on leave out of the jurisdiction.

106. That is my decision.

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