Case Digest: Re H-N And Others (Children) (Domestic Abuse: Finding of Fact Hearings)

[2021] EWCA Civ 448

This judgment focuses on four appeals[1] which all involve allegations of domestic abuse by one parent against another. The Court used this opportunity to provide guidance on how the Family Court should deal with domestic abuse in private law proceedings, and in particular to address whether in some cases there should be a shift in approach so that the court's focus is on a pattern of behaviour as opposed to specific incidents of abuse; and the relevance of concepts applicable in criminal proceedings to the Family Court. The conclusions and discussion of the four appeals before The President of the Family Division, Lady Justice King and Lord Justice Holroyde can be found at [78] onwards. In summary, the appeals were allowed for Re B-B, Re T and Re H-N and dismissed for Re H. This summary does not focus on the contents and outcomes of the appeals themselves, but rather the general guidance provided by the court regarding allegations of domestic abuse in private law proceedings and the common issues which arose in each of the cases before the Appeal Court.

The Court highlighted four key issues in relation to the proper approach the court should take to such cases. These are as follows:

i) Whether there should be a finding of fact hearing;
ii) The challenges presented by Scott Schedules as a means of pleading a case;
iii) The approach to Controlling and Coercive Behaviour: if a fact-finding hearing is necessary and proportionate, how should an allegation of domestic abuse be approached?
iv) The relevance of criminal law concepts.

Whether there should be a finding of fact hearing

The Court, whilst considering the totality of PD12J, summarised the proper approach to deciding if a fact-finding hearing is necessary. They provided the following guidance:

i) "*The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).*
ii) *In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.*
iii) *Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.*
iv) *Under PD12J.17 (h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in 'The Road Ahead'."* [37]

Cafcass, the First Intervener in the case, made submissions in relation to its role in assisting the court as to whether a fact-finding hearing is necessary, and promulgated a more proactive role for Cafcass prior to any such

[1] Re H-N; Re T; Re H; Re B-B.

determination being made. A particular recommendation that found favour with the court (and which was supported by the Association of Lawyers for Children) was that instead of a 'safeguarding' letter, Judges should direct that Cafcass undertake an "*enhanced form of safeguarding assessment (including where appropriate meeting the child) prior to the case being listed for a second gatekeeping appointment, with any resulting listing decision being made on a more informed and child-centred basis.*" [39] The court observed that this particular recommendation seemed to justify close consideration by those charged with ultimately reviewing PD12J in due course with the advent of the Domestic Abuse bill becoming statute.

The challenges presented by Scott Schedules as a means of pleading a case

It was argued before the court with "*effective unanimity*" that Scott Schedules in domestic abuse cases had declined in value to the extent that they were now a "*potential barrier to fairness and good process, rather than an aid.*" [43]

Two concerns were raised:

a) First, one of principle, the "*cumulative impact*":

"The principled concern arose from an asserted need for the court to focus on the wider context of whether there has been a pattern of coercive and controlling behaviour, as opposed to a list of specific factual incidents that are tied to a particular date and time. ***Abusive, coercive and controlling behaviour is likely to have a cumulative impact upon its victims which would not be identified simply by separate and isolated consideration of individual incidents****."* (Emphasis added) [44]

b) Second, one of pragmatism, the "*vantage point*":

"As an example in one of these four appeals, the parties were required to 'limit' the allegations to be tried to ten and the judge at trial further reduced the focus of the hearing by directing that only three would be tried. It was submitted that that very process of directed selection, produces a false portrayal of the couple's relationship. If such an applicant succeeds in proving the three remaining allegations, there is a risk that the court will move forward on the basis that those three episodes are the only matters 'proved' and therefore the only facts upon which any adverse assessment of the perpetrator's future risk falls to be made. ***By reducing and then further reducing its field of focus, the court is said to have robbed itself of a vantage point from which to view the quality of the alleged perpetrator's behaviour as a whole and, importantly, removed consideration of whether there was a pattern of coercive and controlling behaviour from its assessment.****"* (Emphasis added) [45]

The Court noted that a move away from using Scott Schedules was the correct approach, and that a new method was required for summarising and organising the matters to be tried so that a Respondent clearly knows the case to meet without risking the distortion of proceedings to the extent that the question of whether there has been a pattern of abusive behaviour is not before the court when it should be. However, the court concluded that it was *"not an appropriate vehicle to do more than describe the options suggested by the parties"* (which included the mooting of a 'Threshold' type document equivalent to Care Proceedings; formal pleadings by way of Particulars of Claim and a narrative statement in a prescribed form) and confirmed that it is for others such as the Private Law Working Group and The MOJ Harm Panel to develop new guidance or rule changes. [49]

Approach to Controlling and Coercive Behaviour: If a fact-finding hearing is necessary and proportionate, how should an allegation of domestic abuse be approached?

The Court observed that in order to avoid adding to already lengthy forensic evaluations of fact-finding hearings, it is the responsibility of individual judges or a bench of magistrates to set proportionate timetables and maintain control of the process where a fact-finding hearing has been determined necessary [56], but an increased focus on controlling and coercive behaviour must occur [50].

It was stated that where an alleged pattern of coercive and/or controlling behaviour falls for determination, and the court has made that issue its primary focus, it is expected that the need to determine a range of subsidiary date-specific factual allegations will cease to be necessary [56]. Aware that such focus will inevitably increase the length of private law proceedings, alongside the work of others (MOJ Harm Panel report, the Domestic Abuse Act, revision of PD12J), the Court offered the following pointers:

a) *"PD12J (as its title demonstrates) is focussed upon 'domestic violence and harm' in the context of 'child arrangements and contact orders'; it does not establish a free-standing jurisdiction to determine domestic abuse allegations which are not relevant to the determination of the child welfare issues that are before the court;*
b) *PD12J, paragraph 16 is plain that a fact-finding hearing on the issue of domestic abuse should be established when such a hearing is 'necessary' in order to:*
    i) *Provide a factual basis for any welfare report or other assessment;*
    ii) *Provide a basis for an accurate assessment of risk;*
    iii) *Consider any final welfare-based order(s) in relation to child arrangements; or*
    iv) *Consider the need for a domestic abuse-related activity.*
c) *Where a fact-finding hearing is 'necessary', only those allegations which are 'necessary' to support the above processes should be listed for determination;*
d) *In every case where domestic abuse is alleged, both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other."* [58]

The court further observed that where a parent asserts a pattern of coercive and/or controlling behaviour existed in the relationship, and a fact-finding hearing is deemed necessary, then that assertion should be the primary issue for determination. Any other, more specific, factual allegations should be selected for determination on the basis of their potential probative value to establishing the alleged pattern of behaviour and not otherwise, the exception being that a particular factual allegation is so serious that it warrants determination irrespective of the alleged pattern of coercive and/or controlling behaviour.

The relevance of criminal law concepts

The Court reiterated the principles laid down by McFarlane LJ in *Re R (Children) (Care Proceedings: Fact-finding Hearing)*[2] that "*it was fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based upon criminal law principles and concepts.*"

McFarlane LJ stated that family proceedings are not binary in the way that criminal and civil proceedings are. Instead, the primary purpose is to determine what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established. ([62]).

[2] [2018] EWCA Civ 198; [2018] 1 WLR 1821.

The Court further clarified that the Court of Appeal ruling in ***Re R*** is the binding authority and **must** prevail over the High Court judgment of Russell J in ***JH v MF***[3], in so far as there is any perception that the latter judgment differs from the former Court of Appeal Ruling. [66]

It concluded that Family Courts should avoid analysing evidence of behaviour by the direct application of the criminal law to determine whether an allegation is proved or not proved. They should not, however, shy away from using the word 'rape' in the manner that it is used generally in ordinary speech to describe penetrative sex without consent, nor avoid using the word 'rape' in their judgments as a general label for non-consensual penetrative sexual assault. [72]

The Family court should be concerned to determine how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not, come within the strict definition of 'rape', 'murder', 'manslaughter' or other serious crimes. Behaviour which falls short of establishing 'rape', for example, may nevertheless be profoundly abusive and should certainly not be ignored or met with a finding akin to 'not guilty' in the family context. In particular, it was observed that the borderline between 'consent' and 'submission' may be less significant in the Family Court than it would be in Criminal proceedings. [71]

[3] [2020] EWHC 86 (Fam).