



Neutral citation: [2024] EWFC 17 (B)

Case No: RG22C50065

IN THE FAMILY COURT
SITTING AT READING

Before :

HHJ MORADIFAR
(SITTING AS A JUDGE OF THE HIGH COURT)

In the matter of;

Re N

(Children: Findings Against a Professional Witness: Joinder or Intervention)

Mr Marcus Fletcher (Instructed by the Medical Defence Union) for the applicant Dr K
Mr Nick Goodwin KC and Miss Sian Cox (instructed by the Joint Legal Team) on behalf
of the local authority
Miss Penny Howe KC and Miss Jayne Harrill (instructed by Heald Nickinson solicitors)
on behalf of the mother
Mr Andrew Bagchi KC and Miss Fareha Choudhury (Instructed by Edwards Duthie
Shamash solicitors) on behalf of the father
Miss Sally Stone KC and Miss Susan Quinn (instructed by Creighton Solicitors) on behalf
of the children through their guardian.

Hearing dates: 30 January 2024

Judgment

HHJ MORADIFAR:

Introduction

1. These proceedings concern two children who are the subject of public law applications brought by the local authority. Broadly, the local authority asserts that the children have suffered significant harm as a consequence of the mother's exaggeration and fabrication of medical conditions, misleading the professionals involved in the treatment of the children and attempting to control the professionals to such an extent as to cause them significant physical and emotional harm by exposing them to unnecessary extensive procedures and investigations.
2. The matter is before me to determine the detail of the local authority's allegations. The medical history is extensive and the children's presentation is highly complex which has necessitated the court hearing from a large number of witnesses. The hearing is not concluded and I am yet to hear from a number of key witnesses that include some of the treating medics, experts in the case and, importantly, the parents.
3. One of the witnesses who has yet to give evidence, is the children's treating Consultant Paediatrician who has been involved in the children's treatment since they were each less than a year old. I will identify her as Dr K. As the evidence has unfolded, the local authority has reached a view that it must seek findings about Dr K's conduct. The parents are not seeking any findings against Dr K and the guardian has, understandably, reserved her position.
4. In summary, the local authority asserts that Dr K has at all times acted in the best interests of the children but that her professional opinion, in common with other treating professionals, has been manipulated by the mother, that she had an unusually close and inappropriate relationship with the mother that blurred professional boundaries, that she has reacted adversely to nurses who raised concerns about the mother and this has impacted upon their ability to raise concerns about the mother, that she has contributed to the delay in unmasking the true cause of the children's presentation and has not given due attention to concerns about the children's perplexing presentation or the concerns about fabricated or induced illness.
5. After being notified of these developments, Dr K now applies to join these proceedings as a party or an intervener. She seeks access to the main bundle and to be represented in these proceedings. Save for the mother, her application is opposed by all of the

parties. The mother takes a neutral position in which Miss Howe KC and Miss Harrill with characteristic care and consideration set out the competing considerations.

The law

6. The parties are largely agreed on the relevant law but have a different interpretation of the same. Therefore, I will set out a brief summary of the applicable law and discuss its application in more detail later in this judgement.
7. The applicable legal principles may be summarised as follows;
 - a. The issue of joinder as a party or intervention in proceedings is a case management decision by the court which must be made by reference to the overriding objective as set out in Part 1 of the Family Procedure Rules (2010).
 - b. There is no automatic right to joinder by a person against whom allegations are made [*Cumbria CC v T (Discharge of Interveners) [2021] 1 FLR 1338*] and different considerations apply to a professional witness where each case must be decided on its own merits [*Re H (Care proceedings: Intervener) [2000] 1 FLR 775*].
 - c. The guidance provided by McFarlane LJ in his leading judgment in *Re W (A Child)* [2016] EWCA Civ 1140 is authoritative when determining this issue. In summary it provides that;
 - i. The Art. 8 (ECHR) right of the individuals facing adverse findings is engaged and it extends to the individual's professional life; and
 - ii. Similarly, common law (but "*not on all fours*" with Art. 8), requires that a fair process is engaged with; and
 - iii. " 95. *Where, during the course of a hearing, it becomes clear to the parties and/or the judge that adverse findings of significance outside the known parameters of the case may be made against a party or a witness consideration should be given to the following:*
 - a. *Ensuring that the case in support of such adverse findings is adequately 'put' to the relevant witness(es), if necessary by recalling them to give further evidence;*
 - b. *Prior to the case being put in cross examination, providing disclosure of relevant court documents or*

other material to the witness and allowing sufficient time for the witness to reflect on the material;

c. Investigating the need for, and if there is a need the provision of, adequate legal advice, support in court and/or representation for the witness.”

iv. There is a “*strong Caveat*” concerning experts who are instructed in proceedings. It would be rare that an expert witness in proceedings would require an additional process as the expert usually has access to all of the papers, the remit of their instructions will be within the “*four corners of the case*” and any criticism of the expert is likely to have been canvassed by at least one of the parties.

Discussion

8. The issue of Dr K’s participation in these proceedings has been under active consideration through significant parts of this hearing. It is important to note that at first no party sought any specific finding about her and this was reflected on the face of earlier orders that were served on her. Latterly the circumstances have changed and as oral evidence has been adduced, it has become increasingly clear that Dr K is likely to face allegations that she would need to respond to in a fair and proportionate manner. To this end, the court has already given a number of directions that ensure she has access to the relevant statements, transcripts of evidence, clinical records and pleaded findings that are sought against her. Happily, she has had the benefit of legal advice, and whatever my decision on the issue of her participation, she will continue to benefit from ongoing legal advice and support.
9. During this fact finding hearing, the court is tasked with determining the factual disputes that underpin the local authority’s assertion that the conditions of s 31(2) of the Children Act (1989) are satisfied. In this context, the court has approved the instructions of a number of jointly instructed independent experts. Clearly Dr K does not fall in this category of witness. Therefore, Mr Fletcher argues that the strong caveat that McFarlane LJ gives against the participation of instructed experts in a case does not apply to Dr K. He observes that there is some uncertainty about further findings being sought against Dr. K. If those that are already pleaded are found, this would trigger a requirement for self-referral to the General Medical Council (‘GMC’) that has

a number of interim measures that it could impose on Dr K pending a fuller investigation into the circumstances of her alleged conduct.

10. Save for the mother who takes a neutral position, the other parties submit in similar terms that the allegations about Dr K fall squarely within the remit of this case and are not outside the “*the known parameters of the case*”. There is no automatic right to party status or intervention in proceedings and the strong caveat that is applied to the experts who are instructed in proceedings, is guidance against non-parties acquiring party or intervener status. Furthermore, in adopting a fair process to determine these allegations, the court has already satisfied the first two stages of the guidance as set out in paragraph 95 of McFarlane LJ’s judgment in *Re W* (see above). Moreover, there is no requirement for her to be represented, notwithstanding the possible ramifications of any findings, as she will have the benefit of legal advice and assistance with preparing a response that she can speak to when giving evidence and responding when questioned. It is argued that if she is joined as a party or permitted to intervene even on a limited basis, the consequential delay will be disproportionate and unnecessary.
11. Mr Bagchi KC and Miss Choudhury, helpfully refer to *R (on application of Squire) v General Medical Council* [2015] EWHC 299 (Admin), 27-51, where Ouseley J observed that the decisions of the court would be admissible in any tribunal proceedings, furnishing the tribunal with background, but it would not be binding on the said tribunal. I accept Mr Fletcher’s equally helpful submissions that pending a full investigation, there are a number of interim measures and restrictions that the GMC can put in place which are likely to be influenced, if not guided by, this court’s findings about Dr K’s conduct. It would be entirely inappropriate for this court to begin to predict the details of the measures that the GMC may put in place. However, this remains an important consideration when the court is tasked with assessing fairness in the context of Dr K’s Art. 8 rights.
12. Dr K has already had access to some of the relevant evidence that includes the witness statements of the relevant witnesses and access to the clinical records. She will very shortly receive a transcript of oral evidence of the relevant witnesses following which she has the opportunity to file evidence in response to those witnesses and the local authority’s allegations, before she is called to give her oral testimony in March of this year. Importantly, she has and will continue to have the benefit of legal advice regardless of her status in these proceedings.

13. Turning to the guidance in *Re W* that has been summarised above, whilst I accept that the allegations against Dr K are arguably within the known parameters of the case, in my judgment in the instant case, fairness demands that the totality of the guidance is engaged with. It is clear that the first two considerations have been addressed as have parts of the third consideration, by Dr K having the benefit of continuing legal advice and support. The carefully worded guidance of McFarlane LJ provides for alternatives so as to cater for a variety of circumstances in which these issues may arise. I accept Mr Fletcher's submissions that the strong caveat referred to in paragraph 101 of His Lordship's judgment expressly addresses the instructed experts in a case by stating:

"Criticism of Expert witnesses

101. It is, unfortunately, sometimes the case that a judge in civil or family proceedings may be driven to criticise the professional practice or expertise of an expert witness in the case. Although what I have said with regard to a right to fair process under ECHR, Art 8 or the common law may in principle apply to such an expert witness, it will, I would suggest, be very rare that such a witness' fair trial rights will be in danger of breach to the extent that he or she would be entitled to some form of additional process, such a legal advice or representation during the hearing. That this is so is, I suspect, obvious. The expert witness should normally have had full disclosure of all relevant documents. Their evidence will only have been commissioned, in a family case, if it is 'necessary' for the court to 'resolve the proceedings justly' [Children and Families Act 2014, s 13(6)], as a result their evidence and their involvement in the case are likely to be entirely within the four corners of the case. If criticism is to be made, it is likely that the critical matters will have been fully canvassed by one or more of the parties in cross examination. I have raised the question of expert witnesses at this point as part of the strong caveat that I am attempting to attach to this judgment as to the highly unusual circumstances of this case and absence of any need, as I see it, for the profession and the judges to do anything to alter the approach to witnesses in general, and expert witnesses in particular.

102. I should stress that in the previous paragraph I was expressly addressing the approach to be taken to an expert who attends court and gives evidence. I would not wish to be taken as saying anything to add to or alter the approach that is required before criticising a witness who has not been called to give evidence, for which see Munby J's judgment in Re M (Adoption: International Adoption Trade) [2003] EHC 219 (Fam), [2003] 1 FLR 1111, paras 111-120."

When this is read in its entirety and in the context of the totality of the judgment, it provides a helpful yardstick against which consideration of fairness and the necessary steps that the court is required to take to address the same must be measured.

14. Any interference with Art. 8 rights is only permitted when it is necessary, proportionate and in accordance with the law. Therefore, proportionality is a key element when the court is considering whether any additional measures need to be put in place and what the details of those measures should be. For entirely proper and understandable reasons, Mr Fletcher cannot bind his client with assurances that the granting of Dr K's application will not lead to any delay in these proceedings. I have no doubt that in representing Dr K he will make himself available as required and take such reasonable steps as are necessary to deal with issues expeditiously. However, having considered the collective submissions of the Respondents on this issue, I agree that if Dr K is permitted to intervene in these proceedings, there is a high likelihood if not an inevitability that these proceedings will be significantly delayed. In very rare unforeseen circumstances fairness and justice may demand that there is delay, but this must be an option of last resort where delay is unavoidable to achieve fairness. In the present case, I do not find that fairness demands that there is such a delay and in my judgment fairness can be readily achieved without causing delay in these proceedings.
15. No party has suggested that there are limited ways in which Dr K can intervene in these proceedings. The Respondents submit that this is likely to achieve the highest order of unfairness, leading inevitably to an application by Dr K for disclosure of the entirety of the court bundles and returning the case to a point of significant delay. This is an option that may be exercised in some suitable circumstances. However, I agree with the Respondents' observations and I do not find that such steps are required to achieve fairness in the process that Dr K will be involved in.

16. Finally, I have considered whether the court's case management powers should be engaged at this stage so as to limit the local authority's schedule of findings against Dr K. This was not an issue that was addressed during Dr K's application. However, the parties have since addressed this in writing. Having considered the details of the carefully drafted schedule by the local authority, I do not find that such a course is called for. As I have observed earlier, the contents of the local authority's schedule fall within the parameters of the case that can inform the threshold findings in this case and it would be quite improper for me to interfere with them at this stage.

Conclusion

17. Dr K's Art. 8 rights are clearly engaged and these take prominence over her Art. 6 rights that are also engaged. These are collectively addressed on the same facts and considerations that are set out in this judgment. The steps that have already been taken to address these rights and the issue of fairness together with those that will be taken, address the fundamental issue of fairness. However, it is important that Dr K is able to rely on the support of her legal team throughout this process and to be firstly supported when giving her oral evidence and to make observations on the narrow issues of the findings that are sought against her after she has received a draft judgment at the conclusion of the fact finding hearing.
