



Neutral Citation Number: [2020] EWHC 881 (Fam)

Case No: FD20P00031

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2020

Before:

MR JUSTICE MOSTYN

Between:

SZ

Applicant

- and -

DG and PG

First & Second
Respondents

- and -

LG

Third
Respondent

Miriam Best (instructed by Crosse & Crosse Solicitors LLP) for the applicant
Christopher Watson (instructed by Nottingham City Council) for the Council
The respondents were not present or represented

Hearing date: 1 April 2020
The hearing was conducted remotely of by and through Zoom

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn:

1. In this judgment I shall refer to the applicant as the father; to the second and third respondents as the special guardians; and to the third respondent as the mother.
2. This is my judgment on the father's application dated 7 January 2020 for leave to apply for an order for contact in respect of his son ED who was born on 27 June 2012 and who is therefore 7¾ years of age. The reason that the father requires the court's leave is that on 14 January 2015, when making final orders disposing of the substantive proceedings, I imposed a leave requirement pursuant to the terms of section 91(14) of the Children Act 1989. That order was stated to endure until ED's 14th birthday on 27 June 2026.
3. This is a case with a very full history. Between November 2012 and January 2015, I delivered four substantial judgments. The third judgment, dated 18 September 2014 is available publicly and is reported as [D \(A Child\) \[2014\] EWHC 3388 \(Fam\)](#). At paragraphs 10 to 11 I set out a summary of the background to that point in the following terms:

“10. The background this case is to be found in my fact-finding judgment of 30 November 2012 to be found in section A at page 53. I do not repeat it here. Suffice to say that I found the father, Stefan D, to be guilty of truly bestial conduct. I recorded his conviction in the year 2000 in the Czech Republic of offences of the utmost seriousness involving the gross abuse and exploitation of women and girls. I found how, after his arrival in the UK, he meted out appalling domestic violence to his wife, Daniella D. I found how he engaged in serious criminal activity, largely centred around illegal drugs. I described how I was satisfied that he had seduced his 16 year old stepdaughter by plying her with drugs; how he had had unprotected sex with her; and how she became pregnant by September 2011 when she was only 17 years of age. I recorded how this sexual congress took place in the family home to the knowledge of the other minor children there, B and K. I recorded how he was even having sexual intercourse in the same time-frame with his wife as he was with his stepdaughter. I found that the statutory threshold in section 31 of the Children Act had been comprehensively crossed, both in respect of past harm and the risk of future harm.

11. The later developments in the story are recounted in my second judgment dated 18 December 2013 which is at section A, page 150. I recounted how, by Christmas 2012, so that is very shortly after my first judgment, the mother had rekindled her relationship with the father, if it had ever ended; became pregnant by him again; and as a result baby LD was born, as I have said, on 13 September 2013. Since Christmas 2012 mainly and since the birth of baby LD fully the mother and father have lived together in Novy Jičín. When pregnant with baby LD the mother was in England from time to time for contact and no doubt in order to meet with her solicitors. It emerged in the

present hearing that in about April 2013, whilst the mother was in England, the father cheated on her, as she put it in her oral evidence. It subsequently emerged from the father when he gave evidence by video link that he had been consorting with a 19 year old prostitute. To say that this cast doubt on his assertions of reformation, repentance and rehabilitation would be an understatement. His own explanation for this conduct was merely, "She was away and I am a man."

4. In that judgment I recorded that the father gave evidence via a video link from the Czech Republic. I said this:

"28. In his oral evidence whilst he accepted his criminal convictions and indeed his seduction of the mother whilst plying her with drugs, he emphatically rejected my findings of domestic violence. He stated that they were just not true and were based on false evidence. In a revealing moment he disclosed that he had not even seen my judgment and so his rejection of my finding was based on what other people had told him what they are. He did admit consorting with this prostitute and he made the statement to which I have referred in justification for that, "I am here on my own and I am a man." However, notwithstanding that dubious conduct he asserted he was a changed man and that he was starting afresh. He told me that if ED could not be returned to him but was placed with foster parents in the Czech Republic he would be mad with happiness."

5. In that judgment I categorically rejected the proposal of the parents that the substantive care and placement proceedings should be dismissed, and that ED should be returned to her and the father in the Czech Republic. I held:

"32. These are my conclusions. First, I reject the proposal by the mother that these proceedings be dismissed and ED be returned to her and the father in the Czech Republic. That is manifestly not in his interests. Such a placement back with his parents would be replete with far too many risks in circumstances where the father categorically rejects the majority of the previous findings made in this case. He plainly cannot confront his demons until he has identified his demons. The same is true to a lesser extent in relation to the mother. If these parents were living here it is inconceivable that ED would be returned to them. That they are in the Czech Republic surely makes no difference."

6. My preferred solution was that there should be a special guardianship order in favour of ED's current carers. I adjourned the case to see if they wished to apply for such an order. They duly did and the matter came before me for final disposal on 14 January 2015.

7. By my judgment of that day, and in the order giving effect to it, the following provisions were made:

- i) A special guardianship order was made in favour of ED's current carers. Had they been younger, and had it been sought, an adoption order in their favour would have been made by me.
 - ii) An order for contact on six occasions a year was made in favour of the mother. I stated that such an order was importantly in ED's interests so that he did not lose touch completely with his Czech, and specifically Roma, heritage.
 - iii) An indirect contact order in favour of the mother was also made permitting her to send ED letters, cards and small gifts from time to time.
 - iv) There was an order that there should be no direct face-to-face contact between the father and ED.
 - v) The order was silent as to whether there should be any indirect contact between the father and ED although it was implicit in the order for such contact in favour of the mother that the father would also benefit from it for as long as he was in a continuing relationship with her.
 - vi) As mentioned above, I made an order imposing a leave requirement in respect of any future applications for contact to endure until ED's 14th birthday in 2026.
8. My reasoning for imposing the leave requirement was expressed as follows in my fourth and final judgment:

"10. I now turn to the question of whether there should be a section 91(14) bar on any application for an order for contact, variation of contact or any other section 8 order. In my judgment I am satisfied that it would be appropriate to make such an order. That would mean that any such applications would be put on the same footing as an application to discharge the special guardianship order itself. That requires the leave of the court. It would put it on the same footing as an application for post-adoption contact, as set out in section 51A(4)(c) of the Adoption and Children Act 2002. In my judgment it is plainly an order that should be made so that the stability of the placement with the special guardians can be guaranteed, or at least, if not guaranteed, assured so far as is possible. It should be understood that an order under section 91(14) carries with it no stigma. It simply requires that the parents, were they to make an application the nature of which I have mentioned, to satisfy a court that they have an arguable case before the special guardians are troubled by the application. In my judgment, on the facts of this case where this is not a conventional special guardianship order (they are normally made in favour of relatives) but is in fact made in favour of carers whose identities shall remain confidential. In my judgment that order under section 91(14) should endure until ED's 14th birthday. In other words until 27 June 2026. After his 14th birthday his own views, were an application to be made for contact, would, in my view, be, if not decisive, then highly influential, and in such circumstances it

would not be necessary for the court's leave for an application to be made.”

9. I now turn to the subsequent history.
10. As stated above at the time of my final order the mother was pregnant. On 12 April 2015 DD was born. He is now aged nearly 5. The father now states that he is not the biological father of DD. In 2016 LD and DD were removed from the parents by the Czech authorities and placed in institutional care (which I take to be a children's home).
11. On 24 April 2016 a further child was born to the parents, SD. She is now aged nearly 4. She was removed from the parents at birth and placed with foster parents.
12. In 2016 father was convicted of assault, threatening words and behaviour, and blackmail in a court in the Czech Republic. I am not told who the victim of his conduct was.
13. The mother participated in the contact regime with ED established by my final order until 2017 when she stopped altogether.
14. In 2017 the relationship between the mother and father ended and she returned to this country. The father followed her. In his witness statement he states:

“I came to England in 2017 to try and persuade the 2nd Respondent to engage in the Czech case about our three youngest children. Unfortunately, within 24 hours the 2nd Respondent made allegations against me which led to me being arrested. However, the case was dropped and I was released. At that point, it was recommended that I should leave the country. When I attempted to do so, the immigration authority stopped me from leaving and I was held in custody for around 3-4 months. I do not really understand why I was held. I think it was something to do with the fact that I had previously left the country without informing the Police. I had to sign some papers to say that I would never return to the UK. I believe I might be barred from re-entering the UK.”
15. This was by no means the whole truth. The Cafcass safeguarding report prepared for the purposes of these proceedings reveals that in 2017 the father was convicted of battery and failure to comply with notifications at the Nottingham Magistrates Court. He received a custodial sentence. The details of the offence on the Police National Computer state that he used an ex-partner (presumably the mother's own mother) to meet up with the victim (plainly the mother) who he tried to force to return to the Czech Republic with him. Further, additional police information reveals that there is a Protection from Harassment order in existence to protect the mother from the father.
16. By this time the mother had formed a new relationship. From that relationship she fell pregnant and gave birth to twins on 3 June 2018.
17. Overall, the mother has six children and the father has eight children.

18. In 2018 the father met a Ukrainian woman online. They married. They live together in the Czech Republic. From that time the father concentrated on seeking to recover his three children who were in care in the Czech Republic. The court ordered that a child psychiatric/psychological report should be prepared. This was dated 19 June 2019 and was jointly authored by a child psychiatrist and a child psychologist.
19. I quote from the evaluation within the report:

“Psychological findings show that the father’s intellectual abilities are significantly below average. His personality is characterised by an unbalanced temperament potential, with characteristics of emotional instability, and an absence of empathy, as a relatively constant feature of his mental state. At the same time, he is currently under the influence of more favourable external conditions, with moderate manifestations, with signs of basic socialisation.

In the last two years, the father has adapted himself to work and partnership, striving to assert himself in a parental role. However, given his age, we cannot detect any significant changes in the father’s personality structure, only some decrease in temperamental potential and certain related possible positive changes in his personality dynamics can be expected in the future due to natural developmental changes. However, the father’s disposition to the dissocial behaviour may still be influenced by external conditions that cannot be predicted by expert examination.

From a psychiatric point of view, no serious mental illness - affective disorder or one of the psychotic disorders - was found in the assessed subject. The clinical picture is dominated by personality issues - he is emotionally unstable and dissocial.

The father has a total of eight children from three relationships. He has failed in all three partnerships, though now he wants to make good in the upbringing of the youngest three children; however, so far he has only been involved in the upbringing of one of the older children. It can be said that the parental role has failed. However, it cannot be denied that the father is making efforts to shape his life favourably at the present time, with a focus on the parental role. His wife’s relationship to the children will depend on the relationship of the partners.

Emotional instability leads to frequent changes in emotion and moods. Insufficient control of impulsivity can be expected in the father in stressful situations. However, there is no indication that he would ever target his impulsive behaviour at his children.

He has a history of substance abuse — pervitin. Protective treatment on an outpatient basis was ordered. He currently attributes this episode to his past life, he considers the matter

closed. Psychiatric examination reveals no signs of substance abuse. He is, therefore, able to resist the first use and regulate the abuse that started in the past.

As a consequence of his personality traits, the father has lower parental competence, especially in terms of a lack of empathy and sensitivity. The father's bond to the children is strong, but mostly instinctive. He is able to promote the need for solidarity with the family in the children LD and DD.

The father, despite his existing, rather negative attitude to the involvement of assisting organisations in making contact with the youngest child SD, is mentally well equipped to understand the necessity of cooperation with these authorities and institutions, and is able to perceive the possible consequences (removal of children, etc.), if the set conditions are not observed.

Assuming the supervision by the child protection authority and possibly assisting organisations, the father is able to cope with the care of the children LD and DD.

The relationship of the father to the children's mother is negative; he cannot be expected to promote a positive attitude towards her in the children. The relationship between the siblings DD and LD is positive, with natural sibling rivalry. Both children have a positive emotional relationship to their father, and the same to their father's current wife."

20. Clearly, the report was, as Mr Watson described it, a mixed bag for the father. One might have thought that the negatives outweighed the positives. Nonetheless, relying on that report, the court in the Czech Republic on 17 October 2019 returned all three children to his care, albeit under state supervision. The court held:

"The father has now sufficiently adjusted his circumstances so that the children could be entrusted to his care. Therefore, the court cancelled the institutional care for LD and DD, and decided to remove SD from foster care and entrust her to her father's care."

21. It is in these circumstances that the father makes his application for permission to seek contact to ED. Ms Best is realistic enough to recognise that the father cannot realistically seek anything more than indirect contact. Indeed, were I to grant the application I would make it subject to a limitation that permission is granted only for the father to seek indirect contact.

22. The father explained his reasons for seeking this relief in his witness statement as follows:

"LD, DD and SD are all now happily in my care. They know they have an older brother who lives in the UK and they ask about him. They would like to exchange photographs and

drawings with him. The children will learn English at school and my oldest son who went to school in the UK would be able to help with translations, if needed.

I would also like to be able to write to ED. I would ask my oldest son to help with translations. I appreciate that things would need to be handled sensitively and taking small steps at a time. I have no intention of talking to him about anything in the past or why we had to leave him. I appreciate that he is a little boy and I do not want to stress him. But I expect his Special Guardians will have had to tell him that he is not biologically their son, and so I expect ED might want to know about his biological family. Especially as he grows older, he may come into difficult years as a teenager. I would want to be able to help him with support and advice, if he wants it from me.”

23. The application for permission is opposed by the special guardians. The male special guardian states in his witness statement:

“I am concerned that due to the history of this case, the Applicant has made this application to try to find out more information about where ED is living and ultimately to try and ensure that ED is returned to his care. Even if steps are taken to try and preserve confidentiality, mistakes can obviously happen and ED himself may say something to reveal where he lives or goes to school.

If ED’s siblings did not live with the Applicant then we would have wholeheartedly supported some form of contact between ED and them. Due to the fact they are now living with the Applicant, and the concerns we have about the Applicant’s motive behind this application, we do not feel able to support his application for leave to apply for an order even if the focus is primarily in relation to establishing indirect sibling contact at this stage.

I would like to take this opportunity to confirm that ED is settled and thriving in our care. He is a lovely boy and he is the heart and soul of our family and our world’s revolve around him.”

24. The female special guardian adopts this evidence.
25. The relevant legal test on an application for permission under section 91(14) is straightforward. In *Re S (Permission to Seek Relief)* [2006] EWCA Civ 1190 [2007] 1 FLR 482 the Court of Appeal stated at [78]:

“In relation to the judicial approach to applications for permission to apply, we should say, by way of preliminary observation, that we see no inconsistency between Thorpe LJ’s test in *Re A (Application for Leave)* [1998] 1 FLR 1 set out at para [53], above: (‘Does this application demonstrate that there

is any need for renewed judicial investigation?') and Butler-Sloss LJ's test in *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573 set out at para [54], above: ('the applicant must persuade the judge that he has an arguable case with some chance of success'). In our judgment the two complement each other. A judge will not, we think, see a need for renewed judicial investigation into an application which he does not think sets out an arguable case."

26. Plainly, in a case such as this when deciding whether there is an arguable case demonstrating the need for renewed judicial investigation the court will have regard to changes of circumstances since the order was made; to the risk of destabilisation that the application may bring to the placement of the child with the special guardians; to the views of the special guardians; and to the welfare of the child generally (albeit not as the paramount consideration). This is obvious.
27. When making the section 91(14) order I intended, as is stated above, that any application for permission should be put on the same footing as an application for leave to seek to vary the special guardianship order. I also intended that a valid analogue would be an application for leave to seek post-adoption contact. I believe that they are valid analogues, but I would reach the same decision on the facts of this case even if they were not.
28. In relation to an application for leave to seek to vary a special guardianship order section 14D(5) of the Children Act 1989 states "The court may not grant leave ... unless it is satisfied that there has been a significant change in circumstances since the making of the special guardianship order." If this were an application for post-adoption contact then section 51A(5) of the Adoption and Children Act 2002 would apply. This states:
- "In deciding whether to grant leave ... the court must consider:
- (a) any risk there might be of the proposed application disrupting the child's life to such an extent that he or she would be harmed by it (within the meaning of the 1989 Act),
- (b) the applicant's connection with the child, and
- (c) any representations made to the court by (i) the child, or (ii) a person who has applied for the adoption order or in whose favour the adoption order is or has been made."
29. I agree with Ms Best that these provisions cannot literally apply to this application because it is, of course, neither an application to vary the special guardianship order nor an application for post-adoption contact. I agree with her that I must determine the application within the four corners of section 91(14) and the governing authorities on that provision. However, on the particular facts of this case it must be right, I believe, that the matters mentioned by Parliament in relation to those provisions, namely the need to have in mind a change of circumstances, and the risk of disruption of the placement of the child, should be afforded due weight. Put another way, I should take those matters fully into account in any event.

30. Ms Best maintains that the father has demonstrated an arguable case justifying a full hearing of his application. Specifically, she points to the following:
- i) The father's circumstances have demonstrably changed. He is now living in a stable relationship and the court of the Czech Republic has entrusted his three younger children to the care of him and his new wife.
 - ii) A premise of the original order was the maintenance of contact between ED and his mother in order, among other things, to promote his Czech-Roma heritage. That has come to an end and the cultural connection has been lost. It would be in ED's interests for that for that cultural connection to be restored.
 - iii) The mother was granted indirect contact and for so long as the relationship between the parents endured the father would have benefited from that order. But their relationship has failed and so that benefit has been lost.
31. The local authority has been allowed to intervene in these proceedings. It is represented by Mr Christopher Watson. He has represented the interests of the special guardians. He argues:
- i) The father has been found to have been guilty of the most reprehensible conduct. There is scant recognition in his evidence before the court that he accepts the court's findings.
 - ii) The risk of disruption to ED's placement that may be caused were this application to be allowed to proceed is not justifiably to be taken.
 - iii) The views of the special guardians should be attributed due weight in the particular circumstances of this case.
 - iv) ED is at a particularly vulnerable age. This application would be more appropriately made when he is more mature and able to give more valid expression to his wishes and feelings.
 - v) In any event the application is premature given that the key change in circumstances relied on by the father, namely the return to him of his three younger children, has only recently taken effect. As recently as 2017 the father was continuing to engage in reprehensible criminal misconduct.
32. On balance I agree with the submissions of Mr Watson, although the matter is quite finely poised. I place particular weight on the risk of disruption and on the views of the special guardians. I consider that the negative matters outlined in the Czech psychiatric/psychological report outweigh the positives. In the light of that I am not satisfied that the applicant would make a positive contribution to the well-being of ED.
33. I am therefore not satisfied, at least at this stage, that the applicant has shown a sufficiently arguable case justifying the intervention of the court.
34. For these reasons the application is refused.
35. That concludes this judgment.
