

Re J (A Child) [2008] EWCA Civ 212 (12 February 2008)

Case No: B4/2008/0279

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM KINGSTON-UPON-HULL COUNTY COURT
(HIS HONOUR JUDGE DOWSE)

Royal Courts of Justice
Strand, London, WC2A 2LL
12th February 2008

B e f o r e :

SIR MARK POTTER
LORD JUSTICE HOOPER
and
LORD JUSTICE LLOYD

IN THE MATTER OF J (A Child)

(DAR Transcript of
WordWave International Limited

A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Miss J Thomas (instructed by Messrs Williamsons) appeared on behalf of the Appellant.
Mr A Carnie (instructed by Messrs Payne & Payne) appeared on behalf of the Respondent.

HTML VERSION OF JUDGMENT

Crown Copyright ©

Sir Mark Potter :

This application for permission to appeal, with the appeal listed to follow should permission be granted, is made by JL ("the applicant"). She seeks to have reversed the decision of HHJ Graham Dowse on 1 February 2008 in the course of proceedings which commenced as private contact proceedings concerning a seventeen month old child named T, who is the granddaughter of the applicant. T has since become the subject of care proceedings by the local authority, and the two sets of proceedings have been consolidated by an order dated 6 September 2007.

On 4 December 2007 the applicant was joined as a party in the care proceedings in circumstances to which I will shortly refer. T's parents are the applicant's daughter CL ("the mother") and DJ ("the father"). The father seeks contact with T with a view, ultimately, to becoming his carer, to which the

mother objects. She alleges that the father is a violent man and thus unsuitable to have the care of T, and in this context she has made a complaint of rape against him.

A finding of fact hearing in respect of that rape allegation was listed for hearing before HHJ Dowse on 11 February 2008: that is to say, yesterday. However, that hearing has been postponed until tomorrow, i.e. 13 February 2008, to await the outcome of this application. We are told, however, it may well be further postponed because of delays in police disclosure.

On 1 February 2008 HHJ Dowse made an order giving a number of directions in the consolidated proceedings. The part of his order appealed against is contained in paragraph 1 of those directions. On the application of the mother, the judge directed that the applicant and ML -- who is the mother's present partner and is also an intervenor in the care proceedings -- should neither be present nor legally represented at the rape fact-finding hearing. At the same time, the judge made clear, for the avoidance of doubt, that the local authority social worker and T's guardian in the care proceedings might both be present and legally represented.

A little more is required by way of background. T was born on 5 March 2006 to the mother and father, whose relationship broke up shortly thereafter. When T was three months old the father's contact ceased. However, in February 2007, when the mother began her relationship with ML, the father issued his private law application for contact. On 3 August 2007 the local authority issued an application for a care order in respect of T. T had first come to the attention of the social services department on 4 June 2007, following concerns expressed by her paternal grandmother about contact between T and the maternal grandfather, that is to say, the applicant's husband. Those concerns appeared unfounded. However, the local authority became more closely involved at the end of June 2007 when T was presented at Chesterfield Hospital with substantial bruising, which the doctors concerned queried as "non-accidental" injury. At that time, T was living in the care of the mother, but spent a substantial amount of her time being cared for by the applicant.

The precipitating factor for the commencement of the care proceedings was the further presentation of T to Hull Royal Infirmary on 6 August 2007 with a head injury, diagnosed as a skull fracture, for which no clear explanation has been offered by any person concerned with T's care. In these circumstances, on 10 August 2007 T was discharged from hospital into foster care under a voluntary agreement, and on 6 September 2007 an interim care order was made which has thereafter been renewed by consent. Care proceedings of some considerable medical and factual complication are now intrain. The mother has alleged that ML was responsible for T's injuries, which he denies.

However, the applicant is also within the pool of possible perpetrators as someone who had the care of T around the time of her injuries and on whom suspicion was cast by the mother at her first police interview. Should the applicant be exonerated at the perpetrator fact-finding hearing now ordered to be held in the care proceedings, she wishes to, and will, be considered as a carer for T, as do both the mother and the father.

Before the judge below, the mother contended that only herself and the father should be present and represented as the parties to the issue in the private law proceedings. She conceded that the guardian on behalf of T and a social worker on behalf of the local authority should be present as observers, but resisted any suggestion that lawyers should be present on the grounds that she would thereby feel intimidated, whereas she should have the opportunity to give her evidence the best advantage. She submitted that, as the grandmother and ML were not parties to the rape fact-finding hearing -- which arose in the private law proceedings -- but were solely involved as intervenors in the perpetration fact-finding hearing fixed for March 2008, neither they nor their legal advisers had a right to attend the court. She also urged that, given the sensitive nature of the evidence to be adduced, it was oppressive, unreasonable and disproportionate to the justice of the case to require her to face a number of barristers or solicitors when giving evidence, even if various of them were not to cross-examine, but merely sat there as an audience.

The local authority opposed the mother's application. They contended they were entitled to be present and legally represented, the evidence in the rape fact-finding hearing being relevant to their assessment in the care proceedings of both the mother and father as carers.

The father also opposed the mother's application on the ground that the rape fact-finding hearing was not a distinct or separate matter, but part of the proceedings as a whole and, as such, the parties to the care proceedings were entitled to be present and legally represented. He submitted that the other parties and, in particular, the local authority and guardian and their advocates, should be allowed to view the demeanour of the witnesses and form a judgment as to whether any of the information which came out of the hearing had a bearing on the substantive application. If information pertinent to the matter as a whole was raised, then the local authority and guardian -- who had to act in the best interests of the children in the care proceedings -- should have an opportunity to pose questions.

ML was not present and made no submissions.

The applicant submitted that her advocate should be present as an observer at the rape finding of fact hearing. Because she was within the pool of possible perpetrators, her advocate should be entitled to observe that hearing in order to witness the "persona and character" of the mother and father, in order to obtain such assistance as it might give at the later perpetrator fact-finding hearing in relation to T. She submitted that a copy of the transcript of the judgment of the hearing would not suffice for that purpose. The applicant also made the point that, around the time of the alleged rape, she was accompanying the mother to and from her then solicitor's office, sitting in on interviews and aware of the private law proceedings which were ongoing. Since she already had knowledge of what the mother regarded as sensitive matters, there could be no reason for excluding her or her advocate on the ground that matters were indeed sensitive.

Finally, the guardian made clear his interest in safeguarding the interests of T and assessing the suitability of the mother and father as potential carers. On that basis the guardian applied to be present by his solicitor as he was unable himself to attend.

The judge dealt with the matter quite briefly, according to the note of judgment which is before us. He permitted the presence, in person or by advocate, of all involved in the care proceedings, save the applicant and ML. He dealt with the presence of ML by making clear that he was away in the army and did not wish to be present. However, he indicated that had ML wished to be present, he would have been excluded, his interest being that of a mere intervenor in the later perpetrator hearing. As to the applicant, the judge made clear that she too was only involved in the care proceedings as an intervenor on the basis that she was within the pool of possible perpetrators. According to the note of his judgment, he observed:

"Mrs Barker for the maternal grandmother says that she should be present and represented to consider what is said because it may be important in relation to allegations of the credibility of the mother. I have already indicated that I am against the maternal grandmother's submissions.

The intervenors were made parties as part of the pool of perpetrators and that is the issue that concerns them. Last week it was said, and I confirm, that insofar as there is a judgment concerning the rape, it may be disclosed to all parties in the case. It may need to be the subject of some editing and I will consider that further."

Before this court Miss Thomas, counsel for the applicant, submits as follows. First, she submits that the judge appears to have given no, or no sufficient, weight to the vital role that the mother's credibility or lack of it will play in the eventual perpetrator fact-finding hearing, should she persist in suggesting, whether directly or indirectly, that the injuries to T happened whilst in the applicant's care.

Second, she submits that the judge failed to have regard to the fact that the private law and care proceedings were consolidated, and that findings made or judgments formed in the course of the rape fact-finding hearing would affect the conduct of the care proceedings in a way which could adversely affect her interest, the father being a rival potential full-time carer for the child. That being so, the applicant should be entitled to observe the course of the proceedings and the demeanour of the father with a view to the ultimate formulation of her case as T's future carer, if and when she is acquitted of blame in the perpetrator proceedings.

Third, Miss Thomas submits that, in the absence of any application by the mother for the court to take special measures in respect of her evidence -- which application has not been made -- the court should accord little or no weight to the mother's assertion that she would be intimidated by the presence of lawyers.

Fourth, Miss Thomas reiterates the point made to the judge that the applicant had close contact with her daughter (the mother) at the time of the rape allegation and knowledge of her reaction and demeanour at the time. She submits that, if evidence is given by the mother which is inconsistent with her recollection, then she might be able to assist the court in establishing the truth.

Miss Thomas has drawn our attention to *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017, the decision of Mumby J, in which he refused the application of an unmarried father seeking contact with his child in care proceedings, to have disclosure of certain documents within those care proceedings which related to two other children of the mother who were also the subject of the proceedings. Mumby J held that such disclosure would invade the Article 8 rights of the mother and those children to an extent quite disproportionate to any forensic purpose the disclosed material might serve in the hands of the husband. The father asserted that his Article 6 rights to a fair trial of the issues affecting him entitled him to disclosure of all materials which might be taken into account by the court in reaching a decision adverse to him. Mumby J made clear that, whereas the Article 6 rights of a litigant in care proceedings prima facie entitled him to disclosure of all such materials, that entitlement might be qualified in circumstances where to grant full disclosure would invade the Article 8 rights of another party in a manner disproportionate to any disadvantage to the litigant in the proceedings, provided that the limitation imposed on disclosure was properly counterbalanced by procedures to ensure the fairness of the trial.

By way of analogy with that case, the applicant asserts that her Article 6 rights to a fair trial at the perpetrator fact-finding hearing similarly entitle her to a prima facie right to be present and

represented at the fact-finding hearing of the rape issue, which is now part of the care proceedings; and that mere supply of a transcript of the judgment once made is insufficient to compensate for deprivation of the opportunity to be present.

On this appeal Mr Carnie has limited his submissions to one particular point. He has not emphasised to us -- and I think he is right not to do so -- the desire of the mother for a hearing which will not be attended by lawyers, or others whose presence might intimidate her. This is because, given that the judge was prepared to order the presence of other parties and their lawyers, it cannot be thought that, in practice, the additional presence of the applicant or her representative would add significantly to that position.

The point which Mr Carnie takes is that the applicant is not a person who has been formally joined as a party to the overall care proceedings with a consequent right to attend each stage of the proceedings. The order for her joinder -- and hence her interests and rights of participation -- are limited to the perpetrator fact-finding proceedings yet to be heard. He points out that were it not for her joinder in the proceedings for that limited purpose, she would have, in the ordinary way, no right or opportunity to be involved in the rape hearing, save and unless she was called as a witness by either party. Her position as a potential carer could, as indeed is usual, be later considered by the local authority, the guardian and in the court proceedings, without any need for her to be a party to the proceedings. Thus, her argument for attending the rape hearing depends solely upon her role as a party to the perpetrator fact-finding hearing, and any interest she may have in the course and outcome of the rape hearing can be properly protected by supply of the judgment and, if necessary, a transcript of the proceedings.

That is, at first sight, a persuasive argument. However, I think that the judge was wrong in the decision to which he came, broadly for the reasons advanced by Miss Thomas in argument. He plainly and rightly accepted the right of the local authority and the guardian to be present in the light of their duty to have regard to the child's best interests, weighing all relevant considerations, including the suitability of the mother and father as potential carers for the children. As such, they would be interested not only in the outcome of the fact-finding hearing, i.e. rape or no rape, but the surrounding facts and circumstances and the light which those circumstances, and the manner and nature of the mother's and father's evidence, threw upon their suitability as carers.

The judge also regarded the role of the applicant as more narrowly confined in that her concern is to protect her own position, both in relation to the perpetrator fact-finding hearing, and in relation to her wish and interest to become the carer of T, but she does not have the direct interest on duty to protect

the childrens' best interests which reside in the local authority and the guardian. The applicant was, indeed, joined as a party to the perpetrator fact-finding hearing, on the basis that it was simply her role as a possible perpetrator which was in issue. Despite that, however, on a broad view permission that the mother's interest went further than that. On the assumption that she is acquitted as a perpetrator, she is interested also as a possible carer for T if the mother and father are regarded as unsuitable. The question of their bility is plainly highly dependent, not only on the outcome of the rape fact-finding proceedings, i.e. rape or no rape, but on what may emerge before the judge and may well affect his mind later as to the general quality and lifestyle of the mother and father. It also seems to me that -- as from the moment when she was joined in the care proceedings, albeit for a limited purpose -- the mother became a party to those care proceedings with an interest at least to be present at any hearing which might affect the outcome of the perpetrator fact-finding hearing.

I do not consider, as the judge plainly did consider, that the argument of Mr Carnie should prevail. Albeit the applicant has been joined as a party to the perpetrator fact-finding hearing, her status is, as I have already stated, that of a party in the proceedings generally. How her case is later presented, as well as the conclusions formed by the judge at that time, are likely to be conditioned by what happens at the rape fact-finding hearing and on that basis she should be entitled to be fully informed as to the progress of that hearing. It is indeed correct that, but for joinder, the applicant would be considered as a carer without the necessity to be joined in the proceedings; but the fact is she has been joined and, assuming a successful outcome of the perpetrator fact-finding hearing from her point of view (that is to say, acquittal, so far as she is concerned), I would expect that she will continue to be permitted to participate by being represented in the later stages of the care proceedings when final disposal is considered.

In my view, therefore, whether or not regarded as an aspect of the applicant's Article 6 rights at the later hearing, there was a clear prima facie case for the right of the applicant to attend or be represented at the hearing, for the reasons submitted by Miss Thomas. Nor do I consider that the mother's anxiety to avoid the attendance of lawyers, other than her own and the father's lawyer, was a sufficient reason to exclude the applicant, as I have already made clear.

Once the judge had rightly decided and, indeed, the mother conceded, the right of the guardian and the local authority to be represented, the addition of a lawyer for the applicant was a peripheral consideration. I accept that the judge took the view that supply of a transcript would be a sufficient safeguard for the applicant's interests, but I do not think that requirement was enough in all the circumstances. There seems to me here to be an important consideration of perception to be taken into account, as well as the question of substance. Depending on the course and outcome of the rape hearing, the perpetrator fact-finding hearing will be likely to involve the resolution of competing claims on the part of the mother, the father and the applicant for the care of T. That resolution may well turn (at least in part) on the judge's assessment of the mother and father during the rape fact-

finding exercise. Such assessment depends upon seeing and hearing the witnesses, and various nuances of evidence or other matters which do not necessarily find their way into a judgment. In such circumstances, it seems to me it is important not to give the applicant a sense of disadvantage, either at the later fact-finding hearing or in the subsequent stages of the care proceedings in which it is at least likely that she will continue to participate as a party.

Finally, so far as the applicant is concerned, she has made clear her primary wish is that to have her representative present as somebody who will be concerned with the later consideration and presentation of her case. However, I would permit not only the representative but the applicant herself to be present, if she so wishes. I can see no reason why she should not attend. In those circumstances I would allow this appeal and make an order appropriately.

Lord Justice Hooper:

I agree.

Lord Justice Lloyd:

I also agree.

Order: Appeal allowed