[2010] EWCA Civ 57

Case No: B4/2009/2627

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PORTSMOUTH COUNTY COURT
H.H. JUDGE MARSHALL
LOWER COURT NO: PO09C00283

Royal Courts of Justice
Strand, London, WC2A 2LL

09/02/2010

B e f o r e :

LORD JUSTICE WALL
LORD JUSTICE WILSON
and
LORD JUSTICE RIMER

Re: W (Children)

Mr Charles Geekie QC (instructed by Dutton Gregory LLP, Winchester) appeared for the Appellant, the "father".
Mr Andrew Bond (instructed by its legal department) appeared for the First Respondent, Hampshire County Council.
Ms Maggie Jones (instructed by Larcomes LLP, Portsmouth) appeared for the Second to Sixth Respondents, the five children, by their Children's Guardian.
The mother of the children did not appear and was not represented.
Hearing date: 21 December 2009

HTML VERSION OF JUDGMENT

Lords Justices Wall and Wilson:

1. A "father" (as it is convenient to call him) has appealed against an order made in care proceedings by Her Honour Judge Marshall in the Portsmouth County Court on 30 November 2009. The judge was due to embark on a fact-finding hearing in the proceedings on 4 January 2010 although since the hearing of the appeal we have been told that, in the event, that date was postponed; and her order on 30 November was to refuse the father's application that the oldest of the five children who are the subject of the proceedings, namely a girl, C, who was born on 27 November 1995 and is thus aged 14, should attend the hearing in order to give oral evidence and in particular to be cross-examined on behalf of the father.

2. The four younger children are a girl who was born on 24 July 2001 and is thus aged eight; a boy who was born on 8 October 2002 and is thus aged seven; a girl who was born on 17 June 2006 and is thus aged three; and a boy who was born on 14 September 2008 and is thus aged one.

3. In the light of its apparent urgency we heard the father's appeal on 21 December 2009 and, at the end of it, we announced our decision, namely that it should be dismissed. We added that we would give our reasons in writing later. This we now do.

4. In the proceedings the applicants for the care orders are Hampshire County Council ("the local authority"). The first respondent to them is the mother of all five children. We have described the second respondent as the father but, more accurately, he is the biological father only of the four younger children and is no more than the *de facto* stepfather of C. The third to seventh respondents to the proceedings are the five children themselves, acting by their Children's Guardian. As we have implied, the mother and the father are not married. They contend that they are not presently cohabiting. It is clear however that, but for the matters giving rise to the proceedings, they would still be cohabiting; and in principle, and subject to any terms which might be imposed upon the mother as conditions of the return of

the four younger children to her, it seems that she and the father would wish to resume their cohabitation.

5. C has a full sister, N, who is now aged 17 and is not a subject of the proceedings.

6. The care proceedings have been precipitated by profoundly serious allegations made against the father by C. Back in 2008 she had made allegations of sexual abuse on his part towards her, as a result of which the police had become involved; but C had quickly retracted the allegations and indeed contended that they had been lies; and family life had continued. It seems, however, that, on an occasion at school later that year, C spoke to a friend about what she alleged to be continuing sexual abuse on the father's part towards her. Ultimately, on 18 June 2009, again at school, she made a further detailed allegation of sexual abuse against the father; and on the same day she was interviewed by a WPC pursuant to the Achieving Best Evidence guidance. The local authority issued the care proceedings. C was immediately taken into foster care, where she has remained. The four younger children were also taken into foster care, but, following the making of an order excluding the father from the home and upon an undertaking on the part of the mother not to bring them into contact with him, they were restored to her care. Unfortunately, at any rate to a limited extent, the mother did bring them into contact with him, as result of which they were again removed from her and placed again in short-term foster care (otherwise than with C), where they remain.

7. The matters relied upon by the local authority for the crossing of the threshold to the making of care orders are entirely founded upon C's allegations against the father. She has alleged that he has on a number of occasions penetrated her vagina with his finger; performed oral sex on her; forced her to perform oral sex on him; raped her vaginally, the last occasion being on 17 June 2009; and raped her anally, the last occasion being on the same date. The father strenuously denies all the allegations. His case is that, just as in respect of the allegations which she made in 2008 but (so he says) rightly retracted, C has maliciously invented the current allegations, perhaps in part as an expression of her jealousy of his much closer relationship with her sister N than with her.

8. Very soon after the ABE interview C was medically examined but no relevant evidence was thereby obtained. The local authority allege, however, that there is other, forensic, evidence against the father. The police seized from the family home the skirt and knickers which C was allegedly wearing on 17 June 2009 and tests on them have shown semen stains containing the father's DNA. Mr Geekie QC on his behalf hopes to raise significant grounds for considering that those items of clothing may have been innocently contaminated with the father's DNA, for example (we speculate) from sheets on which the parents slept or from the father's own underwear. To the doctor who examined her C also produced a tissue with which, so she said, she had wiped herself following the father's alleged rape of her on 17 June 2009 and had deliberately kept for evidential purposes. Apparently the tissue is shown also to have a trace of semen but in an insufficient quantity to allow for DNA analysis. It will (we again speculate) be a necessary part of Mr Geekie's case that, as part of her plot to frame the father, C somehow acquired some semen and applied a tissue to it.

9. The father also faces criminal charges, brought against him as recently as in October 2009. He faces charges of nine counts of sexual activity with C involving penetration and four counts not involving it. He will be entering not guilty pleas to all the charges. The criminal proceedings will not be heard for at least several months and it is accepted that H.H.J. Marshall was correct not to wait for the conclusion of the criminal proceedings but to arrange for the fact-finding hearing to which we have referred.

10. The hope of the parents is that C's allegations against the father will be established to the satisfaction neither of H.H.J. Marshall in the care proceedings nor of the jury in the criminal proceedings; and that the four younger children will then be enabled to return to their joint care. The mother contends that she does not know whether C's allegations are true. Were they found to be established in whole or in part (even if only in the care proceedings), a thorough enquiry would need to be undertaken into the mother's acceptance (or otherwise) of the findings, into her willingness to separate permanently from the father and, generally, into her ability to keep the four younger children safe if returned to her care. But, irrespective of the outcome of the two sets of proceedings, it seems inconceivable that C will ever return to the family home. She has contact with the four younger children but is presently estranged

not only from the father but from the mother and indeed also from N, who appears to have been furiously angry with her for making the allegations. C currently appears very isolated.

11. On 21 September 2009, at a case management conference, the local authority informed the judge that it was agreed on all sides (i.e. including by the Children's Guardian) that they should be granted permission to call C to give oral evidence at the substantive hearing via a video-link. Presumably C's ABE interview, recorded on DVD, was to stand as her evidence-in-chief and, no doubt, the main purpose of calling her to give oral evidence was to enable Mr Geekie to cross-examine her. Within hours of that hearing, and prior to her finally approving the directions which had been presented to her as agreed, the judge, of her own motion, decided that she should receive further argument before granting permission for C to give oral evidence. She directed that the argument be presented at the next hearing, namely on 23 October 2009. At that hearing the local authority revised their position. They indicated that they no longer wished to call C to give oral evidence even by video-link; and that instead they would rely on C's evidence in the ABE interview as hearsay evidence. The Children's Guardian had also changed her mind – partly because in the interim the father had been charged with the criminal offences and C therefore then faced giving oral evidence in those proceedings – and was supporting the revised position of the local authority. Matters were left on the basis that, with his advisers, the father would consider whether to make an interlocutory application to the judge for an order that C should give oral evidence by video-link; and he did so. The hearing of his application took place on 25 November 2009. The judge reserved her judgment and disseminated a written judgment by email on 30 November 2009. Over nine pages she explained why she had decided to refuse the father's application. The judge also refused the father's application for permission to appeal but, at the end of the hearing on 21 December 2009, this court granted it, albeit as a prelude to the dismissal.

12. At the hearing on 21 December 2009 Mr Geekie advanced the appeal. Mr Bond, on behalf of the local authority, and Ms Jones, on behalf of the Children's Guardian, opposed it. The mother, by her solicitors, filed a short written representation to the effect that, as before the judge, her stance in relation to C's giving of oral evidence was neutral.

13. We have said enough to indicate the judge's close acquaintanceship with these proceedings. She has a semi-inquisitorial role in relation to them and our system entrusts to her, subject only to the limited supervision of this court, the duty to enquire into the facts and to reach a conclusion as to whether, on the balance of probabilities, the father sexually abused C. The judge's decision on 30 November 2009 reflected her determination, in the light of all relevant facts, of the manner in which the evidence should most appropriately be presented to her in order to enable her properly to discharge her duty. Hers was, therefore, a discretionary case management decision in every sense; and when we add that, at first sight, the nine pages of her judgment represent a particularly well-balanced discussion of the pros and cons of requiring C to give oral evidence by video-link so that Mr Geekie might cross-examine her, it will become clear why on any view his task in this court was difficult.

14. Nevertheless the father's case, advanced by Mr Geekie in attractively measured terms, has given us very considerable pause for thought; and the concerns privately expressed to us by Rimer LJ, and now reflected in his judgment which follows ours, have intensified a general sense of unease on our part which we will explain.

15. In parenthesis we note at the outset that to make C available for cross-examination in the care proceedings might, of course, serve to make it more, rather than less, likely that her allegations against the father will be established. Were her evidence to stand only as hearsay, the lack of a facility to test it would make it intrinsically less credible. Her answers in cross-examination might render it much more convincing. But the father's decision, no doubt on advice, is to press for the facility to cross-examine her; and we proceed on the footing that he is the best judge of where his interests probably lie.

16. Until one analyses them in the light of the existing guidance of this court about the calling of children to give oral evidence in the family proceedings to which they are subject, the factors pressed by Mr Geekie upon the judge, and subsequently upon this court, seem very powerful, particularly in combination. We set them out, in terms as persuasive as we can muster, as follows:

    (a) C is now aged 14.

(b) In the ABE interview she presents as mature and composed.

(c) The local authority's application for care orders is founded entirely upon her allegations.

(d) Apart from forensic evidence which *may* prove significant, there is no corroboration of her allegations.

(e) In 2008, whether in making or in retracting her allegations, C lied.

(f) Were her current allegations to be found proved in the care proceedings, it is doubtful whether the four younger children would be allowed to return to live in a home in which the father might be living with the mother or, depending on a risk assessment, even to live with the mother alone.

(g) The establishment of C's allegations to the satisfaction of the judge might impact on the father's ability to be allowed to have a normal relationship with any other child yet to be born to him.

(h) Thus, for the lives of the father, the mother, the four younger children and any child yet to be born to the father, the judge's enquiry into the truth of C's allegations could scarcely be more important.

(i) In any event C will almost certainly be giving oral evidence to the jury in the criminal proceedings.

(j) When in September 2009 it was accepted on all sides that she would give oral evidence in the care proceedings, C was expecting to give oral evidence in them; and she remains willing to do so.

(k) In September 2009, with C's interests to the forefront of her mind, the Children's Guardian did not object to her giving oral evidence by reference to any emotional damage thereby likely to be done to her. The subsequent initiation of the criminal proceedings, with the likelihood that C would be required to give oral evidence therein, does not confer obvious validity upon the guardian's current contention that the prospect of C's giving oral evidence twice, rather than once, creates an unacceptable risk to her emotional health.

17. The judge did not consider that there was much significance in C's apparent willingness to give oral evidence in the care proceedings. C, she pointed out, had no experience of giving evidence; she could not be the judge of whether she was likely to be adversely affected by being accused, correctly or incorrectly, of orchestrating against the father a malicious campaign, constructed upon falsehoods. Nor did the judge accept that in the ABE interview C was as mature and composed as she presented. The judge stated that, when watching the interview (which we have not), she had noted that on at least two occasions C needed to leave the room on the basis that she was suffering stomach pains and that, towards the end, she indicated that she had found the interview stressful. Largely, however, the judge accepted the validity and significance of the factors pressed upon her by Mr Geekie.

18. What led to the failure of the father's application before the judge was the jurisprudence of this court (to which, as it happens, we have both contributed) about the proper approach to the calling of a child to give oral evidence in care (or, for that matter, in other family) proceedings. It was Mr Geekie's submission to us that the jurisprudence was insufficiently robust; had too swiftly embraced an insufficiently reasoned criterion that children should not give oral evidence in care proceedings save in exceptional circumstances; and in particular had failed to grapple with the rights of the family members under the European Convention on Human Rights and Fundamental Freedoms 1950 ("the Convention").

19. In this last respect Mr Geekie referred to the rights of the parents and the four younger children under Article 8 to respect for their family life together and, while he acknowledged the entitlement of the state to interfere with those rights if such was both necessary in order to secure the safety of the children and proportionate to that objective, he suggested that neither the necessity nor the proportionality could be demonstrated without rigorous enquiry. Above all, however, Mr Geekie relied on the father's right under Article 6 to a fair hearing in the judge's determination in the care proceedings of his civil rights. Mr Geekie correctly stated that, of the four authorities which in effect comprise the jurisprudence, not even the two which post-date the introduction of the Human Rights Act 1998 had expressly referred to rights under Article 6. Mr Geekie made clear that he did not contend that rights under Article 6 always – or even generally – required oral evidence to be given in care proceedings by

children upon whose allegations the local authority relied. But (he argued) they did at least negative the presumption against oral evidence which had taken hold in the jurisprudence and they required instead a nuanced case-by-case appraisal of the potency of the reasons for depriving the aspirant cross-examiner of that elementary facility. When we explored with Mr Geekie the effect of his submissions in the light of the doctrine of binding precedent, he argued that, although he had not so suggested to the judge, the failure of the jurisprudence of this court to address Convention rights, particularly under Article 6, rendered it *per incuriam*, with the result that this court was *free* to decline to follow it; indeed that, insofar as the jurisprudence was incompatible with Convention rights, the court, as a public authority, was *obliged* under s.6 of the Act of 1998 to decline to follow it; and that, by the application of any less presumptively negative approach to the exercise of the discretion whether to direct oral evidence than that suggested in the existing jurisprudence, his appeal should prevail. But his fall-back position was that, even by reference to the guidance in the existing jurisprudence, the judge, although in no way misconstruing it, reached by reference to it a conclusion which was plainly wrong.

20. These important submissions require us to survey the four authorities which in effect comprise the jurisprudence.

21. First, *R v. B County Council, ex parte P* [1991] 1 FLR 470. This court upheld a magistrate's entitlement to refuse to issue a witness summons for the attendance of a 17-year-old child upon whose hearsay evidence of sexual abuse on the part of her stepfather the local authority intended to rely in care proceedings under the Children and Young Persons Act 1969. One of the grounds of the decision, namely that issue of the summons would entitle delivery to her only of examination-in-chief on the part of the stepfather, is no longer relevant in the light of the flexibility with which, if justice so demands, the court may now rule upon the format of questions to witnesses in family proceedings. Butler-Sloss LJ stated, at 475E, that an order for attendance of a witness would not be made if it would be oppressive; at 476E, that the Report of the Advisory Group on Video Evidence dated December 1989 (the *Pigot* report) had, albeit in the context of criminal proceedings, referred to the adverse effects upon some children of the requirement to give evidence in cases of sexual abuse; also at 476E, that the introduction of the Children (Admissibility of Hearsay Evidence) Order 1990 had made it possible for children to make allegations of sexual abuse in family proceedings without the additional stress of giving oral evidence about it; and, at 476F, that the philosophy behind the Children Act 1989 would be thwarted by the ability of alleged abusers to require children to give oral evidence and that a court should be very cautious before requiring them to do so. Then she added, at 476F-G:

> "If the juvenile court considers at the time of application for a summons that, for reasons of welfare of the child, the child should not be called as a witness, then it would be inappropriate to issue the summons."
>
> Mr Geekie criticises that passage in particular; but it is not reflected in the later jurisprudence and, in that it appears to make the welfare of the child the paramount consideration in determination of the issue, it is in our view wrong. Indeed, in the same case, Lord Donaldson of Lymington MR, at 480H, defined the issue differently, namely as being whether "service of such a summons would itself be so inimical to the welfare of that child … as to outweigh the legitimate interest of the person seeking [it]". Indeed Mr Geekie's complaint about the failure of the jurisprudence to address the interests of the applicant must be judged in the light not only of that comment but also of the opening remarks in the judgment of Nicholls LJ, at 478C-D:
>
> "This is an anxious case. If J's statements about her stepfather's conduct are true, it is of the utmost importance that the younger members of the family are suitably protected. But if what she has said is untrue, a gross injustice will be done to her stepfather if credence is given to her statements. Further, and more importantly in the context of care proceedings, it will not be in the best interests of [the younger children] for the care proceedings to go ahead and be decided on the footing that the events stated by J did occur if, in fact, they did not."

We do not accept Mr Geekie's suggestion that the risk, there identified, that a wrongful acceptance of a child's statements would work gross injustice upon a stepfather and younger children (being the precise suggestion made in relation to the current case) is a thread which has become lost in the later jurisprudence. It is an elementary feature of the central dilemma.

22. Second, *Re P (Witness Summons)* [1997] 2 FLR 447. The court upheld a judge's refusal to order N, a 12-year-old girl, to attend for cross-examination on her statements that the stepfather of her friend, S, who was the subject of the care proceedings, had abused both S and herself. In the course of a judgment with which Kennedy LJ agreed, Wilson J, then sitting as a temporary member of this court,

    (a) reiterated, at 452A, that the criterion was whether the order would be oppressive;

    (b) held, at 452G, that the welfare of the child was not the paramount consideration;

    (c) observed, at 454E, that it was unusual, indeed outside his personal experience as a trial court judge, for a child to give oral evidence in family proceedings but that any application for a direction therefore should be approached on its merits without preconceptions and that, the older the child, the more arguable it became;

    (d) recognised, at 454F-G, the increasing awareness of the grave damage, or further grave damage, which can be done to a child subjected to the trauma of questioning by a stranger whose task is to attack her or his truthfulness in the supremely sensitive area of sexual matters; and

    (e) articulated the speculation, at 454G-H, that in most cases in which the child was of N's age or younger the court would favour the absence of oral evidence even though the concomitant were to be the weakening, perhaps the fatal weakening, of the evidence against the adult.

    Mr Geekie submitted to us that, at (e), Wilson J set the bar too high.

23. Third, *LM v. Medway Council* [2007] EWCA Civ 9, [2007] 1 FLR 1698. This court held that, in ordering a 10-year-old girl to give oral evidence by video-link, a judge had been wrong to hold that it would be "normal" so to order unless damage to the girl amounting to oppression could be demonstrated but that, even applying the correct principles, his order was appropriate in that there was substantial doubt whether she was continuing to adhere to her previous allegations. Smith LJ said, at [44]:

    > "The correct starting point in my view (in accordance with past Court of Appeal guidance) is that it is undesirable that a child should have to give evidence in care proceedings and that particular justification will be required before that course is taken. There will be some cases in which it will be right to make an order. In my view, they will be rare."

    Mr Geekie submits that there should be no "starting point" one way or the other. Wilson LJ added, at [63], that before the court was a rare case in which oral evidence on the part of the girl was necessary in order to enable the judge to discern her up-to-date stance and that he had been entitled to conclude that the order would not be oppressive in the sense of being in all the circumstances unacceptable in terms of her welfare.

24. Fourth, *Re W (Care Order: Sexual Abuse)* [2009] EWCA Civ 644, [2009] 2 FLR 1106. This court declined to set aside a finding of fact in care proceedings that a stepfather had raped his 15-year-old stepdaughter, reached by the judge's appraisal of her ABE interviews and following his refusal to order that she should attend to give oral evidence. In a judgment with which Thorpe and Elias LJJ agreed, Wall LJ said, at [54], that the law about requiring children to give oral evidence in family proceedings was in an unsatisfactory state; at [55], that the giving of oral evidence by children in such proceedings was, like that of Wilson LJ, outside his personal experience when a judge of the Family Division; also at [55], that psychiatrists appeared unanimous that in criminal proceedings it was abusive to require a child to give oral evidence in which his credibility was impugned in relation to alleged abuse, often suffered much earlier; at [57], that the judge had been right to apply the decision in *LM v. Medway Council*, which was binding on him; and, at [59], that it would be rare to order a child to give oral evidence in family proceedings.

25. Given the opportunity provided by this appeal, we would like to refine our thoughts on the current state of the law in the following way: -

    (a) Although the *Pigot* report identified the harm which was likely to flow to children from giving oral evidence in court, the criminal justice system has not chosen to implement the recommendations of the report in full. The result is that, in criminal proceedings, children have continued to be cross-examined months, sometimes even years, after the alleged event.

(b) The *Report of the Inquiry into Child Abuse in Cleveland*, Cmnd 412 (1987), which preceded the *Pigot* report, had demonstrated that to put leading or suggestive questions to children was an inappropriate way of investigating allegations of sexual abuse and of eliciting the truth from children: see in particular, point 4 of the agreement of the professionals set out in paragraph 12.34 of the report. Thus the ABE process which was subsequently developed rightly forbids the asking of such questions. Cross-examination however not only permits, but frequently requires, it.

(c) At the moment there is in effect no meeting of the minds between the criminal and the family lawyers. Care and criminal proceedings, of course, have different purposes, different procedures and different rules of evidence. Nonetheless it seems to us (at least at first sight) to be unsatisfactory to have such diametrically opposed procedures within one overall system of justice.

(d) Although the underlying rationale of the objection within the family justice system to the giving of oral evidence by a child in care proceedings (the potential harm to the child caused by the process) is entirely persuasive to the mind of the family lawyer, the learning upon which it is based has not found expression in the modern case law.

26. In these circumstances we think it appropriate to return to the *Pigot* report in order to see what its members had to say on the point. They took evidence (inter alia) from the Royal College of Psychiatrists and, in a subsection entitled "The child's welfare", they unanimously stated as follows:

> "2.12 We are satisfied that a majority of children are adversely affected by giving evidence at trials for serious offences under existing circumstances. We attach particular importance to the psychiatric opinion we received which suggests that not only do abused children who testify in court exhibit more signs of disturbed behaviour that those who do not, but that the effects of a court appearance are most severe and prolonged in those who have suffered the worst abuse and those without family support. We received evidence on this point from paediatricians, psychiatrists, social workers and a range of organisations and individuals with professional and voluntary responsibility for child care and the care of victims. This led us not only to endorse the case already explained for relieving the stress upon child witnesses, but also to wonder whether the nature and extent of the problem is fully comprehended by the legal profession and the wider public. We cannot emphasise strongly enough that those children who are clearly upset or who break down in the witness box simply manifest openly the effects of a much more generally harmful experience."

27. We are conscious of the fact that these words were written in 1989 and in relation to the criminal law as it then stood. They plainly continue to underlie the present thinking of the family justice system in relation to any suggestion that a child should give oral evidence. But, not least because of their age but also because of the difficulties exemplified by the facts of the present case, we believe that the time has come for a wider consideration of the issue in relation to family proceedings than is possible in the light of the doctrine of precedent, as reflected in the proposal which we make in [30] below.

28. In our view the references in the family jurisprudence to which Mr Geekie particularly objects, namely that the "starting point" is that a child's oral evidence is undesirable and that it is "rare" to order it, do no more than to represent this court's concern to date, expressed in all four of the authorities, about the emotional health of a child subjected to cross-examination in these circumstances and its prediction of the likely decisiveness of that feature in striking the balance in most cases. Nor do we accept that the jurisprudence can be regarded as *per incuriam*. In the two cases which post-date the introduction of the Act of 1998 the court was not invited to analyse the issue through the prism of rights under the Convention and did not do so. But the court can hardly be said to have been unaware (for example) of the right of the adult accused by the child to have, over all, a fair hearing; indeed we have already in effect described such as being an elementary feature of the central dilemma. Furthermore the analysis of the issue through the prism of Convention rights, as offered to us by Mr Geekie, does not appear to us to generate any significantly different effect from that of the existing jurisprudence as we interpret it, founded firmly as it is upon opinion as to what the welfare of the child is likely to demand.

29. The result is that the existing jurisprudence bound the judge just as it binds us. She summarised it accurately. She adverted to all the factors which Mr Geekie had pressed upon her. Notwithstanding the trend of the jurisprudence, she correctly described the issue before her as very finely balanced. We cannot subscribe to the view that her decision was plainly wrong: it was a proper exercise of her discretion.

30. But the judge's application of the existing jurisprudence to the facts of this case leads us both to suggest, as foreshadowed in [27] above, that the time has come for consideration to be given to the possibility of *some* change in the approach to the giving of oral evidence by children in family proceedings. In *B v. Torbay Council* [2007] 1 FLR 203 Coleridge J, at [17], suggested it. In *LM v. Medway Council*, cited above, Wilson LJ, at [58], described the suggestion of Coleridge J as raising "a large and difficult issue, with far-reaching ramifications". In *Re W (Care Order: Sexual Abuse)*, cited above, Wall LJ, at [57], observed that it was not an issue for the judiciary to resolve. We propose to send our judgment and the forceful judgment of Rimer LJ on this appeal to the President of the Family Division. It will be for him to decide whether to take the issue further; but one course open to him would be for him to refer it to the Family Justice Council, which might indeed see fit to set up a multi-disciplinary subcommittee to look into it. Is the premise behind the existing jurisprudence an overstatement of the likely damage to children of giving oral evidence in these circumstances? Is there an age-threshold above and below which different considerations might apply? Can likely damage to a child be reduced and, if so, what measures might be taken, both before and after a child has given oral evidence, to reduce it? Who should be deputed to take such measures? If Cafcass officers are already in post in the proceedings as Children's Guardians or guardians ad litem, do they have time to undertake these extra duties and, in the light of their existing acquaintanceship with the evidence, is it in any event appropriate for them to undertake them? Even if so, who might be made available to undertake them in private law proceedings in which the child has no guardian ad litem? Do persons deputed to support the child in this regard need training or guidance? Do judges, magistrates and family advocates need training or guidance in relation to the proper form and limit of cross-examination of a child? Is it practicable to consider, as suggested in the *Pigot* report in relation to criminal proceedings, that cross-examination might be delivered to the child not at the substantive hearing by video-link but at a preliminary out-of-court, video-recorded, hearing controlled by the judge or magistrates? If however the evidence were to be given by video-link, should it be given from elsewhere in the court building or more remotely and in either event, is the necessary technology accessible to all family courts? Would the introduction of oral evidence of children in some care proceedings be likely to lengthen or shorten them and, if the former, should that be tolerated? Such are but some of the big questions which this issue raises.

31. In presenting his appeal Mr Geekie urged upon us a comparison with criminal proceedings in which a complainant of C's age *would* be required – indeed C herself *will* be required – to attend for cross-examination whether by video-link or otherwise. There are major differences between criminal proceedings and care proceedings. In the former the focus is upon the defendant, namely that if he is innocent he should be acquitted and, subject thereto, that if he is guilty he should be convicted: *R v. Horncastle* [2009] UKSC 14, [2010] 2 WLR 2, per Lord Phillips, at [18]. In the latter the focus is upon the child, namely whether the state is required to intervene in order to protect him or her. Although the child's welfare is not the paramount consideration in determining whether he or she should give oral evidence in care proceedings, that different focus will affect the determination. Cross-examination may, for example, strike further at the strength of the very family relationships the nature of which is under survey: see *LM v. Medway Council*, cited above, at [58].

32. But, notwithstanding the teleological differences between the two types of proceedings, any reconsideration of our practice in care proceedings must include enquiry into what we might borrow from that in criminal proceedings. In this respect two very recent authorities are of significance. On the one hand there is the decision in *R v. Horncastle*, cited above, in which, distancing itself from the apparent view of the European Court of Human Rights, the Supreme Court has held that a defendant's rights under Article 6 are not necessarily infringed even in circumstances in which his conviction is based solely or to a decisive extent on hearsay evidence. On the other there is the decision in *R v. Barker*, [2010] EWCA Crim 4, in which the Court of Appeal (Criminal Division) has held that a conviction was not unsafe although heavily

dependent on the oral evidence of a child aged four who was describing events which had occurred when she was aged less than three. The trial judge had ruled that application to her of the criteria set out in s.53(3) of the Youth Justice and Criminal Evidence Act 1999 did not exclude her competence to give evidence. The Lord Chief Justice stressed, at [40], that in the court's collective experience the age of a witness was not determinative of his or her ability to give truthful evidence and that children should not be stigmatised in advance as being somehow less reliable than adults; and he concluded, at [52], that, unless the court was to resuscitate tired and outdated misconceptions about the evidence of children, there was no justifiable basis for setting aside the conviction. Consideration of any introduction of more widespread oral evidence of children in family proceedings will, no doubt, also include study of recent legislative provisions for lessening the ordeal for children of giving oral evidence in criminal proceedings. In "Measuring Up?", a detailed study by Plotnikoff and Woolfson on behalf of the Nuffield Foundation and the NSPCC published in July 2009, the conclusion was that such legislative framework was basically now very good albeit that its implementation remained disappointing.

33. At all events we have in [1] to [29] above explained why at the end of the hearing we, for our part, concluded that the appeal should be dismissed.

Lord Justice Rimer:

Introduction

34. I have read in draft the joint judgment of Wall and Wilson L.JJ and gratefully adopt their account of the background against which this appeal arises. By the conclusion of the hearing on 21 December 2009, the well judged submissions advanced by Mr Geekie QC had persuaded me to the provisional view that the father's appeal should be allowed, albeit one formed with the diffidence appropriate of a member of the court whose judicial experience has not, like my Lords', been in the field of family law.

35. Having considered the case further and re-read the authorities to which we were referred, I have decided that it would be unjust to Her Honour Judge Katharine Marshall to maintain that view. Whilst, with respect, I consider the reasons she gave for her decision to be unsatisfactory (and I will explain why), I think I understand why she made it, and I apprehend that had she decided it differently she would have surprised her judicial colleagues in this field of the law. I have therefore departed from my provisional view as to the disposition of this appeal and agree that it should be dismissed.

36. I nevertheless arrive at that decision with disquiet, for reasons I will also explain. If I may borrow from Baroness Hale of Richmond, I regard the type of issue with which the judge was faced as raising some big questions (*Campbell v. MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457, at [126]). I fully endorse my Lords' joint indication in paragraph [30] that it is time for a reconsideration to be given to the judicial approach to them.

General observations – the case law

37. My reading of the papers in this case has caused me a high degree of concern as to the justice of the judge's decision. C was accusing the father of sexual violations of the most serious nature. She had made previous allegations of sexual abuse against him in 2008 but had then withdrawn them, asserting that they were lies. She has not, however, withdrawn the further allegations, which the father disputes and which have led to the bringing of criminal charges against him on 13 counts, the trial being likely to be held later this year. C will be a necessary witness at that trial, will give oral evidence and will be subject to cross-examination on behalf of the father. There will be no question of the Crown advancing its case by relying merely on hearsay evidence as to her account of the alleged events.

38. In the civil fact-finding hearing upon which Judge Marshall was or is due to embark in advance of the criminal trial, the procedure is going to be very different, although it was not ever thus. The position of all parties at the CMC on 21 September 2009 was that C would be called as a witness by the local authority, give evidence by a video-link and be available to be cross-examined on behalf of the father. When the judge queried with counsel for the local authority the intention to call C, the response was that 'they had no choice'. C, then just short of 14 (as she now is), was a willing witness and the children's guardian apparently had no concern about her giving evidence. Shortly after that hearing, however, and acting of her own motion, the judge re-opened the question of whether C should do so, a judicial thought

leading to a change of mind on the part of both the local authority and Guardian, to the contested hearing of 25 November 2009 and to the judge's judgment of 30 November 2009 endorsing the local authority's revised decision not to call C to give evidence after all.

39. The outcome was that the judge presented herself with the prospect of conducting a fact-finding hearing at which the local authority would ask her to find on the balance of probabilities that the father had committed the most appalling sexual abuse of C. The primary evidence was to be hearsay evidence in the form of C's ABE interview, C having by her own admission lied in relation to other allegations of sexual abuse she had levelled against the father and being, by own admission, a convincing liar. The father was not, however, to be permitted to test her evidence by asking her a single question. It was to be admitted without challenge, save by his own evidence, which (unlike hers) would be tested under cross-examination.

40. In light of the authorities to which my Lords have referred (in particular, *LM (by her Guardian) v. Medway Council, RM and YM* [2007] EWCA Civ 9; [2007] 1 FLR 1698, per Smith LJ at [44] and *Re W (Care Order: Sexual Abuse)* [2009] EWCA Civ 644; [2009] 2 FLR 1106, per Wall LJ at [55] to [57]), the judge's decision to re-open the question of the calling of C as a witness was, if I may say so, a thoughtful and correct one. The outcome does, however, strike me as profoundly worrying. For a judge to have to decide factual issues as serious as allegations of child rape without the alleged perpetrator having the right to test by cross-examination the primary evidence given against him by his 14-year old accuser may not cause a child and adolescent psychiatrist to lose a moment's sleep. It may not cause a family lawyer to do so either. But I consider that it would cause surprise to most litigation lawyers experienced in different disciplines.

41. It would surprise them because such a procedure is, on the face of it, not only obviously unfair to the father, it is also likely to be materially damaging to the prospect of a safe discharge of the court's fact-finding exercise, a combination of considerations potentially productive of a serious miscarriage of justice. A 'wrong' finding against the father will be personally ruinous for him and likely also to have serious consequences for the future care of the children. A 'wrong' finding in his favour may equally have serious consequences for their future care. In the business of judicial fact-finding, there can rarely be certainty that the judge will come to the 'right' answer, but it is vital that, particularly in cases involving issues as sensitive as this one, the judge should have all available help to assist him to do so. My own experience is that often the most difficult, and worrying, part of first instance decision-making is finding the facts. In the most extreme cases, the difficulty may lie in the absence of anything more to go on than word against word, with nothing providing a corroborating pointer either way. Even in less extreme cases, the exercise can still be very difficult. The worry lies in the fact that the judge has to do the best he can with the evidence he has, knowing that an appellate court will be unlikely to second guess him. In most cases, the fact-finding buck really does stop there.

42. What one also learns as a trial judge is the invaluable assistance provided by the testing of evidence by cross-examination. A witness's evidence and the whole case can be transformed by it. It is ordinarily a vital part of the trial process. Of course in many cases it may not ultimately provide a conclusive pointer as to where the truth lies. But in many cases it *will* do so, by equipping the judge with a rounded grasp of the strength and reliability - or otherwise - of a witness's evidence or of aspects of it, so enabling him to make a decision about which he can feel real confidence. A judge deprived of such assistance is deprived of a crucial element of the trial process essential to the making of a fair decision. A good working example in this area of the potential for injustice by reliance on the untested evidence of a teenage child is *B v. Torbay Council* [2007] 1 FLR 203. The sentiments that Coleridge J expressed in paragraphs [17] and [18] appear to me, if I may respectfully say so, to have the most compelling force to them, although as I understand it the family courts continue to prefer to decide these issues by reference to untested evidence. How many other cases such as *B v. Torbay Council* have there been that we do not know about? 'A child should always say what's true', wrote Robert Louis Stevenson. Yes, but not all children do so.

43. The potential importance of cross-examination in a case such as this - and the inherent disadvantage of being deprived of it - was lucidly explained by Nicholls LJ (as he then was) in *R v. B County Council, ex parte P* [1991] 1 FLR 470, to which decision my Lords have referred. Lord Nicholls of Birkenhead, as he became, was one of the great judges of our time, whose judgments repay careful consideration. The appeal raised two issues: (i) could the

stepfather challenge by judicial review the County Council's decision not to call his accuser, J, as a witness (one made on evidence from a child psychiatrist and social worker that to call J would be harmful to her), to which the answer was a summary 'no'; and (ii) could he challenge the stipendiary magistrate's refusal of his request for the issue of a witness summons requiring J's attendance, in circumstances in which he would probably not be calling her himself, to which the answer was also 'no'.

44. It is worth setting out an extended passage from Nicholls LJ's judgment, at 478. He could have been addressing himself to the present case:

> "This is an anxious case. If J's statements about her stepfather's conduct are true, it is of the utmost importance that the younger members of the family are suitably protected. But if what she has said is untrue, a gross injustice will be done to her stepfather if credence is given to her statements. Further, and more importantly in the context of care proceedings, it will not be in the best interests of L, C and S for the care proceedings to go ahead and be decided on the footing that the events stated by J did occur if, in fact, they did not. "
> The stepfather's case is that J's statements are a tissue of lies. She is an accomplished liar with ample motive for concocting such dreadful allegations. So there is a head-on conflict of testimony between the two of them. Only they know which of them is telling the truth.
> The time-honoured means of resolving this type of dispute is for the two individuals to attend before an impartial judge who hears both of them. Each may himself, or through an adviser, ask the questions, so as to test the other's veracity. The judge listens and observes. At the end the judge has little difficulty, in most cases, in deciding which of the two is being truthful and which is not. This is not a perfect or infallible system, but a better one has yet to be devised. Of course, giving evidence in court in this way is likely to be an ordeal for most people. Depending on the subject-matter, it may be a distressing ordeal. But the judge is able to see that the questioning is fair and temperate; and, as every advocate knows, over-aggressive or unduly-prolonged cross-examination is liable to be counter-productive.
> It is against this elemental background that I have a sense of grave disquiet in the present case. Perforce, the procedure for the taking of evidence has to be modified in the case of young children. Depending on his or her age, the formal questioning of a child may be neither practical nor sensible as a means of finding out what the child has to say, or as a means of testing the child's truthfulness. But in the present case, J is only a few months short of adult status. She is now aged 17 years and 3 months. In the normal course of events, I would have thought that fairness and the best interests of all these minors marched hand-in-hand in requiring the veracity of J's statements, and of her stepfather's vehement denials, to be probed by at least *some* questioning of J. As it is, I am concerned there is a real danger that, in deciding where the future of the three younger children lies, great weight may be attached to J's statements, without her stepfather or his counsel ever having had any opportunity at any stage so much as to ask her one question on any aspect of what she has said. I am alive to the danger of intimidation, and to the very real likelihood of J suffering distress if she has to go over these matters yet again. I would have hoped that these problems would not be insuperable. It ought to be possible to investigate such serious allegations or statements or disclosures, however they are to be described, in a more satisfactory manner than will now be possible, when the stipendiary magistrate will hear evidence from the stepfather and read J's statements, coupled with an expression of view on her credibility by the psychiatrist who has interviewed her."

45. Nicholls LJ then explained why the stepfather's appeal must fail, a decision turning in part on procedural considerations whose like are not alive in this appeal (for why, see *Re P (Witness Summons)* [1997] 2 FLR 447, per Wilson J, as he then was, at 453). He described the difficulties the magistrate would face when the care proceedings resumed, concluding at 479:

> "In the present case, J's statements may be true in every particular. But it is manifestly unsatisfactory, for J and the other children as well as for her stepfather, that the juvenile court is being asked to form at least some view about her truthfulness, without having the proper materials to carry out that difficult but very important task. This does not appeal to me as a course which is likely to be in the

best interests of the children, with whose welfare the care proceedings are concerned.
I emphasise that the present case concerns the evidence of a child of mature years. Nothing I have said applies to children who have yet to reach that age."

46. If I may say so, Nicholls LJ's observations strike a chord which chimes with what I believe most people would regard as reflecting basic principles of fairness and justice, the achieving of which should underpin all case management decisions. He was, however, expressly not uttering blanket guidance to the effect that all children of all ages who make like assertions against an adult must ordinarily be called to give oral evidence and cross-examined. He was dealing with a child at the senior end of the age spectrum, as to whom his instinct was that fairness indicated no apparent reason why she should not. He left open the position in relation to younger children. He favoured a case by case – or child by child - approach.

47. Lord Donaldson of Lymington MR's judgment included observations to like effect. He said, at 480:

> "Whilst I may have considerable reservations as to the further harm which cross-examination in a *juvenile court* would to do a sexually abused 17-year-old (assuming that that is what she is), or to a 17-year-old who is a quite wicked liar (assuming that that is what she is), this must be a matter for the county council in the exercise of its discretion as to what evidence needs to be, and should be, called in support of its application for care orders. By failing to call J to give evidence, they weaken the force of the hearsay evidence in direct proportion to the extent to which the juvenile court may come to the conclusion that the overwhelming reluctance of a child of J's age to give evidence casts doubt upon the reliability of that evidence. Quite different considerations would apply in the case of younger children. If in this case the result were to be that the application for the care orders failed, the county council might find itself wondering whether it had put the interests of J before those of the other children."

48. Lord Donaldson's last quoted sentence is a pertinent one. In defence of decisions such as that under challenge before us, the point is made that the door swings both ways, one swing being that the failure to call the child to give oral evidence and be cross-examined may mean that the local authority will fail to prove its case. That may be so, although it must represent a profoundly unsatisfactory outcome to a process that is not directed at the resolution of a purely adversarial contest of the nature that arises in most civil litigation but is supposed to be a fact finding inquiry conducted for the purpose of deciding upon the future care of a child or children. Moreover, a party such as the father in the present case is also likely to derive little comfort from being told that fortune may swing the door his way. He will want to know why he should not be entitled to question his accuser and clear his name. The rejoinder may be that the proceedings are not concerned with any bid by him to do so. As Lord Donaldson explained, at 482A:

> "I have great sympathy for the appellant in his wish to clear his name. Unfortunately, care proceedings are not intended or designed for this purpose. Indeed, there may be cases in which the fact that the children are persistently making *false* allegations may be one of the factors pointing towards the need for a care order."

That may be so too, but it adds to my concern about the problems raised by a case such as this, in which the settled practice seems focused on marginalising any notion that considerations of fairness towards someone like the father have any part to play in the judicial process. Is that really consistent with the right of the father, a party to the proceedings, to a fair trial under article 6 of the Convention?

49. The more recent authorities tend not to refer to the judgments of Nicholls LJ and Lord Donaldson in *R v. B* so much as to that of Butler-Sloss LJ, with her great experience in this field. Her judgment makes clear the caution that courts must apply before requiring children to attend a hearing to give evidence as to their allegations of sexual abuse and be cross-examined. She said, at 476E:

> "Research has shown the adverse effects upon some children of the requirements to give evidence in cases of sexual abuse. In cases of young children, such harm may well be inferred. (See the Report of the Advisory Group on Video Evidence 1989.)

> The introduction of the 1990 Order [Children (Admissibility of Hearsay Evidence) Order 1990 (SI 1990 No 143)] clearly envisages an alternative to oral evidence and cross-examination, and to make it possible for children making allegations of, inter alia, sexual abuse to do so without the additional stress of a court hearing. The philosophy behind the Children Act would be thwarted by the ability of the alleged abuser himself being able to require the attendance of the child at court. A court should be very cautious in requiring the attendance of a child in these cases, reinforced as it must be by consideration as to how to deal with a refusal to give evidence after the issue of the summons."

50. Butler-Sloss LJ was, however, fully sensitive to the problems with which the judge might be faced *without* the benefit of oral evidence from the child. In that context, she cited with approval from Neill LJ's judgment in *Re W (Minors) (Wardship Evidence)* [1990] 1 FLR 203, at 227:

> "… hearsay evidence is admissible as a matter of law, but … this evidence and the use to which it is put has to be handled with the greatest care and in such a way that, unless the interests of the child make it necessary, the rules of natural justice and the rights of the parents are fully and properly observed."

51. In this court's decision in *Re P (Witness Summons)* [1997] 2 FLR 447, Wilson J (as he then was) explained that the decision as to whether a child in a case such as this should give evidence and be cross-examined was governed by the criterion of *oppression*. I understand that to reflect the point that, whilst the accused's right to a fair trial would ordinarily entitle him to question his accuser, that consideration may be outweighed by the potential for harm to the accuser occasioned by cross-examination about the experience of the matters alleged to have occurred – and even, as Wilson J explained, if they had *not* occurred. He recognised that whilst it is unusual for a child complainant of sexual abuse to give oral evidence in proceedings under the Children Act 1989 – and he had never experienced it – the court must deal with any application to that end on its merits and without preconceptions. He said that, in principle, the older the child, the more arguable the application, perhaps an echo of what Nicholls LJ and Lord Donaldson had said in *R v. B.* He opined that in most cases the court would probably not favour the giving of oral evidence by a child of 12 or younger, even though that would carry a necessary weakening of the case against the adult. Kennedy LJ agreed.

52. Wilson J's observation that such applications should be dealt with on their particular merits strikes me as obviously just. But his own reported experience at first instance down to 1997 appears to reflect that in practice that particular door usually only swings one way; and, as Wilson LJ (as he had by then become) explained in *LM v. Medway Council* [2007] 1 FLR 1698, at [56], his continued experience in the Family Division down to 2005 was the same. His experience therefore reflects that the court's discretion in the matter was ordinarily only exercised one way. *LM* was a case where oral evidence from a 10-year old child *was* directed, and this court declined to overturn the decision. Wilson LJ explained, however, at [61], that the case was:

> "… quite different from that which obtained in *Re P* above or indeed that which obtains in the vast majority of public law applications. The present case does not reflect the straightforward situation in which a parent who has been accused by a child denies the accusation and aspires to cross-examine her or him."

LM was therefore regarded as a special case justifying special treatment. The father in our case suffers the misfortune that his case reflects 'the straightforward situation'. I doubt if he would see it thus. If innocent of the accusations levelled at him by C, he must regard the prospect of having to meet them without any right to question her as a nightmare of immeasurable proportions. It will be no comfort to be told that his case is a straightforward one of a type in which accused fathers have no right to question their accusers.

53. My Lords have cited paragraph [44] of Smith LJ's judgment in which, in effect, she expressed the view that there was a presumption against the calling of child witnesses that had to be rebutted by the demonstration of 'particular justification', in line with her statement in paragraph [40] that 'the guidance of the Court of Appeal … is that it will be unusual for a child to be called to give evidence'. I would, however, also cite what she said in paragraph [45], which shows that the making or otherwise of an order for oral evidence involves a balancing exercise:

> "In considering whether to make an order, the judge will have to balance the need for the evidence in the circumstances of the case against what he assesses to be the potential for harm to the child. In assessing the need for oral evidence in the context of care proceedings, the judge should, in my view, take account of the importance of the evidence to the process of his decision about the child's future. It may be that the child's future cannot be satisfactorily determined without that evidence. In assessing the risk of harm or oppression, the judge should take heed of current research into the effect on children of giving evidence and should not rely upon his impression of the child, although that will of course be relevant."

In light of Wilson LJ's experience during his tenure as a Family Division judge, I question, however, how often the carrying out of that balancing exercise results in an order for oral evidence. His Honour Judge Marston's view was that the answer might be 1%, as my quotation in the next paragraph will show, although I recognise that Judge Marston was not thereby purporting to offer any precise statistic so much as making a general point as to the practice in family courts.

54. Finally, this court re-visited the issue in *Re W (Care Order: Sexual Abuse)* [2009] EWCA Civ 644; [2009] 2 FLR 1106, to which my Lords have referred. That reflected a similar approach. I would refer to Wall LJ's citation at paragraph [68] from the judgment of Judge Marston under appeal, which shows how conventional Judge Marshall's decision in the present case was. Judge Marston said:

> " … The local authority are not calling ISW who as I remind everybody was born on 29th November 1992 so is not yet 16 years of age. They are relying on the DVDs and on other matters so that the "Defendant" here will not have a chance to cross-examine that witness. He sees that as grossly unfair; the reality is it is the position which appertains in 99 out of 100 of these sorts of cases. It is only in a very unusual case that a complainant, if I can use that word, from criminal law will give evidence; a child would give evidence. But of course, it is a door that swings both ways. He says "I am disadvantaged" and of course those seeking to rely on the evidence are equally disadvantaged because they are relying on hearsay evidence. They are relying on untested evidence; they are relying on recorded interviews which as the person against whom the allegations can point out, are untested by way of cross-examination. I have to find that there is cogent evidence to discharge the burden of proof in a case like this, even on the civil burden. And so the fact that the local authority do not have the key player here to be cross-examined is something that I have to take very carefully into consideration when deciding whether they have proved their case or not. As I said, it is a door which swings both ways in a case like this. So the fact that the local authority have decided not to rely upon or call this witness a) is entirely understandable, b) in some ways makes Mr W's task easier, and c) is certainly not something that I would interfere with given the state of the Court of Appeal decisions on this matter."

55. Given this jurisprudence, Judge Marshall was plainly justified in re-opening the question as to whether C should give evidence and be open to cross-examination. She was entitled to have regard to the fact that this court's recent guidance is that to direct the calling of such evidence will be unusual, that it will be a rare case in which it will be done and that particular justification will be required for the making of such an order. That, somewhat general, guidance does not, by itself, provide much help as to what considerations the judge should take into account in deciding whether or not to make such an order, although more concrete guidance was provided by Smith LJ in paragraph [45] of *LM v. Medway Council.*

The judge's decision

56. The judge reviewed the authorities and opposing arguments. Her reasons for her conclusion were expressed in paragraph [15]. She said, in paragraph (a), that the decision was one for the court's discretion; in (b), that in exercising it, the court must take account of, and balance, the parties competing Convention rights under articles 6 and 8, and that there were factors pointing both for and against a direction that C should give evidence; and in (c), she said:

> "c. The allegations to be considered are of a very serious nature and the outcome for the children and their parents has the potential to be far-reaching; however the care proceedings are civil proceedings designed to protect the welfare of the subject

children and the court is not engaged in deciding whether offences have been committed by any individual. That being said, it is no less important that the court reaches a conclusion on the findings sought only after a thorough and careful analysis of all the relevant evidence. A wrong decision in either direction equally has the potential to cause serious injustice."

57. In paragraph (d) the judge said that the court had to consider the parties' article 6 rights to a fair trial, but said that that did not entitle any party to an automatic right to cross-examine witnesses. Without expressly referring to swinging doors, she made the like point. She then said:

> "e. Having watched the ABE interview, I am satisfied that it covers the relevant matters, including the issue of C's earlier allegation and retraction. Credibility of C's account is a key issue. However, the fact that C must have been being [sic] untruthful at some point is not necessarily determinative of her credibility about all matters and her account will need to be carefully considered in the light of her explanations and motivation to lie. Furthermore, it is not necessarily the case that cross-examination of C will elicit the ascertainable truth. In her interview C herself states that she can be a convincing liar. She also claims to have retracted her initial allegations due to being put under pressure."

58. As to credibility being a key issue, the judge was essentially repeating what she had said in paragraph [7] of her earlier judgment of 16 November 2009:

> "This case really is going to come down to the question of whether the court believes what [C] is going to say or whether the court believes the case put on behalf of [the father]. It is a matter of credibility."

59. Reverting to paragraph [15], the judge then said that, whilst C's allegations formed the core of the local authority's case, they were not the only matters that the court was going to have to consider and there was also a good deal of material relating to C's disclosures to and conversations with others, which the father would be able to dispute in his own evidence. In addition, the local authority's case also rested in part on the forensic evidence based on the matters to which my Lords have referred in paragraph [8] above.

60. The judge then expressed her conclusion, as follows:

> "h. Given all of the above, I am satisfied that permitting [the local authority] not to call C to give evidence orally does not prevent [the father] from being afforded a reasonable opportunity to present his case, or is he placed at a substantial disadvantage against [the local authority]."

61. On the face of it, the judge thus arrived at her decision without addressing any overt thought at all to the question why C should *not* be called and cross-examined, let alone to the harm (if any) that C might suffer if she were. The judge did, however, then turn to the matter from C's perspective and said:

> "i. It is accepted that C is a mature 14 year old, and comes across on the DVD as composed and self-possessed. However, such an outward appearance should not be taken at face value and without consideration of other factors. I do not accept that she has "given her evidence without difficulty". There are at least 2 occasions during this interview when C has to stop her account and needs to leave the room as she is experiencing stomach pains. She indicates towards the end that she has found it stressful. I am unable to form a view as to what is the root cause of that stress, but it suggests C may not be as emotionally mature or resilient as her confident presentation suggests.
> j. C has told the court that she is willing to give evidence and was expecting to attend court for the fact-finding hearing. I am told that a witness summons would not be required if the court ruled that she should attend. It is likely that she will be required to give evidence in the criminal proceedings. If she is also required to give evidence in these proceedings, she will have to attend court on at least two occasions to be cross-examined about these allegations. I am not aware that C has previously given evidence in court proceedings and therefore has no experience by which to judge how she will cope, or feel afterwards. The very process of giving evidence is generally considered to be stressful, and is more likely to be so where the purpose of

> C being cross-examined is to test the reliability of her account and challenge her credibility."

62. The judge concluded her judgment by reminding herself that the guidance from this court is that 'it is unusual for a child to give evidence in care proceedings', and she summarised what Smith LJ had said in paragraph [44] in *LM v. Medway Council.* She said that there 'will be some cases in which it will be right to make an order [for the giving of oral evidence], but they will be rare; and finally that:

> "Although this will undoubtedly be a difficult case given the nature of the allegations and the background, on balance I am not persuaded that the circumstances are sufficiently difficult or exceptional to justify interfering with [the local authority's] decision not to call C to give evidence."

Discussion

63. Mr Geekie criticised the guidance in the recent authorities that the starting point in an issue such as that before the judge is that it is 'undesirable' that a child should give evidence in care proceedings and that 'particular justification' for such a course needs to be made good. He submitted that the starting point should be that the objective is to achieve a fair trial process, with no preconceptions or presumptions as to how that is to be done. A fair trial process is one that, in the ordinary course, will entitle a party against whom serious, and disputed, allegations are made to face his accuser and question him about them. Mr Geekie did not, however, suggest that the accused's article 6 rights trump all other considerations and he recognised, rightly in my view, that the court has to engage in a balancing exercise directed at an assessment of whether, in the particular case, fairness to all parties requires an order enabling cross-examination.

64. Were I not of the view that this court's recent guidance is binding upon us, I would be disposed to accept that there is much force in Mr Geekie's submission. I regard it as intuitively unsatisfactory, and likely to be productive of injustice, for courts to approach the type of issue with which Judge Marshall was faced on the basis of a presumption that it is undesirable and unusual to call a child to give evidence and that some special justification must be shown for that presumption to rebutted. These cases may well follow a similar pattern but each will in fact be unique, it should be recognised as such and the accused, if I may (probably inappropriately) continue to use that word, will certainly so regard it. There must of course be a balancing exercise, which will include taking into account the probable or possible effect on the child of a testing of his evidence. But I should have thought that the placing of reliance on broad generalisations as to the potential for such harm might well be unsafe and that the better practice would be for the courts to approach the resolution of such issues on a child-specific basis, with (in case of dispute) the benefit of evidence focused on any likelihood of harm that a testing of his evidence might cause to the particular child.

65. Having said that, I consider that the recent guidance was binding upon Judge Marshall as upon us. It did not show that the father's application was bound to fail, but did show that he had to justify his claim that C should give oral evidence, the starting presumption being that for her to do so would be undesirable. In considering whether he had shown such justification, the judge's task was to engage in a balancing of the relevant considerations. That is what she did.

66. I have to say that, with respect, I regard her weighing of what she regarded as the relevant factors as having in the event been unsatisfactory and unconvincing. Paragraph 15(e) of her judgment reflects an apparent misapprehension of the potential importance of cross-examination. Since C's credibility was directly in issue, her evidence could be said to cry out to be tested by cross-examination. The judge's observation that 'her account will need to be carefully considered in the light of her explanations and motivation to lie' was true, but overlooked that such consideration unaided by cross-examination will inevitably be deficient – and, perhaps, fatally so. Her statement that 'Furthermore, it is not necessarily the case that cross-examination of C will elicit the ascertainable truth' was another undoubted truth. But its making reflected the apparent overlooking of the more important truth, namely that cross-examination *might* elicit the ascertainable truth: and, as Nicholls LJ said in *R v. B,* no-one has yet devised a better way of doing so. I doubt if there has yet been born the lawyer who has advised his client that there is no need to cross-examine a particular witness since it will 'not necessarily elicit the ascertainable truth'. Insofar as that statement formed a material part of

the judge's reasoning, I would regard it as a misdirection. At that point the judge was not ruling out cross-examination because it might be oppressive to C. She was apparently ruling that there was no need for it anyway. That was wrong.

67. The judge then moved on to refer to the fact that there was other material – as described by her, all originating from C – that also formed part of the local authority's case; and she referred to the evidence relating to the clothing and tissue. Her approach appears to have been that there was no need for the father to question C about any of this. Justice would be done by allowing him to give his own responsive evidence. I do not understand that either. The father wants to cross-examine on *all* allegations flowing from C and – subject only to consideration of the question of potential oppression of C – he had, it seems to me, in principle a basic right to do so.

68. The judge then arrived at her conclusion in paragraph 15(h). As I have said, it was not based on any assessment of potential oppression to C by being cross-examined. The judge only began to touch on that in paragraphs 15(i) and (j), cited above. None of that, however, appears to me to contain any evidentially-based finding of potential oppression to C. What it tells us is that C is a mature 14 year old, apparently composed and self-possessed, who was expecting to give evidence, is willing to do so and is likely to have to give evidence at the criminal trial later this year. The judge admittedly opined that C's outward presentation may be misleading, but she provided only paper thin support for that. First, she said that C made two exits from the interview because of stomach pains, but did not find that either was provoked by the agony of the interview. Second, she said that C said that the interview was stressful. No doubt it was, but the judge did not then explain what point she was so making. In paragraph 15(j) the judge said that 'I am not aware that C has previously given evidence', words reflecting that there was no evidence on that point. The judge then built on her (probably justified) assumption by saying that it followed that C had no experience as to how she would cope when, and after, giving evidence. Again, no doubt that was so, but the judge referred to no evidence that anyone perceived her as likely to be *harmed* by the giving of evidence. The judge's final sentence in paragraph 15(j) was also unconvincing. Everyone knows that giving evidence is stressful, but I would not have thought that the judge could, without more, equate this with the type of harm to C that might fairly be brought into the balance. The judge's further comment that cross-examination is particularly stressful if its purpose 'is to test the reliability of her account and challenge her reliability' is also odd. Is that not usually the purpose of cross-examination?

69. It was this assessment of the judge's reasoning that caused me to question the correctness of her conclusion. I was concerned that she had misdirected herself, got the balance wrong and arrived at the wrong result. But I have drawn back from the brink of dissent. That is because, in paragraph 15k, the judge, understandably, said that the guidance from this court is that the starting point is that it is undesirable for children to give evidence in care proceedings and that particular justification will be required before that course is taken. She then said (in effect) that this case was not the exceptional type of case that arose in *LM v. Medway* but was the straightforward type of case to which Wilson LJ had referred. She concluded that there was nothing exceptional about it to require a departure from the starting point. Although she does not say so, I presume that her reasoning was silently underpinned by her tacit acceptance of a generally held view, no doubt implicit in that guidance, that the reason for the starting point is the recognised risk of harm to children by giving evidence in care cases, a risk to which C was equally subject. The guidance showed that the father had, therefore, to show special justification for the order sought and her view, in short, was that there was nothing sufficiently special about the case to enable the father to do so. My Lords have concluded that her conclusion in this respect cannot be faulted. For reasons given, I have had my doubts about that. But, ultimately, with hesitation, I have come to the conclusion that her decision should be upheld. It was a decision that was, for all practical purposes, imposed on her by a mixture of jurisprudence and practice, being however a mixture whose underlying soundness I would respectfully question.

70. The result is that I too would dismiss the appeal. I repeat my endorsement of my Lords' proposal that the practice with regard to the calling of oral evidence from children in care proceedings should be the subject of reconsideration.