



Neutral Citation Number: [2023] EWHC 406 (Fam)

Case No: FA-2022-000278

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
On appeal from Recorder Bradberry

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:24/2/23

Before :

MRS JUSTICE THEIS DBE

Between :

	D	<u>Applicant</u>
	- and -	
	R	<u>Respondent</u>

Dr Charlotte Proudman (instructed by **Duncan Lewis Solicitors**) for the **Applicant**
Mr R Attended In Person

Hearing date: 23rd February 2023

Judgment: 24th February 2023

Approved Judgment

This judgment was handed down remotely at 2.00PM on 24th February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE THEIS DBE

The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis DBE :

Introduction

1. The court is concerned with the mother's appeal from the order of Recorder Bradberry dated 23 September 2022, following a four day fact-finding hearing when the mother and father gave oral evidence. The findings sought by the mother concerned allegations of domestic abuse. Recorder Bradberry concluded the allegations made by the mother were not proved to the required standard.
2. Permission to appeal was given by Morgan J on 6 January 2023, on three of the mother's nine grounds of appeal. Two of the grounds of appeal concern the same issue; that the judge failed to comply with the court's duties under Part 3A and Practice Direction 3AA Family Procedure Rules 2010 ("FPR") and section 63 Domestic Abuse Act 2021 ("DAA"). The third ground concerned the way the court below dealt with section 98 Children Act 1989.
3. It is accepted on behalf of the mother, that if the court allows the appeal on the grounds relating to FPR Part 3A the findings below will need to be set aside and the matter listed before a different judge.
4. The appeal is opposed by the father, who appears as a litigant in person. He has filed a skeleton argument and attended this hearing.
5. The proceedings concern the father's application for contact with the parties' child, X now age 2. The father's application was made on 15 December 2021, over 12 months ago. The fact-finding hearing took place in September 2022. It is a matter of very great concern that the proceedings have been ongoing for over a year. Whatever the outcome of the father's application, delay in itself is inimical to the welfare needs of this young child (section 1(2) Children Act 1989). The continued uncertainty is also likely to have an impact on the parents too.

Relevant Background

6. It is only necessary to give a brief summary.
7. The parents commenced their relationship in about 2015 and married in May 2019. Their child was born the following year, and they separated in June 2021. X remained living with the mother.
8. The parties were unable to agree arrangements for the father to see X. As a consequence he made an application to the court in December 2021 for an order to spend time with X. A Cafcass safeguarding letter was prepared and the first hearing was before the magistrates in April 2022. Bearing in mind the allegations made by the mother concerned allegations of domestic abuse FPR PD12J was engaged. Directions were made by the magistrates for disclosure from the police, local authority, a letter from the mother's GP and for the filing of a Scott Schedule of allegations the mother relied on, with provision for the father to respond. The application was re-allocated to District Judge level.
9. The mother set out ten findings she sought in her Scott Schedule including allegations of undermining and coercive and controlling behaviour, such as isolating her from her

family and friends; pressurising her to seek termination of her pregnancy; pressurising her to engage in sexual intercourse and sexual acts; unwanted sexual touching; sexual intercourse without her consent, in the presence of their child and being sexually aroused by or in the presence of X. The father denies the allegations.

10. The next effective hearing was in May 2022 before Recorder Cranfield. He gave permission for the mother to rely on five video clips of covert recordings of the father relied upon by the mother. The mother had installed covert recording in their home prior to the parties separation, due to her concerns that the father posed a risk of sexual harm to X. Other directions for further evidence were made and the matter listed for a two-day fact-finding hearing in early July. That hearing was adjourned at the mother's request and re-listed in September 2022.
11. It was that hearing that led to the order dated 23 September 2022, which is the subject of this appeal.
12. There is no issue that the findings sought by the mother involved allegations of domestic abuse, and included serious allegations of sexual harm and controlling and coercive behaviour.
13. Both parents were legally represented at the fact-finding hearing in September 2022. It was a remote hearing. The mother gave evidence over two days and the father for half a day. During the course of her evidence, the mother was shown some of the video recordings she relied upon, as there were issues about what she reported was in the video and what could be seen in the video recording. By the nature of the allegations relied upon by the mother, she would have been asked about intimate issues regarding the parents' relationship. It is agreed that all parties' cameras remained switched on during the evidence, so both parents were able to see the other when they gave evidence.
14. It is accepted that at no stage did any legal representative for either party refer the court at any of the hearings to the provisions of FPR Part 3A and at no stage did the court independently consider those provisions. Having reviewed the orders there is no reference to these provisions in any of the orders.
15. In the judgment dated 23 September 2022 the Judge details the findings sought and the conclusions reached about the reliability of the parties' evidence based, in part, on their oral evidence as well as the written material available to the court. It is of note that in the written judgment there is no reference to FPR Part 3A or any real consideration of the mother's vulnerability in her giving evidence as a result of the allegations of domestic abuse. The order dated 23 September 2022 recorded the (non) findings made by the court, gave directions for indirect contact and ordered a section 7 report from Cafcass together with an interim report to address interim contact. The next hearing was fixed for 17 October 2022.
16. The mother's notice of appeal is dated 13 October 2022. The perfected grounds of appeal are dated 27 October 2022. In addition, the mother filed a short statement dated 12 October 2022, together with a letter from her GP which records the mother reporting '*worsening anxiety symptoms following her recent testimony in family court*'. In her statement she described not being aware of any special measures that could have been made, she said she could not concentrate and take everything in

during her evidence whilst seeing the father. She described it as '*distressing and very upsetting*' which led her to be clouded with emotion during the time she gave her evidence which impacted the way she gave it.

17. In the notice of appeal the mother sought a stay of the contact order, which was refused by Arbuthnot J on 1 November 2022. Directions were made for the father to provide a skeleton argument, which he did. On 6 January 2023 Morgan J gave permission on the three grounds outlined above and gave directions for the matter to be listed for this hearing.
18. Pending this hearing the court below has continued to deal with the father's application. The most recent order directed fortnightly supervised contact between the father and X at a contact centre. The court was informed that the parties had jointly registered with the contact centre and were awaiting a space to become free. Subject to the outcome of this appeal, the next hearing is listed on 28 February 2023.

Legal Framework

19. FPR Rule 30.12 (3) provides that this appeal may only be allowed where the decision of the court below was wrong or there was a procedural irregularity, such that the decision made is unjust.
20. The appellate court may conclude that a decision is wrong or procedurally unjust where (i) there has been an error of law; (ii) the judge has clearly failed to give due weight to some very significant matter or, by contrast, has clearly given undue weight to some matter not deserving of it (see *B v B (Residence Orders: Reason for Decision)* [1997] 2 FLR 602; (iii) that a conclusion has been reached on the facts before the court which was not open to the judge reaching them on the evidence (see *Royal Bank of Scotland v Carlyle* [2015] UKSC 13); (iv) that a process has been adopted at the court below which is procedurally irregular and unfair to such an extent that it renders the decision made unjust (*Re S-W (Care Proceedings: Case Management Hearing)* [2015] 2 FLR 136); or (v) that a discretion has been exercised which is outside the parameters within which it is possible to have reasonable disagreement *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647.
21. The need to make due provision for vulnerable persons to participate in and/or give evidence in family proceedings are set out in the rules in FPR Part 3A "Vulnerable Persons: Participation in Proceedings and Giving Evidence", introduced in 2017 and supplemented by Practice Direction 3AA ("PD3AA"). There is no definition of "vulnerability" in the rules, although factors the court may wish to consider are set out in PD3AA para 2.1.
22. FPR Part 3A was amended on 31 January 2022 in relation to cases where there are allegations of domestic abuse. Gwynneth Knowles J succinctly summarised the current legal and procedural framework applicable in such cases in *Re M (Private Law Children Proceedings: Case Management: Intimate Images)* [2022] EWHC 986 (Fam) at paras [36] – [44]. She set out the changes to FPR Part 3A, in particular Rule 3A.2A which is headed '*Court's duty to consider making participation directions: victims of domestic abuse*'. That rule came into effect on 31 January 2022 and incorporated the changes following the implementation of the Domestic Abuse Act 2021, in particular section 63. Gwynneth Knowles J's summary in *Re M* is required

reading for any judge undertaking any hearing that involves allegations of domestic abuse.

23. In a case that involves domestic abuse, where a party or a witness is a victim of domestic abuse, or at risk of it, the court is required to take the following steps, summarised as follows:

(1) Is this a case where there are allegations of domestic abuse within the definition of section 1 DAA? Section 1 defines “domestic abuse” as follows:

(2) Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if –

(a) A and B are each aged 16 or over and are personally connected to each other, and

(b) the behaviour is abusive.

(3) Behaviour is “abusive” if it consists of any of the following –

(a) physical or sexual abuse;

(b) violent or threatening behaviour;

(c) controlling or coercive behaviour;

(d) economic abuse;

(e) psychological, emotional or other abuse;

and it does not matter whether the behaviour consists of a single incident or a course of conduct.

(4) “Economic abuse” means any behaviour that has a substantial adverse effect on B’s ability to –

(a) acquire, use or maintain money or other property, or

(b) obtain goods or services.

(5) For the purposes of this Act A’s behaviour may be behaviour “towards” B despite the fact that it consists of conduct directed at another person (for example, B’s child) .

(2) If there are allegations of domestic abuse s 63 DAA applies and Rule 3A.2A provides:

3A.2A Court’s duty to consider making participation directions: victims of domestic abuse

(1) “where it is stated that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by a party, a relative of another party, or a witness in

*the proceedings, the court **must** assume that the following matters are diminished*

–

(a) the quality of the party's or witness's evidence;

(b) in relation to a party, their participation in the proceedings”...

(emphasis added)

- (3) Where the assumption set out in paragraph (2) above applies, the court “**must consider whether it is necessary to make one or more participation directions**” (Rule 3A.2A(3)) (emphasis added). Participation directions are often referred to as ‘special measures’.
- (4) It is important to keep in mind, and distinguish between, the need for participation directions to facilitate participation in a hearing from those relating to how evidence is given. As regards participation in a hearing, there is a need for that to be considered at the start of the proceedings (and kept under review), whereas those applying to the giving of oral evidence may be additional and/or different to any earlier participation directions. As regards those that may be required for giving evidence, they may best be considered after the written evidence has been filed.
- (5) A ground rules hearing should be held. PD3AA para 5.2 states “*When the court has decided that a vulnerable party, vulnerable witness or protected party should give evidence there shall be a “ground rules hearing” prior to any hearing at which evidence is to be heard, at which any necessary participation directions will be given*’. There is no need for this to be a separate hearing to any other hearing in the proceedings but a part of the hearing should specifically relate to consideration of any participation directions.
- (6) Rule 3A.7 sets out a list of matters to which the court must have regard to “*when deciding whether to make one or more participation directions*:
- (a) the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of –*
- (i) any other party or other witness to the proceedings or members of the family or associates of that other party or other witness; or*
- (ii) any members of the family of the party or witness;*
- (b) whether the party or witness –*
- (i) suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;*
- (ii) has a physical disability or suffers from a physical disorder; or*
- (iii) is undergoing medical treatment;*
- (c) the nature and extent of the information before the court;*

- (d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;*
 - (e) whether a matter is contentious;*
 - (f) the age, maturity and understanding of the party or witness;*
 - (g) the social and cultural background and ethnic origins of the party or witness;*
 - (h) the domestic circumstances and religious beliefs of the party or witness;*
 - (i) any questions which the court is putting or causing to be put to a witness in accordance with section 31G(6) of the 1984 Act;*
 - (j) any characteristic of the party or witness which is relevant to the participation direction which may be made;*
 - (k) whether any measure is available to the court;*
 - (l) the costs of any available measure; and*
 - (m) any other matter set out in Practice Direction 3AA”.*
- (7)** The court may make such directions for the measures specified in Rule 3A.8. In addition, the court may use its general case management powers as it considers appropriate to facilitate the party’s participation (para 4.2 of PD 3AA).
- (8)** The measures set out in Rule 3A.8 “*are those which –*
- (a) prevent a party or witness from seeing another party or witness;*
 - (b) allow a party or witness to participate in hearings and give evidence by live link;*
 - (c) provide for a party or witness to use a device to help communicate;*
 - (d) provide for a party or witness to participate in proceedings with the assistance of an intermediary;*
 - (e) provide for a party or witness to be questioned in court with the assistance of an intermediary; or*
 - (f) do anything else which is set out in Practice Direction 3AA”.*
- (9)** The court should set out its reasons on the court order for making, varying, revoking or refusing any directions in FPR Part 3A (Rule 3A.9).

24. The importance of the provisions in FPR Part 3A have been emphasised in a number of cases, most recently by Baker LJ in *A v A Local Authority and others* [2022] EWCA Civ 8 when he stated as follows:

41. We have focused on the issue of vulnerability in cases like the present involving parties or witnesses with limited understanding. There are other equally important provisions in Part 3A applying to victims or alleged victims of abuse and intimidation. All such provisions are a key component of the case management process which ensures compliance with the overriding objective of enabling the court to deal with cases justly. As King LJ observed in Re N (A Child) [2019] EWCA Civ 1997 at [53]:

"Part 3A and its accompanying Practice Direction provide a specific structure designed to give effective access to the court, and to ensure a fair trial for those people who fall into the category of vulnerable witness. A wholesale failure to apply the Part 3 procedure to a vulnerable witness must, in my mind, make it highly likely that the resulting trial will be judged to have been unfair."

42. It does not follow, however, that a failure to comply with these provisions, whether through oversight or inadvertence, will invariably lead to a successful appeal. The question on appeal in each case will be, first, whether there has been a serious procedural or other irregularity and, secondly, if so, whether as a result the decision was unjust. We are alive to the fact that many witnesses will give their evidence in a way which falls short of the standard that they would have wished for, or their advocates had hoped. Sometimes, this may be because of the very nature of human frailty, at other times it may be because a witness was deliberately deflecting or obfuscating or, worse still, lying.

Submissions

25. Ground 1 of the appeal focusses on the requirements imposed on the court by FPR Part 3A.
26. In her written and oral submissions, Dr Proudman (who did not appear in the court below) emphasised the serious nature of the allegations in this case that clearly come within the definition of domestic abuse. They were such that they activated the requirement in FPR Rule 3A.2A to identify the mother as a complainant of domestic abuse and thus a vulnerable party and in addition, to place the duty on the court to consider what, if any, participatory directions that she required in order to give her evidence.
27. She submits the court wholly failed in its duty under the FPR Part 3A to consider whether the mother, as a vulnerable party, required participatory directions to assist her in giving evidence.
28. In reaching conclusions about the mother's lack of credibility, the Judge relied upon inconsistencies in her oral evidence and the way she gave her evidence. Dr Proudman submits no account was taken of the mother's vulnerabilities as a complainant of domestic abuse and what, if any, impact giving oral evidence in front of the father across the screen had on her evidence.

29. The judge noted in the judgment that the mother was '*at times confusing in her evidence and incapable of answering the question asked. She was at times vague in her responses and in her recollection of events which made her an unconvincing witness. For example she could not recall when she first bought or first installed the covert cameras, nor could she recall the conversation when she challenged the [father]..both of these would in my view been pivotal points in her life*'. What is not known, submits Dr Proudman, is if participation directions had been made, for example for the father's camera to be switched off, what difference that may have made to the way the mother was able to give her evidence.
30. In the recent statement the mother states she was distressed and anxious and that such feelings were triggered by the father watching her when she gave her evidence. There is some support for what the mother describes in the letter from her GP.
31. Dr Proudman emphasises the need for the court to factor in and understand the impact of the mother's vulnerability on her giving evidence. It was not considered by the Judge in the way that it should have been. If, for example, the mother was subject to the stress she describes in her statement that may, in part, have contributed to the way her evidence was given and, in turn, may have impacted on the way it was assessed by the Judge. Those considerations and that analysis does not appear in the judgment. As a consequence, Dr Proudman submits, the failure to comply with the mandatory requirements of FPR Rule 3A is a serious procedural error that resulted in the hearing being unfair and unjust.
32. Dr Proudman's submissions regarding Ground 2 largely cover the same points. She submits it was wrong for the Judge to permit the videos to be replayed during the mother's evidence without, at least, having a ground rules hearing to consider what, if any, impact that course may have on the mother as a vulnerable witness and what, if any, participation directions should be made.
33. In his written skeleton and oral submissions the father argues that there would be no difference to the outcome. The mother's account was so inherently unreliable, with so many contradictions in her evidence that the conclusions reached by the judge should stand. The hearing was a remote hearing, which he submits would have assisted the mother. She did not ask for his camera to be switched off and breaks were taken during her evidence. As regards ground 2 he submitted the video had to be played during her oral evidence as she disputed matters that needed to be clarified by the videos being seen.

Discussion and decision

34. There have been a number of appeals that have highlighted the importance of the need to comply with the requirements of FPR Part 3A and PD3AA (see for example Judd J in *K v L and M* [2021] EWHC 3225 (Fam); Peel J in *GK v PR* [2021] EWFC 106 and Morgan J in *CM v IP* [2022] EWHC 2755 (Fam)). In each of those cases appeals were allowed on the basis of procedural irregularity where the court had failed to comply with its duty to consider the vulnerability of a party or a witness, and to then, in turn, hold a ground rules hearing and consider what, if any, participation directions should be made.

35. Whilst not resiling from the independent obligation on the court, it is a matter of regret that neither parent's legal representative drew the courts attention to the relevant provisions. Consideration of the requirements of FPR Part 3A and PD3AA should now be embedded in the legal landscape of these cases to ensure the important safeguards they provide are kept under active review.
36. In cases of domestic abuse the position is now very clear. As a result of the change brought in by section 63 DAA, and put into effect by the revisions to FPR Part 3A.2A on 31 January 2022:
- (1) A party or witness who is, or is at risk of being, a victim of domestic abuse (as defined in s1 DAA) is to be assumed to be a vulnerable witness or party.
 - (2) Where that applies the court **must** consider whether it is necessary to make one or more participation directions.
37. In this case, even though both parties were represented by counsel at the fact-finding hearing, I am satisfied that the appeal should be allowed on both grounds 1 and 2 for the following reasons:
- (1) No ground rules hearing took place before the fact-finding hearing. The issue was not even considered. The relevant rules are clear, they place a mandatory obligation on the court to consider vulnerability.
 - (2) As this issue was not considered by the court it left a lacuna in the procedural safeguards that are in place for a vulnerable witness.
 - (3) The court did not separately address or consider the participation directions that could have been made to enable a vulnerable party to give evidence, irrespective of whether they were required or not. The court simply did not get to that stage. No thought was given to whether the father's camera should have been switched off, whether there could have been a different way to ask questions or manage how they were asked, and when and how breaks were taken.
 - (4) This was not a straightforward case and the allegations involved intimate details of the parties relationship.
 - (5) As to the issue of the video evidence and how it was managed during the mother's oral evidence, no consideration was given as to how that could best be done, what the options were and what the impact would be on the mother. The detailed guidance given by Gwynneth Knowles J in *Re M (ibid)* at paragraphs [79] – [78] was not referred to.
 - (6) The combination of the wholesale failure to consider FPR Part 3A in this case together with the lack of any reference or proper consideration of the mother's vulnerability in the judgment and the impact of that omission, has the consequence that the hearing was unfair and the conclusions reached cannot remain in place.
38. As a consequence of the courts conclusions in relation to grounds 1 and 2, it is not necessary to consider ground 6.

39. I should make it clear that the outcome of this appeal has no bearing on what the eventual outcome of the father's application or any further fact finding will be, if one takes place. It may, or may not, reach the same conclusion, but the importance will be that the process is fair and in accordance with the procedural safeguards in place.
40. The appeal will be allowed to the extent that the findings will be set aside, the matter will be remitted to be heard by a different judge and will be listed before the Designated Family Judge in the next three weeks to consider the extent to which it is necessary and, if so, to what extent there needs to be a re-hearing and what, if any, adjustments need to be made to the orders relating to supervised contact.