



Hilary Term
[2010] UKSC 12
On appeal from: 2010 EWCA Civ 57

JUDGMENT

W (Children)

before

**Lord Walker
Lady Hale
Lord Brown
Lord Mance
Lord Kerr**

JUDGMENT GIVEN ON

3 March 2010

Heard on 1st and 2nd March 2010

Appellant
Charles Geekie QC
Michael Liebrecht
(Instructed by Dutton
Gregory LLP)

Respondent
Lucinda Davis
Sarah Earley
(Instructed by The County
Council Legal Services)

Respondent
Kate Branigan QC
Maggie Jones
(Instructed by Larcomes
LLP)

LADY HALE giving the judgment of the court

1. At issue in this case are the principles which should guide the exercise of the court's discretion in deciding whether to order a child to attend to give evidence in family proceedings. The current approach was stated by Smith LJ in *LM v Medway Council, RM and YM* [2007] EWCA Civ 9, [2007] 1 FLR 1698, at para 44:

“The correct starting point . . . 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.”

She went on to explain the factors which should guide the judge in considering whether to make the order, at para 45:

“. . . 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 . . . 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 satisfactorily be 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 only upon his impression of the child, although that will of course be relevant.”

2. That approach was based upon the earlier authority of Butler-Sloss LJ in *R v B County Council, ex parte P* [1991] 1 WLR 221 and Wilson J in *Re P (Witness Summons)* [1997] 2 FLR 447. It was endorsed by Wilson LJ in the *Medway* case

and by Wall and Thorpe LJ in *SW v Portsmouth City Council; Re W (children: concurrent care and criminal proceedings)* [2009] EWCA 644, [2009] 3 FCR 1. And it was followed by Wall and Wilson LJ in their joint judgment in the present case: [2010] EWCA Civ 57. Each had previously stated that in all their years of experience in the Family Division of the High Court he had never heard oral evidence from a child in care proceedings. That is also my own experience.

3. The complaint, very moderately advanced by Mr Geekie QC, is that a “starting point” of undesirability, placing the burden upon the person wishing to cross-examine a child to show some “particular justification” for doing so, gives insufficient weight to the Convention rights of all concerned. All the parties in care proceedings are entitled to a fair hearing in the determination of their civil rights and obligations – the parents who stand to lose their children if allegations of abuse are made out, the children who stand to lose their parents if allegations of abuse are made out, but also stand to suffer abuse or further abuse if they are left at home because those allegations cannot be proved. And it is not only their article 6 rights which are in play. The civil rights in issue are also Convention rights in themselves – the right to respect for the family lives of the parents and their children but also the right to respect for the private lives of the children, which include their rights to be protected from attacks upon their physical and psychological integrity: *X and Y v The Netherlands* (1985) 8 EHRR 235. Even a “stranger” child, whose future is not in issue in the proceedings but whose statements are relevant, has privacy interests which deserve respect.

4. Hence, argues Mr Geekie, there should be no starting point or presumption that such cases will be rare. Instead, the court should adopt the approach explained by Lord Steyn in *In re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, at para 17, when balancing of the right to respect for private and family life in article 8 and the right to freedom of expression in article 10:

“First, neither article has *as such* precedence over the other. Secondly, where the values of the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.”

Mr Geekie understands that article 6 is not a qualified right in the same way that article 8 is a qualified right, but he accepts that what is entailed in a fair hearing in Children Act proceedings will have to take account of the article 8 rights of all

concerned. All he asks for is “an intense focus” upon their comparative importance rather than an assumption that the one will almost always trump the other.

The background

5. The starting point of English criminal and civil procedure has historically been that facts must be proved by oral evidence given on oath before the court which can then be tested by cross-examination. Hearsay evidence was mostly inadmissible. But wardship proceedings in the High Court were an exception. The High Court was exercising a protective parental jurisdiction over its wards in which their welfare and not the rights of the parties was the paramount consideration: see *In re K (Infants)* [1965] AC 201; *Re W (Minors) (Wardship: Evidence)* [1990] 1 FLR 203. It was assumed that hearsay was also admissible in proceedings about the future of children in other courts. But the Court of Appeal held otherwise in *H v H (Minor)(Child Abuse: Evidence)* [1990] Fam 86 in relation to matrimonial and guardianship proceedings and Otton J held otherwise in *Bradford City Metropolitan Council v K (Minors)* [1990] Fam 140 in relation to care proceedings in juvenile courts.

6. The result was an addition to the Children Bill then going through Parliament, which became section 96 of the Children Act 1989. Subsections (1) and (2) allow a child to give unsworn evidence in any civil proceedings, even if he does not understand the nature of an oath, provided that he understands that it is his duty to tell the truth and has sufficient understanding to justify his evidence being heard. Subsections (3) to (5) provide for the Lord Chancellor (with the concurrence of the Lord Chief Justice) to make provision by order for the admissibility in civil proceedings of hearsay evidence relating to the upbringing, maintenance or welfare of a child. The Children (Admissibility of Hearsay Evidence) Order 1993, SI 1993/621, simply provides that such evidence shall be admissible “notwithstanding any rule of law relating to hearsay”. It does not make the more detailed provision allowed for by section 96(5).

7. Meanwhile, there had also been developments in the criminal courts, not in relation to the admissibility of hearsay, but in relation to the way in which a child’s evidence might be given. In 1989, the *Report of the Advisory Group on Video Evidence* (the Pigot Report) recommended that both the evidence-in-chief and cross-examination of child witnesses should be video-recorded and the recording stand as their evidence at the trial. The Group received evidence that “most children are disturbed to a greater or lesser extent by giving evidence in court” which was a “harmful, oppressive and often traumatic experience” (para 2.10). They attached “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 than 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” (para 2.12).

8. The Criminal Justice Act 1991 implemented the Pigot Report’s proposals for video-recorded evidence-in-chief but not for cross-examination. A *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings*, drawing on expert psychological advice, was published in 1992; replaced in 2002 by *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children*; and again in 2007 by *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures*. As its name implies, the aim is to enable witnesses who would not otherwise be able to give of their best in a criminal trial to do so.

9. The Youth Justice and Criminal Evidence Act 1999 now provides for a variety of special measures to assist children (and other vulnerable witnesses) to give evidence in criminal cases. These include screens, live television links, using video-recordings as evidence-in-chief, providing aids to communication and examining the witness through an approved intermediary. (There is also provision for cross-examination and re-examination to be video-recorded but there are no plans to bring this into force.) The 1999 Act also allows witnesses of any age to give unsworn evidence in criminal proceedings unless it appears to the court that they are unable to understand the questions put or to give intelligible answers. On top of these measures designed to improve the ways in which the evidence of these witnesses is put before the court, the Criminal Justice Act 2003 now allows for hearsay evidence to be given in criminal trials in a much wider set of circumstances than used to be the case.

10. Family proceedings are typically very different from criminal proceedings. There is often a mass of documentary evidence, much of it hearsay, from which a picture can be built up or inferences drawn. A child may reveal what has happened to her in many different ways. The dangers of over-enthusiasm and leaping to conclusions were well illustrated in the *Report of the Inquiry into Child Abuse in Cleveland 1987* (1988, Cm 412). One consequence has been that video-recordings of “Achieving Best Evidence” (ABE) interviews are routinely used in care proceedings if they are available. The near-contemporaneous account, given in response to open-ended questioning, in relaxed and comfortable surroundings, is considered inherently more likely to be reliable than an account elicited by formal questioning in the stressful surroundings of a court room months if not years after the event. Unlike criminal proceedings, however, it is “rare” for the child to be called for cross-examination in family proceedings.

The facts of this case

11. These are care proceedings relating to five children: a 14 year old girl whom we shall call “Charlotte” and her four half-siblings, aged 8, 7, 3 and 18 months. The mother is expecting another child later this month. The appellant is father to the younger children but not to Charlotte and her 17 year old sister “Nancy”. The mother and father are not married to one another, but the appellant is *de facto* the step-father of both Charlotte and Nancy and has been referred to as the father throughout the case.

12. These proceedings began in June 2009 because Charlotte made allegations at school that the father had seriously sexually abused her, specifically on the previous day but also on a number of occasions before that. This was not the first time that she had made allegations against him to friends and other adults; the police have disclosed statements and interviews from these people. There were two previous investigations which came to nothing: in 2006 when she had failed to confirm what she was said to have told others and in 2008 when she retracted a serious allegation made in a text message to a friend. This time, however, she was immediately “ABE” interviewed and medically examined and there is also some relevant forensic evidence. The father has been charged with 13 criminal offences against her and is currently on bail awaiting trial.

13. Charlotte has been in foster care since making her allegations. Her four younger half-siblings were at first taken into foster care, then returned to their mother following an order excluding the father from the home, then taken back into foster care after the mother allowed them unauthorised contact with the father. They are having supervised contact with both their parents. Charlotte is having contact with the younger children, but the local authority do not think that contact with her mother is beneficial for her.

14. At a case management hearing in September 2009, the parties had agreed that there should be a fact finding hearing in relation to the allegations of sexual abuse made by Charlotte, at which she would give live evidence over a video link. The judge, however, asked for further argument on the matter. The local authority, having by then had time to consider the material received from the police, decided that they no longer wished to call Charlotte as a witness but to rely upon her ABE interview. The father however applied for her to be called. On 30 November 2009 the judge refused this application. The fact-finding hearing is currently listed to begin next Monday, 8 March 2010.

15. On 9 February 2010, the Court of Appeal gave their reasons for dismissing the father’s appeal. In their joint judgment, Wall and Wilson LJJ adhered to the

practice as laid down in the previous decisions of that court. They did, however, point out that the evidence upon which the Pigot Report had relied related to the criminal law as it stood in 1989. They wondered whether the time had now come for “a wider consideration of the issue in relation to family proceedings than is possible in \the light of the doctrine of precedent” (para 27). They therefore proposed to send the judgments to the President of the Family Division so that he could consider whether to take the issue further, perhaps by referring it to the Family Justice Council for a multi-disciplinary committee to look into it (para 30). Rimer LJ drew “back from the brink of dissent”: he concluded that the judge’s decision 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” (para 69). He endorsed the proposal for reconsideration and we have since been told that the President of the Family Division has referred the question to a multi-disciplinary committee chaired by Thorpe LJ.

16. Wall and Wilson LJJ appeared to accept (at para 30) the observation of Wall LJ in *Re W*, above, at para 57, that this was not a matter for the judiciary to resolve. While this must be true of the criminal justice process, with the greatest of respect to them, it cannot be true of the family justice process. There is no problem with the admissibility of hearsay evidence. The problem is whether the current practice of rarely calling children to give live evidence even when they could be called can be reconciled with the Convention rights or even with the elementary principles of justice. That is a question of law for this Court, even if it is one on which we should very much prefer to have the up to date advice of an expert multi-disciplinary committee.

Preserving the status quo

17. There are a great many reasons for not departing from the present practice. The principal reason, urged upon us by Ms Lucinda Davis for the local authority, is that the whole purpose of care proceedings is to protect the interests of children. It does not make sense to set up a process to protect them and then for the process itself to traumatise them by making them give evidence. This does, of course, depend upon the view that giving evidence is indeed harmful to children. But, she argues, the evidence we have is that which was before the Pigot committee in 1989 and it would be wrong to change the practice until there is fresh evidence which casts doubt upon that. As to whether such evidence might be forthcoming, we note the experience of Wall LJ, as related in *Re W* at para 55, which does not suggest that it would: throughout his time in the Family Division, he attended numerous conferences at which every child and adolescent psychiatrist to whom he spoke, or whom he heard speak, condemned as abusive the process in criminal law whereby a child was required to attend court to be cross-examined, often many months and sometimes years after the event in order to have his or her credibility impugned

over abuse allegations. He had never been persuaded that it was impracticable to implement the Pigot proposals in full. Recent research (Joyce Plotnikoff and Richard Woolfson, *Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings*, 2009, Nuffield Foundation and NSPCC) has shown that, although special measures have made the experience better for children, many still find it difficult and stressful.

18. There are other problems with changing the present practice. It might well be possible to do far more in family proceedings to make the process of giving evidence less traumatic for children. There is no reason in principle why the family courts should not adopt the Pigot proposals in full. Care proceedings are said to be inquisitorial. The parties are not permitted to “keep their powder dry” as they are for the full scale battle before the jury in criminal cases. They have to disclose what their answers are to any allegations made. They are compellable witnesses. If the child is ABE interviewed and they wish to put questions to her, the facilities could in theory be made available for them to do this in a further video-recorded session soon afterwards.

19. But what if those facilities are not made available? What if for some reason the ideal cannot happen? Is the judge to say that, because the best trial cannot happen, the proceedings must be abandoned? The children’s need for protection is just as strong and the children’s right to be given that protection is just as powerful. Say, for example, in a case like this, an older child went missing or died after having made her allegations. Is the evidence of those allegations to be ignored in deciding whether or not the younger children require to be protected against something similar happening to them in future? It is one thing for the State to abandon the prospect of punishing a person for his misdeeds. It is another for the State to abandon the children who may need its protection to their fate.

20. There is a further fear. It is, of course, not unknown for children to make false allegations of abuse. But it is also not unknown, indeed it is believed to be more common, for children to conceal or deny the abuse which is happening to them. They may have been “groomed” to believe it normal and natural. They may have been threatened with dire consequences if they tell the secret. They may be perfectly capable of working out for themselves that making a complaint will lead to pain and distress for all concerned and probably to the break up of the whole family. These are powerful deterrents to coming forward or persisting in complaints. It is as much for this reason as for any other that the family justice system has sought to minimise the deterrent effect of its own processes. Were requests for children to give evidence to become routine, the uncertainties which this would generate would add to the deterrent effect both in individual cases and in general.

21. These are all, it can be said, very real risks to the welfare of individual children, and to children as yet unknown, which this court must be careful to take into account in any reformulation of the present approach.

Conclusions in principle

22. However tempting it may be to leave the issue until it has received the expert scrutiny of a multi-disciplinary committee, we are satisfied that we cannot do so. The existing law erects a presumption against a child giving evidence which requires to be rebutted by anyone seeking to put questions to the child. That cannot be reconciled with the approach of the European Court of Human Rights, which always aims to strike a fair balance between competing Convention rights. Article 6 requires that the proceedings overall be fair and this normally entails an opportunity to challenge the evidence presented by the other side. But even in criminal proceedings account must be taken of the article 8 rights of the perceived victim: see *SN v Sweden*, App no 34209/96, 2 July 2002. Striking that balance in care proceedings may well mean that the child should not be called to give evidence in the great majority of cases, but that is a result and not a presumption or even a starting point.

23. The object of the proceedings is to achieve a fair trial in the determination of the rights of all the people involved. Children are harmed if they are taken away from their families for no good reason. Children are harmed if they are left in abusive families. This means that the court must admit all the evidence which bears upon the relevant questions: whether the threshold criteria justifying state intervention have been proved; if they have, what action if any will be in the best interests of the child? The court cannot ignore relevant evidence just because other evidence might have been better. It will have to do the best it can on what it has.

24. When the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child. A fair trial is a trial which is fair in the light of the issues which have to be decided. Mr Geekie accepts that the welfare of the child is also a relevant consideration, albeit not the paramount consideration in this respect. He is right to do so, because the object of the proceedings is to promote the welfare of this and other children. The hearing cannot be fair to them unless their interests are given great weight.

25. In weighing the advantages that calling the child to give evidence may bring to the fair and accurate determination of the case, the court will have to look at several factors. One will be the issues it has to decide in order properly to

determine the case. Sometimes it may be possible to decide the case without making findings on particular allegations. Another will be the quality of the evidence it already has. Sometimes there may be enough evidence to make the findings needed whether or not the child is cross-examined. Sometimes there will be nothing useful to be gained from the child's oral evidence. The case is built upon a web of behaviour, drawings, stray remarks, injuries and the like, and not upon concrete allegations voiced by the child. The quality of any ABE interview will also be an important factor, as will be the nature of any challenge which the party may wish to make. The court is unlikely to be helped by generalised accusations of lying, or by a fishing expedition in which the child is taken slowly through the story yet again in the hope that something will turn up, or by a cross-examination which is designed to intimidate the child and pave the way for accusations of inconsistency in a future criminal trial. On the other hand, focussed questions which put forward a different explanation for certain events may help the court to do justice between the parties. Also relevant will be the age and maturity of the child and the length of time since the events in question, for these will have a bearing on whether an account now can be as reliable as a near-contemporaneous account, especially if given in a well-conducted ABE interview.

26. The age and maturity of the child, along with the length of time since the events in question, will also be relevant to the second part of the inquiry, which is the risk of harm to the child. Further specific factors may be the support which the child has from family or other sources, or the lack of it, the child's own wishes and feelings about giving evidence, and the views of the child's guardian and, where appropriate, those with parental responsibility. We endorse the view that an unwilling child should rarely, if ever, be obliged to give evidence. The risk of further delay to the proceedings is also a factor: there is a general principle that delay in determining any question about a child's upbringing is likely to prejudice his welfare: see Children Act 1989, s 1(2). There may also be specific risks of harm to this particular child. Where there are parallel criminal proceedings, the likelihood of the child having to give evidence twice may increase the risk of harm. The parent may be seeking to put his child through this ordeal in order to strengthen his hand in the criminal proceedings rather than to enable the family court to get at the truth. On the other hand, as the family court has to give less weight to the evidence of a child because she has not been called, then that may be damaging too. However, the court is entitled to have regard to the general evidence of the harm which giving evidence may do to children, as well as to any features which are particular to this child and this case. That risk of harm is an ever-present feature to which, on the present evidence, the court must give great weight. The risk, and therefore the weight, may vary from case to case, but the court must always take it into account and does not need expert evidence in order to do so.

27. But on both sides of the equation, the court must factor in what steps can be taken to improve the quality of the child's evidence and at the same time to

decrease the risk of harm to the child. These two aims are not in opposition to one another. The whole premise of *Achieving Best Evidence* and the special measures in criminal cases is that this will improve rather than diminish the quality of the evidence to the court. It does not assume that the most reliable account of any incident is one made from recollection months or years later in the stressful conditions of a courtroom. Nor does it assume that an “Old Bailey style” cross examination is the best way of testing that evidence. It may be the best way of casting doubt upon it in the eyes of a jury but that is another matter. A family court would have to be astute both to protect the child from the harmful and destructive effects of questioning and also to evaluate the answers in the light of the child’s stage of development.

28. The family court will have to be realistic in evaluating how effective it can be in maximising the advantage while minimising the harm. There are things that the court can do but they are not things that it is used to doing at present. It is not limited by the usual courtroom procedures or to applying the special measures by analogy. The important thing is that the questions which challenge the child’s account are fairly put to the child so that she can answer them, not that counsel should be able to question her directly. One possibility is an early video’d cross examination as proposed by Pigot. Another is cross-examination via video link. But another is putting the required questions to her through an intermediary. This could be the court itself, as would be common in continental Europe and used to be much more common than it is now in the courts of this country.

29. In principle, the approach in private family proceedings between parents should be the same as the approach in care proceedings. However, there are specific risks to which the court must be alive. Allegations of abuse are not being made by a neutral and expert local authority which has nothing to gain by making them, but by a parent who is seeking to gain an advantage in the battle against the other parent. This does not mean that they are false but it does increase the risk of misinterpretation, exaggeration or downright fabrication. On the other hand, the child will not routinely have the protection and support of a Cafcass guardian. There are also many more litigants in person in private proceedings. So if the court does reach the conclusion that justice cannot be done unless the child gives evidence, it will have to take very careful precautions to ensure that the child is not harmed by this.

30. It will be seen that these considerations are simply an amplification of those outlined by Smith LJ in the *Medway* case, at para 45, but without the starting point, at para 44. The essential test is whether justice can be done to all the parties without further questioning of the child. Our prediction is that, if the court is called upon to do it, the consequence of the balancing exercise will usually be that the additional benefits to the court’s task in calling the child do not outweigh the additional harm that it will do to the child. A wise parent with his child’s interests

truly at heart will understand that too. But rarity should be a consequence of the exercise rather than a threshold test (as in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, para 20).

31. Finally, we would endorse the suggestion made by Miss Branigan QC for the child's guardian, that the issue should be addressed at the case management conference in care proceedings or the earliest directions hearing in private law proceedings. It should not be left to the party to raise. This is not, however, an invitation to elaborate consideration of what will usually be a non-issue.

The Outcome in this Case

32. We commend the care with which the judge approached the issue in this case. She considered the factors which we have outlined above most conscientiously. But she approached them, as she was required to do on the authorities as they stood, from the starting point that it is only in exceptional circumstances that a child should be required to give evidence. We cannot be confident that she would have reached the same conclusion had she approached them without that starting point, although she might well have done so.

33. We have considered whether it would be appropriate for us to exercise the discretion afresh but have concluded that we should not do so. It would have the advantage of a speedy decision, one way or the other, in advance of the hearing which is due to start on Monday. But we are not confident that we have all the relevant material before us. In particular, although we have seen the transcripts, we have not seen the video of the first ABE interview. Nor have we seen the video of a second interview, conducted after the Court of Appeal decision, in which Charlotte made allegations of physical abuse of all the children and domestic violence between the adults. In the circumstances we see no alternative to remitting the question to be determined by the judge in the light of the judgment of this court.

34. However, there must be no question of adjourning the hearing fixed for next week. That would undoubtedly be detrimental to all the children concerned. It has already been adjourned twice. Charlotte is understandably anxious that matters be resolved as soon as possible for the sake of the younger children. They have been away from their home since June last year. Even more important is the fate of the baby who is expected later this month. The court's findings will be crucial in deciding what steps, if any, are required to protect the baby. This means that the parties will have to consider their positions and make written submissions to the judge in time for her to decide the question on Monday morning. There is, of course, still time for the father to change his stance.

35. For these reasons, the appeal will be allowed and the question of whether the child should give evidence at the hearing which is to begin on Monday 8 March is remitted to the judge for her to determine in the light of this judgment.