



Neutral Citation Number: [2024] EWCA Civ 1104

Case No: CA-2024-001045

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT BIRMINGHAM
Mrs, Justice Lieven
BM23P70059

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 September 2024

Before:

LORD JUSTICE LEWISON
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE FALK

M (Children: Contact in Prison)

The Appellant Mother appeared in person
The Respondent Father appeared in person
Julie Sparrow (instructed by **HCR Legal LLP**) for the **Respondent Children by their**
Children’s Guardian

Hearing date: 24 September 2024

Approved Judgment

This judgment was handed down remotely at 3.30pm on 24 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Introduction

1. This is a short appeal from an order made by Lieven J on 2 July 2024, allowing limited contact between two children and their imprisoned father. Having read the written record and considered the oral submissions, we informed the parties that the appeal will be allowed, the order will be set aside, and the decision about contact will be retaken by the Family Court. These are my reasons for agreeing with that decision.
2. The children are aged 12 and 10. Their mother is a serving police officer. Their father was a police officer until his conviction. The parents were married, but separated, with the mother and children leaving the home. The father began a relationship with another officer, Ms V, which continues. However, the mother and children returned to the home for a period, during which the father twice raped the mother in August 2019.
3. There have been extensive proceedings in the Family Court concerning the father's contact. It is accepted that he and the children have a strong relationship and that they know Ms V and her family well.
4. In April 2024, the father was convicted of the two offences of rape and in June 2024 he was sentenced to 12 years' imprisonment. He does not accept his convictions and says that he is appealing. He is supported in this stance by Ms V. After the verdict he was granted bail and was offered supervised contact, but he did not accept it. As a result, the children have not seen their father for several months.
5. We have seen the Pre-Sentence Report, the mother's victim impact statement and some account of the sentencing remarks, from which it can be seen that the sentencing judge considered that the father had no insight into his offending behaviour.
6. The Guardian and her solicitor visited the children at school on 24 June 2024, and a note of that visit was included in a position statement seen by the Judge. The school described the children as doing well, despite the circumstances. They work hard and have lots of friends. The children said they would like to see their father and hope he will be okay. They showed a limited understanding about why he is in prison and what prison is like.

The position of the parties

7. The father, who appeared in person before the judge, asked the court to order phone and video contact twice a week, and direct contact once a month, with the children being brought by Ms V. He also asked the court to order independent contact with Ms V and her family.
8. The mother, also in person, argued for contact to be in writing only, given the history and the position of the father and Ms V in relation to the offences.
9. In the particular circumstances, the Guardian recommended written contact only. She did not consider it appropriate for the mother to be ordered to take the children to see someone who was guilty of significant offences against her. She considered the children's views to be of the utmost importance, but the impact on the mother as the

victim and primary carer could not be ignored. Similarly, she did not support contact with either the father or Ms V being unsupervised as (based on previous instances of court orders being disregarded) she was not convinced that they could be trusted in what they would tell the children about the offences or about their mother. Even twice-weekly telephone contact would impact on the children's ability to get on with their daily lives and would leave the mother with a sense of continued control by her ex-partner. The Guardian recognised that this recommendation was not in accordance with the children's wishes, but she considered that they had adapted to the lack of direct contact over the past months. Finally, the Guardian and her solicitor offered to facilitate a one-off visit by the children to see their father in prison if the court directed that, but they did not positively argue for it.

The hearing before the Judge

10. The hearing before Lieven J was a remote one, lasting for about an hour. She did not hear any oral evidence. Having heard submissions, she made a final order. It contained a number of recitals, including the following:

“3. And Upon the Mother and the Guardian expressing concerns about the emotional impact of the children having face to face and telephone contact with their father while he is in prison.

4. And Upon the Court acknowledging that this is a highly sensitive situation where emotions for the parents and the children are inevitably heightened following father’s conviction and sentence.

5. And Upon the Court accepting that this is a very difficult case but being acutely aware of the children’s wishes and feelings.

6. And Upon it being acknowledged by all parties that the children love their father and want to spend time with him.

...

9. And Upon it being acknowledged that the children’s main home will remain with the mother.

10. And Upon the Father accepting in previous hearings, that at times of frustration he may have said things to the children that exposed them to inappropriate comments about the proceedings, to and in front of the children.

11. And Upon the Court urging the father to maintain control of his frustration/emotions in terms of his communication with the children and for both parents to remain child focussed in their communications with the children, and not to speak negatively about the other parent, to minimise further distress to them.”

11. The Judge’s order required the mother to make the children available to spend time with the father (1) for a one-off visit in prison facilitated and supported by the Guardian and her solicitor on 13th August 2024 for up to 2 hours, (2) for visits to

prison three times a year for four hours, accompanied by Ms V, with the children being handed over to her at a public car park for that purpose, and (3) for telephone contact once a month for 30 minutes. The judge also made a section 91(14) order for a year, but gave the Guardian liberty to apply in relation to subsequent visits if the one-off visit proved (in the Judge's word) disastrous.

12. The ordered judgment transcript has not materialised. A note of the judgment, which may not fully reflect what the Judge said, includes these passages:

“This is a difficult decision. I would be concerned about an order that does not allow the children to see their father. I must listen to the voice of the child, although I am being told to ignore the voice of the child.

I am concerned about the impact of their worries and their ages. I believe I would do a huge disservice to them if I did not order some contact.

I am also concerned about [the court] not being a party to coercive and controlling behaviours. I am going to order that the children see their father three times a year, facilitated by Ms V or her parents. I am not going to order the mother to take the children to prison. The children need to come to terms with the situation. I am also going to order some indirect contact three times a year.

The Judge indicated to Mother that she understood why she did not trust Ms V.

The Judge confirmed once again that she is one of those judges who likes to listen to the voice of children.

She orders a monthly telephone call. The impact of this would be less. The Judge confirmed she understood Mother's concerns. Father will never accept the offences, whatever.

...

It is a really difficult case. A is 11 and B is 9. Their father was convicted of two counts of rape of their mother. I have read the Judge's sentencing remarks and Mother's victim impact statement.

What makes it so difficult is the children really love their Father and want to see him. They saw him before conviction but not between then and sentencing. Mother does not trust Father or Ms V. The Guardian has been involved a long time. She opposes direct contact and is also concerned about the narrative given. I have to strike a balance.

The children are worried about their Father and want to see him. I start from the point that I should listen to their wishes and feelings. They actively want contact.

I am equally really worried that they will worry more if they do not see him. The children are old enough to be worried.

I think Mother is unrealistic and does not know what prison is like.

A 12 year old will not live in a bubble. The more they know, the better. We cannot avoid them finding out and reaching out.

Father's proposals are far too much for the children."

Submissions on appeal

13. The mother now appeals, and permission to appeal and a stay were granted by King LJ on 12 August 2024. The grounds of appeal can be summarised in this way:
 - (1) The Judge failed to take account of the recommendation of Cafcass, which was based on the risk of the father and Ms V undermining the mother.
 - (2) The Judge took no account of the impact on the children, who are not now distressed, of seeing their father in prison.
 - (3) The Judge did not consider the risks that the children, as children of a police officer, would be exposed to in visiting a sex offenders prison.
 - (4) Telephone calls cannot be supervised, which risks emotional harm to the children from the father and Ms V, who deny the offences.
 - (5) No account was taken of FPR PD12J, by which the court was obliged to have regard to the harm caused to a victim of domestic abuse, when the order will cause grave distress to the mother, who is a sole carer.
 - (6) The Judge failed to recognise the level of manipulation and abuse on the part of the father, and her order exposes the children to further harm.
 - (7) The order does not allow the family to move on with their lives.
14. The Guardian, through Ms Sparrow, supports the appeal. She still considers that the welfare interests of the children point firmly away from regular visits to their father in prison or by telephone contact. As to the grounds of appeal, this was a short, remote hearing. The Judge did not refer to the welfare checklist or PD12J. She did not consider the impact of the father's offences or of the order on the mother. She did not lay down ground rules for unsupervised contact, even if they were capable of enforcement. She gave primary weight to the children's expressed wishes without considering the impact on them and their relationship with their mother of being exposed to the father's counternarrative. There was nothing in the children's situation that supported a conclusion that the continued absence of face to face contact was so harmful to them that it outweighed the identified risks. The Guardian had weighed

up all these matters and found that written contact was the only safe means of meeting the children's needs at the present time; the Judge did not explain why she was rejecting that advice.

15. The father appeared by video link from prison. His oral presentation and skeleton argument contained no acceptance that he had caused any harm to the mother or thereby to the children. He argued that the Judge's approach was sound and he is grateful to her for standing up for what the children want. They already maintain ongoing contact with Ms V, but have to delete messages to prevent the mother from punishing them. He is appealing his convictions, but he and Ms V will not expose the children to their views. They are only asking for a small amount of contact. The mother's approach is unrealistic and the Guardian has shown bias in not taking account of the extent of pre-conviction contact and of the harm caused by the mother in seeking to restrict contact now. If there is a one-off visit, it should be supervised by Ms V, and not by the Guardian and her solicitor.
16. The mother agreed with the Guardian's submissions and rejected the father's criticisms of her.

Assessment and conclusion

17. In my assessment, there were four relevant welfare checklist elements for the decision-maker:
 - (a) the ascertainable wishes and feelings of the children, considered in the light of their age and understanding.
 - (b) their emotional needs.
 - (c) any emotional harm that they were at risk of suffering.
 - (d) how capable each parent, and any other person in relation to whom the court considers the question to be relevant, was of meeting their needs.
18. In this case, the checklist is supplemented by PD12J. Paragraph 36 requires the court to apply the individual matters in the welfare checklist with reference to the domestic abuse which has occurred and any expert risk assessment obtained. Specifically, the court should consider any harm the parent with care has suffered as a consequence of the domestic abuse, and which the child and the parent are at risk of suffering, if an order is made. The court should only make an order for contact if it is satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before, during and after contact, and that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent. Paragraph 37 requires the court to consider the conduct of both parents towards each other and the impact of it. In particular the court is to consider:
 - “(d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child; and
 - (e) the capacity of the parents to appreciate the effect of past domestic abuse and the potential for future domestic abuse.”

19. The Judge was right to consider this a difficult case. The issue of the father's contact required careful consideration and, almost certainly, the resolution of disputed issues, such as what effect the father's behaviour has had on the mother, what impact an order for contact would have on her ability to parent the children in the way they now need, and whether meetings with the father and Ms V would by one means or another expose the children to a damaging conflict of loyalties.
20. The Judge stated her conclusion, but she said very little to support it. She did not take into account or adequately evaluate:
 - (1) The fact that the father has been convicted of domestic abuse of a most harmful kind, a finding which binds the Family Court.
 - (2) The impact of the rapes and of the order on the mother, as required by PD12J.
 - (3) The significance of the father's unrepentant attitude since conviction as a measure of his ability, and that of Ms V, to meet the children's needs.
 - (4) The weight that was properly due to the children's wishes in the light of their limited understanding of the family situation and their apparently settled state.
 - (5) The balance between their need for contact with their father and their need for continuity of secure care by their mother.
 - (6) The potential for unsupervised contact to unsettle the children and harm their relationship with their mother by exposing them to conflicting narratives.
 - (7) The appropriateness of Ms V being the facilitator of contact, given her identity of views with the father.
 - (8) The practicality of telephone contact being supervised.
 - (9) The justification within the evidence for rejecting the expert assessment of the Guardian.
21. A decision about contact needed to take account of all these matters, and any others arising under the welfare checklist and PD12J. That did not happen, with the gravity of the father's offending being overlooked, and priority being given to a limited assessment of the children's wishes and the Judge's own perception of their need for contact. The appeal must therefore be allowed. The Guardian suggested that we might substitute an order for written contact only, but that would be to make the same mistake twice. It is unfortunate that the proceedings will be prolonged, but a decision about contact must now be retaken in the light of all the relevant factors. Until a final order can be made, contact will take place only in accordance with the Family Court's directions.
22. We therefore make the following orders:
 - (1) The appeal is allowed.
 - (2) Paragraphs 1 and 2 of the order of 2 July 2024 are set aside.

- (3) The issue of the children's contact with the father and Ms V is remitted to the Designated Family Judge for directions to be given for a final hearing before that judge or another Circuit Judge or section 9 judge.
- (4) The Children's Guardian shall within 7 days prepare a bundle of documents for the directions hearing accompanied by a position statement and a draft directions order, and shall serve them on the parents not less than 7 days before the directions hearing.

Lady Justice Falk:

23. I agree.

Lord Justice Lewison:

24. I also agree.
