Neutral Citation Number: [2020] EWCA Civ 1685

Case No: B4/2020/1864

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LEYLAND
HHJ Duggan
PR18P01632

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 December 2020

Before :

LADY JUSTICE KING
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE PHILLIPS

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W (Children: Reopening/Recusal)

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Anna Bentley (instructed by **Inghams Solicitors**) for the **Appellant Mother**
The Respondent Father appeared in person

Hearing date : 3 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Tuesday, 15 December 2020.

Lord Justice Peter Jackson:

Introduction

1. This appeal arises within private law family proceedings about two children. It concerns an application to reopen findings of fact and judicial recusal for apparent bias.

2. The background is that the parents lived together for twelve years. Since their separation the father has brought three sets of proceedings. The first, in 2015, was resolved by mediation. The second ended with an order in January 2017 for the children to live with their mother and spend time with their father in accordance with an agreed schedule. During those two sets of proceedings, which were heard by magistrates, both parents were legally represented. The mother made allegations of harm and domestic abuse by the father towards herself and towards a woman (LM) with whom the father had a later relationship. However, neither party then asked the court to make findings of fact about that.

3. In June 2018, the father committed a serious assault on another girlfriend, HH. In October 2018, he pleaded guilty to assault and was sentenced to 18 weeks imprisonment suspended for 18 months with a requirement for 35 days of rehabilitation activity and a 12 week curfew. A restraining order for 4 years was also imposed.

4. In December 2018, the father made his third application, seeking to enforce the order made in January 2017. The mother's response included allegations that he had engaged in a pattern of abusive, violent and aggressive behaviour within his personal relationships and that he had behaved in this way towards her and towards LM in 2016 and towards HH in 2017/18.

5. At some point in 2019, District Judge Wylie became the allocated judge. In February 2020, the matter finally came before her for a three-day fact-finding hearing. The mother, who was represented by counsel, sought findings in relation to nine incidents. The father, who had been represented throughout the proceedings, was now in person. Evidence was given by both parents. Neither LM nor HH was willing to attend to give evidence and neither parent took steps to compel them to attend. The mother did seek to issue a witness summons for HH but the summons was later withdrawn. However, the court had the police files, which contained their contemporaneous statements, the father's police interview in June 2018, and statements made by other witnesses, including the father's sister.

6. In a detailed judgment, which has not been the subject of any appeal, the District Judge found the mother to be a straightforward and honest witness. She found the father's evidence less satisfactory. Having reviewed all the evidence, she made these six findings:

> "(1) On 23 November 2014, during an argument, following the late return of the children to the mother's home, when both the mother and the father had hold of the front door, the father attempted to pull the door shut, shutting the mother's

head between the door and the frame and said 'I hope that hurt you'. The children were present.

(2) The father assaulted LM on 20 April 2016 whilst the children were in the house.

(3) On 21 May 2016, the father carried out a prolonged assault on LM. During the assault he:
(i) threw a mobile telephone at her
(ii) pushed her downstairs a number of times
(iii) grabbed her neck and dragged her into the living room
(iv) slammed the toilet seat lid on her head.

(4) On 21 May 2016, the father further assaulted LM by:
(i) dragging her hair
(ii) crossing her arms over her neck which restricted her breathing
(iii) twisting her right wrist
(iv) punching her in the leg and attempting to drag her back into the home.

(5) On 9 December 2017, there was a heated argument between HH and the father and during the course of that argument the father head-butted HH.

(6) On 30 June 2018, in drink the father attended HH's home where she and her two children were, when she had expressly told him not to. At her home he:
(i) forced his way through the front door breaking the chain
(ii) in the bedroom, attempted to grab the phone out of HH's hand and in the process hit HH in the face with the phone
(iii) continued to be verbally abusive to her in the presence of her then 7 year old daughter, who had woken up due to the incident
(iv) pushed HH down the stairs
(v) grabbed HH by the neck and punched her
(vi) After the daughter came to the top of the stairs due to her mother's screaming, and asked the father to get off her mother he 'launched' at the daughter
(vii) After HH had pushed him, to prevent him from launching at her daughter, the father went for HH again in the presence of the daughter, but HH screamed out."

7. The father's criminal conviction arose out of the last incident. In relation to findings (2), (3) and (4) concerning LM, the District Judge described the allegations as "the most troubling evidentially". She noted that the events preceded the January 2017 order in the family proceedings, yet no party had sought a fact-

finding hearing at that point, even though both were legally represented. She analysed contemporaneous statements made by LM and by her parents. She noted that the father completely denied any assault on LM and that he attributed her allegations to a personality disorder with which she had indeed been diagnosed. However, having reviewed the evidence, she found that the allegations were very detailed and that it was simply not credible for the father to dismiss them. She found two allegations proved, one allegation proved in part, and one allegation too vague to form the basis for a finding.

The proceedings after the fact-finding hearing

8. At a hearing on 16 April 2020, the District Judge gave directions for further evidence and for a final welfare hearing to take place before her on 10 September 2020 with a time estimate of one day.

9. At a hearing on 11 June 2020, the District Judge gave further directions. The CAFCASS officer had become unable to attend the hearing in September and an earlier hearing was arranged. This was fixed to take place before a Recorder on 7 and 8 July 2020.

10. However, in the lead-up to the July hearing, it was discovered that the CAFCASS officer had become unavailable for the hearing in July and also that the booked Recorder would be unable to sit to hear the case. On 2 July, the District Judge made administrative arrangements for a further directions hearing to take place before another Recorder on 7 July with a time estimate of three hours.

11. On 3 July, the father issued applications for interim contact and for a rehearing in relation to the findings of assault on LM.

12. On 7 July, the matter came before Recorder Searle. As on this appeal, the mother was represented by Ms Bentley, while the father represented himself. The Recorder decided that the application for a rehearing should be heard by the District Judge as she had conducted the fact-finding hearing, and he contacted her during the lunch break. Having done so, he informed the parties that she had recused herself from the case for what he considered to be good personal reasons. He directed that the matter should be listed before HHJ Duggan on 17 July to determine the father's application to reopen the findings in respect of LM and for further case management.

13. On 8 July, the father sent an email to the court asking why the District Judge had recused herself.

The hearing of the father's application to reopen the findings

14. On 17 July, the father's application came before HHJ Duggan. At the outset, the Judge introduced the issue of recusal. Having briefly addressed preliminary matters with father, he had this dialogue with mother's counsel:

> "THE JUDGE: Let me just turn to Ms Bentley because there is a point that I am not sure has received enough

consideration. Ms Bentley, I am very concerned at the knock-on effect of the district judge recusing herself.

COUNSEL: Yes.

THE JUDGE: Let me just explain the way my thoughts are going on that. In law, the basis of recusal is that a reasonable observer would be concerned that justice had not been seen to be done.

COUNSEL: Yes.

THE JUDGE: Now, I know a little bit about the district judge's recusal but that is clearly the legal basis to it.

COUNSEL: Yes.

THE JUDGE: But it does not only apply to what might happen ahead, it applies to what has gone before, does it not?

COUNSEL: : Well, Your Honour, I'm afraid Your Honour has the advantage of me, I don't have any information as to the reasons for District Judge Wylie's recusal. I don't know if it is a matter that has arisen following on from the findings hearing in which case in my submission it would not be relevant or if it's a matter that applies more generally. I'm not sure that it follows that because a judge cannot continue to hear proceedings that that which they have heard before is then undermined. Indeed the email that was read out to us by Recorder Searle that had been received by him from District Judge Wylie seemed to say I have dealt with the factual background and the case can now move forward to the welfare stage.

…

THE JUDGE: But it is the recusal point that is really troubling me. If the position is that a reasonable observer would, knowing the facts, would feel that justice had not been seen to be done I am struggling to see why that does not infect what has gone before.

COUNSEL: Your Honour, I think it comes back to the reason for the recusal because it cannot be right, in my submission, that if the judge has to recuse themselves, 19 months into proceedings, where a great deal of time and money has been spent, the mother, in this case, is not legally aided and is not wealthy and has spent tens of thousands of pounds that she does not have in going through this litigation, it cannot be right that that is simply wiped out…

…

> THE JUDGE: Well her recusal is on the basis that there is a family connection with one of the parties to the case.
>
> COUNSEL: Presumably, that wasn't known to her when she heard the finding of fact.
>
> THE JUDGE: I have not cross-examined her on the subject, that is a fair assumption.
>
> COUNSEL: Well if that's the case, Your Honour, in my submission that doesn't undermine it. She clearly hasn't made her decision based on that connection – "
>
> THE JUDGE: [I]t is not actual bias; it is the perception of bias that is the problem is it not? [Crosstalk] - biased in the second half of the case, would she? She would have followed her judicial oath and concluded the case properly, but the legal test is that a reasonable observer would be concerned that justice had not been seen to be done and that is why she has withdrawn. But that same observer would be concerned about the first half, surely.
>
> COUNSEL: Well, Your Honour, I'm in some difficulty because I wasn't aware that this was to be an issue today, but in my submission, Your Honour, no, a reasonable observer knowing that the district judge was not aware of that connection would not feel that the process was undermined. There are other, in my submission, policy, sound policy reasons as well as practical and pragmatic reasons why the findings should stand."

15. The Judge then addressed the father:

> "THE JUDGE: So, Mr [W], you have been following this. The district judge has withdrawn from the case, having discovered a connection between her family and the parties of the case, that the legal basis for withdrawing in those circumstances is that an observer from outside would be concerned that justice be seen to be done and that is why she has withdrawn. So the question is what we do about the first half of the case that she did hear.
>
> THE FATHER: Yes, Your Honour and that revelation actually concerns me, quite a bit, but during the early part of the case with Judge Wylie she mentioned in court that the case concerned her and it was, she was also from [-] where we both live. Now obviously at the time I just, you know, didn't really read much into that but obviously now what has come to light, you know, does obviously make me wonder, you know, were things known at that time or not.

> THE JUDGE: Well, we do not need to develop this, the district judge has withdrawn because she was concerned that there might be a public perception of unfairness, so she has done the right thing so far as that is concerned and I do not think you or I are in a position to speculate as to whether she has acted inappropriately in the past. She is certainly doing the right thing going forward.
>
> THE FATHER: Yes, I agree, Your Honour, yes.
>
> THE JUDGE: But your primary application is that you are looking for the opportunity to revisit these issues and I guess it does not really matter to you what legal route gets you to that destination.
>
> THE FATHER: Yes, Your Honour. Yes, I do find some of the findings aren't right and, you know, as you will have seen in my application new evidence has come to light which I didn't get the chance to mention in the finding of fact hearing.
>
> THE JUDGE: Yes. I mean there is an irony in this because I do not think your application would succeed on its own details. There is a legal test about reopening cases and a combination of… points that are not good enough to ground an appeal and second thoughts as to how the hearing was conducted last time do not really get you home, but this recusal point is a much stronger concern."

16. The Judge gave a short judgment. He noted that there was no suggestion of actual bias, and continued:

> 3. … Instead, I must wrestle with this as a case in which the District Judge has recused herself because of the appearance of bias.
>
> 4. The case law on this subject says that it is necessary to put one's self in the position of a reasonable observer not actually involved in the case, and the test is whether that observer would be concerned that justice had not been seen to be done.
>
> 5. The judge's withdrawal from the case reflects a position in which she felt that her future involvement in the case would not allow justice to be seen to be done. That is not a major problem in this kind of litigation, it is desirable that the same judge should deal with all parts of the case but it sometimes happens that a second judge has to take over for the welfare stage, and that will be something that will be capable of attainment here.

> 6. The father has made an application to reopen some of the findings that were made by the District Judge, but again the application is not be an insuperable problem for a new judge taking over the case at this stage.
>
> 7. The problem with which I am wrestling is the implication of the recusal so far as the past conduct of the case is concerned. Now, I am acutely aware that to introduce further delay to this case would not only be undesirable but detrimental so far as the best interests of the children are concerned. In addition, this is a case in which the mother is funding the litigation privately and she has already incurred a large amount of expense to which further litigation will add a huge burden. Nevertheless, the test that has to be applied is whether the reasonable observer not directly involved in the case would be concerned that the findings that have been made by this District Judge are infected by the proposition that justice needs to be seen to be done.
>
> 8. I am uncomfortable with the lack of transparency in the process here. Firstly as to the fact that the District Judge had recused herself which was not apparent from the welfare listing. Thereafter the reason is emerging slowly in greater detail as the parties press. A reasonable observer might question the probity of the findings made.
>
> 9. With a heavy heart in the context of the delay and expense involved I am driven to the conclusion that that test of fairness is infringed in this case, and in order to ensure that justice not only is done but is seen to be done, and that it be recognised to be done by a reasonable observer, I must direct that the findings are set aside and these matters revisited."

17. The resulting order set aside the findings made on 5 February 2020 and allocated the case to a different District Judge, fixing an early directions hearing.

Subsequent events

18. In contemplation of an appeal, the mother's solicitors wrote to the Court office on 21 July, explaining the situation and asking three questions:

> "The mother therefore is considering her position and wants to understand the court's reasons for its decision and therefore it would be greatly appreciated if she could be given a response to the following questions:-
>
> 1. Please confirm what the "family connection" is that caused District Judge Wylie to recuse herself?
>
> 2. Was District Judge Wylie aware of this connection when sitting on the Finding of Fact hearing in February 2020?

> 3. If District Judge Wylie was aware of the connection, please confirm why it was not raised with the parties then?"

19. On 29 July 2020, District Judge Wylie provided this reply to the Court office:

> "1. The judge's son and the mother were members of the same local hockey club. The mother is a friend of the son on Facebook and each follows the other on Instagram.
>
> 2. Absolutely not. DJ Wylie was unaware of the connection until June 2020.
>
> 3. As above, DJ Wylie was not aware of the connection until very recently – had she been then she would have immediately raised it with the parties."

Very unfortunately, this information was not conveyed to the parties by the court until 7 November, when it was contained in a letter, sent with apologies for the delay.

20. In the meantime, the mother applied to the Family Division for permission to appeal, which was granted by Mrs Justice Knowles on 23 October. She transferred the appeal to this court under Rule 30.13 of the Family Procedure Rules 2010.

The submissions on appeal

21. On behalf of the mother, Ms Bentley advances these grounds of appeal:

1. The Judge was wrong to conclude that there was any apparent bias operating upon DJ Wylie's decision in February 2020.

2. The Judge failed to give any or any proper reasons for his decision.

3. The procedure adopted by the Judge was flawed and unfair to the mother in that

   (i) she was not given a proper explanation as to why the District Judge had recused herself; and

   (ii) she was thereby prevented from advancing an argument that there was no apparent bias operating upon DJ Wylie's decision in February 2020.

4. The Judge misdirected himself as to the correct legal test for apparent bias.

5. The Judge failed to consider or to apply the legal test for the reopening of findings.

The first four grounds therefore relate to recusal and the last to the reopening findings. Ms Bentley took us to some of the leading authorities on both questions.

22. As to recusal for the appearance of bias, Ms Bentley submitted that the Judge framed the test wrongly. The question is not whether a reasonable observer would be concerned that justice has not been seen to be done; the question is whether the reasonable observer would conclude that there is a real possibility that the judge was biased. Next, the parties should have been put in possession of the facts so that they could have made representations about the appropriateness of whatever action was being considered. As to the substance, the very tenuous connection between the District Judge and the mother could not be a reason for recusal. Most of all, since the District Judge did not know of the connection until June, the reasonable observer could not conclude that there was any possibility of her being biased at the hearing in February.

23. In relation to the application to reopen the findings concerning LM, Ms Bentley submitted that there was little or no fresh evidence and that the Judge should have considered and determined the application in the normal way, giving due weight to the public policy favouring finality and to the many welfare and practical disadvantages in embarking on a reopening process. She argued that re-litigation would make no difference to the outcome as the findings in relation to the serious assaults on HH would remain.

24. In response, the father agreed that the parties had been kept in the dark until very recently on the reason for recusal. He noted that the Judge was uncomfortable about the lack of transparency. This made it hard to believe that the District Judge did not know about the family connection much sooner, particularly as the mother had made mention of the hockey club in her original statement in the proceedings. The findings concerning LM represented a real obstacle for him, because he had done work arising from his assault on HH and this acknowledgement of responsibility had led CAFCASS to recommend contact with the children. However, the position had changed in a supplemental report because of his lack of acceptance of having assaulted LM.

25. The father explained that his application to reopen arose because he may not have presented his case in the correct way at the fact-finding hearing. He had no opportunity to cross-examine LM or her parents. After the hearing he consulted his solicitors again. He became aware that LM had been taking anti-psychotic medication and this might have impacted on the District Judge's findings. He accepted that the statement now made by his sister was in the same terms as one that appeared on the police files, which were read by the District Judge, and that the statement from his mother reflected her questions after the trial, along the lines of "What about X, Y or Z?" His skeleton argument for the hearing before the Judge covered these questions, but they were not dealt with at all.

Applications to reopen findings of fact in family proceedings

26. The remedy for a party who is aggrieved by findings of fact is to seek to appeal them. If an appeal is entertained, it will review the soundness of the findings and the fairness of the process. That is the normal procedure and it will apply in the great majority of cases.

27. There is a small subset of cases where new information comes to light that casts real doubt on the finding. In such a case, an application may be made for fresh

evidence to be admitted on appeal, in accordance with the principles in *Ladd v Marshall* [1954] 1 WLR 1489. Alternatively, an application to reopen on the basis of new information may be made to the trial court, which will approach matters in this way:

> "(1) It should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly-based welfare decisions on the other.
>
> (2) It should weigh up all relevant matters. These will include: the need to put scarce resources to good use; the effect of delay on the child; the importance of establishing the truth; the nature and significance of the findings themselves; and the quality and relevance of the further evidence.
>
> (3) "Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial." There must be solid grounds for believing that the earlier findings require revisiting."

See *Re E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447 at [50], approving *Re B (Children Act Proceedings: Issue Estoppel)* [1997] Fam 117 at 128.

28. It is rare for findings of fact to be varied. It should be emphasised that the process of reopening is only to be embarked upon where the application presents genuine new information. It is not a vehicle for litigants to cast doubt on findings that they do not like or a substitute for an appeal that should have been pursued at the time of the original decision. In *Re E* at [16] I noted that some applications will be no more than attempts to reargue lost causes or escape sound findings. The court will readily recognise applications that are said to be based on fresh evidence but are in reality old arguments dressed up in new ways, and it should deal with these applications swiftly and firmly. They must not be allowed to derail ongoing proceedings, or to revive past proceedings in a way that wastes resources and is unfair to other parties. So, while it may be appropriate to refer a possibly meritorious application to the judge who made the original finding, that step, with its inbuilt delay, will not be necessary where the application is tenuous or worse. Meanwhile, the findings will remain in full effect unless and until they are varied; the mere fact that an application to reopen has been made will not alter that.

Recusal for the appearance of bias

29. In the determination of their rights and liabilities, everyone is entitled to a fair hearing by an impartial tribunal. Judges are bound to apply the law to the facts of the individual case as they find them and to shut their eyes to all extraneous considerations. They must act without partiality or prejudice, and any failure to do so violates one of the most fundamental principles underlying the administration of justice.

30. Instances of actual bias on the part of a judge are very rare and actual bias is difficult to prove because the law does not countenance the questioning of a judge about influences affecting his or her mind. Litigants are therefore protected if it is shown that there is an appearance of bias on the part of the judge, known for short as apparent bias.

31. The test for apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased.

32. These broad principles appear from the decisions in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [2-3], *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, and *Porter v Magill* [2002] 2 AC 357 at [103], as recently endorsed by the Supreme Court in *Halliburton Company v Chubb Bermuda Insurance Ltd.* [2020] UKSC 48 at [52-53] and [68].

33. It is impossible to define the circumstances that may give rise to an appearance of bias as everything will depend on the facts: *Locabail* at [25]. The first stage is therefore to establish the facts: *Medicaments* at [85]. That will enable the parties to make submissions, the judge to make an informed decision, and a reviewing court to assess whether that decision was appropriate.

34. To establish the facts, the reviewing court may receive a written statement from the judge, specifying what he or she knew at any relevant time. It will not be bound to accept the statement at face value, but it will often have no hesitation in accepting its reliability. If it is shown that the judge did not know of the relevant matter, the danger of its having influenced his or her judgment is eliminated and the appearance of possible bias is dispelled. See *Locabail* at [18-19].

35. A judge would be as wrong to recuse himself in the face of a tenuous or frivolous objection as he would to ignore an objection of substance: *Locabail* at [21].

The appeal

36. Unfortunately, the process in this case became confused, as reflected in the fact that this appeal is from the Judge's decision to set aside all the District Judge's findings on the basis of apparent bias, a decision made at the hearing of the father's application to reopen three of the findings for other reasons.

37. I would start with the issue of apparent bias. This arose in an unusual way in that the District Judge had been invited to resume a case that she had originally parted from for uncontroversial administrative reasons (see paragraph 9 above). While judicial continuity is always desirable, the District Judge was not bound to resume the case and could have confirmed that it remained released to another judge. However, she instead purported to recuse herself administratively and the parties only became aware of her reasons after (and, because of the court's error, long after) the case came before the Judge.

38. In my view, once the District Judge decided to decline to hear the case on the basis of recusal, she should have ensured that the parties were formally notified of her reason for withdrawing from the case. This could have been done at the time of the

hearing before the Recorder. Had he been in a position to inform the parties of the facts so that they were in a position to respond, they may well have been content for the case to continue in front of another judge, as had already been contemplated. But as it was, they were left in the dark and both parties asked the obvious question "Why?", the father ahead of the hearing before the Judge and the mother afterwards.

39. It is understandable that the Judge was troubled by this odd position and clear that he was acting with the best of intentions. At the same time, it was necessary for him to approach the matter systematically. The starting point was that the listed application was the father's application to reopen certain findings of fact. There had been no regular process of recusal by the District Judge and there was no appeal before the Judge. In these very unusual circumstances, the fact that a party had not appealed was not a bar to the Judge raising the issue himself, but in doing so he needed to acknowledge that a decision to set aside findings on the basis of apparent bias was one that could only be taken in an appellate capacity. Procedural steps could have been taken to achieve this, but the issue was not addressed and it is not clear what capacity the Judge was acting in.

40. That procedural difficulty might not be insuperable, but there are other reasons why the Judge's unexpected decision to set aside all of the findings on the basis of apparent bias on the part of the District Judge was, I regret, both wrong and unfair:

(1) The Judge was not in a position to take a decision about apparent bias: the decision calls for an informed observer, which supposes knowledge of the basic facts. He should have put himself in a position to inform the parties about the District Judge's reasons for wishing to recuse herself so that they were in a position to respond. He instead referred only to the existence of a family connection, which they were in no position to assess. Consequently, they were not only unable to put their case about the District Judge's withdrawal but, more seriously, they had no meaningful way of addressing the new and radical proposal to set aside her findings altogether. This process was not fair to either party.

(2) As to the legal test for apparent bias, the Judge was right to say that one must put oneself in the position of a reasonable observer who is not involved in the case. However, he was mistaken in stating that the test is whether the observer would be concerned that justice had not been seen to be done, when the correct question is whether the observer would conclude that there was a real possibility that the judge was biased, which is a stronger thing.

(3) Finally, the Judge's conclusion that the District Judge's findings were infected by apparent bias is not supported by any sound reasoning. This was the sort of happenstance community tie that should be disclosed to parties by a judge who is aware of it, but would not ordinarily lead the reasonable and informed observer to conclude that the judge could not try the case fairly. In this case the matter was put beyond argument by the fact that the District Judge did not discover that her son and the mother knew each other until months after she had made her decision.

41. The result is that the decision to set aside all of the District Judge's findings cannot stand, and I would accordingly restore the findings. On the question of recusal, matters have moved on since the hearing before the Judge. The parties are now aware of the District Judge's reasons for recusal and neither of them suggests that she should have any further involvement; in the mother's case, that is a pragmatic response to the procedural history. That issue is therefore closed.

42. That leaves the father's application for the reopening of the findings concerning LM, which was not dealt with by the Recorder or the Judge. This court has the power to make any order that they could have made. We have all the necessary material to decide the application and in my view it is in the interests of the family that we should do so.

43. The father explained his position to us with moderation (see paragraph 25) and I accept that the findings in relation to LM may represent a disadvantage for him because, unlike the findings in relation to HH, he does not accept them. However, his application is on examination no more than an attempt to relitigate findings of fact that were regularly made. They were not appealed and there is no new information of any significance that could now persuade the court to review them. The father's sister's statement is not new material. His mother's statement, insofar as it contains anything of relevance, could have been produced at the trial. The information about the impact on LM of any medication she may have been taking is pure speculation. Looking at the matter overall, there are no solid grounds for believing that the earlier findings require revisiting nor any reason to think that a rehearing will result in any different finding. I would therefore dismiss the father's application.

44. In the circumstances, I would propose that the proceedings are remitted for the overdue welfare decision to be taken on the basis of the District Judge's findings of fact by another Circuit Judge under arrangements to be made through the Family Division Liaison Judge.

Lord Justice Phillips

45. I agree.

Lady Justice King

46. I also agree.