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Case Comment

The process for ABE interviews and Re W Applications in child sexual abuse cases

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Legislation:

European Convention on Human Rights 1950 art.6

Cases:

E (A Child) (Family Proceedings: Evidence), Re [2016] EWCA Civ 473; [2016] 4 W.L.R. 105 (CA (Civ Div))

W (Children) (Family Proceedings: Evidence), Re [2010] UKSC 12; [2010] 1 W.L.R. 701 (SC)

TW v A City Council [2011] EWCA Civ 17; [2011] 1 W.L.R. 819 (CA (Civ Div))

***J. Crim. L. 285** This family law case will be of particular interest to criminal practitioners in light of the court's observations about the proper conduct of ABE interviews.

The appellant in this case was Mr E. Mr E is the father of child A, who was 15 years old at the time of the hearing. Child A was friends with children from another family, their mother being Ms F. They were: B, a younger boy also aged 15; C, a boy aged 10; and, D, a girl aged 8. On 24 February 2015, A was caught stealing while he was with B, C and D at a local shop. The police located both sets of parents, who were in an inebriated and aggressive state, at the home of Ms F. The children were subsequently placed into police protection overnight. A was returned home but B, C and D remained in foster care and became the subjects of care proceedings.

On 20 May 2015, D made allegations to her foster carer that she and her brothers had been sexually abused by Mr E and his son, A. More allegations were made five days later and they were corroborated by allegations from B and C. After a delay while the children were taken on a pre-arranged holiday, ABE interviews were conducted on 27 May 2015 and it is the process of these interviews which form one of the grounds of the appeal. In June, the investigating officer visited the children's home to pose additional "fast track' follow-up questions in order to gain clarity and assist with the chronology of the alleged conduct.

Both A and Mr E were interviewed under caution on 29 May and both denied the allegations. A police investigation was carried out, which involved medical examinations of the children, obtaining financial statements of Mr and Mrs E, visiting the hotels where the children alleged that incidents took place and a search of the family home including the seizure and interrogation of electronic devices. Two of A's young friends were also interviewed. At the end of the investigation, the police concluded that there was insufficient evidence to bring criminal charges. The police also concluded that the ABE interviews could not be used in court and the investigation was closed.

Child A was subject to care proceedings and Her Honour Judge Watson carried out a fact-finding investigation as part of these proceedings. Mr E appealed against those findings.

Earlier in the proceedings, at an Issues Resolution Hearing, the appellant made an application for B, C and D to give oral evidence at the fact-finding hearing. This request was refused by the judge. The fact-finding hearing began on 3 December and the judge watched the DVDs of the ABE interviews. On day two of the hearing, an application was made by the appellant to have the police officer who

carried out *J. Crim. L. 286 these interviews called to answer questions. The appellant sought an explanation for a sudden change in D's demeanour after a one-hour break in her ABE interview. He also had concerns arising from the subsequent "fast track' interviews of the children. This application was refused by the judge.

On 6 January 2016, HHJ Watson made findings that both Mr E and A were perpetrators of sexual abuse, with Mr E being the orchestrator of the activity. She found that Mr E used fear to control the children and encourage them to carry out sexual activity. Acts involved indecent assault, oral sex and other sexual activity, inciting the children to carry out sexual acts with each other and sexual activity involving animals. Incidents took place in Mr and Mrs E's home, outdoors in bushes or scrublands and in hotels. Alcohol and tablets were used and, at times, strangers were invited to watch. Penetration had taken place, but there was no evidence that Mr E had raped or penetrated any of the children himself. He did, however, watch and record the activity. Although A was an instigator of sexual activity, the judge found that, due to Mr E's influence upon him, he had no choice but to carry out the acts and he was both a perpetrator and a victim who had since been removed from the cycle of abuse. No findings were made against Mrs E.

Mr E appealed against the judge's findings on the basis that there were errors in her analysis of the factual evidence. There were also concerns regarding:

(1) The approach when determining whether a child witness should be called in light of the decision in *Re W (Children)* 2010 UKSC 12;

(2) The defects with the ABE interviews (Achieving Best Evidence in Criminal Proceedings--Ministry of Justice, 2011);

(3) The approach to be taken when representing a child in family proceedings when that child is himself accused of being the perpetrator of abuse;

(4) Article 6 issues during investigations and proceedings where a child is either perpetrator, victim or both.

HELD, ALLOWING THE APPEAL and setting aside the findings of fact, HHJ Watson erred in her analysis of the evidence and her approach to inconsistencies in the evidence "fell well short of what was required' (at [98]). Her analysis of A's evidence was also inconsistent and inadequate. Her response to the *Re W* application in relation to child witnesses was wholly inadequate and no analysis was undertaken. The application for the investigating officer to appear as a witness should not have been refused. Finally A's rights under Article 6 to a fair trial and legal professional privilege were substantially breached.

The ABE interviews

Lord Justice McFarlane delivered a leading judgment which contained scathing criticism of HHJ Watson's findings and found issue with various aspects of her findings of fact. In support of His Lordship's judgment, Lady Justice Glover concurred that she would,

… in particular, endorse his concerns about the inadequacy of the ABE interviews and the disregard of A's Article 6 rights by those who were meant to be safeguarding his interests. (at [100])

In March 2011, the Ministry of Justice published guidance entitled "Achieving Best Evidence in Criminal Proceedings' (ABE). The document sets out the best practice to be followed when dealing with vulnerable, intimidated and significant witnesses. ABE guidance sets out a four-stage process to interviewing vulnerable witnesses (ABE 3.3). Phase one consists of rapport building, where preliminaries should take place including date, time and reason for interview. Neutral topics should then be briefly discussed to set the witness as ease and create a positive mood. During phase one the ground rules will also be laid down, including discussion about truth and lies (ABE 3.7-3.23). Phase two consists of a free *J. Crim. L. 287 narrative account. This is where the interviewee is encouraged to give their uninterrupted account of the incident(s). At this stage, only minor prompting is required to advance the discussion, with the interviewer's role being that of an "active listener' (ABE 3.24). Phase three allows for questioning of the witness where their account can be probed further. Guidance is provided on techniques in preventing a witness from becoming distressed and an effective structure to this phase (ABE 3.35-3.79). Para 3.44 states:

Interviewers need fully to appreciate that there are various types of question which vary in how directive they are. Questioning should, whenever possible, commence with open-ended questions and then proceed, if necessary, to specific-closed questions. Forced-choice questions and leading questions should only be used as a last resort.

The final phase is the closure phase. This gives the interviewer an opportunity to summarise the information from the interview in order to obtain clarity and to aid with recall. At this stage the witness is actively encouraged to correct the interviewer if they omit any information or provide an inaccurate summary. The interview should then be ended appropriately, for example by returning to neutral topics prior to its termination. Witnesses are thanked and invited to add any information or ask questions before the interview ends (ABE 3.80-3.87). Throughout the whole interview process the discussions should be recorded. If video or audio recordings are not used (such as for the preliminary discussion) then a written record should be kept (ABE 2.171-2.177).

Counsel for the appellant highlighted various concerns with the ABE interviews carried out with F's children. Phase one of the ABE interviews for all three children occurred off-camera, but no written record was kept of the phase one discussions. It was also argued that the quality of the ABE interviews was poor, with leading questions often used throughout. Some of these questions took place very early in the interviews, adding to the narrative of the interview matters that were not introduced by the child. During D's interview, there was a one-hour interval during which no record was kept of any off-camera discussion. Prior to the interval, D was withdrawn and unresponsive. On her return, her demeanour changed and she was forthcoming with her allegations. Counsel for the appellant argued that the police officer should have been called as a witness to account for what happened during the interval. Counsel also pointed to the delay prior to the ABE interview taking place. The delay occurred because the children were taken on holiday by their foster carer. It was argued that this potentially compromised the content of their interviews.

In *TW v A City Council* [2011] EWCA Civ 17, a 24-year-old single man appealed against a finding of fact that he had sexually abused a four-and-a-half-year-old girl, LR. This finding was made during care proceedings relating to his niece, SW. His appeal against the finding of fact was granted on the basis of a flawed ABE interview with LR. Sir Nicholas Wall P suggested that "the inadequacies of the ABE interview are manifest. Even allowing for a broad margin of latitude to anyone conducting such an interview, the departures from the Guidance are self-evident and glaring' (*TW* at [50]). Criticisms included an inadequate establishment of rapport, lack of free narrative recall by LR, a magnitude of leading questions and that nothing was introduced into the interview by the child.

His Lordship observed that "the Guidance makes it clear that the interviewer has to keep an open mind and that the object of the exercise is not simply to get the child to repeat on camera what she has said earlier to somebody else' (*TW* at [52]). It was suggested by the judge at first instance that the girl was "a forthright child capable of standing up to and overcoming incompetent interviewing …' (at [53]). Sir Nicholas Wall rejected this view, stating that "it seems to us that it is not sufficient for a judge to rely primarily on the fact that the child is able, when being interviewed in a thoroughly unsatisfactory manner and contrary to the Guidance, to make a number of inculpatory statements' (at [53]). His Lordship concluded that, due to the various flaws in the ABE interview, no evidential weight could be placed upon it (at [52]).

J. Crim. L. 288 When considering the various flaws in the ABE process identified by the appellant's counsel in the instant case, Lord Justice McFarlane stated:

Insofar as the judge referred to these matters at all, she dismissed them as matters of concern and held that the interviews met the conditions required by the ABE guidance. I am clear that such a conclusion was simply not open to the judge. The departures from the ABE guidance required the judge to engage with a thorough analysis of the process in order to evaluate whether any of the allegations that the children made to the police could be relied upon. (at [37])

His Lordship took issue with the failure to account for the one-hour interval during D's ABE interview, stating:

[T]he need to understand from the police officers what, if anything, they had said to D during her one hour absence and the need to understand in greater detail than the computer log provided what occurred during the fast-track interviews, made it necessary, in my view, for the police officer to be called. (at [39])

Lord Justice McFarlane also expressed concerns about the judge's failure to consider the relevance

of the unorthodox "fast track' interview. His Lordship concluded that the ABE interviews were unsatisfactory, stating that "it was not open to the judge to hold that the ABE interview material was reliable in the absence of a full and thorough evaluation of the potential impact of the numerous breaches of procedure …' (at [41]).

Paragraph 1.1 of the ABE Guidance states: "[w]hile it is advisory and does not constitute a legally enforceable code of conduct, practitioners should bear in mind that significant departures from the good practice advocated in it may have to be justified in the courts.' The decisions in *TW* and *Re E* would suggest that any significant departures from the ABE process will result in the evidence being regarded as unreliable and potentially inadmissible in proceedings. Those conducting ABE interviews would therefore be advised to ensure compliance with the processes advocated in the guidance. The failure to correctly follow the ABE process also rendered the interviews unusable for the purposes of a criminal prosecution.

The Re W *Application*

During proceedings, an application was made by Mr E's counsel that the children provide live evidence. Unlike criminal proceedings, where live evidence from victims of abuse is a normal requirement, family proceedings have traditionally taken the opposite approach. New rules regarding the calling of children to give live evidence in family proceedings were set out in *Re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12, where Lady Hale expressed concerns with the presumption against children giving evidence in family proceedings on the basis that it "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' (*Re W* at [22]) -- those rights being the child's Article 8 rights and the accused's rights to a fair trial under Article 6. *Re W* requires that the court must balance the requirement for a fair trial and the need to ascertain the truth with the welfare of the child.

The decision in *Re W* along with subsequent guidance (*Working Party of the Family Justice Council Guidelines on the issue of Children Giving Evidence in Family Proceedings* [2012] Fam Law 97), sets out 21 factors to consider when determining whether a child should be called to give live evidence. In her judgment, Lady Hale expressly stated that "[t]he quality of any ABE interview will also be an important factor' when deciding whether to allow a child to give live evidence (*Re W* at [25]). The suggestion is that a well-conducted ABE interview may lead to a conclusion that it is unnecessary to call the witness. Conversely, a poorly conducted ABE interview may require subsequent live evidence. Lady Hale, however, pointed out that,

J. Crim. L. 289 … 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 …. 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. (at [27])

In the present case Lord Justice McFarlane conceded that Lady Hale's judgment "would seem to have gone unheeded in the five or more years since it was given.' but suggested that "the decision in this case should serve as a firm reminder to the judiciary and to the profession of the need to engage fully with all that is required by *Re W* and the Guidelines' (at [48]). Indeed, his Lordship expressed concern with the failure of the courts to follow the binding precedent set by the Supreme Court, which established that the presumption that a child witness would not be called "is contrary to Article 6 of the European Convention on Human Rights' (at [56]).

Despite a six-page submission in support of the appellant's *Re W* application, HHJ Watson failed to provide a formal ruling on this issue. Nor did she give any consideration to the factors set out in *Re W* or the subsequent guidance. Lord Justice McFarlane suggested "it is unfortunately plain that the consideration given to the Appellant's *Re W* application by the judge fell well short of what was required' (at [64]).

His Lordship identified the following factors to be of relevance in this particular case: (a) whether the case depended the child's allegations alone; (b) corroborative evidence; (c) the quality and reliability of the existing evidence; and (d) the quality and reliability of any ABE interview. He concluded:

This case did depend upon the children's allegations alone. An extensive police investigation had failed to produce any supporting evidence. There was no corroborative evidence (outside of the ability of the evidence of one child to support another). For the reasons already given, the quality and reliability of the ABE interview process was badly compromised. (at [67])

Having made this determination, Lord Justice McFarlane concluded that "the *Re W* analysis undertaken by the judge was wholly inadequate' (at [68]) and the decision from the fact finding hearing was therefore unsafe.

The Rights of A

A's involvement in this case as both a victim and a potential perpetrator gave rise to concerns in relation to his Article 6 right to a fair trial and legal privilege. The concerns primarily arose from a meeting which took place on 2 November 2015 between A, his CAFCASS guardian and his solicitor. The presence of the guardian was justified on the basis that, due to A's below-average level of functioning and extremely low ability to process information, A would not be capable of instructing his solicitor directly in the proceedings. The purpose of the meeting, according to A's solicitor, was to go through the evidence that had been filed against him. There was no indication as to whether A was advised on the confidential nature of this meeting.

The following day, HHJ Watson made an order requiring A's CAFCASS guardian to disclose what had occurred during this meeting. The guardian complied, filing their statement on 8 November. The statement provided a commentary of a discussion during which A was asked whether there had been any sexually inappropriate behaviour directed towards A in the past. This was carried out in the presence of the guardian, the solicitor and a worker from the unit, G. During these discussions, A did not respond, so he was provided with a piece of A4 paper with the words "yes' or "no' on them. He was asked to tick whichever answer applied. The statement suggests that A was left with G and G stated that, due to A's physical inability to take the pen and make a mark himself, he held the pen over the two words himself and asked A to indicate which one he was to mark. A indicated "yes' and G ticked it, a move that Lord Justice McFarlane called into question:

J. Crim. L. 290 I have described how G became progressively more involved so that, in the end, he was alone with A and it was he who marked "YES' on the paper drawn up by the guardian. The question of quite how it was appropriate for the key worker to be present at all during the process of taking A's instructions, let alone taking over that process, was raised during the appeal hearing but it was not possible to know how the guardian would respond to the court's preliminary view that it was wholly wrong for the guardian to allow such a process to take place in this manner and in her absence with no protection for A or his rights. (at [92])

His Lordship was highly critical of the judge's failure to respect A's entitlement to legal professional privilege and to safeguard his Article 6 rights. He concluded that, with regard to the decision to order the guardian to file a statement, "[t]hat is a significant and highly unusual order to make and, irrespective of the position of the parties, the judge ought to have questioned the basis of the proposed order and been aware of the need to protect A's Art 6 rights and his entitlement to legal professional privilege' (at [97]).

The decision in the present case highlights numerous failures in process and analysis by the judge at first instance, and Lord Justice McFarlane's criticism is scathing. The decision emphasises the importance of both the ABE guidance and the guidance in *Re W,* as well as more fundamental requirements which should have been followed with regard to Article 6 and legal professional privilege. His Lordship took the opportunity to place a marker with regard to the use of child witnesses, expressing concern "that the previous culture and practice of the family courts remains largely unchanged, with the previous presumption against children giving evidence remaining intact' (at [56]). Instead his Lordship has used this as an opportunity to remind the family courts that "the court undertaking a *Re W* determination will need to engage in a relatively full and sophisticated evaluation of the relevant factors; simply paying lipservice to *Re W* is not acceptable' (at [60]).

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