Neutral Citation Number: [2024] EWFC 196

Case No: ZC24C50088 and ZC28/24

IN THE FAMILY COURT

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Date: 23/07/2024

Before :

THE HONOURABLE MRS JUSTICE JUDD

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Between :

BM	**Applicant**
- and -	
A Local Authority	**1st Respondent**
-and-	
DR	**2nd Respondent**
-and-	
F	**3rd Respondent**
(through her children's guardian)	

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Mark Jarman KC and **Ummar Farooq Ahmad** (instructed by **Appleman Legal**) for the **Applicant**
Edward Kirkwood (instructed by **London Borough of Lambeth Legal Services**) for the **1st Respondent**
The 2nd Respondent did not appear
Richard Beddoe (instructed by **Miles and Partners**) for the **3rd Respondent**

Hearing dates: 10th July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23rd July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE JUDD

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Judd :

1. This is an application by a father to re-open findings of fact in a case involving the death of his daughter (A) in May 2020. This application is made as a prelude to his application to revoke the placement order that was made with respect to A's sibling, F, and for F to be rehabilitated to his care.

2. At the fact finding hearing in October 2021 I found that A had suffered at least four episodes of injury, including the fatal injury. The injuries consisted of injuries to the brain, spinal cord and eyes consistent with shaking, a 13cm skull fracture that was several days old at the time of death, and rib fractures of different ages. I found that both parents knew that A had suffered a head injury leading to swelling some days before her death, both had lied and failed to protect her, and failed to seek medical treatment for her. In those circumstances where both parents displayed similar thinking I found it was not possible to identify who was the perpetrator. I stated that, given the attitude of the parents it could be a case where both parents had inflicted injuries.

3. A welfare hearing took place in March 2022 when I made care and placement orders for F. By then both parents had been charged with murder and had been remanded in custody. In June 2023 the mother pleaded guilty to manslaughter. She stated that she had shaken A on several occasions when suffering from post-natal depression and in a state of serious stress. She also stated that she could have dropped her from a height. Her plea was accepted and in December 2023 the mother was sentenced to three and a half years imprisonment. She was released in the light of the time she had spent on remand.

4. Meanwhile the father stood trial for allowing the death of a child and cruelty. The trial lasted for 14 days in which he gave evidence. He was found not guilty in relation to both counts.

5. The father seeks to challenge and set aside the findings made by this court in October 2021 in the light of the new evidence in which the mother admitted causing the injuries to A which resulted in her death.

The legal framework

6. The approach to be taken by the court when dealing with an application of this nature has been set out in a number of authorities, most recently in *Re E (Children : Reopening Findings of Fact* [2019] EWCA Civ 1447 and in *Re J (Children : Reopening Findings of Fact)* [2023] EWCA Civ 465.

7. In *Re J* Lord Justice Peter Jackson summarised the test to be applied at paragraphs 6 to 11. I quote paragraphs 6 and 7:

> "*6. In summary the test to be applied upon an application to reopen a previous finding of fact has three stages. Firstly, the court considers whether it will permit any reconsideration of the earlier finding. If it is willing to do so, the second stage determines the extent of the investigations and evidence that will be considered, while the third stage is the review itself.*

> *7. In relation to the first stage: (i) the court should remind itself at the outset that the context for its decision is a balancing of important considerations of public police favouring finality in litigation on the one hand and soundly-based welfare decisions on the other; (ii) it should weigh up all relevant matters, including 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 further evidence; and (iii) 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 a different finding from that in the earlier trial. There must be solid grounds for believing that the earlier findings require revisiting.*"

8. In *Re E* he said this at paragraph 34:

> "*It should nevertheless be recalled that the ability to challenge a finding of fact always depends on the finding being one which has potential legal consequences. It is not open to a party to appeal a finding simply because they do not like it; see Lake v Lake [1955] P 336, Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd [2002] EWCA 1142 at [27-28] and Re M (Children) [2013] EWCA Civ 1170 at [21]. In my view the same applies to applications to reopen findings by way of application. Whether the court is prepared to entertain an application to reopen a finding will depend upon whether it is satisfied that the finding has an actual or potential legal significance, in other words, is it likely to make a significant legal or practical difference to the arrangements that are to be made for these or other children?*"

The findings

9. The local authority filed a separate schedule of findings for the hearing although it does not now seem to be available. In any event I set out the findings sought within my judgment and the responses of the parents. At the end of the judgment I concluded as follows:-

a) A suffered a shaking injury several weeks before her death which caused subdural bleeding to the head and spine, and axonal injury;

b) A suffered an injury to her head which caused swelling as noticed by the mother on 11th May. She also suffered fractures to her vertebra and ribs which were of a similar age;

c) A suffered a skull fracture that happened after the injury to her head which caused swelling;

d) A's death was a result of inflicted injury, as evidenced by very recent rib fractures and fresh bruising to her chest which showed that she had suffered an assault very shortly before her death;

e) The perpetrator was either the mother or the father, or in the circumstances of the case, both of them;

f) Both the parents knew that A had been injured on 11th May; and must have known about the other injuries as well;

g) Despite knowing that A had been injured on 11th May neither parent sought medical attention for A;

h) Both parents chose to lie to the court about what had happened, and colluded to try and prevent anyone finding out.

10. On behalf of the father Mr Jarman KC and Mr Ahmad submit that the father disputes the findings that the court made that he was a possible perpetrator of A's injuries. He also disputes that he knew that A had been injured on 11th May or otherwise, and that in this knowledge he failed to seek medical attention for her. He says that he did not lie to the court or collude to try and prevent anyone finding out. On behalf of A, Mr Jarman and Mr Ahmad invite me to conclude that there are solid grounds for reconsidering not only the findings as to perpetration (that is that the father is a possible perpetrator) and as to the state of the father's knowledge, failure to protect, and collusion.

11. The father's case remains that he was unaware of the mother's behaviour towards A that ultimately led to her death and that he was unaware that she had been injured. He was away from the house for prolonged periods of time during the day and the evenings. He said he was not aware the mother was suffering from post-natal depression and thought that she was simply stressed. It is submitted that the exchange of messages between the parents and extended family were not properly translated in the family proceedings and the proper translation casts a different light on the conversations that took place. Particular emphasis is made with respect to several messages in which the word 'danger' is used.

12. Mr Jarman and Mr Ahmad submit that, had this court been presented with the picture that it now has at the fact finding hearing, namely that the mother accepted responsibility for causing the injuries, including the injuries that caused A's death, and that she had not told the father what she had done, it would have viewed the evidence of the father very differently. It would have viewed the evidence in relation to the text messages that passed between the parents and between the father and his family differently, and it would have viewed the medical evidence differently.

13. Whilst Mr Jarman drew my attention to passages of Mr Jayamohan's evidence before the criminal court in which he stated that a non-perpetrator might not be aware that A had not suffered injury given the short lived or subtle nature of the symptoms, he accepted that this evidence did not differ particularly from the medical evidence at the fact finding hearing. He did, however emphasize that the difference as between the translation of some of the messages between the father and family members was

significant, particularly when viewed from the perspective of the mother's acknowledgement of responsibility.

14. On receipt of the mother's letters to the court, Mr Jarman submits that she has stated once again that she lied to the court, and that she was deceiving the father, namely that she was being 'manipulative, calculating and trying to deceive the truth of what I have done the day before'. She also said that she had hidden the truth from the father because she could not bear the feeling of failing.

15. On behalf of the local authority Mr Kirkwood submitted that there is no merit or necessity for any re-opening or reconsideration of the clear findings of the court. The fact that the mother has admitted causing some or all of the injuries to A and her death 'does not come close to explaining or absolving the father from the part which the court found he played in the circumstances leading up to her death'. Mr Kirkwood points to some of the evidence that the father gave in the criminal proceedings and states that that it provides no reassurance at all that the father was not aware of, or perpetrated, the injuries. He submits that the mother's basis of plea is short on detail and reads in a way that is somewhat equivocal, e.g. 'She accepts that following consideration of the medical evidence she must have been responsible for [A's] injuries and ultimately must bear responsibility for her death' and 'there were three or four occasions when she lost control of her emotions and roughly shook [A]… the incidents were always late at night'.

16. The mother did not attend the hearing before me although I was expecting her to, and an interpreter had been arranged. As I was concerned about that I asked for enquiries to be made of the mother to see whether there was anything she wished to say. As a result of that, she sent, through the local authority, a letter she wrote to the sentencing judge and also a letter to me. In that letter she states that she has not been able to get legal aid. She also said that she had been told that her presence in court was neither required or important. I have no idea who told her that her presence was not important because that is not true at all. I am very grateful indeed to her for setting out her position in writing and I make it clear that I have read all the material she sent very carefully.

17. In the letters the mother says she alone is responsible for A's death and injuries, and that she alone poses a risk to her. She says that she is not seeking to remain in the UK or to seek access to F. She is due to be deported. She apologised for lying in 2021 and said that she was still confused, traumatised, mentally ill and scared. She said that she had not told the father what was happening, and implores me to allow A to have at least one of her biological parents in her life and says that she only began to know the father properly after the children were taken away. She says that he is a good man and has been a great father to the girls. She said that F had a better connection to the father than herself and indeed that F preferred the father to her. She said that the messages to the father on 11th May 2020 was manipulation on her part, concealing the truth as to what had happened the day before and being deceptive. The mother has also written a letter for A telling her that she will see her when she is 18.

18. What the mother said in her letters is moving and sad. I think her description of herself in 2021 accords with what I observed in her when she was giving evidence, although I was not able to know exactly why she presented as she did.

19. Mr Beddoe for the guardian also opposes the application and agrees with the analysis provided by the local authority.

Discussion

20. The fact that the mother has pleaded guilty to manslaughter is undoubtedly a major factor in this case. Whilst the local authority and guardian do not accept that this plea would necessarily lead to the court making different findings on a further investigation as to who was responsible for A's death, on any view that must be a likely outcome. Whilst the manner in which the basis of plea is expressed lacks specificity, pleading guilty to manslaughter is no small step, and the mother's case that she was suffering from post-natal depression was supported by expert evidence.

21. So far as the rest of the injuries are concerned, the situation is more complex. The mother has undoubtedly stated that she believes that she injured A on further occasions, and whilst what she has said is somewhat vague, any court considering this would be bound to ask why such admissions would be made if they were not true. Additionally, the court would have to consider the inherent unlikelihood that a child would be injured by both parents as opposed to one. On the other hand, at the fact finding hearing I noted that the parents appeared to have similar thinking and that this might be one of those unusual cases where both parents were responsible for injuring A. I would consider that a re-opening of the findings as to the earlier injures could lead to a more precise factual outcome in that it is possible that the mother would be found responsible for causing all the injuries, but that is by no means certain.

22. The case does not, however, end there. As I set out at paragraph 8(f), (g) and (h) above, I made very serious findings about the father's knowledge of the injuries, failure to seek medical attention and his lies and collusion with the mother. Even if he did not cause any injuries such findings call into question his ability to keep a child in his care safe. In concluding that I was not able to identify a perpetrator as between the mother and the father it was fully within my contemplation that she alone could be responsible for causing the injuries.

23. From my judgment it is clear that my findings against the father (jointly with the mother) were based upon a number of matters including the text messages that passed between him and the mother on 11th May, the evidence of three doctors who had seen A and the parents on various dates between 25th March and 7th May (25th March, 24th April, 5th and 7th May), the messages that passed between the father and members of his family about A's ill-health, and the father's own written and oral evidence in which he was evasive and unhelpful. I also noted that he remained fully supportive of the mother, failed to accept the obvious, and lacked emotion and insight into the concerns of others despite the strength of the medical evidence.

24. The mother's plea and accompanying explanations seek to say that the father was unaware of what she had done but without much by way of detail, including what she said about the messages on 11th May. The father's acquittal on the charges he faced does not materially assist because of the difference in the standard of proof in criminal

and family proceedings. I have read the transcript of his evidence to the criminal court, but save that he gave some evidence about the messages of 11th May which he did not give to this court, his evidence was simply that he had not known what was going on. The explanation that he gave for the messages to his family was much the same as he gave to me in 2021.

25. Although Mr Jarman took me to various passages in the expert evidence in which Mr Jayamohan stated that it was possible that a non-perpetrator would not have been aware that A had been injured, he accepted this did not differ in any material sense from the medical evidence given in these proceedings.

26. I then turn to look at the evidence from the messages between the father and his friends and family, which did play a very significant part in the findings that I made. There is some new evidence in that some of the translations that were available to me in 2021 were not entirely accurate. In the bundle there is a helpful table setting out what were the relevant differences between the originals and the translations I have now (prepared for the criminal defence). For example, on 11th May 2020 there is a message from a family member to the father which was originally translated as 'I think that you should take her to hospital, this is not ok' which should have read 'Take her back to the hospital if it is not ok'. On the following day the father sent a message which was originally translated as 'Yes, it's the little one. She really is in danger, she lays down motionless. Sometimes she will look like she has fainted and there is foam coming out of her nose and mouth', and is now translated as 'Yes, it's the little one. I am very worried for her, she lays down motionless. Sometimes she will look like she has fainted and there is foam coming out of her nose and mouth'. Another message from a family member originally read 'Don't go to work today. Take her to hospital and tell them that she is constantly vomiting. Something not alright. Don't stay at home, call her doctor and maybe someone could come home to see her or you go to them. We have been praying for you since yesterday.' It now reads 'If you don't go to work, take her to the hospital so they can check her. Tell them that she keeps vomiting. Something is not alright. Ok? Don't let her stay there; a doctor can visit patients at home. I have been praying God for her since yesterday'.

27. There are other messages with differences on similar lines. In his oral submissions Mr Jarman drew my attention to some of the photographs and messages that were appended to the father's statement, some of which he said were not before me (albeit I am not quite sure why). I also watched a video clip of F taken late at night on 11th May.

28. I do not consider that the differences between the original and more recently translated messages can bear the weight that Mr Jarman and Mr Ahmad seek to give them. The father was giving relatives an account of A being unwell which led them to urge him to take her to the doctor, and he did not. I have read what he said in his evidence about this in the criminal trial, which includes him saying what he did to me, namely that A was exhibiting the same symptoms that she had exhibited for some time about which he had asked the doctors, who (he said) had not been concerned. This was an explanation that I rejected in 2021 having heard not only from the parents but from three doctors who saw A (and F) for appointments at which both parents were present in the weeks before died. I asked myself whether the father would have repeatedly sent messages to relatives and friends about A's symptoms if he knew all

along what was causing them, but came to the conclusion that he did, based on all the evidence.

29. Looking at the messages passing between the parents on 11th May I note that there is no change to the translations originally provided. The mother sent the father a picture of A, stating that there was a swelling to her head, to which the father responded 'ok'. The mother then sent a photo of the marks to A's neck saying 'and that too' and 'Faut tu va dire c'est moi qui ai fait'(you are going to have to say that I am the one who did'). At the hearing in 2021 the father suggested that the photo had been taken in March 2020 and did not provide any answer as to why he had only responded with 'ok' when sent the photo. This evidence had carried weight in my assessment of the state of knowledge of both of the parents as to A's injuries.

30. In her letter to the court last week the mother stated that when she sent the messages to the father on 11th May she was being manipulative and trying to 'deceive the truth' of what had happened the day before. At the criminal trial the father said he had asked the mother during the telephone conversation that took place between them immediately after she sent the photographs whether she had dropped A. He said she had given him an answer which led him to be reassured. He did not say that at the fact finding hearing. Indeed his evidence then was that the photograph had not been taken on that day at all but in March.

31. There is therefore some new evidence about the messages on 11th May but it is limited. The mother does not explain how the messages she sent were trying to conceal or be deceitful about what had happened the day before, nor has the father provided any explanation about the context of being sent those messages. When I asked Mr Jarman whether the father had an explanation for the difference in his evidence before me and the criminal court the father instructed him that he had been asked different questions in the two sets of proceedings. I am sure he was, but I would have expected him to have volunteered that he had asked the mother on 11th May whether there had been an accident, either in his written or oral evidence to the family court.

32. Many of the other points that were made with respect to my findings about the father in 2021, particularly in the written submissions, came close to being challenges to my original findings by way of appeal.

33. I have already stated that it is likely that a reconsideration of the facts would lead to the court coming to a different conclusion as to the perpetrator of A's fatal injuries, and that there is also a reasonable chance that this would apply to the other injuries as well (although that cannot be said with any degree of certainty). The same, however, cannot be said of my findings about the father's knowledge, complicity and failure to seek medical attention for A. There is some information from the mother about 11th May which could be further investigated to see if she could be more explicit, but this is but one very small piece of the evidential picture. The father offers virtually nothing from his own knowledge or recollection of events at the time. He has cast no further light on what he was thinking, what he understood the messages from the mother on 11th May to mean, and why throughout the fact finding and welfare hearings he continued to maintain that neither he or the mother had caused the injuries when faced with the overwhelming medical evidence and the internet searches the mother was

carrying out. The new evidence, such as it is, does not undermine the integrity of what I found.

34. F was removed from the care of her parents in May 2020. There was very good quality contact between her and her parents for two years after this, so she and the father did have a bond. Nonetheless, it is now two years after he last saw her and she will not know him at all. There has been what seems to me to be an inexcusable delay on the part of the local authority in making permanent plans for F, but whatever the reasons, I am now dealing with a child who has been in care for over four years. Her foster carer (with whom she has been living for all that time) is close to making an application to adopt her. I recognise that the path to this proposed adoption has not been smooth (and is still not guaranteed) but the effect of further delay on F is something that carries very significant weight in my decision. Mr Jarman submitted to me that the effect of delay on F in this case was not as significant as it might be because there is no suggestion that she would move from her foster carer whilst the investigation is carried out. I understand that submission, but the foster carer has been living through a long time of considerable uncertainty and that cannot be in F's best interests.

35. If I was to permit this case to be reopened, there would have to be another hearing which would involve evidence from the mother and the father, and consideration of the messages and other digital material. There might have to be some more evidence from the treating doctors about the symptoms that were raised (or not, as they said and I accepted) with them by the parents. This would be bound to entail a trial of a few days, plus judgment. This would delay plans for F by several months in the first instance. The path to the father being able to apply for a revocation of the placement order and a return of F to his care would take longer still.

36. Further, it is very unlikely that the court would be prepared to place F in the care of the father (even with the assistance of relatives) after so many years away. A move from the foster carer to someone who is now a stranger to her, no matter how well it was managed, would be bound to cause F some trauma. Added to this she has developmental delay, has been diagnosed with autism spectrum disorder, and is non-verbal. Caring for her in those circumstances would be very far from straightforward.

37. In all the circumstances I do not find that there are solid grounds to revisit my original findings and re-open the case. To do so would prolong the already unacceptable delay for F without changing the overall outcome for her. I acknowledge that there could be some benefit to F (including with respect to contact with her birth family) in being able to have clear findings from the family court as to who it was that caused A's death and pre-existing injuries, but I do not think this justifies the expense and time of a further hearing, as well as the emotional impact. My findings were that I did not know as between the father and the mother, or even both of them, who caused A's death and injuries. The mother's conviction and sentence should be sufficient for the family to proceed on the basis that it was she who was responsible for the death of A, at a time when she was suffering from post-natal depression and in a state of stress.

38. In coming to this decision I appreciate the father will be extremely disappointed. I have said some hard things about him, but I do wish to emphasize that this is not the whole picture. I have considerable sympathy for the position that both parents found themselves in after the twins were born, shortly after the outbreak of the pandemic.

They were both isolated, the father was working hard to earn money for the family, and their circumstances would have been difficult for anyone to cope with. By this application the father has shown his commitment to F and I do not doubt that he and the mother continue to love her. In time she will know that and it will help her come to terms with what has happened. Nonetheless, I am clear that this application should be refused for all the reasons I have set out.