

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.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.



Neutral Citation Number: [2019] EWHC 91 (Fam)

Case No: FD16P00512

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2019

Before:

THE HONOURABLE MRS JUSTICE KNOWLES

Re X (Wardship) (Foreign Proceedings: Child's Evidence)

The maternal grandfather appeared in person
The mother did not appear and was not represented
The paternal grandmother did not appear and was not represented
The paternal aunt and uncle appeared in person
Mr Hinchliffe from CAFCASS Legal instructed for the children

Hearing date: 10 January 2019

APPROVED JUDGMENT

Mrs Justice Knowles:

1. This unusual case concerns two boys, X who is 12 years old and Y who is 8 years old, both of whom have been wards of court since 2016. The litigation about the boys and the application before me stemmed from the sudden and violent death of their father in India in September 2016. The boys' mother is presently on trial in India for the murder of their father and is remanded on bail. The application before me is for X to travel to India so that he can answer to a witness summons issued by the criminal court in that jurisdiction for him to give evidence at the trial of his mother. X has provided a statement to the Indian police to the effect that he witnessed his mother, together with an accomplice, kill his father whilst he was sleeping in the same room as his father.
2. This application brings into sharp focus the tension between X's welfare and what can be described as his civic duty to assist the Indian court to ascertain what happened in September 2016. The ongoing criminal trial and the summons for X to attend to give evidence have unsettled X and the entire family, both paternal and maternal, are consumed by strong feelings which they cannot easily control. The paternal family, with whom X and Y live in this country, are in favour of X being allowed to give evidence for it is their son and brother, X's father, who has been killed. The maternal family do not want him to travel to India for it is their daughter who may be convicted of murder and spend the rest of her life in an Indian jail.
3. At the conclusion of the hearing I told the parties who were present in court that I would permit X to travel to India for the purpose of giving evidence in the criminal trial and said that I would give my reasons for this decision at a later date. This judgment explains why I made the decision I did.
4. My judgment has been written in such a way as to minimise the identification of X and Y either in this jurisdiction or in India.

Background Summary

5. In September 2016 the father of X and Y was killed at the home of the paternal grandmother in India where the family were staying on holiday. Following his paternal grandmother's attendance at the local police station in March 2017, X subsequently told the Indian police via a Skype interview in March that he had been sleeping in the same room as his father and had woken to see his father being killed. X's mother and another man were arrested in connection with the killing and both have been charged with the murder of X and Y's father. The mother was initially held on remand but is currently on bail although unable to leave India. Following the father's death, the paternal aunt and her husband, flew to India and returned with X and Y to this jurisdiction on 6 October 2016. Since that date, X and Y have lived with the paternal aunt and uncle.
6. Wardship proceedings commenced on 16 September 2016 at the instigation of the maternal grandparents. A hearing to determine with whom X and Y should live in the long-term and with whom they should have contact was held before Mr N Cusworth QC sitting as a Deputy High Court Judge. His order and judgment are dated 14 September 2017.
7. Mr Cusworth QC made a series of factual findings about the behaviour of the paternal family which had been sought by the maternal family. It is not necessary to detail these

in this judgment save to record that, amongst the findings sought, the paternal family were alleged to have exposed X to the Indian media inappropriately in the aftermath of the father's killing. The paternal family acknowledged to the court that this had happened (though not to the extent alleged by the maternal family) and apologised for the distress their actions had caused. Mr Cusworth QC found that these events were not a relevant consideration in respect of X and Y's welfare and accepted that the fraught and unhappy atmosphere shortly after the father's death must have played a major part in clouding the judgment of the adults involved. He noted that the children's mother had also exposed the children to the media in the aftermath of the killing without regard for their welfare.

8. At the outset of the hearing before Mr Cusworth QC, the maternal grandparents accepted the recommendation of the children's guardian that X and Y remain living with their paternal aunt and uncle. However, they sought visiting and other contact with X and Y in circumstances where both boys were extremely reluctant to see them even in contact sessions supervised by the local authority. Mr Cusworth QC accepted the recommendation of the children's guardian that visiting contact between the children and the maternal family should cease. The loss of both their parents had caused both these very vulnerable boys to lose a sense of security, and contact with the maternal grandparents triggered memories of their trauma. Unfortunately, the maternal grandparents had failed to appreciate and understand X's pain and distress, in particular, with the result that neither boy wanted to see them. Mr Cusworth QC found that visiting contact with the maternal grandparents should stop for the time being but that indirect contact should continue. Provision was made in the order for direct contact between the maternal grandparents and the boys with the agreement of the paternal grandparents and, whilst the local authority continued to be involved with the children as Children in Need, any arrangement for the children to spend time with the maternal grandparents was to be made in consultation with the local authority.
9. The order approved by Mr Cusworth QC provided that the boys should remain wards of court given that issues, such as whether X should give evidence at his mother's criminal trial, would require resolution by the court. The paternal family was forbidden to take the boys to India without the court's express permission though questions of regular medical care and travel elsewhere were left to the paternal family to determine.
10. Despite the provisions of the order providing for possible direct contact with the maternal grandparents, no direct contact and very limited letter contact has taken place since September 2017. The local authority ceased to be involved in April 2018 and closed the case on the basis that the boys were being well cared for by their paternal aunt and uncle. Contact by way of letters and cards between the boys and their mother has also broken down as X, in particular, resisted her overtures to them.

This Application

11. The criminal court in India issued a witness summons for X to attend and give evidence at his mother's trial, the summons being initially returnable in September 2018. I note that a further summons requiring X's attendance in November 2018 was issued at the end of October 2018. The paternal aunt and uncle applied to this court for permission to remove X to India for that purpose and the matter came before me on 17 October 2018 when I was the urgent applications judge. I adjourned the case and directed that enquiries be made via the paternal grandmother's lawyer about the proceedings in India.

The maternal grandparents were not present at that hearing and neither was the mother. Subsequently, notice of this application was given to them and, on 21 November 2018 in the presence of the paternal aunt and uncle and the maternal grandfather, I listed the matter for a final hearing on 10 January 2019 and directed that the children's guardian, Mrs Roddy (happily the same guardian who had reported in the 2017 proceedings) provide a report to the court.

12. The mother sent an email to Cafcass Legal on 17 November 2018 saying that she would leave it up to the court to decide what was best and did not wish her sons to be distressed any further. She did not take part in the final hearing. Both the paternal aunt and uncle and the maternal grandfather appeared in person at the final hearing. I was told that the maternal grandmother was too unwell to attend court. The paternal grandmother did not appear and was not represented though I have no doubt that she was aware, via her daughter and son-in-law, of the proceedings and would have advanced a position no different to theirs had she been present at the hearing. The children were represented by Mr Mike Hinchliffe from Cafcass Legal through their children's guardian, Mrs Roddy.
13. I read the bundle prepared by Mr Hinchliffe and a position statement prepared by him. I heard evidence from the paternal aunt and from the maternal grandfather and read the documents each had supplied. I refused to admit a letter from the paternal aunt and uncle dated 2 January 2019 as it was irrelevant to the issue I had to determine. I provided for some of the details of X's possible trip to India and where he was to stay to be withheld from the maternal family as, in the interests of preventing X's uncontrolled exposure to the media, it was not necessary for them to know these. Finally, I heard Mrs Roddy speak to the contents of her report.
14. I am very grateful to everyone who appeared before me at the final hearing. It was clear that each side of the family struggled at times to remain focussed on the issue which I had to determine but, with some assistance, each was able to ask of the other such questions as they wished which were relevant.

The Parties' Positions and The Evidence

15. The paternal aunt and uncle submitted that it was in X's best interests to travel to India and give evidence. This would result in a speedier resolution of the proceedings and help both X and Y put this tragedy behind them so they could move on with their lives. X had been upset by the proceedings and had been aggressive in school which was unlike his normal behaviour. X was very keen to tell the court what he saw and not allowing him to give evidence would suppress his feelings and extend the trauma he had already experienced. The aunt and uncle planned to take both X and Y together to India and had submitted detailed proposals as to how they would spend their time there which were aimed at minimising X's exposure to the town and the house where his father died. The aunt told me in her oral evidence that she wanted the trip to have some happy memories, so the plan was to use it as an opportunity for the boys to have a holiday as well. She was clear that X would say what was on his mind during the trip, if not to her then to her husband in whom he was able to confide. The maternal grandfather cross-examined the aunt about her belief that the court in India had, on 6 December 2018, sanctioned X giving evidence in the school summer holidays. This was not in fact the case as the Indian court had not sat on that date. This dispute about when precisely X would actually give his evidence and the error in the aunt's statement

did not shed any real light on the difficult emotional issues to which X would be exposed if he travelled to India to give evidence.

16. The maternal grandfather and his wife were opposed to X travelling to India to give evidence in the criminal trial. They were worried that X would be exposed to the media by his paternal family and they considered X's difficult behaviour at school to be a manifestation of his inner emotional turmoil. In their view, these considerations should militate against the trip to India. The maternal grandfather gave oral evidence and admitted to me that, if he were to put himself in X's shoes as I had asked him to do, he would wish to give evidence about what he had seen like X did.
17. Mrs Roddy's report recommended that X be permitted to travel to India in order to give evidence. X was an intelligent, articulate boy with a determined nature who had a good understanding of the issues which concerned me. He was clear that he wished to "*get justice for my dad*" and he said he wanted his mother to die in jail because of what she had done. He did not appear anxious about the prospect of facing his mother in a criminal court and there was no evidence from his teachers and others who knew him well that he had been coached in his attitude towards giving evidence. In her oral evidence, Mrs Roddy told me that she considered X's views to be authentically his own and observed that the paternal family had acknowledged to her how difficult it would be for X to give evidence in these highly charged circumstances. The paternal family now understood how important it was for X not to be exposed to the media by his family and Mrs Roddy was impressed by the great care with which the trip to India had been planned. She assessed X to be a resilient boy though she thought he would need professional help and support to deal with the outcome of the criminal trial particularly if his mother were to be acquitted. X had engaged well with school counsellors who would be available to him on his return and were well informed about his circumstances. If he were denied the opportunity to give evidence, Mrs Roddy thought this would impact adversely on his psychological wellbeing and cause anger and frustration.
18. Even though Mrs Roddy knew that the Indian court would not deploy safeguards for child witnesses common in the criminal courts of this jurisdiction, she maintained her recommendation that X should give evidence in the Indian criminal trial.
19. During the proceedings, this court endeavoured, with very limited success, to ascertain further information about the trial process in India with a view to establishing what measures might be put in place to shelter X during the ordeal of giving evidence at his mother's criminal trial. Though I was told in documents from the paternal grandmother's Indian lawyer and from prosecuting counsel that the trial judge would rarely permit a child to be cross-examined, I was told by the maternal grandfather that this was incorrect, and that X could expect to be questioned by all the lawyers involved. For the purpose of my decision, I accepted what I was told, namely that there were no special measures, such as giving evidence via a video-link, routinely put in place for a child to give evidence in an Indian criminal court.

The Law

20. A long-established principle is that no important or major step in the life of a ward can be taken without obtaining the approval of the wardship judge. This principle must, however, be read subject to the principle expounded in Re W (Wardship: Jurisdiction) [1985] AC 791 that the wardship court cannot exercise its powers, however wide they may be, to intervene on the merits in an area of concern entrusted by law to another public authority. The tension between those two principles on the issue of a ward being required to give evidence in a criminal trial or being interviewed by the police/security services was considered by Munby P (as he then was) in In the matter of a Ward of Court [2017] EWHC 1022 (Fam).

21. In In the matter of a Ward of Court Munby P was concerned with a ward of court who had been approached by an officer in the Security Services acting in the exercise of his functions as an officer of the Security Service. After conducting an extensive review of the law and case-law, Munby P held that there was not and never had been any principle or rule that judicial consent was required before the police/Security Service could interview a ward of court. Judicial consent in such a situation could not be reconciled with the principle that the wardship court should not exercise its powers to intervene in an area of concern entrusted to another public authority. Further, it could not be reconciled with the principle of “*no privilege over other children*” expounded by Waterhouse J in In re K (Minors) (Wardship: Criminal Proceedings) [1988] Fam 1. In paragraph 6 of that case Waterhouse J stated:

“Once a prosecution has been instituted however, the statutory procedure must (it is said) take its normal course. The Crown Prosecution Service will, of course, consider any representation that may be made by a parent or local authority about the potential adverse impact upon a child of having to give evidence. This may be one of the matters to be considered in deciding whether or not to proceed with particular charges, but the discretion is vested in the prosecuting authority rather than the parent or local authority. In the present case, it is said further, an extraordinary and anomalous situation would arise, if the wardship court were to intervene, because the minors might be “protected” from the operation of the statutory rules governing the compellability of witnesses, whereas the other children involved in the case would have no similar protection.”

22. Thus, the permission of the family court was not required for a child – whether they are a ward of court or not – to be interviewed by the police or to be called to give evidence in a criminal trial in this jurisdiction. There is no direct authority which applies to the circumstances arising in this case which are those of a ward being summonsed to give evidence at a criminal trial in another jurisdiction.

23. Although concerned with children giving evidence in family proceedings, the Supreme Court’s decision in Re W [2010] UKSC 12 established principles which might assist a court when making a decision about a ward giving evidence in a trial outside this jurisdiction. In paragraph 24 of Re W Lady Hale observed:

“When the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations: the advantages that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child. A fair trial is a trial which is fair in the light of the issues which have to be

decided. Mr Geekie accepts that the welfare of the child is also a relevant consideration, albeit not the paramount consideration in this respect. He is right to do so, because the object of the proceedings is to promote the welfare of this and other children. The hearing cannot be fair to them unless their interests are given great weight.”

Lady Hale also stated in paragraph 27 that:

“... 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...”

The essential test is whether justice can be done to all the parties without further questioning of the child [paragraph 30]. The court identified a number of factors which, whilst not exhaustive, would assist in the balancing exercise which are itemised as follows:

- a) The issues it is necessary for the court to decide;
- b) The quality of the evidence already available, including whether there is enough evidence to make the findings without the child being cross-examined;
- c) Whether there is anything useful to be gained by oral evidence in circumstances where the child has not made concrete allegations;
- d) The quality of any Achieving Best Evidence interview and the nature of the challenge; the court will not be helped by generalised accusations of lying or by a fishing expedition. Focussed questions putting forward an alternative explanation for certain events may help the court to do justice;
- e) The age and maturity of the child and the length of time since the events;
- f) The child’s wishes and feelings about giving evidence. An unwilling child should rarely if ever be obliged to give evidence and, where there are parallel criminal proceedings, the child having to give evidence twice may increase the risk of harm;
- g) The level of support the child has and the views of the Guardian and those with parental responsibility;
- h) The fact that the family court has to give less weight to the evidence of a child who is not called may be damaging to the child;
- i) And the court is entitled to have regard to the general understanding of the harm that giving evidence may do to a child as well as features peculiar to the child and case under consideration. The risk and therefore weight will vary from case to case.

24. In family proceedings involving evidence given by vulnerable persons, the Family Procedure Rules 2010 contain procedural safeguards in Rule 3A and Practice Direction 3AA, aimed at achieving a fair hearing by providing for appropriate measures to be put in place to ensure that the participation of parties and the quality of their evidence and

that of other witnesses is not diminished by reason of their vulnerability. These came into force on 27 November 2017 but do not apply to children who are parties to proceedings [Rule 3A.2(1)]. They do, however, apply to children who are not parties and who may be required to give evidence in family proceedings. A list of factors to which the family court will have regard when considering the vulnerability of a party or a witness is set out in Rules 3A.7 and includes, for example, their age, maturity and understanding; the issues arising in the proceedings; and whether they suffer from a mental disorder or otherwise have significant impairment of intelligence or social functioning. The court may make participation directions which can include measures preventing a party or witness from seeing another party or witness or giving evidence by live link. In cases where a vulnerable witness is to give evidence in family proceedings, the court will hold a ground rules hearing so that it might consider which participation directions are necessary.

25. These detailed provisions have their origins in Part 2 of the Youth, Justice and Criminal Evidence Act 1999, in the Achieving Best Evidence Guidance of March 2011, and in Part 18 of the Criminal Procedure Rules 2015. Those sources explain the meaning of “*vulnerable*” as it applies to witnesses in criminal proceedings and deal fully with the special measures available under the Act and at common law to help witnesses give their best evidence.
26. Finally, in December 2011 the Family Justice Council issued *Guidelines in Relation to Children Giving Evidence in Family Proceedings*. These largely incorporate the test in Re W and set out the matters to which the family court should have regard when conducting the balancing exercise, those matters largely replicating the considerations found in Re W.

Discussion

27. The circumstances of this case highlight the tension between the priority given to the welfare of this court’s ward and the autonomous legal procedures of another jurisdiction. If X had been required to give evidence at his mother’s criminal trial in this jurisdiction, this would not have been a matter on which this court could have ruled. However, he is to give evidence at his mother’s criminal trial in another jurisdiction and requires the permission of this court to travel there for that purpose. The issue for this court is whether it should apply the same approach as it would had the criminal trial been in this jurisdiction, thereby giving respect to the principles set out in paragraph 21 above.
28. I have given this matter anxious thought and have concluded that my approach should be shaped by the following considerations informed by the case-law referred to above.
29. First, the starting point is that there is no presumption against a ward giving evidence in criminal or civil proceedings merely because those proceedings take place in another jurisdiction.
30. Second, this court will accord respect to the legal processes in the other jurisdiction, recognising the advantage that the evidence of its ward is likely to bring to the determination of the truth. In that regard, this court should ascertain information about (a) the trial process including measures to facilitate the child giving evidence, and (b) the issue to which the child’s evidence is directed. That information does not need to

be exhaustive but must be sufficient for the court to undertake the balancing exercise set out below.

31. Third, in coming to a decision, the ward's welfare is a relevant but not the paramount consideration. This court will consider the advantage giving evidence may bring to this particular child as well as the damage that it may cause. Regard should be had to the Re W factors listed in paragraph 23 above whilst acknowledging that some may not be pertinent to the individual circumstances with which the court is concerned.
32. Fourth, the balancing exercise set out in paragraph 31 must have regard to the first two considerations listed in paragraphs 29 and 30 which carry great weight. Approaching the matter in this way - though different to the approach this court is obliged to take had the criminal trial been in this jurisdiction – strikes an appropriate and respectful balance between the child's welfare and the judicial processes in another state.
33. I turn now to the circumstances of this case. Many of the Re W factors do not apply in the balancing exercise but I have taken account of those which do.
34. I have already referred to the limited information which this court was able to obtain about the Indian proceedings. I am however satisfied that I should make a decision without further delay even if there is limited information about the proceedings in India. This is because I have concluded that X and his family need to know sooner rather than later whether he is to be permitted to travel to India in order to give evidence at his mother's criminal trial. The family are under a great deal of strain as is X as evidenced by some of his behaviours at school. Notwithstanding the witness summons requiring X to attend in November 2018, I was told that it is presently uncertain when X will be required to give evidence. It is hoped that, following my decision, the Indian court can set a definite date, hopefully in the Easter school holidays, which would allow X and Y to travel to India for a holiday as well as to enable X to give evidence.
35. The evidence before me established that, other than X's account given to the Indian police in March 2017, there was no other eyewitness account of the father's killing. Though that account was given some time after the death of his father and in circumstances about which the maternal family is highly critical, X's account is clearly evidence which is crucial to the resolution of the criminal proceedings. There are no special measures such as giving evidence via a video-link which are available to facilitate the giving of X's evidence. Whilst it is possible that the trial judge may intervene to restrict or control cross-examination, I cannot be satisfied that this will indeed occur. Thus, I find X is likely to be exposed to cross-examination in the same manner as an adult. Even though X is confident that the trial will not be an ordeal because he is telling the truth, I am less certain about the effect on him of seeing his mother in court and of being challenged about his mother's alleged involvement in the killing of his father. Finally, it is important to recognise that the crime of which the mother is accused is of the utmost gravity.
36. X is a twelve year old boy who is both intelligent and articulate. He is doing well at school where he is supported by teaching and counselling staff. He has an outlet in the school for some of his feelings which is independent from the paternal family and which is confidential. That resource will be available to him once he returns from India. I regard that support as vital to mitigate against any harm he may suffer either arising from his evidence or once the Indian court has delivered its verdict.

37. X has a passionate belief in the truth of what he saw and wishes to give his account to the Indian court to get justice for his father. He does not appear to have been improperly influenced by his paternal aunt and uncle though I accept he is living in a household sympathetic to the account he gives of his father's killing. Mrs Roddy carefully considered whether X's views about giving evidence were authentically his own and concluded that this was indeed the case. She told me that, if X were denied the opportunity to give evidence, this would cause him anger and frustration and impact negatively on his psychological wellbeing. I accept that evidence.
38. X's carers, the paternal aunt and uncle, support him giving evidence and have thought very carefully about the arrangements for the trip so that X's exposure to the court and the place where his father died is kept to a minimum. They have also recognised the harm which exposing X to media scrutiny at this difficult time may cause him and have offered undertakings to me not to knowingly bring X into contact with any media outlet either in this jurisdiction or in India. However, on the other hand, X's maternal grandparents oppose X giving evidence because they fear the effect on him will be damaging to his emotional and psychological wellbeing. A great part of their concern was the worry that X would be inappropriately interviewed and photographed by the media when in India. I accept that concern as being valid but consider that it can be met by the giving of undertakings by the paternal family as described. X has no direct contact with his maternal family at this moment, but I hope he will, in due course, value the honesty shown by the maternal grandfather in his oral evidence when he told me that, were he in X's shoes, he too would wish to give evidence at the criminal trial. X's mother has very properly not expressed any view about this issue and has indicated that it is a matter for this court to determine.
39. Though X is an intelligent and articulate boy, he has something of a naïve view that, after telling his story, the Indian court will convict his mother. Therein lies the potential harm which might befall X if I permit him to give evidence. The Indian court might accept his account and convict his mother but, equally, it may not and acquit her. That outcome would represent a serious challenge to X's personal integrity which, in my opinion, he would have real difficulty coming to terms with. On the other hand, a life sentence for his mother would represent a bereavement for X, the ramifications of which are likely to reverberate throughout his life even if he presently does not recognise these. Finally, the process of being cross-examined vigorously on behalf of his mother and her co-accused may also be damaging though I suspect X will find this easier to negotiate given his belief in the truth of his account. Giving evidence in his mother's criminal trial is thus not a risk-free course for X though I find that it does not outweigh the advantages to him of doing so.
40. Thus, having regard to the principles outlined in paragraphs 29-32, I have concluded that I should give permission for X to travel to India to give evidence at his mother's criminal trial.

Conclusion

41. Even though X and Y's relationship with their maternal family has broken down, I am satisfied that there are no further steps in that regard which this court can properly take. X and Y are well cared for by their paternal aunt and uncle and, having made my decision about X, no purpose is served in continuing the wardship status for either X or

Y. It will be discharged on their return to this jurisdiction once X has given evidence in the Indian proceedings.

42. The father's death in September 2016 has cast a long and dark shadow over this family and shattered X and Y's sense of security, with profound consequences for the remainder of their lives. I very much hope that, whatever the outcome of the criminal trial, both boys can move forward with hope in their future.
43. That is my decision.