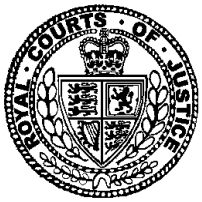

Neutral Citation Number: [2022] EWHC 2506 (Fam)

Case No: BM21C00153

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/08/2022

Before :

MRS JUSTICE LIEVEN

- -

Between :

BIRMINGHAM CITY COUNCIL

Applicant

and

(1) MOTHER
(2) FATHER

(3) PG
(a child through his Children's Guardian)

(4) MG
(a child through her Children's Guardian)

(5) RG
(6) TG
(children through their Children's Guardian)

(7) DG

Respondents

- -
- -

Mr Sam Momtaz QC and Ms Emily Verity (instructed by **Birmingham City Council**) for the **Applicant**
Mr Stefano Nuvoloni QC (instructed by **Greens Solicitors**) for the **First Respondent**
Mr Andrew Neaves (instructed by **Anthony Collins Solicitors**) for the **Second Respondent**
Ms Orla Grant (instructed by **Duncan Lewis Solicitors**) for the **Third Respondent**
Mr Richard Hadley and Ms Param Bains (instructed by **Baches Solicitors**) for the **Fourth Respondent**

Ms Tracy Lakin (instructed by **McDonald Kerrigan Solicitors**) for the **Fifth and Sixth Respondents**
Ms Nina Bache (instructed by **Glaisyers Solicitors**) for the **Seventh Respondent**

Hearing dates: **9 August 2022**

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE LIEVEN

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 Lieven DBE :

1. I am giving a ruling of a case management decision. In May 2021 MG, aged 13, made allegations of having been sexually abused by her brothers DG and PG. At the time, PG was 14 and DG 17. Both boys deny the allegations. MG was made subject to an Interim Care Order ("ICO") in July 2021, PG was made subject to an Interim Supervision Order ("ISO") and has lived in local authority care ever since. MG is also living away from home. RG and TG are living at home. RG and TG have no unsupervised contact with their siblings. This family, over the last 14 months, have been fragmented. It is of great importance for all the children's welfare, as well as the wider family, that this matter is dealt with as speedily as possible.

2. The representation before me today is Mr. Momtaz QC and Ms Verity for the Local Authority, Birmingham City Council ("LA"), Mr. Nuvoloni QC for the Mother, Mr. Neaves for the Father, Ms Grant for PG, Mr. Hadley and Ms Bains for MG, Ms Lakin for RG and TG, and Ms Bache for DG.

3. This hearing was listed, in part, to consider the issues under ***Re W*** [2010] Civ 57 as to whether MG and PG should give evidence. I have also considered whether DG should give evidence but technically he is over 17 so he is no longer, strictly speaking, subject to ***Re W***. It is agreed by all parties, and I concur, that PG and DG wish to give evidence and should do so. It is also agreed between the parties that at this stage the decision should be that MG gives evidence. However, given MG's vulnerabilities as set out in the report of Dr. Freedman, and her changing view as to whether she wishes to give evidence, that decision will have to be kept under review. The principle of how she is to give evidence will have to be considered closer to the hearing and at a ground rules hearing set down before Morgan J, who is undertaking the fact finding hearing for 10 days commencing 31 October 2022. I will consider when a ground rules hearing takes place at the end of this hearing.

4. MG also made allegations against two other boys on 17 December 2021. MG alleged she was sexually abused by three males as well as PG and DG. It is now clear that the third person we thought she was referring to is not a separate individual. The two other individuals MG has made allegations against are her cousin X and a boy called Y who was at school with her. MG made the allegations originally to staff at her residential unit and subsequently at visits from the Social Worker and police in 2022. MG declined to make formal complaints and would not give any ABE interviews.

5. X is the son of the Father's cousin who lives in London. X lives with his parents and siblings and is the same age as MG, 14. MG alleged X sexually assaulted her, and she says this took place a few times in Birmingham and three or four times in London. She has declined to make a formal complaint about X, and he has not been interviewed by the police. A referral was made to [London Borough] Children's Services and to the Metropolitan Police and, so far as this court is aware, no action has been taken. I will make disclosure orders against both in case anything further comes out of the woodwork. It is material to note that MG also alleged that RG had told her that X had touched her. RG has been spoken to by the Social Worker but she said X has never done anything that made her worried and upset and that she has never been alone with him. She denied telling MG that X had done anything. TG, when visited, said something similar.

6. In respect of Y, it is known that he is the same age as MG and at school with her. When the police asked MG about Y she initially declined to speak and the report in respect of Y was given by her support worker. Again, MG has declined to make any formal complaint and apparently said she did not want him arrested from school. Y attended a voluntary interview with police and denied the allegations in an interview, which is in the court papers. Y said he thought MG made up the allegation as they had fallen out on Snapchat before Christmas. It appears the police are not taking any further action.

7. The issue that now arises before me is how to deal with the allegations in respect of X and Y. The LA is not seeking findings in respect of the allegations and does not intend to amend its threshold. Mr. Momtaz says it is not necessary to the welfare of MG and the other children, nor is it proportionate to seek findings against both boys, who are children aged 14. No formal complaints were made against them and further again, the LA say it is not appropriate to join a child as an intervenor when the LA are not seeking findings against them. The LA accepts allegations have been made by MG which are admissible and may be relevant to MG's credibility, but that it simply goes to the weight the Judge gives to the matter. The LA do not support X and Y being joined as intervenors.

8. Mr. Nuvoloni for the Mother has indicated that her top priority is to not to jeopardise the hearing. She accepts it is appropriate to find some method to be sure about X's position, but submits it is important to take a proportionate approach.

9. The same position is adopted by Mr. Neaves for the Father.

10. Miss Grant submits it is important for X and Y to be given intervenor status so they can be given legal advice and address evidence in the most robust way as findings may be made against them which may have a welfare impact on the boys and their families. Ms Grant submits that their evidence is critical to prove a full picture of this case. She accepts that if X and Y are joined as intervenors this will inevitably lead to the loss of the trial but is proportionate to facts of the case.

11. Ms Bache for DG does not go as far as Ms Grant, she submits that the court needs to clarify X's position and suggests a witness statement should be produced. She does not suggest that for there to be justice in DG's case, X and Y to be joined as intervenors.

12. Mr. Hadley, for MG, appeared to accept that it is appropriate that the parties can challenge MG's credibility, but he was opposed to X and Y being granted intervenor status. Mr. Hadley submits that such a course is not proportionate and will lead to delay. He did submit that if the allegations are taken into account by the court, X and Y may need to be called to give evidence and he is likely to seek permission to cross examine them in order to challenge any assumption that the allegations are untrue. I understood Mr. Hadley's position to be that if further evidence is sought, they may need to be called to give evidence and open to cross examination.

13. Ms Lakin who appears for the younger two children submits that the top priority is to maintain the fixture and takes a pragmatic way forward. She supports a lawyer meeting with X to take his statement. She submits that would meet the justice of the case.

14. Miss Grant relies upon a decision by Darren Howe QC sitting as a Deputy High Court Judge in ***BB (Children)*** [2021] EWFC 20. In that case Mr Howe was considering a

procedurally difficult decision when part way through fact finding hearing an application was made by some of the parties to dismiss or limit the allegations made against their clients and an application was made by the LA not to pursue various allegations in the threshold. Mr. Howe at paragraph 70 turned to the LA proposal of withdrawing the allegations and referred to *Re A (A child) (No 2)* [2011] EWCA Civ 12 and Munby LJ, as he then was. At paragraph 71 and 72 Mr Howe said as follows:

> *"71. It is of course trite law that the Family Court must treat allegations not proved to the required standard as not having happened. However, the binary system' that applies in the court does not, as a matter of fact, always apply in the community or with all professionals. Although the legal consequences are the same a 'not proved' conclusion is not always treated in the same way as a finding that the allegation is not, and never was, true.*
>
> *72. The distinction between the 2 outcomes was considered in Re A, where Munby LJ said the following:*
>
> *"...notwithstanding the 'binary system' explained by the House of Lords in In re B (Children) [2008] UKHL 35, [2009] 1 AC 11, para [2] (Lord Hoffmann) and para [32] (Baroness Hale), it may be relevant at the subsequent 'welfare' hearing to know, and thus for the judge as part of his fact-finding to record, whether a particular matter was not found proved because the judge was satisfied as a matter of fact that it did not happen or whether it was not found proved (and therefore in law is deemed not to have happened) because the party making the assertion failed to establish it to the relevant standard of proof but in circumstances where there is nonetheless continuing suspicion. It is of course a cardinal principle that at the 'welfare' or 'disposal' stage, as at any preceding fact-finding hearing, the court must act on facts, not on suspicions or doubts; for unproven allegations are no more than that: see the analysis by Baroness Hale in In re B (Children), following and declining to overrule what Butler-Sloss LJ had said in In re M and R (Minors) (Abuse: Expert Evidence) [1996] 4 All ER 239, page 246, and the obiter dicta of Lord Nicholls of Birkenhead in In re O and another (Minors) (Care: Preliminary Hearing), In re B (A Minor), [2003] UKHL 18, [2004] 1 AC 523, para [38]."*

15. I note there is something of a tension in that paragraph. The binary system means that facts are either found or not found. Munby LJ was here contemplating 'a not found proved' analysis where the court would assume facts did not happen but take into account the reality that there was still some suspicion for the purposes of making welfare decisions.

16. Mr. Howe went on in paragraphs 75-77 to say:

> *"75. The requirement of fairness is, in care proceedings, a necessarily high one to ensure the correct decisions are made and children are not wrongfully removed from the care of their families. In my judgment, where the Local Authority relies on allegations made by a child in circumstances where there is no other evidence to support the allegations other than the*

> *account given by the child, the responsibility to act fairly is all the more important. In such circumstances it is, in my judgment, incumbent on the Local Authority to present its case fairly by putting before the court the evidence that supports the conclusions it invites the court to reach but also highlighting the evidence that points the other way. This is what is required by the decision in Kent County Council v A Mother [2011].*
>
> *76. What would be the purpose of requiring the Local Authority to provide all relevant evidence if, having done so, the Local Authority can then choose to ignore the evidence that undermines its case and proceed with the evidence that is supportive of its position? The Local Authority submits that, once it has abandoned an allegation, the burden falls on the Respondents to prove that an allegation is untrue. The logical extension of that submission is that where required, it will be necessary for a Respondent to call the evidence not relied upon by the Local Authority for the Respondent to discharge the burden that, it is submitted then falls to them.*
>
> *77. A Family Court judge can, as a case management decision, require the Local Authority to call evidence of relevance to issues before the court. Once aware of evidence that might undermine a child's credibility, the court can use the jurisdiction within its general case management powers to require a Local Authority to call witnesses that it would otherwise decline to call. An example of this can be found in Re M-Y (Children) [2018] EWCA Civ 1306 in which McCombe LJ described the decision of the trial judge who refused to direct the Local Authority to call a social worker, who was able give evidence concerning the reliability of the child, as unfortunate where "the credibility [of the child] was the essence of the factual assessment to be made".*

17. Ms Grant relies on that passage to submit that the LA are obliged to call X and Y and that they be should therefore granted intervenor status.

18. The court has broad case management powers set out in FPR 1.1:

> *"(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.*
>
> *(2) Dealing with a case justly includes, so far as is practicable –*
>
> *(a) ensuring that it is dealt with expeditiously and fairly;*
>
> *(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;*
>
> *(c) ensuring that the parties are on an equal footing;*
>
> *(d) saving expense; and*

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

19. Further, in exercising those case management powers this court has to have in mind in Children Act 1989 proceedings, that the child's welfare should be at the forefront of my mind, albeit not paramount given that this is a case management decision.

20. There is a difficult position here. If I grant X and Y intervenor status or contemplate that should be the way case goes forward, it is likely, although not inevitable, that it would mean the October hearing is lost. This would be highly detrimental to the interests of the children. There is already considerable delay in this case, and for MG and the other children the present situation is highly detrimental to their welfare. However, I also have to bear closely in mind the need to ensure fairness for MG, PG and DG. This is the case where justice and speed might be seen to be in conflict in the sense that a relatively speedy determination needs to be balanced against the need to protect children.

21. There is no issue between the parties, save for some equivocation by Mr. Hadley, that MG can be asked in court about the allegations made against X and Y. If the court finds they are true, that is highly relevant to her case and if the court finds them not true, there is an impact on her credibility and those representing PG and DG say this would undermine her other allegations.

22. However, I agree that it is not necessary to plead the allegations against X and Y in the LA threshold. The LA is not seeking to prove them, and to do so is not necessary for the welfare issues in respect of the children. It is extremely important that this remains the focus of the case. The Court is not undertaking some broad fact finding exercise to establish the truth or otherwise of every issue that might have some relationship to the case. The Court must remain focused on the issue before it, namely the future welfare of the children and the ultimate orders that the Court may make. Therefore, not to seek to prove these allegations is proportionate on the facts of the case.

23. The allegations that remain in the threshold are sufficient to allow the Court to make properly informed welfare decisions. The further allegations involve two other children and to seek to determine these allegations would expand the scope and length of the case and bring in other witnesses, including other children. It is a proportionate approach for the LA to keep its threshold as narrow as possible.

24. I have taken into account Mr Howe QC's decision in ***Re BB***. However, each case will necessarily turn on its own facts, and I do not understand that judgment to be suggesting that there is a legal requirement that a LA must insert every allegation made into its threshold and then to be obliged to call evidence on every point. That would be a recipe for turning, what are often already unnecessarily lengthy hearings, into even longer and less focused ones. The Court should seek to limit itself to the findings which are necessary to decide what final orders to make.

25. Having said that, in order for MG to be asked useful questions about the allegations, it is necessary for the court to know what X and Y say about them. It is theoretically possible, though in practice extremely unlikely, that they might accept the allegations. We do know what Y says because he has been interviewed, but we do not know what X says. It may be reasonable to assume he will deny them, but we do not know.

26. In my view, his position should be clarified. This can be done by a mechanism of him being asked about the incident, either by an independent social worker or appropriate solicitor, and the parties have accepted that such a process can be set up. It may be necessary to make further orders in this regard, but in practice that is fairly unlikely.

27. It is not necessary for X and Y to be made intervenors or given the opportunity to become one. No one is seeking findings against them, and no one has shown me any precedent where a child is joined and given intervenor status where no findings against them are sought. It is not correct that wherever a child makes allegations against third parties those parties are necessarily joined, and there is no authority for such a proposition. The LA needs to provide a proportionate threshold; and the Judge needs to decide what weight s/he gives to the evidence the parties present. Assuming MG gives evidence, she does need to know what X and Y have said and the parties need to know her response. It is not necessary for the Court to receive evidence from the boys and for them to be cross examined. The trial Judge will then have to decide what weight to give to the material she receives.

28. I accept this may not be a perfect solution; in purely forensic terms perfection would be an outcome where every allegation is fully tracked down and findings made. However, firstly, the Court and the parties need to focus their resources on the key issues strictly necessary for the outcome of the case. Secondly, we are in a position where there has already been very considerable delay and yet further delay would be highly detrimental to the children. The final hearing is listed in week 70 and that is 70 weeks where a family cannot move forward. Thirdly, to make two 14 year old boys intervenors would be highly intrusive, and probably upsetting for them. I do take into account that if the court believes MG's allegations, that could have future ramifications for them. However, that is something the trial judge will have to consider if she gets to that point. Fourthly, a proper understanding of X's and Y's position is important, and that process will be set up. That is the most appropriate and proportionate way forward in this case to ensure that justice and speed are not in conflict.

29. I order that a solicitor experienced in this field is appointed and she or he is asked to interview X in short order. I ask the parties to draw up list of questions by Friday.