A father was seeking permission to appeal interlocutory orders relating to contact arrangements and to institute proceedings for damages arising from breaches of his rights under the Human Rights Act 1998 and the ECHR. The applications were refused.

The father was alleging that the trial judge had not given a fair hearing and the Local Authority's conduct had also breached his rights. Lord Justice Wall reviewed the transcripts of the original hearings and found that the trial judge had been right to focus on the Children Act proceedings at that time, notwithstanding that the decision in *Re V (Care: Pre Birth Actions)* [2004] EWCA Civ 1575 left open the question as to whether it was appropriate for the court to make orders under the Human Rights Act when the proceedings had not been instituted under the Act. He also emphasised that any claims of this nature have to be considered in the context of the overall conduct of the proceedings.

B4/2006/0271, B4/2006/0344, B4/2006/0345

Neutral Citation Number: [2006] EWCA Civ 625

IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM SWANSEA COUNTY COURT

(HIS HONOUR JUDGE PARRY)

Royal Courts of Justice

Strand

London, WC2

Thursday, 23rd March, 2006

B E F O R E:

LORD JUSTICE WALL

IN THE MATTER OF D (CHILDREN)

(DAR Transcript of

Smith Bernal Wordwave Limited

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Official Shorthand Writers to the Court)

THE APPELLANT APPEARED IN PERSON.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

J U D G M E N T

(As Approved by the Court)

1. LORD JUSTICE WALL: There are currently in the Swansea County Court proceedings relating to two children, child D, born on 28 April 1988 and child C, born on 1 June 2002. The father is seeking either residence or shared residence of the children. That application is resisted by the children's mother. HHJ Parry, who has the conduct of the proceedings, has made a series of orders of an interlocutory nature designed to ensure that that application is heard, although it looks as though, from the latest documentation, it is unlikely to be heard before the summer of this year. The applications for permission to appeal now before me relate to three orders she has made on 22 November, 29 November 2005 and 13 January 2006. In relation to the first of those, I have a transcript of the judgment which she gave. I have a full transcript of the hearing on 29 November. I also have a transcript of what she said in relation to 13 January.

2. I simply say at this stage in passing that the latest order which she made on 13 January directed that the father's application for disclosure should be adjourned to tomorrow 24 March at 10.30 and the judge has set aside half a day tomorrow for the case to be listed before her for further argument on disclosure, the identification of an expert to be called in the proceedings, the issues to be tried by the court and the future involvement of NYAS, that is the National Youth Advocacy Service, on behalf of the two children.

3. It is apparent from the discussion which had taken place in court hitherto that the judge has come to the view that the children require separate representation. She has invited NYAS to represent them. NYAS asked to see the relevant documentation and for further time to consider the papers. The judge adjourned, as I indicated a moment ago, in part, so that NYAS could make representations before her tomorrow as to whether they were prepared to act for the two children.

4. So far, from what I have said, the application may appear conventional enough, but it is complicated by the fact that the father wishes to introduce into the proceedings breaches or alleged breaches of what he says are his rights, both under the 1998 Human Rights Act and under the European Convention on Human Rights, so that the judge can adjudicate upon those and make orders for damages in his favour. The judge has hitherto resisted that course, taking the view that she is hearing proceedings under the 1989 Children Act; that her function is limited to an investigation under those proceedings of the children's welfare, and that if the father wishes to take alternative proceedings under the Human Rights Act, he must do so in a separate action or actions. I do not think it is appropriate this afternoon for me to go into the rights and wrongs of what the father is alleging against the local authority and as I understand it now, for that matter, the court. He asserts that he has not had a fair hearing from HHJ Parry pursuant to Article 6 and he also asserts that the local authority's conduct historically has been in breach of his rights; that he is a victim of the local authority's behaviour and that he will be entitled to damages.

5. He has sought, as a result, in the Children Act proceedings stringent orders for disclosure against the local authority. To some extent, the judge has gone alone with this, because she has taken the view (as I read her orders and her judgments and the discussion she had with the father in court) that aspects of the local authority's conduct are indeed relevant to the issue which she has to try, namely the welfare of the children, and that, accordingly, the way the local authority behaved, the allegations that were made, the manner in which they were investigated, are all relevant to whether or not it is appropriate for the father to have residence or share residence of the children and indeed, if he does not, as to his contact with them. It is right to say that the mother's cross-application, she already having an order for residence in her favour, is that the judge make an order under section 91(14) of the Children Act 1989 preventing the father making any further applications to the court.

6. The first order is that of 22 November 2005 and that is almost exclusively an order for disclosure. The mother was ordered to disclose documents held by the City and County of Swansea, not previously disclosed by them for the period 2005 to date and the mother was given permission for her solicitors to issue a witness summons if necessary against the social services department in order to obtain that

material. The judge also made detailed orders for medical and health records, and other detailed matters going back into the past which I need not read out. Permission was also given for her solicitors to obtain a witness summons against the chief constable of the South Wales Police and any other police authority holding records to obtain relevant material and, if necessary, witness summonses would be dealt with by the district judge. There were further directions as to the filing of evidence and position statements and the matter was put over to 29 November, specifically to consider the instruction of expert witnesses and the disclosure of the father's medical records.

7. On 29 November, as I indicated earlier, there was a very substantial discussion between the father and the judge about disclosure, about the relevance of the Human Rights Act, about the propriety of proceedings under the Act being carried on in the context of the Children Act proceedings; whether separate proceedings were necessary, whether they were not, what relief was being sought and so on. The father is critical of the judge in relation to the exchanges which took place. This is a point which I have discussed with him before. As he pointed out in the course of today, in his submissions this afternoon, during the course of last year he issued an application for permission to appeal against an order made by Hedley J, who had permitted his wife to take the two children out of the jurisdiction for a holiday. When that application came before me sitting as a single Lord Justice, I was critical of the interventions which Hedley J had made during the course of argument, particularly given the recent decision of this court in what has become I think probably known as Mr O'Connell's case, known as the case involving the attitude of the courts to Mackenzie friends. I directed that a copy of my judgment with its critical observations of Hedley J's behaviour should be sent to him with a transcript of the hearing he had conducted, so that he could reflect upon it – and that of course was done.

8. So I hope the father will take it from me that I am in no sense unwilling to be critical of judges at first instance who do not behave themselves. But I have read the discussion which the father had with HHJ Parry with some care, particularly in the light of the criticisms I made of Hedley J on an earlier occasion. I have to say that the transcript does not read badly. I do not detect any discourtesy on the part of the judge, and although as often happens in ex tempore exchanges she expressed herself in a way in which perhaps in a reserved judgment she would not express herself, I find nothing objectionable in what she said. The father latches in particular onto a phrase she used when she told him to forget about Article 6 and forget about Article 8, but she explains that very carefully at a later stage in the exchanges. What she says is, and it seems to me I have to say absolutely right, that:

> "Before you get to a breach of Article 6, you have to decided what was relevant in the proceedings, otherwise you could be asking me for disclosure of any document which had no relevance at all to the proceedings which you said was necessary for you to have a fair hearing. It is not for you to tell me what is relevant. It is for you to point out something which may be potentially relevant and for me to decide whether it is a document which should be disclosed. All of this is third-party disclosure. None of the agencies are parties to the proceedings. Therefore there is a hurdle of relevance before I made blanket orders for disclosure."

9. Now in my judgment, that is the point at which the judge was discussing Article 6, because she makes those remarks in response to a specific comment from the father, "you cannot forget Article 6", and that immediately follows her reference to, "forget Article 6, forget Article 8, disclosure is not an open book". So with great respect to the father, I do not think that the comment by the judge is either offensive or, indeed, wrong.

10. When the judge at one point said she does not want to hear any more law, what she is making quite clear, I think, is that what she was dealing with that afternoon was the question of further discovery and she had already made very clear to the father her view that if he wished to introduce the Human Rights Act into the Children Act proceedings, his proper remedy was to take the matter up to the High Court, to appeal her refusal to transfer the matter to the High Court or to issue separate proceedings. She took the view that in the Children Act proceedings she was dealing with the welfare of the two children and not the questions of Article 6 and Article 8 of ECHR, or indeed sections 7 and 8 of the Act.

11. Now it is fair to say that there is currently going on quite a substantial debate about the role of actions under the Human Rights Act in the context of family proceedings. Quite clearly, every family proceeding represents potentially the engagement of Article 8, namely the interference with the right to

respect for private and family life and of course all family proceedings engage Article 6. But it is quite a different matter as to whether or not actions for damages or an award of damages can properly be made in the context of family proceedings. The only direct experience I have had of that particular phenomenon is the county court case of *Re V*, now reported as *Re V (Care: Pre-Birth Actions)* [2004] EWCA Civ 1575; [2005] 1 FLR 627, CA where a judge, although he made care orders, took a very dim view of the local authority's behaviour and awarded the parents £100 each for breach of their ECHR rights.

12. We in this court reversed the judgment, saying first of all that the judge had to view the proceedings as a whole before he could award damages for any breach of Article 6 of ECHR. He could not, following the decision of the European Court of Human Rights in *Mantovanelli v France* [1997] 24 EHRR 370, a case which the father cited to me this afternoon, he could not in those circumstances simply pick out one aspect of the local authority's behaviour and make an award based on that. But the second question which was not fully or finally addressed in *Re V* is indeed whether or not it was appropriate for the court to make orders for damages in proceedings which were not specifically instituted under section 7 and 8 of the Act. So the question is, in my view, an open one and the judge's view that the father should take separate proceedings is one in which, in my view, she is entitled to take.

13. But speaking again, I hope, more generally, I am not going to decide these applications on that basis. There seems to me a much more difficult hurdle which the father has to overcome, namely this: in the final order which I have identified, that is the 13 January 2006, and indeed in the discussions leading up to the order which the judge made, the judge was very clear that what she was doing was not finally adjudicating on the father's applications; what she was doing was adjourning them to be heard on 24 March; that is, tomorrow.

14. So tomorrow in the Swansea County Court she is going to hear, I hope, from NYAS as to whether or not NYAS is prepared to intervene in the proceedings and become the children's guardian, and she is also going to complete argument on the matter of discovery in relation to what documents should be made available for the proceedings she has to hear. It is right to say that she has refused to allow the father to introduce the Human Rights Act claim for damages into the proceedings and that she has told him in terms that if he wants to do that, he should appeal her refusal to transfer the matter to the High Court. It is quite clear that she has refused to transfer the proceedings: that appears quite clear from the order of 29 November, and as the father seeks permission to appeal that order generally, the refusal to transfer, I take it, is one of the orders he appeals. Indeed, in answer to me at the very end of his submissions this afternoon, when I asked him what in practical terms he was going to suggest if he was seeking damages against the judge for breaches of Article 6 and the local authority not being a party to these proceedings, his answer was: well, the matter should be transferred to the High Court or to a different judge.

15. I would like to make it very clear that in refusing the father permission to appeal this afternoon, as I do in relation to all three orders, I do so on the following basis: in my view, any claims for damages under the Human Rights Act have to be considered in the context of the proceedings overall. These proceedings are still in being. They have not concluded. The father is perfectly legitimately seeking disclosure within these proceedings of documentation from the police, and from doctors and from the local authority. He will have to argue before the judge and persuade the judge precisely as to the length of the disclosure she is prepared to admit. He will also then, in my view, have to conduct the proceedings so that they reach a conclusion and if at that stage, he is of the view that the proceedings taken as a whole including the history of the matter and indeed, if appropriate the judge's refusal to allow him disclosure of local authority documentation, or a failure of the local authority to produce that documentation, or indeed any other irregularity in the conduct of the local authority entitle him to damages from the local authority, it is at that point he will have to take proceedings against the local authority and if need be, the court, as public bodies.

16. In other words, these applications are, in my view, premature. The proper course is to fight the case in the Swansea County Court on the merits in relation to the two children with such disclosure as the father is able to obtain and for him then to review the position. I have to say, looking at the judge's orders for disclosure made on 22 and 29 November, particularly the invitation to NYAS and on 13 January those in my view are perfectly proper, perfectly sensible case management decisions and I can

see nothing wrong with them.

17. I can equally, with great respect to the father, see nothing wrong with the judge's conduct. It seems to me she was remarkably careful and patient. She did not lose her temper or say anything she should not have said. She has given him, in my view, no reason to think that she is biased against him and although ultimately it will be a matter for her, speaking for myself, I can see no reason why she should recuse herself or why the case should be taken away from her.

18. The matter is for hearing for directions and for involvement of NYAS tomorrow and the father must complete his submission in relation to disclosure in front of the judge. Indeed, he has a point on that because this afternoon he has produced to me documents which he says have not been produced before, which he says are highly relevant and may well themselves give rise to a further application for disclosure. Those are documents he must show to the judge and invite her to make further orders in relation to them. If any question of enforcement of orders for disclosure arises, that is not a matter for this court. That is a matter for the Swansea County Court on proper application by the father.

19. So whilst I understand the father's anxiety to ensure that his Human Rights Act claims are fully before the court, my view is that he is not going the right way about it. The judge is entitled to say she is hearing Children Act proceedings; she is entitled to say that she will admit into those proceedings documents which are historical but which are relevant to those proceedings, but that if at the end of the day after those proceedings have concluded, the father feels he has a claim under the Act, that is the time for him to make his application.

20. For those reasons, which I have tried to explain as fully and clearly as I can, these applications will be refused and the hearing before HHJ Parry tomorrow will proceed.

Order: Applications refused.