Neutral Citation Number: [2016] EWCA Civ 1140

Case No: B4/2015/1962

IN THE COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2016

Before :

THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE McFARLANE
and
LORD JUSTICE CHRISTOPHER CLARKE

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Re: W (A child)

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Mr Charles Geekie QC and Miss Gemma Kelly (instructed by a local authority) for the **Appellant**
Mr Zimran Samuel (Pro Bono) for **'SW'**
Mr Ben Brandon and Ms Emma Collins (instructed by Slater and Gordon LLP) for **'PO'**
Mr Frank Feehan QC (instructed by Philcox Gray Solicitors) for the **third Respondent**

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Hearing dates: 10th, 11th 12th November 2015 and 16th June 2016

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Judgment Approved

Lord Justice McFarlane :

1. The central issue in the present appeal can be stated shortly. It is as follows:

> Can a witness in Family proceedings, who is the subject of adverse judicial findings and criticism, and who asserts that the process in the lower court was so unfair as to amount to a breach of his/her rights to a personal and private life under ECHR Art 8, challenge the judge's findings on appeal?
>
> If so, on what basis and, if a breach of Article 8 is found, what is the appropriate remedy?

2. Whilst the issue may be shortly stated, I fear that the answer necessitates a relatively elaborate analysis of a number of different legal issues. Also, because of the nature of the matter under appeal, it is necessary that this judgment takes the unusual course of providing only the barest of background detail as to the underlying proceedings and the content of the judge's judgment, about which those who are adversely affected by it wish to appeal.

Background: A summary

3. The judgment at the centre of the appeal was given within ongoing care proceedings relating to a number of children by a circuit judge, sitting as a Deputy High Court judge. The judgment, which is extensive, relates entirely to fact-finding in relation to allegations of sexual abuse made with respect to a number of family members by "C" an older sibling of the children who were the subject of the proceedings. In addition to the children's parents and the children themselves, two male family members had been joined as parties for the fact-finding part of the proceedings as C had made specific allegations of sexual abuse against them. After a lengthy hearing and a very full analysis of all of the relevant material the judge found that none of C's allegations were proved. In coming to his conclusion he was critical of a range of professionals who, in various ways, were involved with C in the extended period during which C's apparent account of sexual abuse developed.

4. No party to the proceedings has sought to appeal against the judge's conclusion that the sexual abuse allegations were not proved. Within the proceedings the statutory threshold criteria in Children Act l989, s 31 had been met on grounds that are unrelated to the sexual abuse allegations at an earlier hearing. In the event, matters have now moved on and we have been told that all of the children are now back at home with their parents, the proceedings have concluded and there are no longer any live public law orders in place with respect to any of the children.

5. In addition to dismissing the sexual abuse allegations, the judge felt driven to include in his fact-finding judgment a range of criticisms and findings as to the actions of the local authority, the wider group of professionals involved and, in particular, an individual social worker and an individual police officer, both of whom the judge proposed to name.

6. Before moving on it is necessary to explain, and to a degree apologise for, the delay in concluding this appeal. The substantive appeal hearing took place over 3 days during

November 2015 but was adjourned part-heard in order to allow SW to be represented by pro-bono counsel who had been identified before that hearing but too late to prepare for and undertake the presentation of her case in court at that stage. The resumed hearing was listed in February 2016, but the listing had to be vacated due to the unfortunate indisposition of one of the members of the court. Thereafter, listing difficulties led to further delay and the case was not concluded until 16th June 2016. Any delay since that time has been due to the time that it has taken to prepare the present judgment, for which we apologise to all those who have been affected by it.

The focus of the appeal

7. Permission to appeal was granted by this court to the local authority, the named social worker ("SW") and the named police officer ("PO"). Their appeal, if successful, will lead to the passages complained of being excised from the judgment, it is therefore plainly inappropriate to offer any more than a mere gist of those matters within this judgment. On that basis, and in short, the complaint relates to the judge's finding that SW and PO, together with other professionals and the foster carer, were involved in a joint enterprise to obtain evidence to prove the sexual abuse allegations irrespective of any underlying truth and irrespective of the relevant professional guidelines. The judge found that SW was the principal instigator of this joint enterprise and that SW had drawn the other professionals in. The judge found that both SW and PO had lied to the court with respect to an important aspect of the child sexual abuse investigation. The judge found that the local authority and the police generally, but SW and PO in particular, had subjected C to a high level of emotional abuse over a sustained period as a result of their professional interaction with her. In addition to the specific adverse findings made against the local authority, SW and PO also complain that there was no justification for the judge deploying the strong adjectives that he used in describing the scale of his findings in a judgment which, in due course, in its final form, will be made public.

8. It is necessary to stress that the issues canvassed in this appeal relate entirely to process. This court has not been asked to analyse the evidence underpinning the judge's adverse findings nor to determine whether or not the judge was justified in criticising the professionals as he did. The central point raised by each of the three appellants is that the prospect of them being the subject of such adverse findings was made known to them, for the very first time, when the judge gave an oral "bullet point" judgment at the conclusion of the hearing. It is submitted that individual and collective adverse findings of the type that the judge went on to make in his judgment, did not feature at all in the presentation of the case of any of the parties and were not raised in any manner by the judge during the hearing. In short terms it is said that these highly adverse findings "came out of the blue" for the first time in the judgment. The findings both in nature and substance have the potential to impact adversely upon the standing of the local authority and/or the employment prospects and personal life of each of SW and PO, yet none of the three had been given any opportunity to know of or meet the allegations during the course of the trial process. They therefore seek a remedy from this court to prevent the inclusion of these adverse and extraneous findings in the final judgment that has yet to be handed down formally and published as the judge intended it to be.

Issues raised in this appeal

9. Although, as I have already said, the central issue in the appeal can be shortly stated, it has become plain to this court that the route that these appellants must follow in order to satisfy the Court of Appeal that it is in a position to afford them the remedy that they seek is a route which is strewn with substantive and procedural legal landmines, the detonation of any one of which is likely to prevent the appellants reaching their goal. In order to set the scene I therefore propose in very short terms to describe the appellant's proposed route to a remedy and, in doing so, pinpoint each of the potential landmines to which I have made reference.

10. A core problem faced by all three appellants is that none of them seeks to challenge the judge's determination on the sexual abuse allegations themselves nor to challenge any particular court order that has been made by the judge. A further significant difficulty facing SW and PO is that they were no more than individual witnesses within the proceedings; neither of them was "a party" nor "an intervenor" (whatever "an intervenor" might be). Against that background it will be necessary to consider how it is possible for the proposed appeal to succeed within the context of the statutory provision governing appeals from a deputy High Court judge sitting in the Family Court which is set out in the Matrimonial and Family Proceedings Act l984, s31K:

> "s 31K (1) Subject to any order made under section 56 (1) of the Access to Justice Act l999 (Power to provide for appeals to be made instead to the High Court or County Court, or to the Family Court itself), if any party to any proceedings in the Family Court is dissatisfied with the decision of the court, that party may appeal from it to the Court of Appeal in such manner and subject to such conditions as may be provided by Family Procedure Rules."

11. Having set section 31K(1) out it is only necessary at this stage to draw attention to the two key phrases, namely "any party" and "the decision of the court". The appellants submit that each of these two phrases must be given sufficiently wide interpretation to allow each of them to be regarded as "a party" and for the judge's adverse findings against them to be regarded as part of "the decision of the court". In respect of their case regarding "decision" the appellants accept that they must successfully navigate around the judgments of this court in *Cie Noga SA v Australia and New Zealand Banking Group* [2002] EWCA Civ 1142: [2003] 1 WLR 307 (*"Cie Noga").*

12. Despite the difficulties apparently placed in their way by the black letter words of s 31K and this court's decision in *Cie Noga*, the appellants submit that this court is bound by the terms of Human Rights Act l998, s 6 (Acts of Public Authorities) and s 3 (Interpretation of Legislation), to apply a construction of s 31K that is sufficient to allow their challenges to the judge's judgment to pass through the s 31K appeal gateway so that this court must provide a remedy if their grounds of complaint are found to be justified.

13. HRA l998, s 6(1) provides that:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

The appellants, rightly, assert that the court is "a public authority" and is therefore bound by s 6(1).

14. HRA l998, s 3(1) provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

15. As appellants, SW and PO assert that the judge's adverse findings against them are sufficient to engage the right to respect for their private life, home and correspondence under ECHR, Art 8. They submit that the right to private life under Article 8 encompasses both substantive and procedural elements, and that the process adopted by the judge with respect to these serious adverse findings was so unfair as to amount to a breach of their Article 8 rights. The local authority, which, of course, as a corporate body, does not have Article 8 rights, submits that if the procedural gateway has to be interpreted in the wide manner argued for on behalf of SW and PO, it must be so enlarged for all-comers thereby allowing the local authority to complain about the fairness of the process in the lower court, albeit outside the context of Article 8. Alternatively the local authority asserts that the lack of fair process complained of amounts to a breach of the right to a fair trial under ECHR, Article 6.

16. If the appellants, or any of them, satisfy this court that it has jurisdiction to hear the appeal that they wish to bring, and satisfy the court that the complaint of lack of fair process is made out, it will, finally, be necessary to consider what remedy applies.

17. As will become apparent, after announcing the adverse findings for the first time in the "bullet point" judgment, the judge was persuaded to embark upon a series of hearings during which he received detailed submissions made on behalf of each of these three appellants and others as to the precise content of the judgment. Some text which was contained in the original draft came to be excised by the judge as a result of that process. There is, therefore, a need to consider that post initial judgment process as a potential "remedy" in this or other cases as well as considering what remedy, if any, the appellants are now entitled to from this court.

18. Having thus set the scene, it is now necessary to descend to detail and look at each of the legal conundrums that I have described.

"A party"

19. In order to evaluate what standing, if any, SW and PO may have to appeal to this court in these proceedings, it is necessary to consider whether any status was afforded to them at first instance. This issue does not, plainly, arise with respect to the local authority who were the applicants before the judge.

20. It is common ground that both SW and PO were no more than witnesses during the fact-finding hearing itself. However, once the judge had issued the first draft of his judgment and the level of judicial criticism had become apparent, they sought, and were granted, the right to be represented in the proceedings and/or make representations to the judge as to the content of the final version of his judgment. SW and PO submit that this change in their status was sufficient to establish each of them

as a "party" to the proceedings, or, at least, "an intervenor" (if that is a different status) albeit that no formal order was issued naming them as additional parties.

21. The researches of counsel during the hearing before this court have revealed a lack of precision and consistency in defining the meaning of "a party" in civil and family litigation.

22. County Courts Act l984, s 147(1) defines "party" as follows:

> ""party" includes every person served with notice of, or attending, any proceeding, whether named as a party to that proceeding or not"

Those wide terms establish that, for county court proceedings at least, it is not necessary for a party formally to be named in a court order or on the court record. Simply "attending" is sufficient. No definition of "attending" is offered, however, common sense dictates that mere presence within the courtroom, for example as a witness, would be insufficient. To hold otherwise would expand the status of being "a party" to a wide band of individuals in an unnecessary and unhelpful way.

23. Senior Courts Act l981, s 151(1) defines "party" as:

> ""party", in relation to any proceedings, includes any person who pursuant to or by virtue of rules of court or any other statutory provision has been served with notice of, or has intervened in, those proceedings"

In contrast to the County Courts Act l984 definition no reference is made in s 151 to "attending". In addition to the CCA l984 definition, the SCA l981 provision includes an individual who "has intervened in" the proceedings. No definition of "intervened in" is provided.

24. No definition of "party" or any related term is provided within the Matrimonial and Family Proceedings Act l984, which, in its amended form, makes provision for the business of the Family Court. Similarly, no such definition appears in the Children Act l989.

25. In the Family Procedure Rules 2010 ("FPC 2010") rule 7.10 makes provision for additional parties (normally a "co-respondent") to matrimonial proceedings or civil partnership proceedings; those provisions have no direct relevance to this case.

26. FPR 2010, Part 12 applies to "children proceedings" and its provisions relate directly to the proceedings in the present case. FPR 2010, r 12.3 sets out to establish "who the parties are" in relation to various categories of proceedings relating to children. The rule lists, in a tabular form, those who will be "applicants" or "respondents" for each category of proceeding. The proceedings in front of the judge in the present case were proceedings for a care or supervision order under CA l989, s 31. In such a case the "applicants" will be "any local authority; the National Society for the Prevention of Cruelty to Children and any of its officers; or any authorised person". The "respondents" will be "every person whom the applicant believes to have parental responsibility for the child" and "the child".

27. In addition to those who are automatically an applicant or a respondent, FPR 2010, r 12.3 (3) provides:

> "3) Subject to rule 16.2, the court may at any time direct that –
>
> (a) any person or body be made a party to proceedings; or
>
> (b) a party be removed"

These provisions are, in common with all other parts of FPR 2010, subject to "the overriding objective" in r 1.1 which is to enable "the court to deal with cases justly, having regard to any welfare issues involved".

"Intervenor"

28. Although the word "intervenor" is not used within the FPR 2010, or, indeed, earlier versions of the rules, the concept of there being an "intervenor" status, falling short of full party status, has been accepted on a case by case basis in the family jurisdiction. One example, at Court of Appeal level, is the case of *Re S (Care: Residence: Intervenor)* [1997] 1 FLR 497. The case involved an individual who had been named as a perpetrator of sexual abuse against his niece in the course of care proceedings. He was not otherwise a party to the proceedings. The court (Butler-Sloss and Evans LJJ and Sir Iain Glidewell) considered that it would be very difficult for the fact-finding process to take place without this individual and that, if he were to give evidence, he required a level of involvement in the process over and above that of simply being called into the witness box. In the leading judgment Butler-Sloss LJ said:

> "Without going into the advantages or disadvantages or indeed the propriety of witnesses generally being represented, it does seem to me in this case that Mr K ought to have his own representation to protect his interests otherwise he will not have a say in the final conclusions to which the judge may come if the judge is called upon to make findings of fact in relation to these allegations of sexual abuse. If Mr K is not represented and is not a party and has not been allowed to intervene and the allegations are found proved, albeit the fact are very old, the consequences for Mr K are very serious…in the circumstances therefore of this case I think that to a limited degree Mr K ought to have his own representation to advise him as to the propriety of what he should do and, if he does give evidence, to lead his evidence in chief, to cross-examine Miss SH or any other witness who is giving evidence about any aspects of impropriety or sexual abuse or other abuse that may be made against him."

Butler-Sloss LJ concluded:

> "Therefore I would in the rather unusual circumstances of this case allow the appeal but not make Mr K a party to the proceedings. There is no need to do that. He does not wish to be an applicant; he does not wish to be a respondent. What he wishes to do is to intervene to protect himself from these serious allegations made against him and he should

> be therefore entitled to intervene and take part in the proceedings to the limited extent that his case is before the court and no further."

The Law Report records that the court order gave the appellant "leave to intervene in proceedings, but not be a party".

29. More recently in *Re B (Care order: Adjournment of fact finding hearing)* [2009] EWCA Civ 1243; [2010] 2 FLR 1445 the Court of Appeal (Ward and Wall LJJ) allowed an appeal from an individual who had been given leave to intervene to meet sexual abuse allegations against him in the course of care proceedings to which he was not otherwise a party. Although the Court of Appeal considered that the individual should have been made a full party to the proceedings at an earlier stage, the court endorsed his status as "intervenor" and for him to be represented. A further recent example of the utility of joining a person (or in that case a newspaper) as an "intervenor" rather than as a "party" is to be found in my Lord, Sir James Munby's judgment as President of the Court of Protection in *Re G (Adult)* [2014] EWCOP 1361 at paragraph 51.

30. These limited references in the reported cases to an 'intervenor' status within proceedings under CA 1989 accords with the experience of this court and of the experienced counsel appearing in this appeal. The fact that the FPR 2010 do not make any express reference to intervenors does not negate or invalidate the well-established practice of family courts affording rights akin to party status to an individual for a specific or limited part of the proceedings. If it is necessary to describe an 'intervenor' in terms which are compatible with FPR 2010, Part 12 this can easily be achieved by reference to r 12.3(3) (see para 27 above) and r 12.3(4):

> '12.3(4) If the court makes a direction for the addition or removal of a party under this rule, it may give consequential directions about:
>
> (a) the service of a copy of the application form or other relevant documents on the new party;
>
> (b) the management of the proceedings.'

An 'intervenor', in the sense used in *Re S* and *Re B*, can be seen simply as a person who has been added as a 'party' for a specific part of the proceedings and whose role in the proceedings (and exposure to the case papers) is controlled and managed using the powers within r 12.3(4).

Who can appeal?

31. Civil Procedure Rules l998, Part 52, provides a complete procedural code governing civil appeals. Since the hearing of this appeal CPR 1998, Part 52 has been extensively revised and a new Part 52 has been substituted with effect from 3rd October 2016 by the Civil Procedure (Amendment No 3) Rules 2016 (SI 2016/788). Insofar as I now need to make reference to CPR 1998, Part 52, it is fortunately the case that the new rules are both in substance and by rule number identical to their immediate predecessors.

32. An appeal may be brought by "an appellant" or "a respondent" each of whom requires permission to appeal (unless the appeal relates to one of the narrow categories for which no permission is required) as established by CPR l999 r 52.3. The word "appellant" is defined in r 52.1 (3)(d) as follows:

> "'appellant' means a person who brings or seeks to bring an appeal"

The word "respondent" has the following slightly more elaborate definition in r 52.1(3)(e)

> "'respondent' means –
>
> > (i) a person other than the appellant who was a party to the proceedings in the lower court and who is affected by the appeal; and
> >
> > (ii) a person who is permitted by the appeal court to be a party to the appeal"

33. The interpretation of "appellant" and "respondent" in Part 52 was considered by the Court of Appeal in *MA Holdings Ltd. v George Wimpey UK Ltd. and Tewkesbury Borough Council* [2008] EWCA Civ 12. Lord Justice Dyson (as he then was) giving the lead judgment, with which the other member of the court, Lloyd LJ, agreed, considered the position of the applicant MA who had not been served with notice of the proceedings and had not applied to be joined as a party. The proceedings related to a dispute under the Town and Country Planning Act l990. None of the parties to the original proceedings sought to appeal the first instance decision. MA, however, wished to appeal and served a notice of appeal setting out relevant grounds. In the course of "some preliminary observations", Dyson LJ said (at paragraph 9):

> "It would be surprising if the effect of the CPR were that a person affected by a decision could not in any circumstances seek permission to appeal unless he was a party to the proceedings below. Such a rule could work a real injustice, particularly in a case where a person who was not a party to the proceedings at first instance, but who has a real interest in their outcome, wishes to appeal, the losing party does not wish to appeal and an appeal would have real prospects of success."

34. Dyson LJ went on to note that old Chancery practice had held that any person may appeal with the leave of the court if he could by any possibility have been made a party to the original action by service. Reference was also made to the availability of the inherent jurisdiction in this context (*Warren v Uttlesford District Council* [1996] COD 262 (Judge J)).

35. Dyson LJ concluded his preliminary observations (at paragraph 12) as follows:

> "It is common ground that this decision [*Warren v Uttlesford DC*] correctly stated the law that was applicable pre-CPR. It is clear, therefore, that there could be rare circumstances where, in the exercise of its inherent jurisdiction, the court should permit a person who had an interest in the outcome of [TCPA l990] section 287 proceedings to

> join the litigation so as to avoid an injustice to him. In the pre-CPR era, a person in the position of MA "could by possibility" have been made a party to the proceedings at first instance. That would have been sufficient to give the court jurisdiction to grant MA leave to appeal in a case such as this, although for the reasons given by Judge J, it is highly likely that an application to be added as a party in the proceedings in the court below would have failed."

36. Dyson LJ then moved on to consider the definitions of "appellant" and "respondent" in the CPR. He held that the meaning of appellant as "a person who brings or seeks to bring an appeal" was not confined to an individual who was a party to the proceedings in the lower court. A respondent is either a person who was a party to the proceedings in the lower court, or (under r 52.1(3)(e)(ii)) is a person who is permitted by the appeal court to be a party to the appeal. Dyson LJ held that this was not confined, plainly, to a person who had been a party to the proceedings in the lower court and that the provision "simply gives the court a wide power to permit any person to be a party to the appeal as a respondent, whether or not he was a party to the proceedings in the lower court". Dyson LJ stated his conclusion at paragraph 22 as follows:

> "In my view, the question of jurisdiction turns on the true meaning of "appellant" in rule 52.1(3)(d) which, for the reasons I have given, does not require that the person seeking to appeal was a party in the proceedings in the lower court. I do not consider that it is necessary to have regard to CPR 19. Even if an application by MA under rule 19.2 and 19.4 to be added as a party in the proceedings below would have failed, that fact cannot shed any light on the true meaning of "appellant". I accept, however, that the fact that such an application was not made may be relevant to the question whether MA should be given permission to appeal."

In view of the clear conclusion reached on the interpretation of the relevant rules, there was no need to consider whether the court could permit MA to appeal in the exercise of its inherent jurisdiction.

Are SW and/or PO entitled to appeal?

37. It is common ground that neither SW nor PO were full parties to the proceedings. In the period following release of the first draft judgment, however, the following steps were undertaken:

i) One month after the hearing at which the judge had orally delivered the 'bullet-point judgment', the first full draft judgment was circulated and the court held a directions hearing some days later. Having heard submissions on behalf of the parties and the police, the judge directed that the draft judgment should be disclosed to those who were the subject of adverse criticism in order for them to prepare submissions and be represented at the next hearing some ten weeks later;

ii) At the next hearing PO and three other professionals were represented. SW was present but un-represented. The court heard submissions from or on behalf of each of those individuals;

iii) An amended draft judgment (which is the current draft) was then circulated some two months later and it was accompanied by a separate judgment given at that time purporting to explain the changes that the judge had made to the draft;

iv) At a further hearing the court heard submissions as to the issues of identification of professional witnesses and anonymisation of the judgment, which was followed by a reserved judgment in which the judge ruled that some professionals would be anonymous but that SW and PO would be named in the public version of the judgment.

38. In the light of those developments, and insofar as the status of "intervenor" is recognised by the family courts, it is clear to me that both SW and PO achieved "intervenor" status, and were therefore additional 'parties' to the proceedings under r 12.3(3)+(4), with respect to the stage of the proceedings relating to the terms of the judgment.

39. In the course of his submissions Mr Frank Feehan QC, who is counsel for one of the family members and who is the sole voice opposing these appeals, conceded that once the judge had invited PO and SW to make submissions upon the draft judgment it was impossible to argue that they had not by then become 'parties'. In addition he suggested that, where a witness applies to be made a party in order to make submissions in relation to specific findings in a judgment, but that application is refused, the witness would then have been a party to that specific application (as applicant) and would have a route to appeal against the refusal.

40. Mr Feehan's concessions on this point were well made. For the reasons that I have given, I consider that both SW and PO were each a 'party' to the proceedings sufficient to afford them a right of appeal under MFPA 1984, s 31K.

41. In any event, in the light of the clear ruling by this court in *MA Holdings Ltd*, it is, in my view, unnecessary to establish with certainty the precise procedural status of SW and PO in the lower court in order to determine whether or not they may act as "appellants" in this court. On the interpretation of r 52.1(3)(d) given in *MA Holdings Ltd* it is clear that this court may entertain an appeal from SW and/or PO irrespective of whether they were formally made a party (or intervenor) in the lower court.

42. Finally on this point, for reasons that I will describe in due course, if, for some reason, an individual fails to achieve the status of an 'appellant' either by a straight-forward application of the rules and s 31K, or via the more flexible route of *MA Holdings Ltd*, in circumstances where it is established that an individual's rights under ECHR, Art 8 have been breached by the outcome of the proceedings in the lower court, then this court has a duty under HRA 1998, s 3 to read down s 31K and the court rules in such a manner as to afford that individual a right of appeal.

43. In conclusion, therefore, on the initial question of whether either of these two potential appellants are, as a matter of procedure, entitled to seek to appeal to this court my answer is in the affirmative with the result that they have successfully circumnavigated the first potential barrier to their respective appeals.

44. The question of party status was not an issue with respect to the local authority and it therefore follows that all three appellants can be heard on appeal.

A decision/determination/order/judgment

45. The second procedural hurdle facing all three appellants, including the local authority, is the question of whether an appeal is possible where the only target of the appeal relates to subsidiary internal findings of the judge set out in his judgment, and does not relate to any specific order that he made.

46. The jurisdiction of the Court of Appeal Civil Division is established by statute. Senior Courts Act l981, s 16 provides as follows:

> "16 (1) Subject as otherwise provided by this or any other Act …or as provided by any order made by the Lord Chancellor under section 56(1) of the Access to Justice Act 1999, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court."

47. County Courts Act l984, s 77 provides for appeals from the County Court as follows:

> "77 (1) Subject to the provisions of this section and the following provisions of this Part of this Act, and to any order made by the Lord Chancellor under section 56(1) of the Access to Justice Act 1999, if any party to proceedings in the county court is dissatisfied with the determination of a judge or jury, he may appeal from it to the Court of Appeal in such manner and subject to such conditions as may be provided by Civil Procedure Rules."

48. With respect to family proceedings, as has already been noted, provision for appeal to the Court of Appeal is made by Matrimonial and Family Proceedings Act l984, s 31K and is stated to relate to dissatisfaction 'with the decision of the court'.

49. The three statutory provisions referred to above illustrate the disparity of language used to describe which aspect of the outcome of the lower court's proceedings is a susceptible target for appeal: "order", "judgment", "determination" or "decision". The leading authority on the distinction to be drawn between those aspects of a lower court's conclusions which are properly susceptible to appeal, and those which are not, is the case of *Cie Noga SA v Australia and New Zealand Banking Group* [2002] EWCA Civ 1142; [2003] 1 WLR 307. The proceedings related to a preliminary factual determination as to whether or not a figure of $100 million had been agreed and/or included in "a settlement agreement" in a multi-million pound commercial transaction. The Court of Appeal (Waller, Tuckey and Hale LJJ) concluded that a first instance decision on a preliminary issue was a "judgment" or "order", within the meaning of SCA l981, s 16(1), or a "determination" within the meaning of CCA l984, s 77(1). The Court of Appeal had jurisdiction to hear an appeal from such a decision even if the decision were limited only to a finding of fact. Where, however, the lower court had gone on to make a decision in relation to the legal consequences of that finding of fact in favour of one party, the successful party would not be entitled to appeal from the factual finding simply because it did not like the reasons for the decision that had, in the event, gone in its favour. In such circumstances it might be

appropriate for the court to encapsulate the finding of fact in a declaration which would, in ordinary terms, establish it as a "judgment", "order" or "determination". Waller, LJ, giving the lead judgment in *Cie Noga*, was required to consider earlier authority in the form of two cases, both, as it happens, in the family jurisdiction: *Lake v Lake* [1955] P 336 and *Re B (A Minor) (Split Hearings: Jurisdiction)* [2000] 1 WLR 790.

50. In *Lake v Lake*, which related to a husband's petition for divorce on the grounds of his wife's cruelty and adultery, the outcome of the proceedings, formally recorded in the court order, was that the petition and the wife's cross petition were both dismissed. The wife's application to appeal, however, solely related to a finding that the judge had made when giving reasons for his judgment to the effect that she had committed adultery. The Court of Appeal in *Lake* held that the right of appeal did not extend to a finding or statement in the reasons given by the court for the conclusion that it had reached. In the course of the leading judgment, Lord Evershed MR said:

> "…I think there is no warrant for the view that there has by statute been conferred any right upon an unsuccessful party, even if this wife can be so described, to appeal from some finding or statement – I suppose it would include some expression or view about the law – which may be found in the reasons given by the judge for the conclusion at which he eventually arrives, disposing of the proceeding."

Later Lord Evershed continued:

> "…it may well be the wiser course for the judge trying such a case to refrain from expressing any concluded view on the issue of adultery, because that view would be in effect unappealable and because of its possible consequences."

51. In *Re B* a local authority sought to appeal against detailed findings of fact given in a judgment at the conclusion of a preliminary stage in care proceedings under Children Act l989, s 31. The Court of Appeal (Dame Elizabeth Butler-Sloss P, Otton and Schiemann LJJ) held that the judge's reasoned judgment, despite not being incorporated in a formal order, amounted to a determination of a preliminary issue and was, albeit that it was on a preliminary issue, determinative of the proceedings as a whole and therefore within the ambit of CCA l984, s 77. The Court of Appeal therefore had jurisdiction to entertain the local authority's appeal without having to wait for the conclusion of the next stage of the care proceedings.

52. In *Cie Noga* Waller LJ interpreted the two earlier authorities on the following basis [at paragraph 27]:

> "Many appeals are brought on the basis of an order made by a judge prior to the formal document being drawn up, and in *Re B* demonstrates that the correct reading of *Lake v Lake* is not that some formal document recording the order must exist. *Lake v Lake* properly understood means that if the decision when properly analysed and if it were to be recorded in a formal order would be one that the would-be appellant would not be seeking to challenge or vary, then there is no

> jurisdiction to entertain an appeal. That is in my view consistent with *Re: B.* That this is so is not simply by virtue of interpretation of the words "judgment" or "order", but as much to do with the fact that the court only has jurisdiction to entertain "an appeal". A loser in relation to a "judgment" or "order" or "determination" has to be appealing if the court is to have any jurisdiction at all. Thus if the decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is not one he or she does not like."

Having referred to the circumstances in *Re B*, where the appeal was simply against the findings of fact made at the first stage of a 'split hearing', Waller LJ continued [at paragraph 28]:

> "In *Re B* is a good example of a decision on preliminary issues of fact. Furthermore the case having been adjourned, and the facts making a difference as to what might flow from the adjournment, the facts in Mr Pollock's words were pregnant with legal consequences. If however in that case the court had gone on to make a decision in relation to the legal consequences which one party would not seek to challenge, in my view that party would not be entitled simply to appeal the findings because it did not like the reasons for the decision in his or her favour. It is in that context that it might be appropriate for the court at first instance to consider whether some declaration should be granted to provide a "judgment" or "order" or "determination" which could be the subject of an appeal. If for example the findings of fact might be relevant to some other proceedings, (and Mr Pollock accepted this), it might be appropriate to make a declaration so as to enable a party to challenge those findings and not find him or herself prejudiced by them. The findings would still be pregnant with legal consequences. It is to go beyond the scope of this judgment to consider precisely what circumstances might allow for the granting of a declaration where findings of fact might affect other proceedings."

53. As I shall explain more fully, Mr Charles Geekie QC, leading Miss Gemma Kelly as counsel for the local authority in the present case, places substantial weight upon that passage from Waller LJ's judgment in support of a submission that where findings are 'pregnant with legal consequences', albeit in a context outside the issues the court has to try in the particular case, a person aggrieved by such findings should have the opportunity to appeal against them.

54. More recently this court has considered these questions in the context of findings of fact in care proceedings in the case of *Re M (Children) (Judge's findings of fact: jurisdiction to appeal)* [2013] EWCA Civ 1170. The appellant local authority sought to challenge the refusal of the first instance judge to make findings of sexual abuse against an individual who had been an intervenor in the care proceedings. The local authority did not seek to challenge the residence order and supervision order made at the conclusion of the proceedings. The Court of Appeal (Longmore, Underhill and Macur LJJ) dismissed the appeal at a preliminary stage, on the basis that the court did not have jurisdiction to entertain it. The appeal, made prior to the establishment of the Family Court, was from a county court and governed by CCA l984, s 77. Having

reviewed the relevant case law Macur LJ, giving the leading judgment, concluded (at paragraph 21) as follows:

> "The principles of appellate jurisdiction to be derived from *Cie Noga* are identified in paragraphs 27 and 28 of the judgment as indicated above. They are clear. Findings of fact do *not* comprise determination, order or judgment unless they concern the issue upon which the determination of the whole case ultimately turns or are otherwise subject of a declaration within the order."

Macur LJ dismissed submissions that the judge's findings could be brought within the definition of "an order" because the order included a recital to the effect that "there was no sexual misconduct on the part of the intervenor". Macur LJ held that the recital "is demonstrably otiose in terms of being "an order"". She continued at paragraph 26:

> "Even if this paragraph is properly classed as a declaration it is certainly not a declaration as envisaged by the court in *Cie Noga*. There is no finding of fact "pregnant with legal consequences" (See para 28). Its presence in the order does not rescue the argument that this appeal should continue."

Paragraph 30 includes Macur LJ's final conclusion:

> "The final order in this case was that sought by the Appellants. There is no order, judgment or determination for appeal. In that there is any declaration, it does not merit scrutiny."

55. The combined effect of the decisions of this court in *Cie Noga* and in *Re M* establish a formidable hurdle in the way of the three appellants to these proceedings. Mr Geekie QC seeks to meet that hurdle by submitting that the passages in the judge's judgment that are complained of are, indeed, findings of fact that are likely to have serious legal consequences and are therefore "pregnant with legal consequences" in the manner described in *Cie Noga.* Each of the individuals and agencies who seek to complain about the judge's findings have roles and duties relating to child protection and are accountable to their employers or other professional bodies. There is, submits Mr Geekie, a real possibility that civil proceedings may follow from the judge's conclusions.

56. A second line of attack adopted by Mr Geekie arises from the specific refusal of the judge in the lower court to encapsulate his adverse findings in the form of a declaration. The local authority argue that the judge was wrong not to grant a declaration. His decision on that point is therefore, they submit, a proper subject for appeal and, if that appeal is successful, the adverse findings will form part of a declaration and that declaration can, properly, on the basis of *Cie Noga*, be considered by this court.

57. Finally, Mr Geekie submits that it is a fundamental principle of justice that, if adverse judicial findings are to be made against a person or body, that person or body should have sufficient notice of that prospect and a sufficient opportunity to take part in the process leading to those findings. Amongst the range of cases upon which he relies is *R v Home Secretary for the Home Department, ex parte Doody* [1994] 1 AC 531 in

which, in the context of a mandatory life prisoner's right to make representations as to release on licence, Lord Mustill described the requirements of fairness as "essentially an intuitive judgment" and went on to say, specifically:

> "Fairness will very often require that the person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

58. Mr Geekie's final submission, therefore, is that the strict approach in *Cie Noga* should not be applied where a judge steps right outside the 'four pillars of the case', or the confines of the proceedings before the court, to make findings of fact that have legal consequences in another context. It is submitted that the test should take account of the seriousness or otherwise of the legal consequences and consideration of whether, as a matter of basic justice, an individual will be so adversely affected by the controversial findings that he or she should have a remedy.

59. Mr Geekie later refined his submission by suggesting that there should be a threshold test triggering a right of appeal based on the question 'are the facts found within the four corners of the case and was it necessary for the judge to make those findings in order to fulfil the judicial task in the case?'. If so, it would be unlikely that a witness who is criticised in the course of those findings would have a right of appeal. If not, then the court should consider:

a) Whether the process was procedurally fair; and

b) The significance of any legal consequences that may flow for the potential appellant as a result of the findings.

60. Mr Ben Brandon, counsel for PO, endorsed Mr Geekie's suggested threshold and submitted that, in considering what did, or did not, fall within the 'four corners' of the case, the question was whether the case turned on those findings. In his submission the findings against PO and SW in this case are wholly outside the four corners of the case.

61. In the context of potential "legal consequences", Mr Brandon draws specific attention to the requirement, as he submits it is, for the judge's findings with respect to PO, if they stand, being "disclosable" material in relation to any criminal proceedings in which PO may be involved as a police officer in the future on the basis of the approach described in *R v Guney (Erkin Ramadan) (Disclosure)* [1988] Cr. App. R. 242. It is also at least arguable that these findings would amount to "reprehensible behaviour" (*R v O'Toole (Patrick Francis)* [2006] EWCA Crim 951) and, he submits, they are also capable of being adduced as evidence of "bad character" pursuant to Criminal Justice Act 2003, s 100 by the defence in a criminal trial. Mr Brandon went on to explain that it is common practice amongst constabularies in England and Wales to remove officers who are the subject of adverse judicial findings from the

"evidential chain" as their participation in the investigation and prosecution of offences may jeopardise the prospect of convicting those whom they are investigating. If this occurred, PO would not be permitted to be concerned in obtaining evidence in criminal investigation thereby compromising her ability to continue to work as a police officer.

62. For SW, Mr Zimran Samuel, who acts on a pro bono instruction and to whom the court is most grateful for taking on this substantial case, has informed the court that SW who, following these proceedings went to work for a different local authority, has been suspended as a consequence of the judge's findings and has been unable to work for any other authority since that time. He argues that that circumstance alone is sufficient to amount to a legal consequence sufficient to bring her appeal within the boundaries established by *Cie Noga.* Mr Samuel adopted the submissions that had been made on behalf of the local authority and PO before making detailed submissions on behalf of SW focussed upon the specific findings of fact made against her. It is not necessary in this judgment to consider that level of detail, although the court fully understands the importance to SW of the points that have been made on her behalf.

63. For the respondent family member who opposes the appeals, Mr Frank Feehan QC relies firmly on *Cie Noga* in support of his core submission that this court simply does not have jurisdiction to entertain these appeals. He cautions against eliding issues of "fairness" and professional reputation with the separate question of jurisdiction.

64. In considering these submissions it is important to bear in mind the possible consequences for holding that the parties before this court may have an avenue of appeal against the adverse findings that have been made against them. One obvious constituency which might also seek to use any such avenue of appeal would be expert witnesses who have been the subject of negative findings by a trial judge in civil or family proceedings. Mr Geekie sought to persuade the court that there was a distinction to be drawn between criticism of an expert, who will almost certainly have been squarely cross-examined on the basis of the very criticisms that then come to be made in a judgment so that there has been a fair process in terms of permitting the expert to have their 'say' on the issues, and the present case where, on his submission, the process was wholly unfair and the direct professional consequences for the appellants are extreme. Mr Geekie was at pains to stress that the local authority's case was focussed upon the lack of a fair process prior to the making of adverse serious adverse criticism. He submitted that once the judge began to contemplate that there had been a conspiracy between the professionals to manufacture the allegations, he should have given the parties, and the key witnesses, some form of warning; the judge's failure to do so in this case prevented the parties and those witnesses from having a fair opportunity to answer that criticism. It was, it is said, simply too late for the judge to raise these very important matters by announcing his findings in that respect for the first time in the 'bullet point' judgment.

65. Before coming to any conclusion upon whether or not the adverse findings of fact made by the judge in the present case may be the proper subject of an appeal, it is necessary to consider the impact of the ECHR upon that issue.

ECHR, Article 8 right to private life

66. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right expect such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

67. No issue was taken before this court as to the potential applicability of ECHR, Art 8, in the context of private life, to the professional lives of SW and PO. It is not necessary to do more than draw attention to the relevant domestic and Strasbourg case law on the point.

68. The position is perhaps best summarised by Baroness Hale in *R (Wright) v Secretary of State for Health* [2009] UKHL 3; [2009] 1 AC 739 at paragraph 30:

> 'As long ago as *X v Iceland* (1976) 5 DR 86, [Art 8] was held to "comprise also, to a certain degree, the right to establish and develop relationships with other human beings". In *Niemietz v Germany* (1992) 16 EHRR 97, para 29, the court held:
>
> > "it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not comprised within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings."

Baroness Hale then went on to describe a number of cases where claims were made with respect to breach of Art 8 private life rights by those in the former Warsaw pact states who had been accused by the current authorities of being former officials in the previous, now discredited, communist regimes (for example by being members of the security services). In *Sidabras v Lithuania* (2004) 42 EHRR 104, for example, it was acknowledged that the finding that an individual had been a former KGB officer would not only ban him from public sector employment, but also from many private sector posts. The Strasbourg court held that these circumstances fell within the ambit of Art 8 for the purpose of the prohibition of discrimination in the enjoyment of Convention rights in Art 14.

69. Baroness Hale continued her summary of the law at paragraph 32 of *R (Wright)*:

> 'An actual breach of article 8 was found in *Turek v Slovakia* (2006) 44 EHRR 861. The consequences of being listed as an 'agent' of the state security agency were must less far-reaching than in *Sidabras* but were nevertheless an interference with the applicant's right to respect for his private life. The procedural aspect of article 8 (which dates back at least to *W v United Kingdom* (1987) 10 EHRR 29) therefore required "the decision-making process involved in

> measures of interference must be fair and such as to ensure due respect [for] the interests safeguarded by article 8" (see para 111). The applicant was unable to disprove the allegation that he was an agent because he was not allowed access to the guidelines governing inclusion on the list.'

70. More recently, in *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 AC 410, Lord Hope, having endorsed Baroness Hale's summary of the law in *R (Wright)*, went on to record (at paragraph 24) that:

> 'Excluding a person from employment in her chosen field is liable to affect her ability to develop relationships with others, and the problems that this creates as regards the possibility of earning a living can have serious repercussions on the enjoyment of private life: see *Sidabras v Lithuania*, para 48. She is entitled also to have her good name and reputation protected: see *Turek v Slovakia*, para 109. As Baroness Hale said in *R (Wright)*, para 36, the fact that a person has been excluded from employment is likely to get about and, if it does, the stigma will be considerable.'

71. If, as is accepted here, the ability of SW and/or PO to continue in their chosen careers will be adversely affected by the terms of the judge's judgment if it is allowed to stand (whether or not it is made public), what are the procedural requirements in relation to the Art 8 right to private life?

72. In *Turek v Slovakia* the Strasbourg court stated:

> '111. The Court reiterates that, whilst Art 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Art 8.
>
> 112. The Court reiterates that the difference between the purposes pursued by the safeguards afforded by Art 6(1) and Art 8 of the Convention, respectively, may justify examination of the same set of facts under both Articles. In the circumstances of the present case the Court finds it appropriate to examine the fairness of these proceedings under Art 8 of the Convention.
>
> 113. In particular, the Court will examine whether the procedural protection enjoyed by the applicant at the domestic level in respect of his right to respect for his private life under Art 8 of the Convention was practical and effective and consequently compatible with that Article.
>
> 114. …. However, the Court must ascertain whether, taken as a whole, the proceedings, including the way in which the evidence was dealt with, were fair for the purposes of Art 8 of the Convention.'

73. In *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2013] EWHC 2492 (Admin), Cranston J held that the procedural rights contained in Art 8 could be engaged in the process of fixing the release-on-license conditions for a prisoner and went on to consider the nature of the procedural rights themselves at paragraphs 56 to 62. Having made express reference to *Turek v Slovakia* (in particular paragraphs 111 and 113), Cranston J continued at paragraph 58:

> '58. What the Strasbourg court requires is that the decision-making process involved in measures of interference, when considered as a whole, must be fair and such as to afford due respect to the interests safeguarded by article 8. Regard is to be had to the particular circumstances of the case, notably the serious nature of the decisions taken: *R v United Kingdom* (2011) 54 EHRR 28, para 75 (involvement of biological parents in adoption). In particular circumstances it may be essential that the parties can access information relied on by the authorities to be able to put forward in a fair or adequate manner those matters militating in their favour: *Dolhamre v Sweden* [2010] 2 FLR 912, para 116 (children taken into care after accusations of abuse, later withdrawn).
>
> 59. These Strasbourg principles of effective participation in the decision-making process to protect article 8 rights have been applied by the domestic courts: see *R (H) v A City Council* [2011] BLGR 590, para 51; *Turner v East Midlands Trains Ltd* [2013] ICR 525, paras 42-45.
>
> 60. What is required by way of procedure in any particular case turns on the extent of interference with those rights and the nature of the interests at stake: *R (BB) v Special Immigration Appeals Commission (No 2)* [2013] 1 WLR 1568, para 52, per Lord Dyson MR. That is the same approach as the common law; the standards of fairness are not immutable. In a well-known passage in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560 Lord Mustill made that point, identifying as factors the statutory background and the context of the decision. Fairness, he said, very often required that a person adversely affected by a decision have an opportunity to make representations on his own behalf "either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both." Lord Mustill added that since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness very often required that a person be informed of the gist of the case to be answered.'

74. In an earlier case of *R v Secretary of State for the Home Department, Ex pte Hickey (No 2)* [1995] 1 WLR 734, the Court of Appeal considered the question of whether details of a police inquiry, established by the Secretary of State following criminal convictions to assess a possible reference to the Court of Appeal Criminal Division, should be disclosed to the defendants to whom it related. The applicants sought declarations that they should have been given fuller disclosure of information from the police investigation. The court considered the matter in terms of the common law rather than in terms of the ECHR. Simon Brown LJ, giving the main judgment, held that fairness required giving the individual who would be affected by a decision the right to address matters that might be held against him before the decision-maker made his or her decision (at page 744):

> '… there seem to me compelling reasons why, whatever the practical difficulties to be resolved, petitioners should, *before* the Secretary of State's decision, be given a specific opportunity to make effective representations upon whatever material has been revealed by his inquiries. … If the inquiries appear to resolve [points that might cast doubt on the safety of the conviction] against the petitioner, elementary fairness surely requires that he should then have the opportunity to address these fresh obstacles in his path before an adverse decision

> is taken against him. … [Advance disclosure] is required in the interests both of fairness and informed decision-making. Without it an adverse decision may not be right; and even if it is, it will certainly not be fair.' (emphasis in original)

75. By way of record, the protection afforded to witnesses, as such, by Article 8 has been accepted by the Divisional Court in *R(B) v Crown Court at Stafford* [2006] EWHC 1645 (Admin) and by the Supreme Court in *Re W (Child Witness)* [2010] UKSC 12 at paragraph 22. .

76. As the local authority case cannot directly engage with an argument based on breach of Art 8, it fell to Mr Brandon on behalf of PO to set out the main human rights submissions for the appellants, a role which he discharged by making clear, helpful and well-argued submissions.

77. Mr Brandon submits that the judge's findings against PO will have a direct impact upon her professional reputation and her employment and, as such, are readily within the private life rights protected by Art 8. There is, he submits, an interference with those rights because of the impact on her ability to perform her office as a constable. The question therefore arises whether the judge's actions are necessary and proportionate. Where there is an absence of procedural fairness, the fact-finding process, insofar as it relates to PO and SW, will be arbitrary and the consequent denial of procedural protection cannot be justified. Mr Brandon submits that the process adopted by the judge did not meet even the most minimal procedural requirements.

78. Mr Brandon rightly drew the court's attention to the Supreme Court decision in *R (L) v Commissioner of the Police for the Metropolis*. He submitted that the rights claimed by PO and SW in the present appeal fall squarely within Lord Hope's description of Art 8 given in paragraph 24 of *R (L)* (see paragraph 70 above) and he also lays stress upon the concluding paragraph of Lord Hope's judgment at paragraph 46. *R (L)* concerned the responsibility of the police when a request is made for an Enhanced Criminal Records Certificate on an individual:

> '46. In cases of doubt, especially where it is unclear whether the position for which the applicant is applying really does require the disclosure of sensitive information, where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated or where the information may indicate a state of affairs that is out of date or no longer true, chief constables should offer the applicant an opportunity of making representations before the information is released. In *R (X) v Chief Constable of the West Midlands Police* [2005] 1 WLR 65, para 37 Lord Woolf CJ rejected Wall J's suggestion that this should be done on the ground that this would impose too heavy an obligation on the chief constable. Here too I think, with respect, that he got the balance wrong. But it will not be necessary for this procedure to be undertaken in every case. It should only be resorted to where there is room for doubt as to whether there should be disclosure of information that is considered to be relevant. The risks in such cases of causing disproportionate harm to the applicant outweigh the inconvenience to the chief constable.'

Based on paragraph 46, Mr Brandon submitted that the implication of Lord Hope's words in the context of the present case is that the judge should have given PO and SW the opportunity to make representations before reaching his conclusion as to their actions.

79. Drawing on the domestic and Strasbourg case-law to which I have already made reference, Mr Brandon submitted that the basic procedural protection required by Art 8 included (depending on the circumstances):

a) Disclosure of relevant court documents;

b) Access to other relevant material;

c) A right to make representations and to do so *before* an adverse decision is made;

d) A right for the person against whom a material adverse finding may be made to have the issue put to them.

80. In opposition to the appeal, Mr Feehan submitted that Art 8 rights to private life have no application to an individual who attends court in a public role, for example as a police officer or social worker, to give evidence in public law proceedings. He sought to make good this submission by reference to *X v Y* [2004] EWCA Civ 662 at paragraphs 37 to 40 and paragraphs 50 and 51. *X v Y* concerned an employee who had failed to inform his employer of a caution for gross indecency and who, when the caution subsequently came to the employer's notice, was dismissed. The Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal each rejected the claimant's assertion that, in relying upon the caution, which arose from circumstances outside his working life, there had been a breach of his Art 8 rights when read with Art 14. Reference was also made to *Pay v UK* (2009) 48 EHRR SE2, which involved a probation officer whose claim, that his involvement in running an organisation which organised 'bondage, domination and sadomasochism' performances and events were part of his Art 8 private life and therefore of no concern to his employers, was rejected.

81. I am bound to observe that Mr Feehan's submissions fell well short, to my mind, of establishing the proposition that, by coming to give evidence in court proceedings conducted in private, a professional witness was in some manner removing themselves from any protection that the private life rights in Art 8 may provide for them.

82. Irrespective of his submissions on the public nature of the role of a witness, Mr Feehan did concede that, whilst Art 8 does not give rights to a witness in a public role during the process of giving evidence, the potential effect of a judgment upon the erstwhile witness' private life may engage Art 8 and require the court to give the witness the opportunity to answer any criticisms that have been made. It is, however, Mr Feehan's case that the judge was justified in making findings beyond those strictly needed to determine the care order application and that the process undertaken by the judge following the initial bullet-point judgment was sufficient to allow the appellant's to make submissions and be heard on the specific criticisms that the judge had, by then, identified. Mr Feehan submits that the lengthy and detailed process

adopted by the judge therefore remedied any potential breach of SW's and PO's Art 8 rights.

83. In response Mr Geekie directly challenged Mr Feehan's assertion that the judge had foreseen the need for a fair process, had promulgated a draft judgment and invited observations upon it. Mr Geekie, to my mind, was able to demonstrate from relevant court orders and from the terms of the bullet-point judgment itself that the judge had simply delivered the bullet-point judgment on the basis that a full version of that judgment would follow in due course; he had not at that time anticipated the need for any process of further submissions.

84. More generally, Mr Geekie submitted that it was unhelpful for each of the three statutory avenues of appeal to use different language and he invited this court, if possible, to interpret the three provisions together so as to produce a single coherent result. The answer to the question 'can I appeal against findings of fact made in a judgment?' should, he submitted, be the same for all comers, irrespective of whether they are able to rely upon human rights arguments.

85. Mr Geekie argued that the decision in *MA Holdings* provided a useful means of moulding the three statutory routes together and he suggested that the principled response would be to achieve a unified view of the three statutes that is also compatible with Art 8.

Do SW and PO enjoy protection with respect to Art 8 private life rights?

86. Mr Samuel made a powerful case, based upon the detailed criticisms made of SW in the judgment and the impact that these have had upon SW's health and employment, for holding that her Art 8 rights to private life have already been substantially compromised by the criticisms made of her in the judge's judgment, notwithstanding the fact that it has yet to be published. That this is so is, no doubt, in part due to the fact that as part of the bullet-point judgment (and therefore at a time when SW knew nothing of the judge's criticisms of her) the judge directed that the local authority that was by then employing SW 'must be alerted to my findings as a matter of urgency'. We were told by Mr Geekie that this was an instruction that his instructing local authority took as requiring them as a matter of urgency to inform any other local authority that SW may be working for about the judge's findings. In the event it was apparently CAFCASS who informed SW's current employer of the findings.

87. The timing of the judge's instruction for SW's employer to be informed is to be noted in the context of whether or not the judge considered that he was engaged, at that stage, in undertaking a fair process by which to allow SW and PO to address his critical findings. The plain implication is that that was not the case and that the judge was simply announcing, in headline form, his concluded findings at a stage prior to any of the parties suggesting that the court should embark on hearing submissions from those professionals who had been marked out for judicial criticism.

Unfairness

88. It is plainly necessary to consider what elements of procedural fairness are required by Art 8 in this context. In my view, however, for the purposes of deciding this appeal, it is unnecessary to go beyond what must be an essential factor to be included

on any list of the elements of procedural fairness, namely giving the party or witness who is to be the subject of a level of criticism that is sufficient to trigger protection under Art 8 (or Art 6) rights to procedural fairness proper notice of the case against them.

89. Mr Brandon submits that it is a basic element of fairness for a judge to ensure that criticisms of the nature that he came to find proved are put to the witness rather than appearing for the first time 'out of the blue' (to use Mr Brandon's phrase) in the judgment. Reliance is this regard is placed upon the Court of Appeal decision in *Markem Corp v Zipher Ltd* [2005] EWCA Civ 267, which was a patent case that included an assertion of procedural unfairness. Lord Justice Jacob, giving the main judgment, drew attention to a 19th century House of Lords decision of *Browne v Dunn* (1894) 6 R 67. The case report of *Browne v Dunn* is sparse, but Jacob LJ sets out in full the relevant parts of their Lordships' opinions at paragraph 59 of his own judgment in *Markem*. Of particular note is the following in the speech of Lord Herschell LC:

> 'Now my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a case, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.'

Other members of House of Lords gave speeches that expressly concurred with the Lord Chancellor on this point and the authority of *Browne v Dunn* was fully endorsed by this court in the course of its decision in the *Markem* case.

90. The statement of the law in *Browne v Dunn* must however be read alongside the authoritative description of the role of a judge given by Lawton LJ in *Maxwell v Department of Trade and Industry* [1974] QB 523 at page 541 B-D:

> "The researches of counsel have not produced any other case which has suggested that at the end of an inquiry those likely to be criticised in a report should be given an opportunity of refuting the tentative conclusions of whoever is making it. Those who conduct inquiries have to base their decisions, findings, conclusions or opinions (whichever is the appropriate word to describe what they have a duty to do) on the evidence. In my judgment they are no more bound to tell a witness likely to be criticised in their report what they have in mind to say about him than has a judge sitting alone who has to decide which of two conflicting witnesses is telling the truth. The judge must ensure that the witness whose credibility is suspected has a fair opportunity of correcting or contradicting the substance of what

> other witnesses have said or are expected to say which is in conflict with his testimony. Inspectors should do the same but I can see no reason why they should do any more."

91. During the detailed submissions made on behalf of PO by Mr Brandon and of SW by Mr Samuel, we were taken to the transcript of the oral evidence which demonstrated beyond doubt that the matters found by the judge were not current, even obliquely, within the hearing or wider process in any manner. None of the key findings that the judge went on to make were put by any of the parties, or the judge, to any of the witnesses and there is a very substantial gap between the cross examination, together with the parties' pleaded lists of findings sought, and the criticisms made by the judge. In this respect this is not a matter that is finely balanced; the ground for the criticisms that the judge came to make of SW, PO and the local authority, was simply not covered at all during the hearing.

92. For my part it became clear from reading the transcript that the cross-examination of SW and PO had been entirely conventional in the sense that it dealt with ordinary challenges made to the process of enquiry into the allegations of sexual abuse and was conducted entirely, to use Mr Geekie's phrase, within the four corners of the case. At the conclusion of the oral evidence, in closing submissions no party sought findings that went beyond those conventional challenges. At no stage did the judge give voice to the very substantial and professionally damning criticisms that surfaced for the first time in the bullet-point judgment.

93. It can properly be said that by keeping these matters to himself during the four week hearing, and failing to arrange for the witnesses to have any opportunity to know of the critical points and to offer any answer to them, the judge was conducting a process that was intrinsically unfair.

94. For my part, in terms of the decision in this appeal, it is not necessary to go further than holding that, unfortunately, this is a fundamental and extreme example of 'the case', as found by the judge, not being 'put' to SW and PO. However, out of respect for the thoughtful and more widely based submissions that have been made, and because the ramifications of this decision may need to be considered in other cases, I would offer the following short observations on other aspects of procedural fairness in the context of Art 8 in answer to the rhetorical question: 'what should the judge have done?'.

95. Where, during the course of a hearing, it becomes clear to the parties and/or the judge that adverse findings of significance outside the known parameters of the case may be made against a party or a witness consideration should be given to the following:

a) Ensuring that the case in support of such adverse findings is adequately 'put' to the relevant witness(es), if necessary by recalling them to give further evidence;

b) Prior to the case being put in cross examination, providing disclosure of relevant court documents or other material to the witness and allowing sufficient time for the witness to reflect on the material;

c) Investigating the need for, and if there is a need the provision of, adequate legal advice, support in court and/or representation for the witness.

96. In the present case, once the judge came to form the view that significant adverse findings may well be made and that these were outside the case as it had been put to the witnesses, he should have alerted the parties to the situation and canvassed submissions on the appropriate way to proceed. One option at that stage, of course, is for the judge to draw back from making the extraneous findings. But if, after due consideration, it remains a real possibility that adverse findings may be made, then the judge should have established a process that met the requirements listed in paragraph 95 above.

Article 8: Conclusions

97. In the light of the law relating to ECHR Art 8 as I have found it to be, it is clear that the private life rights of SW and PO under Art 8 of these individuals as witnesses would be breached if the judgment, insofar as it makes direct criticism of them, is allowed to stand in the final form as proposed by the judge. The finding of breach of Art 8 does not depend on whether or not the judgment is published; the need to inform employers or prospective employers of such findings applies irrespective of whether the judgment is given wider publication. In short terms, the reasons supporting this conclusion are as follows:

a) In principle, the right to respect for private life, as established by Art 8, can extend to the professional lives of SW and PO (*R (Wright) v Secretary of State for Health* and *R (L) v Commissioner of Police for the Metropolis*);

b) Art 8 private life rights include procedural rights to fair process in addition to the protection of substantive rights (*Turek v Slovakia* and *R (Tabbakh) v Staffordshire and West Midlands Probation Trust*);

c) The requirement of a fair process under Art 8 is of like manner to, if not on all-fours with, the entitlement to fairness under the common law (*R (Tabbakh*) referring to Lord Mustill in *R v Secretary of State for the Home Department, Ex Pte Doody*);

d) At its core, fairness requires the individual who would be affected by a decision to have the right to know of and address the matters that might be held against him before the decision-maker makes his decision (*R v Secretary of State for the Home Department, Ex Pte Hickey (No 2)*);

e) On the facts of this case protection under Art 8 does extend to the 'private life' of both SW and PO for the reasons advanced by their respective counsel and which are summarised at paragraphs 61, 86 and 87;

f) The process, insofar as it related to the matters of adverse criticism that the judge came to make against SW and PO, was manifestly unfair to a degree which wholly failed to meet the basic requirements of fairness

established under Art 8 and/or common law. In short, the case that the judge came to find proved against SW and PO fell entirely outside the issues that were properly before the court in the proceedings and had been fairly litigated during the extensive hearing, the matters of potential adverse criticism had not been mentioned at all during the hearing by any party or by the judge, they had certainly never been 'put' to SW or PO and the judge did not raise them even after the evidence had closed and he was hearing submissions.

98. As will be apparent from this analysis of the issues in the context of ECHR Art 8, I regard the process adopted by the judge in the present case to have fallen short by a very wide margin of that which basic fairness requires in these circumstances. The occasions on which such circumstances may occur, or develop during proceedings, will, I anticipate, be rare. This judgment should be seen by the profession and the family judiciary to be a particular, bespoke, response to a highly unusual combination of the following factors:

a) a judge considering himself or herself to be driven to make highly critical findings against professional witnesses, where

b) such findings have played no part in the case presented by any party during the proceedings, and where

c) the judge has chosen not to raise the matters of criticism him/herself at any stage prior to judgment.

99. The fact that, so far as can be identified, this is the first occasion that such circumstances have been brought on appeal may indicate that the situation that developed in the present case may be a vanishingly rare one. For my part, as the reader of very many judgments from family judges during the course of the past five years, I can detect no need whatsoever for there to be a change in the overall approach that is taken by judges.

100. The present case is, unfortunately, to be regarded as extreme in two different respects: firstly the degree by which the process adopted fell below the basic requirements of fairness and, secondly, the scale of the adverse findings that were made. This judgment is, therefore, certainly not a call for the development of 'defensive judging'; on the contrary judges should remain not only free to, but also under a duty to, make such findings as may be justified by the evidence on the issues that are raised in each case before them.

Criticism of Expert witnesses

101. It is, unfortunately, sometimes the case that a judge in civil or family proceedings may be driven to criticise the professional practice or expertise of an expert witness in the case. Although what I have said with regard to a right to fair process under ECHR, Art 8 or the common law may in principle apply to such an expert witness, it will, I would suggest, be very rare that such a witness' fair trial rights will be in danger of breach to the extent that he or she would be entitled to some form of additional process, such a legal advice or representation during the hearing. That this is so is, I suspect, obvious. The expert witness should normally have had full disclosure of all

relevant documents. Their evidence will only have been commissioned, in a family case, if it is 'necessary' for the court to 'resolve the proceedings justly' [Children and Families Act 2014, s 13(6)], as a result their evidence and their involvement in the case are likely to be entirely within the four corners of the case. If criticism is to be made, it is likely that the critical matters will have been fully canvassed by one or more of the parties in cross examination. I have raised the question of expert witnesses at this point as part of the strong caveat that I am attempting to attach to this judgment as to the highly unusual circumstances of this case and absence of any need, as I see it, for the profession and the judges to do anything to alter the approach to witnesses in general, and expert witnesses in particular.

102. I should stress that in the previous paragraph I was expressly addressing the approach to be taken to an expert who attends court and gives evidence. I would not wish to be taken as saying anything to add to or alter the approach that is required before criticising a witness who has not been called to give evidence, for which see Munby J's judgment in *Re M (Adoption: International Adoption Trade)* [2003] EHC 219 (Fam), [2003] 1 FLR 1111, paras 111-120.

Local authority: breach of fair trial rights

103. I have thus far concentrated upon the case of SW and PO with respect to fairness in the context of ECHR, Art 8 and the common law. The local authority is not able to engage with the rights established by Art 8, but it is entitled to the benefit of the right to a fair trial established by ECHR, Art 6 and to similar rights under the common law (for which see paragraph 89 above). During the hearing of this appeal no issue was taken to the effect that there was a distinction to be drawn on the facts of this case between the fair trial rights of the individuals, on the one hand, and the local authority on the other. Given the firm and clear view that I have reached as to the degree to which the process adopted here fell short of the standard of fairness to which those affected were entitled, it is unnecessary to do more than record that the same conclusion, in the context of Art 6 and the common law, must apply with respect to the adverse findings made against the local authority which had not been canvassed during the hearing and were outside the issues in the case.

Remedy

The post-judgment process before the judge

104. Having established that the rights to a fair process of each of these appellants had been breached by the findings announced by the judge in the first, bullet-point, version of the judgment it is necessary to consider what remedy is, or should be, available to them. The question of remedy falls to be considered in two parts. Firstly, whether the steps taken before the judge after the bullet-point judgment to permit submissions and invite the court to review or re-cast its findings were a sufficient remedy and, secondly, if not, what remedy is available on appeal.

105. I have already summarised the process that was played out in the lower court after the judge had given the bullet-point judgment (see paragraph 37). We have been taken through the detail of the submissions that were made to the judge on behalf of the appellants. Although it is clear that the judge made some alterations in matters of detail, the final draft of the judgment in essence maintains the adverse findings that he

had made and, in most respects, holds to the strong adjectives that he had deployed in describing them. In those circumstances, and because it is our intention not to disclose that level of detail in this judgment, it is neither necessary nor appropriate to explain the changes that were made. The question is whether the process that was followed after the bullet-point judgment provided an adequate remedy to the appellants sufficient to redress the unfair process that had preceded it. Before this court the appellants submit that it did not, but Mr Feehan submits that it did.

106. Mr Geekie submits that the post-judgment process was wholly insufficient to cure that matters that are complained of in this appeal for the following reasons:

a) The matters complained of went far beyond that which was necessary to decide the case;

b) The opportunity to respond came after a firm, not provisional, decision had been announced;

c) The mischief in this case was rooted in the lack of forensic examination of the matters complained of and was therefore simply not open to redress by any ex post facto submissions.

Mr Geekie's submissions were adopted and repeated on behalf of the other appellants.

107. Mr Feehan draws attention to, what he describes as, the 'lengthy and detailed process' adopted after the bullet-point judgment in which full written and oral submissions were made on the disputed points, after which the judge modified his judgment and gave a judgment explaining his decisions on each of the matters of detail that had been raised. It was, submits Mr Feehan, a perfectly proper and sufficient process.

108. Looking at this issue in general terms, it must, in some cases, be possible, where a court is contemplating making findings which may have arisen outside the original focus of the case, for the court to embark on a process which allows for those affected to make submissions and/or submit evidence in relation to those matters before final judgment is given. I have already described some of the basic elements in such a process at paragraph 95. For those additional steps to be an effective counter-balance to a process which might otherwise be seen as a whole to be unfair, they need, in my view, to be undertaken before the judge has reached a concluded decision on the controversial points. Whilst not impossible, it is difficult to conceive of circumstances where the overall fairness of the hearing could be rescued by any form of process after the judge has reached and announced his concluded decision. Where a court is considering making findings that have not, thus far, been foreshadowed in the proceedings I would suggest that, at the very least, the judge should alert the parties and, if necessary any affected witness, to the potential for such an outcome so that the steps in paragraph 95, and any other relevant additional matters, can be openly canvassed during the hearing and before any judgment is given.

109. In the present case it is not possible to view the bullet-point judgment as anything other than a statement of the judge's concluded decision on these various matters. There is no indication that at the time that he gave the bullet-point judgment he was contemplating any additional process by which submissions or evidence relevant to those findings might be received by the court. To his credit, the judge did embark on

receiving detailed submissions thereafter, but, for my part, it was simply too late for that procedure to render fair that which had become unfair; the die had already been cast by the announcement of the judge's firm conclusions in the bullet-point judgment.

Is there a remedy on appeal: conclusion on Cie-Noga

110. Having already described the detailed submissions made by each party on the central question raised by the *Cie-Noga* case and other authority at paragraphs 45 to 64 above, it is now necessary to provide an answer and determine whether the Court of Appeal has jurisdiction to receive this appeal in circumstances where it may be difficult to cast the matters complained of a 'decision', a 'determination', an 'order' or a 'judgment'.

111. In the light of the conclusion that I have now reached that the right to a fair trial under ECHR, Arts 8 or 6 of SW, PO and the local authority have been breached, the conclusion on the *Cie-Noga* issue must be determined with full regard to the right to an 'effective remedy' enshrined in ECHR, Art 13 and to the Human Rights Act 1998, ss 7 and 8.

112. Article 13 of the ECHR, which is not a 'Convention right' so far as domestic law is concerned [HRA 1998, s 1(1)] provides that:

> 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

113. The HRA 1998 seeks to provide an effective remedy in the UK, in compliance with Art 13, by s 7 and s 8. The relevant parts of s 7 are:

> 's 7 (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may:
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.
>
> …
>
> (6) In subsection (1)(b) 'legal proceedings' includes:
>
> (a) …
>
> (b) an appeal against the decision of a court or tribunal.'

114. HRA 1998, s 9(1) provides that:

> 'Proceedings under s 7(1)(a) in respect of a judicial act may be brought only:

(a) by exercising a right of appeal;'

115. Pausing there, a court is a public authority for the purposes of HRA 1998, s 6 (see s 6(3)(a)) and, by s 6(1), it is 'unlawful for a public authority to act in a way which is incompatible with a Convention right'. In the present case I have, unfortunately, concluded that the High Court has acted in a way which is incompatible, that is in breach of, the Convention rights of PO, SW and the local authority to a fair trial in relation to the adverse findings that were made against them. It is therefore open to the appellants to 'rely' on their assertion that the High Court has acted unlawfully in 'any legal proceedings' which expressly include 'an appeal against the decision of a court or tribunal' (s 7(1) and (6)). Indeed, s 9(1) is explicit in providing that proceedings in respect of an assertion that a judicial act is unlawful under s 7(1)(a) may only be brought by exercising a right of appeal. Finally, HRA 1998, s 8(1) provides that:

> 'In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant relief or remedy, or make such order, within its powers as it considers just and appropriate.'

116. *Cie-Noga,* which was a major commercial dispute, did not give rise to issues under the ECHR. That decision does not therefore close down the avenue of appeal that is argued for by these appellants. Although Mr Geekie has sought to persuade us that we should interpret *Cie-Noga* in such a way so as to allow this appeal to proceed, in my view it is unnecessary to do so. In simple terms, use of a route of appeal to permit a party, or person entitled to bring an appeal, to assert that there has been, or would be, an act unlawful by virtue of HRA 1998, s 6(1).

117. The decision of this court in *Re M (Children)*, which was a local authority's attempt to challenge a judge's decision not to make findings of fact, which relied on *Cie-Noga*, is also a case which did not give rise to any issues under the ECHR.

118. It is therefore unnecessary to hold that the *Cie-Noga* approach can be engaged in this case because it may be said that the judge's findings are 'pregnant with legal consequences' or some such phrase. That factor is relevant, but it is relevant to determining whether or not the individual's Art 8 private life rights are engaged and in reviewing the overall proportionality of establishing whether or not there has been a breach of those rights. It is also not necessary to use the rather contrived vehicle of the judge's refusal to grant a declaration in the terms of the adverse findings in order, in some way, to generate an 'order' or 'judgment' that can be the subject of any appeal. On the approach which I would adopt, the judge's findings themselves are a 'judicial act' which, on the facts of this case, is capable of being held to be 'unlawful' under HRA 1998, s 7(1) and therefore the proper subject of an appeal, without having to consider whether or not it is a 'decision', 'determination', 'order' or 'judgment'.

Remedy on appeal

119. Where, as I have found to be the case here, the adverse findings complained of have been made as a result of a wholly unfair process and where, again as here, the consequences for those who are criticised in those findings are both real and significant, it is incumbent on this court to provide a remedy and, so far as may be possible, to correct the effect of the unfairness that has occurred. In the present case

what is sought is the removal from the judgment of any reference to the matters that were found by the judge against SW, PO and the local authority that fell outside the parameters of the care proceedings and had not been raised properly, or at all, during the hearing.

120. Mr Feehan accepts, as I understand it, that if this court reaches the stage that, in my judgment, it has indeed reached, then redaction from the judgment must follow, subject to any submissions as to detail. I agree that that must be the case. So that there is no ambiguity as to words such as 'removal' or 'redaction' in this context, I make it plain that the effect of any change in the content of the judge's judgment that is now made as a result of the decision of this court is not simply to remove words from a judgment that is to be published; the effect is to set aside the judge's findings on those matters so that those findings no longer stand or have any validity for any purpose. The effect is to be as if those findings, or potential findings, had never been made in any form by the judge.

Conclusion

121. For all of the reasons that I have now given I hold that each of these appellants was, by the conclusion of the first instance process, a 'party' to the proceedings and that the Court of Appeal has jurisdiction to entertain their appeals on the basis that they each assert that the judge has acted in such a way so as to amount to a breach of their rights under ECHR, Arts 6 and/or 8 pursuant to HRA 1998, ss 7 to 9. I have further held that there was, most unfortunately, a wholesale failure to achieve a fair trial in relation to the matters that the judge went on to find proved against them, which are outside the parameters of the issues in the case and are the subject of this appeal.

122. I therefore allow the three appeals and hold that, if my lords agree, those parts of the judge's judgment which record those matters are to be set aside on the basis that they are to have no further validity and are to be regarded as if they had never been made.

Lord Justice Christopher Clarke:

123. I agree.

Sir James Munby, President of the Family Division:

124. I also agree, and would wish to pay respectful tribute to my Lord's magisterial judgment.