

PALLANT

CHAMBERS

SP v DM [2023] EWHC 2089 (Fam): Important ruling on giving evidence in Family Court proceedings

Giving evidence at a fact-finding hearing is, at the best of times, a stressful and emotional experience. Add to that a pregnancy in its third trimester and an important issue on principle is raised about the parameters of the court's duty to ensure that a trial is conducted fairly whilst ensuring that the mother's vulnerability is properly protected. In *SP v DM*, Sir Jonathan Cohen considered that very issue and the Appellant mother's arguments which significantly attacked the court for purported procedural irregularity in the way that it conducted the fact-finding hearing in respect of mother's evidence in light of her pregnancy. The appeal was dismissed on all grounds.

On 30th June 2023, Mostyn J granted the Appellant mother permission to appeal on grounds 1 and 3, which Mostyn J grouped together, solely in respect of the above issue on principle "*that where a party is heavily pregnant the court has an independent duty to consider an adjournment of the claim, or that evidence should be given by her otherwise than orally under cross-examination, irrespective of whether her counsel has accepted that that course should be followed.*" (at ¶20). Mostyn J also left live grounds 2, 4 and 7 but refused permission to appeal on grounds 4 and 6 as totally without merit.

On appeal, Sir Jonathan Cohen was highly critical and gave short shrift to many of the arguments pursued on behalf of the Appellant mother. He found that they were either "*plainly wrong*" (at ¶24), "*unsustainable*" (at ¶32), and/or "*not supported by the transcript*" (at ¶48). Sir Jonathan Cohen also found that the hearing had been conducted fairly and in accordance with the mother's wishes. Importantly, he noted throughout the judgment that not once was any complaint made by the mother or by any member of her legal team about the course that was taken throughout the hearing, nor did she ever ask for the matter to be adjourned. Indeed, when the mother felt unwell and left court to observe the rest of the evidence by CVP link from her barrister's chambers, it was Ms Anstey, counsel for the father, who suggested, unprompted, an alternative form of questioning; specifically, for her few remaining questions to be orally recorded for the mother to answer at a more convenient time. This was accepted by the first instance judge and Sir Jonathan Cohen found that throughout the entire hearing, the first instance judge had repeatedly made it clear "*that the health of the unborn child must take priority and at all times the advice of the mother's treating team was followed*" (at ¶78).

In respect of Mostyn J's question on principle, Sir Jonathan Cohen unreservedly agreed that the court has "*a mandatory duty to ensure that a trial is conducted fairly and that a vulnerable party is properly protected*" (at ¶60), which sometimes includes "*a duty to override the desire of a litigant to continue with the case*" (at ¶63). However, he was satisfied that the Judge had carried out that duty to consistently ensure the mother was well enough and wanted to continue, which she did. Therefore, there was no requirement in this case for the Judge to override the mother's repeated wish to continue as to do so would be "*patronising*" (at ¶44).

The appeal was conclusively dismissed (at ¶79). Consequently, the stay was lifted to enable contact between the parties' son and the father to be reinstated. As is often the case with stays on orders for contact, Sir Jonathan Cohen observed the "*tragedy of this case is that in the last two years, the child has seen his father on only one occasion since July 2021*" (at ¶80). The Respondent is now seeking a costs order against the Appellant Mother. It shall be interesting to see how the court deals with costs following an appeal given strong criticism by the Learned Judge.

[Elizabeth Wentworth](#)

Pallant Chambers