Neutral Citation Number: [2006] EWCA Civ 1617

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HIS HONOUR JUDGE MITCHELL
CANTERBURY COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Wednesday 29th November 2006

Before :

LORD JUSTICE CHADWICK
LORD JUSTICE WALL
and
LORD JUSTICE LLOYD

- -

Martin Frank Stringer (Appellant)
-and -
Lesley Stringer (Respondent)
(Transcript of the Handed Down Judgment of
WordWave International Ltd
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Official Shorthand Writers to the Court)

- -

Mr Martin Stringer – Appeared in Person
There was no appearance on behalf of the Respondent

- -

Judgment
As Approved by the Court

Lord Justice Wall:

1. The appellant, Mr. Martin Frank Stringer, appeals against an order made under section 91(14) of the Children Act 1989 (henceforth respectively a "section 91(14) order" and "the Act") made by His Honour Judge Mitchell on 27 September 2004 in private law proceedings under Part II of the Act between the appellant and his former wife relating to

their two children, J (a boy) now aged eleven and E (a girl) now rising eight. At the time of the hearing before the judge, the children were respectively nine and six.

2. The circumstances in which the appeal reaches this court are unusual, and are set out in paragraphs 42 to 49 of a reserved judgment of this court, comprising Thorpe LJ and myself, handed down on 18 August 2006. The judgment deals with two appeals, and bears the neutral citation number [2006] EWCA Civ 1190. It has recently been reported as Re S (children) (restriction on applications); Re E (a child) (restriction on applications) [2006] 3 FCR 50. I will henceforth refer to it as Re S; Re E. The two appeals were listed together, since both dealt with unusual section 91(14) orders. An advocate to the court, Mr. Paul Hepher, had been appointed to address the issues of law arising in the two appeals, and his general submissions are summarised in the judgment at paragraphs 50 to 62 ([2006] 3 FCR 50 at pp 62-66).

3. Paragraph 1 of Judge Mitchell's order gave Mr. Stringer permission to withdraw his application for residence of the children. The section 91(14) order followed as paragraph 2. It is particularly unusual. It reads as follows: -

   "The father (Mr. Stringer) shall not make any further applications to the court regarding the residence of the children or his contact with the children without leave of the court until the children have reached 16 years of age. Such application will require a psychological or psychiatric report indicating that the author has had sight of the guardian's report dated 17 September 2004 and the report of Dr Conn dated 1 August 2004 and that the father has engaged in treatment. The application to be heard by His Honour Judge Mitchell if practicable."

4. Paragraph 3 of the judge's order gave Mr. Stringer permission to disclose the two reports referred to in paragraph 2 of the order "to his general practitioner and to any treating psychiatrist or psychologist". The balance of the order, which is not directly material for the purposes of this appeal, gave the mother's husband permission to apply with her for a joint residence order, which the judge then made in paragraph 5. Paragraph 6 forbad direct contact between Mr. Stringer and the children, but permitted indirect contact in the form of letters and cards from Mr. Stringer which were to be passed on to the children by their mother if they were "appropriately expressed". The judge also discharged an earlier prohibited steps order made by Judge Poulton on 5 October 2001, which prevented the children's mother from making any decision about their schooling without Mr. Stringer's consent.

5. As is recounted in the judgment of this court in Re S; Re E, Mr. Stringer sought permission to appeal against Judge Mitchell's order. His application was refused both by the judge and, following an oral hearing, by Black J on 19 July 2005. Her judgment has been transcribed, and is in our papers. Mr. Stringer then made a Taylor v. Lawrence[2002] EWCA Civ 90, [2003] QB 528 application, which was referred to me on paper on 23 February 2006. I expressed concern about both the duration of, and the conditions attached to, the section 91(14) order, and invited submissions from Mr.

Stringer on these two points. As the case raised issues of importance relating to section 91(14) orders generally, and as Mr. Stringer was in person, I invited CAFCASS Legal to appoint an advocate to the court to address issues of law arising from the section 91(14) order made in his case. As I have already stated, arrangements were made for Mr. Stringer's application for permission to appeal to be listed together with the case of Re E, which raised a different point in relation to section 91(14) orders.

6. The submission made by the advocate to the court in Re S; Re E was that the court did not have jurisdiction to attach conditions to a section 91(14) order: - see [2006] 3 FCR 50 at 66-7, paragraphs 63 to 65. This court accepted that submission in paragraphs 73 to 77 of its judgment: see [2006] 3 FCR 50 at 69-70. However, as the matter was only at that stage listed as a permission application without notice either to the children's mother or to their guardian in the proceedings, the relief which this court could grant was limited to that of permission to appeal. In paragraph 96 of its judgment, the court stated:

   "We are in no doubt that we should give Mr. Stringer permission to appeal against the section 91(14) order made in his case. We do not propose to limit the ambit of the appeal to the question of the conditions attached to it. We think Mr. Stringer should be entitled to argue, if he wishes, that an indefinite order under section 91(14) (or, indeed any order under section 91(14)) should not have been made. Whilst his prospects of success in relation to the latter argument may be doubtful, we do not think it appropriate for the argument to be limited to the narrow, conditions point."

7. When we heard the appeal on 30 October 2006, the only appearance was by Mr. Stringer, who was in person. He told us that he had notified both the children's mother and their guardian that the appeal was being heard, but that neither had responded. Furthermore, the documentation available to us was limited. Mr. Stringer attributed this to the fact that the appeal had come on by the Taylor v Lawrence route. As a consequence, he said that he had been unable to put together an appropriate bundle, and he appeared to be largely without papers himself.

8. In these circumstances, we decided to proceed to hear the appeal. Mr. Stringer addressed arguments to us, both in writing and orally, which I shall summarise in due course. In short, he sought the discharge of the section 91(14) order. At the conclusion of his argument, we reserved judgment.

9. For reasons which will, I think, already be apparent, I take the view that the decision to give Mr. Stringer permission to appeal against the conditions attached to the section 91(14) order effectively determines the outcome of the appeal itself in that respect. I would, accordingly, repeat and adopt the reasoning of this court at paragraphs 73 to 77 of its judgment in Re S; Re E.

10. I would add only one point to it. In my judgment there is a real and very substantial difference between, on the one hand, the imposition of conditions on a section 91(14) order and, on the other, a judge telling a litigant, when the section 91(14) order is imposed, that unless he addresses a particular issue, and can show that he has addressed

it, any application which he makes for permission to apply to the court for further relief is unlikely to be successful. The latter, which is not binding on either the litigant or the judge, is plainly permissible. The former is not.

11. Although in Re S; Re E this court set out part of what the judge said when making the section 91(14) order, the position now is that Mr. Stringer does not limit his appeal to the conditions attached to it. He argues that the order either should never have been made; alternatively, now that it has, in effect, been in place for more than two years, it has served its purpose and should be discharged. This is a wider argument than an attack on the conditions, and in these circumstances, I think it right to examine the judgment of Judge Mitchell in more detail, and to set out in full what the judge said about the order and his reasons for making it.

12. In view of the fact that Mr. Stringer had applied to withdraw his application for residence and contact, the judge did not set out the history of the case in detail in his judgment, which, I remind myself, was extempore. He contented himself with the statement that the case had "a considerable history", then added: -

    "This matter has been in this court before several different judges since 1999. The file, from memory, is well over a foot thick. Mrs. Stringer, the mother, has spent a fortune in legal fees and latterly has been representing herself. I think she told me on one occasion she had expended £22,000. Amongst other things, one of those amounts of money was when Johnson J dealt with an application when she wanted to change J's school. Johnson J expressed, in the terms that only he can, his dissatisfaction with the approach of Mr. Stringer, the father, who turned up and I think eventually consented to it when Mrs. Stringer had spent a fortune on legal fees."

13. Johnson J's judgment on that occasion (assuming he gave one) is not in our papers. The judge then related the fact that contact, including staying contact, had been taking place, until both children made complaints of physical assault against their father. The judge described it thus: "in fairness, it was not the most serious physical abuse of its kind". As a consequence, however, the police had become involved, and Mr. Stringer was the subject of a criminal prosecution. On 13 January 2003, Judge Murdoch QC ordered that contact between Mr. Stringer and the children should cease.

14. The judge records that hearings after 13 January 2003 had been taken exclusively by himself. Mr. Stringer's criminal trial, in October 2003, had resulted in his acquittal. The circumstances were that the trial judge, Rafferty J, expressed the view that the allegations of physical assault were best resolved in the family court. As a result, the prosecution offered no evidence, and Mr. Stringer was acquitted. After his acquittal, Mr. Stringer reinstated his application in the family proceedings, and sought the residence of the children.

15. The judge then expresses his view that the children were settled with their mother, and that there was no basis on which to change their residence. He describes making an order

for visiting contact at a contact centre, which occurred, he said, on three or four occasions. He then describes his decision to appoint a guardian -

"Subsequently, because both parties were representing themselves, in a case which I regard as an extremely difficult one and a case where the welfare of these children was seriously in doubt as a result of prolonged proceedings, I took the view that it was appropriate to appoint a guardian under rule 9.5 of the Family Proceedings Rules, and I am extremely grateful for the input not only of the guardian, Derek Carter, but also of Mr. Swales, solicitor for the guardian. I have to say that, without their assistance, this case would have been even more difficult than it is already. It was a great relief to have the experience of both those gentlemen in this court."

16. The judge then goes on to express the opinion that the guardian had done his best to engage with Mr. Stringer "but with very limited success". He records the guardian having expressed the view that Mr. Stringer was "psychologically disturbed". The judge shared that view, although neither he nor the guardian, as the judge himself acknowledges, had any medical experience rendering them capable of making such an assessment. The judge then goes on to say of Mr. Stringer: -

"He appears to have no concept about the welfare of the children, certainly their emotional requirements. He has a belief that he is right, that the system is wrong, the system has failed, the system is to be criticised. His approach is that he had contact before January 2003, therefore why cannot he have it again? He has no understanding at all of the emotional needs of these children and the damage that his behaviour could do."

17. The judge then relates how the guardian had engaged the services of Dr. Conn, a chartered psychologist, who had reported on 1 August 2004. The judge describes the report as "voluminous and helpful", and illustrative of the difficulties the children were suffering. The judge describes a session of face to face contact arranged by Dr Conn. The judge says: -

"I am not going to go into details but at page 55 and 56 of the report Dr. Conn expressed considerable concerns as to the way in which Mr. Stringer dealt with his daughter. That is something again flagged up in the guardian's report. The result is that the guardian, having tried to engage Mr. Stringer further, he has come to the conclusion, as indeed, has Dr. Conn, that, unless there is any therapeutic input by possibly Dr Conn or others, Mr. Stringer should not see these children and that his contact with them could be positively damaging. I have to agree with those sentiments based on the evidence which is before me in the bundle."

18. This leads the judge into the passage in which he decides to impose the section 91(14) order. The passage is a long one, but needs, I think, to be cited in full:-

"As I say, Mr. Stringer had indicated in a letter to the court he no longer wished to pursue the application but he was told by Mr. Swales that, notwithstanding that, he, on behalf of the guardian and Mrs. Stringer, were going to make various applications which

they have done, one of which is that he should not make any further application to the court concerning these children unless it is with the leave of the judge. I entirely agree. It seems to me that the court, the guardian and Dr. Conn have gone out of their way to try to establish a relationship between father and children. That it has not been possible to do so is quite clearly the refusal of father to engage with those persons and also to see that it is his behaviour which has the potential for causing emotional upset and harm to these two children. That he has not done so yet is a tribute really to mother's care and to the care no doubt given by (her husband) who is the father figure in this case, no matter what Mr. Stringer may feel.

It is in some respects with a sadness that I reach that conclusion. I am convinced that had Mr. Stringer engaged with the process a means would have been found whereby he could have assisted and contact could have taken place with a view to developing it into a regime which is the sort of regime with which all family courts are familiar, namely to a position whereby in the future there could have been staying contact, there could have been holidays. That he rejected that course of action is entirely to be laid at his door. The welfare of these children is paramount. It is to be protected. The only way, in my judgment it can be protected is if an order is made under section 91(14) of the Children Act prohibiting any further applications without the leave of the court.

These proceedings have been dragging on for five years. These children's lives have been emotionally in turmoil as a result of Mr. Stringer's applications to the court. That they are not maladjusted is really a tribute to the mother and her partner, because one knows that the sort of behaviour that Mr. Stringer has exhibited cannot be other than detrimental to these children. As I say, it is fortunate that they have the mother's strength of character to protect them from the worst of his excesses. In those circumstances, I propose to make the order. It will bear the attachment that any such application should come before me if practicable. I am well aware that, as a judge, one cannot look to the future but for entirely unforeseen reasons I may not be here. I also take the view that that part of the order will recite that really no consideration should be given to it unless there is some form of report from a psychiatrist or a psychologist indicating some progress so far as Mr. Stringer is concerned so that Mr. Stringer will realise when he gets the order that that is what the court has in mind and also so that any other judge who might be seized of this matter might realise that that was in the court's mind when the order was made."

19. On the conditions point, I have already made clear that I am in no doubt which side of the line identified in paragraph 10 of this judgment the judge's order falls. He was, to my mind, undoubtedly imposing on the making by Mr. Stringer of any further application under the Act, a condition that Mr. Stringer should have sought treatment and obtained a psychiatric or psychological report indicating that progress had been made in that treatment. In my judgment, that was impermissible, and the conditions attached to the section 91(14) order should be deleted. I would, accordingly, allow Mr. Stringer's appeal on that point and to that extent.

Previous orders made in the proceedings.

20. Although not referred to expressly in the judgment, it is plain that following Mr. Stringer's acquittal in the criminal proceedings in October 2003, orders were made by Judge Mitchell designed to investigate the factual allegations made by the children and disputed by Mr. Stringer. Thus on 31 October 2003, Judge Mitchell made a detailed directions order designed to lead to a two day hearing in March 2004. The judge's decision to appoint a guardian was made on 15 December 2003, and Mr. Carter was appointed on 15 January 2004. On 12 February 2004, Dr Conn was instructed to prepare his psychological assessment. As a consequence the hearing fixed for March 2004 was vacated, and re-fixed with a four day estimate for 27-30 September 2004. Judge Mitchell reserved the matter to himself. The substantive hearing on 27 September was, however, as we have seen, aborted when Mr. Stringer sought permission to withdraw his application. Should a section 91(14) order have been made at all on 27 September 2004?

21. The first question which arises under this heading is whether or not Mr. Stringer was given appropriate notice of the application for the order. Mr. Stringer says he was not, and that as a consequence the order should not have been made. The judge should haveadjourned the case for a formal notice of application to be issued and served on Mr. Stringer.

22. If, contrary to his first argument, Mr. Stringer did have sufficient notice of the application, the second question which arises is whether, on the facts as presented to him, the judge was entitled to make a section 91(14) order.

23. The third question, if the answer to the second is in the affirmative, is whether or not the judge was entitled to extend its duration until each child attained the age of 16.

24. On the first question, Mr. Stringer makes a number of points. His case is that he was not properly notified of the guardian's intention to apply for a section 91(14) order. He acknowledges that after he had applied to withdraw his application (something he told us he now bitterly regrets) he was told by the guardian's solicitor that an application for a section 91(14) order would be made at the hearing. It does not, however, appear that any formal application was lodged and served on Mr. Stringer. The only independent evidence in our papers is a letter from the Civil Listing Section Supervisor at the Canterbury County Court to Mr. Stringer dated 13 May 2005, which is in response to a request, dated 22 April 2005, from Mr. Stringer, requesting a copy of the section 91(14) Children Act application.

25. The letter from the court states, somewhat cryptically: - "I am writing in addition to my letter to you dated 13 May 2005 enclosing a copy of a latter dated 8 September 2004 from John Swales solicitors which sets out their proposed intention to ask for an order under that section. I am unable to find a copy of the formal application, if one were issued, within the court file."

26. Unfortunately, the letter itself from John Swales solicitors is not in our papers. I am, however, prepared to accept that it said what the Civil Listing Section Supervisor says it

said, and that some notice was given of the intention to make an application for a section 91(14) order, albeit that no formal application was issued and served on Mr. Stringer.

27. Mr. Stringer makes the point that he was a litigant in person; that, had he had more time, and had he been in a position to take legal advice, he would have appeared at the hearing to resist the making of the section 91(14) order. He points to the guidance given by Butler-Sloss LJ (as she then was) in Re P (a Minor) (Residence Order: Child's Welfare) [2000] Fam 15 at 37 and 38. He would also, I think, be entitled to rely on two other decisions of this court. In Re M (minors) (contact: evidence) [1998] 1 FLR 721, a judge's decision to make a section 91(14) order in circumstances in which a litigant in person had not had notice of the application, or the opportunity of dealing with it was set aside. In Re C (Prohibition on Further Applications) [2002] 1 FLR 1136, Dame Elizabeth Butler-Sloss P (as she had by then become) said at page 1142 that the judge should not have made a section 91(14) order of his own initiative, and without warning to either of the parents. She added that it was "wrong in principle, except in exceptional cases, to place a litigant in person in the position, at short notice, of an order that bars him from dealing with any aspect of the case relating to his children, particularly relating to contact".

28. At the same time, it needs to be remembered, I think, that section 91(14) does not impose an absolute bar on applications to the court. As Butler-Sloss LJ herself said of a section 91(14) order in Re P ([2000] Fam 15 at 38: -

"The applicant is not denied access to the court. It is a partial restriction in that it does not allow him the right to an immediate inter partes hearing. It thereby protects the other parties and the child from being drawn into the proposed proceedings unless or until a court has ruled that the application should be allowed to proceed. On an application for leave, the applicant must persuade the judge that he has an arguable case with some chance of success. That is not a formidable hurdle to surmount. If the application is hopeless and refused the other parties and the child will have been protected from unnecessary involvement in the proposed proceedings."

29. In my judgment, the most powerful piece of evidence before the judge which pointed towards the making of a section 91(14) order was the report of the guardian. It is dated 17 September 2004, that is nine days after the letter which the Civil Listing Section Supervisor says that the guardian wrote to the court setting out his intention to seek a section 91(14) order. Mr. Carter had been the children's guardian since 15 January 2004, a total of some eight months, when he wrote his report. He recorded having met and talked to the children on six separate occasions. He had interviewed Mr. Stringer twice, once in January, and once in March, and had also spoken to him once at court in January.

30. In paragraph 2.1 of his report, the guardian describes telephoning Mr. Stringer to try and arrange an appointment with him in order to discuss the report of Dr. Conn, to which reference has already been made and to which I will return. The guardian reports Mr. Stringer as saying that he was not in the Kent area and that he would not be available to

speak to the guardian. He is also reported as saying that he did not wish either to see or to read the guardian's forthcoming report, although the guardian informed him that an extra copy marked for his attention would be available at court as soon as it was filed.

31. Later in the report the guardian returns to his inability to engage with Mr. Stringer, and in paragraph 8.8 records the following: -

"Tragically, when I contacted Martin Stringer by telephone to try and make an appointment to discuss Dr. Conn's report, he was unwilling to meet with me, and expressed the view that the report was so worthless and prejudiced against him that he would not wish to discuss it. Not only did Martin refuse to make an appointment to see me, he also told me he had no interest in seeing my forthcoming report. He has no accommodation of his own at this time and I therefore persisted in asking how I should serve the report on him. Martin repeated his unwillingness to read or consider my report, and I undertook to lodge an additional copy of it with the Court office when it is filed on 20 September."

32. In paragraph 9.6 and 9.7 of his report, the guardian, under the heading, RECOMMDENDATIONS, writes: -

"9.6 I recommend that an order be made under section 91(14) of the Children Act 1989 that no application for an order under the Act be made by Martin Stringer without the leave of the court. (This is something which has previously been canvassed in Court, and the possibility of which Martin Stringer has been given notice.)"

9.7 If the Court accepts the recommendation under section 91(14) it may wish to make an indication that any application by Martin Stringer for leave to make an application under the Children Act should be accompanied by a psychiatric/therapeutic report regarding his progress in therapy and attesting to the therapist's awareness of issues in this report and that of Dr Conn (cf paras 7.6 and 8.5 above)."

33. The guardian's reference to paragraph 7.6 is to a paragraph in which he expresses the opinion that he found it impossible sensibly to consider any change in the children's residence. The reference to paragraph 8.5 is to an agreement between the guardian and Dr Conn that "...he issues around contact for the children were so serious that in fact further direct contact should only take place once Martin had attended therapy for a substantial number of months and produced evidence that his psychological functioning had improved in respects relevant to his appreciation of the needs of the children and his ability to deal reasonably and rationally with the issues and with the adults who would be important in setting up the contact and assessing it –ideally, of course, this would include the mother as well as professionals."

34. It is, moreover, clear from the following paragraphs (and from paragraph 8.6 in particular) that the impetus for a section 91(14) order with a condition of treatment imposed originated from the guardian and from Dr. Conn. I wish to make it quite clear, however, that I am not, at this point, concerned with whether or not the guardian's view

of Mr. Stringer was either right or wrong. It is both unnecessary and undesirable for me to form any view on the point, since I am not sitting at first instance and plainly have not heard evidence on it. What is relevant for my purposes is the effect which the guardian's report must have had on the exercise of the judge's discretion to make a section 91(14) order. I will return to this point after I have considered Dr. Conn's report, to which I now turn.

Dr Conn's report

35. As the judge remarked, Dr Conn's report, which is in our papers, is extremely long. It runs to some 65 pages. On page two he records the nine issues he has been asked to address. On page 3 he sets out his qualifications and experience. He then itemises the information he has accessed and the work he has undertaken. Over many pages he describes his interviews with, and his assessment of, the children. He then repeats the process in relation to the children's mother and her partner and then in relation to Mr. Stringer.

36. Dr. Conn's assessment of the mother and her partner was positive. His assessment of Mr. Stringer, on the other hand, was negative. He thought Mr. Stringer would "benefit from therapeutic input to help him deal not only with the stresses in his life but with his style of interacting with the world". He was clear in his view that the children should remain living with their mother. He regarded the question of Mr. Stringer's contact as "complex and difficult". He was opposed to direct contact taking place. It is apparent that the condition which found its way into the section 91(14) order made by the judge is prefigured by Dr. Conn's conclusion that "longer term contact would be more realistic and have a better quality should Martin receive some psychological assistance in his own right to reduce his stress and deal with the issues of major events in his life".

37. Dr Conn had been asked, as part of his instructions, to comment on "the relevance and weight to be attached to the various allegations made in this case both between the parents and by the children". I have already related how the allegations of physical assault made by J had led to Mr. Stringer being prosecuted, and then acquitted when the trial judge expressed the view that the allegations were better litigated in the family proceedings. Unfortunately, there never has been a judicial determination of the allegations in the family proceedings, or any judicial assessment of Dr Conn's opinion that "from a psychological perspective" there was "a considerable degree of credibility in terms of these allegations".

38. That conclusion, unsurprisingly, is one which Mr. Stringer rejects out of hand. His view is that he was acquitted on the direction of Rafferty J; that he is innocent and that there is no good reason why family life should not now resume. That, of course, as the judge pointed out, is directly contrary to the views of the children's mother, Dr. Conn and the guardian. Once again, it is neither my function nor my wish to express a view one way or the other on allegations which remain untested and on which there has been no judicial adjudication.

Mr. Stringer's letter seeking permission to withdraw

39. The final piece of the jigsaw which needs to be put in place in this context is the letter which Mr. Stringer wrote to the court withdrawing his application. We have in our papers an extremely emotional document from Mr. Stringer dated 30 August 2004 and headed Re: Leave to withdraw application. The document is what can only be described as an intemperate attack on Dr. Conn, the guardian and the court. Mr. Stringer makes it clear that he has, in his view:

    "… no realistic chance in succeeding in his application for residence with Contact to the mother, as was obvious from the tactics of the Court last November onwards, and thus there is no point at this stage in father continuing to fight this case, and he respectfully asks that the application be allowed to be withdrawn to save court time and public money."

Mr. Stringer's submissions

40. Mr. Stringer has placed a great deal of written material before the court. I have, of course, read all the documents in the bundle. The latest document from Mr. Stringer is a statement dated 14 October 2006 running to some 16 pages of single spaced typing on A4 paper. Much of what he says, both in this and in previous documents, goes to his sense of injustice for things past, and to the merits of his application for what he describes as a restoration of family life. One of his principal complaints, as I understand it, is that there has never been the finding of fact hearing envisaged by Rafferty J, the outcome of which, Mr. Stringer plainly believes, would have been a finding that he had not physically assaulted his children. He remains profoundly critical of Dr Conn, the guardian, his former wife and the court, none of whom, he believes, has acted in good faith.

41. Like many litigants in person – and this is no criticism of him – Mr. Stringer perceives this court as having the power to right what he perceives to be past wrongs, and to give him the hearing on the merits which he craves. However, in the final paragraph of his statement of 14 October 2006, he summarises his argument on the appeal neatly, when he says: -

    "The section 91(14) order has now run for 2 years and in effect longer, since I have not had any family life with my children for 4 years. Any normal and reasonable use of this "draconian" section, even when necessary, would have limited it in time to up to two years. In this case, the order was not necessary, and it was not employed in a reasonable fashion, and has now run its course in any case. I respectfully submit that the section 91(14) be removed so that I can prove my innocence in the Child Cruelty and other matters and a family life can be restored in accordance with the Human Rights Act."

42. These two paragraphs, in my judgment, encapsulate Mr. Stringer's case on this appeal. As I have attempted to make clear, this appeal is limited to the propriety of the section 91(14) order. We are not dealing with the merits or demerits of any future application by

Mr. Stringer. We are not dealing with events prior to the hearing before the judge in September 2004. We are dealing with the various parts of the one question identified by Mr. Stringer in the passage which I have cited in paragraph 41. In these circumstances, I do not propose to rehearse anything else Mr. Stringer has said.

Discussion

43. Was the judge entitled to make a section 91(14) order on 27 September 2004, given that neither the children's mother nor the guardian had made a formal application to the court on notice to Mr. Stringer and properly served on him? He accepts that he was given informal notice. He therefore knew that the order was going to be applied for. He was not, of course, to know that it would, in effect, be open-ended and would have conditions attached to it. He was, moreover, as he has pointed out, a litigant in person.

44. I have to examine this question as an exercise of discretion on the part of the judge. On the one hand, he had before him Mr. Stringer's application to withdraw. He had a discretion whether or not to refuse or to grant that application. He did the latter, and it is no longer open to Mr. Stringer to contest that decision, however much he may regret having made it.

45. The judge was then faced with both the mother and the guardian asking for a section 91(14) order. There had been numerous applications in the case. Black J, in her judgment of 19 July 2005 refers to some 40 to 50 hearings, and records Mr. Stringer's belief that it was nearer 100. The professional evidence before the judge, albeit untested, was overwhelmingly in favour of the children continuing to reside with their mother. In the extracts which I have cited from his judgment, the judge recorded that the proceedings had been going on since 1999. He described the file, from memory, as "well over a foot thick". He described the mother as having "spent a fortune in legal fees".

46. Mr. Stringer is entitled to make the point that the judge does not consider adjourning the application under section 91(14) so that a formal application could be issued and served on Mr. Stringer. The judge was also, of course, aware that Mr. Stringer was a litigant in person. In these circumstances, was he entitled to go ahead, even though the formalities had not been complied with?

47. I have come to the conclusion that he was. A judge in circumstances such as these has a very wide discretion over procedural issues. He has to be fair. But at the same time, he is, in certain circumstances, entitled to proceed to make orders even where the necessary formalities have not been observed.

48. Mr. Stringer had sought permission to withdraw, expressing the view that he there was no point in continuing to contest the case. He had not attended the hearing. The evidence from the guardian was that Mr. Stringer had refused to engage with him, profoundly disagreed with Dr. Conn's report and had no wish even to read the report of the guardian. In these circumstances, it seems to me that, given the other features of the case which presented themselves to the judge – namely the duration of the proceedings, the number

of applications, the settled nature of the children in their mother's care – the judge was, in the overall exercise of his discretion, free to consider making a section 91(14) order even though no formal application had been made.

49. It would, of course, have been better if the judge had himself addressed the procedural point. For him, it was sufficient that Mr. Stringer had been given informal notice of the application. On the facts of this case, however, I have come to the conclusion that such notice was sufficient. Given the tone of Mr. Stringer's letter withdrawing his application, and given his attitude to Dr Conn and the guardian, as recorded by the latter, I feel bound to conclude that, despite what he now says, I doubt very much if Mr. Stringer would have attended to argue the point, had formal notice been given. Even if I am wrong about that, however, I cannot see that it was wrong in principle for the judge to proceed to consider making a section 91(14) order in the absence of a formal application. I do not, accordingly, regard the failure to issue a formal application as a fatal bar to the making of the section 91(14) order.

50. I have also come to the clear view that, on the point identified in paragraph 22 of this judgment, the judge was entitled on the material available to him in September 2004, to impose a section 91(14) order. In my judgment, the facts of this case, as they presented themselves to the judge in September 2004 fulfilled the criteria identified in Re P. I have already rehearsed the relevant factors – the length of the proceedings, the number of applications, the fact of Mr. Stringer's withdrawal, and the lack of anything to be achieved in the interests of the children by further proceedings. The judge was, in my view, entitled to say that the time had come for a section 91(14) order to be made.

51. Was the judge entitled to impose an order which would, in effect, last until the children had reached the age at which, in normal circumstances, the court would in any event decline to exercise jurisdiction over them? This I have found the most difficult question. However, on reflection, I have come to the conclusion that, as an exercise of broad discretion, I cannot criticise the judge for imposing an order designed to last until each child was sixteen.

52. Such an order was, in my judgment, properly open to the judge to make on the facts as they presented themselves to him, and which I have set out in some detail. In effect, the judge was saying that the welfare of the children required an order which enabled them to live out the remainder of their respective minorities without being the subject of further applications to the court, unless Mr. Stringer first satisfied a judge that he had an arguable case with some prospect of success in relation to any application that he wished to make. There was, in my judgment, sufficient in the material before the judge in September 2004 to entitle him to take that view.

53. Where the judge, of course, went wrong was in imposing conditions upon any further application by Mr. Stringer. Furthermore, by imposing the condition he was, in effect, making findings of fact in relation to matters over which he had heard no evidence. If, as suggested in paragraph 9.7 of the guardian's report, the judge had made a nonbinding

indication, that would have been legitimate. However, as I have already stated, I cannot say that this was plainly wrong either to make an order under section 91(14) or to extend it as he did to last until each child was 16. With one further proviso, I would, accordingly, allow the appeal only to the limited extent of deleting the conditions attached to the order.

The future

54. I remind Mr. Stringer of the words of Butler-Sloss LJ in Re P which I have set out at paragraph 28 of this judgment. Section 91(14) imposes only a procedural bar. If Mr. Stringer can show that he has a reasonable prospect of success in a further application to the court, permission will be given for him to make an application.

55. I am, speaking for myself, quite satisfied that any such application should not be made to Judge Mitchell. Mr. Stringer would feel, and would be entitled to feel, that Judge Mitchell had prejudged the case against him and would not be in a position to assess his application with the objectivity it plainly requires. We have also reversed the judge on what he plainly thought was an important part of the order.

56. I would therefore also delete the reference in paragraph 2 of the judge's order to the application for permission to make a further application being heard by Judge Mitchell. In its place I would impose a direction that any application by Mr. Stringer to apply for contact with the children should be made to and considered by one of the Family Division Liaison Judges for the South Eastern Circuit and, if not determined by that judge, then it should be determined by a High Court Judge of the Family Division to be allocated by the Liaison Judge in consultation with the President of the Family Division.

57. As I have already made clear, I express no opinion on the merits of such an application. The merits will be a matter for the judge dealing with it. I do, however, take the view that the application should, in the first instance, be made on paper and without service on the children's mother. If the judge dealing with the application takes the view that an oral hearing is required, he or she will so direct. If that judge takes the view that the mother should be served with the application, that, too will be a matter for the judge.

58. I would therefore allow the appeal to the extent I have indicated.

Lord Justice Lloyd:

59. I agree.

Lord Justice Chadwick:

60. I agree, for the reasons set out by Lord Justice Wall, that this appeal should be allowed to the extent that he has indicated and that we should make the order and give the direction which he has proposed.