

Re A (No. 2) (Children: Findings of Fact)

[2019] EWCA Civ 1947

21/11/2019

Barristers

John Tughan KC
Rebecca Foulkes

Court

Court of Appeal

Practice Areas

Public Children Law

John Tughan QC and Rebecca Foulkes have represented the eldest child of the family throughout these complex proceedings in both the High Court and the Court of Appeal. This exceptional case concerns the death and alleged sexual assault of a 10-year-old girl (S). The local authority alleges that she was sexually assaulted and killed by either her mother, her father or one of her two older brothers.

The case was originally heard by Francis J who found that the local authority had not proved its case on threshold to the requisite standard of proof. His decision was overturned by the Court of Appeal and a re-hearing took place before Hayden J who found the mother responsible for the child's injuries, inflicted in the course of attempted female genital mutilation (FGM), and death. That decision has also been overturned on appeal and an unprecedented second re-hearing will take place in 2020.

In giving the lead judgment on appeal, Peter Jackson LJ found that Hayden J, having developed his own case theory which was not being advanced by any party, had failed to heed the guidance in *Re G and B* [2009] EWCA Civ 10 that if a judge is to go "off piste" and make findings of fact which are not sought by the local authority or not contained in its Schedule, then he or she must be astute to ensure (a) that any additional or different findings made are securely founded in the evidence; and (b) that the fairness of the fact finding process is not compromised. The Court of Appeal considered that the unprecedented finding which Hayden J made "faced insuperable difficulties, conceptually, evidentially and procedurally". In summary, the FGM finding was a critical finding of fact that had no basis in the evidence and there was a demonstrable failure to consider relevant evidence; the process was also fundamentally unfair because the finding had simply never been litigated.

The Court of Appeal went on to decline the local authority's request to substitute a four person pool finding that S's injuries and death may have been inflicted by one or more of her parents and brothers. The Court recognised that there was such a pressing need for a solution to the proceedings that a substituted finding should be made if it properly could be but determined that that could only happen where there was just one realistic consequence to the appeal being allowed, which was not the case

here.

Finally the Court of Appeal chose to exercise its broad discretion to remit the proceedings for a third fact finding hearing, holding that in these most unusual circumstances a second retrial was unavoidable and that it would serve the interests of justice.

To read the full judgment [click here](#).