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FAIRNESS (AND UNFAIRNESS) TO WITNESSES: AN ISW'S GUIDE TO *RE W (A CHILD)* AND TO *RE E (A CHILD)*

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The possibility that judgments may be published and the names of witnesses, particularly experts, included, and subject to criticism in the judgment, raises the question of what redress such witnesses may have if the criticism is unfair. Two Court of Appeal decisions now shed some light on this.

In the opening paragraph of his judgment in *Re W (A Child)* [2016] EWCA Civ 1140, McFarlane LJ (as he then was) sets out the question to be resolved 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?'*

The answer turns out to be a good deal longer than the question.

***Re W (A Child)*: the facts**

One of the difficulties about providing an analysis of this case, which will act as a guide to others in similar circumstances, is that only the briefest facts are given. This is because anything which might identify the individuals would defeat the decision, which was that they *should not* have been named and *should not* have been criticised. Nonetheless, the decision turns on its particular facts, and any attempt to use it in the future will require a comparable factual matrix.

What then can be gleaned? The case started with a fact-finding hearing before a circuit judge, sitting as a Deputy High Court Judge. The eldest of a group of siblings had made allegations of sexual abuse in relation to various family members. At the end of a lengthy hearing, the judge found that none of the allegations of sexual abuse were proved. Threshold was crossed on other, unrelated, grounds, but by the time the judgment was given in the appeal, all children were back home with no public law orders in force.

At the end of the hearing, the judge gave an oral 'bullet-point' judgment, which was to be followed later by a detailed written judgment. These bullet points included findings that a named social worker (identified only as 'SW') and a named police officer (identified only as '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.' (McFarlane LJ at para 7)

The first key point is that these scathing criticisms had not formed part of the case presented by any of the parties at the hearing. Neither SW nor PO had been cross-examined on this basis when they gave their evidence. The judge did not raise the concerns himself in the course of the hearing. The findings were said to come 'out of the blue', and the first anyone knew about them was when the judge delivered his oral, bullet-point judgment.