

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF EG (A CHILD)

BETWEEN:

MA

Applicant;

-and-

JG

Respondent.

WEIR J

The nature of the proceedings

[1] On 30 August 2006 EG, the child of the applicant and the respondent, was born. The applicant father, a foreign national, has never seen the child and the mother who is the respondent is opposed to any contact between the father and their child. The applicant made an application on 14 December 2007 under Article 8 of the Children (NI) Order 1995 for contact with the child, which application has been making its desultory way from the Family Proceedings Court where it remained until 1 December 2008, to the Family Care Centre where it stayed until 1 September 2009 and thence to the Master in Care and Protection with whom it rested until 11 December 2009 when it was transferred to me by her.

[2] It has been apparent since at least 1 December 2008 when the respondent was interviewed by a Court Welfare Officer that the respondent is contending that the child was conceived as a result of an incident of rape perpetrated upon her by the applicant and for that reason she is opposed to

the applicant having any form of contact with the child, has not named the applicant as the father on the child's birth certificate and does not intend telling the child the identity of its father. It has therefore been equally apparent since that date that it would be necessary to conduct a fact-finding hearing in order to establish what had occurred. Notwithstanding this obvious requirement no steps were taken at any level to carry out this essential exercise until the matter was ultimately referred to me and first reviewed on 25 January 2010. On that date I arranged to hold the fact-finding inquiry on the first available date of 22 March 2010 when the applicant and the respondent gave evidence.

The evidence

[3] There was in fact a considerable degree of agreement between the parties in relation to most of the facts leading up to the child's conception. The respondent, upon whom lay the burden of establishing the alleged rape, gave evidence that in the latter part of 2005 and the early part of 2006 she worked in the evenings and weekends in a taxi office. Near that office was a hot food outlet where the applicant was employed. The staff of the taxi office sometimes obtained food from the food outlet and so there was a certain amount of coming and going between the two premises. The respondent knew the applicant to see but they had had very little conversation on account of his incomplete grasp of English. Other employees of the office were in the habit of making jokes to the respondent about the applicant, referring to him as "the boyfriend". However, there was in fact no contact of any meaningful sort between the two until one evening in November 2005 when the respondent was on her way home from a christening party in a taxi at midnight or thereabouts and it was suggested to her by the taxi driver, one of the employees of her taxi office, "why don't you go round to the 'boyfriend'?" After what she described as a bit of cajoling she agreed to go round to his house having she said had quite a few drinks from 7 pm the previous evening. In describing her condition she said "I was more than tipsy". She said that she went in, they sat and talked and ended up having a kiss and then both fell asleep in the applicant's bed. She said that in the morning she went home and got ready for work and that after that she only saw the applicant when collecting food from his premises.

[4] The second (and final) significant encounter between the parties, also initiated by the respondent, occurred on the night of 1/2 January 2006. On this occasion the respondent had been out from about 12 noon on New Year's Day and was drinking until about 1 am on 2 January at which stage the bar ceased to serve drinks. She left it at about 3 am with her friend to walk home and they passed the hot food bar on their way. When they saw that the food bar was closed the respondent sent a text message to the applicant to ask him why it was closed. Apparently she had saved his number in her mobile phone and believes that he had given it to her at the time of her visit to his

home and in the intervening months she had texted him the odd time to see how he was and he had replied. On this occasion he answered that he was at another hot food bar where he was talking to friends. The respondent immediately went round there passing on the way her friend's home and her friend went in. The applicant carried on alone to the other hot food shop where there were 2 or 3 other people whom she knew standing with the applicant. She joined them and asked if there were any chance of some food. At this point there was a minor divergence of evidence because the applicant said that he arranged for something to be made for her whereas she says that no food was available. In any event the applicant walked back with the respondent towards her flat and she invited him in because he was "dead on". She said that they were having a chat and a laugh and that she had invited him up to the flat as she was not ready to go to sleep. She described her flat as having a kitchen, a living room which doubled as a bedroom and a bathroom. They sat on the bed as there were no other seats and were talking and had a kiss. She said that he then tried to manoeuvre her clothes and she said no. At that point she said that she went to the bathroom where she put her nightdress on and came back, getting into bed, talking a little bit more, probably having a kiss again before she then went to sleep. She estimated the time at which she went to sleep at 4.00 to 4.30 am. According to the respondent she woke up to find the applicant on top of her having just ejaculated inside her. Her pants had been pushed to one side and she fixed them back and just lay there without saying anything. After an hour or two hours it was 8 o'clock and she said to the applicant "You have to go, I need to get ready for work". According to her the applicant said "Cheerio". The applicant says that she then ran a hot bath and lay in it until lunchtime. She did not make or receive any calls that day nor did she go to work. On the next morning around 6.00 am her telephone records show that she telephoned the Samaritans and had a conversation that lasted 13 minutes. She says that the Samaritans advised her to phone her GP so she did that and made an appointment. Her GP patient record for the relevant period was put in evidence from which it appears that she had a telephone conversation on 3 January with a doctor and attended the surgery on 4 January 2006 when she saw the same doctor. There is no mention in the notes of any allegation of sexual assault. The relevant passage from the note of 4 January 2006 says:

"Feeling low past 2-3 months. Poor appetite. Difficulty getting to sleep and then problems getting up. Poor concentration. Loss of interest. Changed job about one month ago - loves new job. No obvious ppt for low mood. Much worse over past few days."

She said that she did not want to discuss what had happened with her doctor who was well known to her and that she wrongly mentioned that she had been in a low mood for two months so that he would refer her to the

community psychiatric nurse, believing that he would not have done so had she dated her low mood only to the previous two days.

[5] When her next period was overdue she carried out a test on 16 February 2006 and found that she was pregnant. She told her friends what she said had happened and later her parents and they advised her to report the matter but she did not do so. When she went for her first antenatal examination with the midwife on 27 March 2006 she first told anyone in authority about what she said had happened. She said that she did this because she was fearful that she would not bond with the baby given the way in which it had been conceived. In her notes the midwife has recorded:

“Unplanned pregnancy. [Respondent] states that pregnancy was a result of a ‘date rape’, states she feels happy re pregnancy now, has good support from her family and friends and has not reported the alleged incident to the police or any other authority. Today she does not wish to speak to a social worker as offered and feels she is coping well with the pregnancy and very much wants this baby.”

The midwife was concerned by this information and reported the matter to the social worker. The respondent said “I didn’t report it to the police because to me it was my fault and there was nothing they could do anyway. That was the way I felt.” She said that a couple of weeks after the second encounter the applicant had come into her taxi office, taken her by the jaw and tried to kiss her. That night she left her employment at the office and never returned. Subsequently she had seen the applicant a few times on the street and then later when she had begun working in another office he had come in several times as a customer and she had several times been obliged to serve him which she had tried to avoid doing. She said “I just acted like I didn’t know him”. She said that he was not trying to avoid her and she had no conversation with him about what had happened in early January. She did not tell the applicant that she was pregnant and when later a friend of his noticed that she was pregnant and asked her about the father she had replied that the pregnancy was the result of a one night stand in Belfast. Since the child’s birth on 30 August 2006 she had had no contact with the applicant. She first became aware that he was seeking contact with his child when a social worker called in connection with his application.

[6] In the course of cross-examination the respondent said that she had never before invited someone that she casually knew into her house in this way. On the occasion of their second encounter she thought when she invited the applicant to come in that they would kiss and she did not think before changing into her nightwear that she needed to ask the applicant to leave as they had spent the night together on the previous occasion and

nothing had happened. She said that upon waking to discover what had happened she did not go to the bathroom to wash nor did she ask the applicant to leave until later when she told him that she needed to go to work. She said "I was ashamed of the night's events." She rejected a suggestion that it was easier for her to tell her family that her pregnancy was due to having been raped by this applicant and further denied his case which was that they had had consensual intercourse on three occasions during that night. In reply to a question from me the respondent said she did not mind the applicant staying and that she would probably have seen him again if this had not happened. She was happy for him to stay and to share her bed and was not at any stage aware that intercourse was taking place until waking after the applicant had ejaculated when she found that her underwear had been moved aside.

[7] The applicant was called and confirmed most of the respondent's evidence apart from that relating to the crucial issue as to whether intercourse was or was not consensual. He confirmed that on the occasion of their first encounter the respondent had arrived at his house having been drinking. He himself did not drink and has never done so. They had sat together chatting and watching TV and had then gone to bed wearing their day clothes. Nothing more than kissing had occurred on that night. They had met on a few occasions subsequently either in his food bar or in her taxi office but they had not been alone again together until the night of 1/2 January. On that evening he had been in his house until midnight when he went out to get something to eat. Between 2.30 am and 3.00 am he had received a text message from the respondent and phoned her back to tell her that he was at a particular hot food bar. He said that she came there and he met her outside and asked his friend to make her some food which he had done. The respondent had gone home with him and invited him into her house. They had sat down and talked and started kissing after about half an hour, sitting on the bed in the bedroom. She had gone to change out of her clothes and before that nothing else had happened. In particular the applicant denied that he had tried to touch her. When the respondent returned she was in her nightclothes and they continued to talk and then went to her bed together. The respondent had initiated the sexual encounter and was fully awake. They had intercourse on three occasions, it was about two hours before they went to sleep and then they only slept for an hour and a half at which time the respondent said that she had to get up. Both were fully naked during intercourse and at no time had the respondent told the applicant to stop. He confirmed that no form of contraception had been used. According to the applicant, when they woke up the respondent was perfectly normal and everything seemed normal between them for a month or so and then the respondent had stopped talking to him. He agreed that he had been into her office many times afterwards but denied that he had tried to kiss her and again denied that he had had intercourse with the respondent while she was asleep saying that on the contrary she was awake and participating. He had

found out from friends that she was pregnant and had spoken to the respondent to ask whether he was the father but she did not reply. He said that he had never before been in any girl's house for sex nor had he on any occasion since.

[8] In cross-examination it was suggested to the applicant that he had not had intercourse with the respondent on the first occasion because she was not drunk enough for him to take advantage of her. He denied that he had taken advantage of her and said that the respondent had taken his clothes off and her own while they were in bed and that they were both awake during intercourse. He denied that the respondent had ever said that she was unhappy about what had happened and said that she had merely said that she had to go to work. He said that she was intoxicated to the same extent in the November as she had been on the subsequent occasion in January. He had tried to phone her the following week but her phone was off and he was told by his friend that the respondent had said that the father of the baby was a Portuguese. After the baby was born his friends had seen her with it and he had tried to make contact with her through them and eventually had gone to his solicitor to make the application for contact. He agreed that he was claiming asylum and has a temporary permission giving him the right to remain in the United Kingdom while his application for asylum is processed and had had that permission since before the second encounter. He emphasised that the respondent had not shouted at him or told him to get out of the house and that everything was normal. He had left first and she did not shout at him.

[9] The only other available material that bears upon the issue is the report of 1 December 2008 by the court welfare officer who interviewed both the applicant and the respondent in an attempt to reach an agreement in relation to the contact application. In the course of her interview she obtained an account from each of them as to what had happened in the encounter that led to conception. In the respondent's account she does not mention changing into her nightclothes after she had rejected the respondent's advances but states that she "then fell asleep". She further told the social worker that when she woke up on the following morning "she shouted at the applicant and told him to get out of her house". There is no mention in the account to the social worker of waking up during the night to find the applicant having just ejaculated inside her nor did she say anything in evidence before me about shouting at the applicant to get out of the house.

Conclusion

[10] The respondent was an unconvincing witness. It is clear on her own account that both encounters were initiated by her after she had had considerable amounts of alcohol. On the first occasion she went, possibly with some encouragement, to the applicant's home and after some kissing

willingly spent the night in his bed. On the second occasion, having parted from her friend, she met the applicant, brought him to her home with the expectation that they would kiss and they did so. According to the respondent she asked the applicant to desist when he sought to go further and he did so. At that point one might have expected anyone in her position to ask the respondent to go home so that she could go to bed. According to her, however, she thereupon went into the bathroom and changed into her nightdress before coming out again, talking with and kissing the applicant further and then willingly getting into her bed with him. When challenged about this course of action she said that she did not think that she needed to ask him to leave as they had previously spent the night together and nothing had happened. On this occasion, of course, according to her something unwelcome had threatened to happen that she claimed she was not prepared to permit and yet she thereupon changed into her nightclothes, resumed talking and kissing and retired to bed with the applicant. I found that account frankly incredible.

[11] Furthermore, her evidence of having fallen asleep and woken up after the applicant had moved her pants to one side, got on top of her and had intercourse with her to the point of ejaculation was equally unconvincing. So too was her claim that upon discovering what had happened she had not protested or gone to the bathroom to wash but had remained lying in bed beside the applicant until 8.00 when she told him that she had to go to work. She did not repeat in evidence the assertion that she made to the social worker that she had shouted at the applicant and told him to leave and I do not believe that she did so.

[12] I have concluded that the truth of the matter is encapsulated in her remark made in the course of evidence "I was ashamed of the night's events". In my judgment the respondent was perfectly happy to go to bed with and to have intercourse with the applicant provided that none of her friends or family knew about it and the fact that she had a good deal of drink taken meant that she was careless about or heedless of the need for contraception. On her own case she did not tell anyone; doctor, friends or family, her version of how the conception had occurred until after she realised that she was pregnant and worked out, going by her dates, that the child must be the applicant's. The suggestion made to her, which she rejected, that it was easier for her to tell her family that she had been raped than to admit that she had engaged in consensual intercourse with the applicant seems to me to represent the true essence of her position. Her delay in saying anything until she knew she was pregnant following a test on 16 February fits with the applicant's evidence that the respondent suddenly ceased to speak to him about a month after the second encounter.

[13] It follows that I am not satisfied, whether on the balance of probabilities or indeed to any acceptable standard, that the child was

conceived as a result of the rape of the respondent by the applicant. I conclude, on the contrary, that the conception was the result of consensual intercourse between the parents however much the respondent may have regretted the events of that night both before and, more especially, after she discovered that it had resulted in her becoming pregnant by the applicant. Accordingly I reject the respondent's explanation for refusing the applicant contact with their child.