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A WEAKNESS IN THE SYSTEM

The case of *Re J (a child)*¹ heard earlier this year by the Court of Appeal raises important questions about the adequacy of the current system of appeals.

The case involved an eight-year old boy who, it was said, loves his mother and had regular contact with her until he was the subject of a "freeing order" made by a county court so that he could be adopted. The case involved a hotly disputed claim that the mother was not suitably responsible for the demands of motherhood.

At the heart of the legal debate is a very simple question: if the High Court can, through judicial review, invalidate earlier decisions of itself and lower courts where they are found to have been made in a procedurally improper way, and if the House of Lords can do the same thing in respect of its decisions, who has jurisdiction to review the Court of Appeal? If the answer is, as some might say, "no court can review the procedural work of the Court of Appeal" is that fair?

The need for a fair system of appeal is paramount in any legal system reliant upon public confidence. As Lord Woolf, then Master of the Rolls, says in his seminal report on the modern civil justice system²:

"An effective system of appeals is an essential part of a well-functioning system of civil justice. There can be no doubt about the importance of the availability of appeals to ensure that redress can be obtained for mistakes by a lower court...Save in exceptional cases, an individual who has grounds for dissatisfaction with the outcome of a case should in my view have at least the right to have his case looked at by a higher court, if only to consider whether to allow an appeal to proceed any further."

The significance of this question is enhanced when one turns to the output of the Court of Appeal. The caseload is considerable. In 1998, the last year for which figures are available, there were nearly 9,000 applications for leave to appeal in the Criminal Division of the Court of Appeal, and nearly 2,000 cases set down for a hearing in the Civil Division.³ Not only do these courts "legislate" on important points of ambiguous law, but also the sheer bulk of cases dealt with is substantial.

After the freeing order had been made in *Re J*, the mother appealed to the Court of Appeal arguing that the county court judge had acted irrationally, ignoring the thoughts of the child and flying in the face of the medical expert evidence. However, last July the Court of Appeal summarily refused permission for the appeal to be heard.

The trouble is the Court of Appeal appeared to close the door on the appeal by applying the wrong test. Instead of asking the traditional question "are the grounds for appeal arguable?"⁴ they instead applied the stricter test "does the appeal stand a realistic chance of success?".

¹ On appeal from the Reading County Court, *Wokingham District Council v Sharon Judge and Mrs Marion Always* Guardian ad litem No PTA 1999/6629/2

² Access to Justice, Final Report, The Rt Hon the Lord Woolf, July 1996, London HMSO, p.153

³ Judicial Statistics, 1998, Government Statistical Service, CM4371, , pp. 11-4

⁴ per Lord Donaldson of Lynton in *Iran Nabuvat* [1990] 3 All ER 9 at 10h

In February 2000, the mother went back to the Court of Appeal and applied for the July 1999 appeal decision to be set aside. This application was rejected after a two-hour hearing, in which the Court doubted whether the Civil Procedure Rules 1998 applied in such family law cases.

Rule 3.10 of the Civil Procedure Rules appears to give the Court of Appeal (Civil Division) the power to rectify mistakes. Surely, though, the Court of Appeal should be able to rectify errors in the way it dealt with an earlier case by setting aside the first decision?

It was also argued that if Lord Hoffman had been sitting in the Court of Appeal when he gave judgement in the Pinochet⁵ case, the Court of Appeal could and should have set aside that decision in the same way that the House of Lords did. She stated that if the Court of Appeal decides that it does not have jurisdiction to set aside a fundamentally flawed decision it will have the unique distinction among all British courts of having the power to deliver fundamentally defective judgements that cannot be domestically challenged. The Court of Appeal stated that even if they did have jurisdiction to set aside an earlier decision on the grounds of procedural irregularity, the circumstances of the way Re J had been heard and appealed came "nowhere near" the level of error needed before they would set aside a decision.

There is another factor which aggravates this dispute. If the mother's case prevailed it would mean that thousands of Court of Appeal decisions each year would be technically vulnerable to being reviewed. In practice the real number of such claims would have to reflect hard evidence of procedural irregularity so there would, in all likelihood, be very few.

Nonetheless, the Lord Chancellor's Department might be watching developments here very closely as the legal environment in which this appeal takes place is one in which the government has for economic reasons been keen to reduce the number of appealed cases. Indeed this has been legislated as section 55 of the Access to Justice Act 1999 introduces the idea that, in general, only one appeal should be permitted in every case. The mother in Re J might well be wondering what happened to her chance of even one appeal. Through her eyes, permission to appeal was refused by a court on specious grounds and she was then told that that decision could not be challenged. A disturbingly Kafkaesque plight.

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⁵ In Re Pinochet Urgarte (1999) HL www.parliament.the-stationery-office