Neutral Citation Number: [2024] EWCA Civ 874

Case No: CA-2024-000674

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
HH Judge Tolson KC sitting as a judge under s.9(1) of the Senior Courts Act 1981
OX22P00304

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 July 2024

Before :

LORD JUSTICE BAKER
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WARBY

- -

E, F AND G (INTERIM CHILD ARRANGEMENTS)

- -

- -

Christopher Hames KC and Olivia Gaunt (instructed by **Lyons Davidson**) for the **Appellant**
The Respondent appeared in person.

Hearing date : 23 July 2024

- -

Approved Judgment

Judgment Approved by the court for handing down.

LORD JUSTICE BAKER :

1. This is an appeal by a mother against orders made in private law children proceedings between the parents of three girls, hereafter referred to as E, aged 11, F, aged 10 and G, aged 8.

2. The mother, who was born in Egypt, and the father, who was born in Pakistan, met in 2010 and married the following year. The three children were born in 2012, 2013 and 2015 respectively. At an early age, G was diagnosed as being on the autistic spectrum. The marriage ran into difficulties and the parents separated for short periods in 2018 and 2020, with the mother and children moving into a refuge on each occasion.

3. In July 2022, the marriage broke down finally and the mother and children again moved into a refuge, where they remain. The proceedings started when the father applied under s.8 of the Children Act 1989 for a child arrangements order, a prohibited steps order to prevent the mother removing the children from the jurisdiction or outside their home town, and a specific issue order that the father be allowed to take the children on holiday.

4. Subsequently, the father made a further application for a female genital mutilation protection order ("FGMPO"). It is his case that the mother comes from a culture where FGM is prevalent and that, if she is allowed to take the girls to Egypt, there is a likelihood that they will be subjected to FGM there.

5. The mother opposed all applications and raised allegations of domestic abuse, including physical abuse of the children, and coercive and controlling behaviour towards her both during their marriage and after their separation. The mother alleged that the FGMPO application was an attempt to utilise the litigation as a means of coercive control. The father denied her allegations and made cross-allegations that the mother had been aggressive and abusive to him in front of the children. He also alleged that she had tried to poison him with rat poison. The mother denied all the allegations.

6. At the First Hearing and Dispute Resolution Appointment before a district judge in October 2022, the father's contact was restricted to weekly indirect video contact for 30 minutes plus one letter a month. At a further hearing on 24 March 2023 before the designated family judge, HH Judge Moradifar, a series of interim orders were made including (1) FGMPOs and prohibited steps orders against both parents preventing them from removing the children from the jurisdiction (made on the basis that neither parent opposed the orders without making any admissions as to the allegations); (2) an order for the father to have supervised direct contact with the girls at a contact centre, plus telephone contact; (3) a direction for a Cafcass report under s.7 of the 1989 Act; (4) permission to the parties to instruct a single joint expert in FGM; (5) allocation to HH Judge Tolson KC and listing for a pre-trial review with ancillary case management directions, including special measures and interpreters.

7. On 19 May 2023, the s.7 report was filed by the Cafcass officer. In the course of her inquiries, she had spoken to the children. Her report included the following passage:

> "37. Multiple and complex allegations are maintained between parties regarding both abusive behaviour toward the other and

> of both towards the children. The children make allegations that [the father] has locked them in their rooms, hit them with items such as coat hangers and shoes and is critical of their clothing. They report feeling scared due to incidents and both G and F wish their father to be calmer and stop being angry. They all remember an incident where they feel their father tried to hurt himself with scissors/knife and by banging his head on a wall. E remembers her parents arguing every day and has nightmares. Both E and F allege they witnessed their father damaging their mother's car from the window of the family home. None of the children reports any concerns in relation to their mother's care. All of the children have both negative and positive memories of their father but they share that they do not feel safe in his care and believe he has difficulties managing his anger.
>
> 38. "[The father] has admitted to throwing a phone in the presence of the children and damaging a laptop. He felt that the children would not have noticed that he had damaged the laptop and this would not have affected them. [The father] states he is currently two sessions in to the Managing Strong Emotions" course which he believes he started in around January 2023. He states the delay is due to 'them being really busy'. [The father] does not feel he has difficulties managing his emotions or anger. He stated he 'would do anything to spend time' with his children. I am concerned that, should the wider allegations being made by [the mother] and the children regarding his behaviour be true, [the father] lacks insight into his own behaviour and is unlikely to benefit from such a course, in addition to the significant length of time that this course is currently taking. My understanding is that the maximum length for such a course is 8 sessions of 2 hours each. [The father's] rate of progress regarding this is therefore a concern as it may be an indication of a lack of commitment and/or prioritising this to make positive changes in risk for his children."

8. The Cafcass officer's recommendations included that a fact-finding hearing into the cross-allegations be held as the allegations presented "a barrier to safe contact progression"; that following the hearing there should be an addendum Cafcass report in the light of any findings made; that in the interim, contact should continue to be supervised at a contact centre on a fortnightly basis for two hours, with contact records kept and disclosed to the court; that the telephone contact should continue on a different basis; that the father give an undertaking not to criticise or speak negatively to the children during contact; and that the father attend a parenting programme and an additional programme for parents of children with autism.

9. At the PTR before Judge Tolson on 21 July 2023, directions were given for a fact-finding hearing over two days in October 2023. The contact arrangements were varied so as to provide that "father and the children may during the contact session leave the

contact centre and spend time in the community, provided the contact remains fully supervised."

10. At the hearing on 12 October, however, the fact-finding hearing was adjourned to dates in March 2024. Directions were given for the single joint expert on FGM to be asked further questions. Further case management directions were given, including for a qualified legal representative ("QLR") to be appointed on behalf of the father. The Cafcass officer was directed to file an addendum s.7 report "that shall focus upon her recommendations of the progression of contact and record her updating discussions with the children". The contact order was varied again to provide:

> "Mother shall continue to make the children available to spend time with the father on a supported basis at the contact centre for 2 hours each fortnight. This shall mean that the requirement to provide contact notes and for full supervision is no longer necessary, however a third party shall be present throughout to support contact."

11. The Cafcass officer's addendum report was filed on 29 January 2024. Both parents told her that contact had gone well. The father told her that the children kept asking him when they could come to spend the night with him, and that the mother had recently sent a text message asking for forgiveness and wanting to resume the relationship. In passing, I record that a copy of the text message was included with the father's skeleton argument for this appeal. The father had been on the Umrah pilgrimage to Mecca at the time. The mother wrote:

> "I hope you a good Umrah and all the best and also give my forgiveness to you for anything that I might have done wrong to you Allah is witness I didn't mean any harm to you. I want all the bad things stay in the past and us opening new page in our relationship for the sake of our children, I wish all the best in your life".

At the hearing before us, Mr Christopher Hames KC, who appeared leading Ms Olivia Gaunt on behalf of the mother, stated that this message did not disclose any wish to resume the parties' former relationship. The father, however, told the Cafcass officer that he took the email as evidence that all the mother's allegations of abuse were untrue. He said that he would like unsupervised staying contact every fortnight.

12. In her addendum report, the Cafcass officer set out details of her further conversations with the children which she summarised as follows (paragraph 21):

> "The children's wishes and feelings remain clear regarding how they would want time with their father to look. They were clear that their experiences with their father at contact since May 2023 to present have been positive in the main, but they do not want overnight stays with [him] and want to continue to see him on a fortnightly basis in the community, particularly to be able to do a wider variety of activities with him. Positively, all the children stated they would feel comfortable spending time with him unsupervised. The children's reasons for not wanting

> to have overnight contact with their father differ …. Underpinning this subconsciously is also, in my view, likely to be linked to their experiences when living with their father in relation to allegations of domestic abuse and abusive parenting."

Under the heading "Is there any change to recommendations/final recommendations?", the Cafcass officer wrote:

> "25. The extent to which it is safe and in the children's best interests for contact to progress in line with their wishes and feelings remains dependent upon the findings made in relation to both parties. This will shed light on the dynamics affecting the children's wishes and feelings, particularly regarding their reluctance to spend time with their father overnight at his home and any risk of ongoing coercive control.
>
> 26. There are no changes to recommendations at this stage as a finding of fact has not yet taken place ….
>
> 28. I recommend contact continues to be supervised in the community in the interim as per initial recommendations …."

13. In the period leading to the adjourned hearing, it became apparent that the court might not be able to identify a QLR to attend the hearing. At the suggestion of the mother's solicitors, the father sent to the court questions which he wished to be put to the mother at the fact-finding hearing. No QLR was available and, at the hearing, Ms Gaunt on behalf of the mother, following the guidance given by the President of the Family Division in *Re Z (Prohibition on Cross-examination: No QLR)* [2024] EWFC 22, invited the judge to proceed with the hearing and to put questions to the mother in place of the father. The father, acting in person, invited the court to adjourn so that he could be represented by a QLR. After hearing submissions, the judge delivered a judgment in which he rejected Ms Gaunt's proposal and decided to adjourn to allow for the search for a QLR to continue.

14. The judge then proceeded to hear submissions on the arrangements for contact until the next hearing. The father conceded that there should be no overnight contact at this stage. On behalf of the mother, Ms Gaunt argued for the existing supervised (or "supported") contact to continue. The father sought the removal of the requirement for supervision. The judge then delivered a second judgment in which he decided that the contact need no longer be supervised. Ms Gaunt made an application for permission to appeal which was refused. The hearing concluded with discussion about arrangements for the next contact visit.

15. The order made following the hearing included the following recital:

> "The issues had narrowed. The father no longer seeks overnight 'time with' arrangements and the children are reported by the Cafcass officer as desiring unsupervised time with their father, although they do not wish to stay overnight. The mother continues to press for 'time with' arrangements to be

> supervised. The Cafcass officer continues to recommend supervised arrangements in the absence of a fact-finding investigation."

Under paragraph 1 of the order, the proceedings were adjourned to 25 and 26 July 2024, the hearing being defined as "intended as a fact-finding hearing into the mother's allegations of domestic abuse and the father's allegation that the children are at risk of female genital mutilation. It is also planned as a final hearing to deal with welfare outcomes." The order for interim contact arrangements under paragraph 7 was for one supported visit as under the previous arrangements followed by four hours on alternate weekends "to be unsupervised, but the father must inform the mother of the activities which he intends for the children in advance", the first such visit to be on 31 March 2024. In addition, the order provided for indirect contact via video link twice a week, the mother not to be present on those occasions.

16. On 26 March 2024, the mother filed a notice of appeal against the judge's decision to adjourn the hearing and the order for the father to have unsupervised time with the children. On 27 March, I granted permission to appeal, listed the appeal for a date in April 2024 and stayed the order for unsupervised contact pending the hearing of the appeal. Subsequently, the appeal hearing was adjourned to allow the father an opportunity to seek representation through Advocate and was relisted on 23 July 2024, two days before the adjourned hearing before the judge. The attempts to secure representation for the father at the appeal hearing were unsuccessful and he has appeared in person before this Court.

17. Following the judge's decision that contact should move to an unsupervised basis, the Cafcass officer submitted a s.16A risk assessment to the court and made a referral to the local authority. This prompted an application by the mother's representatives for leave to adduce fresh evidence, initially in the form of the report. In the event, the report has not been disclosed to the parties, but the mother nevertheless pursued an application to adduce as fresh evidence the fact that the Cafcass officer has submitted the s.16A risk assessment and made a referral to the local authority. At the outset of the hearing before us, we informed Mr Hames and Ms Gaunt that we would reserve a decision on the application until we had heard further argument. In the event, as will become clear, I have reached a conclusion on the appeal which obviates the need to consider whether to admit the fresh evidence.

18. When the appeal was adjourned and listed in the same week as the next hearing before the judge, the mother applied for the adjournment of the latter hearing. The father agreed and a consent order was presented to the judge. He, however, refused an adjournment, for reasons set out in an email to the mother's solicitor in these terms:

> "You have agreed an adjournment. The father is unrepresented however. I have not seen the grounds of appeal. However, as I understand it the appeal is based, essentially, on the assertions that (i) I should not have adjourned for the purposes of obtaining a QLR for the respondent; and, (ii) I was wrong to order interim "time with" arrangements extending beyond supervision/support. If the appeal were to succeed on (i) then it would seem unfortunate that the consequence is still further delay when the CA will in fact be telling me to get on with it.

If the appeal succeeds on (ii) then there will be a further reason to consider interim arrangements at an early stage."

19. The judge's understanding of the grounds of appeal was correct. The grounds submitted to this Court were as follows:

1. The judge was wrong to order unsupervised contact in circumstances where:

(a) the court had at a previous hearing directed that an element of fact-finding was necessary to determine the mother's allegations of domestic abuse against the father, which included allegations that he had been physically abusive to the children;

(b) the judge had (wrongly) adjourned the fact-finding hearing on the father's oral application;

(c) he failed to heed and follow the guidance at paragraph 25 of PD12J of the Family Procedure Rules 2010;

(d) he failed to consider all aspects of the children's welfare by reference to the 'welfare checklist' in section 1(3) of the Children Act 1989;

(e) he was wrong to find on the available evidence that the children wanted to spend time with the father unsupervised;

(f) the previous arrangements had been for face-to-face contact between the children and the father to be supervised;

(g) the recommendation of the Cafcass officer was that contact should continue to be supervised in the community on a fortnightly basis for 2 hours pending the outcome of the fact-finding hearing;

(h) the Cafcass officer was so concerned by the judge's decision that she lodged a risk assessment pursuant to s.16A of the Children Act, and made a referral to the local authority, on the basis of an 'unsafe order', and

(i) where he had (correctly) declined to vary interim FGMP orders until the fact-finding of disputed allegations made by the father.

2. The judge wrongly adjourned the fact-finding hearing listed before him on the grounds that no QLR had attended the hearing, in circumstances where the father had provided a list of questions to be put in cross examination of the mother and there was no good reason why the judge could not have put appropriate questions to the mother himself.

20. It is convenient to deal with ground 2 first.

Ground 2

21. Part 4B of the Matrimonial and Family Proceedings Act 1984 (inserted by s.65 of the Domestic Abuse Act 2021) establishes, by ss.31Q – 31Z, the statutory scheme for the appointment of QLRs in family proceedings. These provisions are supported by

Practice Direction 3AB of the Family Procedure Rules 2010, and Statutory Guidance issued by the Lord Chancellor pursuant to s.31Y of the 1984 Act. The scheme was comprehensively considered by the President in *Re Z*, supra, and it is unnecessary to conduct another such exercise in this judgment. The parts of the scheme relevant to this appeal can be summarised as follows.

22. Part 4B identifies categories of case where cross-examination by a litigant in person either will or may be prohibited. As summarised in *Re Z*, at paragraph 11,

> "if the circumstances of the case are such that either (a) a 'specified offence' as between two parties as perpetrator and victim has resulted in a conviction, caution, or charge, (b) where there is a protective injunction in force between them, or (c) if there is 'specified evidence' of domestic abuse between them, the (alleged) perpetrator 'may not' cross-examine the (alleged) victim: ss 31(R)-(T)."

In addition, there are circumstances where, although not under a mandatory obligation to prohibit cross-examination, the court has a discretion to do so.

23. Where a party is prevented from cross-examining a witness in person by virtue of these provisions, the court must consider whether there is a satisfactory alternative means for the witness to be cross-examined or of obtaining evidence that the witness might have given under cross-examination in the proceedings: s.31W(2). Paragraph 5.3 of Practice Direction 3AB states that: "a satisfactory alternative to cross-examination in person does not include the court itself conducting the cross-examination on behalf of a party". It is where the court decides that there is no satisfactory alternative to cross-examination in person that the provisions for the appointment of a QLR in s.31W(3) to (7) apply.

24. For reasons explained by the President in *Re Z*, the scheme has not so far attracted sufficient lawyers to meet the demand for QLRs. The shortfall means that, in a great many cases, the court concludes that the circumstances warrant an appointment of a QLR but no one is identified who is able and willing to take on the appointment.

25. In *Re Z*, the President gave the following guidance for situations where a court has not succeeded in appointing a QLR:

> "23. The principal options facing a court at that stage are likely to be:
>
> a) A further adjournment in the hope that a QLR may be found;
>
> b) An adjournment to allow one or both parties to engage their own advocate;
>
> c) Reviewing the need for the vulnerable party to give oral evidence and be cross-examined. This will include reviewing the need for there to be a fact-finding hearing in the proceedings;

> d) Considering any other alternative means of avoiding in person cross-examination between the relevant parties;
>
> e) The court itself taking on the task of asking questions in place of the in person party.
>
> This is not an exhaustive list. The circumstances in each case will differ and, if other options are available, they should be considered. Equally, depending on the local circumstances, and those of the parties, different options will no doubt be chosen on a case-by-case basis. It does not follow that, if no QLR is available, the court is automatically required to conduct the questioning itself. It is important that all possible alternative options are reviewed at that point in the proceedings.
>
> 24. When considering the options, and whether the court should take on the questioning, the court will take account of PD3AB paragraph 5.3 which states that: 'a satisfactory alternative to cross-examination in person does not include the court itself conducting the cross-examination on behalf of a party'. The validity of that statement is unlikely to be controversial in the eyes of judges and magistrates. Indeed, the negative aspects of questioning by the court must have been prominent in the thinking in Parliament when the QLR process was brought into law by the 2021 Act. At a time when it was still comparatively rare for litigants to act in person in Family cases, Roderic Wood J contemplated the option of the judge asking questions on behalf of an unrepresented party and expressed 'a profound sense of unease at the thought' [*H v L and R* [2006] EWHC 3099 (Fam); [2007] 2 FLR 162].
>
> 25. PD3AB, paragraph 5.3 is not, however, black-letter law. The fact that the PD does not include questioning by the court as a satisfactory alternative, does not, as a matter of law, prevent the court undertaking the task if it considers that, in the interests of justice, it must nevertheless do so. When a QLR is appointed by the court the focus is on whether it is 'necessary in the interests of justice' to do so [s 31W(5)]. The need for the court to deal 'justly' with cases is not, of course, confined simply to the need to act in the interests of justice when appointing a QLR; it is a requirement that pervades every step that the court may take throughout any proceedings in order to meet the 'overriding objective' of the FPR 2010 ….”

In paragraphs 28 to 40 of *Re Z*, the President proceeded to give guidance to a judge who decides that there is no alternative but to abandon attempts to find a QLR and instead ask the necessary questions themselves.

26. In his judgment on the adjournment application, the judge focused on the father’s allegation that the children were at risk of FGM. On this issue, he said there was “an ostensibly reasonable case advanced on both sides”. He continued:

> "23. All of this serves in my judgment to emphasise the need for proper cross-examination by an advocate on his behalf. I reach the conclusion that justice cannot be done in any other way, and there are no alternative means by which cross-examination might be undertaken, or by which the evidence might be obtained.
>
> 24. It follows in fact that I do not believe in the current circumstances that I can conduct a fair trial. An adjournment there will have to be. I am slightly reassured by the fact that I cannot conclude that all hope of a QLR has gone in this case, notwithstanding the well-known difficulties within the system….
>
> 25. But for all those reasons, in a case which I can see might conceivably go further, I have to accede to the application to adjourn, despite the disappointment, the delay and the obvious difficulties which it causes…."

27. On behalf of the mother, Mr Hames KC submitted that the judge had been wrong not to follow the President's guidance in *Re Z*. He highlighted the judge's reference to "an ostensibly reasonable case advanced on both sides" and submitted that there was nothing in the QLR scheme to suggest that it was merits-based or that appointing a QLR should be considered more important in situations where both sides appear to have reasonable cases. In this case, the father had already prepared questions for the court to put to the mother. The proceedings had been going on for over two years. If it were the practice of judges to routinely adjourn multi-day hearings to attempt to identify a QLR, this would result in further delays and backlogs in the court system, a waste of the court's resources, and a further burden on the public purse. Mr Hames warned us that it was not too difficult to conceive of situations whereby alleged perpetrators of coercive and controlling behaviour, who are alleged to be utilising Children Act proceedings as a further way of abusing and controlling their victims, would deliberately exploit the shortage of QLRs to delay the conclusion of the proceedings in a way that was contrary to the whole concept underpinning the scheme.

28. I recognise that judges must be alert to the risk of abuse identified by Mr Hames. But his warning does not persuade me that this Court should interfere with the judge's decision to adjourn the proceedings on 7 March 2024. The judge's decision that there should be further attempts to find a QLR was a case management decision. This Court interferes in case management decisions only if satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge. Here the judge took the entirely reasonable view that the complexity of the issues was such that it would be better if possible for the questioning of the mother to be conducted by a lawyer representing the father rather than the court. For my part, I can entirely understand why he came to that view. Asked to identify why the judge's decision to adjourn was wrong in principle, Mr Hames submitted that it was because it led to a further delay in the proceedings. S.1(2) of the Children Act 1989 requires the court to have regard to the general principle that any delay in determining a question about the upbringing of

a child is likely to prejudice the child's welfare. It does not require the court always to choose a course in proceedings which avoids delay. In this case, the judge took into account the fact that his decision would cause a further delay but held that this disadvantage was outweighed by other factors, in particular that without a representative he could not conduct a fair trial.

29. For those reasons I would dismiss ground 2. I am reassured in this decision by the information fairly provided by Mr Hames that a QLR has now been identified to conduct the next hearing listed this week.

Ground 1

30. The approach to be followed by a court when considering child arrangements cases involving allegations of domestic abuse is set out in the Family Procedure Rules Practice Direction 12J. The general principles are laid down in paragraph 4 of the Practice Direction:

> "Domestic abuse is harmful to children, and/or puts children at risk of harm, including where they are victims of domestic abuse for example by witnessing one of their parents being violent or abusive to the other parent, or living in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with and being victims of domestic abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both of their parents."

31. Paragraph 25 provides:

> "Where the court gives directions for a fact-finding hearing, or where disputed allegations of domestic abuse are otherwise undetermined, the court should not make an interim child arrangements order unless it is satisfied that it is in the interests of the child to do so and that the order would not expose the child or the other parent to an unmanageable risk of harm (bearing in mind in particular the definition of "victim of domestic abuse" and the impact which domestic abuse against a parent can have on the emotional well-being of the child, the safety of the other parent and the need to protect against domestic abuse)."

"Victim of domestic abuse" is defined in paragraph 3 of the Practice Direction to include a child of someone who is a perpetrator or themselves a victim of domestic abuse.

32. A transcript of the hearing on 7 March was produced for the purposes of the appeal. It shows that from the outset the judge was sceptical about the need for contact to remain supervised. Ms Gaunt understandably placed particular reliance on the Cafcass officer's recommendation. This led to the following exchange:

> "Counsel: Paragraph 25, Ms Alexander is very clear the extent to which it is safe and in the children's best interests for contact to progress in line with their wishes and feelings, which is that they have said that they would not mind unsupervised contact, will be dependent on the findings, so –
>
> Judge: But I do not necessarily accept that, is the point I am putting to you.
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> Counsel: Well, if the court does not accept --
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> Judge: CAFCASS are very risk averse these days --
>
> Counsel: Yes.
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> Judge: -- in this situation.
>
> Counsel: Well, if the court takes that view about the recommendations, I would submit that it needs to have [the Cafcass officer] in court here to answer to her recommendations before it makes such a drastic decision, which in all senses of the word is pre-determining the final issue, which the father is asking the court to determine. It is not in a position to do that now. On an interim basis, while the court has already determined that a fact finding is necessary, it cannot go on to --
>
> Judge: Well, it is obviously necessary on the FGM. In the light of [the father's] concession, I am not at all sure that still applies to child arrangements."

33. In his second judgment dealing with this issue, the judge said (at paragraph 32):

> "Acknowledging the force that applies to Practice Direction 12J and the significance attached to allegations of domestic abuse, both in terms of their effects on the children, and also in this case on the children's mother, I find myself unconvinced by Ms Gaunt's argument. This case has been going on now since 2022. The caution which different judges have exercised over time is evident from the fact that the father was restricted to video contact I think from October of 2022, but began supervised time with the children in May of 2023, that is to say almost ten months ago now."

He noted that it was common ground that the contact had gone "at least reasonably well". He continued:

> "34. The point is the testing-out which would have been undertaken following findings, even if they were made in my

> judgment to the hilt of the mother's case, has already occurred. I have seen the contact notes. I moved matters to what was supposed to be supported contact in October. It now happens beyond the contact centre, although I think someone is always still present. But that has gone well.
>
> 35. I have also obtained an addendum report from Cafcass. The contents are of some significance. Ms Gaunt emphasises in her submissions the fact that nothing has changed in the Cafcass recommendations. [The Cafcass officer] says this [in paragraph 25 of her report, quoted above]: 'The extent to which it is safe and in the children's best interests for contact to progress in line with their wishes and feelings remains dependent upon the findings made in relation to both parties'. I am not at all sure that statement is correct."

34. The judge then set out some of the specific comments which the Cafcass officer reported had been made by the children about their father in the addendum report, and set out verbatim paragraph 21 from the report (quoted at paragraph 12 above). He then set out his conclusion and reasons in the following terms:

> "40. Applying the welfare checklist, it seems to me that the time has come, on any view of the facts, to move to unsupervised time with the children for the father. That is what they want, that is what they need. I am satisfied they will not come to harm. It creates no unmanageable risk for the children. The father has improved, in terms of his own capabilities, how he handles this. I will be clear in the order that he is in no way to denigrate the children's mother, he is not to ask about the past, he is not to ask about Female Genital Mutilation.
>
> 41. I think there is an additional advantage to unsupervised time, and that is that one benefit of the adjournment which I have ordered is that it can be tested out under the umbrella of existing court proceedings."

35. As stated above, Ms Gaunt immediately applied to the judge for permission to appeal. One ground advanced was that the judge had predetermined the child arrangements application. The judge rejected that, saying:

> "On the contrary, part of my rationale was that the question of unsupervised contact could be tested out under the umbrella of court proceedings, which means that there is no final determination at all."

Another ground was that the judge had not been able to say that there was an unmanageable risk to the girls. Rejecting this, the judge said:

> "that is not right, because my approach was to assume the facts in favour of the mother, and to determine that, even if those aspects of domestic abuse which the mother alleged were

> correct, it did not mean that the contact should be unsupervised [sic – he must have meant 'supervised']."

36. On behalf of the mother, Mr Hames submitted that the judge had failed to comply with Practice Direction 12J, in particular paragraph 25. He had failed to satisfy himself that unsupervised contact would not expose the children and the mother to an unmanageable risk of harm. The allegations made by the mother, including comments made by the children to the Cafcass officer, raised serious concerns that the father had been abusive and coercively controlling. The judge had departed from the Cafcass officer's recommendations without any good reason or proper explanation. The father had yet to complete the Managing Strong Emotions course and had offered no undertaking as to his conduct or that he would refrain from making any negative comments about the mother when speaking to the children. The judge had attached excessive weight to one factor in the statutory welfare checklist in s.1(3) of the Children Act 1989 – the children's wishes and feelings – and insufficient weight to the crucial factor of the likelihood of harm.

37. In his written submissions in response, the father emphasised the children's expressed wish to have unsupervised time with him as opposed to overnight contact. He pointed to the contact notes which were before the judge which underlined that contact was a positive experience for the girls. He informed the court that he had undergone a number of courses addressing his parenting and anger management. He also pointed to undertakings he had given to the district judge at the outset of the proceedings, including not to denigrate the mother in front of the children, which he said had been complied with. In oral submissions, the father stressed the good relationship he has with his daughters and made a number of points about the mother's conduct which he suggested were inconsistent with the allegations of abuse being true.

38. I understand that the judge was motivated by a wish to move things forward in the light of the children's expressed wishes and feelings. But his reasoning was inconsistent with Practice Direction 12J in general and paragraph 25 of the Practice Direction in particular. His observation that "the testing-out which would have been undertaken following findings … has already occurred" was mistaken, as was his perception that unsupervised time ahead of the fact-finding hearing would bring the advantage that "it can be tested under the umbrella of existing court proceedings". The notion that any relaxation in contact which might follow findings can somehow be tested out before the fact-finding hearing is contrary to paragraph 25 of the Practice Direction. In any event, it is by no means clear that any "testing out" of contact would be undertaken after findings along the lines of the mother's serious allegations. There is a strong likelihood that there would be no expansion of contact after such findings without a further assessment of the father and the completion of work recommended therein.

39. Paragraph 25 of the Cafcass officer's report was no more than a restatement of the policy underpinning the Practice Direction. The court had previously decided that a fact-finding hearing on the allegations of domestic abuse and the risk of female genital mutilation is necessary before decisions about child arrangements are made. In those circumstances, it is incontrovertible that the extent to which it is safe and in the children's best interests for contact to progress in line with their wishes and feelings remains dependent on whatever findings are made. The judge was wrong to express doubt about this.

40. The judge's assertion that "the time has come, *on any view of the facts*, to move to unsupervised time" (my emphasis) is unsustainable. The mother and the children have made serious allegations against the father. If they are found to be true, there is plainly an ongoing risk to the mother and the children. In those circumstances, there will be strong arguments against moving to unsupervised contact before a thorough assessment of the father and the completion of recommended work. The judge's assertions that unsupervised contact "is what [the children] need", that "they will not come to any harm", and that "it creates no unmanageable risk for the children" are equally unsustainable at this stage before the fact-finding hearing has taken place. His observation in dismissing the application for permission to appeal that it could not be said that the risk was unmanageable because, "even if those aspects of domestic abuse which the mother alleged were correct, it did not mean that the contact should be [supervised]" is plainly contrary to paragraph 25 of the Practice Direction and in my view irrational. Unless and until the court has considered the allegations of abuse, the extent of the risk is unknown and thus unmanageable unless contact is supervised.

41. For my part, I would not endorse the judge's observation in the course of submissions that "Cafcass are very risk averse these days". I recognise that he did not repeat this observation in the judgment and that one should not attach too much weight to a passing remark in the course of submissions. But in so far as it reflected his thinking, it was wrong to discount, or attach less weight to, the professional opinion of this Cafcass officer because of a perception that the agency which employed her was risk averse. Cafcass as an agency treats domestic abuse with appropriate seriousness and this Cafcass officer's work in this case was entirely consistent with that approach.

42. For these reasons, I would allow the appeal under ground 1 and set aside paragraph 7(b) of the order providing for the father to have unsupervised time with the children before the fact-finding hearing.

43. The question remains whether the adjourned fact-finding hearing this week should go ahead. I am very reluctant to extend the delay in these proceedings which is prejudicial to the children's welfare. But the judge's comments in the hearing and in the judgment quoted above have understandably left the mother feeling that the judge has predetermined the issues about the allegations of domestic abuse and controlling behaviour. In those circumstances, if my Lady and my Lord agree, the best course is to direct that the matter be listed as soon as possible before the local designated family judge for further case management to re-arrange the hearing before himself or another judge.

LADY JUSTICE ELISABETH LAING

44. I agree.

LORD JUSTICE WARBY

45. I also agree.