IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT CARLISLE
(HHJ Dodd, 20 December 2021)

No. FA-2022-000027

[2022] EWHC 2755 (Fam)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 2 August 2022

Before:

MRS JUSTICE MORGAN

B E T W E E N :

CM — Appellant

- and -

IP — Respondent

DR C. PROUDMAN (Counsel) appeared on behalf of the Appellant.

THE RESPONDENT appeared in Person.

J U D G M E N T

(Via Microsoft Teams)

MRS JUSTICE MORGAN:

Introduction

1 In the course of ongoing private law proceedings concerning the parties' only child, a boy who is now ten, there was a hearing at the court below. The appellant to these proceedings is the child's mother and the respondent is his father. The appellant appeals against the order of a circuit judge in the Family Court at West Cumbria, made on 20 December 2021. The order was made following a judgment delivered at the conclusion of a hearing on the same day. Both parties at that hearing were represented by counsel.

2 I gave permission to appeal on two of the grounds for which permission was sought, and those grounds are as follows:

Ground 1: The judge was wrong in failing to implement participatory directions to assist the mother, a complainant of domestic abuse and coercive and controlling behaviour, to give her best evidence. There was a failure to address Part 3 FPR 2010 and PD3AA, which include an obligation on the court to address that issue. That, for convenience in this judgment, I will refer to as "the failure to implement participatory directions".

Ground 2: The learned judge was wrong in refusing to determine the mother's allegations of domestic abuse and coercive and controlling behaviour relevant to welfare decisions in respect of contact on a proper consideration of PD12J, and made no reference to the authority of *Re H-N and Others (Children)(Domestic abuse: Finding of fact hearing)* [2021] EWCA Civ 448. Again, I will refer to that below.

3 At this hearing, the appellant is represented through counsel and the respondent appears without representation.

The Law On Appeal

4 By operation of the FPR 30.12(3), an appeal may be allowed only where the decision of the court below was wrong or there is a procedural irregularity such that the decision made is unjust. The appellate court may conclude that a decision is wrong or procedurally unjust where (i) there has been an error of law, (ii) where the judge has clearly failed to give due weight to some very significant matter or, by contrast, has clearly given undue weight to some matter not deserving of it (see *B v B (Residence Orders: Reason for Decision)* [1997] 2 FLR 602; (iii) that a conclusion has been reached on the facts before the court which was not open to the judge reaching them on the evidence (see *Royal Bank of Scotland v Carlyle* [2015] UKSC 13), or (iv) that a process has been adopted at the court below which is procedurally irregular and unfair to such an extent that it renders the decision made unjust (*Re S-W (Care Proceedings: Case Management Hearing)* [2015] 2 FLR 136), or (v) that a discretion has been exercised which is outside the parameters within which it is possible to have reasonable disagreement *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647.

5 I remind myself, when looking at the law, that the function of the appellate court is to determine whether the judgment at the court below is sustainable. For that, I look to *Re F (Children)* [2016] EWCA 546, where the then President, Munby LJ, summarised the approach as follows:

> "Like any judgment, the judgment of the Deputy Judge [i.e., the judge appealed against in that case] has to be read as a whole, and having

> regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."
>
> 23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):
>
> > 'The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.'
>
> It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis"."

I pause there in my consideration of the law to say that I keep those passages well in mind when I look at the date and the circumstances on which this circuit judge in a busy court heard the case and made the decision in respect of which I am faced with the appeal today.

6 Continuing the consideration of the law, the appellate court should be slow to interfere with findings of fact. As Lewison LJ said in *Fage UK & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5 at [114]-[115]:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. … The reasons for this approach are many. They include:

> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.
>
> It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted."

7 I hold in my mind at this hearing as to that which is applicable as I consider the two grounds of appeal on which permission has been given, all of that which emerges from the well-known and uncontentious case law on appeal.

8 Since the grounds of appeal before me are rooted in circumstances in which there have been allegations of domestic abuse, relevant also are the legal principles engaged within that context, both at first instance before the judge hearing it, and before me as I consider the appeal. Accordingly, it is necessary for me to go on and consider the relevant and applicable law under the sub-heading:

<u>Domestic abuse</u>
<u>Practice Direction 12J</u>

9 Practice Direction 12J of FPR 2010 defines, at para.3, domestic abuse as including:

> "Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass but is not limited to:

- Psychological
- Physical
- Sexual
- Financial
- Emotional."

10 At para.4 of PD12J, I find the proposition that:

> "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."

By para.5 of PD12J, courts hearing cases of this sort are directed that they must, at all stages of the proceedings, consider whether domestic abuse is raised as an issue. Paragraph 16 of PD12J requires the court to determine as soon as possible whether it is necessary to conduct a fact-finding hearing in order to provide a factual basis for any of the welfare reports or assessment of risks which will be undertaken. And going through, having considered that, it must then, under para.19, give directions as to how the proceedings are to be conducted. Further, within the direction, as will become necessary to look at later, para.28 then gives guidance as to how the fact-finding hearing (if required) should be conducted.

Re H-N & Ors (Children) (Domestic Abuse: Finding of Fact Hearings)

11 Relevant at this hearing also, of course, is the (at the time of the first instance hearing) very recently decided case of *Re H-N & Ors (Domestic abuse: Finding of fact hearings)*. In *H-N & Ors*, the Court of Appeal set out the approach to be taken where one or both parents asserts that a pattern of coercive and controlling behaviour existed.

Vulnerable witnesses: Part 3A

12 The relevant parts of the Domestic Abuse Act 2021 were, by the time of the hearing in the court below, in force. Section 63 of that Act provides that where a person is or is at risk of being a victim of domestic abuse, the court must assume that their participation and evidence will be diminished by reason of vulnerability. The provisions for vulnerable witnesses are extensive and are set out in Part 3A and PD3AA. Part 3A provides as follows:

> "3A.3
> (1) When considering the vulnerability of a party or witness as mentioned in rule 3A.4 or 3A.5, the court must have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule 3A.7."

There then follows, by 3A.4(1) the court's obligation to consider whether a party's participation in the proceedings (other than by giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation

directions; by (2) before making such participation directions the court must consider any views expressed by the party or by a witness about giving evidence; by 3A.5(1) the court must consider whether the quality of evidence given by a party or a witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participations directions, and in like form, before making those, the court must consider any views expressed by the party or the witness about the giving of evidence.

13 Carrying on through 3A.6(1) and (2), I see the way in which the court is directed to consider whether it is necessary to make one or more participation directions to assist either the protected party participating in the proceedings or the protected party giving evidence in the proceedings. Again, before making participation directions in the case of a protected party, the litigation friend of that person must be considered in the same way.

14 Importantly, when deciding whether to make, in those categories that I have set out, one or more participatory directions, the court must have regard, in particular, to the impact of any actual or perceived intimidation, including the behaviour towards the party or the witness on the part of the other party or other witnesses to the proceeding, or members of the family or associates of that party or other witnesses, or any members of the family of the party or the witness whether also the party or witness suffers from mental disorder or otherwise has a significant impairment of intelligence or has a physical disability or suffers from any continuing medical treatment. Then set out is a list of other matters to which the court is directed to have regard:

> "(c) the nature and extent of the information before the court;
>
> (d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;
>
> (e) whether a matter is contentious;
>
> (f) the age, maturity and understanding of the party or witness;
>
> (g) the social and cultural background and ethnic origins of the party or witness;
>
> (h) the domestic circumstances and religious beliefs of the party or witness;
>
> (i) any questions which the court is putting or causing to be put to a witness in accordance with section 31G(6) of the 1984 Act( );
>
> (j) any characteristic of the party or witness which is relevant to the participation direction which may be made;
>
> (k) whether any measure is available to the court;
>
> (l) the costs of any available measure; and
>
> (m) any other matter set out in Practice Direction 3AA."

15 By PD3AA, para.1.3, it is the duty of the court to identify any party or witness who is a vulnerable person at the earliest possible stage of the proceedings. In PD3AA, para.5.2, I find the requirement for a ground rules hearing prior to any hearing where a vulnerable party, a vulnerable witness or a protected party is to give evidence and, at such hearing, to make participation directions. That which falls to be considered during the grounds rules component include the conduct of advocates and parties, any support for the person giving evidence, the form the evidence should take, the way the evidence should be taken and

directing the manner of any cross-examination and considering participation directions, including prescribing how any cross-examination should take place.

16 I accept, in looking at all of those applicable statutory provisions, that the language and the sense of all, place the duty on the court, regardless of the position adopted for or on behalf of any party, including the party who later asserts that they are vulnerable.

The Essential Background

17 I intend to set out the essential background in only the most abbreviated form, aware as I am that aspects of it will not be agreed as between the parties and that the detail of the possible explanations for that which is not agreed is outwith the scope of this appellate hearing.

18 The appellant and the respondent, I have been told, met online in 2011. The appellant became pregnant. The parties were not living together at the time. The respondent lives in Glasgow. The appellant, who had family from there, moved back for a while. The parties' relationship has been described in the papers I have seen as one which was "on and off" for a while. In 2014 the respondent first made an application for a child arrangements order and the parties attended a parenting programme by agreement. No order was ultimately made and visiting contact proceeded by agreement.

19 In 2015, the appellant relocated to Cumbria for work. Contact continued sporadically. By August of that year, the child was expressing fear of, and an unwillingness to go to his father at a handover. There was an incident at a particular handover to which the police were called. By 2016, the mother had become aware of safeguarding issues said to have been raised in respect of two other children of the father, in respect of whom there were ongoing proceedings in the Scottish courts.

20 In April 2019, the father made a further application for contact. I take at face value, and accept what I am told, that fourteen orders have been made. Cafcass has been involved in those proceedings and a Cafcass officer was appointed as the Child's Guardian in March 2021. The outline of the positions of the appellant and the respondent, and that which they have taken within those proceedings, is that the appellant alleges she is a victim of domestic abuse from the respondent and the respondent alleges that the child is experiencing parental alienation by influence from the appellant. I make it clear at this hearing, I express no view as to where between those two positions the truth lies or even where it more closely lies.

The Appeal
Failure To Make Participatory Directions

21 In this case there had been, at the time the appellant was acting in person and well in advance of the final hearing, a request made of the court by The Women's Organisation assisting the appellant. That request was for special measures. It came at a time when the final hearing was intended to be held at the end of September 2021. It is useful to look at the request. The request, which I have been shown at this appeal, reads as follows:

> "To whom it may concern
> I am writing to request special measures for a Family Court hearing
> on 23 September 2021."

It then gives the case reference and continues:

> "The measures requested are for [the appellant]. I would like to request a separate waiting area and screens within the courtroom. This is due to the appellant having experienced domestic abuse from the applicant. The appellant has previously been self-representing and was unaware she was able to have such measures in place. If you require any further information please feel free to contact myself on the below details."

I pause there to say that whilst I see The Women's Organisation describing to the court the appellant as having previously experienced domestic abuse rather than having alleged it, I have no doubt the court will have taken it in the form that it should have been taken, as an allegation. I read no adverse inference into the fact that it is expressed as it is.

22 The following day confirmation came back from the court:

> "I can confirm special measures will be put in place for the appellant's forthcoming attended hearing at the Carlisle Combined Court. Screens will be used in the courtroom and a separate waiting area will be available. Kindly pass this information on my behalf."

So it is clear that explicitly the court had had drawn to its attention that the appellant was a person who was vulnerable within the definitions foregoing.

23 The hearing listed for the end of September, for reasons it is not necessary to consider here, did not go ahead. It was re-listed for the end of December 2021. In the run-up to that hearing, I have seen messages which the appellant sent to the same worker at The Women's Organisation in which she asks for it to be checked that the special measures arranged for September would still be in place for December. I have had my attention drawn to a message which reads as follows:

> "Hi,
> I am just checking the special measures will still be in place on 20 December at Carlisle Family Court for my hearing. Do you know if this is the case?"

The Women's Organisation contacted the court and a message came back:

> "I spoke to the court. They stated she will check they are in place. Her calendar was down so unable to check at the time but basically if they are not she will put them in place."

So from that I draw two things. First, that the court had been put on notice again that the appellant in this case (the mother in that) was to be regarded as a person who came within the category of "vulnerable", and, second, that the appellant had been reassured that special measures would be in place.

24 On arrival on 20 December there were no such measures in place and I have seen contemporaneous messages sent from the appellant to the women's worker, saying, "*There are no special measures in court. Do I raise that to my barrister?*" . She, of course, was represented through counsel on that occasion.

25 In the face of those communications, the court could not, as I see it, have been in any doubt that the special measures should have been in place and I note that there has, in fact, since

been an apology for the failure to transfer over, which seems to be what happened when the listing was changed, the request from September to the listing in December. In fact though, whether or not The Women's Organisation had raised the matter, there is a duty imposed on the court by, in combination, s.63 of the Domestic Abuse Act 2021 and the effect of Part 3A and PD3AA. As appears above, s.63 of the Domestic Abuse Act requires that where a person is, or is at risk of being, a victim of domestic abuse, the court to proceed on the assumption that their participation in proceedings and evidence will be diminished because of vulnerability.

26 Here, in addition to the requests raised by the appellant and The Women's Organisation on her behalf, which, in my judgment, are sufficient to put the court in the position of realising that she was a person at risk of being a victim of domestic abuse, the learned judge had also the allegations -- and I remind myself that the allegation, not the truth or otherwise of it, is sufficient -- which were set out already in her witness statement, including allegations which were of rape, of sexually abusive behaviour and allegations that the respondent had behaved in a coercively controlling way.

27 The judge, in the order which is under appeal from 20 December, explicitly included in the recitals to the order emerging from the hearing that domestic abuse had been raised as an issue which is likely to be relevant to any decision of the court relating to the welfare of the child. So by that recital, he might be taken to have had it in his mind during the hearing. I further note that by the time of the hearing on 20 December 2021, there was a witness statement from an earlier date, in October 2021, which I have been told, and accept, was before the judge at the December hearing, in which the appellant had set out in terms not only the allegations on which she would be relying but also had set out the effect which she said, being asked to describe, at an earlier case management hearing before a different judge the abuse on which she relied and of which she complained. She set out how describing it without the benefit of special measures had had an adverse effect on her. I therefore see that that too was a matter which was before the judge and might be expected to inform his thinking when he considered the special measures which might be appropriate.

28 The respondent submits to me, both in his short document submitted and in his oral submissions made at this hearing, that the appellant is not a vulnerable party. The effect of the submissions he makes to me is that he submits that she has done her best to present herself as vulnerable and to give the impression that she is somebody of vulnerability so as to sway the view and engage the sympathy of the court. He says that she has trawled the internet so as to see what she needs to say to achieve the desired effect. He says that she was at the hearing under appeal represented through counsel and that there was no request made from counsel, or attempt made by counsel, to ask for special measures or anything of the sort, including, says the respondent, when it was discovered, as is now said, that special measures required and agreed had not been put in place. The respondent himself was not aware, and had not been made aware previously at the court below, of any of the communications there had been with the court, either for the September hearing or on the morning which have been drawn to my attention today.

29 Although I understand why, as an unrepresented party at these proceedings, the respondent makes those submissions, it is the case that the obligation to consider vulnerability in the sense required by the legislation is one which rests on the court. The obligation is to *consider* it, so it might have been in this case that had the judge considered the question of special measures at a ground rules hearing, and heard from counsel for each of the parties, the conclusion reached as to what was necessary, or the extent of the duty on the court to investigate further in the face of whatever submissions were made by either side, would have been dependent on that which was explored at that ground rules hearing. The

obligation on the court to consider participation directions should not be taken to mean that unless the court accedes exactly to all that is asked for it has failed in its duty.

30 Regrettably, there was no ground rules hearing, either separately and distinct from the hearing on 20 December or as a preliminary aspect of that hearing. Yet more regrettably, when I turn to the judgment, it is entirely silent as to any consideration of special measures at all and, indeed, there is no mention of Part 3A of FPR 2010, PD3AA or PD12J.

31 I do not disregard the fact that it is, of course, far easier for me, at some distance and with more time available to me on this appeal than there was to the circuit judge on the day it was listed in a busy court on one of the last sitting days before Christmas, and that I have a distinct advantage over him in that respect. It is also plain, on the face of the judgment, that the judge sat late to deliver an *ex tempore* judgment, having had at the start of the day to deal with various preliminary applications, as I will come on to. He expresses himself within that judgment as being unable to cover as much of the background detail in the judgment as he might have wished to had he been delivering it earlier in the day or had he had the opportunity I have had to go back and read the papers in this appeal and to deliver an oral judgment on another day. I keep in my mind the well-rehearsed authorities that a judge need not say everything. There is also a very strong flavour running through the judgment that the judge was very aware of the need to avoid delay in decisions for the child; a child in respect of whom the Children's Guardian was supportive of the application made by the father.

32 I bear in mind also that both parties were represented through counsel and counsel for the appellant made, so say both the appellant and the respondent at this hearing, no request at all for special measures to the judge or raise the matter with him in a way which might have assisted the judge in avoiding the error into which he fell.

33 Notwithstanding that, I am sorry to say on the particular facts of this case, there are a number of matters which drive me to the conclusion that I must allow the appeal on Ground 1. Prominent amongst them are these:

(1) There is no reference in the judgment to the Domestic Abuse Act 2021, s.63, which was in force at the time and sufficiently recently so, having come into force in October for this December hearing, that I would have expected it to be at the forefront of the judge's mind rather than to have slipped it. Neither is there any mention of PD3AA or Part 3A of FPR 2010. It is not the case that a judge has to say the words of the provisions to be taken to have considered what he should have but, faced as I am with no indication within the judgment that he has considered those matters, albeit describing them differently, I cannot be confident that he has. In the particular factual circumstances of this case, I would go further and say that I am satisfied that he has not.

(2) There was no grounds rule hearing, either on the morning of the substantive hearing or before it. Had there been such a hearing, even as late as on the morning of the hearing, I have little doubt it would have uncovered in a matter of seconds the previous correspondence there had been with the court office in which special measures had been requested and agreed. Had one been held, as I have found it should have been, as part of the earlier case management, then a consideration of that which was contained in the appellant's statements by way of allegations made (which it is not necessary for me to detail in this judgment) they would readily have drawn the judge's attention to the vulnerability issues arising.

(3) I have had the opportunity now to see a later statement prepared by the appellant, setting out what she says was the adverse effect on her and, therefore, on her quality of evidence because of her participation in the absence of special measures at this hearing. That, of course, gives me an advantage of hindsight which the judge did not have but of relevance to me is that he did not need the hindsight of seeing the statement she gives as to the effect on her at that hearing because he had that which had been set out in a statement about the effect on her of an earlier hearing when she had participated without special measures at that.

(4) Since in the judgment the judge forms conclusions adverse to the appellant, in part on the basis of the evidence he heard from her, which he contrasts with that he heard from the respondent, and yet there is no evidence of any consideration of how the case is to be managed to allow her to give her best evidence and to participate as fully as possible, that also gives me cause for concern.

34 I accept, therefore, that the appellant's case on Ground 1, that there has been a procedural irregularity, is made out and I am left sufficiently uneasy as to the effect of the procedural irregularity on the conclusions reached that I find the appeal must be allowed on Ground 1 because the irregularity makes it unjust.

Ground 2: The Judge Was Wrong In Refusing To Determine The Mother's Allegations Of Domestic Abuse And Coercive And Controlling Behaviour Relevant To Welfare Decisions

35 This ground, on the facts of this particular case, can be taken relatively shortly. The appellant has, from an early stage of the proceedings, raised within the body of her statements allegations of domestically abusive behaviour from the respondent towards her. As I have already indicated, those allegations having included allegations of rape, physical and emotional violence and abuse, and a pattern of what is alleged to be coercive and controlling behaviour.

36 Within the body of the order made by HHJ Dodd, he recorded the following by way of recital as to applications made by the appellant's counsel at the outset of the hearing. Relevant to the ground of this appeal is the recital in which the learned judge records this:

> "The first application was for the matter to be retracked to comply with PD12J, namely seeking a fact-finding hearing. The court applied PD12J, including but not limited to paragraph 5 and 17. The court considered that any concerns of DJ Todd at an earlier hearing must have been abated as a fact-finding hearing was not directed. The matter was also raised in the mother's appeal, dated 30 July 2020, at Ground 2 and, as such, the appeal was dismissed on the merits on 11 September 2020 by HHJ Forester. The court considered that notwithstanding the allegations of domestic abuse, a fact-finding hearing is not necessary or proportionate because of the extent of the relevance of those allegations to the matters the court is determining today and because of the content of the welfare reports of the Children's Guardian. The views of the Children's Guardian, as expressed in her analysis, are that the allegations are mainly historic and the allegations do not prevent safe arrangements for the child being made whilst keeping contact between the parents to the minimum."

The reference there to DJ Todd was a reference to a hearing on 24 November 2020, at which the appellant had raised allegations of domestically abusive and violent behaviour within her statement as part of case management. The judge on that occasion had heard from the appellant, so I have been told at this hearing, a description of the allegations made so as to be able to case manage them. Although it is right to say that the order from that hearing does not reflect that they have been so considered or, indeed, that the learned judge heard from them in that way. I have already considered that under the heading of Ground 1.

37 I accept the submission made before me, however, that whether or not the judge in December was right or wrong in concluding that any concerns of DJ Todd at an earlier hearing must have been abated as a fact-finding hearing was not directed, is neither here nor there. As it turns out, I am satisfied that he was wrong to take that view but it does not, as I see it, matter because there is a continuing obligation to keep those matters under review by the trial judge himself, HHJ Dodd, and he had also case managed the case at earlier hearings. I note in particular that within the case management order of 7 July 2021, HHJ Dodd does not report that any consideration was given to PD12J or to *H-N & Ors*. That case management hearing must have been directed to consider the hearing at the end of September that was later vacated.

38 The absence of any reference to *H-N & Ors* is a surprising omission in July 2021 because the decision, which had been widely heralded as a Court of Appeal consideration within conjoined cases at appeal of whether PD12J was fit for purpose, and with intervention from interested bodies at the invitation of the Court of Appeal. The judgment had been handed down a little more than three months before the 7 July hearing and had attracted significant attention, unsurprisingly, both amongst the profession and the judiciary. So its omission from the recorded thinking of HHJ Dodd on 7 July 2021 is surprising even within a busy court.

39 The appellant and the child, though not the respondent, are recorded at that hearing as being represented and so it may be thought surprising that the appellant's representative did not raise it before the judge if the mother were at that stage seeking to revisit the need for a fact-finding. But whilst again that provides some sympathy for the situation the judge finds himself in, it does not relieve him, I regret to say, of the obligation to give consideration to PD12J, not just at the earliest opportunity but to keep the matter under review throughout the court process, and explicitly by PD12J s.14, to make it clear in his order that he has done so.

40 I am further troubled by the fact that by the time the hearing of the case management came on on 7 July, the court had the benefit of a recently filed Cafcass report in which the officer referred back to allegations made by the appellant and contained within an earlier s.7 report in 2019 of coercive and controlling behaviour. The effect of the case management is there has not been a fact-finding on the allegations of domestic abuse and coercive and controlling behaviour as alleged and neither, at case management by HHJ Dodd, has there been a consideration of whether there should be such a hearing.

41 So having not considered the question of the appellant's allegation at the case management hearing in July, when I come to consider the basis on which the judge approached what was expressed as an application to "retrack" the case on the morning of the 20 December hearing, I see that his decision is expressed, as I have already indicated, as one in which notwithstanding the allegations of domestic abuse, a fact-finding hearing is regarded as unnecessary and not proportionate.

42 I regret to say that, even relying, as he does, on the advice of the Children's Guardian, that taken together with the earlier lack of application of those matters to which the court is required to have regard within PD12J s.17, I find myself with a real disquiet to the approach taken to the application on behalf of the appellant at the outset of the hearing. PD12J s.17 directs the court that in determining whether a fact-finding hearing is necessary, a court must consider, amongst other things, whether the nature and extent of the allegations, if proved, would be relevant to the issues before the court. I cannot see anywhere here the court's consideration of this or an explanation of any conclusions reached. The closest that it comes to is the reliance on the views of the Children's Guardian, as expressed in her analysis, that the allegations are mainly 'historic' and that they do not prevent self-arrangements for the child being made, which, as I will come onto, I regard with some disquiet also.

43 Furthermore, s.17 of PD12J requires the court also to consider whether matters which are set out in 36 and 37 of the PD can be determined without a fact-finding hearing. When I look at this case, and I reflect that the court should be considering, per 36, any harm which the child, as a victim of domestic abuse, and the parent with whom the child is living has suffered as a consequence of that domestic abuse and (b) which the child and the parent with whom he is living is at risk of suffering if a child arrangements order is made. The court is directed that it should make an order for contact only if it is satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before, during and after contact, and the parent will not be subjected to further abuse.

44 Whilst I see that the judge has recited that the Guardian's view is that such contact can safely be ordered, I do not see the judge's analysis of how those feeds into his own decision-making. Once again a judge operating under pressure of time might be able to set out only in short form that analysis but it is unfortunate that it is absent here. Nor do I see the learned judge considering those matters to which his attention is drawn by s.37 below, including, for example, in every case where a finding or an admission of domestic abuse is made or where domestic abuse is otherwise established, the court should consider the conduct of both parents towards each other, towards the child and the impact of the same, including particularly the effect of domestic abuse on the child and arrangements for where the child is living or its effect on the child's relationship with the parents.

45 Specifically in relation to coercive control and behaviour, I am left uneasy that the learned judge, allowing of course, as I do, for the fact that he was pressed for time and does not always, to me, appear to have had the assistance he should have had from counsel, did not focus in a way that would have been appropriate on that which was being alleged by the appellant and to consider it alongside the guidance emerging from *H-N & Ors*, and, in particular, the following paragraphs where the Court of Appeal had itself considered the approach to coercive and controlling behaviour in the following way:

I pause there to interpose that in this case I am able to see from the judgment how it is the judge anxiously sought to take account of the damage likely to be caused to this child by delay, but I do not see the other side of that balance reflected in his judgment. Continuing to para.51:

> "50. … cases must still be heard and with an increased focus on controlling and coercive behaviour as identified earlier in this judgment. We accept that judges will inevitably be faced with difficult case management decisions as they balance the need for a proper application of PD12J with the damage caused to children by delay."

> "Ms Mills QC on behalf of the second interveners, …, submitted that 'the overwhelming majority of domestic abuse (particularly abuse perpetrated by men against women) is underpinned by coercive control and it is the overarching issue that ought to be tried first by the court.' We agree and it follows that consideration of whether the evidence establishes an abusive pattern of coercive and/or controlling behaviour is likely to be the primary question in many cases where there is an allegation of domestic abuse, irrespective of whether there are other more specific factual allegations to be determined. The principal relevance of conducting a fact-finding hearing and in establishing whether there is, or has been, such a pattern of behaviour, is because of the impact that such a finding may have on the assessment of any risk involved in continuing contact."

So it seems to me that the well-pitched submission of Barbara Mills QC in the Court of Appeal, with which the Court of Appeal agreed, has also escaped the learned judge's analysis, I regret to say, in this case.

46 Similarly, where at para.52 of *H-N & Ors*, the Court of Appeal reminds both the judiciary and the profession that:

> "Professionals would now, rightly, regard as 'old fashioned' the approach of the DVMPA 1976 where protective measures were only triggered in the event of 'violence' or 'actual bodily harm'. In like manner, the approach of regarding coercive or controlling incidents that occurred between the adults when they were together in a close relationship as being 'in the past', and therefore of little or no relevance in terms of establishing a risk of future harm, should, we believe, also be considered to be 'old fashioned' and no longer acceptable. The fact that there may in the future be no longer any risk of assault, because an injunction has been granted, or that the opportunity for inter-marital or inter-partnership rape may no longer arise, does not mean that a pattern of coercive or controlling behaviour of that nature, adopted by one partner towards another, where this is proved, will not manifest itself in some other, albeit more subtle, manner so as to cause further harm or otherwise suborn the independence of the victim in the future and impact upon the welfare of the children of the family."

47 So when I look back at the Cafcass report, and its characterisation of the allegations as "historic", and the learned judge's reliance on that in reaching the conclusions he does about whether, on the morning of 20 December, he should accede to the application made to review the applicability of PD12J to the situation before him, it follows that I am driven to the conclusion that he has fallen into error. So it is that on the second ground of appeal I will also allow the appeal.

48 In so doing, I note that I have been reliant on the recital included in the order made at the end of the hearing on 20 December because the consideration of the application for a wider fact-finding hearing made on the morning does not feature in the learned judge's judgment and that is regrettable even given the want of time that there was, as he strove to give the parties a decision before the end of the day.

49 I make the point so that the respondent, who appears unrepresented at this hearing, understands that in saying, as I do, that the judge should have considered the wider pattern of the allegations, I am not expressing any view as to whether, on the balance of probabilities, the allegations made by the appellant are true, for I am perfectly well aware that the respondent's case is that they are not. That will be a matter for the trial judge. At this hearing I have strictly confined myself to a consideration of the approach of the judge in the court below and whether the findings can stand. That I have found that they cannot does not in any way constrain the judge who will hear the matter when it is remitted because that will be entirely a matter for that judge, who will come to the case with a clean sheet.

50 I will, in conjunction with the Family Division liaison judge for the relevant circuit Mr Justice MacDonald, remit the matter for a re-hearing by a different circuit judge, though allocation will obviously be a matter for MacDonald J. My own suggestion is that it is listed for a directions appointment either before him or, at his direction, an identified circuit judge, for further directions to consider (i) ground rules and participation directions as may be required; (ii) the appropriate forensic examination to be applied to the case, including such allegation as each party makes against the other and how they are to be formulated; (iii) the extent of any fact-finding element of the case and whether that should be a separate fact-finding hearing or form part of any welfare component at a final hearing, and (iv) the time estimate and structure for the hearing howsoever it is to be configured.

51 Because at this hearing I have limited information as to the welfare aspects and because I have seen that the Cafcass officer investigating, and appointed as the Guardian, has been so firmly supportive of the progression of contact between the child and his father, I had hesitated to stay the arrangements now in place following the 20 December order. Having heard, however, that there has, in any event, been such little compliance with that order and recognising that if the outcome of any re-hearing may alter the arrangements either way, I will stay the arrangements as ordered by the prevailing order of 20 December 2021 and they will, for the time being, revert to the arrangements under the previously operating order, but whether that stay should continue will be added to the list of matters to be considered by MacDonald J or the circuit judge to whom he releases the directions hearing.

52 That concludes the judgment on the appeal. I will invite Counsel in due course to draw up the order once I have heard the applications in relation to costs.

CERTIFICATE

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