



Neutral Citation Number: [2021] EWHC 891 (Fam)

Case No: ZC20P00585

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2021

Before:

MR JUSTICE WILLIAMS

Between:

CLB
- and -
SLB

Applicant

Respondent

June Venters QC (instructed by **Venters**) for the applicant
Lesley Mitchell (instructed **Direct Access**) for the respondent

Hearing dates: 23 February 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE WILLIAMS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Williams J:

1. The appellant appeals against an Order made by HHJ Judith Hughes QC sitting in private at an adjourned First Hearing Dispute Resolution Appointment dated 5th October 2020 in proceedings concerning his child F (born on 6 May 2008) who is therefore now nearly 13 years of age. The appellant is represented by June Venters QC. The respondent is the child’s mother, SLB who is represented by counsel Lesley Mitchell.
2. The appeal concerns three aspects of a case management order made pursuant to Children Act 1989 proceedings in which the substantive issue is the father’s wish to enforce/vary a child arrangements order. The appellant father contends that the Judge erred in refusing to order a fact-finding hearing to investigate his allegations of parental alienation, and in limiting the scope of the local authority’s section 7 report to F’s wishes and feelings. Similarly, the father contends that the Judge erred in refusing to appoint a Children’s Guardian under Rule 16.4 of the Family Procedure Rules 2010 (“FPR”). The respondent mother’s position is, put broadly, that the father’s application to vary the child arrangements order is the latest episode in a long-running campaign of meritless court applications aimed at undermining the arrangement whereby F lives with his mother ordered in October 2017. The Judge was therefore entitled to take account of the history of the proceedings, and their impact on F’s welfare, when making case management decisions.
3. The Grounds of Appeal rely on procedural irregularity, that being a short form for asserting that the decision was unjust because of a serious procedural or other irregularity in the proceedings. They assert as follows
 - i) *The Father sought a fact-finding hearing to determine allegations of parental alienation and domestic abuse. In refusing this application, the court failed to give any or any proper consideration to:*
 - a. *Practice Direction 12 J, Family Procedure Rules [“FPR”] in particular*
 - 1.1 *the court failed to apply the general principles [§5] in that the court failed to identify the factual and welfare issues involved; failed to consider the nature of any allegation and the extent to which it would be likely to be relevant in deciding whether to make a child arrangements order and if so in what terms and failed to give directions to enable contested relevant factual and welfare issues to be tried as soon as possible and fairly*
 - 1.2 *the court failed to apply the general principles [§7] in that the court failed to apply the statutory presumption that the involvement of a parent in a child’s life will further the child’s welfare, unless there is evidence to the contrary and thus Article 8 is engaged.*
 - b. *The views of Cafcass, who in their report/letter to the court dated 25th August 2020, indicated “consideration should be given to holding a fact-finding hearing in this case, prior to any further assessment taking place.” [D7]*
 - ii) *The Father sought separate representation for the child and for the appointment of a children’s guardian pursuant to Rule 16.4 FPR. In refusing this application, the court failed to give any or any proper consideration to:*

a. *The views of Cafcass, who in their report/letter [ibid] indicated:*

1.1 *“We do agree that this case meets varying points of the criteria for the appointment of a Rule 16.4 Guardian based on the information provided to us, however also acknowledge that the Local Authority may have expressed a view that further Court proceedings are not in the children’s best interests and that this matter should come to an end..”[D6]*

1.2 *“.....if the matter continues, Cafcass would be in a position to allocate a Rule 16.4 Guardian should this be the direction the Court wishes to take.”[D6]*

b. *Rule 16.4 - Practice Direction 16A:*

1.1 §7.2 (c) *“where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute”*

1.2 §7.2 (d) *“where the views and wishes of the child cannot be adequately met by a report to the court”*

iii) *When considering the future outcome of these proceedings, the comments made by the court indicated that a disproportionate amount of weight would be placed on the wishes and feelings of the child. In doing so, the court failed to give any or any proper consideration to the appropriate test to be applied by the welfare check list which is that it is the “ascertainable wishes and feelings of the child (considered in the light of his age and understanding) [Section 3 (a) Children Act 1989 (“CA1989”)]. Such an indication engages Article 6 and the Father’s ability to have a fair trial were this court to be seized of these proceedings.*

iv) *The Court has directed a Section 7 report from a Local Authority in respect of whom the father has made a number of complaints, (some of which have been upheld and some of which are still pending. Currently there is no permission for the father to file and serve such evidence and an application to do so will be renewed in due course), and to whom the case has been closed for more than 6 months. The Father’s article 6 rights are, therefore, fully engaged*

v) *The court failed to provide a reasoned judgment for its decision to refuse the father’s application for:*

a. *A fact-finding hearing*

b. *Separate representation of the child and the appointment of a Rule 16.5 Children’s Guardian*

c. *Refusing to appoint Cafcass to provide the Section 7 report, ignoring the Father’s pending complaints against the Local Authority and his perception of bias against him*

v) The Court has refused to record upon the order the fathers applications and position and the determinations made by the Court

vi) The Court has failed to respond to an email from Father's counsel, seeking a reasoned judgment, permission to appeal and applying for a stay of the proceedings

THE COURT HAS ERRED IN ITS APPLICATION OF THE FACTS

i) The Court has directed a "wishes and feelings" report in respect of contact but has failed to grapple with the issue of parental alienation and that the child's wishes and feelings may not be his own

ii) The Court is wrong to consider the child's wishes and feelings as being determinative particularly in light of the father's position

4. The appeal was lodged on 26 October 2020 and on 20 November 2020 Lieven J granted permission to appeal. Her order records;

a. It is arguable that the Judge was wrong not to order a fact-finding hearing and to limit her directions to only considering the issue of the child's wishes and feelings without regard to the arguments as to parental alienation of the child.

b. It is also arguable that the Judge was wrong not to appoint a Guardian.

c. I appreciate that these were case management decisions and as such the Court has a wide margin of discretion. However, the Judge was closing down the scope of the future hearings by the approach she took at this stage and effectively leaving the entire decision to rest on the child's wishes and feelings.

d. I do not consider that the Judge arguably erred in respect of the decision to order a report from Islington rather than Cafcass, but in the light of subsequent events and in the context of the appeal, this matter should be considered by the Judge hearing the appeal.

5. Lieven J made an order listing the appeal for 21 January 2021 with a time estimate of 1 ½ days. She gave detailed case management directions for the preparation of skeletons, an agreed bundle not exceeding 200 pages, the filing of an agreed list of essential reading and the allocation of the time estimate for the various components of the appeal. The original hearing date was adjourned as the appellant's counsel was not available and the case was relisted in February. For reasons which I am unclear that hearing was also vacated, and the matter was relisted split over three days in front of me commencing on 22 February. An appeal bundle was lodged with the court the contents of which I assumed were agreed.

6. At some point in the day or so leading up to the hearing the respondent mother filed a supplemental appeal bundle (30 odd pages) and the appellant filed a skeleton argument in response and a further supplemental appeal bundle numbering nearly 400 pages. No list of essential reading was provided, and I confined my reading to the original appeal bundle. This bundle contained documents which had not been before the case management Judge in particular the section 7 report which she had ordered, and which was the subject of the appeal. It emerged at the hearing that another section of the appeal bundle (the contact notes) had also not been before HHJ Hughes QC. Both Ms Venters and Ms Mitchell agreed that those documents should be before the

court although no application had been made in an appellant's notice or in a respondent's notice for the court to admit additional evidence.

7. At the commencement of the hearing I informed the parties that I had not read the two supplemental bundles or any documents within them nor had I read the appellant's skeleton argument in response or the section 7 report although I had of course read the parties skeleton arguments which made some reference to it and to some of the documents in the respondent supplemental bundle. Ms Mitchell made an application to rely on her supplemental bundle and Ms Venters said if the mother's supplemental bundle was to be admitted the father ought to be permitted to rely on his supplemental bundle and skeleton in response. I gave a short judgment refusing those applications for a variety of reasons but perhaps principally because their admission would inevitably have led to the adjournment of the appeal as there was insufficient time allowed in the time estimate to enable either the parties to address them all for me to read or process them and both parties were keen to avoid further delay. In the course of Ms Mitchell submissions, she suggested that if the appeal were refused that I would be able to summarily dismiss the appellant's application. Given that no appeal had been lodged against Her Honour Judge Hughes QC's refusal to summarily dismiss the father's application and no respondent's notice had been filed making any like application I declined to consider that submission.
8. Having dealt with the preliminary matters I heard submissions from Ms Venters QC in support of her skeleton argument, from Ms Mitchell in support of her skeleton argument and briefly from Ms Venters in response. As I have referred to above, it emerged in the course of the parties submissions that the contact notes which formed a significant component of the appellant's submissions in support of the need to explore the reasons for F's non-attendance at the contact centre and his asserted wish not to have contact with his father rather than simply ascertaining his wishes and feelings had not been before HHJ Hughes QC. Ms Mitchell also accepted that the ambit of the 2 hour DRA hearing provided for by the order of 5 October 2020 could not be confined to simple consideration of what F said but would inevitably permit exploration of the apparent discrepancy between his actions during contact over a prolonged period which appeared to show a positive and developing relationship and what he ultimately said to the section 7 reporter which was to the effect that he did not wish to see his father now or in the future.
9. It seems to me inevitable that the exploration of that discrepancy and the potential impact of F's older brothers disinclination to have contact with the appellant's father would almost inevitably involve consideration of whether an addendum section 7 report at which the contact notes could be discussed with F and the possible need for further consideration of a rule 16.4 Guardian on the one hand and the respondent mother's applications to summarily dismiss the application, for a no contact order and for a section 91 (14) order would necessitate a further and lengthier hearing given the range and importance of the issues, particularly if the ultimate order sought in effect was to terminate the possibility of the father and F having a relationship during his minority. The need for the court to leave no stone unturned in seeking to fulfil its positive obligation to promote the article 8 rights of the appellant and F and to balance that against the potentially harmful effects of further litigation seem to me unlikely to be capable of just determination at a two-hour dispute resolution appointment.

10. Thus, as a result of developments during the course of the hearing and the reliance of the parties on documents which had not been before HHJ Hughes QC it began to emerge that whatever the outcome of the appeal there would need to be further hearings at which similar applications and orders would be open to the parties and the court. On the appellant's submissions, if the appeal was allowed the application would be listed for FHDRA at which the court would consider whether a section 7 report should be ordered from LB Islington or from Cafcass, whether a rule 16.4 Guardian should be appointed and whether the application should be listed for a fact finding hearing to determine the reasons behind F's stated wishes and feelings. On the respondents submissions if the appeal were dismissed, the application would be remitted for the DRA at which consideration would be given to an addendum section 7 report from Islington, a renewed application might then be made for a rule 16.4 Guardian (or perhaps later after the addendum report was received) and the court would consider what sort of hearing was required to explore the apparent discrepancy between F's actions in contact and his ascertained wishes and feelings. Whilst there are of course differences between those two positions they seem to me to be differences of degree than substance albeit important given the issues which are at stake.
11. However ultimately the matter is before me as an appeal and that is how it needs to be disposed of albeit the ultimate order I make will have to reflect in some shape or form the position we are currently at.

Background

12. F was born on 6 May 2008 and has an older brother, Q, aged 17. Both boys have lived with their mother since their parent's separation in late 2016.
13. At a hearing on 11 May 2017 Her Honour Judge Wright made an order which recorded that a separate fact-finding hearing was not necessary in the case. Both the appellant and the respondent were represented by counsel. As far as I can tell that decision was not appealed.
14. A final hearing took place before District Judge Hugman on 10 October 2017. The Judge heard evidence from the appellant, from the respondent and from the section 7 reporter. That order provided that both children would live with the respondent and that the appellant would have supervised contact with F on a fortnightly basis at a contact centre for one hour. A judgment was given which was to be transcribed at public expense. The case was listed for a review before DJ Hugman. Unusually the appellant was ordered to pay the respondent's costs of a non-molestation application and of the Children Act proceedings and of an unspecified emergency application.
15. The judgment was contained in the appeal bundle and of course is essential reading. Ms Venters QC made various criticisms of the judgment and how the father feels he was treated unfairly but ultimately the judgment and order were not appealed and the findings of DJ Hugman are binding on the parties, first instance judges, those reporting to the court and on the appellate court. Given that part of the grounds of appeal asserts that a fact-finding hearing ought to have been listed it is important to note some of the contents of this judgment which I shall return to.

16. The duration of this contact was extended to 2 hours from 28 April 2018, and 3 hours from 4 August 2018 by a further order on DJ Hugman on 17 April 2018.
17. On 20 July 2018, the father made an unsuccessful application to vary this Child Arrangements Order.
18. On 5 October 2019, a supervised contact report records F being particularly upset and stating that he did not wish to attend contact [F54]. It was agreed at the session that sessions would be resumed when F told his mother he wished to resume. The father says that he has not had contact with F since this session [A8] and this is not disputed by the mother.
19. On 21 May 2020, the father's most recent application to vary the Child Arrangements Order was issued. The mother cross-applied for an order pursuant to section 91(14) Children Act 1989. The hearing was first listed on 6 August 2020 before justices and they allocated to a Circuit Judge for hearing on 5 October 2020. CAFCASS was also ordered to file a short report to deal with the question of whether the child should be joined as a party and a Rule 16.4 Guardian be appointed.
20. The CAFCASS Safeguarding report dated 3 August 2020 [E1-E5], notes that the local authority has had significant involvement in the past with the family due to behavioural concerns from Q towards his mother and F and the acrimonious relationship between their parents. The report notes that it is "*extremely worrying that F is again the subject of court proceedings due to his parents not being able to co-parent effectively. Islington have assessed many of the concerns raised by parents, but Mr LB is not satisfied his concerns were dealt with appropriately, in particular his complaint is that F's wish to see him was not evidenced in their report to court. The court will need to weigh up the need for further assessment, in particular in gaining F's wishes, with the impact this process may have on both children's behaviour and well-being.*". In the order allocating the case to a circuit judge it seems that a direction was included for Cafcass to file a report dealing with the issue of whether the child should be joined as a party and a rule 16.4 Guardian be appointed. Their letter to the court notes that given that the case is closed to the Local Authority and "*Mr LB has indicated that he would challenge working with the Local Authority due to previous complaints he has made against them*" that a section 37 report was not appropriate. The letter said that on the information available to them that Cafcass agreed that "*this case meets varying points of the criteria for the appointment of a Rule 16.4 Guardian*" but also acknowledged that the Local Authority expressed a view that further proceedings are not in the children's best interests and that the matter should come to an end. They noted that If the court took the decision that the proceedings should continue and that a rule 16.4 Guardian should be appointed, they would be in a position to allocate one. The letter also noted that considering the information contained in the party's statements in respect of domestic abuse, consideration should be given to holding a fact-finding hearing prior to any further assessment.
21. The parties provided lengthy position statements in advance of the hearing; far in excess of that provided for by the rules. I'm not sure what bundle was provided to the court. The hearing originally commenced before HHJ Evans-Gordon but because of technical difficulties it was reallocated and came before HHJ Hughes QC

22. A transcript of the CVP hearing has been produced. I have read that in its entirety and indeed one has to so read it in order to absorb the approach the judge took rather than selecting particular sentences or expressions which might viewed in isolation be said to support a particular contention. It has to be borne in mind that this was a case management hearing which came before the judge at short notice and which was not the subject of a reserved judgment with careful consideration of phrasing and expression, but which was the product of a very experienced family judge dealing with a very familiar form of hearing in which very familiar issues were engaged.
23. The Order of HHJ Hughes made following the FHDRA on 5 October 2020 records that the court decided that a fact-finding hearing was not necessary, and that the child should not be joined as a party to proceedings. Further, a report pursuant to section 7 of the Children Act 1989 was ordered to be prepared by Islington Children’s Services, “*confined to the child’s ascertainable wishes and feelings in respect to [sic] spending time with the father*”.
24. A series of emails were exchanged between counsel for both parties and the judge in the days following the hearing as to precisely what was ordered. In particular, the parties were unable to agree what had been ordered in relation to the scope of the local authority report.

The Law

25. FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for serious procedural irregularity.
26. The nature of the courts function when dealing with appeals arising from case management decisions has been considered by the Court of Appeal in *Re TG (A Child)* [2013] EWCA Civ 5. The President gave the decision of the Court. In that judgment the President recognised and explored the very wide discretionary case management powers that the family procedure rules confer on a case management judge.

[35] (4) Fourth, the Court of Appeal has recently re-emphasised the importance of supporting first instance Judges who make robust but fair case-management decisions: Deripaska v Cherney [2012] EWCA Civ 1235, paras [17], [30], and Stokors SA v IG Markets Ltd [2012] EWCA Civ 1706, paras [25], [45], [46]. . . Of course, the Court of Appeal must and will intervene when it is proper to do so. However, it must be understood that in the case of appeals from case management decisions the circumstances in which it can interfere are limited. The Court of Appeal can interfere 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: . . . □ Royal & Sun Alliance Insurance plc v T & N Limited [2002] EWCA Civ 1964, paras [37]-[38], [47], Walbrook Trustee (Jersey) Ltd v Fattal [2008] EWCA Civ 427, para [33], and Stokors SA v IG Markets Ltd [2012] EWCA Civ 1706, para [46]. This is not a question of judicial comity; there are sound pragmatic reasons for this approach. First, as Arden LJ pointed out in Royal & Sun Alliance Insurance plc v T & N Limited [2002] EWCA Civ 1964, para [47]:

"Case management should not be interrupted by interim appeals as this will lead to satellite litigation and delays in the litigation process."

Second, as she went on to observe:

"the judge dealing with case management is often better equipped to deal with case management issues."

The judge well acquainted with the proceedings because he or she has dealt with previous interlocutory applications will have a knowledge of and 'feel' for the case superior to that of the Court of Appeal

.....

[36] Exactly the same applies in family cases. Thus, in Re C Thorpe LJ and I dismissed the appeal notwithstanding what I said was the "robust view" His Honour Judge Cliffe had formed when deciding to stop the hearing. And in Re B I refused permission to appeal from an order of Her Honour Judge Miranda Robertshaw involving what I described (para [16]) as "appropriately vigorous and robust case management." I said (para ["The circumstances in which this court can or should interfere at the interlocutory stage with case management decisions are limited. Part of the process of family litigation in the modern era is vigorous case management by allocated judges who have responsibility for the case which they are managing. This court can intervene only if there has been serious error, if the case management judge has gone plainly wrong; otherwise the entire purpose of case management, which is to move cases forward as quickly as possible, will be frustrated, because cases are liable to be derailed by interlocutory appeals."

As Black LJ very recently observed in Re B (A Child) [2012] EWCA Civ 1742, § [35]: "a judge making case management decisions has a very wide discretion and anyone seeking to appeal against such a decision has an uphill task."

[37] None of this, of course, is intended to encourage excess on the part of case management judges or inappropriate deference on the part of the Court of Appeal. There is, as always, a balance to be struck. As Black LJ went on to observe in Re B, § [48]:

"Robust case management ... very much has its place in family proceedings but it also has its limits."

I respectfully agree. The task of the case management judge is to arrange a trial that is fair; fair, that is, judged both by domestic standards and by the standards mandated by Articles 6 and 8. The objective is that spelt out in rule 1.1 of the Family Procedure Rules 2010, namely a trial conducted "justly", "expeditiously and fairly" and in a way which is "proportionate to the nature, importance and complexity of the issues", but never losing sight of the need to have regard to the welfare issues involved.

[38](5) Fifth, in evaluating whether an appellant meets the high threshold required to justify its intervention, the Court of Appeal must have regard to and must loyally apply the principles laid down by Lord Hoffmann, speaking for a unanimous House of Lords, in Piglowska v Piglowski [\[1999\] 1 WLR 1360](#), 1372. In relation to appeals against the exercise of discretion it is conventional to refer to the classic authority of G v G (Minors: Custody Appeal) [\[1985\] 1 WLR 647](#). Nowadays it is perhaps more helpful to refer to Piglowska v Piglowski, where Lord Hoffmann, having set out the

key passages from G v G and from the later decision of the House in Biogen Inc v Medeva Plc [1997] RPC 1, continued with this vitally important observation: "reasons for judgment will always be capable of having been better expressed ... 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."

27. In the Road Ahead published in June 2020 [and updated in 2021] the President said

Whilst a court is not required to hold the child's welfare as the paramount consideration when making case management decisions, the child's welfare and the need to avoid delay will always be a most important factor and may well be determinative in many cases. Making a timely decision as to the child's further care is in essence what each case is about. The child's welfare should be in the forefront of the court's mind throughout the process.

43.If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time that the court affords to each hearing. Parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear.

44. Clear, focussed and very robust management of cases will be vital in the coming months. The case management judge will have the difficult role of balancing the welfare of the child, the need for a fair and just process and the limited resources of space, time and format with the need to conclude the proceedings.

28. In Re C (Children: Covid-19: Representation) [2020] EWCA Civ 734 Lord Justice Peter Jackson said (albeit in relation to a different form of case management decision)

To conclude, as was said in Re A, the means by which an individual case may be heard is a case management decision over which the first instance court will have a wide discretion based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. For specialist judges, these are becoming routine decisions, and as time goes on a careful evaluation of the kind made in this case is no more likely to be the stuff of a successful appeal than any other case management decision.

Fact-finding on parental alienation

29. Ms Venters relied on the Court of Appeal's observations in cases concerning parental alienation in Re S (Parental Alienation: Cult) [2020] EWCA Civ 658 at [7]:

"At the outset, it must be acknowledged that, whether a family is united or divided, it is not uncommon for there to be difficulties in a parent-child

relationship that cannot fairly be laid at the door of the other parent. Children have their own feelings and needs and where their parents are polarised, they are bound to feel the effects. Situations of this kind, where the concerned parent is being no more than properly supportive, must obviously be distinguished from those where an emotionally abusive process is taking place. For that reason, the value of early fact-finding has repeatedly been emphasised.”

30. That case if I may say (and I dealt with the remitted hearing) was of an entirely different nature to this case in particular because in this case there has already been a substantive welfare hearing following an agreement between the parties that fact-finding was not necessary. The judgment that was given by District Judge Hugman in this case is plainly relevant to the case management of the current application and indeed the appeal but not because it failed to engage with fact-finding but because it sets the starting point for any judge evaluating how this case should be approached. I do not consider it necessary to set out anything further in relation to parental alienation in this judgment because the judgment of DJ Hugman and the contact notes make clear both that a judge has found as a fact matters against the father which might potentially explain F's resistance to contact and also matters that demonstrate the mother's support for F having contact with the father.
31. Nor do I consider it necessary to rehearse the contents of PD 12 J and the jurisprudence in relation to fact-finding and the interplay with the ordering of section 7 reports. The order of HH J Wright recording the parties agreement that a fact-finding was not necessary and the subsequent welfare judgment of District Judge Hugman dealt with issues between the parties that had occurred during their marriage and prior to October 2017. Apart from the mothers assertion that the father's repeated applications to the court and perhaps questioning F during contact issues amounted to domestic abuse there were no identified matters by the father or the mother that post-dated District Judge Hugman's decisions which could properly be described as allegations of domestic abuse warranting consideration of a separate fact-finding. As I say elsewhere in this judgment the mothers allegations were part and parcel of the core issue in the case which was the reasons for F stated refusal to see his father and the apparent disconnect between his behaviour during contact and his stated wishes. This did not require a separate fact find or for a section 7 report whether from Cafcass or Islington to be put back pending a factual enquiry.

Appointment of Children's Guardian under Rule 16.4

32. Paragraphs 7.1 – 7.3 of Practice Direction 16A supplementing Part 16 of the FPR set out guidance about the minority of circumstances in which the child should be made a party to the proceedings. Paragraph 7.1 states that making the child a party to the proceedings is a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur in only a minority of cases. Alternative routes including asking for further work to be carried out by Cafcass, a referral to social services or the obtaining of expert evidence should be considered.
33. Paragraph 7.2 states that:

The decision to make the child a party will always be exclusively that of the court, made in light of the facts and circumstances of the particular case. The following are offered, solely by way of guidance, as circumstances which may justify the making of such an order –

- (a) Where an officer of the Service or Welsh family proceedings officer has notified the court that in the opinion of that officer the child should be made a party;*
 - (b) Where the child has a standpoint or interest which is inconsistent with or incapable of being represented by any of the adult parties;*
 - (c) Where there is an intractable dispute over residence or contact; including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;*
 - (d) Where the views and wishes of the child cannot be adequately met by a report of the court;*
- [...]*

34. Further, paragraph 7.3 highlights that it must be recognised that separate representation of the child may result in a delay in the resolution of the proceedings, and when deciding whether to appoint a Guardian, the court must take into account the risk of delay or other facts adverse to the welfare of the child.

Appellant Father's submissions

35. The grounds of appeal (above) themselves set out in some detail the appellant's case. That is supported by the skeleton argument and Ms Venters submissions. I shall seek to focus on what appear to me to be the principal points.
36. Father's principal submission on the first and third ground of appeal is that the Judge had effectively closed her mind to all the factual issues that he was seeking to pursue (e.g. advancing a case of parental alienation and the relevance of the domestic abuse allegations), and decided that only the child's wishes and feelings would be determinative. In doing so, the judge disregarded any link between the child's apparent wish not to have contact with his father, and the father's allegations that the mother was adversely influencing F. The father submits that there was evidence of parental alienation namely what F had said about how presents sent by the appellant to F seemed to get destroyed. This was recorded in one of the contact notes. Ms Venters submitted that if there was hostility to contact and this was targeted at the father this would in fact amount to a form of domestic abuse of the father and not just emotional abuse of F. The father submits as a consequence, the statutory presumption under section 1(2A) of the Children Act 1989 had been disregarded. Ms Venters whilst accepting that the decision and judgment of DJ Hugman had not been appealed sought to argue that aspects of the judgment justifiably gave the father cause to be concerned that justice had not been done and that subsequently he had been ill served in terms of advice in relation to appeal.
37. The father relies in particular on these extracts of the transcript of the hearing;

MISS KELLY [counsel for the father]: Well, your Honour, in terms of any report that is commissioned, what I would seek on behalf of the father – and

the court has given a very clear indication, and what I would seek on behalf of the father – is that part of that report does look at undue influence as part of the reporting process in gathering the ascertainable wishes and feelings.

JUDGE HUGHES: Well I can't do that, because I can either have a wishes and feelings report or I can have a full s 7 report; and actually at this moment I'm quite satisfied the arrangements at the mother's home are perfectly fine, the boy is going to school, he's doing well, I don't need a s 7 or an overall report – I simply need to know his wishes and feelings at this point.

.....

JUDGE HUGHES: [...] If the boy says, "I do wish to see my father", as far as I'm concerned that will also bring matters to a conclusion in terms of a court order. But I don't know – I do understand what the mother says, and I do understand what the father says – I do not believe that it's necessary to have a rule 16.4 guardian, and I am not prepared to magnify this. I think that within six weeks the local authority, London Borough of Islington, must provide me with a s 7 report limited to wishes and feelings of F – and if the matter comes back in front of me, thereafter I will deal with it on the basis that I've explained to you.

And it does not need a trial. It certainly does not need a regurgitation of fact-finding that's been either in the background or sometimes near the foreground of this case. It simply needs what I just said, and then I will determine it. That's it. Seems as straightforward as that. The case has gone on. The boy has walked with his feet last October, if he still doesn't wish to see his father I – there's no way I would be able to make him. And what is more, there must be a moratorium between these parties.

38. In making her oral submissions Ms Venters expanded on her contention that the judge had inappropriately focused on the importance of F's stated wishes and feelings. She submitted that the observations made by the judge made clear that whatever F said would be determinative and that she was not interested in the reasons which might underpin that. In seeking to expand upon this point Ms Venters referred me to the selection of contact notes which were contained within the appeal bundle and took me to repeated references which supported the contention that in the course of contact F and his father had been shown to have a warm and affectionate relationship, that he appeared to enjoy the time with his father and that he had expressed interest in extending the contact. She also noted that there was material within the contact notes that indicated some negativity from the mother and her placing undue responsibility on F's shoulders for decision-making rather than taking responsibility herself and issues relating to Q and the role he might have played in shaping F's decisions. The contact notes formed the cornerstone of the father's argument that the court had to look beyond the stated wishes and feelings and understand why they were saying something which appeared contrary to their experience of contact.
39. On the second ground of appeal, the father's position is that the judge ignored the views of Cafcass which appear to support the appointment of a guardian and the guidance set out in FPR PD 16A because of her focus on the importance of the child's wishes and feelings and the view she appeared to take that it would be entirely

inappropriate for the father to challenge the child's wishes and feelings, if those are that he does not wish to have contact with his father. Ms Venters pointed out that the justices themselves had directed that a report be obtained from Cafcass on the possible need for a 16.4 guardian and that there were various aspects of the case which plainly fell within the guidance set out in paragraph 7 of PD 16 A.

40. In relation to the author of the section 7 report (Ground iv) the Appellants case is that the Judge completely disregarded the representations made by counsel for the father concerning the objectivity of the Local Authority giving a wishes and feelings report in this case. He asserts that he has made complaints several of which have been upheld and thus this made it inappropriate for Islington to report as the father's perception would be that they would be biased against him. Ms Venters submitted that any social worker would see the substance of the complaints but would not see the outcome where they had been upheld.
41. Ms Venters did not expand upon the grounds which criticised the failure to provide a reasoned judgment or to record the position of the father on the order or to respond to emails.

Respondent Mother's submissions

42. The respondents response to the appeal was contained within a 26-page skeleton argument running to 89 paragraphs. As I have noted it also included an application inviting me to strike out the father's substantive application despite that application having been made to HHJ Hughes QC and refused. No appeal against that had been lodged. Given its length I intend to do no more than summarise in brief terms the main points made in it and elaborated upon by Ms Mitchell in her oral submissions.
43. The thrust of the submissions made on behalf of the mother focuses on the Father's conduct and his history of bringing applications in which costs are ordered against him, and pursuing complaints about the Local Authority, CAMHS, the Police, the mother's legal representatives, a member of the judiciary and the children's secondary school. It asserts that the father's whole motive in pursuing proceedings is not because he wants to see F but because he has a compulsive need to damage the mother. Somewhat surprisingly it makes only brief reference to the judgment of DJ Hugman save in respect of the father's tendency to complain. It contains references to from Islington families intensive team and the adolescent multiagency specialist service generated between 2017 to 2019 as well as the section 7 report which post-dated the decision of HH J Hughes QC but which both parties ultimately agreed I should see. These illustrate the very extensive involvement that Islington have had with the mother, with F and with F's elder brother Q.
44. In relation to the first ground of appeal, the mother submits that the judge was entitled, having considered the court bundle and both parties' position statement and having heard oral submissions, to have regard to the previous judgments and findings about the nature of the Father's applications [A30]. Accordingly, the court could conclude that the determinative issue would be F's wishes and feelings.
45. Further, the mother submits that the father failed to set out any allegations in respect of which the court could make findings of parental alienation, and no oral submissions were made at the hearing [A30]. The mother denies throwing away any presents,

saying that she retrieved presents which were thrown out by F, and others were donated when F outgrew them [A31]. Accordingly, the mother submits that the court could be readily satisfied that there had been no parental alienation and could conclude that domestic abuse allegations from 2016 were irrelevant to the question of present contact.

46. In relation to the second ground of appeal, the mother submits that the indications of the CAF/CASS report were repeatedly brought to the attention of the judge by the Father's counsel and that it is implausible that the Judge did not take it into account. Accordingly, the mother submits that all relevant considerations were taken into account when deciding whether to appoint a Children's Guardian.
47. In relation to Ground iii) the mother argues that at age 12 F's views would be the primary determining factor and that the judge was right to identify the weight that would be given to them at that early stage. However, in oral submissions Ms Mitchell did acknowledge that the contact notes were not before the court and that an explanation for the change as between his apparent positive engagement in contact and his subsequent refusal to attend and his current expressed wishes might be required and would properly be within the ambit of the next hearing.
48. Ms Mitchell argued that permission had not been granted to pursue the ground of appeal in respect of the identification of Islington as the section 7 reporter but in any event emphasised that no evidence had been provided by the father of any upheld complaints about Islington's conduct and that the findings of his habitual complaints meant that the judge's decision that he should not get to choose the reporting body was the correct one.
49. In connection with the remaining grounds Ms Mitchell argued that there was no substance to them, and that no written judgment was required that the order required what was necessary and that the alleged failure to respond did not form a proper ground of appeal.

Evaluation

50. The judgment of DJ Hugman is the starting point for any consideration of applications in relation to F. It was not appealed at the time nor has it been appealed subsequently. It would appear to be an extempore judgment and the appellate courts consistently have cautioned against criticising such judgments by detailed textual analyses which might allow criticisms to be found. That is the case in an appeal against the relevant judgment. It is simply not open to the appellant to try to go behind that judgment in advancing his arguments in this quite separate appeal. One can of course understand why he wishes to go behind the judgment because it contains significant criticism of him and findings which are plainly potentially relevant to the determination of his current application. The judge found that the father's complaints against various individuals were made because he cannot accept criticism of himself and were a form of coercion and bullying. He found that he was in various ways not child-centred but self-centred. He made findings on credibility; finding the father to be evasive, self-justifying and unable to accept any criticism. In contrast he found that the mother gave her evidence well and he preferred her evidence wherever there was a conflict. He found that the father was in various ways bullying and manipulative and had exposed the children to inappropriate behaviour. Thus, to the extent that there were

relevant findings against either parent they were adverse to the father and positive for the mother. They plainly form a reasonably firm foundation for the conclusion that the mother was in general supportive of contact and that there may be objective reasons in F's experiences of his father that would support a desire not to see his father. There was no basis for arguments in relation to parental alienation and HH J Hughes QC was quite right to identify this and reject the need for a fact-finding in relation to the issue. Equally there was no evidential basis for the father's contention that there needed to be fact-finding in relation to domestic abuse. In so far as any findings emerge from DJ Hugman's judgment which are relevant to domestic abuse they are against the father rather than the mother. There was no evidential basis in what had happened since April 2018 to warrant a PD 12J mandated a fact-finding on domestic abuse issues at this time.

51. I observe that in the course of submissions in relation to the listing of a fact-finding hearing the appellant relied on the assertion that if the mother was herself relying on new allegations of domestic abuse which the father denied that the court would have to determine this. This was perhaps in addition to the father's own point that his allegations of domestic abuse should be considered but given that the order of HH J Wright (at which the father was legally represented) concluded a fact-finding was not necessary and the judgment of DJ Hugman which disposed of factual dispute between the parties predating October 2017, his own allegations of domestic abuse provided almost no foundation at all for him to argue the point. However, had the mother made new allegations of domestic abuse that might have provided some foundations for the fact-finding argument. However, as the hearing progressed it seemed to me that there was a misunderstanding of the nature of the mother's case. The father interpreted the submissions that DV agencies had concluded that the mother was a victim of severe abuse as indicating that there were discrete allegations against him of historic abuse. However, as Ms Mitchell confirmed this was not the mother's case but rather that the father's behaviour in particular in pursuing litigation but also at some level in exercising contact rights was motivated not by a desire to see F but rather by a desire to harass the mother. Seen in that context it seems so closely bound up with the substantive issue of F's views and the reasons for them it would not be possible to hold a discrete fact-finding hearing as opposed to a welfare hearing at which the party's motives, their behaviour and F's views were all part of the landscape
52. The mother's case against the father that he is pursuing his application only to harm her does, in terms, amount to an allegation of domestic abuse in the form of coercive or controlling behaviour. The mother supports this by reference to a report which is said to conclude that in making court applications and making allegations amount to extreme domestic abuse. This might arguably, (and indeed ultimately it appeared that Ms Venters' submissions in support of a fact-finding were based on the mother's allegations rather than the father's) indicate a need for a fact-finding hearing although that was not what the mother sought. However, the father's motivation in seeking contact is part of the substantive welfare evaluation in this case. From my reading of the contact notes and the level of warmth and affection shown between the father and F it is at first blush a surprising suggestion that he has no genuine interest in his son but rather is pursuing a vendetta against the mother via the application to see his son
53. It was in the course of Ms Venters' submissions in relation to the view the judge took of the importance of F's wishes and feelings that it became clear that there is an

apparent disconnect between F's non-attendance at contact between November 2019 and October 2020 and the generally positive impression of the relationship between F and his father that is depicted in the contact notes. It then became apparent that those contact notes had not been included in the documentation before the judge. It is also clear from the 10 page position statement filed on behalf of the father for the hearing before HHJ Hughes QC that no reference at all appears in that document to the positive contact that had been taking place and the evidential base that existed for exploring that apparent disconnect. The 10 pages were devoted to parental alienation, the need for fact-finding, separate representation of the child the father's objections to Islington, rebutting the mothers putative 91 (14) application and the father's objections to the mothers supplemental bundle and her case. It is right that there is a very brief passing reference by the appellant's counsel in the hearing to there being positive contact notes but against the backdrop of the position statement where his focus was almost entirely on other matters it is hardly surprising that this point, both in terms of the evidential basis for it and its importance, was lost. PD 27A provides that position statements should be no more than three pages and that they should be as short and succinct as possible. The position statement filed on behalf of the mother was even longer at 12 pages containing extensive reference to the law and the facts. This again did refer to the fact that prior to October 2019 contact appeared to be going well but this was one line in 12 pages of detailed argument. This all for 1/2-hour FHDRA. In the context of the documents which were put before her it is hardly a surprise that it was not apparent to HHJ Hughes QC that there was an apparently well evidenced disconnect between the child's actions in contact, his non-attendance thereafter and what was said to be his then (October 2020) wish not to have any ongoing relationship with his father. Had this been made clear, as it was in the course of submissions before me, it seems inevitable that the judge would have adopted a more nuanced view in particular in relation to the need to explore that apparent discrepancy. Of course, it is a matter of speculation, but I would have thought it was probable that the direction to the section 7 reporter would have included some reference to the need to consider the contact records. This would have led the section 7 reporter to raise with F some of the positive references in the contact notes and to elicit his response. That would have enabled the section 7 reporter to gain a far better insight into the reasons for F's current views and the extent to which they were authentically his own, the extent to which they were balanced and based in experience and thus to enable the court to take a view on the weight that could properly be attributed to them. That might also have enabled the section 7 reporter to consider on an informed basis whether there was any basis for pursuing joinder of F as a party. It is in that context that the appeal against the limiting of the remit of the section 7 report must be judged.

54. The overriding test for the appointment of a guardian is whether it is in the best interests of the child to make them a party. As Ms Mitchell pointed out not only are guardians reserved for the most difficult cases, but the appointment of a guardian also has welfare implications for the child in terms of them being drawn into the litigation. The evaluation of whether the criteria were met for the appointment of a rule 16.4 guardian is a classic discretionary evaluation. A judge of HHJ Hughes QC's experience does not need to go through in some mechanistic checklist way the contents of FPR 16 and PD 16 A. The decision that it was not in F's best interests to make him a party and that a guardian was not necessary as it seems to me unimpeachable particularly prior to the obtaining of any views from the child, particularly of his age and with a background of litigation. Thus, the application was

premature and, in my view, rightly dismissed. The fact that Cafcass had identified matters which might potentially support the appointment of a guardian were in no way binding upon the judge; as the rules make clear the decision is that of the judge.

55. I do not consider that there is any merit in the father's appeal against the order that Islington should provide the section 7 report. In elaborating on the father's complaints Ms Venters outlined that one of them related to how the mother had misreported what a social worker said. She when the father had complained that the mother had misrepresented the social workers comments that this was upheld. Whether that is so or not (and no documents appear to be available the upholding of that complaint or indeed any complaint) that would be a complaint about the mother not the London Borough of Islington. Indeed, in relation to that particular complaint it ought to fortify the father's face in Islington rather than undermine it. However, as Ms Mitchell rightly points out no evidence was produced before HH J Hughes QC or before this court that substantiates the father's assertion that complaints (plural) he has made against Islington have been upheld by external agencies, or indeed by anyone. It is self-evidently relevant that DJ Hugman found that the father had a tendency to complain against anybody who criticised him and that his complaints were (insofar as they were before DJ Hugman) not substantiated but were motivated by his inability to accept criticisms and to seek to erase it. I'm not sure whether HHJ Hughes QC had been able to read that judgment but the lack of any evidential foundation for the submission that it should not be Islington who provided the section 7 report was more than sufficient to justify her conclusion that Islington should provide the report. The fact that Cafcass noted the father had complained against them, the fact that their case had been closed for six months does not detract from the obvious value of a report being obtained from the local authority who had long involvement with the family. Even the local authority's subsequent letter indicating that it might be better that they didn't report is of little if any relevance to the decision. I declined to speculate on why they might have said that. There is therefore no merit in the father's appeal in this regard.
56. I do not consider there is any merit in the grounds which criticise the judges approach to the provision of a reasoned judgment. This was an FHDRA and the reasons emerge clearly from the transcript of the hearing that took place some judges might choose to give a short judgment at the conclusion of such hearings in which they summarise their reasons others (and I am one of them) express their reasoning as they go along. There is no need provided the reasons are clear to provide a written judgment and it would simply be impossible on a practical level to do that for every FHDRA. As the conduct of this appeal has demonstrated the judges reasons were sufficiently given during the course of the hearing. Nor is there any merit in the father's appeal in relation to what was included within the order. It sets out the decisions that were made. The criticism of the post hearing communications does not form a basis for asserting that the decision itself was wrong.

Conclusion

57. The ultimate outcome of this appeal has in some ways been clear as I have set out above because whether the appeal is allowed or not the course this case subsequently follows will not, I think be very different. Having identified that the evidential basis for what seems to me to be the central point was not before HH J Hughes QC either in the form of the contact notes or any helpful written or oral submissions, any criticism of her focus on F's wishes and feelings and their likely importance seems to me to be

entirely misplaced. This court has the power under FPR 30.12(2)(b) to receive evidence which was not before the lower court. This is subject to the overriding objective and the factors identified in *Ladd-v- Marshall* [1954] 1 WLR 1489, which the Court of Appeal have confirmed (see *Gillingham-v- Gillingham* [2001] EWCA Civ 906) remains relevant. Thus, the discretion to admit fresh evidence would be exercisable if;

- i) The evidence could not have been obtained with reasonable diligence for use at the trial, and
- ii) the evidence was such that if given it would probably have an important influence on the result of the case, though it need not be decisive, and
- iii) the evidence was credible.

This all being subject to the overriding objective to deal with the case justly. Given that this is a case management decision under appeal and evidence was not the central component of the hearing before HH J Hughes QC the test seems inapposite. However, what does appear to me to be important is that the point was made albeit poorly and that the contact notes plainly demonstrate the potential force in the argument about the need to explore the apparent discrepancy between F's previous actions and his current words. Thus, it seems to me in applying the overriding objective to deal with this appeal fairly that it is right that I take into account (as indeed both parties invited me to do) the contact notes and the section 7 report. The conclusion in the section 7 report relied upon by Miss Mitchell that F's views appeared to be authentically his own must be viewed by me through the prism of the contact notes; a prism not available to the section 7 reporter.

58. Given that the decision HH J Hughes QC reached arose from the presentation of the case before her and the deluge of issues contained within the position statements and their failure to focus on the central issue a strong argument can be made that the decision should be upheld because it was neither wrong or unjust for serious procedural irregularity on the basis of the material that was presented to her. However ultimately I have reached the conclusion that in order to deal with this case justly and in the light of the evidence that I have admitted and in particular to do justice to F that it can be seen that the limits placed on the remit of the section 7 report was with hindsight wrong and so the proper course is for me to reset the approach in order to facilitate a more efficient way forward when the case returns to the family Court. As I have noted even were the appeal to be refused it would be open to the appellant to argue for an addendum section 7 report to consider the relevance of the contact notes and it would be open to the appellant to renew an application pursuant to FPR 16.4 for the appointment of a Guardian were the addendum section 7 report to provide material justifying that. It seems to me that to refuse the appeal and to require another judge to go through a similar process to that which has been undertaken before me would be a waste of judicial resources and to put strict technical interpretation before pragmatism which is a component of doing justice.
59. It does though illustrate the very real problems which are caused by a failure to focus closely on the real issues which the court must grapple with at a time limited FHDRA. The need for advocates and the parties to identify those issues is emphasised by the Road Ahead. The provision of position statements which far exceed the permitted

length and which do not clearly and succinctly identify the main issues for the judge to determine at the FHDRA but seek to argue in detail ancillary points or the ultimate case are unhelpful and I have no doubt have contributed to the circumstances which have led to this appeal.

60. I will therefore allow this appeal but only to a limited extent in respect of the remit of the section 7 report. In respect of all other Grounds I refuse the appeal. I cannot now set aside paragraph 6 of the order which confined the section 7 report to the child's ascertainable wishes and feelings in respect of spending time with the father because it has already been fulfilled. It seems to me that the appropriate order that should now be made on the appeal is that the application is remitted to the Central Family Court with a direction that an addendum section 7 report is provided by Islington to consider the issue of F's expressed wishes in the light of the material contained within the contact notes. I do not consider that any further direction to the section 7 report is required. I have refused the appeal in respect of all of the other grounds including HHJ Hughes QC's decision in relation to the appointment of a Guardian, but it would not be appropriate for me to seek to place any limit on the first instance court or the parties in that regard in the future. Whether it is in the best interests of a child to be made a party to proceedings falls to be determined on the material that exists at the relevant time. Whether the section 7 report contains material that either the mother or father might seek to rely on to make such an application or indeed whether the report itself raises that as an issue that can be considered without any shackles being applied by me.
61. I will remit the case to the Central Family Court and invite Her Honour Judge Roberts the Designated Family Judge to action the addendum section 7 report and to relist the matter at her discretion. Given that I make no criticism of HHJ Hughes QC in this judgment but rather understand and endorse the decisions she took on the material before her there is no reason why this case cannot be heard by her.
62. That is my judgment.