



Neutral Citation Number: [2024] EWHC 3190 (Fam)

Case No: FA-2024-000285

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/12/2024

**Before :**

**THE HONOURABLE MR JUSTICE HAYDEN**

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**Between :**

**F**

**Appellant**

**- and -**

**M**

**First Respondent**

**- and -**

**Z**

**Second Respondent**

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**Lucy Davis** (instructed by **Direct Access**) for the **Appellant**  
**M** appearing in person

Hearing date: 19<sup>th</sup> November 2024  
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**Approved Judgment**

This judgment was handed down remotely at 2pm on 10<sup>th</sup> December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE HAYDEN

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.

**Mr Justice Hayden :**

1. In this case, the Appellant Father (F) applies for Permission to Appeal against a Child Arrangements Order made by Recorder Millington on 18<sup>th</sup> September 2024. The Order was made in respect of Z, who is 9 years of age. The order provided that Z should live with the Respondent Mother (M) and spend time with Z in accordance with a schedule of contact. A preamble to the order recited that “any Section 8 order made in this court is both recognised and enforceable in Hungary under Brussels 112A”. M sought and obtained leave to relocate with Z to Hungary.
2. Z was born in 2015. The couple separated in March 2019. At that time, Z remained living with M, seeing F on a regular basis. On 23<sup>rd</sup> December 2020, F issued an application for a Child Arrangements Order seeking a division of time between the two parents on an equal basis. On 22<sup>nd</sup> April 2021, M applied for permission to relocate to Hungary. The case then experienced lamentable delays which I regret to say are redundant of any satisfactory or, indeed, coherent explanation. Additionally, there has been a conspicuous lack of judicial continuity. A fact-finding hearing took place in June 2022 before District Judge Jenkins, who heard cross allegations. F contended that M had alienated the child against him. M contended that she had been subject to domestic abuse. The Judge did not find any of the allegations, on either side, to be established by the evidence.
3. Though there was a hearing before HHJ Talbott in November 2022, which appears to have been confined to Christmas holiday arrangements. There was a further hearing before HHJ Robertson which concerned M’s application to travel abroad with Z for one week to attend a wedding. In July 2023, there was a hearing before a Deputy District Judge and a yet further hearing in August before District Judge Elliott, which concerned a challenge to a Section 7 Report, filed in the still unresolved substantive application. The case finally came to be heard in September 2024. The only chronology available to me is that prepared by F as a Litigant in Person. I regard it as substantially accurate. It reveals delay on a scale that is unacceptable and entirely inimical to the welfare of the subject child.

4. The challenges faced by the Family Justice System, at present, are well known and understood. It is not necessary to comment upon them here but great as they are, they cannot be permitted to eclipse the central principle of the Children Act 1989 which obligates the avoidance of delay, recognising this is intrinsic to fair and balanced welfare outcomes for children. Further, in the Family Justice System, judicial continuity has been the touchstone of case management for more than two decades. It is not a luxury; it is a necessity. It may be more challenging to achieve in the present climate, but its importance must not be lost sight of. Further, it has been emphasised cross jurisdictionally. One of the clearest expressions of its importance is in the judgment of Hughes LJ, Vice President of the Criminal Division (as he then was) in **I & Others [2009] EWCA Crim 1793**:

*“Judicial continuity is an essential feature of good case management. Case management is a continuous process and demands consistency of approach. Successive decisions are likely to impact one upon the other. In order to give case management of upcoming cases the close attention it needs, at the same time as coping with current trials, the judge needs to be committed to the case. It is a waste of resources for more than one judge to have to read properly into a large volume of papers; the heavier the case the more this is so.”*

5. The case was finally heard by Recorder Millington, sitting in Central Family Court on 18<sup>th</sup> September 2024. It is the Recorder’s decision that is the subject of appeal. The appeal was advanced on one essential ground, namely that the outcome was “*unjust, due to serious procedural irregularity*”. That ground was argued on two bases. The first contended that the Recorder had failed to consider relevant factors when coming to his decision. The second was that “*counsel acting for [M] had previously been engaged in discussion with [F]*.” It was contended that because of those discussions, Counsel had a duty of confidence to F, and her decision to represent and “*continue representing*” her was prejudicial to F receiving a fair trial.

6. The first basis of appeal was unarguable but, on 12<sup>th</sup> November 2024, I granted an oral hearing for permission to appeal (on the second basis), with appeal to follow. F's pleaded case, advanced before me by Ms Davis, is that he met Ms O at a charity social event. In conversation, Ms O informed F that she was a family barrister which he contends provided him the outlet to discuss the challenges he had faced as a litigant in person in his ongoing family law dispute. F states that Ms O gave him her telephone number and invited him to call her the following week to discuss his case, with a view to her representing him.
7. It is F's case that he took Ms O up on that invitation and contacted her by telephone on 5<sup>th</sup> October 2022. F asserts that the telephone conference lasted approximately one hour, at the conclusion of which Ms O indicated that she was happy to represent him, and that he should contact her when he received a hearing date. She provided him with her website address.
8. On 21<sup>st</sup> February 2023, F contacted Ms O, asking her to represent him, and she responded, F asserts, by inviting him to send her the court bundle, after which she indicated she would "*send a client care letter and start the process*". F contends that he sent the bundle on 21<sup>st</sup> February 2023 but received no response.
9. At a hearing on 5<sup>th</sup> June 2023 before HHJ Robertson, F attended court to find that Ms O was representing M. He described himself as "*shocked*" to see her there. F is an articulate educated man who is employed as a social worker. He was sufficiently disturbed by Ms O's presence on the other side of the case to raise it with the Judge. His instinct was that this was both inappropriate and, at least potentially, unfair. From the account set out in the skeleton argument, prepared by Ms Ellis of Counsel, it is said that the Judge enquired of M whether she was aware that F had previously met with Ms O. M told the Judge that she was aware of it and indicated, upon further questioning, that she was content for Ms O to continue to represent her. If this was the sole focus of the enquiry, then it failed to identify the central danger. The point was not whether M was content for Ms O to represent her, but whether F was. It further requires to be emphasised that F was, at this point, an unrepresented litigant.

10. Ms Davis tells me that there was a Directions Hearing in July 2023, at which Ms O again appeared on behalf of M. There is no reference to this in the papers. Though F's obvious discomfort with Ms O's decision to represent his partner continued, I have been told by his Counsel that by the time the case came before Recorder Millington, on 18<sup>th</sup> September 2024, F assumed that his misgivings were not shared by the court and did not raise the matter again. Recorder Millington, therefore, was entirely unaware of the background.
11. Ms O was contacted during the course of this appeal. She has a different recollection. She accepts that she met F at a social event but asserts that she had no discussion with him. She denies giving F her details, saying that she asked him to get them from her daughter (who I assume was at the event). Ms O accepts that F telephoned her on 5<sup>th</sup> October 2022. In her email to this court, she states as follows:

*"5 October 2022. He rang about Representation at a future hearing but what he wanted was advice, which I refused to give him because I was not instructed. It was left by way of a message to him on whatsapp from me that when he had made up his mind about whether he wanted to instruct me to represent him he should contact me. I did not give advice nor give any impression that I would act for him. I made no notes. He was like so many others who make enquiry of me as a direct access barrister.*

*He was like any other person seeking a direct access service. At this stage I had no details of the case.*

*Not only am I a Direct Access Barrister, I am also my own clerk.*

*People talk to me about their cases in general terms to allow me to establish what service I can offer.*

*No relationship was created at this time."*

12. Ms O had been informed by Ms Davis as to the complaint made against her in this appeal. It requires to be set out:

*"[F] has informed the court that:*

*(i) He met you at a fundraising event in October 2022 where he discussed his case before the Family Court with you in brief*

*terms. He recalls that you gave him your telephone number and invited him to call you;*

*(ii) On the 5<sup>th</sup> of October 2022, he telephoned you and discussed his case with you, at length, for about 1 hour;*

*(iii) On the 1<sup>st</sup> of February 2023, he contacted you again asking you to represent him in court. You responded by text message asking for the bundle;*

*(iv) On the 21<sup>st</sup> of February 2023, he sent the bundle to you with detailed comments in an accompanying email;*

*(v) On the 5<sup>th</sup> of June 2023, at a Directions Hearing before HHJ Robertson, he describes himself as “shocked” to find you representing his former partner, [M]. He immediately raised the matter with the Judge who checked with [M] that she was happy to proceed with you representing her. It is [F]’s recollection that he was not asked whether he was happy for you to represent his former partner; and*

*(vi) At the hearing in September 2024, you again represented [M] but neither you nor he informed the Judge (Recorder Millington) that you had advised him on this case in the past.”*

13. In her email in response, Ms O does not engage with F’s account to the effect that the conversation on 5<sup>th</sup> October 2022 lasted approximately an hour. F, through his Counsel, told me that when he raised the matter with Judge Robertson, Ms O had disputed the length of the conversation. Also, in her email, Ms O states the following:

*“He contacted me on two times subsequently. Both contacts were none case related. I responded cordially and in my own style. Pleasant I was to him no more.”*

This is a reference to an exchange of WhatsApp messages which are, as Ms O says, not related to the case. They appear to be expressing mutually warm and fulsome New Year’s greetings.

14. Ms O accepts having received the bundle from F. She also accepts that F asked her to represent him. In her WhatsApp message filed by F, which appears to be in February 2023, Ms O states:

*“Thanks for contacting me. Please email me so I can send you a client care letter for the hearing. I operate best if I am given the*

*bundle and then make my own assessment of the evidence and what are the next steps in the case. Send me an email so that I can start the process.”*

15. Ms O also states in her email that she “*neither opened or read the bundle or his email because I, never as a matter of practice, undertake any work until a signed contract/ agreement has been provided by a potential client together with proof of identity and address and my fee is paid.*” I do note, however, that in her own account, she talks of sending “*a client care letter for the hearing*” which certainly can be read as indicating that she is regarding herself as having been instructed.

### **The Law**

16. Central to the understanding of the concept of fairness is a recognition of the importance not only of an actual unfairness but the perception or risk of it:

*“31) Re C (Children: Covid 19: Representation) [2020] EWCA Civ 734 (“Re C”) at para 23 identifies a list of aspects of the right to a fair hearing guaranteed by law. They include:*

- a. “...(2) There must be protection not only from actual unfairness but also from the risk of unfairness...*
- b. ... (5) The principle of equality of arms entails a reasonable opportunity to present one’s case, including one’s evidence, in a way that does not place one at a substantial disadvantage to one’s opponent...*
- c. ... (6) The administration of justice requires not only fairness but the appearance of fairness... However, the misgivings of individuals with regard to fairness of the proceedings must be capable of being objectively justified...”*

*32) In P (A Child: Fair Hearing) [2023] EWCA Civ 215 (citing Serafin v Malkiewicz [2020] EKSC 23 [2020] 1WLR 2455) the Court of Appeal confirmed:*

*“It is a fundamental principle rooted in the common law concept of natural justice and reflected in the ECHR, that a legally valid decision can only spring from a fair hearing. If a hearing is unfair, a judgment cannot stand.” (para 42)*



34) *Under the BSB Bar Code of Conduct, which MO-E was bound by, a barrister must not accept instructions to act in a particular matter if, inter alia:*

*(4) “there is a real risk that information confidential to another former or existing client **or any other person to whom you owe duties of confidence**, may be relevant to the matter, such that if, obliged to maintain confidentiality, you could not act in the best interests of the prospective client and the former... person to whom you owe that duty does not give informed consent to disclosure of that confidential information” (emphasis added)*

*And*

*(10) “there is a real prospect that you are not going to be able to maintain your independence”*

*(Rule C21)*

35) *A duty of confidence will arise:*

*“whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected.”*

*(paragraph 11(ix) A v B plc [2003] QB 195)*

36) *An actual, particularised, breach of confidentiality does not have to be established in order to render a trial unfair in these circumstances: R v Winston Smith (1975) Cr App R 128 (“Smith”). In Smith a pupil barrister had sat in a conference between the Defendant and his solicitor’s clerk and had seen the Defendant’s proof of evidence. The pupil barrister later attended the trial, robed, and sat behind prosecution counsel – who was in his chambers. The Court of Appeal accepted that no information obtained by the pupil was divulged to counsel for the Prosecution or used at the trial. Despite this the court found it “impossible to say that, in the circumstances justice was seen to be done” and the appeal against conviction was allowed.*

37) *Smith was more recently approved in Kjell Tore Skjevesland v Geveran Trading Co Ltd [2002] EWCA Civ 1567 (“Kjell Tore”), where the Court of Appeal dismissed an appeal which had been mounted on the basis of procedural irregularity. The*

*irregularity asserted was that counsel for the petitioner had been previously socially acquainted with the wife of the defendant, during a period of time that was factually in issue in the proceedings and that this had led to unfairness.*

*39) Further, at paragraph 42, the court clarified that breaches by an advocate of the BSB Code of Conduct are not a matter for the court, but rather that:*

*“the court is concerned with the duty of the advocate to the court and the integrity of the proceedings before it. The court has an inherent power to prevent abuse of its procedure and accordingly has the power to restrain an advocate from representing a party if it is satisfied that there is a real risk of his continued participation leading to a situation where the order made at trial would have to be set aside on appeal...”*

17. I do not need to decide between the conflicting accounts of F and Ms O, nor would it be right for me to do so, on the case as advanced before me. However, there is sufficient common ground between them, as to the extent of their exchanges, which enables me to determine this appeal:
- i. Ms O plainly and on her own account, provided F (be it directly or indirectly, through her daughter) with her professional contact details, in her capacity as a Direct Access barrister;
  - ii. F responded, only a few days later, by contacting Ms O directly and in her professional capacity;
  - iii. Following this contact, both later exchanged text messages, on two occasions. The messages made no reference to the case, but indicate the existence of a relationship;
  - iv. On 21<sup>st</sup> February 2023, F contacted Ms O asking her to represent him at a Directions Hearing;
  - v. Ms O responded to that request by asking F to email her in order that she could send “*a client care letter*”, she further requested a copy of the electronic bundle to be sent to her;

- vi. F provided Ms O with the electronic bundle, as requested;
  - vii. When F arrived at court, he was shocked to discover Ms O representing M and immediately raised with the Judge his perception of the unfairness of the situation; and
  - viii. F repeated his complaint subsequently at a later hearing before a different Judge. He did not repeat the complaint before the Judge who heard the case.
18. As is clear from the case law that I have set out above, F does not have to establish a particularised breach of confidentiality. The weight of the professional obligation is to avoid the appearance or risk of unfairness and, in the time-honoured phrase, for justice not only to be done but to be seen to be done. What is clear is that F approached Ms O in a professional capacity and, at her request, sent him the case papers. There were, as I have set out, a number of contacts. F plainly considered that a professional relationship had been created. F's immediate complaint to the judge, when he discovered that Ms O was representing his partner, is a clear indication of his perception of the professional nature of their relationship. Whilst it may not have generated any factual matrix of unfairness, it creates the appearance and/ or risk of unfairness. F certainly perceived unfairness, which is an important forensic barometer. It is also manifestly authentic. In this sphere, the bar is set high and for good reason. The integrity of the court process must be inviolable. Accordingly, this appeal must be allowed.
19. In order that the case can be reheard expeditiously, it is transferred to the High Court and has been listed before a Judge of the Division on 28<sup>th</sup> November 2024. Achieving this listing on short notice has been challenging. It is partly reparation to the child and the parties for the appalling delay that has occurred in this case historically but, more importantly, to ensure that if Recorder Millington's conclusions are replicated on rehearing, the plans for the child to relocate to Hungary which are scheduled for January 2025, will not be derailed.