Case No: B4/2012/2952

Neutral Citation Number: [2013] EWCA Civ 72
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BRENTFORD COUNTY COURT
HIS HONOUR JUDGE POWLES QC
BF11P00635

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2013

Before :

LADY JUSTICE ARDEN
LORD JUSTICE ELIAS
and
LADY JUSTICE BLACK

- -

Between :

	H (A CHILD)	

- -
- -

Mr Nick Goodwin (instructed by **Hodge Jones & Allen Llp**) for the **Appellant**
Ms Sally Gore for the **Respondent**

Hearing date: Tuesday 29th January 2013

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Judgment **Lady Justice Black :**

1. This is an appeal against an order made by Judge Powles on 29 October 2012. The order concerns contact between H, who is 8, and his father (F). The appellant is H's mother (M) with whom H lives.

2. H's parents physically separated in May 2011 although it seems the relationship had come to an end in fact before then. Proceedings between them began soon afterwards with an ex parte application by M which resulted in a non-molestation order and an order prohibiting F from removing H from M's care or from the jurisdiction.

3. It was rapidly apparent that there were factual disputes between the parents as to how F had behaved during the relationship and that there was dispute also as to what the arrangements should be for F to see H. In particular, M objected to F seeing H in his new home.

4. To understand the issues in this appeal, it is necessary to understand the evolution of the court's orders in relation to H. I will therefore go through the chronology of events, much assisted by the written chronology provided by M's counsel. It would be enormously helpful if such chronologies were provided in all family appeals as they are for most first instance hearings.

The procedural history until July 2012

5. On 29 September 2011, the court made an order for contact every Saturday morning and otherwise as agreed in writing. The order includes various recitals, amongst them the following:

> "Upon it being recorded that the mother does not consent to contact at the father's home".

6. In November 2011, a fact finding hearing took place before District Judge Allen. She carefully examined a number of allegations made by M, which included allegations that F had been violent to her, for example by punching her in the chest with both fists, grabbing her neck and pinning her against the wall.

7. The district judge found that the relationship was "clearly a volatile relationship" and that both parties could lose their temper and scream and shout in the course of incidents. She found that H had been present in the course of "mutually loud and violent argument between the two people he loves most in the world" which was very distressing for him and that the main risk in the proceedings was that the mutual antipathy, if unresolved, could be harmful to him.

8. The district judge did not find the direct physical or verbal abuse alleged by M proved. She thought that on occasions F demonstrated controlling and apparently somewhat domineering behaviour towards M and that he had a loud voice and could appear aggressive. However, it appears that she did not think he meant to be aggressive as she found that such physical contact as there was with M was not intentional and that he did not intend any physical harm by any of his actions "even where they appear controlling or to a degree aggressive". She summarised that "really my only finding is that the respondent can appear to be aggressive and controlling on occasions."

9. The order that was made after the fact finding hearing has the following recital

encapsulating the position:

> "Upon the Court finding the specific allegations not proven and making no findings save that the respondent could give the appearance of being controlling and aggressive on occasion" (*minor correction mine)*

10. There is also a recital recording that F gave certain undertakings. These must, I think, be those which feature on the form at page 106 of the bundle, that is not to communicate with M except by texts for the purpose of arranging contact and not to go into the street where M lives. The undertaking form records that the earlier non-molestation order was discharged.

11. The body of the 28 November order provides for the contact order of 29 September to continue, with additional Christmas contact. Two further recitals are also relevant to contact, namely:

> "Upon the deletion of the recital of 29 September 2011 that M does not consent to contact taking place at F's flat"

and

> "Upon the Court considering that Saturday contact should be extended and inviting the parties to reach agreement on this"

12. CAFCASS were invited to provide a report about the child's wishes and feelings in relation to contact and staying contact in January 2012 when there would be a directions hearing.

13. Things did not, however, proceed as anticipated. It is M's case that on 23 November 2011, shortly before District Judge Allen's decision, H had alleged to her that F had assaulted him. We are told by her counsel (who did not appear below although F's counsel, Ms Gore, did) that M told counsel who was then representing her about this but counsel decided not to inform the District Judge.

14. On 12 December 2011, an "Independent Domestic Violence Advocate" with whom M had been in contact referred the case to social services.

15. On 16 December 2011, Mr Chikoore, a social worker from the relevant local authority, met M and H in order to make an initial assessment to establish whether there were any risks to H from his father. From his discussion with M emerged a number of allegations which M said H had made about F's violent behaviour towards him. The specific incidents alleged were that F threw H across a table hurting his back and hitting his head

against a wall in March 2011, that F had dragged him across the room by his arm during contact on 12 November 2011, and that F had hit him across the chest whilst he was playing with the Xbox at his house during contact. M also made some more general allegations about F's conduct affecting H, including that he used to lock H in the downstairs toilet by way of punishment.

16. Mr Chikoore spoke to H. H did make some allegations to Mr Chikoore. The social worker noted that when H was describing alleged incidents of physical abuse by his father he spoke loudly enough for his mother to hear whereas when he talked about the positive aspects of contact, he lowered his voice. H told the social worker he enjoys contact with F and was looking forward to seeing him the following day. At no point did he indicate that he was scared of F or did not want to see him. The social worker thought that H's opinion of the alleged incidents may have been influenced by M. He concluded that it was appropriate for H to continue to have contact with F. He said so in his report which he circulated on 12 January 2012.

17. It is now known that M had taped both her own and H's conversation with the social worker, unknown to Mr Chikoore; a transcript has been prepared. In due course, M complained to the local authority about Mr Chikoore's conduct. It has reached stage 2 of the local authority's internal procedure and a response is awaited by her.

18. Meanwhile, M had applied on 20 December 2011 to suspend or vary the existing contact provisions on the basis that H had told the social worker that F had been violent towards him and he had witnessed violence by F against M. Giving directions that day, the district judge essentially adjourned the matter to the end of January 2012 to await a report from Mr Chikoore, providing that contact was to be supervised by a named third party until further order.

19. On 27 January 2012, both parties appeared before a district judge who discharged the provision for supervision by the third party and substituted a requirement that all contact take place in a public place and not at F's home until further order. Provision was made for Mr Chikoore to file and serve his Initial Assessment (a different document from his first report) by early February and for CAFCASS to provide a full welfare report by mid May.

20. The core of Mr Chikoore's Initial Assessment is much the same as his first report although he added to it as well. He gave the opinion that there were no immediate child protection concerns, that there was no evidence to suggest that H was at immediate risk from his father and that "on the contrary, he has talked positively about contact with him and this should be promoted wherever possible".

21. The district judge considered the matter again on 20 February 2012. He ordered that

contact be extended so that it would be for a longer time on Saturdays and also from after school until 5.30 p.m. on Tuesdays, with F's undertaking relaxed so that he could take H back to the boundary of his M's home at the end of contact. It will be noted that contact still had to take place in a public place.

22. Towards the end of May 2012, the CAFCASS officer provided her report. She met H and the parents and also observed H with his father. M said to the CAFCASS officer that there should be no extension of contact because she saw H's safety as paramount although, the officer records, she accepted that H loved his father and, according to CAFCASS officer, said he would probably want more contact (as indeed H, in due course, told the CAFCASS officer that he would, including going to his father's house). M apparently remained convinced that H was scared of F. However, when the CAFCASS officer saw H's reaction when his father arrived for contact, it was noticeable excitement and delight. There was an obvious well-developed bond between them with H showing no signs of anxiety or unease. When the CAFCASS officer later asked him about having told her that F had grabbed him or thrown him across the room, he said it was not true and his mother had told him to say what he did. The officer did not conclude that this meant M had encouraged H to lie. M said she had told H to tell them if he had been hurt and the officer thought "[t]here could be confusion in H's mind as to whether he was indeed hurt by his father or was hurt in a play fight where there was no intention on his father's part to cause him harm".

23. The CAFCASS officer shared the assessment of the social worker and added her own view, based on her own observations, that H would feel deprived and neglected by his father if their relationship was not allowed to flourish, not to mention that it was vitally important that he experienced both sides of his mixed heritage. She recommended shared residence, with H living predominantly with his mother but having increased contact with F with no restrictions on where they went or what they did. She envisaged this developing into staying contact.

24. It seems that M did not accept the findings of District Judge Allen in November 2011, did not accept the view of the social worker, and did not accept the recommendation of the CAFCASS officer. In addition to her complaint about the social worker, she has made a complaint about the CAFCASS officer, amongst her concerns being the fact that the officer revisited H's allegations with him in the presence of F.

The hearing before District Judge Nisa in July 2012

25. Towards the end of June, M suspended contact for 48 hours because, she said, H had said that F took him regularly to his flat in breach of the court order then in force. F's response was to apply to enforce the contact order. The application was listed for urgent directions on 13 July 2012. District Judge Nisa gave directions with regard to the filing of evidence and listed the matter for "final hearing" with an estimate of 2 ½ days on the

first open date after 7 September 2012.

26. A transcript has been obtained of the hearing before District Judge Nisa because the parties are in debate as to what she decided, and in particular what was intended to be the ambit of the final hearing that she directed. It is clear that the application listed before her was F's application for enforcement of the contact order but that that did not proceed because the contact had restarted on an assurance by F that he would not take H to the flat. Counsel for F told the district judge that there was no agreement "effectively on anything" between the parties and they had come to the view that "there will have to be a final hearing to try to determine exactly what's going to happen". However F's counsel tried to persuade the district judge to lift some of the conditions concerning contact. He had got no further than heralding an application for relaxation of the provision preventing F from going into the street where M lived when the district judge intervened because those issues were not listed and would be sure to provoke considerable argument. She said she was "not going to be making any determination of those very important issues without evidence and just on submissions".

27. It is clear from the transcript as a whole that the district judge intended the final hearing to include (but not be limited to) a determination of M's allegations about F having taken H to the flat. In addition to whatever other evidence the parties filed, the CAFCASS officer and the social worker were to attend the first day of the final hearing. There was no order for a separate fact finding hearing to determine the issue of whether F had been violent to H and no order for the filing of a schedule setting out the allegations that M sought to prove, either in relation to that or in connection with the alleged breach of the contact order.

From the July hearing until the hearing before Judge Powles

28. Following the hearing before District Judge Nisa, matters went off track. The date ultimately fixed for the full hearing was in April 2013, 9 months away. I remain unclear as to how precisely this happened. I see that Ms Gore told Judge Powles that it was to have taken place in December 2012 but that witness difficulties prevented that. Another contributory factor seems to have been the pressure of work in the court which meant that hearing dates were simply not available.

29. On 23 July 2012, F applied to be allowed to revoke his undertaking not to take H home and not to enter the road where M and H live, and also for contact to be extended as recommended by CAFCASS. His statement in support of that application still contemplates a hearing in September 2012. In her reply to this statement, M said there had been "two further incidents whereby H has been hurt or distressed by his father", one at church in March 2012 and one in a café in April 2012.

30. On 10 August 2012, there was a 30 minute directions appointment before District Judge Plaskow at which F's application was adjourned to be dealt with at the final hearing.

The hearing before Judge Powles

31. A further directions hearing was arranged for the 29 October 2012 for an hour. So it was that the matter came before Judge Powles. It was at that hearing, it seems, that it emerged that the first date available for a hearing was in April 2013. We are told that Judge Powles heard the matter for a day, although only on submissions, with no evidence being called. Finally, he extended the duration of contact, varied the collection and return arrangements and lifted the restrictions on F taking H to his home. It is the lifting of those restrictions against which M appeals. There were other features of the order but M does not challenge them. They included H being joined as a party to the proceedings and CAFCASS being required to appoint a guardian for him. In the light of delays in the appointment of CAFCASS guardians, the judge later replaced this latter requirement with an invitation to NYAS to act.

32. The judge was plain that he was dealing with the matter as an interim application pending the full hearing in April. He recorded the positive recommendations of the social worker and CAFCASS officer but also that M was dismayed at their reports and had complained about both of them. He referred to the welfare checklist and focussed particularly on risk, notably the risk of denying H contact on the one hand and the risk to his safety perceived by the mother because of the way in which she thinks F has acted. M was urging the judge to continue to require contact to be in a public place to ensure H's safety.

33. The judge was conscious, as he said, that other judges had not agreed to relax the relevant conditions but, he said, "those judges were not aware I am sure that it will not be until April that we can have a final hearing". He said "another best part of six months is a long time in an eight and a half year old child's life and it seems to me that I must look at the matter afresh". He thought that as a stopgap until autumn, H seeing his father in the artificial situation of public places was fine but not for longer. He explored M's argument that if changes were made, it would pre-judge the outcome of the final hearing because the allegations, if true, should influence decisions about contact. He asked himself "if they are all proved is that going to have a profound effect on whether contact is going to take place or not?". His answer was that "while it may do, it may have some influence, I do not think it likely that they are going to be sufficient, even if wholly proved, to stop F seeing his child". He considered that what needed to happen quickly was "the process of rebuilding confidence in each other" and the only way to start was "by trusting each other a little bit".

34. He said that if he released the restriction on H being taken to F's home and something

goes wrong, then F:

> "will be the author of his own misfortune because if he demonstrates that he cannot control himself, then that will have a significant impact, I would have thought, on the amount of contact that he can expect to enjoy in the future."

He considered that F had therefore got "everything to lose by showing temper towards H…or seeking to get his own way through some form of instrumental violence".

35. There was some confusion at the start of the hearing before Judge Powles as to what District Judge Allen had found in November 2011 in relation to the adults' relationship. The judge certainly did not *under*estimate the nature of what was found in a way that was disadvantageous to M when he worked on the basis that F "can be aggressive and controlling". The judge explicitly said that that had given him pause when wondering about whether he should relax the contact arrangements. He decided, however, that he should, there being "every reason why [F should take H to his flat] so that H can see how he lives".

36. Judge Powles listed the matter for a further hour in January 2013 in order to deal with the question of the guardian's appointment and said he would look again at the question of overnight contact then but, conscious of the need not to put too much pressure on M or H, would not order it over Christmas. He wanted to see for himself how the relaxation of arrangements worked out.

37. It is worth noting that in the argument that followed the judgment over various issues, the judge made quite clear to the parties that he had H at the centre of his thoughts at all times in making his decisions and that they would do well to focus on what H needs rather than what they need.

General points about the appeal

38. The essence of M's appeal is that Judge Powles ought not to have relaxed the restrictions on contact without there first being a fact finding hearing in relation to H's "allegations" about F's conduct towards him and that not only was his decision premature, it was also a wrong exercise of his discretion on the evidence that was available and put H at risk.

39. The M's appeal has as its backdrop PD 12J of the Family Procedure Rules 2010 although that practice direction was not actually cited to Judge Powles and it is therefore hard to criticise him for failing to mention it specifically in his judgment.

40. Counsel for M submitted that Judge Powles was engaged in making decisions both in relation to case management and in relation to welfare. I am usually extremely reluctant to enter into a debate over the classification of decisions. Often, such debates seem to me unhelpfully to shift the focus of an argument away from a careful consideration of all the circumstances of the particular case which are what matter. However, this is an occasion when there may be value in identifying the nature of the decisions that Judge Powles made.

41. I agree with counsel's analysis of the position. Judge Powles determined a number of case management issues, including finding a date for the final hearing and deciding to hear the interim contact issue on submissions only, but he also made a welfare decision about what interim contact there should be. Although we did not hear argument on the point, it seems to me that the judge was accordingly applying two slightly different tests in reaching his decisions. The welfare of the child was his paramount consideration when determining the question of interim contact which was a decision in relation to H's upbringing (section 1(1) Children Act 1989) but not when he made his case management decisions as he was not then determining questions relating to the child's upbringing. Judges adjust their thinking naturally, day in, day out, to accommodate these legal principles. They do not articulate them expressly, nor would I expect them to do so. Certainly, nothing turns on this distinction in this case.

42. When it comes to this court's general approach to appeals against case management decisions and in relation to welfare decisions, I find it hard to distinguish between the two varieties of appeal. We have made clear in other cases, most recently Re TG (A Child) [2013] EWCA Civ 5, that robust but fair case management decisions will be supported by the Court of Appeal which will only interfere in limited circumstances where it is:

> "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." (§35)

Precisely the same is true of a judge's welfare decision which is, of course, another exercise of his broad discretion. The difficulty of appealing in relation to interim (as opposed to final) decisions has also been emphasised over the years. This not only applies to interim welfare decisions. Case management decisions also have the capacity to give rise to interim appeals which my Lady has pointed out in another case (cited at §35 of Re TG) lead to satellite litigation and delays in the litigation process.

43. The President reminded us in Re TG (§38) of the vital considerations set out in Piglowska v Piglowski [1999] 1 WLR 1360. He did so there in connection with a case management decision concerning the instruction of an expert. I recently referred to Lord

Hoffmann's observations in Piglowska in Re B (a child) [2012] EWCA Civ 1475 (§113) in the context of a welfare decision, stressing the central relevance of them in many family cases. They must influence our approach to the issues in this case.

The appellant mother's submissions

44. Counsel for M submitted that Judge Powles' decision to relax the restrictions on F's contact pre-empted the full hearing set for April 2013 and made it redundant. It was particularly wrong, he argued, for him to do this without hearing evidence either as to the substance of H's allegations or as to how, if proved, they might affect welfare decisions for H. He submitted that the allegations were serious and the only proper course was for him to have declined to deal with the application without them first being determined. By proceeding without this being done, he said that the judge was unable to apply the welfare checklist in s 1(3) Children Act 1989 as he should because he could not assess harm properly. Furthermore, he had deprived himself of the benefit of the guardian's welfare recommendations in the light of such factual findings as were made.

45. He also submitted that the judge was not entitled to change the course set by the district judges who heard the matter on 13 July 2012 and 10 August 2012 unless there were fresh circumstances that justified that. What they had effectively determined, he said, was that the restrictions on contact at home would remain until the fact finding exercise had taken place at the final hearing. He argued that a deviation from this course was not justified by the fact that they were probably not aware then that the final hearing would not be until April.

46. He also criticised the judge's approach in asking himself whether the allegations, if proved, would have a profound effect on contact and answering that that would not lead to a cessation of contact. He said the issue was more subtle than the judge thought and he had to consider not only whether the allegations, if proved, could lead to a cessation of contact but also whether in those circumstances safety measures, such as contact only being in public or even perhaps under supervision, would be required.

47. He relied on Re Z [2009] EWCA Civ 430 and Re F-H [2008] EWCA Civ 1249. From Re Z he took the observation of Wall LJ that the Practice Direction in relation to domestic violence was to be obeyed and that it "places proper and firm emphasis on the importance of the fact-finding exercise" which cannot be short-circuited, with the judge only ordering contact if at the conclusion of the hearing, he finds as a fact, having heard all the evidence, that the children are in no way at risk or that for some other reason contact can take place. He also relied on what Wilson LJ said in the same case. Wilson LJ accepted that not all allegations made by one parent against the other should properly be the subject of a fact finding hearing but considered that the problem in that particular case was that when the fact finding hearing reached its second day, the judge terminated it of his own motion. Wilson LJ referred to Re F-H (supra) "in which this court stressed

the caution which a judge should bring to bear in deciding to reverse a programme, previously set by another judge, that a fact-finding hearing should take place" (see §§43 and 44 of Re Z).

Discussion

48. My consideration of the grounds of appeal will start with PD 12J which supplements Part 12 of the Family Procedure Rules 2012. This follows closely its predecessor, issued on 14 January 2009, with which Re Z was concerned. Its focus is the risk of harm to a child where there has been, or there is a risk of, domestic violence and a purpose of it is to ensure that that risk is not overlooked or given too little weight.

49. It cannot be said here that the court failed to recognise that an issue of this nature arose. M's allegations in relation to F's conduct towards her had been examined at the hearing in November 2011 and what H had said was going to be one of the issues in the forthcoming final hearing. There is no express provision in the orders of July and August 2012 for a fact-finding hearing to determine whether there was substance in what H said about F's treatment of him nor does the transcript of the July 2012 hearing clearly set out an intention that the final hearing should consider this. However, it seems to me that it is a necessary implication that this was intended. H's "allegations" were of great concern to M and it was quite plain that she would be pursuing them at that hearing. That is confirmed, I think, by the 2 ½ day estimate for the hearing which would have been over-generous if the issues were confined to the factual question of whether F had taken H back to the flat (as to which there was evidence from an investigator which it might be thought would perhaps shorten things considerably) and the welfare question of what adjustments should be made to contact.

50. Judge Powles also had the issue at the forefront of his mind as we can see from his judgment. Although he did not refer specifically to the practice direction, he was well aware of the need to consider the likely impact of the domestic violence issue on the conduct and outcome of the proceedings and in particular whether the nature and effect of the violence alleged was such that, if proved, the decision of the court was likely to be affected (see, inter alia, paragraph 11 of the practice direction). M's complaint seems to me not so much that he failed to have regard to that question as that he gave the wrong answer to it.

51. PD 12J does not prevent a judge from making an order for contact without making findings of fact in relation to disputed allegations of domestic violence.

52. Paragraph 13 does not dictate that there must be a fact finding hearing but simply requires the court to determine as soon as possible whether it is necessary to conduct such a hearing before it can proceed to consider any final order for residence or contact

and, if it decides that a fact-finding hearing is not necessary, to record the reasons for that. The issue of domestic violence cannot in any circumstances be ignored; as provisions such as paragraph 3 and paragraph 11 make clear, it must be kept in mind at all times. However, in an appropriate case, a conscious decision can be made either not to make findings of fact at all or not to do so in a separate fact finding hearing.

53. In this regard, it is worth underlining what Munby J (as he then was) said in Re C (Children) [2012] EWCA Civ 1489 (reiterated in Re TG at §27) about the breadth of the family judge's discretion to determine the way in which an application should be pursued. As he said, that discretion permits the judge, in an appropriate case, summarily to dismiss an application as lacking in sufficient merit to justify pursuing the matter or to determine that an issue is one to be dealt with on the basis of written evidence and oral submissions only. I would add that that is so whether the application is for an interim order or a final order.

54. Although paragraph 15 of PD 12J contemplates a two stage process of fact finding hearing and welfare hearing, I do not read it as *requiring* two separate hearings. That would not be consistent with the President's Guidance of May 2010 [2010] 2 FLR 1897 and associated authorities which sought to limit the proliferation of split hearings, see particularly §8 of the Guidance. PD 12J should be read, in my view, as imposing an obligation on the court to determine whether findings need to be made about factual issues at all and whether, if so, that should be done in a separate fact finding hearing or as part and parcel of a composite fact finding and welfare hearing. If it decides a separate fact finding hearing is necessary then it has to give directions for that and it must be sure to fix the welfare hearing there and then.

55. Paragraphs 18 to 20 deal specifically with the making of interim orders pending a fact finding hearing and set out the matters that should be taken into account by the court if it is contemplating such an order. They concentrate particularly on the effect contact is likely to have on the child and on "any risk of harm, whether physical, emotional or psychological, which the child is likely to suffer as a consequence of making *or declining to make* an order" (my italics) (paragraph 19 b)). Paragraph 20 reminds the court to consider also the ways in which risk can be minimised.

56. Counsel for M referred us also to paragraphs 26 and 30. Paragraph 26 becomes relevant when findings of fact have been made; similar ground is covered at an interim stage by paragraphs 18 to 20. Paragraph 30 is similarly directed to the situation where findings have been made but its message applies equally at an interim stage: the court should always explain how it has approached the issue of domestic violence and incorporated the considerations that flow from it in its decision as to interim contact or residence.

57. I am not persuaded that M can point to any provision of PD 12J with which Judge Powles failed to conform. In my view, the appeal can only succeed if it is established

that his exercise of his discretion in relation to case management and/or substance was flawed in a way that requires this court to intervene.

58. Did the judge wrongly deviate from a course that had been set in the hearings of July and August 2012?

59. It is difficult to spell out of the hearing in July 2012 a specific determination that no decisions could be made about contact until the facts had been found. The district judge intervened very early on in the hearing to prevent F's counsel from pursuing adjustments to contact because that issue had not been listed before her, although she offered to give directions so that the lifting of restrictions could be determined on another date and it is fair to say that she told counsel that she was "not going to be making any determination of those important issues without evidence and just on submissions".

60. The August 2012 hearing does not take us much further. There is no transcript of that hearing; it would not have been a justifiable expense to seek one. The order did, however, put over the question of revoking the restrictions on contact to the final hearing.

61. It is probably sensible to work on the basis that District Judge Nisa and District Judge Plaskow contemplated that findings of fact needed to be made in relation to what H had said before the restrictions were relaxed. However, I am in no doubt that Judge Powles was right to say that those judges did not contemplate that there would be a delay until April 2013 before the findings could be made. And I am equally in no doubt that the judge was right in considering that a further six months was a long time in the life of a child of H's age and that he could and should look at the matter afresh.

62. He was entitled to take the view that the present arrangements were not satisfactory and to give active consideration to removing some of the restrictions on contact. He noted the artificiality of H's contact with F which prevented him from relaxing naturally at home with him and enjoying ordinary life together and required that there always had to be something on the go. He thought that fine as a stopgap but not appropriate given the wait for a final hearing. He did not mention it expressly but cannot have been oblivious to the fact that it was now October and contact in public places is more difficult in winter than it is in summer.

63. The judge decided to deal with the issue on the basis of quite lengthy submissions and without oral evidence. That is not infrequently the position at an interim hearing; indeed, there may sometimes be no alternative course open to the judge. The mere absence of live evidence does not invalidate the judge's decision provided that the available written evidence, taken together with the submissions, is sufficient to enable him to make a proper welfare decision, giving appropriate regard amongst other factors to any risk of

harm. In my view, it was a proper course to take here.

64. Did the judge fail to take proper account of the risk that F may pose to H? I am not persuaded that he gave inadequate weight to the risk of harm or failed to appreciate the nuances in relation to the impact that adverse findings might have upon contact, for example in terms of safety measures that might be required. He was conscious of the argument advanced on behalf of M that to relax the conditions now would be to pre-judge the outcome of the April hearing. He acknowledged that adverse findings may have an influence on contact but he thought it unlikely that they would prevent F seeing H. That was in accordance with M's case. She was not seeking a termination of contact and at one point her counsel went as far as to say to Judge Powles that proof of the allegations would not necessarily even prevent unsupervised contact. Accordingly, I think it entirely possible that at this point in his judgment, the judge had an eye to the future and was thinking about how contact would ultimately be managed given that it was likely to continue even if the allegations were proved. No doubt this thought was what was behind his comment that "the process of rebuilding confidence in each other, if that is going to be possible, must start".

65. It is not fair, however, to suggest that his consideration of the impact of the allegations was confined to this passage in his judgment. The issue of what safety measures needed to be in place around contact was central to his judgment as he considered whether it was necessary for H and F to remain in public places in the interim. He acknowledged very clearly in §6 that M's allegations meant there was a risk that F would be violent to H and that he would not be safe in F's company if left alone. His judgment shows that he evaluated the risk (what the harm might be and the likelihood of it materialising) by considering a number of strands of evidence and that he balanced it against other factors.

66. In evaluating the risk of F behaving abusively towards H, the judge was entitled to take into account the evidence of the CAFCASS officer and the social worker about what had possibly engendered the allegations, and about the absence of child protection concerns and the desirability of contact, whilst recognising M's complaints about the way in which they had carried out their evaluations (§5). The CAFCASS officer in particular had made significant observations in relation to H's enthusiastic and easy reaction to F which were very material but both professionals stressed the need for contact. It was a measure of the CAFCASS officer's confidence that she felt overnight stays should be introduced even though Judge Powles felt that that should not happen just yet. I read Judge Powles' comment in §9 about F having everything to lose by showing temper towards H as reflecting the judge's view that this would operate as a disincentive to F to behave in that way and therefore as diminishing the risk.

67. The judge also looked, as he was obliged to do, at the risk of harm flowing from refusing to adjust the contact arrangement. He was entitled to give weight to H's need to have a "proper relationship" with his father in normal circumstances and to the deficiencies of the restricted arrangements. He was entitled to give weight to the unsatisfactoriness of

the stopgap arrangement now that it would have to last for a much longer time than anticipated.

68. Balancing the two main factors in the case was particularly a matter for the judge's discretion and it led him to the decision to lift the restriction on contact as he did.

69. We should resist the temptation, as Lord Hoffmann told us in Piglowska, to subject the judge's judgment to "a narrow textual analysis", particularly when it was an extempore judgment delivered at an interim hearing that lasted for much longer than the time allocated for it in the list. We should read Judge Powles' reasons "on the assumption that, unless he demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account". It has not been demonstrated to me that Judge Powles erred in making the order that he did which was within the bounds of his discretion, supported by the evidence and explained in his judgment. I would therefore dismiss the appeal.

Lord Justice Elias:

70. I agree.

Lady Justice Arden

71. I also agree.