Neutral Citation Number: [2022] EWCA Civ 911

Case No: CA-2021-001878

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
The Honourable Mr Justice Keehan
WV19F00188

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 July 2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
LADY JUSTICE WHIPPLE

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AZ (A CHILD) (RECUSAL)

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Shiva Ancliffe QC and Sham Uddin (instructed by **Duncan Lewis**) for the **Appellant**
Tom Wilson (instructed by **Shoosmiths**) for the **First Respondent**
Timothy Bowe (instructed by **Glaisyers**) for the **Second Respondent** (written submissions)

Hearing dates : 4 May 2022
- -

APPROVED JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 5 July 2022.

LORD JUSTICE UNDERHILL, LORD JUSTICE BAKER and LADY JUSTICE WHIPPLE :

INTRODUCTION

1. This is the judgment of the Court to which all its members have contributed.

2. It concerns an appeal against the refusal by Keehan J of an application to recuse himself made during a hearing in long-running private law proceedings under the Children Act 1989 about a boy, A, now aged four. At an earlier hearing when Peter Jackson LJ granted permission to appeal, the appellant, A's mother, made it clear that she was not inviting the Court to set aside the order made at the end of the hearing during which the recusal application was made. Rather, she sought an order that the judge would be recused from sitting on the next, and final, hearing in the proceedings, which were listed to start on 23 May 2022.

3. In view of the imminence of that hearing, having taken time to consider the merits, we informed the parties a few days after the hearing before us that we had decided to dismiss the appeal for reasons which would be given at a later date. This judgment sets out the reasons for our decision.

THE FACTUAL AND PROCEDURAL BACKGROUND

4. The following summary is taken substantially from earlier judgments in these proceedings, none of which have been the subject of an appeal.

FACTUAL BACKGROUND

5. A's parents met and married in 2009. After the mother had sadly suffered a series of miscarriages, they decided to try to have a child via a surrogacy arrangement. In April 2017, they entered into an arrangement with a surrogacy agency in Ukraine. In June of that year, they signed a written surrogacy agreement with a woman in Ukraine to whom they had been introduced by the agency. Thereafter, the process of creating an embryo started with the father providing sperm which was inserted into an egg provided by the donor. On 5 August 2017, the embryo was implanted into the surrogate mother.

6. At about the same time, the mother, with the father's knowledge and agreement, sent an email to the director of the agency asking if the father's unused genetic material could be stored for five months while they awaited the progress of the course of treatment then underway.

7. Ultrasound examination of the surrogate confirmed that she was pregnant and the parents returned to this country. On 21 November 2017, without informing the father, she sent an email to the director of the Ukrainian surrogacy agency enquiring about the possibility of using the remaining embryos for a second surrogacy. The director replied proposing that the parents execute a power of attorney authorising the agency's lawyer to sign the necessary papers.

8. On 7 December 2017, the mother and father executed a power of attorney authorising the surrogacy agency to sign documents on their behalf. It was the father's case in these proceedings, accepted by the judge, that he was told by the mother that the purpose of

the power of attorney was to assist with the registration of the expected child's birth and obtaining a passport.

9. The surrogate gave birth to A in Ukraine in April 2018. The baby was handed over to the parents shortly after birth.

10. A few weeks later, the director of the surrogacy agency sent an email to the mother enclosing a copy of a second surrogacy agreement. The mother replied asking the director not to discuss the second agreement with the father, asserting that he found it difficult to discuss the matter because of concerns about miscarriages. On 24 April 2018, the second surrogacy document between the agency and the parents was signed. The judge subsequently found that the father's signature had been forged.

11. On 7 July 2018, the parents flew back to this country with A. On 12 July they filed an application for a parental order under s.54 of the Human Fertilisation and Embryology Act 2008. By this stage, however, there were difficulties in the parties' relationship. On 23 July, the mother left the family home with A and the following day transferred £60,000 from the parents' joint account into her own account. A few weeks later, she and the child returned to the home and thereafter the parents attended couples counselling. Meanwhile, the parental order reporting officer carried out inquiries in accordance with the regulations and visited the family on several occasions. The mother did not inform the officer of the second surrogacy arrangement.

12. Meanwhile, another woman in Ukraine had been identified by the agency to act as the surrogate under the agreement. On 25 October 2018, a further surrogacy agreement was signed between the parents and the second surrogate. The agency's lawyer signed the agreement on behalf of the parents using the power of attorney which they had signed December 2017. The director of the agency sent an email to the mother that the agreement had been signed and enclosing a scanned copy. The email was neither copied nor forwarded to the father. On 9 January 2019, an ultrasound scan confirmed that the second surrogate was pregnant and that she was carrying twins.

13. It was the father's case accepted by the judge that it was not until 5 March 2019 that the mother informed him about the second surrogacy. On the same day, he telephoned the agency in Ukraine making enquiries about it. On the following day, the mother reported to the police that she had been assaulted by the father on 3 February 2019. She changed the locks of the family home to prevent the father gaining entry. On 15 March 2019, the mother made a without notice application for a non-molestation order against the father which was granted by a deputy district judge on 18 March. On 22 March 2019, the father applied for a child arrangements order in respect of A. No contact took place between the father and the child until a hearing in June 2019 when it was agreed that contact would start on a supervised basis. Meanwhile, in a further exchange of emails with the agency in Ukraine, the mother renewed her request to the director only to communicate with her and let her know if the father or someone on his behalf contacted the agency.

14. On 5 August 2019, the second surrogate in Ukraine gave birth to twins, a girl and a boy. For the next few months, the mother divided her time between caring for A in this country and travelling to the Ukraine to look after the twins. During this period, the father's contact with A was extended by a court order and by the end of the year A was having regular overnight stays with his father.

LITIGATION BACKGROUND

15. The three court applications (the joint application for a parental order, the mother's application for non-molestation and occupation orders, and the father's application for a child arrangements order) were listed for a composite fact-finding and welfare hearing over five days in January 2020. At the conclusion of the hearing, only the evidence relating to the fact-finding element of the hearing had been completed. The judge therefore adjourned for written submissions on that element, after which a reserved judgment would be delivered to be followed by a further hearing to determine the welfare issues. On 6 April 2020, prior to the delivery of the reserved judgment, the mother brought the twins to this country from Ukraine. At that stage, A moved to live principally with his father, and had regular weekly contact with his mother.

First Judgment

16. On 17 April 2020, the judge handed down his first judgment in these proceedings. Having summarised the background, the law and the evidence, he started his analysis by recording his impression of the parents' evidence (at paragraph 103):

> "I found the father to be a measured and sincere witness who gave evidence in clear and precise terms, albeit he became very emotional when speaking about A. I regret to observe that I found the mother to be a most unsatisfactory witness who lied to the court in key parts of her evidence."

17. He observed that the principal issue to be determined was whether the father knew about the second surrogacy agreement. The mother's case that the father had known of and consented to it was supported to some extent by the evidence of the director of the Ukrainian surrogacy agency. The judge found that the mother had lied extensively in her evidence about the second agreement. He said (at paragraph 115(vii)):

> "the mother has serially lied in her evidence. I find no innocent explanation for these lies. She is, I find, a wholly unreliable witness who will tell lies with alacrity to achieve her objectives."

The judge also found the director of the agency to be "a most unsatisfactory and ultimately unreliable witness" who had in some respects been untruthful in her evidence. He concluded that the father had not signed the agreement; that the mother had deliberately concealed the second surrogacy from the father until 5 March 2019 when it was too late for him to do anything about it because the surrogate's pregnancy was so far advanced; that the father had not consented to the extension of the period of storage of his genetic material by the agency; and that he had not consented to the second surrogacy arrangement.

18. The judge also considered the mother's allegations of domestic abuse on which she relied in support of her application for an injunction. He rejected these allegations, concluding (at paragraph 120):

> "I consider it most likely, and find, that the father's adverse reaction to the news of the second surrogacy so incensed and angered the mother that she sought to punish the father and/or

> exact revenge by: (i) making a false allegation of assault against the father to the police; and (ii) stopping all contact between A and his father, for no good or child focussed reason whatsoever."

Second Judgment

19. The welfare hearing started on 22 April 2020. In the course of his evidence, it was put to the father that he had brought flowers to the mother at her brother's home on the day after the end of the fact-finding hearing in January, and stayed for several hours. The father accepted that he had visited but denied that he had brought flowers or stayed for several hours. Counsel acting for the mother (not, we record, Mr Uddin) then informed the judge that there were CCTV recordings of the father's visit and that the mother wished to apply to re-open the findings of fact made in the judgment of 17 April. The hearing was then adjourned for the recordings to be produced and transcribed. After a series of further case management hearings, the judge considered the mother's application to re-open at a hearing on 13 July. He dismissed the application, indicating that he would give his reasons in the judgment to be delivered following the adjourned welfare hearing, but gave the mother permission to seek further findings of coercive, controlling and financial abuse. Subsequently, the adjourned hearing took place over three days from 22 to 24 July after which judgment was reserved and handed down on 3 August.

20. In this second judgment, having summarised the background, developments since the first judgment, and the relevant legal principles, the judge considered first the application for a parental order. All parties – the parents, the guardian representing A, and the local authority who had intervened in the proceedings – agreed that the order should be made, and the judge, after carefully considering how the unusual facts should be accommodated within the statutory provisions, concluded that all the provisions were met and agreed to make the order. There is no suggestion of any criticism of his decision and it is unnecessary to consider this issue any further.

21. The judge then set out his reasons for dismissing the mother's application to re-open the earlier findings. At this point, he considered the evidence about the father's visit to the mother on the day after the fact-finding hearing. The CCTV evidence had demonstrated that, contrary to the father's evidence at the hearing in April (given before disclosure of the existence of the CCTV images), he had visited the property for several hours and had brought flowers for the mother. The judge recorded that in a subsequent statement and at the hearing in July the father had accepted that he had lied about this. The judge continued (paragraph 71):

> "He said he deeply regretted lying to the court and explained that he had only done so because of his shame that he had failed to reconcile with the mother. He said he did not want the world to know of his failure. A witness lying to the court can never be condoned, but: (i) I accept the father's explanation; and (ii) I find that it does not undermine or negate my previous overall finding as to the father's credibility."

The judge dismissed the application to re-open as totally without merit.

22. He then considered the additional allegations of abuse which he had permitted the mother to raise at the adjourned hearing, which included that he had required her to account for every penny spent and that he had made threats about her not being A's biological mother. The judge rejected these allegations and also concluded that there was no cogent or reliable evidence to support an allegation by the mother that the father was a flight risk and might abduct A to Bangladesh. He noted (paragraph 96) that, although the mother asserted that she accepted his earlier findings, she still maintained, contrary to those findings, that the father had assaulted her in February 2019 and that he knew all about and consented to the second surrogacy. The mother's application for a non-molestation order was dismissed.

23. With regard to the application for a child arrangements order, the judge accepted that the mother had the ability to meet A's physical needs, but found that she was "completely unable to accept the harm she had caused A, not least by pursuing the second surrogacy" which had taken her away from A for prolonged periods while she was looking after the twins in Ukraine. On the basis of the totality of her evidence, the prospects of A being allowed to enjoy a relationship with his father if he lived with her were "very poor". In contrast, the judge was

> "entirely satisfied that that if A continued to live with his father, he would be enabled and encouraged to have a loving, positive and beneficial relationship with his mother."

He therefore concluded that it was in A's welfare interests to live with his father. With regard to the mother's contact, and the further issue of how and when A should be introduced to the twins who are living with her, the judge acceded to an application by the guardian for a report from a consultant clinical child and adolescent psychologist, Dr Pettle, and therefore adjourned to a further hearing the final decision on the extent of contact, together with an application by the father that the mother's exercise of parental responsibility for A should be limited by court order. In the interim, the mother's contact was to continue on the same basis as before – one visit per week lasting four hours in the father's home, with the father to be absent during the contact. The local authority was discharged as an intervenor. The judge concluded his second judgment in these terms:

> "It was submitted on behalf of the mother that she had accepted the findings of fact which I made in the judgment of 17th April 2020 and that she wished to move forward with the father in the care of A. She now has the opportunity to demonstrate this resolve over the course of the intervening months before this matter returns to court when, hopefully, final orders will be made."

Events Between August 2020 and August 2021

24. On 1 October 2020, the mother filed an application in the family court in Wolverhampton for child arrangements orders in respect of the twins. She claimed an exemption for the requirement to attend a Mediation Information and Assessment Meeting (MIAM) on the grounds of domestic violence. Her application made no reference to Keehan J's findings regarding the conception of the twins or his rejection of her allegations of domestic abuse.

25. On 7 October 2020, the mother telephoned the police and made allegations of domestic abuse against the father. On 13 October, she gave a statement to the police in which she set out her allegations, including those which the judge had found to be untrue in the family proceedings. She said that she had "serious concerns" about the father's treatment of A, adding:

> "when someone knocks on my door I am worried it will be someone coming to inform me that my son has passed away".

As a result, the police attended the father's home to conduct a check on A's safety. Police logs recorded that they had "absolutely no concerns" about the father looking after the child, who was described as looking "healthy and happy as he should be". The note added: "there is potential of this being a malicious call". At around the same time, the mother made a complaint to the General Medical Council about the father (who is a doctor), repeating allegations of abuse which the family court had found to be untrue. The mother only disclosed that she had made this complaint to the GMC when she was giving evidence ten months later in August 2021.

26. Following the police visit to his home, the father applied to the family court for an order for police disclosure. At a further hearing before Keehan J on 11 November, an order for disclosure was made. The order included a recital that the mother had informed the court that "she did not make the referral to the police". Subsequently, the police applied for disclosure of the judgments given in the family proceedings in April and August 2020. An order for disclosure of those judgments was made following a closed hearing on 11 January 2021 attended only by the police. At a further hearing on 27 January, a further order for disclosure by the police was made and the mother was directed to file a statement explaining the circumstances of her report to the police.

27. The final hearing was listed for two days on 24 and 25 March 2021. At that time, of course, the country was in the middle of the Covid-19 pandemic. In the event, the hearing did not proceed. The mother was unable to attend as she was undergoing chemotherapy. Her application to adjourn was initially refused but ultimately granted at the start of the hearing on 25 March. The judge's approach to her application to adjourn is one of the instances now relied on as evidence of apparent bias. At the hearing on 25 March, the judge admonished the mother's counsel in terms that feature in the second instance relied on in support of this appeal. We shall therefore consider these matters in more detail below. Following further submissions, the hearing was adjourned to dates in August 2021. The judge made further case management directions, including requiring the mother to file updating medical evidence about her current state of health and treatment by 23 July.

28. In the following weeks, there were further email exchanges between the mother and the police in which she encouraged them to pursue their investigation. The emails are extensively quoted in the third substantive judgment delivered on 15 November 2021. In one email, the mother wrote:

> "I am very concerned that the importance of the police investigation is critical to my eldest son's welfare."

In another, she wrote:

> "I am concerned the two [family court] judgments … did not give an accurate account or true reflection to all the evidence the court had been provided during the court proceedings."

In a further statement made for submission to the CPS for a charging decision, she repeated her allegation that the father had signed the second surrogacy agreement, asserted that A had "suffered numerous accounts of child abuse through maltreatment from my ex-husband", and continued:

> "I now fear for A's welfare and safety, as these concerns have been ignored by the family court proceedings"

and

> "I am not happy with the outcomes of the family court, to this date. I do not believe that the judge has listened to my case fairly and that he has made his decisions based upon my ex-husband's testimony and has not properly considered the evidential facts provided, including independent professional reports that my legal team have presented to him. I do not agree with their findings and I feel that the Judge has been biased throughout."

29. Meanwhile, Dr Pettle had carried out her assessment as directed, looking in particular at whether, and if so how, A should learn about, and be introduced to, the twins, and how their relationship should be developed. Her recommendations, as explained in detail in her report and later in her oral evidence, as summarised subsequently in the third judgment, were that:

(a) keeping secrets from children can be toxic and can have an extreme effect on close family relationships;

(b) there was no reason to delay giving an agreed simple narrative to A in which he was told about the twins which would be added to over time as a prelude to him meeting them;

(c) both parents should be involved in drafting the narrative;

(d) the sooner this piece of work was started with A, the easier it would be for him to assimilate the information he was being given;

(e) the narrative should be given to A over the next 3 to 4 months and that he should have his first meeting with the twins some 2 to 3 months thereafter;

(f) it was not a sustainable position for A not to be told about his half siblings and it would be better for A if the father could acknowledge the twins.

30. Plainly the continuing difficulties between the parents posed a significant obstacle to the implementation of this plan. Dr Pettle addressed this problem in her report (in a passage which was later quoted in the third judgment and, we infer, was of particular importance to the judge's exploration of the issues at the hearing in August 2021):

> "While [the mother] accepts that judgments have been made, she has continued to pursue her allegations relating to domestic abuse with the Police. She also made serious comments about A's wellbeing which led the Police to undertake a welfare check, but they found absolutely nothing to substantiate her concerns. [The mother] shows little insight into the consequences of these actions, particularly the impact these were likely to have on her former husband and the implications for communication about A. [The father's] position of wanting nothing to do with the twins has become more entrenched, and he does not want A to know of their existence until he is much older. The circumstances have cemented the breakdown of trust between [the parents]. The only way to achieve a more positive outcome for A is for his parents to change their behaviours, and this appears unlikely to happen in the foreseeable future. This severely limits the options.
>
> The attachment security and mental health needs of A need to be prioritised. The parental couple are each caught up in their own grievances about the other's behaviour and unless they find a different way forward A will end up carrying these conflicts into the future, and this is likely to cause him emotional distress. A is likely to become increasingly aware of the chasm between his parents and this can be damaging, and potentially leads children to feel that they need to take sides. Assuming that [the mother] remains the legal resident parent for the twins, she is the mother (social, legal and psychological) of all three children in addition to [the father] being the genetic link between them, and it could be beneficial for A to develop a relationship with [the twins]. This requires that constructive safe and positive contact be supported by both parents. It does not appear that this can be provided by these parents now. [The father] does not take A to handovers and his decision to avoid any direct communication with [the mother] appears to be predominantly based on self-protection. If the rift between them continues they would be unable to talk together about how to handle A's questions about his conception or that of the twins as he grows older. Furthermore, [the mother's] actions give little confidence that she will reliably follow agreed decisions."

31. The mother did not comply with the direction to file updating medical evidence about her current state of health and treatment by 23 July. Instead, her solicitors sent an email to the judge's clerk asking that their client be permitted to attend the hearing remotely. The judge responded via his clerk that,

> "in the absence of direct medical evidence on the adverse impact of [the mother] attending court, she will attend the hearing in person at least for the purposes of giving her evidence. Therefore this will be a hybrid hearing with the mother and father attending in person with the respective legal teams. Other parties are entitled to attend in person or to appear remotely."

On 4 August, the mother filed an updating statement in the proceedings in which she gave details about the progress of her medical condition. She did not, however, file any medical evidence. On 16 August, two days before the hearing, her solicitor emailed the judge's clerk again renewing the request that the mother give evidence remotely, saying that she had requested updated medical evidence which was not yet available, but citing the details set out in the mother's statement. On 17 August, the judge responded via his clerk that "in the absence of cogent medical evidence my decision that both parents shall give evidence in person stands." The mother's counsel (by now Mr Uddin) responded immediately that "it is my firm instruction that my client will not be attending in person to give evidence" and seeking an indication of how the court wished to proceed. The judge's clerk responded that "Mr Justice Keehan will, if necessary, order the mother's attendance and attach a penal notice." Later that afternoon, counsel emailed the judge's clerk again saying that he had received instructions that the mother "cannot participate at the hearing either in person or by remote method because she instructs me that she is not physically and emotionally fit". The judge's clerk replied that, "absent any cogent medical evidence, His Lordship is minded to proceed as previously arranged." Mr Uddin replied indicating that he wished to "make an application through this email to withdraw from the case as I feel professionally that I cannot continue or would his lordship want me to make that application in person at tomorrow's hearing". The judge's clerk replied that any application could be made at the start of the hearing.

August 2021 Hearing and Afterwards

32. The hearing at the centre of this appeal took place over five days from 18 to 20, 26 and 27 August 2021. The full hearing has been transcribed and we shall consider those parts of the transcript relevant to this appeal in detail below. In summary, the hearing proceeded as follows. At the start of the first day, Mr Uddin did not make an application to withdraw as anticipated in the email exchange the day before. Instead, he asked the judge to put back the hearing until 2pm so that he could take further instructions from his client, who was attending remotely. The judge agreed. When the hearing started that afternoon, Dr Pettle gave evidence and was examined by all counsel. At the end of the afternoon, Mr Uddin made a further application for his client to give evidence remotely. By that point, a report had been received from the mother's treating consultant concerning her attendance at court, apparently following a request from the solicitor for the child. After hearing submissions, the judge ruled in these terms:

> "Mr Uddin, I think we have reached a stage in the case where I have to take a pragmatic approach. So the mother may give evidence remotely, subject to this caveat. If the technology does not work or we otherwise engage in difficulties with trying to receive the evidence remotely, it is going to have to be in person."

Mr Uddin confirmed that his client had no objections to the father giving evidence in person.

33. On the next day, the father gave evidence, in person. On the third day, the mother started her evidence, remotely. At the start of her evidence, Mr Uddin informed the court that his client wanted breaks every 20 minutes during her evidence. The judge replied that "we will do 40 minutes and see how we go." It seems from the transcript

that there were two breaks during the morning and none in the afternoon. The mother's evidence had not concluded at the end of the third day, and the hearing was adjourned for six days, resuming on 26 August. On that date, the mother continued her evidence, with two breaks in the morning session, and concluded her evidence shortly after the short adjournment, after which the children's guardian was examined in chief and cross-examined on behalf of the father. On the next day, the guardian returned to the witness box. A few minutes into the morning session there was an exchange between the judge and Mr Uddin in the course of which the judge again admonished counsel for his conduct. This incident is another matter on which the mother relies in this appeal and we shall consider it detail below.

34. After the guardian had completed her evidence, counsel on behalf of the police, who had attended at the judge's request, entered the court. The judge asked a number of questions to establish when the police investigation would be complete and a charging decision taken. Counsel was unable to answer those questions. He informed the judge that the police were awaiting further information from the mother. The judge asked: "Six months have passed since that request was made. How much longer are the [X] Police Force proposing to give the mother before they send the papers to the CPS?" After a further exchange, the judge observed that "At the moment it strikes me as utterly indefensible that absolutely nothing has happened on this case for five months." He directed that a senior officer should provide a statement answering the questions he had posed, and warned that he was likely to be highly critical of the police force in his judgment.

35. After counsel for the police withdrew, Mr Uddin applied to the judge to recuse himself. That application was refused. After further housekeeping matters, the hearing was adjourned with an order made (1) refusing the mother's application to recuse, (2) directing the parties to file written submissions by 13 September and (3) granting the father permission to disclose certain documents to the GMC, the Medical Defence Union, the CPS and the police, including the first and second judgments in the proceedings.

36. On 2 September, the senior police officer responsible for the investigation sent a statement to the court saying that he had instructed the investigating officer to give the mother a further 28 days to provide outstanding evidence, failing which the file would in any event be sent to the CPS, and that it was anticipated that a charging decision would be taken within 28 days of receipt of the file.

37. On 3 September, the mother filed a notice of appeal against the judge's refusal to recuse himself. In the notice, the mother stated that she was not legally represented, and the grounds of appeal consisted of a narrative statement written in the first person apparently by the mother. Her complaint was summarised by a passage highlighted in bold typeface:

> "I wish to appeal the decision of the judge not to recuse himself as I feel that he has not conducted himself in an impartial way and has been biased in his comments and conduct throughout the hearings. He has made inappropriate comments to me such as previously calling me malicious and continued to call [me] a liar on many occasions, throughout the hearings. He has also

> pressurised and intimidated me for reporting my abuse to the police."

The mother set out in some detail her complaint about the judge's treatment of her when challenging her about the police investigation. She said that in her opinion,

> "he has even tried to interfere with the criminal investigation by telling me to withdraw my statement from the police for the criminal investigation, because he has ruled in the fact finding that there was no domestic abuse."

She complained about the judge's approach to her medical condition before and during the hearing. The grounds concluded:

> "I feel that throughout the hearing I was treated unfairly, intimidated, interrogated for reporting to the police, bullied and the judge was not being impartial in his handling of the hearing. I feel that my ex-husband was treated differently during his cross-examination, with the judge even responding on his behalf on some parts and l was treated very negatively."

38. On 26 September, a skeleton argument was filed in support drafted by Mr Uddin in which he raised additional grounds of appeal. A response was filed on behalf of the father inviting this Court to refuse permission to appeal. A response was also filed on behalf of the guardian in neutral terms but making some observations about the judge's conduct of the proceedings. On 28 September, the mother filed an amended appeal notice seeking to rely on supplemental grounds. On the following day, the Civil Appeals Office granted the mother permission to amend.

39. On 27 October, the judge's clerk sent the draft judgment to the parties' lawyers for typographical correction. On 3 November, Mr Uddin had sent an email to the judge's clerk in which he said that he understood that a transcript of the hearing was available. Mr Uddin continued:

> "At this stage I have concerns that some of the narrative in the judgement does not accord with my recollection and notes. I therefore would like to know whether his lordship had the benefit of the transcripts when the judgement was drafted. I would also like to see copies of the transcripts before making my final editorial comments. I think it is both in the interest of justice and proportionate for the court to share the transcripts with the parties specially when "allegations" are levelled against me in the draft judgment which in my view appear to be inaccurate."

The judge's clerk replied saying that the judge had the transcript when preparing the judgment, and that if counsel wished to see the transcript they should be ordered and paid for through the court office. Mr Uddin replied citing a particular part of the draft judgment which he contended did not accord with his notes of the hearing and adding:

> "Therefore in my view it is essential for all counsel to have access to the transcripts before making editorial comments in

> view of the fact that the transcripts have been used when drafting the judgment."

We were not told if there was any response to this email or how the issue of typographical corrections was resolved.

Third Judgment

40. The judgment was handed down on 15 November 2021 (although it was wrongly dated 25 October 2021). There is no appeal against the findings or decisions made by the judge, but since it provides the context in which the allegation of bias falls to be considered it is necessary to set out his reasoning in some detail.

41. Having identified the issues and summarised the relevant legal principles, the judge set out the history in some detail (paragraphs 19 to 95). He then turned to the application to recuse. We shall return to this part of the judgment when considering the merits of this appeal. At paragraphs 103 to 109, he set out Dr Pettle's evidence, citing extensively from her report including the passages quoted above.

42. Between paragraphs 110 and 116 he summarised the father's evidence. He recorded that the father did not accept Dr Pettle's recommendations about introducing A to the twins in the near future. He said that the father's view was that "he would know from A when his son felt ready and comfortable to meet with the twins". The father was opposed to a family assistance order recommended by both Dr Pettle and the guardian. The father had said that part of his problem was that he still loved the mother. The judge observed that this had been apparent on each occasion that the father had given evidence. It was nevertheless the father's position that, because of the mother's false narrative, his lack of trust in her and her repeated applications that he thought contact should be restricted to six visits a year and that there should be an order restricting the mother's exercise of parental responsibility.

43. Between paragraphs 117 and 130 the judge considered the mother's evidence. He recorded that she had made allegations to the police that he found false either in earlier judgments or in this judgment, adding that she could not give a satisfactory explanation as to why she had reported the allegations other than to say that she had not lied to the police. At paragraph 122, he recorded:

> "she asserted that the court had ignored the concerns for A's welfare and safety in the care of the father. She then said that the family case and the criminal investigation were two separate matters. For the purposes of the family proceedings she accepted the findings made in my two previous judgments – most pertinently that the allegations she had made against the father were false. However, for the purposes of the criminal proceedings she did not accept my findings, she asserted that those allegations which I had found to be false were true, she made further allegations against the father in respect of his care of A and she asserted that this court was biased against her."

The judge recorded that the mother had said in evidence that she had also disclosed the same information to the GMC, justifying this on the basis that the father was "a danger

to the general public". In reply to the guardian's counsel, she had said that it would be an end to the matter if the CPS decided not to prosecute.

44. The judge recorded that the mother's primary case was that, once A had been introduced to the twins, he should move to live with her. She said that she accepted the report and recommendations of Dr Pettle and the guardian and would comply with everything the professionals suggested. At paragraphs 129 to 130 the judge said:

> "129. When asked how she and the father could agree a narrative to be given to A when she believed in a different set of facts from the father (and having been asked this question five times) she eventually replied that she would have to accept the findings and judgements of this court. She continued that she would have to draw a line under past events and that she was willing to work with the father.
>
> 130. She was asked whether she accepted that the father did not pose a risk of harm to A. She agreed. This stance is completely contrary to many of the assertions and allegations made by the mother to the police …."

45. The judge then turned to the guardian's evidence, recording her recommendation for monthly contact between A and his mother, for A to be told about the twins in an agreed narrative and then having a meeting, and for this process to be under the umbrella of a family assistance order. She did not agree with the father's proposal for an order restricting the mother's parental responsibility. At paragraphs 133 to 134, the judge made the following critical comment about one aspect of the guardian's evidence:

> "133. In light of the allegations the mother had made to the police about the father and the overall tenor of the mother's evidence, the children's guardian was asked how the mother could contribute to the narrative for A. She responded that the mother was a very child centred lady who could separate out her views from A's best interests. I asked in what sense was the mother 'child centred' when she had commissioned a second surrogacy without the knowledge or consent of the father but using his genetic material and bringing two innocent children into this world, she could not provide any satisfactory answer.
>
> 134. If this view of the mother has informed the children's guardian's analysis of the issues in this case, the foregoing evidence completely undermines her assessment of the case and her recommendations."

46. The judge then set out his overall analysis. He acknowledged the father's devotion to A, accepting his wish to promote the boy's welfare, but added (paragraph 138):

> "There is but one caveat to enter and that relates to the twins. The father knows and acknowledges that he is their biological father, but he cannot yet see himself as a father figure to them. One cannot imagine the emotional and psychological impact on

> the father upon learning that, without his knowledge or consent, his genetic material had been used which resulted in the birth of two innocent children. His struggle to come to terms with what has happened and the fact that he is the father of twins is entirely understandable. It, however, clouds the father's thinking and judgment on the issue of introducing A to his half siblings."

The judge observed:

> "It is the actions of the mother in commissioning a second surrogacy without the knowledge or consent of the father which has caused this very sorry state of affairs and which will result, in all likelihood, in emotional and psychological damage and harm for A and the twins. In the circumstances it beggars belief that the children's guardian should describe the mother as 'a very child centred lady'.

47. At paragraph 145, the judge made the following observation which is of direct relevance to this appeal:

> "For the avoidance of any doubt my exchanges with Mr Uddin during the course of this hearing, which are set out above, and my observations upon his conduct have had no bearing whatsoever on my assessment of and findings about the mother and the evidence she gave to the court."

48. The judge accepted that the mother plainly loved all three children and that her physical care of them was "beyond question". He went on, however, (at paragraph 147),

> "The real and substantive issue in respect of the mother is the level of risk that she poses to A's emotional and psychological wellbeing as a result of her views about and attitude towards the father. For the last three years or so, she has conducted a relentless campaign to vilify and denigrate the father. Her visceral hatred of the father is all consuming and in truth she will not willingly concede there are any positives about him as a person or as a father. She has repeatedly lied about the father with alacrity and, I regret to find, she has continued to do so."

He repeated his findings in the first and second judgment, noting that the mother had not sought permission to appeal against them. He noted that she had said she accepted his findings for the purpose of these proceedings but not for the purposes of the police investigation and had now made further allegations. He continued:

> "153. It is deeply troubling that the mother gave no indication that she recognised or understood the utter absurdity and illogicality of this stance. In my judgement this stance is cogent evidence of:
>
> i) the depth of the mother's hatred of the father;

ii) the zeal with which she has relentlessly conducted a campaign to vilify and denigrate the father irrespective of the adverse consequences for A; and

iii) the fact that she has not moved on and that there appears to be little or no prospect of the mother changing her views or approach in the foreseeable future.

154. In my judgment, it is self-evident that if the mother persists in maintaining her false accounts of past events and if these are communicated to A it would be likely to confuse him and cause him to question which of his parents he should trust. This would inevitably cause him emotional and psychological harm.

155. I have no confidence that as A grows older that the mother would not refrain from communicating some or all of this false narrative. Indeed, on the totality of the evidence it is more likely than not that she would do so.

156. The mother said in evidence that if the CPS decided not to prosecute the father, she would accept this decision. Based on past events, I consider this to be highly unlikely."

49. The judge then set out his further findings of fact:

"163. On the basis of the totality of the evidence I have read and heard and my analysis of the same, I make the following findings of fact on the balance of probabilities:

i) A is safe and well in the care of his father and is not at risk of suffering any harm as a result of the care given to him by his father;

ii) the mother continues not to accept this court's findings in relation to:

a) the circumstances of the twins' conception and her deception and dishonesty in relation to the second surrogacy arrangement;

b) her false allegations of domestic abuse by the father; or

c) the father's ability to care for A.

iii) From 7th October 2020 to date, the mother has knowingly, deliberately, and repeatedly lied to West Midlands Police by making false allegations against the father, despite this court having found that those allegations to have been fabricated by her;

iv) the mother made those false allegations to the police in an attempt to secure A's return to her care;

v) between 7th October 2020 and January 2021, the mother misled the police by failing to inform the investigating officers of the findings made by this court;

vi) the mother attempted to stop the police from disclosing details of its investigation to this court and to the parties, in part at least because she did not want the court to know that she had lied to the police;

vii) in addition to repeating false allegations, the mother has lied to the police as follows:

a) on 28th November 2020, the mother told the police that she was 'very concerned that the father and his legal team are continuing to carry out his threats to jeopardise and stop my contact with my son'. No such threats were ever made;

b) on 8th December 2020, the mother told the police that the guardian's legal team were supporting an urgent hearing to stop her contact with A. The guardian has never supported stopping A's contact with the mother; and

c) on 21st January 2021, the mother told the police that the father had made 'further threats to stop my limited...contact'. No such threats were ever made.

viii) the mother has lied to General Medical Council, repeating her false allegations about the father's behaviour. She did so in an attempt to discredit him;

ix) the mother lied to this court during her oral evidence about the circumstances in which she reported her allegations to the police, in that:

a) she stated in her written and oral evidence that her support worker told her that the police wanted to talk to her, and that that was why she got in touch with them;

b) in fact, she contacted the police unprompted to report her concerns.

x) the mother lied to the court during her oral evidence, in that she stated that she had told the police about this court's findings in relation to her false allegations and credibility, when she had not done so;

> xi) the mother misled the Family Court at Wolverhampton when applying on 1st October 2020 for child arrangements orders in relation to the twins, in that, in her C100 application:
>
> a) she claimed a MIAM exemption on the grounds of domestic violence, without referring to the fact that this court had rejected her allegations of abuse as fabricated;
>
> b) she referred to the circumstances of the Twins conception and the father's position in relation to them, but made no reference to this court's findings in relation to the same; and
>
> c) she referred to a parental order having been made in respect of A within these proceedings, without making reference to any of the findings made by this court.
>
> xii) the mother misled this court at the hearing on 11th November 2020. One purpose of the hearing was to determine the father's application for police disclosure following the unannounced "safe and well check" on 14th October 2020. She informed the court that she did not make a "referral" to the police."

50. In the following section of the judgment, headed "X Police", the judge summarised the police investigation, including the information he had received following the hearing. He continued:

> "169. The decision of the police to afford such latitude to the mother took no account of the adverse emotional and psychological stress upon the father of having an ongoing police investigation hanging over him, when he is the primary carer of A. Nor did it take any account that this court was awaiting the final outcome of this police investigation before it could make final welfare decisions and orders in respect in A.
>
> 170. The latitude given to the mother might, in other circumstances, be considered necessary and reasonable. On the facts of this case it was wholly unnecessary and wholly unreasonable. It has caused the father unwarranted and prolonged anxiety and it has delayed the conclusion of these proceedings. It will be for others to judge whether this police investigation was a meritorious or unmeritorious use of police time and of scarce public resources."

51. Finally, the judge set out his analysis and conclusions. On the basis of his findings, the judge made a child arrangements order for A to continue to live with his father. He concluded, however, that it was not possible to make a final order about the mother's contact. He ordered that it should continue to be by video during her chemotherapy but would then revert to face-to-face contact. He was, however, unable to define that contact, observing (at paragraph 183):

> "The frequency and duration of this contact will very much depend on the extent to which the mother accepts my findings and my decisions as set out in this judgment. It will also be informed by the mother's reaction to and the stance adopted by her once the police investigation and any criminal proceedings have concluded."

He concluded, notwithstanding Dr Pettle's recommendation, that there was no realistic prospect of the parties being able to work cooperatively to agree a narrative for A. He therefore gave a direction that the father should draft "a simple and straightforward account of the early life of A and his siblings" which should then be sent to the mother for comments which should be incorporated insofar as they were in accordance with the court's findings. He indicated that a family assistance order should be made, recognising that this required the consent of both parents and expressing the hope that the father would now agree. He dismissed the father's application for an order restricting the mother's exercise of parental responsibility, observing that

> "whilst I have found some of the mother's actions to have been utterly appalling, there is no evidence or no cogent evidence that she has interfered with the father's exercise of parental responsibility."

He gave permission for the father to disclose information about the proceedings to other agencies. Finally, he directed that the matter be listed for a further case management hearing once the CPS had made a charging decision.

Events since November 2021

52. Subsequently the case was listed for a five day hearing starting on 23 May 2022. At the appeal hearing before this Court, we were told that following the police investigation the CPS have decided not to bring any charges against the father. The mother is exercising her victim's right of review, and has asked the CPS to review their decision not to prosecute.

53. On 10 March 2022, Peter Jackson LJ directed that the mother's application for permission to appeal against the recusal decision be listed for an oral hearing. At the conclusion of that hearing on 1 April, he granted permission to appeal on the basis of a re-drafted ground of appeal appended to his order. That ground was that the judge had showed bias against the mother as demonstrated in nine "instances" (set out and considered below). Peter Jackson LJ directed that a copy of the order be sent to the judge so that arrangements could be made for another judge to conduct the hearing on 23 May should the appeal be successful.

THE LAW RELATING TO RECUSAL

54. As Hildyard J observed in *M&P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch) at paragraph 16:

> "The right to a fair trial, both under the common law and Article 6 of the European Convention on Human Rights (the House of Lords in *Lawal v Northern Spirit Limited* [2003] UKHL

> 35 having confirmed that there is no difference between the requirements in each) includes the right to a trial and decision conducted and made by a decision-maker free not only from actual bias but also from the appearance of bias. Justice must both be fair and be seen to be fair."

As Hildyard J noted, case law has established that an appellate challenge to the conduct of a judge during a trial may take two forms. The first is a broad challenge to the fairness of the trial which is a matter for judicial evaluation. The second is an assertion that the judge gave the appearance of bias. The test for bias is different and involves a well-established two stage process summarised by Leggatt LJ in *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 at [17] in these terms:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased: see *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, paras 102-103."

55. The application for recusal in this case and the subsequent appeal to this Court have been argued only on the basis of apparent bias. In identifying further guidance from the case law, we therefore mainly focus on those authorities relating to that category of case. Unsurprisingly, however, there is a degree of overlap between general unfairness and apparent bias and some of the dicta in cases concerning the former are plainly relevant to cases involving the latter.

56. The following points are of particular relevance to this appeal.

(1) The overriding objective in Part 1 of the Family Procedure Rules 2010 requires a judge "to deal with cases justly, having regard to any welfare issues involved." FPR 1.1(2), in substantially the same terms as the corresponding provision in the Civil Procedure Rules, provides that "dealing with a case justly" includes amongst other things ensuring that it is dealt with expeditiously and fairly, dealing with it in ways which are proportionate to the nature, importance and complexity of the issues, and ensuring that the parties are on an equal footing. The rules require the court to further the overriding objective by active case management, which includes setting timetables or otherwise controlling the progress of the case, identifying the issues at an early stage, and deciding properly which issues need full investigation and hearing and which do not: FPR 1.4(2)(a), (b)(i) and (c)(i). Judges sitting in the family court have extensive case management powers which they are expected to exercise firmly. It follows that a judge in the modern era is permitted and indeed expected to intervene in proceedings to a far greater extent than in earlier times.

(2) This is particularly so when the family court is deciding a question relating to the upbringing of a child. Whenever a court determines any such question, the child's welfare is the paramount consideration: Children Act 1989, s.1(1). Children's proceedings are, for the most part, quasi-inquisitorial rather than adversarial. They are therefore an exception to the general rule described by Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55 – "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the

parties, not to conduct an investigation or examination on behalf of society at large." It is common for a judge in family proceedings to decide that the welfare of the child requires the court to look beyond the issues and arguments identified by the parties. The judge is also required by s.1(2) of the 1989 Act to have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(3) Apparent bias is an area of the law in which "the context, and the particular circumstances, are of supreme importance" and which requires "an intense focus on the essential facts of the case": *Man O' War Station Ltd v Auckland City Council (formerly Waiheke County Council)* [2002] UKPC 28, per Lord Steyn at paragraph 11.

(4) The fair-minded and informed observer "will adopt a balanced approach" and "is neither complacent nor unduly sensitive or suspicious": *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856, per Lord Steyn at paragraph 14.

(5) "It is necessary to consider the proceedings *as a whole* in engaging in the objective assessment of whether there was a real possibility that the tribunal was biased": *Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492, [2016] 4 WLR 183, per Davis LJ at paragraph 36.

(6) Bias means a prejudice against one party or its case for reasons unconnected with the merits of the case: *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117, per Scott Baker LJ at paragraph 28; *Secretary of State for the Home Department v AF (No2)* [2008] EWCA Civ 117, [2008] 1 WLR 2528, per Sir Anthony Clarke MR at paragraph 53; *Bubbles and Wine*, supra, per Leggatt LJ at paragraph 17.

(7) "The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal": *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004, [2000] QB 451, paragraph 25.

(8) "[O]n the whole the English tradition sanctions and even encourages a measure of disclosure by the judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be": *Arab Monetary Fund v Hashim and others (No.8)* (1993) 6 Admin LR 348, per Sir Thomas Bingham MR at page 356, cited by Davis LJ in *Singh v Secretary of State for the Home Department*, supra, at paragraphs 34-5.

(9) "If a fair-minded and informed observer, having considered the facts, would not conclude that there is a real possibility that the tribunal will be biased, then the

objection to the judge must fail even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done": *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515, [2014] 1 WLR 1943, per Sir Terence Etherton C, at paragraph 40.

(10) "Managing a trial can be challenging, even for an experienced judge, and it is sometimes necessary to react without much time for refined consideration. Generous allowance always has to be made for this and also for the fact that, even with counsel's help, it is very difficult to tell from a transcript, or even from listening to a recording, precisely what was going on at all stages during the hearing. Furthermore, different judges have different styles and counsel and litigants can usually be expected to cope with the talkative, the uncommunicative, the robust, and even the irritated judge, provided the judge's behaviour does not stray outside acceptable limits": *Re G (A Child)* [2015] EWCA Civ 834, (a case concerning allegations of unfairness), per Black LJ at paragraph 31.

THE COMPLAINT OF BIAS AND THE JUDGE'S RECUSAL DECISION

57. The redrafted ground of appeal is in the following terms:

> "The Appellant appeals on the sole ground that the Judge showed bias against the Appellant in the following instances:
>
> (1) By the Judge in calling the Appellant a liar on the 19th August 2019.
>
> (2) The Judge casting doubt on the Appellant's medical diagnosis in early 2021.
>
> (3) Bullying, admonishing and threatening to report the Appellant's counsel to the Bar Standard's Board on the 25th March 2021.
>
> (4) Pressuring the Appellant for reporting the allegations of abuse to the Police.
>
> (5) The making of and not making of notes during the evidence.
>
> (6) Not allowing the Appellant to have regular breaks during the proceedings in August 2021.
>
> (7) Treating the Respondent father differently.
>
> (8) Bullying and threatening the Appellant's counsel with the Bar Standards Board on the 27th August 2021.
>
> [(9)] Misinterpreting and giving a different narrative to the evidence given by the Respondent father and the Guardian at the hearing in August 2021."

58. The recusal application made by counsel on 27 August focused on the matters now set out in instances (3), (5) and (8). After hearing the application, the judge immediately delivered a judgment dismissing it. That ex tempore judgment was subsequently incorporated into the third substantive judgment handed down on 15 November 2021. We now set out in full the passage in the third judgment dealing with the recusal issue:

> "97. The background to this application commenced at a directions hearing on 25th March 2021. Mr Uddin had filed and served a position statement on behalf of the mother. I considered a number of passages in this position statement to be rude and impertinent to the court. I raised this matter with Mr Uddin at the commencement of this directions hearing. I told counsel that I considered his position statement to be impertinent and impudent and that if I received a like position statement from him in the future, I would consider reporting him to the Bar Standards Board.
>
> 98. During the early part of the mother's evidence there were occasions when she gave no or no satisfactory answer to questions. I told the mother what I had written down in my notebook in order to give her the opportunity to reflect on her evidence and to give a response. Mr Uddin objected to me taking this course of action and so I stopped doing so.
>
> 99. During the course of Mr Uddin's cross examination of the children's guardian he put a proposition to her which did not reflect her evidence. I raised the matter with Mr Uddin and in the exchange that followed there came a point when I considered he was being disrespectful. I told him so and invited him to continue with his cross-examination of the guardian. He did not do so. I repeated the request and on the final occasion I did so in an emphatic manner. He did not do so and, in terms, said I was bullying him. I told him that he was coming close to being reported to the Bar Standards Board in respect of his conduct in the hearing.
>
> 100. Shortly thereafter Mr Uddin made a personal statement to the court relating to my comment about a potential referral to the Bar Standards and the risk that the mother may, as a result, have lost confidence in him. He confirmed she had not.
>
> 101. It was against this background that Mr Uddin made his application for me to recuse myself. He relied essentially on three grounds:
>
> i) the manner in which I had treated him at the directions hearing referred to above and at this hearing;
>
> ii) that the mother considered I was biased against her and that any fair minded and informed observer would

> conclude that there was a real possibility that I was biased against the mother: *Porter v Magill* [2002] 2AC 357; and
>
> iii) that I had treated the mother unfairly.
>
> 102. I refused the application. In giving a short extempore judgement I said:
>
> > "I have an application to recuse myself from this case made on behalf of the mother. I have well in mind the test to be applied from *Porter v Magill*, whether a fair-minded observer would consider that the court was biased. The application is essentially based on the mother's perception that I am biased because I have made findings against her or I have held her to account to answers that she has not satisfactorily given to the court. That is no basis for recusing oneself. Reference was made by Mr Uddin to the occasions on a previous occasion and today when I had to admonish him for rude or offensive behaviour. I have only had to do that on one previous occasion in the twenty years that I have sat as a full-time or part-time judge. This application for me to recuse myself is utterly and totally without any merit whatsoever and it is refused. I note in so finding that the mother in the course of this case has perceived correspondence from the guardian to be a threat to stop her contact when no fair-minded person reading that document could possibly conclude. Therefore, her perception, it would appear, is skewed and is no basis for me to recuse myself after conducting this case for so many years. Application dismissed."

THE APPEAL

59. At the start of the hearing, Ms Shiva Ancliffe QC, who came in to lead Mr Uddin for the purposes of this appeal, indicated that she would not be pursuing instance (1), because the transcript of the hearing on 19 August 2019 had not been produced, nor instance (6), because the transcript of the hearing in August 2021 demonstrated that, following discussion and a judicial ruling, there had in fact been breaks in the mother's oral evidence.

60. The remaining instances seem to us naturally to fall in to two groups, which have a rather different character. Accordingly, we will deal separately with those which turn on the judge's interventions in the evidence, or in one instance his attitude to an application, in a way which is said to show apparent bias against the mother – namely (2), (4), (5), (7), and (9) – and those which relate to his criticisms of the mother's counsel, Mr Uddin – (3) and (8).

(A) INSTANCES (2), (4), (5), (7) & (9)

THE INDIVIDUAL INSTANCES AND THE PARTIES' SUBMISSIONS

Instance (2)

61. Instance (2) is "the judge casting doubt on the Appellant's medical diagnosis in early 2021." It is argued that the judge's response to the mother's application to adjourn the hearing in March 2021 for medical reasons was such as to give rise to an appearance of bias.

62. At a directions hearing on 16 March, during discussions about the form of the hearing, the mother informed the court that she would be unable to attend a hearing in court because she was shielding for medical reasons. The judge directed her to file an application to vacate the hearing with a statement supported by medical evidence (redacted to protect confidentiality) as to the diagnosis and treatment. The mother duly filed an application with a statement disclosing that she was suffering from fibromatosis, a non-malignant condition for which, she asserted, she would be undergoing chemotherapy starting that week.

63. At a further hearing on 19 March, the judge refused to vacate the hearing but agreed that it should be conducted entirely remotely. In a short judgment, he observed that, in the light of the background, he was very suspicious that she would be starting chemotherapy that week, adding that the mother had known about the diagnosis for several months but not raised it as a reason for an adjournment until he indicated that she would be required to attend the hearing. He added (according to an agreed note produced for this appeal):

> "If incontrovertible evidence is produced before or at the hearing that the mother did in fact undergo chemotherapy today and that she is suffering side effects which impair her ability to participate in the hearing, it may well be that I have no choice but to adjourn. But I am not prepared to make that decision today on the basis of the inadequate information today. I am further persuaded to take this course by the fact that I do not know for how long I would have to be adjourning. Could be many many months. I am not persuaded that that is in the best interest of the child."

64. The mother did not attend the hearing on 25 March. Further evidence was filed on her behalf confirming that she had indeed started treatment, and that she had had a severe reaction to the treatment. Prior to the hearing her counsel, Mr Uddin, filed a position statement in which he asserted that the mother felt that the court would use any application for an adjournment against her and that it was apparent that the court had a "prima facie disregard for the mother's position". At the start of the hearing, the judge strongly criticised counsel for what was said in the position statement: this is the subject of instance (3), with which we deal later.

65. In the event, the judge agreed to adjourn the hearing and after exploring options decided that it should be listed in August 2021. It is clear from the transcript of the hearing that, in selecting those dates, the judge took into account the mother's position, observing:

> "given the circumstances of the mother, I do not consider it appropriate that she should have to yet again instruct other counsel. I am also concerned that given the reaction the mother

> has had to date from just taking a single course of chemotherapy as she has reported this morning, that if I list it in June, which is only three months away - just under three months - there is --- there must be a real risk that she will not be in a state of health where she could participate fairly in a hearing and I would face the prospect of having to adjourn the case off yet again, which would be well beyond August and would be into the new term in October.
>
> Accordingly, on the basis of the availability of counsel for the mother and taking a prudent and cautious approach as to the progress the mother is going to make, I think the safer course is to list in the August dates. I regret that causes yet further delay and I regret the adverse impact on the father but I would be more confident that we would be able to conclude the matter then than if we listed the case in June."

The judge made further case management directions, including requiring the mother to file updating medical evidence about her current state of health and treatment by 23 July.

66. On behalf of the mother, it is accepted that the judge was entitled to seek further information before deciding whether to grant the adjournment, but it is submitted that the manner in which he dealt with the issue gave rise to an appearance of bias. It was argued that the judge unfairly cast doubt on the mother's diagnosis. On behalf of the father, Mr Wilson points out that the judge acceded to the application to adjourn, fixed the adjourned hearing for a date that accommodated the mother's anticipated medical treatment and ultimately agreed that she could attend the August hearing. In his written submissions to this Court, Mr Bowe for the guardian submitted that the suggestion that the judge cast doubt on the diagnosis is pitching the situation too high and that in the circumstances it had been appropriate for the judge to make relevant enquiries under his wide case management powers.

<u>Instances (4), (5), (7) and (9)</u>

67. Instances (4), (5), (7) and (9) concern the judge's interventions during the evidence. Central to the mother's appeal is the assertion that these interventions lacked balance and were unfair. Ms Ancliffe summarised the point succinctly in this way. The judge's interventions in the father's evidence were helpful to the father's argument. In contrast, his interventions in the mother's evidence were designed to challenge her case. Similarly, his interventions during the guardian's evidence were either helpful to the father or undermining of the mother. Ms Ancliffe submitted that a fair-minded and informed observer would conclude from these interventions that there was a real possibility that the judge was biased.

68. We shall consider this argument by first considering instances (4) and (5) which concern the interventions during the mother's evidence, and then comparing them with instances (7) and (9), which address issues arising out of the evidence of the father and guardian.

Instance (4)

69. Instance (4) is "pressuring the Appellant for reporting the allegations of abuse to the police."

70. At several points during the mother's oral evidence, the judge questioned her about her complaint to the police. It was her counsel who first asked her to explain why she had made a report against the father notwithstanding the findings in the family proceedings. After he had asked a series of questions, the judge then intervened and the following exchange took place:

> "Judge: Why did you repeat your lies to the police?
>
> Counsel: Sorry, my Lord.
>
> Judge: Why did [the mother] repeat her lies to the police?
>
> Witness: Your Lordship, if you have a look at the welfare judgment that you made, you asked me specifically at a certain point, and it is documented in the welfare, did I lie about the second surrogacy and I answered to you and said "no" and you have documented that. You then asked me if I lied about the domestic assault and I said "no" and you then asked me about if I had lied about the domestic abuse, and I said "no", and you have documented that in your welfare, and I also told the police that and they said, "Well, has anybody documented that you have said that to the judge?" and I said, "Yes, it has been documented in the welfare judgment", but I cannot give that to them directly, the police have to request for them and, you know, when you made the final closing on that day, you did ask me those questions and I said to you, "I've never lied to the court at any point".
>
> Judge: What you are completely missing out is that whatever evidence you gave me I found against you and found that you were lying, did I not?
>
> Witness: Your Lordship, you did, but you did ask me the question that, did I lie and I said to you that I did not lie.
>
> Judge: You may well have done, but I found, on the totality of the evidence, that you had lied.
>
> Witness: I also -- you are right, your Lordship, and I told the police that that is what your judgment said.
>
> Judge: I, having found you lied, why did you go and repeat those lies to the police?

Witness: Because I went for therapeutic help and, when my counsellor looked at everything, she made independent enquiries and said that they are two separate issues and a criminal court does not affect the civil court and therefore----

Judge: --- please answer the question I have asked you. Why did you choose to repeat your -- what I have found to be your lies to the police?

Witness: Because I was told by my support worker that both the civil court and criminal court are separate and, therefore, anything happening in the criminal court does not affect the family court, and, if you will forgive me, your Lordship, I was under quite a lot of stress after what has happened and I was having counselling and at the time I went with professional guidance and recommendation.

Judge: I will ask one more time. Why did you repeat your lies to the police? You did it, you chose it, you made the statement. Why?

Witness: Your Lordship, the evidence I have provided to the police, the police told me that they will decide, because it is not a family court, whether I lied or not and, if they felt that the investigation that they are doing did not have any merit, because my evidence does not prove it, then they will come up with that decision. It was not up to me to decide.

Judge: I am going to record that you have not given a satisfactory answer to my question.

Witness: Your Lordship, I do not know how else to answer it, apart from the truth of how it has happened and what I have been told by the police.

Judge: You tell me why you decided to repeat -- you decided, you gave the statement, why did you repeat your lies to the police?

Witness: Your Lordship, I did not lie to the police. I gave the evidence that I had, that I provided to family court, but, because the police told me that there are two separate issues between family and civil court, and it does not affect each other, and my support worker took me to the police station, I provided every evidence that you had before you and they said they will come up with a decision, the truth or not the truth, and, if there is no merit

> on the evidence that I have provided them, then they will stop the investigation within a few weeks. If there is any merit, then they will carry on the investigation independently and let me know what the situation is as it carries on.
>
> Counsel: May I proceed, my Lord?
>
> Judge: Yes."

71. A little later, the judge asked whether it was the mother's evidence that she did not know she had the right to withdraw her complaint. Mr Uddin objected, stating that in criminal proceedings the police do not require the victim's consent to prosecute. The judge did not proceed with that point. Further on in her evidence, the mother disclosed for the first time that she had made a complaint to the GMC. The judge asked where there was any reference to this complaint in the eighteen statements that the mother had filed in the family proceedings. After further questions from counsel, the mother referred, in a series of lengthy answers, to further allegations against the father which she said had emerged from old medical records which had been disclosed to her during the police investigation. The judge then asked why these allegations had not been mentioned in any of the mother's statements. After a break and further evidence, he repeated this question and, after the mother's response, stated: "I have written in my notebook that, once again, you have withheld material evidence from this court." This led to the following exchange with Mr Uddin:

> "Counsel: My Lord, I note your Lordship's comment about writing in your Lordship's book certain things and it is a matter entirely for your Lordship as to what your Lordship writes in your Lordship's book and what your Lordship does not write in your Lordship's book, but my concern is this. We should never be selective about anything and that applies to my client, obviously, but the point that I am making is this. My client has been giving evidence and your Lordship has said, more than once, "I am writing this in my book, I am writing that in my book". I am concerned as to why your Lordship needs to say "I am writing this in my book". What about the other evidence that she has been giving, is your Lordship going to write that in your Lordship's book?
>
> Judge: I say it in fairness to everybody, so that, if the mother wants to comment further, she can do. But she has accepted that she has medical records relating to A, which she has not disclosed to the court or to the other parties, and yet she has felt free in her oral evidence to refer to certain matters which she alleges are contained within those medical records, further allegations against [the

> father] which are not recorded in any statement she has provided."

In a lengthy response, Mr Uddin reiterated his concern about the judge's comments about writing in his book. The judge made no further comment.

72. The issue of the mother's complaint to the police arose again in the course of Mr Wilson's cross-examination. The judge intervened on several occasions. It is unnecessary to set out every intervention. At one point, the following exchange took place:

> "Judge: It is an immensely simple question. Did you try and stop the police disclosing information to this court?
>
> Witness: In terms of asking what is the purpose of showing that information to the family court when the family court proceedings has already gone through the fact finding and the welfare, in that instance, yes.
>
> Judge: ---I will make a note in a minute that you are avoiding answering the question."

After further questions from Mr Wilson, and further questions from the judge, the mother agreed that she had tried to stop police information being disclosed into the family proceedings. Mr Wilson continued with his cross-examination, during which the judge intervened on several further occasions, including questions about why the mother had alleged to the police that A had suffered maltreatment from the father.

73. The mother's evidence was adjourned part-heard and resumed the following Thursday. Mr Wilson resumed his cross-examination which continued without any intervention by the judge for a further hour and a quarter. After a break the mother was then cross-examined by Mr Bowe on behalf of the guardian. After some time, Mr Bowe asked questions about what A was to be told about the twins. At this point, the judge intervened for the first time that day, asking whether the narrative to be given to A should be as found in his judgments or as she had asserted in her statement prepared for the CPS. After a series of questions, the mother said that she wanted the judge to look at the further documents she had provided and reconsider his findings, but that, if the judge did not change his position she would have to accept his judgment and move forward with that.

74. At the end of counsel's questions, the mother asked the judge if he could "spare twenty minutes" to go through further documents she had produced that morning. The judge agreed, and at the start of the afternoon session the mother duly went through the documents, giving further evidence about information contained in them. The judge asked a number of questions as the mother was going through the documents.

75. In the original grounds of appeal drafted by the mother, she asserted that the judge repeatedly interrupted her evidence to the extent that she felt intimidated and bullied; that he tried to interfere with the criminal investigation by telling her to withdraw her

statement from the police; and that he had wrongly accused her of misleading the court by not sharing information about the criminal investigation when her understanding was that the family court and criminal investigation were separate matters. In submissions to this Court, Ms Ancliffe accepted that the judge had been entitled to focus on the issue of whether the mother accepted the findings. The mother's answers, however, had been to the effect that she had gone to the police because she had been advised to do so by a domestic abuse counsellor. The judge had therefore been wrong to accuse her of not answering the question and his interruptions had been excessive and so as to give an appearance of bias.

76. On behalf of the father, Mr Wilson submitted two of the central welfare issues at the hearing were the mother's ability (i) to support A's placement with his father and (ii) to assist in providing A with a consistent, honest narrative about his life story in general and his relationship with his half-siblings in particular. The judge had therefore been entitled to question the mother about the contradiction between the assurances made by and on behalf of the mother that she accepted the findings and the manner in which she had initiated and pursued the police investigation. He had been justified in repeating the question because the mother's answers were evasive. He was equally justified in asking whether she was aware she could withdraw the police complaint because of the further contradiction between her evidence that the investigation was out of her control and her emails to the police which showed that she had been actively trying to influence the investigation. During the mother's evidence, the judge allowed her to adduce further documents. At the conclusion of her evidence, the judge permitted her to address him for twenty minutes. Mr Wilson submitted that overall the judge's interventions occupied only a small proportion of the mother's evidence and were both relevant and proportionate.

77. In his skeleton argument prepared for this appeal, however, Mr Bowe informed us that, taking the circumstances in the round, the guardian considered that the judge disproportionately intervened in the mother's evidence. He submitted that this went further than the judge simply being 'robust' and crossed a line into apparent bias undermining the overriding objective. Mr Bowe informed us that the guardian considered that the judge's approach to testing this part of the evidence would cause the fair-minded observer to believe that he had adopted a negative or hostile position against the mother. He added that the guardian considered that the mother's perception, as a lay person, that the judge's style amounted to pressure when coupled with his overt warning to counsel for the police, could well be interpreted as an attempt to influence the outcome of an independent police investigation.

Instance (5)

78. Instance (5) is "the making of and not making of notes during the evidence." The transcript shows that on four occasions during the evidence the judge made a comment about recording the evidence in his notebook. The first occurred during the cross-examination of the father. When Mr Wilson objected that Mr Uddin was mischaracterising the father's evidence, the judge said "well my pen is resting on my notebook at the moment". The obvious implication of his comment was that he was not making a note because the line of questioning was not assisting him. The remaining three occasions all occurred in the mother's evidence. The second occurred in the passage quoted in paragraph 73 above when the judge said "I am going to record that you have not given a satisfactory answer to my question." The third occurred in the

passage quoted in paragraph 74 above when the judge said "I have written in my notebook that, once again, you have withheld material evidence from this court." This led to the exchange between the judge and counsel quoted above. The fourth occurred during the passage in Mr Wilson's cross-examination quoted at 75 above when the judge warned the mother "I will make a note in a minute that you are avoiding answering the question".

79. In his skeleton argument for this appeal, Mr Uddin stated that it was observed that during the parents' evidence the judge rarely wrote down any notes and submitted that the judge's comments about making a note when the mother had not answered a question or withheld evidence were a further indication of apparent bias. In oral submissions Ms Ancliffe argued that there had been selective recording of evidence adverse to the mother's case.

80. In response, Mr Wilson submitted that on each of the four occasions the judge's comment had been warranted, either expressing a view about the utility of the questions being posed, or alerting the witness to his view that she was not answering the question and/or giving her an opportunity to provide a further explanation. When challenged by counsel, the judge explained that he had made the comment "in fairness to everybody, so that, if the mother wants to comment further, she can do so." In the event, the judge obtained a transcript of the hearing and therefore had a full record of the evidence before completing his judgment. In his written submissions, Mr Bowe acknowledged that though the mother may not have liked the judge's technique, it is not uncommon for a judge to advise a witness how they will record their evidence in order to provide an opportunity to reflect on the answer.

Instances (7) and (9)

81. Instance (7) is "treating the father differently." Instance (9) is "misinterpreting and giving a different narrative to the evidence given by the father and the guardian at the hearing in August 2021." They overlap and can conveniently be considered together.

82. It is argued that, in contrast to the manner which he adopted towards the mother during her evidence – a manner which her counsel characterised as intimidating and bullying – the judge's approach to the father was conciliatory and sympathetic. Particular attention is drawn to one point in the evidence when Mr Uddin was asking questions about when A should be introduced to the twins. It is suggested on behalf of the mother that the tenor of the father's answers was that he would allow A to decide when to meet them, but the judge intervened, saying

> "it is not a case of A making the decision, the father recognises that it is him who has to make the decision, and/or the mother. He is the child. But he will indicate to his father when he is ready to meet the twins."

Counsel persisted with his questions and the judge intervened in the same vein again. As we understand the submission to us, it is contended that this interpretation put the father in a more favourable, less intransigent, light than his answers warranted.

83. On behalf of the father, it was submitted that the judge permitted each parent to give evidence, and to cross-examine the other, over a lengthy period of time. Mr Wilson

conceded that the judge intervened more frequently in the mother's evidence than during the father's, but submitted that that was not objectionable given the welfare issues to be decided, the findings made against the mother in the earlier judgments, and the content of her evidence. With regard to the specific intervention in the father's evidence about which complaint was made, Mr Wilson submitted that the judge's summary of the father's evidence was accurate. He also pointed out that, during this exchange, the judge expressed a preliminary view contrary to the father's case, suggesting that his fears about the impact on A of a premature introduction of the twins were unfounded.

84. In oral submissions, Ms Ancliffe drew attention to several points in the guardian's evidence when the judge intervened in a way which, it was submitted, gave rise to an appearance of bias. It should be noted that the guardian gave evidence for a lengthy period, mostly without any interruption by the judge.

85. In her evidence in chief, the guardian described the mother as being "very child-centred". The judge challenged her about this, asking to what extent it was child-focussed to organise a second surrogacy without the father's knowledge and consent. The guardian conceded that this had not been child-centred. She expressed the view that the mother would be able to "follow a narrative that's in A's best interests". Later in answer to Mr Wilson, she said:

> "I think you have to separate out her narrative that she's told the police, which she clearly believes to be the truth. It doesn't necessarily follow that she's going to use that narrative with A. Many, setting aside this particular situation, many, many victims of domestic abuse do not give that narrative to their children because even if that's what they believe they would never want their children to be harmed in that way, to affect their relationship with the other parent. So, I don't-- I think where you're going with this is that she would necessarily give all of this information to A. I don't think she would."

86. When Mr Uddin questioned the guardian, he returned to this issue and the following exchange took place:

> "Counsel: ….again, if I misquote you, please correct me. I think you said no one could take away that feeling of being a victim from her. Do you remember that or something to that effect?
>
> Witness: Yes, I do.
>
> Counsel: Would you therefore agree with me that it is wrong for this court or anybody to weaponise that feeling and use it against her in these proceedings and in this-- in the (inaudible) these proceedings? Do you understand what I mean by that?
>
> Witness: Yes. I think-- maybe I need to separate out what I'm trying to say. I think it was wrong of [the

mother] to use examples that this court found should not be evidenced. Some of her allegations-- well, all of her allegations, the court didn't uphold those but that doesn't take away how she may feel she was treated by her husband in day-to-day life and that's okay to share that with whoever she believes is the relevant people to do that, to share it with, so I'm trying to separate it out. I don't agree that she should have used those examples that the court didn't uphold but if she believes she was emotionally/physically abused by her husband, then she has to do what she believes is right in that respect.

Judge: Would you like to reflect on that? I have not only not upheld them. I have found all the allegations were false.

Witness: Yes.

Judge: Are you saying that she is therefore----

Witness: Yes, that's correct.

Judge: - free to go around repeating those false allegations?

Witness: No, and if I didn't express that in that way, then I should. I don't think she can do that. I don't think it's right or proper but what I'm trying to say is there may be other examples of her experiences that she believes was a form of abuse and-- and that's her belief and she-- no one can take that from her. I don't think it's right----

Judge: (inaudible) speculating (inaudible) other experiences the mother has that we have not been told about.

Witness: I'm not speculating. I'm-- I am aware and I'm sure it's in lots of documents that-- when she explains about her lived experience with her husband, so I don't think it's new information to the court.

Judge: What other allegations of abuse are you referring to that the mother has made which were not the subject of court findings?

Witness: Well, the mother talks about them having a lot of marital disputes to the extent they-- they went to

see a counsellor. She talks about her husband being quite overpowering, shouting, being, in her view, controlling.

Judge: Yes. I found----

Witness: So that's a kind of----

Judge: --- (inaudible) allegations to be false. Have you not read the fact-finding judgment?

Witness: Yes, I have.

Judge: Then what other aspects of-- what circumstances of abuse has the mother referred-- talked to you about that were not considered by me in the fact-finding judgment?

Witness: I don't think there's a specific allegation. I think it is more general, general in terms of what she would describe as controlling behaviour.

Judge: I found that to be a false allegation. Are there any examples of the mother alleging abuse that were not the subject of the fact-finding judgment?

Witness: Not that I can recall.

Judge: No, so you are speculating when you say that there may be other matters.

Witness: I guess that could be how it's viewed. [The mother] may have other experiences that she's not shared with-- with people either through the papers or through conversation.

Judge: So you are speculating. You have no evidence on which to base the evidence you have just given?

Witness: Okay. I accept that.

Judge: Thank you."

87. Later in Mr Uddin's cross-examination, when the guardian was being asked about how the mother's contact could be extended, the judge intervened again:

"Judge: What happens if the mother does not agree a narrative that is in keeping with the findings of fact that I have made both in the fact-finding judgment and the welfare judgment?

> Witness: Well I don't think that contact can progress under those circumstances.
>
> Judge: Thank you."

When the guardian suggested that there could be a "movement towards more effective communication between them", the judge asked:

> "How is he supposed to do that when he is facing a police investigation launched at the request of the mother?"

The guardian suggested that the father's proposal that contact should be limited to six visits a year was potentially shutting the mother out of A's life, but agreed with the judge that there was "no evidence that he had in fact done so."

88. Ms Ancliffe accepted that the judge was entitled to interrupt and challenge the guardian if he had concerns about her evidence but the manner in which he did so and the vigour with which he pursued the point gave rise to an appearance of bias. Mr Wilson submitted that these interventions were unobjectionable, given that the question whether the mother accepted the findings was of critical importance to the welfare issues in the case. He observed that the guardian's counsel did not object to any of the judge's interventions.

DISCUSSION

Introductory Observations

89. Before turning to consider whether, individually or cumulatively, the instances relied on by the mother give rise to apparent bias, we identify a number of important points which the fair-minded and informed observer would take into account.

90. First, by the date of the hearing in August 2021 these proceedings had been going on for a very long time. The child arrangements application had been made in March 2019, nearly two and a half years earlier. For a case to continue for that length of time is wholly outside the norm for private children's proceedings. The issues of with whom A should live, how and when he should spend time with the other parent, and whether he should have contact with his half-siblings were still outstanding. The judge was understandably and rightly concerned to avoid further delay which could, as the statute warns, prejudice the child's welfare. He was plainly trying to manage the case in accordance with the statutory principles and the overriding objective.

91. Secondly, by August 2021 the judge was very familiar with the case and all its complex and unusual features. He had conducted two substantive hearings, plus a number of case management hearings, and delivered two lengthy judgments. It was unsurprising that he had formed some views about a number of the issues. It was equally unsurprising that he indicated what those views were. In doing so, he was acting in what Sir Thomas Bingham described as "the English tradition" which "sanctions and even encourages a measure of disclosure by the judge of his current thinking" (see paragraph 56(8) above). It does not follow from the fact that the judge disclosed his current thinking that his mind was closed.

92. Thirdly, in his two earlier judgments the judge had made a number of serious findings against the mother. In particular he had found that she had fabricated allegations of domestic abuse against the father and that she had through deception arranged for his genetic material to be used in the second surrogacy. There had been no appeal against these findings. The mother's dishonest and manipulative conduct was therefore part of the established factual matrix of the case. As Lord Hoffmann observed in *Re B (Children)* [2008] UKHL 35, [2009] AC 1 at paragraph 2:

> "The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not …. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

Where a family court dealing with proceedings relating to a child finds on a balance of probabilities that an alleged fact did or did not happen, all decisions about the child's welfare must be based on that finding.

93. It was inevitable that the judge would have his earlier findings in mind at all points when making case management decisions and considering the ongoing substantive issues. His findings were reinforced by the clear-sighted and authoritative analysis and recommendations expressed in Dr Pettle's report which we have cited above. In those circumstances, it would have been wrong and contrary to the interests of the child if he had not taken those findings into account in his conduct of the proceedings. Insofar as the judge's criticisms of the mother during the hearing in August 2021 arose out of his previous findings, they were not evidence of bias. As this Court has said on a number of occasions (see paragraph 56(6) above), bias means a prejudice against one party or its case for reasons unconnected with the merits of the case.

94. Fourth, the obligation to deal with a case fairly and to ensure that the parties are on an equal footing does not mean that a judge is obliged to treat the parties in precisely the same way. By this stage, the principal aim of the proceedings was to resolve the dispute about A's living arrangements and determine whether and if so when and how A should be introduced to the twins. Dr Pettle had made a series of recommendations about the way forward but had also identified aspects of the attitudes of both parents which made it more difficult to achieve a resolution. She advised that the "only way to achieve a more positive outcome for A is for his parents to change their behaviours". It was evident that, so far as the mother was concerned, it was necessary to focus on the apparent contradiction between her assertion that she accepted the judge's earlier findings and her efforts to bring about the father's prosecution. Given his earlier findings, it is unsurprising that the judge challenged the mother about this apparent contradiction in direct terms. So far as the father was concerned, the focus was on what Dr Pettle described as his "entrenched" position of wishing to have nothing to do with the twins and wanting A to know nothing about them until he was much older. It is plain from the transcripts that the judge, whilst understanding the father's feelings about the mother's behaviour, was very doubtful about the wisdom of the father's position on these issues. He chose to tackle the father about this in a less directly challenging way than the approach he adopted when speaking to the mother. A judge is entitled to adopt different approaches when probing and testing the evidence of witnesses. The fact that the judge on this occasion took a more directly challenging approach to the mother's

position than he took when probing the father's views would not by itself lead a fair-minded and informed observer to conclude that there was a real possibility of bias.

95. Fifth, in considering the proceedings as a whole to determine whether there was a real possibility that the court was biased, the fair-minded and informed observer would look at the judgment delivered at the end of the hearing under scrutiny and at the extent to which it was supported by the evidence. We recognise that, as Black LJ observed in *Re G*, supra, at paragraph 52,

> "the careful and cogently written judgment cannot redeem a hearing in which the judge had intervened to the extent … of prejudicing the exploration of the evidence".

Nevertheless, in considering the question of apparent bias in this case, it is relevant to note that the judge rejected a number of submissions made on behalf of the father. In particular, he refused to make a final child arrangements order; he rejected the father's contention that A should not meet the twins at this stage; and he dismissed the father's application for an order restricting the mother's exercise of parental responsibility of A. He also encouraged the father to relent and give his agreement to the making of a family assistance order. (Under the terms of s.16 of the 1989 Act, such an order cannot be made without the consent of those persons to be named in it.)

96. With those general observations in mind, we turn to the individual instances relied on which we consider, first individually and, then, cumulatively.

Instance 2

97. We do not agree that the judge's treatment of the application for an adjournment in March 2021, taken by itself, gives rise to an appearance of bias. In his position statement for the hearing on 25 March 2021 (which we consider in connection with another issue below), Mr Uddin cited the dicta of Gloster LJ in *Teinaz v London Borough of Wandsworth* [2002] EWCA Civ 1040, [2002] IRLR 721, including the following passage at paragraph 22:

> "'If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question."

The judge's approach to the issue at the hearings in March 2021 was firmly in line with that advocated by Gloster LJ.

98. In considering whether the judge's approach to this issue suggested a real possibility of bias, a fair-minded and informed observer, aware of the mother's assertion about her

health and treatment but knowing about the history of the proceedings, would take into account (1) the findings which the judge had already made in his two earlier judgments about the mother's dishonest and manipulative behaviour; (2) the emerging evidence about her report to the police; (3) the fact that she had not disclosed her condition for eight months prior to 16 March; (4) the judge's finding that the medical evidence initially supplied was insufficiently clear, and (5) his concern about the impact of further delay on the child's welfare. It was not unreasonable for the judge to take the view that he needed to be satisfied about the genuineness of the mother's assertions about her condition and treatment. In the circumstances of this case, given his earlier findings, it is unsurprising that the judge was initially suspicious about a last-minute adjournment application based on the mother's late disclosure of a medical condition. When he was eventually satisfied about the genuineness of the mother's assertions about her condition and treatment, he duly adjourned the case for several months, making sure that the next hearing would be listed if possible to accommodate the mother's treatment and giving directions about the filing of further medical evidence in July (with which, we note, the mother initially failed to comply).

99. In oral submissions, when Whipple LJ pointed out that all the judge was really saying was that he wasn't satisfied about the medical evidence, Ms Ancliffe replied that he did not need to say it in that way. Having read the transcript and notes with which we have been provided, we do not agree that there was anything about the judge's approach to this issue in March 2021, or in the way he expressed himself during the hearing on 25 March, which would lead the fair-minded and informed observer to consider that there was a real possibility that he was biased.

100. In the amended ground of appeal appended to the order granting permission to appeal, instance (2) was expressed as "casting doubt on the Appellant's medical diagnosis in early 2021". In his skeleton argument for this appeal, drafted before Ms Ancliffe was instructed, Mr Uddin also submitted that the judge had "continued in the same vein" at the start of the hearing in August 2021, "doubting the appellant's medical condition and taking an unreasonable stance against the appellant". Ms Ancliffe did not pursue this argument at the appeal hearing but for the record we see nothing wrong with the judge's approach to this issue prior to or during the hearing in August 2021. The mother failed to comply with the direction to file updating medical evidence by 23 July 2021. Instead there was a flurry of emails which we have summarised above. It was only during the first day of the hearing on 17 August that a report from her treating clinician was produced. At that point, despite his clear views that it would be better for both parties to attend court in person to give evidence, the judge took the "pragmatic approach" and agreed to the mother giving evidence remotely. As the transcript shows, thereafter he allowed the mother reasonable breaks during her oral evidence. Contrary to Mr Uddin's submission, the judge's stance towards the mother's medical condition in August 2021 was entirely reasonable.

Instance (4)

101. The judge's interventions during the evidence on which the mother relies in support of this appeal have to be considered in the context of the whole hearing. There were lengthy periods in the evidence when the judge said nothing at all. He made no attempt to curtail the questioning of any of the witnesses and as a result the hearing substantially exceeded the time estimate. Many judges might have adopted a stricter approach, particularly in the current circumstances with substantial backlogs and delays in the

family justice system. The judge did not prevent the mother introducing undisclosed documents during her evidence, and he allowed her to address the court for nearly twenty minutes at the end of her evidence when she went through the documents she had produced. Many, perhaps most, judges would have refused to admit the documents or to allow the witness to address the court in that way. All these features of the hearing would be taken into account by a fair-minded and informed observer when considering whether there was a real possibility of bias.

102. It is clear from the transcript that the judge adopted a different approach to the mother's evidence from that adopted during the father's. As we noted above, that by itself is unobjectionable. Treating the parties fairly does not necessarily involve responding to their evidence in precisely the same way. We have looked carefully to see whether the difference in approach was greater than justified so as to give rise to an appearance of bias. The judge's interventions during the father's evidence were less frequent and his challenges to the father were expressed in moderate terms. In contrast, his interventions during the mother's evidence were more frequent and his challenges were direct and at times robust. Given the history of the mother's dishonest and manipulative conduct before and during the proceedings, the judge was understandably concerned that she was seeking to direct or influence the police investigation so as to circumvent his findings. The mother's assertions that she accepted his findings, that she only made the complaint to the police after her domestic abuse counsellor had arranged the appointment, and that the police investigation did not affect the family court was inconsistent with other evidence about her dealings with the police. Her assertions to the effect that the police investigation was out of her control were disingenuous. The documents disclosed by the police against her wishes showed that she positively and repeatedly encouraged them to pursue the investigation. In a series of emails to the police, she said that she was not happy with the outcome of the family proceedings, that her concerns about A being maltreated by the father had been ignored by the family court, and that the judge had not listened to her case fairly, had not considered the evidence and had been "biased throughout". Given those contradictions, her evasive answers in evidence, and the importance of establishing whether she genuinely accepted the findings, the judge's more direct and challenging approach during her evidence was, in our judgment, acceptable. We reject the submission that he was unfairly pressurising the appellant for reporting the allegations of abuse to the police or that he was interfering in the criminal investigation.

Instance (5)

103. There is no substance in the complaint about the judge's taking of notes or his references to his notebook during the hearing. It is entirely a matter for a judge to decide what notes to take of the evidence. Neither counsel nor anyone else in court is in any position to assess what a judge is writing down. It is not unknown for a judge to indicate to counsel that his line of questioning is not helpful by putting down his pen. This is an example of the disclosure of judicial thinking which, as Sir Thomas Bingham MR observed, is sanctioned in the English tradition. Criticising a witness's answer, and recording the criticism in his notebook, is a legitimate expression of scepticism which, to use Sir Thomas's words, "is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be". In this case, the judge's references to the notebook during the mother's evidence were

made in the course of appropriate challenges about her reasons for reporting allegations to the police which he had found to be fabricated.

Instances (7) and (9)

104. We do not accept the submission that the judge's interventions in the course of the father's evidence were designed to shore up his account. In particular, we reject the argument that his interventions during Mr Uddin's cross-examination about when A should be introduced to the twins had the effect of putting the evidence more favourably than the witness's answers warranted. Having read the full transcript, we are satisfied that the judge's interpretation of the father's evidence was correct. Although the father at one point said that A "would take his own decision", having looked at the whole of this section of the transcript we are satisfied that his evidence overall was as summarised by the judge. The judicial interventions were measured and unobjectionable and there is nothing about them which suggests any apparent bias.

105. In our view, there was nothing wrong or improper in the judge's interventions during the guardian's evidence or anything about those interventions which might lead a fair-minded and informed observer to conclude that there was a real risk of bias. On the contrary, the judge was rightly concerned about a fallacy in the premiss in the questions put by Mr Uddin which was, to some extent, reflected in the guardian's answers. The premiss was that, irrespective of the court's findings against her, the mother had a feeling that she was a victim of abuse, that she was entitled to act on that feeling, and that it was, in counsel's words, wrong for the court to "weaponise" that feeling and use it against her in the proceedings. The premiss was untenable and, insofar as it formed part of the guardian's analysis, it was important in the child's interests that it be identified and challenged.

106. The court had found at the earlier hearing that the acts of abuse alleged by the mother did not happen and that she had fabricated them. The argument on behalf of the mother that she had a feeling she was the victim of abuse was therefore baseless. Counsel's assertion that "it would be wrong for this court or anyone to weaponise that feeling" was a scurrilous statement to which many judges (although not, we observe, this judge) would have raised immediate objection. In the circumstances, the judge was entirely justified in intervening to challenge the guardian's responses to this line of questioning. Her professional opinion was a very important part of the evidence on which the judge was being asked to make decisions about A's future. If a judge is concerned about the rationale behind a guardian's opinion, he is justified in raising his concerns. Like all professional witnesses, a guardian must expect her opinions to be challenged, sometimes robustly. In oral submissions, Ms Ancliffe conceded that the judge was entitled to take this course but submitted that there was an excessive vigour in his intervention. The intervention was certainly robust but in our view not excessively so. Consequently, we reject the suggestion that any of the judge's interventions during the guardian's evidence gave rise to an appearance of bias.

CONCLUSION ON ISSUES (2), (4), (5) (7) & (9)

107. We have considered these instances both individually and collectively. We are satisfied that they would not lead a fair-minded and informed observer to conclude that there was a real risk that the judge was biased against the mother. There is no doubt that the judge was very critical of the mother's conduct and that he expressed that criticism in

forthright terms during her evidence and at other points in the hearing. But looking at the proceedings as a whole, those criticisms have to be seen in the context of his findings in his earlier judgments about her dishonest and manipulative behaviour. As noted above, bias means a prejudice against one party or its case for reasons unconnected with the merits of the case. Here the judge's criticisms of the mother during her evidence were plainly based on the merits of the case, which included the serious, unappealed findings which he had made against her. His justification in pressing her hard about the apparent contradiction in her words and actions was that A needed to have an agreed narrative, based on the judge's findings, so that he could have a clear idea about his identity and be prepared for the introduction of the twins.

108. In reaching that conclusion, we take into account the guardian's opinion about the matter, as expressed in Mr Bowe's skeleton argument to this court. The guardian was, of course present during the hearing and we have no doubt that she is both fair-minded and informed. But she is not an independent observer. In one important respect, her evidence about the mother's actions was rightly criticised by the judge. Her views about the merits of this appeal are to be taken into account but they are not decisive.

(B) INSTANCES (3) AND (8)

THE INDIVIDUAL INSTANCES AND PARTIES' SUBMISSIONS

109. We start by setting out the facts of the incidents on which the mother relies and the parties' submissions on them. Both, as will be seen, arise out of criticisms made by the judge of the conduct of Mr Uddin and in particular of his reference to the possibility of having to report him to the Bar Standards Board ("the BSB").

Instance (3)

110. Instance (3) is "bullying, admonishing and threatening to report the appellant's counsel to the Bar Standards Board on 25 March 2021."

111. As stated above, prior to the hearing on 25 March, Mr Uddin on behalf of the mother prepared a position statement addressing the application for an adjournment. It is unnecessary to set out this document in full. In the course of summarising the circumstances in which his client's medical condition had come to the court's attention, counsel included the following observations:

- "The application for an adjournment is made by the respondent mother with some trepidation. The mother feels that this court will use against her any application for an adjournment."
- "It is apparent that the court due to issues at previous hearings has a distrust of the mother and to put it bluntly prima facie disregard for the mother's position."
- "It is one thing for the court to deny the mother to vary an interim contact order but another to disregard her application for an adjournment."
- " …she had ignored her own health conditions to avoid a delay in these proceedings and her weariness of this court due to her previous experience before this court."

- "The subsequent treatment of the mother by the court after her cancer disclosure has solidified mother's weariness of this court."

- "It is true the mother has raised questions about the conduct of the court at previous hearings, but it would be unfair and unjust for the court to use this against the mother which the mother feels the court is doing."

112. The transcript of the hearing shows that almost immediately after the start of the hearing, the following exchange took place:

> "Judge: Yes, Mr Uddin?
>
> Counsel: May it please you Lordship, my Lord ---
>
> Judge: It does not please me, actually, because I consider your position statement to have been impertinent and impudent and I should tell you now that if you ever dare file a position statement like that before me again, I will consider reporting you to the Bar Standards Board. Do you understand?
>
> Counsel: Thank you, my Lord. My Lord, the position statement was done on instructions from my client
>
> Judge: Yes, I am sure it was."

113. Following this exchange, the judge, having heard submissions from the other parties, granted the adjournment and, as already noted, re-listed the hearing in August, rather than the dates preferred by other parties, partly to ensure that Mr Uddin could continue to represent the mother, for whom there had previously been a change of representation on at least two occasions, and partly in the hope that the mother's medical treatment would be completed so that she could participate at the hearing.

114. In his skeleton argument drafted before Ms Ancliffe was instructed, Mr Uddin submitted that if a fair-minded and informed observer read the position statement they would regard the judge's comment about the BSB as bullying and that this conduct in itself demonstrated an appearance of bias. On behalf of the father, Mr Wilson did not argue that the judge's reference to the BSB had been either justified or proportionate. He suggested, however, that the fair-minded and informed observer (1) would be aware that, against the background of his findings of dishonesty against the mother, the judge had required proper evidence about her medical condition; (2) would therefore be surprised at the tone of the position statement filed on her behalf; (3) would note that the comment about the BSB did not prevent the mother's case from being fully argued at the hearing; and (4) would also note that, despite admonishing counsel for his remarks in the position statement, the judge acceded to the mother's request for an adjournment.

Instance (8)

115. This instance is described as "bullying and threatening the Appellant's counsel with the Bar Standards Board on the 27th August 2021". As all parties recognised, this was the

most troubling incident during this difficult hearing. In argument before us, Ms Ancliffe placed particular weight on it in support of the appeal.

116. The background to this incident is a passage in the evidence given by the children's guardian at the end of the previous day's hearing. During questions from Mr Wilson on behalf of the father in which he was challenging the need for a family assistance order, the guardian had described the relationship between the mother and A as "so special and so close" and continued:

> "I think we're looking hopefully at a new chapter in this little boy's life, one where he can resume a positive relationship with his mother and learn about his siblings. All of these things are really important for A, for his sense of identity. He must have suffered trauma and loss losing his mother out of his life and all of his extended family, to whom he was very close and, again, I've observed that personally on more than one occasion. So, to have that back in his life would just be so good for him and I think the CAFCASS officer could assist with that."

117. On the following morning, shortly after Mr Uddin started his examination of the guardian, the following exchange took place:

> "Counsel: Now, yesterday in evidence you said, and please correct me if you find me to (inaudible) in any way, that A did suffer trauma when he was moved away from [the mother] to the care of [the father] leaving behind----
>
> Judge: If [the guardian] said that, I did not hear it.
>
> Counsel: Well, I did-- I prefaced it, my Lord, with the "If I have misquoted you, please correct me."
>
> Judge: Yes. All I am saying is I do not recall her saying that.
>
> Counsel: Well, my Lord, she (inaudible). My Lord, I am asking a question but I did preface it and said, "If I misquote you." What would you like my Lord to do, not-- for me not to even ask the question because your Lordship has not heard it?
>
> Judge: Well, she did not say it.
>
> Counsel: Well, let us hear what she says then, my Lord.
>
> Judge: Do not talk to me like that.
>
> Counsel: My Lord –
>
> Judge: You carry on and do what you want.

Counsel: Well, my Lord, how could I do anything I want? I am in your Lordship's court.

Judge: Yes. It would be helpful if you could remind yourself of that. Now ask the question.

Counsel: Well, no, my Lord. I----

Judge: Ask the question.

Counsel: Well, I want-- I think we need a five-minute break because I do not like being spoken to like this. I am an officer of this court. I deserve respect. Your Lordship comes into this court and we all stand up because we show respect and I am an officer of the court. I will not----

Judge: No you are not --

Counsel: (inaudible)

Judge: --an officer of the court. You are not a solicitor. You are a member of the Bar.

Counsel: Well, my Lord, I---

Judge: I am not wasting any more time. Get on with your cross-examination.

Counsel: My Lord, I will make one further point. This is my workplace. This is my workplace, just like your clerks and----

Judge: Will you please just get on with asking your question?

Counsel: I will but can I have it affirmed from you that you will not talk to me in that way?

Judge: If you speak to me respectfully, I will speak to you respectfully.

Counsel: My Lord, I apologise if I have come across in any way disrespectful but this is my place of employment and I will not be spoken to in that way by anybody. When I have employees, I never speak to them in that way.

Judge: You are getting yourself close to being reported to the Bar Standards Board. Now please just get on with your cross-examination.

> Counsel: May I ask that same question again or not?
>
> Judge: Certainly.
>
> Counsel: Yesterday - please correct me if I misquote you in any way - my understanding was that A suffered trauma when he was moved away from [the mother], away from the extended family and her. Am I quoting you right or am I misquoting you?
>
> Witness: I think you're probably misquoting me. I don't remember using the word "trauma". I'm not saying A wouldn't have suffered trauma but I don't recall saying that in evidence yesterday.
>
> Counsel: Okay. Well, I did say-- I said in fact-- I had a note of "trauma" and I will-- I stand to be corrected. Did you use the word "traumatic" then or-- can you recollect?
>
> Witness: I can't recollect, I'm sorry.
>
> Counsel: All right then. Well, then, in that case, in relation to the upheaval, how do you think that has affected A?
>
> Witness: I think A because of his age would have been confused about the changes that took place moving from one residence to another residence. He already had formed a good relationship with his father so it wasn't as though he was going some-- with someone he didn't know. The environment would have been slightly different but, yes, I think it-- because he's preverbal and explanations couldn't really be given to him as to what was happening in his little life, you know, I think he would have been confused."

118. The guardian's evidence continued. A little later in the morning, following a short adjournment for unconnected reasons, Mr Uddin addressed the judge in these terms:

> "My Lord, if I may be permitted to make this personal statement which is recorded here, in these proceedings today was the second time your Lordship has threatened me with the Bar Standards Board and I am concerned whether my client is losing confidence in me and whether I can continue. However, having spoken to my client, she has not lost confidence in me. I will continue with this case but, my Lord, I totally appreciate these kind of cases are not easy for anyone concerned, even your Lordship. These are dealing with the souls of people and, my Lord, I am also a human being with blood and salt running

> through my veins and if there is another threat, my Lord, I am going to have to consider-- I totally accept, if I am in any way inappropriate, then your Lordship should admonish me so, on that basis of that understanding, my Lord, I am going to continue. I feel my client has not lost confidence in me and I can carry on. I just wanted to put this marker down, my Lord. May I continue?"

The judge did not respond to this statement. Counsel resumed his examination of the guardian. There were no further episodes of conflict between him and the judge.

119. It was submitted on behalf of the mother that this incident would lead a fair-minded and informed observer to consider that there was a real possibility of bias for several reasons. First, the judge's initial intervention was wrong and unfair. Counsel's recollection of the guardian's evidence the previous evening was correct: she had referred to trauma. Secondly, the judge lost his temper with counsel and addressed him in a way that amounted to bullying. Thirdly, counsel was clearly unsettled by the way in which the judge addressed him and asked for an adjournment, which the judge refused. Fourthly, the judge's renewed threat to report him to the BSB was unjustified and wrong. Finally, the effect of the intervention was that the guardian wrongly said that counsel had misquoted her. The judge's intervention therefore materially undermined the evidence.

120. In response, Mr Wilson acknowledged that the judge's comments during this exchange may be the most troubling. He pointed out that counsel's summary of the guardian's evidence the previous day was not precisely accurate. He did not seek to defend the judge's reference to the BSB. He added, however, that, following this exchange, Mr Uddin had continued to cross-examine the guardian for an extended period recorded over a further 21 pages of transcript, during which there were further respectful and productive exchanges between judge and counsel. This was one incident over a five-day hearing and, in evaluating the question of apparent bias, a fair-minded and informed observer would have regard not just to this moment but to the whole hearing in the context of the overall proceedings.

121. In his written submissions to this Court, Mr Bowe informed us that, having carefully considered the transcript, the guardian could see that counsel's question did not strictly reflect the evidence that she had given the day before in that she had not said that A had suffered trauma "when he was moved away" from the mother to the father but rather that A must have suffered trauma having lost the mother and his extended family. He added, however, that the guardian's perception was that the judge unexpectedly shouted at counsel when telling him not to talk like that, causing counsel to request a five-minute break and that the style of the intervention, taken in combination with the previous admonition and reference to the BSB on 25 March, resulted in what Mr Bowe called a somewhat freezing effect on counsel. He also noted that the effect of the intervention was to cause the guardian to doubt her previous evidence and potentially deprive counsel of the opportunity to explore the issue of "trauma" more fully on the mother's behalf. For those reasons, it was his submission that a fair-minded observer would consider that instances (3) and (8) together do amount to apparent bias.

DISCUSSION

Introductory Observations

122. In this part of the case we are concerned with alleged bullying of counsel by a judge. Where it occurs, judicial bullying is wholly unacceptable. It brings the litigation process into disrepute and affects public confidence in the administration of justice. However, it inevitably remains the case that situations of conflict between bar and bench will sometimes arise. In that connection we make the following points.

123. First, counsel are sometimes obliged to object to, or be critical of, something said or done by the judge in the course of a hearing. Judges should, and almost always do, appreciate that this is a fundamental part of the advocate's role and should entertain the objection with respect, even if they regard it as ill-founded. However, respect goes both ways. It is important that any such objection or criticism is expressed, however firmly, in a professional way. Most judges nowadays conduct hearings in a less formal manner than may have been usual in earlier generations, but that is not a licence to disregard the particular position of authority which they necessarily enjoy.

124. Second, trials are a very intense environment. Even the best counsel may in the pressure of the moment express themselves in ways which they did not really intend or say things which they would not have said if they had had time for reflection – whether in the context of an exchange with the judge of the kind discussed above or more generally. Judges should, and almost always do, recognise this. Many such lapses can simply be overlooked or corrected with a light touch.

125. Third, there will nevertheless be occasions when counsel's conduct requires explicit correction or admonishment. In such a case the judge should try to ensure that any rebuke is proportionate and delivered in measured terms, without showing personal resentment or anger. Even a merited rebuke may be unsettling for counsel; and it may also, even if unjustifiably, have an impact on the confidence of their client in the fairness of the hearing. That said, some such impact may be unavoidable, in which case it has to be accepted as a consequence of counsel's behaviour.

126. Fourth, a statement by the judge that they are considering referring counsel to the BSB is a particularly strong form of admonition and is accordingly particularly liable to have an adverse impact of the kind referred to above. For that reason, we believe that it will rarely be appropriate for a judge to raise the possibility of referring counsel to the BSB in the middle of a hearing. In the great majority of cases, the better course will be to wait until the end of the hearing, which will avoid raising the temperature more than is necessary and will also mean that the judge can evaluate counsel's conduct in the overall context of the hearing. In the rare case where an allegation of professional misconduct does have to be raised in the course of a hearing, the situation will require sensitive handling and the judge will be well advised to take time to consider carefully when and how to raise the matter.

127. Finally, since judges are human, and (as Black LJ observed in *Re G*, supra) hearings can be challenging for them as well as for counsel, they will sometimes lapse from these high standards, and incidents will occur which the judge should have handled better. But such lapses do not necessarily amount to bullying; still less does it necessarily follow that in such a case the hearing will have been unfair or that the judge should recuse themselves from any further involvement. On the contrary, it is fundamental to the culture and training of a professional judge that they will decide

each case according to its objective merits. If judge and counsel rub each other up the wrong way, whether or not it is the fault of either or both, that can be, and almost always is, put to one side in the decision-making process. Likewise, the professional training and experience of counsel should enable them to deal with criticism from the bench, even if they may believe it to be unjustified.

128. We should add that although the mother's reference to bullying requires us to consider the judge's conduct, the dispositive question on this application is not whether he was guilty of misconduct in relation to either instance but whether his conduct would give rise to a reasonable apprehension that he was biased against the mother, because of her counsel's behaviour.

Instance (3)

129. In his third judgment handed down on 15 November 2021 the judge said that parts of the position statement filed for the hearing on 25 March 2021 were "rude and impertinent": the phrase he used at the hearing itself was "impudent and impertinent". We might not have used those precise terms, but we agree that the passages that we have quoted from the position statement are objectionable. Although, as we have acknowledged above, there are occasions where it is counsel's duty to accuse a judge of unfairness, in the context of the adjournment application the accusation was not only unfounded but gratuitous. It did not advance the substance of the application to say that the mother feared that it would be unfairly "disregarded" because of the judge's previous findings, still less that she feared that he would use it against her. Those assertions did no more than vent the mother's personal feelings about the judge's findings (which findings were unappealed). We recognise that this may not have been an easy position statement for Mr Uddin to draft but if his response to the judge that it was drafted "on [the mother's] instructions" meant that he thought he was obliged to make offensive imputations of this kind merely because his client wanted him to do so, that was a serious misunderstanding of his duty.

130. It was in our view appropriate for the judge to admonish counsel about the tone of the position statement. He also acted appropriately by doing so succinctly, and in a way that drew a line before he moved on to the substance of the application. We have to say, however, that we do not think that his rebuke was well expressed. Although it is never easy to assess how things are said from a written transcript, the words used by the judge convey the impression that he felt personally affronted: that was not appropriate. As for his mention of the BSB, it is fair to say that the judge did not say that Mr Uddin's conduct merited a report (and we do not believe that it did) but only that he would report him if he did the same again. But it was, for the reasons set out above, inadvisable for him to mention a possible reference to the BSB in the course of the hearing.

131. Although we believe that the incident could have been handled better, we consider it to have been a limited incident, best characterised as an over-reaction to what was in our view a gratuitously offensive position statement.

Instance (8)

132. As we have seen, the parties before us were agreed that instance (8) was the most serious of the instances on which the mother relied. It is important to start by analysing exactly what went wrong.

133. The starting point is the judge's querying of whether in his question to the guardian Mr Uddin had accurately summarised an earlier answer she had given. The question began:

> "Now, yesterday in evidence you said, and please correct me if you find me to (inaudible) in any way, that A did suffer trauma when he was moved away from [the mother] to the care of [the father] leaving behind …"

It was at that point that the judge intervened to say that he had not heard the guardian say that, though a little way into the exchange he said in terms that she had not done so.

134. Because of the way things developed, the judge did not specify exactly what it was in Mr Uddin's formulation that he believed was wrong. When Mr Uddin eventually put the question again the guardian said that she did not believe that she had used the word "trauma". As the transcript shows, she was wrong about that, and to that extent Mr Uddin's question accurately reflected her evidence. But it is not clear to us that that was the judge's point. Mr Uddin's formulation was in fact inaccurate in a different way, because it suggested that the guardian had attributed the trauma to A being moved "to the care of [the father]" whereas she had referred only to it being caused by the loss of his mother and extended family. The difference is only slight, and it is fair to say that Mr Uddin had not finished his question when the judge intervened and he may well have been going on to refer to that aspect too (as he did when he eventually put the question again); but even if so his introduction of a reference to the father arguably carried the implication that the guardian had said there was something about the father's care that caused trauma. It may well have been this perceived inaccuracy that the judge was objecting to. In any event, at this stage there was no more than a possible misunderstanding of a kind which sometimes occurs in the course of cross-examination, and no-one is to be criticised.

135. Mr Uddin responded to the judge's intervention by saying:

> "What would you like my Lord to do, not-- for me not to even ask the question because your Lordship has not heard it?"

That was in our view disrespectful and impertinent. The correct response from an advocate when his recollection of the evidence is questioned by the judge is to seek to clarify the position, most obviously by establishing exactly what the issue is and asking that the judge's note be compared with those of counsel and solicitors. His further response "Well, let us hear what she says then, my Lord" also has a confrontational ring, at least as it appears in the transcript.

136. Thus far the criticism is entirely of Mr Uddin. But it is clear that his disrespectful response (or responses) caused the judge momentarily to lose his temper. Even without the tape, it is plain that his response ("Do not talk to me like that") was angry – and that is confirmed by the guardian's recollection recorded at paragraph 121 – and his replies in the course of the following exchange, culminating in the observation that Mr Uddin was coming close to being reported to the BSB, show that he did not immediately recover his poise. That exchange in its turn clearly unsettled Mr Uddin and caused him too to become heated – "I deserve respect", "can I have it affirmed that you will not talk to me in that way?", "I will not be spoken to in that way by anybody". Although the judge tried to close the incident down and return to the evidence, Mr Uddin would

not at first do as the judge asked. He requested a break, which the judge refused. Although Mr Uddin resumed his questions to the witness, he obviously remained troubled, hence his "personal statement" a few minutes later.

137. This was clearly a regrettable incident. It was started by Mr Uddin's disrespectful response or responses, for which the judge was fully entitled to admonish him. However, the way that the judge did so raised the temperature and clearly unsettled Mr Uddin. With the benefit of hindsight, we believe that he should have taken up the suggestion of a short break for "cooling-off". Instead, he warned Mr Uddin that he was getting close to being reported to the BSB. We have already observed that it is generally inadvisable to warn of the possibility of a reference to the BSB in the course of the hearing, and that was particularly so here when feelings were running high.

138. Miss Ancliffe submitted that the judge's intervention had led the guardian to wrongly disavow her earlier reference to A having suffered trauma by having been moved from her mother's care. That may be the case, even though the judge himself did not focus on that word, but it is in truth impossible now to know. Ultimately, it does not matter. We are not concerned as such with the effect of the judge's intervention but whether the incident to which it led gives rise to a reasonable suspicion of bias on his part. However, we should say that we do not consider that the guardian's revisiting of the issue had a material impact on the outcome. She was a professional witness well able to express her considered opinion and her subsequent answer, set out at the end of paragraph 117 above, described in more precise terms how A had been affected by the move from the mother.

CONCLUSION ON INSTANCES (3) & (8)

139. It will be seen that we have some criticisms of the judge's response in relation to both these instances, and in particular instance (8). However, the question on this appeal is whether what he said on those occasions would lead a fair-minded and informed observer to consider that there was a real possibility that he was biased against the mother. We do not believe that it would. In neither case was his conduct gratuitous: on the contrary, he was reacting, albeit inappropriately, to disrespectful conduct on the part of Mr Uddin. These were two short-lived and isolated episodes in separate hearings, the second of which lasted several days. They are just the kind of incident which may arise in the course of highly-charged proceedings but which, as we have said above, a professional judge will put to one side when assessing the merits of the case. As noted at paragraph 47 above, in his eventual judgment the judge said that the exchanges between him and Mr Uddin had had no effect on his decision-making. Of course that statement itself cannot be conclusive, but it is consistent with what the fair-minded and informed observer would expect of a professionally trained judge and there is nothing to suggest that it was not the case here. There is no complaint of any other inappropriate interchange between the judge and Mr Uddin. We refer also to paragraph 95 above. The mother and her legal representative were given a fair opportunity to put her case, and the mother was allowed to adduce extra evidence. At the conclusion of the hearing, the judge handed down a judgment in which he rejected a number of the proposals put forward by the father. All the evidence is that the judge reached his conclusions following the August 2021 hearing in a fair and balanced way, and there is no reason to suppose that he would not do so in the remaining stages of the case.

140. Having been critical of some of Mr Uddin's comments, we should record our impression that, despite the evident professional difficulties he was facing, he represented his client tenaciously and effectively.

OVERALL CONCLUSION

141. In relation to both groups of instances, we have concluded that they would not lead the fair-minded and informed observer to conclude that there was a real possibility that the judge was biased against the mother. For the avoidance of doubt, that remains our view if all seven instances are considered cumulatively. It is for those reasons that we concluded that there was no basis on which the judge should have recused himself and that this appeal should be dismissed.