Neutral Citation Number: [2023] EWCA Civ 686

Case No: CA-2023-000520

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT CENTRAL LONDON
HH Judge Hughes KC
ZC21C00447

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 June 2023

Before :

LORD JUSTICE HOLROYDE
LORD JUSTICE BAKER
and
LADY JUSTICE ANDREWS

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K AND L (CHILDREN: FAIRNESS OF HEARING)

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- -

Kemi Ojutiku (instructed by **Obaseki Solicitors**) for the **Appellant**
Andrew Collings (instructed by **Local Authority Legal Unit**) for the **First Respondent**
John Schmitt (instructed by **Osbornes Law**) for the **Second Respondent**
Lucy Cheetham (instructed by **Lawrence and Co**) for the **Third Respondent**

Hearing date : 11 May 2023

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Approved Judgment

This judgment was handed down by the judges 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 10.30am on 20 June 2023.

LORD JUSTICE BAKER :

1. This is an appeal by a mother against care orders made in respect of her children, K (a girl, now aged 13) and L (a boy, aged 10).

2. At the conclusion of the hearing, we informed the parties that the appeal would be allowed for reasons to be given in a judgment at a later date. These are my reasons for agreeing with that decision.

Background

3. The family has been known to the London local authority children's services department throughout the children's lives because of a range of problems, including domestic violence between the children's parents, violent incidents between the parents and other adults, drug and alcohol misuse by the parents, difficult behaviour exhibited by the children, and very low school attendance. On three occasions, in 2016, 2018 and 2020, the children were placed under Child Protection Plans. The parents separated, with the children remaining with the mother, but incidents of domestic abuse continued, some in the presence of the children. By the Spring term of 2021, L's school attendance had declined still further to 15%. In June 2021, a report from Dr Nicholas Banks, a clinical psychologist, concluded that the mother was not emotionally attuned to the children due to her own unmet psychological needs and that they were likely to suffer significant emotional neglect if they remained in her care. The local authority decided to start care proceedings and instigated the pre-proceedings protocol.

4. In September 2021, L started at a new school in a different area of London. On 3 September, the local authority filed an application under s.31 of the Children Act 1989. At the first hearing before the magistrates, interim supervision orders were made in respect of both children who remained living at home under a written agreement. Directions were given for further hair strand testing of the parents, a further report from Dr Banks, and viability assessments of various members of the extended family to establish whether they could care for the children. Shortly afterwards it became known that the mother was pregnant. An initial child protection conference in respect of the unborn baby was postponed because the mother refused to provide contact details for the putative father.

5. In his supplemental report, filed in March 2022, Dr Banks continued to express concerns about the children's future care if they remained with their mother. He reported that L was functioning at least two to three years below his age expectation and that he was showing characteristics of ADHD for which he should be assessed. He described the relationship between the children as emotionally positive and recommended that they should not be separated. A parenting assessment of the mother recorded that the children's basic care needs were met, that the mother's level of engagement with professionals had improved, that she was attending all antenatal appointments, and that domestic abuse was no longer a feature in her relationships. The assessment concluded, however, that the children should not remain in her care because they would "continue to receive maladaptive parenting" which would "impact negatively on all aspects of their development". Meanwhile, a viability assessment of the paternal grandmother recommended that the children be placed in her care if the court concluded that they should not remain with either of their parents.

6. On 27 April 2022, the mother gave birth to a baby boy. No proceedings have been taken in respect of the baby who remains living with the mother.

7. Following a change of social worker, the local authority filed what was intended to be its final evidence with care plans proposing that the children remain at home with the mother under supervision orders. In June 2022, the guardian filed her final analysis supporting this plan. The father, however, continued to oppose it and instead contended that the children should be placed with the paternal grandmother. Over the course of the summer, the local authority continued to receive reports about L's disruptive behaviour. On one occasion he was found alone and unconscious and taken to hospital after being trapped in a lift.

8. On 9 September 2022, a further case management hearing took place before HHJ Harris. By this stage, the guardian was on maternity leave. The court order recited that her replacement endorsed the recommendation supporting the care plans. The father continued to oppose the children remaining with the mother and the case was therefore listed for a final hearing starting 6 March 2023 (eighteen months after the start of the proceedings). The order required the local authority to submit a timed witness template allowing for judicial reading and "with a court sitting day of five hours (11 – 4)". Over the next few months there were continuing difficulties about the father's contact and renewed concerns about the mother's capacity to manage the children's behaviour. K was said to be associating with older disruptive teenagers who the mother had allowed to visit the home. There was evidence that L was coming into contact with drugs. On the other hand, his school attendance was significantly higher. The new guardian visited the children who told her that they wished to remain at home. A professionals meeting took place at which Dr Banks confirmed his view that the children would continue to be at risk in their mother's care.

9. At a pre-trial review before HHJ Sapnara on 15 February 2023, the judge gave further directions for the final hearing, including that (1) the local authority should file an updated care plan adding "an alternative plan to set out the details of a placement in foster care should the court not approve the primary plan for placement with mother", (2) an advocates meeting should be convened on 23 February 2023, (3) the guardian should file and serve her final analysis and recommendations by 3 March 2023, (4) (varying the order of 9 September) the final hearing days "shall start at 10am with parties present at 9am", and (5) the agreed threshold document and the finalised witness template "to be lodged with this order".

10. The final threshold document (that is to say, the document setting out the basis agreed between the parties on which the threshold criteria for making care or supervision orders under s.31 of the Children Act 1989 were satisfied) was filed in accordance with the order. In summary, it stated that the children had experienced significant domestic violence throughout their lives; that the parents' relationship continued to be acrimonious despite no longer living together; that the children had additional emotional needs and behavioural difficulties believed to result from the parental conflict; that despite extensive professional involvement, the mother did not engage effectively with children's services; that the children suffered from poor school attendance; that there were ongoing concerns that their basic needs were not being consistently met; that hair strand tests showed that the parents were continuing to take drugs and/or drink excessively; and that Dr Banks' assessment had concluded that the children were likely to continue to suffer emotional neglect in their mother's care.

11. In the event, the advocates meeting did not take place until Thursday 2 March. It was attended by counsel for all parties, including Ms Charlotte Brazier, who had been recently instructed to represent the mother and had not at that point met her client. In accordance with the order of 9 September 2022, the original witness template had provided for judicial reading time on the first morning of the hearing, and Ms Brazier had arranged to have a conference with the mother at that time. It was only at the advocates meeting that counsel realised that the template filed with the court did not reflect Judge Sapnara's direction about the timetable for the hearing. They arranged to file an amended template. At the time of the advocates meeting, the parties had not received the guardian's report. It was served on the parties the following morning, the last working day before the hearing. In the report, the guardian indicated that, contrary to her earlier position in which she had confirmed her predecessor's endorsement of the local authority's plan, she now wished to hear the evidence before making final recommendations.

12. Thus, at the start of the final hearing, the position of the parties was as follows. The local authority and the mother were proposing that the children remain at home under supervision orders. The father was proposing that the children be removed from the mother and placed initially in foster care with a view to being moved to the paternal grandmother in due course. The guardian was reserving her position until the conclusion of the evidence.

13. The hearing continued over four days. The conduct of the hearing lies at the heart of this appeal and it will be necessary to describe what happened in some detail later in this judgment. In brief, the hearing took the following order. On the first day, after very brief initial exchanges, the previous and present social workers gave evidence. On the second morning, Dr Banks gave evidence by video link. The mother's evidence started on the second afternoon and continued on the third morning. After the lunch adjournment, the father gave evidence and was followed by the guardian giving her evidence in chief. It was at this stage that the guardian recommended that the children be removed from the mother's care and placed in a long-term foster placement. The guardian's cross-examination took place on the morning of the fourth day and continued into the afternoon. Counsel then delivered oral submissions (no written submissions were required) and the judge reserved judgment until the following day.

14. The judgment began with an exposition of the issues and the background. The judge then summarised the evidence of the six witnesses who had given oral evidence. She continued :

> "I make the following findings:
>
> (a) The family has been known to social services since 2009.
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> (b) The children have been caught up over many years in the domestic disputes of their parents; neither parent can be exonerated from responsibility as even though the mother moved homes either she made contact with the father or he with her.
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> (c) The mother has used contacts to punish the father rather than considering the needs of the children to see him regularly and as a result there were gaps in his contact with the children.

(d) The mother has made progress in the following areas.

(i) She has greatly reduced drug/alcohol intake but this was in train in 2022 when the parenting assessment was underway. It needs to be accepted this was a significant change when it occurred.

(ii) She has not been involved in domestic violence incidents with the father in recent times although the father produced text messages dated July 2022 in his statement which show even then she is willing to express hostility to him; there was of course the dispute about Egypt earlier this year which while not a violent incident indicates her willingness to support a suspension of contact.

(iii) She has worked hard to get L into better educational provision.

(iv) She has maintained a tidy home since Mr A has been her social worker.

(v) She has physically cared for the children including feeding them and ensuring they had regular sleep and indeed two separate beds in the room.

(e) The mother has not made progress in these areas:

(i) her supervision of the children and her ability to keep them safe even after L's very serious accident on 1 August 2022; thereafter she has provided supervision on her own terms but not as needed by the children;

(ii) her ability to send K to school or to school on time so K's current attendance is 70%;

(iii) her ability to ensure K does her homework/extra schoolwork as advised by the school;

(iv) her ability to prioritise contact for the children with their father and send them regularly;

(v) her continuing use of cannabis and possibly alcohol (tests are awaited);

(vi) her emotional attunement to the children and their needs and her ability to prioritise these;

(vi) her ability to work with professionals which is inconsistent …;

> (vii) I find the mother is unreliable and untruthful and what she says when checked against other records is not honest."

15. The judge then stated that she needed to give herself a *Lucas* direction and set out in some detail the case law concerning the treatment of lies in the family court. She made some observations about the father and referred to s.1 of the Children Act 1989. She then set out her conclusions in these terms:

> "26. …. I am very conscious the children need a secure home which can meet all their needs including emotional, physical and educational. I know if asked they would wish to stay with the mother but I have to consider their welfare and to leave them with the mother would in my view effect no changes in their lives to meet their very real emotional and safety needs. In my view the mother is not capable of meeting their needs and there is no other family member who has been assessed who could do so (see s.1(3) of the Children Act 1989).
>
> 27. I cannot approve the local authority's request for a supervision order. I am persuaded by the evidence that were I to do so all I would be doing is shoring up a situation which cannot change sufficiently in the childhood of the children who are already 13 and 10. I agree with Dr Banks that when support/supervision is withdrawn part of the scaffold will collapse…. I believe Dr Banks that there is no fundamental change in the mother's ability to meet the emotional needs of the children and this is unlikely to occur in the future because of her own emotional needs and inability to prioritise the children. Mr A [the social worker] himself told me there were risks leaving the children in the mother's care. In my judgment those risks are too great and I must make care orders and sanction their removal from the mother's home.
>
> 28. I am well aware the children may well be very distressed by this decision but I believe that with the right placements they will come to terms with it and in my judgment the advantage[s] of removal outweigh the very substantial risks of remaining.
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> 29. Dr Banks originally said the children should be placed together. If that can be done it should be. However, the Guardian said they are a 13-year-old girl and a 10-year-old boy with different needs who are used to spending time apart as K spends weekends with her grandmother and she felt if placed separately their carers could give more time to each individually. I must leave the decisions with regard to foster placements to the local authority but there is no obligation on the local authority from me to place them together."

The appeal

16. The mother filed a notice of appeal on 16 March 2023. Permission to appeal was granted on 24 March. The appeal was opposed not only by the father and the children's guardian but also by the local authority.

17. The mother relied on five grounds of appeal:

    (1) The judge erred in her approach to the evidence, in that she attached insufficient weight to competing evidence before the court.

    (2) The judge erred in her approach to key aspects of the mother's case, and failed to address those issues adequately.

    (3) The judge failed to conduct a clear and proper analysis of the factors set out in the welfare checklist, in particular the impact upon the children of a change in circumstances.

    (4) The judge failed to identify that there were gaps in the evidence, and in doing so failed to consider properly or at all what information would be required to plug such gaps in the evidence and/or to ensure that the evidence was up to date. Further or alternatively, the judge erred in declining to adjourn the final decision until such information was available.

    (5) The judge's management of the final hearing was biased against the mother.

18. Before considering the substance of the appeal, I must mention a preliminary application we considered at the outset of the hearing. Very unfortunately, on the previous day, Ms Brazier, who had represented the mother before the judge and settled the grounds of appeal and skeleton argument, was taken ill and was therefore unable to appear at the hearing. Alternative counsel Ms Kemi Ojutiku was instructed in her place, but nonetheless at the start of the hearing she applied for an adjournment because the mother wished to be represented by counsel who had appeared below. We sympathised with the mother's wishes but decided that any further delay would be contrary to the interests of the children. A decision on their future was urgently required. If the appeal succeeded, a rehearing would almost certainly be necessary. The proceedings had already been ongoing for over 21 months, well in excess of the statutory 26-week time limit. Accordingly, we refused the adjournment application, whilst indicating that we would keep the issue under review during the hearing.

19. In the event, the mother's case was not materially affected by Ms Brazier's absence. We were extremely grateful to Ms Ojutiku for taking on the brief at very short notice and impressed by her mastery of the extensive documentation and the issues arising. We were also grateful to all counsel and to their instructing solicitors for taking steps to ensure that the appeal could be heard urgently and efficiently.

Ground 5 – unfairness and bias

20. It is convenient to start with the last ground of appeal which was the principal focus of the appeal hearing.

21. In *Re AZ (A Child) (Recusal)* [2022] EWCA Civ 911 at paragraph 54 and 55, this Court observed:

> "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 … 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."

22. Although the ground of appeal referred only to bias, it was clear from the skeleton argument filed by Ms Brazier in support of the appeal that both apparent bias and unfairness were alleged. The argument advanced was that the judge's management of the final hearing was biased (or appeared biased) against the mother or alternatively was unfair to her.

23. It is unnecessary in this judgment to review the legal principles which have been extensively considered in the case law in recent years – see in particular, regarding unfairness, *Re G (A Child)* [2015] EWCA Civ 834 and *Serafin v Malkiewicz* [2020] UKSC 23, and, regarding bias, *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515, *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 and *Re AZ (A Child) (Recusal)* [2022] EWCA Civ 911. The following points are of particular relevance to this appeal.

24. First, 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." "Dealing with a case justly" includes amongst other things ensuring that it is dealt with expeditiously and fairly, 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. As this Court observed in *Re AZ* at paragraph 56:

> "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 … This is particularly so when the family court is deciding a question relating to the upbringing of a child."

25. Secondly, a judge who becomes too actively involved in the hearing may impede his ability to exercise judgment. The risk was identified in the well-known passage in the judgment of Lord Greene MR in *Yuill v Yuill* [1945] P 15 at page 20:

> "A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the

> conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation."

Lord Greene's observation was made nearly eighty years ago. In all parts of our modern legal system, judges take a more interventionist approach, not least in children's proceedings which are, for the most part, quasi-inquisitorial rather than adversarial. Nonetheless, excessive judicial intervention, particularly during the evidence, may undermine the fairness of the process. As Jonathan Parker LJ observed in *The Mayor and Burgesses of the London Borough of Southwark v Maamefowaa Kofi-Adu* [2006] EWCA Civ 281 at paragraph 146:

> "145. Nowadays, of course, first instance judges rightly tend to be very much more proactive and interventionist than their predecessors… That said, however, it remains the case that interventions by the judge *in the course of oral evidence* (as opposed to interventions during counsel's submissions) must inevitably carry the risk so graphically described by Lord Greene MR. The greater the frequency of the interventions, the greater the risk; and where the interventions take the form of lengthy interrogation of the witnesses, the risk becomes a serious one.
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> 146. ....the risk identified by Lord Greene MR in *Yuill v. Yuill* does not depend on appearances, or on what an objective observer of the process might think of it. Rather, the risk is that the judge's descent into the arena (to adopt Lord Greene MR's description) may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may *for that reason* render the trial unfair."

26. Thirdly, an appellate court must be careful when reviewing the conduct of the hearing to bear in mind all the vicissitudes and difficulties that arise at trial. As Black LJ observed in *Re G* at paragraph 31:

> "Managing a trial can be a 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."

27. Fourthly, the fact that a judge has intervened frequently during the hearing, or interrupted one advocate but not others, is not by itself unfair. As Hildyard J succinctly put it in *M&P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch) at paragraph 23, "interventions need to be assessed not only quantitatively, but also qualitatively." In the words of Black LJ in *Re G*, supra, at paragraph 39:

> "It is necessary to look not only at the quantum of the judge's interventions but also at their nature…. [A] litigant does not have an unrestricted right to present a case in such a way as he or she or his or her lawyers may choose. A judge sometimes has no choice but to intervene during the evidence because of the nature of the questioning or in order to manage the use of court time …. Furthermore, the interventions can sometimes be a help to counsel in his or her questioning rather than a hindrance."

28. Fifthly, a hearing that has been conducted unfairly cannot be saved by the judgment. As Black LJ put it in *Re G* 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."

29. Finally, the authorities draw a distinction between judicial interventions during the evidence and in the course of closing submissions – see for example the observations of Jonathan Parker LJ in the *Kofi-Adu* case cited above. In the *M&P Enterprises (London) Ltd* case at paragraphs 223 to 225, Hildyard J noted that:

> "There is a clear distinction between, on the one hand, interventions in cross-examination and re-examination with respect to the evidence and on the other hand, intervention in counsel's closing submissions for the purpose of testing them."

At paragraph 225, he continued:

> "Closing submissions offer the appropriate opportunity not only for Counsel to put forward their case on the evidence as it has emerged, but for Counsel to be tested by the Judge to enable him or her fully to understand the case as presented and to identify any weaknesses in it as a preliminary to writing a judgment. In the latter context, intervention is both appropriate and common-place: and fairly critical and dogged questioning is neither unusual nor improper. The provisional view of the Judge may now be apparent, or even expressed: but that is not of itself objectionable, the trial, having in effect, entered the adjudication stage. Of course, even at such a stage a judge may exhibit or give the appearance of some pre-existing bias: but a provisional view before judgment is to be distinguished from that. Nor, without more (and the additional feature would have to be fairly striking), is the fact that a judge is markedly more interventionist in one side's case than the other any indication of bias."

30. The test for apparent 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 paragraph 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, paragraphs 102-103."

31. 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. As Lord Wilson observed in *Serafin v Malkiewicz* at paragraph 39, this definition of bias is "quite narrow" and excludes cases (such as *Serafin v Malkiewicz*) where the judge's apparent prejudice against a party is seemingly the product of his view as to the merits of the case.

32. In ascertaining all the circumstances,

> "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"

(per Davis LJ in *Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492, [2016] 4 WLR 183 at paragraph 36.)

33. The fact that during a hearing a judge expresses a view about an aspect of the evidence does not by itself indicate that he or she may be biased.

> "[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"

(per Sir Thomas Bingham MR in *Arab Monetary Fund v Hashim and others (No.8)* (1993) 6 Admin LR 348, at page 356, cited by Davis LJ in *Singh v Secretary of State for the Home Department*, supra, at paragraphs 34-5.)

34. In her skeleton argument in support of the appeal, Ms Brazier identified three points at which the judge's management of the final hearing was unfair and/or gave rise to an appearance of bias, namely (1) insufficient time was afforded to the mother to consider the changes in the guardian's position at the outset of the final hearing and later after her evidence; (2) cross-examination of the father was restricted in circumstances where the cross-examination of the mother had far exceeded the time estimate, and (3) closing submissions on behalf of the mother were interrupted repeatedly by the judge in circumstances where no other advocate was interrupted at all.

35. The respondents all submit that the judge's conduct of the hearing fell within the ambit of her case management powers. As the father had consistently opposed the children remaining with their mother, she and her representatives ought to have been prepared for a contested hearing at the outset on the first morning. The fact that the guardian

withdrew her support for the local authority plan and said that she wished to hear the evidence before making a recommendation did not extend the scope of the hearing and the judge was entitled to insist on the hearing starting as planned. The judge was rightly conscious of the need to complete the hearing within the allocated five days and all parties were subject to time constraints. It is accepted that the judge intervened during the evidence but that was a sign that she was engaged with and focused on the key issues. On occasions she corrected or challenged all of the advocates. Overall, the hearing was conducted in an even-handed fashion and each party was given a fair opportunity to present their case. A fair-minded and informed observer would not conclude that there was a real possibility that the judge was biased.

36. I shall consider the allegation of unfairness or apparent bias under three headings foreshadowed in the appellant's skeleton argument: (1) the guardian's change of position, (2) the judge's conduct during the evidence, and (3) the judge's interventions during closing submissions.

The guardian's change of position

37. Under s.42(2)(b) of the Children Act 1989, the children's guardian is under a duty to safeguard the interests of the child in the manner prescribed by rules of court. Under FPR rule 16.20(3), a guardian appointed in care proceedings must have regard to the principle that the child's welfare is the paramount consideration and to the factors in the statutory welfare checklist in s.1(3). Although it is not uncommon for a children's guardian's assessment of the child's welfare and recommendation for future care to change during the course of proceedings, it is less common for such a change to occur at a relatively late stage as happened in this case. There is no reason to question the good faith of the guardian when she decided to withdraw her original recommendation, informed the court that she wished to hear the evidence before reaching a final opinion, and then at the end of the evidence put forward a recommendation that was fundamentally different from her initial view. But on any view this was a significant development which required careful handling by the judge, in three respects. First, given the lateness of the guardian's change of position, it was essential that all parties, in particular those who might be disadvantaged by the development, to be given a fair opportunity to prepare and respond. Secondly, given the guardian's wish to hear the evidence and the likelihood that her ultimate recommendation would be based substantially on her impressions of that evidence, in particular that given by the mother, it was important for the judge to ensure that the evidence was presented in a way that was fair to all parties. Thirdly, once the guardian had reached her ultimate conclusion and made her recommendation, it was essential that the judge afford the party adversely affected by it the opportunity to put forward her case in response so that the court would have the fullest material on which to base its decision.

38. At the outset of the hearing, Ms Brazier asked for more time to take further instructions in the light of the guardian's analysis which had been received at the end of the previous week and with a view to preparing an updated statement on behalf of the mother. The judge refused this request, saying:

> "I am really sorry, it might be more convenient for you to have an updating statement from your client. If that is the case and your client wishes to do so, she may do so overnight. It will be in time for her to give evidence tomorrow…. But I am not going

> to give you the whole morning to sit there talking. You have talked and talked and talked. The positions could not be clearer and it seems to me the evidence, particularly of the social workers, has been on the table for some considerable time. So I am really sorry, I am not very interested in more time."

39. This was a peremptory dismissal of an application to put the start of the hearing back. Other judges might have granted this application or, if they decided to refuse it, to do so in less dismissive terms. But the judge was plainly concerned about risk of the hearing overrunning. Ms Brazier was not suggesting that her ability to cross-examine the social workers might be prejudiced if she were not allowed time to talk to the mother. Although it was plainly necessary for her to have an opportunity to discuss the guardian's change of position with her client, I am not persuaded that it was essential that she be allowed that opportunity at that point. Taken by itself, therefore, this exchange was not unfair. As the authorities make clear, however, an assertion of unfairness has to be evaluated in the context of the hearing as a whole.

40. Towards the end of the third afternoon of the hearing, the guardian gave her evidence in chief in which she recommended that care orders be made in respect of both children and alternative placements found for them. On the fourth morning of the hearing, the guardian continued her evidence. At the outset of her cross-examination, Ms Brazier expressed concern that details of the guardian's final analysis were still being divulged in oral evidence and that it would be more normal for there to be a further written report. The judge observed "that has never happened in the 21 years that I have been a judge and I am not expecting it to happen now".

41. This was another peremptory dismissal of an application for the guardian's amended analysis to be committed to paper. Again, other judges might have granted this application or, if they decided to refuse it, to do so in less dismissive terms. In the event, the day's hearing concluded at the end of the guardian's evidence in chief. Ms Brazier therefore had the overnight adjournment to take stock and discuss her recommendation with her client. She then conducted a very thorough cross-examination of the guardian on the following morning. In my view, the judge's refusal to require the guardian to commit her analysis to paper was within her case management powers. Taken by itself, it was not unfair. Again, however, I remind myself that an assertion of unfairness has to be evaluated in the context of the hearing as a whole.

42. For my part, the fact that the guardian changed her position at a late stage, and the judge's treatment of Ms Brazier's consequential requests, did not amount to unfairness. I have much more concern about the judge's conduct during the mother's own evidence and counsel's submissions on her behalf.

The judge's conduct during the evidence

43. Various complaints were made to us about the judge's conduct during the evidence. In particular, it was asserted that (a) she had declined to listen to interim submissions or attempts on behalf of the mother to raise issues, (b) she was unwilling to entertain cross-examination of the father on the subject of domestic abuse, and (c) her interventions strayed beyond active case management.

44. On the second morning, the hearing did not start until 10.57. Dr Banks was due to be the first witness, giving evidence remotely. Following the judge's indication, the mother's team had prepared a 10-page updating statement but there had been a delay in filing it that morning and in sending a copy to Dr Banks. During a short pause while the link was established, Ms Brazier tried to raise an issue:

> "Ms Brazier: Your Honour, forgive me for rising out of turn but perhaps I could capitalise upon the time that is available. I am not sure whether we are going to get to the mother later, I am conscious that she is the next witness due. I do not know whether the court will want her to be left overnight if her evidence is not concluded.
>
> Judge: For heaven's sake, of course I will have the mother called as soon as Dr Banks is finished. I do not believe in time wasting, I am sorry. We do not prolong cases and just call a witness each day because they might be stuck overnight. Look, please sit down, just [wait] your turn.
>
> Ms Brazier: Your Honour, that was not my query.
>
> Judge: I do not mind what your query was, please sit down."

Dr Banks then gave his evidence which concluded shortly after 1pm. There were very few interventions by the judge during his evidence. Ms Brazier then raised the matter which she had tried to mention earlier, namely that the mother had asked to give evidence behind a screen. The judge refused, saying

> "that application should have been made weeks ago as well and it does not seem to me in a case of this nature where she has been sitting side by side, two away from [the father] that she should make that application at this stage."

45. Part 3A of the Family Procedure Rules, headed "Vulnerable persons: participation in proceedings and giving evidence", imposes duties on a court conducting proceedings in the family court. Under rule 3A.5:

> "(1) The court must consider whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.
>
> (2) Before making such participation directions, the court must consider any views expressed by the party or witness about giving evidence."

Under rule 3A.3:

> "(1) When considering the vulnerability of a party or witness as mentioned in rule … 3A.5, the court must have regard in particular to the matters set out in paragraphs (a) to (i) of rule 3A.7.
>
> (2) Practice Direction 3AA gives guidance about vulnerability."

The factors in rule 3A.7 include

> "(a) the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of … any other party or other witness to the proceedings…."

and

> "(d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse."

Paragraph 2.1(a) of the Practice Direction states that "abuse" in rule 3A.7 includes domestic abuse.

46. Under rule 3A.1, the "participation directions" referred to in rule 3A.5 includes a direction that a witness should have the assistance of one or more of the measures in rule 3A.8 which include (under rule 3A.8(1)(a)), measures which "prevent a party or witness seeing another party or witness."

47. Under rule 3A.9:

> "(1) The court's duties under rules 3A.3 to 3A.6 apply as soon as possible after the start of proceedings and continue until the resolution of the proceedings.
>
> (2) The court must set out its reasons on the court order for
>
> (a) making varying or revoking directions referred to in this Part; or
>
> (b) deciding not to make, vary or revoke directions referred to in this Part in proceedings that involve a vulnerable person …."

48. The following paragraphs of the Practice Direction 3AA are also relevant:

> "1.3 It is the duty of the court (under rules 1.1(2); 1.2 & 1.4 and Part 3A FPR) and of all parties to the proceedings (rule 1.3 FPR) to identify any party or witness who is a vulnerable person at the earliest possible stage of any family proceedings.
>
> 1.4 All parties and their representatives are required to work with the court and each other to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished and without being put in fear or distress by

> reason of their vulnerability as defined with reference to the circumstances of each person and to the nature of the proceedings.
>
> 1.5 In applying the provisions of Part 3A FPR and the provisions of this Practice Direction, the court and the parties must also have regard to all other relevant rules and Practice Directions and in particular those referred to in the Annex to this Practice Direction.
>
> …
>
> 5.2 When the court has decided that a vulnerable party, vulnerable witness or protected party should give evidence there shall be a "ground rules hearing" prior to any hearing at which evidence is to be heard, at which any necessary participation directions will be given."

49. Thus, the scheme of this rule and Practice Direction, so far as relevant to this appeal can be summarised as follows. (1) The potential vulnerability of a witness or party must be raised at the earliest possible point in the proceedings and addressed in a "ground rules hearing". (2) The court nevertheless remains under a duty throughout the proceedings to consider whether the quality of a witness's evidence is likely to be diminished by way of vulnerability and if so whether to make participation directions. (3) In exercising its duties and powers under Part 3 the Rules, the court must also have regard to its other duties and powers under the Rules, including the overriding objective in Part 1 and general case management powers in Part 4.

50. We were not told of any earlier hearing at which the issue of potential vulnerability or participation directions were considered by the court. For whatever reason, the issue of whether the mother should give evidence from behind a screen was not raised until the start of the second morning. When Ms Brazier attempted to raise it she was told to sit down. When she succeeded in raising it just before the end of the morning session her application was dismissed summarily by the judge on the grounds that (1) it should have been raised at an earlier stage and (2) the mother was sitting two seats away from the father in court, the implication being that the judge did not consider that the case for any special measures was made out.

51. I understand the judge's irritation that the issue was being raised at the last minute. In considering the application, she was bound to take into account the requirement under the overriding objective to ensure that the case was dealt with expeditiously and fairly to all sides. Nevertheless, in dealing with the application in the peremptory way described, she was in my view failing to comply with the obligations under rule 3A.5 to consider whether the quality of the mother's evidence was likely to be diminished by reason of vulnerability arising out of the history of domestic violence. Ms Brazier did not have a fair opportunity to make submissions on this issue. Had she been able to do so, the judge might have given the point appropriate consideration.

52. The mother's evidence started after lunch on the second day and continued in the morning and into the afternoon of the third. The judge intervened repeatedly, both in chief and cross-examination. The transcript indicates that she asked over 500 questions.

On many occasions she challenged the mother's evidence, in particular about her attempts to manage the children's behaviour and her use of cannabis. The frequency of judicial interventions increased during the cross-examination by Mr Schmitt on behalf of the father. During that part of the cross-examination that took place on the third morning, the judge asked over 200 questions, significantly more than Mr Schmitt. At times, the judge in effect took over the cross-examination.

53. By way of example, I cite a passage when the mother was being asked questions about K's association with two older girls. There had been evidence that the girls had stayed over a weekend and smoked cannabis in the house. The mother asked the judge whether she wanted to hear the story.

> "Judge: Right.
>
> Mother: Do you want to hear the story?
>
> Judge: Well you just said, "I did them a favour."
>
> Mother: Yeah. I did them a favour. Basically what happened was the mum called my phone and they explained to me that her daughter can't resign her over the weekend and her social worker is going to find her daughter accommodation on the Monday. Can I do her a favour and have her mum -- can I do her a favour and have her daughter to stay with me for two days, and I said yes. Me not knowing that -- it was over the weekend. Soon as, I let [the social worker] know and he said that that girl was known to services and he says I shouldn't have her in my house because -- let me just explain this properly -- she's very developed. What's she's going through and to what K's going through, they're going down two different paths. So I explained to [the social worker] she's not my daughter's friend. I just did the mum, I just did them a favour.
>
> Judge: That was after the weekend was over, was it not?
>
> Mother: Yes. And they was no smoking weed in my house.
>
> Judge: If somebody says to you, "My daughter cannot be with me all weekend. I have got to find somewhere. The social services are looking for a place for her," do you not think, "Oh my goodness, there is a problem here. The girl has obviously had some difficulties. Why would I, with what I have got to cope with, namely, my two children and my baby, why would I be the person who is going to be able to help?"
>
> Mother: Yeah. Obviously, it was a family friend, so I just did her a favour.

Judge: But did you not think, the girl is going through such problems at home that she has got to be removed, "Can I cope with this? No I cannot. I have got enough on my plate. I cannot take on anything else." Did you not think that?

Mother: No I didn't. At the time, I didn't think that.

Judge: Right. And what were the problems when she came, this girl?

Mother: She was smoking. But she was never smoking in my house or near my house. I don't understand where this is coming from. One of the girls is a non-smoker so I don't understand where –

Judge: And one of them is a smoker.

Mother: A smoker and she wasn't smoking in my -- I don't allow smoking in my house, full on.

Judge: What problems did you notice with these two girls?

Mother: One was smoking. And I let her know, "You should not be smoking." So I did let her know.

Judge: So she was smoking in your house.

Mother: No. I don't allow smoking in my house, full on.

Judge: Right. So where is she smoking, in your garden?

Mother: No, outside my house.

Judge: In the front of your house?

Mother: `Out on the street. Within my estate.

Judge: Right. So you said, "I am sorry, I do not have you in the house smoking."

Mother: I don't allow smoking in my house anyway, so it wasn't about age. It's not about age.

Judge: But I am asking you, what were the problems you noticed.

Mother: That she smoked. And she's very developed.

Judge: You must have known that before she ever came to the door because she is your friend's daughter.

Mother: Yeah. I did kind of know that, yeah.

Judge: Right. So that was not a problem, she was developed. That did not happen on the day, did it.

Mother: No.

Judge: What were the problems when they stayed for the weekend? Were they drinking?

Mother: No, they wasn't drinking. Alcohol has never been drunk in my house.

Judge: Right. They were not smoking and drinking in your house.

Mother: No.

Judge: What were they doing in your house?

Mother: They were just downstairs on their phone, watching TV. That's what they were doing because they didn't even sleep upstairs. They slept downstairs. So they didn't go upstairs at all.

Judge: Right. Did they inconvenience you at all?

Mother: Yeah, course they did. They took over my front room. That's the truth.

Judge: Right. Did you ask them to do something different or did you just let them do it?

Mother: No, I told them. After the thing I told her she can't stay here anymore. So once the weekend finished I said to her, "You need to call alternative -- you need to look for alternative somewhere to stay because it's not advisable." I let her know that I have a social worker, that I can't have you here.

Judge: I thought you do not tell anybody you have got a social worker.

Mother: I mean I didn't tell anyone I'm in court. That's what I said. I'm not going to stress to people that I'm in court. The community, the majority of the people within my community know I have a social worker because they all go to kind of like the same youth club so they see him there and what not. So I just let her know, "I can't have your problems coming into my case."

Judge: But you could on the Friday, have her problems come into your case, but by Monday you cannot.

Mother: But the smoking weed in my house, I don't know where this has ever, where this has come from.

Judge: Were they, do you think, a bad influence on K, these people?

Mother: To be honest with you, they wasn't really sitting with K because they're not K's age group.

Judge: What was K doing?

Mother: She was in her bedroom.

Judge: All the time?

Mother: Yeah. Majority of the time, in her bedroom.

Judge: Do you think that is a good idea?

Mother: No, not really.

Judge: What were you doing?

Mother: I was in my front room, supervising it. That's what I was doing.

Judge: Supervising what?

Mother: Supervising them in my home. I didn't want to be robbed. So I was supervising, watching my home. I just didn't want certain things to -- if anything got broken, I'm just supervising.

Judge: And what was your son doing? Your big son.

Mother: In his room, playing a game.

Judge: So you were devoting yourself to two complete strangers or at least effectively vis-à-vis your own children. You are giving them all your time, supervising them, do not want to be robbed, and leave your own children to fend for themselves.

Mother: Not really because my kids were upstairs. My son was playing Fortnite and my daughter was just in her room doing little things. So I would never leave my kids to fend for theirself.

Judge: But it is fending for themselves. Why are you not playing a game with them or doing something with them? That is what mothers do, is it not?

Mother: Yeah, and I do, I do a lot of activities with my kids.

Judge: Instead of that you are devoting yourself to two 16 year olds that you do not really have any feeling for, except you do not want them robbing you.

Mother: No. You're right."

54. I regret to say that this passage from the evidence is a clear example of a judge descending into the arena. By intervening on such a scale, and in such a challenging manner, the judge ran the risk (in Jonathan Parker LJ's phrase in the *Kofi-Adu* case) of so hampering her ability properly to evaluate and weigh the evidence before her as to impair her judgment and thereby render the trial unfair. Furthermore, in circumstances where the guardian had expressly said that she wanted to hear the evidence before finalising her recommendation, it was even more important for the judge to exercise restraint and avoid excessive interruption of the evidence. By intervening very frequently during the mother's evidence in the challenging manner illustrated above, going so far at times as to take over the cross-examination from the father's counsel, the judge created a risk of influencing the guardian's recommendation which was likely to turn on her impression of the evidence generally and the mother's evidence in particular.

55. The mother's evidence concluded in the course of the afternoon on the third day. The following exchange then took place between Ms Brazier and the judge:

"Ms Brazier: Your Honour, thank you. I apologise for interrupting. I am acutely aware that the court will want to crack on with the timetable. I am just conscious that the mother has now been in the witness box for over a day in totality and she has not had the opportunity to speak to her representatives.

Judge: I agree entirely. She can send you any note she wants to, and you may speak to her before you cross-examine the father. But I am going to move on now.

Ms Brazier: Very well your Honour. So there can be a break before I cross-examine the father.

Judge: Yes, there can be a break."

At the end of the father's evidence in chief, the judge said that there would be a five-minute break and they would resume at 3pm. Ms Brazier asked whether there was "any scope for a little more time". The judge replied:

"No, there is not. You have had all the time. You have done a recent statement and there cannot be much more instruction you need. You must know what your case is by now. So it is no extra. It is 3pm."

56. The father's evidence followed and was completed during the afternoon on the third day. The judge asked relatively few questions but intervened during Ms Brazier's cross-examination on behalf of the mother to restrict the extent of questioning about the father's behaviour during contact with the children.

The judge's interventions during submissions

57. The guardian's evidence concluded at 3pm and, after a short adjournment, counsel made oral closing submissions in the following order – father, mother, local authority and guardian. No written submissions were requested or prepared. The submissions on behalf of the father, local authority and guardian were delivered without any intervention from the judge, save for one question to counsel for the local authority about the care plan in the event that she rejected their plan for a supervision order.

58. During Ms Brazier's submissions on behalf of the mother, however, the judge adopted a completely different approach. In the course of submissions lasting about 50 minutes, the judge spoke on no fewer than eighty occasions.

59. By way of example, I cite the following exchange:

> "Ms Brazier: Your Honour, in terms of the other challenges that the mother has faced during her life, similarly in my submission she has managed to transform her personal situation. When one looks at the struggles that the mother faced whilst in a relationship with the father, and I know, your Honour, that your interest was not focused on that during cross-examination of the father, but nonetheless the social work evidence within the bundle does reflect some …
>
> Judge: Yes I am sure they had a very difficult relationship interspersed with violence, interspersed with arguments, interspersed with drug taking, interspersed with whatever. However, your client from her own mouth told me that she ran back for it, she wanted more. Then they break up and then she would run back again. So I cannot blame it all on the father, can I, as your client certainly sought to do in some of her written evidence.
>
> Ms Brazier: Your Honour, the mother does not seek to entirely blame the father, but she did also highlight that from her perspective she was in a coercive, controlling, domestically abusive relationship and …
>
> Judge: Well why run back for more if that is the case, everybody is there to help her get out of it, she got

new accommodation, she suddenly makes contact with him again.

Ms Brazier: Your Honour, the court knows from experience how difficult some individuals who are the subject of domestic abusive relationships find it to extricate themselves from those …

Judge: Well I might do, but I find it quite hard to know why in the summer of 2022 when she is embarked for two years on a different relationship she is writing the sort of text messages to him that are exhibited to his statement.

Ms Brazier: Your Honour, to the mother's credit, if I may, the mother held her hand up to that when she was questioned about it. She said that when she had extricated herself from her relationship with the father she felt that it was now her turn to be critical of him, and she held her hands up to that and she admitted that she had done it …

Judge: That is not to her credit. She is …

Ms Brazier: It is to her credit, your Honour, that she admitted it and that she has …

Judge: She is wasting time going back to a relationship which she knows has no prospect whatsoever for no reason at all because she has got a happy relationship, she says, it sounds, that is what she says, with this other person, and she is wasting time throwing abuse at the father, he no doubt is throwing abuse back and they are carrying on their way. But that is not a benefit to anybody, including the children.

Ms Brazier: No, your Honour. Your Honour will have heard that the mother said that the father would seek her out and would …

Judge: That is not what she said in evidence, she said …

Ms Brazier: He would come to the property and be abusive to her, is what she said, and she said that the previous social worker J was privy to that and that J called the police. But looking at the background, your Honour, the sorts of abuse that the mother suffered during the relationship with the father were significant.

Judge: I agree, I agree, but why run back for it, you do not need it again, you have got out of it, you have got new housing, you are in a different area, if the father comes around you ring the police and tell them, you do not start sending him messages, particularly abusive messages which just might inflame the situation to send him round again to say "how dare you write to me in that way".

Ms Brazier: But, your Honour, the point now is that the mother has extricated herself from that relationship.

Judge: Well the last message that the father received according to him I think was July last year, and that was after the commencement of these proceedings.

Ms Brazier: And, your Honour, the father still sees fit to call the mother from a blocked number as recently as last Wednesday to be abusive towards the mother.

Judge: The unfortunate thing is, or fortunate, they do need to keep in touch with each other because they have two children and the contact remains an issue, and it does not seem to me an issue that they have been able to really work out at all between them and they have managed to work out a little with the assistance of the social services. That is why they have to be in touch, the father rings up the mother to ask about the children and the mother blocks his number because he is asking K quite inappropriately about money, according to her.

Ms Brazier: Your Honour, the mother would say that they do not have to be in contact with one another, but the circumstances have dictated that they have continued to be in contact with each other, and that that has not been helpful."

60. Further on the following exchange occurred:

"Judge: … Where is the evidence about the partner and why is the partner not appearing before the court if he is such a vital member of her household? All of those questions are unresolved. Right.

Ms Brazier: Your Honour, could I try and address that?

Judge: Yes.

Ms Brazier: The partner this week has been caring for the children at home …

Judge: Of course he has, but if we had a bigger support network or if there were a support network the partner could leave the child for half a day and come and give evidence to the court and at least show his face and tell us exactly … instead of that we get your client's say-so, together with the social worker's limited, I would suggest, observations, he is cooking, he is doing something in the house, and I am not denying that he probably gets on very well with L and K, I am not denying that. But we are not allowed to see him, we do not have a clue really much about him except what your client says, and when she says things such as he is 28 years of age, it is found out that he is not 28 years of age he is actually 25 and we know very little about him I would suggest.

Ms Brazier: Your Honour, could I try and address those observations in turn.

Judge: Right.

Ms Brazier: Firstly, by way of update, you heard this morning that the mother was delayed outside court because there was an emergency relating to her …

Judge: And presumably somebody else is looking after the baby.

Ms Brazier: Indeed, your Honour.

Judge: Right.

Ms Brazier: So her partner has had an operation today that has been planned for some time and he could not therefore look after the baby and the subject children …

Judge: And so probably yesterday he could have managed not to look after the baby and come and supported the mother at court perhaps.

Ms Brazier: Your Honour, as you have observed yourself, the immediate support network is limited, but the mother does her absolute best in the circumstances. She has prioritised every day of this week getting to court early, she has been at court for 9.00 am every single day, apart from

today. She was a little bit later, she arrived for 10.00 am today. Your Honour, in terms of the report from L's school, that shows that the mother, since L has joined his new educational provision, has ensured that he has been there for 93 per cent of the time and …

Judge: Presumably it is a little easier if a taxi arrives at a certain hours and comes back at a certain hour, it is easier to get him into a taxi than it was to walk him to school because sometimes presumably he did not want to go or his attendance … when he was at school when he was in your client's care without the taxi was appalling, even worse than figures I have seen in many other cases.

Ms Brazier: Your Honour, could I just highlight that the mother explained that L's taxi provision has been in place for some time, it predates him going to his specialist school.

Judge: Yes, but when he did not have the taxi, that is what I am talking about, 15 per cent was it, or less, attendance at school?

Ms Brazier: Your Honour, as you have heard from the mother, she firmly ties L's attendance to his success at, the success of him getting his new educational provision, that in her mind has been fundamental in him engaging properly with school.

Judge: I am not sure I understand all that, because my understanding of the evidence is he started his new school last September and that there were behavioural problems right up until the end of the year, as a result of which he was put in a two-to-two situation, since when things have been much better. That is my understanding. If that is wrong, tell me now.

Ms Brazier: Your Honour, until partway through last year L was in mainstream school, he was then …

Judge: No I know that, but we are talking about when he went to …

Ms Brazier: He was then sent to a pupil referral unit …

Judge: I know, and she went along with him for an hour or day, I know all that …

Ms Brazier: No, into mainstream school …

Judge: But we are talking about the new school which I believe he started in September.

Ms Brazier: So as your Honour is aware, it is strongly, very strongly suspected that L has ADHD. Mother is awaiting a formal diagnosis …

Judge: Look, please do not deviate from the point, I have got all that, but the point is you are telling me how marvellously he has done at this new school, my understanding, which you can correct if it is wrong, I will repeat, is he went to this school in September, he had behavioural problems throughout the course of the first term, he was then put in a two-to-two unit where he has got one other person and two teachers and he has done much better. That is my understanding."

The "point" from which the judge was complaining that counsel was deviating was one raised by the judge, not counsel.

61. A third example occurred later during exchanges about K's homework:

"Judge: … the girl is 13 and does not want to do academic work presumably because she is finding it so difficult and behind, who is to give her the book or the access to the, and tell her to sit down now, half an hour, maths, goodbye. Who is to do it?

Ms Brazier: Mother has explained to this court that she now sits down with K …

Judge: Now, but she has been knowing this for months, months. It is not yesterday that she was told for the first time this was needed and the school have been saying where is the work, it is not getting done.

Ms Brazier: Your Honour, the key here I maintain is the fact that the EHCP [Education, Health and Care Plan] remains absent.

Judge: I It has got nothing to do with the EHCP.

Ms Brazier: It must, your Honour …

Judge: If you are sent home with some work, maths and English, half an hour every night, it has got nothing to do with EHCP, it has got to do with discipline and that is what you have to do. And

> whether you do it first before you have tea, or whether you have tea first is the mother's responsibility, is it nothing to do with anybody else.
>
> Ms Brazier: Your Honour, in my submission the mother's position is strengthened by the comparator of L's experience. If the court could not see what has happened …
>
> Judge: Do not speak to me like that please, if the court could not see …
>
> Ms Brazier: I am really sorry.
>
> Judge: Of course I can see and I know what you are saying, but it is ridiculous to put all this weight on the EHCP which has been waited for years and ignore what is going on on the ground, i.e.. lack of supervision, lack of discipline, lack of … that is what is the problem, not educational provision.
>
> Ms Brazier: Your Honour, just to be clear, I did not mean any disrespect, I do feel slightly that I am being grilled so I apologise if my choice [of] words is not as eloquent as it might otherwise be.
>
> Judge: Right."

62. It is plain from this exchange that the judge mistakenly interpreted counsel's comment "if the court could not see what has happened" as discourteous when in fact Ms Brazier was identifying L's experience as a comparator for assessing K's position. It is equally plain from her reference to being "grilled" – and was even clearer listening to the recording – that counsel felt under considerable pressure during these submissions.

63. As noted above, the reported cases on unfairness draw a distinction between judicial interventions during the evidence and in closing submissions. The distinction is that interventions during submissions are less likely to hamper the judge's ability to evaluate and weigh the evidence before him and impair his judgment. For my part, I would not agree with Hildyard J's suggestion in the *M&P Enterprises (London) Ltd* case that by closing submissions the trial has entered the adjudication stage. Adjudication comes after evidence and argument. It is certainly correct, however, that submissions offer the court the chance to test each party's case, that intervention and close questioning of counsel may well be both appropriate and necessary so that the court understands and tests the argument, and that in doing so the court may fairly divulge a preliminary view as to its merits. That is how legal argument works in all courts, both at first instance and on appeal.

64. Oral advocacy lies at the heart of our justice system, and often makes a difference to the outcome of a case, particularly one in which the issues are finely balanced. No advocate enjoys addressing a judicial Sphinx. Stony silence can be hard going. A degree

of judicial intervention in closing submissions is to be expected. Indeed it should be welcomed, as it is generally helpful to the advocate to be told what aspects of their client's case are causing the judge difficulty or concern, and to be given a fair opportunity to address them. Their answers may help to persuade the judge to take a different view from the one that he or she has provisionally expressed. Even if it becomes apparent in the course of exchanges with the judge that the advocate's submissions are not finding favour, that does not signify that the judge has a closed mind, but, rather, that he or she has not been persuaded. In general terms that would not be a legitimate ground of complaint.

65. There remains, however, a danger, both at first instance and on appeal, that excessive intervention may prevent counsel advancing their client's case. While closing submissions offer the judge the opportunity to test the case being put forward, this should not descend into an argument. The purpose of submissions is for counsel to persuade the judge that her client's case should prevail, not for the judge to persuade counsel that it should not.

66. I regret to say that in the present case the degree of judicial intervention during Ms Brazier's submissions exceeded what was reasonable or fair. I bear in mind Black LJ's observation in *Re G*, cited above, that "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". Nevertheless, it is plain from the transcript of Ms Brazier's submissions – and even clearer from listening to the recording – that the judge's challenges to her arguments went far beyond testing the case. As a result, I was left with the strong impression that Ms Brazier had not been able to advance all of the arguments she wanted to make and had certainly been prevented from putting forward her arguments in the way she intended. I would commend her for remaining courteous throughout and doing her best to present her client's case.

67. Listening to argument without excessive interruption is important in all cases. But it was particularly important here, for three reasons. First, the issue at stake was the future care of two very troubled children. The judge's decision would have a lifelong impact on all members of the family. Secondly, on paper at least, the issue looked finely balanced. Until shortly before the hearing, both the local authority and guardian supported the mother's case that the children should remain at home. At the point when Ms Brazier stood up for her closing submissions, the guardian had changed her position. Two parties now supported the children staying at home, two proposed their removal under a care order. In those circumstances, it was plainly important for the court to listen to all the parties' arguments before reaching its decision. Given the lateness of the guardian's change of position, it was particularly important that the mother's counsel be given a fair opportunity to put forward the contrary arguments not only in cross-examination of the guardian but also in submissions. Thirdly, unlike in many cases, counsel did not have the opportunity to file written submissions in which they could put forward their full arguments in a structure of their choosing. It was therefore necessary for all counsel to be able to develop their argument orally so that the judge had every point before her when she came to her decision. Three counsel were heard without any interruption. The fourth was interrupted repeatedly throughout.

Conclusion on ground five

68. In *Re G* supra, Black LJ (at paragraph 53) identified three final points which had to be borne in mind in assessing the allegations of unfair conduct by the judge in that case.

> "The first is that I am very much aware of the pressures that there are on the family justice system and upon the hard-pressed and very hard-working judges in the Family Court who must ensure that the court's limited time is used to the best possible effect. This inevitably means that family judges have to manage hearings before them robustly and this requires intervention at times. The hand of fate, in this case in the form of the disruption caused by the storm, can sometimes make the judge's task almost impossible. The second is that I am deeply conscious of the fact that the one person from whom this court has not heard is the judge, who would no doubt have had much that she could valuably have contributed to the evaluation of the process. I have done my best to make allowances for this and I have thought long and hard about which side of the line of fairness the hearing in this case fell. The third is that the case is not about Ms Toch [counsel] and whether she was treated fairly, although she has been mentioned frequently in this judgment. It is about whether the mother was given a fair chance to put her case and Ms Toch was simply one means by which she sought to do so, hence the need to look at the exchanges between the judge and Ms Toch".

69. All of those points are relevant to the present appeal. The pressures on judges in the family justice system are even greater now than they were in 2015 at the time of the hearing in *Re G*. The number of children caught up in public and private law proceedings and the delays in resolving those proceedings have increased substantially before and during the pandemic. As in *Re G*, this appeal is not about the treatment of counsel. It is not about whether Ms Brazier was "grilled". The exchanges between counsel and judge are only relevant to establishing whether the mother was given a fair hearing.

70. And again, as in *Re G*, we have not heard from the judge. Although we have heard the tape recording of closing submissions, we were not present during the hearing and inevitably have an incomplete picture of what occurred. I am acutely aware that this judge, with her deep experience of family law cases, has had no chance to respond to the criticisms levelled at her in the course of the appeal. Nevertheless, I reached the clear conclusion, with regret, that the criticisms are substantially justified and that the appeal should be allowed.

71. An allegation that the conduct of the proceedings was unfair or that there was an appearance of bias must be assessed by considering the proceedings as a whole. In this case, a review of the whole of the hearing between 6 and 9 March leads to the inexorable conclusion that the hearing was unfair to the mother. Taken by itself, the judge's refusal at the outset of the hearing to allow the mother an opportunity as requested to discuss with her lawyers the guardian's withdrawal of her recommendation would not be sufficient to persuade me that the hearing as a whole was unfair. Similarly, whilst the peremptory rejection of the request that the mother should give evidence behind a screen was contrary to the guidance in the rules and Practice Direction, it would not by itself lead me to conclude that the hearing was unfair. Likewise, the judge's refusal of

Ms Brazier's request for more time to speak to her client before she cross-examined the father would not, by itself, lead to that conclusion. But those events did not occur in isolation. They have to be evaluated in the context of the whole hearing and in particular the judge's manifestly excessive intervention during the cross-examination of the mother and during Ms Brazier's closing submissions. Looking at all these issues together, I conclude that the mother, in this finely-balanced case, did not have a fair opportunity to put forward her argument that the two children should stay at home.

72. Having reached that conclusion, it seems to me to be unnecessary to go on to consider whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased. The definition of bias as now approved by this Court ("a prejudice against one party or its case for reasons unconnected with the merits of the case") is, as Lord Wilson observed in *Serafin*, "quite narrow". Insofar as the judge in the present case demonstrated any prejudice against the mother, it plainly arose out of her views as the merits of the case.

73. For those reasons, I concluded that the appeal should be allowed on ground five.

Ground 3 – the judge's analysis of the factors in the welfare checklist

74. Under this ground, it was submitted that the judge failed in particular to give any consideration to an important factor in the checklist – the likely effect on each of the children of a change in their circumstances. It is submitted that the judge failed to take into account (1) the emotional impact on both children of removal from their mother, who was identified by Dr Banks as their primary attachment figure; (2) the impact on each child of being separated from the other and from their baby half-brother; (3) the significant risk of a breakdown in any alternative placement as a result of the children's behaviour; (4) the risk of K absconding from a foster placement, and (5) the disruption to the assessment of the children's educational and associated care needs.

75. In response, on behalf of the local authority, it was acknowledged that the judge did not work her way through all the factors in the welfare checklist but it was submitted that all of the matters said to be omitted from consideration were well explored during the evidence. On behalf of the father, it is submitted that the transcripts demonstrate that this experienced judge was fully immersed in the evidence, rigorously processing it through frequent intervention. Insofar as she failed in her judgment to refer expressly to any of the specific factors in the checklist, it can be fairly assumed that she took them into consideration but that they were outweighed by the compelling reasons which emerged from the evidence as to the need to sanction the immediate removal of the children from their mother's care. These arguments were reiterated on behalf of the guardian for whom it was submitted that any reasonable reading of the judgment demonstrated the judge had the checklist in the forefront of her mind when considering the children's welfare interests. It is also pointed out that she expressly acknowledged the distress which her decision was likely to cause to the children but that this was outweighed by the very substantial risks of remaining at home.

76. In *Re D (A Child: Placement Order)* [2022] EWCA Civ 896 at paragraph 1, Peter Jackson LJ summarised the approach to be followed by judges deciding the order to be made following a finding that the threshold criteria under s.31 are satisfied. Although he referred specifically to adoption, the approach is to be followed wherever a court is considering the removal of a child from his or her family.

> "The recent decision of the Supreme Court in *H-W (Children)* [2022] UKSC 17 underlines that a decision leading to adoption, or to an order with similarly profound effects, requires the rigorous evaluation and comparison of all the realistic possibilities for a child's future in the light of the court's factual findings. Adoption can only be approved where it is in the child's lifelong best interests and where the severe interference with the right to respect for family life is necessary and proportionate. The court must therefore evaluate the family placement and assess the nature and likelihood of the harm that the child would be likely to suffer in it, the consequences of the harm arising, and the possibilities for reducing the risk of harm or for mitigating its effects. It must then compare the advantages and disadvantages for the child of that placement with the advantages and disadvantages of adoption and of any other realistic placement outcomes short of adoption. The comparison will inevitably include a consideration of any harm that the child would suffer in the family placement and any harm arising from separation from parents, siblings and other relations. It is only through this process of evaluation and comparison that the court can validly conclude that adoption is the only outcome that can provide for the child's lifelong welfare – in other words, that it is necessary and proportionate."

77. A move into long-term foster care does not involve as severe an interference with the right to respect for family life as placement for adoption. Nevertheless, it represents a significant interference and a very grave step for any child and calls for an equally rigorous process of evaluation in which the advantages and disadvantages of each option are identified and compared. As Peter Jackson LJ noted, that comparison will inevitably include a consideration of any harm that the child would suffer in the family placement and any harm arising from separation from parents, siblings and other relations.

78. In the present case, no such comparison took place. The judge simply stated her decision in the brief paragraphs quoted above. Nowhere in the judgment was there any or any adequate identification of the possible harm that the children might suffer if removed from home. I accept the submission made on behalf of the mother that the likely effect of a change of circumstances was a critical factor in the welfare checklist which called for specific consideration. It is possible that, had it been properly considered, the judge might nevertheless have come to the conclusion that the potential risks to the children from remaining at home outweighed the risks that would arise if they were removed. But the factors identified on behalf the mother – the emotional harm of separation from their primary attachment figure, the further emotional harm if the siblings were separated, the potential disruption to their education, and the risk of placement breakdown and absconding – all required evaluation, particularly in circumstances where the local authority had not formulated any specific plan for the placement of the children away from home. There is no basis for thinking from the brief analysis contained in the judgment that these matters received any evaluation in this case. Whilst recognising the caution which any appellate court must exercise when interfering with the evaluation of the evidence carried out by a trial judge, I formed the

view that on this occasion the judge failed to carry out a clear and proper analysis of the factors in the welfare checklist. For that reason, I concluded that the appeal should also be allowed on ground three.

Conclusion

79. In those circumstances, as there will have to be a retrial of the final hearing, I consider it unnecessary and potentially unhelpful to consider the remaining grounds of appeal which concern the judge's treatment of various aspects of the evidence. There is a risk that any comments by this Court about that evidence may unintentionally influence the conduct or outcome of the rehearing. I emphasise that nothing I have said in this judgment should be taken as indicating any view as to the right outcome of the rehearing.

80. Following the appeal hearing, we approved an order under which the appeal was allowed, the care orders made on 10 March 2023 set aside with a direction that the applications under s.31 be reheard and to that end listed before the Designated Family Judge for Central London for case management. In the interim the supervision orders made on 7 October 2021 will continue.

LADY JUSTICE ANDREWS:

81. I agree.

LORD JUSTICE HOLROYDE

82. I also agree.