Neutral Citation Number: [2023] EWCA Civ 860

Case No: CA-2023-000693

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
The Hon. Mr Justice Newton
WD20P01372

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 July 2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE BAKER

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H (A CHILD) (RECUSAL)

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Grant Armstrong and Thaiza Khan (instructed by **Ian Walker Family Law Solicitors**) for the **Appellant**
Jacqueline Renton, Mani Singh Basi and Nadia Campbell Brunton (pro bono via Advocate) for the **Respondent**

Hearing dates : 27 June 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 10:30 on 24 July 2023.

LORD JUSTICE BAKER :

1. This is a second appeal brought in private law family proceedings concerning a boy, hereafter called H. The appeal is brought by H's mother against the decision of a High Court judge to allow an appeal by the father against the refusal by the circuit judge allocated to the case to recuse himself from the proceedings.

2. These are long-running proceedings in which there have been a considerable number of applications and orders. The following summary only refers to those aspects of the proceedings relevant to this appeal. The mother was legally represented at all the hearings referred to below. The father sometimes was represented, at other times appeared in person.

3. The father is a British citizen, the mother a citizen from a country in South America. They met in the mother's country in January 2016, started a relationship and moved to the UK in August 2018. In 2019, they were married, and they moved into a home of their own. In September 2019, H was born.

4. By this stage there were already problems in the relationship. The mother alleges that she was the victim of domestic abuse. On 9 October 2020, the father was arrested on suspicion of theft and assault against the mother. Following this, the mother left the matrimonial home with H and found refuge accommodation.

5. On 14 October 2020, the father applied for a child arrangements order, a prohibited steps order and a specific issue order. The latter two applications were withdrawn after the mother agreed undertakings. On 21 January 2021, the mother was granted an *ex parte* non-molestation order under the Family Law Act 1996. On 10 February, the father filed an application for contact and on 16 February, the proceedings were consolidated and directions given for a fact-finding hearing. At a further hearing on 4 March, however, the Family Law Act proceedings were compromised with neither party seeking findings and the non-molestation order was discharged with undertakings given by the father on the basis of no admissions. An order was made for interim supervised contact between H and the father and a report from Cafcass pursuant to s.7 of the Children Act 1989.

6. That evening, the mother and H moved to refuge accommodation in an unknown location. They later moved to other refuge accommodation. On 17 March, the father filed a C2 application seeking a further order for interim contact, disclosure of the mother's location, a prohibited steps order preventing the mother changing the child's address and from seeking citizenship for the child from her home country. At a further hearing on 26 March, another order was made for interim contact, progressing to overnight staying contact.

7. On 2 June 2021, the mother filed a C2 application seeking transfer of the proceedings to a court in the West Country, a fact-finding hearing and a variation in the contact order so as to remove overnight stays. On 7 June, the father filed a C2 application seeking immediate disclosure of the child's location, dismissal of the mother's application of 2 June, the appointment of a guardian under FPR rule 16.4, an increase in interim contact and a child arrangements order for "residency" of the child to be transferred to the father. At a hearing on 2 July, the district judge made an order for interim contact once a week alternating between one three-hour visit in

the West Country and one overnight visit at the father's home in London. The mother's application for the suspension of overnight contact was dismissed. The lengthy order included a number of recitals, including that the court "did not currently consider it appropriate to reconsider the earlier decision in respect of a fact-finding hearing" but that "in the event [that] the mother seeks to make new allegations of domestic violence and/or abuse that have occurred since 4 March 2021 … the court will consider whether such allegations necessitate determination by way of a fact-finding hearing at the forthcoming dispute resolution hearing". By a further recital, the court recorded that the transfer of the proceedings requested by the mother was not appropriate or necessary at that time "due to the temporary nature of her current refuge accommodation". The judge made a number of case management directions, including ordering the mother to file a statement (including any fresh allegations) by 13 July and the father to file a statement in response one week later on 20 July.

8. The dispute resolution hearing listed in August 2021 had to be adjourned because the Cafcass report had been delayed as a result of problems with an interpreter. The mother failed to file her statement as ordered and following a further application by the father an order was made without a hearing that she do so by 6 September. On 27 August, the Cafcass officer filed her report recommending inter alia that there should be a fact-finding hearing and that in the interim the father's alternate weekend staying contact be extended from one night to two.

9. At the dispute resolution hearing on 25 October 2021, the parties agreed that there should be a fact-finding hearing on their cross-allegations. The district judge re-allocated the proceedings to a circuit judge and gave directions for the hearing, including an order for the mother to file an updated Scott schedule and supporting statement "by no later than 7 weeks prior to the fact-finding hearing" and for the father to file a response to the mother's schedule and his own amended schedule with supporting statement "by no later than 5 weeks prior to the fact-finding hearing". In each case, the updated or amended schedules were described in the order as being additional "to that already prepared within the previous Family Law Act 1996 proceeding". Further case management directions were given, including extensive orders for disclosure by the mother of H's nursery and GP records and of risk and welfare assessments undertaken by each of the refuges at which she had resided with H. In the interim, following the Cafcass officer's recommendation, the district judge extended contact to include a second night on alternate weekends. The fact-finding hearing was subsequently listed for three days starting 23 March 2022.

10. On 11 January 2022, the mother, who had not yet filed her amended Scott schedule and supporting statement, filed a C2 application seeking an extension of time for disclosure of the extensive documentation ordered in October and further disclosure from the police. That application was heard remotely on 13 January 2022 by HH Judge McPhee to whom the case had been re-allocated. At that hearing, the father represented himself. A transcript of that hearing has been obtained because the judge's decisions at that hearing formed part of the later complaints of apparent bias considered below. At this point, I merely record that the judge made a series of orders including (1) orders extending the time for disclosure; (2) an order that, in the event that the mother claimed privilege for any document, she should give reasons; (3) an order for the mother to serve a supplemental Scott schedule and supporting

statement by 16 February 2022, and (4) an order for father to respond and to serve his schedule and supporting statement by 9 March.

11. On 22 March, the day before the fact-finding fixture, the mother applied to adjourn the hearing on the grounds that H had contracted Covid-19 and that she was therefore unable to travel to court. That application was granted and a further case management hearing took place on 24 March at which both parties were represented, the father by direct access counsel. The judge's decisions at that hearing also formed part of the later complaints of apparent bias and therefore a transcript of that hearing has also been obtained. It will be necessary to look at what happened in more detail below. At this point, I record that the judge made another extensive case management order in which inter alia he (1) re-listed the hearing for three days starting 6 June 2022, (2) gave the father permission to file a further Scott schedule and witness statement "revising and condensing the content of the allegations in his existing statement" by 4pm on 31 March 2022, and (3) ordered that the existing case management order as to interim contact remain in force. The order also included a number of recitals of which the following two are relevant to this appeal. First, addressing a challenge by the father to a decision by the mother to withhold a document from disclosure, the order recorded:

> "The court reviewed the email withheld from the father …. The court determined that it reflects a safety and security concern, and does not bear any further than that, but the court will continue to keep the matter under review."

Secondly, the order recorded:

> "The court reminded the parties that at the fact-finding hearing the court cannot be expected to deal with every allegation pled, and the parties should adopt a focused and forensic approach to the allegations placed before the court."

12. The fact-finding hearing took place between 6 and 8 June in front of Judge McPhee. Both parties were represented, the father by a different direct access counsel. In his judgment dated 14 June, the judge made a number of findings against the father, including rape, sexual assault and coercive and controlling behaviour, and declined to make any findings sought by the father against the mother.

13. On 5 July 2022, the father filed a notice of appeal seeking permission to appeal against the findings ("the fact-finding appeal"). On 22 August, Arbuthnot J dismissed that application on the papers. In a written judgment, she declared that the application was totally without merit. One of the points raised by the father was that the mother's evidence did not support a finding of rape. In her judgment, Arbuthnot J found inter alia that the judge clearly set out in a compelling way why, despite inconsistencies, he accepted the mother's account of the sexual assaults. She added: "Whether the father's penis actually entered the vagina or was just on the edge is neither here nor there. There was much evidence of sexual assaults which the judge was not wrong to find credible."

14. On 15 August, the Cafcass officer filed an addendum report in which she said:

> "In light of the findings, I will be making a recommendation that H live with his mother and spend time with his father with a safety plan in place. I am supporting the mother's application for relocation when considering the findings made. I appreciate the geographical distance creates barriers to when H can spend time with his father. There was a justified reason behind the mother's relocation and requiring refuge. She and H are now well established in their new community."

The Cafcass officer made a number of recommendations, including that the level of contact be reduced. She proposed that H should have contact with his father on alternate weekends in the West Country, either non-staying contact on a Saturday or staying contact for the weekend if the father could arrange accommodation. She recommended that there should be longer periods of staying contact in London at half term and in holidays. She explained her reasons for the reduction in term time contact in these terms:

> "The pattern of time H has been having with his father has been interim arrangements, but they are not conducive for long-term final recommendations. H and his mother should be afforded whole weekend time together which at this stage they do not have as he has weekly time with his father during weekend periods. For that reason, I will recommend alternate weekends of time with his father. The arrangements during the interim have not been child focused, in my opinion, but I appreciated at the time they were interim arrangements. It is not in H's best interest to continue having an ongoing pattern of long car journeys to London on alternate weekends."

15. The case came back before Judge McPhee on 9 September 2022, at which the father appeared in person. The mother, through a position statement filed by her counsel, raised a number of factual errors in the fact-finding judgment. In addition, it was stated on her behalf that the judge had misunderstood her pleaded case in making what amounted to a finding of rape having taken place on 20 June 2019, when the mother's case was that unwanted sexual touching had taken place, but no penetration. The mother's case was that these errors did not materially change the impact of the findings made against the father. The father's case was that the judge should not make what amounted to a fresh finding against him on the basis of a counsel's note, and should instead set aside his findings, or at least reopen them. The judge made an order substituting the finding as proposed on behalf of the mother, as well as correcting the factual errors.

16. The father asked the court to extend the current contact arrangements until the final hearing. The mother asked the court to vary the order as proposed by the Cafcass officer. After hearing submissions, the judge delivered a judgment and made an order that, until the final hearing listed in January 2023, contact should take place fortnightly in the West Country from 2pm on Fridays to 5pm on Sundays. Those arrangements were to be suspended at half term and over Christmas when provision was made for H to have staying contact with his father in London. After the judgment had been delivered, the father raised objections, including the extra costs

that he would incur arranging accommodation. After further exchanges, the judge stated:

> "I hear what you say…. I can see that the situation is difficult for you financially, but I do not accept that you cannot maintain contact with your child. This order is for a short period, until January, when the situation can be looked at afresh."

17. The father did not file a notice of appeal against the varied interim contact order.

18. On 17 October 2022, the mother filed a C2 application in the proceedings seeking a specific issue order that H should be given a flu vaccination, permission to register him as a national of her home country and obtain a passport for him from that country, and permission to take him on holiday there. She asked for an urgent hearing in respect of the vaccine issue with the other matters to be determined at the final hearing. On 26 October, Judge McPhee made an order providing for the vaccination application to be considered at a hearing on 16 November 2022.

19. During the hearing on 16 November 2022, without notice to the mother or to the court, the father, appearing in person, made a lengthy oral application for the judge to recuse himself on the ground of the appearance of bias. The judge adjourned the matter until 23 November, indicating that at that hearing he would consider the recusal application first and then if he dismissed it, proceed to determine the vaccination application.

20. At the hearing on 23 November, at which the father again appeared in person, the judge heard further submissions on the recusal application which he dismissed. He then heard further submissions on the vaccination issue and granted the mother's application. The vaccination has since taken place.

21. On 12 December 2022, the father filed a notice of appeal against the judge's refusal to recuse himself. On 3 February 2023, permission to appeal was granted on the papers by Morgan J.

22. On 15 March 2023, the appeal hearing took place before Newton J. The father appeared in person. At a remote hearing on 17 March, judgment was delivered allowing the appeal and allocating the case to a new judge.

23. On 11 April 2023, the mother filed a notice of appeal against Newton J's order, which she amended on 12 April. Permission to appeal was granted on the papers on 5 May.

The law

24. In *Re AZ (A Child) (Recusal)* [2022] EWCA Civ 911, [2022] 1 WLR 78 at paragraph 54, 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."

The test for apparent bias involves a well-established two stage process summarised by Leggatt LJ in *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468, [2018] BLR 341 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."

25. It has been stated in several cases since *Porter v Magill* that apparent 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* [2020] UKSC 23, [2020] 1 WLR 2455 at paragraph 39, this definition of bias is "quite narrow". For that reason, like Lewison LJ, whose judgment I have read, I consider it preferable to consider the matter on the more general level of whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the father would not receive a fair trial.

26. A party may argue that a particular decision during proceedings was unfair. If so, his remedy is to seek to appeal against that decision. Alternatively, he may argue that the judge's treatment of his case was unfair over the course of the proceedings and that he should therefore recuse himself. In those circumstances, however, it is necessary to consider the whole of the proceedings to determine whether the judge's approach to the aggrieved party has been unfair. In *Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492, [2016] 4 WLR 183, a case about apparent bias, Davis LJ said, at paragraph 36:

> "It is necessary to consider the proceedings *asa whole* in engaging in the objective assessment of whether there was a real possibility that the tribunal was biased."

In my judgment, it is also necessary to consider the proceedings as a whole when addressing an allegation that over the course of the proceedings the judge has treated a party unfairly.

27. In submissions, Mr Armstrong on behalf of the appellant cited the observations of Sir Thomas Bingham MR in *Arab Monetary Fund v Hashim (No.8)* (1994) 6 Admin LR 348. The observations were made in considering an argument of apparent bias but apply equally to a claim of unfairness. Sir Thomas said at p355:

> "In a case such as this, in which interlocutory applications proliferate, it may well be that one side fares more successfully, perhaps much more successfully, than the other. There are a number of possible explanations for this, the most obvious being that the successful party has shown greater judgment,

> determination and knowledge of the rules than its opponent. Mr Ross-Munro accepted, as we understood, that no inference of apparent bias could be drawn from the fact that most, or all interlocutory applications had been decided against Dr Hashim. We agree. He also disclaimed any attack on the correctness of Chadwick J's interlocutory decisions. This we find puzzling. It must, we think, be hard to show consistent unfairness in the absence of consistent error."

28. Thus when considering a submission that a judge has been unfair in his case management decisions over the course of the proceedings, the fact that one party has been more successful than the other is by itself plainly of no relevance. Furthermore, if the individual case management decisions are not themselves consistently wrong, it will be hard, if not impossible, to demonstrate consistent unfairness.

The lower court judgments

29. The arguments raised by the father in support of his oral application on 16 November 2022 for the judge to recuse himself were wide-ranging but can be reduced into four categories:

(1) points arising out of the fact-finding judgment, including that the judge failed to consider the father's allegations and other statements in his fact-finding judgment, that the father had made "unfounded grandiose claims" about the mother's understanding of English, that the mother had answered all questions put to her, that he had praised the mother's credibility, and that he failed to give reasons for his decision;

(2) the judge's inaccurate finding that the father had raped the mother when the evidence at its highest was of sexual assault;

(3) the judge's unbalanced case management decisions, including the decision on 13 January 2022 that the father should be given only three weeks to file his schedule and evidence, greater latitude generally given to the mother about filing evidence beyond the scope of the earlier order while denying the father a fair opportunity to file evidence, and the decision on 24 March that the email withheld by the mother need not be disclosed;

(4) the judge's treatment of the interim contact issue at the hearing on 9 September.

30. The transcript of Judge McPhee's recusal judgment can be set out in full:

> "1. I am dealing now with an application by [the father] … that I recuse myself on the basis of the test in *Porter & McGill*. It is worthwhile referring to the case of *Porter v McGill* [2001] UKHL 67. That was a case in which the issue of bias was, once again, dealt with in court. An issue that had been before the courts on a number of occasions. The importance, of course, of the case was that it was before the most senior court in the United Kingdom, the House of Lords, as it then was.

2. At paragraph 102 of the transcript of that judgement, it says this: '…where the court considered the test for actual or perceived bias is namely whether the fair-minded and informed observer, having considered the facts, would conclude that there is real possibility that the judge was biased. If so, the judge must recuse themselves'.

3. I put no gloss upon that definition and that reasoning. That is the test that I need to apply in this. In his application to me, the father made plainly clear that the test is not bias, it is the appearance of bias as outlined in that test. The father made his application and raised a number of issues. Some of those were of case management issues, some related to the fact that I had found in my judgment of June of this year.

4. The reality is that all of those matters were before Mrs Justice Arbuthnot on the 22 August 2022 when she dealt with the appeal that the father sought to make against the decision that I had made in respect of the fact-finding hearing. The learned judge found that the appeal was totally without merit, said that there would be no further oral reconsider of the application for permission to appeal. The vast bulk of the allegations that the father makes were considered by the learned judge in respect of that appeal. Those case management decisions, fact-finding decisions, decisions on evidence and, in addition, specifically in respect of the allegation that I had found, at paragraph 72 of the judgment, that whilst on honeymoon in June 2019 the father had penetrated the vagina of the mother.

5. The judge said that, in respect of that, there was much evidence of sexual assaults which the judge was not wrong to find credible. When the matter came before me on the 9 September, having come back to court for a case management hearing, it was made plainly clear to me by a counsel on behalf of the mother that the finding that I had made at paragraph 72 was not a finding that she had sought.

6. She had not given evidence about actual penetration. I accepted what the mother told me, I accepted the submissions made on that occasion by the father that that judgment needed to be reviewed and refined. Even after the judgment had been upheld, during the course of the application for leave to appeal. I looked again at the evidence. I looked and found the paragraph that was in question. On that same day, 9 September, I acknowledged that I should vary the finding at paragraph 72 and subsequently, although delayed for reasons unknown to me, the order has gone out explaining the difference between the new paragraph 72 and the old paragraph 72.

7. I acknowledge this, that I fell into error and it was a serious error in respect of that matter. I have no other explanation other than acknowledging that I fell into error in a wide-ranging case with a number of findings. I had no difficulty in reviewing that once it was brought to my attention. I did so immediately, seeking to correct the unfairness that I had created by that particular finding.

> 8. I think when one looks at the issue overall, it does not impact on the remainder of the findings. I did not review any other part of the judgment, having looked at those submissions that the father. It was an error, I acknowledged the error when it was brought to my attention on 9 September. As is usual with judgments, I corrected it and I corrected it even though the matter had been before the High Court. It was right to correct it.
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> 9. My view is that the test for actual or perceived bias is whether a fair-minded and informed observer, having considered the facts, would conclude there is a real possibility that the judge was biased. My view is that there is no issue here in respect of the appearance of bias. There was an issue of an error which I acknowledged. On the first occasions it was pointed out to me, I have corrected the error. It is one area in a wide-ranging judgment that finds a number of facts ranging from sexual violence, domestic violence, coercive and controlling behaviour.
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> 10. I think looked at by a fair-minded and informed observer having considered all of those facts, nobody would conclude that there was a real possibility that I was biased.
>
> 11. For those reasons, I refuse to recuse myself."

31. The father's grounds of appeal against the judge's refusal to recuse himself were:

> "1. The judge admitted that he fell into serious error and created unfairness when he made a finding of rape that had no basis in the evidence. Similar errors have objectively been raised with him but he has repeatedly refused to review his judgement of 08.06.22. The appearance of bias is further compounded by the judge's inability to offer any explanation as to how these errors occurred.
>
> 2. The judge created the appearance of bias by conducting hearings in contravention to FPR 1.1 and Article 6 of The Human Rights Act. The judge afforded the other party significant opportunities that were not afforded to me. The judge restricted and prohibited me from filing evidence and statements at numerous hearings but allowed the other party to file unlimited evidence without restriction. This did not place us on an equal footing and left me at a substantial disadvantage and unable to fairly present my case.
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> 3. The judge created the appearance of bias when he failed to acknowledge serious allegations that present a significant risk of harm to any child and parent. The appearance of bias is further raised by the judge removing any trace of my case and evidence from these proceedings without any determination or explanation.

> 4. The judge made comments that created the appearance of bias and unfairness.
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> 5. The manner in which the judge disposed of my application further raises the appearance of bias. The judge failed to adequately explain his reasons for refusing to recuse himself and failed to address the relevant circumstances raised within my application."

32. In his judgment, after setting out the background and reciting verbatim the transcript of the father's oral submission to the judge on 16 November, Newton J (at paragraph 22 of his judgment) made the following observations about those five grounds:

> "[T]he appellant, reiterates the points made below. He is not represented but he marshalled his arguments articulately, politely and with some force, plainly identifying and applying the legal principles:
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> 1. His first ground is that there was a serious error, and consequent unfairness, in the judge's inability to explain why it was that he had changed his finding. On its own, I think there the submission that there is no basis for that, it seems to me a judge is entitled to make corrections, but the appellant argues in a slightly different way because he says having regard to the overall perspective of what had happened, that it was unfair he was not afforded the right to challenge the substitution as indeed were other issues, and it goes back to his earlier submissions in relation to that. Of course, the father is resistant to accepting the findings, as one would anticipate.
>
> 2. His second ground relies on the way in which the evidence was received, and in the case of the father that no evidence was provided for, especially since he was not legally represented. He draws support from that in the way the mother was able to file evidence, and indeed more evidence, outside of the scope of the order of District Judge Moses of October 2021 but he had not been given the same latitude. And in addition, also because of the presentation of his case: he was told, for example, by the judge – I have seen it – to lodge a separate C2, whereas the mother was effectively permitted to produce evidence. And there is also support, as I have already indicated, he submits in relation to the "withheld" documents – which may or may not be relevant, it does not really matter – which the judge looked at, decided were not privileged but nonetheless were withheld from the father's gaze. He has no way of telling, the father has no way of telling whether they are relevant or not, given he has not seen them. The father says there should be open justice.

> 3. The third ground concerns a failure of the court to acknowledge the significant risk to the child. In the context of this appeal, I do not think there is anything in that.
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> 4. The fourth ground concerns judicial comments. He relies as a foundation again on what occurred at the hearing on 13 January 2022 and the different approach taken, that is as to latitude – and in addition he prays in aid the significant reduction in contact on 9 September 2022 without apparently, he says, being able to adequately put his case or give an explanation.
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> 5. Fifthly – and perhaps rather pertinently as far as this appeal is concerned – that he, the judge, misdirected himself, that he did not apply himself as to the hypothetical fair-minded and informed observer, that is to say a third party looking in. And more pertinently, he submits, failed (as he already had done, it is submitted on 9 September) to give adequate reasons, or any reasons, or address any of the aspects raised in argument. He submits that in the judgment given in relation to recusal, the only issue which the judge sought to address was the unsound finding of the rape. It will be of note that Morgan J when granting permission to appeal was concerned that it appeared to be the only ground relied on by the judge, I agree. In relation to everything else he says that there is no discussion, no reasoning therefore sufficient to satisfy a fair-minded observer because it simply is not there, there is not any reasoning. He of course draws support from the remarks, unfortunate remarks, that were made at the end of the 16 November hearing. The appellant sought to develop those points in this appeal at some length, but also to some effect during argument."

33. At paragraph 23, Newton J added:

> "An additional point has arisen which is the intertwining by the Judge of the decision to recuse himself and the decision to permit the vaccination. There are shades here of what occurred on 9 September, where the father said that if the judge took a particular course, he ought to be afforded the courtesy of being able to seek some legal advice, because the issues were serious ones."

34. Having summarised the mother's responses and referred to the law, Newton J then set out his decision and reasons in the following paragraphs:

> "34. This case is not without some difficulty. As the court made clear to the appellant at the outset, it is through the lens of a fair-minded and informed observer that this court looks at the issues on the facts, all of them, as they were known to the court, and only on that basis does the court to consider whether there

is a real possibility that the tribunal had the appearance of bias – and, I add, since it feeds into it, any significant unfairness or procedural irregularity. And so, with that prism it could be that a series, for example, of case management decisions made which were not themselves the subject of appeal might nonetheless, taken together with the content of those hearings and other events could be sufficient to satisfy the test, the appearance of bias test.

35. It seems to me that some distinction may need to be used in relation to the way in which the matter has been dealt with. The judgment of Arbuthnot J as has been relied on here has been a distraction since the judge sought comfort and reassurance from the strong judgment, but missed, it seems to me, the nuanced points that were made in relation to the submissions overall.

36. The current serious points made by the appellant need to be considered in the way in which they are dealt with in the judgment of 23 November. That judgment not only concentrates on, but in fact only deals with, the substitution of the rape finding to that of sexual assault. It simply does not mention, let alone consider, the several other grounds raised by the appellant. So, it is quite impossible to know whether or not they were considered or how; and as the appellant himself submits in relation to the transcript, it is evident that in his submissions that he made which cover several pages, the allegation, the rape or the sexual assault allegation, just cover a few lines.

37. Even allowing for the exigencies of a busy court list – the judge was clearly busy on both occasions – and dealing with a number of cases and the pressure of those cases and I bear in mind that it was raised, as it were, in the middle of a hearing without notice. But the hearing was in fact adjourned so that it was on notice, and the judge explained that he had gone to some lengths to re-read the papers and as to what had occurred apparently at the previous occasion.

38. So, even relying on the *Piglowska* line of cases, I consider that it is incumbent upon the judge in any judgment, in these circumstances to give an adequate explanation as to why he is rejecting the submissions made by the appellant. And, put bluntly, there is here no explanation. The bald statement of conclusion, as it is described by the judge – "in my view there is no issue here in respect of bias" – does not address the points made.

39. The appellant also relies on the change of finding, a finding which was wrong in law and which is troubling; but I can only examine it in the context of the recusal application, that is to say from the worrying and uncomfortable foundation that it

seems to me of why it occurred but more pertinently how it was substituted in circumstances where anyone could understand an anxiety on behalf of the appellant. Whether that would give rise to the suggestion of an appearance of bias on its own, I rather doubt, but having regard to the other points made by the appellant which are many and quite sophisticated, the appellant additionally relies on the fact that the judge gives no explanation as to how such a serious omission was made; and it has a symmetry with the current position, the judgment of 23 November – the judge gives no reasons.

40. The judgment does not address at all the points made in the second or fourth grounds of appeal. As I have said, there is nothing in the third. And the appellant, who nails his colours to the mast, says that judge has not given any adequate reasons; indeed, no reasons at all. And so, I ask rhetorically –applying the test, the *Porter v Magill* test, how can that test be satisfied if there is no reason, there are no adequate reasons, set out in the judgment?

41. That leaves aside the remarks made to counsel on 16 November, foreshadowing the judgments (that is reliance on the judgment of Arbuthnot J). I am additionally troubled, as was foreshadowed by Morgan J, about the intertwining of the two issues, the failure to separate them. As I say it is normal practice in matters of this significance, particularly where these things are raised, even in a busy county court list with robust case management, to at least permit what seems to me to be a fair course to be taken. It was raised by the father and not dealt with by the court. Had it done so it might have had a different outcome, but self-evidently it only reinforces the appellant's anxiety of the appearance of bias.

42. So, taking all those points together, the absence of any discussion let alone reasoning in the judgment of 23 November; the factual background starting with the error of law and how it was dealt with; the supporting background (in relation to evidence filing) where the mother does appear on more than one occasion, in fact several, to have been given more latitude than the father, who on the whole but not always, has been acting in person; and additionally, notwithstanding that the appellant had raised the issue about moving straight on, and which the application was not permitted, he had not been permitted to file any evidence.

43. So, taking all those things together: 1) there is no reasoning; 2) it seems to me there is a procedural irregularity; and 3) having regard to the background, that is to say the way in which and the basis upon which the appellant puts his appeal, applying the test in *Porter v Magill*, without hesitation I say that a person could not conclude that there was not a real

possibility of bias, and accordingly, without hesitation I allow the appeal."

The appeal to this Court

35. In her notice of appeal to this Court, counsel who had represented the mother before Newton J relied on a number of grounds. Those pursued at the hearing before us can be summarised as follows. It is argued that Newton J:

(1) failed properly to apply the test in *Porter v Magill* [2002] 2 AC 357 to the circumstances of the case and was wrong in law in finding that that there was an appearance of bias created by Judge McPhee in a number of case management decisions;

(2) failed properly to apply and give sufficient weight to the principle derived from *Piglowska v Piglowski* [1999] 1 WLR 1360 and instead found that Judge McPhee failed to give further explanation for an error made by the learned judge in finding rape, which the Judge accepted was an error – the fact that Judge McPhee's judgment was brief does not mean that he failed to consider all the points.

(3) was wrong to find that the fact that Judge McPhee, after refusing the recusal application, went on to deal with the specific issue vaccination application (referring to this as "intertwining of the two issues") gave rise to the appearance of bias – it would not have been reasonable or proportionate to list the flu vaccination application, having heard the submissions, after 21 days thereby causing undue delay.

(4) failed to recognise that Arbuthnot J in refusing permission to appeal the fact-finding judgment and determining that it was totally without merit, had considered many of the case management decisions relied upon in the appeal;

(5) acted in a way that was procedurally unfair and contrary of the overriding objective by taking into account the father's submissions that 'privileged documents' had been considered by Judge McPhee when the father had no way of telling if they were relevant.

36. In oral submissions for the mother, Mr Grant Armstrong, who had not appeared before Newton J, focused on the first ground of appeal. He took us through the various case management decisions and, whilst not abandoning the argument that they were all subsumed within the fact-finding appeal, sought to demonstrate that there was nothing in the decisions which, taken individually or collectively, was unfair to the father or gave rise to an appearance of bias. He submitted that Judge McPhee had been entitled to dismiss the recusal application for the reasons he gave. Alternatively, if Newton J had been correct in finding that the reasons were insufficient, he ought nevertheless to have dismissed the appeal on the grounds that there was no merit in any of the father's arguments as to unfairness or bias.

37. Before this Court, the father was represented by Ms Jacqueline Renton and Mr Mani Singh Basi, who had not previously appeared in these proceedings. This Court is grateful to them for acting on a pro bono basis. Their overarching submission was

that Newton J's judgment was well-reasoned, that he was clearly aware of the legal principles that needed to be applied in respect of recusal applications, and correctly applied the law to the facts of the case. It was submitted that his decision was clearly open to him on the facts of the case. Newton J had been right to conclude that Judge McPhee's reasons were inadequate and failed to address the father's complaints. Ms Renton also took us through the specific case management decisions which gave rise to the father's recusal application. It was her submission that Newton J's conclusion that these issues, taken together with the erroneous rape finding and the judge's "intertwining" of the recusal and vaccination applications, gave rise to an appearance of bias, was unassailable.

Discussion

38. In his ex tempore judgment on 23 November, Judge McPhee essentially gave two reasons for dismissing the recusal application. First, he considered that, with the exception of the erroneous finding of rape, the points raised by the father, including his complaints about case management decisions, had been subsumed with the appeal against his findings of fact and therefore dealt with by Arbuthnot J in dismissing the application for permission to appeal. Secondly, with regard to the erroneous finding, he concluded that, whilst it was a serious error, he had acknowledged and corrected it once it was brought to his attention, thereby removing the unfairness he had created. That error did not impinge on the remainder of the findings. In those circumstances, a fair-minded and informed observer, having considered all of those facts, would not conclude that he was biased.

39. In dismissing the application for those reasons, however, the judge fell into error. In particular, he was wrong to conclude that, with the exception of the erroneous rape finding, all of the father's grounds for seeking recusal had been subsumed in the fact-finding appeal. Some of the points raised by the father in support of his recusal application were plainly points which he had raised, or should have raised, in the fact-finding appeal, including criticisms of the judge's findings, his assessment of credibility, his weighing up of the evidence, and his alleged failure to give reasons for his decision. But other points were not within the scope of the fact-finding appeal, in particular the various allegations that in exercising his case management powers at earlier hearings he unfairly limited the time and opportunities for the father to file evidence whilst allowing the mother greater time and opportunities. Judge McPhee was therefore wrong to dismiss the application for the first reason he gave, namely that it raised issues which had been dealt with by Arbuthnot J in dismissing the application for permission to appeal.

40. This error also undermined the judge's second reason for dismissing the application. He was correct in thinking that, considered by itself, his erroneous finding would not justify recusal on ground of unfairness or bias, particularly given the prompt way in which he corrected it when drawn to his attention. But as noted above, it is necessary to consider the proceedings as a whole when addressing an allegation that the judge has treated a party unfairly. The erroneous finding therefore had to be assessed in the context of the other complaints about case management decisions raised by the father but not considered by the judge.

41. For that reason, I conclude that Newton J was right to find that the reasons given by Judge McPhee for dismissing the application were inadequate. Before allowing the

appeal, however, he ought to have looked closely at the father's complaints to determine whether they justified recusal on the grounds of unfairness or apparent bias. Before us Mr Armstrong submitted that that Newton J failed to go through the various points raised by the father to see if there was any substance in his contentions. Instead, he took a great deal of what the father said as being correct. There is much force in that submission. In fairness, I should stress that Newton J did not have the benefit of detailed submissions of the sort we received from Mr Armstrong who took us carefully through the relevant parts of the history of the proceedings. Furthermore, he did not have the opportunity to consider some documents which were available to us but not to him. Had he done so, it is likely that he would have come to a different decision.

42. I shall consider the specific points raised by the father in this order: (1) the order for filing of evidence at the hearing on 13 January 2022 and the other complaints about case management decisions concerning the filing of evidence; (2) the complaint about the withholding of a document; (3) the decision to reduce contact on 9 September; (4) the so-called "intertwining" of the recusal application with the vaccination issue, and then, again, (5) the judge's erroneous finding.

43. At the remote hearing on 13 January 2022, the judge asked the father (appearing in person) if he agreed with the proposed draft case management order. The transcript of the hearing records that the following exchange took place:

> "Father: In principle, [I am definitely?] in agreement [inaudible]. I do agree that we need to retain the listing for the hearing.
>
> Judge: Yes.
>
> Father: The time that I will be able to prepare my case and go through the disclosures is quite limited. To be dealing with that myself, around work commitments, it is simply not enough time to respond to the mother's allegation statement and go through all the disclosures.
>
> Judge: Okay.
>
> Father: My issue is that the mother has had three months until now –
>
> Judge: Yes.
>
> Father: -with those disclosures, and to allow for four months… And effectively I have two weeks to prepare my whole case, and go through disclosures, is simply not right.
>
> Judge: Okay, so tell me how long you think you need.
>
> Father: I want to retain the fact-finding hearing, so I need at least three weeks.
>
> Judge: Yes, okay.

Father: Ideally, four weeks.

Judge: You can certainly-

Father: [inaudible]

Judge: You can certainly have three weeks. I can extend your response to 9 March, because I still think that gives parties time to provide a consolidated schedule to me by 16 March which is plenty of time for 23 March.

Father: Right, and in terms of the mother filing her Scott schedule and statement-

Judge: Yes.

Father: -what date will that be?

Judge: I am content that that is 16 February, because that allows you three weeks to respond.

Father: Okay.

Judge: I think, realistically, the delay in this disclosure has caused the difficulty, but I think that is fair to both sides."

44. Towards the end of the hearing, the father returned to this issue:

"Father: Can I just raise the point again, Your Honour, about the mother having three months already to deal with disclosures and prepare her case.

Judge: Yes.

Father: [So we're supposed to have three weeks?] I will have at least seven disclosures to go through, a statement of [inaudible] care, and my own Scott schedule to file in three weeks. And the mother will have three weeks to go through two disclosures, plus [prepare her?] Scott schedules and statements.

Judge: What do you want me to do about that?

Father: I am struggling-

Judge: What do you want me to do about that?

Father: Sorry, your Honour, the feedback is terrible.

Judge: What would you like me to do about that?

> Father: I am struggling to understand [where the judgment is fair?] of the mother having four months to prepare and us having three weeks.
>
> Judge: Do you remember I asked you how long you needed … and you told me three weeks?
>
> Father: I would need at least three weeks, yes.
>
> Judge: Yes.
>
> Father: I mean, if it was four weeks, that would be more ideal-
>
> Judge: I think, you see-
>
> Father: -but we can't-
>
> Judge: -that you will have more time than three weeks, because if you get the outstanding police disclosure by 27 January, you can start to look at that yourself from 27 January, can you not?
>
> Father: Yes of course.
>
> Judge: Okay. I am happy with the timetable. I understand that there will be pressure upon you; I understand that you are a litigant in person. I equally understand that all of us want to keep the hearing dates that are available. I can tell you now, if this comes out of the diary, it will not go back in until the summer."

45. These passages from the transcript of the exchanges between the father and the judge demonstrate conclusively that there is no merit in the father's assertion that the judge's order about the time for filing his statement was unfair or indicative of bias. As has been observed many times, judges in family cases are encouraged to make case management decisions that ensure that the proceedings are conducted with a focus on the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved. Case management decisions will be upheld on appeal save in clearly defined and narrow circumstances. The judge's decision about the time to be allowed for the father's statement was a paradigm example of a case management decision that was focused on the overriding objective. He was concerned not to lose the hearing date but nevertheless allowed the father extra time – three weeks instead of two – to prepare his statement. The father was also concerned not to lose the hearing date and asked for three weeks, "ideally four". The father's argument on his recusal application was that the mother had had four months to prepare her case so it was unfair that he should have only three weeks. The judge, however, approached the issue on the basis of establishing how long the father needed and giving as much time as possible without jeopardising the hearing date. That approach was manifestly fair to all parties and just, having regard to the welfare issues.

46. In any event, the fact-finding hearing did not go ahead in March and was adjourned to June. As the transcript for the hearing in March shows, counsel then acting for father asked for time to "tidy up" the father's schedule and statement, and was granted seven days to do that, as reflected in the order made on 24 March quoted above. His counsel asked for permission to file further evidence. The mother's counsel opposed the application, observing that the case had been listed for a full hearing that week and that, if permission were now given for the father to file further evidence, provision would have to be made for the mother to respond. The judge refused the father's request, saying that if the father wished to adduce additional evidence he should file a C2 application to that effect.

47. Before us, Ms Renton relied on two matters arising out of the judge's treatment of the parties at this point. She contended that the judge unfairly allowed the mother to expand the scope of her allegations beyond those originally raised. In addition, it is submitted that it was unfair to require him to file a C2 application for permission to file further evidence when no such requirement had been imposed on the mother. Neither of these points stands up to scrutiny. The mother had been permitted to expand the scope of her allegations by the earlier order made by the district judge on 25 October 2021. The father had been given an identical permission. Neither party was given more latitude than the other. I can see nothing in Judge McPhee's treatment of the parties' respective cases at the hearings on 13 January or 24 March 2022 to support the contention that he was treating the mother more favourably. His decision that, if the father wished to adduce further evidence beyond that which had been filed for the abortive fact-finding hearing in March, he should file a formal application was a sensible case management decision. I note that prior to the hearing on 13 January 2022, the mother had filed a C2 application seeking an extension of time. The judge was plainly concerned at the expansion of the factual issues, as demonstrated by his warning to the parties recited in the order made on 24 March that the court cannot be expected to deal with every allegation and that they should therefore "adopt a focused and forensic approach to the allegations placed before the court."

48. At the hearing in June, the father was again represented. As Mr Armstrong submitted to us, if there had been continuing complaint on the father's side about inadequate time to prepare, or any other unfairness to the father, it was incumbent on counsel to raise it for the judge to determine.

49. Looking at the history of the case management hearings in this case, I can see no argument whatsoever for saying that any of the court's directions about the filing of evidence were unfair to the father. It may be that some of the directions were more advantageous to one party or the other, but that is an inevitable feature of lengthy litigation. Overall, there is no basis for thinking that any of the directions resulted in the father being unable to advance his case.

50. On the issue of privileged documents, the judge decided on 13 January 2022 that a list of documents should be prepared and reasons given for withholding those said to be privileged. By the hearing in March, it seems that the dispute over disclosure had narrowed to one document. The reason for withholding it was, in the judge's words, that it related to a safety and security concern expressed by a refuge. The judge ruled, however, that the document was irrelevant to the issues in the case and therefore not disclosable, adding that he would keep the issue under review. This

was plainly a case management decision within the judge's discretion and does not give rise to any conceivable complaint of unfairness or bias.

51. Newton J, however, regarded the judge's treatment of this issue as supportive of the father's second ground of appeal. In the course of his judgment, as quoted above, he made this observation when commenting on ground two:

> "there is also support, as I have already indicated, he submits in relation to the "withheld" documents – which may or may not be relevant, it does not really matter – which the judge looked at, decided were not privileged but nonetheless were withheld from the father's gaze. He has no way of telling, the father has no way of telling whether they are relevant or not, given he has not seen them. The father says there should be open justice."

52. I do not agree with Newton J's view that the judge's decision not to order the disclosure of the one document which had been withheld by the mother adds any support at all to the father's assertion of apparent bias. As Maurice Kay LJ observed in *Durham County Council v Dunn* [2012] EWCA Civ 1654 at paragraph 23, "obligations in relation to disclosure and inspection arise only when the relevance test is satisfied". It was plainly open to the judge to conclude that the document should not be disclosed because it was not relevant to the issues in the case. He agreed, however, to keep the matter under review. Although we were not addressed in detail on the court's powers and duties to oversee disclosure and inspection contained in FPR Part 21, it is clear that under FPR rule 21.3, which substantially follows CPR rule 31.19, the court is the ultimate arbiter of whether a party is entitled to withhold a document. The course taken by the judge about the email is typical of the sort of pragmatic approach to disclosure taken regularly by judges exercising their case management powers in the family court. It was neither unfair to the father nor evidence of apparent bias.

53. Ms Renton for the father submitted that the best point on apparent bias was the reduction in contact at the hearing on 9 September 2022. In my judgment, there is no merit in this argument whatsoever. The judge made an order in line with the Cafcass officer's recommendation which was firmly rooted in the child's welfare needs (a) to have more weekend time with his mother and (b) to avoid lengthy journeys to London once a fortnight. The arrangement was for four months pending the final hearing. It excluded the October half term and Christmas holidays for which the judge made provision that included staying contact with the father in London. It is conceivable that another judge may have declined to alter the arrangements pending the final hearing, but the judge's order was plainly justified on the evidence before him and in my view one he was entitled to make at the hearing on 9 September on the basis of the Cafcass report and the parties' submissions without adjourning for further evidence. The order for contact made at the hearing was a carefully crafted short-term arrangement based on the Cafcass officer's recommendation as to what was in the interests of the child's welfare. The judge's observation that he did not accept that the father could not maintain contact with H under the varied order was correct and unobjectionable. There would have been no prospect of a successful appeal against the order and the suggestion that the judge's treatment of this issue constitutes evidence of unfairness of bias has no merit.

54. It may be significant that Newton J was not shown the addendum s.7 report filed by the Cafcass officer on 15 August 2022 and did not have available the transcript of the hearing on 9 September 2022. Both documents were included in the bundle for the present appeal.

55. Next there is the so-called "intertwining" issue. In his judgment, Newton J said (at paragraph 19) that the judge's decision to continue with the vaccine issue if he dismissed the recusal application

> "gives rise to some anxiety because implicit in what the father says is the ability, his wish, to be able to consider his position once the judge has given a determination on the recusal, just in the same way, for example, by analogy, when a court makes a direction, an order, in respect of an adoption but waits until the time for appeal has passed."

Later (at paragraph 41) he added:

> "I am additionally troubled, as was foreshadowed by Morgan J [when granting permission to appeal], about the intertwining of the two issues, the failure to separate them. As I say it is normal practice in matters of this significance, particularly where these things are raised, even in a busy county court list with robust case management, to at least permit what seems to me to be a fair course to be taken. It was raised by the father and not dealt with by the court. Had it done so it might have had a different outcome, but self-evidently it only reinforces the appellant's anxiety of the appearance of bias."

56. With respect, I do not agree with this analysis. The judge's case management decision to adjourn both issues – recusal and vaccination – to the same hearing on 23 November, with the recusal application to be determined first and if it was refused to proceed with the vaccination issue, was unobjectionable. It was a sensible use of limited court resources and time. Furthermore, looking at the transcript for the 23 November hearing, rather than being "intertwined", the strands were carefully separated out. I do not agree that the situation is analogous to allowing time for appealing to pass before proceeding with an adoption. It would be plainly contrary to justice if a judge was obliged to adjourn every hearing in which an application for recusal is made and dismissed to allow the unsuccessful applicant the opportunity to appeal. Ordinarily, the right to seek permission to appeal against the dismissal of the recusal application arises at the end of the hearing, not part way through. If there have been orders made subsequent to the dismissal of the recusal application to which the applicant objects, his remedy is to ask the judge or the appellate court to stay the orders until determination of the application for permission to appeal against the dismissal of the recusal application or, if permission is granted, the determination of the appeal.

57. In *Watts v Watts* [2015] EWCA Civ 1297, an appeal in two actions relating to a dispute between a brother and sister over their late mother's estate in which an application for the judge to recuse herself on grounds of the appearance of bias had been made at the start of the trial, it was argued that the judge had erred by giving

her decision refusing the application and reserving her reasons until the end of the hearing. In rejecting the argument, Sales LJ said (at paragraph 27):

> "In my view it was correct in the circumstances for the judge to give her decision with reasons to follow later, so that the trial could proceed without further delay and to minimise the risk that it might have to run over, so adding to the cost. The test is not one of how the individual litigant might feel subjectively, but an objective one of how the notional fair-minded and informed observer would view matters. Such an observer would not think that this way of proceeding displayed any disposition of unfairness towards the appellant. It only gave rise to the appearance of a judge willing to make a sensible case management decision in accordance with the overriding objective set out in CPR Part 1."

58. One is therefore left with the erroneous finding of rape. That was a mistake but, as noted above, one which the judge acknowledged and corrected promptly. By itself, that is manifestly not evidence of unfairness and apparent bias.

59. In short, as Mr Armstrong submitted, all of the father's complaints about unfairness are illusory. His underlying complaint, of course, is that the judge made serious findings that he had abused the mother which he does not accept. But that is irrelevant to the issue arising on this appeal.

60. Accordingly, I conclude that, although Newton J was right to decide that Judge McPhee's reasons for refusing the application were inadequate, he was wrong to find that the points raised by the father demonstrated that the judge had conducted the proceedings unfairly or that they gave rise to an appearance of bias.

61. In those circumstances, I would allow the appeal, set aside the order transferring the proceedings to another judge, and direct that they be listed as soon as possible for a case management hearing before Judge McPhee.

LORD JUSTICE PETER JACKSON

62. I agree with both judgments.

LORD JUSTICE LEWISON

63. I agree with Baker LJ that the appeal should be allowed for the reasons that he gives. But I wish to add a short judgment on what I consider to be the correct approach to the questions that arose in this case.

64. The case law in this jurisdiction has traditionally been expressed in the language of bias. The question was formulated by Lord Hope in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103] as follows:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

65. Commenting on that in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856 at [14] Lord Steyn said:

> "The House unanimously endorsed this proposal. In the result there is now no difference between the common law test of bias and the requirements under article 6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context."

66. It is not clear to me that the concept of "bias" is adequate to cover the various circumstances in which a judge may be asked to recuse themselves. It must be recognised that the question of recusal may arise because of some characteristic of the judge in question which is extraneous to the actual dispute before them, or it may arise because of the judge's handling of the dispute itself.

67. In *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468, [2018] BLR 341 Leggatt LJ defined "bias" at [17] as follows:

> "Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case …"

68. If "bias" is defined in that narrow way, I find it difficult to see how it can plausibly be said that the judge in this case was biased. But in *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455 at [39] the Supreme Court refrained from endorsing that definition, merely assuming it to be correct. In fact that case was decided, not on the basis of bias, but on the question whether there had been a fair trial. Lord Wilson went on to say in that paragraph:

> "… in so far as the judge evinced prejudice against the claimant, it was the product of his almost immediate conclusion that the claim was hopeless and that the hearing of it represented a disgraceful waste of judicial resources."

69. He also said at [48]:

> "But, when one considers the barrage of hostility towards the claimant's case, and towards the claimant himself acting in person, fired by the judge in immoderate, ill-tempered and at times offensive language at many different points during the long hearing, one is driven, with profound regret, to uphold the Court of Appeal's conclusion that he did not allow the claim to be properly presented; that therefore he could not fairly appraise it; and, that, in short, the trial was unfair. Instead of making allowance for the claimant's appearance in person, the judge harassed and intimidated him in ways which surely would never have occurred if the claimant had been represented. It was ridiculous for the defendants to submit to us that, when placed in context, the judge's interventions were "wholly justifiable"."

70. So I would prefer to regard the question on a more general level. In a case in which the trial has taken place, whether it was fair has been said to be a question of judicial evaluation: *Re AZ (A Child)* (Recusal) [2022] EWCA Civ 911, [2022] 1 WLR 4 WLR 78, as indeed *Serafim* demonstrates.

71. But in this case the trial (at least as regards the child's welfare) has not yet taken place. So I would prefer to characterise the question as: would the fair-minded and informed observer, having considered the facts, conclude that there was a real possibility that the father would not receive a fair trial? Those facts include the judge's procedural decisions during the course of the proceedings, and his interventions and interactions with the parties during oral submissions.

72. One of the aspects of a fair trial, as shown by the Strasbourg jurisprudence is summarised in the metaphor "equality of arms". The European Court of Human Rights explained the meaning of this in *Dombo Beheer NV v The Netherlands* (1993) 18 EHRR 213:

> "32. The requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 (art. 6-2, art. 6-3) applying to cases of the former category. Thus, although these provisions have a certain relevance outside the strict confines of criminal law…, the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases.
>
> 33. Nevertheless, certain principles concerning the notion of a "fair hearing" in cases concerning civil rights and obligations emerge from the Court's case-law. Most significantly for the present case, it is clear that the requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to such cases as well as to criminal cases (see the *Feldbrugge v the Netherlands* judgment of 26 May 1986, Series A no. 99, p. 17, para. 44).
>
> The Court agrees with the Commission that as regards litigation involving opposing private interests, "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.
>
> It is left to the national authorities to ensure in each individual case that the requirements of a "fair hearing" are met."

73. Commenting on the concept of "equality of arms" in *McClean v Buchanan* [2001] UKPC D 3, [2001] 1 WLR 2425 Lord Hope said at [39]:

> "The principle that there must be an equality of arms on both sides is clearly established in the jurisprudence of the Strasbourg Court: see *Dombo Beheer BV v The Netherlands* (1993) 18 EHRR 213, 229, para 33. What this principle requires is that there must be a fair balance between the parties. In civil cases the accused must be afforded an opportunity to present his case under conditions which do not place him at a substantial disadvantage as compared with his opponent: *De Haes and Gijsels v Belgium* (1997) 25 EHRR 1, 56-57, para 53."

74. The concept is reflected in rule 1.1 of the FPR where the "overriding objective" is defined as including ensuring that a case is dealt with "fairly"; and "ensuring that the parties are on an equal footing." Similar provision is made in the CPR. Commenting on the CPR, Zuckerman on Civil Procedure (4th ed) says at para 1.47:

> "It would, therefore, be more in keeping with the ideas behind the overriding objective to interpret CPR 1.1(2)(a) as requiring fairness in the exercise of judicial case management powers and ensuring that they are not as a matter of practical reality exercised to the detriment of one party. On this view, ensuring that the parties are treated on an equal footing would mean, for instance, that the court must not give directions that impose on one party an unwarranted procedural disadvantage compared with another party. This does not mean that the court must mechanically ensure that each party is treated the same; for example, if one party is allowed to call only one expert witness, CPR 1.1(2)(a) does not automatically dictate that the other party must not be allowed more than one expert. Equality in this context is fact-sensitive and depends on the circumstances of the particular case."

75. The thrust of the father's complaint in this case was that the judge had given a number of case management decisions which imposed on him an unwarranted disadvantage compared with the mother's position. They included differential time limits for the service of documents; withholding documents that had been provided to him by the mother; refusing to allow the father to submit further evidence; removing some of the father's evidence from the bundle; and not considering the father's allegations. He summarised his complaint by saying:

> "I conclude that the mother has disproportionately been given allowances that were not afforded to me."

76. In my judgment, that series of complaints, if unexplained and uninvestigated, could lead a fair-minded and informed observer to conclude that there was a real possibility that the father would not receive a fair trial at the welfare stage. The problem in this case is that in his judgment declining to recuse himself, the judge did not engage with those complaints at all. He focussed instead on an erroneous finding of fact that he had made, but which he subsequently corrected. In relation to the complaints about his procedural rulings, he said that Arbuthnot J had considered those complaints when dealing with the father's application for permission to appeal against the judge's

judgment on the fact-finding hearing. In fact she did not. The grounds of appeal against the fact-finding judgment took completely different points. So the reasoning of the judge's decision not to recuse himself is, in my judgment, undermined.

77. Nevertheless, counsel for the mother took us through the impugned procedural decisions in some detail. When seen in their proper context, it is plain that HHJ McPhee was justified in making each of them. The father's complaints about unfairness were, in my judgment, wholly unfounded. There was no reason, on the facts of this case for HHJ McPhee to have recused himself. If Newton J had himself engaged with the judge's various case management decisions he would have seen that the father's complaints were unfounded; and that HHJ McPhee's lack of reasoning did not lead to the conclusion that the appeal should be allowed; but that the judge's reasons for each of his decisions could be readily deduced. I consider that Newton J was wrong to have come to the contrary conclusion. No unfairness, whether real or perceived, would have been created by dismissing the father's appeal.