Neutral Citation Number: [2023] EWCA Civ 889

Case No: CA-2023-000998

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT BARNET
Her Honour Judge McKinnell
ZW22C50147

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 July 2023

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WILLIAM DAVIS

- -

C (Child: Ability to Instruct Solicitor)

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- -

Joy Brereton KC and **Frankie Shama** (instructed by **Dawson Conwell LLP**)
for the **Appellant Mother**
Rebecca Davies (instructed by **the local authority**) for the **Respondent Local Authority**
The **Respondent Father** appeared in person
Shiva Ancliffe KC and **Gill Honeyman** (instructed by **Covent Garden Family Law**) for the **Respondent Children by their Children's Guardian**

Hearing date : 5 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Introduction

1. This appeal arises from an order allowing A, a 14-year-old boy, to instruct his own solicitor in proceedings brought by his parents to discharge care orders in respect of A and his sister B, who is 13. The care orders were made to protect the children from parental conflict and from behaviour by their father that had severely alienated them from their mother. The appeal raises issues about the ability of children to instruct a solicitor directly and about meetings between children and judges.

2. The background is that the parents married in 2006 and separated in January 2019 before divorcing. Communications further deteriorated after the separation and private law proceedings began, eventually involving the mother obtaining a non-molestation order in early 2020 and reducing the father's contact. On several occasions the children ran away from their mother to their father, including for a month in March 2020, and the mother then stopped contact with their father altogether for a period. The family attended the Tavistock Clinic and an aid organisation, both of whom declined to provide therapy because of concerns about the children's safety. Concern was also felt about their presentation at school and the deteriorating relationship with their mother, including reports of violence by A towards her and B.

The care proceedings

3. The local authority became involved in early 2020 and in July 2020 it issued care proceedings. Contact with the father resumed under supervision. Expert psychiatric advice was sought from Dr Malcolm Bourne. In a report in December 2020, he stated:

> "I do take a clear view that the father is being very damaging to the children's emotional health. If the mother's description of the father as controlling during their marriage is correct, then the children would have been damaged by being exposed to that. More generally, though, his own need for his children to idolise him and disparage their mother, overwhelms A's and B's needs. A in particular presented to us, and other professionals share this experience, of someone who talks in very much an over-adult fashion, overtly or unconsciously parroting his father's beliefs and words."

A was then aged 12.

4. Unfortunately, the proceedings could not be swiftly determined, and in October 2021 the local authority reached the view that continued placement at home was untenable. With the support of Dr Bourne and the guardian, an interim care order was made in November 2021 and the children were placed in separate foster placements. They have remained in foster care since then.

5. Dr Bourne was next asked to assess whether A, whose views fundamentally differed from the guardian, was competent to instruct his own solicitors. After a full interview with A in November 2021, his report included this advice:

> "Whereas I acknowledge and agree that there is bound to be some degree of influence over a child by a parent, I also believe that in this situation, the degree of influence over A by his father is extreme and damaging. The papers that I have read describe the potential for the child to be 'parroting' a parent's beliefs/words, and to act as their mouthpiece. In my opinion, this situation is more insidious and far-reaching than that as A has absorbed a belief system of his father's; it is most damagingly connected with his mother, whom he describes above as having a 'great hatred' of.
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> …
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> I think that A understands well enough the 'facts' of the process of litigation including the function of the lawyer, judge and Guardian and his role with those. I do not believe that A has a good appreciation of the potential consequences of his involvement in litigation. He essentially saw no risk of difficulty or emotional harm from hearing about, for example, his family members, in the court environment, or reading about them - he said he had asked for my report, for instance.
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> Whereas I appreciate that instructing his own solicitor would not necessarily mean he would have unfettered access to reports and papers, his lack of such understanding is of concern in the key issue for this report.
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> …
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> In conclusion then, I would say that the majority of the areas under consideration outlined above lead to a view that A is not competent to instruct his own solicitor. The main arguments 'for' his doing so are his overall intelligence and his strength of feelings about this. However, I would say that his strength of feeling is at least in part based on false beliefs or premises. So although there is something of a balanced answer, I would say that the overall answer is that A is very probably not competent to instruct his own solicitor, on around a 90:10 balance."

6. The final hearing in the care proceedings took place before Her Honour Judge McKinnell in November and December 2021, when she heard nine days of evidence. This included evidence from Dr Bourne and psychological assessments of the children by Melanie Gill. The children's solicitor, Angela Gaff, took instructions from the guardian, who supported the local authority's application, with their wishes and feelings being conveyed to the court by the guardian and by Ms Gaff. On 14 January 2022, the judge handed down her judgment and made care orders on the basis of care plans for both children to remain in foster care, with individual therapy for the children, for each parent and with family therapy. There was to be sibling contact. A non-molestation order forbade the father from contacting the children for three months to give them the chance to engage with therapy. Rehabilitation to the mother's care

was not expressly part of the care plan but was regarded as a goal, or at least a possibility.

7. In the course of a substantial judgment, the judge found that the parents' relationship had been abusive and argumentative and had been since A was born. She also found that the father had alienated the children from the mother by referring to her in derogatory terms, accusing her of lying to them and abusing them, encouraging them to act secretively, exerting influence over them to provoke them to misbehave and abscond from home, and causing A in particular to write to professionals in line with the father's wishes. She found that the threshold criteria were met in that the children were at continued risk of emotional harm due to being exposed to conflict between their parents, and that they were beyond parental control, A having threatened the mother repeatedly and both children having assaulted her on more than one occasion with increasing severity.

8. The following findings from the 2021 judgment are directly relevant to the present appeal:

> "10. Dr Bourne assessed both A's and B's capacity to instruct solicitors and concluded that neither of them has capacity. The children's wishes and feelings have been made clear to me in their correspondence, diary entries and by both the Guardian and Ms Gaff.
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> …
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> 12. …The experts are in no doubt whatsoever that the children are parroting the father's beliefs and words. Having considered all the evidence, I entirely agree with them. It is clear and obvious. The language and phrases used by the children clearly comes from the father. They have either overhead him saying those things or he has spoken to them, using those words and phrases or he has told them what to say and write. The language, phrases and words do not all come from 11 and 13 year old children.
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> …
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> 14. … The father… was, and remains, unable to separate his own needs from those of his children. He was, and remains, unable to see the significant harm his behaviour has had, and continues to have, on his children. That needs to change. The father will only be able to bring about change through acceptance of this judgment and long term therapy. The children's welfare is the Court's paramount consideration. The children come first. The father's insight has been, and remains, extremely poor.
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> 15. … I make it clear that the mother and the father must not show the children a copy of this judgment or share its contents with them until the LA (in consultation with the therapists) consider it appropriate. The children, particularly A, already

know far too much about these proceedings and far more than it is healthy for them to know. It is clear to me that the father is responsible for most of the children's difficulties, their broken relationship with the mother and the psychological harm they have suffered and continue to suffer. The father does not agree. He blames the mother, the social worker and the Court. He is pitted against everyone and he has drawn the children into his feeling and belief that it is him and the children against the rest of the world. He is unable to see the harm he is causing to the children and how distorted his view is.

…

20. … It is by no means clear to me that the father will properly engage with the recommended therapy. He has no insight whatsoever into the difficulties and harm he has caused to the children and to the mother. He has a very long way to go before he can be considered to be an emotionally and psychologically safe parent. I am sure he can keep the children physically safe but that is just one part of the picture and it is absolutely clear to me that he does not get the whole picture even after reading the detailed experts' reports and hearing the experts' clear and unanimous views. Regrettably, the father remains firmly in denial. I hope that changes because he clearly has a lot to offer the children but only when he is able to meet the children's emotional and psychological needs. His secret communications with the children and damaging influence over them has to stop. He is setting the children on a road to significant mental health issues, which are likely to have long lasting effects on their ability to function on a day to day basis, both as children and as adults. The content of A's emails and his concerning behaviour and inability to manage his responses and emotions are a real concern. The way in which A mirrors the father's distorted views and treatment of people he disagrees with is very concerning, as is his control and influence over B. The father must give the children peace and space to recover.

21. Whether the father will abide by the direction not to have contact with the children remains to be seen. He has blatantly breached the order he agreed to by passing on a bracelet and message to B via another child in B's school after the children had been removed. He knew the reason behind the children having no contact with him and the mother. He appears to have no respect for Court orders. He does not accept the clear and unanimous' views of the experts and all the professionals involved in this case. He seems to be determined to do as he pleases whatever the consequences. As far as he is concerned, he is right and everyone else is wrong... The risk of harm to the children from the father is significant and ongoing and the father currently shows no indication of changing his behaviour.

> 22. An application can be made in the future to discharge the care order once the recommended therapy has progressed far enough to ensure that it is safe for the children to return home. These proceedings have lasted considerably longer than the statutory 26 weeks."

9. The judge made good these findings with meticulous reference to the evidence over the course of the following fifty pages. This included the evidence of an independent social worker who has assessed the parents and found clear evidence of alienation. Of note, the judge further considered the issue of the children's exposure to the proceedings:

> "*Has the father given A access to documents and information that A should not have seen/known about?*
>
> 174. I find that he has. The 2020 screenshot clearly shows a conversation between the father and A in which A tells the father that he has deleted the police emails. A should not have seen police emails. He is a child. A has complained about documents not having been included in the bundle. A has seen the mother's statement in the NMO proceedings. He has either been shown the documents by the father or the father has left them lying around for the children to see or the father has told him about them. Whichever it is, it is not appropriate for a child (and A is still a child) to see these documents or know about what is/is not included in the court bundle. More likely than not, the father has shown A the mother's statement and has told A about documents "missing" from the bundle. The father's inability to see the harm he is causing to A and B by sharing details about these proceedings is staggering."

10. In relation to the issue of competency to instruct solicitors, the judge entirely accepted Dr Bourne's analysis:

> "62. Dr Bourne's independent reports on A's and B's competency to instruct solicitors are evidence based, reasoned and clear. He clearly researched the relevant questions and approached the assessment with an open mind and with knowledge of the children and the family dynamics. I have no hesitation in accepting them. Dr Bourne's evidence was that A's emotional maturity was not higher than expected for a child of his age and it was compromised by the influence of the father. Dr Bourne was concerned by A's insistence that it would not be a problem if he had access to the full bundle. He said that there was something about A's general narrative that deviated so far from reality that it indicated that it was compromised. B was clearly not competent. She was confused, withdrawn and in an emotional mess. Dr Bourne was struck by the clarity in what B said about contact (repeating the father's words) compared with her confusion about other matters. Dr Bourne's view was that neither of the children's executive functioning was developed.

> If A instructed his own solicitor but did not get what he wants, it would be more damaging for A because whilst he would get the power, he would not get the result. If he does not get the result, A will say that the Court is wrong and will adopt the father's attitude. Dr Bourne considered that to be more harmful to A. It was important that A got the message that it was for the adult professionals to make decisions in his best interests.
>
> …
>
> *Are either of the children competent to instruct their own solicitors?*
>
> 179. I find that they are not. Neither of them has the level of emotional maturity needed to instruct their own solicitors. They do not understand how the court process works. They are solely focused on their wishes and feelings and do not understand that those wishes and feelings are part of the overall picture and have been communicated loud and clear to the Court. They do not understand that their wishes and feelings may not be the same as what is best for them. I accept Dr Bourne's assessment on this issue.
>
> 180. Both of the children are heavily influenced by the father. They cannot think for themselves. Their views, wishes and feelings have been influenced and distorted by the father. The children have been properly represented by the Guardian and by Ms Gaff. The Guardian and Ms Gaff have both informed the court about the children's wishes and feelings. The Court is in no doubt whatsoever about the children's wishes and feelings. There is nothing more that the Court could be told that it does not already know about the children's wishes and feelings. The father accepted that in his oral evidence. Instructing another solicitor would have added nothing. It would not have given the children what they want because what they want is clearly not in their best interests. Neither of the children are competent to instruct their own solicitors. Even if they were, the outcome would be the same. Giving the children what they want is not the same as giving the children what they need."

11. Having delivered this compelling judgment, the judge wrote a sensitive letter to the children, in the course of which she assured them that their wishes and feelings had been strongly presented by the parents and professionals and that their voices had been heard.

The discharge applications

12. If ever a family needed respite from litigation, this was it. As it was, prompted by concern that the father was having unauthorised contact with the children and that therapy was being delayed, the mother issued an application to discharge the care

orders on 30 May 2022 and the father followed suit on 25 June 2022. A different guardian was appointed, and he reinstructed Ms Gaff.

13. On 27 June 2022, the father was arrested and charged with breaching the non-molestation order preventing contact with the children. He spent two weeks in custody on remand and was sentenced to 100 hours of community service with tagging.

14. On 28 June 2022, it was discovered that a 250-page e-book had been published in A's name on Amazon Kindle. The book, entitled *Monstrous, Corrupt and Criminal Family Court, with its Social and Health Services*, contained significant personal information about the children, the case and professionals including foster-carers. Injunctions were granted by the High Court and Amazon removed the book from sale.

15. Dr Bourne was re-instructed to consider A's competence to instruct a solicitor directly. He met A again and provided a report on 20 September 2022, which concluded:

> "We have considered at some length the question of the risk of harm in A having to be given enough information to make an informed instruction, and that he might then feel responsible, himself, for any outcome that he does not want or agree with. As noted, A already and still talks as if he has excessive responsibility for his own outcomes, again something I believe that he has absorbed and been encouraged to think because of the way his father talks to him.
>
> I believe therefore that there is a very high risk of emotional damage to A if he does instruct his own solicitor yet the outcome is still not what he wants. He will feel even more responsible for this, and potentially for anything his father is upset or angry about. A believes that his own solicitor will represent his views more 'purely' (my word) than a Guardian would and therefore that the outcome of the case is more likely to be agreeable to him. I believe that A is mistaken to think this; this in itself is not surprising in his situation, but I believe this compounds the possible damage just described as it then fuels A's consequent feelings of getting it wrong.
>
> In conclusion then, I would still say that the majority of the areas under consideration outlined above lead to a view that A is not competent to instruct his own solicitor. The main arguments 'for' his doing so remain his overall intelligence and his strength of feelings about this, even if that is in part based on false beliefs or premises. But the origins of those beliefs very much reflect the lack of independence of thought that A has been able, or allowed, to develop. The argument against his having sufficient independence to instruct, and the harm done through assigning him that level of authority and responsibility, is in my opinion very strong, and therefore means that A is not competent to instruct his own solicitor."

16. In November 2022, the mother applied for a contact order and in January 2023 the father did likewise.

17. As a result of specific concerns expressed by Dr Bourne about A, a psychiatric risk assessment was prepared by Dr Anthony James, who interviewed the family members. His report dated 22 December 2022 contains these observations about A:

> "He is young at 14 years, and although he gives the impression possibly of being older, he is quite immature.
>
> …
>
> A is close to his father, and he is influenced by his views. Father is quite dominant, and A is rather young, and to a degree immature, and, therefore, less able to form his own independent views."

Asked about how A could be supported at school, Dr James wrote:

> "I think that it will be important to make clear to A that there is a world outside of the court proceedings, foster care, acrimonious parental arguments; and the best way to ensure this is for his schooling to focus upon the academic work, forthcoming GCSEs and his need to look towards university et cetera– the normal routine, expectations for a healthy adolescent today. In other words, focusing on some normalcy."

18. A had been having therapy, amounting to 15 sessions, but he withdrew from it in January 2023.

The meeting with the children

19. It had been the intention for the judge to meet the children during the original care proceedings, but this became unsuitable following their recent removal into foster care. During these discharge proceedings, the judge met the children separately on 8 March 2023. The meeting with A, which lasted for 1 hour and 25 minutes, took place in the presence of Ms Gaff and A's foster carer. Ms Gaff took a full note, which was approved by the judge and circulated to the parties.

20. It is unnecessary to refer at length to the discussion, and I only note these matters. The judge made clear that she was not taking evidence from A. His first question was about seeing court documents, saying that he knew he would be able to see documents in the future. He related his complaints against his mother and asserted that she had manipulated him into foster care. He said that he despised the psychologist Ms Gill and that she had manipulated the case. Dr Bourne, Ms Gill and the independent social worker had simply agreed with the social worker without making their own assessments. A asserted that he was very mature as a result of the court case and the judge responded that he seemed very mature to her. A said that his therapist had been useless and that he didn't want to talk to anyone associated with Ms Gill. Urged by the judge to take advantage of the opportunity of therapy, A said that he didn't see the point and would not see his mother if he was not allowed to see his father. He said that he would be asking for another change of social worker.

21. I refer to two more matters surrounding this meeting. The first is that, shortly before A met the judge, Ms Gaff told him that B had taken part in an important family event the week before, involving the mother but without the father or A being aware. A referred to this when meeting the judge. The other matter concerns this exchange:

> "J – Are you glad you came to see me or has it not been good? You can be honest. I won't mind.
>
> A - I am not sure what has been clarified.
>
> J – For me, it's always better to see somebody if they want to see me. I am not taking evidence but there will be bits of what you have said to me that will stick with me. I will certainly remember how tall you are and how mature you are. I know that families and lives are not frozen in time. Things happen and things move on. It does not stand still. I hope that there is less of a whirlwind and that it is easier to find a way through. It's a bit like being in a sandstorm. If you are in a sandstorm, you can't see where you are going. Where we have got to now is better than where you were before. But it's not simple. It's important that your voice is heard. It has been helpful for me to see you. It is not necessary that I see every child. I don't need to see every single child. But I think it helps me.
>
> A – To continue your analogy about a sandstorm, I want to give you goggles and a compass.
>
> J – You really are mature. That's very clever."

22. On 14 April 2023, the father sent an email to the parties asserting that family life had been perfect before "the family system" came into it and annihilated it through hundreds of lies and criminal acts. An hour later, A submitted a lengthy complaint to the local authority alleging that he had been badly psychologically abused by both his previous and his present social worker. He asserted that there were "too many things" that they had all done wrong and complained about his exclusion from his sister's event. He said that "I have no more mother" and that his foster carer loved him more than she did. The only happiness he and B had was with their father. The flavour of A's complaint is contained in these passages:

> "This is sick and criminal because you know that and you go on. I wonder if you all have pleasure doing this. What do you want? How many times I heard that everything was for my best interest and my wellbeing. You got it all wrong and you go on.
>
> …
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> B and I had the worse people we could imagine to care about us. You were all wrong on everything. I will never change my mind. I want to live with papa and B.
>
> …

> After that meeting, [foster carer] told me I have been excellent with the judge so nobody, no doctors can write that I can't have my own lawyers. You probably are scared because I will read things that are crazy. I told the judge that one day I will read everything anyway so I want everything now.
>
> I asked many times to have separate representation. Mr Bourne always argued that I couldn't instruct solicitors but I did it many times with the guardians and now with the judge. This has been so stupid and abusive. In reality nobody wants us to express our wishes and feelings, but mostly nobody wants us to read all the court documents. I said to the judge that one day I will [have] access to all documents and I'm sure that I will find a lot of wrong and sick things. I will use all my rights and will take people to court for everything that the family court people have done to me."

23. On 26 April 2023, Ms Gaff sent the note of A's meeting with the judge and his complaint document to Dr Bourne for further advice. Dr Bourne replied on the following day.

> "An individual's capacity to carry out a specific task, in this instance instructing their own solicitor, changes over time, and this is clearly the case for a child as they get older. Hence reconsidering the question some seven months later than my more recent assessment, is a reasonable exercise to undertake.
>
> That said, having re-read what I wrote both in 2021 and [2022] about this, and having read the Note from A's recent meeting with the Judge, my view is that the various issues and factors which I discussed, have not changed. The risk of influence from the father remains the same, hence also the risk of 'parroting' and any 'alienation' that has taken place.
>
> The 'balance of harm' exercise – the harm of instructing vs the harm of not instructing – remains relevant and the factors that are on each side of those scales are still apparent. If A does not receive permission to instruct his own solicitor, he will likely feel deprived of what he thinks would have been best for him and that he has not had any 'agency' – power – to influence proceedings. If he does receive that permission and especially if he does not agree with the Judge's eventual decisions, there is an increased risk of his feeling over-responsible for the 'wrong' things happening. So whereas it seems to me unlikely that A instructing his own solicitor will affect the overall outcome of the case (although A, I think, believes it would), A's sense of responsibility may be increased if he does instruct his solicitor.

…

> I am suggesting, then, that this written discussion is a 'revisiting' of the capacity question which comes to the same conclusion and notes the difficult balance between the two sides of a question, both of which have merit, and which is for the court to decide. My own conclusions though have not changed."

The children's solicitor's application

24. On 4 May 2023, Ms Gaff made an application for an order for separate representation for A in these terms:

> "The child's solicitor, notwithstanding the recent supplemental response from Dr Bourne, would invite the Court to make an order for separate representation of A. A is intelligent and is rising 15. He engaged with the Judge on 8th March and demonstrated an ability to understand the proceedings. He was able to articulate pertinent questions and to listen to responses. Whilst the child's solicitor understands and agrees with Dr Bourne's view that A can often express his father's views, she takes note of the various authorities which emphasise that the influence of a parent on a child's views should not be given too much weight in the gauging of whether a young person has sufficient understanding to give instructions to their own solicitor."

25. The application came before the judge on 24 May 2023 at a hearing that began at 2.30 pm and finished at 6.15 pm. The parties were legally represented, except for the father who self-represents by choice. The father supported the application, while the mother and the local authority opposed it.

26. Introducing the application, Ms Gaff contended that there were arguments both ways. She referred to the opinions of Dr Bourne and Dr James, and to a note from A's school earlier in the week that described him as "very vulnerable". She said that "the pivoter of our application really relates to the manner in which A conducted himself at court on 8 March." Evidence was given by Dr Bourne remotely, though no one has suggested that anything he then said altered the effect of his reports.

27. It is clear that, in addition to its late ending, the hearing took place in very suboptimal circumstances. The judge was engaged on other cases in the morning and most of the documentation reached her very late. So much so that the court order contains this striking preamble:

> "The 2,111 page bundle prepared by the Local Authority was not sent directly to the Judge. It was sent by the Local Authority to the Judge's clerk (but not to the Court office or to the Judge) on 22nd May 2023 (at 15:39) when the Judge's clerk was on leave with an out of office message on. It was not resent to the court office or to the Judge. The Mother's position statement was also sent to the Judge's clerk (and not to the court office or the Judge) when the Judge's clerk was on leave on 23rd May 2023 (at 10:54) with an out of office message on. The Local Authority's case summary was sent to the Judge's clerk on the day of the hearing (24th May at 12:26). The hearing was listed to start at

> 2:00pm. The Judge received the 2,111 page bundle, the Local Authority's case summary (6 pages) and the Mother's position statement (15 pages) at various points during a full list on the day of the hearing (24th May 2023). The Court did not adjourn the application but heard the evidence and submissions and gave an extempore judgment (finishing at around 6pm) to avoid further delay, particularly bearing in mind the listed Issues Resolution Hearing/Early Final Hearing on 27th June 2023 and the lack of other time in the diary to list this application before then or within a reasonable timescale."

28. The Family Court is under sustained pressure and this is sadly not an unfamiliar scenario. I admire the judge's commitment to hearing the application for the parties' benefit, despite all the difficulties. However, this came at a price, as she was deprived of the opportunity for fuller reflection.

The judge's decision

29. The judge gave an *ex tempore* judgment allowing A to instruct his own solicitor, a suitable member of the children's panel having been identified by Ms Gaff. She summarised her impressions of A:

> "7. A is a young man. He is still a child but he is a young man, very tall, who I had the benefit (and it was a benefit) of meeting on 8 March 2023, when Ms Gaff and A's foster carer also attended court. When I met him, I was struck by quite how intelligent and articulate a young person A was. I was struck by his maturity, by his ability to maintain a calm presentation, particularly when I am told now (and I had not appreciated it at the time) that he had, just minutes before, learnt about the event that his sister had had arranged for her, which he had not been told about or invited to. I was aware when he came in to see me that he did not know about it at the time, but I had not appreciated until today that it was only a matter of minutes before he came in to see me that he was told about it. He was entirely calm during his meeting with me - calmer, I have to say, than a lot of parents that I see in care proceedings. That news, I know, was devastating for him… But he was composed. He was articulate. He was mature and he is clearly intelligent.
>
> 8. There was a particular part of the conversation I had with him, which I think related to a compass but I would have to look the note of the conversation up and I have not had time to do so today, which made it absolutely clear to me that, whatever the thoughts are about whether the father has influenced A or not in the past, and I have made findings in relation to that, the conversation he had with me and the matters which he responded to me about were entirely from him. It was a dynamic conversation. He did not have an earpiece into which the father was speaking to him. He responded to an analogy and I thought that what he said was very mature, very intelligent and very insightful.
>
> 9. A has, for some time now, had very strong views about separate representation. It is something that has been raised in the background

> on a number of occasions, but it was not until relatively recently that the guardian made the formal application. It has been clear to me for some time, and certainly following my meeting with A, that he does not have much trust or confidence in the system. He does not trust the process. He does not trust the guardian. He does not trust the social worker. He does not trust the therapist. He certainly does not trust Melanie Gill and it may be that he does not trust me, I do not know. But what he feels very strongly is that his voice is not being heard. That is something that the court has to take very seriously when that is what a 14, nearly 15, year old mature young person is saying."

30. The judge referred to *Re R (Children : Control of Court Documents)* [2021] EWCA Civ 162, [2021] 1 WLR 2534. She made clear that if A was separately represented, it would not be on the basis that he had access to every document. Next, she set out the positions of the parties and their various submissions. She directed herself with reference to the authorities identified below and continued:

> "18. The headline legal principles for this judgment… is that the court has to look at the child's understanding and the issue of "sufficient understanding" is set out in the mother's position statement as well. It relates to understanding the nature, purpose, benefits, risks and consequences of proceedings, the ability to retain information discussed, to use and weigh the information and to communicate decisions to others. I have no doubt that A ticks all of those boxes from my discussions with him and my understanding of this case, and I have been the judge involved in this case throughout.
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> 19. Turning to the case of *Re W*, the relevant passages are set out on p.4 of the guardian's position statement. It is right to say that the fact that A's view coincides in this case with the father's view does not mean that it is not A's own view. There was some discussion with Dr Bourne at the hearing today about whether A has been parroting the father's view or whether he has been parroting them and now that view is entrenched as part of A's view. My own sense, having met with A, is that he believes what he says, that that is now his view, and when I discussed matters with him (and I did not question him about things, because that is not the role of a judge meeting a child) and dealt with the matters he raised, it was clear to me that A has a view of his own. Whether it is right or wrong, it is his view. There is, of course, a risk of harm to A in not participating in the litigation. That is something that is referred to in the case of *Re W*.
>
> 20. The case of *CS v SBH* talks about the intelligence of the child, the emotional maturity of the child, reasons for wishing to instruct a solicitor, understanding of the issues, understanding of the process of the litigation and the court's assessment of the risk of harm to the child of direct participation balanced against the risk of harm arising from excluding the child from direct participation. It is right that it is the court that remains the ultimate arbiter of whether the child "has understanding or sufficient understanding to act without a Guardian." I think that that is an important point to remember because, as in all

> cases where experts are involved, the expert provides a view but it is the court that takes that view of the expert into account but considers it against everything else that the court knows. The expert's view is not determinative. It is one part of the evidential jigsaw, and that applies to Dr Bourne's evidence today. It is the court that makes the ultimate decision."

31. The judge then referred to Dr Bourne's assessment of the risk to A if he was separately represented:

> "23. Dr Bourne has been concerned, both in his reports and at the hearing today (and it is something that is reflected by the mother and also by the local authority) that there may be a negative impact on A if he is separately represented and ultimately the decision at the final hearing does not go in his favour. It is said that he might feel responsible. On the other hand, it is said that if he is given separate representation or allowed to have separate representation, that he might feel empowered and it might validate his negative views of his mother. It is said that separate representation may impact A's relationship with B and that it might impact B's progress in spending time with her mother. It is said that it might impact his life and his studies. But it is pretty clear to me from my involvement in this case and from having met A that this litigation forms a very large part of his life. He is preoccupied by it as it is. He may well find it difficult to read summaries about what his parents and the other professionals are saying. He may find it difficult to read documents if he gets to see documents in these proceedings. These are all concerns and they are all valid concerns held by Dr Bourne, held by the mother and also held by the local authority."

32. As to the risk of A breaching confidentiality, the judge concluded that it could not be determinative on its own. She also mentioned his complaint, which had not been in the court bundle, but she said that it did not seem to her to take matters much further.

33. The judge then gave her decision:

> "28. Drawing all these matters to a conclusion, considering the balancing exercise, I agree that this "more an art than a science" and I have had to step back and see where I think the answer lies. I consider that at this stage the answer is pretty clear. I am satisfied and find that A does need separate representation. I was unsure about that before I met with him earlier this year. Having met with him on 8 March 2023, as I say, I was surprised at just how articulate, intelligent and mature he is. That is not to say that he will not find separate representation difficult in terms of schoolwork and in terms of whether or not it gives him the answer that he wants, but I have to balance that against the fact that he is clearly thinking a lot about these proceedings, that he is clearly preoccupied by these proceedings (his long list of matters that he brought to the meeting with me made that quite clear), and the likelihood that if he is told again that he does not have sufficient understanding and does not meet the various criteria set out in the

authorities to get separate representation, that that is likely to be more harmful to him than him having the ability to participate.

29. I do consider that he is sufficiently intelligent, that he has sufficient understanding and, from my assessment of him, I do think that he is emotionally mature enough to be able to instruct solicitors. He has a strong and clear wish, and has had for some time, to have his voice heard. He does not feel that he is being heard in these proceedings. He has a mistrust of professionals, which may include the court. I am not concerned about that. But he has a mistrust of the guardian, who is representing his interests, and whilst he may have been thought to have been parroting his father's views, whether that is right or wrong (and I make no findings beyond the findings I have already made), he has his own clear view and he needs to have confidence in the process and to have confidence that the important decisions about his future, a boy who is approaching the age of 15, will be properly put before the court.

30. I am satisfied and confident that competent solicitors will be able to identify whether or not A is running the father's case, as is the concern. I do not have concerns about that, having met with A. I think he has his own views, whether they are right or wrong, and I do not believe, from my assessment, that he is now the mouthpiece of his father.

31. I am satisfied that he understands the process and that he understands that his wishes and feelings are part of the matters which the court has to consider, and that is from my discussions with him. I made it clear to him, I believe, that he is not responsible for decisions and I think that was something I raised in my letter to the children some time ago.

32. As far as the risk that he would feel responsible is concerned, that will be managed by the court, by the professionals around him and by his own solicitor. He is a sufficiently mature child, I think, to understand that the responsibility for decisions is with the court and if, ultimately, the court does not agree with him, then I am confident that he will not blame himself, but will blame others, including me and other professionals who took a view which is against his. But I am confident that he will not feel responsible. More importantly, he will want his voice to be heard and I believe that he will feel frustrated if he is not able to have his voice heard in the way that he clearly wants.

33. I am conscious that I am not imposing too high a level of understanding on A, as the cases say that I should not. I am satisfied that the risk of harm is higher if he is not afforded separate representation. He does have a clear understanding of the issues in this case. He might not agree with the professionals, but that is not a reason to refuse him separate representation. The decisions to be made are extremely important in relation to his future. He is nearly 15 and, as I say, I consider him to be a mature, reflective (to some extent), but an

> intelligent young man and I consider that the time has now come for him to be separately represented. That is my decision."

The appeal

34. The judge stayed the relevant parts of her order to enable the mother to apply for permission to appeal. On 30 May 2023, this court extended the stay and on 14 June 2023 permission to appeal was granted by King LJ on four grounds.

35. The mother, supported by the local authority, advances these grounds of appeal:

    1) Error in the judge relying, or overly relying, on her own evaluation of A from meeting him.

    2) Procedural unfairness in the judge relying on her own evaluation without the parties being aware of it until after she made her decision.

    3) Error in placing insufficient weight on the clear conclusions of Dr Bourne;

    4) Error in giving insufficient consideration of the extent to which A had been alienated by the father and the impact of this on the sufficiency of his understanding.

    5) Error in giving insufficient consideration to the consequences for B of separate representation for A.

    The second ground is not one for which permission was given by King LJ but I would admit it as being a consequential aspect of the first ground. The fifth ground rested on Dr Bourne's view that for B to know that A is separately represented would risk derailing the progress she has made in rebuilding her relationship with her mother. However, it was not strongly relied on, and I will say no more about it.

36. On behalf of the mother, Ms Brereton KC and Mr Shama argued that the judge's meeting with A took on an improper role. The meeting was not for the purpose of obtaining information about the issue of separate representation, but the judge placed major significance on it, seen in eleven paragraphs spread throughout the judgment, most of which are cited above. This was contrary to guidance and authority, which provides that such meetings are not to become part of the forensic process. In this case, the meeting was at the heart of the judge's decision and the judge's substituted her own assessment, eclipsing that of the expert. However, she was an arbiter, not an expert or an assessor and if she needed to rely on impressions received in the meeting with A, she should have told the parties and put the issue into the forensic arena. Instead, the parties had no warning, which was procedurally unfair.

37. In relation to grounds 3 and 4, this was a case at the severe end of the alienation spectrum, involving removal into foster care, deprivation of parental contact and a package of therapy. Since the judgment, the father had been imprisoned and a book published. The judge did not take these matters into account when making her decision and, while she referred to Dr Bourne's evidence, she did not explain why she rejected his consistently stated opinion, formed over time, in favour of her own single encounter.

38. These submissions were seconded by Ms Davies for the local authority. She pointed to paragraph 30 of the judgment (cited above) as a particularly stark example of the judge's failure to take into account her previous findings. Ms Davies noted that the father continues to dispute the court's findings and to make damaging and derogatory comments about the mother and professionals; the judge failed to consider the impact on A's welfare of additional exposure to such statements.

39. The father addressed us on a range of largely historic matters. He said that he did not know if A should have separate representation or not, but overall argued that both children should be separately represented so that they could express themselves. He denied alienating the children ("I simply connected") and described the experts as forming a small collusive group ("I will take them to the High Court for acts of extreme gravity"). He said that for the judge the meeting on 8 March had been "a kind of a U-turn", with her realising that A speaks for himself and is not "a piece of me". The papers in the private and public law proceedings now run to over 7000 pages. Both children had been seeking their own solicitor since the end of 2020; A would suffer a physical and psychological reaction if he does not have one and his mother would face more resistance and opposition. Therapy had not helped as A would not commit to it.

40. On behalf of the guardian, Ms Ancliffe KC and Ms Honeyman submitted that this was a case management decision, that the judge directed herself correctly in law, and that this court should be slow to conclude her decision was wrong. There are difficulties in applying the guidance about judicial meetings with children. Judges are encouraged to meet a child, and it is impossible then for them to rid the mind of impressions formed in the meeting, even more so when the decision before the judge is to assess the child's competence. Here, it would have been wholly artificial for the judge to put out of mind her impressions of A, which chimed with those of Ms Gaff. Not setting out to gather evidence does not mean that any evidence that does appear should be ignored. In any case, a careful reading of the judgment as a whole shows that the judge's subjective impressions were not determinative. For both Dr Bourne and the judge the critical factors were the authenticity of A's views and the risk of harm if the application was or was not granted. Time had passed since Dr Bourne first formed his view and the judge was not obliged to accept it. His report was merely one part of the evidential jigsaw, and the judge was entitled to make the contrary findings that she did, including the crucial one that A was more likely to hold others responsible than to blame himself for adverse outcomes in the proceedings. The judge was right to find of A's view that "right or wrong, it is his view". A does not trust professionals. He is vehemently against the local authority's current care plan for him and Ms Gaff cannot fully argue his case while taking instructions from the guardian. If he had separate representation, he could apply for contact with his father and he could apply to discharge his care order. The logical consequence of the mother's argument is that he would need to be represented through a guardian throughout his minority unless he changed his view, which seems very unlikely. This would be a perverse outcome, especially in light of the growing recognition of the need for older children to have a voice in family proceedings.

41. Ms Ancliffe noted that the judge mentioned her impressions of A during hearings on 9 March and 5 May, and all parties knew ahead of time from the note that she had been impressed by A's maturity. Ms Gaff's position statements made it clear that the

meeting was pivotal in her own evaluation and that she was concerned about her ability to fully represent A's views in circumstances where they conflicted with those of the guardian. It was open to any party to have sought to cross-examine Ms Gaff. If A has his own solicitor, it is not likely that he will be allowed access to all documents or to be in court throughout hearings.

42. All counsel made submissions about the law, to which I now turn.

Children instructing solicitors

43. The United Nations Convention on the Rights of the Child 1989 has been ratified by the United Kingdom and although it is not incorporated into domestic law, is reflected in our legislation and practices. Article 12 provides:

> "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

44. Section 41(1) Children Act 1989 provides that the court shall appoint a guardian for a child who is subject to specified proceedings, which include applications to make or revoke a care order, unless satisfied that it is not necessary to do so in order to safeguard the child's interests. That is what occurred in this case, both in 2020 when the care proceedings began and in 2022 when the discharge applications were made.

45. The rules governing the representation of children in family proceedings are found in Part 16 of the Family Procedure Rules 2010 ('the FPR') and PD16A. As noted by Baker LJ *in Re Z (Interim Care Order)* [2020] EWCA Civ 1755, [2021] 2 FLR 830, they are far from straightforward. Under PD16A 6.2, the guardian must appoint a solicitor for the child unless one has already been appointed.

46. The Children Act 1989 of course provides by s. 1(3)(a) that the court must have particular regard to the wishes and feelings of the child, and by FPR 16.20(3) this duty also falls upon the guardian.

47. FPR 16.29 concerns the question of who instructs the child's solicitor:

> "(1) Subject to paragraphs (2) and (4), a solicitor appointed –
>
> (a) under section 41(3) of the 1989 Act; or
>
> (b) by the children's guardian in accordance with the Practice Direction 16A,

> must represent the child in accordance with instructions received from the children's guardian.
>
> (2) If a solicitor appointed as mentioned in paragraph (1) considers, having taken into account the matters referred to in paragraph (3), that the child –
>
> (a) wishes to give instructions which conflict with those of the children's guardian; and
>
> (b) is able, having regard to the child's understanding, to give such instructions on the child's own behalf,
>
> the solicitor must conduct the proceedings in accordance with instructions received from the child.
>
> (3) The matters the solicitor must take into account for the purposes of paragraph (2) are –
>
> (a) the views of the children's guardian; and
>
> (b) any direction given by the court to the children's guardian concerning the part to be taken by the children's guardian in the proceedings.
>
> …"

48. Rule 16.29(1) accordingly provides that the solicitor must conduct the proceedings in accordance with instructions received from the guardian, whose role is to act on behalf of the child with the duty of safeguarding the child's interests having regard to the principles set out in the welfare checklist: FPR 16.20(1) and (3). The guardian must also advise the court of the wishes of the child in respect of any matter relevant to the proceedings, including the child's attendance at court: PD16A 6.6(b).

49. However, where the solicitor considers, having taken into account the guardian's views and any direction given by the court, that the child (a) wishes to give instructions which conflict with those of the guardian and (b) is able, having regard to the child's understanding, to give instructions on his or her own behalf, the solicitor must conduct the proceedings in accordance with instructions received from the child: rule 16.29(2) and (3). In such a case the guardian will continue to carry out their duties, usually without legal representation.

50. A solicitor acting for a child in family proceedings will be a member of the Law Society's Children's Panel, an accreditation signifying experience and expertise in representing children. The judgement about whether a child has the ability to instruct is quintessentially a matter for the solicitor in the unique circumstances of the case and expert advice will not always, or even usually, be necessary. However, this was not a usual case, as Ms Gaff recognised. She did not simply start to take instructions from A under rule 16.29, but sensibly issued an application so that the matter could be decided by the court, which has the ultimate right to decide whether a child has the ability to instruct a solicitor: *Re CT (A Minor) (Wardship - Representation)* [1993] 3 WLR. 602, [1993] 2 FLR 278 at 614F.

51. Since the advent of the Children Act 1989 there have been a number of judicial considerations of this question. Important early decisions of this court were given in *Re S (A Minor) (Independent Representation)* [1993] 2 W.L.R. 801, [1993] 2 FLR 437 and *Re CT* (above). In the former case, Sir Thomas Bingham MR said this at 814F:

> "The Act of 1989 enables and requires a judicious balance to be struck between two considerations. First is the principle, to be honoured and respected, that children are human beings in their own right with individual minds and wills, views and emotions, which should command serious attention. A child's wishes are not to be discounted or dismissed simply because he is a child. He should be free to express them and decision-makers should listen. Second is the fact that a child is, after all, a child. The reason why the law is particularly solicitous in protecting the interests of children is because they are liable to be vulnerable and impressionable, lacking the maturity to weigh the longer term against the shorter, lacking the insight to know how they will react and the imagination to know how others will react in certain situations, lacking the experience to measure the probable against the possible. Everything of course depends on the individual child in his actual situation. For purposes of the Act, a babe in arms and a sturdy teenager on the verge of adulthood are both children, but their positions are quite different: for one the second consideration will be dominant, for the other the first principle will come into its own. The process of growing up is, as Lord Scarman pointed out in *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112, 186B, a continuous one. The judge has to do his best, on the evidence before him, to assess the understanding of the individual child in the context of the proceedings in which he seeks to participate."

52. The next decision is *Mabon v Mabon* [2005] EWCA Civ 634, [2005] 3 WLR 460. That was a private law case concerning six children of which the eldest three were aged 17, 15 and 13. This court allowed their appeal from a refusal to allow them to instruct their own solicitor. Thorpe LJ said this of the private law equivalent to the present rule 16.29:

> "26. In my judgment, the rule is sufficiently widely framed to meet our obligations to comply with both Article 12 of the UN Convention and Article 8 of the European Convention, providing that judges correctly focus on the sufficiency of the child's understanding and, in measuring that sufficiency, reflect the extent to which, in the twenty-first century, there is a keener appreciation of the autonomy of the child and the child's consequential right to participate in decision-making processes that fundamentally affect his family life."

and

> "29. In testing the sufficiency of a child's understanding I would not say that welfare has no place. If direct participation would pose an obvious risk of harm to the child arising out of the nature of the continuing proceedings and, if the child is incapable of comprehending that risk, then the judge is entitled to find that sufficient understanding has not been demonstrated. But judges have to be equally alive to the risk of emotional harm that might arise from denying the child knowledge of and participation in the continuing proceedings."

53. *Re W (A Child) (Care Proceedings: Child's Representation) Practice Note* [2016] EWCA Civ 1051, [2017] 1 WLR 1027, concerned FW, a 16-year-old girl who had been made subject to a care order in March 2015. During those proceedings, which included a fact-finding hearing in November 2014 and a welfare hearing in March 2015, she had instructed a solicitor directly. Nine months after that, in February 2016, the local authority applied for a recovery order returning FW to foster care after she had run away to her parents. FW in turn issued an application to discharge the care order. The judge refused her application to be allowed to reinstruct her former solicitor and directed that her views be presented by her guardian.

54. This court allowed an appeal by FW, with the main judgment being given by Black LJ, whose observations I shall seek to summarise. Between paras. 26 and 28 she acknowledged that views about children's involvement in legal proceedings have continued to evolve since *Mabon*. She affirmed that what is sufficient understanding in any given case will depend upon all the facts. She regarded it as of considerable significance that the girl had instructed her own solicitor virtually throughout the care proceedings and that that solicitor, with her accumulated knowledge, considered her to have sufficient understanding to instruct her in the new proceedings.

55. Between paras. 32 and 35 Black LJ expressed the view that caution needed to be exercised before allowing a conclusion that a child was the parents' mouthpiece or agent to deny a child of F's age her own solicitor on the basis that she lacks sufficient understanding. She explained the difficulties in teasing out whether a view is in whole or part the child's independent view or the product of influence; the fact that the child's views are considered to be misguided in some way does not necessarily mean the child does not have sufficient understanding. There is a danger in the court becoming embroiled in satellite litigation about the child's understanding, where that is a matter that remains contentious in the main proceedings. Caution is also required when taking account of the risks to a child from direct participation, so that the judge does not stray into treating the question as a welfare assessment rather than an assessment of understanding. There will often be a risk of harm not only from participating in the litigation but also from not participating. It is important to consider in practical terms the consequence of refusal of representation: in that case further disaffection and the lost opportunity for engagement with a trusted professional.

56. The relevant part of Black LJ's judgment ends with these general observations:

> "36. Sometimes there will be a clear answer to the question whether the child is able, having regard to his or her understanding, to give their own instructions to a solicitor. In cases of more difficulty, the court will

> have to take a down to earth approach to determining the issue, avoiding too sophisticated an examination of the position and recognising that it is unlikely to be desirable (or even possible) to attempt to assemble definitive evidence about the matter at this stage of the proceedings. All will depend upon the individual circumstances of the case and it is impossible to provide a route map to the solution. However, it is worth noting particularly that, given the public funding problems, the judge will have to be sure to take whatever steps are possible to ensure that the child's point of view in relation to separate representation is sufficiently before the court. The judge will expect to be guided by the guardian and by those solicitors who have formed a view as to whether they could accept instructions from the child. Then it will be for the judge to form his or her own view on the material available at that stage in the proceedings, sometimes (but certainly not always) including expert opinion on the question of understanding (see *Re H (A Minor) (Care Proceedings: Child's Wishes)* (*supra*) at page 450). Understanding can be affected by all sorts of things, including the age of the child, his or her intelligence, his or her emotional and/or psychological and/or psychiatric and/or physical state, language ability, influence etc. The child will obviously need to comprehend enough of what the case is about (without being expected to display too sophisticated an understanding) and must have the capacity to give his or her own coherent instructions, without being more than usually inconsistent."

57. In *CS v SBH (Appeal FPR 16.5: Sufficiency of Child's Understanding)* [2019] EWHC 634 (Fam), [2019] 1 WLR 4286 at paras. 63-65, Williams J analysed and adopted the approach recommended in *Re W*, leading in that case to the conclusion that a 12-year-old child did not have sufficient understanding to instruct a solicitor to pursue an appeal in private law proceedings.

58. Drawing matters together, this survey of the rules and the cases shows that, whether the answer falls to be given by the child's solicitor or by the court, the question will be: *Does this child have the ability to instruct a solicitor in the particular circumstances of the case, having regard to their understanding?* The assessment will be based on a broad consideration of all relevant factors and any opinions from solicitors and experts. The guidance in *Re W* bears repeating:

> "Understanding can be affected by all sorts of things, including the age of the child, his or her intelligence, his or her emotional and/or psychological and/or psychiatric and/or physical state, language ability, influence etc. The child will obviously need to comprehend enough of what the case is about (without being expected to display too sophisticated an understanding) and must have the capacity to give his or her own coherent instructions, without being more than usually inconsistent."

The assessment will be case-specific. It will not be driven by welfare factors, or by a theoretical comparison between protection and autonomy, but by a practical assessment of the child's understanding in the particular context of the case. There are no presumptions and care will be taken not to over-value any particular feature.

The consequence of a sound assessment will be that the child's rights and interests are respected and preserved.

Children meeting judges

59. I describe these meetings as 'children meeting judges' rather than 'judges meeting children' to emphasise that the meeting is for the benefit of the child, not the judge.

60. The purpose and format of these meetings fall under the *Guidelines for Judges Meeting Children who are Subject to Family Proceedings*, issued by the Family Justice Council and Sir Nicholas Wall P in April 2010. They are creditably concise:

> "**Purpose**
>
> The purpose of these Guidelines is to encourage Judges to enable children to feel more involved and connected with proceedings in which important decisions are made in their lives and to give them an opportunity to satisfy themselves that the Judge has understood their wishes and feelings and to understand the nature of the Judge's task.
>
> **Preamble**
>
> In England and Wales in most cases a child's needs, wishes and feelings are brought to the court in written form by a Cafcass officer. Nothing in this guidance document is intended to replace or undermine that responsibility.
>
> - It is Cafcass practice to discuss with a child in a manner appropriate to their developmental understanding whether their participation in the process includes a wish to meet the Judge. If the child does not wish to meet the Judge discussions can centre on other ways of enabling the child to feel a part of the process. If the child wishes to meet the Judge, that wish should be conveyed to the Judge where appropriate.
>
> - The primary purpose of the meeting is to benefit the child. However, it may also benefit the Judge and other family members.
>
> **Guidelines**
>
> 1. The Judge is entitled to expect the lawyer for the child and/or the Cafcass officer:
>
> (i) to advise whether the child wishes to meet the Judge;
>
> (ii) if so, to explain from the child's perspective, the purpose of the meeting;

(iii) to advise whether it accords with the welfare interests of the child for such a meeting take place; and

(iv) to identify the purpose of the proposed meeting as perceived by the child's professional representative/s.

2. The other parties shall be entitled to make representations as to any proposed meeting with the Judge before the Judge decides whether or not it shall take place.

3. In deciding whether or not a meeting shall take place and, if so, in what circumstances, the child's chronological age is relevant but not determinative. Some children of 7 or even younger have a clear understanding of their circumstances and very clear views which they may wish to express.

4. If the child wishes to meet the Judge but the Judge decides that a meeting would be inappropriate, the Judge should consider providing a brief explanation in writing for the child.

5. If a Judge decides to meet a child, it is a matter for the discretion of the Judge, having considered representations from the parties -

(i) the purpose and proposed content of the meeting;

(ii) at what stage during the proceedings, or after they have concluded, the meeting should take place;

(iii) where the meeting will take place;

(iv) who will bring the child to the meeting;

(v) who will prepare the child for the meeting (this should usually be the Cafcass officer);

(vi) who shall attend during the meeting – although a Judge should never see a child alone;

(vii) by whom a minute of the meeting shall be taken, how that minute is to be approved by the Judge, and how it is to be communicated to the other parties.

It cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence. That is the responsibility of the Cafcass officer. The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her.

6. If the meeting takes place prior to the conclusion of the proceedings –

> (i) The Judge should explain to the child at an early stage that a Judge cannot hold secrets. What is said by the child will, other than in exceptional circumstances, be communicated to his/her parents and other parties.
>
> (ii) The Judge should also explain that decisions in the case are the responsibility of the Judge, who will have to weigh a number of factors, and that the outcome is never the responsibility of the child.
>
> (iii) The Judge should discuss with the child how his or her decisions will be communicated to the child.
>
> (iv) The parties or their representatives shall have the opportunity to respond to the content of the meeting, whether by way of oral evidence or submissions."

61. Meetings of this kind have been considered in three decisions of this court and one decision in the Family Division.

62. In *Re KP* [2014] EWCA Civ 554, [2014] 2 FCR 545 there had been a meeting lasting over an hour between a child aged 13 and the judge in child abduction proceedings. This court allowed the appeal, saying that:

> "59. … during the judicial interview the judge sought to probe and to tease out what, if any, reasons there were behind K's stated views. In this manner we consider that the conduct and the content of the interview achieved a pivotal status in the judge s evaluation of the case. It can only have been during, and as a result of, that process that the judge came to the central conclusion in her analysis of the case, namely that the child s wishes and feelings, whilst passionately and emotionally expressed, lacked any rationality. Put another way, the judicial interview provided key evidence on which the judge relied in coming to her conclusion. For the reasons that we have already explained, the judge was in error in approaching her meeting with K in this manner. The material gleaned from their encounter goes to the heart of the judge's analysis and, in consequence, that analysis cannot stand and must, reluctantly, be set aside by allowing the appeal."

63. At an early stage the court made these general observations:

> 56. … i) During that part of any meeting between a young person and a judge in which the judge is listening to the child's point of view and hearing what they have to say, the judge's role should be largely that of a passive recipient of whatever communication the young person wishes to transmit.
>
> ii) The purpose of the meeting is not to obtain evidence and the judge should not, therefore, probe or seek to test whatever it is

> that the child wishes to say. The meeting is primarily for the benefit of the child, rather than for the benefit of the forensic process by providing additional evidence to the judge. As the Guidelines state, the task of gathering evidence is for the specialist CAFCASS officers who have, as Mr Gupta submits, developed an expertise in this field.
>
> iii) A meeting, such as in the present case, taking place prior to the judge deciding upon the central issues should be for the dual purposes of allowing the judge to hear what the young person may wish to volunteer and for the young person to hear the judge explain the nature of the court process. Whilst not wishing to be prescriptive, and whilst acknowledging that the encounter will proceed at the pace of the child, which will vary from case to case, it is difficult to envisage circumstances in which such a meeting would last for more than 20 minutes or so.
>
> iv) If the child volunteers evidence that would or might be relevant to the outcome of the proceedings, the judge should report back to the parties and determine whether, and if so how, that evidence should be adduced.
>
> v) The process adopted by the judge in the present case, in which she sought to 'probe' K's wishes and feelings, and did so over the course of more than an hour by asking some 87 questions went well beyond the passive role that we have described and, despite the judge's careful self-direction, strayed significantly over the line and into the process of gathering evidence (upon which the judge then relied in coming to her decision).
>
> vi) In the same manner, the judge was in error in regarding the meeting as being an opportunity for K to make representations or submissions to the judge. The purpose of any judicial meeting is not for the young person to argue their case; it is simply, but importantly, to provide an opportunity for the young person to state whatever it is that they wish to state directly to the judge who is going to decide an important issue in their lives."

64. In 2014 Sir James Munby P asked the Working Group on Children and Vulnerable Witnesses, as one of its tasks, to review the 2010 Guidance in the light of *Re KP*. The Working Group reported in February 2015, recommending (at para, 35(xi)) that the guidance be replaced by a new Practice Direction which would reflect the decision in *Re KP*. However, the report endorses a critique of the Guidance:

> "24. The WG endorse the views expressed by Professor Cooper which illuminate the flaws inherent in the 2010 guidelines which include the judge meeting the young person to hear their wishes and feelings; however, as alluded to above, it is not part of the judicial function to evidence gather so the wishes and feelings expressed at the meeting cannot properly be taken into account when decision making. This a difficult concept for any young

> person to grasp at best; and is misleading as it amounts to saying the judge is here to listen to you but cannot take any notice of what you say. It would seem from the Fortin research that the paternalistic and interpretive approach to the "evidence" or expressed views of children in the past has left them feeling that they were effectively excluded from adult decision making which directly concerned them and would affect them for the rest of their lives."

The recommendation for a Practice Direction has not been acted upon, and it is not clear from the Working Group report how it would differ from the Guidance.

65. In *Re N-A (Children)* [2017] EWCA Civ 230, children aged 15 and 13 met the judge during proceedings about whether they should move abroad with their father. The judge refused the application and on appeal the father complained that, although much of what was said in the meeting was reported to the parties, the judge did not report her doubts, formed at the meeting, about whether the older child's heart was in the project. In dismissing the appeal, Black LJ found that it would have been prudent of the judge to have mentioned her doubt to the parties, but that the decision was not fatally undermined because the thrust of the judge's reasoning about what was in the children's best interests was not in any way dependent on what she surmised about their wishes.

66. In *B v P (Hague Convention - Children's Objections)* [2017] EWHC 3577 (Fam), [2018] 1 WLR 3657, children aged 12 and 11 who had a diagnosis of autism met the judge, MacDonald J. Following the meeting, he was sufficiently concerned about the children's presentation to raise with the parties the question of whether an expert report by a child psychologist should be commissioned and, having heard submissions, ordered that a report be obtained. In his later judgment, MacDonald J made these observations:

> "44 The foregoing minutes of the meeting also demonstrate some of the difficulties of judges seeing children, particularly in the context of the injunction against using such meetings as a means of gathering evidence. Whilst that injunction has an entirely legitimate procedural and forensic foundation, it can place judges in some difficulty where it is inevitable that, upon meeting a child, a judge begins to form an impression of the child, to see how the presentation of the child compares to that contended for by the parties and, as in this case, to hear statements from the child that may be relevant to the issues that the court is tasked with deciding. This is a predictable and unavoidable consequence of meeting and talking to children. In this case, meeting the children resulted in them telling me directly that they objected to returning to Hungary, and their emotional presentation when articulating their objections gave me some impression of the potential impact of such a return on their emotional wellbeing.
>
> 45 How is a judge to treat such information? On the basis of the *Guidelines for Judges Meeting Children who are subject to*

> *Family Proceedings* and subsequent authority, the judge may not rely on that information as evidence in the proceedings. Against this, where the judge, as in this case, considers that what he or she has seen in the meeting with the children may have some relevance to the issues to be determined in the proceedings, it would be entirely artificial, and potentially unjust simply to banish those matters from his or her mind without more. Within this context, it may be said that the injunction against using a meeting with the child as a means of gathering evidence contained in the *Guidelines for Judges Meeting Children who are subject to Family Proceedings* is far easier to articulate in theory than it is to apply in practice.
>
> 46 On the face of the 2010 Guidelines, the difficulties I have articulated fall to be dealt with pursuant to paragraph 6(iv) of those guidelines, which paragraph provides that the parties or their representatives shall have the opportunity to respond to the contents of the meeting, whether by way of oral evidence or submissions. In this case, having heard submissions from the parties on the content of my meeting with the children, I decided that, in light of my concerns about the children's presentation during the course of the meeting and having regard to the issues raised in this case, the appropriate course was to authorise the joint instruction of an independent expert in the manner that I have already described."

67. Lastly, a judicial visit to an adult in hospital was considered in *Re AH (Court of Protection - Judicial Visits)* [2021] EWCA Civ 1768, [2022] 1 WLR 2437. Moylan LJ explained that the appeal would be allowed for two reasons:

> "71 … First, it is strongly arguable that the judge was not equipped properly to gain any insight into AH's wishes and feelings from his visit. Her complex medical situation meant that he was not qualified to make any such assessment. If the visit was used by the judge for this purpose, the validity of that assessment might well require further evidence or, at least, further submissions.
>
> 72 Secondly, in order to ensure procedural fairness, the parties needed to be informed about this and given an opportunity to make submissions."

Sir Andrew MacFarlane P emphasised (para. 78) that there must be:

> "clarity over the purpose of the encounter and focus on the fact that at all times the judge is acting in a judicial role in ongoing court proceedings which have yet to be concluded."

68. In my view, these decisions show that the Guidance remains a workable framework; indeed applications to this court for permission to appeal arising from meetings between children and judges are rare. It encourages judges, in appropriate

circumstances, to meet children as one way of helping them to feel more involved in and connected with proceedings that affect them in important ways. It makes clear that the judge decides whether, when and how a meeting will take place: these decisions are very much a matter for the discretion of the individual judge in the individual case. It emphatically stresses that the meeting is not for the purpose of gathering evidence. Another critical feature is that a meeting should help the child to understand that it is the judge (and no one else) who is responsible for the decisions in the case and that the outcome is never the responsibility of the child.

69. The issues raised by the Working Group and by MacDonald J arise from the fact that these arrangements are a middle way between the unacceptable extremes of children never seeing judges and meetings becoming evidence-gathering sessions carried out by a judicial officer in the absence of the parties.

70. The right approach is for the judge to give close consideration to the Guidance with its numbered guidelines when planning and taking part in a meeting with a child. This will increase the likelihood of the meeting being as valuable as it can be for the child, whilst taking care to ensure that it is not allowed to develop into an evidence-gathering exercise. That risk may increase if the meeting becomes as long as it was in *Re KP* and in the present case; by keeping the meeting to an appropriate length, its purpose will be clearer to everyone. Where the judge does consider that something of evidential significance has arisen in the meeting, the parties should be made aware, as occurred in *B v P*.

71. Finally, the Guidance affirms that the primary purpose of the meeting is to benefit the child but it realistically acknowledges that it may also benefit the judge and other family members. I take that to mean no more than that a meeting with a child can provide an additional perspective for the judge, as I said in *Re A (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent)* [2017] EWFC 4, [2017] 4 WLR 201 at [137]. The meeting does not change the evidence, but it may illuminate certain aspects of it. There is nothing wrong with that, and provided that the judge observes the limits surrounding the meeting and the parties have a clear account of what has occurred, problems are unlikely to arise in the great majority of cases. Nothing that we have heard on this appeal suggests otherwise.

Application to the present appeal

72. This was an evaluative case management decision (albeit an important one) by a judge who was thoroughly immersed in the affairs of this family. A decision of that kind is entitled to the very widest degree of latitude on appeal. I have nevertheless concluded, with real reluctance, that the decision that A has the ability to instruct a solicitor directly was wrong in the distinctive circumstances of this case.

73. The starting point is that the context for the decision is contained in the judgment in January 2022, cited at paras. 8-10 above. At that time, the judge clearly identified the risk from the father and the compelling reasons why A, then aged 13, did not have the ability to instruct his own solicitor:

> "[The father] is setting the children on a road to significant mental health issues, which are likely to have long lasting effects

> on their ability to function on a day to day basis, both as children and as adults." (para. 20)
>
> "The risk of harm to the children from the father is significant and ongoing and the father currently shows no indication of changing his behaviour." (para. 21)
>
> "Both of the children are heavily influenced by the father. They cannot think for themselves. Their views, wishes and feelings have been influenced and distorted by the father." (para. 180)

and much more in the same vein.

74. The judge's doubts about the father's ability to change his approach were well-founded. His attitude is unchanged. Since the care order was made, he has been convicted of breaching the court's order. The book in A's name was published. A has withdrawn from therapy. In April, A made a complaint against all professionals reflecting precisely the same blinkered attitude as his father. On an objective basis, the most optimistic view of A's understanding of the issues is that it has not improved since January 2022.

75. Because of the history, the court had the advantage of expert advice from Dr Bourne. It also had some evidence from Dr James and from the school, and the view of the guardian and his solicitor. Dr Bourne's opinion about A's ability to instruct was clear and unchanging, exemplified in his report of September 2022:

> "The main arguments 'for' his doing so remain his overall intelligence and his strength of feelings about this, even if that is in part based on false beliefs or premises. But the origins of those beliefs very much reflect the lack of independence of thought that A has been able, or allowed, to develop. The argument against his having sufficient independence to instruct, and the harm done through assigning him that level of authority and responsibility, is in my opinion very strong, and therefore means that A is not competent to instruct his own solicitor."

76. How, then, did the judge come to reach the opposite conclusion? The answer clearly lies in her response (and that of Ms Gaff) to the meeting with A. As to that, there were in my view three errors of approach.

77. First, it was the judge's role to adjudicate, not to assess, but she made her own assessment of A's ability to instruct in a manner that went well beyond the permissible use of a meeting of this kind. As in *Re KP* and *Re AH* (and in contrast to *Re N-A*), the assessment went to the heart of the resulting decision. The problem was compounded by the judge not expressly disclosing to the parties the reliance she was planning to place on her own view, so that they were deprived of the opportunity to alert her to how questionable that would be.

78. Second, and more substantively, the reasons given by the judge for her assessment are not sustainable. This can most conveniently be illustrated by reference to the judge's image of the sandstorm, where A's response ("To continue your analogy about a sandstorm, I want to give you goggles and a compass.") obviously made an

impression. Further thought would have shown that it was in fact a vivid sign of A's lack of understanding. His proposal that it is the judge, and not he himself, who needs goggles and a compass encapsulates his lack of insight and his blanket rejection of her assessment of what has happened in this family. In the same key, the father submitted to us that the judge had made a U-turn and that she now realised that A speaks for himself. Both father and son are under the same delusion about the cause of the problems and the opportunity for A to instruct his own solicitor gives him a powerful extra dimension within which to perpetuate this damaging narrative, oblivious to the harm that he might be causing himself.

79. Third, the judge described A as very mature and very insightful, while the evidence from two psychiatrists was that he is emotionally immature and lacking insight. Since September 2021, Dr Bourne had repeatedly advised that A has 'absorbed' his father's damaging belief system and that this was more insidious and far-reaching than mere 'parroting'. The judge nevertheless preferred her personal assessment that A has "his own clear views". She rightly directed herself that experts advise and judges decide, and she referred to Dr Bourne's opinion, but she gave no reason for rejecting it, as required by *Re B (Care: Expert Witnesses)* [1996] 1 FLR 667; *Re D (A Child)* [2010] EWCA Civ 1000, [2011] 1 FLR 447. This was all the more necessary when she had whole-heartedly accepted his advice the year before.

80. I consider that the judge was distracted by general observations about exercising caution before depriving intelligent older children of their own representation, and that it led her to overlook how extreme and effective the father's abuse has so far been. This is not a case where A had his own solicitor in the previous proceedings, as in *Re W*. Nor is it a case where a child has formed an unwise view of their own, even if it might be coloured by adult influence. Instead, these children have been the victim of severe alienation of a kind that should have led the judge to firmly reject the application for A to be allowed to instruct a solicitor directly, for all the reasons she gave when making these care orders.

81. I am sure that (as the judge said) A will feel frustrated by not having his voice heard in the way that he wants. The father has, without concern, predicted that the mother will face more resistance and opposition. It would however be naïve to expect that A or his father will be satisfied by any outcome they do not want, and the prospect of A, who has clearly show his interest in gaining access to the court papers, being satisfied with limited disclosure is unlikely.

82. In parting from the case, I again recall the pressured circumstances in which the judge was taking her decision. There has been no complaint about the quality of what was after all an *ex tempore* judgment given after hours. I also recognise that she had balanced submissions from the guardian and his experienced solicitor, but their footing was no stronger than hers. It is always a professional challenge to represent an older child whose wishes conflict with a guardian's assessment, but it was not suggested to the judge or to us that the situation was untenable, any more than it had been during the previous proceedings.

83. I therefore consider that the grounds of appeal have been made good. I would allow the appeal and discharge the order permitting A to instruct his own solicitor. Despite the detour that the case has taken, there is no reason why the judge should not continue to have conduct of the proceedings and every reason why she should: none of the

parties suggested otherwise. I express the hope that there will now be an early resolution of the discharge applications, as these children have been the subject of proceedings of one kind or another almost continuously since 2019.

Lady Justice Elisabeth Laing:

84. I agree.

Lord Justice William Davis:

85. I also agree.