This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Case No: BH21P00764

IN THE FAMILY COURT SITTING AT BOURNEMOUTH

Courts of Justice
Deansleigh Road
Bournemouth
BH7 7DS

Date: 6 October 2021

Before:

HIS HONOUR JUDGE DANCEY

- -

Between:

A Mother	**Appellant**
- and -	
A Father	**Respondent**

Patrick Goodings (instructed by **Alderson Law LLP**) for the **Applicant**
Adam Langrish (instructed by **Ellis Jones**) for the **1st Respondent**

Hearing date: 30 September 2021

- -

JUDGMENT

His Honour Judge Dancey:

Introduction

1) On 30 September 2021 I gave permission to appeal to the mother of three children, aged 10, 8 and 5 and went on to hear her appeal from an order made by a district judge three days earlier that she return the children from the North of England to Dorset and for shared time with their father. In default of return the district judge made a transfer of 'residence' order.

2) By way of brief background, the parents started their relationship in 2009 and in 2010 the mother moved to live with the father in Ireland where they married (in 2010, although they are unable to agree which month). The family moved to England in 2017. The father is black African, the mother white English, so the children have dual heritage.

3) On 9 July 2021 the mother removed the children from the family home where they all lived. The father came home from work to find them gone. He had no forewarning of the mother's intentions. Initially the mother took the children to Yorkshire and then to a refuge further north.

4) Initial messaging between the parents suggested the mother had no problem with the father having unsupervised contact with the children.

5) When that did not happen the father made an application to the court on 24 August, seeking a specific issue order requiring the mother to return the children to Dorset, a prohibited steps order preventing the children being removed from Dorset or England (he thought she might have removed them to Scotland as she did once before) and a child arrangements order so he could spend time with them.

6) On 1 September the mother made an application to transfer the proceedings to the court near where they were living, for a prohibited steps order to prevent the father removing the children from the UK (because he had connections in South Africa, Ireland and Switzerland and had talked about needing the children's passports in case he needed to move quickly). She also sought a live with order and a child arrangements order to deal with contact. In her application the mother said that the father had been controlling and had left the children alone and had been involved in a sexual assault on her.

Summary of decision

7) I have decided to allow the appeal and to set aside the order.

8) It seems to me that it would be proportionate for the father to move out of the family home to let the mother and children back in. He has agreed to that but the mother has not. She wants to make a statement explaining why and I need to see that before making a decision.

9) If the mother does move back in, I anticipate it would be on the basis of undertakings or injunctions preventing the father going to the house or the children's schools while the mother's allegations are investigated. In that way future risk of harm could be managed safely.

10) Cafcass need to see the children to find out what they are saying. Until that has been done I am not in a position to consider whether they can safely spend time with their father.

11) Clearly a decision needs to be made quickly and I will hold another hearing in about three weeks to consider whether the mother should return the children to the family home and, if Cafcass has been able to see the children, whether to make an order so they can spend time with their father.

Hearing before the recorder on 6 September 2021

12) The application was initially heard by a recorder on 6 September, remotely by Microsoft Teams. The parties were represented, the father by Mr Langrish, who also represented him before the district judge and on appeal to me, the mother then by a solicitor, Mr Goodings representing her before the district judge and before me on the appeal.

13) The recorder directed safeguarding checks by Cafcass and a further hearing on 27 September (which was to be before a circuit judge but for listing reasons was heard by the district judge). He did not make any substantive order on the application. A recital to the order recorded the hope that the children's schools in Dorset would keep places open for them. Another recital recorded the mother's position that, provided the father surrendered his passports, she had no objection in principle to the father having unsupervised direct contact with the children in the area where they were living.

14) In his judgment (a note of which has been agreed) the recorder noted that the father had, as he admitted, lied to the mother about being HIV+, a fact she did not discover until 7 years into the marriage and the birth of their three children. The recorder described this, rightly, as an "*horrendous deception*".

15) In a statement filed on the day of the hearing before the recorder the mother said:

    a) she was frightened of the father;

    b) she did not believe the father could be trusted;

    c) he had lied to her and consistently sought to undermine her and control her emotionally, intellectually and physically and manipulated her financially;

    d) she was receiving help from domestic violence support services;

    e) he had made reference in his statement to the fact that he and the children attended church but that she had stopped to put her in a bad light and as part of his ongoing control and abuse;

    f) his description of her as an 'unemployed housewife' was an indication of his controlling behaviour and attitude;

    g) he did not understand the impact of his actions regarding HIV – he had lied to her about medication she found and, although she has been tested negative for HIV and told the children will therefore also be clear, he was concerned that both she had contracted it and the eldest child was born with it (but did nothing to enable medical diagnosis or treatment);

    h) transmission of a STD is listed on government websites as domestic abuse (and Mr Goodings pointed out the serious criminal offences it involves);

    i) she had in 2019 gone to Scotland with the children, returning in August 2019 because she had been told she may be arrested for abduction;

j) at that point she returned to the family home because the father told her he would lose the tenancy – this she says is also an example of his controlling behaviour;

k) she said she needed her own bedroom and asked him not to enter it, but on her birthday in 2019 he just walked in and did not respect her boundaries – he also walked in on her in the bathroom;

l) when they lived in Ireland (until 2017) he had driven dangerously with the children in the car;

m) he had also left the children alone in the park to go cycling;

n) he had been sexually abusive, laying on top of her and holding her down while having sex so that she could not breathe;

o) she left the father, taking the children, on 9 July 2021 because, as a final straw, she believed he was stealing from work and she thought she would get into trouble.

16) In her statement the mother said she had tried to discuss contact but discussion descended into the father telling her she was not allowed to leave. She said there needed to be an order about contact. The children did not want 'sleepovers' at the father's home. They were happy with what was going on. The eldest child was already receiving counselling and the younger two were also awaiting it.

17) The recorder noted that the court had to consider the welfare checklist and Practice Direction 12J: Child Arrangements and Contact Orders: Domestic Abuse and Harm. He was concerned that the court should not sanction unilateral removal of children without an evidential basis but needed to balance that against removal from their primary carer (the father always having worked and the mother giving up her paid work to look after the children). He decided he was not in a position to make a decision without a Safeguarding letter from Cafcass.

18) On16 September a support worker at the refuge where the mother was staying with the children wrote referring to allegations of sexual assault, coercive control, gaslighting and exertion of dominance. It was said that the mother, now free from abuse and able to gain control over her own life, had improved in her mental health, self-confidence, self-worth and self-esteem. The letter spoke positively of the mother's relationship with and nurture of the children and her prioritisation of her and the children's safety and "*wonderful parenting skills*".

Cafcass safeguarding letter – 21 September 2021

19) The family court adviser completing the Cafcass safeguarding letter of 21 September recorded that the children had been known to the local authority since 2017 following a referral from the mother concerned about the children having contact with the maternal grandparents. In April/May 2019 (at about the time the mother went to Scotland) there were GP and police referrals when the mother reported domestic abuse by the father and physical abuse of the children (although the GP referral only refers to physical abuse of her son). In February 2021 the school raised concern because the middle child has a bruise on his eyelid but the case was closed.

20) Neither parent is known to the police.

21) Cafcass spoke to the mother to check on the children's welfare and her whereabouts. They did not speak to the father. The mother said the father was controlling and coercive and she had reported rape last year but did not press charges. The police had wanted to press charges in respect of him lying about being HIV+. She thought he had put hers and the children's lives at risk by his behaviour and her mental health had been hugely impacted. She said his dishonesty about this was domestic abuse. She said the father is misogynistic and he expects females to be submissive – she was concerned about his attitude on the children.

22) In the analysis section of the safeguarding letter Cafcass noted that the children, who had not had contact for two months, may have witnessed domestic abuse and may have mixed feelings about being apart from their father. They said that failure to disclose that he was HIV+ raised serious concerns regarding domestic abuse and the father's ability to prioritise and protect the children. Applying PD12J, the mother should list her allegations with a view to a fact-finding hearing with level 2 police checks. Due to the allegations made, Cafcass expressed the opinion that neither direct nor indirect contact were safe or in the children's best interests at that time.

23) Cafcass suggested GP's reports about the father's HIV status, including when he was diagnosed, and about the oldest child's sensory processing disorder, a condition it was said the father did not accept.

Hearing before the district judge and judgment – 27 September 2021

24) The hearing before the district judge on 27 September was also conducted remotely by Microsoft Teams. A half day had been allowed and it was agreed the hearing would be by submissions without hearing evidence.

25) I have an agreed note of the district judge's judgment. A transcript is awaited.

26) The district judge started by reminding himself that the children's welfare was his paramount concern. He noted that the children had lived and attended schools locally for some 4 years before being uprooted and moved some 300 miles away. He said the mother's reasons for moving were unclear, although noted the allegations in her statement, in particular what the district judge described as his "*lack of candou*r" about his HIV status (an expression about which Mr Goodings is critical and the prism through which he says the judgment should be viewed). The district judge noted that the HIV issue had been known about since at least 2018 with the parties living under the same roof (albeit in separate bedrooms) since the mother's return from Scotland in August 2019 until she left in July 2021.

27) The district judge was concerned that he had little information about the schools the children were attending or their accommodation in the North. He understood that the mother's brother and sister lived locally here. The court, he said, would need to be told why it was in the children's best interests to reside unilaterally in the North with their mother.

28) The district judge said he understood that PD12J and the decision [of Hayden J] in *F v M* [2021] EWFC 4 would likely be engaged the approach was that taken in internal or external relocation cases. He said that not a shred of evidence had been shown as a basis for saying it was in the best interests of the children to be removed from their home environment, schools and local connections. While the district judge accepted that the mother might, after a fact-finding hearing, be

shown to have been justified in moving from the family home, moving her so far away was disproportionate.

29) The district judge expressly considered the welfare checklist under section 1(3) of the Children Act 1989 in the context of return to the area. He did not have the children's expressed wishes and feelings. Their education needs were being met by their schools locally. Those schools needed to know whether the children would be returning or their places would be lost, in which case the children's educational needs would be failed. The district judge referred to the huge change in the children's circumstances and their ages and considered the likely impact of change was emotional harm.

30) The district judge concluded that the children should be returned to this area and resume attendance at their schools here. In terms of accommodation, it was a matter for the mother how she achieved that.

31) If the mother refused to return to the area the district judge said it was inevitable that there should be an order that the children live with their father in the interim. He was, he said, conscious that the safeguarding letter suggested no contact but that was predicated on the mother's allegations and no interview with the father whatsoever.

32) The district judge noted the recital in the order of 6 September setting out the mother's position about contact. The father having surrendered his passports the mother had then changed her mind and no contact had taken place since 9 July. If that continued the children would undergo significant emotional harm. On the mother's return a schedule of contact should be set up. There would be a suspended transfer of residence order in case mother did not return the children.

33) There was then a short break for the parents and their legal representatives to consider the practical implications of the decision. The father returned to propose a shared care arrangement with equal time spent with each parent. The mother's position remained no contact (direct or indirect) in line with the Cafcass recommendation. She indicated she was considering an appeal (although did not seek permission from the district judge).

34) There was discussion about accommodation with the mother's brother or sister. It was said that the brother was a drug user and the sister could or would not have the mother and children to stay. It was pointed out by Mr Langrish that, despite knowing this was the issue to be decided, no effort had been made by the mother to address the issue of accommodation locally. The district judge reiterated that the recorder had made clear that the issue where the children should live would be determined at that hearing and that she had agreed unsupervised contact, contrary to her position as stated to Cafcass.

35) In view of the positions put the district judge agreed the father's proposal of shared care. He gave the mother 48 hours to return the children, approaching the local authority for bed and breakfast accommodation if necessary. Failing that there would be a transfer of residence order on an interim basis "*whilst we sort out PD12J and directions that we can now go through*". This would enable the children to return to their schools without delay (and there was no evidence they were currently attending school at all). They needed to be back in the locality with their friends and their father. Any further delay, concluded the district judge, would cause them further emotional harm.

36) Having made orders to put those arrangements into effect (and a prohibited steps order to prevent the mother removing the children from Dorset) the district judge gave directions in line with the Cafcass recommendations for a schedule of allegations supported by a statement by the mother and a response by the father with level 2 police checks and a GP's letter about the fathers' HIV status. A letter about the eldest child's condition was not needed as the father did not dispute he had it. There was to be a listing for a First Hearing Dispute Resolution Appointment when Cafcass could be available in 4 weeks.

Cafcass section 16A risk assessment

37) On 29 September Cafcass filed a section 16A risk assessment with the court. The author was the same Family Court Advisor who had prepared the safeguarding letter. I directed that should be made available to the parties ahead of the hearing on 30 September.

38) Cafcass said they had been "made aware" of the outcome of the hearing on 27 September. Given that Cafcass were not present at that hearing and the resulting order had yet to be drawn and sent to them, the only sensible conclusion is that the mother or somebody on her behalf contacted Cafcass to let them know what had happened.

39) Cafcass said that allegations of rape, controlling and coercive behaviour and physical harm to the children had been made, supported somewhat in the local authority checks. The mother had now made a report to the police and was to be interviewed. It appeared Cafcass had now spoken to the father as he had accepted he had withheld his HIV status. Cafcass considered he was somewhat dismissive about this and minimised the impact this had on the mother.

40) Cafcass said that safeguarding advice that contact was not safe at this time had been disregarded.

41) It was noted that the father was not concerned about the mother's care of the children, that she was in a 3-bedroom house, that the children were attending school and settled in the refuge. The letter from the refuge was noted, in particular the improvement in the mother's mental health since being there.

42) It was said that the children were apparently upset (I assume as reported by the mother) and saying they did not want to have contact with their father. Having not had contact for some 10 weeks, the FCA was of the view that contact was being re-introduced in a way that was not safe or child focussed (the plan was for the children to return to their previous schools and be collected by their father at the end of their first day back for the weekend). If, as the local authority referrals suggested, the children had been physically abused by their father they would not only be scared and resistant to contact but also at risk of further physical harm in his care.

43) The mother told Cafcass that, in August 2021, she had told the father she needed to come and collect her things. She came with her brother and sister when he was at work. The father arrived 10 minutes later and acted in an intimidating manner, unpacking what she was packing. The police attended as the father had reported the mother breaking into the house (Mr Langrish told me she had used bolt-cutters to do so until Mr Goodings objected to new evidence being submitted by counsel in submissions). The mother said she had messages telling her she could come and collect her things and was of the view the father had set the situation up.

44) Importantly, the mother said she was worried about how the father would respond when she returned and she was worried he would kill her. I addressed this specifically with Mr Goodings in the hearing to try and understand the basis for that worry.

45) The FCA pointed out the expectation under PD12J that contact should not expose the child or other parent to an unmanageable risk of harm and the increased risk of harm when a victim of domestic abuse seeks to end the relationship. By forcing the mother and children from the refuge and back to the area they may be at increased risk, particularly when she is now planning to press charges.

46) The children would have a 6 hour+ journey, placed in their previous school and then collected by their father the first day for overnight contact. They would, thought the FCA, likely be exhausted, confused, unsettled and frightened if the allegations are accurate. Even if contact was safe it would have to be reintroduced in a stepped and thought-out manner.

47) The risk assessment concluded by expressing the view that the mother and children needed to stay in the refuge with a fact-finding hearing before contact could be considered. The current order, they said, was unsafe and placed the mother and children at risk. They had made a child protection referral to the local authority based on the concerns raised in the risk assessment.

The appeal

48) The mother's solicitors filed her appellant's notice on 28 September. On the same date I listed the application for permission to appeal, with appeal to follow if granted, at 11:00 on 30 September allowing 4 hours. I directed an expedited transcript of the hearing on 27 September and the district judge's judgment. I stayed the order of 27 September pending the hearing on 30 September.

49) I also directed the mother's solicitors to send me direct by email an agreed bundle of the documents relevant to the issues to be determined by no later than 4pm on 29 September. Notwithstanding that I provided my direct email address, the solicitors sent the bundle to the court office and it did not reach me from that source before the hearing. It was not until the morning of 30 September, when I pointed out that I had not received the bundle, that the father's solicitors sent me a copy. I had been able to read the father's statement, the agreed note of the district judge's statement, the grounds of appeal and the skeleton arguments that were sent to me direct by Mr Goodings and Mr Langrish. What I had not seen until I received the bundle was the note of the recorder's judgment and the mother's statement. Because of other hearings that morning, I had little time to consider those documents in advance of the hearing.

50) The hearing on 30 September was held remotely by Teams at the request of the mother's solicitors (given the distance involved in travelling to court).

51) The hearing was also attended remotely by Louise Tickle, accredited press representative. Having invited submissions, I have conducted the hearing in private but given permission to Ms Tickle to publish information subject to the restrictions set out in FPR 30.12A(3)(a) and (b) to prevent identification of the parents and children.

52) At the start of the hearing I canvassed the possibility of the father moving out of the family home, allowing the mother to move back in with the children and

enabling them to go back to their schools locally. This would be on the basis that protective measures would be put in place while the mother's allegations were investigated, preventing the father coming to the home or communicating with the mother. This had not been considered before so I gave time for instructions to be taken.

53) Mr Goodings told me that the mother did not feel able to move to this area and would like to make a statement setting out her reasons why. He told me that the father had raped the mother throughout the relationship and had told her GP who had treated her for intimate injuries. She was worried the father would kill her, as she had told Cafcass in the context of the risk assessment. I asked on what this concern was based and was told the rapes, his dangerous driving and lying about HIV. When I enquired further about the allegation of rape, Mr Goodings told me that the allegation was of forced, non-consensual sex. On two occasions the mother was pinned down. In addition to that she was raped throughout the relationship. This is what she has told the police and her GP.

54) Mr Langrish told me that the father needed no persuading and had immediately volunteered to move out of the home to enable the children to return.

55) I then explored with Mr Goodings the mother's allegations. The mother had in responding to the father's statement raised some allegations (set out at paragraph 15 above) but it was not easy to understand, given what she had said to Cafcass and what Mr Goodings was now telling me, quite what the allegations involved and their extent.

56) I indicated that I would give permission to appeal and invited Mr Goodings and Mr Langrish to make their submissions on that basis. I said I would give my reasons when giving judgment.

Grounds of appeal and the parties' submissions

57) I am going to set out here the grounds of appeal relied on by Mr Goodings and his and Mr Langrish's submissions.

Ground 1: The judge ordered the children to return to the [South] area with no evidence as to where they were to live.

Mother's submissions

58) The judge having raised the issue of lack of evidence about the children's living arrangements in the North, he then declined an invitation from Mr Goodings to hear oral evidence from the mother as to those arrangements. Mr Goodings said the judge refused to hear evidence on the basis that the mother had had her chance to file updating evidence, although the recorder had not directed any further evidence. No prohibition had been set on oral evidence by the recorder and the district judge should have heard from the mother rather than apply what appeared to be a 'relief from sanctions' approach and declining to hear from her absent a statement.

59) By ordering the mother to return the children without evidence where they could go the judge had, said Mr Goodings, denied himself the opportunity to properly assess what was in the children's best interests. He referred to the judge's remark, "*how mother achieves that is a matter for her*", resulting in his inability to properly consider the welfare checklist, including any change in the children's circumstances.

60) The judge then found himself in the invidious position, because there was not evidence that there would be accommodation where the children could live with the mother, of having to order a potential transfer of living arrangements. This seemed to be an afterthought and a method of enforcement which was wrong.

61) Mr Goodings pointed out that the fact that the sister had a large house locally and could stay with her brother had first featured in Mr Langrish's note to the court on 27 September. Had the mother been able to give evidence she would have explained that her sister would or could not have her and her brother is a drug addict.

62) Anticipating an argument that the mother should have explored accommodation locally, Mr Goodings told me that nobody expected that the court would not 'comply' with the Cafcass recommendations. She was left with 48 hours to find somewhere to live which created the situation in which the judge made the suspended live with order and shared care arrangement.

<u>Father's submissions</u>

63) It was agreed that the hearing before the district judge would proceed by way of submissions. The mother had not sought any direction to file further evidence, despite being represented. There would be no opportunity for anything she said in evidence to be verified or scrutinised on behalf of the father.

64) What became clear was that, despite being aware that this was the issue to be determined by the court at the hearing, the mother had given no thought to the possibility of the children being returned to their schools and lives in this area. The judge was bound to be concerned about the mother's motivation and willingness to comply with the court's order. Given the urgency regarding schooling and that places were being kept open until that day, the last thing to do was adjourn for further enquiries about accommodation, given the mother had already had over a fortnight to make such enquiries and deal with it by evidence.

65) The judge knew the children could return to their home with their father. He found the removal of the children and their current circumstances would be causing them emotional harm. This finding is not challenged by the mother. He was aware the mother had a strong relationship with her sister and room to accommodate her and/or the children. Mr Langrish described the sister as an ally who had helped the mother break back into the family home in August. The sister's adult children had moved out. The mother had options if inclined to use them. The court was left with the impression that the mother was unlikely to be proactive or receptive to returning the children.

66) The mother was effectively trying to hold the court to ransom by saying her way is the only way.

Ground 2: The judge did not consider PD12J. Specifically, he did not consider PD 12J paras 25-27 or address the factors contained therein within his judgment.

<u>Mother's submissions</u>

67) PD12J paragraphs 25 to 27 make clear (in summary) that, when directing a fact-finding hearing, the court should only make an interim child arrangements order if satisfied the order would not expose the child or other parent to an unmanageable risk of harm, giving particular consideration to the likely effect on the child, including on the care given to the child by the parent making allegations

of domestic abuse, of contact and any risk of physical, emotional or psychological if an order is made or declined.

68) Despite being urged during the hearing, the judge failed to address PD12J at any point in his judgment and failed therefore to consider the harm the mother and/or the children would suffer if he made the orders sought, the level of supervision required, the risk to the children and the impact domestic abuse could have on their emotional well-being and the safety of the mother. Mr Goodings refers in this context to the letter from the refuge support worker concerning the improvement in the mother's mental health.

69) In his oral submissions Mr Goodings placed most force in this ground. He said the recorder had clearly determined that PD12J was engaged. The district judge was obliged to engage with it. It was clear that the father's behaviour, if only the deception about HIV, fell within the definition of domestic abuse in PD12J. Instead the district judge treated this as a relocation case. He did not grapple with the balance of harm in forcing the mother and children to move back to the area.

70) The only real consideration of PD12J in the judgment follows the making of the return and interim child arrangements orders, followed by timetabling for schedules of allegations and responses with a view to considering the need for a fact-finding hearing. These almost appeared to be final determinations. PD12J was fully engaged and needed to be considered before that point.

Father's submissions

71) Mr Langrish rolled up his submissions on grounds 2 and 5 (failure to consider PD12J, *H v N* and *F v M*).

72) Taking the mother's statement at its highest and assuming her allegations to be true, no concerns were reported by the mother since October 2019. While the judge rightly acknowledged he might have to consider the need for a fact-finding hearing, this was not a decision he was able to reach on the information before him, nor was he asked to.

73) The judge was satisfied that, taking the mother's case at its highest, this was not a situation where he had to be concerned about the children spending time with their father, as they had done for the entirety of their lives and long after the mother found out about his HIV. The mother had not produced any evidence, nor identified any risk, of harm posed to the children and no agencies were involved or concerned. What was it, Mr Langrish asks, that the judge failed to weigh up and apply?

74) In his oral submissions, Mr Langrish pointed to the need to avoid automatic or 'knee-jerk reaction' as soon as allegations are made. Without any proper scrutiny Cafcass automatically recommended no contact. If we look at what is alleged we see the mother increasing the severity of her allegations as she doesn't get what she wants. There seems on the mother's case to be a presumption of a 'magic wand' in PD12J that an order should not have been made. The question is, where is the risk and could it be managed by the court?

75) It was, says Mr Langrish, enormously significant and fundamental to the case that the mother had said before, during and after the hearing on 6 September that there was no problem with the father coming to the North for unsupervised contact, the only identified concern being flight risk, managed by surrender of his passports.

The suggestion that PD12J trumps the making of orders flew in the face of the mother's case down to that point. This is why the concern of both the recorder and the district judge was about the harm caused to the children by their removal.

76) *Ground 3: The judge failed to consider the factors set out in s.1(3) of the Children Act when making the suspended live with CAO and the shared care spend time with CAO.*

Mother's submissions

77) The judge only considered the welfare checklist in the context of the specific issues application – the return of the children to the area – and did not undertake a separate welfare analysis in respect of the suspended transfer of residence or shared care orders which appeared to make as an ' after thought' and without holistic evaluation.

78) The judge failed to consider harm in the context of the mother's allegations and the further change of circumstances of moving them from where they were currently living.

79) Mr Goodings relies on *Re R (A Child)* [2021] EWCA Civ 1019, underlining the requirement for a robust and reasoned evaluation of the checklist, and, from *Re G (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965, the need for an holistic evaluation of the child's welfare having regard in particular to the relevant checklist.

Father's submissions

80) It was clear the district judge determined that removal from their home was contrary to the children's interests and took return to their settled status quo as his starting point. Where there was no risk of harm posed by either parent and where both parents had been caring for the children until 9 July, the judge was entitled to take the view that the most important welfare issue was their return home to their schools, friends and lives here and that was the crux of the welfare decision.

81) In reality further consideration of the welfare checklist would have been artificial and unnecessary. The mother's deliberate choice in refusing to entertain the possibility of return and not to furnish the court with information prevented such an exercise being carried out meaningfully.

Ground 4: The judge did not attach sufficient weight to the mother's allegations of rape, coercive and controlling behaviour and the accepted facts of the father failing to disclose his positive HIV diagnosis to the mother.

Mother's submissions

82) Mr Goodings identified the mother's allegations from her statement as allegations of deception about HIV, controlling and coercive behaviour, domestic abuse including dangerous driving, sexual abuse and rape.

83) The district judge was wrong to conclude that the mother's reasons for relocation were unclear. His reference to the HIV deception as a "*lack of candour*" (an expression which caused the mother considerable distress) is the prism through which Mr Goodings invites me to view the district judge's approach to the evidence. He refers me to the CPS charging guidelines about transmission of

sexual infections which can amount to grievous bodily harm which, when intentional, potentially carries a maximum life sentence.

84) The fact that the deception was now historic matters not because of the gravity of what he did. Although the father makes admissions he concerningly minimises his behaviour.

<u>Father's submissions</u>

85) Given that in her statement the mother raised no concerns since October 2019, having chosen to return to the family home in August 2019, it cannot sensibly be argued that the judge was wrong not to have given the allegations that were raised more weight.

86) The mother was obviously entitled to move on and live apart from the father but even her own counsel described to the district judge the steps she took as "*unpalatable decision-making*".

87) At the hearing before the district judge it was not the mother's case that she was concerned the father might kill her as she now suggests. The allegations, as they were presented at the hearing on 27 September, fell well short of an explanation for a move to the other end of the country and the district judge was fully entitled to find that was a disproportionate reaction.

Ground 5: The judge failed to consider the guidance set out in Re H-N and others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448 and the guidance in respect of coercive and controlling behaviour set out in F v M [2021] EWFC 4.

<u>Mother's submissions</u>

88) Despite being referred to Hayden J's decision in *F v M* the district judge disregarded the mother's allegations of coercive and controlling behaviour either on the basis that the mother had agreed unsupervised contact at the hearing on 6 September or that she had returned from Scotland to the family home in August 2019.

89) Mr Goodings makes the established point that victims of domestic abuse often return to their abuser and may make many attempts before successfully leaving.

90) The transfer of living arrangements followed by a direction for a schedule of allegations was, as Mr Goodings puts it, an "*incomprehensible juxtaposition of approach*".

<u>Father's submissions</u>

91) Mr Langrish made his submissions about grounds 2 and 5 together, so see above.

Ground 6: The judge repeatedly stated that the mother had to provide evidence as to why the children should remain in [the North]. In doing so he reversed the burden of proof in respect of the father's application for interim return.

<u>Mother's submissions</u>

92) Mr Goodings conceded that there was no burden of proof on the father, bringing the application, to show that the children should be returned. It is simply a welfare decision. So the suggestion that the district judge reversed a burden of proof was, he accepted, misconceived and not pursued.

93) This led to a discussion about the proper approach to unilateral removal of children within England and Wales and whether any analogy was to be drawn with Hague Convention abduction cases where the presumption is summary return subject to one of the defences being established. The district judge had expressed that he approached the case as one of relocation. It appeared in fact he adopted a summary return approach in line with the Hague jurisdiction. Mr Goodings said that the underlying purpose of the Hague Convention is to prevent parents taking their children overseas to another jurisdiction. He also pointed out that the criminal law also draws the distinction between removal out of the UK and internally (section 1 of the Child Abduction Act 1984).

Father's submissions

94) The district judge correctly determined that the welfare decision was where the children should live and be schooled during the proceedings and decided that was best served by them returning home. He was bound to highlight that nowhere in her evidence did the mother appear to consider why her actions were in the best interests of the children or the impact on them of behaving as she had.

Ground 7: The judge wholly rejected the safeguarding recommendations of Cafcass without a proper basis for doing so and absent any proper analysis.

Mother's submissions

95) The district judge wrongly dismissed the Cafcass safeguarding recommendations on the simple basis that they had not spoken to the father. Mr Goodings asked at the start of the hearing on 27 September that Cafcass speak to both parents and provide an updating letter, but the district judge rejected that approach. The district judge disregarded the Cafcass view that PD12J was engaged. The recommendations were in large part at least based on the HIV deception, admitted by the father, and the fact Cafcass had not spoken to him was not a good enough reason to depart from the recommendations without analysis.

96) Mr Goodings submitted that concessions made by the mother under pressure and at court concerning contact should not bind her moving forwards. This does not extinguish her case regarding domestic abuse.

97) It is a rare thing for Cafcass to file a section 16A risk assessment and the fact they did so in this case on learning of the outcome on 27 September is an indication of their concern.

Father's submissions

98) It was, says Mr Langrish, a fundamental unfairness that Cafcass made recommendations to the court without speaking to the father, particularly where they had spoken to the mother and apparently without appreciating that her open position during July and August and at the first hearing on 6 September was that unsupervised contact was safe. Her position only changed after the hearing on 6 September when it became apparent that her decision to remove the children so far away was disproportionate and unreasonable.

99) So the Cafcass recommendations were based on a flawed understanding and the district judge was right to deal with them as he did.

Legal principles

Appeals

100) The test for grant of permission to appeal is whether (a) the appeal would have a real prospect of success (which I accept to mean arguable rather than 50:50) or (b) there is some other compelling reason why the appeal should be heard: FPR 30.3(7).

101) The test on substantive appeal is whether the decision was (a) wrong or (b) unjust because of a serious procedural or other irregularity: FPR 30.12(3).

102) Mr Langrish refers to two well-known authorities on the margin to be given to decision-making, cited in *H v N*. In *G v G (Minors: Custody Appeal* [1985] 1 WLR 647 Lord Fraser said in relation to cases concerning child welfare issues:

> *"In most of these cases there is no right answer. All practicable answers are to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision is wrong, and unless it can say so, it will leave his decision undisturbed.'*

103) Lord Fraser adopted what Asquith J said in *Bellenden v Satterthwaite* [1948] 1 All ER 343:

> *"We are here concerned with judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible and is, in fact, plainly wrong, that an appellate body is entitled to interfere."*

104) I add what Munby P said about the approach to appeals in Re F (Children) [2016] EWCA Civ 546:

> *"22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The Judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."*
>
> *23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):*
>
> > *"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case ... These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he*

should perform his functions, and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis"."

105) So the court must give a decision and explain the reasons for it so that the parties and appeal court can understand how the decision was reached. The court does not have to deal with every point raised provided it is evident that all relevant factors have been considered. The comments in *Piglowska* about the section 25 MCA 1973 checklist apply equally to the section 1(3) welfare checklist.

The approach to allegations of domestic abuse – PD12J

106) As PD12J has been a focus for this appeal, I will set out what I see to be the relevant provisions as to the court's approach.

107) The starting point is paragraph 4 of PD12J:

> 4. Domestic abuse is harmful to children, and/or puts children at risk of harm, whether they are subjected to domestic abuse, or witness one of their parents being violent or abusive to the other parent, or live in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with domestic abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both of their parents.

108) Paragraph 5 sets out the requirements on the court:

> 5. The court must, at all stages of the proceedings, and specifically at the First Hearing Dispute Resolution Appointment ('FHDRA'), consider whether domestic abuse is raised as an issue, either by the parties or by Cafcass or CAFCASS Cymru or otherwise, and if so must –
>
> - identify at the earliest opportunity (usually at the FHDRA) the factual and welfare issues involved;
> - consider the nature of any allegation, admission or evidence of domestic abuse, and the extent to which it would be likely to be relevant in deciding whether to make a child arrangements order and, if so, in what terms;
> - give directions to enable contested relevant factual and welfare issues to be tried as soon as possible and fairly;
> - ensure that where domestic abuse is admitted or proven, any child arrangements order in place protects the safety and wellbeing of the

child and the parent with whom the child is living, and does not expose either of them to the risk of further harm; and

- ensure that any interim child arrangements order (i.e. considered by the court before determination of the facts, and in the absence of admission) is only made having followed the guidance in paragraphs 25–27 below.

In particular, the court must be satisfied that any contact ordered with a parent who has perpetrated domestic abuse does not expose the child and/or other parent to the risk of harm and is in the best interests of the child.

109) By paragraph 7 the court is required to have regard to allegations and admissions of domestic abuse and harm or risk of harm when considering whether the statutory presumption of involvement of a parent in a child's life applies.

110) By paragraph 14 the court must ascertain and record whether domestic abuse is raised as an issue likely to be relevant to the welfare decision and specifically whether the child and/or parent would be at risk in the making of any child arrangements order.

111) Paragraphs 25 to 27 are important in the context of the current appeal:

> 25. Where the court gives directions for a fact-finding hearing, or where disputed allegations of domestic abuse are otherwise undetermined, the court should not make an interim child arrangements order unless it is satisfied that it is in the interests of the child to do so and that the order would not expose the child or the other parent to an unmanageable risk of harm (bearing in mind the impact which domestic abuse against a parent can have on the emotional well-being of the child, the safety of the other parent and the need to protect against domestic abuse including controlling or coercive behaviour).
>
> 26. In deciding any interim child arrangements question the court should–
>
> (a) take into account the matters set out in section 1(3) of the Children Act 1989 or section 1(4) of the Adoption and Children Act 2002 ('the welfare check-list'), as appropriate; and
>
> (b) give particular consideration to the likely effect on the child, and on the care given to the child by the parent who has made the allegation of domestic abuse, of any contact and any risk of harm, whether physical, emotional or psychological, which the child and that parent is likely to suffer as a consequence of making or declining to make an order.
>
> 27. Where the court is considering whether to make an order for interim contact, it should in addition consider –
>
> (a) the arrangements required to ensure, as far as possible, that any risk of harm to the child and the parent who is at any time caring for the child is minimised and that the safety of the child and the parties is secured; and in particular:

(i) whether the contact should be supervised or supported, and if so, where and by whom; and

(ii) the availability of appropriate facilities for that purpose;

(b) if direct contact is not appropriate, whether it is in the best interests of the child to make an order for indirect contact; and

(c) whether contact will be beneficial for the child.

112) Given that the father has admitted the HIV deception, and accepting that as domestic abuse, paragraphs 36 and 37 also apply:

> 36. In the light of any findings of fact or admissions or where domestic abuse is otherwise established, the court should apply the individual matters in the welfare checklist with reference to the domestic abuse which has occurred and any expert risk assessment obtained. In particular, the court should in every case consider any harm which the child and the parent with whom the child is living has suffered as a consequence of that domestic abuse, and any harm which the child and the parent with whom the child is living is at risk of suffering, if a child arrangements order is made. The court should make an order for contact only if it is satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before during and after contact, and that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent.
>
> 37. In every case where a finding or admission of domestic abuse is made, or where domestic abuse is otherwise established, the court should consider the conduct of both parents towards each other and towards the child and the impact of the same. In particular, the court should consider –
>
> (a) the effect of the domestic abuse on the child and on the arrangements for where the child is living;
>
> (b) the effect of the domestic abuse on the child and its effect on the child's relationship with the parents;
>
> (c) whether the parent is motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent;
>
> (d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child; and
>
> (e) the capacity of the parents to appreciate the effect of past domestic abuse and the potential for future domestic abuse.

113) Paragraphs 38 and 39 set out the considerations in relation to contact where domestic abuse has taken place:

> 38. Where any domestic abuse has occurred but the court, having considered any expert risk assessment and having applied the welfare checklist, nonetheless considers that direct contact is safe and beneficial for the child, the court should consider what, if any, directions or conditions are required to enable the order to be carried into effect and in particular should consider –

(a) whether or not contact should be supervised, and if so, where and by whom;

(b) whether to impose any conditions to be complied with by the party in whose favour the order for contact has been made and if so, the nature of those conditions, for example by way of seeking intervention (subject to any necessary consent);

(c) whether such contact should be for a specified period or should contain provisions which are to have effect for a specified period; and

(d) whether it will be necessary, in the child's best interests, to review the operation of the order; if so the court should set a date for the review consistent with the timetable for the child, and must give directions to ensure that at the review the court has full information about the operation of the order.

Where a risk assessment has concluded that a parent poses a risk to a child or to the other parent, contact via a supported contact centre, or contact supervised by a parent or relative, is not appropriate.

39. Where the court does not consider direct contact to be appropriate, it must consider whether it is safe and beneficial for the child to make an order for indirect contact.

114) Coercive and controlling behaviour are defined in paragraph 3 of PD12J:

> "coercive behaviour" means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim
>
> "controlling behaviour" means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour

115) This is in the context of the wider definition of domestic abuse:

> "domestic abuse" includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment

116) In *F v M* Hayden J considered the criminal offence of controlling or coercive behaviour in an intimate or family relationship created by section 76 of the Serious Crime Act 2015, emphasising the repeated and/or continuous nature of coercive and controlling behaviour and the alarm and distress caused by it, as well as the significant impact on the victim's daily life. Hayden J referred to

behaviour as being a pattern of acts rather than a single act, with the significance of individual acts and the nature of the abuse being understood properly only in the context of wider behaviour.

117) In *H v N* the Court of Appeal endorsed the approach of Peter Jackson LJ in *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121:

> "*61. The correct approach to allegations of domestic abuse is set out in PD12J. It sets out a clear and helpful framework to ensure that full consideration is given to the grave effects of domestic abuse, and that proper weight is given to abuse where it is proved. At the same time, the framework requires an exercise of judgement by the court in each case where the issue may arise. Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to "domestic abuse", where "coercive behaviour" is defined as behaviour that is "used to harm, punish, or frighten the victim…" and "controlling behaviour" as behaviour "designed to make a person subordinate…" In cases where the alleged behaviour does not have this character it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict*."

118) In its judgment the Court of Appeal agreed with submissions that the overwhelming majority of domestic abuse (particularly that perpetrated by men against women) is underpinned by coercive control such that controlling and coercive behaviour is likely to be the primary question. Where a pattern of such behaviour is established relevant to assessment of risk of future harm, failure expressly to consider the issue may make the decision vulnerable on appeal.

119) What is clear from the judgment in *H v N* is the need for careful application of PD12J when managing cases where domestic abuse is raised as an issue and in the approach to interim child arrangements before allegations can be determined and thereafter when allegations are admitted or proved.

120) The acutely difficult question the present appeal poses is the balance to be struck by the court between (a) the potential harm identified by PD12J of making orders that may place children at risk of the consequences of domestic abuse and (b) the emotional harm and potential relationship damage that may be caused by unilateral removal a considerable distance away from the family home and cessation of contact.

121) These are decisions that have to be made on an urgent basis, often with limited and untested information. Get it wrong and the court risks placing children at risk of harm either way. This is a welfare analysis that requires caution, balance and proportionality – often not easy to achieve at an interim stage.

122) I suggested during submissions that the framework of analysis proposed by Peter Jackson LJ in the different context of public law care and placement orders in *Re F (A Child) (Placement Order: Proportionality)* [2018] EWCA Civ 2761 might be a useful way of addressing the balancing exercise, adapted to the needs of any given case:

a) What is the type of harm that might arise (for present purposes, putting the mother's case at its highest)?

b) What is the likelihood of it arising?

c) What would be the consequences in terms of severity of harm if it happened?

d) Can the risks of harm happening be reduced or mitigated so that they are manageable (including in this case by the making of protective measures)?

e) What does a comparative evaluation of the advantages and disadvantages of each option (here, return or not, contact or not) say about the best interests of the children, having regard also to the need to protect a parent vulnerable to abuse?

f) Is the outcome proposed proportionate?

123) Although I suggest that, for these purposes, the mother's case should be taken at its highest, that does not in my view mean that the court is bound to accept everything that is said without any sort of critical analysis. The process of identifying the relevant issues for determination and gathering evidence from the parties and elsewhere takes time. At the moment police disclosure locally is taking 5 to 6 weeks.

124) In the meantime, allegations remain untested. The court is entitled (indeed I would suggest required) at an interim stage to consider the circumstances around the allegations including:

a) the seriousness of the allegations and the harm that might result;

b) whether there is already evidence from other sources which supports or undermines the allegations;

c) the consistency or otherwise of the allegations (making allowance for the fact that it is in the nature of domestic abuse that accounts are often given piecemeal and incrementally, especially in relation to allegations of sexual abuse which may be delayed because of embarrassment, shame or simply thinking 'I won't be believed');

d) possible motivations for making allegations;

e) how the children are presenting and what they are saying.

Analysis and decision

125) I bear in mind that I am asked to consider the decision of the district judge on 27 September in light the information and evidence before him when he made that decision. I have considerable sympathy for the district judge. He was faced with unclear and developing allegations. He had to make a decision which carried risk of harm to the children either way.

126) It seems to me the district judge was entitled to take into account the following matters:

a) that the parents had lived under the same roof (albeit with separate bedrooms) since the mother returned from Scotland in August 2019 until she left on 9 July 2021;

b) save for the allegations of sexual abuse, the allegations the mother had made at that point appeared fairly historic (while acknowledging that did not make them irrelevant);

c) the timing of the allegations of sexual abuse was unclear;

d) some of the allegations of controlling behaviour relied on were not particularly serious on their own (again while acknowledging that the court has to consider the overall impact of a pattern of behaviours, some of which might appear relatively insignificant in isolation but take on a different hue in context);

e) the mother had gone back to the family home to collect her belongings, albeit with her sister and brother;

f) the mother had been clear in her open position down to and including the hearing on 6 September that she had no concern about unsupervised staying contact, save only the risk flight requiring the surrender of the father's passports;

g) the father having done what was required of him and surrendered his passports, the mother changed her mind without any further incident or new concern as justification;

h) the mother has moved with the children from the family home about as far as was possible within the jurisdiction;

i) that the children had been separated from the father with whom they lived and from their schools, friends and the lives they had known here for 2½ months and there was at least a prospect of emotional harm to them already and if that situation continued;

j) the trigger for the move did not seem to be related to domestic abuse but the mother's concern that the father might have been stealing from work and she might get into trouble as a result;

k) although Cafcass had made recommendations they had spoken only to the mother and not the father and seemed unaware of the mother's open position about contact down to 6 September.

127) Taking these matters into account the district judge was, in my judgment, entitled to take a critical view of the mother's position and weigh that in the balance. He was also entitled to expect a rational explanation for a move of such distance and to consider the proportionality of the mother's decision-making.

128) Although I express no view as a matter of principle whether the court is entitled to, or should, adopt a summary return approach, akin to the Hague jurisprudence, consideration of the likely effect of any change of circumstances may well entitle a court to conclude in a unilateral removal case that the status quo should be re-established if safe to do so while matters are fully investigated. The key is the question of safety.

129) All that said, the district judge was also required to consider the following:

a) the mother was raising allegations of domestic abuse and PD12J was therefore clearly engaged;

b) that required a cautious approach to the question of orders that could and should be made and the potential for resulting harm, including emotional and psychological harm so far as both the children and the mothers were concerned;

c) although Cafcass had not interviewed the father they had made clear, indeed strong, recommendations, based on professional analysis of the information before them, including local authority, GP and police referrals and a possible injury to one of the children (accepting that the referrals might be seen as self-serving);

d) the children had yet to be seen by any professional and, given their ages, it would be important to hear their voices;

e) the children's likely reaction to seeing their father again, or indeed living with him, was unknown;

f) whether or not the mother should have made enquiry about accommodation in this area there was uncertainty about where the children would live if returned (unless with their father);

g) the welfare checklist holistic evaluation of all aspects of the proposed outcome, including spending time or living with their father.

130) While allowing for the fact that the district judge's judgment was extempore and that perfection is not expected, it does seem to me that in respect of the following his approach was wrong:

a) while he was entitled to take a critical or even sceptical approach to the allegations of domestic abuse, it was not open to the district judge effectively to dismiss them summarily or set them entirely to one side for the purpose of making interim orders;

b) as a result the district judge did not engage with PD12J until very much as an after thought once he had determined the interim orders he would make;

c) the district judge dismissed the question of risk without sufficient analysis or information, particularly on the more subtle question of coercive or controlling behaviour and the potential emotional and psychological impact;

d) the district judge gave insufficient weight to the Cafcass recommendations, based on limited information though they were, and failed to explain why he was departing from them in such a wholescale way;

e) while addressing the welfare checklist in relation to the question of removal, the district judge did not apply it holistically in relation to the question of return to the father, or spending time with him.

131) The district judge was entitled to expect an explanation about the move so far away and Ground 6 is not made out. In respect of that Ground the appeal is dismissed.

132) In respect of the remaining grounds however, I have come the conclusion that the appeal should be allowed and the decision of the district judge set aside.

Conclusion and next steps

133) This leaves the question what happens now. The case should, as the recorder indicated, be allocated to circuit judge level and I propose reserving it to myself subject to any representations at the hearing on 6 October when this judgment is handed down.

134) A decision needs to be made now about what happens in the short term. I consider I am in a position to deal with that without the need for a further hearing save as to directions.

135) The father readily indicated his willingness to move from the family home. The mother said she wanted to make a statement about why she did not want to move back to the area.

136) Subject to what the mother says about the impact on her (and the children) of moving back to the area, on which I need to see her statement, it seems to me on what I know at the moment that the risk of harm could be effectively managed by (a) the father moving out, (b) the mother and children moving back in and resuming their lives and schooling locally and (c) protective measures being put in place. That would in my view be a proportionate approach.

137) Provisionally my view as to the way forward is as follows:

a) Cafcass should undertake urgent enquiries, in particular to ascertain what the children are saying and the possible impact of them of spending time with their father (and those enquiries should be undertaken otherwise than by the FCA who prepared the safeguarding letter and risk assessment);

b) we did discuss during the hearing whether this was a case for the appointment of a children's guardian pursuant to FPR 16.4 and I consulted the Cafcass private law service manager in accordance with the practice direction; their view at the moment is that such an appointment is not needed but we agreed that could be reviewed in light of this judgment;

c) I am sending the draft of this judgment to Cafcass to explore (a) and (b) if possible ahead of the hearing on 6 October and with an invitation to attend that hearing;

d) pending further advice from Cafcass there should be no direct contact, although the parties may consider indirect contact to reassure the children that their father is still committed to them;

e) upon receipt of that advice further consideration should be given to the question of direct and/or further indirect contact;

f) the mother should as a matter of urgency (certainly within the next two weeks) prepare her statement, but without a schedule, setting out her reasons for not being prepared to come back to the area and all allegations of domestic abuse on which she asks the court to make findings;

g) there will be a further hearing in three weeks to consider the following:

i) the father moving from the family home;

ii) the mother and children moving back in;

iii) protective measures (either by undertakings or FLA orders) to prevent the father coming to the home, to the children's schools or

communicating with the mother directly or indirectly or the children directly;

h) police, local authority and GP disclosure should be progressed as quickly as possible, although I appreciate some of that will not be available for a hearing in three weeks;

i) in the meantime, the children's schools should be asked to continue holding their places open, perhaps to the end of half term (if they are not prepared to do so for that long I will consider accelerating the timetable suggested above).

138) I say that is my provisional view as to the way forward to allow for any further representations at the hearing on 6 October.

139) I should add that the current practice, driven by resource demands, of Cafcass not interviewing both parents for the purpose of preparation of the safeguarding letter has contributed to the sense that the Cafcass recommendations were based solely on what the mother told them. At the moment Cafcass are leaving it until the FHDRA before speaking to the parties at court. I am concerned that interviewing parents in this pressured environment rather than independently away from court risks safety issues being missed. In this case of course the hearings were on non-Cafcass days and there was no opportunity to speak to both parents even at court. The father was not spoken to by Cafcass at all until after the decision under appeal.

140) That concludes this judgment.