Neutral Citation Number: [2020] EWHC 2666 (Fam)

Case No: MA20P01591

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2020

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

Waqas Ahmed	**Applicant**
- and -	
Sumara Iqbal	**Respondent**

- -
- -

Mr Simon Bradshaw (instructed by the **Bar Direct Access Scheme**) for the **Appellant**
Ms Nazmun Ismail (instructed by **Joe Egan Solicitors**) for the **Respondent**

Hearing dates: 29 September 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 13 October 2020.

Mr Justice MacDonald:

INTRODUCTION

1. This is an appeal against an order of District Judge Carr dated 29 June 2020 prohibiting counsel then acting for the appellant father in proceedings under Part II of the Children Act 1989, Ms Sima Najma, from accepting further instructions from the father in those proceedings. The appeal from the learned District Judge has been listed before me pursuant to the provisions of PD30A para 2.1 on the grounds that the appeal raises an important point of principle or practice. The appellant father is represented by Mr Simon Bradshaw of counsel *pro bono* under the Bar Direct Access Scheme. The respondent mother is represented by Ms Nazmun Ismail of counsel.

2. In circumstances where it was apparent from the papers that the permission stage of the appeal had not been dealt with ahead of this listing, I determined at the outset of this hearing, with the agreement of the parties, that I would proceed to hear the application for permission to appeal with the appeal to follow immediately if permission was granted. In the event, I heard full submissions from both Mr Bradshaw and Ms Ismail and have been greatly assisted by their comprehensive Skeleton Arguments. Given the nature of the issues involved, I reserved judgment for a short period.

BACKGROUND

3. The appellant father is a national of Pakistan. On 21 October 2013 he entered the United Kingdom on a student visa. Whilst in this jurisdiction he met the respondent mother and the parties entered into an Islamic marriage on 10 May 2015. This was followed by a civil ceremony on 2 September 2015. On 24 November 2016 the respondent mother gave birth to the parents' daughter.

4. On 14 December 2016 the father made an immigration application for leave to remain in the United Kingdom, which application was sponsored by the mother. During the course of the immigration process that ensued Ms Najma, who was then working for a firm of solicitors as a Chartered Legal Executive, acted for the father with respect to his immigration application, having been recommended to the father by his uncle. During the course of so acting, Ms Najma was given permission by the father to communicate directly with the mother in her capacity as the sponsor for the father's immigration application in light of the father's limited command of English.

5. In this context, the mother and Ms Najma communicated directly and extensively between August 2016 and April 2017 when the parents separated. Some of those communications were before the learned Judge, from which communications it was clear to the learned Judge that the mother and Ms Najma engaged in correspondence that included Ms Najma providing the mother with extensive informal advice on the immigration process, the impact of certain immigration rules and the progress of the father's application. In addition, on occasion it is clear that the mother confided in Ms Najma matters personal to the mother and the father. By way of example, on 16 August 2016 the mother sent a WhatsApp message to Ms Najma in the following terms during the course of her pregnancy with the parties' daughter:

> "I am sorry to be a pest but just been stressed about all this. The doctor was unable to make a letter for [the father] as he isn't a patient. But he will do a letter for me stating how it is affecting me and I am 24 weeks pregnant. I am suffering from a lot of anxiety and he is the one responsible for me. He is caring for me. This recent news from the HO has made my anxiety worse. My anxiety has been caused because of all this and I haven't been sleeping and eating properly. I just don't want anything happening to my baby."

6. On the mother's account, there were a series of problems with Ms Najma's conduct of the father's immigration application and her advice to the mother with respect to that application between August 2016 and April 2017 as evidenced in the WhatsApp messages that were before the learned Judge. Within this context, again on the mother's account, by March 2017 the mother considered herself to have been misled by Ms Najma in a number of respects regarding the father's application. The father's immigration application was ultimately unsuccessful, as was an appeal to the First Tier Immigration Tribunal. The father has made a further application for leave to remain based on his relationship with his daughter. That application remains pending.

7. As I have noted, in April 2017 the parties' relationship broke down, the mother and father having become estranged after the mother had formed the view that the father had married her and conceived a child for an ulterior motive. Namely, to gain settled immigration status in the United Kingdom. Following the breakdown of the parties' relationship in April 2017 the parties divorced under Islamic law on 30 May 2017. Shortly prior to that date, on 26 May 2017, the father issued an application for a child arrangements order in respect the parties' daughter under Part II of the Children Act 1989.

8. Shortly after the institution of the Children Act proceedings the mother made a complaint of professional misconduct against Ms Najma to the Chartered Institute of Legal Executives (hereafter CILEx) regarding Ms Najma's alleged conduct during the course of the father's immigration application. During the currency of that complaints process Ms Najma did not act for the father in the proceedings under the Children Act 1989 and the father was represented by alternate counsel. A finding of fact hearing took place before the Lay Bench on 1 March 2018 at which limited findings were made against the father.

9. The complaint against Ms Najma to CILEx was made by the mother on 28 June 2017. The complaint amounted to allegations by the mother that during her dealings with the mother Ms Najma acted in a manner that may amount to professional misconduct. The details of the complaint were before the learned Judge. In her response to the mother's complaint, provided to CILEx in August 2017 and also before the learned Judge, Ms Najma stated that:

> "There is not a shred of evidence (other than the statement of a bitter ex-wife wo (*sic*) is trying to deport my client to Pakistan) that I allowed my independence to be compromised by given advice to the complainant under the instructions of [a third party]."

In addition, during the course of setting out her response to the mother's complaint, Ms Najma expressed her view that the mother was "very controlling" of the father and

was a "very controlling and paranoid person" who had fabricated allegations against Ms Najma.

10. With her response to the complaint, Ms Najma also submitted a statement of evidence to CILEx, which statement was also before the learned Judge. In that statement, dated 26 August 2017, Ms Najma stated that she had been informed by the father that the mother was very controlling and stated her view that the mother exercised control over the father by her ability to speak English. Ms Najma repeated her own view that the mother was "very paranoid and controlling" (providing examples in the statement that she contends evidenced "a level of paranoia") in addition to asserting that she found the mother to be aggressive and demanding and quite rude and describing occasions when she had been irritated by the mother. Later in her statement, Ms Najma described feeling her "blood boil" when the father made an allegation that he had been assaulted by the mother and forming the clear view that the father was being made to sign documents against his will, Ms Najma contending that she "could tell" (it is unclear how) from the signature that it had been "written against his will" and that the father was scared of the mother. The statement concludes with Ms Najma stating her view that:

> "It became apparent and obvious to me that [the mother] was trying to cut [the father's] resources and was trying to get him deported. She also tried her best to make sure that I have no involvement in the case and I believe her motivation for doing this is because she knows I usually win these types of cases. This has not deterred me from assisting [the father]. I will not let this happen and I will defend this case as well as [the father] until it is over. I will not be bullied and humiliated and beaten down by a bitter ex-wife. It is not fair on my client and it is a miscarriage of justice."

11. On 20 December 2018, the CILEx Professional Conduct Panel decided to refer two allegations against Ms Najma to the Disciplinary Tribunal having concluded that there was sufficient evidence to prove, on the balance of probabilities, that Ms Najma had not maintained high standards of professional and personal conduct. Following the Panel's decision, the matter was passed to an investigation officer to prepare a file for the Disciplinary Tribunal. CILEx Regulation also took legal advice ahead of any decision to draw up charges for the Disciplinary Tribunal. Following further investigation by the investigation officer, on 29 April 2019 CILEx Regulation decided to withdraw the complaints against Ms Najma from referral to the Disciplinary Tribunal, the investigating officer having concluded that there was insufficient evidence to prove the allegations.

12. Meanwhile, on 20 March 2019 the mother had sent an email to Ms Najma's chambers that made further allegations against Ms Najma. That email is contained in the bundle and was before the learned Judge. The mother's email to Ms Najma's chambers stated as follows:

> "To whom it may concern, Please be advised that the above individual has an outstanding complaint against her about her conduct. There will be a hearing in front of the Cilex DT in July. The Bar Standards Board also has an open complaint. I would strictly want to remain anonymous but you can make your own enquiries about this. She should not be allowed to promote

> herself this way as it is not for the public good. She is very corrupt and not ethical at all."

13. In response, Ms Najma herself sent an email to the mother on 20 March 2019 and on the same day made a complaint of harassment to the police. The email from Ms Najma to the mother, which again was before the learned Judge, stated as follows:

> "It has been brought to my attention that you have sent the attached email to my Chambers and you have sent several other emails to organisations in an attempt to discredit me which has caused me and my reputation utter financial and emotional distress. This continued form of harassment has has (*sic*) now been reported to the police and I am in the process of gathering the evidence against you to hand to them later today. Please stop harassing me and discrediting me as you have been doing over the last two years. This is your only warning before I issue a defamation claim against you."

14. Ms Najma's complaint of the same date to the police of harassment by the mother stated as follows:

> "This individual has been harassing me and intimidating me since May 2017. I represented her husband [the father] in his immigration matter in the UK when they were married. After their separation in February 2017, I could no longer speak to her about the case due to client confidentiality. She then turned on me and reported me to my regulator by making several false allegations which are currently being investigated. Aside from this, she has contacted my former employers, current employer and various other organisations over the last 20 months and has sent emails discrediting me and slandering me asking them to make sure that I do not do her husband's case. I do not know why she is doing this and this has now become unbearable for me. The final straw has been today (20th March 2019) when I received a call from my chambers stating that she had emailed them stating "she should not be allowed to promote herself in this way as it is not for the public good. She is very corrupt and not ethical at all". This is not the first time that this has happened and I have tried to ignore this for 20 months but I am now at breaking point and want her to stop harassing and intimidating me to stop working on her husband's case."

And:

> "This has caused me emotional distress and I feel like I am going into depression because of what she is doing."

15. Within the context of Ms Najma stating to the police that she was now "at breaking point" and at risk of descending into depression, in his statement dated 15 July 2019, the father states that as a result of the mother's email to Ms Najma's chambers, Ms Najma felt "extremely embarrassed and humiliated" by the conduct of the mother. The father's statement exhibits Ms Najma's communications with the mother and the police.

16. On 29 October 2019, the mother's legal representative pointed out to the Legal Adviser the communications that were exhibited to the father's statement and

indicated the mother's objection to Ms Najma continuing to act as counsel for the father. In response, Ms Najma informed the Legal Adviser that she had sought the advice of the Bar Standards Board and her Head of Chambers, and that they were of the view that there was nothing preventing her acting on behalf of the father. This was recorded on the face of the order of 29 October 2019. In light of this, the Legal Adviser reallocated the proceedings from the Lay Bench to District Judge Carr.

17. On 9 November 2019 Ms Najma emailed the Bar Ethical Enquiries Service. This is not a service provided by the Bar Standards Board but rather is a service provided by the Bar Council. The Bar Ethical Enquiries Service advised Ms Najma that:

> "If you do not feel that your independence is compromised , there is no immediate need to withdraw under rC21.10 in the BSB Handbook. If the outcome of the complaints raised against you was still pending, the advice would be different in this regard. You do retain an ability to withdraw under rC26.l, as your professional conduct is being called into question. There is no obligation to do so, however. The only further point I would make is your Core Duty 2: to act in the best interests of your client. You should at all times have regard to your client's best interests, including in circumstances where external factors may impact upon their interests and their case. If the situation is proving adverse to your client's case by virtue of you continuing to act as their representative, you should seriously consider whether their interests would be better served by different legal representation (CD2, rC17)."

Within this context, I note that the email from Ms Najma that invited a response from the Bar Ethical Enquiries Service did not set out that she had communicated with the mother in detail and for an extended period between 2016 and 2017 with respect to the father's immigration application, during which time she had provided the mother with extensive informal advice regarding that application and during which period the mother had, on occasion, confided in Ms Najma regarding her own concerns and personal feelings at that time.

18. On 11 December 2019, the mother issued her application on Form C2 for an order that Ms Najma be prohibited from accepting the father's instructions in the proceedings under the Children Act 1989. Both parties were permitted by the learned District Judge to file evidence respect of that application.

19. In her statement of 7 January 2020 the mother alleged that Ms Najma fabricated evidence in order to avoid sanction by CILEx. The mother further contended that Ms Najma was using the case to gain revenge against the mother for making a complaint to CILEx and, latterly, the Bar Standards Board. The mother alleged that Ms Najma had reported her to the police in order to weaken her position in the proceedings concerning the parties' daughter.

20. Ms Najma represented the father before the learned Judge on the mother's application for an order prohibiting Ms Najma from further acting for the father. In this context, Ms Najma prepared a Position Statement dated 8 March 2020. I note that in this Position Statement Ms Najma asserts that "It is plain, that the Mother seeks to disadvantage and weaken the Father's position in an attempt to further her own agenda which is for the Father to be removed from the UK and to have no contact

with the Parties daughter." Significantly, Ms Najma also made assertions in her Position Statement in support of the father's case that plainly engaged the period during which she was acting for the father and informally advising the mother regarding the father's immigration proceedings, asserting that "The Father has made clear since the start of these proceedings at [C1-106] that the Mother has an ongoing campaign and obsession to have him removed from the UK."

THE JUDGMENT

21. In a concise and reasoned judgment, the learned Judge began by providing a brief overview of the background to the mother's application as set out above and referencing the fact that he had heard detailed arguments on both sides, which arguments he summarised as follows:

> "[9] For this hearing, both parties have filed detailed arguments and I have heard extensive submissions. I need not repeat them here. In summary, Counsel for the mother submits that [Ms Najma] had a close working relationship involving the seeking of advice. [Ms Najma] and mother acted together giving and accepting instructions. Following the breakdown of this, the mother's alleged activities had an impact on [Ms Najma]. Counsel made a complaint to the police and the father is using the hostility between the mother and his counsel as part of his case with evidence supplied to him by [Ms Najma]. At the substantive hearing, it will have to be put to the mother in opposing the recommendation in the s 7 report for direct contact to commence, that she is not child-focused and her motivation is in question. The court would be in difficulties dealing with these with [Ms Najma] putting the father's case.
>
> [10] The father's position is that the application by the mother is a tactical move to thwart his application. Matters alleged are for professional conduct proceedings and not a matter for the family court. The complaint to the professional body was dismissed. The test for recusal of an advocate is a higher one than that for a judge. Recusal of an advocate is exceptional and very rare. The circumstances point to an application to prevent [Ms Najma] acting on the basis that the mother would not like her acting. The police complaint is irrelevant as it does not further any issues relating to the child. The essential issues have already been decided, namely the finding of the facts. What remains is the welfare hearing. The mother is now seeking to reintroduce what was decided at the finding of fact hearing."

22. The learned Judge then went on to explain the reasons for his decision to grant the order sought by the mother. He began by examining the question of the jurisdiction of the court to make orders with respect to the representation of a party at a hearing. Whilst the learned Judge expressed hesitation with respect to the proposition that the court's case management powers under the Family Procedure Rule 2010 provided the necessary jurisdiction to make the order, he expressed himself satisfied that he had the requisite power "both under Art 6 of the European Convention of Human Rights and in domestic law". In this context, the learned Judge concluded as follows with respect to the applicable legal principles:

> "[13] The domestic law is set out by Arden LJ in the [*Skjevesland v Geveran Trading Co Ltd* [2002] EWCA Civ 1567] case together with the principles for the court to consider. In contrast to the situations described *Geveran* of course, here the court is looking prospectively at a hearing rather than reviewing a concluded hearing but the principles are still applicable."

23. The Appellant father contends at this appeal hearing that the learned Judge then made a series of findings of fact on which he based his decision. By contrast, the mother submits that the learned District Judge did not make findings of fact but rather simply, and appropriately for a case management decision, looked at the case in the round, relying on matters that were already established in other contexts. Reading the judgment, it is plain that the learned Judge took into account of the following matters in reaching his determination:

    i) CILEx ultimately found that the allegation by the mother of a lack of professionalism by Ms Najma during the period between 2016 and 2017 was without substance.

    ii) A professionally appropriate relationship had existed between the mother and Ms Najma during the period between 2016 and 2017.

    iii) Ms Najma's responses to the complaint made by the mother to CILEx by way of a reply and statement of evidence as summarised above.

    iv) Ms Najma's reply to the email subsequently sent by the mother to her chambers, as summarised above.

    v) That the father in evidence to the court stated that he considered that Ms Najma felt both humiliated and embarrassed by the mother's conduct.

24. The learned Judge then dealt briefly with the key submissions that had been made by the parties. He acknowledged the submission on behalf of the father contending that the mother's application was "tactical" in nature and that she was, in essence, profiting from her own wrongdoing by making spurious complaints against Ms Najma then relying on those spurious complaints to make good her application in these proceedings. At this point, the learned Judge concluded that, whilst the issue of tactics was relevant, the courts focus must be on the fairness of the trial in the substantive proceedings. The learned Judge also acknowledged the submission on behalf of the father that the lay magistrates had already dealt, at a finding of fact hearing, with the core issues in the case. However, he considered that, proceedings relating to children being dynamic in nature, he was compelled to consider all of the material properly admitted before him in determining the mother's application.

25. With respect to the submissions made on behalf of the mother, the learned Judge attached "some weight" to the submission made on behalf of the mother that, in light of the history of the matter, she would not be able to give her best evidence if cross examined by Ms Najma, the mischief lying in the cross-examination being distracted by the issues between the mother and Ms Najma. The learned Judge attached more weight to the submission that Ms Najma was "part of the proceedings" and "firmly aligned to the father", accepting that, to a certain extent, there was a duty on counsel

to act impartially. The learned Judge stated that counsel remained subject to the duty set out in *Rondel v Worsley* [1969] 1 AC 191, which he articulated as the duty to maintain professional independence and to advise the client in the client's best interests.

26. Within this context, and expressly observing that the order sought by the mother "is very exceptional and something not to be acceded to readily", the learned Judge weighed in the balance the following factors:

i) The father had confidence in Ms Najma, who had represented him for a number of years.

ii) There was evidence before the court that the mother had made a professional complaint against Ms Najma and had sought to denigrate the Ms Najma to her chambers.

iii) Counsel should be robust, independent and professional and should not lightly decline to represent a party or withdraw from doing so.

iv) Against these factors, the court must be concerned with the integrity of the proceedings and particularly so when adjudicating on the welfare of a child.

v) The question of the impact of the complaints raised by the mother against Ms Najma were not matters in the exclusive purview of the regulatory body and were also a matter for the court to consider in seeking to act in compliance with the overriding objective in Part 1 of the FPR 2010.

vi) The court has an inherent power to prevent an abuse of process and, accordingly, the power to restrain and advocate from representing a party if it is satisfied that there is a real risk that his or her continued participation will lead to a situation where the order made at trial would have to be set aside on appeal.

vii) The trial must be fair. It is necessary for a party objecting to an advocate to demonstrate that unfairness will result. In many cases it will be suffice to demonstrate unfairness that there is a reasonable lay apprehension of the same, because it is important not only that justice is done but also that it is seen to be done.

viii) In this case, there was a risk that the mother would apprehend that the proper conduct of the case would be unfairly affected by the antipathy between herself and Ms Najma, which antipathy was "palpable" and recorded in writing and documents filed with the court.

ix) Further, there was risk that the presentation of the father's case could be affected by Ms Najma's own feelings towards the mother, as demonstrated by the counter-allegations made by Ms Najma in response to the mother's complaints.

x) Ms Najma was on record as expressing significant distress at the conduct of the mother, which may appear to a lay person strongly to suggest that Ms Najma would have difficulty in maintaining professional detachment.

xi) Whether or not the mother's conduct was reprehensible, the cross examination of the mother by Ms Najma would mean cross-examination of the mother by an advocate who was inextricably bound up in the case, and who may not only be putting her client's case but also her own.

xii) It was not possible to put aside the issue of whether the mother's opposition to contact was child-focused or arose from her hostility to the father arising from his alleged betrayal and to do so in order that Ms Najma could continue to act would preclude an obvious line of cross-examination on an issue central to the determination of the proceedings.

xiii) The court must also be mindful of the importance of public confidence in the administration of justice.

27. Having balanced the foregoing factors, the learned District Judge concluded as follows with respect to the overall position of Ms Najma:

> "[25] Counsel was clearly upset by the allegations made by the mother. The making of a complaint against a professional in the Family Court setting is part of the experience of all those who appear there, whether they be a judge, advocate or Cafcass officer. The reaction of professionals should be one of an objective and dispassionate rebuttal. Here, in my judgment, the reaction went beyond mere rebuttal and became a highly personalised response which would reasonably be regarded as inconsistent with the retention of the requisite objective independence. Further, the material before the court also points to counsel standing alongside the client to an unusual degree in attacking the mother's motives. In the view of the court the reaction threatens counsel's ability to discharge counsel's role in the manner in which it is to be discharged. There is a real risk that the acrimony between counsel and the mother threatens to become an issue in the trial which will divert the focus from the central issue which is the welfare of the child. Counsel has become embroiled to such an extent that counsel's ability to conduct child-centred proceedings on behalf of the client in an appropriate professional manner is now compromised. Most importantly, the failure of parents to agree childcare arrangements often, sadly, arises from their personal feelings towards each other. In such cases, counsel for the parties can have a vital role in acting as intermediaries and brokers of agreement. This requires the professional ability to act with detachment from the underlying hostility between the parties and to give impartial advice. If either counsel has become personally embroiled in the dispute, and in this case there is clearly great hostility between the parties, this may be unachievable and work to the detriment of an outcome which is child, rather than parent, centred."

28. Within this context, and *again* reminding himself that the order sought was an exceptional and rare step, the learned District Judge considered that the balance of the

relevant factors fell in favour of directing that Ms Najma should not represent the father in the proceedings under the Children Act 1989 and made an order accordingly.

THE GROUNDS OF APPEAL

29. The grounds of appeal drafted by Mr Bradshaw are dated 9 July 2020 and comprise five grounds, although it will be seen that there are certain areas of overlap between the various grounds of appeal:

    i) The learned Judge erred in failing to give adequate weight to the potential for the mother to adopt a tactical position amounting to an abuse of process.

    ii) The learned Judge erred in law at paragraph [23] of his judgment by treating the dictum that justice must not only be done but be seen to be done, as articulated in *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, as a decisive or strongly determinative factor and at paragraph [17] of his judgment by, in effect, applying the legal test for bias on the part of a tribunal set out in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, as considered in *Porter v Magill* [2002] 2 AC 357, namely whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias on the part of the tribunal.

    iii) The decision of the learned Judge was procedurally unfair in circumstances where (a) he made findings of fact as to Ms Najma's view of, and attitude towards the mother against the weight of the evidence and without proper regard to Ms Najma's duty to fearlessly advance the father's interests, (b) where Ms Najma was required to be an advocate in her own defence as well in defence of the father and (c) where Ms Najma was not subject to cross-examination so her evidence was not heard and tested.

    iv) The learned Judge placed undue weight on the response of Ms Najma to the behaviour of the mother in circumstances where it is the first duty of counsel to fearlessly advance the interests of her client and where it was the mother's behaviour that caused Ms Najma to have to work to discharge that duty, and in doing so misapplied *Rondel and Worsley* [1969] 1 AC 191.

    v) The learned Judge placed undue weight on the potential for difficulties to arise in cross-examination of the mother by Ms Najma, the risk that a witness might not like a line of questioning or that might not like the questioner falling short of a reasonable basis for interfering with the father's right to have the advocate of his choice.

SUBMISSIONS

Ground 1

30. With respect to Ground 1 the father submits that the fact that, as noted by the Court of Appeal in *Gerevan*, the jurisdiction to make an order removing counsel risks "purely tactical" applications being made, and the fact that as also noted in *Gerevan* cases in which the jurisdiction is exercised are "likely to be very exceptional", must result in any evidence that an application is being made for tactical reasons being given

substantial weight. On behalf of the appellant, Mr Bradshaw submits that such evidence of a tactical application was present before the judge in the form of the mother's history of complaints against Ms Najma (and the fact she exhibited to the court only the complaint to CILEx and not the documents dealing with the dismissal of that complaint), derogatory comments to her chambers and unsupported assertions that Ms Najma had fabricated evidence during the complaints process. Within this context, Mr Bradshaw submits that the evidence demonstrated that the mother's application was plainly tactical, which motivation should have weighed very heavily in the learned Judge's decision but, wrongly, did not.

31. In reply, Ms Ismail submits that one only has to read the judgment of the learned Judge to see that he expressly took account of the risk of tactical manoeuvring amounting to an abuse of process, the learned Judge stating expressly that he had done so and referring at a number of other points during the judgment to that issue and the *Gerevan* case in which the risk was highlighted. Within this context, Ms Ismail submits that it is plain that the learned Judge was alive to the risk of a tactical application and gave that risk appropriate weight having regard to the evidence, weight being a matter for the learned Judge.

Ground 2

32. In respect of Ground 2, Mr Bradshaw submits that at paragraph [23] of his judgment the learned judge referred to a reasonable lay apprehension of *bias* (as I will come to, this is to misquote the learned District Judge, who in fact was referring to a reasonable lay apprehension of *unfairness*) and placed excessive reliance on the principle that justice must not only be done but seen to be done, thereby wrongly applying the principles in the *Sussex* case. Mr Bradshaw further submits that, whilst not mentioning either authority, the learned District Judge incorrectly applied a test of bias set out in *Medicaments* and *Porter v Magill* as indicated by the fact that, in Mr Bradshaw's submission, the learned Judge expressed the test "very much in the terms of the *Medicaments* case".

33. In reply, Ms Ismail submits that, again, it is clear from the judgment that the learned Judge articulated and applied the correct legal test, referring repeatedly to *Gerevan* and correctly noting the continuing duty imposed on counsel by *Rondel v Worsley* to maintain professional independence. In the circumstances, Ms Ismail submits there is simply no basis for suggesting that the learned Judge erred in law in this case by applying the incorrect legal test.

Ground 3

34. With respect to Ground 3 Mr Bradshaw submits that the findings were made by the learned Judge (that Ms Najma's reaction to the mother's complaints had been "highly personalised" to an extent that "would reasonably be regarded as inconsistent with the retention of the requisite objective independence" and was "standing alongside [the father] to an unusual degree in attacking the mother's motives") were demonstrably contrary to the evidence and resulted from a decision making process that was plainly defective. With respect to the latter, Mr Bradshaw submits that the order of the learned District Judge of 23 April 2020 that the mother's application would be dealt with by way of submissions (which order the father did not appeal) placed Ms Najma in the invidious position of advocating for herself which, in circumstances were she

did not have the opportunity to give evidence and be cross-examined, meant the learned Judge should have proceeded with "utmost caution", which caution is not evidenced in the judgment. With respect to the findings, Mr Bradshaw submits that those cannot be sustained on the evidence in circumstances where the learned Judge failed to view the responses of Ms Najma to the mother in the context of the acrimony characterising the parents' relationship and the accuracy, in those circumstances, of Ms Najma's description of the mother as "bitter".

35. By way of response, on behalf of the mother, Ms Ismail submits that the matters relied on by the learned Judge were no more than a recording of what Ms Najma herself had made clear in various documents authored by her that were before the learned Judge, Ms Najma's own words being clear as to her personal view of the mother as a "bitter ex-wife" and the impact of the mother's conduct on her. Ms Ismail submits that the learned Judge cannot be criticised for relying on statements made by Ms Najma herself in the context of the application that was before the court.

Ground 4

36. As to Ground 4, Mr Bradshaw submits that in the face of the mother's behaviour it was entirely appropriate for Ms Najma to communicate with the mother and the police in the manner that she did and that, in the circumstances, the learned Judge was wrong to apply *Rondel v Worsley* in the way that he did. Mr Bradshaw submits that the learned Judge failed to give sufficient weight to the risk to the administration of justice inherent in an application by an opposing party to remove counsel, given the observations in *Rondel v Worsley* of the importance of counsel not being embarrassed or enfeebled in endeavouring to perform their duty to the due and proper administration of justice by the fear of subsequent litigation.

37. On behalf of the mother, Ms Ismail submitted that, correctly articulated the principles in both *Gerevan* and *Rondel v Worsley*. Within this context, Ms Ismail submitted that the learned Judge cannot be criticised for reaching the conclusion that her actions constituted compelling evidence that Ms Najma was not able to fulfil her duty in circumstances where she had become embroiled in a personal dispute with the mother, where she had made clear her view that the mother was a "bitter ex-wife" and had expressed other derogatory views with respect to the mother and that, accordingly, where it was not possible for there to be the appearance of fairness whilst Ms Najma continued to act as counsel for the father.

Ground 5

38. Finally, Mr Bradshaw submitted that, in failing properly to factor in Ms Najma's core duties as counsel to, in the words of Lord Reid in *Rondel v Worsley*, "fearlessly ... raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case", the learned Judge attached undue weight to the difficulties that may have arisen in circumstances where Ms Najma was required to cross-examine the mother.

39. Ms Ismail submits in response that, again, weight was a matter for the learned Judge. Ms Ismail submitted that the learned Judge cannot be criticised for his conclusion that, given the nature of the dispute that had taken place between the mother and Ms Najma, and the views expressed by Ms Najma regarding the mother and her

motivations, it would not be possible for the mother to give her best evidence in the proceedings under the Children Act 1989 were she to be cross-examined by Ms Najma in that context, which context included Ms Najma's own words articulating her distress at the conduct of the mother and her plainly expressed personal view of the mother as a "bitter ex-wife".

40. Ms Ismail submitted that this difficulty is bought into even sharper focus in circumstances where, as the learned Judge observed, cross-examination would inevitably involve questions regarding the father's motivation for his immigration application and the mother's position that the father had, as she saw it, his betrayed her by using the marriage and their child for an ulterior motive. Within this context, Ms Ismail submits that Ms Najma was, by virtue of her working relationship with the mother during the course of the immigration application, in the position of a witness and, as such, could not possibly properly undertake cross examination acting as counsel for the father. Further, in light of the complaints made by the mother in respect of her, Ms Ismail submits that Ms Najma could not possibly approach cross-examination on this issue in an appropriately professionally detached manner, particularly having regard to Ms Najma's responses to the mother's complaints.

THE LAW

41. As set out above, the learned District Judge drew the principles that he applied to the mother's application from the decision of the Court of Appeal in *Skjevesland v Geveran Trading Co Ltd* [2002] EWCA Civ 1567. That appeal concerned the dismissal of an application for a retrial of a bankruptcy petition that had been made on the grounds that counsel for the petitioner was acquainted with the appellant's wife and friends during the period which was the subject of examination in the bankruptcy petition. In the circumstances, the *Gerevan* case dealt with a slightly different situation to that which faced the learned Judge, *Gerevan* involving a retrospective examination of the position of counsel in concluded proceedings rather than a prospective examination of the position of counsel in ongoing proceedings. However, in analysing the applicable principles, the Court of Appeal in *Gerevan* considered the position of counsel generally, allowing the learned Judge rightly to conclude that principles articulated in *Gerevan* applied to the prospective examination of the position of counsel in this case.

42. As to the applicable principles, in *Gerevan* Arden LJ (as she then was) made clear that the court has power, in exceptional circumstances, to prevent an advocate from acting for a party and not only in circumstances where that advocate has obtained relevant confidential information:

> "[39] We accept that the circumstances (other than those where he has relevant confidential information) where an advocate may be restrained by the court from acting as an advocate in litigation are likely to be very exceptional. However, such circumstances have occurred in the past. Thus in *R v Winston Smith* (1975) 61 Cr App R128, a pupil barrister met the accused and discussed his case with him and then subsequently appeared behind prosecuting counsel at the accused's trial. The Court of Appeal assumed that no information which the pupil had obtained from the accused was divulged to the prosecution. Nevertheless, this court held that it was impossible to say that in the circumstances justice had been seen to be done.

> Accordingly, the conviction was set aside. Likewise in *R v Batt*, summarised above, the reason why the Court of Appeal considered that it was generally undesirable for a husband or wife or other cohabiting partners to appear as advocates against each other in a contested criminal matter was because "to do so may give rise to an apprehension, however unjustified that may be in any given case, such as the present, that the proper conduct of the case may have been in some way affected by that person or relationship."
>
> [40] Undoubtedly, those particular cases are to some extent affected by the special position of prosecuting counsel. Prosecuting counsel has additional obligations, for example to present his case with the aim of assisting the court to reach a true verdict and not just to win. However, this line of authority referred to above is not unique to the criminal law. *Re L* (summarised above) arose in care proceedings in the Family division. Wilson J pointed out that whereas civil litigation and criminal trials comprised a confined investigation of past events, the inquiry in care proceedings goes wider and involves an important investigation into all matters relevant to the future life of the child. In that inquiry the local authority is the arm of the state and has a role of crucial importance. The submissions on behalf of the local authority are likely to carry weight and respect. In Wilson J's judgment, the local authority had to be seen to act impartially and there was a reasonable apprehension that its approach would be coloured by favour towards one party if the solicitor for that party was cohabiting with the solicitor for the local authority having charge of the proceedings. It was not necessary to investigate any aspect of the actual history of the proceedings. The cohabitation without more grounded the apprehension. In the circumstances, Wilson J considered that it was appropriate to make an order removing the solicitors for the local authority from the record.
>
> [41] We, therefore, reject the submission of Mr Mortimore that the only circumstances in which the court can act to prevent an advocate from acting is where he has confidential information. The case law demonstrates that in exceptional circumstances an advocate can be prevented from acting even where he does not have such information."

43. As to the test that applies when determining whether the court should exercise the power articulated in the foregoing paragraphs in *Gerevan*, it will be seen that the authorities cited in those paragraphs (*R v Winston Smith*, *R v Batt* and *Re L*) concentrated on the question of whether there could be said to exist a reasonable apprehension, whether justified or not, that counsel's own situation would have an adverse impact on the proper conduct the proceedings. Within this context, the Court of Appeal held as follows:

> "[42] Where a party objects to an advocate representing his opponent, that party has no right to prevent the advocate from acting based on the Code of Conduct as the content and enforcement of that Code are not a matter for the court. However, the court is concerned with the duty of the advocate to the court and the integrity of the proceedings before it. The court has an inherent power to prevent abuse of its procedure and accordingly has the

> power to restrain an advocate from representing a party if it is satisfied that there is a real risk of his continued participation leading to a situation where the order made at trial would have to be set aside on appeal. The judge has to consider the facts of the particular case with care (see the words of Lord Steyn in the *Man o' War* case cited above). However, it is not necessary for a party objecting to an advocate to show that unfairness will actually result. We accept Mr Jones' submission that it may be difficult for the party objecting so to do. In many cases it will be sufficient that there is a reasonable lay apprehension that this is the case because as Lord Hewart CJ memorably said in *R v Sussex Justices ex parte McCarthy* [1923] 1 KB 256, it is important that justice should not only be done, but seen to be done. Accordingly, if the judge considers that the basis of objection is such as to lead to any order of the trial being set aside on an appeal, as in the *Winston Smith* case, he should accede to an order restraining an advocate from acting. But we stress that the judge must consider all the circumstances carefully. A connection, for instance, between counsel for one party and a witness on the other side may be an important factor where the evidence is of fact but, depending on the nature of the connection, it may be less important where the evidence is of an expert nature and the cross-examination is likely to be on questions of technical expertise. The judge should also take into account the type of case and the length of the hearing, and any special factor affecting the role of the advocate, for instance, if he is prosecuting counsel, counsel for a local authority in care proceedings or as a friend of the court."

44. It is clear from this passage that one of the situations contemplated by the Court of Appeal which might result in a real risk of counsel's continued participation leading to a situation where the order made at trial would have to be set aside on appeal is where counsel's continued participation would lead to a reasonable lay apprehension of unfairness, it not being necessary to show that unfairness will *actually* result in circumstances where justice must not only be done but be seen to be done.

45. As to the application of this test, the Court of Appeal emphasised in *Gerevan* that the court should exercise caution having regard to the heavy professional duties and obligations that rest on the shoulders of counsel:

> "[43] A judge should not too readily accede to an application by a party to remove the advocate for the other party. It is obvious that such an objection can be used for purely tactical reasons and will inevitably cause inconvenience and delay in the proceedings. The court must take into account that the other party has chosen to be represented by the counsel in question. Moreover, an advocate is subject to the cab-rank rule. If the court too willingly accedes to applications to remove advocates, it would encourage advocates to withdraw from cases voluntarily where it was not necessary for them so to do and the cab-rank rule would be undermined. We accept that the cab-rank rule is a salutary rule. It is an integral and long established element in our adversarial system. Down the centuries the cab-rank rule has been the way in which unpopular causes have been represented in court. When Erskine defended Tom Paine in 1792 he was widely criticised for so doing. His reply was:

> "If an advocate refuses to defend from what he may think of the charge or of the defence, he assumes the character of Judge; nay, he assumes before the hour of judgment, and in proportion to his rank or reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused in whose favour the benevolent principle of English law makes all presumptions ... "
>
> [44] The particular presumption referred to by Erskine was the presumption of innocence, which is now enshrined in article 6.2 of the European Convention on Human Rights. Erskine was speaking about a criminal case, but his point applies with necessary modification also to a civil case."

DISCUSSION

46. I am satisfied in this case that permission to appeal should be granted but that the appeal should be dismissed. My reasons for so deciding are as follows.

47. I deal with the grounds of appeal in a slightly different order to that pleaded by Mr Bradshaw on behalf of the father, beginning with Ground 2 concerning the question of whether the learned Judge applied the proper legal test in determining the mother's application. Having regard to the decision of the Court of Appeal in *Gerevan* I am satisfied that the learned Judge applied the correct legal test in this case.

48. As I have noted, the Court of Appeal made clear in *Gerevan* that one of the situations which might result in a real risk of counsel's continued participation leading to a situation where the order made at trial would have to be set aside on appeal is where counsel's continued participation would lead to a reasonable lay apprehension of unfairness. That was the question before the learned Judge in this case.

49. Within this context, whilst I accept that the learned Judge did not set out a detailed discussion of the legal principles he applied, a reading of the judgment in its entirety demonstrates that the learned Judge approached the legal test in this case correctly and with the appropriate level of caution. At paragraph [10] the learned Judge acknowledged the submission on behalf of the father that:

> "[10] ...The test for recusal of an advocate is a higher one than that for a judge. Recusal of an advocate is exceptional and very rare."

At paragraph [13] the learned District Judge then stated as follows:

> "[13] The domestic law is set out by Arden LJ in the *Geveran* case together with the principles for the court to consider. In contrast to the situations described Geveran of course, here the court is looking prospectively at a hearing rather than reviewing a concluded hearing but the principles are still applicable."

Within this context, and having regard to the passages I have extracted from *Gerevan* above, the learned Judge went on at paragraph [17] to correctly identify that the court's focus was on the fairness of the substantive proceedings. Thereafter, at paragraph [23] of his judgment the learned Judge restated that the following two legal propositions from *Gerevan*:

> "[23] These are the considerations which have weighed with me.
>
> a) The court has an inherent power to prevent abuse of its procedure and accordingly has the power to restrain an advocate from representing a party if it is satisfied that there is a real risk of his continued participation leading to a situation where the order made at trial would have to be set aside on appeal.
>
> b) The trial has to be fair. However, it is not necessary for a party objecting to an advocate to show that unfairness will actually result. In many cases it will be sufficient that there is a reasonable lay apprehension that this is the case because it is important that justice should not only be done, but seen to be done."

50. Within this context, I am unable to accept Mr Bradshaw's submission that the learned Judge applied the wrong test, let alone that he mistakenly applied the legal test set out in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, as considered in *Porter v Magill* [2002] 2 AC 357, namely whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias. Contrary to Mr Bradshaw's written submissions, it is clear that at paragraph [23] the learned Judge did not formulate the test as one of a reasonable lay apprehension of bias but rather, and in accordance with *Gerevan*, as one of a reasonable lay apprehension of *unfairness*. Indeed, the learned Judge made no reference to *In re Medicaments and Related Classes of Goods (No 2)* or *Porter v Magill*. Mr Bradshaw's attempt to substitute unfairness with bias mischaracterises the approach of the learned Judge at paragraph [23], which approach based on a reasonable lay apprehension of unfairness was entirely consistent with the decision of the Court of Appeal in *Gerevan*.

51. Within this context, I also cannot accept Mr Bradshaw's submission that the learned Judge erred in law at paragraph [23] of his judgment by treating the maxim that justice must not only be done but be seen to be done as a decisive or strongly determinative factor. At paragraph [23] the learned Judge was simply acknowledging that which was recognised by the Court of Appeal in *Gerevan*, namely that, when asking whether the position of counsel risks creating a reasonable lay apprehension of unfairness, the reason it is not necessary to establish *actual* unfairness is because, as articulated *R v Sussex Justices, Ex p McCarthy*, it is a cardinal principle of fairness and natural justice generally that justice must not only be done but be *seen* to be done.

52. Dealing next with Grounds 1, 4 and 5 concerning the weight the learned Judge attached to certain of the factors in this case, I am satisfied that the learned Judge did not err by failing to give adequate weight to the potential for the mother to adopt a tactical position amounting to an abuse of process, by giving undue weight to the response of Ms Najma to the behaviour of the mother in circumstances where it is the first duty of counsel to fearlessly advance the interests of her client or by giving undue weight the potential for difficulties to arise in cross-examination of the mother by Ms Najma.

53. With respect to the risk of the mother's application being simply tactical in nature, the learned Judge expressly recognised in his judgment that this was a risk in applications of this nature and took account of the risk of tactical manoeuvring amounting to an

abuse of process, referring at a number of points during the judgment to that issue and the *Gerevan* case in which the risk was highlighted. Within this context, I accept that the learned Judge's conclusions on this issue are not expressed in the clearest of terms. However, I read the learned Judge's conclusion at paragraph [17] of the judgment to be that the question of whether the mother's conduct amounted to tactical manoeuvring was secondary to the question of whether that conduct gave rise to a reasonable lay apprehension of unfairness given Ms Najma's response to the same. Having regard to the evidence before him, the learned Judge was entitled to reach that conclusion and evaluate the weight to be attached to the issue of tactics accordingly.

54. With respect to the contention that the learned Judge attached undue weight to the response of Ms Najma to the behaviour of the mother in circumstances where it was her duty as counsel to fearlessly advance the interests of her client, Mr Bradshaw's concentration on Ms Najma's duties as counsel obscures the real issue. The conduct to which the learned Judge attached weight in deciding whether the continued involvement of Ms Najma would lead to a reasonable lay apprehension of unfairness was not the fact that Ms Najma had sought to continue to act for the father in pursuance of her professional obligations but rather the *manner* in which she conducted herself in seeking to do so.

55. Ms Najma was, of course, required to respond to the complaint made by the mother to CILEx. It was also open to Ms Najma to make a complaint of harassment to the police if she wished to do so. Further, in seeking to maintain fidelity to the cab rank rule, counsel may have to rebut complaints and criticisms levelled at them by an opposing party during the course of proceedings. However, in this case, at various points during her response to the mother's conduct, Ms Najma:

i) Asserted that the mother was a "bitter ex-wife" who was seeking to achieve the deportation of the father to Pakistan.

ii) Asserted that the mother was a "very controlling and paranoid person" who had fabricated allegations.

iii) Described the mother as aggressive and demanding and quite rude.

iv) Implied that, in her assessment, the mother had overborne the father and had forged the father's signature.

v) Stated her intention "not be bullied and humiliated and beaten down by a bitter ex-wife".

vi) Accused the mother of causing her financial and emotional distress.

vii) Threatened defamation proceedings against the mother.

viii) Asserted that mother had brought her to breaking point, caused her emotional distress and put her at risk of depression.

Moreover, the documents containing these assertions by Ms Najma against the mother were then filed as evidence in the proceedings under the Children Act 1989, in which Ms Najma was acting as counsel for the father.

56. In my judgment, having reminded himself of the risk of tactical applications and that the court will only grant orders of the type sought by the mother extremely rarely, the learned Judge was in entitled in the foregoing circumstances to consider that the statements made by Ms Najma, and relied on by the father as evidence in the family proceedings, went beyond an effort to dispassionately rebut the mother's complaints and criticisms in order to maintain fidelity to the cab rank rule and to advance her duty to fearlessly advance the interests of her client. Within this context, this material thereafter having been introduced as evidence in the family proceedings, I am satisfied that the learned Judge cannot be said to have been wrong to have attached the weight he did to elements of Ms Najma's reaction to the conduct of the mother having decided, by reference to the duty in *Rondel v Worsley*, that:

> "[25] Counsel was clearly upset by the allegations made by the mother. The making of a complaint against a professional in the Family Court setting is part of the experience of all those who appear there, whether they be a judge, advocate or Cafcass officer. The reaction of professionals should be one of an objective and dispassionate rebuttal. Here, in my judgment, the reaction went beyond mere rebuttal and became a highly personalised response which would reasonably be regarded as inconsistent with the retention of the requisite objective independence."

57. With respect to the potential for difficulties to arise in cross-examination of the mother by Ms Najma in the particular circumstances of this case, given the evidence before the court the potential for such difficulties was plain.

58. Both the mother and the father had put in issue in the proceedings under the Children Act 1989 the period during which Ms Najma was acting for the father with respect to his immigration application and communicating regularly with the mother. Whilst the mother was not Ms Najma's client, it is clear from the communications before the learned Judge that a *de facto* professional relationship arose between them for a significant period between 2016 and 2017, which included Ms Najma providing the mother with informal advice. As the learned Judge recognised, having regard to the competing cases of the parents, the question of whether the mother's opposition to contact was genuinely child focused or arose from her hostility to the father over her alleged betrayal prior to their separation in 2017 would be in issue at the final hearing. In those circumstances, it was plain that Ms Najma would, in all likelihood, be required to cross-examine the mother regarding her conduct and her motivations during a period in which Ms Najma had been providing informal advice to the mother, in which the mother had on occasion confided personal matters to Ms Najma and at the conclusion of which the mother and Ms Najma had fallen out. That this would give rise to a reasonable lay apprehension of unfairness on the part of the mother were she to be cross-examined by Ms Najma was clear.

59. In addition, in circumstances where Ms Najma had repeatedly expressed clear and negative personal views regarding her assessment of the mother's character, motivation and conduct, with those negative personal views thereafter being placed in evidence in the proceedings under the Children Act 1989, there was plainly the potential for the mother to feel she was being cross examined in the family proceedings by someone who had developed a personal animosity towards her and/or that Ms Najma was asking her questions with an ulterior motive given the very recent dispute between them.

60. Within the foregoing context, the learned Judge cannot be said to have been wrong in reaching the conclusion that the cross examination of the mother by Ms Najma would give rise to an reasonable lay apprehension of unfairness on the part of the mother in circumstances where, as the learned Judge concluded, whether or not the mother's conduct was reprehensible, the cross examination of the mother would be by an advocate who was inextricably bound up in the case, and who may not only be putting her client's case but also her own. That this was a conclusion open to him on the evidence can be seen simply from the number of times that Ms Najma features *as an issue* between the parents' in their respective evidence in the proceedings concerning their daughter.

61. I turn finally to deal with Ground 3 and the question of procedural fairness. Having considered carefully the submissions in this case, I am not satisfied that the decision of the learned Judge was procedurally unfair by reason of his findings being against the weight of the evidence, Ms Najma being required to advocate in her own defence on the application or the absence of oral evidence and cross-examination.

62. With respect to the contention that the learned District Judge made findings of fact as to Ms Najma's view of, and attitude towards the mother against the weight of the evidence and without proper regard to Ms Najma's duty to fearlessly advance the father's interests, the learned judges conclusion that Ms Najma's reaction to the mother's complaints had been "highly personalised" to an extent that "would reasonably be regarded as inconsistent with the retention of the requisite objective independence" and his conclusion that Ms Najma was "standing alongside [the father] to an unusual degree in attacking the mother's motives" were grounded in statements made by Ms Najma herself. The application before the learned Judge concerned a case management decision in respect of which the learned District Judge was entitled to view the evidence in the round when coming to his decision. Further, as I have already articulated, on the evidence before the court the learned District Judge was entitled to conclude that the statements made by Ms Najma, and relied on by the father as evidence in the family proceedings, went beyond an effort to rebut of the mother's complaints and criticisms in order to maintain fidelity to the cab rank rule and to fearlessly advance the interests of her client. Within this context, in my judgment it cannot be said that, in so far as the learned Judge made findings of fact, they were against the weight of the evidence before him or that in doing so he failed properly to account for the duties under which Ms Najma was operating.

63. The issue of Ms Najma being an advocate in her own defence is a little more difficult. There are obviously some disadvantages to counsel arguing in their own defence in order to meet an application for an order preventing them from continuing to act for their client. Against this however, it is apparent that Ms Najma chose to adopt this approach, presumably on instruction from her client, the father. Within this context, in so arguing counsel continues to act on behalf of, and upon the instruction of their client. In addition, the advocate who is the subject of the application will ordinarily be best placed to answer it. Further, it is not uncommon for an advocate to have to answer criticism levelled at them by another party at points during the course of proceedings. Within this context, I was not taken to any authorities that suggest that a special procedure should be adopted on applications of the kind with which the learned Judge was concerned or which suggest that there is a principled objection to the advocate who is the subject of the application arguing against it on the instruction

of their client. On balance, I am not satisfied that the fact Ms Najma argued the application for an order preventing her from acting rendered the learned Judge's decision procedurally unfair.

64. Finally, I am satisfied that there is no merit in the contention that the hearing before the learned District Judge was procedurally unfair in circumstances where it was dealt with by way of submissions and Ms Najma was not subject to cross-examination so her evidence was not heard and tested. There was no appeal mounted against the case management order of the learned Judge stipulating that the matter would be dealt with by way of submissions. In any event, that approach was proportionate to the case management issue with which the court was seized. It would not be appropriate for case management applications of this nature to become a species of satellite litigation involving oral evidence and cross examination.

CONCLUSION

65. In conclusion, whilst as made clear by the Court of Appeal in *Gerevan* it is only in *exceptional* circumstances that the court will countenance an order prohibiting counsel from continuing to act for a party, I am satisfied that the order of District Judge Carr of 29 June 2020 cannot be said to have been wrong.

66. The learned Judge was required to, and did ask himself whether counsel's continued participation would lead to a reasonable lay apprehension of unfairness. Having posed the correct question, the learned Judge proceeded, in line with the requirements laid out in *Gerevan*, to weigh up each of the relevant factors, including the type of case and the factors affecting the role of Ms Najma. Within this context, in my judgment the learned Judge was justified, on the evidence before him and having exercised appropriate caution having regard to the rarity of the order sought, in concluding that this was an example of the extremely rare cases in which it is appropriate for the court to direct that counsel should not continue to act for a party to proceedings because their continued participation would lead to a reasonable lay apprehension of unfairness, creating a real risk of counsel's continued participation resulting in the order made at trial being set aside on appeal.

67. Accordingly, whilst I am satisfied in this case that permission to appeal should be granted to the appellant, I dismiss the appeal.

68. Upon sending this judgment to counsel in draft, I indicated that I would consider in writing any submissions with respect to the question of anonymising Ms Najma's name in this judgment. Ms Ismail submitted that anonymising Ms Najma's name in a judgment on appeal would not meet the need for open justice. Mr Bradshaw submitted that Ms Najma's name should be anonymised to prevent the judgment being used by the mother to further criticise Ms Najma. However, very properly, Mr Bradshaw also conceded that there is no principle *requiring* the court to grant such anonymity in a judgment on appeal. Mr Bradshaw further and properly conceded that, whilst in one case concerning the question of whether counsel should continue to act the judgment had not named counsel (in *R v Smith*, where counsel concerned was a pupil), this was not the approach taken in the appeal in *Gerevan* or the appeal in *R v Batt*. I have considered carefully Mr Bradshaw's helpful submissions but I am satisfied that anonymising counsel's name would not be appropriate in this case.

69. That is my judgment.