Neutral Citation Number: [2024] EWHC 2236 (Fam)

Case No: FA-2024-000162

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT CANTERBURY
Her Honour Judge Davies
ME20P01163

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/08/2024

Before :

MS JUSTICE HENKE

- -

Re: T & O (Appeal: Fair Hearings: Delegation of Judicial Functions)

- -
- -

Samuel Davis (instructed by **Mowll & Mowll**) for the **Appellant**
The **Respondent** appearing in person

Hearing date: 27 August 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 29 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MS JUSTICE HENKE

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.

Ms Justice Henke :

Introduction

1. This is an application for permission to appeal with the appeal to follow immediately thereafter if permission is granted.

2. The order the Appellant seeks to appeal was made by HHJ Davies on 22 May 2024 in private law proceedings concerning two children. The children concerned are the children of the Appellant and the Respondent.

Background

3. The parties were married. They separated finally in August 2020. Within days of separation the Respondent issued a C100. Days later, the Appellant issued a Family Law Act application. That application was dealt with by way of undertakings given by the Respondent on 16 September 2020. The Appellant alleged the Respondent had breached the undertakings and the matter returned to court. The case came before Mr Recorder Saxby KC who found the Respondent had indeed breached the undertakings he had given on 16 September 2020 and made a non-molestation order in the Appellant's favour. The Respondent was unsuccessful in his attempt to appeal that order.

4. The litigation history of this case has been protracted. In October 2021, the Respondent's application for a child arrangements order came before Mr Recorder Roche KC who conducted a fact-finding hearing. Mr Recorder Roche KC found as a fact on the balance of probabilities 21 allegations brought by the Appellant against the Respondent and dismissed the allegations made by the Respondent against the Appellant. The Respondent sought permission to appeal those findings but his application for permission to appeal was refused by Mrs Justice Arbuthnot who certified his application as being totally without merit.

5. The findings of fact made by Mr Recorder Roche KC were findings of serious emotional, psychological, and physical abuse. They included threats of rape, as well as findings of coercive and controlling behaviour. A schedule of the findings made is attached to this judgment. The schedule has been appropriately anonymised by me. It should be read as a whole.

6. After the fact-finding hearing, Mr Recorder Roche KC directed that CAFCASS should prepare an addendum s.7 report. In the meantime, the Respondent was to have regular contact with the children at a contact centre. In the addendum report dated 26 November 2021, the Family Court Adviser wrote that she was concerned to understand the Respondent's psychological functioning and capacity. In the interim and pending any such report she recommended supervised rather than supported contact.

7. On 3 December 2021, Mr Recorder Roche KC joined the children as parties to the proceedings and directed that interim contact should be supervised rather than supported.

8. On 25 February 2022, Mr Recorder Roche KC permitted the parties to instruct a psychologist and made non-molestation and occupation orders to protect the Appellant. The jointly instructed psychologist reported on 30 May 2022 and provided two addenda on 18 July 2022 and 21 July 2022. There were further hearings before Mr Recorder Roche KC on 9 June 2022, 28 July 2022, and 4 November 2022. On the last of those dates, Mr Recorder Roche KC dismissed an application by the Respondent for a variation of contact arrangements. The Respondent applied for permission to appeal that decision. The application for permission to appeal was refused by the President of the Family Division on 19 December 2022.

9. The final welfare hearing took place before Mr Recorder Roche KC over four days beginning on 3 January 2023. Mr Recorder Roche KC delivered a reserved judgment on 30 January 2023. I have a copy of that judgment before me. For the reasons given within that judgment, he decided to give limited weight to the opinion evidence of the psychologist. At paragraph 63 of his judgment, he said this:

> "63. *I have considered all the evidence, including the carefully considered and insightful assessment and recommendations of the children's guardian. I have had particular regard to the welfare checklist and reached the conclusion that, until [the Respondent] has shown more insight into and acceptance of his behaviour in the past and until he is able to show considerably more control over his emotions and behaviour, his contact with the boys must be professionally supervised, by an independent social work professional in the community or in a contact centre. Without such supervision, there is too great a risk that the Respondent consciously or unconsciously, will cause further harm to the Appellant and undermine the relationship between the boys and their mother.*"

10. Mr Recorder Roche KC decided that the frequency of contact should be monthly. At paragraph 67, the learned Recorder stated his hopes for the future and said this:

> "*I hope that these arrangements can be varied in the future. In order for that to happen, [the Respondent] needs to change substantially and it is very likely that he will need professional help to do so. I urge the Respondent to seek counselling/therapy in order to develop his understanding of what went wrong in his relationship with the Appellant and in these proceedings. For such counselling/therapy to be effective, it must be on a sound basis and the Respondent will be permitted to show any therapist the findings and the judgments in these proceedings.*"

11. Mr Recorder Roche KC then proceeded to extend the non-molestation orders and occupation orders for two years until January 2025 and directed that the Respondent should not have any direct or indirect contact with the children except as permitted by court order or agreed in writing with the Appellant.

12. Final orders dated 30 January 2023 were drawn up to reflect Mr Recorder Roche KC's judgment.

13. The Respondent sought permission to appeal the contact order made by Mr Recorder Roche KC by Appellant's Notice dated 26 January 2023, before judgment had been formally handed down. The Respondent sought an order for unsupervised contact every other weekend. The application for permission to appeal was dealt with by Sir Jonathan Cohen on the papers on 31 March 2023. He refused the Respondent permission to appeal but gave directions for the case to be reviewed later in the year and commented that supervised contact was not a long-term solution. At paragraph 11 of his decision on permission to appeal he said this:

> "*[…] It is not satisfactory in the long run for contact to remain supervised. But the Appellant [Respondent to this appeal] will need to prove himself by accepting therapy or going on course/courses and accepting that he is not a victim. Any course manager/therapist must be shown the judgments of the court so as to approach the issues on an informed basis. If he can do that contact might be able to move to supported contact and then unrestricted. Nor is the ban on the children visiting his home likely to be sustainable in the long term.*"

14. The Appellant sought to appeal Sir Jonathan Cohen's directions and observations given on refusing permission to appeal. That appeal was considered by Sir Jonathan Cohen on the papers on 5 April 2023. On that occasion he refused the Appellant's application for permission but observed that the Respondent had not told him of a new application he had made to the lower court. Sir Jonathan Cohen accordingly stated that further case management should be considered by the judge at first instance and that that consideration would include issues relating to further hearings and any application for a s.91(14) order.

15. The application to the lower court to which Sir Jonathan Cohen referred on 5 April 2023 was a C2 application the Respondent had issued on 6 February 2023. By that application he sought to see the children, stating that he had by then undertaken four sessions for high conflict management and that he intended to continue with the therapy.

16. On 28 April 2023, the Appellant made a C2 application by which she sought a s.91(14) order. On the face of her application, it was stated on her behalf that the Appellant considers that the Respondent uses the Children Act proceedings as "*a tool of his continuing abuse of me*".

17. The competing applications came before HHJ Davies on 2 June 2023. I have before me a note of the judgment she gave. HHJ Davies clearly thought that on that occasion the Respondent's application was unreasonable. There were still ongoing allegations including allegations that the Respondent had breached the non-molestation order. HHJ Davies recognised the stress and anxiety the Respondent's application had caused the Appellant and stated:

> "*I will make a Section 91(14) for 4 years - during that time any applications should be reserved to me […] I say to the father there has to be proceedings completed under the Family Law Act - he has to complete CDAP. He has to do other things as well. If he makes an application in the future, I will consider it on its merits. What are other things? Not just courses/therapy but changing a whole mindset and accepting the findings.*"

18. In addition, the order of HHJ Davies of June 2023 contains the following recitals:

> "*4. The Father making an application to vary the final order in these proceedings made on 30 January 2023. The Court noting that the Father's application was filed 6 days after the final order was made.*
>
> *5. The Court summarily determining the Father's application today. It being recorded that the Father's application was unreasonable and has subjected the mother and the children to stress and anxiety. It being further recorded that, before the final order can be varied:*
>
> > *a. The Father will need to change his whole mindset and accept the findings made against him by Recorder Roche KC,*
> >
> > *b. The current criminal proceedings will need to have concluded,*
> >
> > *c. The Father will need to have completed appropriate therapeutic courses,*
> >
> > *d. The Father will need to demonstrate real change and that it is not simply a matter of completing courses in a 'tick box' fashion.*
>
> *6. The Court made a Section 91(14) barring order against the Father today with a period of 4 years. The Court noted that this will stop unreasonable applications, and that a reasonable application made within the barring period will be considered on its merits.*"

19. The Respondent sought permission to appeal the order of HHJ Davies by Appellant's Notice dated 26 June 2023. It is unclear from the papers before me what, if anything, happened to that application

20. The Respondent's application to vary the order that Mr Recorder Roche KC made on 30 January 2023 next came before the lower court on 22 January 2024. On that occasion, HHJ Scarratt refused the Respondent permission to apply to vary the order of 30 January 2023. The Respondent sought permission to appeal that decision by Appellant Notice dated 20 February 2024. However, he failed to comply with directions to enable that application to be determined. Consequently, on 22 May 2024 Sir Jonathan Cohen struck out that application for permission to appeal.

21. On 2 April 2024 the Respondent appeared before the Magistrates Court where he was ordered to undertake 90 hours of unpaid work and where a restraining order was made preventing him making any direct or indirect contact with the Respondent except for

child contact as ordered by the family court *via family solicitors or social services.* He was also prevented from attending at a number of properties.

22. The Respondent made another application to the lower court to vary the order for contact which had been made on 30 January 2023. I do not have the relevant C2 before me, but the Respondent has submitted to this court a position statement dated 8 May 2024. That position statement was before HHJ Davies on 10 May 2024. The position statement is long. It is 45 pages of which the first 5 pages set out his case and the remainder are supporting documents. From that document it is clear that the Respondent was seeking four hours of contact on a Saturday and four hours on a Sunday once a month without supervision as a trial period. He stated that he had complied with the court's previous directions and had developed a detailed parenting plan. He had gathered evidence to support his case which included contact centre reports, reports of observations of contact between himself and the children by the Independent Social Worker as well as evidence of concluding the CDAP programme and undertaking 17 sessions with a psychologist specialising in "*fact-finding systems*". I specifically record that attached to the position statement is an open letter from Synergy Counselling written by his psychotherapist about the work they have undertaken with the Respondent. It is undated and unsigned. It sets out the progress the Respondent had made at the date of writing and the ongoing work he will need to undertake. There is also in the papers the Respondent has forwarded to me a two-page report from CDAP dated 3 January 2024. In addition, the Respondent attached to the position statements a number of certificates in relation to course the Respondent has undertaken and a selection of letters which he has written to the children together with photographs and collages of photographs. He also sent to the court under cover of his position statement a whole host of receipts for items he has purchased the children on Amazon.

Order of HHJ Davies dated 10 May 2024

23. On 10 May 2024, HHJ Davies heard the Respondent's application for permission to apply for unsupervised contact with the children, including staying contact. She did so in a short hearing which was without notice to the Appellant and via a CVP link.

24. I have the transcript of the hearing of 10 May 2024 before me. During that hearing the learned Judge granted the Respondent permission to make the application for contact on the basis of all the work he had done and listed the substantive application for directions on 22 May 2024. Given the manner in which HHJ Davies heard the Respondent's application, I have reminded myself of the President's judgment in *Re S - CA 1989, S91(14)*) [2023] EWHC 1161 (Fam). In particular, I have in mind:

> "*11 […] During the course of the hearing this morning, I have drawn attention to a relatively recent authority, namely the decision of Cobb J in the case of Re P v N [2019] EWHC 421 (Fam), in which, helpfully, Cobb J reviews the existing Court of Appeal authority on the question of the test for leave when someone applies to be released from a s.91(14) embargo. The test is set out and settled finally in a decision of Re S [2006] EWCA (Civ) 1190 , a decision in which both Wall and Thorpe LJJ took part:*

> *"78 […] Thorpe LJ's test in Re A [1998] 1 FLR 1 set out at paragraph 53 above: ('Does this application demonstrate that there is any need for renewed judicial investigation?') and Butler Sloss LJ's test in Re P [1999] 2 FLR 573 at paragraph 54 above: ('The applicant must persuade the judge that he has an arguable case with some chance of success'). In our judgment the two complement each other. A judge will not, we think, see a need for renewed judicial investigation into an application which he does not think sets out an arguable case […]*
>
> *79. It is self-evident that a party who is the subject of an order under section 91(14) [of the Act] which has been made because of particular conduct by that party must have addressed that conduct if his application for permission to apply is to warrant a renewed judicial investigation or to present an arguable case […]"*

12. So, rather than applying a more formulaic test, namely the one in s.10(9) , it seems to be settled Court of Appeal authority, to establish, that what has to happen is a lower standard, which is simply the need for renewed judicial investigation based upon an arguable case. The earlier decision of Butler Sloss LJ, to which reference had been made, includes this observation by that tribunal: that the test "is not a formidable hurdle to surmount." Nor should it be. This is a filter rather than a barrier and it should be approached in that way.

13. As a further gloss, and I think since the decision of the Her Honour Judge Patel in September, Parliament has amended the Children Act to introduce s.91A. Section 91A(4) reads:

> *"Where a person who is named in a section 91(14) order applies for leave to make an application of a specified kind, the court must, in determining whether to grant leave, consider whether there has been a material change of circumstances since the order was made."*

So, it seems to me that if the application were being decided now, the test would be that identified by the Court of Appeal in Re S, together with now s.91(14)."

Further and later in the judgment, the President stated:

"*16. In any event, as the decision of Cobb J in Re P v N demonstrates, it is well settled that an application for leave under s.91(14) should be heard on notice to the other party. No doubt there will be exceptions, but that is the normal approach. A gloss is put on that so that the process that has been adopted in this case should be the first stage, namely a judge should look at it at a without notice hearing; but then, if it gets through that stage, then notice has to be given to the other side and an inter partes hearing conducted on the question of leave.*

> *17. I am sufficiently satisfied, as I anticipate my positive comments earlier in this judgment will have indicated, that the father gets past that first stage and, therefore, there now needs to be a further hearing of which notice is given to the mother and at which the judge has the full file […]*"

25. It is quite clear from the order of HHJ Davies dated 10 May 2024 and the transcript of the hearing that day that HHJ Davies listed the substantive application for contact for directions on 22 May 2024 rather than the on notice hearing of the Respondent's application for permission to apply. That was a procedural error. However, the Appellant has not sought permission to appeal the order of 10 May 2024. In coming to that decision, I am told that she has been pragmatic and taken an approach which she hopes is efficient of time and money. Nevertheless, at one point during oral argument, Counsel on behalf of the Appellant told me that if the appeal against the order of 22 May succeeded and I decided to remit the case for rehearing, the point would be taken at the lower court that the next step should be to hear the application for permission to apply on notice. That submission troubled me. It seems to me that either the order of 10 May 2024 is the subject of an appeal, or it is not. In the absence of an appeal against that order, the order of 10 May 2024 still stands, and the Respondent has been granted permission to apply. In those circumstances, I consider that the gateway for the substantive application has been opened and, absent an appeal, cannot now be closed.

Order of HHJ Davies dated 22 May 2024

26. The hearing on 22 May 2024 was listed for directions to consider the Respondent's application for unsupervised contact. At that hearing, HHJ Davies read the documents the Respondent had submitted in support of his application confirming CDAP attendance and attendance with a psychologist. His case was that he had changed; that supervised contact was only ever going to be a practical short-term solution and it needed to move on; that he loved the children very much and that the notes of his supervised contact with the children were all positive. In essence he argued that the time had now come to progress contact between him and the children.

27. I have before me the transcript of the hearing before HHJ Davies on 22 May 2024. The hearing was conducted on submissions via CVP. Neither party was represented. It is clear from the transcript that the Appellant was opposed to the Respondent having any unsupervised contact with the children. The Appellant had seen the report from CDAP but challenged its conclusion. It was her case that whilst the Respondent had attended the course, she was not convinced that he had gained insight into his behaviours and its impact on her. She told the court that:

> "*His recent correspondence to the court for the, his statement just to me follows the same pattern as it's always been, highly intensely emotional comments about the boys being sad. It, it just doesn't, it doesn't seem to have changed […] But I just don't see change*."

28. Despite the Respondent's submission in response that he had changed and that he had completed the necessary work to bring about change, the transcript reveals that the

Appellant continued not to accept that he had undergone the change she considered necessary to ensure the children were safe from emotional harm in his care.

29. However, having heard submissions from both parties and interacted with them during the course of the hearing, HHJ Davies made an order in the following terms: -

> "*1. [The independent social worker] do file and serve a S7 report as to the issue of whether she considers there should be unsupervised contact between the father and the children. Such report to be filed and served by 29th May 2024.*
>
> *2. If this is a positive assessment then unsupervised contact should start on 1st June for four hours from 2pm to 6 pm. Handovers and arrangements to be made between the mother and [the paternal step grandfather]. This contact is to be either in the community or at the father's home if the social worker is satisfied this is appropriate.*
>
> *3. If [the social worker's] report is positive, the mother is to make the children available for contact with their father for four hours commencing 1st June, for four hours fortnightly on either a Saturday or a Sunday.*
>
> *4. [The social worker] is to file a final S7 report as to how contact should progress by 5th July. The court are to send both reports on to the mother.*
>
> *5. Both parties are to file a short statement dealing with the proposals for contact moving forward. And whether they agree with the social worker's proposals.by 19th July. If there is agreement as to the way forward, then the parties may write to the court to request a final order.*
>
> *6. A one day final hearing listed in the [family] court at 10:00 on the 20th August 2024 with a time estimate of 1 day.*
>
> *7. [The social worker] is to appear as a witness if the mother does not agree with her proposals and the mother must notify the court promptly and tell [the social worker] so the father can secure her attendance at a final hearing.*
>
> *8. This order may be shown to [the social worker] to obtain any dates to avoid that she may have and for the benefit of doubt this will be a remote hearing by CVP.*"

30. The Appellant seeks to appeal that order.

The Appeal

31. The Appellant's Notice is dated 12 June 2024. By that Notice she sought permission to appeal the entire order made by HHJ Davies on 22 May 2024 and a stay of the order. I granted that stay on 25 June 2024 and gave directions to enable me to consider the application for permission to appeal. Those directions included making provision for

the filing of the transcript of the hearing and a skeleton argument in support of the appeal. On 25 July 2024, I considered the application for permission to appeal in light of the transcript of the hearing on 22 May 2024 which by then had been received, the amended Grounds of Appeal the Appellant now relied upon, and the skeleton argument prepared on behalf of the Appellant in support of appeal. I gave directions for the filing of a skeleton argument by the Respondent, continued the stay, and directed that the Appellant Notice be listed for a rolled-up hearing, namely for the application for permission to appeal to be heard orally with the appeal to follow immediately thereafter if I granted permission to appeal.

32. At the rolled up hearing the Appellant was represented by Counsel, Mr Davis. He had settled the Amended Grounds of Appeal and the Skeleton argument in support on behalf of the Appellant. The Respondent represented himself.

33. At the beginning of the hearing, I had an electronic bundle containing 209 pages which had been prepared on behalf of the Appellant. I ensured that the Respondent had access to a paper copy of that bundle and time to orient himself in it. Whilst he did that, I acquainted myself with documents the Respondent had prepared, and which had not reached me. Although he forwarded to me numerous documents, the Respondent was correct in his assessment that the position statements he wished me to read were themselves relatively short. I took time to read the documents. In doing so I concentrated on a position statement the Respondent had prepared for a District Judge and another he had prepared for the appeal proceedings, and which was dated 7 August 2024 together with attachments to that document. Amongst the papers attached to the position statement dated 7 August 2024 is a letter from Synergy Counselling, Training and Consultancy and certificates relating to various courses he has completed. Having read them, they appeared to be the same documents the Respondent had submitted to HHJ Davies. I also reminded myself of the content of the CDAP report dated 3 January 2024. Time has also allowed me to consider the reports from supervised contact which the Respondent has submitted and I note, for the purposes of this appeal, that all are positive. I have also considered all the photographs he sent in as well as a polygraph report and statements which appeared to me to be more relevant to a family finance application. Amongst the papers there are also numerous examples of the letters he has written to the children.

The Appellant's Case

34. The Appellant's case as outlined to me in oral submissions followed the case advanced in the skeleton argument. The Grounds upon which she seeks to appeal were initially as follows: -

> "*12. The critical issues in relation to this family, before contact can progress, are:*
>
> *a. Whether the Father has undergone real and substantive change and no longer poses a risk of harm to the Appellant or the children in the light of the findings made against him, and*

b. The Father's historic manipulation of professionals (and the concern that any professional he engages with may be aligned by him), The Judge did not take either factor into account when making the order dated 22 May 2024 and was wrong not to do so. This is the first ground of appeal.

13. The Appellant also appeals for the following (further) reasons:

a. These were proceedings which required an FPR 16.4 Guardian. The children have been represented in the proceedings for an extensive period of time and it is an anomaly that, when the Father's application to circumvent the Section 91(14) barring order and vary the child arrangements order was heard, they were not represented. These are proceedings which have seen intractable disputes over contact, irrational and implacable hostility from the Father and where the views of the children cannot be adequately represented or met by a report to the Court. The Judge was wrong to make an interim contact order that permitted contact progression without joining the children and seeking their views through a Guardian. Alternatively it was procedurally irregular in the context of these proceedings to hear the application without a Guardian.

b. The children's views cannot be adequately represented through a Section 7 Report in this case given its complex background and the Father's history of abuse and manipulation. The Judge was wrong to find that a Section 7 Report was appropriate.

c. The Judge does not appear to have had the previous papers before it, or to have considered the same. The Judge was wrong not to consider the history of this case and the importance of ensuring that the Father can demonstrate real change. Alternatively this was a serious procedural irregularity.

d. The Judge did not account for the risk that the Father may have manipulated or aligned the independent social worker. This is a live risk in the context of these proceedings and care should have been exercised before relying on the independent social worker. The Judge was wrong not to account for this possibility and take steps to safeguard against the manipulation or alignment of the social worker.

e. The Judge was wrong to allow the potential progression of contact when (a) the criteria in HHJ Davies order dated 2 June 2023 has not been complied with and (b) when there had been no real investigation into whether the Father has undergone real change. The documents and the statements of the Father show that he has not changed at all and the Judge was wrong not to take that into account."

35. In her skeleton argument dated 18 July 2024, the Appellant sought to expand the Grounds of Appeal to include the following additional Grounds, namely: -

> "*a. HHJ Davies was wrong to delegate her responsibility as the main decision maker in relation to the contested issue of interim contact to the Independent Social Worker ("ISW") in this case.*
>
> *b. HHJ Davies was wrong to direct a Section 7 Report from the ISW without first establishing (a) what the extent of the ISW's involvement with the family was, (b) what the extent of the ISW's knowledge was, (c) what documents the ISW had access to (or would need access to) and (d) globally whether the ISW was in a position to produce a Section 7 Report or to determine the progression of interim contact without further input or oversight from the Court.*
>
> *c. It was procedurally irregular and/or wrong for HHJ Davies to determine that a Section 7 Report should be ordered and to otherwise determine the issues before the Court at this interim hearing without first giving both parties the opportunity to make full submissions.*"

36. Given the Respondent had had notice of the additional grounds of appeal since 18 July 2024, I allowed the Appellant to rely on the additional grounds.

37. The Respondent's case on appeal was set out in his written document dated 7 August 2024. Within that document he restated the case he had placed before HHJ Davies on 22 May 2024. The Respondent supplemented his written submissions orally before me. In his oral submissions to me, the Respondent emphasised that he had done all that had been asked of him by Mr Recorder Roche KC and by Sir Jonathan Cohen. He had undergone therapy with a specialist psychotherapist and had voluntarily participated in and completed the CDAP course. He had done what was required of him swiftly and he should not be penalised for his rapid response. There had already been, he estimated, 20 hearings in this case. He stated that continued protracted litigation was not in the children's best interests. Contact had been supervised for far too long and it needed to move forward. The Appellant, he says, wishes to prevent contact between him and the children.

38. The Respondent urged me to refuse permission to appeal. He told me that since I had stayed the order of HHJ Davies contact had not reverted to supervised contact under the previous order as it ought but had stopped. As he advanced that argument it became clear that the Appellant and the Respondent could not agree the reason it had stopped. The Appellant told me through counsel that she had stated her agreement to supervised contact continuing but the Respondent had refused such contact. The Respondent giving me a contrary account. I do not seek to resolve that dispute at the hearing. I simply note that the Appellant confirmed before me her agreement that if the appeal succeeded, she would agree to supervised contact continuing as before whilst any remitted hearing proceeded in the lower court. That was a formal stated position and one which during the hearing I said I would record in this judgment.

39. I also permitted the Appellant to produce fresh evidence namely an email from the service for which the Independent Social worker named in the order works to HHJ Davies. That document had been sent to the Respondent by the said service on 21 June 2024. The Respondent was aware of its contents and had had time to consider it. He did

not directly challenge its content but submitted that the Independent Social Work Service had been intimidated by the Appellant's solicitor and that is why they had sent the email. He asserted that they had been "petrified" to do otherwise.

40. The email dated 21 June 2024 sets out that the Independent Social Work Service have not started the S7 enquiries in the light of the stay I granted. It also says this:

> "*As a brief background the social worker has only ever been instructed to supervise contact between [the Respondent] and the children and to provide a brief report thereafter. [The Respondent] has self-funded these supervised contact sessions. We have never been provided with a court bundle or any background as to the reasons why there are Private Law proceedings. I was therefore surprised that without any warning or enquiry as to whether we could so, we were ordered to undertake a Section 7 Report. As a matter of best practice, we would not provide such a report without a court bundle, redacted if required.*"

My Decision on Appeal and My Reasons

41. A court will only allow an appeal where the decision of the lower court was wrong, or unjust because of a serious procedural or other irregularity in the proceedings (FPR rule 30.12(3)). An appeal court must not substitute its own judgment and must give deference to the trial judge who heard and read all of the evidence. The court must apply the principles set out in the case of *Piglowska v Piglowski* [1999] UKHL 27, bearing in mind the exigencies of daily court life are such that reasons for judgment will always be capable of being better expressed; these reasons should be read on the assumption that, unless it has been demonstrated to the contrary, the judge knew how to perform their function and which matters they should take into account.

42. I take into account that HHJ Davies is a highly respected judge who had past knowledge of this case, having made the s.91(14) order in June 2023. The order of 22 May 2024 was made after a short, remote hearing during what I expect was a very busy list. Further, I accept the Respondent's submission that the learned Judge was motivated by wanting to progress contact in an efficient manner given the significant financial and emotional cost of these protracted proceedings on the parties. However, I consider that in this case she fell into serious procedural error and that she made a decision which was wrong and cannot stand. Accordingly, at the conclusion of the rolled up appeal hearing, I granted the Appellant permission to appeal and indicated that I would allow the appeal for the reasons that I gave orally that day and which I said I would set out and expand upon in this judgment.

43. I have allowed the appeal for four inter-related reasons.

44. Firstly, this is a highly contentious case. It is clear from the transcript that the Appellant did not accept that the Respondent had fundamentally changed such that contact with the children could progress safely from supervised to unsupervised. However, the hearing on 22 May 2024 did not permit the Appellant to make a substantive challenge to the evidence which she did not accept. Whilst the overriding objective applied to HHJ Davies' case management decisions, moving from supervised to unsupervised context in the context of

the history of this case was a significant and substantive step. Section 1 of Children Act 1989 ought to have been applied. Consideration of the s.1 factors through the prism of Practice Direction 12J would have included consideration of any risk of harm to the children and any impact of the change in contact arrangements upon them directly and indirectly through the impact on the Appellant, their mother with whom they live.

45. The evidence of future risk of harm in this case was in dispute. The Respondent asserted he had changed and posed no risk. The Appellant clearly did not accept that and asserted that despite the courses he had undertaken, he had not fundamentally changed and continued to pose a risk to the children. In this case determination of the issue of whether or not the Respondent had changed or continued to pose a risk to the children was central to the decision of whether the contact could progress from supervised contact to unsupervised contact, Where, as here, there was a significant challenge to the evidence of change, I consider that the Respondent's application should have been set down for a hearing in which the challenged evidence could be tested through cross-examination of the Respondent and potentially the CDAP reporter and the psychotherapist upon whose report the Respondent relied. The order of 22 May 2024 did not provide an effective mechanism for such challenge and accordingly was, in my view, unfair.

46. Secondly and linked to the preceding paragraph, I consider that on 22 May 2024 the learned Judge failed to give any or any proper regard to paragraphs 35-37 of Practice Direction 12J. In particular, I consider that by failing to provide for a hearing at which the evidence of change could be challenged, HHJ Davies failed to have regard to paragraph 35 of Practice Direction 12J which states that:

> "*35. When deciding the issue of child arrangements the court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.*"

Without a hearing which permitted effective challenge of the Respondent and the evidence upon which he relied to substantiate change, I consider that the court could not ensure that the children would not be exposed to an unmanageable risk of harm and that unsupervised contact was in their best interests.

47. Thirdly, I consider that HHJ Davies wrongly delegated her judicial function to the Independent Social Worker. At paragraph 29 above I have set out the order HHJ Davies made on 22 May 2024. By reason of the provisions of that order, contact was to progress from supervised to unsupervised contact upon the receipt of a positive assessment to be provided by the Independent Social Worker who had been observing the Respondent's contact with the children. The mechanism established by the order delegated the decision to progress from supervised to unsupervised contact to the Independent Social Worker. I consider that HHJ Davies was wrong to delegate that judicial function to the Independent Social Worker. The decision should have been made by the judge herself after a hearing which permitted effective challenge of the Respondent's evidence of change and consideration of the best interests of the children after application of s.1 Children Act 1989 and Practice Direction 12 J.

48. My fourth reason is inter-related to my third reason which I have set out in the preceding paragraph. The Independent Social Worker did not have a copy of the case papers. Her role was solely limited to being a supervisor of the Respondent's contact with the children. She did not have access to the case papers or knowledge of the Appellant's challenge to the evidence of change. In such circumstances, whilst I am sure she would have acted in good faith and as objectively as possible, she simply would not have had the material necessary to make an informed decision about whether or not it was in the children's best interests to progress contact from supervised to unsupervised contact nor could she decide whether that contact would be safe. In the event, the content of the email of 21 June 2024 (set out above) from the Independent Social Work Service to HHJ Davies is not surprising.

Conclusion and Directions for the Future Progress of the Case

49. For the reasons I have given, I have come to the decision that the order of HHJ Davies of 22 May 2024 cannot stand. I have reminded myself of the Appellate Court's powers set out in FPR 30.11 (1)-(3) and have decided that:

    a. The order of 22 May 2024 should be set aside.

    b. The Respondent's application for unsupervised contact and staying contact should be remitted for hearing before the lower court before a judge other than HHJ Davies. A date and time for an effective case management hearing before that judge will need to be obtained.

50. In order to avoid further delay, I direct today that:

    a. The children should be joined as a party to the proceedings in accordance with FPR r.16.2. I consider it is in the best interests of these children to have their own voice within these proceedings independent of either of their parents. This is a high conflict case. They have been separately represented in earlier proceedings.

    b. A rule 16.4 Guardian should be appointed to represent the children.

51. During the course of the appeal hearing which was heard in public I made a reporting restriction order restricting the publication of the identity of the children and the parties and prohibiting the publication of any information which may lead to any such person being identified. I made such orders pursuant to my powers under FPR r.30.12A paragraph (3)(a) and (b). That order remains in force.

52. Having considered the Appellant's application for costs and applying the law as set out in *Re O (Appeal: Costs)* [2024] EWHC 1163 (Fam), I have decided that the appropriate order for costs is no order for costs between the parties.

53. That is my judgment.

54. Counsel for the Appellant is asked to draft an order for my approval which reflects the decisions I have made herein.

Schedule

i. That on the 31 December 2004 the Respondent assaulted the Appellant in a hotel room causing the Appellant to suffer a black eye.

ii. That in the Spring of 2007 the Respondent assaulted the Appellant and by putting his hands over her nose and mouth caused her to believe that she was going to be suffocated.

iii. That on 11 August 2019 the Respondent told the Appellant that he would 'love to put his fingers round her neck and squeeze until the life comes out of you, watch you die'. The Respondent said this to the Appellant in front of the youngest child, O.

iv. That on the 23 September 2019 the Respondent verbally abused the Appellant whilst on the phone, calling her a selfish bitch. The Respondent shouted this abuse at the Appellant whilst [one of the children] was in the car with her.

v. That on the 11 May 2020 the Respondent told [the parties' son] that 'she is a putrid nasty poisonous person. She's not a real mummy. Real mummies do not constantly ask their children to wash their hands. Does Mummy talk to you like that? If she does, just phone me and I'll help' about the Appellant.

vi. That on the 5 August 2021 the Respondent verbally abused the Appellant in front of both children, calling her a disgusting Mother.

vii. That during the course of the relationship the Respondent subjected the Appellant to regular sexual abuse including verbal attacks, insults and coercion.

viii. That during the weekend of 1 October 2017 whilst in a Waitrose car park the Respondent made a threat to start raping the Appellant if she did not agree to have sex with him. That the Respondent made this threat in the presence of the children.

ix. That during the course of the relationship the Respondent subjected the Appellant to regular financial abuse.

x. That from 2015 to 2020 the Respondent took control of the Appellant's personal financial affairs including but not limited to her tax returns without her consent.

xi. That from 2015 to 2020 the Respondent controlled the Appellant's access to funds by stopping or blocking her credit card.

xii. That from 2018 to 2020 the Respondent coerced the Appellant into signing financial documents and finance agreements.

xiii. That in July 2020, without the Appellant's knowledge or consent, the Respondent removed £92,000 from the parties' RBS joint current account and forged the Appellant's signature on bank papers in order to effect her removal from the same account. The Respondent admitted that he committed an act of fraud in this regard during evidence and submissions.

xiv. That during the course of the relationship the Respondent subjected the Appellant to psychological and emotional abuse.

xv. That between 2012 and 2020 the Respondent repeatedly accused the Appellant of being mentally ill. The Respondent told the Appellant's parents in calls and phone messages that the Appellant was psychotic and mentally ill and needed psychiatric help.

xvi. That during the course of the relationship the Respondent subjected the Appellant to coercive control.

xvii. That from 2015 to 2020 the Respondent prevented the Appellant's access to her mail by taking it to his office without her consent, where he kept it.

xviii. That on 23 June 2015 the Respondent verbally abused the Appellant in front of her own Mother (the Maternal Grandmother) calling her (the Appellant) a greedy bitch.

xix. That between 2015 and 2020 the Respondent took the Appellant's passport from the home and kept it at his office and despite the Appellant's requests, refused to give it back to her until August 2020.

xx. That in July 2019 the Respondent gave the Appellant a 'contract' that he told the Appellant and the Maternal Grandparents that he would force the Appellant to sign if she tried to divorce him.

xxi. That on 18 July 2020 the Respondent sent messages and made calls threatening the Appellant and the Maternal Grandparents, causing them to flee their homes