Neutral Citation Number: [2024] EWHC 2786 (Fam)

Case No: FA-2024-00176

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

HHJ Kushner
LU20P04572

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 September 2024

Before :

MR JUSTICE CUSWORTH

- -

Between :

TM — **Appellant**

- and –

TF — **Respondent**

- -
- -

Elizabeth Traugott (**Direct Access**) for the **Appellant**
Ben Mansfield (instructed by **Pictons**) for the **Respondent**

Hearing date: 10 September 2024

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JUDGMENT

This judgment was handed down remotely at 10.30am on 4 November 2024 by circulation to the parties or their representatives by e-mail and by release to The National Archives.

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This judgment was delivered in public. 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 parties must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Cusworth :

1. This has been the hearing of an application for permission to an appeal an order made by HHJ Kushner in the Luton Family Court on 31 May 2024, and if permission is granted, for the hearing of the substantive appeal. Both parties have been well and sensitively represented by Counsel, in a hearing which forms part of a long running set of proceedings involving the parties' son, known as TC, who is aged 9. In addition to full skeletons from both parties and a large number of authorities from counsel, I have also received 2 bundles comprising over 1,000 pages, including the transcript of both parties' evidence. The judgment itself runs to 50 pages, including 217 paragraphs and a number of passages of dialogue during its delivery between the judge and counsel. Notwithstanding, the matter has been listed before me for just 1 day, on 10 September 2024.

2. I have heard oral submissions from Ms Traugott for the appellant, who appeared below, and Mr Mansfield for the respondent, who did not. Rather than break the hearing into component parts, I have heard full submissions from counsel in relation to both the permission application and the substantive appeal. I then adjourned to consider this judgment. I will first provide a little of the important background.

3. Background. An application by the respondent father for child arrangements was issued in November 2020. In response the appellant mother made a series of very serious allegations of domestic violence and other violent assaults against the respondent father. On 28 March 2022 Deputy District Judge Leigh-Smith found proved all but one of the appellant's allegations, and made 24 serious findings against the respondent. The Judge characterised his findings as "significant physical and emotional threats" some of which were "frightening" and others "bizarre". He had reminded himself of *Re H-N* [2021] EWCA Civ 448 and *F v M* [2021] EWFC 4. The findings included threats, stalking and physical violence. By way of example, the Judge found that the respondent was abusive by:

a. Threatening two women with a machete by chasing them down the street with it, then leaving it by the front door of the home causing the appellant to believe he was reminding her what he was capable of;

b. Forcing the appellant to jump out of a moving car to escape his physical and verbal abuse then grabbing her by the hair and dragging her back into the car where he hit her in the mouth causing her lip to bleed;

c. Threatening to stab the appellant in the eye with a hypodermic needle;

d. Threatening to hit the appellant when she was 7-weeks' pregnant;

e. Threatening to behead the appellant after turning up at her house late one night demanding to see TC, who was asleep;

f. Planting recording devices in the appellant's home to listen to the appellant's conversations;

g. Stalking the appellant by researching TC's childminder and turning up there, necessitating a police callout, as the respondent had not been given the childminder's address;

h. Parking outside the appellant's home address to watch her;

i. Verbally abusing the appellant including during indirect phone contact with TC;

j. Behaving inappropriately with TC by blowing on his penis when he was an infant and with another child by grabbing his genitals.

4. The respondent appealed those findings, but by an order made on 24 June 2022, HHJ Kushner dismissed that appeal. An order dated 17 August 2022 recited that the Respondent should attend a DAPP with RESPECT accreditation as recommended by Cafcass. The Respondent completed a DAPP with The A Project in February 2023. The A Project is not RESPECT-accredited, but was approved by CAFCASS. Contact between TC and his father progressed on a supervised basis, notwithstanding the findings. On 12 May 2023 HHJ Kushner moved contact from supervised at a contact centre to supervised in the community. On 11 September 2023 the same Judge progressed contact from supported to unsupervised in the community with supported handovers. The

appellant mother objected to some extent to each of these developments, but reports provided indicated that the arrangements proved successful.

5. The appellant has expressed concern that, at a hearing on 19 October 2023, counsel for the respondent and HHJ Kushner made reference to the possibility that, in circumstances where it decided that TC was missing ordered sessions contrary to his best interests and the appellant mother was found to be responsible, a transfer of residence and/or a foster care bridging placement might be considered by the court as possible options. The appellant was also not represented at a further review hearing on 31 October 2023 where an accelerated contact schedule, albeit not including overnight stays, was ordered. The appellant sought permission to appeal this interim contact order. That permission was refused by Peel J on 12 February 2024. The permission application was found to be completely without merit.

6. At the listed final hearing before HHJ Kushner on 14 May 2024, both parties gave evidence, as did the CAFCASS reporter. In her judgment on 31 May 2024 the judge progressed contact from 14 hours on a visiting basis over 2 days on alternate weekends to overnight on alternate weekends during the school summer holidays – then 3 months hence. In her very full judgment, in which she recited the significant history of the case, including all of the findings made against the father, she found that while he still did not accept the court's findings, he did demonstrate a general understanding of domestic abuse. The judge set out in full the relevant paragraphs of PD12J, and there can be little doubt that she was fully cognisant of the mother's concerns, as she questioned her about her perception of the risks at some length. At various points during the judgment there are what can only be described as testy exchanges between the judge and Ms Traugott, the appellant mother's counsel.

7. The appellant mother then applied for permission to appeal and for a stay of the Order and Judgment made. The stay application sought that the order be stayed until the permission application could be heard, as 'the progression to overnight contact was made without proper consideration for PD12J and the child's wishes

and feelings'. By an order of 22 July 2024, I suspended the introduction of overnight visits until this application for permission had been determined. Visiting over two days every other weekend has continued as previously ordered.

8. In support of her application for permission, the appellant is relying on 6 grounds of appeal, which she sets out as follows:

    a. *Ground 1: The PD12J analysis and the Learned Judge's decision to progress contact to overnight was unsound in circumstances where the Respondent confirmed in his evidence at the Final Hearing that he does not accept the most serious findings of domestic abuse despite attending a DAPP course and that he only went on the DAPP course because he had been ordered to. The Learned Judge's decision improperly circumvents PD12J and renders it meaningless.*

    b. *Ground 2: It was procedurally unfair and legally unsound for the Learned Judge to find that the child "may be influenced by the mother whether intentional or not" when this was not a finding sought by the Respondent and, according to clear guidance from the courts and from Cafcass, rejection is justified where there has been domestic abuse. The finding is equivalent to a determination that the Appellant alienated the child albeit using different terminology and is therefore legally, factually and procedurally unsound.*

    c. *Ground 3: It was procedurally unfair and improper for the Learned Judge to cross-examine the Appellant extensively about what she (the Appellant) perceived to be the risk of contact when there are significant findings of domestic abuse that the Respondent does not accept and it is the role of the court, under PD12J, to determine the risk of harm to victim and the child, not the victim.*

    d. *Ground 4: The child's explicit wishes and feelings as set out in a letter to the court drafted in the presence of the Cafcass officer were not given sufficient weight.*

    e. *Ground 5: It was procedurally improper for the Learned Judge to cross-examine the Appellant extensively about her home life and the child's socialisation and to then use this evidence to criticise the Appellant's*

parenting in the Judgment when the Appellant had not been given advanced notice that the issue would be put to her or used against her. In particular, even if true (and its truth is disputed by the Appellant) it is not relevant that the Appellant has a quite home life and is not "embedded in the community" either to contact or to the child's anxiety about contact with a domestically-abusive parent.

f. *Ground 6: It was procedurally improper for the court to refuse to make a final order but instead to list a further hearing to review the progress of contact, particularly where the court made a finding that the Appellant influenced the child. The decision at the end of the Judgment not to make a final order in circumstances where there has been a finding of "influence" sends a clear and inappropriate message to the Appellant that she will be blamed if contact does not progress despite the child's clearly-expressed wishes and feelings and the Respondent's failure to accept the findings of domestic abuse*.

9. At a further hearing on 22 August 2024, Theis J listed this oral permission hearing, with appeal to follow if permission were granted, and directed that in addition to a full skeleton from the respondent, the appellant should obtain a transcript of her evidence before HHJ Kushner, given allegations of procedural impropriety which are being made.

10. Determination. By FPR 2010 r.30.12, in the event that permission is granted, this appeal would be limited, other than exceptionally, to a review of the decision of the lower court. Ms Traugott accepted that, in that the event that her appeal succeeds, the inevitable consequence would be that the application which was before HHJ Kushner in May 2024 would have to be remitted to another judge for a rehearing on the merits. Although she tells me that her client is very keen to avoid any further hearings in this matter, very understandably, it is the case that the consequence of her appeal succeeding would be a probable re-hearing of the final child arrangements determination.

11. In considering first whether to grant permission to the appellant appeal, I will deal with each of the grounds relied on in turn; however, first I should make very clear that there can be no question but that the findings made by DDJ Leigh

Smith are of the utmost seriousness, and in any circumstances must remain a significant concern and consideration for any court which comes to consider child arrangements in relation to TC, as I will continue to refer him in this judgment.

12. I must also make clear, however, that this appeal is not one that goes to the principle of whether there should or should not be direct arrangements in place for TC to spend time with his father. Orders to that effect have already been made, and as explained the mother's appeal against the order of HHJ Kushner made on 31 October 2023 was refused permission to proceed. The evidence before the court is that the arrangements currently in place provide for positive contact between father and son and that TC benefits from the arrangements. The issues for the judge at the hearing on 31 May 2024 were whether the arrangements should or should not progress to overnight stays, and whether the order which the judge made should then be the final order which disposed of the proceedings.

13. Clearly, TC's wishes and feelings would have to be an important consideration for the judge. In his report dated 23 April 2024, the CAFCASS reporter recorded being told by TC, who had also written a letter to this effect, that he did not want to sleep at his father's house, but that: 'Whilst the court will recognise that TC does not yet feel ready to stay overnight with his father this might be recorded as an option to avoid the need for further proceedings when he does feel ready.' He then wrote to TC, explaining that: 'You told me you weren't ready for sleepovers. I told the court what you wanted and I shared the letter you wrote for the judge. I recommended that you continue to see your dad with no changes and that you should be allowed to choose if and when you want to stay overnight.'

14. In his evidence at the final hearing, the Respondent confirmed, as he did in the final DAPP report, that he did not accept the most serious findings of domestic abuse. Ms Traugott also points out that he said that he attended the DAPP just so he could have contact with TC. In her very full and detailed judgment the

judge fully set out at the outset paragraphs 36, 37 and 40 of PD12J. I am satisfied that she had these well in mind in arriving at her decision. I will consider her specific observations in relation to domestic violence below. She recorded the CAFCASS reporter's evidence to her as follows:

> *'176…. He took over the case at relatively short notice but in my view has considered the case and has a good grasp of the case, notwithstanding the short time that he has been involved. He accepted fully that the father had not accepted the findings and he had factored that in. He did not consider that the matter should go back to supervised contact or even supported contact and considered that it could remain as it was. He did not consider that there was any real bias in the contact centre report, nor did he think that overnight contact was off the table. Rather, he was looking at the mechanism for moving it on. So the principle of overnight contact was something that he considered in the light of the risks.*
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> *177. He said that it should happen when TC felt that he would be happy with it. However, he clearly thought that contact could and should move on. It was really a question of when and at what pace…*
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> *179. He accepted that if left to the mother to monitor TC's stated wishes, that contact would not have moved on. But at each development, from supervised to supported, to community, to unsupervised and then to the father's home, the child has expressed enjoyment despite baulking at every stage before he tried it. Under my questioning of the CAFCASS officer, whether there was a way through and whether there was some reason not to have overnight contact other than what had been the reported expressed wishes of TC, he insisted that simply adding overnight so he was away for two days, whether it was testing it, Saturday overnight through to Sunday, I asked whether in fact it could be for a shorter period, incorporating the Sunday breakfast. So I asked whether that was one way through, in other words, it would start later on the Saturday, finish much earlier on the Sunday and that would give TC a taster.*
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> *180. The CAFCASS officer said that he thought that was a good way of transitioning. Other than that, he could not see a way of moving on. When one looks at the balancing exercise and the management of risk, he thought the risk was manageable in these terms. He said that considering that there was no evidence of violence in the current relationship, that he was looking after two children full time with no concerns expressed about that and*

extensive time spent with a third child, his child, and has done for some little time. As well as the really good reports of the relationship with the father and the child-focused way that he had built the relationship. He felt that there was value in the relationship with the father in terms of identity and commitment of the father. He felt that TC would be able to have a rounded view of his father and therefore a rounded view of himself.

181. He accepted that the father, and in fact this was unprompted, the CAFCASS officer considered the father as a good role model in the sense of identity, as the father is from a different cultural background, and that it provided a valuable relationship in respect of TC's own identity. However, he accepted that if the mechanism for progress is not found by the court then it would lead to conflict between the parties. He accepted that it could not be left to TC because that would be a recipe for that conflict continuing.'

15. Having then dealt with the considerations arising from PD12J, the judge then continued to explain the substantive provisions which she proposed as follows:

'206. I propose that contact and the current arrangements continue at the moment and that is Saturday and Sunday, separate days, and that they should continue. We are at the end of May now but it should continue throughout the end of May, June and indeed July. August is, of course, the school holidays. I would want it to continue on alternate weekends. However, I do think that it is possible during the school holidays that there should be during the week an overnight contact. It can be short, starting late in the day and finishing relatively early the next day…

207…If that cannot be managed because of work on either side, I do not know, then it will have to be contact at the weekend. However, I make it clear that momentum is again the order of the day. Once term starts, overnight can be again overnight 3 p.m. to 11 p.m. on alternate weekends through September, and I would want this matter back before me some time in October and at the very latest, November.'

16. That then was the essence of the decision which HHJ Kushner made – a relatively modest if not insignificant progression of arrangements for TC to spend time with his father, to take effect some months after her order was being made, with a review after two or three months to confirm that the arrangements were working, and remained in TC's best interests, taking account of his

expressed wishes, with a view hopefully then to make final orders for arrangements or the future.

17. Whilst the mother's appeal raises very significant issues to do with the judge's approach to PD12J, and her conduct of the hearing, which I will address below, I have to bear in mind in considering the application for permission, that such an application can only be granted under FPR 2010 r.30.3(7) where the appeal has a real prospect of success, or if there is some other compelling reason for the appeal to be heard. Absent those issues raised by the appellant mother, an appeal against a discretionary determination such as this, providing for an incremental increase in arrangements some months hence which although not currently asked for by TC were certainly considered to be within contemplation by the CAFCASS reporter, would be most unlikely to be susceptible to appeal.

18. In that context I will come to the grounds relied on for the appellant in turn.

Ground 1: The PD12J analysis and the Learned Judge's decision to progress contact to overnight was unsound in circumstances where the Respondent confirmed in his evidence at the Final Hearing that he does not accept the most serious findings of domestic abuse despite attending a DAPP course and that he only went on the DAPP course because he had been ordered to. The Learned Judge's decision improperly circumvents PD12J and renders it meaningless.

19. I agree with the appellant that it is a matter of the most significant concern that the respondent father has not, despite the findings of the court, acknowledged the truth of the majority of the most serious allegations against him. That is a matter which the judge is undoubtedly required to weigh heavily in the exercise of her discretion. I have been referred to the recent well-publicised authority of *Griffiths v Kniveton* [2024] EWHC 199 (Fam) where Lieven J declined to make an order for direct arrangements in the circumstances of that case. However, I also have to remember that the principle of an ongoing relationship here is not in issue. One exists, and on the evidence it is a beneficial one for TC.

20. In her judgment, the judge made clear that her previous order had taken into account the father's position and lack of acceptance. She said:

> *'86. The CAFCASS report… repeated the findings, so again at the forefront of the CAFCASS officer's mind. But also describing how TC was saying that he loves his dad and that there is nothing he dislikes about his father…*
>
> *87. The final DAPP report was there which indicated that the father was not a risk to children. The CAFCASS officer had taken on board that the father had not accepted the findings so it was not unclear whether the father had taken it on board. On the contrary - all the agencies were dealing with it on that basis and saying that notwithstanding that, they were looking at the risk and saying that the risk had either diminished or was able to be managed.*
>
> *88. So balanced against that, looking at the risks in the light of the findings, what was also being put forward was that the time spent between TC and his father was good…'*

21. In dealing with the capacity of the parents to appreciate the effects of past domestic abuse the judge said:

> *'199…What I have considered with the father is although he does not accept the findings, he is now very much more alive to the effect of domestic abuse. I consider that there can be taken into account first of all his relationship not just with the children who are in his care, but also the relationship with his current partner and indeed his current relationship with his past partner, which as I understand it, post-dates the relationship with the mother. I think that bodes well for the future. It is certainly something that informs me of the nature of the risk at the time.*
>
> *200. I think I have made it clear about the findings of domestic abuse and how it has influenced my decision. However, I have taken it very slowly, which is part of the influence of the findings. I have taken it very slowly so that there can be some reassurance to the mother of the way this matter is going and taking it slowly to take a measured view of the risks that are there in respect of TC.'*

22. The judge has thus remained fully aware of the non-acceptance of the allegations in making her decision. I agree with Mr Mansfield for the respondent father that, whilst the respondent's lack of acceptance must remain a concern, the judge having considered it was not obliged as a result to determine that the arrangements should not progress in the absence of acknowledgment. She had to exercise her discretion cautiously, which on the face of her judgment is what she has done. PD12J provides a framework through which findings of domestic violence must be considered in every case, and factored into the court's decisions. But those decisions must ultimately be governed by even broader welfare principles which must always balance the impact of domestic violence, but will not always prohibit, in the right case, an appropriate relationship between child and parent.

23. Further, in relation to the DAPP course, it is evidently right that it was not one that was formally accredited at the time when the father went through it. However, it is also clear that the course, run by the A Project, is one that CAFCASS would accept, and that the CAFCASS officer then involved approved the referral before it was made. I do not accept that the value of the course in the court's estimation should have been significantly reduced by reason of its non-accreditation in the court's eyes as Ms Traugott suggested.

24. As to the criticism of the respondent's initial motivation for attending the course, whilst this would not be encouraging, the judge was entitled as she did to note the respondent's progression during the course, his increased engagement and understanding, notwithstanding his failure to accept as true many of the findings made. Further, the judge expressly considered, as she was required to do, the father's motivation in pursuing the arrangements, and was satisfied that the respondent cares very sincerely about the child, and has shown a significant level of commitment to him.

25. Consequently, I do not accept that the appellant has demonstrated that ground 1 of her appeal has a real prospect of success. I will deal with the question of any other reason why the appeal should be heard at the conclusion of this judgment.

26. *Ground 2: It was procedurally unfair and legally unsound for the Learned Judge to find that the child "may be influenced by the mother whether intentional or not" when this was not a finding sought by the Respondent and, according to clear guidance from the courts and from Cafcass, rejection is justified where there has been domestic abuse. The finding is equivalent to a determination that the Appellant alienated the child albeit using different terminology and is therefore legally, factually and procedurally unsound.*

27. Firstly, the judge was very clear to reject the suggestion that this was a case in which TC was alienated from his father, or that the appellant mother was responsible for any conscious alienation. The judge's finding that TC was probably influenced by his mother's negativity around contact certainly does not amount to a finding of alienation, and cannot therefore be criticised on the basis that it did.

28. As to the balance of the ground relied on, it was clear from the transcript, and the court's judgment, that the judge was concerned to understand, in the context of the issue about how to progress the arrangements, why it was that TC was not expressing a wish for his visits to his father to develop. In that context, a finding that a child of TC's age was swayed by his mother's concerns is neither surprising nor exceptional, whether or not such a finding was actively sought by another party.

29. It is also evident that the judge made clear to the mother during the hearing that she was seeking to elicit more background to give herself an understanding of how TC might react to the change in the arrangements sought. Given the issue, such enquiries were neither procedurally unfair nor legally unsound, but rather fairly and properly designed to enable the court to understand all the circumstances that may be relevant to a determination in TC's best interests. Whilst the questioning took some time, and was evidently upsetting for her, the appellant was able to answer clearly and firmly, and produced answers to the court's questions which properly reflected her case. In those circumstances, the appellant has no real prospect of success with this ground of appeal.

30. *Ground 3: It was procedurally unfair and improper for the Learned Judge to cross-examine the Appellant extensively about what she (the Appellant) perceived to be the risk of contact when there are significant findings of domestic abuse that the Respondent does not accept and it is the role of the court, under PD12J, to determine the risk of harm to victim and the child, not the victim.*

31. Whilst it is certainly the court's task to assess risk, it is equally open to the court in undertaking that task to seek evidence from the parties to enable it to fully assess that risk. In circumstances where the existing order provided for TC (i) to spend 14 hours with his father over alternate weekends, which arrangements had been successful, but (ii) not to stay overnight, it was not inappropriate for the court to seek to understand from the appellant her case as to any additional risk inherent in those weekends including overnight stays, but with earlier returns. The appellant was quick to explain to the court, and the court acknowledged, that she retained her underlying and significant concern about the unaccepted findings of domestic abuse and other violence, which the court needed to, and did, continue to keep in mind.

32. Ms Traugott suggested that the judge's questions indicated that she had not paid sufficient attention to the risk of the longer lasting and more subtle effects of domestic violence and coercive and controlling behaviour, as explained by the court of Appeal in *Re H-N* [2021] EWCA Civ 448 at paragraph 52. I am satisfied from the transcript that the mother eloquently and in detail explained her position and her concerns to the judge, and that the judge, whilst directing her on occasion, certainly allowed her to do that. It was clear that the mother wanted the supervision of contact to be reimposed, whilst the judge was looking to secure some progression in the arrangements. However, it was also clear that the judge listened to and understood the mother's concerns during the exchanges between them, as she was obliged to.

33. It is further suggested by Ms Traugott that on a number of occasions the judge inappropriately 'descended into the arena'. In *Hima v Secretary of State for the*

Home Department [2024] EWCA Civ 680 William Davis LJ said this about the test for whether a hearing has become unfair to one of the parties:

> *'11. Determining whether a hearing was unfair requires an objective assessment by the court of the conduct of the hearing. Fairness in judicial proceedings requires consideration inter alia of whether the judge was open-minded in the course of the hearing, whether the parties to the proceedings were treated in an even-handed manner and whether the judge demonstrated partiality during the hearing. In the context of judicial interruptions or interventions during oral evidence one issue will be whether that generated a risk of a descent into the arena. All of these matters are to be assessed not by whether it gave rise to an appearance of bias in the eyes of the fair-minded observer but by whether objectively it rendered the trial unfair.*
>
> *12. Whether judicial unfairness in the course of a hearing vitiates the eventual decision will be part of the objective assessment. There will be cases where a judge acts unfairly in a hearing but the effect of the unfairness is not sufficient to affect the outcome of the proceedings… The determination will depend on the facts and circumstances of the particular case.'*

34. There is no evidence here that the judge at any point declined to listen to submissions made on the appellant mother's behalf, nor that she did not listen to the evidence that the mother gave her, in particular in answer to the questions that she asked of her. Whilst she did not ask as many questions of the father herself, she did not prevent Ms Traugott from cross-examining him as she felt appropriate. It is clear that the judge gave this case careful and thoughtful attention, and remained throughout well aware of the significance of her determinations, and the balance that she had to strike. Whilst the judge was evidently determined to move the case on, I do not accept that this is anything like such a case as *Re K and L (children: fairness of hearing)* [2023] EWCA Civ 686, where a judge was found to have hampered her ability properly to evaluate and weigh the evidence before her, so as to impair her judgment and render the trial unfair.

35. The court had receipt of the DAPP course assessment which did not find that the respondent presented an unmanageable risk, notwithstanding the unaccepted findings. It also had the evidence of the CAFCASS reporter who, whilst in writing he had advocated allowing TC's current reluctance to stay overnight to dictate the pace, clearly from his oral evidence had no concerns about any overnight stays from a 'risk' perspective.

36. Whilst the judge's questioning did on occasion appear to lack sensitivity to the mother's understandable concerns, she had plenty of information to enable her to assess the risk herself, and did so satisfactorily. In those circumstances, the order that she made was unquestionably open to her, notwithstanding the appellant's concerns. The appeal on this ground consequently has no real prospect of success.

37. *Ground 4: The child's explicit wishes and feelings as set out in a letter to the court drafted in the presence of the Cafcass officer were not given sufficient weight.*

38. The judge was bound to consider TC's expressed wishes and feelings. It is clear that she did so. She was also entitled to explore whether if an order was made which developed the arrangements further, such development was likely to be successful and in his best interests. In that regard, it was open to the court to consider the history of progression in face of TC's reluctance, the mother's understandable reticence in light of the history, and whether on balance if such an order for made it was likely once made to lead to a positive development of the relationship between TC and his father. It is clear from the judgment as set out above, that the evidence from the CAFCASS reporter was certainly in favour of some progression in due course, and the judge was well within her discretion to determine that a 3 month period after the hearing was an appropriate before it should be introduced, conveniently during the school summer holiday.

39. The weight to be given to any piece of evidence is essentially a matter for the trial judge, and it is clear from both the judgment and the transcript that the

judge was very careful to develop an understanding of what lay behind TC's expressed wishes. She also carefully considered the positive notes provided by the supervisors of previous meetings between TC and the respondent. In those circumstances, her decision to provide for overnights stays in due course was open to her, notwithstanding TC's expression of views, and the appeal on this ground has no real prospect of success.

40. *Ground 5: It was procedurally improper for the Learned Judge to cross-examine the Appellant extensively about her home life and the child's socialisation and to then use this evidence to criticise the Appellant's parenting in the Judgment when the Appellant had not been given advanced notice that the issue would be put to her or used against her. In particular, even if true (and its truth is disputed by the Appellant) it is not relevant that the Appellant has a quite home life and is not "embedded in the community" either to contact or to the child's anxiety about contact with a domestically-abusive parent.*

41. In his judgment in *Hima v SSHD* (above), Underhill LJ aid this at [61]:

> *'61. …deciding whether the conduct of a judge has been such as to render a hearing unfair is a highly fact- and context-specific exercise. For that reason, … I recognise that the characteristics of such [quasi-inquisitorial] cases may mean that it may more often be appropriate for judges to intervene during the evidence than it is in typical High Court litigation. But what is appropriate depends on the circumstances of the case, and the judge should in any event do nothing that compromises the fairness of the proceedings or gives an impression of partiality.*

42. Here, whilst it is true that the judge asked the appellant a number of questions about TC's home life, it was open to her to do so, and not inappropriate for her to ask those questions to enable her to better understand both the impact on him of spending time in the respondent's household, and whether and if so what adjustment he would need to make for those visits to be a success. The judge explained to the appellant that she wanted to get a picture of TC's lifestyle. The judgment does not read as one that is unduly critical of the appellant's parenting, but rather one which considers the contrasting styles of the appellant and the respondent, and the impact on TC of managing those differences.

43. Again, the context here is of the court considering whether to progress and develop the arrangements already successfully in place following the judge's previous orders, and seeking to understand the mother's case about the impact on TC of the changes being proposed. The frequency, for example, of any previous sleepovers which TC had undertaken was evidently potentially relevant to the likely success of the proposed overnight stays with his father. Furthermore, the quiet life which the judge described was fairly considered as a possible explanation for TC's reported anxiety at the prospect of a visit to the more robust home of the respondent. These were plainly considerations which the judge was entitled to bear in mind.

44. Whilst the court was obliged to retain always in its mind the findings of abuse and their unacknowledged nature, that does not preclude arrangements being made for a child to spend time with the parent against whom those findings have been made provided that, in all of the circumstances, the court is satisfied that that any risk is manageable and that the arrangements are in the interests of the child.

45. In the circumstances the judge was here entitled to find on the totality of the evidence, including the history of the existing arrangements to the date of the hearing, that the staged progression of those arrangements was in TC's interest. Ascertaining as the judge did more about the background to TC's lifestyle with the appellant was clearly relevant to that assessment. This ground of appeal therefore has no real prospect of success.

46. Ground 6: It was procedurally improper for the court to refuse to make a final order but instead to list a further hearing to review the progress of contact, particularly where the court made a finding that the Appellant influenced the child. The decision at the end of the Judgment not to make a final order in circumstances where there has been a finding of "influence" sends a clear and inappropriate message to the Appellant that she will be blamed if contact does not progress despite the child's clearly-expressed wishes and feelings and the Respondent's failure to accept the findings of domestic abuse.

47. Had the adjournment of the application been designed primarily to place undue pressure on the appellant to ensure that the order made was complied with, then it may well have been an inappropriate step by the court. However, in this case, the judge's decision not to conclude the proceedings can be seen to have been a product of the caution which she had exercised throughout in developing the arrangements, in large part because of the important and unresolved history. There is no evidence that she made any reference at the hearing to the possibility of sanctions if the mother failed to comply, or raised the prospect with her then of a change of living arrangements for TC in the event of her non-compliance.

48. It is clear that the judge did not feel that she could make final orders without a sufficient understanding of how the first occasions of overnight staying had progressed. This is evidenced by the fact that she gave a direction for a further s.7 report, including an update on TC's wishes and feelings, and for feedback from the agency supervising handovers. Given that overall the appellant mother had cooperated in enabling compliance with the court's previous orders, the court had no reason to expect that, subject to her right of appeal, she would not do so on this occasion, and there is thus no evident reason to interpret the court's declining to make a final order as being primarily coercive.

49. As set out above, there has been no finding that the mother has sought to alienate TC from his father, nor can the finding that he has been influenced by her unhappiness be interpreted as one. It was certainly within the judge's case-management powers to direct a further hearing given the circumstances in this case, and the incremental nature of the increases to the arrangements that had previously taken place. Consequently, this ground has no real prospect of success.

50. I then turn to whether there is any other compelling reason why this appeal should be heard. It is of course of the utmost importance that the court takes proper notice of the provisions of PD12J, and applies the framework which it provides carefully and rigorously. Especially in circumstances where there are findings that remain unacknowledged, the court must always remain

appropriately cautious, and cognisant of the long lasting damaging effects that any abuse perpetrated is bound to have had on all concerned, especially given findings as serious as those in this case. Having said that, in this case it is clear that the judge has had the provisions of PD12J well in mind, and has repeatedly referred to them in her judgment.

51. This is not a case where the issue is whether in the circumstances there should be any relationship between TC and his father. This is a case where CAFCASS and the DAPP providers are satisfied that the arrangements already in place are safe, and CAFCASS have agreed that they can, in due course, progress to overnight stays. The issue before the court on 31 May 2024 was whether, notwithstanding TC's expressed view, an order for such a stay could be made at that hearing. The judge took much care and thought before making an order which was appropriately cautious, but which nevertheless progressed the relationship in a way which she found was in TC's best interests. I am entirely satisfied that it was open to her to do so, and that her enquiries during the hearing did not go beyond those which were permissible to her in all of the circumstances.

52. I am therefore satisfied that there is no other compelling reason why this is appeal should be heard, and I must refuse the application for permission to appeal in this case. Consequently, the stay on HHJ Kushner's order of 31 May 2024 should be lifted, and overnight contact should commence in accordance with paragraph 4 of that order with effect from Saturday 21 September 2024, unless otherwise agreed in accordance with Recital J of that order to commence on Friday 20 September.

53. That is my judgment.