Neutral Citation Number: [2024] EWHC 288 (Fam)

Case No: FA-2023-000272

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM HER HONOUR JUDGE WALKER
SITTING AT THE FAMILY COURT IN COVENTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2024

Before:

MR JUSTICE MACDONALD

- -

Between:

(1) GM	**Appellants**
(2) PM	
- and -	
(1) EB	**Respondents**
(2) TM	

- -
- -

Mr Piers Pressdee KC and Mr Mani Singh Basi (instructed by **Creighton & Partners**) for the **Appellants**
The First Respondent appeared in person
The Second Respondent appeared in person

Hearing dates: 5 February 2024

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Approved Judgment

This judgment was handed down remotely at 2.00pm on 12 February 2024 by circulation to the parties or their representatives by e-mail.

Mr Justice MacDonald:

INTRODUCTION

1. I am concerned with an appeal against an order of Her Honour Judge Walker (hereafter 'the Judge') dated 4 October 2023, by which the Judge ordered indirect contact between the appellants and their grandson, P. P was born in December 2017 and is now aged 6 years old. The respondents to the appeal are P's mother, EB (hereafter 'the mother'), and P's father, TM (hereafter 'the father'). The appellants are P's paternal grandfather and paternal step-grandmother. Permission to appeal was granted by Sir Jonthan Cohen on 20 December 2023.

2. At this hearing, the appellants have been represented by Mr Piers Pressdee of Kings Counsel and Mr Mani Basi of counsel. Mr Pressdee and Mr Basi appear for the appellants *pro bono*, as do their instructing solicitors. The respondents appear in person. I have had the benefit of a detailed Skeleton Argument and oral submissions from Mr Pressdee and Mr Basi. Pursuant to the order of Cohen J dated 20 December 2023, the mother provided a Position Statement and made short oral submissions. I also heard short oral submissions from the father via video-link.

BACKGROUND

3. The father is currently serving a sentence of imprisonment for murder, following a conviction in 2018. The mother received a conviction for assisting an offender. Within that context, the local authority undertook a child protection investigation pursuant to s.47 of the Children Act 1989 and a pre-birth assessment prior to the birth of P. No concerns were identified regarding the mother's parenting capacity. P was born on 22 December 2017. All parties accept that P spent regular time with the appellants, including overnight stays, until this ceased in March or April 2021, when the father made an application to spend time with P.

4. There have been a number of sets of proceedings concerning P. In June 2021, the father applied for a child arrangements order under s.8 of the Children Act 1989. On 3 March 2022, the Judge made an order granting the father parental responsibility for P and providing that P live with the mother and have contact with the father in prison on four occasions per year, together with indirect contact by way of monthly letters. By that order, the Judge further provided that the contact was to be facilitated by the appellants.

5. The father alleged that the mother failed to comply with the child arrangements order of 3 March 2022 and, on 4 May 2022, the father commenced the first of two enforcement applications against the mother with respect to that order. In her judgment on the appellants' current application, at paragraph 4, the Judge records the mother's "initial reluctance" to co-operate with the child arrangements order of 3 March 2022 in favour of the father. During the enforcement proceedings, CAFCASS recorded concerns expressed by the father's probation officer that the appellant paternal grandfather was discussing with the father ways they could fraudulently evidence to the court that there was an ongoing relationship between the father and P, through fake letters and cards. The appellant paternal grandfather refutes that allegation. As a result of the enforcement proceedings, whilst the level of contact between P and the father in prison remained as originally ordered, the Judge directed that contact be facilitated by a person chosen by the mother.

6. On 22 July 2022, the appellants applied for permission to apply for a child arrangements order with P. At an initial hearing of the appellants' application on 16 November 2022, the appellants were granted permission pursuant to s.10(9) of the Children Act 1989 to apply for a child arrangements order. At that hearing, the court ordered that a safeguarding letter be prepared by CAFCASS. Upon receipt of that safeguarding letter, the court gave directions on paper for the preparation of a report pursuant to s.7 of the Children Act 1989 (hereafter 'the CAFCASS report') and listed the matter for a Dispute Resolution Appointment on 14 June 2023, pursuant to paragraph 19 of FPR 2010 PD 12B.

7. Following the receipt of the order listing the matter for a Dispute Resolution Appointment, on 22 February 2023 the appellants issued a C2 application form requesting disclosure into their proceedings of the evidence from the previous proceedings between the father and the mother. This court does not have a copy of that C2 application, but it is asserted in the appellants' initial grounds of appeal that the court did not process or deal with that application. During the hearing, and in response to the court's enquiry, Mr Pressdee and Mr Basi indicated that there was no order made requiring the disclosure of the evidence from the previous proceedings between the father and the mother into the proceedings dealing with the appellants' application. The order made by the Judge at the Dispute Resolution Appointment, to which I will come in more detail below, appears to bear this out. That order provides only that the safeguarding letters from the previous proceedings be disclosed into the proceedings commenced by the appellants (it is not clear whether this direction was made in response to the C2 application). The CAFCASS report likewise suggests that the Family Court Adviser did not have access to the papers from the previous proceedings between the father and the mother. In the circumstances, it would not appear that those papers were available to the appellants, the Family Court Adviser or the Judge ahead of the final hearing on 4 October 2023.

8. In October 2022, the father issued a second set of enforcement proceedings against the mother in relation to his contact. At a hearing of the second enforcement application on 1 March 2023, the mother agreed to facilitate contact during the Easter holidays. That contact took place and was the first contact since the making of the child arrangements order on 3 March 2022. The second set of enforcement proceedings concluded on 19 May 2023 with no amendment to the father's level of contact and an agreement that the paternal grandmother would facilitate the contact in prison.

9. On 2 May 2023, CAFCASS wrote to the court in these proceedings to inform the court that the mother was not permitting the Family Court Adviser to meet with P and that, accordingly, the CAFCASS report could not be progressed. In the CAFCASS report that was ultimately produced, the Family Court Adviser details the issues she had in meeting with P. The report details that, following the direction for a CAFCASS report, the mother withdrew her consent for wishes and feelings work to be completed with P. This resulted in District Judge Montanaro making an order on 26 May 2023 that, in its entirety, was in the following terms:

> "**UPON** the court considering the letter from Cafcass indicating the Mother has withdrawn her consent for the Family Court Advisor to meet with the child.

> **UPON** the court indicating as follows: The court has directed Cafcass to prepare a s.7 report. This is a direction of the court not voluntary. Cafcass need to meet with the child to prepare that report. If the Mother contends that the report should not be prepared then she must make an application to the court and the matter will be listed for a hearing. The court indicates that it is highly unlikely it will discharge such direction at this stage as the court needs the s.7 report to be able to reach conclusions and it is vital that Cafcass are able to see the child to do that. Miss A is an experienced FCA and the court is satisfied she will do all she can to ensure the visit is entirely appropriate.
>
> **IT IS ORDERED THAT:**
>
> 1. The Mother shall make the child available to meet with Cafcass at a date convenient to the Family Court Advisor on the first available date after 5 June.
>
> 2. This order having been made without a hearing any part affected by it may apply, copied to Cafcass and the other parties, for it to be set aside, varied or discharged in the next 7 days."

10. Further discussions took place with the mother in an effort to ensure the Family Court Adviser could meet with P, after the mother indicated she would only be agreeable to a meeting at home. Latterly, the mother agreed to a meeting at the CAFCASS Office and that meeting with P took place following a hearing on 14 June 2023 before the Lay Justices. At that hearing, the court adjourned the Dispute Resolution Hearing to 15 August 2023 in circumstances where the CAFCASS report was still not yet available. The order made on 14 June 2023 contains a recital recording that the mother had confirmed that she would co-operate fully with CAFCASS to ensure P could be seen and the CAFCASS report completed. At the hearing on 14 June 2023, the court also made a direction that all parties file and serve Position Statements 5 days before the next hearing, outlining whether they agreed or disagreed with the recommendations in the CAFCASS report.

11. The CAFCASS report was ultimately produced on 5 July 2023. With respect to the mother, the Family Court Adviser expressed concerns regarding the mother's ability to meet P's needs with respect to his identity and relationships:

> "42. During this assessment [the mother] has raised my suspicions as to her ability to promote P's paternal identify and relationships. [The mother] has at times sought to control professional intervention with P, control P's awareness and access to his paternal relationships and both P and school seem to be under the impression that her partner is his father. Whilst [the mother's] partner is taking on a parenting role with P which is positive P needs to have an accurate understanding of his paternal relationships. Additionally [the mother] has presented as resentful at times in relation to [the appellants] and I am concerned that her decision making in this regard is led by her own adult feelings and issues rather than for concern about P's welfare should he spend time with them. [The mother's] partner has expressed strong views similar to [the mother] which in my view is not helpful.

> 43. [The mother] presents with an unwillingness to resolve matters and reflect on her behaviour, appearing preoccupied in seeking to attribute blame on [the father] and [the appellants]. [The mother] is unconcerned by the time P has missed with [the appellants] and lacks insight into the impact of the loss of these relationships on P both short and long term. Whilst it is understood that [the mother], may have been negatively affected by decisions made by the court in respect to [the father] and P's time which she does not agree with, as a parent it is vital that she separates this from what is best for P. [The mother] has since complied with the order in relation to [the father] but I am mindful that this has led to three sets of court proceedings."

12. The report of the Family Court Adviser did not raise any safeguarding concerns with respect to the appellants:

> "44. The concerns raised by [the mother] that P may suffer emotional harm should he spend time with [the appellants] have not been substantiated. It is not disputed that P had an ongoing relationship with [the appellants] until 2021 which was positive and no safeguarding concerns were raised about P's welfare during this time. [The mother] by her own admission reports that the reason this time stopped was as a result of [the father] making an application to the court, which is not welfare led. [The appellants] present as committed and loving grandparents to P who are willing and able to be involved in his life."

13. Within this context, the Family Court Adviser made the following recommendation in her report of 5 July 2023:

> "45. It is my professional opinion that it is in P's best interests to spend regular and meaningful time with [the appellants]. The reintroduction of this time should start with the sharing of photographs and a pre-recorded video message from [the appellants]. Thereafter face to face time should take place for a minimum of 4 hours in the community once a month which could lead to overnight stays one weekend a month (either Friday to Saturday or Saturday to Sunday) within 6 months. Handovers should take place by an agreed third party or in a public setting where there is CCTV (supermarket entrance). [The appellants] should also be permitted to send cards/small gifts to P on special occasion such as Christmas and Birthdays. P should have the opportunity to maintain positive relationship with [the appellants], this will aid not only P's emotional well-being but also his identify development both short and long term. It is clear that the relationship between [the mother] and [the appellants] has broken down and there are high levels of mistrust. Therefore it would be beneficial that they attend the planning together for children programme to aid their understanding of the impact of adult conflict on children."

14. It would appear that the adjourned Dispute Resolution Appointment, listed on 15 August 2023 by the order of the Lay Justices of 14 June 2023, was not originally due to come before the Judge. However, on 4 July 2023, the court sent out a Notice of Hearing to the parties in the following terms:

> "On receipt of an email from [the mother], the matter has been reallocated to HHJ Walker. The hearing on 15 August is vacated.
>
> **The directions hearing for this matter will be heard by this court**
>
> **at The Family Court at Coventry, 140 Much Park Street, Coventry, West Midlands, CV1 2SN**
>
> **on 18th August 2023 at 12:00**
>
> **With a time estimate of 1 hr**"

15. The adjourned Dispute Resolution Appointment came before the Judge on 18 August 2023. The appellants contend that prior to the Dispute Resolution Appointment on 18 August 2023, the mother emailed to the court a document exhibiting a letter from the school. The appellants assert that they were not provided at the Dispute Resolution Appointment with a copy of the document or the exhibit. The mother did not seek to gainsay this assertion during her submissions. The appellant paternal grandfather emailed the court after the hearing to request a copy of the document and the Judge responded noting that the mother should have served the document on the appellants, pursuant to the order of 14 June 2023, and stating that she could not see any objection to the document being provided to the appellants in circumstances where they were parties to the proceedings. This court has been provided by the appellants with a copy of the document dated 18 August 2023 but not the exhibited letter, which the appellants contend has never been made available to them. Whilst titled "Statement", the document dated 18 August 2023 emailed by the mother to the court ahead of the Dispute Resolution Appointment would appear to be the Position Statement directed by the Lay Justices on 14 June 2023. The document does not carry a statement of truth pursuant to FPR 2010 r.17.2(1)(a).

16. In the document dated 8 August 2023, the mother made clear she objected to direct contact between P and the appellants as recommended by the Family Court Adviser. The document also levelled a series of accusations at the appellant paternal grandfather. In particular, the statement alleged:

    i) That the appellant paternal grandfather had exhibited coercive control throughout the previous set of proceedings.

    ii) That the appellant paternal grandfather's parenting of the father had been poor, resulting in the father spending a period in care and, ultimately, being convicted of murder.

    iii) That the appellant paternal grandfather had misled the court and the Family Court Adviser with respect to the father's relationship with P.

    iv) Both appellants had fabricated and exaggerated matters during the previous proceedings and the appellant paternal grandfather had failed to work in an open and honest manner.

    v) That the appellant paternal grandfather regarded the father's offending behaviour as positive and had shown no remorse or feeling for the victims.

vi) The appellants had misrepresented a person as being P's godparent in an attempt either to intimidate the mother or create the impression of a happy family.

17. I pause to note at this point, that the document from the mother dated 8 August 2023 did *not* contain an accusation that the appellant paternal grandfather had provided the mother with a mobile phone, which was then used by the father to contact the mother in breach of bail conditions imposed on the mother. The mother is not recorded by the Family Court Adviser as having mentioned that allegation during the course of the preparation of the CAFCASS report and the Family Court Adviser's account of the safeguarding information available from the previous proceedings makes no mention of such an allegation. I will return to this issue below.

18. At the Dispute Resolution Appointment on 18 August 2023, pursuant to FPR 2010 PD 12B paragraph 19.3(5) the Judge made directions towards a final hearing listed on 4 October 2023. In circumstances where there appears to have been no prior direction in the proceedings pursuant to FPR 2010 r.22.5 for witness statements of the oral evidence on which the parties intended to rely in relation to any issues of fact to be decided at the final hearing, a notable feature of the order made by the Judge at the Dispute Resolution Appointment is that it contained no direction for the appellants, both of whom were applicants in the proceedings, to file and serve such witness statements, whether in response to the allegations raised in the mother's document of 8 August 2023 or otherwise. The order likewise contained no direction for the mother to file and serve a witness statement. Rather, the directions given were limited to the following:

> "4. No document other than a document specified in an order or filed in accordance with the Rules or any Practice Direction shall be filed without the court's permission.
>
> 5. [The father] shall serve and file his final statement by 4pm on 1st September 2023.
>
> 6. The safeguarding letters from the previous proceedings concerning P (CV21P00603, CV22P00256 & CV22P00830) shall be disclosed into these proceedings.
>
> 7. The bundle for the next hearing will be prepared by HMCTS. A copy of the bundle (which shall include the safeguarding letters as above) will be sent to HHJ Walker, the parties and to the FCA two days before the hearing.
>
> 8. HMCTS shall arrange a CVP link for the whole day on the 4th October 2023 to allow the father to participate in the hearing."

19. In their original grounds of appeal, the appellants assert that during the Dispute Resolution Appointment the Judge also indicated that they should each prepare questions for cross-examination at the final hearing. This direction did not appear in the sealed order of 18 August 2023. The appellants contend that they wrote to the court regarding the omission but that no response was received from the court. This court has not been provided with a copy of that correspondence.

20. Ahead of the final hearing, the appellants contend that they wrote to the court on 25 August 2023 to ask if they could file a witness statement but received no response to that enquiry. Again, this court has not seen that correspondence. In that context, ahead of the final hearing (and in breach of paragraph 4 of the order of 18 August 2023) the appellants submitted a witness statement to the court addressing the matters raised in the mother's document dated 8 August 2023. It is not clear whether the Judge was provided with a copy of that witness statement. Whilst that witness statement did contain a statement of truth, as required by FPR 2010 r.17.2, the statement was not signed, as required by FPR 2010 r.17.6.

21. The appellants further assert that, pursuant to paragraph 7 of the order of 18 August 2023, they received an email from the court on 3 October 2023 stating the court bundle was enclosed, but that that email was recalled by the court and not resent. The paternal grandfather contends that he emailed the court to ask for the bundle but did not get a response. At paragraphs 4 and 11 of her judgment, the Judge refers to having read all of the papers in the court bundle. The mother asserted during her submissions that there was a court bundle for the final hearing.

22. The final hearing was heard before the Judge for one day on 4 October 2023. The appellants assert that at court they were told that the mother had emailed to the court a second document, dated 30 September 2023, together with two exhibits. It is not clear when that document was sent to the court, although during her oral submissions the mother stated it was prepared prior to the final hearing. The appellants contend that the mother had not provided them with a copy of that document or the exhibits ahead of the final hearing. Once again, the mother did not seek to dispute this account. Whilst the document provided by the mother dated 30 September 2023 is titled "Statement", no direction pursuant to FPR 2010 r.22.5 had been made for a witness statement from the mother, whether before or at the Dispute Resolution Appointment on 18 August 2023, and the document was submitted in breach of paragraph 4 of the order of 18 August 2023, which provided that no document other than a document specified in an order or filed in accordance with the Rules or any Practice Direction shall be filed without the court's permission. The document did not carry a statement of truth.

23. In her second document, further allegations were raised by the mother against the appellants. In particular, and as referred to above, the mother alleged as follows:

> "I know HHJ Walker is aware of the background regarding [P's] life however I am going to give a little more insight to show the suffocation we have felt as a family. Whilst I was pregnant with P I had bail conditions for some time to not have contact with [the father] when he was in prison on remand. [The appellant paternal grandfather] turned up to my mum's house with a cheap phone and sim card so that I had no excuse not to miss [the father's] calls from prison. Forcing me to break my bail conditions, [the father] then used this phone to often call and terrorise me, telling me that I was going to give birth to my baby in [a] women's prison and that he would tell the police I was more involved in the murder investigation than what I actually was."

24. The document produced by the mother dated 30 September 2023, and provided to the appellants on the day of the hearing, also contained significant allegations that encompassed the appellant paternal step-grandmother. These included that, with the appellant paternal grandfather, the appellant paternal step-grandmother had accused the

mother of causing the appellant paternal grandfather's stroke, that the appellant paternal step-grandmother had asked the mother to lie to the father regarding the paternal grandparents' relationship with P and that the appellants were overbearing in respect of the mother.

25. Finally, the document the mother produced at the hearing invited the court to make an order pursuant to s.91(14) of the Children Act 1989 that no further application for an order under the Children Act 1989 be made without the leave of the court.

26. The appellants assert by their grounds of appeal that, having been provided with the mother's document at court on the day of the final hearing, they were given twenty minutes to digest the contents of the document, and were never provided with a copy of the two exhibits to that document. The appellants further contend they were not given an opportunity to file and serve a witness statement in response to the new allegations made in the document, and in particular the serious allegation that the appellant grandfather has assisted in a breach of bail conditions. The appellant paternal grandfather asserts that he was thereafter cross-examined on the contents of the document, including with respect to the allegation that he had provided the mother with a mobile phone which was then used by the father to force her to breach her bail conditions. Again, the mother did not seek to dispute this account during the course of her submissions but did suggest that the appellants would have been aware of the new allegation from the previous proceedings between the mother and the father. It is not clear from the judgment whether the appellant paternal step-grandmother was also cross-examined on the allegations raised against her in the mother's document of 30 September 2023.

27. This court has the benefit of a transcript of the Judge's judgment, delivered *ex tempore* at the conclusion of the hearing.

28. Having set out a brief summary of the history of the matter, the parties' positions and the recommendation made by the Family Court Adviser, the Judge records the manner in which she dealt with the final hearing as follows:

> "11. This hearing has been difficult for all concerned including me as the judge. All of the parties are litigants in person and [the father] has joined each hearing by CVP from prison. I have done all I can to support every party to present their case. I have read all the documents in the court bundle, and I have heard the oral evidence of each of the parties and the Cafcass officer and I invited them to ask questions of each other.
>
> 12. In managing the case, I looked to [the appellant paternal grandfather] to be the lead advocate and witness in support of his and his wife's case. In particular, I did not allow [the appellant step-grandmother] to ask additional questions of [the mother] and had to point out to her that from [the mother's] perspective, that would have felt intimidating. Although [the appellant paternal grandfather] has suffered from a stroke, he has, in fact, coped with the day very well and he gave a heartfelt speech at the conclusion of the evidence. I do accept, however, that these proceedings will have been stressful for them as well as [the mother]."

29. It is clear from the Judge's judgment that in reaching her decision she relied on the document emailed to the court by the mother dated 30 September 2023 and given to the appellants at the final hearing. At paragraphs 17 and 18 of the judgment, the Judge quotes extensively from that document with respect to the impact of ongoing proceedings on the mother. The judgment indicates that, during the hearing, the Judge formed a negative view of the appellants and a more positive view of the mother:

> "19. Whilst I accept that I am only able to form an impression of the parties based on our time in court, I have to say that I have found [the appellants] to be somewhat arrogant and focused on presenting themselves as upstanding members of the community which I am sure they are. However, that actually has little relevance to this contact application and is somewhat unsympathetic to [the mother].
>
> 20. [The appellants] have been unjustifiably critical of the court process and have sought even to try and tell me how to conduct these proceedings. I do appreciate that court proceedings are stressful but I can entirely understand why [the mother] has experienced the applicants as being domineering and supercilious. It also seems to me that they struggle to understand that the reasons why [the father] has a limited relationship with his own son is because of his own actions and his incarceration. [The father] is also forceful in his criticisms of [the mother].
>
> 21. Meanwhile, in the face of this criticism, [the mother] has demonstrated a respect for the court process and also for the decisions of the Court. However, it is obvious to me the stress that six years the proceedings have had upon her and that that must have had an impact upon her ability to be a responsive and parent to P at times."

30. At paragraph 22 onwards, the Judge proceeded to make certain findings with respect to the conduct of the appellants. Those findings included the following finding based on the document dated 30 September 2023 emailed to the court by the mother and provided to the appellants on the day of the final hearing:

> "I also accept that [the mother] was telling the truth when she sees (*sic*) says that [the appellant paternal grandfather] gave her a mobile phone to make contact with [the father] in breach of his (*sic*) bail conditions, and he is not telling the truth about that. Although it is only a minor point, it does evidence that [the mother] is justified in her concern that the applicants are willing to tell lies in order to present themselves in a positive light."

31. Thereafter, the Judge set out the following analysis of the impact of these matters on her decision, which drew further from the document dated 30 September 2023:

> "24. Of utmost importance, it seems to me, to P is that his mother is safe and secure. If she is not, then he is likely to suffer emotionally as a result. I am entirely satisfied that [the mother] is telling the truth when she says that she has experienced [the appellants] as being overbearing at times. Whilst I acknowledge that there would be a benefit to P of being able to have a relationship with his wider paternal family, including a greater sense of his culture and heritage, that benefit has to be weighed against the possible

> detriment to him of having contact arrangements imposed upon his mother about which she is fundamentally opposed and in which she has little voice or say.
>
> 25. It is my view that P is likely to experience spending time with [the appellants] as being stressful and anxiety-provoking if that is how his mother experiences them. To put him through that every month as suggested by Ms A seems to me to be actively to expose him to harm and I am afraid that I do not believe, in reaching her recommendations, the Cafcass officer has sufficiently considered this side of the equation. I do not accept the criticisms of [the mother] by the Cafcass officer are warranted. Ms A reached the view that [the mother] is negatively inclined towards [the appellants] for no reason, but [the mother] has set out in her statement her experience of them and I accept her evidence about that. Indeed, it is my assessment of them also.
>
> 26. The evidence leads me to conclude that whilst [the appellant paternal grandfather] has, on the face of it, wished to cooperate with [the mother], that is only with a view to getting the outcome that he wants. It is not my impression that he has been willing to listen to the impact of all on this [the mother] and there is a considerable risk, in my view, that that dynamic will continue moving forward. [The mother] has ensured that P spends time with [the father's] biological mother and, therefore, his grandmother and, indeed, with [the father], so, he does have an appropriate link with his wider paternal family. As a point of principle, I do not accept that it is right to provide the paternal grandparents to make up for the contact that [the father] would have had with him had the situation been different."

32. As I have noted above, in the CAFCASS report the Family Court Adviser had recommended the reintroduction of contact by the sharing of photographs and a pre-recorded video message, progressing to face to face time for a minimum of 4 hours in the community once a month, which could lead to overnight stays one weekend a month within 6 months. With respect to that recommendation, as set out in the foregoing passage of the judgment, the Judge concluded that the Family Court Adviser had not taken sufficient account of the dynamics in the adult relationships. In addition, in setting out her reasons for rejecting the recommendation of the Family Court Adviser, the Judge concluded as follows:

> "27. It was my view, to some extent, that Ms A was seeking to compensate for the absence of [the father] around his life in making her recommendation, particularly when recommending the level of contact that she had, being one weekend per month which appears to me to be a great deal of time for any grandparents.
>
> 28. Ms A's recommendation seemed to sit in a vacuum where it was her hope and expectation that the adults would be able to work together for the benefit of P, but I saw no evidence in court that this is even remotely possible. Even [the appellant paternal grandfather], when cross-examining the Cafcass officer said that he and his wife were fearful that [the mother] would make up allegations about them in the future, and [the mother] has no trust in the applicants at all.

> 29. Yet, Ms A was able to offer no solution for this dysfunction in the adult relationship and, therefore, no solution to the inevitable exposure of P to that situation. I am afraid I was forced to conclude that Ms A had not properly balanced any of these issues when making her recommendation for contact, and, for those reasons, I depart from her recommendation. Whilst she was undoubtedly right to say that the dysfunction between the adult relationships would be one that she would expect the adults to work on, I fear that that there is no willingness to be able to do that to make things better and P will continue to be caught in the crossfire."

33. Within the foregoing context, the Judge concluded that it was in P's best interests to order indirect contact between P and the appellants by way of photographs, cards, presents and letters once per month:

> "30. I do not doubt that [the appellants] love P very much but I simply cannot see how contact arrangements can be managed in a positive way given the personalities of the applicants, their attitude to [the mother] and her experience of them in real life.
>
> 31. P is energetic and a bright young boy who is doing okay at school but not quite reaching expectations. He is going to benefit from as much stability as can be provided to him. Spending one weekend per month outside of his nuclear family unit to be with his grandparents will take him away from their life, his activities, his homework and all the other parts of his life with his mother that will cause disruption and it is my view that that can only work if it has the support of [the mother] which, sadly, it does not.
>
> 32. I do accept that Ms A is right to identify that P does not have a real knowledge of his paternal family and she was concerned that [the mother] had not been honest with P's school about [the father] and his situation (i.e. being in prison for murder). It is my view that this can be remedied if has not already been so.
>
> 33. However, that absence of a paternal family can also be remedied to some extent by permission for indirect contact moving forward. The order I am going to make is a child arrangements order for indirect contact by way of photographs, cards, presents and letters once per month from now on. [The appellants] are well aware of [mother's] address."

34. The appellants lodged their Notice of Appeal against the Judge's order of 4 October 2023 on 23 October 2023. Amended Grounds of Appeal were provided on 29 November 2023. As I have noted, permission to appeal on all grounds was granted by Sir Jonathan Cohen on 21 December 2023.

GROUNDS OF APPEAL AND SUBMISSIONS

35. By their amended Grounds of Appeal dated 29 November 2023, the appellants divide their grounds into those concerning the fairness of the final hearing and those concerning the Judge's welfare analysis at the final hearing. With respect to the fairness of the proceedings, the appellants rely on the following grounds.

Fairness

36. By Ground 1, the appellants contend that the Judge's decision to permit the second document of the mother dated 30 September 2023, and to rely on it to make serious findings against the appellants concerning aiding the breach of bail conditions and a wider willingness to lie, breached the common law principle of natural justice, as reflected in the Overriding Objective in FPR r.1.1 and the requirements of Art 6 of the ECHR.

37. With respect to Ground 1, Mr Pressdee and Mr Basi point to the following matters which they submit establish that ground:

    i) The document dated 30 September 2023 was produced at the final hearing and the mother was allowed to rely on it.

    ii) The mother had no permission to file a witness statement as no such statement had been directed by the Judge at the Dispute Resolution Appointment nor by the court otherwise. The document did not contain a statement of truth.

    iii) The appellants had not been served with the document dated 30 September 2023 ahead of the final hearing and only learned of its existence at the final hearing.

    iv) The appellants were accorded 20 minutes to read and consider the document dated 30 September 2023, without the exhibits, before the appellant paternal grandfather was cross examined, including on the contents of the document dated 30 September 2023.

    v) The document contained a serious allegation against the appellant paternal grandfather of aiding a breach of bail conditions, which allegation had not previously been raised in the proceedings and which is disputed.

    vi) The appellants were given no opportunity to adduce written evidence in answer to the new allegation.

    vii) Based on the document of 30 September 2023, and giving no account of what other evidence had been considered and balanced, the Judge made a serious finding against the appellant paternal grandparent of aiding a breach of bail conditions, and used that finding to inform a wider finding against both appellants of a willingness to lie and a finding that the mother's overall perception of the appellants was justified.

    viii) The judge used those findings, together with further extracts from the document of 30 September 2023 regarding the mother's perceptions of the appellants, when reaching her central conclusion that it was not in P's best interests to have any contact with the appellants beyond the indirect contact ordered by the Judge, given the personalities of the appellants, their attitude to the mother and the mother's experience of the appellants in real life.

38. Mr Pressdee and Mr Basi submit that upon the mother producing the document dated 30 September 2023, two fair routes were open to the Judge in circumstances where the appellants were litigants in person. First, the Judge could have excluded the material

in circumstances where it had not been directed and was provided in breach of paragraph 4 of the Judge's own order of 18 August 2023. Second, if the Judge was minded to admit the document and in circumstances where it contained a new allegation likely to materially impact on the court's ultimate decision, the Judge should have adjourned the final hearing to permit the appellants to file and serve witness statements dealing with the new allegation. Mr Pressdee and Mr Basi submit that by choosing instead to proceed in the manner she did, the Judge took a course that was manifestly unfair to the appellants and, in circumstances where the Judge drew much broader and more profound conclusions from the finding she made consequent on the document dated 30 September 2023, a course that so contaminated the final hearing and its ultimate outcome as to make the proceedings as a whole unfair.

39. Mr Pressdee and Mr Basi acknowledge that a decision whether or not to rely on evidence is a case management decision, with which decisions appellate courts are loath to interfere. However, they submit that the course taken by the Judge at the final hearing was unfair *per se*, in circumstances where it denied the appellants the ability to put their case effectively and to participate effectively in the decision making process, by not affording them the opportunity to address properly all the material that might, and in this case did, affect the court's ultimate decision on the appellants' application. Mr Pressdee and Mr Basi further submit that the course taken by the Judge infringed the principle of equality of arms by not affording the appellants a reasonable opportunity to present their own case with respect to the allegation, including their evidence, which did not place them at a substantial disadvantage compared to the mother. Finally, Mr Pressdee and Mr Basi submit that the course taken by the Judge appeared unfair, as well as being unfair.

40. By Ground 2, the appellants contend that the Judge's decision to conduct the final hearing without the appellants having been provided with a bundle in accordance with paragraph 7 of the order of 18 August 2023 breached the common law principle of natural justice, as reflected in the Overriding Objective in FPR r.1.1 and the requirements of Art 6 of the ECHR.

41. With respect to Ground 2, Mr Pressdee and Mr Basi rely on the following matters which they submit establish that ground:

    i) At the Dispute Resolution Appointment on 18 August 2023 the Judge directed that a bundle would be prepared by HMCTS and made available to the Judge, the parties and the Family Court Adviser two days prior to the final hearing.

    ii) Despite making enquiry of the court, the appellants were never provided with a bundle for the final hearing in accordance with the Judge's direction of 18 August 2023.

    iii) Alone among the parties, the absence of a bundle deprived the appellants of the safeguarding letters from the child arrangements and enforcement proceedings involving the mother and the father and the exhibits to the documents of the mother dated 8 August 2023 and 30 September 2023.

42. Mr Pressdee and Mr Basi submit that it was incumbent on the Judge to ensure that the appellants had the means to present their case effectively and to participate in proceedings effectively by ensuring that the appellants had in their possession the same

material that the court and each of the other parties had received. Mr Pressdee and Mr Basi further submit that, in circumstances where the appellants were not provided with a bundle, the process adopted was unfair *per se* and so compromised the final hearing as to make the proceedings as a whole unfair.

43. The father supported the appellants' submissions on Grounds 1 and 2 of the amended Grounds of Appeal dealing with fairness. In her Position Statement lodged pursuant to the order of Sir Jonathan Cohen, the mother largely confines herself to repeating her case on the merits. However, in her short oral submissions, the mother defended the Judge's approach to the hearing as being one that was entirely fair and pointed to the Judge's long involvement in the proceedings concerning the family and the level of knowledge the Judge had of the issues in the case. As I have noted, the mother asserted that the appellants had notice of the allegation contained in the document dated 30 September 2023 from previous proceedings and pointed to the fact that the judge heard oral evidence at the final hearing on the matters which she went on to make findings.

Welfare

44. Grounds 3 to 9 of the appellants' amended Grounds of Appeal concern the Judge's welfare analysis in this case. In circumstances where I am satisfied that the appeal must be allowed on Grounds 1 and 2 of the amended Grounds of Appeal, for reasons I will come to, I am satisfied that it is neither necessary nor desirable for this court to deal with Grounds 3 to 9 concerning the Judge's welfare analysis at the final hearing. In light of my decision in respect of Grounds 1 and 2, this matter will need to be remitted to a different judge of Circuit judge level for re-hearing, where the question of welfare will fall to be considered afresh. In the circumstances, I can take the account of the grounds concerning the Judge's welfare analysis shortly.

45. By Ground 3 the appellants contend that the Judge erred by failing to take a sufficiently medium and long term view of P's welfare. On behalf of the appellants, with respect to Ground 3, Mr Pressdee and Mr Basi submit that in the context of P's necessarily limited relationship with his father, and given his background and heritage, the Judge failed to weigh sufficiently in the welfare balance the advantages to P throughout his minority and beyond of having the opportunity to develop and maintain full and meaningful relationships with the appellants. They further submit that, within this context, the Judge wrongly accorded weight to the level disruption recommencing contact with the appellants would cause P without undertaking any assessment of how long-lived and significant of such disruption would be. Mr Pressdee and Mr Basi further submit in this context that the learned judge accorded disproportionate weight to the mother's self-reported perception and adverse view of the appellants in circumstances where the Family Court Adviser had recommended work to address the adult conflict and the mother, and the appellants had agreed to undertake that work.

46. By Ground 4, the appellants contend that the Judge erred by failing to give any consideration to P having direct contact with the appellants at a level lower than that being recommended by the Family Court Adviser. By Ground 5 of the amended Grounds of Appeal, the appellants contend that the Judge's finding that the mother had "demonstrated a respect for the court process and also for the decisions of the Court" was not a finding reasonably open to her and / or was contrary to the weight of the evidence before the court. On behalf of the appellants, Mr Pressdee and Mr Basi point to the fact that the mother stopped contact with the appellants in April 2021, that as

recognised at paragraph 4 of the judgment the mother was initially reluctant to comply with the child arrangements order in favour of the father, that the mother initially withdrew her consent to wishes and feelings work with P, delaying the CAFCASS report, and that the mother submitted a document that she had no permission to file and which she did not provide to the appellants.

47. By Ground 6, the appellants contend that the Judge erred in placing significant weight on what she found, at paragraph 21, to be the impact on the mother and on her ability to parent P of the stress of six years of proceedings. Mr Pressdee and Mr Basi submit that this finding was not open to the Judge and/or contrary to the weight of the evidence. On behalf of the appellants, Mr Pressdee and Mr Basi submit that the proceedings had in fact been ongoing since 4 May 2021 with respect to the application of the father, shortly prior to which P had been having regular, positive staying contact with the appellants. They also point to the fact that the appellants' application for contact was commenced July 2022. They further submit that the Judge failed to account for the mother's role in the prolonging of the proceedings by her non-compliance with the original order.

48. By Ground 7, the appellants contend that the Judge erred in forming an unduly adverse view of the appellants. On behalf of the appellants, Mr Pressdee and Mr Basi submit that the Judge's view that the appellants were "arrogant", "domineering" and "supercilious" was not supported by the totality of the evidence, including the CAFCASS report and the appellants' evidenced communications with the mother. They further submit in reaching her conclusion regarding the appellants, that the Judge relied disproportionately on her own assessment of the appellants at court and, in particular, on what she viewed as the appellants' unjustified criticisms of the court process, in circumstances where there were objective grounds for the appellants to be concerned about the fairness of the process.

49. By Ground 8, Mr Pressdee and Mr Basi submit the Judge erred when considering the significant of P's past contact with the appellants in circumstances where, contrary to the Judge's finding that P would have no recollection of the appellants, he had told the Family Court Adviser that he knew the paternal grandfather, where P had in the past had positive, overnight contact with the appellants and where the Family Court Adviser had identified no safeguarding concerns. Finally, by Ground 9, the appellants contend that the Judge failed to have sufficient regard to the recommendation of the Family Court Adviser, and in particular her evidence concerning the mother.

50. Once again, the father supported the appellants' submissions concerning the grounds dealing with the Judge's welfare analysis in this case. The mother submitted that the Judge had got the welfare balance right in the circumstances of the case, and had reached the correct conclusion having regard to the long history of the matter and to what the mother contends has been the approach and behaviour of the appellants over the course of that period and at the final hearing itself.

LAW

51. Evidence is the means by which the court decides the facts in issue before it. Subject to primary and secondary legislation, the common law rules of evidence applicable to all civil proceedings apply equally in family proceedings.

52. The provisions of the Family Procedure Rules 2010 (hereafter 'FPR 2010') dealing with evidence are contained primarily in Part 22 and Part 23 of the FPR 2010 and apply to private law proceedings. The power of the court to control evidence is set out in FPR 2010 r.22.1 as follows:

> "**Power of court to control evidence**
>
> 22.1.—(1) The court may control the evidence by giving directions as to—
>
> (a) the issues on which it requires evidence;
>
> (b) the nature of the evidence which it requires to decide those issues; and
>
> (c) the way in which the evidence is to be placed before the court.
>
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
>
> (3) The court may permit a party to adduce evidence, or to seek to rely on a document, in respect of which that party has failed to comply with the requirements of this Part.
>
> (4) The court may limit cross-examination."

53. The general rule with respect to evidence of witnesses is set out in FPR 2010 r.22.2 as follows:

> "**Evidence of witnesses – general rule**
>
> 22.2.—(1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved—
>
> (a) at the final hearing, by their oral evidence; and
>
> (b) at any other hearing, by their evidence in writing.
>
> (2) The general rule does not apply—
>
> (a) to proceedings under Part 12 for secure accommodation orders, interim care orders or interim supervision orders; or
>
> (b) where an enactment, any of these rules, a practice direction or a court order provides to the contrary.
>
> (Section 45(7) of the Children Act 1989 (emergency protection orders) is an example of an enactment which makes provision relating to the evidence that a court may take into account when hearing an application.)"

54. The rules concerning the service of statements for use at the final hearing are contained in FPR 2010 r. 22.5, which provides as follows:

"**Service of witness statements for use at the final hearing**

22.5.—(1) The court may give directions as to service on the other parties of any witness statement of the oral evidence on which a party intends to rely in relation to any issues of fact to be decided at the final hearing.

(2) The court may give directions as to—

(a) the order in which witness statements are to be served; and

(b) whether or not the witness statements are to be filed.

(3) Where the court directs that a court officer is to serve a witness statement on the other parties, any reference in this Chapter to a party serving a witness statement is to be read as including a reference to a court officer serving the statement."

55. FPR 2010 r.22.6 deals with the rules governing the use at the final hearing of witness statements that have been served:

"**Use at the final hearing of witness statements which have been served**

22.6.— (1) If a party—

(a) has served a witness statement; and

(b) wishes to rely at the final hearing on the evidence of the witness who made the statement,

that party must call the witness to give oral evidence unless the court directs otherwise or the party puts the statement in as hearsay evidence. (Part 23 (miscellaneous rules about evidence) contains provisions about hearsay evidence.)

(2) The witness statement of a witness called to give oral evidence under paragraph (1) is to stand as the evidence in chief of that witness unless the court directs otherwise.

(3) A witness giving oral evidence at the final hearing may with the permission of the court—

(a) amplify his witness statement; and

(b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties.

(4) The court will give permission under paragraph (3) only if it considers that there is good reason not to confine the evidence of the witness to the contents of the witness statement.

(5) If a party who has served a witness statement does not—

(a) call the witness to give evidence at the final hearing; or

(b) put the witness statement in as hearsay evidence,

any other party may put the witness statement in as hearsay evidence."

56. The court is required by PD12B to consider both at the First Hearing Dispute Resolution Appointment and the Dispute Resolution Appointment whether to direct evidence be filed. The Child Arrangements Programme in FPR 2010 PD12B requires, at paragraph 11.2(7), the court to have regard to provisions with respect to evidence set out in FPR 2010 Part 22.

57. Finally with respect to the FPR 2010, statements of truth on witness statements are dealt with by Part 17 of the FPR 2010. FPR 2010 r. 17.2 requires a witness statement to be verified by a statement of truth. Pursuant to FPR 2010 PD5B para 6.1, where a document with a statement of truth is filed by e-mail, the original document with the original signature should be retained and the court may require the document containing the original signature to be produced. FPR 2010 r.17.4 provides as follows for the consequences of failing to verify a witness statement with a statement of truth:

"**Failure to verify a witness statement**

17.4. If the maker of a witness statement fails to verify the witness statement by a statement of truth, the court may direct that it shall not be admissible as evidence."

58. Within the foregoing context, and subject to the power of the court to permit a party to adduce evidence or to seek to rely on a document, in respect of which that party has failed to comply with the requirements of FPR 2010 Part 22, at a final hearing evidence is what is set out in the witness statements served on the other party pursuant to FPR 2010 r.22.5, attested to by the witness by way of a statement of truth, and either agreed to by the parties or spoken orally in the witness box at a final hearing (see *Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd* 196 ConLR 5 per Fraser J (as he then was) at [21]).

59. The foregoing provisions of the FPR 2010 are each subject to the requirements set out in the Overriding Objective in Part 1 of the FPR 2010. Accordingly, the starting point for any decision with respect to the provision or management of evidence is the Overriding Objective in FPR 2010 r.1.1, which provides as follows:

"**The overriding objective**

1.1.— (1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

(2) Dealing with a case justly includes, so far as is practicable—

(a) ensuring that it is dealt with expeditiously and fairly;

(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

> (c) ensuring that the parties are on an equal footing;
>
> (d) saving expense; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

60. The Overriding Objective emphasises the role played by the FPR 2010, and therefore the role played by the proper application of the provisions of the FPR 2010 dealing with the form and manner in which such evidence must be adduced, in the fairness of proceedings. The requirement in the Overriding Objective to ensure that the case is dealt with fairly is itself informed by principles of natural justice and the principles enshrined in Art 6 of the ECHR guaranteeing a fair trial.

61. Within the latter context, the essential touchstone is fairness, and the question is whether the proceedings taken as a whole are fair. In *Dombo Beheer BV v The Netherlands* (1994) 18 EHRR 213 at [33], the ECtHR held that the principle of equality of arms entails a reasonable opportunity to present one's case, including one's evidence, in a way that does not place one at a substantial disadvantage to one's opponent. In *Mantovanelli v France* (1997) 24 EHRR 370 at [36], the ECtHR confirmed that, to be effective, the right of access to a court means the individual has the opportunity to address all material that might affect the court's decision and is placed in a position to call evidence and to cross-examine. This will include the opportunity "to have knowledge of and comment on the observations filed or the evidence adduced by the other party" (*McMichael v United Kingdom* (1995) 20 EHRR 205 at [80]) and adequate time to prepare (see *Jespers v Belgium* 27 DR 61 (1981). In considering the question of fairness, in *P, C & S v UK* [2002] 2 FLR 631 at [91] the ECtHR held that the administration of justice requires not only fairness but the appearance of fairness.

62. Accordingly, fairness demands that a party knows the case being made against them, including the evidence that is to be adduced, and has the ability to answer that case effectively, including time to prepare, the opportunity to adduce their own evidence and the opportunity to challenge the evidence of the other party, in a way that does not place them at a substantial disadvantage compared to that other party. In this regard, in addition to fairness *per se*, the appearance of fairness will also be important. In considering fairness, the seriousness of what is at stake is a relevant consideration.

63. In circumstances where, for the reasons set out above, I am satisfied that it is neither necessary nor desirable for this court to deal with Grounds 3 to 9 of the amended Grounds of Appeal concerning the Judge's welfare analysis at the final hearing, it is not necessary to rehearse here the legal principles relevant to that exercise.

DISCUSSION

64. It is important at the outset to acknowledge the very real challenges facing busy Circuit judges required to deal with private law proceedings, and which the Judge faced in this case. In private law litigation in particular, and following the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, judges are now more often than not faced with self-representing parties who are entirely unfamiliar not only with the substantive law but also, and importantly, with the requirements of the Family Procedure Rules 2010, including the proper form and filing of evidence. In this context,

Circuit judges are regularly dealing with highly complex family situations without the assistance of lawyers to marshal the relevant evidence in accordance with the rules of procedure. It is further important to recognise that the workload of the Circuit bench creates an imperative to get on with the case if possible and to avoid adjournments based on procedural matters, the result of which would be to cause further delay in reaching a decision for the subject child. No judge wishes a family to have to be before the court for any longer than is strictly necessary. All that said, I have concluded that the appellants' appeal must be allowed on Grounds 1 and 2 of the amended Grounds of Appeal. My reasons for so deciding are as follows.

65. By FPR 2010 r.22.1, the court is empowered to control the evidence by giving directions. Pursuant to FPR 2010 r.22.2(1)(b), any fact that needs to be proved at a final hearing is to be proved by oral evidence. Within this context, pursuant to FPR 2010 r.22.5(1), the court may give directions as to service on the other parties of witness statements of the oral evidence on which a party intends to rely in relation to any issues of fact to be decided at the final hearing. Whilst FPR 2010 r.22.5(1) provides the court with a discretion as to service of such witness statements, having regard to the requirement in the Overriding Objective to deal with the matter fairly, as informed by principles of natural justice and the principles enshrined in Art 6, the court will ordinarily direct witness statements of the oral evidence on which a party intends to rely in relation to any issues of fact to be decided at the final hearing and will do so at a point that allows the other parties a proper opportunity to understand and answer the evidence against them.

66. This court requested a full set of the case management orders made in these proceedings. The case management orders, made on 16 November 2022, 26 May 2023, 14 June 2023 and 18 August 2023, suggest that at no point prior to the final hearing on 4 October 2023 were directions given pursuant to FPR 2010 r.22.5(1) for witness statements of the oral evidence on which the parties intended to rely in relation to any issues of fact to be decided at the final hearing from either the appellants, who were each applicants in these proceedings, or the mother, who by virtue of having care of P was the primary respondent to the application. Although the appellants sent a statement to the court ahead of the final hearing, that statement was not directed by the court, was filed in breach of the order of 18 August 2023 and was not signed. The document provided to the court by the mother dated 30 September 2023 was likewise not directed by the court, was filed in breach of the order of 18 August 2023 and contained no statement of truth. It would not appear that at the final hearing permission pursuant to FPR 2010 r.22.1(3) was given to the appellants or the mother to rely on these documents as evidence in the context of a failure to comply with the provisions of FPR 2010 Part 22.

67. I acknowledge that, on 14 June 2023, the Lay Justices had directed Position Statements from the parties requiring them to outline their respective positions in light of the contents of the CAFCASS report. However, FPR r.22.5(1) makes clear that a witness statement is a statement of the oral evidence on which a party intends to rely in relation to any issues of fact to be decided at the final hearing, signed by a person. A witness statement must comply with the requirements of PD22A and FPR 2010 r.17.2(1) stipulates that a witness statement must be verified by a statement of truth. The document dated 8 August 2023 sent to the court by the mother, apparently in response to the direction for Position Statements made by the Lay Justices on 14 June 2023, was

not directed as a statement of the oral evidence on which the mother intended to rely in relation to any issues of fact to be decided at the final hearing and contained no statement of truth.

68. Accordingly, at the final hearing on 4 October 2023 the only witness statement of the oral evidence on which a party intended to rely in relation to any issues of fact to be decided at the final hearing that was before the Judge in accordance with the rules would appear to be the witness statement of the father, which had been directed by the Judge at the Dispute Resolution Appointment on 18 August 2023. Having regard to the contents of the case management orders, the appellants do not appear to have been afforded the opportunity to file and serve a witness statement of the oral evidence on which they intended to rely in relation to any issues of fact to be decided at the final hearing ahead of that final hearing on 4 October 2023. Further, the mother likewise does not appear to have been afforded the opportunity to file and serve a witness statement of the oral evidence on which she intended to rely in response to any issues of fact to be decided at the final hearing. In those circumstances, ahead of the final hearing the appellants had had no opportunity to see the evidence of the mother that might affect the court's decision. Whilst there had been previous proceedings between the parents, beyond the safeguarding letters from those proceedings no direction had apparently been made for the disclosure into these proceedings of the witness evidence from those prior proceedings.

69. In the foregoing circumstances, no party disputes that the mother emailed to the court the document dated 30 September 2023 in circumstances where she had no permission to file a witness statement ahead of the final hearing, and that the document did not contain a statement of truth. Likewise, no party disputes that the Judge allowed the mother to rely on that document at the final hearing, although it is not clear whether the Judge expressly dealt with the question of permission pursuant to FPR 2010 r.22.1(3). It is equally not disputed that the appellants had not been served with the document dated 30 September 2023 ahead of the final hearing, only learned of its existence at the final hearing and were accorded 20 minutes to read and consider the document, without the exhibits, before the appellant paternal grandfather was cross examined, including on the contents of the document.

70. The document produced by the mother contained what was, on any estimation, a serious allegation against the appellant paternal grandfather. Namely, that the appellant paternal grandfather aided a breach of bail conditions. Whilst breach of conditions of bail is not a Bail Act offence, nor is it a contempt of court unless there is some additional feature (see *R v Ashley* [2004] 1 Cr. App. R. 23), the allegation raised in the mother's document was nonetheless a grave one, a positive finding in respect of which was capable of having significant ramifications for the appellant paternal grandfather. In the circumstances, I am unable to agree with the Judge that this was a minor point. Rather, it was a serious allegation of dishonest conduct on the part of the appellant paternal grandfather in the context of ongoing criminal proceedings.

71. Of equal significance is the fact that the allegation had not previously been raised in the proceedings arising from the appellants' application for contact and was disputed. As I have noted, the document from the mother dated 8 August 2023 did not contain the allegation, the mother is not recorded by the Family Court Adviser as having mentioned that allegation during the course of the preparation of the CAFCASS report and the Family Court Adviser's account of the safeguarding information available from the

previous proceedings makes no mention of such an allegation. Whilst the mother contends that the appellants knew of the allegation from the proceedings between the father and the mother, a point disputed by the father in his short submissions, I accept the submission of Mr Pressdee and Mr Basi that, even if true, this is not the point. The allegation had not been raised in *these* proceedings and, much more fundamentally, the appellants did not know until they were at court on the day of the final hearing that the allegation was going to be raised against the appellant paternal grandfather in these proceedings, that the mother was going to be permitted to rely on that allegation and that the court was going to decide whether the allegation was made out on the balance of probabilities. It is not disputed that the appellants were not given an opportunity to file and serve a witness statement in answer to the new allegation.

72. It is in the foregoing context, in circumstances where neither the appellants nor the mother had been directed to file and serve witness statements of the oral evidence on which they intended to rely in relation to any issues of fact to be decided at the final hearing, and based on a document submitted by the mother that had not been directed by the court, that did not comply with the relevant provisions of the FPR 2010, that the appellants had been given no notice of prior to the final hearing and that the appellants had only a limited time to consider on the day of the final hearing before being required to give evidence and be cross examined, that the Judge made a serious finding of dishonesty against the appellant paternal grandfather.

73. The question for this court is whether, having regard to the matters set out above, the proceedings taken as a whole were fair. I must conclude that they were not. In my judgment, the course of action described in the foregoing paragraphs was unfair to the appellants *per se* when measured against the requirement of the Overriding Objective to deal with the case fairly as informed by the principle of natural justice and the terms of Art 6 of the ECHR, and in particular the requirement that a party must know the case being made against them, including the evidence that is to be adduced against them, and have the ability to answer that case effectively in a way that does not place them at a substantial disadvantage compared to the other party.

74. Further, it is clear from the judgment that the Judge went on to use the finding that the paternal grandfather had aided a breach of bail conditions to inform a wider finding against the appellants of a willingness to lie and a finding that the mother's perception of the appellants generally was justified. The judge then used those findings, together with further extracts from the document of 30 September 2023 regarding the mother's perceptions of the appellants, in reaching her central conclusion that it was not in P's best interests to have any contact with the appellants beyond the indirect contact ordered by the Judge, given the personalities of the appellants, their attitude to the mother and the mother's experience of the appellants in real life. In the circumstances, I am satisfied that the unfairness to the appellants identified above affected the proceedings as a whole. I accept the submission that the approach taken by the Judge deprived the appellants of the opportunity to effectively influence the outcome of the hearing.

75. As made clear by the Supreme Court in *Serafin v Malkiewicz* [2020] 1 WLR 2455 at [49] and restated by the Court of Appeal in *P (A Child)(Fair Hearing)* [2023] 2 FLR 197, it is a fundamental principle rooted in the common law concept of natural justice and reflected in the ECHR, that a legally valid decision can only spring from a fair hearing. If a hearing is unfair, a judgment cannot stand. In the circumstances, satisfied

as I am that Ground 1 of the amended Grounds of Appeal is made out, the appeal must be allowed.

76. Whilst not strictly necessary to consider it given my conclusion on Ground 1, in circumstances where the appellants did not have access to a bundle for the final hearing, I am satisfied that Ground 2 of the amended Grounds of Appeal is also made out. Whilst the Judge makes reference to having herself read the bundle, and the mother asserts that there was a court bundle, this court has no reason to doubt the appellants' assertion that the court did not provide them with the same in circumstances where the other assertions they make regarding the final hearing have not been disputed before this court. Taken with the matters I have set out above, the absence of appellants having access to a court bundle further breached the common law principle of natural justice, as reflected in the Overriding Objective in FPR r.1.1 and the requirements of Art 6 of the ECHR. In the circumstances, I am satisfied that Ground 2 of the amended Grounds of Appeal is also made out.

77. Having regard to the conclusions set out above, and for the reasons already given, I do not consider it necessary to deal with Grounds 3 to 9 of the amended Grounds of Appeal.

CONCLUSION

78. In concluding, it is important once again to acknowledge the difficult situation that the Judge faced in this case. The Judge was presented with the now ubiquitous difficulty created by litigants who are without the benefit of legal advice and representation sending documents to the court without regard to the requirements of the FPR 2010 or the case management orders made by the court. This situation means, however, that in seeking to achieve fairness it is all the more important that the rules of evidence set out in FPR 2010, including those concerning the filing and serving of witness statements set out in FPR 2010 Part 22, are applied by the court to represented and unrepresented litigants alike.

79. In conclusion, and for reasons I have given, I allow the appeal and set aside the Judge's order of 4 October 2023. I shall remit the matter to a different judge of Circuit judge level for the re-hearing of the appellants' application and will refer the matter to the Family Presiding Judge for the Midland's Circuit, Lieven J, for allocation.