PRIVATE LAW UPDATE

BY

ARCHNA DAWAR

DEANS COURT CHAMBERS

WARNING TO PRACTITIONERS…..TRY TO STAY OUT OF PRISON

RE: NASRULLAH MURSALIN [2019] EWCA Civ 1559

- 8.5.19 – Immigration appeal, bundle contained documents relating to the family proceedings. Matter was referred to the family judge to consider contempt proceedings:
  'the behaviour of the appellant's legal representatives, Gull Law Chambers, I am satisfied falls a long way below that expected of solicitors. They have included in the appeal documents a court document that contains a very clear warning about publication and they seem unable to either read that or have any knowledge of family law proceedings or indeed very limited knowledge of immigration proceedings given their repeated applications for adjournment in order that the Family Court proceedings are determined. I request a copy of this decision is forwarded by the appropriate Immigration and Asylum Chamber officer to...Family Court case number …in order that the relevant family judge can consider the position and whether contempt proceedings are appropriate or not."
- June 2019 – family proceedings concluded and the Recorder referred the matter to the DFJ.

- 12.7.19 – committal proceedings took place against the paralegal – breach admitted.

  "Mr [M], I find that you have breached the Family Court Rules by supplying documents without the court's permission or in accordance with any existing protocols which would permit you to disclose the said documents to those who are not involved or otherwise party to these proceedings. This is a serious breach of the Family Procedure Rules and the general family rules, and only weeks ago I gave a publicised judgment about the specialism that is required for those who undertake family work and appear in these courts, and, in the circumstances, I find that you have breached it, and it falls to me to pass a sentence. This breach is so serious that in my judgment it can only attract a custodial sentence, and in those circumstances, having taken into account all that you have said and bearing in mind all that has been said by Mr Gull, who is also taking responsibility as your supervisor and the principal lawyer in Gull Law Chambers Limited, I sentence you to a time of imprisonment for six months but suspend that for the same period of six months, and it will be dismissed at the end of that if no other matters have occurred in the intervening period."

- 3.9.19 – Court of Appeal - *appeal successful: 'prima facie that there may have been a breach of the Family Procedure Rules in the form of a disclosure of documents from the family proceedings without the court's permission. The consequences of that disclosure may not have been as serious as in other cases….Nothing I say hereafter should be interpreted as excusing the unlawful, unauthorised disclosure of confidential Family Court documents.'* Procedural problems*: ' Unclear whether or not the hearing was conducted in open court…. Secondly, it is clear that the appellant was given no proper notice whatsoever that he was being accused of contempt of court or of the specific allegations against him. The proper course which should have been adopted at that stage was either (a) to have issued a reprimand to Mr Gull,*

who seems to have been principally responsible for any unauthorised disclosure, or (b) if the judge considered the matter merited committal proceedings, to have particularised the alleged contempt and then adjourned the hearing to enable the appellant to consider his position and obtain legal advice. It was not sufficient for the judge to proceed simply because the appellant agreed that he could do so.

PARENTAL ALIENATION:

CAFCASS have released new guidance designed to help welfare officers identify and assess cases, which feature parental alienation. The guidance defines parental alienation as follows:

> *When a child's resistance or hostility towards one parent is not justified and is the result of psychological manipulation by the other parent.*

The guidance note can be found: https://www.cafcass.gov.uk/grown-ups/parents-and-carers/divorce-and-separation/parental-alienation

R (A Child - Appeal - Termination of Contact) [2019] EWHC 132 (Fam)

The mother and father married in 2003. R was born in 2006. In 2013 mother made an allegation to the police that father had physically abused R. No action was taken by the police or the local authority. In 2014 mother and the maternal grandmother made further allegations of physical abuse against father, later found to be untrue. The parties separated in 2014. Following a period of no contact, imposed by mother, father issued an application for R to live with him. Contact between father and R progressed from supervised to supported to unsupervised and to overnight and regular contact took place between July-November 2015, although not without difficulty. A psychological assessment (by Dr Duprey) was commissioned, and as a result of a section 37 direction, in February 2016 care proceedings were issued. At the IRH an agreement was

reached that R would continue to reside with his mother and spend time with his father. The parties, and the Court, agreed that it was not in R's best interests for the court to make findings of fact in relation to the allegations (which included serious allegations on both sides, encompassing serious emotional abuse and alienation), as they were not likely to affect the outcome of the plan. A supervision order (on the basis of an agreed threshold in terms including that R had suffered emotional harm by being drawn into conflict) and child arrangements order were made. Contact was ordered to progress, and it did, but again not without difficulty. In early 2017 mother ceased contact, which prompted father to issue enforcement proceedings. In December 2017 the Court ordered a finding of fact hearing and an updated report from Dr Duprey. Further delay followed, until in May, June and July 2018 that the Court heard the case as a combined final hearing, rather than a fact-finding hearing.

After making the following Finding of Fact in respect of the parents:

The Father

i) At times the father did indeed become angry with R and that he exhibited that anger and frustration by shouting at R when it was not necessary to do so and when the father should have had more empathy (or attunement) with R; on balance of probabilities the father's actions were not of a nature (or frequency) that R suffered harm. The father has not acted in a way which caused R emotional or physical harm.

ii) The mother has not proved that the father took hold of R in the manner that she alleges. On this occasion, the father shouted at R (and that this showed a lack of understanding as to R), but there is no other finding. The finding is that this is not a father who has harmed his son.

iii) Other than the findings above the findings sought by the mother are not proven on balance of probabilities.

The Mother

i) The mother has been dishonest on many occasions and she has tried to bolster her firm belief by being untruthful about the extent of the abuse. She has encouraged R in his belief both directly (by discussing things with him) and indirectly (by him overhearing her, or by writing in his diary)

ii) In 2014 the mother primed R to make allegations against the father to the police which were not true,

iii) The mother discussed with R what she said had happened to him in the past, and she encouraged him to tell the social worker. The mother did coach/primed R to make allegations against his father which were not true

iv) B's diary - The mother wrote matters into the diary which were not in fact true. The mother has lied about the father more generally to bolster her case

v) Ongoing since 2013 – the mother engaged in a course of conduct with the intention of preventing R from having any contact with the father and the paternal family.

vi) Ongoing since 2013, the mother has been implacably hostile towards the father having contact and/or a positive relationship with the father based upon her firm (but incorrect) belief that contact with the father would be unsafe.

vii) From 2015 to present - the mother has alienated R from his father. As a result, R has suffered and/or remains at risk of suffering from significant long-term emotional harm as a result of his mother's manipulation; this is against the background of the mother's strong and firmly held (though incorrect) belief that the father presents a risk to R.

viii) From 2015 to the present the mother has repeatedly, deliberately breached court orders (including consent orders) during the court proceedings that R has been the subject to since 2015.

The trial judge made the following final order:

- ***R was to live with his mother.***
- ***He was only to have indirect contact with his father by means of the father sending letters, cards or gifts by post once per month (for six months) and thereafter fortnightly.***
- ***Orders pursuant to section 91 (14) Children Act 1989 which meant the father required the leave of the court to make an application either for R to live with him (duration 2 years) or to spend time with R (duration 1 year).***

Mr Justice Williams characterised the judgment of HHJ Thorp as envisaging '*the likelihood being that R would have no relationship with his father or paternal family for many years to come'*.

Williams J accepted the trial judge's assessment of the court appointed expert which was that Dr Duprey was found to be a particularly impressive witness. She was the chartered clinical psychologist who was instructed to provide a psychological assessment of R and his parents. He described the core of Dr Duprey's conclusion as follows: that R should have contact with his father and that work be carried out with both parents to enable contact to move forwards. She considered that the therapy that had been carried out to date had been wrongly focused on R and that it should have been focused on the parents in particular the mother. She thought it needed a specialist in the field of parental alienation and she was concerned about the local authority not playing any role in the family's future and thought they may be best placed to identify local agencies or experts who can help. She clearly thought that responsibility for the adverse shift in R's position was linked to the mother's having become more fixed in her position.

However, Williams J pointed to a **lacuna in the expert evidence**: "what [Dr Duprey] did not do though and she does not appear to have been asked by anybody in either her report or her oral evidence was to articulate precisely in psychological and developmental terms the possible or likely consequences for R of:

i) Firstly, growing up and reaching adult hood without having any relationship with his father or paternal family,

ii) Secondly, continuing to hold a set of beliefs about his father that were at best inaccurate at worst fundamentally wrong,

iii) Thirdly, growing up and reaching adult hood being parented solely by his mother who had been identified not only as having caused emotional harm to him through her alienation of him from his father but also and as significantly

whose parenting was identified as creating an enmeshed relationship where R was unable to developmentally separate, to develop his own identity separate to that of his mother.

This lacuna contributed towards the trial judge under-estimating the very considerable medium to long-term harm [to R from cessation of direct contact with father] arising from a number of sources. This was not simply a case of harm arising from a lack of contact. To that had to be added the **harm being done to R himself as a result of the false narrative he had absorbed about his father and thus his genetic heritage**. In addition to this was the harm that had been identified arising from the enmeshed relationship.

Williams J determined that the decision to make a final order in respect of [no] direct contact was wrong because the combination of the consequences of the findings of fact that had been made and the lack of full exploration of the options available (in particular in relation to therapy for the mother) meant that **the end of the road had not been reached**. Whether it is characterised as His Honour Judge Thorp having not given due weight to the possibilities of obtaining further information, or not giving due weight to the consequences of his findings of fact in particular how they sounded in terms of the local authority's position or whether it is characterised as a disproportionate decision on the facts as they stood does not matter. It follows that if the decision to terminate efforts to promote contact was wrong that **the decision to rule out a suspended transfer of residence was also wrong** as all options would need to be available to the court to progress contact."

The father's appeal was allowed in part with R still to live with mother, but further consideration to be given to progressing direct contact, with the indirect contact continuing in the interim and the S91(14) orders falling away.

Authority useful as it provides a very helpful summary on the role of the Judge when dealing with these complex cases:

Reviewed the authorities:

Re G (Residence: Same-Sex Partner) **[2006] EWCA Civ 372**, [2006] 2 FLR 614

> "26 'Welfare'… extends to and embraces everything that relates to the child's development as a human being and to the child's present and future life as a human being. The judge must consider the child's welfare now, throughout the remainder of the child's minority and into and through adulthood. The judge will bear in mind the observation of Sir Thomas Bingham MR in Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124 at 129, that:
>
> 2. '… the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems.'
>
> 3. [27] … Evaluating a child's best interests involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations. Everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment, and the child's social, cultural, ethnic and religious community, is potentially relevant and has, where appropriate, to be taken into account. The judge must adopt a holistic approach …"

44. In the matter of ***M (Children)*** **[2017] EWCA Civ 2164** in the context of a no contact order case the Court of Appeal affirmed the summary given in ***Re C (Direct Contact: Suspension)*** **[2011] EWCA Civ 521**, [2011] 2 FLR 912, para 47 where the Court of Appeal summarised matters as follows:

> "• Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.
>
> • Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there

is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.

• There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.

• The court should take both a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems.

• The key question, which requires 'stricter scrutiny', is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.

• All that said, at the end of the day the welfare of the child is paramount; 'the child's interest must have precedence over any other consideration.'"

To that summary, which had been followed both in ***Re W (Direct Contact)*** **[2012] EWCA Civ 999**, [2013] 1 FLR 494, and ***Re Q (Implacable Contact Dispute)*** **[2015] EWCA Civ 991**, [2016] 2 FR 287, the Court add a reference to what Balcombe LJ said in *Re J (A Minor) (Contact)* [1994] 1 FLR 729, 736:

"*… judges should be very reluctant to allow the implacable hostility of one parent (usually the parent who has a residence order in his or her favour), to deter them from making a contact order where they believe the child's welfare requires it. The danger of allowing the implacable hostility of the residential*

parent (usually the mother) to frustrate the court's decision is too obvious to require repetition on my part.

S91 (14) CA 1989

Re G (Children) (Intractable Dispute) [2019] EWCA Civ 548

The parents had separated when the children were aged five and two, but litigation had been ongoing for six years. The mother had made unproven allegations that the father had been guilty of domestic abuse. The children said that they did not wish to see him. He applied for an order that they should live with him, but it was refused on the basis of two local authority reports. The reports were later found to be biased and unreliable, and the father's application was considered afresh. However, he refused to attend supervised contact and Skype contact broke down. He applied successfully for the replacement of two CAFCASS guardians, and his relationship with the third guardian broke down. At a further hearing a judge concluded that the mother had failed to actively promote contact, but it was not a case of parental alienation. The father's application for a fresh psychological assessment of the family was granted. However, he then failed to co-operate with the assessment. The report stated that he displayed intimidating behaviour and had traits indicative of Asperger's. It recommended therapeutic intervention for the father, with further contact only taking place once that was completed.

At the final hearing the judge dismissed the father's application, concluding that he had been unable to prioritise the children's needs over his own, and his open hostility towards the mother was harmful to her welfare and damaging to the children. He accepted the report's recommendation, and made an order under the Children Act 1989 s.91(14) preventing the father from making any further applications for three years without permission.

Father appealed – Appeal dismissed.

A judge had been entitled to make an order under the Children Act 1989 s.91(14) restricting a father from making further applications concerning contact with his children for a period of three years without permission. Litigation had been ongoing for six years, and the order was not incompatible with the judge's further order that the father should have no direct contact until he had completed therapeutic intervention work to address his hostility towards the children's mother.

Re P & N (Section 91(14): Application for Permission to Apply: Appeal) [2019] EWHC 421 (Fam)

This private law children case involved two boys aged 8 and 6 who lived with the mother ('M') and had no contact with the father ('F').

In January 2015 a district judge determined, exceptionally, that it was in the best interests of the boys that F should have no further direct or indirect contact with them.

Within months F made a second application for an order to spend time with the boys. This was dismissed in July 2016, and an order under section 91(14) Children Act 1989 imposed for 3 years.

F made several further applications, then in March 2018 made an application for permission to apply for a section 8 (spend time with) order. This was the second such application since the imposition of the section 91(14) order.

The application was heard by HHJ Plunkett without formal notice to M, or to the solicitor for the children (who had been joined to the earlier proceedings and represented by a Guardian). The Guardian, whose role had been converted to named 'officer' under a Family Assistance Order at the conclusion of the proceedings, had been invited to attend the hearing before HHJ Plunkett but was not in fact present. The Judge granted F's application.

Once notified of the outcome of F's application, M sought permission to appeal. Her single ground of appeal was that the Judge was wrong to grant F's application without hearing from her, or receiving her representations.

Cobb J heard the appeal and concluded that the approach and decision of HHJ Plunkett was both seriously unjust for procedural irregularity and wrong and identified three material flaws:

i) Once the judge had formed the view on the papers (or at the oral hearing) that F's application was not hopeless, and that he had established a prima facie case, he should have afforded M the opportunity to make representations on that application.

ii) Even if not, strictly speaking, procedurally irregular (in that the rules do not prevent the judge from considering the application on a 'without notice' basis), on the facts of this case, it was wrong not to have given M the opportunity to respond to the application.
iii) The judge's rationale for granting the application was wrong. He appeared to have reached his decision on pure welfare grounds. Section 1(1) CA 1989 does not apply to this question; this is not a 'best interests' decision.

Civil restraint orders in family proceedings:

AEY v AL (Family Proceedings Civil Restraint Order) [2018] EWHC 3253

The court made a civil restraint order for two years against a father.

- Family had been involved on litigation for 5 years.
- Father had made repeated applications that his 3 daughters lived with him.
- Applications were dismissed and Father made 7 applications for permission to appeal
- Knowles J found all the applications were without merit.

- Application for a civil restraint order was made by the court of its own motion.
- Very rare order!

Knowles J refers to ***Nowak v The Nursing and Midwifery Council*** **[2013] EWHC 1932 (QB),** which provides a useful summary of their purpose:

> "*58. As explained by the Court of Appeal in the leading case of* ***Bhamjee v Fosdick*** **[2004] 1 WLR 88**, *the rationale for the regime of civil restraint orders is that a litigant who makes claims or applications which have absolutely no merit harms the administration of justice by wasting the limited time and resources of the courts. Such claims and applications consume public funds and divert the courts from dealing with cases which have real merit. Litigants who repeatedly make hopeless claims or applications impose costs on others for no good purpose and usually at little or no cost to themselves. Typically, such litigants have time on their hands and no means of paying any of the costs of litigation – so they are entitled to remission of court fees and the prospect of an order for costs against them is no deterrent. In these circumstances there is a strong public interest in protecting the court system from abuse by imposing an additional restraint on their use of the court's resources.*
>
> *59. It is important to note that a civil restraint order does not prohibit access to the courts. It merely requires a person who has repeatedly made wholly unmeritorious claims or applications to have any new claim or application which falls within the scope of the order reviewed by a judge at the outset to determine whether it should be permitted to proceed. The purpose of a civil restraint order is simply to protect the court's process from abuse, and not to shut out claims or applications which are properly arguable."*

The court found that such an order could be made in the circumstances, notwithstanding that there was no application before the court.

Knowles J referred to the court's case management power at **R. 4.3(4) FPR 2010** *"to make an order of its own initiative without hearing the parties or giving them the opportunity to make representations".*

Father was given an opportunity to respond by way of written submissions.

TWO CASES ON COSTS ORDERS:

Timokhina v Timokhin [2019] EWCA Civ 1284

The mother and father were Russians living in London. When their marriage broke down the father applied to the High Court to take the children and relocate permanently to Russia. During the course of the proceedings the mother travelled to Russia where she was arrested after attempting to bribe a police officer to instigate criminal charges against the father. The High Court granted the father's application. A hearing was then held to consider the mother's application for a stay and for permission to appeal. No order for costs was made. The mother was sentenced to 4 years in prison in Russia. The mother later withdrew her appeal and at a hearing for costs the judge made an order in respect of the earlier hearing giving the father his costs. The mother appealed on the grounds that the judge was wrong to award the costs of the earlier hearing when the order was silent as to costs and the general rule was that no party was entitled to costs.

Judgment:

An overview of some key costs points arising….

(1) The court may at any time make such order as to costs as it thinks just. (**FPR 28.1**)

(2) The principle that costs follow the event does not apply in family proceedings (**FPR 28.2**).

(3) The deemed costs order for an applicant's costs in an order granting permission to appeal (CPR 44.10 (2) is dis applied by **FPR 28.2**.

(4) Where at a hearing the order is silent as to costs, the *general* rule is that no party is entitled to costs (by virtue of **CPR 44.10 (1)(a)(i)**

incorporated into costs in family proceedings via **FPR 28.2**, however, using statutory interpretation, Lady Justice King determined that this general rule is not an *absolute* rule. The intention of the draftsman was to leave the court with a residual discretion, which fits logically into the wholly discretionary approach to costs in family proceedings. The judge had the jurisdiction to make an order for costs in respect of a previous hearing at which there had been '*no order as to costs'*.

(5) Costs will be awarded on the indemnity basis where paying party has been responsible for conduct which is unreasonable to a high degree – not just merely wrong or misguided in hindsight;

(6) The general rule is that a summary assessment of costs will be undertaken at the conclusion of any hearing, which has lasted not more than one day. (**PD44 9.2**).

(7) Mrs T was only successful on one point - having in mind that (on the indemnity basis) the costs do not need to be proportionate, but that the test is whether they are 'unreasonable', Lady Justice King found that counsels' fees for the (costs) hearing were, *'on any basis*,' unreasonable in amount pursuant to **CPR 44.4(1)(b)(ii).** Leading counsel's attendance at the low-level hearing, where there was no longer any threat to the welfare of the children, and marked at £25,000, was unreasonable, '*even absent a requirement for proportionality and notwithstanding the presumption in favour of the receiving party where indemnity costs are ordered'* (**CPR 44.3(3)**)

Re: ABCDEF (Fact Finding: Honour Based Violence) [2019] EWHC 406 (Fam)

The substantive case was concerned with three children of a mother who all had different fathers. Much of the hearing centred on allegations made by M against the oldest child's father ('F'). Keehan J, who conducted a fact-finding hearing in December 2018 concluded:

'I am entirely satisfied that the mother made a false case and false allegations against the father. There is no truth whatsoever in any of the allegations that the mother has made… It is, in my judgment, appalling that this little boy and this

father have not seen each other for some three and a half years solely because of the malicious conduct, as I find it to be, of the mother.'

The Expert's Report:

Dr Dalvinder Kaur-Kelly, an expert in honour-based violence, had been instructed in December 2017 to provide an expert report by 5 February 2018.

On 2 February 2018, at the request of Dr Kaur-Kelly, the date for the filing of her report was extended to 30 March 2018.

On 16 April, there was a hearing for which Dr Kaur-Kelly had not filed her report. The date for the filing of the report was extended to 21 May 2018.

Questions were asked of Dr Kaur-Kelly upon production of her report on 8 June and Dr Kaur-Kelly replied on 20 June. Her response to these questions is set out in a report dated 2 July 2018. On 23 July, Dr Kaur-Kelly gave evidence before HHJ Bellamy in the course of the first composite hearing.

Further to re-allocation, Dr Kaur-Kelly was ordered by Keehan J on 2nd August 2018 to provide an addendum report by 28 September 2018. She applied for an extension, which was refused. No report was filed and Dr Kaur-Kelly and all parties appeared before Keehan J on 2 October 2018, **the sole purpose of the hearing was for the court to hear Dr Kaur-Kelly's explanation as to why she had failed to file her report by the required date**.

An extension to 15 October 2018 was agreed. No report was filed. The direction for an addendum report was discharged.

Dr Kaur-Kelly was too ill to attend the Final Hearing in December 2018 and Keehan J considered the issue of costs against the expert separately, finding that the costs borne by the parties on 2 October and 10 October were required solely because of Dr Kaur-Kelly's serial failures to comply with court orders. He summarised the principles governing the discretion to order costs against expert witnesses as follows: "*Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense.*

Dr Kaur-Kelly does, unfortunately, suffer from an adverse health condition which causes her difficulties from time to time and which flares up from time to time. That is most regrettable. However, as a professional witness and accepting forensic work, Dr Kaur-Kelly knows and knew only too well of her duty to the court and of the importance of filing reports on time. If her health was such that she could not be sure that she would be able to comply with court orders, she should frankly not have accepted instructions to be a forensic expert witness."

Keehan J was satisfied that there were no good reasons why he should not make an order for the costs incurred by all of the other parties in respect of the two October hearings against the expert. He considered her to have acted inappropriately and to have serially failed to comply with orders of the court. He also found there are no cogent reasons why he should not name Dr Kaur-Kelly in the judgment.

APPEALING FINDINGS OF FACTS

***A and R (Children)* [2018] EWHC 2771 (Fam)**

A wealthy couple divorced and through their solicitors' in correspondence were unable to settle the child arrangements. After more than 100 hours of mediation meetings costing over £50,000, resulting in 4 nights per fortnight spent with F, he issued his C100 requesting 5 nights per fortnight. After almost a year of proceedings on the father's application during which the mother raised allegation of domestic abuse there was a Fact Find before a Recorder who made limited findings against both parents and directed a S7 report. Mother appealed against the findings of fact, and was wholly unsuccessful.

Baker J, in dismissing the appeal, pointedly quotes from Jackson LJs' case **L v F [2017] EWCA Civ 2121:**

"*Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to 'domestic abuse', where 'coercive behaviour' is*

defined as behaviour that is 'used to harm, punish, or frighten the victim...' and 'controlling behaviour' as behaviour 'designed to make a person subordinate...' In cases where the alleged behaviour does not have this character, it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict." (para 41)

A key point to note is that the trial judge was not criticised by Baker J for not referring to PD12J in her judgment. *"I see no basis upon which this court could fairly conclude that the Recorder failed to apply the correct definition of "domestic abuse". This was plainly the issue which concerned her, which is why she asked counsel about the meaning of "controlling and coercive behaviour" during the course of submissions. They referred her to the Practice Direction and Peter Jackson LJ's judgment in L v F. I am satisfied that she had it firmly in mind."* (para 63)

The Judgment also provides a useful summary (paras 42-44) of the appellate court's treatment of appeals against findings of fact.

"I turn next to consider the law concerning the treatment of appeals in these circumstances. ***An appeal to the Family Division is a review, not a rehearing****. A court can only allow an appeal where the decision of the judge in the first instance was wrong or unjust because of some procedural or other irregularity. The appellate courts have repeatedly stressed the need for caution and restraint when considering appeals both based on challenges to findings of fact made…by the judge at first instance. Probably, the best-known exposition of this is the oft-cited passage of the judgment of Lewison LJ in* ***Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5,*** *paras.114 to 115:*

> "114. *Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but*

also to the evaluation of those facts and to inferences to be drawn from them….

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted."

43. …in ***Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33****. (para.40) Lord Wilson noted:*

"An error in the balancing exercise justifies intervention only if it gives rise to a conclusion that the judge's determination was outside the generous ambit of reasonable disagreement or wrong within the meaning of the various expressions to which he had referred."

Baroness Hale of Richmond observed (para.20):

"The Court of Appeal has jurisdiction to hear appeals on questions of fact as well as law. It can and sometimes does test the judge's factual findings against the contemporaneous documentation and inherent probabilities. But where findings depend upon the reliability and credibility of the witnesses, it will generally defer to the trial judge who has had the great advantage of seeing and hearing the witnesses give their evidence. The question is whether the findings made were open to him on the evidence. As Lord Hoffmann explained in ***Biogen Inc v Medeva plc [1997] RPC 1,*** *the need for appellate caution is 'based upon much more solid grounds than*

professional courtesy'. Specific findings of fact are 'inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance...'"

44. *On the other hand, I also bear in mind the observation in* ***Sherrington v Sherrington [2005] EWCA Civ 326*** *(para.33):*

"That, however, does not mean that an appeal on fact can never succeed. If this court is convinced that the judge was plainly wrong, then it is its duty to interfere."

PR v JES v TER (Appeal: Sexual Abuse, Fact Finding) [2019] EWHC 791 (Fam)

This was an unusual case with two judgments by the same Circuit Judge.
The first was in January 2017 when the judge found that sexual abuse allegations made by the mother against the father were not established.
The second judgment was delivered in July 2018, which concluded on the same allegations (but now following disclosures from the child) that sexual abuse was proven. Williams J opined that the change from one conclusion to the other lay at the heart of this (successful) appeal.
Father appealed. Permission to appeal was given without condition.

Appeal heard by Mr Justice Williams:

The most salient points to take from this case are:

1. The court must keep in view the great care that needs to be taken in obtaining evidence from children to ensure its reliability.
2. **Re E (A Minor) (Child Abuse: Evidence) [1991] 1 FLR 420** and **AS-v-TH and Others (False allegations of abuse) [2016] EWHC 532 (Fam)** set out in detail the steps required.
3. The judge noted that within the first judgment the judge had detailed the approach set out in **Re E** (above) with respect to evaluating sexual abuse allegations by young children, he did not do so in his second judgment.

4. He also notes that the more complex the background and evidence the more sophisticated will the analysis need to be and the more obvious the demonstration that special care has been taken.

More generally, it was held that the second judgment had failed to demonstrate that a comprehensive review of the evidential trail showing the process from which the child moved from making no allegations and showing no unhappiness to the contrary situation, had been carried out. The second judgment did not make clear that the allegations in May 2017 were considered in light of the factual backdrop of 2015/2016. The allegations in 2017 were not clearly subjected to real detailed scrutiny. Various points which challenged the reliability of the child's evidence were not properly dealt with, including the context in which the allegations were made. The judgement did not address or analyse the fact of how many times the child had been interviewed since the alleged incidents in 2015. The judge did not explain why the latter interviews of the child were given greater weight by him than the earlier ones carried out by professionals, and the consistency point was not addressed. The lack of corroborating evidence did not get a mention albeit it was one of the features specifically addressed in the first judgment. The absence of express consideration of the above factors in this complex case was a considerable flaw. Williams J held that the judgment had placed too much weight on the ABE evidence of the child when such weight could not be properly attributed to it without a detailed contextual analysis. The judge had failed to address that the reliability of the evidence had to be viewed in the context in which it had come into existence.

Warnings:

Mr Justice Williams made the following points of note to lawyers dealing with these types of proceedings:

- First, he noted the delay that had "plagued" these proceedings and their resolution. He described this delay as "staggering".

- Second, the hearing in March 2019 had been set down for two days to allow one day for judicial reading. When he was sent the essential reading list it amounted to 30+ hours of reading plus the ABE interview. He reminded advocates that *'essential reading list'* should point the court to what is essential, particularly in respect of an appeal hearing;
- Third, he considered whether the overloading of the Scott Schedules in the second fact-finding had contributed to the issues that had arisen which were the subject of the appeal. He stated that it was imperative in fact-finding exercises that lawyers and judges case managing identify the central facts on which the court is required to rule. This ought to be done at FHDRA stage. Where Scott Schedules are imprecise or overloaded with a mixture of facts and evidence they can become a distraction and risk diverging the courts attention away from the central facts.

Warning to those representing children:

Mr Justice Williams noted the fact that the Guardian played no role in this complex appeal and observed that a child is made a party to private law proceedings of this sort because the court has considered it is in their best interests to be a party. He did not understand why it would be considered that it was not in the child's best interests for her Guardian and lawyers to play a role in an appeal in such a critically important matter concerning the child. He said:

> "*Assuming (as is the case in this appeal) that the Guardian is taking a neutral position and that they participated at the first instance hearing*, **is it not in the child's best interests to provide such assistance to the court as they can to ensure that the appellate court is as well informed as can be achieved both about the process at first instance but also the arguments adduced on appeal?**"

M v F (Appeal: Fact Finding) [2019] EWHC 572 (Fam)

This Judgment set out reasons for Williams J's refusal of mother's application for permission to appeal the following findings:

- *On 23 July 2011 the injuries to the mother's face were caused in the course of being pushed to the ground by the father including pushing to the head. The father's actions were significantly provoked by the actions of the mother who was very drunk at the time.*
- *On 4 February 2017, the father did not push the child deliberately into the mother. The father uttered a threat to kill the mother but there was nothing to indicate that he would act violently or act on it.*
- *On the mother's allegation of biting, the only firm conclusion the court can reach is that there was no clear, controlling behaviour designed to impose psychological pressure on the mother.*
- *The father's behaviour in respect of finances falls a long way short of controlling or coercive behaviour. The father was pushy and placed himself in a position where he had the better position in family decisions, for example the house being in his sole name*
- *The father does not pose any direct risk of physical harm to the child.*
- *The father does not pose any psychological risk to the mother.*

Williams J describes what the Circuit Judge did in what can be viewed as a practitioner's checklist for an 'unappealable' Fact Find Judgment:

After a hearing which was courteous, even-tempered, appropriately inquisitorial and adversarial when necessary, Judgment was given in which the Judge:

1. Refers in succinct terms to the burden and standard of proof.
2. Refers in general terms to PD12J and the importance of fact finding in respect of matters, which have the potential to affect the child arrangements that might be made.
3. Refers to the importance of making findings as to credibility and makes findings on credibility.
4. Focuses on the two particular incidents in respect of which there was a measure of agreement between the parties that something had occurred.
5. Carefully considers the evidence of each of the parties and in respect of each of the incidents finds that the truth lay somewhere between the parties two accounts.

6. Analyses the mother's evidence in particular the inconsistencies before he rejected the mother's allegation that physical abuse had been used as a form of control.
7. Considers the financial control allegation, noting that the mother had trained and qualified as a nurse and had a bank account of which she had the sole control. Noting that the mother was able to spend her money on what she chose, he concluded that the evidence fell a long way short of a pattern of controlling and coercive behaviour in financial terms.

In conclusion, the Judgment has the appearance and hallmarks of a concise, robust piece of judicial decision-making based on a thorough understanding of the essential principles, which bore upon the decision he had to make.

A 'TRANSPARENCY' UPDATE:

In May 2019 the President of the Family Division, Sir Andrew McFarlane, released **draft guidance, for consultation, on reporting in the Family Courts**. In his View from the President's Chambers, published simultaneously with the draft guidance, the President announced that he intended to set up a *'Transparency Review'*, during which all available evidence and the full range of views on this important topic would be considered (including evidence of how this issue is addressed in other countries).

> *"The aim of the review will be to consider whether the current degree of openness should be extended, rather than reduced."*

He added that he intended to invite two or three respected individuals, not known as having a firm view on the issue, to assist him as fellow assessors in this process. *The review is expected to be conducted until spring next year with a view to producing a report and recommendations by May 2020.*

THE REASON FOR THE GUIDANCE

Re R (A Child) (Reporting Restrictions) [2019] EWCA 482 Civ

This was the permission to appeal case heard by the President and King LJ in February 2019 which prompted Andrew McFarlane to issue his Draft Guidance.

Louise Tickle of the Transparency Project (see www.transparencyproject.org.uk) appealed against a reporting restrictions order made by HHJ Levey, sitting in Portsmouth on 18 October 2018 at the conclusion of care proceedings in relation to a young child. The proceedings had had a history of substantial litigation in the family court and in the Court of Appeal. Originally, His Honour Judge Hess had made an order in June 2017, which refused mother's application to discharge existing care order and made an order authorising the local authority to place the child for adoption (based on allegations against mother of FII). That order was the subject of an application for permission to appeal, which was granted. The full Court of Appeal heard the appeal on 20 February 2018, giving a full judgment in public (**M (A Child) [2018] EWCA Civ 240**), which has been reported on BAILII and subsequently in official law reports and elsewhere. As a result of the Court of Appeal judgment, the case had to be re-determined by a different judge (which turned out to be HHJ Levey).

By this time the case had attracted interest in the media, and three journalists attended court, as they are entitled to do under the Family Procedure Rules ***[FPR 27.11 (2) (f)]***. They had already alerted the judge of their intention to attend, and their intention to apply, if they considered it was justified, for a variation of the ordinary restrictions in relation to reporting.

At the hearing the issue was dealt with relatively swiftly, and the judge made an order which not only restricted reporting but also had the effect of restricting the reporting of information that was already in the public domain as a result of the previous publication of the Court of Appeal judgment.

Permission to Appeal was formally granted (despite the parties having an agreed way forward) based on the Grounds of Appeal which asserted:

1. The judge gave no reasons for his failure to refer to the existing Court of Appeal judgment in this case.
2. He failed to consider the existing case-law in relation to transparency in the family court and the determination of issues which may or not restrict reporting.
3. Crucially, he failed to undertake the necessary balancing exercise between Article 8 and Article 10 of the European Convention on Human Rights, which is to be undertaken in any case such as this.

The Present remarked "*This court has sympathy for any judge at the current time faced with an application such as this. It also has sympathy for the journalists involved, often appearing without any legal representation, who make such applications. That sympathy arises from the fact that at present there is no detailed guidance or route map for how such applications are to be determine. It is, therefore, my resolve as President to issue such guidance at the earliest opportunity."*

TWO CASES ON TEMPORARY REMOVAL FROM THE JUSRISDITION

SR v MA (Temporary Leave to Remove from the Jurisdiction) [2019] EWHC 435 (Fam)

Mrs Justice Roberts gives permission for a Brazilian mother of a 10-year-old child, whose British father has had care of him in England since 2015, to remove the child to Brazil for holidays of up to four weeks. Although, Brazil is a Hague Convention Country, expert evidence was accepted that should the mother choose to wrongly retain the child within that jurisdiction, the father would face a potentially long and expensive legal process as Brazil has a poor record of timely compliance with its treaty obligations.

The Law:

Roberts J reminds us that the application must be determined from the perspective of the child's welfare and those matters set out in the welfare checklist in **s 1(3) of the Children Act 1989**. She refers to **Re N (Leave to Remove) [2006] 2 FLR 1124** , in which (regarding removal to Slovakia) Thorpe

LJ stressed the importance of looking at the balancing exercise which the court had to undertake through the eyes of the child. The concerns of the parents had to fall into this exercise in terms of an objective risk assessment but the court must equally weigh in the balance the particular needs of the child with whom it is dealing.

Accepting that case law removal to a non-Convention country was also relevant Roberts J referred to **Re R (A Child) [2013] EWCA Civ 115** , in which Patten LJ said (at para 23):

> *"The overriding consideration for the court in deciding whether to allow a parent to take a child to a non-Hague Convention country is whether the making of that order would be in the best interests of the child. Where (as in most cases) there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the court has to be positively satisfied that the advantages to the child of her visiting that country outweigh the risks to her welfare which the visit will entail. This will therefore routinely involve the court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the child's return if that transpires. Those safeguards should be capable of having a real and tangible effect in the jurisdiction in which they are to operate and be capable of being easily accessed by the UK-based parent."*

The Judge's conclusions:

On Welfare:

- "*I have endeavoured to consider the position from M's perspective and from all that I know about this child's clearly expressed wishes to spend holidays with her in Brazil. His love for and attachment to his mother are self-evident from the photographs I have seen and from all that Ms Sivills has told me about that important relationship. I have no doubt that, without the opportunity to spend time together in her home country, M will be deprived of the opportunity to develop psychologically in the full knowledge that he has two parents who love and care for him. The contact arrangements which can be put in place in this country are such that meaningful contact*

in the terms I have described is very unlikely to happen. In this event, M's experience of his mother as a parent will be very different and this cannot be in his best interests".

On Risk:

- *"In the event of a wrongful retention, the risk of which I consider to be low or, at least, manageable given the protective measures which are available, I have taken on board and carefully considered everything I have heard about the process which would be involved in the local Brazilian courts, including the potential cost and delay of securing M's return to this jurisdiction. The Expert agrees that the raft of recitals and agreements proposed on behalf of the mother are comprehensive and likely to be influential in determining the court's approach even if they cannot be said to be determinative of a summary return. However, those safeguards together with my assessment of the mother's trustworthiness combine to provide me with reassurance that M will be adequately protected against the risk of a wrongful retention. I am satisfied that the raft of recitals and undertakings which will form part of my order will have a real and tangible effect in the event that, contrary to my clear expectation, the mother were to seek to engage the jurisdiction of the Brazilian court to support an attempt to keep the child in that jurisdiction. I shall also direct that, in the event of any application by the mother in Brazil, a copy of my judgment is to be lodged with the Central Authority for onward transmission to the judge who deals with the application. In addition, I am going to direct that, in this event, there shall be communication between the two jurisdictions through the Office of International Family Justice which is based here in the Royal Courts of Justice. I am entirely satisfied that mirror orders need to be in place before there is any question of M leaving this jurisdiction to travel to Brazil. Those orders must be registered in both the Federal and local courts. The cost of securing mirror orders will have to be met by the mother given the evidence which I have in relation to the father's financial situation.*

HOWEVER EXPERT EVIDENCE NOT ALWAYS REQUIRED

F v M (Temporary Leave to Remove: Alleged Risk of Onward Abduction to Non-Hague Country)

This case was heard by a Recorder sitting as a Deputy High Court Judge upon father's application for temporary leave to remove which advocates proposed to be heard on the basis of submissions only, however, given that the Mother objected to the holiday to France on the basis that F was likely to use this trip for onward travel with the children (aged 8 and 5 years) to Lebanon, oral evidence was heard.

The Judge stated that without this allegation, he would have had little difficulty in granting F's application when undertaking the welfare analysis through the prism of **s.1 (3) Children Act 1989**.

The Guardian supported F's trip to France with the safeguards that were offered by F. Given M's allegation that there was a likelihood of abduction to Lebanon, the Judge adopted the approach set out by Mr Justice Cobb in **Re H (A Child) (Temporary Leave to Remove to Turkey) (Enforcement of Child Arrangements Order)** ***[2015] EWFC 39***, and therefore had to consider:

a) *The magnitude of the risk of breach of the order if permission is given;*
b) *The magnitude of the consequences of breach if it occurs; and*
c) *The level of security that may be achieved by building in to the arrangements all of the available safeguards.*

Recorder Howe QC was aware that he had no expert evidence before him as to how, or if, it would be possible for M to obtain the return of the children from Lebanon should F abduct them to that jurisdiction and refers explicitly to the next paragraph of the Patten LJ speech quoted above at page 30 from Re R (A Child) [2013] EWCA Civ 115:

"Although, in common with Black LJ in Re M we do not say that no application in this category can proceed in the absence of expert evidence, we consider that there is a need in most cases for the effectiveness of any suggested safeguard to be established by competent and complete expert evidence which deals specifically and in detail with that issue. If in doubt the Court should err on the side of caution and refuse to make the order. If the judge decides to proceed in the absence of expert evidence, then very clear reasons are required to justify such a course.

The Judge therefore proceeded on the basis of mother's case that:

a) If the children were abducted to Lebanon it would be extremely difficult, if not impossible, for M to secure their return;
b) There are physical safety and health risks for the children should they be taken to Lebanon; and
c) As a result of (a) and (b) it likely that were the children abducted to Lebanon their relationship with their mother would be permanently severed and they would be likely to suffer significant harm in terms of their emotional wellbeing and physical safety.

The Judge clarified that he was not making a judicial determination on the actual realities in Lebanon, but in the absence of expert evidence, and taking a cautious approach, it was necessary to take M's concerns at their highest. Therefore, when assessing the consequences of abduction, the Judge concluded they "**could not be more grave**". The Judge concluded that F was an honest witness but that M was evasive and ready to criticise F. Although the Judge acknowledged that the children would suffer grave harm if they were taken to Lebanon, he found this risk to be **'vanishingly small'**.

F was granted permission to remove the children to France, subject to the following safeguards offered by the father (with (b) at the Judge's suggestion!):

(a) to give an undertaking to the court not to apply for travel documents for the children and to return the children, on 1st January 2019, to this

jurisdiction. Given that the breach of this undertaking would have serious consequences for this man, who I assess to be honest and hardworking, I consider the giving of this undertaking to be a material safeguard;

(b) to install the app "Find my Friend" onto his mobile telephone so the mother can check at any time of her choosing where he is located. He also agrees to the making of FaceTime calls to her, and I will require that to be each morning and each evening. I will also require him to agree to take calls from the mother at any time so that she can satisfy herself that the children and the father are where the "Find my Friend" app has the father's phone located. Should the terms of this safeguard be breached, and the mother is persuaded the father is not with the children in France or Switzerland; the mother can then contact the appropriate authorities.

ARCHNA DAWAR

DEANS COURT CHAMBERS

OCTOBER 2019