Neutral Citation Number: [2013] EWCA Civ 1104

Case No: B4/2013/0074

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SHEFFIELD DISTRICT REGISTRY
HHJ Goldsack QC
SE9P00088

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/09/2013

Before :

LORD JUSTICE AIKENS
LORD JUSTICE MCFARLANE
and
LORD JUSTICE BRIGGS

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Re: A (A child)

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The applicant, Mr D, appeared in person

Miss Pennie Stanistreet (instructed by **Taylor and Emmet Solicitors LLP**) for the First Respondent
Ms Jessica Pemberton (instructed by **NYAS**) for the Second Respondent

Hearing date : 7 June 2013

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Approved Judgment

Lord Justice McFarlane :

1. On 9th October 2012, in the opening words of the judgment that is the subject of this appeal, His Honour Judge Alan Goldsack QC made the following observation:

> "It was in 1988, as a Recorder, that I first started hearing private family law cases. I have continued to hear them over the intervening twenty four years, including four years as Designated Family Judge at the end of the last century. I do not recall any case (even Public Law cases involving several children) which has taken so long or has left me with such a feeling of failure on the part of the Family Justice System. Neither the parents nor the child have been well served…. All I can say, with the benefit of hindsight, is that some of the turns which this case has taken, or not taken, appear surprising and I have no difficulty in understanding why father has expressed criticism both of professionals appointed to assist the court and judges for not enforcing orders."

2. The case concerns a girl, M, born on 26th October 1999 and therefore now fast approaching her fourteenth birthday. M's mother ["the mother"] is now aged 48 years and her father ["the father"] is aged 60. M's parents separated in May 2001 when M was only some 21 months old and the first application for contact was made by the father five months later in October 2001. The litigation concerning M between the parents has continued, almost without interruption, for the ensuing twelve years. Since 2006 alone there have been no fewer than eighty-two court orders. At least seven judges have been involved in the case at one stage or another and over ten CAFCASS officers have played a part, initially as report writers and, latterly, as M's children's guardian. More recently M has been represented by NYAS. Several local authority social workers have also been involved at various stages of the case. HHJ Goldsack considered that these basic statistics provided the "best evidence that there has been systemic failure in this case".

3. These extensive proceedings have been conducted in the Sheffield County Court and concluded, so far as that court is concerned, with the order made by HHJ Goldsack at the conclusion of his judgment on 9th October 2012. The order made that day provides that M shall reside with her mother and "there shall be no order for direct contact between M and the applicant father; the father shall be at liberty to send e.mails, cards and presents at Christmas and M's birthday and shall be at liberty to obtain reports and information from M's school". An embargo in relation to any further applications relating to M was put in place with respect to both parents under Children Act l989, s 91(14), until October 2015, by which time M will be sixteen years old.

4. The father, who acts in person before this court, seeks to appeal that final order, but in doing so inevitably makes substantial complaint about the manner in which the entire proceedings have been conducted. Were he represented the father's advocate would be likely to deploy labels which are familiar to those who practice in the family courts on the basis that this is "an unimpeachable father" who has been consistently prevented from enjoying contact with his daughter by "an implacably hostile mother"

in circumstances where all agree that M enjoys her time with her father on those occasions when contact has actually been achieved.

5. In order to underline the scale of the failure of the Family Justice system in this case I should record in these introductory remarks that if an advocate had sought to characterise this case in the manner suggested above, that characterisation would be, to my mind, uncontroversial. This is "an unimpeachable father" against whom no adverse findings of fact have been made at any stage in this process and whose demeanour before this court, as it was apparently before HHJ Goldsack, was dignified and measured despite the enormous frustration and anger that he must feel. So far as the mother is concerned HHJ Goldsack held that he had "no doubt that ….mother has always been implacably opposed to contact" to the father and to the extended paternal family. In relation to M the judge was equally plain: "the evidence is clear that whenever M has contact with father it is positive and that M does love her father."

6. Despite the core findings that I have recorded, HHJ Goldsack felt driven to make the order for no direct contact between father and daughter on the basis that, in recent times, M had consistently stated her firm opposition to the continuation of the court process and any further attempts to establish direct contact to her father. The judge concluded that, at the age of 13 years, M's wishes could not and should not be overridden. The father's case is that the judge should not have accepted M's recent utterances as being a true indication of her wishes and feelings, given her apparent willingness to contemplate further contact only some six months prior to the final judgment and he asserts that the court should not abdicate its responsibility to make orders that afford paramount consideration to M's welfare when the child would plainly benefit from having a full and ordinary relationship with her father. As a second limb of his appeal the father submits that, where the court itself admits that there has been a systemic failure in the provision of family justice to this case, the outcome should be a full re-hearing, properly undertaken before a new judge, rather than the making of an order for "no direct contact".

7. Before this court the mother seeks to uphold the decision under appeal on the basis that the judge was right in holding that the time had come to listen to the voice of the child and to bring these proceedings to an end. On behalf of M it is submitted that this was a careful judgment, given by an experienced judge and it is not open to this court to hold that it is 'wrong'.

The forensic history

8. Given the basic statistics that I have described it would be as unnecessarily burdensome as it would be totally unedifying for me to set out here a blow by blow procedural history of this case. If my Lords agree, I propose that a small bundle of the relevant papers in this case are sent to the President of the Family Division and to Mr David Norgrove, as Chairman of the Family Justice Board, in the hope that lessons may be learned for the Family Justice System as a whole as a result of what has transpired in this case over the last twelve years in Sheffield County Court.

9. Despite the criticisms that may be made of its outcome, I regard HHJ Goldsack's judgment in this case as an impressive and clear distillation of the vast amount of material to which he was exposed and of the issues in the case. In setting the procedural scene I can do no better than to rely upon his description:

"3 . Father is now 60; mother now 48. They were in a relationship for about ten years before M was born. Although never married they lived together before the birth and for a few months after the birth. An important background fact has been mother's health problems, both mental and physical, which are of long standing. She had at least one mental breakdown before the birth of M. She has been variously diagnosed as having an emotionally unstable personality disorder, displaying paranoid personality traits and periodically suffers from depression. These have not been helped by occasions when she has abused alcohol and/or illicit drugs. She also suffers from Crohn's disease and was unable to attend the final hearing because she had only recently been discharged from hospital after admission for complications from that condition.

4. It is father's case that, since very shortly after M was born, mother (aided and abetted by her parents – with whom she has had an on-off relationship over the years and who, father believes, have never liked him) has tried to prevent him from having a worthwhile relationship with M. Mother has always asserted that she wants M to have a "normal" relationship with her father. That there have hardly ever been periods when that occurred she has increasingly put down to M not wanting to go for contact (particularly staying) and, more latterly, refusing to go for contact.

5. Father has only had any contact with M as a result of bringing applications before the court and referring the matter back to court when mother either refuses to "move contact on" or does not produce M for contact. Early Cafcass reports are revealing. As early as April 2002 mother was resistant to contact moving on to overnight stays although there has never been any doubt about father's ability to cope with the care of M: Cafcass recommended it. Almost immediately mother tried to undermine it by saying M was not happy with the food father was providing and M did not want to go. She stopped M going. Cafcass recommended suspending staying contact. It was re-instated later and in March 2003 the Cafcass writer observed: "the court may feel enough resources have been devolved to this case and it is incumbent on mother and father to make any order work".

6. Later that year father saw more of M because mother was in a new relationship and wished time with her boyfriend. M was also being left with her maternal grandparents who were concerned that mother was drinking heavily, behaving badly and not providing proper care. The acrimonious situation between maternal grandparents and father and, to

a lesser extent, mother was noted. A section 37 report was recommended and ordered. The recommendation was for M to stay with mother and parents to sort contact out between themselves (subsequently defined by the court). Within months Cafcass were preparing another report because mother was not providing the contact ordered. Father was considering an application to change residence but decided against. He wanted alternate weekends. That is what was recommended because "there was no good reason why a child of nearly five who has a demonstrably good relationship with the non-resident parent should not spend a full weekend with that parent". A family assistance order was made. Yet further difficulties resulted in the case being back before court in March 2006 when no staying contact was ordered pending yet another report from Cafcass.

7. Within days of that order M made allegations that father had sexually abused her. The investigation into those matters was not handled well and breached all guidelines. The Judge did not feel the professionals involved had approached the matter with an open mind. There was a five day hearing which resulted in the Judge concluding that the alleged abuse had not occurred. She described M as "telling a story rather than reliving it". Several matters stated in her judgment are informative and have come up time and again in the subsequent history of this case

   - M is a very bright girl and mature beyond her chronological age: she can be manipulative
   - In dealings with Cafcass and Social Services mother cannot deny her negative feelings toward father and M is very well aware of this
   - Mother had blown a different minor issue out of all proportion: "I believe M played to her mother's sympathy and she got it in bucket loads!"
   - Despite the allegations M had shown no reluctance to go for contact on other occasions
   - "Father does not come out of this all sweetness and light". Father had accused mother of priming M. The Judge did not go so far as to find that proved but did find that mother was all too ready to find bad in father which fostered the negatives she already had.
   - Care would need to be taken to avoid M becoming an "emotional wreck".

8. A Guardian was appointed for M. She observed contact with father on two occasions. It went well. M showed no reluctance and said afterwards that she had enjoyed it. Unsupervised contact was recommended. Subsequently, in February 2007, overnight contact was ordered. By then the case was being dealt with by the now Designated Family

Judge (DFJ) who has since dealt with virtually every hearing until September 2011.

9. There was a dramatic turn of events a few days later. Mother's mental health was deteriorating. M was with her maternal grandparents. The day before M was due to have the first staying contact with father mother visited him. When she left father found a knife concealed down the settee and his back door key was missing. Mother brought M the following day. There was an ugly scene and the police were called. They found the key and another knife in the mother's handbag. She was charged with possessing a bladed article and harassment of father. She was admitted to a mental hospital. She was subsequently made the subject of a community order with a restraining order not to visit father's house (subsequently varied). Father was granted a residence order in respect of M on 26th February and she lived with him happily until November 2007.

10. Once mother was discharged from hospital and her health had improved M started having contact with her. She told her Guardian that although she loved her father and wanted to spend a lot of time with him she would like to return to live with mother. Meanwhile Dr Hall, Chartered Clinical Psychologist, had been instructed to prepare a report on both parents and M. In her first report (April 2007) she did not consider mother was capable of looking after M properly. By the time of her addendum (September 2007) she did and her recommendation was that M return to live with mother. The Guardian also recommended M return to live with her mother, largely based on M's strong wish to do so and the Guardian's view that M was operating at a level above her chronological age and was able to assess her own best interests.

11. In evidence I asked father whether he had opposed the move back to mother. He told me that had been his intention. But he was advised by his lawyers that, in the light of the recommendation from the Guardian, he was bound to fail. Reluctantly, he had accepted that advice so there was no contested hearing. He told me (and it is contained in her report) that he was assured by the Guardian that mother was now promising to co-operate with contact and it was on that basis that the Guardian made her recommendation.

12. Mother did not regularly make M available for contact as directed and further hearings were required in 2008 and early 2009. Contact was ordered and on some occasions a penal notice attached. There was a very detailed order with a penal notice attached on 12th March 2009. A week later

mother applied to suspend the order. M had returned from contact with a bruise to her leg. She alleged father had caused it by pinching her. Father was to accept that was correct but only because M at the time was hurting him and he did it to make her stop. Incredibly, not only was father charged with common assault but the matter went all the way to a trial before a District Judge who decided that no criminal offence had been committed. That was in November 2009. In the meantime the DFJ had ordered that contact was to be supervised by maternal uncle.

13. M's position on contact was hardening. She was telling her Guardian that she was frightened of father. She was refusing to attend contact unless it was supervised by a person of her choice. The Guardian took the view that was appropriate. A full hearing was directed and Dr Hall asked to prepare a further report. In February 2010 she advised that M should not be forced to go to contact in any way than the way she wants it. That recommendation was adopted by the Guardian and so ordered by the court. Mother agreed to go for mediation at father's expense. The DFJ made a section 91(14) order to last until October 2012.

14. In fact the case was back before the DFJ before long. An order was made for father to have further supervised contact with Core Care. Arrangements were being made for a "final" hearing and it was agreed that Dr Kirk Weir, consultant psychiatrist, be instructed because of his expertise in long-running acrimonious cases. His report was prepared in late July 2011. On 18th August yet another order was made for father to have unsupervised contact. M did not attend and father brought the case back to court on 1st September. On that occasion M attended court. After speaking to M, the DFJ ordered she go off for the day for contact with father, accompanied by someone she knew well.

15. On 2nd September mother brought the matter back to court, complaining about what had happened the day before and saying that M had spent the night crying and distressed about the trauma of what happened. In fact, based on other evidence I later saw and accept, M had had a thoroughly enjoyable day with father on the 1st but then burst into tears when she arrived home to her mother and maternal grandmother and said it had been awful. The DFJ set up a hearing for 30th September which was later changed to 17th October for the experts to attend."

The hearings before HHJ Goldsack

10. It is a feature of the case that a good level of judicial continuity had been achieved, at least since 2006, by HHJ Carr QC presiding over some fifty-five or more of the court hearings. HHJ Carr was due to conduct the hearing on 17th October 2011 at which the two experts, Dr Hall and Dr Weir, were due to attend. At the last minute HHJ Carr was unavailable and, rather than postpone the hearing and re-book a date when the experts could attend once more, the matter came before HHJ Goldsack who went on to hear both of those experts give evidence. At the conclusion of that hearing two significant matters are to be noted. Firstly, HHJ Goldsack, rather than considering that he had acted, as it were, simply as a commissioner conducting the process of the experts giving their oral evidence and then returning the case to HHJ Carr, considered that he was now "part-heard" and that all further hearings should be before him. The second significant matter is that, no doubt in large measure as a result of the expert evidence given that day, the judge expressed a clear view that this might be a case justifying a transfer of M's residence from the mother to the father and in any event justifying the making of an immediate order for unsupervised staying contact for M at the father's home. Before us the father rightly regards this expression of judicial opinion, given within a year of the final "no contact" determination, and where the experts did not return to give further oral evidence to the court, as being of importance.

11. The contact ordered on 17th October did not take place. M telephoned the father saying that she would not be attending for contact. When the matter came back before the judge in late October, he made an order for shorter periods of contact and, to use his words, "attached a penal notice": (this is a point to which I will return in due course). Judge Goldsack records in his final judgment "I could not have warned mother more fully of the potential consequences if she disobeyed the order". Judge Goldsack takes up the story again:

> "The first contact – on M's birthday – went well (it was held at her house with mother leaving her and father alone). Contact was due to start the next day at 3.00 p.m. By a dreadful mistake father got the time wrong and turned up to collect M at 4.30 p.m. Mother had by then left the house with M without trying to reach father by phone. When he realised his mistake and phoned mother she refused to change her arrangements. Essentially she accused father of being in breach of the order and letting M down. It was used as "justification" for M not attending the forthcoming weekend contact either."

12. At a subsequent hearing the judge made a further more flexible order for contact permitting M to make choices and, because of that and because of the failure of the previous order, the judge states "I did not attach a penal notice."

13. Pausing there, and taking up the references to "penal notice", it is right to observe that since December 2008, when CA 1989 s 11I came into force, "where the court makes (or varies) a contact order, it is to attach to the contact order….a notice warning of the consequences of failing to comply with the contact order". The purpose of that provision seems plain; it is to alert the parties to the fact that all contact orders are potentially enforceable against those who may act in breach of them and, secondly, to remove judicial discretion as to whether to attach, or not attach, a "penal notice" to any particular order. It would seem therefore that HHJ Goldsack was in error in

considering that he had to make a positive decision on each occasion whether to attach, or not attach, a penal notice. Be that as it may, the father is particularly critical of HHJ Goldsack in moving from a position at one hearing where he was, in no uncertain terms, threatening enforcement proceedings if the order was breached, to a position at the next hearing and at all subsequent hearings where he accepted that failure by the mother to comply with the terms of any order would not be marked by any enforcement procedure.

14. Following the hearing on 17th October the matter came back before HHJ Goldsack on the following occasions:

4th October 2011

26th October 2011

3rd November 2011

2nd December 2011

9th December 2011

15th February 2012

13th June 2012

9th July 2012

19th September 2012

21st September 2012

4th and 5th October 2012 (with judgment being handed down on 9th October 2012)

15. Although at the conclusion of the hearing on 17th October 2011 it seems that the judge and the parties considered that the matter was part-heard, with one day of oral evidence having been taken, and that the conclusion of this "final" hearing should take place promptly thereafter, in the event no further oral evidence was received by the judge on the substantive issues in the case at any of the thirteen subsequent hearings save for the last hearing dates in early October 2012, almost exactly twelve months after the first day of the final hearing.

16. The reasons for the most unfortunate lack of progress in completing the part-heard final hearing arose from the fact that the case continued to be struck by a series of events each of which contributed to delay in concluding the process:

a) M's guardian, who had only been appointed in August 2011, developed health problems and could not attend the adjourned hearing fixed for 1 November 2011. A fresh, very experienced guardian was appointed in her place and the hearing was adjourned;

b) at a subsequent hearing the new guardian considered that there was clear evidence that M may have suffered significant psychological harm and she recommended drawing the local authority into the case via a direction under CA 1989, s 37. The judge acceded to that advice and the case was therefore further adjourned to February 2012;

c) shortly before the February 2012 hearing the new guardian was taken ill and the matter had to be rescheduled to a June hearing in the hope that she would be sufficiently fit to take part. By June it was sadly plain that the guardian was not able to return to work. Those acting for the father persuaded the judge to appoint the National Youth Advocacy Service ('NYAS') as M's guardian, which made further delay inevitable;

d) the mother then became ill as a result of her Crohn's disease and had several weeks in hospital. The maternal grandmother moved into the mother's home to look after M. By the time of the final hearing in October 2012, the mother, whilst out of hospital, was not fit to attend court. The judge therefore only heard evidence from the father and the new NYAS guardian (in addition to the two experts some 12 months earlier).

17. So far as contact between the father and M was concerned during this protracted sequence of court hearings following 17th October 2011, I have already described how the judge's early robust intentions to establish unsupervised staying contact ground to an early halt on 27th October 2011 in consequence of the "dreadful mistake" made by the father in misunderstanding the allotted time for collection. Thereafter the father saw M only once for contact during the remainder of 2011 (12th November) and attended a meeting with the Guardian and M which was also in mid-November. Despite the fact that on 17th November 2011 HHJ Goldsack made provision for contact to take place for the whole of the day-time on two consecutive days each week leading, it was hoped, to an overnight stay in the third or fourth pair of contact days, none of those planned contact visits took place. At the hearing of 9th December, the order simply notes that "the child is not currently having direct contact with her father, despite a number of orders attempting to ensure contact would happen". Thereafter, during 2012, only one contact visit took place and that was on 4th February.

18. The 4th February 2012 contact visit is important. It was set up by the then children's guardian, Ms CT. An earlier attempt at effective contact had been made by Ms CT on 19th January when she brokered an encounter between M and father at the CAFCASS office. This was not a great success and was terminated prematurely because of M's apparent discomfort. Thereafter, on 2nd February, Ms CT spoke to M's mother and asked her how best to set up a short contact session. The mother suggested using a local café as a meeting place and a meeting was arranged for Saturday 4th February whereby M would walk to meet her father there and spend as much of the following four hours with him as she would wish. When Ms CT first raised this prospect with M herself in a telephone conversation on 3rd February on three occasions M repeated the phrase that she did not want contact "at the moment". However, when Ms CT informed M that both of her parents agreed to this arrangement and the court wanted Ms CT to put contact in place if possible, M agreed to attend.

19. According to her report, Ms CT's final conversation with M was on 6th February to discuss the events of 4th February. M gave an account of what she had done and indicated that she had returned home after two and a half hours or so. Ms CT reports: "she told me she would be interested in using the café as a meeting place again to meet up with her father, preferably at the weekend". Ms CT's conclusion as to M's wishes and feelings as at early February 2012 was:

> "the position remains that M does not refuse to have contact with her father. She is convinced that matters will be sorted out informally and that contact will continue on an unstructured basis if left to the family to sort out. She is adamant that the court's involvement is counter productive. She wants the process to stop.
>
> In summary M has reaffirmed her wish to live with her mother, develop her social relationships and have continuing contact with her father on an ad hoc basis."

20. Within days of her final encounter with M Ms CT was unable to continue as her children's guardian due to ill health. Despite M's apparent confidence that the family would sort out informal contact arrangements without outside professional intervention, no further contact took place. In the absence of contact generated within the family, and in the absence of further directive contact orders from the court, the father was reliant upon a professional who was active in the role of children's guardian to broker any future arrangements. The unfortunate hiatus generated by Ms CT's illness and the delay in appointing NYAS, meant that no such arrangements were made and, by the time the NYAS guardian came to report, M's apparent willingness to contemplate contact with her father had seemingly changed to an outright refusal to see him.

The expert and professional evidence

21. Dr Kirkland Weir is a well known and respected consultant child, adolescent and family psychiatrist who has taken a special interest in highly conflicted post-separation family relationships. In his main report of July 2011 he highlights the apparent paradox between M's stated resistance to being with her father on the basis of fear, set against all the observations of contact suggesting that she has no such feelings when she is actually in his company. Dr Weir stated

> "my observations of contact are identical to those made by others over the years. Her father loves M and his feelings are reciprocated. I have no concerns about the quality of his parenting."

In relation to the mother's role Dr Weir stated:

> "I did not think that the mother could be trusted to support M's contact with her father or grandparents. The mother appears to want an unhealthy exclusive relationship with M. The mother hides her opposition to contact behind her daughter's stated

> "wishes and feelings". She is an intelligent person and…may well know exactly what she is doing. If that is so she is deliberately causing emotional harm to her daughter."

22. Dr Weir concluded that the suggestion from CAFCASS that the proceedings should be terminated on the basis of M's "wishes and feelings" was unacceptable. Dr Weir recommended that residence should be genuinely shared by the parents and, failing that, there were grounds for M moving to reside with her father. He strongly recommended that the court should consider an immediate increase in contact.

23. Dr Hall, a chartered clinical psychologist who had been instructed as an expert in the case from time to time since 2007 took a position that was contrary to that of Dr Weir. Her view was that M's wishes should be listened to and that M should remain residing with her mother.

24. As the judge records, by October 2011 Dr Weir thought that the prospects of a change of residence being successful were sufficient for it to be tried, however he accepted that it would require the active support of other agencies, for example the Local Authority or CAFCASS, and he accepted that that support was not forthcoming.

25. During the twelve months that followed his appearance in the witness box Dr Weir provided further written reports. In February 2012 he repeated his opinion that, for reasons that he explained, M's views should not be used as a principal basis for decision making. He noted that the guardian had reported that M apparently knew the contents of Dr Weir's earlier report and this fact led him to state his opinion that:

> "it is highly probable that M's views on contact and the proceedings are influenced directly by her mother as well as by the internal psychological difficulties caused by her conflicts of loyalty. That is why her views change and why it is invidious to suggest to M that they will play much part in the court's decision making."

26. At that stage Dr Weir maintained his opinion in favour of active consideration being given to a change of residence. He said that such a plan was "not without risk but nor is maintaining the status quo".

27. Dr Weir's final written contribution is dated 10th September 2012. In it he was asked to comment upon the situation that had by then developed as a result of the passage of time during which no contact had taken place. His shortly stated conclusion was:

> "The passage of time, the concurrent increase in M's age and the lack of contact are relevant as all make it less likely that a resumption of contact can be achieved without M's co-operation. A forced transfer of residence cannot be recommended for a reasonably mature 13 year old unless an agency such as SSD/CAFCASS/NYAS are prepared to be actively involved in supporting the transfer and the aftermath. The court will be in a position to know if this is likely."

28. It does not appear that Dr Hall made any further contribution to the evidence following the October 2011 hearing.

29. So far as M's children's guardian is concerned, I have already recorded the efforts made by Ms CT in February 2012 to achieve a modest degree of effective contact prior to her untimely withdrawal from the field. It is also important to record some other aspects of Ms CT's opinion during her short exposure to this case.

30. Ms CT was appointed on 17th November 2011. In a position statement dated 8th December 2011 she expressed the view that there was clear evidence that M may have suffered significant psychological harm and she believed that there was a realistic prospect that social services might advise that M should be removed from her mother's care (to be placed with the father) under a care order. It was as a result of this opinion that the court made the section 37 direction on 9th December 2011 to which I have already made reference. In her written report dated 9th February 2012 Ms CT stressed, in relation to the mother, that "as M's mother it is her duty to ensure court orders are respected and that she makes every effort to help to conclude what she sees as an emotionally abusive legal process for M. She has shown that she is able to use her persuasive powers to ensure M attends meetings and contacts if she applies herself". Ms CT's conclusion was that she was "supportive that every effort should be made to allow M's relationship with her father to flourish. I am not convinced that such efforts should be continued under court scrutiny as I believe that the process is having a significant impact on M and this risks alienating her from contact completely. This would be a great loss to M as she has shown she enjoys contact with her father." She left her final recommendations open pending receipt of the section 37 report, however, by the time that report was received sadly Ms CT had succumbed to ill health.

31. The section 37 report is dated 7th February 2012. The Local Authority did not consider that care proceedings under CA 1989, Part 4, were required. They recommended that M should remain residing with her mother and that the parents and M should engage in mediation/family group conferencing. Support for M was recommended and the court was advised that "contact with father to be set at M's pace and to be viewed positively by all adults within M's life". Pausing there, it is impossible not to observe that, of course, if contact had been "viewed positively by all adults within M's life" there is unlikely to have been any difficulty in establishing an easy and sensible relationship between both parents and their daughter.

32. The final professional contribution came from the NYAS guardian in a report dated 27th August 2012. In it the NYAS guardian, Ms ST, is highly critical of the opinion advanced by Dr Weir. Her conclusion is best encapsulated by quoting the entirety of paragraph 8.10 of her report:

> "It is very sad that the relationship between (father) and his daughter M has reached this stage, but…when everything possible has been attempted to try to make the relationship between the child and non-resident parent work, and has failed, and it is clear that the child will not benefit from the attempt to continue it, then it is time to end the proceedings. It is difficult

> without being critical of very minor issues, to determine what else or what more (father) could have done or whether he should have done some things in a different way. Even if M had been willing to live with her father, there is quite a "gap" between the knowledge he has demonstrated of young people at M's age and development, and the expectations she has, and there would no doubt have been a lot of challenging issues in their relationships. I *do* understand (father's) argument that until he is given an opportunity to try parenting M on a full-time basis, no one, including him, knows what he might be capable of. Sadly, I am unable to recommend that he be given that opportunity."

33. In expressing her opinion Ms ST stressed that she had not had the opportunity of meeting the mother and had not read all of the documents in the bundle. Her opinion was expressed as being on a pragmatic basis aimed at releasing M from a childhood which had so far been blighted by court proceedings. Her recommendation was that the proceedings should be concluded with no recommendation for direct contact, save that any such contact should be at the instigation of M.

HHJ Goldsack's conclusions

34. After reviewing the procedural history and summarising the experts' opinions, Judge Goldsack noted that the active support of other agencies that Dr Weir regarded as essential if a change of residence was to occur was not forthcoming as neither the Local Authority nor NYAS favoured such a move. He recorded the consistency of opinion expressed by M since the October 2011 hearing being that "she does not currently want contact with father (because she is frightened of him and/or does not trust him) and wants these proceedings brought to a conclusion". The judge noted that the father accepted, in the absence of support from any agency, a change of residence was not viable. He also noted that Dr Weir's express view that that a resumption of contact could not be achieved without M's co-operation had to be seen in the light of the fact that that co-operation was not presently available. HHJ Goldsack then went on to express his conclusions in six succinct and clear paragraphs as follows:

> "26. This is a case where one could raise a number of "what ifs". What if the court had taken a stronger line with mother in the early stages and transferred residence to father when she blatantly ignored court orders? What if M had been allowed to stay with father after he successfully looked after her for eight months when mother had a further mental breakdown? What if the court had not endorsed the recommendations that contact should proceed at M's pace and on her terms? What if, at any stage, there had been a male professional assigned to the case – would there have been a different approach? And what if there had not had to be significant delays after the hearing in October 2011 because of the illness of successive Guardians?
>
> 27. But I agree with the NYAS case worker that "we are where we are" and this case must be determined on the now available

evidence. That is, that there is no way at present to enable father to have meaningful contact with M. She simply will not attend. I have no doubt that, despite her assertions to the contrary, mother has always been implacably opposed to contact – and that includes the father's extended family, with some of whom M has at times enjoyed good contact. Whether that is because of her mental heath problems (as father is still charitably inclined to accept) is probably no longer relevant. It is a fact, which M has taken on board. The evidence is clear that whenever M has contact with father it is positive and that M does love her father. I do not believe she is in fact frightened of father. But she is torn by loyalty to her mother who does have serious medical problems.

28. I have enormous sympathy for father. Despite all that has, quite unjustifiably, been thrown at him he has remained loyal to his daughter. With a mother and maternal grand-parents determined to prevent him having a positive relationship with M he is in an impossible position.

29. But, despite all that has happened, M is doing well. She is described as bright and doing well at school. She has a good group of friends, her attendance is good and she is one of the most advanced in her year group. Although there must remain concern that she has been psychologically damaged by all that has happened in her family life that is not yet apparent by any disturbed behaviour. Although for many years her stated views have, in my judgment, been substantially influenced by mother I accept that what she is currently saying are her own views. Given her present age it is now time to give those views considerable weight. She is entitled to a life which does not involve endless meetings with professionals and the uncertainty of what the next court order will say – and which she has no present intention of complying with if it not to her liking.

30. Accordingly my judgment is that a line needs to be drawn under these proceedings. Father is still putting forward other possible ways of achieving contact but no-one else believes they will work and nor do I. The court has tried all possible options and must now accept failure. M is increasingly blaming father for the continuance of these proceedings and to continue them further will reduce what chance there is that, free of pressure, M will in time realise that father does have a role to play in her life and she will seek him out.

31. Over the last few months much case law has been referred to in position statements, skeleton arguments and submissions. I have considered them all but, ultimately, each case is fact specific. In that small proportion of cases where nothing seems to work a court must be prepared to say that proceedings have

> become part of the problem and are likely to cause damage (or further damage) to the child concerned. This is such a case."

35. Accordingly HHJ Goldsack went on to make the residence and contact orders that I have described. Before making the s 91(14) direction the judge noted that the father could not be criticised at all for using the court process as he had and further observed that it had been the mother's and, increasingly M's, own "obstinacy" that had made repeated applications necessary. However, having decided that the litigation should end, the judge considered it would be illogical to leave matters in such a way that the father could re-open the court proceedings at any time. He therefore made the s 91(14) direction.

The legal context

The child's 'wishes and feelings'

36. The legal context within which the decision to make any order under CA 1989, s 8 relating to the arrangements for residence and contact for M falls to be taken is well established. At all times M's welfare must be the court's paramount consideration (CA 1989, s 1). When considering making, varying or discharging any such order the court must have particular regard to the matters listed in the 'welfare checklist' at CA 1989, s 1(3), which include at s 1(3)(a) 'the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)'. The court must also have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child (CA 1989, s 1(2)) and the court must not make any order unless it considers that doing so would be better for the child than making no order (CA 1989, s 1(5)).

37. There is a substantial body of case law relating to the role that the wishes and feelings of a child may have in a court's overall welfare determination. These cases, which underline the importance of having regard to a child's views, and stress that the importance of this factor will increase as the child's age and/or level of understanding increases, are also plain that the extent to which 'wishes and feelings' may be a, or even the, determinative factor will vary with the facts of each case. In those circumstances it is not surprising that the judge does not refer to any specific authorities in his judgment and that none of the submissions to this court referred to past case law on this topic.

38. In *Re D (A Child)* [2006] UKHL 51; [2007] 1 AC 619, in the context of a child abduction case, Baroness Hale made the following general observations [at paragraph 57]:

> "As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants. Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone

> else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parent's views."

Intractable contact disputes

39. Where, as in the present case, there is an intractable contact dispute, the authorities indicate that the court should be very reluctant to allow the implacable hostility of one parent to deter it from making a contact order where the child's welfare otherwise requires it (*Re J (A Minor) (Contact)* [1994] 1 FLR 729). In such a case contact should only be refused where the court is satisfied that there is a serious risk of harm if contact were to be ordered (*Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48). It is however to be noted that in each of the two cases to which I have just made reference the Court of Appeal upheld a 'no contact' outcome, with the consequence that these oft quoted statements are in fact obiter. Further, in *Re J*, where contact was refused in order to avoid placing the child in a situation of stress as a result of the mother's implacable hostility to contact, Balcombe LJ rightly acknowledged that affording paramount consideration to the child's welfare may, in some cases, produce an outcome which is seen as 'an injustice' from the perspective of the excluded parent:

> "… the father may feel that he is suffering injustice. I am afraid to say that I think he is suffering an injustice, but this is yet another example where the welfare of the child requires the court to inflict injustice upon a parent with whom the child is not resident."

40. A clear example of an acceptable, if robust, approach to these difficult cases in more modern times is to be found in *Re S (Transfer of Residence)* [2010] EWHC 192 (Fam); [2010] 1 FLR 1785, which was heard by HHJ Clifford Bellamy sitting as a deputy High Court Judge. The factual context of *Re S* is not dissimilar to the present case. The first application for contact had been made when S was a year old and the proceedings had been ongoing for 10 years. The father had not had contact for over two years and S was aged 11. The mother was implacably hostile to contact and the court had held that S had suffered emotional harm as a result of the protracted contact dispute. At the time of the hearing, S was refusing to see his father. In the event the judge, contrary to the firm recommendation of the guardian, made an order transferring residence from the mother to the father. In doing so, and amongst a range of factors considered, Judge Bellamy noted S's strongly held views and held that those views were entitled to respect. However the judge accepted the expert evidence that, as a result of alienation, not only where the child's views irrational they were also unreliable; in doing so the judge relied, in part, on objective evidence that S seemed relaxed and happy when he had been having contact with his father. The mother's application for permission to appeal the residence order determination was refused by Wall LJ ([2010] EWCA Civ 219), although, in the event, the practical

attempts to achieve a change of residence failed (*Re S (Transfer of Residence)* [2011] 1 FLR 1789).

41. Each case turns on its own facts, but *Re S* is certainly an illustration of an acceptable judicial approach in a case where the outcome chosen by the judge as best meeting the welfare needs of an older child runs directly contrary to his firmly stated wishes and feelings.

The Supreme Court decision in Re B

42. Argument was heard in the present case on 7 June 2013, some five days prior to the Supreme Court handing down judgment in *Re B (A Child)* [2013] UKSC 33. Despite the potential relevance of that decision to the appellate process in a case such as this, we have not thought it necessary to invite further submissions from the parties and none of the parties has sought to make any such submissions.

43. In *Re G (A Child)* [2013] EWCA Civ 965 at paragraphs 32 to 35 I purported to summarise the impact of the Supreme Court's decision in *Re B* in the appellate context. *Re B* concerned decisions under the CA 1989 and the Adoption and Children Act 2002 making public law orders relating to children which plainly engaged the right to family life protection enshrined in ECHR, Article 8. It may well be that not all orders under CA 1989 relating to children will be of sufficient import to engage Art 8 (for example an order which merely defines the time of day and/or place for contact), but the impact of Art 8 is by no means confined to public law orders. There will be a range of private law children orders which engage Art 8 and which must now be approached on appeal in the manner established by the majority of the Supreme Court in *Re B*. It is not necessary for the purposes of this judgment to establish where the outer limit of this 'range' may be, and I expressly do not intend to do so, but an order refusing all direct contact between parent and child must plainly be on the *Re B* side of the boundary.

44. The determination of the order which best meets the court's duty to afford paramount consideration to the child's welfare is an exercise of judgment. The traditional appellate approach to issues of pure judgment has been that of recognising a generous ambit of reasonable disagreement and only intervening where the judge's decision is seen to be outside that ambit and is 'plainly wrong' (per *G v G* [1985] 1 WLR 647). In *Re B* all five SCJ's agreed that the task of a trial judge making the ultimate determination of whether to make a care order was 'more than to exercise a discretion' (Lord Wilson SCJ, paragraph 45). For the reasons I have given, I would include a 'no contact' order in a private law case in the same bracket. In such cases, the Supreme Court held that the trial judge's task is to comply with an obligation under HRA 1998, s 6(1) not to determine the application in a way which is incompatible with the Art 8 rights that are engaged. The majority in the Supreme Court went on from that unanimous position relating to the role of the trial judge, to hold that 'the review which … falls to be conducted by the appellate court must focus not just on the judge's exercise of discretion but on his compliance or otherwise with an obligation' (paragraph 45). The 'plainly wrong' criteria in *G v G* being held to be 'inapt' for such a review.

45. As I observed at paragraph 35 of my judgment in *Re G*, Lord Neuberger (paragraph 93) presents a helpful dissection of the various layers of possible appellate conclusion

in any given case in order to identify those cases where the first instance decision will be 'wrong' and therefore meet for appeal:

> "*There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).*"

46. It follows that, in the present case, this appeal, in so far as it relates to the judge's exercise of discretion, must be dismissed if the judge's determination is in category (i) to (iv), but must be allowed if it is in category (vi) or (vii).

'System failure'

47. It is not unusual for appellants and prospective appellants in a case relating to children to make a complaint, or indeed a string of complaints, about the procedure that has been applied to the determination of the welfare issues relating to a particular child. In the absence of a finding that there has been a failure to conduct a fair trial, such complaints are unlikely, of themselves, to support a successful appeal and are more likely to result in words of guidance for the conduct of future proceedings. What is unusual in the present case is that the father seeks to hold up the entirety of the court process, running back over the course of more than a decade, in support of his submission that the system as a whole has failed to meet its duty to afford paramount consideration to M's welfare and to respect M and her father's Art 8 rights to family life. The force of this submission is significantly enhanced by the fact that the highly experienced judge expressly records that, in a judicial career spanning 25 years, he does not recall any case which has left him 'with such a feeling of failure on the part of the Family Justice System'.

48. What, if any impact, should this alleged 'system failure' have on the outcome of an appeal? The starting point must be that the judge was correct in separating his view on that topic from the judicial task of determining the welfare outcome in accordance with CA 1989, s 1 as he saw it in October 2012. On appeal, however, the matter is not as straightforward. The decision in *Re B* has clarified the appellate court's task as being that of conducting a review of the discharge by the lower court of its duty under Human Rights Act 1995, s 6 not to act in a manner which is incompatible with an ECHR Convention right. Primarily the appellate review will focus upon the trial judge's decision as a matter of proportionality, with a duty upon the appellate court to intervene if, on that basis, that particular welfare decision is 'wrong', but the ECHR establishes rights to procedural fairness under Art 6 and as an adjunct to the primary rights protected by Art 8. Where what has taken place in the lower court demonstrates a process which is not compatible with a party's Art 6 and/or Art 8 rights to procedural fairness, the sharpened focus provided by *Re B* makes it plain that the appellate court has a duty to intervene. This perspective does not in my view represent

a change from what has gone before where a breach of Art 6 or the procedural requirements of Art 8 is demonstrated or from the role of the appellate court as established by Civil Procedure Rules, r 52(11)(3): "The appeal court will allow an appeal where the decision of the lower court was – (a) wrong; or (b) unjust because of a serious procedural or other irregularity …". The decision in *Re B* is, however, a helpful restatement of the duty of courts under HRA 1998, s 6 and the corresponding nature of the review to be conducted by an appellate court. In this context however, the scope of any procedural review needs to contemplate the proceedings as a whole in addition to any particular hot-spots upon which the parties may rely.

Delay

49. Delay is one of the striking features of this case. The procedural requirements under ECHR, Art 8 in the context of delay were recently considered by the ECtHR in the case of *Kopf and Liberda v Austria (Application No 1598/06)* [2012] 1 FLR 1199. In that case foster carers who had looked after a child from the age of 2 years for nearly four years, applied to have contact to him once he had been removed from their care and returned to his mother. At the start of the proceedings the youth welfare officer recommended to the court that contact should take place but, by the end of the court process nearly three years later, the recommendation had changed to one of 'no contact' on the basis that the child's emotional stability may be harmed by the reintroduction of the former foster carers after a break of two years. By the time of the final hearing the child was vehemently opposed to contact and the district court refused the contact application. The foster carers appeals at regional and supreme court levels were refused. The ECtHR held that the outcome, by the time of the final hearing, was compatible with Art 8 as it struck a fair balance between the competing interests by affording particular interests to the welfare of the child. But the ECtHR held that the procedural requirement of Art 8 to deal diligently with the application had not been complied with in that the passage of time had been crucial to the decision and had had a direct and adverse impact on the foster carer's position. It was accordingly held that there had been a violation of the foster carers' Art 8 rights.

Has there been systemic failure sufficient to violate ECHR Article 8?

50. The appeal as it has been constituted before this court is in no manner a fitting vehicle to enable a root and branch appraisal of the procedural history of this protracted case. The father, as a litigant in person, has concentrated his grounds of appeal on the hearings before HHJ Goldsack and the other parties very largely have simply responded to the detailed points that the father has made. We have only been exposed to the documents relevant to the most recent hearings and, in particular, have not seen any earlier judgments. It would be quite wrong, even if the relevant detailed history were available to us, for this court now to make express micro-criticisms of individual judicial decisions made over the course of around 100 hearings spread over a period of years. It follows that the conclusions to which I have come on this aspect of appeal are based on a high-level, macro, appraisal of what transpired prior to HHJ Goldsack's involvement and upon more detailed consideration of the hearings that took place before him.

51. Despite those caveats, I am satisfied that the proceedings as a whole have violated the procedural requirements that are a part of the rights enshrined in Article 8 and the

result of this failure is that family life rights of M and her father to have an effective relationship with one another have been violated.

52. The finding that I have made is based in part upon the bald facts which were recited at the beginning of this judgment: this is an unimpeachable father, who has been prevented from having effective contact with a daughter who has enjoyed seeing him, in circumstances where the child's mother and primary carer has been held to be implacably opposed to that contact. In ECHR terms, there can be no dispute that the issues in this case engaged the Art 8 right to family life of M and each of her parents. No facts have been established to support a finding that, in terms of Art 8(2), it was 'necessary' or proportionate to refuse contact in order to protect the 'health' or 'the rights and freedoms' of others. HHJ Goldsack was right to express a profound feeling of failure on the part of the Family Justice system. Other than matters relating to the mother, her physical health, her mental health and/or personality, there has been no valid reason to limit or curtail the relationship between M and her father, yet the court process has concluded, after more than ten years, with an order denying the father any direct contact with his daughter.

53. The conduct of human relationships, particularly following the breakdown in the relationship between the parents of a child, are not readily conducive to organisation and dictat by court order; nor are they the responsibility of the courts or the judges. But, courts and judges do have a responsibility to utilise such substantive and procedural resources as are available to them to determine issues relating to children in a manner which affords paramount consideration to the welfare of those children and to do so in a manner, within the limits of the court's powers, which is likely to be effective as opposed to ineffective.

54. During the oral appeal hearing we invited counsel to indicate where, if at all, they considered that the case had taken what can now be seen to be a wrong turn. Understandably Miss Stanistreet did not feel able to identify such a point. Ms Pemberton, however, was clear that the stage following M's return to her mother where the father had conceded the issue of residence on the basis that the mother would now adhere to the contact regime, yet the mother thereafter failed to cooperate with contact, was a key turning point at which the opportunity for a prompt return of M to residence with her father was not taken. On our limited exposure to the detail of the case at that time, I agree that, for whatever reason, this does appear to be an opportunity to achieve a more positive outcome that should have been, but was not, grasped.

55. In addition the court enquired whether HHJ Goldsack's conclusion that the mother 'has always been implacably opposed to contact' was the first occasion in the history of the case when a judge had expressed such a conclusion. Counsel assured us that it was at least implicit in HHJ Carr's handling of the case that this was her view and that is why permission was given to instruct Dr Weir. Without sight, which we have not had, of HHJ Carr's judgments, it is not possible to take this point further, other than to observe that if (and it obviously is an 'if') the court had not previously expressly faced up to the mother's longstanding implacable hostility until the instruction of Dr Weir in mid-2011, then the court may have been approaching the case on a basis which, on HHJ Goldsack's finding, was erroneous.

56. In addition to the matters raised by HHJ Goldsack and by Ms Pemberton, the father complains that the court has never taken action to enforce its orders against the mother. In response Miss Stanistreet points out that, when asked in the past, the father has indicated that he did not wish to have the mother committed to prison. That, with respect, is not a total answer to the point. There may be many cases where the wronged parent may be reluctant to push, or be seen to push, for enforcement proceedings against the other parent for breach of court orders; that circumstance does not, of itself, relieve the court of the responsibility for enforcing its own orders.

57. HHJ Goldsack plainly contemplated these matters in the paragraph of his judgment which set out a number of 'what ifs' (see paragraph 34 above). The first two 'what ifs', in common with Ms Pemberton's observations, point to a stronger line being taken much earlier 'when [mother] so blatantly ignored court orders' both before and, more significantly, after residence was transferred back to her in 2007. I have already pointed to a concern that the mother's stance of being implacably hostile to contact may not have been recognised and acted upon until comparatively recently. If, back in 2007, the court had already sufficiently analysed the case to conclude, as HHJ Goldsack (and Dr Weir) came to do in 2011/12, that the mother had 'always' been implacably hostile to contact, then it is difficult to understand how it could have been in M's interests to return her to her mother's care, with an assurance that she would adhere to the contact regime, at that time. The probability must be that the court had not sufficiently engaged in obtaining expert evidence and conducting its own analysis to reach that key conclusion. Thereafter the court continued to make further orders for contact which were, in the main, ignored but where the resulting breach did not lead to any adverse consequence for the mother.

58. In what is already a long judgment, and where we do not have any detail of the approach adopted by the different judges who previously had the conduct of this case, but we do know that there have been over 80 orders since 2006, many of which were ignored by the mother, it is neither possible nor necessary to do more than point to the relatively extensive powers that the court now has to make and enforce orders for contact. This area of the law was comprehensively described by Munby LJ, as he then was, in *Re L-W (Enforcement and Committal: Contact); CPL v CH-W and others* [2010] EWCA Civ 1253; [2011] 1 FLR 1095. That decision, and the earlier cases (in particular) of *A v N (Committal: Refusal of Contact)* [1997] 1 FLR 533 and *Re S (Contact Dispute: Committal)* [2004] EWCA Civ 1790; [2005] 1 FLR 812 stressed the importance of the fact that orders for contact are orders of the court and, as such, consideration of the rule of law is directly engaged both when the court is considering making such an order and, crucially, when considering the consequences of any subsequent breach.

59. In *A v N*, Ward LJ stated:

> '… orders of the court are made to be obeyed. They are not made for any other reason … it is perhaps appropriate that the message goes out in loud and in clear terms that there does come a limit to the tolerance of the court to see its orders flouted by mothers even if they have to care for their young children. If she goes to prison it is her fault, not the fault of the judge who did no more than his duty to the child which is imposed on him by Parliament.'

In *Re S*, Neuberger LJ, as he then was, stated:

> 'It seems to me that this [committal order] was an order which was justified both in terms of enforcing respect for the orders of the court, and, therefore, for the rule of law in society, and also, as a last resort, to coerce the mother into complying with court orders.'

60. In *Re L-W* at paragraphs 96 to 98 Munby LJ expressly agreed with the approach taken in *A v N, Re S* and other cases and he went on to stress (echoing his own words in *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam); [2004] 1 FLR 1226) the need in an intractable contact case for:

- judicial continuity;
- judicial case management including effective timetabling;
- a judicially set strategy for the case; and
- consistency of judicial approach.

For my part, I would in turn expressly endorse Munby LJ's description of the approach to be taken in these most difficult of cases and I would commend a re-reading of his judgment to any judge facing a contact case which is, or may be becoming, intractable. In doing so I would stress the latter two elements in the judicial armoury that I have listed. The need for the single judge who has charge of the case to establish a 'set strategy for the case' and to stick consistently to that strategy, so that all parties and the judge know what is happening and what the court plainly expects will happen, cannot be understated. If, as part of that strategy, the court makes an express order requiring the parent with care to comply with contact arrangements, and that order is breached then, as part of a consistent strategy, the judge must, in the absence of good reason for any failure, support the order that he or she has made by considering enforcement, either under the enforcement provisions in CA 1989, ss 11J-11N or by contempt proceedings. To do otherwise would be to abandon the strategy for the case with the risk that a situation similar to that which has occurred in the present case may develop; to do otherwise is also inconsistent with the rule of law.

61. The first time that a judge should give serious consideration to whether or not he or she will, if called upon, be prepared to enforce a contact order should be <u>before</u> the order is made and not only after a breach has occurred. Such forward thinking should be part of the judge's overall strategy for the case. If a directive contact order is called for, then, on making it, the judge should be clear, at least in his or her own mind, that, upon breach, enforcement may well follow. If, on the facts of the case, enforcement is not to be contemplated, then an alternative judicial strategy not involving a directive court order (and which might in an extreme case include a change of residence or, at the other extreme, dismissing the application for contact) must be developed. The error by HHJ Goldsack that I have already identified in deciding whether or not to 'attach a penal notice', when now, as a matter of law, all contact orders are to contain a warning notice as to enforcement (CA 1989, s 11N), is not a minor technical error. It is an error that, with respect, indicates a misunderstanding of the nature of the task of making a directive contact order in the first place. Under the modern law, the judicial discretion is not whether or not to attach a penal notice, it is whether or not to make the contact order itself.

62. Finally, in terms of the judge's 'what if' list, I would share his questioning of the period during which the court endorsed a recommendation for contact to proceed at M's pace and on her terms. Such an approach was rightly held to be generally inappropriate by this court in *Re S (Contact: Intractable Dispute)* [2010] EWCA Civ 447; [2010] 2 FLR 1517.

63. On the question of quite when or how it is that the proceedings as a whole have been conducted in a manner that is in breach of the family life rights of M and her father it is neither right nor possible to do more than point to these matters as being of relevance. Again, in the context of the proceedings before HHJ Goldsack to which I now turn, there is no one occasion about which it is possible to say that a clear breach of any Art 6 or Art 8 procedural rights occurred. That said, and despite the goodwill and best intentions of the judge, the various officers of CAFCASS and NYAS and those agencies themselves, which I take as read, the resulting process cannot be regarded as a sound or timely procedure for determining the issues that the father had brought before the court in 2011.

64. I have already set out in some detail the procedural history of the case after it first came before HHJ Goldsack in October 2011. I would cite the following particular matters in support of my overall concern:

a) the case was ready for final determination in October 2011, yet was not concluded until October 2012;

b) prior to the October 2011 hearing the court order had provided for the father to have unsupervised contact. In the event that did not take place but, following a meeting between HHJ Carr and M at court, M had gone for a day of unsupervised contact with her father which was later held to have been thoroughly enjoyable;

c) following hearing the oral evidence of the experts on 17th October, HHJ Goldsack was sufficiently in favour of building up the relationship between father and daughter to order unsupervised staying contact;

d) that contact never materialised, but was replaced with an order for shorter periods of contact which was supported by a full explanation to the mother of the consequences should she disobey the order. The first such contact did not take place as a result of the father's mistake over timing. Thereafter the court backed off from expressing the requirement that subsequent orders should be obeyed by, in the judge's erroneous phrase, not attaching a penal notice;

e) thereafter a replacement guardian was appointed and, on her recommendation, the judge acceded to a further adjournment to facilitate the s 37 direction;

f) when, shortly before the resumed hearing planned for February 2012, the 'new' guardian became indisposed, the judge allowed an adjournment of four months and then, in June, was forced to abandon that appointment and replace CAFCASS with NYAS;

g) the final stage of the hearing was concluded without the presence of the mother, without the NYAS officer ever having met the mother and without the judge having heard any evidence from the mother at any stage in the 12 month part-heard hearing;

h) By November 2011 the judge had moved from a position, held only a month earlier, of favouring unsupervised staying contact and making orders for daytime contact backed up by explicit warnings as to the consequences of breach, to one of accepting that there should be 'some flexibility for M to make choices' and, for that reason, not attaching a penal notice. It would seem that from that time onwards the judge did not regard his orders for contact as being ones that would be directly enforced against the mother – and she must have known that;

i) The judge accepted, and we have no reason to doubt, the genuine nature of the mother's physical condition which prevented her from attending court in October 2012, but the consequence of this was that the mother, who will have understood that the judge no longer contemplated that his orders for contact would be backed up by enforcement proceedings, and whom the judge went on to conclude had always been implacably opposed to contact, was no longer even actively engaged in the court process;

j) M's day to day care was apparently being undertaken by the maternal grandmother, yet she was not seemingly drawn into the court process in any way;

k) by the time of the final hearing the judge had moved from a position of being favourably disposed to unsupervised staying contact to one where he regarded a 'no contact' order as the only tenable outcome, yet, other than the accrual of more evidence as to the consistency of M's stated wishes and feelings, there had been no change following October 2011 in the core evidence relating to either of the parents or to M.

65. Standing back, therefore, and looking at the process from October 2011 as part of the proceedings as a whole, I can only conclude, as I have stated, that collectively the combined interventions of the court over this very extended period have, from a procedural perspective, failed to afford due consideration to the Art 8 rights of M and her father to a timely and effective process in circumstances where there is no overt justification for refusing contact other than the intractable and unjustified hostility of the mother. The failure that I have identified is of such a degree as to amount to an unjustified violation of M's and the father's right to respect for family life under ECHR, Art 8.

HHJ Goldsack's welfare decision

66. Having found that the father has effectively succeeded in the second substantive limb of this appeal, it does not necessarily follow that a rehearing is justified. Just as in *Kopf and Liberda v Austria*, the ultimate welfare determination may be seen to be sound, notwithstanding that there has been a procedural violation of Art 8. It is

therefore necessary to look further at the judge's decision to refuse any further attempt at direct contact and to bring the proceedings to an end.

67. The core passages of HHJ Goldsack's decision are set out in paragraph 34 above. The judge's reasons for refusing to order direct contact can be summarised as follows:

    a) M has consistently expressed her view to a number of professionals and her view was that 'she does not currently want contact with father (because she is frightened of him and/or does not trust him) and wants these proceedings brought to a conclusion';

    b) 'We are where we are' and the case must now be determined on the available evidence;

    c) there is no way at present to enable father to have meaningful contact with M; she simply will not attend;

    d) Mother has always been implacably opposed to contact and that is a fact which M has taken on board;

    e) contact between father and M when it occurs is positive. M loves her father and I do not believe she is in fact frightened of him, but she is torn by her loyalty to her mother;

    f) Although for many years M's stated views have been substantially influenced by mother, I accept that what she is currently saying are her own views. Given her age it is now time to give those views considerable weight;

    g) M is entitled to a life which does not involve endless meetings and uncertainty as to future court orders;

    h) No other strategies will work and M is increasingly blaming her father for the continuance of these proceedings.

68. If the judge's appraisal of the weight that can, and should, be attributed to M's wishes and feelings is soundly based, then it must follow that his conclusion on the merits of the welfare decision could not be categorised as 'wrong'. Such a decision would fall to be seen alongside, by way of example, those in the cases of *Re J (A Minor) (Contact)* [1994] 1 FLR 729 and *Kopf and Liberda v Austria (Application No 1598/06)* [2012] 1 FLR 1199 cited above. The evaluation of the weight to be given to the expressed wishes and feelings of a teenage child in situations where the parent with care is intractably hostile to contact is obviously not a straightforward matter, no matter how consistently or firmly those wishes are expressed. In this context the decision of HHJ Bellamy in *Re S (Transfer of Residence)* [2010] EWHC 192 (Fam); [2010] 1 FLR 1785 provides a good illustration.

69. In challenging the judge's evaluation of wishes and feelings in this case, the father makes the following points drawn from the larger number of points that he seeks to make on appeal:

i) the court, and the various agencies, have failed to take into account that this is a case of implacable hostility and that it is in that context that M has come to express the views that she currently expresses;

ii) in particular, the court has failed to follow the advice of the only acknowledge expert in the case in relation to parental alienation and intractable hostility, Dr Weir;

iii) the court has ignored the evidence of the mother's personality disorder, her physical and mental ill-health and her alcohol dependency – both as a contributory factor to M's views but also because of the possibility that in the future M will require the support of her father should the mother, once again, become incapable of caring for her;

iv) the court has failed to consider why M should have become so hostile towards her father, when following the last contact in February 2012 she had expressed a wish to continue to see him for contact;

v) the court has failed to take account of the fact that on 1st September 2011 M attended court saying that she did not wish to see her father, yet left with him for a day of unsupervised contact which, it has been found, she thoroughly enjoyed.

70. In response, the basic position taken on behalf of the mother and of NYAS is that the judge did take account of all matters and that the reality was that there was no tenable alternative to that chosen by the judge. In addition both counsel point out that Dr Weir had always held that there was no prospect of contact working successfully while M remained in the maternal family and that, once Dr Weir came to accept that a change of residence was not tenable, he too was effectively accepting that there was no prospect of continuing direct contact.

Discussion

71. The judgment is attractively concise and clear, but, I am concerned that in achieving such conciseness the judge has not allowed himself sufficient room to analyse just how much weight he should attach to M's stated wishes and feelings. The shortly stated reasons themselves tee-up questions which required analysis, but to which no analysis is given. The prime example is that the judge records that the reasons for M's express view were fear of her father and an inability to trust him, yet the judge goes on to hold (as had other judges on earlier occasions) that she was not actually frightened of him. Save possibly for his mistake in the time for attending contact in November 2011, there was no evidence of a cause for her not to trust him. The judge also records that M loves her father and had thoroughly enjoyed relatively recent times with him. Despite the readily apparent contradiction between the reasons given by M for her stated view and the facts as the judge found them, at no stage does he engage in considering what weight he should give to her wishes and feelings if, as he seems to have considered was the case, her expressed reasons for that view had little substance.

72. In this regard, given that he was basing his decision very much on M's wishes and feelings, it was also incumbent on the judge to face up to Dr Weir's clear evidence

that M's views should not be used as a principal basis for decision making and explain why he was disagreeing with the expert on this key point.

73. On their face the judge's core findings are not readily compatible with each other and required further explanation. The findings were that:

    a) he did not accept the validity of M's stated reasons for her expressed wishes and feelings;

    b) he found that the mother had always been implacably hostile to contact and that M had taken this on board; yet

    c) he regarded M as now expressing views which were her own.

    The judge's failure to explain how these three apparently incompatible findings were to be reconciled is significant and plainly goes to the root of the judicial exercise of discretion, based as it was on M's views.

74. The judge's focus is very much upon the here and now. It is plainly right for judges to make their evaluation of a child's welfare based upon the current situation, but in analysing that situation they must bring to bear such evidence that may be relevant from what has transpired in the past. Here the situation was not straight-forward and did not simply involve a young person who has consistently expressed her view contrary to contact. In recent times, despite her expressed view, M had been persuaded to attend contact by HHJ Carr and, on being told by the then guardian that her mother was in favour of the contact visit, spending time with her father in February 2012. Both of these occasions were, as the judge found, positive and enjoyable. In the circumstances there was a need for the judge to make express reference in his analysis to these matters of history and then to bring them into his analysis of the weight he could then attach to M's wishes and feelings. Without such analysis, his statement that 'she simply will not attend' is an insufficient conclusion.

75. By the time of the last of the hearing before HHJ Goldsack, this case would seem to have acquired something of a *fin de siècle* air. The two CAFCASS guardians appointed during the previous 12 months had had to retire from the case and, as we have been told, the NYAS worker was approaching retirement. Dr Weir had by then retired. The local authority had withdrawn from the case. The mother had ceased to attend court, the NYAS officer had not even met her and the judge had not heard any evidence from her. The unfortunate procedural history that I have examined in the earlier part of this judgment will have been well to the forefront of the judge's mind. It is in that context that the judge and the NYAS guardian agreed that 'we are where we are' and that there were no other tenable options.

76. The *fin de siècle* context that I have described has to be seen alongside the serious imbalance in the case that was generated by the mother's absence from the hearing. This judge's finding that the mother was, and had always been, implacably hostile to contact was plainly important. The finding was made without hearing evidence from the mother, but it is a finding which is not challenged on the mother's behalf in the course of this appeal. Before the judge the mother's case asserted that she was in favour of contact. The previous guardian had been able to persuade the mother, only 8 months previously, to give her blessing to a contact session and this positive move by

the mother had enabled M herself to change her stance from unwillingness to attend to one of attending. Given the mother's absence at the hearing, with the crucial consequence that neither the NYAS officer nor the judge was able to form their own view of her, it was arguably premature to conclude that 'we are where we are' and that there was no other option than to refuse contact. I make this observation knowing that no party sought to adjourn the final hearing in order to permit the mother to attend. The judge, however, had a responsibility, irrespective of the position of the parties, to consider whether he was able to come to a conclusion of this degree of finality in the absence of the mother, or whether, if her physical condition prevented attendance at court, there were other procedural steps that could be taken to engage her in the court process via video link or by taking of her evidence in some less physically challenging environment. On this topic, the judgment does not describe any consideration being given either to a process whereby the mother's evidence could be heard, or, if not, what impact the judge considered that her absence from the hearing had on his ability to come to a final conclusion.

Conclusion

77. Drawing matters together, whilst I do not conclude that the outcome ordered by the judge is, of itself, wrong and therefore to be set aside, I am sufficiently concerned about the process of these proceedings as a whole, which I have held has violated the Art 8 rights of both M and her father, and also by the deficits in the judge's analysis which I have now identified, to conclude, in the words of CPR, r 52(11)(3), that the outcome is 'unjust because of a serious procedural or other irregularity'. For the previous systemic failure to end in a hearing which itself was highly unsatisfactory and where the judge has failed to conduct a sufficiently thorough analysis, makes it almost inevitable that this court will consider that it has a duty to intervene with the aim of establishing an effective and full rehearing.

78. This decision is made with a heavy heart as I fully understand that the idea of re-opening these matters before the court will be a profoundly unwelcome one for M. That it is necessary, for the reasons that I have given, I am clear, just as I am clear that, on this rare occasion, part of the responsibility for this turn of events rests with those of us who work in the Family Justice system. But sight must not be lost of the place where the ultimate responsibility for this situation plainly rests, which is with the parents and, in this case, with M's mother in particular. It is she who has, on the judge's clear and unchallenged findings, doggedly refused to allow M to develop and maintain a relationship with her father without any good reason whatsoever for so doing; it is she, should she wish to do so, who could now unlock this intractable situation and permit her daughter to have some form of normality and balance in her relationship with her parents as she goes through her teenage years and beyond.

79. In the circumstances, I would allow the appeal and direct that the order of 9th October 2012 be set aside. As a consequence the father's application for contact/residence will need to be re-heard. In a case where, as I have held, the Family Justice system has so far failed this family, there is a need to give priority to achieving an effective and timely court process. The case should not return to HHJ Goldsack, who has, in any event, now also retired. In the first instance the case is to be listed before Mr Justice Moylan as the Family Division Liaison Judge for the North East. It will be for Mr Justice Moylan to allocate the case to one senior family judge who is to conduct all future hearings. The choice of whether that judge is to be Moylan J himself or another

judge is a matter that I would leave to his discretion, but I would stipulate that the allocated judge must be either a High Court judge or one who is authorised to sit as a deputy High Court judge.

80. In recent times the ability of the court to make progress in hearing the case has been significantly thwarted by the unfortunate indisposition and/or retirement of a number of the professionals who have been instructed to act as guardian or expert. Serious thought will no doubt be given to the appointment (as there must be as a result of the retirement of the NYAS officer) of a fresh children's guardian and the potential for further expert instruction. I would suggest that thought be given to the option of instructing a multi-disciplinary team (for example, if this were a London-based case, the Marlborough Family Service), rather than one individual. Such a team would have the advantage of providing a small group of professionals who could engage with the different individuals in this family (which might include the maternal grandparents) with a view to assessing both the adult psychiatric and personality difficulties that are apparently in play, as well as providing the all important adolescent focus upon M. A team approach might also reduce the risk of the timetable for the case being overtaken by the indisposition of one individual professional.

Lord Justice Briggs

81. I agree that this appeal should be allowed, for the reasons given by McFarlane LJ. I also agree with his directions as to how the case should be reheard, and that a bundle of the relevant papers should be sent to the President of the Family Division and to the Chairman of the Family Justice Board, so that lessons may be learned from a study of this prolonged and most unfortunate litigation.

Lord Justice Aikens

82. I agree with the judgment of McFarlane LJ and the orders that he proposes. It is tragic to have to agree with the judge that the Family Justice System has failed the whole family, but particularly M, whose childhood has been irredeemably marred by years of litigation. As a result of the system's failure, she has suffered the lack of a proper relationship with her father during her childhood years. Yet he, throughout, has acted irreproachably. Speaking as one who is not an insider to the Family Justice System, I suspect the root of the problem is that the system is overworked and short or resources with the result that there is insufficient opportunity for professionals and judges alike to stand back from time to time and take a fresh look at a case and reconsider it from basics. That, in my opinion, was the cause of the failures in this case. I would allow the appeal.