Neutral Citation Number: [2023] EWCA Civ 215

Case No: CA-2022-002418

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT COVENTRY
Recorder Arthur
CV21C50123

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2023

Before:

LORD JUSTICE LEWISON
LADY JUSTICE KING
and
LORD JUSTICE PETER JACKSON

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P (A Child: Fair Hearing)

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Dorian Day and Matiss Krumins (instructed by **Brendan Fleming Limited**) for the **Appellant Mother**
Amanda Johnson (instructed by **Coventry City Council**) for the **Respondent Local Authority**
The **Respondent Father** appeared in person
Stephen Abberley (instructed by **Sills & Betteridge LLP**) for the **Respondent Child by her Children's Guardian**

Hearing date : 21 February 2023
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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

1. Rule 52.21(3)(b) of the Civil Procedure Rules 1998 provides that an appeal court will allow an appeal where the decision of the lower court was unjust because of a serious procedural or other irregularity in the proceedings in the lower court. In this case the appellant mother argues that the Family Court should not have continued a hearing and made a placement order permitting the adoption of her child but should instead have adjourned to allow her to obtain legal representation after her lawyers had withdrawn at an advanced stage of the hearing.

The context

2. The subject of the proceedings is C, a girl born in October 2021. When she was a day old, her local authority issued care proceedings and she was placed in foster care, where she remains. After assessments were carried out, an application for a placement order was issued in May 2022. The proceedings were listed for a five-day final hearing starting on 24 October 2022.

3. C is her parents' only child, but between them they have nine others. Of her mother's four older children, one lives with a relative under a special guardianship order, two are in foster care, and one has been adopted. The father has five older children from relationships with two women, one being the mother's older sister; both have accused him of violence towards them.

4. In 2015, in proceedings concerning her fourth child, the mother was assessed by a clinical psychologist as having a learning disability and a Full-Scale IQ of 63 (1st percentile). In the present proceedings, directions were given in July 2022 on the basis that she was to be regarded as a vulnerable individual. She accordingly had the assistance of a lay advocate at the final hearing.

5. The father has a substantial criminal history dating back to 1998 for theft, robbery, burglary, violence, criminal damage, possession of cannabis, and driving offences, and has served a number of prison sentences. During the present proceedings, a psychological assessment considered that he would be likely to meet the threshold for a diagnosis of psychopathy.

6. The final version of the local authority's threshold statement asserted that if C was in her parents' care she would be at risk of emotional and physical harm and neglect in the following ways:

    1) By witnessing domestic abuse and violence between her parents.

    2) By witnessing her father's hostile and aggressive behaviour.

    3) By exposure to her father's criminality due to poor role modelling and exposure to risky adults and situations.

    4) By her parents' substance misuse impairing their parenting, depleting family finances, increasing risk of parental mental health difficulties and exposure to risky adults.

    5) By neglect.

7. The threshold document was a substantial one, extending to six pages, closely referenced to the extensive evidence. A large part of it concerned violence and abuse perpetrated by the father against the mother. Because it became relevant to what occurred at the trial, I set out the pleading of that allegation in full:

> "1) The relationship between M and F is a volatile and unstable [one] characterised by domestic abuse and violence, examples of this include:
>
> a) On 17th September 2019, an ambulance was called by a third-party (M's aunt). M was assaulted by F and had a cut to her head. [C64; H57, [H216, H218 - H227; H233]
>
> b) On 19th February 2020, Police were called by a third-party as F grabbed M to her left side of the neck causing injury. [H73- H81, H86-H97]
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> c) On 22nd March 2020, police attended the property. M reported that the relationship ended mutually on 21st March 2020. F attended the address to collect his belongings and an argument occurred. M tried to convince F to leave and he grabbed her by the neck through clothing pushing her backwards. No visible injuries observed. Police took no further action as M did not want support [H56, H113, H120 - H124]
>
> d) On 29th January 2021, M was subjected to numerous assaults throughout her relationship with F. M has been kicked, punched and strangled. M fled the address in fear of further violence from F. M stayed with her Aunt. F was arrested and released on bail with conditions until 03/03/2021 including not to go to [address] and not to contact M in any way. On 1st February 2021, M reported to [name] Housing she had been assaulted by her partner, F over the weekend and the Police had arrested him and he was in custody. Police agreed to support a house move on the basis that M presented as scared to return to the address. [C3; C5; C65; H1, H7, H12, H17-H20, H23, H27-H37; H59-H64; H234 – H235]
>
> e) M reported to [name] Housing on 25th February 2021, that she fled the property the day prior because F beat her up. She left in a taxi whereby F chased after her [C4-C5; C66]
>
> f) On 27th July 2021, M reported to [name], Social Worker, that F spat at her and also bit her. [Social worker] observed injury to M to be a large circular bruise on M's right forearm. M made a subsequent disclosure to Midwife, and injury was observed. [C6; C13; C47; C68]
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> g) On 8th October 2021, M left the property and F due to his aggression; C49; C69;C70

h) On 8th December 2021, Police attended property. F was found throwing a suitcase full of M's clothing and items onto the street, whilst shouting "F**ing Wh***; F***ing B**h". M attended the Local Authority offices that day seeking refuge. [H275; H319-H326, H332, H338, H345-H346; F104]

i) On 13th January 2022, third party witness reports F and M were arguing on the street and spitting at each other [H298-H300, H309, H316-H317, H332-H336]

j) On 11th February 2022, the Mother accepts that there was a verbal altercation between M and F [C197; H271 - H281, H284-H288, H290, H296]

k) On 8th March 2022, M was being frequently "kicked out" of her property by F and contacted the local authority for support to rehouse her as she separated from F. [C159; E203]

2) The parents have remained in a relationship with one another despite the occurrence of domestic abuse.

3) Neither parent sufficiently understands the impact that their domestically abusive relationship might have on their child exemplified by:

a) M's repeated re-entry into the relationship despite making repeated complaints of domestic abuse and violence by F examples of this include:

i) On 29th July 2021, M reconciled with F and allowed him to re-enter the property, despite reporting domestic abuse incident of 27th June 2021 [C68]

ii) On 25th August 2021, M reconciled with F despite reporting domestic abuse incident of 27th June 2021; [C47]

iii) On 10th October 2021, M reconciled with F following the incident of 8th October 2021 detailed above. [C49; C70]

iv) The Mother reconciled with F despite stating she originally was going to seek a restraining order against F, following the incidents of 8th March 2022 [E203]

b) M's failure to pursue prosecution against F, examples of this include

i) No further police action was taken from the incident of 17th September 2019 as M did not want support and did not respond to police calls [H220]

ii) M confirmed she did not want support nor to take any further action following the incident of 19th February 2020 [H80-H81]

iii) M refused make a statement to the police relating to the incident on 22nd March 2020 [H123]

iv) M confirmed she did not want support nor to take any further action following the incident of 29th January 2021, despite having provided an initial statement. [C3; C5; H59-H61]

v) On 11th February 2022, Mother accepts that she refused to give any details of the incident to the police [C197]

c) M's failure to engage with domestic abuse support services, including the following examples

i) In June 2021, M disclosed feeling low in mood and struggling to manage current stress factors within her life. At this time M had not engaged with her GP or Midwives to discuss her emotional and mental health and is not currently receiving any support from services [C63]

ii) In July 2021, M acknowledged that she would benefit from counselling to address the previous experiences in her life. M's medical records during the current episode of Social Care involvement evidence that M did not engage in any service to address this [C63]

iii) On 20th August 2021, a referral was made with M's consent for domestic violence support. M was offered space within a refuge but did not attend. On 7th October 2021, [refuge] informed Social Worker, [name] that they have made 10 or more attempts to call M to engage with their service and would be closing the referral. [C69; F50; F57]

iv) M was offered and accepted support by an Independent Domestic Violence Advocate (IDVA) and with support regarding housing. However, Children's Social Care and partner agencies records indicate that M withdrew her statement to Police in February 2021 and subsequently disengaged with support agencies [C66]

v) M was spoken to and been offered support in July, November, and December 2021 and either refused support or refuge accommodation or did not respond to contact attempted [C165; F7; F107; H265 and H266]

> vi) On 10th February 2022, Police offered advice and support with information regarding Claire's Law to Mother. The Mother declined the support. [H326].
>
> vii) M was referred to [refuge] by Probation Services; around May/June 2022, M refused to work with [refuge] and the referral was closed [C196; C204]
>
> d) F's minimisation of his behaviour characterising it as bickering, false reports by the mother and neighbours. These are inaccurate claims and he has perpetrated domestic abuse and violence upon M as set out at paragraph 1 above. C48; C73; C208; F31-F32"

8. There was therefore a substantial body of evidence that for at least three years the mother, a person with a learning disability, had been the victim of severe violence and abuse and that she had been unwilling or unable to separate from the father. At trial the parents presented as a cohabiting couple wishing to parent C together. They denied any domestic violence between themselves, or between the father and his previous partners.

9. A number of assessments were available to the court, including a pre-birth assessment from an independent social worker, a psychiatric assessment of the father, a psychological assessment of both parents, an independent social work assessment of both parents, and hair strand testing for drugs. There were also assessments of each parent from previous proceedings. Evidence was filed by the social worker, the parents and the Guardian. There was a mass of material from the police and other agencies.

10. To understand the origin of this appeal, it is necessary to focus in on the allegation that the parents had separated in March 2022. The independent social worker's statement in April 2022 contained these passages:

> "M ended the relationship and was requesting refuge accommodation as well as asking her solicitor to obtain a Restraining Order against F. M stated to children's services that there were arguments all the time, F kept 'kicking her out' of the home and was aggressive. F was abusive shouting at her in the street and has left abusive messages on her phone."
>
> "M and F had a brief separation as recently as 8th March 2022. M denies this incident having anything to do with her relationship with F, explaining *"I'd had enough, everything was getting to me, all the assessments, contact, appointments, I have no time to chill out, so I decided to go to my Aunt's".* … M was unable to provide a clear rationale for requesting her solicitor to apply for a Restraining Order against F following this incident, stating that she just wanted to be left alone."

In response, the mother's statement in June 2022 contained this account:

> "There was another argument in March and I did leave the house for a couple of days. I think at that time that everything had really got on top of me and I needed some space and time to think. These proceedings have been really stressful. We were coming to the end of the parenting assessment sessions which I had found quite hard and I was constantly thinking about whether C would come home. There was an argument and I did go to push F and he did push back. I left the house so that I could calm down and I went to my aunt's house for a few days. I did tell the team manager that we had separated but this was said in anger and I just needed to be by myself for a bit."

The written evidence therefore contained an acceptance by the mother that she had briefly separated from the father in March 2022, and had told the team manager at the time. It also contained an assertion, not denied, that she had asked her solicitor to obtain a restraining order against the father, and that she had been asked about this during an assessment shortly afterwards.

The hearing

11. The final hearing was conducted by Recorder Arthur. At the start of the week, all parties were legally represented in the usual way. The social worker and the independent social worker gave evidence and were cross-examined. The psychiatric and psychological assessments were not challenged and their authors were not questioned.

12. The father's behaviour throughout the hearing troubled the Recorder, who described it in this way:

> "40. … F found it extremely hard to keep his emotions under control throughout the hearing. When other witnesses said things with which he disagreed, he tutted, huffed, or shouted out from the back of Court (e.g. *"that's a lie"* during the SW's evidence), to the extent that the SW appeared intimidated and distracted by him on occasions. During M's oral evidence, F shouted out to provide the answers he thought she should give, such as when M was asked if she was making up the allegations to get a joint house move for both she and F together, she said "*yes*", but F shouted out "*No it wasn't*", and M then changed her answer saying the move was intended to be for: "*Just me*". F also objected to M being asked what he considered to be unfair questions (e.g. "*She [LA counsel] is tripping her [M] up*"). I had to exclude him from the Courtroom on more than one occasion. In his own oral evidence he frequently became frustrated, raising his voice, interrupting, and appearing volatile and aggressive. He accepted being "defensive" during his oral evidence but denied being aggressive or losing his temper in the witness box. I can see why it would be intimidating for professionals working with him if that is how he presents when he is merely frustrated, and how much more frightening he must appear when he is angry. It would not be appropriate for a C to witness this behaviour. He

> would often apologise afterwards, but it did not stop him from repeating the behaviour moments later."

13. On the Wednesday the mother gave evidence. During her cross-examination by counsel for the local authority (not counsel appearing before us), she said that she did not remember separating from the father in March 2022, or alleging domestic violence and asking professionals (including the social worker's team manager and her own solicitor) for assistance in fleeing from him and protecting herself at that time.

14. On the Thursday morning, when the mother was coming to the end of her cross-examination, counsel for the local authority applied for permission to question her about an email sent by her solicitor to the local authority solicitor on 8 March 2022. The email was not among the 2147 pages of evidence already before the court. It read:

> "I have had a long discussion with my client. She has spoken to [the team manager] today. I can confirm she has separated from father and is in urgent need of help. Please could the local authority assist her with getting a place at a refuge in the first instance? She is currently at her aunt's house, but father is aware of this address, and she does not feel safe there. She also has no money at all and only the clothes she is wearing. I have said that I will contact you to ask that the social work team help her get to a safe place and that I will call her back later. Someone at my office is looking into getting a non-molestation order as well. She is due to have contact tomorrow but apparently father has convinced himself that this is a joint contact, and she is frightened that he will turn up. I understand that [the team manager] is looking into changing the dates and times of contact, but mother also would like to know if it can be moved to another venue as she is worried that father will just wait around the building for her. Many thanks"

15. Although the mother was in the middle of giving her evidence, the Recorder allowed her to speak to her counsel so that she could give instructions on the local authority's application. When the hearing resumed, both counsel for the parents opposed the admission of the email, while counsel for the Guardian (again not counsel before us) supported it. The Recorder admitted the correspondence. In her later judgment she explained:

> "I gave an ex-tempore judgment giving permission for the LA to adduce email correspondence as my priority was to have the fullest, most accurate and contemporaneous evidence before me, on which to decide C's best interests for her long-term future. I made clear that I understood that the emails were hearsay evidence, somebody else's record of what M had said, so I would hear whatever the Ps had to say in response (via their oral evidence), in order to consider what weight if any should be given to them."

16. Following the Recorder's ruling, the mother's barrister and solicitor withdrew due to professional embarrassment, leaving the mother unrepresented in the witness box, although her lay advocate remained. The mother briefly concluded her evidence, during which she stated that her solicitor had invented the content of the email. The court than took an extended lunch break to allow the parties to consider whether the hearing could continue with the mother unrepresented. In the afternoon, the mother applied for an adjournment.

17. The Recorder related what ensued:

> "13. … After lunch, I heard submissions on behalf of all parties regarding M's application to adjourn the final hearing part-heard to allow her to get alternative legal representation (F supporting the application, the LA and CG opposing it). M was assisted in making her submissions by her advocate, who had remained to assist her throughout the hearing despite her legal team leaving Court, because the advocate was funded by HMCTS. I gave another ex-tempore judgment refusing M's application to adjourn the final hearing for a number of reasons. It would take some time to be listed again by which time the initial evidence would be stale and we might need transcripts of the first few days. There was no guarantee that new representatives would be happy to continue a final hearing when they had missed the first half so there was a risk of a further application to adjourn and start the final hearing from the beginning (something which all parties including the Ps vehemently opposed). There was a real risk that new representatives would also have to withdraw professionally embarrassed as a result of similar difficulties taking instructions. Any disadvantage to M was limited, as the major cross-examination of the ISW and SW had already been completed, she was running the same case as F so was unlikely to wish to challenge his evidence through cross-examination, and F's counsel could cover the majority of cross-examination of the CG first with M asking any additional questions afterwards. M could be offered additional breaks to consult with her advocate, convey her position and cross-examination via written notes to the Judge rather than having to speak in Court, and could give her closing submissions last so she would know what to respond to in all the other submissions. In fact, M managed extremely well for the remainder of the hearing, passing notes to me when she wished to ask a question via me."
>
> 14. The power to grant an adjournment stems from r4.1(3) of the Family Procedure Rules, so whilst C's welfare is one of the factors I had to consider, it was not my paramount consideration in this decision, although it was of course very important. I also had to consider the wider objectives within Rule 1 of the FPR. Looking at the issue in the round, considering the advantages and disadvantages, fairness and unfairness, to all parties, as *Re L [2013] EWCA Civ 267* requires that I do, I found that any

> disadvantage to M was less than the disadvantage to all the parties, including C, of adjourning the final hearing. I therefore refused M's application to adjourn the final hearing, and it continued with M acting as a litigant in person supported by her lay advocate, and we proceeded to hear F's oral evidence. There is no presumption that an adjournment must be granted to avoid M becoming a self-representing party even when she does not want to be, not even when M's limited cognitive functioning is taken into consideration, and not even when it is a contested placement application."

18. During the hearing the mother, acting in person as she was, did not seek to appeal from the refusal of an adjournment.

Events after the hearing

19. As a result of the time taken on this issue, the Recorder's decision on the applications for care and placement orders could not be given within the hearing window, and judgment was reserved until 21 November 2022, when a two-hour hearing was fixed for the making of final orders.

20. During the hearing of the appeal, we asked how the mother gained her present legal representation. We were told that efforts were made on her behalf during the midday break on the Thursday of the hearing to find replacement solicitors. A number were identified but none could attend there and then, and the formalities of a transfer of legal aid needed to be completed. In the event, the mother's present solicitors obtained a transfer of the certificate on 4 November 2022. However, they took no steps before the date fixed for the handing down of judgment, except to instruct Mr Day a few days beforehand. No application was issued, nor were the court or the other parties given prior notice that the mother was once again represented.

21. The Recorder handed down her judgment on 21 November 2022 by sending it electronically to the parties an hour before the hearing. In it, she determined that a placement order should be made for all the reasons given by the local authority. She explained why C could not be placed with her parents:

> "94. On the basis of the written and oral evidence, I have been forced to conclude that a placement with either or both Ps would come with a very high risk indeed. It would place C at high risk of emotional harm from witnessing the volatile and abusive relationship between the Ps. I have already made the point that whilst there are positive changes exhibited by the Ps, e.g. F conquering his cannabis addiction, both maintaining appropriate home conditions, and a significant reduction in police call-outs and separations/reconciliations, those changes are vulnerable, and particularly the cessation of cannabis use is still in its infancy. There is limited evidence that the Ps would act differently in future to the way they have behaved during these proceedings in relation to DV. I have concluded that there is a likelihood that the relationship between F and M would continue to be abusive and volatile in future. I have no confidence in the

> Ps' assertions in oral evidence that their relationship is healthy, given they do not see the significant danger to C inherent in their previous relationship.
>
> 95. There is little or no improvement in the working relationship between F and the various professionals, with F criticising the current social worker and guardian, albeit he has now got a good working relationship with his new probation officer. However, given my findings that both Ps lied in oral evidence and to numerous professionals, on balance, I am overwhelmingly satisfied that there is no realistic prospect of an open and constructive working relationship being built between the Ps and the local authority or other key agencies/safeguarding professionals."

22. In relation to domestic abuse she had earlier concluded:

> "69. Taking all of the above into account, I have no hesitation in finding that on the balance of probabilities, all the incidents took place as set out in paragraph 1 of the threshold document, i.e. that M was telling the truth then, but is lying now. I also make the linked findings set out in paragraphs 2 and 3 that the parents have remained in a relationship with one another despite the occurrence of domestic abuse and that neither parent sufficiently understands the impact that their domestically abusive relationship might have on their child (with all the examples also found proved)."

23. The only other passage that I would cite is one that refers critically to the mother's closing submissions:

> "89. M's lack of insight was again demonstrated via her closing submissions. Whilst I recognise that she was by that stage unrepresented, and she has cognitive limitations, her submissions focussed largely on the couple's finances: *"I disagree that the Ps aren't financially stable. We have kept receipts for shopping, which we showed the ISW at assessment, and I also have them today if you want to see them. We are financially stable. We can manage our money, and pay our bills. We claim benefits together, and the bills are in our joint names."* This completely misses the main points in the hearing. In fact, money was only brought up briefly regarding the cost/affordability of cannabis."

24. Returning to the hearing on 21 November 2022, the mother's new representatives appeared when the court convened, and Mr Day made an oral application, unsupported by any documentation, for the court to reopen its decision. The application was put on alternative bases: a complete rehearing before another judge; a complete rehearing before the Recorder; or a resumption of the hearing from the point when the mother's representatives withdrew. It was further suggested that there should be an

intermediary assessment, but the Recorder rightly regarded that as a matter that could only arise if the hearing was reopened and there is no appeal in that respect.

25. Although the matter came before her without procedural formality and clarity, the Recorder entertained counsel's submissions and responses from the other parties, and she reserved her judgment in respect of the reopening application until 1 December 2022. In that judgment she showed an astute awareness of whether the oral application was procedurally proper:

> "5. I queried whether M's application was more of the nature of an appeal, but M's new counsel explained his intention was to avoid criticism from the Court of Appeal for not having given the first instance Judge the opportunity to rectify the situation first, before resorting to an appeal."

However, nothing more is said about this, and the other parties seem to have acquiesced in the re-argument of the adjournment issue with the mother being legally represented and with wider citation of authority.

26. The Recorder gave a further judgment on 1 December 2022 in which she refused to reopen the hearing. She affirmed her main judgment and made care and placement orders.

The Recorder's reasoning

27. As can be seen above, the Recorder's essential reasoning was that:

> "Looking at the issue in the round, considering the advantages and disadvantages, fairness and unfairness, to all parties, as ***Re L [2013] EWCA Civ 267*** requires that I do, I found that any disadvantage to M was less than the disadvantage to all the parties, including C, of adjourning the final hearing."

She identified that the disadvantages in adjourning included: delay, staleness of evidence, the possible need for transcripts, and the possible need to start again, which the parents did not want to do. She described the disadvantage to the mother as "limited": the social workers had already given evidence, the mother had almost completed her evidence, the father was running the same case, his counsel could undertake the main cross-examination of the Guardian, time would be allowed for the mother to consult her lay advocate, she could cross-examine the Guardian by written notes via the court, and she could make her closing submissions last. The Recorder noted that there was no presumption that an adjournment must be granted, even where the mother wanted representation, had limited cognitive functioning, and faced a placement application.

28. In her second judgment, the Recorder reviewed the main authorities on adjournments in family proceedings in some detail. From them she concluded:

> "42. … All of the authorities make clear that each case should be determined on the basis of its own facts. Comparing the facts in this case to the facts in the various authorities, the arguments

> against adjourning mid-trial, and against re-hearing now, far outweigh the arguments of unfairness to M. The facts in this case are analogous to (or even stronger than) those cases where the Court of Appeal upheld the initial Judge's refusal to adjourn to allow the parent(s) to obtain alternative representation. I made the decision to refuse to adjourn midtrial without having the case of *Re A* before me. However, my decision would have been the same had I been aware of that case then. I apply the *Re A* case to my decision-making now when considering whether there should be any re-hearing of any part of the trial, and I find that there is no proper basis for re-opening the final hearing and listing the case for re-hearing, even when considering the factors set out in *Re A*."

29. The mother applied for permission to appeal from the order of 1 December 2022 and this was granted by Baker LJ on 3 February 2023.

The appeal

30. On behalf of the mother, Mr Day and Mr Krumins argued that the Recorder's refusal of an adjournment did not have the hallmarks of fairness and constituted a stark breach of her Article 6 rights. In the balancing exercise, the Recorder failed to take adequate account of the impact on the mother of being unrepresented in such a serious case. This was compounded by the mother's learning disabilities, and there was a breach of Article 14 because allowances were not made for them. The application to reopen the final hearing gave the court an opportunity to mitigate the unfairness which arose from its own decision to admit the email.

31. Mr Day submitted that the Recorder was wrong to find that the father having representation mitigated the effect on the mother: although their ultimate cases were the same, parts of the local authority's case against the father, to which his counsel was responding, were irrelevant to the mother. Had she had the benefit of her own counsel, cross-examination and submissions tailored to her specific case would have been possible. Instead, she was left to cross-examine the Guardian, an important witness on welfare, and to deliver closing submissions alone. This rendered her participation sterile. The overall prospects of success of her case should have been an irrelevant factor. This was not a case where a party was at fault for losing their representation. Nor was delay a signal factor trumping procedural fairness. Given C's young age, the plan for adoption could still be put into effect after a delay of some months.

32. The father, who appeared in person before us, supported these submissions. He argued that it was unfair that the mother had been left in this position. Her predicament had stressed and distracted him and had affected the way in which he gave his own evidence, leading him to give a poor impression of himself.

33. For the local authority, Ms Johnson argues that the hearing was not unfair for the reasons given by the Recorder. Procedural adjustments were made to assist the mother after her representatives withdrew and her learning disability was accommodated by the court. Her lay advocate enabled her to participate effectively in the proceedings in the manner described in *Re C (Lay Advocates)* EWHC 1762 (Fam).

34. For the Children's Guardian, Mr Abberley concurred. The Recorder identified the relevant factors in coming to a conclusion that was open to her. It was true that the delay arising from an adjournment would not affect the care plan, but it would affect the child.

Observations on the procedural history

35. It is clear from her judgments that the Recorder approached her task conscientiously and that until the issue of the email arose there could be no possible complaint about the conduct of the proceedings. However, from that point on there are two subsequent matters that do cause concern. They relate to the admission of the email and the application to reopen. In my view, neither should have been permitted.

36. The case took a distinct wrong turn when the local authority applied to admit the email for cross-examination. In my view that decision and the decision to admit it were unwise. The priority cannot have been to obtain still more information, regardless of the consequences. The court already had extensive evidence that the witness was a vulnerable individual who was a trapped victim of chronic domestic abuse. She was living with her alleged abuser and was giving evidence in his presence. His behaviour in court was disruptive and intimidating, even to a professional witness, to the extent that he had been excluded more than once. The email was on the face of it a good faith communication between lawyers, setting aside party differences to secure assistance for a vulnerable client. Co-operation of this kind is to be encouraged and the court should not gratuitously admit such communications into evidence: no doubt for that reason the email had not previously been deployed by the local authority.

37. In those circumstances, cross-examination of this nature (described by the Recorder as being "to rebut the mother's evidence") could have no real value. It risked perpetuating the alleged abuse and driving a wedge between the mother and her lawyers. Under FPR rule 22, the court has the power to control the evidence and the fact that evidence is admissible does not mean that it has to be admitted, particularly at such a late and sensitive stage of proceedings. There were a large number of allegations of domestic abuse, and this was just one more. The local authority already had ample material to challenge the claim of memory loss, and the court was well able to draw conclusions about it. The irrelevance of the exercise can be seen from the fact that the only substantive reference to the email in the final judgment, which contains detailed findings of fact extending to some seventeen pages, are the words highlighted below:

> "64. … M's current account is inconsistent with the contemporaneous records of what she said to the team manager *and to her own solicitor*. …"

38. The unwisdom of the late admission of the email is borne out by what followed, but even then the situation might have been salvaged. It would have been open to the mother's legal representatives to alert the Recorder to the fact that if she admitted the evidence, they would have to withdraw, but there is no record of them doing that. Equally, there is no sign of the court reviewing its decision, as it could have done, when confronted by the loss of the legal team. Altogether, the admission of the document placed the mother and the court in a quite unnecessary difficulty. Although this is not an appeal from that decision, it was the cause of what followed and it is

clear that it would have been far better if the court had simply set that piece of evidence aside so that the case could continue with all parties represented.

39. As to the application made after judgment had been handed down, it is true that this court has given guidance (see *Re I (Children) (Clarification of Judgments)* [2019] EWCA Civ 898, [2019] 1 WLR 5822) on the duty of prospective appellants to seek clarification of a judgment where it is – I emphasise – genuinely needed, before embarking on an attempt to appeal on the basis that a trial judge has given inadequate reasons. That is not what happened here. This informal application was for a reopening of the case and appears to have been made in reliance on s. 31F of the Matrimonial and Family Proceedings Act 1984 or on FPR rule 4.1(6). It is not necessary to investigate that now, because the thrust of the appeal relates to the refusal to adjourn the proceedings and not the refusal to reopen them. However, on analysis, I consider that the Recorder's first instinct was sound. By the time the application was made, she had handed down her final judgment and she was in effect hearing an appeal from her own refusal to adjourn, which is not possible: *Re L (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8, [2013] 1 WLR 634 at [44]; *Re E (Children) (Reopening Findings of Fact)* [2019] EWCA Civ 1447, [2019] 1 WLR 6765 at [45]. Moreover, there was in truth no further evidence for the court to consider. The fact that the mother had the benefit of counsel who was citing other authorities could not justify reopening a substantive decision that had by then been handed down.

40. Before leaving this issue, I reiterate what is said in *Re E*, namely that the question of whether a party should seek to appeal or apply to reopen is fact-sensitive. In the present case, in the very particular circumstances that had arisen, it might conceivably have been appropriate for the Recorder to have considered further submissions from those representing the mother if they were made promptly and with proper formality once they came onto the record. However, it was on any view too late for the court to entertain such an application after judgment had been handed down. I sympathise with the Recorder, who had no notice of the issue and little assistance from the parties, but in my view she should have trusted her instinct by refusing to entertain the application and indicating to the mother that her remedy lay in an appeal. Although this was a case management decision taken some weeks earlier, CPR PD52A 4.6 provides that this court may consider, among other things, whether it would be more convenient to determine an application for permission to appeal from a case management decision after the trial has concluded. In the particular circumstances that had arisen, it is not likely that the mother would have been disadvantaged by not attempting to appeal until judgment had been handed down.

41. Finally, before coming to the crux of the appeal, I would clear the ground in two other respects. First, although the application to reopen was procedurally irregular, it has not led to difficulties in this court addressing the substantive issues. The Recorder in effect treated the reopening application as if it was a rerun of the adjournment application and the target of the appeal is likewise the refusal to adjourn. In the circumstances, concern about the route by which the matter has come before this court effectively falls away. Second, and more fundamentally, I emphasise that we are not concerned with the merits of the decision to make a placement order. There has been no attempt to appeal in that respect. That is not surprising as the Recorder approached her task with evident care, and there could be no prospect of a successful appeal on

the basis that her decision was wrong. We are solely concerned with whether the process by which it was reached was fair.

Fairness

42. It is a fundamental principle, rooted in the common law concept of natural justice and reflected in the ECHR, that a legally valid decision can only spring from a fair hearing. If a hearing is unfair, a judgment cannot stand: *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455 at [49].

43. The legal principles governing the Recorder's decision and this appeal are well-established in the authorities to which we were taken. The most helpful of them in the family law context are:

Re B and T (Care Proceedings: Legal Representation) [2001] 1 FLR 485

P, C and S v the United Kingdom (2002) 35 EHRR 31

Re G-B (Children) [2013] EWCA Civ 164

Re A (Withdrawal of Treatment: Legal Representation) [2022] EWCA Civ 1221, [2022] 3 FCR 439

Valuable observations in a civil context also appear in these decisions of this court:

Terluk v Berezovsky [2010] EWCA Civ 1345

Solanki v Intercity Technology [2018] EWCA Civ 101

Bilta (UK) Ltd v Tradition Financial Services Ltd [2021] EWCA Civ 221

44. The Recorder systematically reviewed the family authorities, drawing out similarities and differences to the present case. I do not think it is necessary to repeat that exercise. The decisions each provide instances in which proceedings were or were not adjourned and where such decisions were or were not upheld on appeal. What is important are the underlying principles, which I now seek to identify.

45. The question of whether proceedings should be adjourned can arise at different stages in proceedings and for a variety of reasons. When it does, the authorities contain a range of propositions:

1) The court must strike a fair balance, having regard to all the interests at stake, and not merely the interests of one party. In a case involving children, their interests (though not paramount) must be considered, as must the effects of delay.

   Re B and T at [21]; *Re L* at [9]; *Re G-B* at [52] and [54]

2) There can be more than one right answer to this evaluative exercise; the question is whether the decision was a fair one, not whether it was "the" fair one.

   Terluk at [19]

3) These are classic case management decisions, and as such an appeal court will be slow to interfere.

   Re TG (A Child) [2013] EWCA Civ 5, [2013] 1 FLR 1250 at [24-38]

4) However, the question on appeal is not whether the decision lay within the broad band of judicial discretion but whether, in the judgement of the appeal court, it was unfair in the circumstances identified by the judge.

   Terluk [18]; *Solanki* at [32-34]; *Re A* at [43]

5) The assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist.

   Re G-B at [49]; *Bilta* at [30]

6) The starting point is the common law principle of natural justice, reflected in the overriding objective, which ensures compliance with the requirements of Article 6 ECHR. In this area, domestic and Convention requirements march hand in hand.

   Re B and T at [28]; *Re A* at [26-28]

7) The question is whether the proceedings as a whole are fair. It is not appropriate to extract a part of the process and view it in isolation.

   Re B and T at [21]; *Re G-B* at [50]

8) The right of access to a court is not absolute and any limitation will only be incompatible with Article 6 where it impairs the very essence of the right and where it does not pursue a legitimate aim in a proportionate manner.

   P, C and S at [90]

9) However, Article 6 contains certain minimum requirements. An obvious example is the right and ability of those concerned in the proceedings to put their case effectively. The appearance of fairness is also important and the seriousness of what is at stake will be relevant.

   Re B and T at [22]; *P, C and S* at [91]; *Re A* at [30-31]

10) The principle of equality of arms under Article 6 and the overriding objective do not require all parties to be legally represented.

    Re B and T at [23]; *P, C and S* at [90]; *Re G-B* at [53]

11) When considering whether to adjourn, the court will be cautious before taking account of the strength or weakness of a party's case, mindful that forensic fortunes may change at trial, but the realistic consequences of any lack of representation may be considered.

    Re A at [29]; *Re G-B* at [51]

12) Fairness may be achieved by the manner in which the court hearing is conducted.

Re G-B at [55]

46. I emphasise that these propositions are a selection and not a checklist, still less an exhaustive one. The essential touchstone is fairness and the weight to be given to any individual proposition or other relevant factor must be a matter for the judgement of the court in the case before it.

Application to the present case

47. I have expressed concern about the events that precipitated the loss of the mother's representation. They were unfortunate and unnecessary, but it does not follow that the proceedings as a whole were unfair. Indeed, I have reached the conclusion that they were fair.

48. In the first place, the events of 24/25 October 2022 must be placed in context. The question of whether C could safely live with her parents had been the subject of particularly exhaustive consideration throughout the proceedings. All that information was captured in the written evidence. The father had legal advice and representation throughout the period and the mother had legal advice and representation for all but a day and a half. Up to that point she had been able to present her case in an effective manner by making statements, by her accounts being extensively recorded in a wide range of professional assessments, and by her having given almost all of her oral evidence. That is not to minimise the unsatisfactory position she was placed in at the end of the hearing, but to put it into perspective.

49. Next, it is relevant to consider the extent to which the loss of representation placed the mother at an actual disadvantage, as opposed to a notional one. Here, given the overall complexion of the case, I do not consider that the mother was deprived of any significant further opportunity to urge her case on the court. The significant psychiatric and psychological evidence was unchallenged. Critical evidence had been given by the independent social worker. The essential issue for the court concerned the reliability of the written record of the parents' situation. That was a factual question in respect of which the mother's representatives, had they remained or been replaced, could have made little impact by means of questions to the father or the Guardian, whose advice about welfare was almost entirely predicated on the court's findings of fact, or by closing submissions. The weight of the written record and the absence of any favourable professional opinion would have hampered any advocate. Mr Day was unable to make good his submission that there might have been forensic opportunities for an advocate to distinguish the mother's position from that of the father. He fell back on the possibility that new lawyers might have advised the mother to abandon her case and separate from him. However, by that stage this was fanciful. Even if such advice was given, the mother would not have accepted it and it would in any case have been too late. For better or worse she had remained with the father and any chance to separate from him was probably lost in March 2022. They presented as a couple throughout the trial and indeed at the hearing of the appeal. Taking all these matters into account, I therefore accept that the impact on the mother's case (as opposed to the mother personally, as to which I am sympathetic) was limited, and I take that to be what the Recorder meant. She need not have relied on the concrete

quality of the mother's closing submissions as a further indicator of lack of insight, but that was only one of several examples that were independently available.

50. Third, the predicament in which the mother was placed was mitigated by the presence of the father's lawyers, presenting broadly the same case, and her own lay advocate, and by the assistance given to her by the Recorder.

51. The court was also bound to take into account the weight to be attached to the rights and interests of others. Most particularly, the presumption that delay was prejudicial to the child sounded loudly in this case. C had been waiting all her life for her future to be decided and the proceedings were already overrunning at double the statutory maximum. If the case was adjourned it would take several months before a decision emerged, incidentally entailing considerable expense and burdens on witnesses and the court. The parents had understandably found the proceedings difficult and did not want to start again, whatever they now say. The Recorder was therefore right to give weight to the serious disadvantages of an adjournment.

52. I acknowledge that the withdrawal of the mother's lawyers was concerning to the father, but it is impossible to accept his submission that it led to unfairness to him. As the Recorder's judgment shows (see paragraph 12 above), his behaviour in the witness box was of a piece with his earlier behaviour, and with many other recorded observations.

53. Finally, I accept that the decision about C was one of great importance and that appearances matter. This is reflected in the fact that legal representation is automatically provided to parents in these cases by the state. However, an informed, dispassionate observer would look at the whole picture and would consider that, notwithstanding the events leading to this appeal, the proceedings were fair overall. Although I regret that the issue was allowed to arise in the first place, once it had the Recorder was entitled to refuse the application for an adjournment. Thereafter, although she should not have entertained the application to reopen, she was right in the end to refuse it. There has been no breach of natural justice or of Convention rights in the making of the care and placement orders in respect of C.

54. I would dismiss the appeal.

Lady Justice King:

55. I agree.

Lord Justice Lewison:

56. I also agree.
