Neutral Citation Number: [2024] EWCA Civ 469

Case No: CA-2024-000675

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT IN LIVERPOOL
His Honour Judge Greensmith
LV24C50083

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2024

Before :

LADY JUSTICE KING
LADY JUSTICE NICOLA DAVIES
and
MR JUSTICE COBB

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- -

Re T (Interim Care Order: Arrangements for Contact)

- -

Simon C Heaney (instructed by **Local Authority Solicitor**) for the Appellant (Local Authority)
Kate Burnell KC (who did not appear below) and **Joanna Mallon** (instructed by **Paul Crowley Solicitors**) for the First Respondent (mother)
Lisa Edmunds (who did not appear below) (instructed by **Berkson Family Law**) for the Second Respondent (the child, by the Children's Guardian)

Hearing date : 23 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 7 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Honourable Mr Justice Cobb:

Introduction

1. This is an appeal from a decision of His Honour Judge Greensmith ('the Judge') sitting at the Family Court in Liverpool on 22 March 2024. The decision under appeal was made within ongoing public law proceedings under Part IV of the Children Act 1989 ('CA 1989').

2. Following a short contested interim hearing, the Judge made a case management order which contained a number of recitals, one of which required the Appellant local authority (the 'Local Authority') to arrange direct (i.e., face-to-face) contact three times per week between the subject child, T, aged 3½ years, and her mother, the First Respondent ('the mother'). This contact provision (both as to frequency and form of contact) had been opposed by the Local Authority and the Second Respondent ('the Children's Guardian').

3. On 26 March 2024, the Local Authority sought permission to appeal on an urgent basis, and a stay of the direct contact order. Both forms of relief were granted by Lord Justice Baker on 27 March 2024.

4. At the conclusion of the hearing of the appeal, we announced that the appeal would be allowed, the relevant recitals contained in the order of the 22 March 2024 in relation to contact would be set aside, and the case would be remitted forthwith for urgent consideration of interim contact and case management to HHJ Parker, the Designated Family Judge for Merseyside and Cheshire. In view of the position taken by the mother at the appeal hearing (see §26 below), we felt it unnecessary to make any interim orders for contact ourselves.

5. For the purposes of the appeal, we had the benefit of written and oral submissions of counsel on behalf of the Local Authority and the Children's Guardian, and leading and junior counsel for the mother. We had a full transcript of the 22 March 2024 hearing, which contained within it the ruling under challenge.

Factual background

6. T has been the subject of an interim care order since 27 February 2024, and is currently placed with her maternal great aunt. T's mother is twenty years old. T's father's whereabouts are currently unknown and he has so far played no part in these proceedings.

7. It is unnecessary for me to rehearse the full background history relevant to this application. For present purposes, it is sufficient to record that on 1 January 2024 the mother reported her former partner (Mr A) to the police, alleging that he had sexually abused T, some twenty months earlier. She supported her allegation by showing the police a sexually explicit photograph stored on her mobile phone; she handed her phone to the police for analysis. That analysis revealed the presence of a second, recently deleted, photograph, taken a matter of minutes before the photograph implicating Mr A, which allegedly also implicated the mother. Potentially incriminating text messages were also discovered. The mother and Mr A were both arrested and interviewed under caution. Initially the mother was remanded in

custody, but from 10 January 2024 was released on conditional bail; one of the conditions was, and is, a prohibition on contact with T save as ordered by the Family Court.

8. The mother and Mr A were charged with three offences: (i) under section 7 of the Sexual Offences Act 2003 (sexual assault of child under 13, namely T), (ii) under sections 1(1)(a) and 6 of the Protection of Children Act 1978 (taking an indecent photograph or pseudo-photograph); and (iii) under section 160(1), (2A), and (3) of the Criminal Justice Act 1988 (possession of indecent photograph or pseudo-photograph). The mother is due to stand trial in relation to these alleged offences later this year. Mr A has pleaded guilty to the offences and awaits sentence following the mother's trial.

9. On the arrest of her mother, T initially stayed with her maternal great grandmother before moving to her maternal great aunt, where she continues to reside; for reasons unconnected with this appeal, T had in fact previously lived with her maternal great aunt for over a year (from the summer of 2021 to the summer of 2022).

10. Initially the family placement with the maternal great aunt was arranged by the Local Authority with the agreement of the mother under section 20 CA 1989. On 7 February 2024, the Local Authority issued an application for a care order, and the case was allocated to this Judge; that application came before the court for initial case management hearing on 27 February 2024, and an interim care order was made by consent. By the time of the first hearing, the Local Authority had taken no steps to facilitate any contact between T and her mother. Mr Heaney conceded before us that more could and should have been done to assess the risks of, and/or potential for, contact in one form or another, and to communicate the authority's position to the mother, in accordance with the authority's duties under Schedule 2 para.15 CA 1989 (see §29 below). We were told that the Local Authority felt that it could not go behind the bail condition that any contact needed to be authorised by the Family Court.

11. At the hearing on 27 February 2024, the Judge gave a clear indication of his view about the frequency and form of contact going forward. I highlight his views as they appear in the relevant recitals (which were recorded as (b) and (c) in the order, and are reproduced below) to the order which he made on that day. In light of those judicial indications, the parties withdrew from court and reached agreement as to the plan for contact; Mr Heaney referred to this as the 'roadmap'. This agreement as to interim contact (recitals (b) and (c)) is as follows:

> "… (b) The court was concerned that [T] had not had contact with her mother for some considerable time and expressed a view that contact should be taking place on a professionally supervised basis around 3 times per week. The court directed the local authority to facilitate contact forthwith. The court was further concerned that the local authority had failed to share information about the child's well being and progress with her mother. The guardian was equally concerned.

> (c) As such, the local authority confirmed that in relation to contact;
>
> i. Preparatory work with [T] would take place 4th March 2024;
>
> ii. There will be a supervised FaceTime [videocall] call between [T] and the mother 6th March 2024
>
> iii. Direct contact will commence 8th March 2024, which from 11th March 2024 will be 3 times per week;
>
> iv. The local authority shall actively review the contact arrangements and will ensure that the mother is kept informed of the child's welfare". (Emphasis by underlining added).

As a result of the agreement, the 'no order' principle (section 1(5) CA 1989) was engaged.

12. A further case management hearing was fixed for 22 March 2024, and an Issues Resolution Hearing was fixed for a date in June 2024.

13. In accordance with the agreement recorded above, T was prepared for contact, and indirect contact (by videocall) took place on 6 March 2024. This contact was, in the view of the Local Authority, not successful; the notes of the contact (available to the Judge at the later hearing) refer to T as scared and tearful, she was resistant to seeing her mother, and asked repeatedly for the contact to end. Accordingly the Local Authority decided to defer the planned introduction of direct (face-to-face) contact (per recital (c)(iii)/(iv) above) and arranged further contacts by videocall on 12 March and 19 March 2024. There is some dispute about the success of these later contact sessions; it is the Local Authority's case that the contacts had been difficult and T had continued to be resistant to see and/or engage with her mother. On the 12 March 2024, T is reported to have referred to her mother several times as 'naughty', and called her a 'monster' and a 'dinosaur'. The mother's case is that the contacts were improving in quality, and that by 19 March 2024, T was in fact unhappy about the contact coming to an end.

14. Given its assessment that the contact was proving distressing for T, on 21 March 2024 the Local Authority issued a formal application for an order under section 34(4) CA 1989; this statutory provision permits an authority to 'refuse to allow' contact between a child and their parent (see §31 below). In fact the application in this case sought the court's permission merely to "restrict" contact. The grounds for the application, contained within the form, were expressed to be as follows:

> "Since the last hearing the Local Authority has facilitated three FaceTime [videocall] contact sessions between [T] and her mother. [T] has been resistant to attending contact and has been distressed following contact. In light of this

> the Local Authority wish to continue with weekly FaceTime [videocall] contact at this time and believe that to rush progressing contact would have an adverse impact on [T]."

15. The further case management hearing took place on 22 March 2024 as contemplated. The hearing was largely dedicated to the issue of contact. The Local Authority's application for an order under section 34(4) CA 1989 was supported by a statement of evidence from the social worker which had been filed in advance of the hearing. That statement referenced the fact that T had made additional comments to the police which "raise concern" and which were being investigated. The statement concluded as follows:

> "The Social worker … has asked [T] on numerous occasions in different ways about wanting to see her mother. [T] on every occasion has said "no". [T]'s reason for this is that her mother is naughty. The Local Authority are also concerned that [T] is referring to [Mr A] as her "naughty daddy".
>
> The Local Authority are concerned that despite there being 3 video calls [T] does not want to progress with face-to-face contact with her mother. The Local Authority are concerned that given [T]'s reasons for this is that her mother is naughty. The Local Authority are of the view that family time between [T] and her mother needs to be managed sensitively and slowly with [T]. The Local Authority's view is that further direct work needs to be undertaken with [T] and explore why she refers to her mother and [Mr A] as naughty and allow her time to talk about this. If [T] has been sexually abused by her mother and her mother's ex-partner [Mr A], [T] may feel scared and re traumatized."
>
> "As a result of the above, the Local Authority are pursuing an application to prevent face to face family time progressing for [T] at this time due to her own wishes and feelings. [The social worker] had spoken to [the mother] previously regarding the fact that this may take time and is of the view that video calls to continue to be held once per week. [The mother] stated that she understood that this may take some time and asked [T] herself if she would like to see her and her response was, "I do not know". It is the social workers' view that [T] should not be asked such questions and direct work to be undertaken with [T] over a 6-week period to try and explore her wishes and feelings. This will also allow the police to explore the new information provided by [T]. [The mother] was not provided with the information at the time of writing this statement".

16. No other evidence had been filed for the hearing, but Mr Heaney had filed and served a 'Legal Framework' document which highlighted the fact that the serious criminal charges faced by the mother (see §8 above) and accepted by Mr A:

> "… go to the heart of the physical, emotional and psychological wellbeing of the child both now, in the mid-term and throughout the child's life. Accordingly, it cannot simply be a case of defaulting to principles of direct contact if it is not in the child's welfare".

17. The positions of the parties on the issue of interim contact at the 22 March 2024 hearing can be summarised as follows:

    i) The Local Authority were inviting the court to approve an arrangement for continued videocall contact once per week for the reasons rehearsed in the social worker's statement and in the 'Legal Framework' document; the social worker wished to undertake further work with T to understand her resistance to contact, and her perception of her mother as 'naughty';

    ii) The mother aspired to direct (face-to-face) contact at least twice per week but in pre-hearing discussions had reached a compromise agreement with the Local Authority that the contact for the time being could remain as videocall contact; there was a dispute as to frequency. As I mention again below, during the hearing, she changed her position and sought immediate direct contact;

    iii) The Children's Guardian was supportive of the Local Authority in its application to limit the contact to once per week by videocall.

Judgment

18. The hearing lasted altogether about forty minutes. There is no formal judgment recording the Judge's reasons for his decision in relation to contact at this hearing. His short ruling is embedded within the transcript, albeit interrupted by the submissions of the advocates. The ruling in its entirety is located in three separate sections of the transcript which I have, for present purposes, threaded together.

19. In the first (main) part of the ruling the Judge said this:

> "I think the starting point here has to be that to all intents and purposes an order has been made for contact. Now, I'll say very clearly, that if the Local Authority is incapable of complying with that order an application should have been made to court. That's the first point.
>
> Secondly, this is the second time today that I have come across a local authority taking the word of a very young child as to whether contact should take place or not, and it seeming to me that a local authority has drawn the line and that really isn't the way we do things. This is a three and a half year old child. Of course there is here the overlay of the now phrase: "Naughty Mummy." … that could be for any number of reasons, including the reason that the child gives, of throwing her toys away. So, as far as I can see, there has not been a significant change since I made that order.

> Now, the mother's now saying, all right, it's difficult, so let's say twice a week. But direct contact is direct contact. … if I say direct contact I mean anything that doesn't include a medium. In other words, no electronics, no phones, it's face to face.
>
> So, for future reference please, direct contact is direct contact, it's face to face, and I do understand that sometimes children will literally just say no, and it can be a difficult call to think, well, am I going to stress that child to such a level that forcing contact is going to cause a child such distress. So I do sympathise with the Local Authority, or with anybody else. A parent who has to make contact work. Of course it can be very distressing.
>
> I don't think we've reached that in this case, from what I've read. However, if we do then it might be that we have to get other professionals involved to help the social worker help the child, because I think the work of a social worker is hard enough without having to suffer the high emotions of a child in a situation like this, having to force it to do something, and then to have to stop doing that and go onto something else immediately.
>
> … There really needs to be direct contact, even if it's just for a few minutes. But of course very heavily supervised. Of course. Closely supervised, shall we say. So that's really where I'm going to leave it… it's going to be twice a week. And it's going to be an order". (The passages underlined above are referenced further at §35-§36 below).

20. Following that part of the ruling and in light of the 'first point' made in the ruling (above), Mr Heaney reminded the Judge that the Local Authority had in fact issued an application under section 34(4) CA 1989. The Judge plainly had not seen the application, and appeared to be unaware of it. He was taken to it on the online portal, and then briefly considered it. This led to the second part of the ruling which contained the following:

> "The Court has made an order that contact take place three times a week, it's now altered to twice a week. The 34(4) application is standing adjourned. The Local Authority is asked to promote, continue to promote contact in accordance with the Court's order.
>
> If, after 14 days, the Local Authority forms the view that it would not serve the child's welfare because the attempts to secure contact are causing the child adverse trauma, then the Local Authority is invited to bring the matter back to court and … the Guardian will be present and we can have the Guardian's input, and all it needs is, is a short statement as to what's happened between now and then, and then, at that

> point, the Court will reconsider the position with regard to contact, and consider the Local Authority's application under Section 34(4)". (The passages underlined above are referenced further at §35-§36 below)

21. The Judge went on to observe (in relation to T's reference to her as "naughty mummy") that "children's reasoning can often be irrational" and that:

> "… we need to get to the bottom [of it], but if we get to the stage where a child's distressed, we need to get to the bottom of it (sic.)".

Following further submissions from Mr Heaney for the Local Authority and Ms Mallon, for the mother, the Judge added:

> "I don't agree the Local Authority simply ignored the direction of the Court [following the 27 February 2024 hearing]. The statements I have read is that the social worker has tried, a great, a lot of effort to try and make contact happen, and has come across a child who is very distressed, who is saying no, and may, as I say, if the reason is because mummy threw her toys away, well that's irrational. But however, if there's a much deeper meaning, reason for that, which is entirely rational, that's what we need to get to the bottom of". (The passages underlined above are referenced further at §35-§36 below).

22. In bringing the hearing to a conclusion, the Judge addressed the parties in this way (a passage which I treat as the third part of the ruling):

> "… contact is for the benefit of the child. And … if the detriment outweighs the benefit, then it's the child we focus on. … Please don't hesitate to bring this back on the question of contact. It might be you want to bring it back even sooner than 14 days" (see further §39 below).

23. The order which was generated following the hearing contained the Judge's direction in relation to contact. The order was drafted by Mr Heaney and approved by the advocates and finally by the Judge. The contact provisions once again appear as recitals. Mr Heaney conceded at the hearing before us that this had not been the Judge's intention, and that the contact provisions should have been reproduced within the main body of the order. The recitals read as follows:

> "(f) The court stated that the recordings (b) and (c) of the previous order were equivalent to orders of the court - in this instance - an order for contact. The order had accordingly not been implemented, and the order should now be implemented as it had not been rescinded.
>
> (g) The local authority's application for a section 34(4) [order] was adjourned pending further consideration of the

> court. In giving a short extempore judgment, the court stated that contact could not progress on the basis the child had said 'no' and that the stage had not been reached in deciding direct contact could not take place.
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> (h) Further, the court reiterated that direct contact did not include video recordings (sic.), the direct contact ordered was contact that did not have any form of digital interface.
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> (i) Direct should commence no later than Tuesday 2nd April 2024."

Arguments on appeal

24. The Local Authority, through Mr Heaney, challenged the ruling in three material respects (I have distilled the five grounds of appeal), namely that:

    i) The Judge failed to conduct a child-focused welfare review of contact (irrespective of the existence of the section 34(4) CA 1989 application, but particularly in light of the same) prior to making his order for direct contact. He was further wrong to adjourn the section 34(4) CA 1989 application without considering it on its merits;

    ii) The Judge fell into error in elevating the status of the recital in the 27 February 2024 order to a court order, and treated the issue of contact as one of enforcement, not welfare. The Judge had wrongly concluded that by not moving to direct contact, the Local Authority had in effect breached his order;

    iii) The Judge had dismissed, or at least had failed to have proper regard to, the distress of T in relation to the contact given the grave allegations of abuse, without seeking to investigate, or allow time for a further investigation of, the reasons for her distress. The Judge had dismissed the Local Authority's plan to undertake further work with T to understand why she was "adamant" that she did not want to see her mother, and why she referred to her as "naughty".

25. The mother, through Ms Burnell, initially contended that the Judge was right to hold the Local Authority to its agreement, expressed in the recital to the 27 February 2024 order. During the hearing, she realistically accepted (a) that the Local Authority entered into the agreement on 27 February 2024 in good faith; (b) that the circumstances changed following the agreement, and (c) that the recital containing the contact provision was not enforceable as if it was an order. Further, Ms Burnell rightly conceded that once the Local Authority's plan for contact had deviated from the agreement recorded in the 27 February 2024 order, her client could have made an application for defined contact under section 34(3) CA 1989, but she did not do so.

26. Ms Burnell acknowledged that in the pre-hearing discussions on 22 March 2024, the mother had accepted that her contact should continue to be by way of videocalls for the time being; the point of difference between the mother and the Local Authority had been as to frequency given that the mother wished to see T twice per week, whereas the Local Authority was proposing once per week. During the hearing, perhaps buoyed by the Judge's remarks, the mother's position changed, and she

sought immediate direct contact. At the appeal hearing before us, the mother's position had reverted to an acceptance that the contact should continue to take place by videocall for the time being, although she wishes the Local Authority to plan for direct contact.

27. As to the ruling itself and the Judge's reasoning, Ms Burnell accepted that the Judge was 'confused' about the existence or status of the section 34(4) CA 1989 application, and had not appreciated when the hearing began that the issue between the parties was as to the frequency of videocall contact rather than the form of the contact. Ms Burnell further conceded that, in making his ruling on contact the Judge's evaluation of E's welfare was, at best, 'brief'.

28. The Children's Guardian supported the Local Authority in its appeal. Ms Edmunds ably argued that the Judge was wrong to treat the 27 February 2024 recital as to contact as an enforceable order. She contended that the Judge was further wrong to compel direct contact in the face of unanimous professional opposition without hearing any oral evidence or full argument. She argued that T's welfare required a careful assessment, and she pointed to nothing in the ruling which indicated how the Judge had actually assessed welfare, particularly in these complex circumstances; the ruling contains no reference to any welfare checklist factors (section 1(3) CA 1989). Ms Edmunds contended that at the hearing the Judge had become fixed on the notion that the Local Authority had disobeyed an earlier 'order', and that his subsequent decision-making was contaminated by this; the upshot was a confused outcome and an order for direct contact which compromised T's welfare.

The statutory framework

29. I turn briefly to address the statutory duties on this Local Authority in respect of contact, which arose in respect of T when she was first accommodated with her maternal great aunt in January 2024. Schedule 2 para.15 CA 1989 provides as follows:

> "(1) Where a child is being looked after by a local authority, the authority shall, unless it is not reasonably practicable or consistent with his welfare, endeavour to promote contact between the child and—
>
> (a) his parents;
>
> (b) any person who is not a parent of his but who has parental responsibility for him; and
>
> (c) any relative, friend or other person connected with him."

30. A child is being 'looked after' by a local authority if s/he is in their care by reason of a care order or is being provided with accommodation under section 20 of the CA 1989 for more than 24 hours with the agreement of the parents, or of the child if s/he is aged 16 or over (section 22(1) and (2) of the 1989 Act).

31. The statutory contact regime in public law proceedings is contained in section 34 CA 1989. I summarise those parts of the section (and where relevant associated sections) which are relevant to this appeal:

    i) The local authority is under a duty to allow the child reasonable contact with his parents (section 34(1) CA 1989). This duty is of course buttressed by the general duty set out in Schedule 2 para.15 (above), which applies "unless it is not reasonably practicable or consistent with his welfare";

    ii) The Local Authority, the child, or the parent may apply to the court for orders regulating contact whereupon the court "may make such order as it considers appropriate with respect to the contact which is to be allowed between the child and [that person]/[any named person]" (section 34(2)/(3) CA 1989). When making such an order, the child's welfare is its paramount consideration (section 1(1) CA 1989); the court must have regard to the welfare checklist (section 1(3) CA 1989) and it must not make any order unless it would be better for the child than making no order at all (section 1(5) CA 1989);

    iii) The authority may make an application to the court (as it did here) for authorisation to "to refuse to allow contact between the child and any person" (one of those identified by statute) and "named in the order" (section 34(4) CA 1989);

    iv) When making a care order or interim care order the court may make a contact order even if no application has been made, if it takes the view that an order should be made (section 34(5) CA 1989);

    v) In an urgent case, section 34(6) CA 1989 gives a local authority the power to refuse to allow contact for up to seven days which would otherwise be required if "they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare".

Discussion

32. Decisions about contact between a child and his or her parents, particularly those taken at an interim stage of public or private law proceedings when the evidence is necessarily incomplete, are some of the most difficult which Family Court judges are required to make. The challenge is all the greater when the Judge, as here, is working under pressure of time. While the CA 1989 (and where relevant the Adoption and Children Act 2002) provide the relevant statutory framework for such decisions, and while caselaw yields much useful guidance, each case is highly fact-specific. Each child is an individual, with individual needs, and individual circumstances. At an interim hearing, the relevant welfare factors are often not capable of being fully understood (given the limited evidence available, as here), and are often nuanced and finely balanced. Judicial decision-making in relation to contact at every stage of the process and in each and every case demands a careful and conscientious evaluation; the statement that contact "must not be allowed to destabilise or endanger the arrangements for the child" (per Butler Sloss LJ, as she then was, in *Re B (Care: Contact: Local Authority's plans)* [1993] 1 FLR 543 at 551) retains its unimpeachable authority.

33. At the hearing on 22 March 2024, the Judge accepted that he had been 'very concerned' in February 2024 by the Local Authority's failure to facilitate any contact in the period immediately following E's removal from her mother. When he discovered in March 2024 that the contact had not followed the 'roadmap' agreed at court following the 27 February 2024 hearing, he appeared to treat this simply as a case of 'non-compliance' by the Local Authority which required immediate implementation; he did not ostensibly see this as a reason to pause and reflect on whether the earlier agreement between the parties truly met T's needs. I agree with Ms Edmunds that the Judge's subsequent decision-making was to a significant degree contaminated by his view that the Local Authority had apparently failed to comply with his 'order'.

34. The Judge's ruling, which I have reproduced above, is I regret fundamentally flawed, as much for what the Judge does include within it (see §35-§36 below), as for what he omits to address (see §37-§39 below).

35. The Judge's 'first point' ("an application should have been made to court": see §19 above) plainly falls away given that the Local Authority had indeed made an application in relation to contact. Although the Judge had not located the application form at the outset of the hearing, he should have been alerted to the existence of it by the social work statement (which he had read) given that this had been explicitly prepared in support of "an application to prevent face to face family time". In any event, on the facts it is difficult to see how the Judge could legitimately go on to find that there had "not been a significant change of circumstances" since he made the 27 February 2024 order, because that order had been made at a time when T had not seen her mother for six weeks; in the intervening period, contact had taken place on three occasions and had been professionally assessed as distressing to her. This was, on any view, a 'significant change' in T's circumstances.

36. The ruling is inherently contradictory in raising a question mark about T's distress at contact ("if we get to the stage…"), while also contemplating the need to "get to the bottom" of her distress; he separately appeared to find that T is indeed "very distressed" by the contact which has taken "a lot of effort to achieve". His proposal for 'close' or 'heavy' supervision of contact failed to appreciate that the risk (which had been highlighted by Mr Heaney in his 'Legal Framework' document) was, in this context and at this stage, of emotional harm to T by the imposition of direct contact, not physical or sexual harm. The Judge proposed that the matter be restored to court if the social worker formed the view that T was suffering "adverse trauma" (sic.) through contact with her mother, little appreciating that this was in fact the stage which the Local Authority was asserting had already been reached in this case, and the very basis on which the Local Authority had issued its section 34(4) CA 1989 application.

37. What does the ruling not deal with? It is striking that the Judge proceeded to determine the issue of interim contact between T and her mother without any, or any meaningful consideration of T's current welfare. There is nothing in the transcript to show that the Judge undertook any kind of reasoned analysis of the harm or the risk of harm (section 1(3)(e) CA 1989) which would be caused by imposing direct contact on T at this stage in the face of her firm resistance; he was of the mistaken belief that the Local Authority had based its unwillingness to advance on its roadmap to direct contact solely on account of "the word of a very young child". Just as in the case of

Re A [2013] EWCA Civ 543, the Judge failed to explain sufficiently or at all why it was that he felt it appropriate to act by imposing direct contact before acquiring a proper understanding of T's resistance to contact with her mother. In those circumstances, it seems to me that his decision was at best premature. That the Judge referenced that it was the "second time today" that he had "come across" a local authority presenting similar facts and similar proposals legitimately underscores Mr Heaney's criticism of the ruling that it did not consider T's circumstances individually.

38. The Judge appears to have paid little if any attention to T's emotional needs (section 1(3)(b) ibid.), appearing to accept that the "high emotions of a child" were inevitably engaged in being "forced" into contact; he surprisingly suggested in this context that it would be the social worker facilitating contact who would "suffer". He did not address the 'capability' of the mother to meet T's needs in direct contact (section 1(3)(f) ibid.), particularly given the questions raised about her engagement with T during the three videocalls. While the Judge acknowledged the many reasons which may exist for T's resistance to contact, and for describing her mother as 'naughty', he failed to give sufficient weight as relevant 'background' (section 1(3)(d) ibid.) to the alleged abuse of T by the mother and the admitted abuse of T by Mr A.

39. While I note that in the final exchanges at the hearing the Judge made reference to contact being "for the benefit of the child", upon whom it was necessary to "focus" (see §22 above), nowhere in the main discussions and/or more importantly in his ruling on the contact issue, did the Judge indicate that he was treating as pre-eminent T's welfare in the decision-making.

40. Thus, for the reasons which I have set out in §32-§39 above, the Judge's direction that the Local Authority should facilitate interim direct contact between T and her mother at this stage was, in my judgment, wrong, and cannot stand.

41. It follows that it is no longer necessary for the disposal of this appeal to determine whether the Judge was also wrong to elevate the recital containing the contact provisions in the 27 February 2024 order to the status of an enforceable order, with which the Local Authority had not complied. The arguments arose because at an early stage of the hearing the Judge had observed:

> "… the Court of Appeal said very clearly that recordings are part of the order, it's just a way of expressing what the Court want to happen, so that was agreed and it was ordered …".

During the hearing, the Judge repeatedly described the provision for contact in the 27 February 2024 order as if it was indeed a court 'order':

> "… the Local Authority has not complied with the order … an order has been made for contact … The Court has made an order that contact take place three times a week…".

42. Counsel before us could not identify the decision of this court to which the Judge had referred, nor did we recognise his reference. Although we were referred to *BSA v NVT* [2020] EWHC 2906 (Fam) as apparent authority for the enforceability of

recitals, we paid no regard to it having regard to paragraphs 6.1 and 6.2 of the Practice Direction: Citation of Authorities [2001] 1 WLR 1001 (and see the rubric at the head of the judgment itself). No other authority cited to us (including *X v Y* [2019] EWHC 1713 (Fam), and *H v H* [1993] 2 FLR 35) convincingly demonstrated that the Judge was right to regard the recitals as enforceable as if they were free-standing court orders.

43. But reference to this part of the case cannot pass without remarking on the striking feature of the two case management orders which we have reviewed in this appeal, namely the disproportionate number of highly discursive recitals which have adorned each of them. The orders are consequently unwieldy and difficult to navigate. They offend in many ways against the President's Memorandum on 'Drafting Orders' (November 2021) and the 'House Rules' which support the Standard Family Orders which were re-issued (with the authority of the President of the Family Division) by Mr Justice Peel in May 2023.

44. Given the dispute in this appeal about the use and import of recitals, and the enforceability (or otherwise) of them, and given the Judge's mistaken belief that the key contact provisions were actually 'orders' (or treated as such), it may be helpful to highlight here an extract from the 'House Rules' (May 2023) to avoid confusion in the future:

> "[3] Recitals in a children order shall appear at the end of the order. Recitals must only record necessary information, drafted in as short and neutral a manner as possible. They should not record what happened in the hearing and should be limited to essential background matters which are not part of the body of the order. Any purported views of the court which did not form part of the court's decision should not be recited. The recording of a party's position before, during, or after the hearing as a recital should cease unless the standard order template requires such information.
>
> [9] … Where possible, and in any event as provided in the standard order templates, recitals in children cases should appear in a schedule to the order."

45. Finally, I am of the view that the Judge was not in fact wrong to adjourn the application for an order under section 34(4) CA 1989. As the Local Authority had merely wished to 'restrict' contact in the interim to indirect contact (see §14 above), it is arguable that it should more appropriately have issued an application under section 34(2) CA 1989. In any event, as it was no part of the plan of the Local Authority to refuse contact between T and her mother at this stage, and did not intend to implement the power afforded to it under section 34(4) CA 1989 for the foreseeable future, it would have been premature for the Judge to accede to the application: *Re S (Care: Parental Contact)* [2005] 1 FLR 469, and *Re L (Sexual Abuse)* [1996] 1 FLR 116 at p.127.

Lady Justice Nicola Davies

46. I agree.

Lady Justice King

47. I also agree.