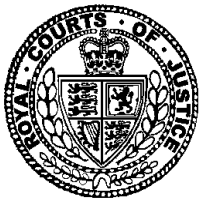

Neutral Citation Number: **[2021] EWHC 812 (Fam)**

Case No: **FA2021-000010**

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 11/03/21

Before :

MR JUSTICE WILLIAMS

- -

Between :

JB	**Applicant**
- and -	
SW	**Respondent**

- -

- -

Ms Reed, (Pro Bono via **Advocate**) for the **Applicant**

Ms Hudson (instructed by Preston Redman) for the **Respondent**

Hearing date: 9 March 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE WILLIAMS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Williams J :

1. This is my judgment on the appellant's appeal against an occupation order under section 33 Family Law act 1996 made by Recorder Willetts at the conclusion of a one-day hearing on 17 November 2020. The order was made in favour of the respondent and was due to take effect by 4 PM on 12 January 2021. On 7 January 2021 HHJ Dancey stayed the order on the basis that the appellant indicated his intention to seek permission to appeal out of time and having seen supporting material from children's services concerning the impact of the occupation order on the appellant's cohabitees children. The appellant's notice was filed on 11 January 2021 and Lieven J further stayed the order. On 2 February 2021 Lieven J granted permission to appeal. In her order she gave her reasons as follows;

   It is arguable that the judge was wrong in his assessment of the impact of making the order on the children in occupation of the property and on the prospects of [the respondent] being able to remain in the property if she regained occupation.

2. Lieven J gave directions listing the appeal for ½ day hearing, to include as a preliminary issue the determination of whether evidence obtained after Recorder Willetts decision should be considered by the appeal court.

3. The original grounds of appeal filed with the appellant's notice drafted by the appellant himself. They are as follows;

   1. At the time of the hearing I did not have all the witness statements to hand into the judge.
   2. The Judge did not think realistically about the effects of making two adults and two children homeless especially with Covid 19 and the lockdowns.
   3. The Judge was only going on hearsay from SW and her solicitor about her getting her children back there was no physical evidence that she was getting them back to the immediate effect of obtaining this property.
   4. I feel that the whole decision was based on hearsay and that there was no evidence from Miss Woodward or her solicitor and the Judge did not think about SW's suitability for this house at the time because it is just SW and her current partner moving in to a three bedroom house.
   5. In the eyes of the professional that have given witness statements SW is not likely to be getting her children back in the near future and that SW would be under occupying this property in the meantime while she is in the court battles to fight for her children back.
   6. The Judge made this decision based on SW's solicitor saying they can only do the lengthy court battles to apply for the children back if she was to have this house, this does not guarantee she would win the court battles as you can see from the Social Care teams statement.

4. The amended Grounds of appeal drafted by Ms Reed were as follows

   GROUNDS
   1. The Learned Judge wrongly stated the legal test (judgment paras 8-12) and failed to apply it correctly or at all. In particular;
   a. Having correctly identified that the children occupying the property were

'relevant children' for the purposes of the Act (pa 32) the Learned Judge failed to properly consider the effect of any order upon the health, safety and wellbeing of the relevant children (pa 40), wrongly applying a significant harm test (pa 42).
b. The Learned Judge's (unreasoned) conclusion that he should make the order because the Respondent had the greater housing need was neither supported by the evidence, and nor was it the correct legal test (pa 43).

2. The Learned Judge erred in his approach to the evidence;
a. In relation to the burden of proof;
b. By attaching weight or too much weight to irrelevant or immaterial factors; c. Failing to consider relevant evidence;
d. By misstating the evidence available to him;
e. By making impermissible (and wrong) assumptions relating to matters in respect of which there was no direct evidence (and which the new evidence demonstrates were wrong).

3. The following procedural errors in combination gave rise to unfairness:
a. The matter was wrongly treated as 'urgent' throughout, dissuading the Appellant, a litigant in person suffering from anxiety and depression, from seeking more time to obtain evidence in support.
b. The court made directions requiring the Appellant (who was the Respondent to the application) to file his evidence prior to the Applicant having filed any evidence in support of an occupation order and before he knew what case he had to meet.
c. It is unclear from the judgment whether the judge had or had considered the Appellant's second statement, which had been properly filed and served but had arrived too late to include in the bundle.
d. The Appellant's partner was wrongly excluded from the proceedings / hearing.

5. The appeal came before me on 9 March 2021. By that time the appellant had secured pro bono counsel, Ms Reed, through Advocate (formerly the bar pro bono unit)), Ms Reed had prepared amended Grounds of appeal and a skeleton argument. Ms Hudson, counsel was instructed on behalf of the respondent. She had filed a response to the grounds and skeleton submitted by the appellant when a litigant in person. She filed a further position statement addressing matters raised in Ms Reed's skeleton and amended Grounds. The respondent opposed the appeal.

6. I thank both counsel for the assistance they have provided to the court in their written documents and in their concise and focused oral submissions. I would particularly wish to express my thanks to Ms Reed for agreeing to present the case on a pro bono basis. Although the appellant himself had provided the raw materials for what might be described as the core of the appeal Ms Reed's input converted those raw materials into an end product that was compelling.

7. At the commencement of the hearing Ms Hudson made an application to adjourn the hearing in order to obtain a full transcript of the hearing before the Recorder. Ms Hudson submitted that a number of assertions made in the appellant's case could only be clarified by the obtaining of a transcript. In particular Ms Hudson referred to the appellant's contention that the hearing had been procedurally unfair by reason of the

alleged exclusion of the appellant's cohabitees from the hearing and the alleged absence of any questioning of the respondent by either the appellant or the judge during the hearing. Ms Reed opposed the application on the basis that no request had been made earlier by the respondent, the matters raised were capable of being answered by the respondent herself and there was no respondent's notice seeking to rely on other matters. I refused the application for an adjournment on the basis that the matters identified in support of the suggested need for a full transcript did not appear to be sufficiently important in the context of the appeal overall to require the transcript particularly having regard to the overriding objective to determine cases justly and bearing in mind the additional delay that would be caused and the additional court time that would have to be made available for an adjourned hearing. I indicated that were matters to develop in the course of the appeal itself that indicated the transcript bore a greater relevance than appeared at the outset I would if necessary, revisit the issue.

8. Ms Reed then turned her attention to the application to adduce fresh evidence. A witness statement from the appellant had been filed setting out the circumstances in which the additional evidence came to be put before the court. The evidence that the appellant sought to rely upon consisted of the following;

   i) A letter from the children's head teacher identifying their vulnerability and the potentially very damaging impact on the children of having to move home and school,

   ii) A statement from the cohabitee's allocated social worker outlining the circumstances in which the cohabitee and her children came to move in with the appellant (this I believe was handed up to the Recorder during the course of the hearing).

   iii) An email from the appellant's housing officer supporting the appellant's occupation of the property and identifying that were the respondent to return to the property there would be an issue of under occupation which would lead to the possibility of rent arrears accruing

   iv) An email from children's services confirming that there was no plan to rehabilitate any of the children to the care of the respondent and that housing issues were not the relevant issue.

   v) An email from a housing officer confirming that were the appellant's cohabitee and children to be excluded from the home they would likely enter bed and breakfast accommodation in another town for a period of 56 days or more.

9. She submitted that it met the attenuated Ladd-v-Marshall test because,

   i) The appellant set out in his statement that he had sought information from his cohabitees social worker prior to the hearing to the hearing but it was only on 4 December 2020 that the social worker sent all of the documents that now comprise the additional evidence he seeks to rely on and he had not as a litigant in person felt able to seek an adjournment.

   ii) The new evidence was obviously relevant and would have an important influence on the outcome of the case because it went to issues which were

material to the Recorder's decision in relation to the consequences for the children, the reality of the likely position on rehousing the appellant and the likely over housing of the respondent and demonstrated that assumptions made were probably wrong.

iii) The evidence is credible being provided by local authority or other professionals who are independent and well-placed to give evidence of those matters.

10. Ms Hudson opposed the application. Her principal argument was that the appellant had had ample opportunity to prepare for the hearing and that he had not asked for an adjournment and that he should not now be allowed a second bite of the cherry to re-run arguments but with more recently acquired evidence particularly when the Recorder had heard extensive oral evidence.

11. FPR 30.12 (2) provides that unless it orders otherwise, the appeal court will not receive either oral evidence or evidence which was not before the lower court. This is subject to the overriding objective and the factors identified in *Ladd-v- Marshall [1954] 1 WLR 1489*, which the Court of Appeal have confirmed (see *Gillingham-v- Gillingham [2001] EWCA Civ 906*) remain relevant. Thus, the discretion to admit fresh evidence would be exercisable if:

i) The evidence could not have been obtained with reasonable diligence for use at the trial;

ii) The evidence was such that if given it would probably have an important influence on the result of the case, though it need not be decisive; and

iii) The evidence was credible.

This all being subject to the overriding objective to deal with the case justly, including proportionately. In family cases relating to the welfare of children the appellate courts have recognised (see for instance Re B (Minors) (Custody) [1991] 1 FLR 137) the application of the criteria may be somewhat relaxed.

12. It seems incontrovertible that the evidence which the appellant seeks to rely on meets the second two limbs of the Ladd v Marshall test. The Recorder concluded that the impact on the children would be no more than the instability which usually accompanies a change of home, that the appellant, his cohabitee and the children would probably be rehoused in broadly similar accommodation to that which they were to be excluded from given they would be in priority need and that the mother would then be appropriately housed and with a platform to potentially make an application for the rehabilitation of her children. The effect of the evidence was to undermine if not entirely to dispel each of those conclusions which were fundamental to the evaluation that the Recorder undertook.

13. The real area of contention is whether the evidence could have been obtained with reasonable diligence for use at the trial. The main documents of significance all clearly postdate the hearing and the appellant statement and emails in support tend to indicate that they were received via his cohabitees social worker in the circumstances. When directions were given for the hearing of the application for an occupation order the case management directions required the appellant to respond to it and to file a statement

setting out why he sought to remain in the property. This seems to have been on the basis that the respondent had filed a statement in support of a non-molestation order, and it was perhaps assumed that this document set out the respondent's case in relation to an occupation order also. However, this assumption was not correct. The non-molestation order statement only dealt with issues of conduct. There was therefore no framework within the legally represented respondent's statement to which the appellant could have responded. If the statement in support of the application had been based on the criteria identified in section 33(6) and (7) FLA 1996 this might have alerted the appellant to the need to address those matters. The order provided for the respondent to file a statement further addressing why she sought to return to the property. At the pre-trial review on 22 October the order recites that the appellant might wish to familiarise himself with section 33 FLA 1996. However, whilst the order indicated the potential importance of documents relating to the care order in respect of the party's five children in care and the availability of the appellant's cohabitees former accommodation it did not identify the importance of any documents relevant to the impact on the appellant's cohabitees children, or the issues of the appellant's ability to be rehoused. It appears that the appellant made some attempt to obtain evidence relating to his cohabitees former accommodation as that forms the content of the social workers email which was received prior to the court hearing and which was put before the Recorder on 17 November. Whilst the recital to the order did direct the appellant to section 33 of the Family Law Act 1996 for the purposes of representing himself there is nothing in the orders or in the respondent's statements which would have focused the appellant's preparations on the critical importance of obtaining evidence relevant to the factors contained in sections 33(6)(a)-(d) or section 33(7). It is clear from the judgment that the Recorder identified the very limited evidence that was before him; he referred to the "paucity" of evidence and this applied both to the appellant's and the respondent's evidence. This suggests that neither had sufficient time to fully prepare their cases; for the respondent even with the benefit of legal representation. Whilst I accept that being a litigant in person does not absolve a party from compliance with the rules and the need to approach proceedings with great care and diligence an issue as serious as occupation of one's home I also have to recognise that litigants in person are often ill-equipped to comprehend precisely what the court will need in terms of evidence or submissions. This is so whether or not they suffer from any form of condition which might further impact on their capacity to prepare for court cases of this sort. In such cases it is very often helpful to litigants in person and the court itself for represented parties and the court to draft statements and case management orders in such a way as to draw attention to the critical factors which the court will be considering. In this case (as it transpired) where the court did draw attention to one matter the appellant sought to address it and obtained information which demonstrated that his cohabitees former home would not be available to her or her children to re-occupy. True it is that the appellant could have asked the court for an adjournment, but many individuals might work on the assumption that where a date has been given that is the date on which a decision is taken. An appeal based on fresh evidence is emphatically not an opportunity for the dilatory or lazy to attempt to re-argue their case before a different judge. Ultimately, and particularly given the importance of the issue at the heart of this appeal which is the occupation of a family home and having regard to all the circumstances in the preparations for the hearing that I have set out before I am satisfied that the evidence which now exists could not have been obtained with due diligence by **this** appellant for the hearing on 17 November 2020. I therefore will allow the appellant to rely on that evidence.

Appeals: the approach

14. FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for procedural irregularity.

15. The court may conclude a decision is wrong or procedurally unjust where;

    a. An error of law has been made,

    b. A conclusion on the facts which was not open to the judge on the evidence has been reached *Royal Bank of Scotland v Carlyle* [2015] UKSC 13, 2015 SC (UKSC) 93

    c. The judge has clearly failed to give due weight to some very significant matter, or has clearly given undue weight to some matter, *B-v-B (Residence Orders: Reasons for Decision) [1997] 2 FLR 602.*

    d. A process has been adopted which is procedurally irregular and unfair to an extent that it renders the decision unjust: (has there been an unseemly rush to judgment) Re S-W (Care Proceedings: Case Management Hearing) - [2015] 2 FLR 136

    e. A discretion has been exercised in a way which was outside the parameters within which reasonable disagreement is possible; G v G (Minors: Custody Appeal) [1985] FLR 894,

16. In Re F (Children) [2016] EWCA Civ 546 Munby P summarised an approach to appeals,

> *22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The Judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."*
>
> *23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):*
>
> > *"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions, and which matters he should take into account. This is*

> *particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*
>
> *It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".*

17. The court must give a decision and explain the reasons for it so that the parties and the appeal judge may properly understand the basis of the decision. The trial court does not have to deal with every point raised and does not need to set out the law in detail provided it is evident from the decision that all relevant factors have been considered.

Analysis of the Grounds

18. Having decided to admit the evidence which the appellant seeks to rely it seems to me that aspects of the appellant's original grounds of appeal and indeed aspects of Ms Reed's amended grounds recede in importance. Ms Reed's ground one focused on whether the Recorder correctly applied to the tests set out in sections 33 (6) & (7) Family Law Act 1996. I observe that this was an ex-tempore judgment and thus some care should be taken by appellate courts in being tempted by narrow textual analysis to conclude that the law has wrongly been applied. However I do not for the purposes of the disposal of this appeal I do not need to explore the arguments as to how the Recorder expressed himself in setting out the legal test, how he expressed himself in applying it and evaluating whether or not there was merit in the submission that the test was either wrongly stated or incorrectly applied. Ms Reed is of course right in her skeleton argument to observe that the approach endorsed by the appellate court in Chalmers v Johns was firstly to undertake the balance of harm test set out in section 33 (7) FLA 1996 as the satisfaction of that section might lead to a mandatory order thus rendering the section 33 (6) exercise irrelevant. If the balance of harm test did not lead to a mandatory order, then the court would go on to consider the section 33 (6) evaluation.

19. Likewise, the contents of ground two in which Ms Reed argued that the decision was unjust by reason of serious procedural irregularity do not require further exploration. Self-evidently not all flaws in the preparation for or conduct of a hearing will properly be characterised as procedural irregularities, still less serious ones which have unfair consequences. I express no view on whether the errors identified would be characterised as procedural irregularities nor on whether they rendered the decision unfair.

20. The heart of this appeal relates to the application of the factors identified in section 33(6) FLA 1996, the basis of the Recorder's decision on the material available then and the relevance of the fresh evidence to those.

33 Occupation orders where applicant has estate or interest etc or has home rights
(6) In deciding whether to exercise its powers under subsection (3) and (if so) in what manner, the court shall have regard to all the circumstances including –

(a) the housing needs and housing resources of each of the parties and of any relevant child;

(b) the financial resources of each of the parties;

(c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3), on the health, safety or well-being of the parties and of any relevant child; and

(d) the conduct of the parties in relation to each other and otherwise.

21. In his judgment the Recorder noted the paucity of the evidence "*adduced by both parties to substantiate the factors that are set out in the statute"*. It was clearly given immediately following the conclusion of the evidence and submissions. At the commencement of his judgment he identified that it was "*an incredibly finely balanced application*". The judge summarises the background, refers to the law and sets out a summary of the oral and written evidence that was available to him He reached the following conclusions,

i) The driving force for the application is for the respondent to proceed to apply for a discharge of the care orders although it is important to note that it is raised so soon after the final order.

ii) The cohabitee's children were relevant to children for the purposes of the act.

iii) The appellant, his cohabitee and her children would be a priority whereas the respondent would not be a priority.

iv) The domestic abuse the respondent alleged did not amount to more than the sort of behaviour that one might see in the breakdown of a relationship and did not satisfy the significant harm component of section 33 (7)

v) The appellant's cohabitee would have been able to apply for housing and had a priority had she not moved in with the appellant.

vi) Both the appellant and respondent had broadly similar needs and resources if one took the respondent on his own.

vii) Both parties have health issues, and both are living in properties at present and so have their housing needs met.

viii) If the occupation orders were made his cohabitee and her children would have to move which would cause "*in effect, instability*". From the email he had seen from the social worker she did not go on to say any more than instability or "*that it would cause any more disruption than I suspect any family would have to endure if they had to move home'*

ix) Conduct of the parties does not stand out as a feature in the case.

x) *I stress again the absence of corroborative evidence, corroborating evidence that could have been obtained, supporting evidence, statements could have been more structured to reflect what the actual considerations are that the court has to undertake.*

xi) It was unwise of the appellant to allow his cohabitee to move in in the circumstances.

xii) The order made will make no difference to the children in care. It is important to have regard to the purpose of the family home. It was intended as a home for the parties and their respective children. It cannot be right that the applicant is forever excluded from her right of occupation when the[appellant] takes in a new partner and her family.

xiii) An occupation order would cause instability to the cohabitee's children and that would to some extent be unsettling but that is not significant harm.

xiv) The respondent has established on the balance of probabilities a housing need greater than that of the respondent as her accommodation is far from ideal and her health may as a result be affected together with her somewhat precarious position around her new partner.

xv) The appellant, his cohabitee and her children would be a priority to be rehoused. It would be far easier for the cohabitees to find alternative accommodation than the respondent.

xvi) The respondent is more likely to apply to discharge the care order in the immediate future and if successful it would permit some of the children to return home. However, the case turns more on priority housing needs than those considerations.

22. It is plain from the judgment and from the summary of the conclusions the Recorder reached that issues relating to the impact on the relevant children, and the position as to rehousing weighed very heavily in his decision to make the occupation order. It is also very clear that he regarded the issue as very finely balanced and that he acknowledged that his ability to make a sound decision was to some extent hampered by the absence of corroborating evidence, supporting evidence or attention to the statutory factors.

23. Ms Hudson in her written submissions emphasised that the Recorder had the benefit of hearing from the parties in giving oral evidence and that his conclusions as to the respondent's greater housing need could not be impeached. She emphasised that he weighed up the relevant factors on the basis of the evidence he had, and that he took account of the impact on the cohabitee's children. She also emphasised that the Recorder placed very little weight on the possibility of the respondent securing the return of the children from care. In relation to the possibility of the respondent being unable to remain in occupation Ms Hudson notes that this was not put before the Recorder. She submitted that it would be wrong for this court to substitute it's own view for that which was reached by the Recorder, who was tasked with that function based

on the evidence before him. In her oral submissions Ms Hudson realistically acknowledged that following on from my decision to admit the fresh evidence it was difficult to effectively argue the appeal and she focused her submissions on the need for the case to be remitted for further hearing if the appeal was allowed.

24. Ms Reed submitted that were the appeal allowed that I should substitute my own decision for that of the Recorder on the basis that the evidence contained within the fresh evidence was so compelling that the only realistic outcome of a rehearing was the refusal of the application.

25. Having regard to the contents of the letter from the relevant children's headmaster and the extent of his concern expressed therein as to the impact on the children of a further move and a change of school it seems inevitable that the Recorder's conclusion as to the impact on the children would have been different had that letter been before him. The Recorder concluded that the impact on those children would be limited to the normal instability arising from a loss of accommodation. However, the evidence of the headmaster places the impact at a much more significant level than that having regard to their experiences to date. Given that the decision was, as the Recorder emphasised, a finely balanced one that of itself would have been likely to tilt the balance.

26. In addition the contents of the letters from the local authority which confirm the status that the appellant, his cohabitee and children would have in terms of rehousing, the likelihood of their being placed in bed-and-breakfast accommodation and the consequent need for the relevant children to change schools strongly suggests that the Recorder's conclusions as to the consequences for the appellant and his family unit undervalued the impact of an occupation order. Although it is not explicit, it seems implicit that the Recorder concluded that they would be rehoused in rented accommodation rather than relocated to a different town in bed-and-breakfast accommodation.

27. Finally, although Ms Hudson is right that the Recorder placed very little weight on the possible return of the children in care to the respondent mother's care it was a factor, albeit of modest weight. However, the letter from the housing association indicates that the respondent would be regarded as under occupying a three bedroom accommodation and this would have consequences in terms of the benefits she would receive in respect of it with the consequent risk of arrears accruing and the accommodation being lost. Had the Recorder regarded the decision overall as clear this may have been an unimportant element, but where the decision was regarded as very finely balanced even this might have had the potential to tip the balance the other way.

28. Taken in combination the fresh evidence clearly has the potential to have a considerable, indeed potentially determining impact on the respondent's application for an occupation order.

29. I am therefore satisfied that the decision reached was wrong. However, this is not a criticism of the Recorder because he did not have the material before him which would have enabled him to reach another decision. On the material before him many Judges would have reached the same conclusion. Many might have reached an opposite conclusion. Some might have adjourned on the basis that they did not feel the parties had equipped them to take any decision. However, this is merely a reflection of the fact that judges are human beings who are capable of reaching quite different decisions in

the same situations none of which could necessarily be said to be wrong. In many cases there will be a range of outcomes within the parameters of legitimate judicial decision-making. Hence the appellate courts allow a wide latitude to 1st instance judges in terms of case management, in terms of their evaluation of competing factors and in their exercise of discretion. However, in cases such as this where the court has concluded that evidence secured after the determination should be admitted the decision has to be based on the new evidential foundation which exists. On the evidential foundation is now before the court it is clear to me that the decision was wrong. I have little doubt that Recorder Willetts would say the same. I will therefore allow the appeal on the basis that the Recorder's evaluation of the competing factors has been demonstrated to be wrong by reason of the availability of the fresh evidence. I will therefore set aside the occupation order.

30. Having set aside the order, should this court substitute its own decision or remit the matter for further hearing? It seems to me inevitable that the matter must be remitted. It is not the function of the appellate court, save in rare circumstances, to undertake its own evaluation of the totality of the evidence and to make orders. In any event the parties are now some four months on from where they were in November and the evaluation of the evidence base that which exists to date including the fresh evidence and any updating evidence from the parties as to the factors relevant to the section 33 (6) and 33 (7) exercises will need to be considered. The position in relation to the respondent's housing situation and her efforts to secure the return of the care of her children in care will also need to be considered. This might, although need not necessarily, involve rehearing the evidence as to matters of conduct. I see no reason in this case why the matter could not be remitted to the Recorder for further consideration although it seems to me that who deals with the remitted application is a matter for the designated Family Judge based on the availability of judicial resources. I do not consider that there is any basis to exclude the Recorder from the pool of judges to whom the case might be remitted.

31. That is my judgment.