Neutral Citation Number: [2020] EWHC **2968** (Fam)

Case No: FA- 2020-00063 Re: Child

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2020

APPEAL FROM A FINAL DECISION OF HHJ HUGHES QC IN THE FAMILY COURT SITTING AT CENTRAL LONDON

Before :

MR JUSTICE WILLIAMS

- -

Between :

MGB	**Applicant**
- and -	
GT	**Respondent**

- -
- -

Both Parties Litigant in Person

Hearing dates: 5 October 2020

- -

JUDGMENT

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.

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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

Introduction

1. The court is concerned with two sisters: D (aged 11) and S (aged 9) in this long running private children matter.

2. This is an appeal by the Appellant Mother (the mother) against a decision of HHJ Hughes QC made on 10th March 2020 that the Respondent Father (the father) may arrange for the children to visit and stay with the Paternal Grandparents in the Ukraine from 18th July 2020 to 2nd August 2020 inclusive [C46]. Paragraph 3 of the order requires the mother to make the children available to the father for the holiday and a penal (rather than the usual warning) notice against the Appellant is attached. In the terminology of orders relating to children it is an order permitting the temporary removal of the children from the jurisdiction. Such orders may take effect as a specific issue orders under s.8 or under section 13(1)(b) Children Act 1989.

3. The Appellant asks that the order be varied to substitute Ukraine for the United Kingdom. I read this to mean that she seeks a variation to allow the paternal grandparents to have a holiday with the children within the jurisdiction i.e. England and Wales.

4. The date of the decision appealed is 10th March 2020. The Appellant's Notice was filed on 16th April 2020. It is therefore out of time by 16 days. This is explained by reference to the disruption caused by Covid-19. On 9th July 2020 Judd J granted permission to appeal and a stay. The reasons record that;

    a. The appeal has a realistic prospect of success. There has been a long history of acrimony between the parties in this case, and for one reason or another, the children are very reluctant to see their father.
    b. The order that the children should travel to the Ukraine for a holiday with the paternal grandparents appears to have been made although there was no application for it in advance of the hearing.
    c. It is not clear to what extent the emotional effect of the order upon the children had been considered, or what information the court had about the paternal grandparents.
    d. Although the date for the holiday will have passed before the appeal is heard, the principle of such a holiday, to be reviewed.

5. Relief from sanctions is not expressly given in the order granting permission to appeal however I will nevertheless assume it to be implicitly granted [C48]. That order required the father to file a skeleton argument by 31st July 2020.

6. The Respondent raises procedural irregularity in the service of the appeal documents. In his note for this hearing he says that the mother refused to provide him with a copy of the order of 9 July and that he only received it on 15 September. The original order allowed the father 22 days to file his skeleton argument. Receipt of the order on 15 September has allowed the father 20 days and he has filed a nine-page response

together with a copy of the order of 9 August, and other documents. He supplemented his criticism of the late service of the order, submitting that the mother was in breach of the August 2018 order and should be disbarred from pursuing an appeal and noted that the matter did not warrant being before a High Court Judge. I'm quite satisfied that the father has had an adequate opportunity to respond to the appeal; his written response is detailed and lengthy. I'm also quite satisfied that the mother is entitled to bring this appeal; not only is it unclear what order remains in force determining the child arrangements but in any event no order has been made determining that the mother is in contempt of court and should be debarred from making any applications. She is therefore entitled to appeal. An appeal from a Circuit Judge in the Family Court applies to a High Court Judge. The appeal is therefore been dealt with at the proper tier.

7. I have today heard oral submissions from both the mother and from the father. Both parties are litigants in person and communicating in a language which is not their first language, but both were very fluent in English. Both had filed lengthy written documents in English. The mother participated by telephone only. The father participated by audio and video.

8. At the conclusion of the hearing I informed the parties that I would allow the appeal, deliver a written judgment and remit the case to a Circuit Judge at the Central Family Court to determine the issues of child arrangements and temporary leave to remove. I also indicated that I would join the children as parties and appoint a Cafcass Guardian pursuant to FPR 16.2 and 16.4.

Background

9. There were previous proceedings in 2018 presided over by HHJ Meston QC (CN17P01042). This order is not in the bundle but is attached to the Respondent's skeleton argument. It ordered limited mid-week spending time and fortnightly Sunday contact. Starting with one overnight in March 2019 and two overnights from March 2020. Holidays were to be dealt with by agreement between the parties but by Summer 2020 the order recited that it was intended that the children should be spending 50% of the holidays with the father. Rather unusually the girls were to have contact separately [E17 para 6]. The mother applied for a variation in 2019. On an interim basis on 6th February 2020 the CAO was varied pending an urgent section 7 report and the commencement of staying contact was suspended. [C1]. At the review hearing on 18th March 2019 direct contact was suspended and replaced with daily skype [C3].

10. There was a review hearing on 17th May 2019 before HHJ Hughes QC. The issue of a trip to the Ukraine in Summer 2019 was aired. This social worker recommended the 'Parents in Dispute Programme' at the Tavistock [C8 line 24]. The Judge rejects the Respondent's request for a trip to Ukraine because "I do not think you are going to get the children to the airport at the moment…. She is not going to because she actually cannot forget about 8 March and she is so upset the police are not prosecuting and therefore all the other things you [the Respondent] have done" [C14 line 2]. It is clear that the position at that time was that the children were highly resistant to spending time with the father. The Judge declined to order any holiday with the father whether

in the Ukraine or Italy. The order which emerged from that hearing is not in the bundle, but it appears that apart from discharging local authority involvement the arrangements for the children to spend time with the father were left to the parents. The transcript of the hearing makes clear that the mother is supportive of undertaking work whilst the father is highly sceptical of the mother's motivation or the likely assistance that would be gained. The absence of an order is unfortunate for it led to uncertainty later, persisting to this day as to whether the August 2018 order had been varied or reinstated.

11. It appears that there was little direct contact thereafter [C37]. The matter came before Recorder Cooper on 19th September 2019 because HHJ Hughes QC was not available. The father sought the resumption of the arrangements set out in the order of August 2018 including overnight staying contact whilst the mother agreed visiting contact. Recorder Cooper provided for weekly visiting contact in the community [C38] and a further hearing was listed for 6th December 2019. The matter came before District Judge Duddridge on 6th December 2019 [C44]. This recorded that the child arrangements order of 9th August 2018 had broken down and that the children were unwilling to meet the father. The mother's case was that this was because of the father's past behaviour whilst the father said it was because of the mother's hostility towards him and his family generated by parental alienation by the mother. The District Judge recorded that the evidence showed the children's unwillingness to spend time with the father including D running away and showing signs of severe stress when visiting the father. The order also recorded that the parties had not returned to the Tavistock to enquire about family therapy; the father's position is that they had seen a doctor at the Tavistock in 2018 without success and that further therapy would not work. The order made was;
    a. For Cafcass to provide a short report addressing the issues of whether the children should be joined and what other steps were necessary to ensure their views were properly represented,
    b. Listing the matter for further hearing on 10th March with a time estimate of two hours
    c. For visiting contact and Skype contact.

12. It is clear from the papers that the parties did not attend further therapy at the Tavistock (it is unclear if any was undertaken) and the main reason appears to be the resistance of the Respondent [C43]. It is also clear from the papers that the relationship between the mother and father is highly conflicted and there are allegations recorded in the papers both of domestic abuse, referrals to the police and of the father handling the children roughly (at a minimum) or being physically abusive (at a maximum). During a s47 report D alleged that the Respondent had forcibly pushed her into a car and hit her with his fist [E6] and hung her upside down [E10]. She attended A&E on one occasion. The Respondent gives a description of the children refusing to see him in a chronology consistent with the date of the allegation of hitting [E10]. D is said to be clear and consistent in her account although the observed injuries were not consistent [E10]. The Respondent has admitted to pushing the children's faces into their food but explained it as a joke [E7]. The s47 report in the bundle references other C&F assessments where it is said the Respondent admitted to inappropriate chastisement [E9]. The Respondent did admit to punching the MGM in the stomach but says this was because she attempted to push him into moving traffic [E10]. The Respondent accepts throwing the salt but says he aimed it

past the Appellant rather than had at her [E11]. On 8th March 2019 the police were called by a member of the public who reported seeing the Respondent pick up D by her backpack, turn her upside down and suspend her in the air and seeing the Respondent pulling both children aggressive down the road [E19].

13. None of those allegations appear to have been determined. Nor does it appear that the order of August 2018 arose from a judgment which made any findings in relation to parental alienation or domestic abuse. The papers do not suggest that there has ever been a fact-finding hearing. The Appellant mother says she supportive of there being direct contact. The respondent father maintains that the mother is undermining his relationship with the children and alienating them from him. It appears agreed between the parties that the children become very distressed during direct contact, particularly D.

14. When the matter came before HHJ Hughes on 10th March 2020 the particular issue before the court was whether the children should be joined as parties to the applications. At that time only visiting contact was taking place. No application was before the court for an order of providing for the temporary removal of the children from the jurisdiction and no evidence had been filed in relation to that or any report from Cafcass filed. Whilst that issue had been canvassed before HH J Hughes QC the year before at no point was the issue ever identified as being listed for determination on 10 March or indeed even identified as an ongoing issue. The impression given by the orders in 2019 was that contact had become stuck and that a means needed to be identified to make progress.

The Hearing

15. At the commencement of the hearing the judge identifies the purpose of the hearing being to see whether a Guardian should be appointed for the children. The mother supported the appointment of the Guardian, the continuation of visiting contact for S and the identification of some way to deal with D and her contact. The father's position was to return to the structure of the August 2018 order although as he was no longer living in the U.K. his actual proposal was to have Skype contact four times a week and the children spend the entire summer holidays with him in the Ukraine and thereafter half of the school holidays. For reasons which are not entirely clear to me the Cafcass officer did not recommend the appointment of a 16.4 Guardian and did not consider there was any work Cafcass could do to try to rebuild the relationship; no mention is made of child contact interventions. The Cafcass Officer and Camden Social Workers were sworn and give evidence. During one Social Worker's evidence the Judge asks whether we go from here? In answer to that the social worker says that one thing which has not been tried is the fact of allowing the children to go to the Ukraine to spend time with the grandparents against whom no complaint was made. Somewhat surprisingly the social worker said that if it didn't work and if it gets very traumatic, they could always come back. [B27/31]. In response to this development the mother said that she might be able to discuss it with S but with D she would be very worried. The mothers concerns of whether the children would be returned were answered by the social worker saying that she was sure the paternal grandmother would not tolerate the children being abused or harmed and that the court had to have faith in her. In the course of the hearing the judge says the only way to find out what would happen would be to send them and see how they got on.

16. The mother's objections or reservations about due process are given little weight with the emphasis being on this appearing to be a solution which might break the deadlock. The mothers concerns whether the children would be returned, their well-being in the paternal grandparents household (the mother maintains that the paternal grandmother is not considered an equal) , their wishes and whether this was a fair process are all overridden in a momentum that built in favour of this solution to breaking the apparent log-jam. The mother suggested that the grandparents come to London to see the children for a week and if that went well that the children might then go to the Ukraine. The judge dismisses this on the basis that the mother would then raise an objection. The judge says that a decision will be made today and focuses on the unlikelihood of the possibility of the grandmother physically harming the children. She dismisses the possibility of emotional harm in inferring that there is no reason why the grandparents would do something which would emotionally harm the children. She does not consider the issue of the children having to do something so dramatically different from what they are used to, their unfamiliarity with the grandparents, their separation from the mother or the anxiety relating to that or the possibility of the children not being returned.

17. The Judge says that she "has taken all of the matters into account and has come to the conclusion that it would be in their best interests, both of them, to go to Ukraine for two weeks this summer and you may choose which two weeks they go. I have also considered it would be in their best interests of the grandmother could come for a period of time in May or June to London and spend time with them; that would be in their best interests as well." However, she also concludes that if the grandmother doesn't come the mother was still to send them to Ukraine. It emerges quite late on that the father might be living with the paternal grandparents and that it would be left to the paternal grandparents to decide how much time the children spent with the father whilst they were there.

The Law

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

19. 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,

20. 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):*
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> > *"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."*
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> *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".*

21. The authorities which deal with applications for temporary leave to remove children from the jurisdiction all make clear that they are ultimately paramount welfare decisions in which the court either must or should consider the factors set out in the welfare check-list. Although the majority of the jurisprudence focuses on non-Hague Convention countries the underlying principles also are relevant when dealing with Hague Convention countries. The jurisprudence all highlights the need to consider the magnitude of the risk of a breach of the order if permission is given, the magnitude of

the consequences if it occurs and the level of security that may be achieved by building in safeguards. In relation to Hague Child Abduction Convention countries there will always be a remedy of summary return pursuant to article 12 of the Convention. Those countries who are also signatories to the 1996 Hague Child Protection Convention might also provide further safeguards through the advance registration of an order or at worst the ability to apply to enforce an order. Thus in relation to Hague Convention countries the safeguards aspect of the three points is often easily answered and indeed the magnitude of the risk and the magnitude of the consequences may be substantially reduced as a result of the presence in the landscape of those remedies. However, that does not absolve the court of the responsibility to consider the evidence of whether there is a risk of nonreturn and the consequences of nonreturn alongside the security.

22. The authorities also make clear that a proper process must be undertaken before a decision is taken including the provision of evidence as to the Welfare Check-List and in particular the 3 issues of risk, consequences and safeguards.

GROUNDS

23. The Appellant advances seven grounds of appeal. I have had sight of both parties' skeleton arguments. Unfortunately, the Respondent's skeleton argument does not directly address the Appellant's grounds and is a repetition of the skeleton argument filed at first instance, singing on his perspective of the past and of what the children need in the future rather than on whether the decision of 10 March was right or wrong. Inevitably a litigant in person will be unfamiliar with the precise nature of an appeal but it would have assisted had the father sought in reply to the mother's grounds of appeal. I do not think this was any product of late service but rather the father is preoccupied with his dissatisfaction with the current state of play. The father was able to deploy preliminary objections to the appeal being heard and so I am satisfied that he could have addressed the Grounds of appeal had he chosen to do so.

Ground One: The Judge made the final decision at a directions hearing.

24. Procedurally a court is able to make a section 8 order of its own motion when seized with an application. It was therefore an order she theoretical had, the power to make. The Judge does not expressly turn her mind to the test in section 10(1) of the Children Act 1989 though she would have doubtless answered it in the affirmative had she done so. Nor did she expressly turn her mind to her general case management powers to treat the hearing as an expedited final hearing. Again, had she done so it does appear most probable that she would have exercised her wide discretionary powers to make such directions.
25. However the court's ability to make orders of its own motion and at an interlocutory hearing has to be seen in context of the stage of the proceedings reached, the nature of the order concerned and the evidence then before the court. In order to ensure that the hearing is fair to the parties and to ensure that the order is in the best interests of the children, some process needs to be followed to enable the parties to put evidence before the court and to put their case.

26. The hearing was listed to consider whether a guardian should be appointed, the question of a holiday to the paternal grandparents in the Ukraine arose out of the social workers evidence. Whilst it had been raised a year before by the father, contact had deteriorated over that period and thus one would have assumed that the prospect of contact in the Ukraine whether with the paternal grandparents or the father or both was even less of an issue in March 2020. It was certainly not something that either the father or the mother had prepared for. They had to respond on the hoof to the suggestion made by the social worker and taken up by the judge. In the usual course of such applications not only would the nature and extent of the trip be articulated in an application, that evidence would be filed by the father in support and the mother would have responded. In a case such as this given the ages of the children and the background it is likely that a Cafcass report would have been ordered. None of this took place. The mother had no notice and had to respond in court in the suggestion. There was thus no evidence before the court as to where the holiday would occur and the circumstances. There was no evidence before the court is to safeguard to ensure that the children were returned or that would have enabled the court to consider the risk of them not being returned. During the appeal hearing the father seemed to say that the holiday would not have taken place in Lvov but rather the grandparents would have taken the children away to the Carpathian Mountains. It also emerged that the father was living with the grandparents and so the holiday would in fact be not with the paternal grandparents but rather with the father and the paternal grandparents; unless the paternal grandparents took them elsewhere. No consideration was given as to whether an order might be registered with the local court to ensure that if the children were not returned it could be enforced under the 1996 Hague Child Protection Convention. Whilst the mother was able to deploy a number of points in argument, she clearly did not have an opportunity to put together a coherent case in relation to the issue.

27. I am therefore quite satisfied that the decision was reached in a manner that renders it unjust by reason of serious procedural irregularity. Given the absence of notice and the lack of evidence the parties or the court were in a position fairly to determine the issue.

Ground Two: The Judge did not consider previous facts of violence and the background history in the proceedings

28. As I have referred to above it does not appear that there has been a fact-finding or other hearing in which a judge has determined the allegations made by the mother or the children or indeed the father's cross allegation of parental alienation. The nature of the hearing was plainly not an appropriate forum to determine such issues but given the difficulties which have dogged the development of the children's relationship with the father since the parties separated it seems probable that some baseline needs to be established against which the court can judge the children's welfare. I do not consider that this ground adds anything to the other grounds.

Ground Three: There was no special-order application from the father to remove the children to the Ukraine, so the issue had not been raised before the mother nor before the court hearing

29. As I have said in relation to ground one, the purpose of the hearing was to consider whether a guardian should be appointed for the children, I am satisfied that the

making of the order at this hearing in the circumstances that confronted the court and the parties was not appropriate.

30. The transcript suggests that the onus is on the Appellant to justify why the trip should not happen. She is evidently on the backfoot and has perforce not had time to gather any evidence in response. This is to a certain extent borne out by certain arguments that she is able to raise now that were omitted at first instance e.g. the geopolitical situation in Ukraine etc (see below).

Ground Four: The judge did not consider the track record of non-compliance with the court orders by the respondent, so it is not clear if the children will be made available to the Appellant

31. The Appellant relies on the failure of the Respondent to take up contact in January and February 2020 and some skype calls and in concurrent financial remedy proceedings and the alleged non-financial contribution towards the children. I am unaware of any findings in this respect. Certainly, allegations regarding finances would seldom be relevant.

32. The Appellant argues that the Judge did not consider the risk of non-return to this jurisdiction. It is true that no express reference is made to this and nothing can be implied either. There is no specific evidence about a special risk of non-return in this case. However, these are highly acrimonious proceedings (the financial proceedings are described also as very acrimonious though I do not know their current status). Further, the Respondent has relocated to Ukraine for the foreseeable future. The Respondent has also made reference to a desire to have custody of the children albeit on a 50:50 basis; this is significantly different from what has ever been envisioned previously. It is plain that the issue of risk needed to be very carefully considered. The possibility of the father having become frustrated by the deteriorating contact in England combined with his relocation to the Ukraine would provide sufficient foundation for a careful evaluation of the issue of whether a risk existed of the children not being returned and if so it's magnitude.

33. The authorities identified this as a central issue on such applications but here it appears to be assumed by the social worker and the Judge that the children would be returned at the end of a holiday. Whilst that conclusion might be found to be correct it can only properly be reached after an evaluation of the evidence relating to it. Given there was no evidence from the mother or father as to their then situations it was incapable of proper adjudication. The decision was therefore wrong in that it failed to properly address this issue.

Ground Five: There was no evidence as to the issue of removing the children to Ukraine before the court and the Judge did not consider the high risks for the children of going to a country in an ongoing war zone, as well as a very low income per capita and rising crime levels and very little protection available against home violence

34. In effect this argues that there was no evaluation of the risks to the children whilst in the Ukraine. Some of the arguments raised e.g. low income per capita are likely to be non-starters, but the court does need to know something about the proposals for the

trip and to be satisfied that there is no risk physically to the children whilst there. It appears likely that much of this would be capable of evidencing and if this were the only ground, I'm not sure that the appeal would have succeeded. The UK government does currently advice against travel to southern parts of Ukraine due to the political instability and there are areas without consular support (https://www.gov.uk/foreign-travel-advice/ukraine). I was told during the appeal that the PGPs address is in the west of the Ukraine and that the parties had travelled to the Ukraine up to and including 2017. I therefore do not conclude that this ground is made out.

Ground Six: The Judge did not consider the safety and feelings of the children at all, despite the Appellant's insistence and there was no judgment or reasons given for the decision made

35. One of the principal issues in such cases is the likely effect upon the children were they not to be returned. In the context of this case and its background the children's wishes and the impact on them of making such an order was also very important. There is no consideration in the judgment of the likely effect upon the children were they not to be returned because the judge assumed that they would be. There appears to be an assumption that the children's views should not be obtained on this issue because they had had much involvement with social services or Cafcass before. Indeed, both the Cafcass officer and the social worker appeared to consider that there was further that could be done with the children although the Cafcass officer did meet the possibility of a family assistance order.
36. Given the issue before the court was whether a 16.4 guardian should be appointed given the intractable position that was developing, it is surprising that the role of the children received such little attention. In particular there was evidence before the court that D was in a highly conflicted position and found contact very distressing. The idea of travelling to the Ukraine to have contact with her father and her grandparents was, one would have thought, likely to be very difficult for her. These concerns were brushed aside on the basis that if she were distressed, she could be returned or that it would only be for a short period.

37. Whilst it is not mandatory to seek the children's wishes and feelings on every application in the context of this case and given the nature of the order contemplated it would be highly unusual not to either seek their views or have the use of a Cafcass Officer , or Guardian , to give chapter and verse as to why their views should not be sought.
38. There is thus almost no consideration of the effect on the children or the risk of emotional harm or any reference to their wishes and feelings. Given the effect on the children of not being returned is a primary issue in such applications the absence of any consideration of the issue renders the decision wrong.

39. The Judge provides no reasons for her decision [B49 line 27] saying simply that she considered it to be in the best interests of the children. She does not apply the welfare checklist or give any explanation of her conclusions on the three principal issues of magnitude of risk, magnitude of harm or safeguards. She also finds that it would be in the children's best interests for the PGM to come to London beforehand if she "could" come [B49 line 30]. This reads as quite confusing. Either it is in their best interests and should happen or it is unnecessary. It is unclear why their best interests are determined by reference to the PGM's availability.

Ground Seven: During the hearing, it became evidence that Social Service workers have withheld information about the distressed behaviour of the children when they were doing work with them to issue the report in May 2019 (but the report was still used for the final order)

40. The two social workers present were last involved in May 2019 [B26, line 28].

41. During the Appellant's cross examination of the social worker she puts to her that D said to the Appellant following contact with the Respondent "What do I have to do that they leave me in peace? Should I kill myself?" [B30 line 4]. The social worker opines that this is something D says to evoke anxiety in the Appellant [B31 line 4]. It then transpires that it has also been said to the senior practitioner [B31 line 7]. It is evident that the social worker has had a strained engagement with D [B33 line 6; B32 line 30]. It is perhaps regrettable that such a stark comment from a child had not been previously shared with the parents and the court especially in the context of the Appellant reporting that D is very resistant of her own volition to seeing the Respondent and the submission that D is being pushed too far. It really goes to the crux of the issue: whether the children are being alienated or whether they have justified reasons for their resistance. This is perhaps simply illustrative of the failure to get to grips with the underlying issues relating to the children's difficulties with seeing their father. On its own I do not consider this ground would demonstrate that the decision was wrong but it does lend further support to the mother's case that inadequate attention was paid to the welfare checklist and in particular how the proposed order would impact on the children.

42. As I referred to above the father did not specifically grapple with the grounds of appeal. The general tenor of his case is that the difficulty with the relationship is that the mother is undermining it and that only by insisting that the children spend time with him, whilst they should realise that they have nothing to fear from him. None of this goes to the heart of this appeal which is whether the process that was adopted was a fair one and whether the court had the material available to it to reach an appropriate decision on the evidence. Whilst there may have been much evidence before the court in August 2018, by the time this decision was made in March 2020 the children were both older and the situation on the ground had changed. The father's opening position during the appeal was that the August 2018 order remained in force and should be upheld. When I pointed out that this was not possible given, he was now living in the Ukraine he seemed somewhat at a loss albeit seemed then to accept that some further order was necessary.

Conclusion

43. I am satisfied that the order made was both unjust by reason of serious procedural irregularity for lack of notice and lack of evidence and that it was wrong because neither the welfare checklist nor the test for determining temporary leave to remove applications were applied by the judge.

44. Since the matter returned to court in early 2019 and in particular since the hearing in May 2019 from which no audit emerged the parties have been in a state of some uncertainty as to what the child arrangements orders are in relation to the children spending time with the father. The situation on the ground has now moved on both as

a result of the coded pandemic, the father's relocation to the Ukraine and the children's own lives developing.

45. The order of 10 March 2020 will be discharged. The issue of temporary leave to remove for a holiday in the Ukraine together with the more general issue of the child arrangements for these children will be remitted to the Central family Court to be listed before a Circuit Judge for directions. It seems clear to me that given the history of this case that it is in the children's best interests for a guardian to be appointed pursuant to FPR 16.2 and 16.4 and I shall make that direction in order to minimise the delay once the matter is restored before the Circuit Judge . I shall inform the designated Family Judge of the outcome of this appeal. The matter will be listed for a one-hour directions hearing before a Circuit Judge on a date to be fixed by the Central Family Court.

46. That is my judgment.