Case No: FA-2024-000135

Neutral Citation: [2025] EWHC 229 (Fam)

IN THE FAMILY COURT HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT EAST LONDON
HHJ ATKINSON

Date: 05/02/2025

Before :

MR JUSTICE POOLE

A Father v A Mother (Appeal) (Child Arrangements and Non-Molestation Orders)

A FATHER

Appellant

-and-

(1) A MOTHER
(2) and (3) C and D
(4) CAFCASS

Respondents

The Appellant appeared in person
The First Respondent appeared in person
Miss Anarkali Musgrave (instructed by Freemans Solicitors) for
the Second and Third Respondents
Lauren Doyle of the Cafcass High Court Team appeared in person

Hearing dates: 19 December 2024

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JUDGMENT

This judgment was delivered in public 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 including the parties must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Poole :

Introduction

1. This appeal arises out of protracted proceedings in which the two children involved have been embroiled for several years. The Appellant father is responsible for much avoidable hostility in and out of the courtroom. He appeals against decisions made by an experienced Judge who has acquired considerable knowledge of the family over a number of hearings and who had intended to conclude the proceedings and to protect the children from further litigation for the remainder of their childhoods.

2. The Appellant is the father ("the Father"), an Australian who currently lives in England, and the First Respondent the mother ("the Mother"), of two boys, C and D, who are in their mid-teens ("the Children"). The Father appeals against orders made by HHJ Atkinson ("the Judge") in the Family Court at East London on 25 April 2024, in particular:

   2.1. The making of a non-molestation order ("NMO") under the Family Law Act 1996;
   2.2. The Judge's refusal to recuse herself.
   2.3. The making of a Child Arrangements Order by which the Children will have no face to face time with the Father and the Father will not be allowed to contact them at all and may only respond to contact made with him by the Children.
   2.4. A s91(14) order effective during the Children's minority.

3. By orders made by Ms Justice Henke, the father was given permission to appeal out of time, and the hearing before me was listed for permission to appeal with the appeal to follow, meaning that if permission were granted, the Court would hear the appeal itself.

4. At the hearing the Father was unrepresented but was able to rely on grounds of appeal and a skeleton argument drafted by Counsel. The Mother was unrepresented. The Guardian was also without legal representation. Shortly before the hearing the Children sought separate representation which the Guardian and parents did not oppose. I received an application, on notice, supported by detailed witness evidence from their experienced solicitor seeking permission for the Children to be separately represented and I granted the application under FPR r16.6(3)(a) having been satisfied that each child had sufficient understanding to conduct the proceedings concerned, without a litigation friend or children's guardian. Nevertheless, in particular given that I was hearing an appeal against orders made when the Children had a guardian, I required the Guardian to continue to participate in the proceedings. At the hearing Ms Doyle of the Cafcass High Court Team appeared on behalf of the Guardian. Counsel represented the Children at the hearing.

5. I was invited by the Father to see the Children. Their Counsel informed the Court that the Children were ready to see me if required but that they had been advised that I would be unlikely to consider it necessary for the purposes of an appeal. I have received a position statement from Counsel for the Children which states that they are concerned that the orders made by HHJ Atkinson are disproportionate to the risks identified by the court and in particular that the NMO was made contrary to their expressed wishes and feelings and that it "makes indirect contact with their father fraught with difficulties." The Father had included in his Appeal Bundle email correspondence from the Children to the Guardian, and the Guardian's solicitor, in which, between them, they say, "We don't want daddy to leave UK again, we just want it to go back to the way it was but also spend this Christmas

with him. We don't want to run away just because no one helps us… We ask daddy to help us … because mum says the courts will fix it but they never do." They also say to the Guardian's solicitor, "We don't want to meet you without dad present to help us go back to the way it was…" The Children had made videos for the Court to view in which they express the wish to see their father and for arrangements to "go back" to where they were previously. In an email dated 18 November 2024 to the Guardian's solicitor, they say "Dad says the barrister did not let our videos be seen by the judge. Is that true? If it is, why are you not working for us, as dad says we now have the power to fire you and hire someone who will work for us…"

6. Although I have accepted that the Children have sufficient understanding to conduct the proceedings concerned without a litigation friend or Guardian, it does not follow that I accept that they are free from influence from either parent. Given the history of this case, the Children's communications, together with the assertion by the Father during the course of his submissions at the appeal hearing that he has taken to using secret signals when communicating with the Children, clearly give rise to serious concerns about his continuing influence over them.

7. I declined to meet the Children. This is an appeal, not a re-hearing. I have viewed the videos as part of the evidence relevant to the decision whether to permit the Children to conduct the proceedings before me without a litigation friend or Guardian. A judicial meeting with the Children could not have been for the purpose of gathering evidence as to their wishes and feelings. I considered it unwise to meet them because their expectations might very well have been that the meeting was an opportunity for them to express their wishes and feelings. They are now represented and they have had ample opportunity to put their case through Counsel.

8. I indicated at the outset of the hearing that although the hearing was listed for determination of permission to appeal with the appeal to follow if required, I would hear full submissions from each party relevant to both permission and the substantive appeal. The parents are litigants in person and it would have caused them difficulty to proceed in a staged way at the hearing. Nevertheless, I have to consider whether to grant permission to appeal in respect of each ground of appeal and only if permission is granted, to consider the substantive appeal in respect of each relevant ground.

9. Counsel had drafted the Father's grounds of appeal which are:

> "Non-Molestation Order
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> 1. The Court was wrong to make the NMO in that: (a) there was serious procedural irregularity, in that F had no notice and there was no opportunity given for F to apply to vary or set-aside the order, and (b) the decision was substantively wrong, in that: (i) it should not have been made ex parte; (ii) the order was not necessary in the circumstances of the other orders, and (iii) it was for an unjustified, and unjustifiable, duration.
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> Recusal

> 2. There was procedural unfairness in that the Court did not consider and give reasons on the recusal issue before the substantive judgment; there being substantive reasons for looking at the matter anew
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> Child arrangements order
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> 3. There was procedural unfairness and/or the Court was wrong in that there was insufficient:
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> (a) thought or analysis was given as to whether the children should have been separately represented, or in the alternative (b) the wishes and feelings of the children
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> 4. The decision was wrong in that there was an absence of analysis about the positives of F/negatives of the order that was being made.
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> 5. The decision was wrong in that the draconian outcome was outside the ambit of the Court's discretion based on the facts.
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> S91(14)
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> 6. The decision was wrong in that: (a) it was disproportionate to extend and increase the s91(14) from that which was ordered as part of the 2022 Order, and (b) the Court did not set out what needed to be done in the future for a successful application."

10. Thus the four decisions which are appealed are the NMO, the refusal to recuse, the child arrangements order ("CAO") itself, and the s91(14) order. I shall address the Grounds of Appeal in a different order from that set out by Counsel, dealing first with recusal, then the child arrangements order, the NMO, and finally the s91(14) extension. It seems to me that I should deal with recusal first because if the Judge should have recused herself then none of her other orders can stand.

Background

11. The Father is an Australian national, the Mother an English national. In September 2020 CAO was made in the Family Court at a time when the Father was living in Australia and the Mother and children in England. On 9 December 2022 the Judge re-considered the CAO in the light of findings she made against the Father and in relation to the Family Court Adviser's evidence, and with the Father then living in England.

12. The Judge recorded what she called the salient findings on the face of her order of 9 December 2022:

"a. Little was factually in dispute as the father accepted that he had breached the previous orders, however he was unable to provide reasonable explanations for his breaches and tried to justify his behaviour;
b. The father has used the court process to harass the mother;
c. The father has unilaterally and repeatedly sought to alter the arrangements between the parties;
d. The court did not find any evidence that the mother had blocked contact at any time as asserted by the father and in fact found that she has strived to support the boys' relationship with the father;
e. The father's communication with the mother was often offensive, bullying and harassing;
f. The father has shown that he is unable to comply with court orders, even where there are PSOs and penal notices in place;
g. The father has no respect for the court process or orders and at times during the hearing had no respect for the Judge or the judicial role;
h. The father exercised control over the mother by reducing the mother's time with the boys without her consent;
i. The father was unable to accept any responsibility for his actions and sought to unreasonably blame the mother which he has not hidden from the boys, the negative exposure of which is likely to have a negative impact upon them;
j. The father does love the boys and they have a good relationship but he has a serious deficit in his ability to meet their emotional needs;
k. The father is obsessed with the pursuit of justice, which makes him act unilaterally, unreasonably and renders him unable to see the impact of that on his sons;
l. The father's quest for 50/50 is just the beginning and the court considered it highly likely that his next application would be relating to the school. A 50/50 arrangement would mean he would be better placed to undermine the boy's current schooling;
m. The father has involved the boys in the parental dispute, shows no remorse for doing so and has no insight into the impact of his behaviour on the boys;
n. At times the father's evidence was unboundaried and frightening;
o. There were very few people whom the court had experienced as combative and as rude as this father, and it was frightening how his presentation could change suddenly;
p. The way the father seeks to resolve disputes is unilaterally, with false narrative and by gaslighting, all of which are poor examples to adolescent boys;
q. The mother demonstrated that she was able to promote the father and the court was satisfied she was well able to meet all of the boys' needs;"

13. Nevertheless, the Judge made a CAO for the Children to live with the Mother but to spend defined time with the Father that amounted to four consecutive nights per fortnight during term time and roughly half of the school holidays.

14. In the same order, and for reasons set out in detail in her judgment, the Judge made an order under the Children Act 1989 s91(14) preventing the father from making any further application in relation to the children save only in respect of an application for permission to remove them from the jurisdiction for the purpose of a holiday. The order was effective until the children had concluded their GCSE's.

15. Some months later the Mother brought an application to enforce the CAO. On 14

September 2024 after a two day hearing of her application, the Judge recorded the following findings in her order of that date:

> "Findings
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> The court is satisfied beyond reasonable doubt that [the Father] has breached the order of 9th December 2023 [sic.] without reasonable excuse as follows:
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> a. On 1st May 2023 failing to return the children after a period of staying with the father in breach of paragraph 14;
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> b. At February half term 2023 and on the weekend of 13th/14th May, taking the children away within the jurisdiction and not notifying the mother of the details of the trip in breach of paragraph 11(i);
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> c. Refusing to hand the children over at [the specified place] in breach of paragraph 11(j);
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> d. Persistently communicating the arrangements for visiting through the boys in breach of paragraphs 22 and 23 of the order and by way of example as set out in the following paragraphs of the mother's schedule of breaches at items 1,4,5,7,10,24,25,26,30,32,33,34,35,39,41,42,59,63. (schedule attached);
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> e. Having contact outside of the terms of the order by inviting the boys to visit his home outside of his allotted time. Examples of which are on 13th March 2023 (boys invited to 'swing by' after school); 14th March 2023 (boys invited to come over after school, 22nd March 2023 (boys 'swung by' to collect items; 27th March 2023 (boys invited to 'swing by' after school), 18th April 2023 (boys invited to go out to dinner – or drop by for an hour marathon weekend); 25th April 2023 (boys invited to swing by); 25th May/ 26th May (boys invited to deviate from arrangements);
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> f. Failure to communicate through Our Family Wizard in breach of paragraph 22 of the order.
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> In addition, the court found that these breaches have put the children at risk of harm as follows:
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> a. The refusal of the father to return the children to [the specified place], leaving them to roam back to their mother's home, not informing her of any changes in arrangements and fixing them with responsibility to notify her of changes has left them on occasions without an adult knowing their whereabouts and potentially at risk.

> b. The father has continued to draw the children into his battle with the mother by:
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> i. Choosing to virtually never communicate with her or respond to her as directed or at all;
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> ii. Fixing the children with responsibility for communicating changes in the arrangements;
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> iii. Encouraging them to visit him outside of the agreed hours with no notice to their mother from him;
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> iv. Continuing to make derogatory comments about their mother suggesting that she is the cause of the restrictions upon their contact.
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> c. On 9th August, 4 days into his extended summer holiday contact with the children, the father was so badly affected emotionally by the receipt of the case management order of 1st August, defining the breach allegations that he called a family friend to come and collect the children and return them to their mother. The incident was highly emotionally charged. There is no clarity as to what the children witnessed. They spent the next 2 days with their mother confused, emotional, highly distressed but unwilling to reveal what happened. The father made no contact with them until 4 days later.
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> d. The mother stopped direct contact whilst there were ongoing court proceedings concerned that the same might happen again. The boys have not had direct contact since but have had indirect contact by phone and through gaming with their father."

16. I have read the approved transcripts of the high quality judgments from 9 December 2022 and 14 September 2023. Shortly prior to the delivery of the judgment on 14 September 2023, the Father applied to the Judge to recuse herself. She gave an ex tempore ruling on that issue which has also been transcribed and approved and which I have read. The Judge refused to recuse herself setting out in detail the relevant legal principles and her reasons for that refusal. That judgment is, again, fully reasoned and clear.

17. On 14 September 2023 the Judge also made the children parties to the proceedings and appointed a rule 16.4 Guardian.

18. The Father did not appeal any of the orders made on 9 December 2022 and 14 September 2023.

19. At a directions hearing on 29 January 2024, which the Father did not attend notwithstanding that he had been given notice of the hearing, the Judge recorded on the face of her Order that,

> ".. .the court notes from reading the father's documents submitted late, the last being submitted on the morning of the hearing, that the father may be seeking to make a further application for HHJ Atkinson to recuse herself from hearing this matter. If the father issues such application it will be dealt with at the final hearing, the court not being in a position to consider this today in light of the very late production of the father's documents and the fact of his non attendance at today's hearing."

20. In fact, no formal application for the Judge to recuse herself was made by the Father.

21. Then on 23 and 25 April 2024 the Judge conducted a final hearing in the Children Act proceedings. Again, I have read the approved transcript of the Judgment delivered on 25 April 2024. The Mother appeared in person, unrepresented. The Father was then living in Australia. He did not attend the hearing and the Judge recorded in her judgment, "He has not engaged in the proceedings since October of last year when he left the country and returned to his native Australia." The Judge noted, however, that the Father was planning imminently to return to live in England. A link had been set up for the Father to attend the hearing remotely but he did not use it. The Judge proceeded in his absence. No issue is taken in this appeal about her decision to do so.

22. The Father had himself provided written evidence to the Court but, the Judge recorded, he had "refused to attend the hearings, largely because I have not responded to his second application that I should recuse myself, but nor has he been prepared to attend this hearing to hear my determination of even that issue." The Father had not made a formal application for the Judge to recuse herself but instead had written repeatedly to the Court stating that she should do so. He has said in his Appellant's Notice, "I do not make 17 separate recusal request lightly…" Notwithstanding the absence of a formal application, the Judge dealt with the Father's case that she should recuse herself in her judgment of 25 April 2024, again refusing to recuse herself. She considered that the Father had not identified any new grounds for recusal arising after her September 2023 decision not to recuse herself.

23. The Father had also heavily criticised the children's guardian, Mr A. The Father had written, "I withdraw my support for Mr A to act as [the Children's] Guardian and to ever speak with them again." The Judge, however, noted Mr A's experience and detailed reports and she relied heavily on his evidence. In his first two meetings with the Children in October 2023 they had been closed and tearful. C said that "he would like things to go back to normal and he considered it was normal when they all lived together as a family". Mr A noted that C was very distressed by thinking about this. On the second visit, D came into the room and immediately put his face in his hands. He was in tears and could not answer questions. A third visit, made over a month after the Father had left for Australia, the boys were more relaxed but, again D cried when asked whether he was worried about his father. C was taciturn and walked out of the meeting.

24. In her April 2024 judgment, the Judge addressed the issue of separate representation and noted that the Children had "not asked that their views should be separately represented by their solicitor despite knowing what the recommendations of their Guardian have been."

25. At paragraph 48 of her April 2024 judgment, the Judge recorded,

> "The Guardian's assessment of this situation was that these boys are suffering significant emotional distress because of the controlling behaviour of their father. The controlling behaviour identified by me in my findings in the Dec 2022 judgment and again in the Sept 2023 judgment have in his view impacted the mother's approach to parenting and restricted the boys' freedom to be able to express themselves. He highlights their 'perceived need to withhold information' as a 'powerful indication that they do not feel safe to openly express themselves' and he points to the events of August 2023 as an example of this reminding me that this was something that was so powerful that they 'well up with emotion at the mention of August 2023 and they are unable, even now, to discuss it any further'

26. The Judge continued at paragraph 49:

> "The Guardian comments that their views that their mother is the unfair parent, should be considered in light of their father's controlling behaviours and observes that neither child presented the idea to him with any conviction. It is also significant that neither objected to the recommendations in the report of no face-to-face contact at the meeting related above. In the Guardian's view, they understand the reality more than they want to verbalise and that is extremely challenging and harmful for them. It impacts their ability to be fully transparent with their mother, and that chimes with my findings in previous judgments. The father's controlling behaviours, he says, must be considered in the context of domestic abuse. He identifies that if these behaviours do not abate, then those are ongoing risks for the children. Risks would be reduced by [the Father] developing his insight into his behaviours, but that seems unlikely given the position that he has adopted throughout."

27. The Judge accepted the Guardian's evidence and analysis. She took into account all the evidence when doing so. She concluded at paragraph 74 of her judgment of April 2024:

> "I agree with the Guardian that these boys are the victims of domestic abuse themselves. It is easier for them to say that they want to see him 50/50 because then there is no backlash. Children and young people can be direct victims of coercive control and they can experience it in much the same way as adults do, feeling confused and afraid, living constrained lives and being entrapped and harmed by the perpetrator. There is clear evidence that the false narrative peddled around fairness,

> for example, by the father has resulted in the children verbalising an inaccurate and distorted view of their mother. Their willingness to suffer their father's behaviour, his anger, not telling us about what happened in August, is no different to the situation in which the adult victims of domestic abuse find themselves. Excusing the perpetrator's behaviour, persuading themselves that it is not that bad and it can be tolerated, and for these boys it must be tolerated because it is the only way that they get to see their dad, who they love. These are the risks that present if we move to the father's regime of a 50/50 division. The boys may feel that a 50/50 division will bring them some sort of peace but I am satisfied, as I was in Dec 2022, that this would be momentary because I am quite clear that his campaign will not stop with a 50/50 division."

28. The Judge's reference to "what happened in August" was to an incident on 9 August 2023. The boys had been spending time with the Father in accordance with defined arrangements. They were due to spend more days with him but, as the Father conceded in the September 2023 hearing, he had felt "overwhelmed by the proceedings". He effectively rejected the boys and had no contact with them for four days. They returned to the Mother who reported that they were very distressed. They have still not spoken openly about what happened that day.

29. The Judge continued at paragraph 75 of her April 2024 judgment:

> "The Guardian proposes the only other alternative. That is to stop face to face contact between the father and the children and limit indirect contact to only that which is initiated by them. Stopping face to face contact is a very draconian step and has troubled me. The children have powerful feelings for their father. That was why I left the contact in place. But [the Father] has abused this from the moment the order was made, because it was not what he wanted. The risks to their emotional wellbeing posed by their father would support a recommendation that there should be no contact at all but [the Guardian] recognises the strength of their feeling and also the need to enable them to become the arbiters of how and when they see him."

30. The Judge then considered the pros and cons of the proposal but ultimately concluded that the cessation of face to face contact was in the best interests of each of the Children. She also determined that the Children could, as and when they wish, contact their Father by telephone or electronic communications but he could not contact them otherwise than in response. She recognised the risk that he would nevertheless seek to manipulate them through such contact.

31. The Judge further determined that the existing s91(14) order should be extended during their minority because "these children need peace. The father, although he is not ostensibly engaging in these proceedings … is perpetuating them… He is weaponizing them in order

to undermine the mother's parenting of the boys, and using the opportunity visit more turmoil on them in so doing."

32. At the end of her judgment, after prompting by Counsel, the Judge gave reasons for refusing the father's application to her to recuse herself. She recorded that she would, again, write to the Children, which she subsequently did.

The Law on Appeal

33. By the Family Procedure Rules 2010 r30.3(7):

> "Permission to appeal may be given only where –
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> (a) the court considers that the appeal would have a real prospect of success; or
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> (b) there is some other compelling reason why the appeal should be heard."

34. FPR 30.12(3) provides that an appeal may be allowed where either the decision was wrong or it was unjust for serious procedural or other irregularity. The court may conclude a decision is wrong because of an error of law, because a conclusion was reached on the facts which was not open to the judge on the evidence, because the judge clearly failed to give due weight to some significant matter or clearly gave undue weight to some other matter, or because the judge exercised a discretion which "exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong": *G v G (Minors: Custody Appeal)* [1985] FLR 894.

35. The appellate court must consider the judgment under appeal as a whole. In *Re F (Children)* [2016] EWCA Civ 546 Munby P summarised the approach as follows:

> "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…
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> 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".

36. The appellate court should be slow to interfere with findings of fact. As Lewison LJ said in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5, at paras114 to 115:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them….The reasons for this approach are many. They include,
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> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
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> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
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> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
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> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
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> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.
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> 115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted."

37. More recently Lewison LJ set out the principles to be applied again in *Volpi and ors v Volpi* [2022] EWCA Civ 464 at [2], principles cited by Baker LJ in *T (Fact-Finding: Second Appeal)* [2023] EWCA Civ 475:

> "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
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> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
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> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
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> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

Recusal

The Legal Framework

38. I was not referred to the Court of Appeal decision in *AZ (A Child) (Recusal)* [2022] EWCA Civ 911 but it contains a very helpful summary of the law relating to recusal. At paragraph 54 the Court of Appeal noted:

> "As Hildyard J observed in *M&P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch) at paragraph 16:
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> "The right to a fair trial, both under the common law and Article 6 of the European Convention on Human Rights (the House of Lords in Lawal v Northern Spirit Limited [2003] UKHL 35 having confirmed that there is no difference between the requirements in each) includes the right to a trial and decision conducted and made by a decision-maker free not only from actual bias but also from the appearance of bias. Justice must both be fair and be seen to be fair."

The Court of Appeal endorsed the observations of Leggatt LJ *in Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 where he said at [17]:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased: see *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, paras 102-103."

The Court of Appeal observed that there is a degree of overlap between general unfairness and apparent bias, before setting out ten points relevant to the appeal with which it was concerned:

(i) The overriding objective in Part 1 of the Family Procedure Rules 2010 requires a judge "to deal with cases justly, having regard to any welfare issues involved." The Rules require active judicial case management and so family judges are

expected to intervene in proceedings to a far greater extent than in earlier times.

(ii) The child's welfare is the court's paramount consideration and "children's proceedings are, for the most part, quasi-inquisitorial rather than adversarial."

(iii) Apparent bias is an area of the law which requires an intense focus on the essential facts of the case.

(iv) The fair-minded and informed observer will adopt a "balanced approach" and is "neither complacent nor unduly sensitive or suspicious."

(v) It is necessary to consider the proceedings as a whole in engaging in the objective assessment of whether there is a real possibility that the tribunal was biased.

(vi) Bias means prejudice against one party or its case for reasons unconnected with the merits of the case.

(vii) The mere fact that the Judge had, earlier in the case, commented adversely on a party or witness or had found their evidence to be unreliable would not without more found a sustainable objection. But if there was room for doubt, that doubt should be resolved in favour of recusal.

(viii) A Judge should not prematurely express conclusions suggesting a closed mind, but does not act amiss if they indicate scepticism or the need for particularly compelling evidence to persuade them of a fact.

(ix) If a fair-minded and informed observer, having considered the facts, would not conclude that there is a real possibility that the tribunal will be biased, then the objection to the judge must fail even if that leaves the objecting party with a sense of injustice.

(x) Litigants can usually be expected to cope with different judicial approaches and styles provided judicial behaviour does not stray outside acceptable limits.

39. Here, in his oral submissions, the Father asserts both actual bias and an appearance of bias. In his written grounds and skeleton, prepared by Counsel, the only point taken on the recusal decision is that of "procedural unfairness in that the Court did not consider and give reasons on the recusal issue before the substantive judgment there being substantive reasons for looking at the matter anew."

Application for Recusal and Judge's Determination

40. The Father had previously applied for the Judge to recuse herself, in response to which the Judge had delivered a 42 paragraph ruling on 14 September 2023, the transcript of which I have read, lengthened due to interruptions by the Father whose final remark was that "You're judge, jury and executioner, this is not the way democracy works." In that ruling, HHJ Atkinson properly set out the law on recusal and applied it to the application. The Father did not appeal that ruling but shortly before the next hearing, in January 2024, he wrote a lengthy letter to the Court to the effect that the Judge should recuse herself. He made a number of points in his letter but in substance his one point was that the Judge was biased against him and had already determined that he should be excluded from the Children's lives. He also maintained that the Guardian was involved in a similar campaign against him.

41. In his submissions to me, the Father went so far as to assert that Cafcass is institutionally biased against fathers and that, in accordance with that systemic approach, the Guardian had deliberately sought to build a case against him. The Judge had been a willing participant in what amounted to a conspiracy to deprive the Father of a relationship with his children.

42. At the case management hearing on 29 January 2024 the Judge recorded that the Father submitted documents late which showed that he "may be seeking to make a further application for HHJ Atkinson to recuse herself from hearing this matter." She recorded that if the Father were to issue such an application, she would deal with it at the final hearing. The Father did not issue such an application and he did not attend the final hearing for the purpose of making an application for recusal orally or for any other purpose.

43. At the April hearing, the Judge did not expressly address the issue of recusal at the beginning of her judgment but she said at paragraph 33:

> A major theme throughout all his documents is that I should recuse myself. He made that 'application' in January of this year. The father did not issue an application as such, he simply sent a statement. He did not attend to argue it. It came on the morning of the hearing of 29th Jan, so I declined to deal with it as I had to deal with the substantive issues and then get on with my already very busy list. Ever since, he has persistently emailed the court, my clerk, another judge in this court (a lay Magistrate), encouraging them to ensure that I am removed from the case or insisting that I consider the recusal application by a deadline he has set for me. I have declined to engage outside the formality of this hearing. I will deal with the recusal point at the end of this judgment. Suffice to say it adds nothing to the application that he made previously and therefore I have dismissed it."

44. Then, having made her determinations on the child arrangements order, the non-molestation order, and the s91(14) extension, the Judge was reminded of the recusal issue by Counsel for the Guardian. At that point the Judge referred to a "recusal application". She noted that there was "nothing new" in the Father's written "reasons for recusal" when compared with the previous application. She distinguished between proper grounds for recusal and a party's dislike of the decisions the Judge had previously made. Without reciting authority on the issue - which she had previously set out in her ruling in September 2023 - the Judge dealt summarily with the application, finding that there were no grounds to conclude that she had demonstrated bias or that there was an appearance of bias. As noted, she had recorded her dismissal of the application to recuse herself earlier in the judgment.

Analysis and Conclusion

45. Although the Appellant's grounds and skeleton argument do not assert actual bias, the Father effectively did so during his oral submissions. I can deal with that submission briefly. He has not provided any evidence at all of bias. He has not referred to any conduct or statements of the Judge outside the proceedings as a basis for the claim of actual bias, nor could actual bias be inferred from the judgments or orders the Judge had given and made prior to the hearing in April 2024. The distinction between making findings against a litigant and a Judge being prejudiced against them is obvious, but the Father's protests of

bias amount to little more than a complaint that the Judge has made findings against him. He protests that he is effectively bound by those decisions and that there is nothing that he can do about them unless or until he has a different Judge. He invited me, as a Judge new to the case, to take a "broad view" and to make a different child arrangements order. He was disappointed that I did not use further court time to re-address the CAO as though I were dealing with it at first instance. I told him that I was sitting in an appellate capacity and was bound by the rules and law relevant to appeals, but he would not accept that. Litigants cannot select the judge who is to hear their case. Subject to appeal, factual findings made are indeed binding on the parties. Naturally, the Father is frustrated that he has not persuaded the Judge of his case on various matters, but it does not follow that the Judge is prejudiced against him.

46. As to any assertion that there was an appearance of bias, again I need to say, for the benefit of the Father, that his mere assertion is not sufficient, however many times he makes it. He has not in fact identified any factual basis for contending that there was an appearance of bias that should have precluded the Judge for hearing the case. It is true that the Judge had made serious findings against the Father but it did not follow from that fact alone that her mind was closed in relation to any further applications, issues, and orders. The Judge's rulings and judgments demonstrate her focus on the evidence and the best interests of the Children, and her analytical approach.

47. In his skeleton argument on appeal, Counsel for the Father contends that since the Father's previous application for recusal, the Judge had ordered an interim cessation of direct contact and there had been a breakdown in communication between the Father and the Court. Furthermore the Father had been concerned that the Court was refusing to allow evidence which he considered to be admissible. I reject the suggestion that these amounted to substantial fresh grounds for a further application to recuse. The interim cessation of contact was a fully reasoned decision made after a hearing. There was no breakdown of communication, but rather a decision by the Father to disengage from proceedings other than by sending repeated email communications to the Court and others. No appeal was made against the September orders nor against subsequent case management decisions. They were not challenged. The "new features" identified by Counsel were no more than further grievances harboured by the Father. The continuing or growing discontent of a litigant is not a proper ground for repeated recusal applications.

48. No fair-minded observer informed of all the relevant circumstances would have concluded that there was a real possibility that the judge was biased – that is not an arguable case in my view.

49. I now turn to procedural issues relating to recusal. In her case management order of 29 January 2024 the Judge had noted that no (fresh) application to recuse had been made but that if one were made, she would consider it at the final hearing. The Father took no further steps to make an application but, when reminded of the issue when giving her judgment at the final hearing, she addressed recusal as if an application had been made. This was inconsistent but it was favourable to the Father. The Judge did not dismiss the issue on the grounds that no application had been made. The procedural point taken by Counsel for the Father when drafting the grounds and skeleton on appeal, is that the Judge failed to deal with the issue of recusal at the outset of the hearing. In fact she addressed the issue at paragraph 33 of her judgment, prior to stating her conclusions on any substantive decisions, recording that "I have dismissed" the application to recuse made in January 2024. There is

no substance to the Father's case that the Judge failed to deal with the recusal application until after she had given her substantive judgment. It is fair to note that the Judge gave reasons for dismissing the recusal application at the end of her judgment, after being reminded by Counsel of the issue, but those were her reasons, not her decision. In any event, the Judge was perfectly entitled to decide to proceed with the hearing and to give her reasons for doing so later.

50. Judges in family cases often have unrepresented parties appearing before them. One or more of those parties may become very unhappy with decisions made by the judge during the course of proceedings. Naturally, such litigants may wish to change the Judge, but it is recognised as important to maintain judicial continuity where possible and it would be unjust and unfair to the other parties and the children involved to change the judge just because one party did not agree with the judge's previous findings and decisions. The great majority of litigants in person accept the court's decisions but sometimes a family judge receives repeated entreaties by an aggrieved litigant in person to recuse themselves. As HHJ Atkinson did, it is good practice to make a formal ruling on an initial application. However, repeated applications can disrupt proceedings and cause delay unless properly managed. The court may properly decide, as here, to require a formal application to be made before they consider a repeat application to recuse.

51. Here, the Judge did in fact consider the repeat application and dealt with it firmly, but with reasons. There was no need for her to set out once again the law on recusal because she had done so in detail in a previous ruling. She was entitled to deal with the repeat application in summary fashion, in particular since the Father had not troubled to attend the hearing to pursue the application.

52. The Judge clearly reached the correct decision to refuse to recuse herself. There was no procedural irregularity rendering the decision unfair or unjust. There is no real prospect of success on the appeal on this ground and no other compelling reason why the appeal on this ground should be heard. Permission to appeal on this ground is refused.

The Child Arrangements Order

The Legal Framework

53. Children Act 1989 (CA 1989) s8 defines a child arrangements order as meaning an order regulating arrangements relating to with whom a child is to live, spend time or otherwise have contact and when a child is to live, spend time or otherwise have contact with any person. By CA 1989 s9(6):

> "No court shall make a section 8 order which will end after the child has reached the age of sixteen unless it is satisfied that the circumstance of the case are exceptional."

But s9(6) does not apply to a child arrangements order if the arrangements regulated by the order relate only to either or both of the following: "(a) with whom the child concerned is to live, and (b) when the child is to live with any person." – see CA 1989 ss6A and 6B. In

the present case the child arrangements order made on 25 April 2024 did not relate only to either or both of those matters. Furthermore, the Judge did not make a section 8 order that extended beyond the Children's 16th birthdays and did not refer to any exceptional circumstances that would justify such an extension.

54. By CA 1989 s91(10):

> "A section 8 order shall, if it would otherwise still be in force, cease to have effect when the child reaches the age of sixteen, unless it is to have effect beyond that age by virtue of section 9(6).

CA 1989 s91(10A) disapplies s91(10) to provision in a child arrangements order regulating arrangements relating to with whom a child is to live or when the child is to live with any person. Hence the Judge's s8 orders in respect of C and D's face to face time and indirect contact with the Father, which the father seeks to appeal, will cease to have effect once each child is 16.

Submissions

55. The Father's Grounds of Appeal and Skeleton Argument contend that the Judge gave insufficient thought or analysis as to whether the children should have been separately represented or, in the alternative, their wishes and feelings. The boys had enjoyed time with their father and there was evidence that they wanted an even division of time between their parents. They were worried about their father. Separate representation should have been considered because there appeared to be a difference between what the Children were saying to the Guardian, and their actual wishes and feelings, a discrepancy which the Father was anxious to scrutinise by way of disclosure of the Guardian's notes of his meetings with the Children.

The Order made on 25 April 2024

56. The CAO was that the children shall live with their mother and that the father shall not have face to face contact with the children or contact them by telephone, video calls, online gaming, social media, WhatsApp or any other form of communication save by way of reply to a communication sent to him by either child, and then only out of school hours.

Analysis and Conclusion

57. The Judge acknowledged the risks involved in making her CAO for the Father to have no direct time with the Children and for indirect contact to be initiated only by the Children:

> "75. The Guardian proposes the only other alternative. That is to stop face to face contact between the father and the children and limit indirect contact to only that which is initiated by them. Stopping face to face contact is a very draconian step and has

> troubled me. The children have powerful feelings for their father. That was why I left the contact in place. But [the Father] has abused this from the moment the order was made, because it was not what he wanted. The risks to their emotional wellbeing posed by their father would support a recommendation that there should be no contact at all but [Mr A] recognises the strength of their feeling and also the need to enable them to become the arbiters of how and when they see him.
>
> 76. The drawbacks of this arrangement are that it is highly likely that the father will continue to seek to influence the children into seeing him or speaking with him and no order I can make, given their ages, can prevent that. It also leaves them having to decide when to see him – something that we usually avoid in cases involving children. However, [Mr A] has argued a powerful case for the need for these boys to be able to develop their own agency in this situation. They need to be able to stand up to their father and tell him if it is not convenient to see or speak to him. If they are to develop into decent, well rounded and emotionally mature young men, they also need to recognise when their father is unfairly negative about their mother and be able to call him out or at the least ignore his comments. That is about developing independence and the ability to speak freely. Something that they cannot do at the moment in his presence."

58. The Judge recognised that the CAO was draconian and did not coincide with the stated wishes of the Children who were of an age when their wishes and feelings carried considerable weight. Nevertheless, in a detailed judgment, which followed the earlier detailed judgments from November 2022 and September 2023, the Judge explained why she had reached her determination. In making the order she accepted the fully reasoned recommendation of the Guardian. I have already set out extracts from the judgment which referred to the exceptional conduct of the Father which, the Judge concluded, was abusive of the Children as well as the Mother, harmful to them, and likely to continue for so long as he had face to face time with the Children. This is not an ordinary case. The Father's emotional abuse and controlling behaviour has been relentless. He either has no insight into his conduct and its effects or, worse still, he pretends to have no such insight. Whether disingenuously or not, he purports to be an ordinary, loving parent who cannot understand why he is being so unfairly victimised by the Guardian and the Judge. The CAO allowed continuing indirect contact, which has been taking place, even though the Judge had reservations about the way the Father would exploit it. Those reservations may have been well-grounded: the Father told me that he is having to use "secret signals" with the boys during his communications with them. Their video asking to spend face to face time with their father raises concerns about the Father's continuing role in influencing them.

59. Reading the judgment as a whole, it is clear that this very experienced Judge had each child's best interests as her paramount consideration and took into account all the matters and circumstances relevant to her determination of the section 8 order that served that end. I can detect no error of law and find the Judge's mastery of the evidence and her analysis to be impressive.

60. The Judge expressly considered whether the Children should be separately represented, noting that no suggestion had been made to that effect by the Children. The Guardian had not raised it and the Father had not attended the hearing to argue for it. Clearly, the Judge was very concerned about the influence of the Father on the Children's expressed views, and their wishes and feelings. She took that into account – indeed it was a matter central to her judgment. She was acutely aware that what the boys said in different circumstances to different people might not reflect their true wishes and feelings. Great care was taken by the Judge to consider the wishes and feelings of each child. There were no grounds for suspecting that the Guardian had done anything other than faithfully report his meetings with the Children. There would have been no benefit or justification at the time in separate representation, even if it had been proposed. The Court took full account of the Children's wishes and feelings.

61. The Judge did recognise that the risk of harm to the Children from contact with the Father would continue through the indirect contact she allowed, but her decision to prevent face to face contact was a legitimate means of seeking to mitigate the harm to the Children. It cannot reasonably be argued that the Judge was not entitled to preclude face to face contact because she was allowing indirect contact.

62. The Judge accepted the recommendations of the Guardian. The Judge was very familiar with the family and history of the case. Her reasoning in her judgment was clear and comprehensive. No error of law has been identified and no procedural irregularity. I can find no merit in this ground of appeal. It has no real prospect of success and there is no other compelling reason why it should be heard on appeal. I refuse permission to appeal the child arrangements order.

Non-Molestation Order

The Legal Framework

63. By s42 Family Law Act 1996:

> "42 Non-molestation orders.
>
> (1) In this Part a "non-molestation order" means an order containing either or both of the following provisions—
>
> (a) provision prohibiting a person ("the respondent") from molesting another person who is associated with the respondent;
>
> (b) provision prohibiting the respondent from molesting a relevant child.
>
> (2) The court may make a non-molestation order—
>
> (a) if an application for the order has been made (whether in other family proceedings or without any other family proceedings being instituted) by a person who is associated with the respondent; or

(b) if in any family proceedings to which the respondent is a party the court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child even though no such application has been made.

(3) In subsection (2) "family proceedings" includes proceedings in which the court has made an emergency protection order under section 44 of the M1Children Act 1989 which includes an exclusion requirement (as defined in section 44A(3) of that Act).

(4) Where an agreement to marry is terminated, no application under subsection (2)(a) may be made by virtue of section 62(3)(e) by reference to that agreement after the end of the period of three years beginning with the day on which it is terminated.

…

(4B) In this Part "the applicant", in relation to a non-molestation order, includes (where the context permits) the person for whose benefit such an order would be or is made in exercise of the power conferred by subsection (2)(b).]

…

(5) In deciding whether to exercise its powers under this section and, if so, in what manner, the court shall have regard to all the circumstances including the need to secure the health, safety and well-being—

(a) of the applicant . . . ; and

(b) of any relevant child.

(6) A non-molestation order may be expressed so as to refer to molestation in general, to particular acts of molestation, or to both.

(7) A non-molestation order may be made for a specified period or until further order."

(8) A non-molestation order which is made in other family proceedings ceases to have effect if those proceedings are withdrawn or dismissed."

64. FLA 1996 s45 provides:

"45 Ex parte orders.

> (1) The court may, in any case where it considers that it is just and convenient to do so, make an occupation order or a non-molestation order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court.
>
> (2) In determining whether to exercise its powers under subsection (1), the court shall have regard to all the circumstances including—
>
> (a) any risk of significant harm to the applicant or a relevant child, attributable to conduct of the respondent, if the order is not made immediately;
>
> (b) whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately; and
>
> (c) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay [F1involved] in effecting substituted service.
>
> (3) If the court makes an order by virtue of subsection (1) it must afford the respondent an opportunity to make representations relating to the order as soon as just and convenient at a full hearing."

65. FPR Rule 4.3 states:

> "(4) The court may make an order of its own initiative without hearing the parties or giving them an opportunity to make representations.
>
> (5) Where the court has made an order under paragraph (4) –
>
> (a) a party affected by the order may apply to have it set aside (GL), varied or stayed (GL); and
>
> (b) the order must contain a statement of the right to make such an application.
>
> (6) An application under paragraph (5)(a) must be made –
>
> (a) within such period as may be specified by the court; or

> (b) if the court does not specify a period, within 7 days beginning with the date on which the order was served on the party making the application."

66. The standard template non-molestation order (template order 10.1) includes the following wording for orders concerning contact with children:

> "22. The respondent, [respondent name], must not telephone, text, email or otherwise contact or attempt to contact the relevant child[ren] (including via social networking websites or other forms of electronic messaging) [except for such contact as may be agreed in writing between the applicant and the respondent or in default of agreement ordered by the court].
>
> 23. The respondent, [respondent name], must not [between the hours of 8.30am and 4.00pm] go to, enter or attempt to enter the school premises known as [school name], and must not go [along the road[s] known as [road(s) name(s)]] / [anywhere within the territory of the map annexed hereto], except [by prior written agreement with the applicant] / [by prior written invitation from the school authorities]."

67. The President of the Family Division issued Practice Guidance on Non-molestation Injunctions in July 2023. In relation to ex parte (without notice) injunctions, paragraph 6 of the guidance states:

> "The court must at all times balance the applicant's need for protection with the need to limit interference with the respondent's rights to that which is proportionate. Although FLA 1996 s 45 does not establish a test of exceptionality, authority at High Court level (R v R [2014] EWFC 48 and DS v AC [2023] EWFC 46) has held that a FLA order should only be made without notice to the respondent in exceptional circumstances. Orders made without notice should not have the effect of barring a respondent from their home or place of work or other necessary location without very careful consideration and specific evidence to justify such an extensive infringement of the respondent's rights. Any order having that effect should be regarded as exceptional."

And at paragraph 13:

> "The ex parte order itself can be for a substantial period, such as 6 or even 12 months, but the return date must be listed within 28 days at most. The period of the order is a matter for the discretion of the judge, who will also want to consider how soon a fact-

> finding hearing is likely to be listed, if the application is contested."

And at paragraph 19:

> "An order made without notice must contain a statement of the right to make an application to set aside or vary the order under rule 18.11 in accordance with FPR 18.10(3). The phrase 'liberty to apply' is not sufficient for this purpose. The order must spell out that the respondent is entitled, without waiting for the return day, to apply to set aside or vary the order. If the respondent does apply to set aside or vary the order the court must list the application as a matter of urgency, within a matter of days at most."

68. The Guidance also addresses the use of orders to impose an exclusion zone on the respondent. At paragraph 18, it is stated:

> "If the court decides to exclude the respondent from a geographical area, the order should specify a named road or roads or a clearly defined area and avoid the use of expressions such as '100 metres from the applicant's home'. The use of maps, which can become detached, should likewise be avoided unless they are embedded into the body of the order."

The Non-Molestation Order Made on 25 April 2024

69. In the present case the Judge made the NMO of her own motion – there had been no application for one. On the face of the NMO order made on 25 April 2024 the Court recorded:

> "The Guardian had set out in his analysis dated 15 January 2024 at paragraph 57 his recommendation: "Given [the Father's] multiple breaches of orders to date, I consider that a power of arrest should be added to the penal notice in respect of in-person time (physical contact) occurring in the UK. [The Father] could then be arrested without the need for [the Mother] to return the matter to Court if he were to breach the order following the conclusion of these proceedings."
>
> The Guardian repeated his recommendation in his addendum analysis dated 18 April 2024 at paragraph 17: "I remain of the opinion that it not safe for the boys to spend in-person time with their father, including in the event that [the Father] returns to the UK, and that a power of arrest should be added to the penal notice in respect of this."

> The father confirms he has been given notice of the Guardian's recommendation in his position statement dated 19 April 2024 where he refers to the Guardian's recommendation and responds: "I state quite clearly if you seek to enact the power of arrest, I will deliberately breach an order to seek the intervention of a new judge. I am tired of being bullied and feel absolutely vilified I did not speak with this individual from cafcass."

70. A power of arrest cannot be added to a CAO. A penal notice conventionally appears at the head of a CAO, as was the case with the orders made in these proceedings. Breaches of the order may result in enforcement proceedings, as also occurred here. As a last resort, contempt proceedings may be brought for breaches of CAOs with penal notices attached, but no power of arrest may be added. As is clear from the reasoning set out in her judgment of 25 April 2024 the Judge accepted the principle articulated by the Guardian that the Father should be liable to be arrested for future breaches of the Court's CAO. She adopted, of her own motion, the mechanism of an NMO. The order reads, as relevant:

> "IMPORTANT NOTICE TO THE RESPONDENT [NAME OF FATHER]
>
> YOU MUST OBEY THIS ORDER. You should read it carefully. If you do not understand anything in this order you should go to a solicitor, Legal Advice Centre or Citizens Advice Bureau. You have a right to apply to the court to change or cancel the order.
>
> WARNING: IF, WITHOUT REASONABLE EXCUSE, YOU DO ANYTHING WHICH YOU ARE FORBIDDEN FROM DOING BY THIS ORDER, YOU WILL BE COMMITTING A CRIMINAL OFFENCE AND LIABLE ON CONVICTION TO A TERM OF IMPRISONMENT NOT EXCEEDING FIVE YEARS OR TO A FINE OR BOTH.
>
> ALTERNATIVELY, IF YOU DISOBEY THIS ORDER, YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED, OR HAVE YOUR ASSETS SEIZED.
>
> The court was satisfied that [The Father] had been provided with sufficient notice of the possibility that an order would be made against [the Father] whereby he could be arrested if he had face to face contact with either or both of his children….
>
> Non-molestation order
>
> 1. [The Father] must not have in person contact with [R and/or S]

> 2. [The Father] shall not instruct or encourage anyone else to contact [R or S] on his behalf.
>
> 3. [The Father] must not attend the children's school, [address stated] or their home at [address stated].
>
> 4. [The Father], who does not currently live in the UK, must not go within 1 mile of the children's school {address stated] or [home address stated]
>
> Duration of the Non-Molestation Order
>
> 5. Paragraphs 1- 4 of this order shall be effective against [the Father] once it is served upon him.
>
> Permission is granted for the order to be served electronically in light of [the Father's address being unknown and the parties being given to understand that he is in Australia currently though planning to come to the UK on 10th May 2024.
>
> 6. Paragraphs 1-4 of the order shall last [for the whole of the Children's minorities]."

71. At paragraph 82 of her judgment the Judge explained her decision to make the NMO as follows:

> My reasons are that the Guardian was quite clear that we need to end these proceedings. With that I wholeheartedly agree. The pressure is enormous on these children and every time a hearing approaches, as demonstrated recently, [the Father] increases the pressure on the children. It has to stop. Making an order, as I did previously, and leaving the mother to enforce it, means that when breached she has to issue an application and come back to court. I consider that the risks to these children are such that they justify the making of a non-molestation order. The requirement in the order that he should not initiate contact with the children and he must not have any in-person contact is essential in order to enforce this order, and it is essential to ensure that they are kept safe from harm. On that basis, I am justified, in my judgment, in making a non-molestation order to support the contact order and to keep the children free from harm."

The Ground of Appeal and Submissions

72. The Appellant's first ground of appeal is that:

> "The Court was wrong to make the NMO in that: (a) there was serious procedural irregularity, in that F had no notice and there was no opportunity given for F to apply to vary or set-aside the order, and (b) the decision was substantively wrong, in that: (i) it should not have been made ex parte; (ii) the order was not necessary in the circumstances of the other orders, and (iii) it was for an unjustified, and unjustifiable, duration."

73. The Father was living in Australia at the time when the NMO was made but was intending to return to England, as he subsequently did. He told me that he had been put in the same category as a paedophile by being made subject to arrest simply for loving his children and wanting to see them. He said that his sons wanted to see him as shown by their position statement made now that they have separate representation. In Counsel's skeleton argument on behalf of the Father the Court is reminded that the Father was a litigant in person and it is submitted that a full hearing, or return date, was not listed, which was a procedural irregularity. The fact that no notice had been given, that there was no return date, and the duration of the order (over three years) in combination rendered the imposition of the NMO unjust. Further, the NMO was unnecessary because a penal notice was attached to the CAO.

74. In response, the Mother and the Guardian point to the notice given to the Father, as recorded on the face of the NMO, that consideration would be given at the April 2024 hearing to an order that would allow for the Father's arrest for breach of the CAO. They also remind the Court of the history of repeated breaches which the Judge found, as she noted at paragraph 15 of her judgment of 25 April 2024:

> "… evidence an almost pathological inability in the father to comply with an order with which he did not agree. I considered that the breaches showed a comprehensive failure on the part of the father to comply with the detailed terms of the court order. In addition, he had used the boys to communicate changes and arrangements, fixing them with the responsibility for letting mum know his plans for them or the arrangements, and the blame agenda against the mother continued unabated."

> The Father had already stated his intention to disregard any such order. The circumstances were exceptional in that the Father had already repeatedly demonstrated that the attachment of a penal notice alone was insufficient to secure compliance with court orders.

Analysis and Conclusion

75. At the conclusion of the hearing I announced my decision that I would grant permission to appeal on this ground on that basis that it had a real prospect of success. I made it clear to the Father that I had not yet determined the appeal itself and that he should not assume, as he had indicated he was doing, that he would inevitably succeed on the appeal itself.

76. The Judge had the power to make a non-molestation order. The fact that a penal notice was attached to the child arrangements order which prevented the Father from having face to face contact with his children did not preclude the making of a non-molestation order to the same effect. The latter order allowed for an arrest upon breach, the former did not. For the reasons articulated by the Judge at paragraph 82 of her judgment, there was some justification on the striking facts of this case for supporting the child arrangements order with a non-molestation order. The Father had repeatedly and unapologetically breached previous child arrangements orders and had evinced an intention not to be bound by any further orders with which he did not agree.

77. There had been no application for a non-molestation order and so there was no ex parte (without notice) application. This was an order made of the Court's own motion under FLA 1996 s42(2)(b). As such FLA 1996 s45 does not apply – notice to the Father was not required by the rules or the Act.

78. The Court made the order of its own initiative, as it was entitled to do, but having done so without hearing from the Father, the requirements of FPR r4.3(4) and (5) applied. Whilst the Father had been made aware that consideration might well be given to making an order allowing for his arrest for breach of any order in relation to face to face contact with the children, and he had responded by saying that he would deliberately breach any such order, he had not been heard. He had not been forewarned of the possibility of his being excluded from a zone one mile from the children's school or from their home, nor that he might be arrested if he instructed or encouraged anyone else to contact the children. Nor had he been warned that orders might be made extending to the Children's 18th birthdays.

79. The exclusion zones of one mile from the boys' school and one mile from their home were large and no consideration appears to have been given as to the practical impact of such a large exclusion area. The Father was in Australia but it was known that he was intending to return to England. As it is, I have not been told that the exclusion zones are, in themselves, causing him any particular difficulty, but he did not have any notice of the possibility of exclusion zones being imposed and he was not heard on that provision.

80. The order did state that "you have a right to apply to the court to change or cancel the order", but there was no return date, the order was to last for over three years, and on the same date as it made the NMO, the Court ordered that "the father is prevented from "making any further application in relation to the children for the duration their minority without permission of the court." I shall address that particular s91(14) order later in this judgment, but a litigant in person might believe that they were not entitled, without permission, to challenge the non-molestation order which related to the children.

81. By operation of CA 1989 ss91(10) and 9(6), the child arrangements order in relation to contact will cease to have effect when the Children are 16. The NMO was made to remain effective until the Children are 18. It has the effect therefore of continuing the order for no face to face contact for a further two years without the Court having found exceptional circumstances to justify the extension of the direct contact arrangements in the CAO beyond the Children's 16th birthdays.

82. The obvious answer to the complaint that the Father was not heard on the non-molestation order is that he had chosen to absent himself from the hearing. He accepted to me during his oral submissions that because the particular Judge was continuing to hear the proceedings, he

considered it futile to participate. Accordingly, it can be inferred that had the Father been informed by email or otherwise, that the Court was contemplating making an NMO to include exclusion zones and a prohibition on his using others to contact the children, he would not have engaged with the Court for so long as HHJ Atkinson was conducting the case.

83. There was no return date specified in the non-molestation order but there is no requirement in the FPR for a return date when the Court makes such an order of its own motion. FPR r4.3 requires that the affected party is given an opportunity to be heard. The Father knew that a power of arrest was being considered, had indicated that he would deliberately breach any such order which carried with it a power of arrest, and had chosen not to participate in the hearing. I am satisfied that he was given an opportunity to be heard. FPR r4.3 also requires that an order made of the court's own motion includes a statement of the right to have it set aside, varied or stayed. The order contained a statement that the Father could apply to change or cancel the order. The requirement was therefore met. It was stated to be a right and the s91(14) order was made in a separate order relating to the CAO. There is no evidence that the Father was confused by the orders – it is no part of his appeal that he believed that the s91(14) order applied to the NMO. The non-molestation order was made for a long period but its length was not in excess of the powers given to the Court by FLA 1996 s42.

84. The NMO was an exceptional order to make and I have carefully considered whether it was necessary but I am satisfied that the Judge was entitled of her own motion to make an NMO that the Father must not have in person contact with the Children and must not instruct or encourage anyone else to contact them on his behalf. The Father was given an opportunity to be heard and was told of his right to challenge the NMO once made. The Judge might have included a specific return date and might have made it clearer that the s91(14) order did not apply to the NMO, but no error of law was made in those respects. The Judge gave reasons why, given the exceptional non-compliance of the Father and the harm to the Children caused by his breaches and the need for the Mother to then seek enforcement, it was necessary to make an NMO alongside the CAO.

85. However, in one respect the NMO does not reflect the reasons given by the Judge for making it. The NMO prohibits the Father from encouraging or instructing any third party to contact the Children on his behalf but, unlike the CAO, it does not prohibit him from initiating contact (other than having contact in person). At paragraph 82 of her judgment (quoted above) when justifying the making of the NMO, the Judge said, "The requirement in the order that he should not initiate contact with the children … is essential in order to enforce this order, and it is essential to ensure that they are kept safe from harm. On that basis, I am justified, in my judgment, in making a non-molestation order to support the contact order and to keep the children free from harm." But the NMO did not support the CAO in that particular respect because it did not prevent the Father from initiating contact with the children. Naturally, the absence of an order within the NMO barring the Father himself from initiating indirect contact is not the subject of appeal. There is no cross-appeal by the Mother who is a litigant in person.

86. I have two remaining concerns about the NMO:

    86.1. The exclusion zone order ought to have been expressed differently to be in accordance with paragraph 18 of the President's Guidance from 2023. I have not been told that it has caused any practical difficulties for the Father going about his day to day business in England. Nevertheless, the Guidance ought to have been followed.

86.2. The NMO lasts two years longer than the CAO. This discrepancy was not addressed by the Judge in her judgment. The Judge did not find any exceptional reasons for extending the CAO for time with and contact with the Father beyond the Children's 16th birthdays. The NMO was therefore more than a mechanism for backing up the child arrangements order: it had the effect of extending the prohibition on direct contact for two years beyond the CAO. Nor did the Judge address the duration of the NMO in her ex tempore judgment.

87. These points were not addressed by the parties at the appeal hearing. Only after I had taken time to consider my judgment on the appeal did they come to the forefront of my mind. I therefore informed all parties of my concerns about these matters and gave them opportunity to make further written submissions if they desired. They did so. The Mother rightly said that the points above had not been raised by the Appellant, but he is a litigant in person and, having noted these concerns, I must address them. Counsel for the Children submitted that the Judge was wrong to make a non-molestation order effectively barring face to face contact with the children to age 18. She submitted that the contact provisions of the CAO cease to have effect when the Children are 16 and therefore making an NMO to last until they were 18 was disproportionate.

88. The experienced Judge made clear in her judgments that the Father was one of the most unbending, angry and non-compliant litigants she had ever encountered. Her findings that he was causing significant harm to the Children were ones she was entitled to make. Her legitimate goal was to protect these Children and she considered that the making of an NMO to support the CAO was required. However, she did not give reasons for why the NMO would be made until the Children were 18. I cannot import to this part of her decision-making, the reasons she later gave for making a s91(14) order for the whole of the Children's minority. Had she expressly addressed whether there were exceptional circumstances to extend the CAO in relation to time with the father to the Children's 18th birthdays, then perhaps she may have made that order. But she did not do so. The orders made were not coterminous as perhaps the Judge had intended. Making the NMO to remain in force until the Children were 18 was an exceptional course and required justification.

89. With misgivings because of the consequent prolongation of these proceedings, I have concluded that the appeal against the NMO should be allowed on the grounds that the Judge did not give reasons for making an NMO of a longer duration than the similarly (but not identically) worded CAO which she intended to use the NMO to "support". The Judge did not give reasons for making an NMO until the Children were 18. The Judge did not expressly consider the duration of the NMO in the context of the CA 1989 provisions about extending CAO's beyond a child's 16th birthday. To make an NMO barring the Father from having direct contact with the Children until they were 18 ought to have been recognised by the Judge as an exceptional course, requiring specific justification. These were errors which mean that the appeal against the NMO should be allowed.

90. As for the exclusion zone provisions within the NMO, I do not consider them to be an error of law or an irregularity causing injustice such that the appeal should be allowed on that ground. However, given the orders I shall make, as set out below, the Judge will have an opportunity to reconsider the terms of any exclusion zone orders.

S. 91(14) Order

91. At the hearing I announced that I would give permission to appeal the s91(14) Order. The order was an exceptional one in that it would last for over three years and until the children were 18. I was giving permission to appeal the NMO which also lasted until the Children were 18 and it seemed to me that there was a compelling reason to consider the appeals against both grounds in order to analyse how the orders sat together and alongside the CAO. As noted above, I emphasised to the Father that the grant of permission was not an indication of success on the appeal itself.

The Legal Framework

92. CA1989 s91(14) provides:

> "On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court."

93. CA 1989 s91A provides:

> "(1) This section makes further provision about orders under section 91(14) (referred to in this section as "section 91(14) orders").
>
> (2) The circumstances in which the court may make a section 91(14) order include, among others, where the court is satisfied that the making of an application for an order under this Act of a specified kind by any person who is to be named in the section 91(14) order would put—
>
> (a) the child concerned, or
>
> (b) another individual ("the relevant individual"),
>
> at risk of harm.
>
> (3) In the case of a child or other individual who has reached the age of eighteen, the reference in subsection (2) to "harm" is to be read as a reference to ill-treatment or the impairment of physical or mental health.
>
> (4) Where a person who is named in a section 91(14) order applies for leave to make an application of a specified kind, the court must, in determining whether to grant leave, consider

> whether there has been a material change of circumstances since the order was made.
>
> (5) A section 91(14) order may be made by the court—
>
> (a) on an application made—
>
> (i) by the relevant individual;
>
> (ii) by or on behalf of the child concerned;
>
> (iii) by any other person who is a party to the application being disposed of by the court;
>
> (c) of its own motion.
>
> (6) In this section, "the child concerned" means the child referred to in section 91(14)."

94. Hence, s91(14) orders may only be made in respect of applications for orders under the CA1989. They may be made of the Court's own motion. They may be made in respect of applications in relation to "the child concerned" whatever the age of the child (provided they are a child and therefore under 18) and there is no prohibition on a s91(14) order having effect until a child reaches the age of 18 as was ordered in the present case. Nevertheless, in *In the matter of S (Children)* [2006] EWCA Civ 1190, the Court of Appeal held at [85] and [90]:

> "[85] In our judgement, however, orders made without limit of time, and orders expressed to last until a child is 16 should be the exception rather than the rule, and where they are made, the reasons for making them should be fully and carefully set out.
>
> [90] Section 91(14) of the Act has been described as both draconian and flexible. Both descriptions are apt. Its use, however, has to be carefully controlled by the court as part of its over-arching strategy, which is to preserve and foster relationships wherever possible. An order which is indeterminate, or which is expressed to last until the sixteenth birthday of the relevant child is, in effect, an acknowledgement by the court that nothing more can be done. As we have already made clear, cases in which the court reaches the end of the road do exist, and there are cases in which it is essential for the welfare of the children and the physical health and sanity of the resident parent that an indefinite halt is called to litigation. But if the court has indeed reached that stage, it needs to spell out its reasons clearly, so that the parents – and in particularly the parent who is the subject of the s 91(14) order knows precisely where he or she stands, and precisely what issues he or she had to

> address if an application for permission to apply is going to be possible."

As is clear from that judgment, such orders are permissible but they give the appearance that the Court is "permanently shutting the door of the court in the litigant's face" and so should be rare.

Analysis and Conclusions

95. No notice was given to the Father that the Court would consider extending or otherwise varying the s91(14) order initially made on 9 December 2022. That original order had prevented the Father from making "any further application in relation to the children save only in respect of any application seeking permission to remove them from the jurisdiction for the purpose of a holiday. The order was to remain in force until the children concluded their GCSEs (when each would be nearly 16). On 25 April 2024 the Judge ordered,

> "S91(14) Children Act 1989 Order
>
> The father is prevented from making any further application in relation to the children for the duration of their minority without permission of the court. Any application for leave to apply shall be reserved to HHJ Atkinson."

96. I am satisfied that, as a s91(14) order, it only applied to applications under the CA 1989 in respect of the two children. However, it was wider than the previous s91(14) order because it covered all applications under the Act in respect of the Children, and was to be remain effective until they reached the age of 18.

97. As noted, the contact arrangements within the child arrangements order made on 25 April 2024 will cease to have effect when the Children reach the age of 16. The "lives with" order will continue to have effect beyond that age. Without the s91(14) order the Father would also be entitled to bring applications for prohibited steps or specific issue orders. Hence, it was not illogical to make a s91(14) order that persists beyond the Children's 16th birthdays. Nevertheless, as the Court of Appeal made clear in *In the matter of S (Children)* (above) orders of that kind should be the exception rather than the rule and the reasons for making them should be fully and carefully set out.

98. The Judge explained her reasons for extending the s91(14) order as follows:

> "85. Section 91(14): my original section 91(14) order was to extend until the children had finished their GCSEs, I think, anticipating that the father might have made a further application in relation to their schooling at that point. In fact, these children have not had a moment of the peace. So, I am going to extend the 91(14) order. I am removing the limited permission to apply in relation to a holiday. I am extending the 91(14) order during their minority. These children need peace. The father, although

> he is not ostensibly engaging in these proceedings, he is perpetuating them, in my judgment. He is weaponizing them in order to undermine the mother's parenting of the boys, and using the opportunity to visit more turmoil on them in so doing. I anticipate that this decision will bring more challenges and further applications to vary – perhaps with the return of the father to the UK, or simply because he decides not to return and seeks orders which reflect that."

99. The Judge did not recognise that she had not extended the contact arrangements in the CAO beyond the Children's 16th birthdays but she was entitled in law to make a s91(14) order that had effect during the whole of their minority and she gave reasons for taking that exceptional course.

100. The Father's skeleton argument contends that the use of the term "minority" within the s91(14) Order was insufficiently clear, but a "child" is defined at CA 1989 s105 as a person under the age of 18 (save for an exception which is of no present relevance). In context "minority" meant the period until the Children reached the age of 18.

101. The Father's skeleton also contends that it was not made sufficiently clear to the Father what he needed to do in order to be given permission to make an application. I reject that submission – the Father's unacceptable conduct had been the subject of a number of judgments and the Judge's condemnation of his harmful behaviour could not have been made more clear. Likewise, the need to protect the Children from the Father "weaponizing" litigation to "visit more turmoil" on them was spelled out by the Judge. Hence, any future application by the Father during the Children's minorities would have to be devoid of those characteristics for the Court to be able to consider giving permission. The Court cannot spell out in advance precisely what would be required for permission to be given but the Judge has made clear where the Father stands and what he has to change in order for the grant of permission to be possible. Sadly, the Father shows no signs of accepting the Judge's findings and analysis, but the Judge has made it clear that so long as the Father continues his use of proceedings to undermine the mother and bring turmoil on the Children, future permission to bring applications under the Act is unlikely to be granted.

102. The Father's conduct was regarded by the Judge as being exceptional and she was entitled to conclude that it called for an exceptional order. The Judge made no error of law; there was no injustice caused by procedural error, the judge was entitled to make the order that she made and she gave her reasons for doing so. I dismiss the appeal against the s91(14) order.

Final Conclusions and Disposal

103. For the reasons given I refuse permission to appeal the Judge's decision not to recuse herself, and against the making of the CAO. I grant permission to appeal the s91(14) order but dismiss the appeal against that order. I grant the appeal against the NMO.

104. As noted, the Children are now separately represented and they have expressed views about the NMO through Counsel in this appeal. The question of whether those views are independent of paternal influence is another matter. A further change since the Judge made the NMO in April 2024 is that the Father has returned to England to live. It is of course possible that he will not remain but he is now living here.

105. I have considered the Court's powers on appeal. In the present case the Judge was not wrong to make an NMO but the duration and terms of the NMO were not consistent with the CAO it was intended to support, and no reasons were given for the duration of the NMO which was in any event inconsistent with the duration of the CAO. Furthermore, considerable time has passed since the NMO was made and the Children are now separately represented. If the NMO is to be reconsidered then it should be reconsidered in its entirety. In my judgement the appropriate order is to set aside the NMO but to remit the case to HHJ Atkinson for reconsideration of the making and terms of the NMO. I have refused permission against the recusal decision. It is appropriate for the same Judge to reconsider the making and terms of the NMO. At the same time, in order to allow the Judge fully to consider the duration and consistency of the orders, I shall refer the issue of the duration of the CAO to HHJ Atkinson.

106. I must advise the Appellant Father that this appeal decision does not mean that all the Judge's previous orders are open for reconsideration. The appeal against the s91(14) order has been dismissed. Permission to appeal the CAO has been refused. Given the history of this case it is important that there is clarity as to what the Judge must reconsider in the light of my decision. I shall direct that the NMO be set aside and that the case be remitted to HHJ Atkinson for her to give directions, on paper, for a with notice hearing to reconsider the following matters:

    106.1. The making of an NMO against the Father.

    106.2. The terms of the NMO and in particular:

        106.2.1. The wording of any exclusion zone orders;

        106.2.2. The wording of any orders concerning the Father initiating contact with the Children by himself of by encouraging or instructing others.

    106.3. The duration of the NMO, any extension of the contact provisions of the CAO beyond the Children's 16th birthdays, and the consistency of the duration of the CAO and any NMO that the Court may make.