Neutral Citation Number: [2020] EWCA Civ 583

Case No: B4/2020/0626

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
SITTING AT CARLISLE
HHJ DODD
CA19C00007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 April 2020

Before :

THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE NICOLA DAVIES

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Re A (Children) (Remote Hearing: Care and Placement Orders)

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Karl Rowley QC and **Simon Heaney** (instructed by **Cumbria Family Law Ltd**) for the **Appellant Father**
David Rowlands (instructed by **Cumbria County Council**) for the **First Respondent Local Authority**
John Chukwuemeka (instructed by **Milburns Solicitors**) for the **Second Respondent**
Nicholas Rooke (instructed by **Holdens**) for the **Third Respondent**
Richard Hunt (instructed by **Bendles Solicitors**) for the **Fourth to Seventh Respondent Children by their Children's Guardian**

Hearing date: 22 April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Thursday, 30 April 2020.

Sir Andrew McFarlane P:

1. This is the judgment of the court to which all three members have contributed.

2. This case is the first appeal in a case relating to the welfare of children to reach the Court of Appeal on the issue of remote hearings during the COVID 19 pandemic. The appeal was heard on 22 April 2020. On the following day the same constitution heard the second such appeal, *Re B (Children) (Remote Hearing: Interim Care Order)* [2020] EWCA (Civ) 584. There will undoubtedly be further appeals in children cases heard in the High Court or the Court of Appeal on the issue of remote hearings in the coming weeks.

3. Against that background we wish to stress the following cardinal points with the utmost emphasis:

    i) The decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceeding that were open to the court and is, therefore, held to be wrong.

    ii) Guidance or indications issued by the senior judiciary as to those cases which might, or might not, be suitable for a remote hearing are no more than that, namely guidance or illustrations aimed at supporting the judge or magistrates in deciding whether or not to conduct a remote hearing in a particular case.

    iii) The temporary nature of any guidance, indications or even court decisions on the issue of remote hearings should always be remembered. This will become all the more apparent once the present restrictions on movement start to be gradually relaxed. From week to week the experience of the courts and the profession is developing, so that what might, or might not, have been considered appropriate at one time may come to be seen as inappropriate at a later date, or vice versa. For example, it is the common experience of many judges that remote hearings take longer to set up and undertake than normal face-to-face hearings; consequently, courts are now listing fewer cases each day than was the case some weeks ago. On the other hand, some court buildings remain fully open and have been set up for safe, socially isolated, hearings and it may now be possible to consider that a case may be heard safely in those courts when that was not the case in the early days of 'lockdown'.

4. The President's Guidance on Remote Hearings issued on 19 March 2020 lists the types of hearing which may be considered to be suitable for a remote hearing at paragraph 8. The list includes 'All directions and case management hearings' and, with respect to Public Law Children cases, the following three categories:

i) Emergency Protection Orders

ii) Interim Care Orders

iii) Issue Resolution Hearings.

Paragraph 10 of the 19 March Guidance goes on to state:

> "10. It is possible that other cases may also be suitable to be dealt with remotely. As the current situation is changing so rapidly, and as the circumstances that will impact upon this decision are likely to differ from court to court and from day to day, the question of whether any particular case is heard remotely must be determined on a case-by-case basis."

5. As paragraph 3.3 of MacDonald J's remote hearing manual records, on 25 March 2020 the President clarified the position concerning attended hearings by stating that:

> "… live court-based hearings should now be confined only to *exceptional* circumstances where a remote hearing is not possible and yet the hearing is sufficiently urgent to mean that it must take place with those involved attending court in a manner which meets the social distancing requirements."

6. On 9 April 2020, the Lord Chief Justice, the Master of the Rolls and the President of the Family Division sent a message to all circuit judges and district judges concerning remote working during the 'lockdown' ['the LCJ's message']. That message included this guidance:

"Generally:

a. If all parties oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing; if parties agree, or appear to agree, to a remotely conducted final hearing, this should not necessarily be treated as the 'green light' to conduct a hearing in this way;

b. Where the final hearing is conducted on the basis of submissions only and no evidence, it could be conducted remotely;

c. Video/Skype hearings are likely to be more effective than telephone. Unless the case is an emergency, court staff should set up the remote hearing.

d. Parties should be told in plain terms at the start of the hearing that it is a court hearing and they must behave accordingly.

In Family Cases in particular:

e. Where the parents oppose the LA plan but the only witnesses to be called are the SW & CG, and the factual issues are limited, it could be conducted remotely;

f. Where only the expert medical witnesses are to be called to give evidence, it could be conducted remotely;

g. In all other cases where the parents and/or other lay witnesses etc are to be called, the case is unlikely to be suitable for remote hearing."

7. It was reported to us that sub paragraph (g) has been interpreted as applying to interim hearings. If that is the case, the President wishes to make it plain that, as the text under the heading 'Generally' in sub paragraphs (a) to (c) indicates, the parameters set out thereafter, including sub paragraph (g), are intended to apply to final hearings and not to interim hearings.

8. It follows, applying the principles set out above and the guidance that has been given, that:

i) Final hearings in contested Public Law care or placement for adoption applications are not hearings which are *as a category* deemed to be suitable for remote hearing; it is, however, possible that a particular final care or placement for adoption case may be heard remotely;

ii) The task of determining whether or not a particular remote hearing should take place is one for the judge or magistrate to whom the case has been allocated, but regard should be had to the above principles and guidance, as amplified below;

iii) The requirement for 'exceptional circumstances' applies to live, attended hearings while the current 'lockdown' continues.

9. The factors that are likely to influence the decision on whether to proceed with a remote hearing will vary from case to case, court to court and judge to judge. We consider that they will include:

i) The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?

ii) Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties;

iii) Whether the parties are legally represented;

iv) The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters;

v) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;

vi) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;

vii) The scope and scale of the proposed hearing. How long is the hearing expected to last?

viii) The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;

ix) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;

x) Any safe (in terms of potential COVID 19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates.

10. It follows from all that we have said above that our judgment on this appeal should be seen as being limited to the determination of the individual case to which it relates. Each case is different and must be determined in the light of its own specific mixture of factors. The import of the decision in this case, in which we have held that the appeal must be allowed against a judge's decision to conduct a remote hearing of proceedings which include applications for placement for adoption orders, is that, on the facts of this case, the judge's decision was wrong. As will be seen, one important and potentially determinative factor was the ability of the father, as a result of his personality, intellect and diagnosis of dyslexia, to engage sufficiently in the process to render the hearing fair. Such a factor will, almost by definition, be case-specific. Another element, and one that is likely to be important in every case, is the age of the children and the degree of urgency that applies to the particular decision before the court. The impact of this factor on the decision whether to hold a remote hearing will, as with all others, vary from child to child and from case to case.

11. It also follows that the decision on this appeal must not be taken as an authority that is generically applicable to one or more category of children cases. We wish to state with total clarity that our decision does not mean that there can be no remote final hearings on an application for a care order or a placement for adoption order. Neither is our decision to be taken as holding that there should be no 'hybrid' hearings, where one or more party physically attends at a courtroom in front of a judge. The appropriateness of proceeding with a particular form of hearing must be individually assessed, applying the principles and guidance indicated above to the unique circumstances of the case.

12. Finally, in addition to the need for there to be a fair and just process for all parties, there is a separate need, particularly where the plan is for adoption, for the child to be able to know and understand in later years that such a life-changing decision was only made after a thorough, regular and fair hearing.

The background

13. The appeal arises in care proceedings originally issued on 15 March 2019 in respect of 6 children. The oldest child has now turned 17 and lives with his mother. The local authority withdrew their application in respect of him on 3 April 2020. On the same

date a supervision order was made in respect of the second oldest child, who is now 15 years old and lives with Mr and Mrs A, who are his father and stepmother. The youngest 4 children are currently in foster care; the appeal concerns the final hearing which will determine the long-term plans for their care. The local authority's plan for the 3rd and 4th oldest, who are aged 11 and 8 years respectively, is for them to remain in long-term foster care. The plan for the youngest two, one aged 3 years 10 months and the other aged 20 months, is adoption and they are each the subject of an application for a placement for adoption order.

14. Mr A is the father of all six children. Ms B is the mother of the oldest 4 children and Mrs A is the mother of the 2 youngest children [initials chosen at random].

15. The local authority's concerns relate to emotional and physical harm through exposure to domestic violence, coercive and controlling behaviour, instability, conflict, and volatility. The agreed schedule, upon which it is accepted the threshold criteria under Children Act 1989, s 31 for making a care order have been met, includes instances of neglect and poor supervision (arising from parental alcohol misuse), and difficulties around mitigation of the resulting risks due to a lack of parental honesty.

16. The case had been listed for a conventional final hearing for 5 days in the Family Court sitting in Carlisle commencing 30 March 2020. That hearing was vacated by the Designated Family Judge, HHJ Forrester, at the start of the COVID crisis and listed for further consideration once the status of the public health emergency became clearer, at a hearing which took place before HHJ Dodd on 3 April 2020.

The decision under appeal: Summary

17. On 3 April 2020, HHJ Dodd gave directions for the final hearing to go ahead in "hybrid" form, over seven days in late April and early May. Mr and Mrs A were to attend in person to give evidence. In addition, in the light of Mr A's concern about being unable to access a remote hearing due to dyslexia and a lack of suitable technology in the home, the judge directed that Mr A could attend for the entire hearing in person in a courtroom in front of the judge if he was unable to engage remotely. At that stage, it was also envisaged that his counsel would physically attend with him.

18. An application for permission to appeal was lodged with the Court of Appeal on behalf of Mr A on 4 April 2020.

19. This case was relisted before HHJ Dodd in order to give the court the opportunity to review the listing decision in the light of the LCJ's message of 9 April. At the review hearing on 17 April 2020, the judge maintained the decision to conduct the hearing as a "hybrid" with Mr and Mrs A attending court (separately) to give evidence, with the expectation that they would be accompanied by a representative of their respective firms of solicitors. It was accepted that their counsel would join the proceedings remotely. The court maintained the option of Mr A attending the court throughout the hearing if he was unable to engage with the process remotely.

The judge's decision: 3 April 2020

20. At the hearing on 3 April, the local authority and the children's guardian urged the court to make arrangements for a remote final hearing at the earliest possible date on the basis that the adoption plan for the younger two children required determining urgently. The judge considered that a completely remote hearing was not appropriate and that the parents should have the opportunity to give their evidence in person before him sitting in the courtroom. This suggestion was opposed by counsel for Mr and Mrs A, firstly on the ground that they were reluctant to leave their home during the current lockdown, secondly that a remote or hybrid hearing would not be sufficiently fair to meet the requirements of ECHR Articles 6 and 8, and thirdly that it was oppressive to expect their counsel to travel each day from Merseyside to Carlisle (as there were no hotels currently available in Carlisle for an overnight stay).

21. Despite having taken account of the parents' opposition, the judge considered that the case was sufficiently urgent to justify listing it in April/May for a hybrid hearing. He considered that the option of adoption would become less achievable with the passage of every month and that, as the children would have to move from their present placement in any event, it was necessary for the hearing to take place now, rather than waiting for the current restrictions on movement to be lifted. He considered that it was reasonable to expect the parents, in common with essential workers and others, to leave their home and come to the court building in Carlisle where it would be possible to maintain safe social distancing. He made it plain that the proposal that they should attend court was an offer of a facility, rather than a compulsory requirement. The judge considered that the suggestion that a remote or hybrid hearing would breach the fair trial requirements of Article 6 as unarguable and that it was commonplace for witnesses to give evidence over a video link. He held that there would be no detriment to the parents and the court would get the full flavour of their evidence by their physical attendance. The judge indicated that it was a matter for counsel whether they attended court in person or remotely, but travel or accommodation difficulties were not a reason for not proceeding with the hearing.

22. The court therefore directed that the final hearing should commence on the basis described by the judge on 27th April 2020.

The judge's review: 17 April 2020

23. Prior to the review hearing on 17 April, the judge prepared and circulated a detailed 'case plan' for the final hearing. It is a narrative document which records the salient features of the case and describes the arrangements that had been proposed for the hearing.

24. It is of note that in the 'case plan' the judge records the age of the second youngest child as '4 (will be 5 in June)', whereas the true position is that this child is currently 3 years old and will only become 4 in June 2020. In the body of the 'case plan' the following appears:

> "The main concern is the effect further delay may have on the chances of a successful adoption for X and Y – X will be 5 in June and research shows that the chances of an adoption being successful decrease significantly around that age."

25. The 'case plan', having described the circumstances leading up to the directions given on 3 April, identifies a range of practical and forensic issues that need to be

considered or resolved at the reconvened case management hearing on 17 April. We consider this to be the kind of document that is likely to be useful whenever a court is considering the arrangements for a possible remote hearing of any substance.

26. At the hearing on 17 April there was a significant shift in the position of the local authority so that it no longer supported the case proceeding as a remote or hybrid hearing. Counsel for the local authority, Mr Rowlands, told this court that the change of position was largely driven by consideration of the LCJ's message.

27. Having heard submissions from all parties, the judge gave a short judgment in which he, first of all, stressed that he was not ordering either the parents or a representative of their solicitors' firm to attend but that this was simply his expectation. The judge noted that the LCJ's message indicated that final care proceedings which were contested and in which the parents were expected to give evidence would not normally be suitable for a remote hearing. The judge drew a distinction, however, between a fully remote hearing, and the form of hybrid hearing that he had established which would not, he stated, suffer from the deficits with respect to a fair trial that might attach to a fully remote hearing. The judge agreed that a fully remote hearing should not take place.

28. On the issue of urgency, counsel's agreed note of the judgment reads as follows:

> "Urgency - is closing the adoption 'window' 'X' will be 4 in June. I don't have it in mind long delay until the Summer, my thoughts are spurred on that the window for X is closing fast. There is no time to lose.
>
> What I am invited to do by all save CG is vacate and relist for another CMH end of May by that point further guidance as to remote hearings from PFD
>
> If there were even a bit more time for X very tempting
>
> To wait another 6 weeks might then have been appropriate
>
> But it won't be. It will be a CMH and then find a hearing. That would then depend upon judicial resources and available witnesses, etc X's position does not allow for that delay."

29. The judge concluded, after expressing his gratitude for the additional assistance offered by the LCJ's message and the opportunity to review the arrangements, by holding that the planned hybrid hearing should proceed on 27 April.

30. It is of note that the judge was sent a copy of counsel's note of the 17 April judgment and responded by email on 20 April:

> "Other than that X will, I believe, be 5 not 4 in June, your Note is approved."

After counsel had drawn attention to X's correct date of birth, the judge accepted the position and agreed the Note as reproduced in paragraph 28 above.

The Appeal

31. Permission to appeal against the order made on 3 April was granted by Lord Justice Peter Jackson on 17 April. Although no formal application for permission was made, the court has permitted the Appellant to make submissions which also challenge the judge's reconsideration of the case at the 17 April hearing which resulted in the judge confirming the 3 April order. It was a considerable achievement by the parties to have ensured that the appeal was ready for a full hearing in less than three working days.

32. For the Appellant, Mr Karl Rowley QC, leading counsel who did not appear below, and Mr Heaney, who did, relied upon the following primary ground of appeal:

> The Learned Judge was wrong not to vacate the listed final hearing:
>
> i) In view of the combination of the Guidance of the President on 19 March and the message from the LCJ of the 9 April;
>
> ii) There was in reality no or no sufficient urgency to make decisions in respect of the children given the ongoing effects of the pandemic.

33. In his submissions, Mr Rowley argued that the judge's decision to proceed was well outside the margin of reasonable case management decisions that might be made in the circumstances of this case. Determining the question of a child's adoption, against parental wishes, at a final hearing conducted remotely, must be exceptional. This case was not so urgent that it needed to be heard in this manner, and the judge was in error in apparently believing that X was rising 5 years old, when in fact he is a year younger.

34. It is apparent that part of the judge's reasoning was that the hearing would not be 'remote' because Mr and Mrs A would attend court and give their evidence in front of him. Mr Rowley submitted that this insight indicated that it was one entirely from the judge's perspective and failed to take account that for Mr and Mrs A, sitting at home and attempting to follow all of the other evidence that would be given over a video link, the bulk of the process would indeed be remote. Mr Rowley argued that the correct approach when evaluating fairness was to look at the whole hearing, including from the perspective of the parent; it was not just a matter of the court seeing them when they gave their evidence.

35. An extensive expert psychological assessment has been provided to the court in which Mr A is described as being emotionally fragile and brittle. The report includes the following:

> "He is apparently Dyslexic and struggles to process language and symbols but has learnt to compensate to a degree. He does not open his mail or use a diary and tends to hold most information in his head or rely on others reminding him."

The expert conducted a formal assessment of Mr A's cognitive ability and reported that he struggled to process some information at normal speed and needed extra time to focus and concentrate. The report continued:

> "He was easily distracted and his confidence evaporated almost instantaneously, if he made a mistake. It is suspected this is part of the father's trouble, he gets frustrated easily and quickly becomes exasperated. If he does this with his family,

> he may come across as having a short-fuse and being rather abrupt, even volatile."

The father is unable to access any video technology in his home and would have to share access to the court process by watching on his wife's iPad. In Mr Rowley's submission, Mr A's dyslexia, emotional fragility and poor attention span render it impossible for him to engage with the court process at home, unsupported by lawyers, to any degree that might be regarded as a fair process when the issue before the court is whether any of his four young children can be returned to his care and where the plan is for two of them to be adopted.

36. In line with the local authority, Mr Rowley submitted that the fair way to proceed would be to await such further guidance on remote hearings as may be issued in May 2020 (following an independent review that is currently being under taken at the request of the President of the Family Division by the Nuffield Family Justice Observatory) and for the case to be listed for a further case management hearing at that time.

37. For the local authority, Mr Rowlands, who appeared before the judge, explained that the Family Finding team had found a possible match for X and Y with prospective adopters, but that the case would not be progressed further prior to the making of a placement for adoption order. If the case were adjourned, then it was possible that this potential match may be lost. It was not, however, the local authority's case that the 'window' of potential adoption would become shut, with the result that X would be seen as unadoptable, if the final hearing were postponed. The local authority case was simply that the sooner the issue of long-term placement is decided, the better it will be for the children.

38. The local authority had changed its stance before the judge between the two hearings largely as a result of sub paragraph (g) in the LCJ's 9 April message which indicated that 'where the parents and/or other lay witnesses etc are to be called, the case is unlikely to be suitable for remote hearing'.

39. Mr Rowlands drew attention to the manual produced by Mr Justice MacDonald, '*The Remote Access Family Court*' [Version 4], paragraph 3.3.

40. The local authority's position in this appeal is that it does not agree with the judge that the circumstances of this case are sufficiently exceptional to require the hearing to proceed on 27 April as proposed. Even if a placement for adoption order were made, the 'family finding' process would not be able to conclude until after the COVID restrictions have been lifted. The facts of this case, and the ages of the children, do not, in Mr Rowlands' submission, require urgent and immediate determination. He also concedes that the judge failed to give sufficient consideration to the difficulties that the father would have in engaging with the proposed process as a result of his emotional fragility and other difficulties.

41. For Mrs A, Mr Rooke, who appeared below, supports the appeal. He submits, in line with Mr Rowley and Mr Rowlands, that the case is not so urgent as to require the imposition of a process which removes from the parents a number of key elements of a fair trial which are normally considered to be either important or essential.

42. For Mrs B, the mother of the older children, Mr Chukwuemeka, who appeared below, also supported the appeal, whilst accepting that the sole issue in his client's case related to contact. He submitted that, despite the judge's requirement for Mr and Mrs A to attend to give live evidence, this was in reality still to be a remote hearing and, as the judge himself concluded, a remote hearing was not appropriate in this case.

43. The sole party supporting the learned judge's decision is the Children's Guardian, who is represented by Mr Hunt, as he was before the judge. In opposing the appeal Mr Hunt accepts that a contested application for the adoption of a child is arguably the gravest order for any parent to face and that such a hearing must be both fair and just. Mr Hunt also accepts, in common with the judge, that it would be inappropriate for this case to proceed as an entirely remote hearing. The appeal is nevertheless opposed on the basis that the regime established by the judge in this case meets the requirements for fairness and justice and should be allowed to proceed.

44. Mr Hunt, rightly, observes that the guidance and other statements issued in recent times by the President and other senior judges have sought to set out clear principles, but have fallen short of actually prohibiting certain classes of hearing so that the decision in each case is a matter for the discretion of the trial judge. In circumstances where this case is urgent and needs to be heard now, the requirement imposed by the judge for Mr and Mrs A to give their evidence in person means that the hearing is no longer 'remote' and will be a fair and appropriate process.

45. At its core, the issue between the Children's Guardian and the other parties turns on the urgency or otherwise of the need to determine the placement for adoption application. Mr Hunt submits that the learned judge was right in concluding that the circumstances were sufficiently urgent for X to justify proceeding on 27 April.

46. Dealing with specific points raised by the court, Mr Hunt is plain that during the hearing on 17 April the judge correctly stated that X would be 4 years old in June, despite the fact that both before and after the hearing the judge seems to have been in error as to the age of X. Separately, Mr Hunt accepted that no thought had been given to the fact that the 15 year old boy, who is subject to a supervision order, will be present in the home of Mr and Mrs A during the hearing. Mr Hunt accepted that, if the parents had been required to give evidence over a video link from their home in circumstances where the older child would be present, this would not be appropriate. He submitted that, now that the point had been raised, this further justified the judge's decision to require Mr and Mr A to attend court.

Discussion

47. At the conclusion of the appeal hearing we announced our decision that the appeal was to be allowed and that the hearing fixed for 27 April was to be vacated and relisted for a further case management hearing before HHJ Dodd in mid-May on a date to be fixed by the parties with the court. This judgment now records our reasons for that decision.

48. Although we have clearly come to a different view to that of the learned judge and have taken into account factors in addition to those which were considered at the two hearings before him, there are no grounds for criticism of his handling of or approach to this case. On the contrary, it is plain that at all times he gave most anxious

consideration to the question of how these applications might be heard in these extraordinary times.

49. Our principal reasons for concluding that the judge was wrong and that this case is not currently suitable either for a remote hearing or for the form of hybrid hearing set up by the judge fall under three headlines:

    i) Mr A's inability to engage adequately with remote evidence (either at home or in the courtroom);

    ii) The imbalance of procedure in requiring the parents, but no other party or advocate, to attend before the judge;

    iii) The need for urgency was not sufficiently pressing to justify an immediate remote or hybrid final hearing.

    We will look at each of these factors, briefly, in turn.

50. It was accepted before the judge that Mr A did not have any technology available personally to him at home to enable him to connect with a remote video hearing. At most he would be able to do so by joining with his wife via her iPad.

51. Mr A has limited abilities, and some disabilities, which render him less able to take part in a remote hearing. He has been diagnosed as dyslexic. He is unused to reading. He has a short attention span, is emotionally fragile and brittle and quickly becomes exasperated.

52. The process of joining the hearing from their home would be undertaken by Mr and Mrs A with his 15-year-old son in residence, who would be locked-down with them throughout the days of the remote hearing.

53. It is not clear how Mr A would be able to communicate with his legal team during the remote part of the hearing, but it is likely that any such communication would fall well short of that which normally applies to a lay party who is personally attended at court by a solicitor and counsel.

54. Although the judge offered the facility for Mr and Mrs A to attend at court each day of the hearing so that they might follow the proceedings via the court's video equipment, that option, whilst meeting the technical deficit that has been identified, would not address the other factors which are likely to inhibit Mr A's ability to engage with a remote procedure.

55. The concept of fairness and the need for a lay party to 'engage' in the process includes the ability of that person to follow and to understand what transpires at a court hearing at least to an adequate degree and then to be able to instruct their lawyers adequately and in a timely manner.

56. Taking these technical, emotional, intellectual and environmental factors together, it is not possible to understand how Mr A could engage sufficiently with the professional evidence that is to be given over a video link to his wife's iPad in his home over the course of a number of days for that process to be regarded as adequate or fair.

57. Mr Rowley is correct in submitting that the fairness of the process has to be seen as a whole, including from the perspective of the lay party. The judge apparently concluded that it was not appropriate to consider a wholly remote hearing for this case and the Children's Guardian agrees. In our view, making provision for Mr and Mrs A to give their evidence before the judge in the court room did not significantly alter the position on the facts of this case and did not address the substantial deficits in Mr A's ability to follow the evidence from his home and to instruct his counsel adequately.

58. Turning to the second headline reason, the judge was correct in identifying the need, if possible, for the parents to give their evidence in person before him at court. Recently, in the judgment given in *Re P (A Child: Remote Hearings)* [2020] EWFC 32 at paragraph 26 the President stressed the importance of the court being able to see all the parties in the court room. Although that case was specifically directed to the hearing of allegations of Factitious or Induced Illness, the more general point that a judge will be in a better position to assess the evidence of a witness who gives evidence live from a witness box than one who speaks over a video link is plainly right. There is, however, a need for caution when the only witness(es) required to attend court are the lay parties when others, for example the key social worker, are not. When a lay party is required to attend court, but his or her advocate is not, the cause for concern at the imbalance in the process must be heightened. Consideration must be given to the potentially exposed position of a witness giving live evidence in front of a judge in the absence of his or her lawyers or any of the other parties and in response to questions asked over a video link. The judge does not appear to have considered whether in this particular case it was reasonable to expect these parents to be placed in that potentially daunting position. When this is placed in the balance alongside the other factors which establish a lack of a fair process it gives them additional weight.

59. Thirdly, and more importantly, whilst the need to determine the long-term plan for these children, and in particular whether the younger two are to move to an adoptive home, is clearly pressing, it is not so urgent as to require an immediate hearing in April/May 2020 where, for the reasons that we have given, that hearing cannot be undertaken remotely.

60. On more than one occasion, both before and after the 17 April hearing, the judge referred to X as being a year older than his true age and there are grounds for holding that he may have inadvertently understood that this was the case. Be that as it may, the local authority position is plainly that X's age does not establish this case as exceptional and that his age does not justify a remote hearing that would not otherwise be justified. Most importantly, the local authority does not support the judge's conclusion that the adoption 'window' will imminently close for X and that it is necessary to determine his future immediately. This professional social work opinion, coupled with the information that the family finding process is on hold until the current COVID restrictions have been lifted, does not support the judge's conclusion on timing.

61. Finally, and more generally, we would draw attention to, and endorse, the steer given in the LCJ's message of 9 April at sub paragraph (a): 'If all parties oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing'. Whilst in the present case it is true that the Children's Guardian did not oppose proceeding with the planned hearing, all of the other parties, including the

local authority, did. In such circumstances, when the applicant local authority itself does not support a remote contested final hearing, a court will require clear and cogent reasons for taking the contrary view and proceeding to hold one.

62. For the reasons that we have now given, and despite our appreciation for the conscientious approach that the judge sought to adopt at every stage, we concluded that his decision to proceed with the planned hearing was wrong and must be set aside. The matter will return to the judge for him to give further directions with a view to the final hearing taking place as soon as may be possible.

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