Neutral Citation Number: [2022] EWCA Civ 1588

Case No: Case No: CA-2022-001689

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WATFORD
His Honour Judge Richard Clarke
CASE NO: WD22P00095

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 December 2022

Before :

LADY JUSTICE KING
LORD JUSTICE BAKER
and
LORD JUSTICE DINGEMANS

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N (A CHILD) (INSTRUCTION OF EXPERT)

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Christopher Hames KC and Kitty Broger-Bareham (instructed by **PS Law LLP**) for the **Appellant father**
Mark Twomey KC, Alexander Laing and Srishti Suresh (instructed by **Dawson Cornwell**) for the **Respondent mother**

Hearing date : 26 October 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 6 December 2022.

LORD JUSTICE BAKER :

1. This is an appeal against a case management order in private law proceedings under the Children Act 1989 relating to a boy, ("A"), now aged 8. The order under appeal permitted the parties to instruct a named independent social worker to carry out an assessment to assist the court to determine issues relating to child arrangements and education. The expert named in the order is a woman. The appellant father proposes that the assessment should be carried out by a male social worker. He asserts that the order permitting the instruction of a female social worker is an infringement of his human rights.

Background

2. The parents were both raised as members of the Hassidic Haredi Orthodox Jewish community, the father in the United States of America, the mother in England. In 2013, they underwent an arranged marriage in Jerusalem and thereafter lived together in Israel. In November 2014, the mother gave birth to A.

3. In her statement filed in these proceedings, the mother gives a description of life in the community in Israel and the father's strict religious observances. It is her case that she found her life with the father intolerable. Her description of the father's conduct includes examples of his discomfort in the presence of women, including in some contexts the mother herself.

4. In February 2016, the parties separated. In March 2017, a separation agreement was finalised and approved by the Jerusalem District Rabbinical Court. Under clause 10 of the agreement, the parties agreed that the mother "shall have permanent custody of the boy" and that she "may reside in Israel or overseas, at her sole choice". The agreement contained detailed provisions for contact, including overnight staying and holiday contact, defined in different terms depending on whether the mother and A lived in Israel or in another country. Under clause 16, the parties agreed:

> "The parents may only take the boy to places acceptable to the Hassidic community, and which are suitable to the education institutions where he learns."

Clause 21A provided:

> "Both parents shall decide in the matter of the educational institutions of the boy, and all educational matters and the care of the boy shall be with the cooperation of both parties through [rabbis named in the agreement]."

5. In October 2018, the mother and A returned to this country where initially they lived in the Hassidic Haredi community in North London. After the move to England, A had regular telephone contact with his father, and also had direct contact on occasions when the father visited this country, and also in the United States. Following the outbreak of the Covid pandemic in February 2020, however, direct contact was interrupted and the parties were unable to agree arrangements due to international travel restrictions, save

for three nights during Chanukah in 2020 where A spent time with the father in America.

6. After arriving in London, A initially attended an ultra-Orthodox Jewish school, with close links to the Hassidic Haredi community. In the Autumn 2019, however, the mother, without informing the father, moved to another area of North London with a substantial Jewish population but fewer connections with the Hassidic Haredi community. At that point, the mother informed the rabbi identified as a mediator in the separation agreement that she wished to move A to another ultra-Orthodox school, hereafter called "Y School". According to the father, he did not agree with this proposal but the mother proceeded to move A to Y School without his consent.

7. In Summer 2021, the mother and A moved home again, to an area just outside London. According to the father, he was not given notice of this move. He contends that the area does not comply with clause 16 of the separation agreement. The mother proposed that A should move school again to a different school closer to their current home.

8. On 27 January 2022, the father applied for child arrangements and prohibited steps orders under s.8 of the Children Act 1989, seeking a defined order for contact, including staying contact, and an order preventing the mother from changing A's school. On 10 February 2022, HHJ Vavrecka made an interim prohibited steps order preventing the mother moving A from Y School until further order.

9. On 23 February 2022, the mother filed a C2 notice of application seeking a specific issue order that she be given permission to transfer A from Y School to the school closer to her current home. On the following day, Judge Vavrecka extended the prohibited steps order and gave case management directions in respect of the cross-applications.

10. On 23 March 2022, in accordance with the Child Arrangements Programme in Practice Direction 12B, a Cafcass Family Court Adviser, Ms Natasha Marek, sent a "safeguarding" letter to the court, copied to the parties. She recounted telephone conversations she had had with each of the parties in which they had summarised their respective cases. Her note of her conversation with the mother recorded that:

> "she felt that all aspects of her life had been controlled …. She identifies that she experienced domestic abuse in the form of religious control and believes [the father's] application is motivated by this same desire to control. Her experiences in Israel had been traumatic and she sought therapeutic support after."

The Cafcass officer recommended that there be a further assessment by way of a report under s.7 of the Children Act 1989 to be completed by Cafcass addressing whether either party posed a risk to A; the impact of the concerns raised about domestic abuse and mental health; recommendations for arrangements for A to be able to spend time with his father; the impact of a change of school on A in terms of his emotional wellbeing and identity; A's wishes and feelings, and any other matter considered relevant to A's welfare.

11. On 25 March 2022, the father filed an application under Part 25 of the Family Procedure Rules seeking the court's approval for the appointment of an independent social worker

to carry out an assessment. The expert identified in the application was Ms Sue Leifer, whose curriculum vitae attached to the application stated that she had experience working with families from many ethnicities "including the Charedi community". The application proposed that Ms Leifer "undertake a s.7 assessment" in the course of which she should address the following questions:

> "(a) If either party poses a risk to A, particularly in the context of the concerns raised in relation to domestic abuse and mental health
>
> (b) Where A should live
>
> (c) When A should 'spend time with' his Father and how this can be increased over time
>
> (d) Whether A should have holiday contact with [his father] in Israel and/or other international destinations
>
> (e) Whether A should continue to attend Y School
>
> (f) The impact of any change of school on A's emotional well being
>
> (g) Whether the Mother is able to positively assist A in developing an understanding of his Haredi background and culture
>
> (h) Please obtain A's wishes and feelings on relevant issues.
>
> (i) Please comment on any other issues which are within your area of expertise."

12. On the same day, 25 March, both parties filed statements in accordance with the case management directions. In his statement, the father expressed the view that the mother was seeking to distance A from the Haredi community and that, whilst she was entitled to choose for herself not to live within that tradition, he was concerned that her choices were impacting on A's emotional stability and his ability to experience fully Haredi religious traditions and culture. He contended that A should continue to attend Y School and set out his proposals for contact, including staying contact in Israel. In her statement, the mother described how she had found it impossible to live with the father and to comply with his religious observances and the limitations on her life which he imposed, describing their marriage as "unbearable through the constant set of restrictions set by [the father]." She said that she was very supportive of A having a good relationship with his father but was opposed to staying contact in Israel or anywhere else outside the jurisdiction of England and Wales at this stage. She set out her reasons for wishing to move A to a new school, and provided details of two schools, one local to her current home and one where she worked, both Orthodox Jewish establishments which included children from the Haredi community but also children from the broader orthodox way of life which the mother herself now wishes to follow.

13. On 29 March, a further case management hearing took place before District Judge Moses. In a position statement filed for the hearing, the father's then counsel, Ms Doushka Krish, stated that:

> "Father considers that it is essential that a comprehensive section 7 welfare assessment is undertaken by an independent social worker who has expertise in undertaking assessments within the orthodox Jewish community."

She submitted that Ms Leifer:

> "has the requisite experience to carefully assess the position and make informed recommendations on issues which will, in every sense, affect the way in which A grows up, his belief system, and his relationship with each parent".

Counsel acknowledged that the instruction would incur delay because Ms Leifer was unable to start work before September 2022, but argued that "the need for expert assessment outweighs the impact of the delay".

14. In her position statement, the mother's counsel objected to the appointment of Ms Leifer, stating:

> "The mother is concerned that Ms Leifer is associated with *Ezer lyoldos,* a Charedi organisation which works strictly within the Charedi community. This raises concern that she may be a biased choice. The Part 25 application does not propose any other expert which is unusual. The mother would prefer Cafcass to carry out the report as they are more likely to offer a neutral standpoint."

15. At the hearing on 29 March, the district judge accepted the mother's suggestion that the initial approach be made to Cafcass. The order made following the hearing included, at paragraphs 13 to 17:

> "13. The parties shall, by 4pm on 31 March 2022, write to Cafcass, to enquire whether there is a Family Court Advisor available at Cafcass who has the culturally appropriate expertise in both the ultra-orthodox Haredi Hassidic Jewish community and modern Orthodox community necessary to undertake this assessment. This information is required for the Court to consider whether an Independent Social Worker with the necessary expertise is required to complete the section 7 report. The letter to Cafcass shall specify the issues requiring assessment in the context of the following:
>
> The parents are both from the Haredi Hassidic (ultra orthodox) Jewish tradition. The Father continues to observe this tradition and lives in Israel. Following the separation of the parents the Mother relocated to live in London with A and has overtime moved away from the Haredi community and now describes

herself as a modern orthodox Jew. The Mother lives in ….. which is predominantly a secular society, with those of the Jewish faith practicing as modern orthodox Jews. It will be necessary for the author of the Section 7 report to understand the cultural sensitivities and differences between Modern Orthodox, General Orthodox and Ultra Orthodox Jewish traditions and practices, and to apply this knowledge to in assessing the questions at paragraph 14 [sic] below.

14. Cafcass must respond to this letter by 4pm on 14 April 2022.

15. In the event that Cafcass is able to undertake the assessment, Cafcass must by 4.00pm on 30 June 2022 send to the court and to the parties a report under section 7 of the Children Act 1989 dealing with the following:

a. The arrangements for A to spend time with his father - whether there should be any restriction on location where this takes place and how this can be increased over time.

b. Whether A should have holiday contact with his father in Israel and/or other international destinations.

c. Whether A should continue to attend Y School.

d. The impact of any change of school on A's emotional wellbeing.

e. Whether the mother is able to positively assist A in developing an understanding of his Haredi Hassidic background and culture.

f. A's wishes and feelings on any relevant issues.

g. Any other relevant issues.

h. Recommendations in respect of arrangements for the child including stepped arrangements with a view to a final order if possible.

16. A copy of this order must be sent by the court to Cafcass.

17. In the event that Cafcass is unable to allocate an officer with the requisite expertise, the parties shall identify an ISW to undertake the assessment. If the parties do not reach agreement on the identity of the ISW, the matter shall be listed on the first open date after 7 April (excluding if possible 15-25 April inclusive because it is the Jewish festival of Passover) before a Circuit Judge. Each party shall submit details of proposed ISWs no later than 48 hours before the hearing."

16. The order included a provision that A should live with his mother until further order, defined arrangements for interim contact, and further case management directions. It also included a recital that:

> "The court made clear that this is not a case where Practice Direction 12J is engaged, on the basis that there are no allegations that are relevant to the welfare outcome for the child, and there are no identified risks to the child from either parent."

Practice Direction 12J, headed "Child Arrangements and Contact Orders: Domestic Abuse and Harm", sets out what the court is required to do in any case involving an application for a child arrangements order, or any question about where a child should live or about contact with a parent or other family member, in which it is alleged or admitted, or there is other reason to believe, that the child or a party has experienced, or is at risk of, domestic abuse perpetrated by another party. Under paragraph 5 of the Practice Direction, the court is required, at all stages of the proceedings and in particular at the First Hearing Dispute Resolution Appointment, to consider whether domestic abuse is raised as an issue and, if so, (inter alia) the extent to which it would be likely to be relevant in deciding whether to make a child arrangements order. The recital to the order dated 29 March set out above recorded the district judge's consideration of, and conclusion about, that issue.

17. Following the hearing on 29 March, the father's solicitor, Ms Preece, wrote to Cafcass inquiring whether it had "a culturally appropriate professional who can conduct the assessment." She succinctly summarised the background and identified the questions to be covered in the report, in the same terms as set out in the district judge's order. She did not include any stipulation or request as to the gender of any Cafcass officer assigned to the case. On 8 April, Cafcass replied stating that it had "no culturally appropriate professional able to conduct the assessment as detailed in Ms Preece's letter." Further discussion took place between the parties' representatives in which the father's solicitor proposed another independent social worker, Mr John Power, as an appropriate person to prepare the report. The mother initially agreed but withdrew her agreement, stating that it had been conditional on work being completed in time for a hearing on the schooling issue before September 2022, which was not agreed by the father and a condition with which Mr Power had been unable to comply, by the time of the hearing on 20 July. On 15 May, the mother filed a further interim application seeking to restore the matter to court.

18. On 20 July, a further case management hearing took place before HH Judge Clarke. The issues were (1) the identification of the independent social worker to be appointed under Part 25 and (2) whether, as the mother proposed, her specific issue application relating to schools should be listed separately for an earlier hearing. A further issue about interim contact over the summer holidays was resolved by agreement between the parties.

19. On the first issue, the father no longer pursued the appointment of Ms Leifer. Instead, he proposed the appointment of Mr Power. In reply, the mother put forward two other candidates – Ms Marlene Marcano or, alternatively, Ms Judi Lyons. In a position statement, the father's counsel, Mr Andrew Powell, put forward the following submissions:

> "(a) The father indicated early on in these proceedings that in light of the concerns raised by the mother he had a preference for the ISW to be male.
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> (b) For the assessment to have any credibility, and for the father to have any faith in it, it is important that he is 'on board' with the identity of the assessor from the outset.
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> (c) It would be prejudicial to the father's case (and indeed contrary to the child's best interests) and represent a disproportionate interference with his Article 6 rights … were the court to sanction an instruction that was doomed to fail from the outset.
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> (d) Fairness demands that each party have confidence in the expert….
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> (e) The mother's wish to have the schooling issue determined as soon as possible is untenable when it is so profoundly interlinked with the ongoing child arrangements which cannot yet be settled and thus the ISW report must be a composite document that addresses comprehensively child arrangements moving forward and schooling.
>
> (f) The mother already agreed Mr Power as an ISW in May. Had he been instructed then he would have been able to report in time … That was through no fault of the father."

20. In her position statement for the hearing on 20 July, the mother's then counsel asserted that the father wanted to instruct Mr Power:

> "on the basis that, because mother has made allegations of domestic abuse, he would feel 'more comfortable with a man'. The mother would be 'more comfortable' with a woman, bearing in mind her passed experiences, but ultimately it is the welfare and stability of the child that must be considered paramount."

It was the mother's case that her application for a specific issue that she be permitted to move A to a local school should be determined before the start of the new school year at the beginning of September and that, as Mr Power was unable to complete his report until the end of that month, he should not be instructed. She also pointed out that, whereas Ms Marcano was able to limit their costs to legal aid rates, Mr Power was not. In response, the father offered to meet any shortfall in Mr Power's costs if he was instructed.

21. After hearing oral submissions, the judge delivered an ex tempore judgment which has now been transcribed. At paragraph 6, the judge noted:

> "Father seeks to argue he would have difficulties speaking to a female social worker and also sought to argue that it would not be compliant with his Haredi tradition. That was not raised in

> Father's position statement, or his previous witness statement, at all."

The judge continued:

> "9. Father seeks to argue Article 6 rights, including arguing that fairness demands that the Court should instruct an expert which the parties have confidence in. The Court's attention has quite rightly been drawn to the Equal Treatment Bench Book which talks about the parties generally, and overall everybody, needing to have confidence in the justice system.
>
> 10. The Court has a number of issues with Father's Article 6 submission. Counsel is unable to refer to any case law which would support the Article 6 argument. Part of Father's argument that Mr Power should be instructed is based upon his sex, which raises questions as to whether the Court is being asked to select an expert based upon their sex alone, and whether Father would be able to properly discuss the issues in the case with a female. It is pointed out on behalf of Mother that Mother could run the same argument in relation to a male.
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> 11. The Court also takes into account the fact that if the issues the parties needed to discuss were so serious then Practice Direction 12J would have applied. A previous order by Moses DJ confirmed that Practice Direction 12J was not required to be engaged."

22. The judge noted that, as the issue related to case management, the child's welfare was relevant but not paramount. He reminded himself of the overriding objective in the FPR. He recorded that the father had made submissions about a comment in an email from Ms Marcano in which she had observed:

> "One of the key issues here is the impact on the child and whether the decisions being made will be in the child's best interest and how this would impact on the parent that the child is residing with and the conflict that could arise as the child grows older."

It had been submitted on behalf of the father that this comment showed a level of bias. The judge rejected this submission, noting that the comment had identified "one of the key issues", not the only key issue, and stated that he was satisfied that it did not show that she had a closed mind.

23. At paragraphs 16 to 18, the judge set out his decision on this issue and the reasons for making it.

> "16. The instruction of an expert is normally based around three fundamental factors: whether the proposed expert is suitably qualified, what the cost is and when they would be able to provide the report by.

> 17. It is accepted that each of the experts is suitably qualified. Mr Power is considerably more expensive and Mr Power is going to take longer. In those circumstances, in normal situations the Court would not authorise the instruction of Mr Power and the Court has heard nothing today which would cause the Court to change that view.
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> 18. As far as Ms Mercano and Ms Lyons are concerned, they would appear to be roughly similar in cost although Ms Mercano specifically confirms that she is prepared to work at legal aid rates. The flipside is that she does not put a ballpark figure on how much it would cost. But in the circumstances and given the fact that she has confirmed that she is prepared to work at legal aid rates, the Court is satisfied that the appropriate expert in this case is Ms Mercano."

24. The judge proceeded to consider but reject the mother's argument that the choice of schools issue should be determined first at an earlier hearing, saying he took on board the father's argument that the substantive issues were interlinked.

25. Following judgment, the father applied for permission to appeal against the judge's decision that Ms Marcano be instructed and applied for the judge to recuse himself on the grounds that the refusal to appoint Mr Power in the light of the father's objections demonstrated that the court did not have regard to the cultural reasons for the father's objections. The judge rejected both applications. At the conclusion of the hearing, the judge made an order in which he recorded the agreement between the parties as to interim contact, gave directions for the instruction of Ms Marcano, and listed the matter for a dispute resolution appointment on 21 September 2022 and a final hearing on 5 and 6 December.

26. The father filed a notice of appeal against the order for the appointment of Ms Marcano and the judge's refusal to recuse himself, and invited the court to substitute an order that permission be granted to instruct Mr Power to undertake the assessment. On 8 August, Sir Andrew McFarlane P granted permission to appeal against the order appointing Ms Marcano but refused permission on the recusal issue. He transferred the appeal to this court under FPR rule 30.13.

27. On 29 September, HH Judge Clarke vacated the dispute resolutions hearing and the final hearing listed in December 2022.

28. Before turning to the issues arising on the appeal, I should record that Mr Twomey KC, on behalf of the mother, drew attention in his skeleton argument to some development to those issues which have occurred since the judge's order. In September, Mr Power informed the parties that he could no longer accept the instruction to carry out the assessment due to other work commitments. After a telephone conversation with the father's solicitor, however, he stated that he would carry it out provided he was joined by another named professional with experience of working with the Haredi community. In further discussions, it emerged that Mr Power was proposing to invite a third individual, described as "a senior colleague from the Orthodox community", to assist with the assessment. Mr Twomey observed that the relief sought in the appeal notice was therefore no longer available.

The appeal

29. The grounds of appeal appended to the appeal notice were in the following terms:

(1) in appointing Ms Marcano as the ISW, the court failed to attach adequate weight to the father's right to a fair hearing;

(2) the appointment of Mr Power made no difference to the court timetable;

(3) in appointing Ms Marcano as the ISW, the court failed to attach adequate weight to the father's religious and cultural beliefs.

30. For the hearing of the appeal, Mr Christopher Hames KC was instructed on behalf of the father, leading Ms Kitty Broger-Bareham. Mr Hames stressed the importance which the father attached to the substantive issues in the case, in particular education, citing the observations of Munby LJ in *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677 at [16] to [19]. It is evident that the education of their son is a matter of crucial importance to both parents.

31. On the importance of procedural fairness, Mr Hames cited a passage from the recent decision of this court in *A (A Child) (Withdrawal of Treatment: Legal Representation)* [2022] EWCA Civ 1221, which reiterated that the starting point for the protection of human rights was the domestic law rather than the Human Rights Act 1998. As Lord Reed stated in *R (Osborn) v Parole Board* [2013] UKSC 61 at [57],

> "Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate."

Referring further to observations of Lord Reed in *Osborn* at [68] to [70], this court said (at [30] to [32]):

> "30. …. When setting out the values which underlie the concept of procedural fairness, Lord Reed pointed out that the purpose of a fair hearing is not only that it improves the chances of reaching the right decision. Those values also include the avoidance of the feelings of resentment which will arise if a person is unable to participate effectively in a decision-making process which affects them. In this way the law seeks to protect the value of human dignity.
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> 31. As Lord Reed put it at paragraph 68:
>
> '… justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken.'

> 32. These principles apply to all litigation, including in the protective jurisdictions in the family courts and the Court of Protection. The fact that the welfare of a child is the paramount consideration in proceedings under the Children Act 1989 and the inherent jurisdiction relating to children, and that any act done, or decision made, under the Mental Capacity Act 2005 for or on behalf of a person who lacks capacity must be done, or made, in his best interests does not obviate the requirement for a procedure which pays due respect to persons whose rights are significantly affected by such decisions. The specific procedural requirements will, however, be tailored to take into account the nature of the protective jurisdiction and the extent to which such persons are permitted to participate will depend on the specific circumstances of the case."

32. In addition, referring to Article 6 of ECHR, Mr Hames cited the decision of the European Court in *Letincic v Croatia* (app 7183/11, 2 May 2016) and in particular the passage at [50]:

> "where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or her or to be shown the documents he or she has taken into account. What is essential is that the parties should be able to participate properly in the proceedings before the 'tribunal'."

33. In addressing the court on the grounds of appeal, Mr Hames largely adopted the written submissions drafted by previous counsel. Under ground 1, he submitted that the judge's failure to attach adequate weight to the father's objection to the appointment of a female ISW was a breach of his Article 6 rights. The judge had disregarded the father's reasonable and legitimate concern that the appointment of a female ISW would compromise his ability to engage in the assessment which the court had previously considered to be necessary to resolve the proceedings. As a result, the father's ability to put his case at the final hearing would be severely compromised.

34. With regard to ground 3, which Mr Hames described as building on ground 1, it was accepted that Article 9 had not been cited explicitly in the court below, but it was submitted that the father's rights under the article were engaged at all times. The judge's approach discriminated against the father by appointing an ISW with whom he would have difficulty engaging as a result of his religious beliefs. It was acknowledged that in his Part 25 application the father had initially proposed that Ms Leifer should be instructed. It was only after receipt of the mother's statement that it became apparent that the assessment would require discussion of allegations of an intimate nature. As a result, the proposal to instruct Ms Leifer was withdrawn and a male professional, Mr Power, was identified as the father's "preferred choice of ISW".

35. It is in this context that the argument in ground 2 became relevant. Once the judge had decided that the mother's specific issue application should not be determined urgently at an initial separate hearing but considered at the same time as the father's contact application in December 2022, the proposed appointment of Mr Power made no difference to the court timetable. In the light of the father's offer to meet the additional cost of instructing Mr Power over and above the legal aid rates, there was no substantial

reason not to appoint him and, given the father's strong beliefs, a good reason to do so. In the circumstances, the decision to appoint Ms Marcano was, in counsel's terms, a flagrant disregard of the father's firmly held beliefs.

Discussion

36. The decision to appoint Ms Marcano was a case management decision by a judge who had the benefit of detailed written submissions and oral argument. An appellant who challenges such a decision faces a high hurdle. Appeals from case management decisions will only be allowed where the judge fails to take into account a relevant factor or has regard to an irrelevant factor or reaches a decision that was plainly wrong: *Royal and Sun Alliance Insurance PLC v T & N Lts* [2002] EWCA Civ 1964, *Jalla and another v Shell International Trading and Shipping Co Ltd (Appeal 3: Refusal to Extend Time)* [2021] EWCA Civ 1559.

37. As Lewison LJ observed in *Mannion v Grey* [2012] EWCA Civ 1667 at [18],

> "it is vital for the Court of Appeal to uphold robust, fair case management decisions made by first instance judges."

This principle applies just as strongly to case management decisions in the family jurisdiction as it does in other areas of the law. Robust case management is a fundamental feature of the family justice system. This court will be slow to interfere with case management decisions by first instance judges grappling with the multiplicity of issues that frequently arise in family cases.

38. In this case, the judge reached his decision by rejecting the argument that the appointment of a female ISW would infringe the father's human rights, identifying the criteria relevant to the decision (qualifications, costs, timeliness) and concluding that Ms Marcano was the candidate who satisfied those criteria.

39. In my view, the judge was fully entitled to reject the father's human rights arguments. There was no reference to Article 9 in any of the documents filed in the proceedings before the hearing on 20 July 2022 and, although no transcript of the hearing has been prepared, there is nothing in the judgment to suggest that Article 9 was mentioned at any point. As Dingemans LJ rightly explains in his judgment, if the father contended that the appointment of a female ISW would infringe his rights under Article 9, it was necessary for him to set out that argument clearly and support it with evidence. These steps were simply not taken in this case. Similarly, there was no evidence at all from the father to support his assertion that his rights under Article 6 would be infringed by such an appointment. In oral argument to this court, Mr Hames drew attention to evidence in the mother's statement as to the father's beliefs and conduct which could have been relied on to support an argument that the father would find it impossible to engage with a female professional instructed to conduct an assessment. As Mr Hames readily conceded, however, no evidence supporting the argument had been filed on behalf of the father himself.

40. On the contrary, the argument was undermined and in some respects contradicted by actions taken on behalf of the father in the course of proceedings.

41. Until a relatively late stage there was little sign that the father might object to the appointment of a female independent social worker. Throughout the proceedings, he has been represented by a female solicitor, Ms Preece. His first barrister was a woman. The Cafcass Family Court Adviser who carried out the initial safeguarding assessment and who spoke to the father in the course of that preliminary assessment was a woman. It is true that none of these professionals has met the father in person. During the appeal hearing, we were told that all communication has been by telephone, not video link (the father does not use the internet). Ms Preece's discussions with the father have been conducted in the presence of a member of a Hassidic organisation acting as an intermediary. Nonetheless, the fact is that the father has had dealings with a number of female professionals during the course of these proceedings.

42. There is no suggestion in his Part 25 application, drafted by his solicitor Ms Preece, that the father wanted a man to be appointed as the independent social worker. On the contrary, the professional identified in the application was a woman, Ms Leifer. In the position statement filed on his behalf by his then counsel in support of the Part 25 application, there was no suggestion that the gender of the person to be appointed as an ISW was or might be an issue. The position statement reported that the father considered it "essential" that the assessment be carried out by an ISW with experience of undertaking assessments within the Orthodox Jewish community. If the father at that stage had also regarded it as "essential" for religious or cultural reasons that the assessment be carried out by a man, one might have expected the position statement to say so. It did not.

43. The order made by the district judge on 29 March sets out in some detail the issues to be raised when inquiring of Cafcass whether it would be able to appoint someone to carry out the assessment. Those issues were properly identified in the letter subsequently sent to Cafcass by Ms Preece. Had the gender of the professional carrying out the assessment been a matter of fundamental importance to one or other party, one would have expected it to be mentioned at that stage. It was not. When the father's Part 25 application returned to court after Cafcass had declined to carry out the assessment, the position statement in support of the father's proposal that Mr Power be instructed stated that the father had "indicated early on in these proceedings that in light of the concerns raised by the mother he had a preference for the ISW to be male". But the district judge's order of 29 March had included a recital that "this is not a case where Practice Direction 12J is engaged". In the light of that recital, it would not be necessary for the court, or the assessor, to address the question whether the mother's concerns amounted to coercive control or another form of abuse. No other reason was advanced in the position statement for continuing to oppose the instruction of a female ISW. Furthermore, as Mr Twomey KC pointed out in the course of the appeal hearing, the use of the word "preference" to describe the father's position about the appointment of a woman was hardly consistent with the argument now advanced that such an appointment would prevent his effective participation in the proceedings and amount to a breach of his human rights.

44. There was nothing in any document filed in the proceedings before the hearing on 20 July to suggest that the father objected to the instruction of a female independent social worker on the grounds that such an appointment would compromise his ability to engage in the proceedings due to his beliefs or that it would therefore be a breach of his right to a fair hearing under Article 6 and his right to manifest his religious beliefs under

Article 9. It was only in oral argument before the judge that the father's counsel suggested that given the father's beliefs the appointment of a woman would be a breach of his Article 6 rights. This assertion was unsupported by any evidence filed by the father and undermined by a number of steps taken on his behalf in the course of the proceedings. In those circumstances, the judge was entitled to reject it.

45. In these circumstances it is not necessary to say whether it could ever be right to specify an expert of a particular gender. I do not, however, rule out the possibility that such an order could be justified. As ever, all will depend on the circumstances. Justice requires the court to adopt a procedure which pays due respect to persons whose rights are significantly affected by its decisions. It is, however, imperative that any application that the expert instructed be of one specified gender must be clearly explained and fully supported by evidence demonstrating why such a stipulation should be included.

46. The judge correctly identified three factors relevant to the decision to appoint an ISW and in my view his assessment of those factors in this case cannot realistically be challenged in this court. All three proposed experts had the experience to carry out the assessment and the judge was entitled to conclude that considerations of cost and timeliness favour the appointment of Ms Marcano. She alone had confirmed that she was willing to work at legal aid rates. The overriding objective in rule 1 of the Family Procedure Rules to deal with a case justly "includes, so far as is practicable … saving expense". Although the father had undertaken to meet any shortfall between those rates and Mr Power's fees, it would plainly have been undesirable in the circumstances of this case for one party to make a greater contribution to the financial cost of instructing the expert if another expert was able to carry out the assessment on a jointly-funded basis. Mr Hames is correct in saying that the decision to hear the mother's specific issue application at the same time as the father's child arrangements application and not at an earlier separate hearing meant that Mr Power's report would have been available in time for the hearing. As Mr Twomey pointed out, however, the fact that Ms Marcano was able to file a report at an earlier date remained an advantage in that the sooner the report was available the more likely it was that the parties would have an opportunity to consider it and reach an agreement before the hearing. The decision to appoint Ms Marcano was consistent with the principle in s.1(2) of the Children Act 1989 ("that any delay in determining the question is likely to prejudice the welfare of the child") and the overriding objective which "includes, so far as is practicable … ensuring that it is dealt with expeditiously …." In the circumstances, it cannot be said that the judge took into account any irrelevant factor in reaching his decision.

47. For these reasons, I would dismiss the appeal against the order permitting the parties to instruct Ms Marcano to carry out the assessment.

48. It is very unfortunate that the hearing date in December has now been lost as a result of this appeal. I am of course aware of the very great pressures on the list in private family cases but it is imperative that the final hearing in this case is listed on the earliest possible date after Ms Marcano's report is available. To that end, if my Lady and my Lord agree, I would propose that the matter be restored for a further case management hearing before the judge to reconsider the timetable which has been disrupted as a result of this appeal.

LORD JUSTICE DINGEMANS

49. I agree that the appeal should be dismissed for the reasons given by Baker LJ. As appears from Baker LJ's judgment, one of the grounds advanced on behalf of the appellant raised an issue of religious rights which is protected by, among other protections, article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") to which domestic effect has been given by the Human Rights Act 1998.

50. Article 9 provides an unqualified right to freedom of religion and a qualified right to manifest a religion. As appears from *Re M* [2017] EWCA Civ 2164; [2018] 4 WLR 60 at paragraphs 116 to 126, in which Sir James Munby P referred to a number of other authorities with approval: "freedom of thought, conscience and religion is one of the foundations of a `democratic society' … It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it".

51. *Re M* at paragraph 117 shows that "in some cases, a practice may be a manifestation of a religious belief for some groups but not others". This demonstrates the importance of adducing evidence to identify the relevant religious belief and how the manifestation of that religious belief would be interfered with by the proposed action, in this case the appointment of Ms Marcano as the Independent Social Worker ("ISW"). Once that evidence has been adduced, the court's role was identified in *R(Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; [2005] 2 AC 246 by Lord Nicholls at paragraphs 22 and 32, to which Munby P also referred in *Re M*. It is important to emphasise that the court's role does not extend into judging the "validity" of the relevant religious belief, see *R(Williamson)* at paragraphs 22 and 60.

52. In this case, as appears from the chronology of events set out in the judgment of Baker LJ, it was apparent that the appellant had proposed the appointment of a female ISW at an early stage of the proceedings. In these circumstances it became essential, if it were to be submitted that the appointment of Ms Marcano as the ISW infringed the appellant's rights under article 9 of the ECHR, to adduce evidence showing how that appointment would interfere with the manifestation of the appellant's religious belief.

53. As it is, there was no such evidence in this case. In many cases where issues of religious sensitivities arise, the process of identifying and adducing evidence about the relevant religious belief and the potential interference with the manifestation of the relevant religious belief, leads to the identification of possible ways round the potential interference, which respect both the relevant religious rights and the court's need to case manage and determine fairly the proceedings.

LADY JUSTICE KING

54. I agree that the appeal should be dismissed for the reasons given by Baker LJ and Dingemans LJ. I would only add a little about the extensive case management powers available to judges which allow them to conduct proceedings in such a way as to give proper respect to the views and/or beliefs of those who appear before them, whilst at the same time ensuring that justice is achieved.

55. The well-known and well established 'overriding objective', found at FPR 2010 r.1.(1) is the procedural code designed to enable the court to deal with cases justly, having regard to any welfare issues involved.

56. The balance of the rule amplifies the proper approach to be adopted in order to achieve the overriding objective. This includes at FPR r.1.4(1) the requirement that the court "must further the overriding objective by actively managing cases". The rule goes on at FPR 1.4(2) to set out 13 matters of active management which include at FPR r.1.4(2)(5) "controlling the use of experts" and at FPR 1.4(3) a total of 16 examples of the court's case management powers which are in addition to those given by virtue of any specific enactment.

57. It is against the backdrop of these extensive powers of case management that, as noted by Baker LJ at paragraph 37, the appeal courts have repeatedly emphasised their reluctance to interfere with case management decisions made by a judge at first instance.

58. Those who drafted the Children Act 1989, and the judges at all levels who have sought to interpret it, have been conscious that in order to achieve the best possible outcome for children, whether in private or public proceedings, their parents and carers must be placed in a position so as to enable them to give their best evidence.

59. Statutory examples include s98(2) Children Act 1989 which provides for a statement or admission made in care proceedings not to be admissible in evidence in proceedings for an offence other than perjury. In *Re X (Disclosure of Evidence)* [2001] 2 FLR 440, Munby J, in that context, emphasised that the interests of a child are served by encouraging frankness and the importance of encouraging people to tell the truth in cases concerning children.

60. A further, but very different, example is the use of intermediaries and of physical special measures (screens, separate entrances and the like) designed to enable those who are vulnerable or victims of domestic abuse to attend court and to give their best evidence. The FPR r.3A.4 and r 3A.5 specifically require a court to consider "whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability".

61. *In Re A (Sexual Abuse: Disclosure)* [2012] UKSC 60, [2013] 1 FLR 948 (para 36), Baroness Hale referred to the flexibility inherent in family proceedings and said that "The court's only concern in family proceedings is to get at the truth. The object of the procedure is to enable witnesses to give their evidence in the way that best enables the court to assess its reliability".

62. In *Re S (Practice: Muslim Women Giving Evidence)*, [2006] EWHC 3743 (Fam), [2007] 2 FLR 461, Macur J made arrangements by way of screens and the ingenious use of a large umbrella, so that she could see the witness, but that the litigant's male counsel would not be able to see his lay client. In this way the Muslim woman litigant, who was accustomed to wearing the veil, was able to remove her veil whilst giving oral evidence. Macur J stressed the importance of witnesses in family cases being able to present their evidence to the satisfaction of the court. Macur J however also sounded a note of caution, saying that "Each case must obviously be looked at in its own

circumstances, and the court must be alert to any opportunistic attempt to derail proceedings".

63. The need to obtain the best possible evidence applies equally to that part of proceedings which takes place before the hearing, whether in the form of assessments or the commissioning of expert's reports. The court has at its disposal the raft of case management powers referred to above which will enable it to find creative solutions to any difficulties which may be thrown up as Macur J did in *Re S* and as did the appellant in the present case. The court was informed that the appellant had used an intermediary and a telephone, without a video link, in order to enable him to give instructions and to take advice from his female solicitor.

64. As highlighted by both Baker LJ and Dingemans LJ the court will not however be in a position to utilise these case management powers in order to identify a way around a potential problem unless and until the problem in question has been properly identified, put before the court and where necessary, evidence adduced in relation to the same.