



Neutral Citation Number: [2024] EWFC 80 (B)

RG21P01079

**In the Family Court at Oxford**

St Aldate's  
Oxford  
OX1 1TL

**JUDGMENT**

**11 March 2024**

**Before**

**HER HONOUR JUDGE NOTT**

**Between**

**M**

Applicant

**and**

**S**

Respondent

**Representation:**

Applicant Father: In person

Respondent Mother: Dr Proudman, counsel, instructed by Duncan Lewis Solicitors

Children's Guardian: Miss Hudson, counsel, instructed by Fairbrother Darlow Solicitors

**This judgment was delivered in private, with a journalist present pursuant to a Transparency Order. 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 child and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.**

**Proceedings having now concluded, this judgment has been abridged for publication where necessary to preserve anonymity.**

## Introduction

1. This ruling follows a two-hour hearing in protracted Children Act proceedings relating to L, a bright and engaging nine year-old boy who has an autism spectrum condition, and whose Father seeks contact. L last saw his Father on 9 October 2020. L, through his Children's Guardian and Independent Social Worker (ISW) has said that he is not allowed to see his Dad, and that that makes him sad. As we move towards Final Hearing the Mother's position is that L should have no direct contact with his Father for the remainder of his minority.
2. The Mother is represented by Dr Charlotte Proudman, The Father is in person. Pursuant to a direction I made at an appeal hearing on 13 March 2023 – [judgment published here](#) – L's interests are represented by his Children's Guardian. Miss Emma Hudson appears for the Guardian.
3. This hearing has been held remotely via CVP and there are Part 3AA Participation Directions in place: the Mother has her camera switched off and she has leave to have an ISVA present. I understand the ISVA is not present now, but will provide support at the conclusion of the Hearing.
4. A journalist Hannah Summers attends pursuant to a Transparency Order in the same terms as at the last Hearing.
5. The matter was last before the Court on 25 January 2024. This was a Hearing before Cusworth J in the Family Division of the High Court to consider the Mother's application for permission to appeal the Order of HHJ Vincent on 23 November 2023 which had directed two sessions of interim supervised contact to inform the Guardian's final recommendations, and had directed the parties to set out their positions on the Mother's Rule 12.73 disclosure application re the Father's employer.
6. The Mother's application for permission to appeal attached to it documentary medical evidence, including reference to a diagnosis of PTSD in February 2023, which had not been adduced or referred to in any of the documents provided by the Mother prior to the High Court application or at any previous Court hearing, including at the April and November 2023 hearings. The Guardian says that she was not aware of this diagnosis prior to receipt of this evidence; nor did the ISW refer to such diagnosis in her risk assessment filed in November 2023 notwithstanding the Mother says that she had told both of her diagnosis by telephone in April 2023.
7. Remittal to this the lower Court was agreed on the basis of the Guardian's acknowledgement that she would likely have taken a different approach to the issue of interim contact had she been aware of the Mother's PTSD diagnosis.

## Purpose

8. By Order of Cusworth J dated 25 January 2024, the purpose of today's hearing is four-fold:
  - a. To set directions for and timetable to a Final Hearing, including the need for further evidence;
  - b. To set Ground Rules for the Final Hearing;
  - c. To consider in light of the Guardian's updated position whether L should have supervised direct contact with his Father prior to Final Hearing;
  - d. To determine the Mother's application that the Court should disclose the fact-finding Judgement dated 22 June 2022 to the Father's employer.
9. I am not in a position to timetable to Final Hearing since the Mother put parties on notice this morning that she intends to apply for a declaration of incompatibility '*that the current presumption of parental involvement with rapist parents is in breach of Art 8 and 14*' (Mother's position statement).
10. Further the Father has indicated that he would withdraw his application for direct contact if reasonable indirect contact can be agreed. The Mother and Guardian need time to reflect on that concession.
11. I will therefore deal with all outstanding directions relating to final evidence and case management, set directions in respect of the Mother's proposed declaration of incompatibility application which will be listed as soon as possible before the Designated Family Judge, and deal with the substantive disclosure application before me.

## Positions

12. The Father wants to see L. He was visibly upset during the Hearing and told me that he would like to seek a compromise and find a constructive way forward to bring these lengthy proceedings to an end, which he recognised are emotionally damaging to all concerned, including L. He would withdraw his application for direct contact if the Mother would agree to continuing indirect contact via phone calls and messages. He opposes further disclosure of the fact finding Judgment to third parties. He says that his work does not bring him into contact with children or vulnerable adults, and that his new military role involves him managing a platoon of soldiers. He points out that he has

been subject to, and cooperated with a protracted police investigation of the Mother's criminal allegations of rape.

13. Counsel for the Mother sent me, but not the parties, a 14 page, 6500 word position statement last night. I forwarded it to the solicitor for the Guardian shortly after receipt, but not to the Father who is in person. In it the Mother raises a host of matters without notice to the Court or parties. She seeks to reduce L's interim indirect contact with his Father, seeks to adduce an evidential statement from an ISVA, and seeks a new finding of post-separation abuse by the Father resulting from the Father's recent expressions of conflict about whether to continue his application for direct contact. As she did before the High Court, the Mother strongly opposes the Guardian's suggestion that the Court should direct Part 25 expert assessment of her current PTSD symptoms in order to inform its assessment pursuant to PD12J paragraph 36(2)(b), 36(3) and paragraph 37. However, in apparent conflict with that opposition, she now raises an intention to seek intermediary assessment.
14. On the substantive disclosure application she submits, "*the MOD must be put on notice and told in broad terms that findings were made against F of rape and domestic abuse and stalking (etc) of a woman, the mother of his child, and they should be invited to intervene if they seek a copy of the judgment.*"
15. Further, and again without notice, the Mother says that she will apply for a declaration of incompatibility, and would seek Family Division Guidance on the issue of whether Family Court findings of domestic abuse including sexual abuse should be added to DBS records, and whether parties with such findings against them should be "*put on the sex offender's register*" [sic]. She invites the Court to "*liaise with Knowles J, the Domestic Abuse Lead in the High Court to see whether she would be amenable to addressing these issues:*
  - i. *Disclosure of FFH judgment to the MOD;*
  - ii. *Findings included on DBS records (consideration given to the interplay with DBS/SOR); and*
  - iii. *Declaration of incompatibility.*"
16. The solicitor for the Guardian filed her short position statement timeously. The Guardian initially adopted the Mother's position on the issue of inviting the Ministry of Defence to intervene regarding disclosure; however in oral submissions after considering the facts specific to this case, Miss Hudson indicated that the Guardian no longer considers any approach to the Father's employer to be necessary.
17. The Guardian pointed out the difficulties in meeting an over-long position statement which raises several new substantive issues, makes strong criticism of the Guardian's professionalism and approach, and which is served at the

door of the Court. She has had no time to consider or take a reflective position on issues relating to intermediary assessment, ECHR compatibility, DBS checks, post separation abuse. I did not ask her to address the professional criticisms made of her in relation to Part 25 assessment, her dealings with the Mother and – during the substantive hearing – her alleged ‘failure’ to take the lead on the Mother’s disclosure application, so risking emotional harm to the Mother.

18. The Guardian supports the continuation of indirect interim contact, but no longer recommends supervised direct contact ahead of the Final Hearing. Re Mother’s PTSD, the Guardian *“is concerned that without an expert view on this issue her final recommendations (and the decision of the court) will be based on the Mother’s self-reporting of the impact of contact on her mental health. The Guardian’s final report would therefore, unusually, have to contain either/or recommendations for contact based on the extent to which the court accepts the Mother’s position on the impact of contact on her mental health.”*
19. The Guardian suggests that the Mother should be invited to file a short statement dealing solely with the impact of contact on her mental health before the Guardian files her final analysis.

#### Background

20. I set out the background briefly. The parties met in 2006, they married in 2010. L was born in April 2014.
21. The parties separated in 2016. It would appear that there was a difference in their evidence during the Fact-finding Hearing as to whether or not they briefly reunited, but certainly they were finally separated by 2017 and were divorced in 2018.
22. In 2020 the Mother reported allegations of rape and sexual abuse against the Father to the police.
23. In 2020, there was a police referral to the Local Authority, which, as a result of that referral, undertook section 47 enquiries in respect of the Father’s contact with children in his care, which included L. Direct contact between L and his Father ceased and a Non-Molestation Order in respect of the Mother was made against the Father.
24. In 2021 there was further Local Authority investigation in relation to concerns that Mother raised about Father’s alleged inappropriate behaviour towards L. No further action was taken as a result of the Local Authority investigation; these matters were considered at the Fact-finding Hearing in June 2022 and they were found not to have taken place.

25. Father issued an application for a Child Arrangements Order for L to spend time with him on 10 September 2021; in the course of the proceedings, the Father filed a witness statement exhibiting intimate photographs of the Mother that had been taken during their relationship and which she had apparently sent to him in 2016. As a result of that, the Court referred the matter to the police for investigation of a possible s.33 Criminal Justice and Courts Act 2015 offence.

*Fact Find Hearing 20-22 June 2022*

26. For a s.33 offence to be committed, the disclosure must be made with the intention of causing the subject of the images distress. The Father, acting in person in proceedings at all times, apologised for exhibiting the images to his witness statement, and gave evidence that it was his intention simply to show that the intimate relationship was continuing at a time the Mother said it was over. That evidence was accepted by Mr Recorder Hocking at the Fact Finding Hearing (fact find Judgment para 54). After investigating the disclosure, the police took no further action. However a Non-Molestation Order specific to those images was made by the Family Court prior to and then at the conclusion of the Fact-finding Hearing, which took place on 20-21 June 2022. and which resulted in serious findings against the Father as follows:

- (i) Father would intimidate and belittle Mother, throw things, punch cupboards and doors and shout at and shove Mother, in L's presence or so that L would see mother upset afterwards;
- (ii) Father would intimidate the Mother into sex during child contact, with L in the room next door, in terms set out at paragraph 25 of the Mother's witness statement: *"After the Applicant finally moved out, he insisted on having contact with L in my home. He would corner me in the kitchen, touch / grope me, get into my personal space, and insist on sex. I would comply to keep him happy and avoid conflict, as L would be in the next room. I would feel dirty, upset, belittled, worthless; after the Applicant left I would cry."*
- (iii) On 30 July 2016 the Father raped the Mother in her home after he had been having contact with L; Again the Recorder took the facts behind this incident from Mother's witness statement at paragraph 27: *"On 30/07/2016 the Applicant had contact with L in my home. I went to a neighbours BBQ. Within an hour he texted to ask how long I would be, and continued to text me whilst I was there. By the end of the evening I became upset as I did not want to return home. I do not remember going home. The next morning I woke up naked. The Applicant told me I had been drunk, initiated sex, and that I had fallen asleep and he had carried on and "finished anyway". Again, I do not recall this. I felt*

*confused, violated and dirty*” The Recorder set out in his Judgment that the Father admitted such behaviour on one occasion but did not set out the Father’s evidence in any more detail.

Properly, due to the importance of keeping criminal concepts and definitions away from the Family Court – which is not punitive, and which must focus on harm through sexual misconduct rather than penalty in respect of it – the Recorder did not apply the elements of the criminal offence of rape as set out in s.1 Sexual Offences Act 2003 when making his findings.

- (iv) On an occasion in January 2017 the Mother told the Father that she would be at a McDonalds as he picked up L for contact; 20 minutes later the Father and L arrived at McDonalds. The Recorder did not determine the issue of whether this could properly be characterised as *‘stalking.’*
  - (v) The Father gave the Mother a hug on 21 July 2020, which hug was unwanted.
27. Mother’s allegations concerning Father’s alleged physical and sexual abuse of L and mistreatment of the family dog were found not to have happened (paras 37-43); save for the incident at (iv) above, Mother’s allegations of stalking and harassment were found not to have occurred (paras 65 – 71) and the Recorder found that the Mother had *‘a heightened sensitivity’* to Father in this regard (para 19).
28. A Section 7 report was directed to assess the risks surrounding contact in light of the findings made.

#### *FHDRA and Appeal*

29. At a FHDRA following the Fact-finding Hearing on 8 November 2022 a Final Child Arrangements Order was made. The Mother applied for leave to appeal.
30. I heard the appeal on 13 March 2023 – when this matter was last before me. I allowed the appeal due to failures to consider both Part 3AA Participation Directions to enable Mother’s fair participation and PD12J when determining the substantive issue of contact. During the appeal the Mother made trenchant criticisms of the section 7 report-writer. Her position had seemingly now hardened such that L should have no direct contact with his Father whatever in light of Mr Recorder Hocking’s findings. L had told the report’s author that he wanted to see his Father. I therefore appointed a Guardian.
31. At a Directions Hearing on 12 April 2023 the Court directed that an ISW should complete a risk assessment of the Father.

### *High Court Application*

32. A further Directions Hearing was heard on 23 November 2023 after service and filing of the ISW report which assessed the Father's risk of causing harm to L and to his Mother during or surrounding contact as low. The Mother's position was that the ISW report was flawed and that she remained opposed to L having any direct contact with his Father. She also sought a reduction in his indirect contact.
33. The Court timetabled the matter to a Final Hearing in February. The Guardian invited the Court to order two sessions of supervised contact prior to the Final Hearing in order to help inform her Final Analysis. That Order was made and Mother filed application for leave to appeal.
34. The Mother filed evidence in her application to the High Court detailing a diagnosis of PTSD set out in medical reports dated 6 February 2022 and 25 March 2022 respectively.
35. The Guardian indicated that had she been aware of the PTSD diagnosis this may have changed her view as to the utility and proportionality of interim contact. Therefore the High Court remitted the matter for reconsideration, directing that upon reconsideration the High Court application for leave to appeal should be marked 'withdrawn.'
36. The Guardian indicated that the PTSD material she had seen was (a) a year old, and (b) did not address how PTSD might affect the Mother should contact move from indirect to direct contact as per the Father's application and L's stated desire. She invited the Mother to make a Part 25 application for expert assessment of how her mental health might be affected by contact to enable the Court to make informed assessment of that which it must consider pursuant to PDJ12 paragraph 36, namely the fact and extent of any emotional harm to the Mother should direct contact be directed.
37. The Mother indicated to the High Court and subsequently reiterated to the Guardian that she would not make any Part 25 application, would oppose any such application made by the Guardian, and would not engage with any mental health assessment. She stated that the Court should be capable of assessing the issue of emotional harm to her without expert independent assistance. She complained about having to disclose her private medical records to the Court. Cusworth J recorded on the Order that she had done so voluntarily, pointing out that there had been no direction for her so to do.
38. Permission to file this evidence in the lower Court Children Act Proceedings was neither sought nor obtained. PTSD was not raised by the Mother in proceedings prior to her High Court application. I infer from the Order dated

25 January 2024 that Cusworth J gave leave for the Mother to file the records in the High Court proceedings; they now appear in the bundle before me from D146 and comprise:

- (i) A certificate detailing the Mother's unfitness for work due to stress and anxiety covering January to March 2022 (D146- 147)
- (ii) A certificate detailing the Mother's unfitness for work due to stress and anxiety covering November to December 2022 (D148, D159)
- (iii) A GP letter dated 1 December 2023 stating that the Mother has been off work through symptoms of PTSD between October 2021 and May 2022 and between November 2022 and January 2023 (D161)
- (iv) A letter from the local Mental Health Trust dated 6 February 2023 to the Mother's GP setting out a treatment plan and making a diagnosis of PTSD as a result of the Mother's abusive marriage, with symptoms improving since having been prescribed sertraline two months previously (D149 – 153)
- (v) A letter dated 25 March 2023 from a clinical psychologist detailing assessments of the Mother over a number of counselling sessions with the Mother and setting out a plan for future treatment (D154- D158)
- (vi) A letter dated 30 November 2023 from the Mother's ISVA in support of the Mother's High Court Applications for Leave to Appeal and Stay of the interim order, setting out the Mother's distress at the interim order for contact made on 23 November 2023 (D160).

NB: I have reservations about Mother's ISVA effectively becoming a witness in proceedings – this impacts her independence and potentially compromises her supporting role. Further the letter is deficient as a witness statement since it contains no declaration of truth. A second such letter was sent to me, but not to the parties, directly last night with the Mother's position statement.

Directions and Timetabling

*Further Evidence*

*Psychiatric Evidence*

39. The Mother says that she would be further traumatised were the Guardian to apply or were the Court to order a Part 25 psychiatric assessment. She criticises the Guardian for inviting psychiatric assessment, but understands

that the Guardian's role in assessing the impact of her PTSD on contact will be hampered by lack of up-to-date expert evidence.

40. The Mother is aware that both the Guardian and the Court would be assisted by expert independent evidence, and knows therefore there that may be a lacuna in the evidence when the Court performs the balancing exercise required of it pursuant to PD12J paragraphs 36(2)(b), 36(3) and 37. Her position now, and likely at Final Hearing, is that direct contact between L and his Father would so harmful to her emotional and psychological well-being as L's primary carer that the Court should make no order as to contact even were the Court satisfied that contact was otherwise in L's welfare interests.
41. The Court can and will have regard to medical records including letters from treating psychiatrists, but cannot treat them as if they were expert evidence as per Part 25. There are obvious limitations, not least in that the evidence cannot be tested, and the expertise of the author is not established per Part 25 and PD25B. In this case the hearsay medical evidence filed will be more than a year old by the Final Hearing; it does not directly address the PD12J considerations nor does it advise the Court on how the Mother's mental health might be affected and supported in the event of the Court ultimately directing contact.
42. It is not the role of the Family Court to force an unwilling party into psychiatric assessment.
43. I therefore make no direction for the preparation or filing of Part 25 expert evidence. However the Mother may not subvert the Family Procedure Rules in relation to evidence.
44. She may file a short statement setting out the impact on her mental health that contact has. This should be filed by 25 April 2024.
45. Having declined the opportunity to have placed before the Court independent expert medical evidence that carries with it the safeguards inherent in Part 25 and PD25B, the Mother may not file or serve any further expert medical evidence that is not Part 25 compliant, and may not file further evidence without the leave of the Court.
46. The Court at Final Hearing will assess the evidence before it and make its ultimate decision by applying its findings to the welfare checklist and to PD12J paras 35-39, setting out its reasons pursuant to paragraph 40.

#### ISVA Evidence

47. The letter from the ISVA should be removed from the bundle for Final Hearing. Dr Proudman sent me by email yesterday a second letter from the

same ISVA, similar in form and content dated 7 March 2024. Permission has not been given to file that letter in evidence. It is highly unusual for an ISVA to be invited to give evidence in proceedings where they act as a supporter/adviser. Safeguards are generally in place to ensure that this does not happen, and that ISVAs are not put in a position where they may have to act as witnesses. In this case the Mother proposes to rely on her ISVA to evidence her distress during the currency of these proceedings generally, and during court hearings specifically. This is not a helpful precedent.

48. The ISVA should consider this Judgment, the Home Office Guidance of September 2017 on the '*Role of the Independent Sexual Violence Adviser: Essential Elements*', the President's '*Practice Guidance: Independent Domestic Violence Advisers and Independent Sexual Violence Advisers (Family Courts)*' issued on 6 April 2023 and any other professional code of conduct relating to her ISVA role. If having done so, she is satisfied that she may properly act as a witness, then any statement relied on must be properly drafted, filed and served by 25 April 2024. A different ISVA should then be appointed to support the Mother at and through future hearings in such circumstances.

#### Intermediary

49. In her position statement Dr Proudman stated, "*M will seek an assessment by an intermediary to ensure she is able to fully engage in proceedings*". She then set out fifteen reasons why the Mother should not undergo any further assessment of her mental health or functioning to inform these proceedings.
50. The appointment of an intermediary requires application to the Court pursuant to FPR3A.1, and will inevitably require independent assessment. Any intermediary assessment has to be informed.
51. During the Hearing this morning Dr Proudman indicated that the Mother would seek to rely on an intermediary assessment that is not informed by any expert assessment of her PTSD, which is said to be the cause of her potential communication needs.
52. While the FPRs and Practice Directions give scant assistance regarding the appointment and duties of intermediaries in the Family Court, Lieven J recently gave Guidance as to the same in *West Northamptonshire Council v KA & Ors* [2024] EWHC 79 (Fam). Lamenting the lack of assistance in the FPRs, she considered the Criminal Procedure Rules and a 2020 Court of Appeal Criminal Division decision *R v Thomas (Dean)* [2020] EWCA Crim 117.

53. Having set out the ratio in *R v Thomas*, Lieven J held, “*The following principles can be extracted:*

(a) *It will be "exceptionally rare" for an order for an intermediary to be appointed for a whole trial. Intermediaries are not to be appointed on a "just in case" basis... A judge appointing an intermediary should consider very carefully whether a whole trial order is justified, and not make such an order simply because they are asked to do so.*

(b) *The judge must give careful consideration not merely to the circumstances of the individual but also to the facts and issues in the case;*

(c) *Intermediaries should only be appointed if there are "compelling" reasons to do so... An intermediary should not be appointed simply because the process "would be improved";*

(d) *In determining whether to appoint an intermediary the Judge must have regard to whether there are other adaptations which will sufficiently meet the need to ensure that the defendant can effectively participate in the trial;*

(e) *the application must be considered carefully and with sensitivity, but the recommendation by an expert for an intermediary is not determinative. The decision is always one for the judge;*

(f) *If every effort has been made to identify an intermediary but none has been found, it would be unusual (indeed it is suggested very unusual) for a case to be adjourned because of the lack of an intermediary;*

(g) *steps that can be taken to assist the individual to ensure effective participation where no intermediary is appointed...include having breaks in the evidence, and importantly ensuring that "evidence is adduced in very shortly phrased questions" and witnesses are asked to give their "answers in short sentences". This was emphasised by the Court of Appeal in *R v Rashid (Yahya)* [2017] 1 WLR 2449.*

*All these points are directly applicable to the Family Court...*

*Finally, it is the role of the judge to consider whether the appointment of an intermediary is justified. It may often be the case that all the parties support the appointment, because it will make the hearing easier, but that is not the test the judge needs to apply.”*

54. There is currently no intermediary application before the Court. Any application will require independent assessment by an intermediary as to the Mother’s communication needs, but since intermediaries are not experts –

rather they are communication specialists – any intermediary assessment of the Mother must itself be informed by expert assessment of the specific issue affecting communication: in this case the Mother’s mental health.

#### Guardian Final Analysis

55. The Guardian should serve and file her recommendations after the next Hearing since there is realistic prospect that proceedings will end with the Father withdrawing his application for direct contact and the Mother agreeing to regular indirect contact by phone and message.

#### Ground Rules - Testing Mother’s Evidence on behalf of Father

56. The Father cannot cross-examine the Mother. Because his application for contact pre-dates 21 July 2022, having been issued on 10 September 2021, the Court cannot appoint a QLR to conduct cross-examination. In this case there is overlap between the position of the Children’s Guardian and the Father. I have proposed that the Guardian undertake necessary cross-examination to explore issues surrounding the safety of contact against the Welfare Checklist and PD12J. The parties agree in this course.

#### Interim Contact

57. The Mother is against interim direct contact, submitting that it would be emotionally damaging for both L and her.
58. The Father is resigned to there being no direct contact in the interim, and has indicated he would withdraw his application if he had an undertaking from the Mother that telephone contact and messaging could continue.
59. On behalf of L, the Guardian would support interim direct contact to help inform her final recommendations, all else being equal. However, in the face of the Mother’s position that interim contact would be catastrophic for her mental health, the Guardian no longer invites interim direct contact, recognising that this issue should await final determination.
60. While it would doubtless help inform the Court’s final judgment, I am reluctantly driven to the conclusion that interim contact cannot safely be ordered ahead of Final Hearing in light of Mother’s position, which will need to be fully-ventilated along with Mother’s assertions that there are serious flaws in the ISW risk assessment. The PD12J issues that relate to contact in the context of historic domestic and sexual abuse now inextricably link the issues of interim and final contact.
61. Since there has been a new Guardian appointed, she should assess L’s indirect contact ahead of filing her final recommendations. Indirect contact through

fortnightly telephone calls should continue on a fortnightly basis subject to the Father's concession today that he will be led by L: if L doesn't wish to telephone him on a particular evening, then Father accepts that.

#### Disclosure of the Fact Find Judgment to Father's Employers

62. This is the substantive application before me today. It is not brought by the Ministry of Defence but by the Mother who complains that the Court should not have left it to the Mother to make the application, rather it should have been raised by the Court of its own motion after the facts were found as per Knowles J's suggested process in *Re Z (Disclosure to Social Work England; Findings of Domestic Abuse) (2023) EWHC 447 (Fam) (2 March 2023)* (Mother's Skeleton argument dated 21 December at para 56 Bundle p104).
63. Recorder Hocking made his findings on 22 June 2022. Having found the Father to be a largely honest witness (para 24 Judgment) he refused the Mother's application for a Non-Molestation Order save on the narrow issue of disclosure of intimate photographs as unnecessary. The Local Authority had already completed two section 47 enquiries including one that concerned the Mother's allegations. *Re Z* was published nine months after the Fact Find Hearing, on 2 March 2023.
64. The Mother made application seeking disclosure of the fact finding Judgment to the police, to the Local Authority and to the Father's employer via his supervising officer in a C2 application dated 27 March 2023, after publication of *Re Z*.
65. However the Mother and Father had already on 24 February 2023 signed a consent Order directing disclosure of the fact find Judgment and evidence behind it to the Police who were investigating the Mother's criminal allegations against the Father. That Order was effected on 30 March 2023. I have seen the two bundles that were sent; they are comprehensive.
66. I have reviewed the skeleton argument dated 21 December 2023 filed in the Mother's application to the High Court at F85-105 of the Respondent's Bundle. On disclosure, the Mother's position was put forward thus: "*The Father was recently promoted to a senior position in the Army, and yet there has been no disclosure of the fact-finding judgement to his employer, despite the potential risks he poses to colleagues and other people. In addition, there has been no disclosure of the fact-finding judgement to the local authority despite him supervising contact in respect of another child and with consideration to him being a grandfather. The issue of disclosure has been adjourned to the final hearing and seemingly the requirements set out by Knowles J in Re Z (Disclosure to Social Work England: Findings of Domestic Abuse) [2023] EWHC 447 (Fam) (2 March 2023) have not been followed. It is*

*submitted that this is a complex case which should be reallocated to a High Court judge after the appeal has concluded.” (para 4, Bundle p85).*

67. However, the Mother had withdrawn her application in respect of disclosure to the Local Authority at a Directions Hearing on 12 April 2023. At that Directions Hearing, Mother and Father both confirmed that the police had sought and received disclosure of the fact find Judgment to inform their investigation into criminal allegations of rape by the Mother.
68. Nonetheless the Mother indicated that she would be pursuing her application for disclosure to the Father’s employer, but invited its adjournment until after the ISW risk assessment of the Father. It would seem then that the Mother did not consider Father’s employment to be sufficiently risk-laden in respect of the vulnerable to require prompt disclosure to the Father’s supervising officer. The Father has subsequently been promoted.
69. On 12 April 2023, the Mother’s disclosure application was adjourned to abide the risk assessment; that risk assessment having been completed (finding the Father posed low risk of harm to L and to the Mother), directions in respect of it were made at Hearing on 23 November 2023, which directions were challenged in the High Court.
70. The Mother sought through her High Court application to relitigate the issue of disclosure to the Local Authority. However Cusworth J simply directed determination of the disclosure application to the Father’s employer to be heard before me. Having carefully considered the ISW risk assessment, having noted that the Local Authority has in any event investigated the allegations relating to L, historic allegations relating to the Father’s childhood, and carefully examined the Father’s contact with his children and step-children, I find further disclosure to the Local Authority is otiose and unnecessary.
71. As to the application concerning the Father’s employer, counsel for the Mother now submits that Knowles J’s suggested process set out from paragraph 65 of her judgment in *Re Z* requires me to inform the Ministry of Defence of the broad findings of fact and invite its intervention before there can be determination of the substantive disclosure issue.
72. However the suggested process set out by Knowles J does not say that. First, paragraph 65 of *Re Z* deals with application to disclose material to a regulatory body. This is not the application before me. Second, the suggested process is not automatically to invite the intervention of the regulatory body as Intervenor, but to consider so doing.
73. I set out paragraph 65 in full:

*“In the interest of assisting judges faced with these comparatively rare applications, I suggest that:*

*a) where a party to family proceedings works with vulnerable people or children and where a court has made findings of fact which may engage or call into question that party’s fitness to perform their role, the court should consider whether its findings and judgment should be disclosed to the relevant regulatory body pursuant to rule 12.73(1)(b) of the FPR 2010;*

*b) it is desirable that the court takes responsibility for considering any onward disclosure in order to prevent the need for a victim of any abuse (who, by reason of PD3AA, is a vulnerable party) having to draw the matter to the court’s attention;*

*c) the court should first invite the parties to confirm their positions with respect to disclosure in these circumstances;*

*d) if disclosure is opposed, the court should consider inviting the relevant regulatory body to intervene and disclose to it such limited information as may assist that body in deciding whether it seeks disclosure for any regulatory purpose;*

*e) preferably, the issue should be considered at an attended hearing with the regulatory body present; and*

*f) in the event that disclosure is refused, the court must send its disclosure judgment promptly to the regulatory body.”*

74. The Mother’s application does not concern a regulatory body; it seeks disclosure of the Judgment to the Father’s employer. Such disclosure is dealt with by Knowles J’s next paragraph, 66:

*“I have also carefully considered whether, in these circumstances, there should also be disclosure to an employer. I have decided against this for the following reason. Disclosure to a regulatory body will trigger a process which is very likely to have well-established protections for the individual whose fitness to practise is under investigation and where the court can be confident that its disclosure will be carefully safeguarded. The same protections and process are, in reality, unlikely to be replicated for each and every employer. Additionally, disclosure to a regulatory body will also impose on the individual an obligation to inform his or her employer and will also trigger an investigation in which contact will be made very quickly with an employer. Thus, employers are likely to be informed as part of a process which, as it should, protects the rights of those whose fitness to practise their profession is under scrutiny.”*

75. I am being asked to invite the Father's employer to intervene, in circumstances where there has already been comprehensive disclosure, by Order of this Court to the police. The Father consented in that Order. The police investigation into the Mother's criminal allegations is independent and can be assumed to be thorough. Certainly it is not limited to the material before the Family Court.
76. This application is made under and governed by FPR 12.73(1)(c). The application of this Rule and the relevant case law has most recently been comprehensively examined in *Re Z*, to which I have already referred in respect of process.
77. To distil the relevant legal principles, my approach on the substantive application must be to apply the ten criteria set out in *Re C (A Minor) (Care Proceedings) (Disclosure) [1997] Fam 76*, and to consider in tandem the necessity and proportionality of a Disclosure Order bearing in mind parties' Article 6 and 8 rights (*Re M (Children) [2019] EWCA Civ 1364*). There is no presumption in favour of disclosure.
78. Applying the legal principles to the facts specific to this case, is it necessary for me to invite the Ministry of Defence to act as Intervener to inform the Court of specifics relating to the Father's employment?
79. I consider the *Re C* checklist in the context of private law proceedings where the Father has been unrepresented throughout. This is not a case where he had s.(98) protections – or even representation – during the Fact Finding Hearing. He was found by the Recorder to have been commendably frank in his evidence on many issues, including about an incident that the Recorder found was rape.
80. There is no evidence in support of the Mother's contention that the Father's employment brings him in contact with children or vulnerable adults beyond broad assertion that it might. The only evidence before the Court as to the details of the Father's occupation is that he has seen active service completing tours of duty in Iraq, Northern Ireland and Afghanistan and that he is now working at a military base in the UK.
81. The nature of vulnerability was considered in *A Local Authority v SK & HK [2007] EWHC 1250 (Fam)* which concerned a Local Authority application for disclosure about a Mother found to have physically assaulted her child and to have lied about it. The Mother resisted disclosure in part on the basis that she was employed at a care home for the elderly and so did not come into contact with children. Having conducted a careful balancing exercise Sumner J ordered disclosure finding that the Mother worked with vulnerable adults who, like children, may well not be able to look after themselves or provide a coherent account of any harm done to them.

82. Vulnerability will be fact and case specific, as will the robustness of different regulatory or other investigatory safe-guarding processes.
83. Dr Proudman heavily criticised HHJ Vincent in the High Court for directing short statements from the parties setting out their positions on disclosure in line with para 65(c) of the *Re Z* Guidance (skeleton paragraphs 54, 56 and 57 at Bundle F103-104). The 21 page skeleton argument before the High Court, and reproduced in the bundle before me, cites and quotes extensively from 20 Family Division cases, cites and quotes extensively from the Harm Report 2020, from an expert psychiatric report cited in a 23 year-old case, from a nine year-old academic paper titled “*Process and Legislation Designed to Restrict the Rights of Rapist Fathers*,” and from Guardian newspaper articles describing interviews with rape victims.
84. Some of this material within the skeleton argument has been repeated in today’s position statement.
85. Nowhere in any position statement or skeleton argument filed on behalf of the Mother in this Court or in the High Court is there any mention of the Provisions and Protocol that have direct relevance to the facts of this case – the Common Law Police Disclosure Provisions 2015 revised in 2017 (the ‘CLPD Provisions’), and the Protocol Regarding the exercise of criminal jurisdiction in England and Wales between The Director of Public Prosecutions and The Director of Service Prosecutions (the ‘DPP and DSP Protocol’) most recently revised on 25 October 2023 by the current incumbents Max Hill KC and Jonathan Rees KC.
86. This significant omission is unfortunate in circumstances where the disclosure application has been pursued for over a year, where complaint has been made to the High Court that a Circuit Judge has made ‘*improper*’ case management directions on the issue, and where the Father is unrepresented.
87. The Father is in the military. Both the CLPD Provisions and the DPP and DSP Protocol bite.
88. In 2015 the CLPD Provisions replaced the Notifiable Occupations Scheme. Pursuant to them, the police have a common law duty to consider the need to make disclosure to a third party where “*in the course of an investigation or other policing activity, a significant risk is identified which there is an urgent pressing social need to address*” (CLPD Provisions paragraph 6).
89. Further, “*The primary trigger for consideration of the need to make such a disclosure will be the arrest (or voluntary interview as a suspect) of an individual for an alleged recordable offence; or if no consideration had been*

*made at that stage, upon the subject being charged with a recordable offence”* (CLPD Provisions paragraph 7).

90. In addition to the common law duty generally, the police are bound by the 2023 DPP and DSP Protocol which sets out in detail the requirements of and process for cooperation. I do not set it out in full here save to observe that by paragraph 4.1.1. in cases of rape, consultation between the two prosecuting authorities is mandatory; this also is the case where there is an allegation of domestic abuse or child abuse (4.1.2).
91. Dr Proudman submitted today, having reviewed the Protocol and CLPD Provisions, that the Court of Appeal has made it plain that criminal legislation and principles have no place in the Family Court. She further submits that notwithstanding any obligations that the police and DSP may have, it is incumbent on the Family Court independently to notify the MoD of the application for disclosure. She says that the police may have failed to follow due process, failed in their safe-guarding obligations and that this is a case of wider public interest where the Family Court should invite intervention.
92. Miss Hudson submits on behalf of the Guardian that the CLPD Provisions and DPP and DSP Protocol are clear, and that the Court can be satisfied that third party safeguarding is appropriately considered under them. While she posited that the Court might ask the police to confirm that they have complied with their safeguarding duties pursuant to the common law and the Protocol, on balance this would be otiose and the Court should be entitled to assume that due process has been followed. In response the Mother argues that the Court should obtain confirmation from the Police that they have complied with their third party safe-guarding obligations.
93. I do not accept Dr Proudman’s submission that this Court should ignore the CLPD Provisions and the Protocol as belonging firmly and solely to the criminal jurisdiction. Her application centres on third party safe-guarding. *Re Z* requires me to have regard to the third party safe-guarding powers, processes and protections of the relevant regulatory body. The Protocol relates directly to the public body with direct investigative authority over the Father through his military role; the CLPD Provisions bind the police force investigating the Mother’s criminal allegation of rape. Unlike in *Re C* or *Re Z*, in this case there has been comprehensive disclosure to the police, who have conducted a full criminal investigation, which I am told remains live with the Mother currently engaged in the Victims’ Right of Review Scheme.
94. In the context of Knowles J’s observations in paragraph 66 of *Re Z*, the investigating officers not only have the fact-finding Judgment but all the evidence behind it. Robust processes exist to assist and direct the investigating authorities. There is no evidential basis on which I could

conclude that third party safe-guarding obligations have not been met. Just as “*Disclosure to a regulatory body will trigger a process which is very likely to have well-established protections for the individual whose fitness to practise is under investigation and where the court can be confident that its disclosure will be carefully safeguarded*” I can be confident that there are well-established protections for the Father within the third party processes applicable under the police investigation.

95. Having considered whether or not to invite the intervention of the Ministry of Defence against the *Re C* checklist, I conclude that it is unnecessary in circumstances where the public interest in police disclosure – described in the *Re C* checklist as ‘*a very important factor*’ – has been met and where there are well-established processes, with appropriate safeguards, governing cooperation between the relevant agencies – in this case the police and the military.
96. The application is accordingly refused; I direct disclosure of this narrative judgment to the relevant Police force for consideration as part of their overall investigation but decline to direct them to confirm that they have complied with their statutory and common law third party safe-guarding obligations. There is no obligation on the Court to do this – Knowles J did not suggest that there is or should be – and the Court is entitled to assume that regulatory and investigative bodies follow law and procedure.

#### Declaration of Incompatibility

97. Dr Proudman has put ‘*the court on notice that she will be seeking a declaration of incompatibility.*’ Notwithstanding this issue was alluded to in the skeleton argument filed in the High Court in December 2023, notice that a declaration will be sought is given three years into these Children Act Proceedings, the night before this substantive two-hour hearing, in a list with an urgent ICO application at 12pm and an appeal from the Justices this afternoon.
98. Any application for a declaration of incompatibility together with any material in support must be filed and served by 4pm on 18 March 2024. The Guardian must file a response together with a list of third parties who may have an interest and who should be invited to intervene by 4pm on 3 April 2024. The Father may file a response if he chooses, although given the legal complexity he is not expected to. Position statements limited to four sides of A4 in 12 font and 1.5 line spacing must be filed and served by 4pm on 8 April. The Mother’s position statement should include her response to the Father’s offer not to pursue direct contact with L if regular phone calls and messaging can continue.

### Next Hearing

99. The matter will be listed for Directions Hearing remotely before HHJ Moradifar on 11 April at 10:30am. Issues are:
- a. Whether proceedings can conclude on the basis of the Father's offer not to pursue contact but to maintain indirect contact through regular phone calls and messages;
  - b. In the event that there remains a contested hearing, directions upon the incompatibility application including venue and whether the application should be heard concurrently with the Final Hearing;
  - c. Timing of the Guardian's Final Analysis

### Disclosure and Barring Service/Notification under Section 80 Sexual Offences Act

100. I decline to liaise with Knowles J on the issue of DBS checks and Notification. These regimes are creatures of statute with clear procedures and application. Notification is governed by section 80 and Schedule 3 of the Sexual Offences Act 2003; the DBS service is a governmental organisation governed by the Safeguarding Vulnerable Groups Act 2006 and has interplay with the Rehabilitation of Offenders Act 1974 and the Rehabilitation of Offenders (Exceptions) Order 1975. Amendments to the same are a matter for Parliament, not the Court.

### Father's Representation

101. I am concerned about equality of arms and the Father's Article 6 rights. To date this Father has navigated proceedings without advice or representation throughout, dealing with a substantive Fact-Finding Hearing and with subsequent applications that would potentially be to his detriment if granted. The proposed application for a declaration of incompatibility is predicated on the basis that the Father is a '*rapist*,' that therefore L should have no contact with him, and that notwithstanding PD12J the current statutory framework under the Children Act 1989 is incompatible with the Mother's Convention rights. It seems to me that this case may now reach the point of exceptionality such that legal aid should be granted to the Father for the remainder of these proceedings.
102. Father is advised to take a copy of this order and any other papers he has in respect of these proceedings to a solicitor for the purpose of seeking advice on legal aid and generally. He also has leave to disclose this judgment to the Bar Pro Bono Unit.