Case Nos. B4/2016/1440
B4/2016/1444

Neutral Citation Number: [2016] EWCA Civ 1332
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(MR JUSTICE KEEHAN)

Royal Courts of Justice
Strand London, WC2A 2LL

Date: Thursday, 20 October 2016

B e f o r e:

LORD JUSTICE McFARLANE

LORD JUSTICE LINDBLOM

MR JUSTICE HENDERSON

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IN THE MATTER OF U (CHILDREN)

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(Official Shorthand Writers to the Court)

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Mr R Howling QC (instructed by Barrett & Thomson) appeared on behalf of the **Applicant**
Mr W Tyler QC & Miss C Piskolti (instructed by Cordell & Cordell) appeared on behalf of the **Respondent**

J U D G M E N T (Approved)

1. **LORD JUSTICE McFARLANE**: This appeal concerns the welfare of four young children who have been the subject of ongoing proceedings in the Family Court now for some two or more years.

2. The background to the case can be shortly stated. The children's parents both originate from Afghanistan. They were married in 1999 and travelled to the United Kingdom in the year 2000. Since that time they have achieved British citizenship and all six members of the family are British citizens and live here permanently. The four children are, first of all, two girls, both with the initial S, the eldest now 16, the second aged 14, and then two boys, F, who is now 12, and Y, significantly younger, now aged six.

3. The family experienced progressively, as I understand it, growing disagreement between the two parents in the years 2011 onwards. Unbeknownst to a number of the family members, the father in fact underwent a religious second marriage to a lady with whom he now lives. That was in 2012. That information, however, was not made known to his wife and the children until the middle of 2014, and it was in the middle of

2014 that the parental relationship finally fractured.

4. The mother contacted the police on two occasions in August, making complaints about the father, and matters came to a head on 11 September 2014 when the father, having called the police to the rented property which he rented for the family in his name, achieved the change of the locks at that property and the mother's removal from it. It is said that there was an agreement there and then, in the presence of the police, that the children would remain with the father, but the upshot, at the end of that day, was that the mother had moved to alternative accommodation with the three older children, the two girls and the elder boy F. That left the youngest child, Y, in the care of the father, and during the currency of the proceedings in the Family Court that was the arrangement that existed, the elder three with the mother, the younger child with the father.

5. The proceedings have to all intents and purposes been conducted before Keehan J in the Family Court throughout. He has presided over some 14 different hearings at least, on my calculation. The primary hearing was a fact finding hearing conducted by the judge concluding in a judgment given on 3 March 2015, which is available as I understand it on Bailii with a neutral citation [2015] EWFC 535. The judge helpfully summarises the facts as he found them to be at paragraphs 9 and 10 of his second judgment, which is the subject of this appeal, dated 15 March 2016, neutral citation [2016] EWFC 14:

> "9. The full background history to this matter is set out in paragraphs 10-18 of the fact finding judgment:
>
> > 'The parties, who are both of Afghani origin, married in June 1999. Each contends the marriage was turbulent. In 2011 the mother alleged the father had been violent to her. He was arrested and released on bail with a condition that he not reside at the former matrimonial home. Three months later the police notified the father that they were taking no further action in respect of the mother's complaint.
> >
> > When the father attempted to return to the family home the mother denied him entry. He commenced proceedings in the county court for an occupation order and a non molestation order against the mother. He also applied for residence orders in respect of the children.
> >
> > After some months, however, the parties agreed to effect a reconciliation and on 26 March 2012 the private law proceedings were concluded with the consent of both parties.
> >
> > On 6 August 2014 the mother made a complaint to the police that the father had sexually assaulted her and blackmailed her on 24 July 2014. On 7 August 2014 the mother made a further complaint to the police that the father had sexually assaulted her a number of times between March 2013 and March 2014. The father was arrested, interviewed and bailed with a condition that he must not reside at the family home. On 10 September the parties were notified by the police that no further action

would be taken against the father and that his bail would be cancelled the following day.

It is the mother's case that it was shortly before these events that the mother discovered that the father had taken a second wife. The emotional and psychological impact of this on the mother cannot be overstated.

On 11 September the father attended the family home in the company of a police office. There was no one present. The father entered the property and changed the locks; the property was rented and the tenancy was in his name.

The mother returned. The father refused to let the mother into the house. An argument ensued. YU was present. Both called the police who attended. The mother was advised she would have to secure alternative accommodation. In the police records, which the mother disputes, it noted that the parties reached an agreement that the children would remain living at home with the father until the mother had secured an alternative property.

In the event YU remained with the father and the mother collected the older three children from school and took them to the home of a friend. They remained living there for a few days until the mother obtained a property from the local council. I note the mother alleges she had been served with a notice to quit by the landlord of the family home which expired on 21.9.14. In preparation for the pending move the mother had started packing the children's clothes and told them they would have to move to a new home.

On or shortly after 11 September the mother accepts she told the 3 older children that their father had thrown them out of their home and had told the mother that she and the children could sleep on the streets. This was not the first time, nor sadly the last, when the mother was wholly negative, in what she told the older children about the father.'

10. I made the following findings of fact against the mother at paragraphs 32 and 33 of that judgment:

'The mother gave evidence over the course of two days. She was, I regret to find, a most unsatisfactory and unreliable witness. She either lied about significant events and allegations or greatly exaggerated or embellished what had in fact happened.

I so find for the following principal reasons:

I) the mother alleged the father assaulted SaU on two occasions in late 2013. On the first occasion she said the father beat SaU on the

head and then locked her in a cupboard or storage room. In evidence, however, the mother said the father slapped SaU so many times in the face and she was crying so much that she could not talk. The mother could not explain why this later account of the event was not in either of her statements;

II) the older 3 children spoke to Ms Odze about an event when the father locked SaU in a cupboard. The father denies he did so. There may have been an event when the father had cause to discipline SaU -- perhaps inappropriately -- but given the degree to which the mother, by her own admission, has involved the older three children in the parental dispute, I am of the view I should be very cautious in placing any weight on comments made by the children to the CAFCASS Officer or other professionals.;

III) on a another occasion it is alleged the father pulled SaU's hair and slapped her. It is agreed there was an incident between SaU and the father which caused SaU to call the police. Given the alacrity with which the parents have involved the police in their marital disputes, I am less surprised than might otherwise be the case that SaU followed the course so frequently taken by her parents. In evidence the mother confirmed that the father had pulled SaU's hair and beaten her. This account of events does not accord with the police log of the incident, namely:

> "Father was spoken to separately who stated that he had found messages on his daughter's phone which he didn't approve of and the messages were between this daughter and some unknown person. When questioned and told that he was going to ring the number the subject began crying and wanted the phone back, as the father paid the bill he kept the bill she was clipped softly around the ear and sent to her bedroom.
>
> The subject and mother were also spoken too and confirmed that this was what happened, and now the subject is upset because she is no longer allowed the phone.
>
> Subject was safe and well and had no visible injuries and was spending the day in her room. I've no concerns over the subject as she was punished according by her father."

The mother denied she had confirmed the father's account to the police. This is another occasion when the mother has disputed a police recording of events. I am satisfied that the police log is accurate and that the mother is once again lying in her evidence to the court;

IV) The mother sought to suggest in evidence that there were subsequent incidents, post September 2013, involving the father and the children. She could not explain why there is no reference to any such events in either her statements or her

schedule of findings sought. The excuse that she "ran out of time" with her solicitor will not do. The mother is lying;

V) The mother's evidence about when she found out the father had married a second wife and her account of the events of 24 July 2014 are confusing and contradictory. At one stage in her evidence she asserted she found out about the second marriage on 23 July 2014. Some minutes later she said it was a few weeks before 24 July;

VI) on 6 August the mother went to the police to report that her husband had been harassing her. She told that on 24 July he had started hugging and kissing her. When she refused his advances she alleged he threatened her that unless she did as he wished he would show photographs and recordings of her on his mobile telephone to he children. (I note the police later seized the father's mobile phones and forensically examined the contents. No inappropriate or other photographs or recordings of the mother were found).

VII) The following day she returned to the police and made further allegations that the father had engaged in sexual activities with her without her consent, including having sexual intercourse with her when she was asleep. In her evidence she alleged, that the father had been violent to her on 24 July. Further when pressed why she had not reported his violence to the police there was a very very long pause; no answer was given. Eventually the mother asserted she had explained everything to the police and had been present at the police station for 5 or 6 hours. I do not accept that explanation. It is far more likely, in my judgment, that if the mother had made allegations of violence they would have recorded the same. They did not because no such allegations were made. They are, I find, of recent invention by the mother in a misguided attempt to bolster her case against the father. Once more she is lying and is exaggerating events;

VIII) the mother knew she and the children would have to leave the family home after the landlord served a notice to quit. She had started packing up the family belongings. All of this occurred at a time when, as a result of her complaint to the police on 6 August, the father was on bail with a condition that he must not reside at or visit the family home. On 11 September, the day after his police bail had been cancelled he returned to the family home. It was immediately apparent that the mother had caused considerable damage to the property and furnishings. The father changed the locks. The mother returned. There was an argument and both called the police who attended. The mother was advised that because the tenancy was in the father's name, she would need to secure alternative accommodation. It is recorded in the police log that the parents reached an agreement that the children would remain living with the father until the mother was able to obtain her own property. The father agrees with this account. The mother denies there was any such agreement. I

> am satisfied there was such an agreement but that the mother almost immediately reneged on the same and went and collected the three older children from school. She took them to a friend's home. YU had remained in the care of his father. I find the mother's actions that afternoon to be inappropriate and not in the best interests of the children. Further she greatly compounded matters by telling the three older children that their father had thrown them out of their home and that he had told the mother that she and the children could sleep on the streets. That was not only untrue but was cruel to the children.'"

6. Having made those findings, adverse as they were to the mother both in terms of finding none of her allegations against the father proved but also finding that she was prone to be an unreliable witness who exaggerated and embellished allegations, the judge went on to form his preliminary view as to the way forward. He summarised his position in that respect in this way in his earlier judgment:

> "I find the mother assaulted the father in June 2014. I find that she has caused the children -- especially the three older children -- emotional harm by reason of her wholly inappropriate and negative comments and outbursts against the father. The father had an enjoyable holiday with the three older children in Barcelona in August 2014. By late September they refused and still refuse to see him. In my judgment their change of view of the father is primarily driven by the views of the mother, however, the father has not ameliorated the position by some of his actions prior to the marital breakdown."

The significance of the two closely placed dates, August and then September 2014, is that they straddle, on my understanding, the breakup of the relationship between the parents.

7. The judge, looking forward, identified what he considered to be the best course to try and bring these polarised parents together for the benefit of the children, it being a given that children will normally benefit from having some form of continuing positive relationship with each of their two parents, notwithstanding the parental separation.

8. In that regard both the judge, and more particularly the family, had the great benefit of being able to be referred to the Anna Freud Clinic and in particular the input into this case by Dr Eia Asen, the well known child and adolescent psychiatrist. Dr Asen's instruction was dual, in the sense that he was instructed both to carry out an assessment of the parents and the children but also to offer each member of the family, both individually and collectively, therapy in order to try and move matters forward. At the stage that the case was before the judge in March 2015, the three older children were not seeing their father, and equally the mother was either not seeing or had difficulty in seeing the younger child. The judge's primary purpose was to try and break that logjam.

9. The work by Dr Asen commenced in May 2015. He achieved, with the cooperation of the family members -- and in this I do not in any way disregard the positive contribution that the mother must have made -- the early commencement of meetings between the three older children and the father, and those progressed. Contact between the mother and the younger child, Y, was more difficult to start. Some supervised contact sessions were commenced, but there was a delay in moving to unsupervised contact, and that did not start until a meeting that occurred on 31 January 2016.

10. That first unsupervised contact was of note in the proceedings for a number of reasons. First of all, at the end of the contact session, or at least some time after it, it was clear to anyone who saw him that the young child, Y, had had a significant part of the fringe on the front of his hair cut, and cut in a rough and ready fashion. The mother blamed the father, explaining that the father would have done it in order to suggest and blame her for cutting the boy's hair during the contact visit. The father blamed the mother, saying that she had done it, on a reverse basis, in order to blame him, as she did. There was a standoff between the parties as to quite what the truth of that matter was.

11. Secondly, the visit is of note because, unbeknown to anybody -- certainly the mother, the young boy Y, who at that stage was only aged five, had been sent by his father wired for sound, in the sense that he had a hidden microphone somewhere on his clothing by which the father was able to achieve a recorded version of the conversation between mother and child. That reprehensible conduct was rightly criticised by both Dr Asen and the judge, but nevertheless a translation of the transcript of the tape recording was admitted into evidence, and that showed a third feature of this contact, namely that on no less than three occasions the mother had asked this young boy whether or not there was a baby in the household, namely a child born to the father and his second "wife". I put the "wife" title in that way because decree nisi between this couple, the parents, was only achieved this year on 24 February.

12. Matters moved on, and fairly swiftly after that unfortunate contact meeting on 31 January, which was the end of unsupervised contact visits for the mother at that stage, the final hearing came on before Keehan J. By that stage, he had the benefit of four separate reports from Dr Asen and his team. Those reports indicated that the Anna Freud Clinic had conducted sessions with the family, either together or individually, which numbered something of a dozen or more in order. The reports are full. The conclusion that Dr Asen gave at the end of the process was that the very negative view that the mother had with respect to the father, as evidenced by the findings to which I have already made reference, continued effectively unabated, and Dr Asen was concerned about the mother's apparent actions at the 31 January contact session if it was she, rather than the father, who had taken the scissors to Y's hair. He therefore put his recommendation to the court on an alternative basis.

13. If the court found that it was the mother who had cut the boy's hair, then Dr Asen considered that this was fresh and recent evidence of a mother who continued to manipulate the children so as to achieve negative findings against the father, and he was pessimistic that despite the therapy that had been put in she could change in a way that would protect the children from being exposed to this emotionally damaging mindset that she had. He therefore recommended that in principle all four children should go to live with the father, but he accepted that given the ages of the two girls, and the degree to which they were entrenched into the mother's world view, it would not be possible for them to move easily, and if they physically moved their presence would compromise the ability of the father to hold on to the care of any of the children, but particularly F, in the middle as he would be in the group of the four children. So Dr Asen measured his recommendation by indicating that of the three older children, only the boy, F, should move to the care of the father if there was a finding of fact against the mother on the hair cutting episode.

14. Having mentioned that, it is right to just interpolate one matter of note, which is that Dr Asen, in the course of his final report, having rehearsed in some detail what he understood about the hair cutting evidence, says this:

> "Based on the information available to me at this point, I have formed the opinion that it is more likely than not that the mother cut Y's hair during the contact session on 30 January 2016."

He went on to give some reasons for that opinion. Mr Howling QC, who appears for the mother before this court today, understandably submits that in offering that opinion Dr Asen stepped well outside his role as an expert psychiatrist and was in error in doing so.

15. The case came on for hearing before the judge. He conducted the hearing on two consecutive days, 8 and 9 March. He heard oral evidence in full from the two parents and from Dr Asen. There was no Cafcass officer actively involved in the case, and although the local social services had been involved, they were not drawn in to offer any welfare recommendations to the court. The case was then adjourned for submissions. Both counsel submitted many detailed written submissions and attended on the morning of 15 March to respond to the other side's submissions and assist the judge as best they could in final oral submissions. We were told, and it is important in the context of this appeal, that the judge then rose at approximately 11.15 am and returned to court almost exactly one hour later to deliver his judgment.

16. Pausing there, it is also important to note that the family were aware that the judge was going to make his decision on 15 March. Plainly this was a very important determination for all members of the family, and it was accepted that if the position was in favour of moving one or more of the children to the father, there would be a need for the children to be supported at that stage by professional input so that the judgement could be explained to them and the move could be facilitated in a supportive way, rather than leaving the two parents and the older children to fend for themselves. So Dr Asen had made himself available on 16 March to undertake that process, so it was therefore necessary for the judge to issue his judgment by lunchtime on the day before and, in order for Dr Asen to understand the detail of what the judge was saying, the judgment had to be written. Thus it was that when he returned to court after the one hour adjournment following the close of submissions, Keehan J read out a judgment that he had largely prepared earlier in the light of the submissions that had been made.

17. The case then proceeded. Application for permission to appeal was made and refused and eventually Dr Asen and the family proceeded to attempt to implement the judge's order. It is not necessary for me to say anything about that other than that eventually the boy, F, did move to live with his father and that is where he has remained in the six or seven months that have passed since the judge's judgment.

18. The judge's reasoning for coming to that conclusion is set out, albeit in relatively brief terms, in the judgment. He summarises the findings of fact that I have set out. He summarises Dr Asen's evidence and the evidence of the parents. In particular with regard to the mother, the judge notes this at paragraph 27:

> "At the conclusion of her evidence, during re-examination, the mother was asked by her counsel whether there was anything else she wished to say. In response and in English she [it must be] then launched into a tirade against the father. She accused him of being a liar. She said she would not trust him with the care of any of the children. It was not just the words the mother used to deliver her invective against the father that greatly concerned me, it was the vehemence with which she did so in a state of very high and uncontrolled emotion. It was redolent, indeed completely at one, with the mother's views as expressed during the course

of her evidence at the fact finding hearing."

Any reading of the judgment would indicate that that was an important, if not a turning, point in the case for the judge and his analysis.

19. The judge then moved on to draw his conclusions together. He first of all had to deal with the factual issue as to who had cut Y's hair at the contact session. He rehearsed the evidence and concluded that it must have been the mother that did so. That was plainly an important finding, not only because of its immediate impact upon the boy and the mother's trustworthiness as a person to have unsupervised contact, but it had wider implications. The judge explains them in this way at paragraphs 40 and 41:

> "40. There is only one explanation, in my judgment, for that passage [in the tape of the contact session] and that is that the mother asked to be given a pair of scissors and then cut Y's hair in a 'disfiguring' fashion. Her contrary explanation is a lie. Her claim to have been 'shocked' when she saw a photograph of Y taken by his father is a lie. Her allegations that the father cut Y's hair and that he bribed the transcriber and/or translator to produce a false or inaccurate transcript are baseless and without any foundation. I find they are all lies.
>
> 41. If that were not bad enough the evidence is clear that the mother 'recruited' the older children to deny seeing her cut Y's hair to the father and to Dr Asen. I consider that to be an extremely disturbing course of action. It well illustrates that the mother will stop at nothing in her campaign against the father even to the emotional and psychological harm to her children. Moreover, not even after the benefit of intensive family therapy with Dr Asen over the course of the last eight months."

And then this:

> "42. I find there is no prospect in the foreseeable future of the mother changing, in a meaningful and sustained way, her past and current damaging behaviour as I have described in the fact finding judgment and the preceding paragraphs of this judgment. Further I find there is no prospect of the mother promoting a positive relationship between the children and the father. I find that there is no prospect of the mother desisting from actively involving the children in her campaign against the father."

20. Damning findings indeed, and depressing findings, given that the judge identified no change from the position as he had found it to be almost a year earlier, despite the intervention of a highly skilled therapeutic unit with whom the mother had fully cooperated.

21. The judge then in some ten short paragraphs draws his conclusions together. He notes that the father is genuinely committed to the best interests of the children, but the mother however continues to cause them emotional harm. The judge, relying on Dr Asen's description, held that the father's second wife is a "force for good" and is supportive of the children. The judge found in relation to the mother's actions, and this is the key finding, as follows at paragraph 46:

> "I accept, without reservation, that it is positively harmful for the children to remain in or, as the case may be, to be placed in the care of the mother given her enduring and entrenched views against the father and his

> second wife. Therefore, I find it is in the welfare best interests of all four children to move to live with their father. I will, however, only make a child arrangements order in favour of father in respect of F and Y. I hope that in due course, once F is settled in his father's care, that S and S will come to see and understand that their welfare best interests would be better served by living with their father and their two younger siblings. Thus for the reasons given by Dr Asen, set out in paragraph 33 above, I do not propose to make a child arrangements order in respect of the girls."

The reference to paragraph 33 is a reference to the judge's summary of the description I gave a short time ago of Dr Asen's reasons for holding that, in terms of recommending that the girls should move to their father's care as well.

22. The judge then notes that this course is contrary to the ordinary principle of maintaining siblings in the same home, and he went on to hold that F should move "immediately" and that any contact with the mother should be suspended for the time being. And that is where the judgment concluded.

23. The judge refused permission to appeal. I, however, was persuaded to grant permission on one primary basis, which was the submission made by junior counsel who acted for the mother before the judge but not at earlier hearings, Mrs Finola Moore, which was to the effect that the judge had not undertaken an adequate welfare evaluation but had taken account only of the negative findings against the mother and used that to drive his overall conclusion.

24. Further grounds were raised for which I give permission. First of all, the question of whether the children's "voice" had been heard within the proceedings, and in particular the submission that the judge should have granted an application for the children to be joined as parties to the proceedings so that they might be separately represented before the court. I also in the course of granting permission allowed the appeal to proceed on almost all of the other micro grounds, if I can call them that, that were raised on behalf of the mother.

25. The court today has had the benefit of the late entry into the proceedings on behalf of the mother of Mr Rex Howling QC. I make that observation with no disrespect to Mrs Moore, who marshalled the case thus far, but coming to the case late in the day has allowed Mr Howling to produce a welcome and realistic focus to the mother's case. He accepts that the mother cannot challenge the findings of fact that have been made against her or the judge's overall view as to her mindset, or the opinion of Dr Asen. He does however make two core submissions: first of all, that the judge has not undertaken a sufficient analysis of each of the welfare requirements of each of these four children, and secondly, that there has been an unsatisfactory and inadequate process for delivering information about and hearing the wishes and feelings of each of the four children before the court.

26. In addition, Mr Howling makes submissions in support of the ground relating to the appointment of a rule 16(4) children's guardian for the children. I will deal with that point first, because it is a discrete issue. It is common ground that no formal application was made to the court for the children to be joined as a party and/or the instruction of a guardian. The high point of the case arose in the course of a short hearing before the judge on 9 June 2015. In the course of that hearing, junior counsel then representing the mother, not Mrs Finola Moore, said this in the light of Dr Asen's first report:

> "... whether your Lordship would think it appropriate, bearing in mind particularly the ages of the eldest two, whether they should have a

guardian in these proceedings."

Reference is then made to the age of the children. Then this:

> "[The children] would have a say in proceedings affecting the future and the only way that that would be possible would be through a guardian. You raise it, my Lord, because it seems to me ..."

The judge says this:

> "I understand why you raise it. My view at the moment is given that it appears to me that the three children, including the 15 year-old, had a perfectly happy relationship with their father when they went to Barcelona in August, and they have been completely alienated by the mother, that there would be at the moment little point, it strikes me. It would neither be necessary nor proportionate for them to be separately represented at this stage, but thank you for raising it."

27. That is where the point began and ended. The issue apparently was not subsequently raised with the judge at any subsequent hearing. This court has been taken to the relevant passages in Family Procedure Rules 2010 PD 16A, which list a number of circumstances in which in private law proceedings it may be appropriate to join the children. In particular Mr Howling draws attention to the following, paragraph 7.2(c):

> "Where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;
>
> ...
>
> (e) where an older child is opposing a proposed course of action;
>
> ...
>
> (i) where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position."

28. I agree that with hindsight those various roundly described circumstances might apply to this case. But the point is that we are looking at it with hindsight. The judge was never invited to look at it square on as an application, and it seems to me not possible now for the mother through her lawyers to complain that this issue was not raised. Mr Will Tyler QC, leading Miss Piskolti, who did appear below, Mr Tyler did not, raises a number of points in submission to indicate that this would be quite a complicated decision for the court if the issue had not been raised.

29. For my part, I am afraid this point goes nowhere. Mr Howling, with his refreshing realism, accepts that if it were a freestanding point of appeal and there was no other point of appeal in the case, he would not be able to progress the argument. What is important, and I do bear in mind, is Mr Howling's subsidiary point, which is that in the absence of children who were separately represented before the court, and in the absence in the case of a Cafcass officer being involved who has undertaken the bespoke task of meeting each of the children for the purpose of recording their wishes and feelings, there is all the more reason for the judge to make sure that he or she has

"heard" each of the children by other means. The means in this case comes via Dr Asen, in the sense that the opinions of the three older children were spelled out in his report, but Dr Asen accepted that he had no evidence of what young Y's wishes and feelings might be, and it is accepted, as I understand it, that there was no separate professional information before the court as to Y's wishes and feelings in this case.

30. I move, then, to consider the core submissions that Mr Howling makes. The first is that the judge has failed to conduct a sufficient welfare analysis. Mr Howling points to the fact that it has been a benefit to this family and these proceedings to have almost 100 per cent judicial continuity. That has allowed the judge to indicate a strategy for the case, to pick up a word used by Mr Tyler, at an early stage. But Mr Howling rightly points to that strategy being identified by the judge in a judgment in June 2015 following receipt of Dr Asen's first report, which was to contemplate the move of all four children into the father's care, one of them obviously already being there. Mr Howling, to use my words, indicates that that set the mould or described the route for the case, and it was thereafter very difficult for all those involved to think of options outside that, and there was a mindset travelling in that direction from that stage. He therefore submits that it was all the more important for the judge at the final hearing to conduct a welfare evaluation with his eyes wide open to all of the relevant factors.

31. Secondly, Mr Howling submits that whilst the judge did plainly set out the adverse findings that he had to make with respect to the mother, he did not, when it came to the welfare balance, take account of adverse findings that were there to be made against the father. He took us to some three or four references in the reports of Dr Asen to support that submission, in particular paragraph 3.4 of a report of February 2016, where Dr Asen says this:

> "It is now as evident as it has ever been that as long as the intense inter-parental warfare continues, and sadly with both parents being actively involved in fuelling the conflict, all four children remain at severe risk of continuing to suffer significant emotional harm if they remain exposed to their parents' highly acrimonious relationship."

Mr Howling submits that side of the case, namely that the father was not unimpeachable, fails to find a voice in the judge's analysis.

32. Mr Howling goes on to point to the absence of any express welfare evidence from a professional or an expert. I have already indicated that the Cafcass officer who had been instructed a year before had stepped down from the case by common agreement between the parties when Dr Asen's team stepped in, and that there was no welfare evidence from the social services who were involved in a minor way. But Mr Howling submits that Dr Asen, whilst instructed to assess from a psychological point of view the capacity and the personality of the parents, was not instructed to provide a welfare recommendation, and he submits that Dr Asen did not purport to do so. Mr Howling therefore submits that this was a fundamental structural error in the case, and the judge was in error in relying upon Dr Asen's recommendation as if it had been a welfare recommendation.

33. Finally, and I hope I do not do an injustice to Mr Howling in picking up what I think are the three or four main points of his overall submission, he points to the lack of what he says is an in depth analysis in the conclusion that the judge gave. It is shortly set out and in particular it does not touch ground, in his submission, with those key elements of the welfare checklist which were relevant to this case. He does not submit that a judge in the Family Division, and in particular one of the experience of this judge, should slavishly refer to the welfare checklist, but in the course of evaluating the

welfare of each of these children, a judge ought to refer to relevant issues.

34. In this case, submits Mr Howling, the judge's error is made plain in paragraph 46, where in the first sentence the judge identifies the "positively harmful" behaviour of the mother and then at the beginning of the second sentence he says "Therefore I find it is in the welfare best interests of all four children to move to live with their father." Mr Howling therefore submits that the judge was in error in approaching this as an, as it might be called, "one point case" without looking at the wider landscape.

35. The second core submission relates to wishes and feelings. As I have indicated, Dr Asen's reports at various turns indicate that the three older children are 100 per cent in the mother's camp. To a degree, that is what the case was all about. Equally, there is no account of the wishes and feelings of young Y. In addition to making that overall submission, Mr Howling says that the outcome that both Dr Asen and the judge came to focus upon, and indeed deliver by the court order, was for F to be separated from his two sisters and move on his own, in the sense of leaving the mother's home, to a new home with his father and young Y. There had been no evaluation, submits Mr Howling, of that proposal, and the court had no information before it as to what F's wishes and feelings would be with respect to that new structure on his life.

36. Finally, and as a separate matter, Mr Howling understandably makes the submission that I have already flagged up about Dr Asen stepping outside his professional role and putting forward an opinion on the facts of the truth or otherwise of the hair cutting incident. Again, perhaps if I can deal with that as a separate matter. It is plain from the sentence I have quoted that Dr Asen does seem to have formed at least a working hypothesis, if not a conclusion, as to the truth of these matters. But it is equally plain from a reading of the judgment that the judge took absolutely no regard to Dr Asen's opinion, stated as it was on that point, in his report. The judge formed his own view. He heard the key witnesses, the mother and the father, and he read the transcript of the contact session, and he made his finding, which is not challenged, and Mr Howling rightly says cannot be challenged by way of appeal on that point. In effect, the judge held that the view that Dr Asen had formed was, albeit after the event, proved, and so the fact that Dr Asen had that view in his mind, which came to be proved by the judge, cannot infect the overall validity of Dr Asen's approach to the case as a whole. It goes, I think, nowhere in terms of a potential success on this appeal for the mother.

37. In response, Mr Tyler meets the submissions that have been made head on by inviting this court to step back and look at the reality of the circumstances in which this judgment was given. Before doing so, he again rightly refers this court to the necessary legal context within which appeals fall to be considered. He refers to the judgment of the court in Piglowska v Piglowski [1999] 1 WLR 1360 which is in well known terms. It invites appellate courts to be most wary before entering into a detailed textual analysis of a judgment, particularly if it is an ex tempore judgment, and that the court must have regard -- and this is a reference to Re B (Appeal: Lack of Reasons) [2003] EWCA Civ 881 -- to the "seniority and experience" of the judge and the virtue of brevity in a judgment.

38. He also submits that there was no attempt by those acting for the mother to invite the judge to give a longer explanation of his reasoning. Right it is that an application for permission to appeal was made, but that was on narrow, focussed grounds and was made immediately by Mrs Moore very shortly after the judge had finished speaking his judgment. At no subsequent stage were the omissions, as they are now said to be, in the judge's judgment brought to the judge's attention and he was not invited to therefore add to what he had said.

39. In the particular circumstances of this case, Mr Tyler says that the court should be particularly understanding of the priority, for the family and for the court, for the judge not only to deliver his judgment almost immediately after the oral submissions had concluded, but to do so in a form that could be recorded in writing and handed to Dr Asen for the difficult work that he was going to undertake the following day. Mr Tyler, to use his phrase, says that this was a pragmatic judgment in a case that needed resolution that afternoon, and that the judge delivered what was required and should not now be criticised if there are reported inadequacies in the process.

40. Further than that, Mr Tyler submits that a number of the key points made by Mr Howling simply were not current in the proceedings before the judge. They were not raised. For example, the suggestion that the court lacked information about the view that F might have as to the proposal that he be hived off from his two sisters to go to live with his father was not the subject of a request for an adjournment for F to be seen so that gap in the evidence could be rectified. But more than that, on that particular point, Mr Tyler submits that it was totally unnecessary for that process to be undertaken. Given the very, very clear view that all three of the older children had about their father and their stated desire to live with their mother, the idea that one of them would be more amenable to being separated from the other two to go on his or her own does not require a crystal ball to predict what the wishes and feelings would be, and the evidence of that information was well before the court.

41. Mr Tyler makes the further, and to my mind compelling, submission that this court should look at the process that has been conducted over the course of 16 or 18 months with this family as a whole. There had been something like 14 different hearings in front of Keehan J. Two of them were of significant length, which allowed him to engage in depth with the facts of the case and more particularly with what he perceived to be the personalities of the parties. That is an unusual occurrence, even in this day and age when judicial continuity is encouraged.

42. The second signal factor in this case was that Dr Asen and his team had been instructed, and they too had become immersed in the details of this family over the course of a number of months, with many sessions with different family members.

43. A third factor is that because of the number of hearings the judge conducted, which were to a degree tailored to the receipt of the four reports that Dr Asen produced and because Dr Asen in turn was working with his eyes open to the findings that the judge had made, there was something of a symbiotic relationship between the court on the one hand and the Anna Freud Clinic on the other, and that that process had been a cooperative and complementary process which produced a judge at the end of the day who had a wealth of knowledge about this case and of the subtle issues that would have been current in it. The judge, in short terms, was steeped in this case, and so to submit that he in some way would have failed to engage with the factors that he was required to engage with when assessing the children's welfare is a bold submission. Mr Howling understands that is the case, and he also accepts that this is not only an experienced judge but a judge who in his practice at the Bar was similarly experienced over the course of many years in undertaking cases just such as this.

44. Mr Tyler submits that looking at the welfare checklist, if one attempts to categorise the evidence in the case within the headings of four of the key elements, the judge firstly had sufficient and clear evidence as to the wishes and feelings of the key children in the case. Because of the judge's findings as to the mother, it was beyond contemplation that, notwithstanding that there was an absence of information about Y's wishes and dealings, the judge could in the best interests of Y have moved him to live with her at

this stage.

45. Secondly, the judge made findings about the potential for harm to the children in the case. Although the father is said to be hostile to the mother, there were no findings that he was actively a source of potential emotional harm to them were they to be living with him. On the contrary, the judge records that the father was much more able to restrain demonstrating his negative feelings about the mother when with the children.

46. Thirdly, the judge had evidence of the capacity of these parents to look after their children. Again, this was not a case about cooking, physically looking after the children, there was no criticism of the father's care of young Y, and indeed there was praise for the father's second "wife". The question of capacity turned upon the mother's capacity to provide emotionally safe care for them, and the judge was against her on that. The only information that might have been lacking was under the heading "The effect of any change in circumstances", but again that was what the issue was about, and the judge was in no doubt that to move F to the father's care would be an exercise in robust parenting, as it were, requiring professional input, and he did his best to establish that.

47. So in terms of evidence not only before the judge but also mentioned in the judgment, albeit not in the ultimate analysis, the points are all there. They are shortly stated, and they are shortly stated because of the pragmatic parameters on the judge's ability to provide a longer judgment on that day.

48. So, having rehearsed matters as I have, and having listened carefully to Mr Howling's submissions, and indeed being the judge who granted permission to appeal and indicated that there may well be a real prospect of success on appeal, now that I see the case in the way that I have described, I am entirely satisfied that there are no grounds for holding that the judge was in error in the overall approach that he took to his analysis of welfare, or in terms of the provision of the "voice" of the child in this case, or in relation to the other less overarching matters that Mr Howling has raised.

49. So despite the clarity and force of the submissions that he has helpfully made to us today, I would dismiss this appeal.

50. **LORD JUSTICE LINDBLOM**: I agree.

51. **MR JUSTICE HENDERSON**: I also agree.