Neutral Citation Number: [2011] EWCA Civ 521
Case No: B4/2010/2165

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE DUDLEY COUNTY COURT
His Honour Judge HENDERSON
DD09P00002

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 May 2011

Before :

LORD JUSTICE PILL
LORD JUSTICE HOOPER
and
LORD JUSTICE MUNBY

In the Matter of C (A Child)

Between :

AL Appellant

- and -

(1) JH
(2) C (by her guardian)
Respondents

Mr Marcus Scott-Manderson QC and Ms Marie-Claire Sparrow (instructed by Talbots Legal Advice Centre)) for the appellant (mother)
Mr Charles Geekie QC (instructed by the Bar Pro Bono Unit) for the first respondent (father)
Mr Stephen Cobb QC and Mrs Val Cox (solicitor advocate) (respectively instructed by and of CMHT solicitors) for the second respondent (child)

Hearing date : 17 March 2011

Judgment

Lord Justice Munby :
1. This is an appeal from a judgment and order of His Honour Judge Henderson on 11 August

2010. The judge was exercising his jurisdiction under Part II of the Children Act 1989 in the Dudley County Court. The proceedings related to a little girl, then aged 3½, who I will refer to as C.

The background

2. The mother and the father commenced a relationship through the internet in the Spring of 2005. They began living together in Sweden in April 2005, relocating to this country in June 2006. Their daughter, C, was born in February 2007. In November 2008 the mother made an attempt on her life, following which she was hospitalised for a little over two weeks. On her discharge she went to live in a hostel. On 20 December 2008 there was an incident which led to a fact-finding hearing in June 2009.

The proceedings

3. On 8 January 2009 the father issued proceedings in the County Court, seeking residence, specific issue and prohibited steps orders. Directions were given by the District Judge on 16 January 2009; he made an interim residence order in favour of the father and ordered supervised contact three times a week at a contact centre. I shall return later to deal in more detail with the history of contact. Further directions were given by the District Judge on 13 February 2009, by a Recorder on 20 April 2009 and by a Circuit Judge on 11 May 2009, with a view to a fact-finding hearing on 15 June 2009.

4. The fact-finding hearing took place before Judge Henderson, who has conducted all subsequent hearings. Following a three day hearing, he gave judgment on 17 June 2009. He rejected the mother's allegations that the father had raped her: "I am satisfied that he did not ever rape her or attempt to rape her. I also reject the allegation that he regularly drank to excess." The allegations of rape, he said, were untrue and were made by the mother knowing that they were untrue. He found established certain cross-allegations made by the father against the mother but said that "apart from the apparent suicide attempt, her behaviour as alleged does not go significantly beyond the behaviour of many people in decaying relationships and …, subject to any material that emerges from later assessments of the mother, are likely to have no great significance in terms of the childcare issues".

5. On 7 August 2009 Judge Henderson directed that C be made a party and appointed a rule 9.5 guardian, Elspeth Bourne. Her reports are dated 16 February 2010, 3 June 2010 and 26 July 2010. By the same order the judge directed that Maria Mars, a Chartered Clinical Psychologist, prepare a report in respect of the mother and the father. Her report is dated 26 January 2010. On 20 January 2010 the judge directed that Dr Christopher Fear, a Consultant Psychiatrist, was to prepare a psychiatric assessment of the mother. Dr Fear interviewed the mother on 10 March 2010; his report is dated 5 April 2010. On 22 February 2010 the judge gave permission for Jane Chapman, the Centre Director of Living Springs Family Centre, to conduct an assessment of contact between the mother and C. For this purpose she observed seven one-hour contact sessions between March and May 2010, the first on 20 March 2010 and the last on 4 May 2010. Her interim report is dated 5 April 2010, her final report 10 May 2010.

6. There was a further hearing before Judge Henderson on 7 June 2010. By then, all the reports were before the court, except only the guardian's final report. The mother agreed that there should be a residence order in favour of the father. Following the guardian's view, in preference to that of Mrs Chapman, the judge ordered that contact be suspended pending the final hearing: "It is plain that recent events have caused real upset to C's equilibrium in recent

times. So I shall suspend contact between now and then to protect her from further upset." But he emphasised that "My approach at the final hearing will be this: that C should see her mother regularly, unless there are powerful reasons why not."

7. Judge Henderson was asked, but refused, to direct an adjournment of the final hearing – fixed for 9 August 2010 – either to permit Dr Fear to attend to give oral evidence or to allow for the instruction of a child psychologist to assess C. He described Dr Fear's evidence as "really part of the background." The doctor's absence, he said, would not in any significant sense damage the mother's case, and he was anxious, if at all possible, that the case be resolved as soon as possible. As far as any further assessment of C was concerned, he was, he said, "satisfied that there is nothing out of the ordinary in terms of C's recent reactions to events."

8. The mother sought permission to appeal. Her application was refused on the papers and again, on renewal, by Wilson LJ on 27 July 2010: [2010] EWCA Civ 1155. In relation to the judge's refusal to direct a further assessment of C, in particular, as Wilson LJ put it, "to contribute to the debate about the possible link or otherwise between the deterioration in her behaviour and her contact with her mother," he observed that "It is in my experience relatively rare for a judge to feel the need to commission an expert appraisal of that sort in relation to the behaviour of a child as young as C and therefore as limited in her ability to express herself as C would be." He concluded by commenting that at the forthcoming hearing, and with the aid of oral evidence from Mrs Chapman and the guardian as well as the parents, the judge would have the opportunity to gauge the true extent of C's loss of emotional equilibrium in recent months, its significance and the reasons for it.

Contact

9. It is convenient at this point to deal with the history of contact since the final breakdown of the parents' relationship in December 2008. There was no contact between the mother and C until the District Judge made the order on 16 January 2009 to which I have already referred. He ordered supervised contact three times a week, for 3 hours on each occasion, at a contact centre in Stourbridge, the cost to be borne equally between the mother's public funding certificate and the father. Contact commenced on 29 January 2009. On 20 April 2009 the Recorder increased contact to four times a week, still for 3 hours on each occasion. He fixed the father's contribution to the cost at £300 per week and directed the balance to be paid by the mother. Funding difficulties emerged in relation to the mother's public funding certificate. On 11 May 2009 the Circuit Judge directed contact three times a week for 2 hours on each occasion and partially relaxed the supervision requirement.

10. On 17 June 2009, at the conclusion of the fact-finding hearing, Judge Henderson directed contact four times a week for 2 hours on each occasion, the costs of three of these to be borne by the father. In July 2009 the venue for contact was moved to a contact centre in Coseley. These arrangements were continued by Judge Henderson in the order he made on 7 August 2009. In the event, because of funding and other difficulties, contact actually took place only three times a week.

11. On 29 September 2009 there was an incident at the contact centre in Coseley. This led to a meeting at the contact centre on 23 October 2009, the upshot of which was that contact was reduced to twice a week, although within a matter of days the contact centre indicated that it could return to three times a week. In fact it did not, because of funding issues. On 17 December 2009 the contact centre refused to arrange any further contact because of incidents

arising between the mother and C. There was no further contact until 20 March 2010, when it resumed, supervised by Mrs Chapman, in accordance with the order Judge Henderson had made on 22 February 2010 for contact once a week for one hour. Mrs Chapman supervised and assessed contact, as I have said, on a total of seven occasions between then and May 2010. Since then there has been no direct contact.

12. Understandably we have not been taken through, or been asked to read, the voluminous contact notes. Mr Scott-Manderson tells us, and I entirely accept, that they show that contact was on many occasions a positive and enriching experience for both the mother and C. As against that, however, he has to acknowledge that there are many entries in the contact notes which show a more concerning picture. The father's witness statement contains an anthology of quotations, referring to contact sessions in July 2009, September 2009, November 2009 and December 2009 (two) which he says (and the passages he quotes bear this out) show that on occasions the mother has lost control of her emotions and failed to put C's needs above her own, in circumstances demonstrating, as he put it, that when the mother is upset she loses the ability to focus upon C and her needs.

The hearing before the judge

13. The final hearing before Judge Henderson started on 9 August 2010 and lasted three days. The judge had before him the various reports I have mentioned and heard oral evidence from Mrs Mars, Mrs Chapman, both parents, and the guardian. We have a transcript of Mrs Chapman's evidence. The judge gave judgment on 11 August 2010. His order (erroneously dated 9 August 2010) provided that there be no direct contact until further order. But he ordered "indirect contact (including letters, cards, presents, photographs)." He also directed under section 91(14) of the Children Act 1989 that the mother might not make an application for direct contact without leave before 11 February 2012.

The expert evidence

14. I should summarise the expert evidence which Judge Henderson had before him at the final hearing. I start with Mrs Mars. She describes herself as having many years' experience dealing with children, adolescents and adults, including parents who have suffered mental health breakdown and psychological difficulties. She summarised her conclusions in relation to the mother as follows:

"She currently presents as emotionally fragile, with a low self esteem; poor impulse control and intense anger. [She] is also presenting with personality difficulties which might affect her ability to form lasting and meaningful relationship.

[She] has demonstrated that she has the ability to recognise and meet C's current needs, but I am concerned that during episodes of intense anger, which seems to happen frequently, it appears that [her] judgment becomes impaired and she looses her capacity to think about her daughter and her daughter's needs. This poses a risk for C."

15. She added that the mother's current emotional state:

"is highly likely to impact on her ability to consistently meet her daughter's needs; and also her ability to develop trust and maintain healthy relationship, and cope with stressful situations."

16. Dr Fear's conclusion was that:

"there is no evidence of on-going serious mental illness or of any serious mental illness in her life. She does not have a history of drug or alcohol misuse. There is evidence of emotionally unstable personality traits that are manifest predominantly when she is stressed."

He added:

"There is no evidence to suggest that [she] would intend her child any harm and, indeed, the information I have seen within the Trial Bundle would support a view that she has very deep feelings of affection for her daughter. At times when she is pressed or stressed, however, she is liable to the kind of emotional and behavioural explosions that have previously been documented and this tendency will continue. There is clearly a potential for the child to suffer as a result of witnessing or being caught up in such occurrences."

In answer to a question about the mother's capacity to engage in treatment or therapy, he wrote:

"As I have not diagnosed a specific condition, there is no particular treatment that is indicated. It is entirely possible for individuals with these personality traits to learn ways of overcoming them or to adjust to some of the issues from their past that have given rise to them. For this to happen, they have to engage in psychological therapy, with the most effective base for a cognitive based stratagem. This will allow them to recognise their automatic thoughts and automatic ways of responding when faced with certain situations and to modify them. I am unable to place a likely duration on such engagement as it would rely on [her] recognising that she has difficulties and committing herself to working with them. It cannot be enforced and should not be offered to her as something in which she must engage immediately so as to provide a favourable outcome to these Proceedings. Given my assessment of her, I would not consider that [she] has very much in the way of insight into the observations that have been accepted by the Court."

17. Mrs Chapman recorded in her final report how contact had broken down on 1 October 2009 due to what she reported as the mother's aggressive and argumentative behaviour at the contact centre in front of C and how on 17 December 2009 the manager of the contact centre had advised that they were unable to facilitate contact because the mother's behaviour was detrimental to C. She reported in detail on the contact she had observed during the spring of 2010. She said that C was exhibiting an insecure and anxious pattern of attachment to her mother with an element of ambivalence. It was likely, she said, that the mother's disruptive behaviour at previous contact sessions had made C feel fearful and anxious that it might re-occur, producing ambivalence in her responses and mistrust of closeness and intimacy. She described how at contact C was initially reluctant to be close to or receive affection from her mother, though once the structure of a planned activity was put in place C appeared able to relax with her mother and to receive affection. She described C as "clearly a vulnerable little girl" and expressed her belief that the mother had not always been aware of C's needs and the most appropriate manner in which to engage with her. She suggested that the mother could benefit from work being done with her in order to develop her understanding of attachment issues and some of the reasons for C's ambivalent responses to her. It would, she said, help to equip her with the necessary skills to handle these responses appropriately.

18. She said that if her relationship with her mother was to be positively developed it was "important" for C that contact was retained at a reasonable level of frequency. The contact sessions should remain supervised. "It is essential that C has the confidence that she is

supported appropriately in the relationship at the current time."

19. Mrs Chapman considered whether there were any other events or changes in C's circumstances which might have compounded the situation. She speculated whether the introduction of the father's new partner (his former wife) and her daughter into C's life might have disrupted C's feelings of security and thus impacted on the quality of the contact sessions with her mother.

20. She concluded that "it is difficult to accurately assess the attachment between C and her mother purely from observing the contact sessions, without being able to explore and understand the external issues which impact upon the situation." She added, "Exploration of these factors in order to gain a clearer understanding of their bearing upon the situation is essential and it is not possible to make such an important decision or recommendation with regard to the type and frequency of C's future contact with her mother unless this is undertaken."

21. By the time she came to give her oral evidence Mrs Chapman's thinking had changed very significantly. She explained why:

"My main concern was the issue of [the father's] partner moving into the house. Having learned today that this wasn't something that happened swiftly but that obviously C had contact with [X] and her daughter over the last year for increasing periods of time and had the opportunity to know them and be comfortable with them, that does put a different complex on the situation really. So having learned that, I feel that that clearly wouldn't have been impacting on her behaviour in the way that I thought it may have done, and that would just leave me with serious concerns about the quality of the contact and I wouldn't be recommending that we continue to supervise it.

Q Because you said that the relationship between mother and … C is an extremely significant relationship and the decision to terminate any form of contact should not be taken without [extensive] consideration of all the relevant factors. Are you saying you want to … stop all contact with the mother?
A I feel that the relevant factors … have now been … satisfied with the more information today."

Asked whether she thought an expert, like a psychologist, ought to assess C's situation with her mother and her father, Mrs Chapman responded:

"I am aware that the Guardian has met with C with [the father] and obviously she's a very experienced lady in her field and she is comfortable that C is happy and settled in that environment with [him] and his partner, so I would feel that, you know, adequate investigation has been done in that area. You know, it's quite a serious decision to be getting a psychologist involved with a young child unnecessarily."

22. In her report of 3 June 2010 the guardian reported what Mrs Chapman had said following observed contact on 27 April 2010:

""I do believe that these contacts are having a negative upon C … I agreed to do the extra session, but now having had time to reflect on yesterday's session, I'm not sure that it's in C's best interests … The contact yesterday was pretty challenging … it was the most challenging

I've seen". C was described as (amongst other things) "ignoring mum, shouting and crying" and, apparently, when attempts were made to discipline by [mother], C wanted her father. Mrs Chapman advised that she did not feel contact would be in C's best interest if it impacted in this way upon C."

23. She expressed her own conclusions as follows:

"It is a matter of concern to me that following on from contact C can demonstrate such intense anger and defiant behaviour and I am not certain that there is any definitive explanation for such behaviour … I am unable to support a continuation of contact prior to any final hearing. I have concerns about the impact of contact on C at present and I am of the opinion that the ongoing issues appertaining to [the mother's] intense and deep seated hostility to [the father], coupled with on occasions, irrational and aggressive outburst and an inability to accept any responsibility for her behaviour will require further exploration at a full and final hearing before there is any consideration of the reinstatement of contact."

24. In her final report dated 26 July 2010, the guardian said that the mother:

"has at times used the process of contact, even under a supervised setting, to continue to berate [the father] and involve herself in ongoing disputes with contact centre staff. [She] takes no responsibility for her actions, and states she has "never done C any harm" and I remain concerned that [she] is unable to draw a line under her relationship with [the father] for the sake of the emotional well-being of her daughter. Even more worrying is [her] continued view that [he] is a violent rapist, despite the findings of the Court in June 2009 that the accusations were malicious. These accusations were of a very serious nature and would have had far reaching consequences if found proven and I am concerned that should this view prevail it will continue to undermine the stability of the present family unit and C's future emotional well-being."

Her recommendation was as follows:

"the welfare of the child is paramount and I continue to be concerned in respect of [the mother's] inability to contain her emotions, particularly her dealings with C. I would concur with the view of the Psychologist and Psychiatrist that [she] should engage in psychological therapy …

I recommend that there is at present no further direct contact at this stage in order to give some release from the ongoing Court proceedings and would further invite the Court to consider a section 91(14). I would also recommend a review of matters in 18 months in order that [she] has the opportunity of benefiting from the work recommended by Dr Fear. In the meantime there should be indirect contact on a regular basis."

The judgment

25. In his judgment, Judge Henderson said that:

"I approach this application, as I have said more than once before, on the following footing. My presumption is strongly in favour of face-to-face contact between a parent and child and that presumption will only be displaced by powerful evidence.

I have considered the welfare check list of the Children Act, the Human Rights Act and the UN Convention on the Rights of the Child in my analysis of this case."

26. Of the father he said this, having referred to the fact that contact had followed what he called "a declining trend in terms of duration and frequency":

"I reject without hesitation the contention that that reduction was a deliberate, manipulated, reduction, contrived by the father who wanted to disrupt the mother's contact with their daughter. The father has clearly in my view demonstrated in all respects of his dealing with his daughter, a sensitivity to her needs which is exceptional. I have no doubt from what I've heard of and from him that he is genuinely understands the importance of C's mother in C's life, even if they don't at present meet face-to-face. He has done his best in the circumstances to keep the idea of her mother alive. A concrete illustration of his sensitivity to her needs is the careful and well thought-out way in which he reintroduced to the family his former wife and her daughter.

He [has] also clearly given great thought to preserving and nurturing C's French heritage and has maintained a relationship with the mother's family although that is clearly a delicate relationship."

There has been no challenge to that, I must return to the point in due course, but at this stage I merely emphasise that it shows just how far removed from the typical 'intractable contact' case this is.

27. Judge Henderson was sympathetic to the mother's predicament. He recognised that there might be cultural differences – the mother is French – that, as he put it, might mean that her behaviour might be misinterpreted and that "what she might regard as no more than socially demonstrative behaviour in France might be misunderstood in this country." He also acknowledged how "stressful and demanding" an experience supervised contact is for any parent, all the more so for someone in her position. Nonetheless, he said, he was

"sure that the occasions when she's been criticised for loss of temper would demonstrate in any culture a significant loss of temper and control with consequent upset for a child, even a very young child, who heard or saw that happening."

28. His central findings are set out in two passages in his judgment. The first reads as follows:

"She has been in a very difficult position in relation to my findings of fact, which in all substance went against her. She's in the cleft stick that she has to proceed knowing that everyone else would work on the basis of my findings and has repeatedly asserted that she is prepared to work on that basis herself. I believe that she has started to move in the direction she needs to, but I have no doubt that in her heart of hearts she maintains the original assertions that she made so that in that sense is in a very difficult position. In my view in her current state she would be bound to let C know her views if she became angry and lost self-control, as she has done on a number of occasions before. It would plainly cause enormous distress and confusion for this little girl to hear such things said by her mother about her father.

She told me that it was quite clear that the father did not want her in C's life. She accepted

that in the past she had been angry with the father in front of C. However she does not really acknowledge [that is my view from observing her evidence and that of the Guardian, Jane Chapman and Maria Mars] the effect that those outbursts have had on C."

29. The other says this:

"The real reason for the contact coming to an end were two-fold: first the mother's behaviour in the contact; secondly C's response to her mother.

It is important to note that much of the contact between C and her mother has been good and constructive. There have plainly been times when her mother has made C very happy to be with her. However there have been a significant number of episodes where either the mother has behaved in an angry way which would inevitably upset her daughter and/or her daughter has responded in a way that denotes some insecurity at least in relation to mother. That is a pattern, Jane Chapman told me, through contact. C was often angry towards her mother and wary and watchful in relation to her."

30. Judge Henderson then turned to consider the suggestion that problems in relation to contact on 27 April 2010 may have been linked to the fact that on 1 April 2010 the father's former wife and her daughter had moved into his household. Pointing to the fact that other contact meetings between those two dates had gone well, he said:

"I agree with the guardian's and Mrs Chapman's analysis that the difficulties at that contact were not due to the introduction of the new family but were due to difficulties in the relationship between C and her mother."

31. The judge then referred to the evidence of Dr Fear, Mrs Mars and the guardian before turning to comment on Mrs Chapman's evidence. The point is important, so I set out the relevant part of the judgment:

"The Guardian has been consistent in her view in recent months that face-to-face contact needs to be suspended for a significant period of time, she says about 18 months and then, she says, it should be reviewed again.

By contrast Jane Chapman appeared to be supportive of contact continuing for the mother. It became clear as I heard her evidence that her originally supportive view of the mother's application for continuing face-to-face contact was based on a misapprehension. She initially thought that the upset demonstrated most specifically on 28 April, might be explained away by a sudden change in C's home circumstances when the father's ex-wife and her daughter moved into his house. When she explored the matter further and I'm satisfied that this is the correct sequence of events, it became clear that the father had cautiously and considerately reintroduced his former wife into his household following advice and paying very close attention to the needs of C. Having herself being satisfied of that Jane Chapman now rules out that as the cause of the difficulties at the end of April. Her evidence was all the more powerful because of her evident reluctance to make a recommendation that cut across the mother's wishes."

32. Judge Henderson explained his conclusions as follows:

"I'm satisfied having heard those witnesses that face-to-face contact at this stage is likely to be significantly damaging to C. She needs a break to settle

I am satisfied that before contact could be a straightforwardly comfortable and enjoyable experience for C the mother needs to carry out the work that is envisaged in particular by Maria Mars. She needs to deal with her poor impulse control and her management of stress.

I accept the guardian's evidence that it is appropriate in this case to say that there should be no face-to-face contact for a period of 18 months at least. [The father] seeks such an order for three years. I do not accept his argument."

He concluded by emphasising that there "must" be "significant" indirect contact during this period, adding:

"If after that period the mother can demonstrate that she has undertaken the therapy that is necessary and that contact consequently with C can be a comfortable experience then I expect steps to be taken to reintroduce face-to-face contact between C and her mother."

The appeal

33. The mother's notice of appeal was filed on 31 August 2010. Permission was refused on the papers by Sir Mark Potter on 18 November 2010. In his written reasons he said:

"Having read all the relevant reports, statement and previous procedural history, I do not consider there is any reasonable prospect of success. The judge's decision was in accordance with the preponderances of the expert evidence and suggestions of bias in some of the evidence are not made out. The grounds rely heavily on the quoted authorities, the gravamen of which was plainly before the judge. His failure to refer to them specifically does not mean he did not bear them in mind: see paras 4 and 5 of the judgement."

34. The mother renewed her application. It came on for oral hearing before Sir Mark on 20 January 2011. Having been addressed by the mother's counsel, Ms Marie-Claire Sparrow, he said he was prepared to give permission: [2011] EWCA Civ 100. He added these observations:

"I have mentioned to Ms Sparrow the desirability of improving her client's prospects at the earliest possible moment by not relying on the counselling she has received to date as sufficient compliance with the recommendations of the experts but, if she can, to initiate the therapy which was advised by the experts in an effort to reconcile her to her past, or at any rate to eliminate its influence upon her temper and temperament. Those observations have been taken on board, I am sure."

35. In fact, we were told, the mother has been receiving counselling / psychotherapy from a Clinical and Social Psychologist since early February 2011. She had had six weekly sessions and was due to have four more. A brief report in March 2011 says that "she is working hard to cope with her difficult and painful situation and learning to look at the reality of it."

36. The appeal came on for hearing before us on 17 March 2011. All three protagonists now had the advantage of representation by Leading Counsel, Mr Marcus Scott-Manderson QC now leading Ms Sparrow and Mr Charles Geekie QC and Mr Stephen Cobb QC, leading Mrs Val Cox, appearing for, respectively, the father and the child. Mr Geekie, I should observe,

appeared pro bono, for which he deserves his client's gratitude and our thanks.

The law

37. Mr Scott-Manderson helpfully rehearsed for us the relevant Strasbourg jurisprudence, taking us to *Elsholz v Germany* (2002) 34 EHRR 58, [2000] 2 FLR 486, *Gnahoré v France* (2002) 34 EHRR 967, *Scozzari and Giunta v Italy* (2002) 35 EHRR 243, [2000] 2 FLR 771, *Kosmopoulou v Greece* [2004] 1 FLR 800, *Görgülü v Germany* [2004] 1 FLR 894 and *C v Finland* (2008) 46 EHRR 485, [2006] 2 FLR 597. Mr Cobb added a reference to *Glaser v United Kingdom* (2001) 33 EHRR 1, [2001] 1 FLR 153.

38. The principles are not in doubt. The starting point (see Gnahoré v France (2002) 34 EHRR 967, para [50]) is that:

"The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life."

and (see *Görgülü v Germany* [2004] 1 FLR 894, para [48]) that:

"it is in a child's interest for its family ties to be maintained, as severing such ties means cutting a child off from its roots, which can only be justified in very exceptional circumstances."

39. *Kosmopoulou v Greece* [2004] 1 FLR 800 makes clear (paras [43]-[44]) that these principles apply not merely to what we would call public law cases but also to private law cases. The court said (para [44]) that in private as well as in public law cases:

"Art 8 includes a right for parents to have measures taken with a view to their being reunited with their children, and an obligation for the national authorities to take such measures."

Repeating the substance of the language it had earlier used in *Glaser v United Kingdom* (2001) 33 EHRR 1, [2001] 1 FLR 153, para [66]), the court continued (para [45]):

"However, the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned is always an important ingredient ... the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Art 8 of the Convention. Where contact with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them."

In *Glaser v United Kingdom* (2001) 33 EHRR 1, [2001] 1 FLR 153, para [66], the court had added:

"The key consideration is whether those authorities have taken all necessary steps to facilitate contact as can reasonably be demanded in the special circumstances of each case."

40. The point about the child's welfare is crucial. It reflects the settled Strasbourg jurisprudence (see for example Scozzari and Giunta v Italy (2002) 35 EHRR 243, [2000] 2 FLR 771, para [169]) that a parent:

"cannot be entitled under Article 8 … to have such measures taken as would harm the child's health and development."

The point was elaborated in *Gnahoré v France* (2002) 34 EHRR 967, para [59]:

"The Court strongly emphasises that in cases of this kind the child's interest must have precedence over any other consideration. It must point out, however, that there is of course a double aspect to this interest.

On the one hand, there is no doubt that ensuring that the child grows up in a healthy environment falls within this interest and that Article 8 cannot in any way entitle a parent to have such measures taken as would harm the child's health and development.

On the other hand, it is clear that it is nevertheless in the child's interest that the links between him and his family should be maintained except where the family is shown to be especially unworthy for that purpose; to break that link amounts to cutting the child off from his roots. It follows that the child's interest necessitates that only wholly exceptional circumstances may lead to a breaking of the family bond and that everything should be done to maintain personal relations and, where possible and when the occasion arises, to "reconstitute" the family."

Precisely the same point was made by Sedley LJ in In re F (Adult: Court's Jurisdiction) [2001] Fam 38, 57.

41. Mr Scott-Manderson points to another key component of the Strasbourg jurisprudence in relation to private law cases, which I can take from *C v Finland* (2008) 46 EHRR 485, [2006] 2 FLR 597, para [60]:

"The … authorities enjoy a wide margin of appreciation, in particular when deciding on custody. However, a stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed."

42. He also referred us to passages in the concurring opinion of Judge Zupan?i? in *Scozzari and Giunta v Italy* (2002) 35 EHRR 243, [2000] 2 FLR 771, paras O-I5, O-I12-14, which although of great interest need not be set out in extenso, I refer only to what Judge Zupan?i? said at para O-I12:

"the ultimum remedium of interference is justified if (a) it is objectively in the best interests of the child, (b) it balances the rights of the parents (and other close relatives) against the best interests of the child and (c) it demonstrably strives to re-establish the parent-child relationship."

I agree with Mr Scott-Manderson that this is a convenient and accurate summary of the Strasbourg jurisprudence.

43. Unsurprisingly our domestic jurisprudence, if somewhat differently expressed, is to the same effect. The very partial anthology that follows recites some of the best known passages.

44. In *Re M (Contact: Supervision)* [1998] 1 FLR 727, Ward LJ said (at 730) that:

"contact is almost always in the interests of a child and should not be prevented unless the order would hinder the welfare of the child … contact should not be prevented unless there are cogent reasons for doing so."

He referred (at 733) to the observation of Sir Thomas Bingham MR in *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, at 129, that:

"The courts should not at all readily accept that the child's welfare will be injured by direct contact. Judging that question the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems."

45. In *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] EWCA Civ 18, [2004] 1 FLR 1279, Dame Elizabeth Butler-Sloss P quoted (para [19]) what she had said in *Re T (A Minor) (Parental Responsibility: Contact)* [1993] 2 FLR 450 at 459:

"'It is the general proposition, underpinned undoubtedly by the Children Act 1989 … that it is in the interests of a child to retain contact with the parent with whom the child does not reside. The courts generally set their face against depriving a child of such contact".

She also (para [22]) cited with approval what Wall J (as he then was) had said in *Re O (Contact: Withdrawal of Application)* [2003] EWHC 3031 (Fam), [2004] 1 FLR 1258, para [6]:

"Unless there are cogent reasons against it, the children of separated parents are entitled to know and have the love and society of both their parents. In particular, the courts recognise the vital importance of the role of non-resident [parents] in the lives of their children, and only make orders terminating contact when there is no alternative."

She continued (para [32]) that:

"It is … most important that the attempt to promote contact between a child and the non-resident parent should not be abandoned until it is clear that the child will not benefit from continuing the attempt."

She warned (para [33]) against coming to a "premature" decision "to abandon all hope of achieving some contact."

46. In *Re P (Children)* [2008] EWCA Civ 1431, [2009] 1 FLR 1056, para [38], Ward LJ said that "contact should not be stopped unless it is the last resort for the judge" and (see para [36]) until "the judge has grappled with all the alternatives that were open to him."

47. I do not propose to add to the jurisprudence or to attempt to state in my own words what has already been so clearly said by others. All I need do is to extract from the case-law to

which I have referred the propositions upon which Mr Scott-Manderson places particular reliance:

• Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.
• Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.
• There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.
• The court should take a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems.
• The key question, which requires "stricter scrutiny", is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.
• All that said, at the end of the day the welfare of the child is paramount; "the child's interest must have precedence over any other consideration."

The grounds of appeal
48. The mother's notice of appeal identifies seven grounds of appeal:

i) Ground 1: The judge failed to take into account the mother's rights under Article 8 and the "normal assumption" that a child would suffer if contact with the mother were denied. Reference in this connection was made to the decision of the Strasbourg court in *C v Finland* (2008) 46 EHRR 485, [2006] 2 FLR 597, and to my own judgment in *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam), [2004] 1 FLR 1226.

ii) Ground 2: The judge misdirected himself in not differentiating between his approach to residence and his approach to contact, failing to apply a stricter scrutiny test in relation to restrictions on parental contact. Reference was again made to C v Finland and to Re D.

iii) Ground 3: The judge, by suspending contact for 18 months, failed to heed his positive duty to promote contact between the mother and C and in reality abandoned any possibility of a relationship between the mother and C for the foreseeable future, contrary to what this court had said in *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] EWCA Civ 18, [2004] 1 FLR 1279.

iv) Ground 4: The judge failed to strike a proper balance between the respective interests and to look at the medium to long term possibilities. Reference was again made to Re S.

v) Ground 5: The judge, by suspending contact and making the section 91(14) order, failed to apply the stricter scrutiny test. Reference was made to the decisions of the Strasbourg court in *Ignaccolo-Zenide v Romania* (2001) 31 EHRR 212, *Hansen v Turkey* [2004] 1 FLR 142, *Görgülü v Germany* [2004] 1 FLR 894 and *Zawadka v Poland* [2005] 2 FLR 897.

vi) Ground 6: There were no exceptional circumstances to justify the judge's decision

vii) Ground 7: The decision process as a whole did not provide fairness, contrary to Articles 6 and 8, in that (a) the burden of proof was put on the mother to demonstrate that she would not cause problems for C through contact, (b) an application for a child psychologist to provide an independent view was refused, (c) an adjournment to call Dr Fear was refused, and (d) the guardian took a partisan view and showed a lack of independence.

The parties' contentions

49. Wisely, if I may say so, Mr Scott-Manderson did not seek to pursue the complaint of unfairness, the criticisms of the guardian, or those grounds of appeal which in reality involve a challenge to the earlier decision of Wilson LJ. Although he touched also on the other grounds, the focus of his submissions was the proposition that Judge Henderson had been wrong and premature to suspend contact in the absence of any cogent let alone exceptional reasons for doing so. The consequence, he said, was that the judge had in reality abandoned any possibility of a relationship between C and her mother.

50. Pointing to what, I accept, was the judge's positive duty to be active, indeed creative, in identifying and exploring options even if they had not been suggested by any of the parties, Mr Scott-Manderson submitted – and this was his central contention – that before getting to the point of suspending contact the judge should have directed the appointment of a further expert to undertake a family assessment, whether or not that had been suggested by the mother. He supplied us with the names and details of four experts, two psychologists and two psychiatrists, who, if instructed, would be in a position to report within the next three months or so. Mr Scott-Manderson did not suggest that we should ourselves order contact. He invited us to set aside the judge's order and to direct an assessment, to include the father, as well as the mother and C.

51. Addressing the obvious question, what could such an assessment provide additional to what the court already has, what could a psychologist or psychiatrist give that has not already been given by, for instance, Mrs Chapman and the guardian, Mr Scott-Manderson submitted that such a person could bring to bear a different professional expertise which might provide an answer, or at least a better answer, to what he says is the key question, not yet resolved: why is C behaving as she is? That, he submits, is properly a question for a psychologist or psychiatrist, invaluable though the contributions of the other experts have been. (Dr Fear, as he points out, was instructed only in relation to the mother's mental health.) Understandably, he pointed to what Mrs Chapman had said in the passages in her report which I have quoted in paragraph 20.

52. Mr Scott-Manderson pointed to *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] EWCA Civ 18, [2004] 1 FLR 1279, paras [33]-[35], and *Re P (Children) [2008] EWCA Civ 1431*, [2009] 1 FLR 1056, paras [38]-[39], as examples of what he said were analogous cases in which this court, reversing the trial judge, had directed further expert reports in situations where it concluded that judicial disengagement was premature. Thus in *Re S*, Dame Elizabeth Butler-Sloss P referred to a psychological assessment as "the possible key to a reconsideration of future contact" and said "What is needed in this case is a broad assessment of the child in the context of the family, that is to say the father, the mother, and the child, to gauge the depth of the hostility and the rancour from the failed relationship of the parents, the extent to which the child is saying what she has learnt from her mother and her own concerns about her father." The child in that case, I might add, was 6¾ years old. So

here, says Mr Scott-Manderson, what is required is a broad assessment of the child in the context of the family, undertaken by a psychologist or psychiatrist, and it is premature to disengage before that has been done.

53. The section 91(14) order was likewise, he submitted, a 'step too far' and should also be set aside. Mr Scott-Manderson referred in this context to the well-known guidelines set out by Butler-Sloss LJ in *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573, 592-593. He drew attention in particular to guideline (4) – "The power is … to be used with great care and sparingly, the exception and not the rule" – and to guideline (7) – where (as here) there is no past history of making unreasonable applications, the court will need to be satisfied "first that the facts go beyond the commonly encountered need for a time to settle to a regime ordered by the court and the all too common situation where there is animosity between the adults in dispute … and secondly that there is a serious risk that, without the imposition of the restriction, the child or the primary carers will be subject to unacceptable strain."

54. Mr Geekie and Mr Cobb, albeit from their different perspectives, made common cause. Mr Geekie summarised the father's position as being that the order Judge Henderson had made was firmly founded on the evidence before him, that it was not plainly wrong, that the legal basis for the decision is sufficiently evident from the judgment and that the judge had applied the law correctly. Not least bearing in mind that the father was not antagonistic to contact, it is, he said, wrong to characterise what the judge was doing as an abandonment of contact; on the contrary, the order was, he submitted, part of an ongoing process to make contact work. He submitted that the section 91(14) order formed a coherent part of the judge's overall approach, being part of a process aimed at leading to future contact if at all possible. Judged from that perspective, he said, it could not be said that Judge Henderson was plainly wrong to make an order for a period which was, he submitted, proportionate to the needs of the case.

55. Mr Cobb submitted that the outcome far from being plainly wrong in fact corresponded with the guardian's clear recommendations and was not contra-indicated by the other experts. There was indeed, he submitted, and as the judge said, "powerful" evidence for concluding that contact should be suspended. He said that the judge approached his task by correctly highlighting the importance of contact, indeed treating it as a "presumption". His careful analysis of the judgment demonstrated that the judge, even if he did not refer to it in detail, plainly had the 'welfare checklist' in section 1(3) of the 1989 Act very much in his mind. He emphasised the significance of the fact that this is not, on the judge's unchallenged findings, a case of an obdurate or obstructive parent seeking to deny contact to the other parent. He pointed also to the fact that the judge has maintained indirect contact at a high level and had rejected the father's suggestion that the section 91(14) order should be for a period of three years.

56. On the latter point, Mr Geekie referred to *Stringer v Stringer* [2006] EWCA Civ 1617, [2007] 1 FLR 1532, para [10], as authority for the proposition that although it is not permissible to attach conditions to a section 91(14) order, it is permissible for a judge imposing such an order to identify a particular issue and to tell the litigant that, unless he can show that he has addressed it, any application for permission to apply to the court for further relief is unlikely to be successful. To the same effect see also *Re S (Permission to Seek Relief)* [2006] EWCA Civ 1190, [2007] 1 FLR 482, para [90], and *Re J (A Child) (Restriction on Applications)* [2007] EWCA Civ 906, [2008] 1 FLR 369, para [20].

57. Mr Geekie and Mr Cobb also, and with understandable emphasis, pointed to the undesirable effect on C of any further assessment. Both the process of assessment, in which she was to be involved, and the inevitable further period of uncertainty and delay would lead, they said, to undesirable worries and tensions for both C and her father.

58. Mr Scott-Manderson, in reply, encapsulated the issues when he submitted that it was an odd way to promote contact by stopping it and that the judge needed an extra assessment if he was to be fully informed before coming to such an important decision.

Discussion

59. In my judgment, despite the attractive way in which Mr Scott-Manderson put her case, the mother's appeal must be dismissed, essentially for the reasons expressed by Mr Geekie and Mr Cobb.

60. Judge Henderson's starting point was, correctly, his recognition of the vital importance of contact and of the need to demonstrate very good grounds if it was to be suspended. His reference to a "presumption" set the tone for the remainder of his judgment and certainly cannot be said to have set the test too low from the mother's perspective.

61. It is asserted in the grounds of appeal that Judge Henderson failed to take into account the mother's rights under Article 8. At the renewed hearing before Sir Mark Potter, it was said that beyond a very brief reference to his having "considered" the Human Rights Act, there was nothing in his judgment to show that the judge had addressed his mind to either the mother's or C's rights under Article 8. There is, in my judgment, nothing in this point.

62. In *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372, Lord Hoffmann referred to the long-established principle that where challenge is made to the way in which the judge at first instance has exercised his discretion, an appellate court can interfere only if the judge has exceeded "the generous ambit within which reasonable disagreement is possible" and is, in fact, "plainly wrong." He continued:

"the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts."

He went on:

"The exigencies of daily courtroom life are such that reasons for judgment will always be capable of having been better expressed … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account … An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

63. The need for an appellate court to respect the trial judge's exercise of discretion was emphasised by Baroness Hale of Richmond in In *re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80, para [12]. The importance of the principle

that, unless he has demonstrated the contrary, it should be assumed that the trial judge knew how to perform his functions and which matters to take into account, has recently been reiterated by Wilson LJ in *D MCG v Neath Talbot County Borough Council* [2010] EWCA Civ 821, [2010] 2 FLR 1827, para [22].

64. Judge Henderson referred to the Convention. He referred to the 'welfare checklist'. True it is that he did not discourse upon either the Strasbourg or the domestic jurisprudence, just as he did not in terms go through the various paragraphs of the 'welfare checklist' one by one. But there was no need for him to do so. He will have had the key principles well in mind. And there is nothing in his judgment to show that he did not. On the contrary, as Mr Cobb's careful analysis of the judgment has demonstrated, Judge Henderson, as one would have expected, had the detail of the 'welfare checklist' very much in mind.

65. As is evident both from the course of the proceedings and from his judgment, Judge Henderson approached this anxious case with great care, giving it the strict and anxious scrutiny that every such case demands. His conclusions were firmly and securely founded in the evidence, including but not limited to the evidence of the experts and the evidence and expert advice of an experienced guardian. By the end of Mrs Chapman's oral evidence, the expert evidence was really all pointing in the same direction. Expert evidence is, of course, never determinative, but in a case such as this a judge, if he is to depart from it, has to be able to identify appropriate reasons for doing so. Judge Henderson was unable to do so. He was, in my judgment, fully entitled to accept what was being said by Mrs Mars, by Mrs Chapman and by the guardian and, having done so, to decide as he did and for the reasons he gave.

66. Judge Henderson was acutely conscious of the fact that in her report Mrs Chapman had adopted a rather different approach. In his judgment he examined carefully how, in the course of her oral evidence, she had come to change her mind. His analysis cannot be faulted. He was fully entitled to proceed thereafter, as he did, treating the essential core of Mrs Chapman's evidence on the crucial issue as being what she had said in the witness box and not, where it differed, what she had previously said in her report. And this, in my judgment, is the short answer to that part of Mr Scott-Manderson's submissions in which he sought to rely upon what Mrs Chapman had said in her report in support of his argument that a further expert assessment was required.

67. Nor can I accept Mr Scott-Manderson's characterisation of what Judge Henderson was doing as an abandonment of contact. On the contrary it was, as Mr Geekie submitted, part of an ongoing process to make contact work. The expert evidence had identified the difficulties which the mother had to address and which, as the judge was entitled to conclude in the light of all the evidence, she had to address before contact could be resumed. Judge Henderson was, in effect, imposing a moratorium both on contact and on the litigation, to enable the mother to do – as she has now started to do – the work which is needed.

68. The effect of that is to delay the resumption of C's relationship with her mother. I accept, of course, that delay is, in principle, likely to be inimical to any child's welfare and that it is generally to be avoided. And I also accept, as Mr Scott-Manderson submits, that the passage of time can have irremediable consequences for the relationship between parent and child. But there are two countervailing factors that have to be borne in mind. In private law cases, just as in public law cases, planned and purposeful delay may be advantageous in the long run. And delay in a private law context may have very different consequences depending upon the attitude and behaviour of the other parent. In an intractable contact case, where the

other parent is more or less implacably opposed to and obstructive of contact, any delay may well have irretrievably damaging consequences. In such a case, every day that passes is likely to make it more and more difficult to resume contact. But this is not such a case. The father is supportive of contact and there is ongoing indirect contact.

69. In my judgment, Judge Henderson was entitled to conclude that there needed to be a breathing space, just as he was entitled to conclude that the breathing space should be for 18 months rather than three years. Far from such delay being inimical to C, there was much material before the judge supporting his conclusion that it would, in the long run, be advantageous not to try and resume contact until the mother had managed to address her problems. And as part of that overall process he was, in my judgment, entitled in accordance with established principles to make the section 91(14) order.

70. Was Judge Henderson entitled to proceed in this way without requiring the further assessment for which Mr Scott-Manderson contends? In my judgment he was. The question at the end of the day is whether the judge had all the information, all the expert assistance, he reasonably required before coming to a decision as important as one suspending contact. In my judgment, Judge Henderson was entitled to conclude that he did. He knew a lot about both the father and the mother. He had come to positive findings about the father which are not challenged. Mrs Chapman was no longer suggesting that the cause of C's behaviour was to be found in the recent changes in the father's household. On the contrary, there was a mass of material, including carefully evidenced reports from various experts as well as the guardian, which more than justified the judge in concluding that the cause of the difficulties was located in the mother's personality. In these circumstances Judge Henderson was entitled to conclude that he had sufficient expert and other evidence upon which to proceed to judgment.

71. At the end of the day, there was more than enough evidence to justify Judge Henderson's findings that face-to-face contact was likely at this stage to be significantly damaging to C and that the difficulties which had to be addressed related to the mother, just as there was sufficient material to indicate what it was that the mother needed to do if contact was to be resumed. Despite everything pressed upon us by Mr Scott-Manderson, I remain wholly unpersuaded that a further assessment of the kind he is proposing would have assisted Judge Henderson, told either the judge or the mother anything of substance that was not already apparent, or led to any different outcome. In my judgment, this appeal must be dismissed.

72. That suffices to explain my conclusion. But there is a further point I should add. Suppose that Mr Scott-Manderson had been able to persuade us that Judge Henderson's reasoning was flawed in some way and that, in consequence, it was for this court to exercise its own discretion. What then? It does not follow, in my judgment, that it would have been right for us to direct the further assessment for which Mr Scott-Manderson contends. On the contrary, I would have declined to make any such order. Balancing, on the one hand, what I accept would be the undesirable effect on C of a further assessment – the uncertainty and delay, the worries and tensions for both C and her father – against, on the other hand, the unlikelihood that a further assessment would assist Judge Henderson or lead to any different outcome, the balance falls decisively against going down the route which Mr Scott-Manderson would have us travel.

73. It is a bitter pill that the mother has to swallow. But she knows what she has to do. Further assessment would tell her nothing more, and would only delay things even further. In

her own interests, as well as C's, she needs to carry out the work that Judge Henderson referred to. That, for the immediate future, is the only way forward. The resumption of contact, which is so much in C's interests and which the mother so ardently desires, is more likely to be achieved by therapy than by further litigation at this stage.

Lord Justice Hooper :
74. I agree.

Lord Justice Pill :
75. I also agree.