Re V (Children) [2008] EWCA Civ 635 (28 March 2008)

Case No: B4/2008/0634

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM TEESIDE COUNTY COURT

(HIS HONOUR JUDGE BRIGGS

Royal Courts of Justice

Strand, London, WC2A 2LL

28th March 2008

B e f o r e :

LORD JUSTICE WALL

and

LORD JUSTICE LLOYD

_____

IN THE MATTER OF V (Children)

_____

(DAR Transcript of

WordWave International Limited

A Merrill Communications Company

190 Fleet Street, London EC4A 2AG

Tel No: 020 7404 1400 Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

_____

Miss H Robinson (instructed by Messrs Paul Watson) appeared on behalf of the Appellant.

Mr R Noon appeared on behalf of the Respondent Children.

Mr P Kilgour (instructed by Messrs Rwn & Co) appeared on behalf of the Respondent Grandparents

_____

HTML VERSION OF JUDGMENT

_____

Lord Justice Wall:

This is an appeal by EV against orders made by HHJ Briggs, sitting in the Middlesbrough County Court on 29 February of this year. At the heart of the case are questions relating to the mother's two children, whom I will only identify by initials: AEV, a girl born on 15 February 1997 and so now eleven, and a son, PJV, born on 15 June 2000 and so, roughly speaking, seven and three quarters.

The application was to commit the mother to prison for breach of a contact order (the terms of which I shall come back to in a moment) made, not in favour of the father of the children, but in favour of the children's paternal grandparents. It is plain from the documentation, although we have not and cannot go into it, that there is a very substantial degree of feeling in this case. Indeed, an important feature of the case, in my judgment is that, following the separation of the parties in late 2005, the father was not only arrested but, in February 2007, pleaded guilty to several serious criminal offences against the

mother, including harassment and administering a poison obnoxious substance with intent to injure her. He received a total of two years' imprisonment in March 2007. It was expected that he would be released in February or March 2008. In fact, unbeknown to the mother, he was released early.

The children's paternal grandparents are on the record as making it clear that they do not associate themselves in any way with their son's criminal behaviour, but remain anxious to see their grandchildren

I propose to take the matter up for the purpose of this judgment, with the order which the same judge made on 15 October 2007 which was, in effect, a consent order. It will be remembered that at this point the father was in prison. He had previously made an application for residence, which was plainly without merit and which he was given permission to withdraw.

On 15 October 2007, the judge made a family assistance order for a period of twelve months, naming the mother, the grandparents and the children's guardian. Its expressed purpose was to enable CAFCAS to advise and assist the named individuals for the purpose of contact; and in paragraph 3 of his order, the judge directed that, until further order, the mother was to make the children available for contact with their grandparents with the assistance of the guardian. It was agreed that the first session would place on 26 October 2007 at 1 pm at a local leisure centre.. Paragraph 4 of the order is also important in my view, because it reads:

"The issue of Contact may be listed for Review on the Application of any party."

So at that point we have the children separately represented by a guardian. The guardian in place on 15 October 2007 was in fact a replacement as the previous guardian had had to withdraw because of the father's intimidating behaviour towards him. However, the guardian, who remains in place, was plainly in favour of contact with the grandparents whilst the father in was prison.

The contact did not take place. The result was not the review for which the judge had legislated, but an order made by the judge on 18 December 2007 at a hearing which was not attended by the mother, who was working at the time. The judge ordered an adjournment until 4 January 2008, with the mother to attend. He directed her to file a statement, including a statement in relation to the availability of the children's cousins, and he made an order in relation to publicly funded costs.

The judge's clear intention on 18 December 2007 was to find out what had happened to the October contact, and why it had not taken place. However, and in my view unfortunately, he attached a penal notice to that order. As I say, the mother had not attended on that occasion.

On 4 January the matter came back before the judge. The mother had not been served, and therefore no point is taken on her alleged breach of the order, but once again a penal notice was attached and, on this occasion, the judge made a contact order that, until further order, the mother was to make the children available for contact with the assistance of the guardian, the first session this time being fixed for 11 January 2008 at the same location. The judge also listed the matter for review on 18 January.

In fact, the matter did not come back on 18 January because the mother's grandfather had died -- there was a family funeral and she could not come. The matter came back on 25 January 2008, and on this occasion the judge again ordered contact, this time to take place on 8 February. He attached a penal notice to that order and he listed the matter for hearing on 29 February at 10.30 before himself with a time estimate of a day. He aksi directed the filing of statements.

The contact which the judge had directed did not take place, with the result that, when the matter came back before him on 29 February, the mother faced a committal summons issued by the paternal grandparents, seeking her committal to prison for breach of the previous order.

I am very conscious of the fact that the judge gave an extempory judgment and we do not have a transcript of it. We have only a note, but it is very plain from that note (because the judge said so in terms) that what he was principally concerned about, because he said so, was the feud, as he described it, between the different sides of the family and he said in terms:

"The question is should the Court continue the feud between the families."

He took the view that the mother was obstructing contact; that contact should take place as per the order. However, he alo described the case as "a case that does have a considerable degree of danger for the children". Nonetheless, he took the view that contact should take place. He therefore made a fresh order for contact to which he attached another penal notice, and he directed that the mother

should be committed to prison for a period of three months, suspended on terms that, if the contact took place on the date which he had fixed for it --namely 3 April, the order for suspension would not come into effect and she would not be committed to prison. That is the principal order which is being appealed.

There is also an application for permission to appeal an order which we do not have, but which was plainly made by the judge on the same day because he says so in the note of the judgment we have, namely that he was making a fresh order for contact -- that order for contact to take place on 3 April - again, as before, with a penal notice attached to it.

The judge refused permission to appeal. I assume he intended that to relate to the contact order. Of course, no permission was required to appeal a substantive order in relation to the committal, and the appellant's notice has duly been filed. The matter came before me on paper the day before yesterday and, given the proximity of the next contact date and the fact that the liberty of the subject was plainly involved, I directed that the appeal should come in for hearing yesterday afternoon.

For reasons which we will investigate later, the appeal was not effective yesterday afternoon, but we have heard it this morning and the case has been fully argued by counsel for the mother, for the paternal grandparents and the representative of the guardian, to whom I am extremely grateful for his attendance.

The grounds of appeal are essentially these: that the judge made the contact order without proper consideration of what was in the best interests of the children; apparently taking the view that the children needed to see their grandparents in order to prevent the family feud continuing, that he compounded that error not only by attaching a penal notice, but also by making a committal order to enforce what was, in any event, a bad contact order. Furthermore, it is said that in making the committal order, he failed to follow the recommendations of the guardian who was strongly opposed to the committal and had indeed been opposed to the imposition of penal notices earlier: moreover, he did not explain why he disagreed with the guardian's position. It is also argued that the sentence imposed, in any event, was grossly disproportionate, as indeed was the whole proceeding for committal; that the judge also failed to take any notice of the mother's state of mind and health, which was illustrated in letters from her general practitioner and, in particular, and, finally, perhaps above all, he failed to take into account the effect on the children of their mother's incarceration, she being

their sole carer and having been their sole carer throughout their lives. There are other grounds of appeal.

For the grandparents, Mr Kilgour argues that the judge was entitled to act as he did Back in October there had, in effect, been a consent order. The whole idea was to see whether contact would work in the absence of the father in prison; that contact had not taken place because of the mother's alleged intransigence. The mother had been found by the judge not to have wanted contact to take place. Although she was saying it was the children who were opposing contact it was, in reality, her; and therefore the only way to facilitate the contact -- which, by implication, must have been in the judge's mind in the interests of the children -- was to attach a penal notice to the order and to make a committal order sending her to prison, but suspended if she obeyed the order for contact.

For the guardian, Mr Noon has supported the mother's appeal and her application for permission to appeal. Mr. Noon accepted that the guardian was initially in favour of contact, as he made clear, and, as the order of 15 October made clear. However, he had put in a report for the judge, dated 22 February 2008, in which he effectively repeated that, in an ideal world, [I summarise], contact would be in the children's interests, but not at the price which was likely to be paid for it, which, in this case, included the likely incarceration of the mother in prison.

The guardian and Mr. Noon also referred to the fact -- and again this is not a matter which we can properly investigate -- that the father had been released early. He was certainly free and out of prison by the time of the hearing before the judge in February. The mother herself was extremely anxious about the father, not least because he had obtained passports for the children which he was ordered by the judge to hand over (he has not done so) - and also, of course, because of his previous conduct towards her. She was also deeply anxious that this was, as the guardian describes it, the thin end of a particular wedge which would involve the father being brought into contact with the children by means of his parents.

The guardian's view had previously been that the wedge was the likelihood that the children might be able to have a proper relationship with their grandparents so that the feud within the family could come to an end. But in paragraphs 8-10 of his report, the guardian balances those factors against the interests of the children and the rights of the children under the European Convention, and comes to the conclusion that the application to commit was disproportionate and should not be supported. Furthermore, it would, as he put it, seriously disrupt what the children had known and enjoyed, as well as engendering the anxiety, to put the matter at its lowest, that imprisonment would cause a

disproportionate interference generally, including of course with the grandparents' application. So the judge was faced with powerful opposition from the guardian, who gave evidence to the judge in opposition to the order for committal.

The principal complaint which, in my mind, strikes an immediate resonance is that this committal order should never have been made. Indeed, the penal notices the judge put on earlier should not, in my judgment, have been attached. I have come to the very clear view that this appeal succeeds. I would also, in addition to setting aside the committal order, grant the mother permission to appeal against the contact order. I would allow that appeal and would set that contact order aside.

We have this morning from Miss Robinson obtained an assurance that she will seek a speedy review of the contact position from a judge other than HHJ Briggs in the Middlesbrough County Court and, as I stated yesterday, my inquiries of the Middlesbrough County Court indicate that such a review could be heard by the designated family judge or, as he may direct, within a matter of weeks rather than months. I therefore would direct that any application by the mother to dismiss the contact application, alternatively for any variation of the contact order, should be listed as soon as practicable before the Designated Family Judge at Teesside or as he may allocate. I fear I have come to the view that this matter should not be heard by HHJ Briggs, given the orders which he has made to date; and as I indicated also, in the course of argument in the context of any review, I would expect the guardian to visit the children and to be in a position to inform whoever hears the application of their up-to-date wishes and feelings.

I bear in mind here that we are dealing with a girl of eleven and a boy rising eight, and their wishes and feelings are in my view entitled to consideration. Quite what the outcome of the review will be is, of course, another matter about which I say absolutely nothing. It may be that the judge would come to the conclusion that contact with their paternal grandparents was in the interests of the children and sufficient safeguards could be imposed. But as I say, that is a matter entirely for the judge. He may come to the view on the other side that all that can be done has been done and there should be no contact.

I need, however, to explain my reasons for taking the view that the committal order is seriously flawed in a number of material respects and cannot stand. My first observation is that, in my judgement, committal orders in contact applications are matters of last resort. Miss Robinson has not been able to find a case in which a committal order has been made in relation to contact with grandparents. In principle, of course, there is no reason why such an order should not be made, but if

one is to be made it is, as I say, a matter of last resort and one which should be accompanied with the greatest possible care and consideration. In my judgement this case is nowhere near the stage of last resort; indeed, contact should have been reviewed at a much earlier point.

There, are in my view, on the material I have read, sound reasons why contact should not take place, including the potential danger posed by the father and possible collusion by his parents. These are all matters which the judge will have to deal with on the review, but they are not matters which seem to have influenced HHJ Briggs. The mother, in my view, was legitimately in fear of the father indeed the judge says so. The father had been unexpectedly released from prison where he had been serving the two-year sentence to which I have already referred. The judge, as I say, found in terms that the mother was frightened of him and that her fear was genuine. It seems to me, therefore, on 29 February the judge was faced with an entirely different situation from that which had appertained in October 2007 and he did not, in my judgement, take the changed circumstances into account.

The judge found, and it is a curious observation in the light of what he went on to order , that:

"This is a case that does have a considerable degree of danger for the children."

Having reached that conclusion, in my judgement, the judge should have thought long and hard, firstly before making a contact order in the same terms as had been made hitherto, let alone a committal order sending the mother to prison were she to breach the contact order which he made. It is, I think, relevant that the applicants of contact here are the children's paternal grandparents, and one cannot overlook the underlying fact that the children's father had, in the judge's own words, "embarked upon a campaign of harassment against the mother and the maternal grandmother." It is a striking feature of the case that when the father was released from prison prematurely, the paternal grandmother was fully aware of the fact, and of where the father was living, but did not disclose that information either to the guardian or to the mother.

But, perhaps as if not more significantly, nowhere in his judgment, as I read it -- and I appreciate it is only a note -- does the judge consider the effect on these two children, who have always been in their mother's care, of the mother being sent to prison. The criterion for making the contact order seems to me to be a desire not to perpetuate what the judge describes as "the family feud". In my judgement, this is manifestly the wrong test. The test is whether or not contact in the changed circumstances of the case was in the interests of the children and, whilst the children's welfare is plainly not paramount in a committal application, it is a material consideration which in my view the judge totally failed to consider.

Furthermore, the children's guardian was opposed to the contact order and to the committal order. The judge goes out of his way in his judgment -- rightly, in my view -- to pay tribute to the guardian's involvement in the case, but he provides no explanation of any kind for his failure to follow the guardian's recommendation that the contact should not take place and there should not be a committal order.

The judge also uses, I have to say, somewhat emotive language which, in my judgement, does not have a proper place in family proceedings. He talks of a gun being held to the court's head by the mother and her father, who had taken a strong view about contact. The danger of such language is self-evident -- it can easily rebound. Indeed in my view, the message of this judgment in this case to the children is that, if they do not go on contact, their mother is likely to go to prison. That, in my view, is not an appropriate approach in relation to children of these ages, or indeed any children.

The judge also failed to allow the mother's counsel to mitigate on her behalf. Once again, I am conscious of the fact that this is a note, but it is quite clear that the judge, having found the breach proved, and having decided to commit the mother, then immediately imposes a sentence without allowing mother's counsel the opportunity to mitigate. In the judgment this seems to me plain from this paragraph:

"I think the Children's Guardian is very concerned about the possibility of Mother not being there and therefore having to serve a prison sentence. Insofar as this case is concerned, mother has no justifiable excuse. I find the allegation of breach proved. I sentence her to 3 months imprisonment, suspended on the condition that she makes the children available at a time and date specified by [the guardian]. I make a further order that the 2 children are made available at a time and date specified by [the guardian]."

If the judge, as he plainly should have done, had paused for thought, and as the leading case of Goldsmith v Goldsmith [2006] EWCA Civ 1670 tells him he should have done, it would have been immediately apparent to him, in my view, that a sentence of three months imprisonment, even suspended, was manifestly excessive, so much so as to be plainly wrong in principle.

The leading case on sentencing in contempt proceedings is Hale v Tanner [2000] 2 FLR 879, a well-known decision which was not apparently cited to the judge and to which he does not refer; but in that

case a sentence of six months imposed on a suspended basis in a serious case of harassment was reduced by this court to twenty-eight days.

On any view, therefore, the sentence imposed by the judge was manifestly excessive and cannot stand; but, as I say, in my judgement the principle is more important. These proceedings should not have reached the committal stage. I cannot but note that in Hammerton v Hammerton this court was highly critical of an experienced circuit judge who had heard contact and committal proceedings together and had failed to distinguish between them. It seems to me, with great respect to HHJ Briggs, that the lesson of that case has simply not been learnt.

In my judgement, therefore, this committal order should never have been made. In making an order for contact, as he did, the judge applied the wrong criteria – his desire not to assist in the perpetuation of the family feud. In my judgement, in making the contact order, he did not have sufficient regard to the welfare of the children, and he then carried the error over into the committal proceedings, and made an order which, frankly, should never have been made.

Furthermore, in making a committal order, the judge has failed to observe several elementary rules, the two most obvious of which are, of course, failing to explain his departure from the guardian's recommendations and failing to consider the effect on the children of their mother being sent to prison. Far from refusing to continue the family feud, it may well be, in my view, that the judge has fuelled it by giving the grandparents the opportunity to have their daughter-in-law imprisoned.

I understand the argument which Mt Kilgour advances, namely that the judge plainly felt he had no alternative, given there had been breaches of previous orders and that the order made in October 2007 had effectively been made by consent. But in my judgement that argument misses the essential point in the case, namely that by the time the judge came to deal with the matter in February the situation had changed dramatically. The case cried out for a review; and a committal order, which is always an order of last resort, was one which was plainly not appropriate in the circumstances of this case.

For those reasons, therefore, I would discharge the committal order; I would grant permission to appeal in relation to the contact order; I would allow the appeal and set aside the contact order for 3 April, but that would be on the assurance which we have received from the mother that she will immediately apply to the Middlesbrough County Court for a review of contact arrangements to a judge other than HHJ Briggs, and that the guardian will see the children prior to that application being

heard. In my judgement that application should be made to the designated family judge and heard by him or as he may direct, but it clearly should not, in my view, be heard by HHJ Briggs. Those are the orders that I would impose.

Lord Justice Lloyd:

I agree. I add some comments of my own, particularly having regard both to the highly expedited basis on which we have heard the appeal, and also to the fact that the matter will, as a result of the order indicated by my Lord, continue in the County Court.

At one point, it was of concern, in relation to the hearing of the appeal on this expedited basis, whether we had an adequate record of the judgment of HHJ Briggs. The appeal bundle contains a note provided by Miss Robinson, counsel for the appellant. Mr Kilgour for the paternal grandparents (the principal respondents) has read to us this morning a number of passages from his note made at the time of the judgment was delivered, which contained one or two variations in the record. It would be surprising if there were no such variations. However there are no variations such as to suggest that we do not have a fair, even though not precise, record of what the judge said. The transcript has been bespoken and indeed has been made, but the judge, as I understand it, is currently away and therefore it has not been revised and the unrevised transcript has not been made available. Therefore, so far as the record of the judgment is concerned, it seems to me that we are in a position to proceed.

Some issues were touched on in submissions by Mr Robinson, which went to things said in court on earlier occasions and a comparison between that and things said in evidence on 29 February. Mr Kilgour tells us that those submissions would be very much disputed, and clearly those are matters which could not be determined without reference to transcripts of the relevant parts of the proceedings. In the absence of those transcripts, we have to ignore those points. It seems to me that, given that we have an adequate if not a perfect record of the judgment, it is right to deal with the matter on a sensible basis, ignoring points that cannot be resolved without reference to materials that we do not have.

Mr Kilgour puts his case in support of the judgment in this way. On 15 October, in circumstances in which the father was still in prison and was expected to remain there until February this year, and did

remain there until 4 January, an order was made, effectively by consent, which was backed up by undertakings on the part of the paternal grandparents not to permit the father to have contact with the children, directly or indirectly, and not to encourage or facilitate any other party to do so save by order of the court. There was also, as my Lord has said, a family assistance order with a view to the guardian seeking to assist the parties for the purposes of contact. A single occasion of contact was directed on a date which was in fact specified by the guardian -- 25 October -- which was to take place in the presence of the guardian, between the two children to whom my Lord has referred and the paternal grandparents. The point of that, as Mr Kilgour says, was to see how it went so he could then form his own view and report to the court and maybe the matter could be taken further and maybe it could not, but, without at least a single trial episode of contact, no one would be in a position to know what could be done. That was the order and, as my Lord has said, there was the remedy of the provision for a review of the issue of contact, which I imagine the judge thought would take place with the benefit of the experience of at least one occasion of contact.

As has been explained, that occasion of contact did not take place. The mother was directed eventually to put in evidence as to the circumstances in which it did not take place. That she did by her witness statement of 20 December 2007, in which she attributed it substantially to the resolute refusal and, indeed, anger and distress on the part of, particularly, her daughter at the prospect of being exposed to this compulsory contact. That was her evidence, and the matter came back to court, as has been said, late in January when a further order for contact was made enforced by a penal notice. We do not have any note or transcript of any judgment given by HHJ Briggs on 25 January, but he made the order for a further episode of contact, albeit that the father was by then out of prison, and I think I am right in saying that, by the time of that hearing, it was known generally that the father was out of prison. However, the order was made with the same objective, presumably, as the original order in October, namely that there would be one trial contact which would be attended by the guardian, so that he could provide the court with the assistance that had been envisaged in the order of October. But the judge did cause the situation to escalate somewhat by endorsing a penal notice on the order.

Like my Lord, I am inclined to the view that that was the first point at which the matter went wrong. But Mr Kilgour asked rhetorically, what was the judge to do? The first trial contact, which had been ordered on an agreed basis, had not taken place. No one had applied for a review of the issue of contact; he was simply ordering that a trial contact should take place. It did not take place. The result of that was that, at the adjourned hearing on 29 February which had already been set up, there was an application for committal of a perfectly clear and straightforward nature. The mother had defied the 25 January order, though it had been properly served on her with a penal notice attached, and it followed that committal was certainly an available sanction. The judge heard evidence from the mother, from at any rate the maternal grandmother and from the guardian; and, so far as the mother is concerned, the judge took the view, and he said it in terms, that she was hiding behind what she said the children did not want and she was using them, really in the witness statement that I have mentioned, as an excuse and that really it was her views rather than theirs. Maybe they do genuinely feel what she reported them as feeling, but he took the view that those views were based on the foundation of the mother's own views.

Having attached a penal notice to the January order, the judge may have thought on 29 February, taking the view that he did on the evidence that I have mentioned, that his options were rather limited because, if he did not proceed to committal, that the attachment to the penal notice to the January order might seem to have been a futile exercise.

In the light of that sequence of events it may be that the judge was in a dilemma which he ought not to have been in, but Mr Kilgour submits, very simply and straightforwardly: here is an order in October, setting up a single trial episode of contact in order to inform the court and the guardian as to whether it would be worth pursuing this matter in terms of further contact, and the mother frustrates it in October; the mother frustrates it in January, and the mother frustrates it in February. What is the court to do unless it is not to regard itself as wholly constrained and, as it were, giving in to the intransigence of the mother? Mr Kilgour makes a further point, which is fair in itself, that, at the stage of the contact session in October originally ordered, there was no risk from the father because he was in prison. Of course the situation has changed; it changed earlier than it was going to, but it would have changed by February anyway when the father was released.

There is an additional dimension of risk, which is that the father is believed to be in possession of passports in the names of the two children which he had been ordered originally to hand over to the guardian, which, according to the guardian's solicitor he has not done, and he has now been subjected to a further order for the surrender of the passports. We are told by Mr Robinson that while he was in prison, and whilst the grandparents were understood to have the custody of his possessions, they were asked to find the passports and do that which the father had been ordered to do and failed, and they had not done that. That contributes to the mother's concerns.

Mr Kilgour has addressed to us clear and able submissions in support of the judge's order, along a line of reasoning which the judge may have had in mind but did not express as fully as he might have. I know that this was an extemporary judgment and I would not wish to be thought to be complaining of the judge delivering a short judgment.

Nevertheless, circumstances did change in January on the release of the father. Although I can in a sense understand why the judge took a dim view of the mother's conduct in January and again in February, and felt that the right course was to put pressure on by first attaching a penal notice to the

January order and secondly by making the committal order, albeit on a suspended basis, it does seem to me that the judge was moving in that direction too quickly and without proper consideration of the issue of the welfare of the children. He does make reference to the welfare and to the benefits of the children. He refers to the guardian's position, which had been favourable to the idea of trying out contact and, as the guardian said in paragraph 6 of his report of 22 February before the committal hearing, he took the view that trying out contact might be the beginning of the process whereby the families can stop hating each other. Clearly he took the view that there would be benefit to the children from maintaining contact with their grandparents and also with their cousins, the other children of the grandparents. We are told that the guardian opposed the first escalation, namely the attaching of the penal notice, to the January order and he certainly opposed the making of a committal order. The judge refers to the guardian's view, which was that the matter should not be taken any further forward. The judge identifies the dilemma as being, on the one hand it would be of benefit for the children to see their grandparents, but on the other what about the downside, namely the effect on the children of their mother serving a prison sentence? To that juxtaposition the judge says, well, whose responsibility is it that the children would be in danger? It is not that of the court; it is the mother, because if the mother complies with the order she is not in danger.

It does seem to me that the judge ought not to have attached a penal notice to the January order. That is not in itself under appeal because, of course, it is spent. He ought not to have moved straight on to making a committal order in February. Equally, he ought not to have made a further contact order endorsed with a penal notice. Whether it would have been sensible to make a contact order without a penal notice attached is an academic question. Of course, that is not what happened. It is fair to say that the better course might have been for the mother to have applied for the issue of contact to be reviewed at an earlier stage so that the matter could be addressed directly and on its merits on the mother's application, rather than piecemeal in the succession of events that has occurred up to the making of the committal order and the further contact order. But it does seem to me, agreeing with what my Lord has said, that the judge has not, as he should have done on 29 February, stood back and said: really, is it right to increase the tension that much further, by forcing the mother to face a choice between complying with the order (which is not entirely within her capacity if the children simply will not go) and, on the other hand, facing imprisonment. Now, of course, the fact that the order is not complied with does not immediately result in imprisonment, because there would have to be a further application and, if there were some genuine reason why the order had not been complied with, that might be a reason for not making an actual immediate committal order. But it seems to me that it was unwise and inappropriate to make an order which would result in enhancing the tension in this difficult case in which there are, as my Lord says, extremely strong feelings and serious issues in the light of the father's criminal conduct and also in the light of the matter of the passports which I have mentioned. It does seem to me that the judge did not address the issues correctly on 29 February and that the right course is to discharge both of the orders that he made, but with a view to the matter being investigated fully and afresh by a judge other than HHJ Briggs on an application for a review of the issue of contact. As my Lord says what will happen on that review is not something that we can predict. It may be that the judge in charge of that process will wish there to be a trial contact, but the judge will certainly wish to be informed as to the attitudes of the children by the guardian and it seems to me that, without saying anything more as to what may happen in the future, I agree with my Lord that the permission to appeal should be given against the contact order and that the mother's appeals,

both against the committal order and the contact order, should be allowed for the reasons that my Lord has given and that I have endeavoured to give myself.

Order: Appeal allowed