Re Z (Children) [2009] EWCA Civ 430 (06 April 2009)

Case No: B4/2009/0727

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION

(HIS HONOUR JUDGE COLLINS QC)

Royal Courts of Justice

Strand, London, WC2A 2LL

6th April 2009

B e f o r e :

LORD JUSTICE WALL

and

LORD JUSTICE WILSON

_____

IN THE MATTER OF Z (CHILDREN)

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(DAR Transcript of

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Mrs Fleishmann (instructed by Messrs Duncan Lewis & Co) appeared on behalf of the Appellant.

Mr Date (instructed by Messrs Anthony Louca Solicitors) appeared on behalf of the Respondent.

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HTML VERSION OF JUDGMENT

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Lord Justice Wall:

This is an application by the mother of three children for permission to appeal against an order for unsupervised contact by their father to the two youngest of the children. The order was made by HHJ Collins, CBE, sitting in the principal registry on 27 March 2009.

I say at once that we have imposed reporting restrictions in this case and nothing must be reported which in any way identifies the children concerned.

I saw the case on paper on 2 April 2009. I stayed the order for unsupervised contact, the first period of which was due to take place on 4 April 2009, and I directed that the mother's application for permission to appeal, with the appeal to follow if permission was granted, should be listed before my

Lord, Wilson LJ and myself in the current week. That is how we come to be hearing the application today.

Given the overall view which I have formed of the case, I propose to say as little about the facts as is consistent with the outcome which I will propose. That outcome is as follows. Firstly, that we should grant permission to appeal; secondly, that we should allow the appeal; thirdly, that we should direct that the papers be referred forthwith to the Family Division Liaison Judge for Greater London, Hedley J, with a request that he allocate the father's application for contact forthwith to a circuit judge other than HHJ Collins, with a view to there being a speedy finding of fact hearing followed by a CAFCASS report and an early resolution of the father's claim for contact.

The background is as follows. There are three children; they are all boys: L, who is now six; S, who is three, and M who is two. Their parents were married in 2001. There is some controversy about the date of separation. There were certainly proceedings between them in 2007, but on any view they have not lived together since June 2008 which, we were told at the Bar, is the last occasion upon which the father saw the youngest of the children. In June 2008 the children were aged respectively six, two and one year and eight months, on my calculation. The father is 41 and is Algerian by nationality, although he has permanent leave to remain in this country. I do not know the mother's age. She has Belgian nationality, although I think she is Moroccan by origin.

According to the father's application for contact, which is in our papers, there were interlocutory proceedings in the County Court between the parties in October 2007 when, we are told, on a without notice basis a non-molestation order, a prohibited steps order and an occupation order against the father were all made. Although the application by the father states that these are attached to his application, they are not in my bundle and we have not seen either the orders themselves or the underlying evidence in relation to them.

The children live with their mother in Wembley and the father lives with another partner and her three children in North London. It is a feature of the case that the father is not only Algerian, but it is the mother's allegation that she has a fear that he may abduct the children to Algeria, that being of course a country which is not a signatory to the Hague Convention or any other child abduction international treaty.

The father issued his application for contact on 6 August 2008 and on 14 October Deputy District Judge Gill, sitting in the Principal Registry of the Family Division (which I shall henceforth call "the PRFD"), made the first of the orders in this case. That order was that there should be a CAFCASS report directed to the issue of contact to be available by 4 February this year. The mother was to serve and file a statement by 4 November, setting out any allegations of behaviour on the part of the father and the father was to file and serve a statement in reply by 18 November. The matter was to be listed for directions before a district judge in the PRFD on 27 November. On that date the father's application came before District Judge White sitting in the PRFD. He made a number of orders, including a continuation of the orders previously made (or some of them) in the County Court. He made an order for supervised contact in relation to all three children. He dealt with the cost of the supervised contact and the filing of the relevant notes. Paragraph 7 of his order reads:

"The matter be listed for a fact finding hearing on 9th February 2009 at 10:30am before a Judge sitting at Gee Street Court House, London EC1V 3RE (time estimate one day)."

The mother was directed to file and serve a concise schedule of allegations (and any other evidence of violence or harm on which she relied) by 10 December 2008; the father was to file his evidence in reply by 23 December. Thirty minutes were to set aside after the fact finding hearing to consider the issue of progressing contact from a supervised to a supported setting (my emphasis) and the respondent mother was to file and serve a short statement setting out her efforts to enrol L at school. The time for filing the CAFCASS report was extended and both parties were directed to attend the hearing.

Most unfortunately, when the hearing came before HHJ Sleeman, sitting in the PRFD on 9 February 2009, the finding of fact hearing did not go ahead. We were told this was because a great deal of information had come in from the police which the court was unable to assess and assimilate during the course of the time set aside. The judge therefore ordered the police to make documentation (I assume further documentation) available. The judge continued the order for supervised contact; he made further directions about the mother's schedule of allegations, and he made an order at paragraph 7:

"The allocated CAFCASS Officer, Ms Freeman is requested to supervise two sessions of contact, including preferably the first contact session ordered at paragraph 3 above, in order to facilitate reintroduction between the children and the Father."

The CAFCASS officer was ordered to produce an interim report as to her observation of contact and any other relevant matters by 16 March 2009 notwithstanding that findings of fact had not been made

with regard to the mothers allegations of domestic violence, and the judge ordered a final report from CAFCASS for 25 April, that is after the finding of fact hearing – on the issues of residence, contact and prohibited steps. The judge repeated the direction that there should be a finding of fact hearing. He adjourned it to 26 and 27 March with a time estimate of two days before a circuit judge in the PRFD, and he directed the CAFCASS officer to attend on the second day of the hearing unless notified in writing that she was not required. The court would consider the question of interim contact at the end of that hearing.

The judge then listed the final hearing of the father's application for contact for 29 May with a time estimate of one day again, before a circuit judge, with a direction that the CAFCASS officer attend. He made an order that final directions be listed for 8 May 2009 with a time estimate of half an hour. He also made orders in relation to documentation and the filing of bundles.

I pause in my recitation of the facts simply to record what is obvious, namely that on two separate occasions -- in fact three occasions and two judges -- the court took the view that a finding of fact hearing was necessary and was directed; and the court also took the view that contact should be supervised. At that point, of course, there had been no report by CAFCASS.

We have in our papers a schedule of the mother's allegations and the father's stated responses to them. I do not propose to go through that schedule in any detail. Mr Date for the father asserts that although it reads starkly, the reality was somewhat different when the mother gave evidence. Be that as it may, it is for my purposes, I think, sufficient to say that in my judgment the allegations made by the mother are by no means trivial; indeed some are extremely serious, not least being the allegations of damage to property, threats to take the children to Algeria, assaults on the mother, and threats to kill her. In addition, she alleges breaches of the earlier non-molestation order and submits that much of what happened took place in the presence of the children. There is a specific incident which appears to have some force behind it. In September 2008, the father appears to have attempted to seize S and force him into the father's car. S was said to be extremely upset and crying. It is also clear that the police had been called on a number of occasions.

The CAFCASS officer, Mrs Freeman, filed her interim report on 16 March 2009. She records that HHJ Sleeman's order was intended to enable her to observe two periods of supervised contact but that she had been unable to do so because contact at the contact centre in question was not going to start until after the finding of fact hearing had taken place. However, she took the view that it might assist

the court if, together with a colleague, she observed one short period of contact in one of the CAFCASS playrooms in the PRFD, and this she duly did. I quote from her interim report:

"ISSUES

4. [Ms S] has made allegations of domestic violence which was witnessed by the children and of [Mr Z] physically abusing them. A finding of fact hearing is arranged for 26/27 March.

OTHER RELEVANT INFORMATION

5. Prior to observing contact, I spoke to [L] the oldest child on his own in one of the play rooms. He was aware that he was due to see his father later and was not happy about this. [L] appeared rather distressed and when I tried to get him to relax he said 'I have bad dreams, and am scared.' I asked him what made him scared. He said 'he (dad) wanted to take [S] and put him in the car and take him away, I was so scared.' He then went on to say, he was happy when his father ran away.

6. We talked a little about school and different games I then asked about his bad dreams. [L] said 'I was in the toilet I heard noises; dad threw me on the bed and hit me with an umbrella. He was wearing a black jacket, dad's clothes.'

7. [L] was getting quite upset and I was going to leave it when he said 'He wants to take me to Algeria, sometimes he hits me, and he picks up my mum and throws her on the bed and tries to kiss her.' At this point I felt he had had enough …

8. I explained to [L] that his father was in the building and going to see his brothers. I asked if he would meet with his father if I remained in the room with my colleague Rachel. [L] agreed to see him under these conditions.

9. The plan was for [Ms S] to leave the room when [Mr Z] came in. However, [M] the youngest child started screaming and did not want her to go. She came back into the room and sat in the corner. [Mr Z] entered the room and [L] who had been in the Wendy house ran from the house to his mother. [S] appeared to recognise his father after a few seconds and went to him. After kissing [S] he called to [M] who stopped crying and went to his father. I was not sure the child realised it was his father but [Mr Z] felt his youngest son knew him. He kissed both children and made a great fuss of them, they both seemed to enjoy the attention.

10. [Mr Z] called [L] to join them but he would not move from his seat beside his mother. After a few minutes [Mr Z] produced drinks and crisps. He had chosen different crisps for each boy giving them the ones he knew they liked. The two younger boys took them and fully engaged with their father. [Mr Z] called [L] over for his crisps and drink. He eventually went: however he hurried back to his mother and stated that he wanted to go. At this point although [L] was visibly upset [Mr Z] wanted to talk to me. It was not appropriate given the distress shown by the child and I asked the mother to take [L] downstairs. He left his drink and crisps behind.

11. [Mr Z] appeared frustrated and upset; he was also quite angry and threw his hands up in the air. He quickly settled down but seemed to find it hard to understand that it was not appropriate to act this way in front of the younger children. [Mr Z] was without doubt very disappointed and thought that

[L] should have been made to return to the room. Nevertheless he continued talking and playing with the younger children doing some colouring and chatting with them. He threw [M] into the air which the child enjoyed. It was evident from quite early on that there was a strong attachment between [S], the middle child, and his father. [M] also enjoyed playing with his father. There was a good atmosphere and the younger children were relaxed and happy in their father's company. [Mr Z] was attentive to their needs and his play was age appropriate.

12. While I was clearing up, a short time after contact, [Ms S] rang to say [L] was extremely upset on leaving CAFCASS and that she was finding it difficult to calm him down.

ASSESSMENT USING THE WELFARE CHECKLIST

Children Act 1999 S.1 (3)

The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding):

13. The two younger boys enjoyed seeing their father and contact was a positive experience for them. {L] the eldest child was not happy and stated that he did not want to see his father.

Any harm that the child has suffered or is at risk of suffering:

14. [L] was upset prior to seeing his father and perhaps was not emotionally ready to meet with him. [Mr Z] maintains that it was the mother's influence that stopped the child engaging with him and nothing else. Although I saw nothing untoward in [Ms S's] behaviour it is possible [L] was inhibited by her presence. On the other hand, as the oldest child, if [L] has witnessed domestic violence and has memories of this, it would certainly explain his behaviour and his unwillingness to meet with his father. Either way I believe pushing [L] into contact before he is ready may well be emotionally harmful and cause more problems than it resolves. Research has shown that the impact of witnessing domestic violence has a detrimental effect on children's long term emotional well being.

RECOMMENDATION

15. I have only addressed part of the welfare check list in this interim report and will address the full list in my final report. It is generally accepted that contact with both parents is usually in a child's best interest provided all things are equal. However this will need to be considered after the finding of fact hearing. At that stage hopefully the way forward will be clearer. I believe contact will need to be supervised at Stephen's Place either way so that they can do some work with [L] about his feelings towards his father and contact.

16. if the finding of fact indicates that domestic violence has taken place then [Mr Z] will be referred to the Domestic Violence Intervention Programme for an assessment. In this case all the court papers will be required by staff at the DVIP. [Text missing] … the outcome of their assessment, which takes 12 weeks, the way forward for supervised contact at Stephen's Place can be considered."

Between paragraphs 5 and 8, as will have been seen, the CAFCASS officer records a conversation with L, who expressed some fear of his father, and reported the incident to which I have already made reference, namely the attempt to put S in his car. My reading of the CAFCASS officer's report is as follows: (1) it is cautious; (2) it is undoubtedly interim; (3) it undoubtedly deferred full consideration of the welfare checklist until after the fact finding hearing; and (4) it talks in terms of contact needing to be supervised, particularly so far as the eldest child was concerned. There is an issue as to whether

or not Mrs Freeman meant supervision in relation to all three children or just the eldest child; no doubt that is something which can be finally determined in due course. The judge plainly took the view that Mrs Freeman was referring only to the eldest child. That was not the construction put on the matter by counsel for the mother or indeed, it seems, as is set out in some of the earlier orders. Most unfortunately, Mrs Freeman was unwell and unable to attend the hearing before HHJ Collins.

On any view that hearing appears to have taken a most extraordinary course. I need to be very careful at this point because we do not have a transcript of the hearing, nor do we have a transcript of the judgment which the judge ultimately gave. It does appear, however, that at the outset counsel went to see the judge to obtain from him an indication of the nature of his views in relation to the allegations made by the mother.

I do not wish to say more about this than is strictly necessary, but in my judgment the days for such private consultations between the judge and counsel are long over. I simply do not see how such discussions can properly survive the Human Rights Act and, equally, I do not think it right or appropriate -- even if, as is undoubtedly the case, counsel obtained instructions to go and see the judge -- that they should have done so. In my judgment, in cases involving children everything should be done in court and should be on the record. There should not be private discussions between the judge and counsel, particularly, as in this case, it appears that the judge gave an indication, although he went on to hear the case, that the allegations made by the mother did not, in his mind, amount to very much.

At the end of the first day, when the judge had heard the evidence of the mother and the witnesses called on her behalf, there was unfortunately an incident outside the judge's room. The judge, of course, did not observe it; counsel for the mother appeared on the scene very late, apparently, and only saw the tail end of it. Counsel for the father, Mr Date, to whom we are gratefully indebted today for his assistance, observed more of it than counsel for the mother; and clearly it was an unpleasant incident which resulted in injuries to the father's cohabitee.

The result was that when the court sat on the following morning, the judge, of his own initiative, immediately raised the question as to whether or not the finding of fact hearing could continue. In this respect, both counsel, if I may say so, have done their best to assist us and have been very helpful, but I am most assisted by a first-rate note taken by Ms Caroline Murray, who was attending Mr Date on that occasion. If I may say so, Miss Murray has done exactly what solicitors or clerks in her position should do, namely taken a full, detailed and careful note of what happened together with timings, and

therefore I propose for present purposes, insofar as it is necessary, to look at what happened on the second day by reference to that note.

Everyone went into court at 10.35. The judge was informed about the incident which had occurred. The judge, of his own initiative, said that he could not go on with the fact-finding hearing. At the same time the judge appears to have expressed the view that the eldest child needed help but the younger two did not. The judge, however, firmly expressed the view that the fact-finding hearing should be abandoned.

We understand from Mrs Fleishmann that her position before the judge was that there should be an adjournment whilst the police investigated the incident which had occurred outside the judge's room, but that that should be a relatively short adjournment and the judge should then continue with the hearing.

It seems, however, that after five minutes or so the parties came out of court to try and ascertain the position of Mrs Freeman. Unfortunately, Mrs Freeman was ill. There were attempts to contact the contact centre to see if contact could begin at the particular centre, and reference was made to the court duty CAFCASS officer who at some point came across to court, saw the judge in his chambers, came out, took over the resolution of the contact issue with the relevant contact centre and eventually, as we know, sent the judge an email which we have in our papers and which we can time as being sent at 12.22.

The parties, after this detailed degree of negotiation, went into court. Once again, the timings which Miss Murray gives us are extremely important. It would seem that each counsel had approximately five minutes or so to address the judge and, as Mr Date frankly accepts, he had less to say than Mrs Fleishmann because the case was going his way. The judge had heard evidence: he made it quite clear that he did not think much of the mother's allegations, and was minded to make an order which suited the father. Mrs Fleishmann, however, according to the note, made it very clear that she wanted to cross-examine the father, and she says in terms that it was not right that the judge should make an order without the father having been cross-examined, particularly in relation to the issue of passports and the concession which the father had made that he had torn up the mother's and the children's Belgian passports.

There was apparently a discussion between the judge and counsel as to the meaning of Mrs Freeman's interpretation of the need for supervision, but, on any view, Mrs Fleishmann first of all did not have the opportunity to cross-examine the father and did not, as I read it, have a full opportunity to address the judge. The judge then gave a judgment, of which we have a note both taken by counsel and indeed taken by Miss Murray. It appears he concluded that judgment at about 1.30 and so the bulk of the hearing was undoubtedly taken up with the judge's judgment.

It is, I think, not without significance that the duty CAFCASS officer not only deferred to Mrs Freeman but expressly reminded the judge in the email to which I have referred of the most recent practice direction in relation to domestic violence, which, at that date, I think, had not been formally promulgated, or it may well have been promulgated; anyway it is now reported at [2008] 2 FLR page 103. In my judgment the Practice Direction is an extremely important document. Whilst I do not intend to read it into this judgment, it is a document about which all practitioners and all tribunals ought to be very much aware.

I make it as clear as I can that the practice direction is there to be obeyed. It is not designed to tell judges what to decide; it is there to tell judges how to go about deciding issues of residence and contact where there are allegations of domestic violence. Above all, it seems to me the Practice Direction places proper and firm emphasis on the importance of the fact-finding exercise, and in my judgment that process cannot be short-circuited. The judge must conduct a fact-finding hearing and it is only if, at the conclusion of that hearing, the judge finds as a fact, having heard all the evidence, that the children are in no way at risk or that, for some other reason, contact, unsupervised or unsupported, can take place that he should and could/can make an order for contact.

The importance of the practice direction cannot be overemphasised and, however experienced the judge, its terms are simply not to be ignored. I repeat the judge must hear all the evidence. It is simply not good enough for a judge to say he has heard one side, does not think much of it, therefore he is not going to permit cross-examination of the other side of the issues involved, particularly where the safety and welfare of children are concerned. There is no equivalent of the concept of "no case to answer" in proceedings relating to children: see Re R (A Child) [2008] EWCH Civ 1619.

Furthermore, in the instant case, I repeat, that both District Judge White and HHJ Sleeman had taken the view that a finding of fact hearing was necessary, and, in my judgment, looking at the allegations made by the mother, they were right to come to that conclusion. Of course, the ultimate result is a matter for the judge, but the judge can only reach that ultimate result, in my view, if he hears both sides and gives both sides a full and proper opportunity to cross-examine.

I am very conscious of the fact that we do not have a transcript either of the hearing before the judge on the second day or a copy of a transcript of the judge's judgment. We have a note made by counsel for both the parents, and of course we have the note helpfully prepared for us by Miss Murray. These have not been approved by the judge for the very simple reason that the judge is currently on leave. However, it is my view that, at some point, and preferably as soon as possible, we need a transcript both of the hearing on the second day before the judge and of the judgment which the judge gave, and, speaking for myself, I would direct that a transcript of both be prepared at public expense and made available both to the parties and to the court.

In the note which we have, the judge describes the facts in the case as "certainly on the borderline for a Fact Finding hearing to be ordered". In the version of the judgment provided for us by Mrs Fleishmann, he goes on to say effectively that there is nothing:

"…of any substance relating to a course of domestic violence, to Mother in the presence of the children, in the allegations made against the Father. The allegations are generalised and it seems that due to the nature of the allegations no Fact Finding was necessary, as it has no effect on the outcome."

If indeed that was the judge's view, in my judgment it was plainly both premature and wrong.

The judge is also recorded as having said that it was unnecessary for the father to have any form of therapy or anger management. Once again, in my judgment, the judge was plainly premature in making that judgment. That was a judgment he could only properly make if he had heard the father (and in particular heard the father cross-examined) and taken the advice of the CAFCASS officer. In my judgment, therefore, the order made by the judge for unsupervised contact and his assessment of the father overall were both premature.

Mrs Fleishmann, for the mother, has placed before us both her advice on appeal from HHJ Collins' order and a helpful skeleton argument. She complains, firstly, that the judge did not complete the fact-finding exercise and that, in particular, he did not permit cross-examination of the father on the mother's allegation that he intended to abduct the children to Algeria. That appears to be incontrovertible. Given the father's admission that he had destroyed the mother's and the children's Belgian passports, I have to say that, speaking for myself, I regard the judge's omission in this respect

as extremely serious and sufficient of itself to resolve the appeal in the mother's favour. In this case we appear to have, on the face of the documentation, not only allegations of violence, but we have clear evidence from the mother of a threat to remove the children to a country which, as I have already said, is not party to any international treaty obligations. The fact that the father has, or may have, a good relationship with the two younger children is, in my judgment, no reason for making an order for unsupervised contact which, as I say, in my judgment is premature and which (before being made) plainly needed to abide both the conclusion of the fact-finding hearing and the full report of the CAFCASS officer.

In paragraph 6 of her skeleton argument Mrs Fleishmann says this:

"Whilst the CAFCASS report showed 'a very positive relationship between the Father and the boys' it is submitted that this does not address the Mother's fears and the comment re grossly abused children in Paragraph 4 [which] is repeated."

In paragraph 8 of her skeleton she says this:

"In his Judgment the Learned Judge commented that if the allegations were proved it would result in the Father having to undertake an Anger Management Course. It is submitted that the purpose of a Fact Finding Hearing is for the Court to consider whether the allegations are true and thereafter for the CAFCASS Officer to conduct a risk assessment in the light of those findings. Mother was alleging harassment against her rather than violence. Father had accepted that he had come to the Mother's address late at night to see his sons. It might well have been that an Anger Management Course would not have been the recommendation of the CAFCASS Officer but some form of mediation to assist Father to move on now that the marriage had broken down and his sons live with their Mother and he is the absent Father."

In my judgment that allegation is made out.

In my judgment the judge was plainly wrong to refer to anger management, if he did, quite apart from the fact that the concept of anger management is discredited in many circles. As I have already said, it is my view that what therapeutic input, if any, the father required was a matter for the court and the CAFCASS officer only after the latter had reported and the fact-finding hearing had been concluded. This fact-finding hearing was never concluded; the judge did not hear the father; he did not hear cross-examination; he did not hear all the evidence.

In my judgment, therefore, Mrs Fleishmann is entitled to succeed in her appeal.

Mr Date has made a robust defence of the judge in his skeleton argument, for which we are extremely grateful. He not only points out in argument that the court in a contact application is exercising a very wide discretion, but he makes the point that the judge is the arbiter of the findings of fact, and if the judge takes the view that the findings of fact are not made out then it is for the judge to say so and to conduct the hearing accordingly.

Speaking for myself, I do not dissent from that proposition as a generality, but it has an obvious corollary, and that corollary is that the hearing must be fair. The judge must hear all the evidence, and in this case the judge plainly did not hear all the evidence and did not hear, in particular, the evidence of the father under cross-examination. The judge must also give the parties a full and fair opportunity to make submission and should not prejudge issue where a CAFCASS officer is involved and where the CAFCASS officer has in terms said that her views are provisional pending the outcome of a proper, and properly conducted, finding of fact hearing.

Finally Mr Date submits that the risk of abduction is really a side issue, not firmly or fully before the court and really a makeweight on the mother's behalf. I express some concern about that because it is plainly, on any view, a case in which emotions are running high, and all of us who have sat in this jurisdiction have experience of children being taken to countries who are not subject to the Hague Convention and know the difficulties which are engaged in getting those children back. Of course, HHJ Collins is a judge of huge experience and was exercising a very broad discretion, but I have come to the clear view that the order he made was plainly wrong and must be set aside.

As I have already said, I accept that a judge hearing a contact application exercises a wide discretion with which, in the overwhelming majority of cases, this court will not interfere; but, as I say, the discretion must be judicially exercised, the hearing must be fair and it must follow good practice. The Practice Direction represents that good practice. In my judgment, judges at first instance are not entitled to take shortcuts, which either run the risk of compromising the welfare of children or which fail to follow accepted practice. In my judgment, therefore, HHJ Collins, for all his experience, has done both in the instant case, and it is for that reason that I would grant permission to appeal and allow the appeal.

In my judgment, therefore, the way forward is as I have already indicated, namely to direct that the father's application for contact be referred forthwith to the Family Division Liaison Judge for Greater London -- that is Hedley J -- with invitation to that judge to allocate the case to a circuit judge other than HHJ Collins, and either to give directions himself or to list the matter before the allocated judge with instructions designed to ensure, firstly, a speedy finding of fact hearing and, secondly, an equally speedy subsequent determination with the assistance of CAFCASS of the father's application for contact. Those, therefore, are the orders which I would propose.

Lord Justice Wilson:

Desirable though it would no doubt have been for us this afternoon to have had the benefit of a transcript of the second day of the proceedings before the judge and an approved transcript of his judgment, there is, in my view, from the point of view of the children, and, in this regard at least, I expect the father to agree with me, an urgency about the matter which would not readily permit the delay in the collection of those transcripts; and, in my view, the combination of the note of proceedings taken by Miss Murray of Anthony Louca Solicitors and the now agreed note taken by counsel of the judgment enable us to determine this appeal this afternoon.

Mr Date submits to us that not all allegations made by one parent against the other should properly be the subject of a fact-finding hearing. In that submission he is clearly correct. The problem for him is that, in November 2008, a district judge had specifically considered whether the allegations raised by the mother against the father made the case one fit for a fact-finding hearing. We note that counsel appeared on behalf of the father at that appointment, but Mr Date was not the counsel concerned and is unable to tell us what the submissions of his predecessor were. At all events, the district judge ruled that this was indeed a case fit for a circuit judge to conduct a fact-finding hearing. In February 2009 HHJ Sleeman had not disturbed that ruling in any way, but had adjourned the fact-finding hearing for a short time in order that further evidence, in particular from the police in relation to complaints made by the mother, should be able to be considered, in particular by the father, at length, prior to the hearing proceeding; and, as my Lord has explained, the fact-finding hearing did proceed for the whole of Thursday 26 March, and the judge heard the evidence on behalf of the mother, namely that of the mother herself and of her sister, and heard a small portion of the evidence on behalf of the father, namely that of his cohabitant.

Then, however, at the start of the second day, the judge, in effect of his own motion, terminated the fact-finding hearing. There is, of course, now a decision of this court, namely Re FH (Dispensing with Fact-Finding Hearing) [2009] 1 FLR 349, in which this court stressed the caution which a judge should bring to bear in deciding to reverse a programme, previously set by another judge, that a fact-finding hearing should take place. That was a case in which a circuit judge had, at the start of her intended fact-finding hearing, decided not to conduct it. This case, however, is one in which the judge was one half way through his conduct of the hearing. Why, then, did he announce, at the beginning of the second day, that the hearing would not continue and would not even be adjourned, so that it be continued at a later date? The judge appears to have done so solely by reference to the ugly incident in the precincts of his court after he had risen on Thursday 26 March. Why, I have repeatedly asked myself this afternoon, did a violent incident, even in the precincts of the court, not serve to lead the judge to consider that temperatures were raised to a dangerous level between either the parents themselves or their respective witnesses or other supporters? How could the occurrence of a violent incident of that character logically lead to a conclusion that there was now no need to complete the fact-finding hearing?

The result was that the judge never heard the father's evidence in response to the allegations which the mother had made and of which she and her sister had spoken in evidence. Nor did the judge, prior to his decision that contact with the younger two children on the part of the father should be unsupervised, hear the view of the CAFCASS officer. She had clearly written that, even after the fact-finding hearing, contact should be supervised, whether contact with the oldest child or whether contact with all three children. The email sent by the duty CAFCASS officer to the judge on 27 March clearly reminded him that the CAFCASS officer's conclusion was that contact at that stage should be supervised if it was to take place at all. The judge never collected the views of Mrs Freeman, nor did he therefore adjourn the matter in order to collect the views of Mrs Freeman in the new scenario, namely the one which he had just created by his ruling that the fact-finding hearing would not be, and indeed would never be, completed.

We here in this court strive to support robust decisions taken by judges in the exercise of their discretion in family findings. In my view, however, as in that of my Lord as he has explained, this decision by HHJ Collins was over-hasty, was essentially illogical and, either was or might well have been, dangerous from the point of view of the welfare of the children. It is for those reasons, in addition to those articulated by my Lord, that I subscribe to the disposal which he has proposed.

Order: Application granted and appeal allowed