[2011] EWCA Civ 812

Case No: B4/2011/1004/FAFMF

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Principal Registry of the Family Division
Her Honour Judge Hughes QC
IL10C00517

Royal Courts of Justice
Strand, London, WC2A 2LL

15/07/2011

B e f o r e :

SIR NICHOLAS WALL, THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE MOORE-BICK
and
LADY JUSTICE BLACK

Between:

TL	**Appellant**
- and -	
The London Borough of Hammersmith and Fulham	**1st Respondent**
ED	**2nd Respondent**
S (by a Children's Guardian)	**3rd Respondent**

Mark Twomey (instructed by Duncan Lewis) for the Appellant
Christopher Poole (instructed by The London Borough of Hammersmith and Fulham) for the First Respondent
Hearing dates : 22 June2011

HTML VERSION OF JUDGMENT

Sir Nicholas Wall P:

Introduction

1. This is an appeal (for which permission was given on paper by Ward LJ on 10 May 2011) against an order made by Her Honour Judge Judith Hughes QC on 21 March 2011 refusing an application by the appellant for a residential parenting assessment pursuant to section 38(6) of the Children Act 1989 (the Act). It raises a number of important issues for practising family lawyers and for judges, and it is principally for this reason that we reserved judgment at the conclusion of the argument on 22 June 2011.

2. In giving permission to appeal, Ward LJ commented: -

> "Although it is obviously difficult to appeal a case management decision as this is, I am persuaded to give permission mainly because (1) without a favourable assessment this child is likely to be removed from Mother permanently and (2) given that she has made some (but maybe not enough) change, it is arguably not fair to snuff out the only chances of this child remaining within the family."

3. As the proceedings are on-going, this, in my judgment, is a case to which reporting restrictions should apply. Accordingly, I propose to identify only the local authority, the judge and the lawyers. The local authority is the London Borough of Hammersmith & Fulham. The mother is the appellant, and the child who is the subject of care proceedings under Part IV of the Act is "S".

4. Section 38(6) of the Act permits the court, when making an interim care or supervision order to "give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child". One of the leading cases in the House of Lords (***Re C (a Minor) (Interim Care order: Residential Assessment)*** [1997] AC 489 (***Re C***)), decides (inter alia) that the purpose of the section is to order an assessment of the child such as is required to enable the court to make a proper decision about him or her at the final hearing of the application. It also decides that it is impossible to assess a young child divorced from his or her environment, and that the assessment includes the relationship between the child and his or her parents.

5. In the instant case, S was born on 26 December 2010, and is now effectively six months old. The father plays no part in this appeal, although we understand that he is represented and will appear at the final hearing. In the interests of saving costs, and because her case was the same as that of the local authority, the guardian did not appear in this court by counsel, although we had the advantage of a skeleton argument prepared on her behalf.

6. In my judgment, the case raises the following issues: (1) case management; (2) the manner in which judicial discretion falls to be exercised in cases under section 38(6|) of the Act; and (3) the attitude of an appellate court to both (1) and (2).

7. The case also raises, albeit not in the starkest of forms, a phenomenon which will be readily familiar to judges and magistrates hearing care proceedings namely the mother who has given birth to more than one child and each of whose previous children has been taken into care. When considering the case of the latest child, is it appropriate to order a section 38(6) assessment, residential or otherwise?

8. In addition, the case also raises the question of fairness and the right to respect for family life under Articles 6 and 8 of the European Convention on Human Rights (ECHR). If, without the ability to call contrary "expert" evidence a parent is likely at the final hearing to have no "expert" evidence to place in the scales, is that parent entitled to a section 38(6) assessment in order to make the final hearing ECHR Article 6 compliant?

9. There is, of course, no easy answer to these questions. The only appropriate "one size fits all" answer which can be given is that such decisions represent the exercise of a judicial discretion, and that the discretion has to be exercised judicially. Provided that it is, the well known words of Asquith LJ in Bellenden ***(formerly Sattersthwaite) v Sattersthwaite*** [1948] 1 All ER 343 at 345 apply, and an appeal is unlikely to be successful.

10. Despite the limitations expressed in the first sentence of the preceding paragraph, it is my view that the exercise of judicial discretion in the instant case, the attitude of this court to it, and the manner in which the judge went about her task are all capable of wider application, and provide a useful basis on which judges at first instance can build. I should also say that I have had the opportunity to read in draft the judgment of Black LJ which follows, and with which I am in full agreement.

The facts

11. These are not significantly in dispute, and I take them largely from the chronology helpfully prepared by counsel for the appellant, and from the appellant's written statement to the local authority's pre-birth child protection conference on 15 November 2010.

12. The appellant is, in many ways, an unfortunate woman. She is 28. She has, altogether, had three children by three different men, and a large number of miscarriages. Her two oldest children are now 12 and 8. She was 15 when her first child was born. Following the birth of that child, she underwent a number of unsuccessful assessments, with the result that the child was made the subject of a care order on 4 July 2000. That child (a girl) has since been adopted.

13. Following the birth of her second child, the appellant and the child's father underwent residential assessments which were not successful with the result that the child (a boy) was removed, and made the subject of a final care order on 4 February 2005. Neither child has any contact with the appellant.

14. The guardian's first skeleton argument asserts that the younger of these two children "had been negatively affected by his time in the care of the appellant and his father" with the result

that he had developed an attachment disorder before he was 18 months old, and was "one of the most damaged children" with whom the guardian had worked. Indeed, so damaged was he that the original care plan for adoption proved impossible to put into effect, and he was made the subject of a Special Guardianship Order in favour of his foster carer on 13 November 2007.

15. The appellant had an abusive childhood, the details of which need not be recorded. She has, however, been diagnosed as suffering from a Borderline Personality Disorder and an Emotionally Unstable Personality Disorder. She has also suffered from depression. In May 2009 (the judge put it later), she began psychotherapy with an Assessment Service which in August 2010 confirmed her attendance at combined groups and individual psychotherapy sessions as well as psychiatric out-patient appointments, although it was reported that there had been a recent failure to attend.

16. In November 2010, when she was heavily pregnant, the appellant travelled to Jamaica. The purpose of the trip is not clear, and the appellant's departure was "sudden". The judge commented that "At the time of her return she must have been 38 weeks pregnant and was probably more advanced in her pregnancy than was disclosed to the airline personel".

17. As a result of an interim care order (ICO), S is living with foster parents and has regular contact with the appellant. The appellant met S's father when she was working for an escort agency. S's father is, as I have already related, a party to the proceedings.

The proceedings

18. Well in advance of S's birth, the local authority signalled its intention to take care proceedings under Part IV of the Act as soon as S was born. It did so on 30 December 2010. It then applied to the Inner London & City Family Proceedings Court (the FPC) for an ICO and the separation of the appellant and S, who, at that stage, was still in hospital.

19. That application came promptly before the FPC on 12 January 2011. The appellant was both present and represented before the justices, although she did not give oral evidence. Having heard oral evidence from the local authority social worker and from the guardian (who supported the local authority), the justices made an ICO until 9 March 2011.

20. The appellant appealed against that order. As Family Proceedings Courts at that point in time did not have the power to stay their own orders, an application for a stay was made to His Honour Judge Hayward Smith sitting in the Principal Registry of the Family Division (the PRFD). He refused the application for a stay, but directed that the appeal be heard on 25 January 2011 in the PRFD on the basis that S remained in the meantime with the appellant. This occurred.

21. The appellant's appeal was heard by HH Judge Judith Hughes QC and dismissed. The judge reserved her reasons, which she gave in writing on 8 February 2011, and from which there is no appeal. A copy of the judge's judgment dismissing the appeal is in our papers.

22. The appellant's application under section 38(6) of the Act was issued in the FPC on 14 January 2011, and on 25 January, when dismissing the appeal, the judge adjourned it "to be further considered, but not adjudicated" at a "Review / further case management" hearing, which she fixed, before herself at the PRFD for 14 March 2011. She also gave case management directions, inter alia directing the local authority to make arrangements to convene a Family Group Conference. Specifically in relation to the appellant's application under section 38(6) of the Act, she gave the appellant permission to instruct a consultant adult psychiatrist and a consultant clinical psychologist, both of whom were directed to "address the issue of what further assessment, if any, are recommended".

23. On 14 March 2011, the judge directed that the evidence of the consultant adult psychiatrist and the consultant clinical psychologist referred to in the previous paragraph should be heard by the judge at 9.00 am on 21 March 2011 at the PRFD in front of the judge. Two hours were set aside. The judge also directed the appellant's solicitors to use their best endeavours to obtain a report from the appellant's treating psychotherapist as to her progress. For reasons to which I will refer, this did not materialise.

24. The judge heard the appellant's application under section 38(6) of the Act on 21 March and dismissed it. Once again, she reserved her reasons, which she gave in writing the following

day. She also give further directions designed to lead to a further Case Management Conference (CMC) and an early hearing date for the final hearing, which I understand has now been fixed.

The judge's case management

25. Before turning to the substantive appeal, I propose to say a few words about the management of this case, and the role played in it by all the various disciplines, notably by the judge. For someone like myself, much of whose professional life – particularly in this court - has been spent criticising delay and poor management, it is a real pleasure to come across a case in which all the different agencies have fulfilled their roles effectively.

26. It is plain from the local authority's documentation that it has thought very carefully about the case. The statement of the social worker is a model of its kind. It is full, well balanced and fair. It exhibits referrals from the hospital, the initial child protection case conference report including letters from the consultant psychiatrist attached to the Trust, and the local authority's core assessment. We also have in our papers the appellant's post natal notes, and the record of a pre-birth child protection conference held on 15 November 2010, to which the appellant was invited, but at which she was not present. She did, however, provide a written statement for the meeting, in which she is critical of the local authority's core assessment and which argues for a parenting assessment.

27. The local authority's first interim care plan is dated 30 December 2010, and the statement of facts in relation to the proposed interim threshold is dated 7 January 2011. The position statement and skeleton argument prepared for the hearing in the FPC is dated 12 January 2011, and sets out the local authority's case in detail, including references to the leading cases.

28. What is equally encouraging is that the appellant's lawyers were able to respond fully to these documents, and we have in our papers both the appellant's response to the interim threshold document prepared for the hearing in the FPC and the appellant's position statement for that hearing, prepared by counsel, which goes into the law in some detail. There are also skeleton arguments for the hearings before the judge, and detailed chronologies. Moreover, the justices reasons are full and careful

29. In addition, the guardian was promptly appointed and, as I have already stated, knew the case well, having been the guardian for the appellant's two older children. She had been appointed promptly, and completed her first report (comprising 19 pages) on 11 January 2011.

30. In their respective letters of instruction, the two experts appointed by the judge were fully instructed and reported promptly. Both were specifically asked to advise in relation to "any other assessment of (the appellant) which you think would be useful within these proceedings". Both reports are dated 8 March.

31. All this seems to me exemplary, and should be emulated by all those engaged in care proceedings. There has been speed, co-operation between agencies and judicial continuity. Procedurally, the case is a paradigm of what should occur.

32. Before I become too enthusiastic, however, I should note two things. The first is that the judge only achieved continuity and her time-table by sitting at 9.00 am to hear the application – i.e. she interposed the case into an otherwise busy list. Secondly, of course, efficient and effective case management does not mean that the judge's conclusion is necessarily right. What matters is her judgment, and it is to that which I now turn.

The judge's judgment

33. Having set out the background, the judge states her approach in paragraph 7 of the judgment: -

> "The (appellant) indicated that she intended to seek a ruling pursuant to section 38(6) that she should have a residential assessment of her ability to care for (S). I was told that a preliminary decision with regard to the suitability of a parent for a residential assessment can be sought from the Cassell (sic) Hospital at no cost to any party. I suggested before this was embarked upon further professional advice should be sought……"

34. This, of course, explains the order which the judge made on 25 January 2011 giving the appellant permission to instruct a psychiatrist and a psychologist. She then goes on to discuss the evidence of the two experts. The psychologist, whilst acknowledging that he was "not the best person to comment on a residential assessment" is recorded as advising the judge that, if pressed, he would say that the mother "does not yet have a realistic prospect of being able to make good use of this" – that is to say the section 38(6) assessment. He is recorded by the judge as pointing out that the mother was two years into a three year psychotherapy programme and was not ready to take on the challenge of intense activity and the carrying of responsibility.

35. The judge recorded the psychiatrist as advising that whilst from the appellant's point of view an assessment would be welcome, the psychiatrist "struggle (d)" to see how it was in the child's interest "since the likelihood of success remains questionable and the time frame needed to establish success would almost certainly be too long and cover a period of several years".

36. The judge commented: -

> "In their oral evidence both (the psychologist and the psychiatrist) accepted that (the appellant) had a considerable way further to go in her psychotherapy and results may not become clear for a further 18 to 24 months. (The psychiatrist) said that it would be most unlikely for (the appellant) to finish the residential assessment and not need further work."

37. The judge then examined the authorities. She cited the sub-section, and extracted from ***Re C*** the proposition that the purpose of the section was to enable the court to obtain the information necessary for its own decision "notwithstanding that the control over which the child (sic) which in all other respects rests with the local authority". Plainly, as the judge accepted, she needed to have all relevant information to make an informed decision. The hearing must also be fair.

38. The judge accepted the evidence given by the psychologist and, in particular, by the psychiatrist. The issue, in her view, was unlikely to centre round the residential assessment "where the mother and child are scrutinised in testing conditions but in a pampered environment".

39. The judge went on expressly to rule out the mother's failures in previous assessments:

> "The (appellant) has been tested and failed previous residential assessments many years ago now. That is not in my judgment determinative or indeed a fact to which I give much weight. The circumstances might indeed be very different on this occasion. But the reason I refuse the viability assessment arises entirely our of (the psychiatrist's) assessment of (the appellant), that she has in reality made little progress in her psychotherapy and took time out of it quite impulsively when she made the trip to Jamaica in the late autumn last year. She (the psychiatrist) said there are too many unknowns and it would take several years to know if the therapy had been successful and this would not be compatible with S's needs. She talked of the (appellant) having made little progress to date. She said: "In my experience people with this degree of difficulty take a long time to work through them: I have never met anyone who has got over them in a short space of time." The (appellant) has a long way to go and until the progress is made she would be most unlikely to be able to care for S….. "

40. In her final paragraph, the judge concludes: -

> "My concern is with the welfare of the child, S. When I balance the need to be brought up safely from birth if possible or as soon thereafter if not by one's mother who is emotionally available I realise that is not this case and nor is it likely that the (appellant) will be totally available at the earliest in 18 months but more likely in 2 years from now and in my judgment S simply cannot wait that long. I regard it as pointless to order an interim viability assessment in circumstances where the child cannot wait for the outcome to which it may lead within a realistic timescale ***Far better for the mother that she continue with her existing psychotherapy unburdened with the care of a very small baby, much in the best interest of this***

child that she is not treated as an experiment which does not have any benefit for her. (Emphasis supplied)"

The attack on the judgment

41. In opening the appeal to us, Mr. Twomey adopted the reasoning of Ward LJ when granting permission. and summarised the position in his skeleton argument in the following way: -

> "In summary, it is submitted that the refusal to permit the Mother to seek a viability assessment has had the effect of preventing the Mother from presenting any significant evidence in answer to the Local Authority's application for a care order. Given the age of the child and the potential lack of kinship carers, a plan for adoption is likely. The Mother's only hope of defending the application rested on being able to demonstrate to the court the changes she has made since she was last assessed in care proceedings (in 2004) and in the light of the individual and group therapeutic sessions she has been receiving since 2009 and 2010, respectively. A viability assessment, of no cost to the parties, was the first step in the Mother preparing a case in answer to that of the Authority's. The effect of the learned Judge's decision is that her application to prepare such a defence has been summarily dismissed. She has no prospect, without seeking a viability (and if appropriate, residential) assessment, of opposing the Authority's application and, accordingly, of receiving a fair trial."

42. Mr. Twomey was also critical of the judge's case management. He pointed out that on 7 January 2011; the justices had given the mother permission to disclose the case papers to, inter alia, the Cassel Hospital, "for the purposes of obtaining clarification as to whether such resources can carry out a residential parenting assessment in these proceedings". The court was advised, he added on 14 March 2011, that the Cassel could carry out such an assessment; that it would be subject to the completion of a viability assessment; that a viability assessment would require an interview of the mother on two occasions, one of which would be with the child; that appointments were available; that no cost would be incurred by the commissioning of such a report and that a viability report could be prepared and filed within 2-3 weeks of being ordered.

43. Mt Twomey submitted that notwithstanding the earlier direction permitting the Cassel to see the papers and the relatively short period within which such a viability assessment could be prepared, the judge had not permitted the mother (on 14th March 2011) to seek a viability assessment: instead, she had listed the matter for determination of her application 7 days later. Given that the child would need to have been seen in the course of any such viability assessment, it was not been possible, or considered proper, to advance matters further with the Cassel pending the hearing on 21st March.

44. As it happens, and as Mr Twomey accepts, the Cassel is no longer available as an option for the appellant. The issues of principle which Mr. Twomey raised were, he submitted, unaffected by this consideration, and speaking for myself I am prepared to decide this appeal on the basis that if the judge was wrong, an alternative resource would be available.

45. Mr. Twomey was also critical of the judge's treatment of the expert witnesses, and submitted that the psychologist had expressed some support for a residential assessment.

46. Mr. Twomey took us through the various authorities and repeated his principal submission namely that the judge had failed to give due weight to the fact that, without a residential assessment, the appellant would be forced to go into a final hearing without an important piece of evidence, and without having been given the opportunity to demonstrate that, despite her history, she has the capacity to parent her child. The judge's decision, accordingly, he submitted, frustrated the appellant's ability to enjoy a fair hearing.

47. Mr. Twomey further submitted that the Judge had also failed to give due weight to the relevance and significance of the information which a residential assessment would provide to the court. Regardless of the views of the experts, he argued, it did not remove from the court the task of weighing the benefits of a viability assessment in the balance. The appellant only sought a viability assessment at this stage. Of course, a negative assessment would probably be determinative of her position but she would then have had a fair hearing. Mr. Twomey submitted that the overriding principle in the more recent, reported authorities appeared to be that parents must be given the chance to put forward a positive case to the judge determining

the issue of whether a care order should be made, especially, as here, if they run the real risk of losing their child forever. In at least two of the reported cases the prospects were extremely bleak with no expert/professional support. In each case, the Court of Appeal held that the parent should have an opportunity to put forward a challenge/positive case.

48. Mr. Twomey submitted that just as in ***Re L and H (Residential Assessment)*** [2007] EWCA Civ 213, [2007] 1 FLR 1270 (***Re L and H*****),** the appellant was a mother who had done well in contact (as well as such sessions allowed). In this case, the appellant's position was, arguably, stronger. Her progress, in securing and attending at psychotherapy since 2009, was highly significant and relevant. Just as in ***Re L and H*****,** it was said by the Local Authority and Guardian that the mother was unlikely to be able to care for her child and that, given the history, there was no point in any further assessment. But, just as in ***Re L and H***, whilst it may be that the parent fails the assessment, it is manifestly in the interests of the child concerned to see if his parents are able to care for him. It is submitted that the learned Judge's judgment fails to give any or any adequate weight to this point.

49. Furthermore, he submitted, it would be manifestly unfair if this Mother was denied the opportunity to demonstrate that she can overcome her difficulties and care for her child, albeit with support (the extent of which would also need to be assessed). Thus, he submitted that the judge's judgment failed to give any or any adequate weight to the appellant's entitlement (at common law and pursuant to Article 6) to a fair hearing.

Discussion

50. Mr. Twomey argued the appellant's case as well as it could be argued, but I am entirely satisfied that the judge's exercise of discretion cannot be faulted and that this appeal falls to be dismissed.

51. In my judgment, Mr. Twomey's criticisms of the judge's case management are misplaced. Practitioners as well as judges must realise that the judge has a duty to case manage, both under the Act and under the ***Practice Direction: Public Law Proceedings Guide to Case Management*** [2010] 2 FLR 472. also known as The ***Public Law Outline,*** and hereinafter referred to as the ***PLO.*** It is, I think, worthwhile, repeating paragraphs 3.1 to 3.9 of the ***PLO*** and reading them into this judgment:

Court case management

THE MAIN PRINCIPLES

52. [3.1] The main principles underlying court case management and the means of the Court furthering the overriding objective in public law proceedings are:

(1) the timetable for the child: each case will have a timetable for the proceedings set by the court in accordance with the timetable for the child;
(2) judicial continuity: each case will be allocated to one or not more than two case management judges (in the case of magistrates' courts, case managers), who will be responsible for every case management stage in the proceedings through to the final hearing and, in relation to the High Court or county court, one of whom may be – and where possible should be – the judge who will conduct the final hearing;
(3) ***main case management tools:*** each case will be managed by the court by using the appropriate main case management tools;
(4) ***active case management:*** each case will be actively case managed by the court with a view at all times to furthering the overriding objective;
(5) *Consistency* each case will, so far as compatible with the overriding objective, be managed in a consistent way and using the standardised steps provided for in this Direction.

THE MAIN CASE MANAGEMENT TOOLS

The Timetable for the Child

[3.2] The timetable for the child is defined by the rules as the timetable set by the court in accordance with its duties under ss 1 and 32 of the 1989 Act and shall:

(1) take into account dates of the significant steps in the life of the child who is the subject of the proceedings; and
(2) be appropriate for that child. The court will set the timetable for the proceedings in accordance with the timetable for the child and review this

timetable regularly. Where adjustments are made to the timetable for the child, the timetable for the proceedings will have to be reviewed. The timetable for the child is to be considered at every stage of the proceedings andwhenever the court is asked to make directions whether at a hearing or otherwise.

[3.3]. The steps in the child's life which are to be taken into account by the court when setting the timetable for the child include not only legal steps but also social, care, health and education steps.

[3.4] Examples of the dates the court will record and take into account when setting the timetable for the child are the dates of:

(1) any formal review by the local authority of the case of a looked-after child (within the meaning of s 22(1) of the 1989 Act);

(2) the child taking up a place at a new school;

(3) any review by the local authority of any statement of the child's special educational needs;

(4) any assessment by a paediatrician or other specialist;

(5) the outcome of any review of local authority plans for the child, for example, any plans for permanence through adoption, special guardianship or placement with parents or relatives;

(6) any change or proposed change of the child's placement.

[3.5] Due regard should be paid to the timetable for the child to ensure that the court remains child-focused throughout the progress of public law proceedings and that any procedural steps proposed under the Public Law Outline are considered in the context of significant events in the child's life.

[3.6] The applicant is required to provide the information needed about the significant steps in the child's life in the application form and to update this information regularly taking into account information received from others involved in the child's life such as other parties, members of the child's family, the person who is caring for the child, the children's guardian and the child's key social worker.

[3.7] Before setting the timetable for the proceedings the factors which the court will consider will include the need to give effect to the overriding objective and the timescales in the Public Law Outline by which the steps in the Outline are to be taken. Where possible, the timetable for the proceedings should be in line with those timescales. However, there will be cases where the significant steps in the child's life demand that the steps in the proceedings be taken at times which are outside the timescales set out in the Outline. In those cases the timetable for the proceedings may not adhere to one or more of the timescales set out in the Outline

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[3.8] Where more than one child is the subject of the proceedings, the court should consider and may set a timetable for the child for each child. The children may not all have the same timetable, and the court will consider the appropriate progress of the proceedings in relation to each child

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[3.9] Where there are parallel care proceedings and criminal proceedings against a person connected with the child for a serious offence against the child, linked directions hearings should, where practicable, take place as the case progresses. The timing of the proceedings in a linked care and criminal case should appear in the timetable for the child.

53. It will be immediately apparent that the judge was alive to the principles and practice of the ***PLO.*** It was ***her*** case. It was ***her*** duty to manage it as she thought appropriate. She did so, in my judgment, in an impeccable way. She looked at the timetable for S. S was born on 26 December 2010 her future needed to be decided as a matter of urgency. The judge was, accordingly in my judgment right on 24 January 2011 to cut through the case and to ask the critical questions: (1) does this child's welfare warrant an assessment under section 38(6) of the Act? And (2) in looking at the timetable for the child, is there evidence that this mother will be able to care adequately for the child within the child's timetable? Hence the judge's direction that the mother was to be given permission to instruct a psychologist and a psychiatrist who were expressly asked whether they thought a further assessment appropriate.

54. For the purposes of this part of the argument I am prepared to assume that the appellant would do well in a residential assessment, and that the outcome of such an assessment would be positive. We have a transcript of the evidence given by both experts. The psychiatrist was fully prepared to accept that the mother "might do quite well" in a residential assessment, but that was not the point. The point was that the appellant "was at a very early stage" and thus "vulnerable to use the same old coping skills that she has had over the years, which have not been very healthy or very respectable". In summary, the residential assessment "will tell us how she functions in a residential assessment placement…..it will not tell us how she will function in a community placement".

55. In my judgment, the judge was entitled to accept this evidence and to come to the conclusion that a section 38(6) assessment of the child was pointless.

56. I also reject Mr. Twomey's argument that the hearings conducted by the judge, and her refusal of an assessment under section 38(6) of the Act were unfair to the appellant and not ECHR Article 6 compliant. There are several points here. The first is that the two experts instructed by the mother advised the judge against such an assessment. I do not accept Mr. Twomey's argument that the psychologist was in favour. A fair reading of his evidence does not reveal any real difference of opinion between him and the psychiatrist, to whom he deferred on the critical point as to the length of time it would require the mother to be in a position properly to parent S.

57. Furthermore, Mr. Twomey properly accepted in argument that there were cases in which judges were entitled in any event to take short cuts, and to go beyond the interim. Provided that the exercise is carried out judicially, there can be no complaint at the outcome. Even if, therefore, the outcome of the case at final hearing is that the appellant will not succeed in caring for the child, there can be no complaint about what the judge did.

58. In my judgment, there cannot in any event be a breach of ECHR Article 6 when the evidence called by the party alleging breach does not establish the case which that party wishes to present.

59. Secondly, one has to remember what the judge was deciding. She was deciding an application under section 38(6) of the Act. In my judgment, it will remain open to the appellant at the final hearing – if the two experts adhere to their views – to apply for permission to cross examine them, not about a section 38(6) assessment of the child but about the appellant's capacity to provide "good enough" parenting for her child in the long term.

60. In this context I have to say that I am not impressed by the argument that no evidence could be forthcoming from the appellant's psychotherapist because of the confidentiality of the relationship between them. I see no reason - if it be the case - why the psychotherapist could not tell the court, with the appellant's permission, that in his or her opinion the mother had made sufficient progress to care for S. Such evidence would not, in my judgment, be unethical for the psychotherapist to give.

61. In my judgment, therefore, there was no breach of ECHR Article 6 in this case. As to ECHR Article 8, every care case involves a balance between the rights of children and their parents to respect for their family life. In my judgment, the judge was fully aware of these matters, as the extracts from her judgment demonstrate, and I detect no breach of the appellant's ECHR Article 8 rights in what the judge did.

The authorities

62. Mt. Twomey placed reliance on dicta of mine in Re ***L and H*** and, in particular, in the passages in which I discussed the principles underlying the Act. I do not resile from anything which I said in the case. Process is important in Family Law, particularly when the decision made by the judge may have the effect of permanently separating mother and child. But two points need to be made. The first is that ***Re L and H*** was one of those rare examples in which this court took the view that the judge had made an error of law. He had refused the assessment under section 38(6) on the ground that it involved a therapeutic element and was thus outside the section. This court took the view that this was an error of law. The case is thus readily distinguishable on this basis.

63. Secondly, I do not think I was saying anything more than is now contained in paragraph 31 of my ***Guidance of Case Management Decisions and Appeals therefrom*** which is published

at [2011] Fam. Law 189, and which I read into this judgment, along with everything which I specifically said about section 38(6).

The judge's final sentence

64. I have highlighted the judge's final sentence because I think it would have been better left unsaid. It is not necessary for the judge's decision. Mr. Twomey, whilst criticising the judge's general approach, described it generously as "understandable and kind". I agree, but part company with Mr. Twomey when he asserts that the judge's approach was unfair. The final sentence of the judgment was, as I say, unnecessary, but in my judgment does not even begin to vitiate the judicial exercise of discretion.

Conclusion

65. In my judgment, the judge followed the authorities, the ***PLO*** and ***The Guidance*** and applied her discretion judicially to the facts of the particular case before her. In these circumstances it is quite impossible to say that she was plainly wrong, and I would dismiss this appeal.

Lord Justice Moore-Bick

66. I agree and there is nothing I can usefully add, other than to say that I have had the privilege of reading in draft the judgment of Black LJ, with which I also agree.

Lady Justice Black

67. I agree with the President that the judge was entitled to refuse to order a section 38(6) assessment. It was a decision which was well within her discretion on the facts of this case and she set out her reasons for it clearly and cogently. I am grateful to the President for setting out why this is so. In view of the way in which Mr Twomey put his arguments, however, I should like to add something about some of the existing authorities on section 38(6).

68. This was not a case in which it was argued that the proposed assessment was outside the scope of section 38(6), whether on the basis that it was an assessment of the mother rather than the child or more properly classed as therapy than assessment. Accordingly, the dispute was not about whether it *could* have been ordered but about whether it *should* have been. Most of the grounds of appeal focussed on the way in which the judge approached the facts of this particular case. However, it was also argued that the judge's decision "frustrates the mother's ability to enjoy a fair hearing" because "without a residential assessment, the mother will be forced to go into a final hearing without an important piece of evidence, and without having been given the opportunity to demonstrate that, despite her history, she has the capacity to parent her child". Mr Twomey developed these grounds of appeal in his skeleton argument, submitting that "the overriding principle in the more recent, reported authorities appears to be that parents must be given the chance to put forward a positive case to the judge determining the issue of whether a care order should be made, especially, as here, if they run the real risk of losing their child forever". It is this point that I wish to address.

69. The starting point is, of course, section 38(6) itself. It says:

> "Where the court makes an interim care order, or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child; but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment."

70. It is to be read with section 38(7) which provides:

> "A direction under subsection (6) may be to the effect that there is to be –
> (*a*) no such examination or assessment; or
> (*b*) no such examination or assessment unless the court directs otherwise."

71. I have found it helpful to remind myself of what part section 38(6) plays in the overall scheme under the Children Act 1989.

72. Lord Browne-Wilkinson (with whom there was total agreement) put it this way in ***Re C (Interim Care Order: Residential Assessment)*** [1997] 1 FLR 1:

"Therefore the context in which s 38(6) has to be considered is this. The child is in the care of the local authority under an interim care order pending the decision by the court whether or not to make a final care order. Under the interim care order the decision-making power as to the care, residence and general welfare of the child is vested in the local authority, not in the court. However, for the purpose of making its ultimate decision whether to grant a full care order, the court will need the help of social workers, doctors and others as to the child and his circumstances. Information and assessments from these sources are necessary not only to determine whether the s 31 threshold has been crossed (including the cause of the existing or anticipated harm to the child from its existing circumstances) but also in exercising its discretion whether or not to make a final care order. It is the practice of the courts to require the local authority seeking a final care order to put forward a care plan for the court to consider in exercising such discretion. Section 38(6) deals with the interaction between the powers of the local authority entitled to make decisions as to the child's welfare in the interim and the needs of the court to have access to the relevant information and assessments so as to be able to make the ultimate decision"

73. At page 7 he said:

"The purpose of s 38(6) is to enable the court to obtain the information necessary for its own decision, notwithstanding the control over the child which in all other respects rests with the local authority."

And at page 9 he said that the court has jurisdiction:

"to order or prohibit any assessment which involves the participation of the child and is directed to providing the court with the material which, in the view of the court, is required to enable it to reach a proper decision at the final hearing of the application for a full care order."

74. The House of Lords next looked at section 38(6) in ***Re G (Interim Care Order: Residential Assessment)*** [2005] UKHL 68. The main purpose of the assessment that was there proposed was to ascertain whether by a continuing course of psychotherapy the mother could be sufficiently changed to make it safe for her to have care of her child. The debate was therefore about the difference between assessment of the child and treatment of a parent which is not in issue before us, but the speeches contain more general observations which are of assistance. Baroness Hale reviewed the background to section 38(6), endorsed Lord Browne-Wilkinson's analysis, in ***Re C,*** of the subsection as a power to limit or control the parental responsibility which otherwise the local authority have for the child under an interim care order, and added that, taken together with section 38(7), it enabled the court to put limits on the number and type of examinations or assessments that the child had to undergo. She said:

"[64] The purpose of these provisions is, therefore, not only to enable the court to obtain the information it needs, but also to enable the court to control the information-gathering activities of others. But the emphasis is always on obtaining information. This is clear from the use of the words 'examination' and 'other assessment'. If the framers of the 1989 Act had meant the court to be in charge, not only of the examination and assessment of the child, but also of the medical or psychiatric treatment to be provided for her, let alone for her parents, it would have said so. Instead, it deliberately left that in the hands of the local authority."

75. As part of her conclusion, she said:

"[69] In short, what is directed under s 38(6) must clearly be an examination or assessment of the child, including where appropriate her relationship with her parents, the risk that her parents may present to her, and the ways in which those risks may be avoided or managed, all with a view to enabling the court to make the decisions which it has to make under the 1989 Act with the minimum of delay."

And:

"[71] …. if the aims of the protocol are to be realised, it will always be necessary to think early and clearly about what assessments are indeed necessary to decide the case. In many cases, the local authority should be able to make its own core assessment and the child's guardian to make an independent assessment in the

interests of the child. Further or other assessments should only be commissioned if they can bring something important to the case which neither the local authority nor the guardian is able to bring. No one denies that this was a particularly complex and difficult case in which expert psychological assessment of the risks was essential. But that is not always so."

76. It was submitted on behalf of the parents in ***Re G*** that the right of the child and her parents to respect for their family life under Article 8 ECHR placed the local authority, as an emanation of the state, under a positive obligation to provide for the mother to have the benefit of the proposed therapeutic and assessment programme at the Cassel Hospital in order to give the child and her family the optimum chance to live together as a family. The submission was that if section 38(6) was interpreted so that such a programme could not be directed, it would deprive the parents of "the chance to demonstrate that fundamental changes could be made within the necessary timescale so that it would be safe for them to parent their child". Lord Scott said of that:

> "[24]….That may be so, but the proposition that the refusal of the court to make that direction, or the unwillingness of the council, or, for that matter, the NHS Trust or the legal aid authorities, to fund its implementation, would have constituted a breach of Ellie's or the parents' Art 8 rights cannot, in my opinion, be accepted. There is no Art 8 right to be made a better parent at public expense. "

77. I turn now to the Court of Appeal authorities to which we were taken. The earliest of them is ***Re L and H (Residential Assessment)*** [2007] EWCA Civ 213. There, the care proceedings concerned the mother's fourth and fifth children. Her oldest child was living with a relative and her second and third children had been removed from her care and adopted. She wished to have a residential assessment of the fifth child but the judge refused to order it. Her appeal to the Court of Appeal was allowed.

78. My Lord, the President, then as Wall LJ, said:

> **"[85]** I am not for one moment seeking to lay down any general guidelines for the circumstances in which the court should or should not order assessments under s 38(6). The courts must give the subsection a purposive construction and apply the principles set out in *Re C* and *Re G* to the facts of the cases before them. But what is equally important is that the hearing of the proceedings should be fair (or, to put the matter in the language of the European Convention, Art 6 compliant) and that the court should have before it all the relevant evidence necessary for the decision.
> **[86]** I am left with the clear feeling, having listened to the argument in the instant case, that any final hearing which followed a denial to the parents of M of the opportunity to take part in a residential assessment of the child would be unfair. I say that for a number of reasons. First, the parents have plainly been written off by the local authority as carers for either child. I have cited the relevant passage from the core assessment in para [37], above. Although the guardian is at pains to say that her evidence on the s 38(6) issue is not determinative of her final investigation, the clear impression left by her evidence is that the parents are unlikely to be able to care for either M or SA. Both the local authority and the guardian say that the judge does not need the evidence from a s 38(6) assessment. Both say – in effect – that although this mother has done everything expected of her in contact, her history is such that there is no point in any further assessment. The plain inference is that she is incapable of caring for M and SA: that is the end of the matter, and the court should therefore not permit any further expenditure of public funds on a further assessment.
> **[87]** There will, in my judgment, of course, be cases in which to order an assessment under s 38(6) of the 1989 Act will be a waste of time and of public funds. Sadly, it is not difficult to provide examples. Parents who have been found grievously to have injured one or more of their children and have another whilst continuing to deny causing the injuries or without any acknowledgement of their responsibility for the injuries can hardly expect to obtain an assessment of their new child under s 38(6). A woman who has a child or children by a convicted paedophile whom she does not acknowledge to be a danger of her children is in the same position. Child protection is a vital ingredient in any proceedings under the 1989 Act.
> **[88]** Accordingly, if the professional evidence in the instant case was unanimous that a s 38(6) assessment would serve no purpose, it would be unlikely that the judge

could have been criticised for refusing to order one. But that is patently not the case. The consultant clinical psychologist brought in to advise the court (inter alia) on this very issue advises, in strong terms, that a residential assessment of M, the mother and the father is not merely desirable: he strongly recommends it. In my judgment, that is a powerful pointer to the propriety of such an order.

[89] That pointer is, in my judgment, however, immeasurably strengthened when viewed against the fact that, if it is not ordered, the parents will be forced to go into the final hearing without an important piece of evidence, and without having been given the opportunity to demonstrate that, despite their respective histories, they have the capacity to parent M. Indeed, it seems to me that without positive evidence from such an assessment, the outcome of the July hearing is a foregone conclusion.

[90] None of this, of course, is intended as a criticism of either the local authority or the guardian for forming a clear view. Indeed, they may prove in due course to be correct. It may be that the parents will prove unable to sustain their relationship for the period of the assessment, or otherwise demonstrate during it that they do not have the capacity to parent M, let alone M and SA together. As I stated in argument, if the parents fail in the assessment, that is likely to be the end of the case as far as they are concerned.

[91] In my judgment, however, none of these considerations provides a good reason, on the facts of this case, for the assessment of the child under s 38(6) not to take place. As I see the case, it is manifestly in the interests of M to see if his parents are able to care for him, and it is the responsibility of the court to ensure that it has the best evidence on which to reach a conclusion about his welfare. It is also procedurally fair for his parents to be given the opportunity to demonstrate that they can overcome their manifest difficulties and care for him, and it would, in my judgment, be unfair were they to be denied that opportunity. There was powerful, well reasoned, objective and balanced evidence from Dr Drayton that such an assessment was worthwhile. The judge's misreading of the authorities deprived him of the ability to give Dr Drayton's evidence the weight it warranted."

79. I have quoted the whole of this passage because it is important, in my view, to recognise the context for the more general views that the President there expressed. He expressly said ([85]) that he was not seeking to lay down any general guidelines for the circumstances in which the court should or should not order assessments under section 38(6) and that the courts must apply the principles set out in ***Re C*** and ***Re G*** to the facts of the cases before them. He expressly recognised ([87]) that there would be cases in which an assessment would be a waste of time and public funds. It is plain to me that his decision that an assessment should have been ordered of the children in ***Re L and H*** turned on the facts of the case, which included the strong recommendation by the consultant clinical psychologist that there be such an assessment.

80. Mr Twomey submitted that "since this decision, the general focus of the reported authorities in similar cases is on fairness and ensuring that all the relevant information is before the court and that parents and children have been given every reasonable opportunity of presenting their cases, especially in circumstances where they risk losing their children forever".

81. The next decision that he cited was ***Re B (Care Proceedings: Expert Witness)*** [2007] EWCA Civ 556 which was decided only two months after ***Re L and H***.

82. The parents in ***Re B*** were unable to provide good enough parenting for their elder child who was adopted. In care proceedings concerning their younger child, the local authority relied on expert reports relating to the elder child and argued that the prospects for the new baby were extremely poor if he were left with the parents. The judge refused to permit the parents to instruct experts of their own. Between the first instance hearing and the appeal hearing, circumstances changed so that by the time the Court of Appeal came to consider the matter, the mother was proposing to separate immediately from the father and was seeking assessment as a single parent. The court overturned the first instance judge and permitted the parents to instruct an expert.

83. In the course of a relatively short judgment, Thorpe LJ said:

> **"[8]** Looking at the case in the round, I reach the conclusion that it is probably sensible to allow the parents to instruct Dr Banks. It is very important that parents

who are at risk of losing a child forever should have confidence in the fairness of the proceedings and, inevitably, that means the even-handed nature of the proceedings. Furthermore, if Dr Banks shares the opinion of those who have already spoken, there must be a measurable chance that the anticipated 2-day final hearing will either be unnecessary or can be abbreviated."

84. No authority was cited and the decision revolves around the facts of the particular case. That is clear throughout Thorpe LJ's judgment and reinforced by the concluding paragraph which reads:

> "**[11]** To that limited extent I would allow the appeal and emphasise that it is upon the basis that the landscape surveyed by His Honour Judge Vincent in March is a very different landscape now in May. The mother's determination to separate is recently stated and the key issue now becomes her capacity to do that."

85. The next authority is ***Re K (Care Order)*** [2007] EWCA Civ 697, decided two months later. The mother there sought an order under section 38(6) for a two day assessment of her parenting by a local specialist resource. The local authority and the guardian argued that it would be fruitless because of the parents' reluctance to address other fundamental issues such as the volatility of their relationship and their substance misuse. However, one of the two experts in the case felt that a residential assessment would be a very helpful step. The trial judge refused to make the order and his decision was overturned by the Court of Appeal.

86. I do not think that this case was intended to establish principles in relation to section 38(6). The Court of Appeal was hearing the appeal at short notice in the immediate run up to the final hearing of the care proceedings and the decision is very much a decision on the facts. Dealing with the local authority's pessimistic case, Thorpe LJ said:

> **"[4]** That presentation is clearly open to the local authority as things stand and the consequence, as it seems to me, is that the hearing which is fixed for 2 July in front of His Honour Judge Yelton, although time-estimated 5 days, will be something of a non-event. Crucial to the mother's capacity to put any sort of positive case to the judge on 2 July is participation in the assessment and a positive report. If that were to be the development, then the judge and the experts would have to consider anxiously what should be the outcome at the hearing. What should be the next step? What sort of way forward could be cautiously pursued? If the assessment takes place and the report is negative in its conclusion, then obviously the local authority's case is much fortified and it would be hard to see that any order could result in July other than a care order."

That was not a statement of principle. As is clear from the opening words of paragraph 5 of the judgment ("So that is the context within which the judge came to rule on the application"), it was a description of the state of play in the care proceedings. Similarly the following observation in Thorpe LJ's concluding paragraph was an observation about the facts of that particular case:

> **"[7]** I am troubled that if this order is allowed to stand, the essential requirement of fairness to the mother in seeking to resist the care order application will be jeopardised. Her only forensic presentation at this late stage of the contested proceedings is to emerge well from the brief assessment and then to present the judge with the difficult question of what should follow. I think she should have that opportunity."

87. ***Re M (Assessment: Official Solicitor)*** [2009] EWCA Civ 315 can be distinguished from the usual run of care cases in that the mother was not only a minor but also a minor who lacked capacity to instruct lawyers and was represented by the Official Solicitor. The local authority funded a residential assessment of her which failed and instructed a psychologist who said she had no chance of providing adequate parenting unless she had two years of intensive psychotherapy. The Official Solicitor sought the instruction of a fresh psychiatrist who would assess the mother in the context of her relationship with her child and advise on her disability and the impact it had on her potential to be an adequate parent to the child. He also sought permission to refer the papers to another residential establishment for consideration of whether the case was suitable for residential assessment there. It is not clear from the report whether the application relating to the psychiatrist was under section 38(6) or not; the

application in relation to the residential assessment was, as Thorpe LJ said, "only an attempt to prepare the way for a s 38(6) application".

88. In allowing the mother's appeal against the trial judge's refusal to order further assessment, Thorpe LJ said at paragraph 8 that the judge did not :

> "….sufficiently recognise T's incapacity and dependence on the Official Solicitor. If the Official Solicitor, with the responsibility that he holds in the litigation, requires that assessment, it seems to me that a judge should be slow to refuse it. That refusal is all the more extreme if its immediately foreseeable consequence is to deprive the incapacitated litigant of any prospect of averting the care and placement orders sought by the local authority."

89. At paragraph 12 he added: "Is it fair, given her Art 6 entitlement, to effectively deprive her of a positive case to present at final hearing?"

90. My Lord, the President, was a member of the court as Wall LJ and spoke in similar terms to Thorpe LJ, commenting:

> **"[16]** I see this case, I have to say, in the wider context of the family justice system. Care and adoption orders are at the very extreme, indeed at the limits of, the court's powers. There is a view abroad, a view which in my view is wholly erroneous, that the court is simply a rubber stamp that approves the activities of social workers, who in turn are only too willing and anxious to remove children from their parents' care. As I say, that, in my judgment, is a wholly fallacious view. However, its corollary is that the forensic process must be fair. I see that in *Re L and H (Residential Assessment)* [2007] EWCA Civ 213, [2007] 1 FLR 1370, a case helpfully cited by Ms Ford in her skeleton argument, I said this (at para [85]), and I stand by it:
>
> > "'what is equally important is that the hearing of the proceedings should be fair (or, to put the matter in the language of the European Convention, Art 6 compliant) and that the court should have before it all relevant evidence necessary for the decision."

91. He said, however, that he saw the intervention of the Official Solicitor as a feature which made the proceedings unusual and I think it is fair to say that his view of the appeal was influenced by that as can be seen from the following extracts:

> **"[18]** In my judgment, the Official Solicitor had a plain duty to investigate the case on the mother's behalf and to obtain whatever evidence he thought appropriate in order to do so……..
> **[19]** …. What the Official Solicitor wants to do, as I see it, is to obtain a further independent – and I stress the word 'independent' – psychiatric assessment of the mother in order to assist him in deciding how he should put her case before the judge, whoever it is, who takes the final hearing. In my judgment, the Official Solicitor should be allowed to take that course and obtain the report he seeks."

92. ***Re J (Residential Assessment: Rights of Audience)*** [2009] EWCA Civ I is the final case to which I turn. The mother there had ten children and had been the subject of numerous assessments of various kinds which had all concluded that she was not able to care for them properly. There had been an unsuccessful residential assessment after the birth of the ninth child. The judge in care proceedings refused the mother's application for more assessment, this time by an independent social worker. The mother's appeal failed. Wall LJ, with whom the other members of the court agreed, said:

> **"[10]** I think it important to remember when one is looking either at the independent assessments by social workers or at applications under s 38(6) of the Children Act 1989 that one needs to be child focused. *It is not a question of the mother's right to have a further assessment, it is: would the assessment assist the judge in reaching a conclusion or the right conclusion in relation to the child in question?*....." [my italics]

93. In so far as the earlier of the Court of Appeal decisions to which I have referred contain passages which might be taken to suggest that a parent facing the permanent removal of their child has *a right in all cases* to an assessment of their choice rather than one carried out or commissioned by the local authority, I am sure that this was not what the court intended. The President made that clear in the passage I have just quoted from ***Re J***. Still less is there

a principle such as that for which Mr Twomey contends, namely that "parents must be given the chance to put forward a positive case to the judge determining the issue of whether a care order should be made". Such a principle is unworkable not least because, sadly, there are cases in which the parents are plainly not able to care for their children and in which no amount of assessment or evidence gathering will enable them to put forward a positive case.

94. I return to the House of Lords decisions that I examined at the start of this judgment and remind myself that the purpose of section 38(6) is to enable the court to obtain the information necessary for its own decision in the care proceedings. Baroness Hale made it clear in ***Re B*** (paragraph 71, see above) that "[i]n many cases" the local authority and the guardian should be able to assess the situation and that further or other assessments should only be commissioned if they can bring something important to the case which neither the local authority or the guardian is able to bring. Nothing that the House of Lords said in either case suggested a right for a parent of the type for which Mr Twomey argued.

95. This court has of course stressed the importance of the hearing of the care proceedings being fair, being Article 6 compliant. However, it is not necessary, for that purpose, to continue to assess parents if the process is not going to contribute anything to the information that is needed for the ultimate decision.

96. The present case is one in which the judge examined carefully, with evidence, whether the proposed assessment would contribute information that she needed and concluded, for carefully articulated reasons, that it would not because it could only gather evidence about the mother's capacity in the limited sphere of a residential placement and because even if that assessment was positive, that would not overcome the mother's difficulty that the therapeutic work that she required to put herself in a position to care for her child would take longer than the period for which the child could wait for a permanent home. Before taking this decision, the judge enabled the mother to obtain evidence addressing the future prognosis by permitting her to instruct the psychiatrist and the psychologist and she arranged for the hearing of 21 March at which their evidence could be heard and challenged.

97. I appreciate the constraints of a hearing for the purposes of determining whether to make a direction under section 38(6); such a hearing is inevitably shorter and focussed more narrowly than a full hearing at which the threshold criteria are considered and/or a final welfare decision is taken and it will often leave more unanswered questions than such a hearing. The judge must, of course, take that limitation into account in determining whether the proposed assessment is necessary. I would not wish anything that I say here to be interpreted so as to start a practice of extended section 38(6) hearings which are indistinguishable from the final hearing. It is a matter for the individual judge to regulate the nature and extent of the material upon which the section 38(6) decision is taken and the format of the section 38(6) hearing, and this aspect of the judge's case management will, like most case management, be highly dependent on the facts of the individual case.

98. The decision taken by HHJ Hughes was well within her discretion and the process by which she enabled herself to reach it was fair to all parties and effective. Accordingly, as I said at the outset of this judgment, I would dismiss this appeal.