Neutral Citation Number: [2020] EWHC 1109 (Fam)

Case No: FA-2020-000064

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
APPEAL FROM CENTRAL FAMILY COURT
ORDER OF DDJ O'LEARY
ZC18P00715

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2020

Before :

SIR ANDREW MCFARLANE
THE PRESIDENT OF THE FAMILY DIVISION

- -

Re Q

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- -

Ms Deirdre Fottrell QC and **Ms Lucy Maxwell** (instructed by **Hughes Fowler Carruthers**) for the **Applicant Father**
Mr Martin Kingerley QC and (instructed by **Osbornes Law**) for the **Respondent Mother**
Ms Catherine Jenkins (instructed by **Cafcass**) for the **Respondent Child by the Children's Guardian**

Hearing date: 30 April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ANDREW MCFARLANE THE PRESIDENT OF THE FAMILY DIVISION

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10:30am on Wednesday, 6 May 2020.

Sir Andrew McFarlane P:

Background

1. This is an appeal from a case management decision made by Deputy District Judge O'Leary sitting at the Central Family Court via a remote hearing on 22 April 2020 in the course of long-running private law proceedings concerning the welfare of a girl, Q, who is now aged 6 ½ years.

2. At the conclusion of oral submissions I announced my decision, which was that the appeal was to be allowed, the decision to vacate the remote hearing was set aside, and the matter remitted to the deputy district judge to redetermine the question of how and when the final hearing is to take place. This judgment sets out my reasons for that decision.

3. Q's parents have been separated for some years. Her mother, who is of European origin and who requires the assistance of an interpreter during the court proceedings, has been her primary carer. Her father, who is English, was seeing Q regularly until October 2018 when all contact was stopped after Q's mother made allegations that he had sexually abused their daughter. Contact was restarted on a supervised basis in July 2019. In October 2019 Deputy District Judge O'Leary conducted a seven-day fact-finding hearing which concluded with a clear finding that no sexual impropriety had occurred. At the conclusion of that hearing restrictions on contact were relaxed and the case was adjourned for a psychological assessment of the parents.

4. On 13 March 2020 the expert psychological report was filed. Its primary conclusion was that it was in Q's interests for there to be a change of primary carer from mother to father.

5. Following receipt of the expert report, the court directed that contact should be further increased so that Q is currently spending alternate weeks with each parent. That arrangement has continued through the current COVID lockdown.

6. On 12 December 2019 the case was set down for an ordinary final hearing before Deputy District Judge O'Leary on 22 April 2020.

7. On 24 March 2020, at the pretrial review conducted remotely before the deputy district judge, the case was set down for a remote final hearing on 22 April with a three-day time estimate.

8. On 15 April 2020 the Designated Family Judge for Central London, HHJ Tolson QC, in the course of a paper review of pending trials, unilaterally directed that the planned final hearing should be vacated. That decision was reviewed at a further remote hearing before deputy District Judge O'Leary on 20 April 2020. Prior to that hearing, on 10 April, the children's guardian appointed to represent the interests of Q filed her final report in which she accepted the expert opinion of the psychologist and recommended an immediate change of residence so that Q would reside primarily with her father. At the hearing on 20 April, Mr. Martin Kingerley QC, representing the mother, applied for an adjournment on the basis that the matter could not be determined fairly at a remote hearing. That application was refused.

9. On 21 April this court handed down judgment in the first reported case concerning remote hearings, *Re P (A Child: Remote Hearings)* [2020] EWFC 32. On the same date District Judge O'Leary engaged in email correspondence with HHJ Tolson over the question of whether the remote hearing planned for the following day should take place.

10. At the start of the hearing on 22 April, the judge indicated that she had been reviewing the decision to proceed having read this court's decision in *Re P*. After hearing submissions from all parties, the judge concluded that the remote hearing should be vacated and the matter relisted before her for an ordinary face-to-face final hearing in due course.

11. Q's father's appeal is against the decision to vacate the remote final hearing. Permission to appeal was granted by DDJ O'Leary. An appeal from a deputy district judge would normally be heard by a circuit judge. This case has been transferred to be heard by a judge of High Court level [Family Court (Composition and Distribution of Business) Rules 2014, r 6] because of a perceived need to clarify this court's judgment in *Re P* and because the DFJ at the Central Family Court had played a part in the case management decisions that had been made regarding the remote hearing of this case.

The 20 April Judgment

12. At the remote hearing on 20 April, which had, in part, been established to 'test run' the video platform chosen for the substantive hearing (Zoom), the judge rejected Q's mother's application to adjourn the final hearing until it could be heard in a conventional court room. In her judgment the judge rightly drew attention to her close connection to this case resulting from undertaking the fact-finding hearing and conducting virtually every case management hearing over the course of a year. She explained her decision to refuse the application to adjourn in paragraphs 5 and 6 of her judgment:

> "5. As far as the adjournment is concerned, I therefore have to consider the competing interests of first of all the welfare of Q, including avoiding any delay for her in a final determination and secondly, the equally important fact that there must be a fair hearing for all parties. The difficulty in this, as far as the mother is concerned, is firstly, she is having to deal with the case remotely, this of course is a common difficulty for litigants at the moment. The second difficulty is that she needs the services of interpretation …. This adds an additional layer of complexity to the case and difficulty or feeling of estrangement of the mother. A case management hearing decision is not a one-off decision, it is a continuing obligation on the judge to look at the competing interests of obtaining finality of decisions in cases for children and making sure that decisions are fair to all parties. Fairness to all parties includes all parties being able to take part in and feel involved in the process. It is for that reason, that the considered wisdom at the Bar on 24th March was that the Zoom platform was probably going to be the most effective for a final hearing. This is the platform that has been used today. I am certain in my mind that a fair hearing can and should take place on 22nd April with its three day time estimate, all advocates have worked hard to do everything they can to make sure that a fair hearing can happen at this time and in my judgement, it is appropriate that it continues.

> 6. I will of course explain why I have contradicted the order of His Honour Judge Tolson to the learned judge. But I am satisfied that what he has done, has been to make an order in this case, which probably has been made in other similar cases, to adjourn it. There needs to be finality for Q, she has been the subject of litigation for a considerable period of her life. She is displaying evidence of emotional harm as a consequence and this needs to come to an end. I hope that the three-day time estimate will be sufficient. There will need to be breaks built into it because it is an important part of everyone's welfare that there are breaks in hearings which are as intensely personal and direct as these remote hearings. This is amplified by the need for an interpreter also to have breaks. If I am satisfied in the course of the final hearing that there is any unfairness, or sense of alienation for the mother, I can look at that and consider it as the hearing progresses. This gives the possibility, although I hope it does not happen, for an adjournment for a brief period but I am quite satisfied that the final hearing should continue as it was meant to continue on 22nd April, with its three-day time estimate."

13. In the course of this appeal, Miss Deirdre Fottrell QC, for Q's father, who appeared before the judge, draws particular attention to the passage in this judgment where the judge declares that she is 'certain that a fair hearing can and should take place on 22 April', in addition to the passage where the judge concludes that Q needs finality and that the present period during which Q is displaying evidence of emotional harm must come to an end.

The 22 April Judgment

14. At the start of the hearing on 22 April the judge reopened the question of an adjournment and, having heard submissions from each of the parties, gave a short but detailed judgment reversing the decision that she had made two days earlier and adjourning the case until a face-to-face hearing could take place. It is helpful to reproduce the entirety of that judgment so that the detailed points made by the judge, and now taken up within the appeal, can be seen in context:

> "1. I have heard submissions this morning on the issue of the adjournment of this final hearing in the case. I heard submissions first of all on Monday 20 April and it was my decision on that day that the final hearing should go ahead. I did however say that the role of case management in each and every case is a continuing duty and it is a decision capable of being changed. I am going to accede to the submission to adjourn the final hearing and I am going to explain why.
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> 2. It will be recalled that the decision made by me on 20 April contradicted a general order made by His Honour Judge Tolson QC on 14 April. I make no apology for contradicting that order because it was, on 20 April, my decision and my decision alone what should happen. It remains my decision. Of course, I have been in contact with the designated family judge His Honour Judge Tolson QC about this case. So, what, everyone will ask, has changed my mind? It is not any judicial pressure from His Honour Judge Tolson or anyone else. It is two factors together that have changed my mind. They are a combination of a reading of yesterday's decision of the President in *Re P* and last night reading and considering the father's position statement. The root of the tension in this case is a timely resolution of the matter for the sake of the child, Q, as against the need for fairness in this case. I have to

balance those two interests while making it absolutely clear that my paramount concern must be the welfare of Q.

3. At the end of her submissions to me this morning, Ms Fottrell said that the tipping point of my decision should be the fact that the child continues to live with her mother in contrast to the situation that pertained in the case of *Re P*. Factually that is accurate and there are many levels on which this case is distinguishable from *Re P*. But I have to decide this case properly and fairly to all parties in order properly to consider what is in the welfare of Q. If I agree with the view that is put forward by [the expert psychologist], which is a view that the guardian invites me to accept and Ms Fottrell, leading counsel for the father, urges me to accept it is going to mean a significant change in the life of Q. Currently, Q's welfare is being maintained on a very even-handed basis which has been brought about by the problems of lockdown under the coronavirus pandemic and that means that Q spends one week with her father and one week with her mother. This is a situation that has now pertained for approximately four weeks and until this matter can come back to be heard properly, it is fundamental that this arrangement continues even if schools open before the case can be returned to court.

4. Dealing with my reasons for now agreeing to adjournment, they relate to this: The mother is giving evidence and listening to evidence separately from her lawyers with the services of an extremely good interpreter, but she is bound to feel a sense of alienation. That is no different from the situation which existed on Monday. But what is different, is my further consideration of the impact on the mother of any possible change to arrangements. The evidence which I must hear, it has been correctly stated by all parties, is that of [the psychologist] and the guardian but I must hear from the mother and I will of course hear from the father if he wishes to give evidence. It is absolutely correct to say that this is not a fact-finding decision but there are stark matters said on behalf of the father about the mother's care of Q which came clearly to me from the position statement prepared on the father's behalf and I will have to give proper consideration to what the mother has to say about her care of the child and her capacity to engage with professionals and with what Miss Fottrell describes as Q's lived experience.

5. As I read the papers so far, the mother's present attitude is that she accepts the judgement of November 2019 and that Q is fine. But she has not, it appears, engaged with Q or addressed the issue of what Q may or may not have been saying about allegations beyond the judgement that I delivered in November of last year. All of this underlines that the final welfare hearing in this case has to be undertaken in a proper, forensically sound, fair, just and proportionate manner. I must listen carefully to what all parties have to say. The mother needs access to her lawyers throughout the evidence. It follows that sitting in her home and joining in by means of the internet, with the complication of interpretation, is a much less than satisfactory situation.

6. I am also conscious and very much aware that the father will be very disappointed that I am going to accept an application to adjourn this hearing. It occurred to me this morning that it was to the father's enormous credit that at no stage within Ms Fottrell's submissions did she mention a matter, which was in fact already in my mind. That matter was the expense of this hearing for the father. The

person who brought the matter up in submissions and, this is not said in any way critically, was Ms Jenkins on behalf of the guardian. Why I say it is of enormous credit to the father, is that he has not said the hearing must go ahead because an adjournment would inevitably mean the mother representing herself. I want to say that I sincerely hope that the father will be able to fund the mother's continuing representation at an adjourned final hearing because just as it is important that the mother is able to be fully involved, is that she enjoys the excellent representation that she has had so far. All of this will enable the court to come to the right welfare decision for Q. If I was to continue to hear the final hearing at this stage and were I to agree with the submissions made by Ms Fottrell, the mother is very likely to feel a great sense of injustice and she would probably choose to challenge a decision. It is much better that the right decision is made in a proper hearing where all parties are present and all parties are represented.

7. I am looking, among other things, at paragraph 22 where the letter from the Lord Chief Justice, Master of the Rolls and the President of the Family Division dated 9 April of this year is quoted and I am looking at sub paragraph (g):

"In all other cases where the parents and the lay witnesses etc. are to be called, the case is unlikely to be suitable for remote hearing".

On further consideration of that matter, I do not think that on Monday I gave sufficient weight to that element of the original guidance. Obviously I have been listening to the submissions of all parties and giving this case considerable thought from Monday to now. That thought has been informed by reading *Re P* and trying to consider how best to balance the competing interests of everyone who is concerned in this final hearing.

8. I am aware that [the psychologist] has been available today to give evidence. I had hoped to hear his evidence today, which would have (a) started the case and (b) avoided the expense of obtaining his attendance on another date. But I have been persuaded that the hearing needs to be heard altogether over three days, with [the psychologist] giving evidence on the first date. I have been assured and indeed "promised" that time will be made available for this case as soon as the lockdown provisions are set aside. Currently, the best estimate of that is three weeks from last Monday (20th April). But it is perfectly foreseeable and, in my judgement, more likely than not that there will be a further three-week period after that. Accordingly, I would like parties to agree dates for three days that they can manage in the weeks commencing three weeks and six weeks from 20 April.

9. I remain concerned that the matter is dealt with as quickly as possible but, in my judgement now, in order to give effect to paragraph 24 of *Re P* and to do justice to all the competing interests, it would not be appropriate to have that hearing now and in this fashion. I say this, being very well aware that the solicitors instructed by the father have gone to great lengths to make this hearing work but my view is now that the case must happen in a proper court with the attendance of all parties. I should say that in the event that [the psychologist] needs to give evidence by video link that would not be a problem because that is very normal in regular court hearings. It is in Q's interest that a just hearing is had for all parties and caution prevails that it would not be right to proceed now."

15. Before moving on, I wish to observe that both of the ex tempore judgments that are in focus in this appeal are models of clarity and form for which the deputy district judge should be praised.

The Father's Appeal

16. In presenting the father's appeal, Miss Fottrell relies upon four grounds of appeal which can be summarised as:

    i) The judge misapplied the judgment in *Re P*;

    ii) There had been no material change in the circumstances between the two hearings and, insofar as the judge relied upon matters referred to in the father's Position Statement these arose from evidence that was already before the court on 20 April and, further, the judge did not raise this issue with the parties in order for it to be dealt with in submissions;

    iii) Insufficient weight was afforded to Q's welfare; and

    iv) Insufficient regard was given to the overriding objective in Family Procedure Rules 2010, r 1.1.

17. Orally, Miss Fottrell submitted that the judge had been correct on 20 April in holding that it was necessary to proceed and that the proposed remote hearing procedure would be fair to all the parties. Whilst Miss Fottrell accepted that it was open to the judge to review her decision and come to a different conclusion at the later hearing, there was no basis for doing so as nothing had changed over the course of those two days to justify the judge moving from the position of being 'certain' on 20 April that it was right to proceed with the hearing.

18. In her judgment of 22 April, the judge referred to having been in contact with HHJ Tolson. With the agreement of both of those judges, the court and counsel have seen the text of the judicial emails passing between them on 20, 21 and 23 April. Nothing in those emails is relied upon as either being improper or indicating that any pressure was put upon the judge to change her mind on the question of a remote hearing in this case. It is, however, of note that in an email on 23 April, the day after her decision to adjourn the case the deputy district judge wrote to HHJ Tolson:

> "Good morning. Further to our telephone conversation yesterday morning where I indicated to you that I had received the PS [position statement] from Ms Fottrell QC on behalf of the father and re[a]ding this was leading me to reconsider my decision about not adjourning this case I heard full submissions yesterday morning and gave a short judgment at 2.00 pm where I explained that I had changed my mind and why."

19. Miss Fottrell accepts that, in terms of new material, her Position Statement for the final hearing was only submitted on 21 April and was not before the court on the previous day. Whilst the document is clearly based upon evidence that was already before the court, it is right to observe that it sets out a substantial list of detailed criticisms of the mother's care of Q and includes the following roll-up summary:

> "In tandem with these concerning behaviour patterns M has continued to have real difficulties in her own parenting. There is a stark contrast between [Q]'s life with M and with F. Schooling, feeding, imposing boundaries, hobbies and activities are markedly different between the two homes."

My understanding is that matters of this nature had not been the subject of the fact-finding judgment. It is also right to note that the father had made it plain to the court that there was to be no cross-examination of the mother at the final hearing by his counsel. The impact of this factor on the judge is explained in paragraph 4 [22 April]:

> "But what is different, is my further consideration of the impact on the mother of any possible change to arrangements. The evidence which I must hear, it has been correctly stated by all parties, is that of [the psychologist] and the guardian but I must hear from the mother and I will of course hear from the father if he wishes to give evidence. It is absolutely correct to say that this is not a fact-finding decision but there are stark matters said on behalf of the father about the mother's care of Q which came clearly to me from the position statement prepared on the father's behalf and I will have to give proper consideration to what the mother has to say about her care of the child and her capacity to engage with professionals and with what Miss Fottrell describes as Q's lived experience."

And later at paragraph 6:

> "If I was to continue to hear the final hearing at this stage and were I to agree with the submissions made by Ms Fottrell, the mother is very likely to feel a great sense of injustice and she would probably choose to challenge a decision. It is much better that the right decision is made in a proper hearing where all parties are present and all parties are represented."

20. As the outcome of this appeal is for the case to go back to the deputy district judge to be re-determined, I will deliberately say nothing about the underlying merits of any concern that the judge may have had about these matters being raised in this manner in the father's Position Statement and how the court might or might not be able to accommodate them fairly in a remote hearing. The point made on appeal is purely one of fairness and process. The judge plainly regarded at least part of the father's Position Statement as containing material that significantly altered the situation so as to justify, alongside other matters, changing her view on whether the remote hearing should proceed, yet she did not canvas this issue with counsel at any stage during submissions prior to giving judgment (when the point was referred to for the first time). Miss Fottrell's submission is that for the court to approach the issue in this way was neither a fair nor proper process and, she submits, it led the judge into error in that, by not grounding the issue by consideration during submissions, the judge came to an erroneous conclusion on the point.

21. The second principal element of the father's challenge on appeal relates to the judge's approach to Q's welfare and its impact upon the decision to proceed with a remote hearing. In her judgment on 20 April, the judge had stated:

> "There needs to be finality for Q, she has been the subject of litigation for a considerable period of her life. She is displaying evidence of emotional harm as a consequence and this needs to come to an end."

Yet in the judgment on 22 April a different approach was taken to the same issue:

> "Currently, Q's welfare is being maintained on a very even-handed basis which has been brought about by the problems of lockdown under the coronavirus pandemic and that means that Q spends one week with her father and one week with her mother. This is a situation that has now pertained for approximately four weeks and until this matter can come back to be heard properly, it is fundamental that this arrangement continues even if schools open before the case can be returned to court."

22. Both Miss Fottrell and Miss Catherine Jenkins, for the guardian in support of the appeal, have drawn attention to the evidence relating to emotional harm to Q. At paragraph 16 of the Guardian's final report, under the heading 'Professional Judgment', the following is stated:

> "16. Q is a child who, in my view has undoubtedly suffered significant emotional harm. The extent to which she is able to effectively move on from this harm is contingent upon the parenting she will receive onwards, and how effectively she can be supported to avoid internalising feelings of blame and shame, which may result in more lasting damage for her.
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> 17. Ultimately, I find the conclusions of [the psychologist's] report paint a concerning picture for Q's future emotional wellbeing. In order to recover and move forward, Q requires an environment which provides her with stability and the ability to make sense of what has happened to her in a nurturing, safe, open space. I feel that [the psychologist's] conclusions about [mother], and the lack of progress on the CIN plan mean that such an environment may simply not available to Q whilst living with her mother."

23. On the basis of the psychologist's report which, whilst not directly concluding that Q has suffered emotional harm, recommends a change of residence to the father's home, and on the basis of the Guardian's opinion and the judge's own conclusion of 20 April, both Miss Fottrell and Miss Jenkins submit that the judge made a significant error at paragraph 3 of her judgment of 22 April in holding that Q's welfare is currently being maintained by the shared care arrangement and that it is fundamental that that arrangement should continue.

24. Finally, with respect to *Re P*, Miss Fottrell submits that that decision has had a chilling effect and that the judge placed undue weight upon it in the present case. Neither the guidance that has been issued, nor the decision in *Re P*, establish a veto to the holding of a remote hearing where a parent objects, or expert evidence is to be called.

25. Miss Fottrell makes a plea for consistency of approach across the system. She submits that the judge was correct in her analysis and her decision on 20 April and that the appeal against the 22 April order must be allowed.

26. The appeal is supported by Miss Jenkins, who, in addition to the key point on Q's welfare referred to above, confirmed that any concern that the judge may have had arising from the father's Position Statement did not surface during the hearing and, in particular, the judge did not ask for the Guardian's opinion on that matter. Although this will be a three-day hearing where each parent is to be represented by leading

counsel, Miss Jenkins categorised it as a 'simple short contested case' of the type referred to the President's Guidance issued on 19th March. Finally, Miss Jenkins repeated the call for there to be far greater consistency across the system on the issue of remote hearings.

27. For the mother, Mr Kingerley opposed the appeal. He submitted that the judge had a continuing duty to keep the overall conduct of the hearing under review and that she had acted properly in doing so on 22 April. A case management decision of this nature is one over which a trial judge enjoys a wide margin of discretion and it is not possible to hold that the judge was wrong in changing her decision on the issue.

28. On the discrete point now raised about whether the father's Position Statement was referred to during submissions, Mr Kingerley confirmed that this was not raised during the hearing and that the specific points that are adumbrated within the Position Statement were all contained in evidence that was already before the court and, in that sense, the document did not contain new material.

29. All counsel also informed the court that the judge did not raise the prospect for the court to hear the case with all parties attending for a normal face-to-face hearing (a facility which is now available in four courtrooms at the Central Family Court) or for the court at least to hear live evidence from the parents at a 'hybrid' hearing.

Discussion

30. Despite the clarity of the deputy district judge's judgments and the obvious care and thought that she brought to bear on these difficult decisions, I have been persuaded that she fell into error with respect to the two matters which are at the centre of this appeal relating to the father's Position Statement and approach to Q's welfare.

31. It is common ground that the Position Statement did not contain any new material and that the father's forensic position for the final hearing remained that his counsel would not seek to cross-examine the mother. It is clear both from her judgment and from her subsequent email to HHJ Tolson that the judge considered that the way that the case for the father was now being put would, or at least might, entail hearing 'what the mother has to say about her care of the child' and that, were she 'to agree with the submissions made by Ms Fottrell, the mother is very likely to feel a great sense of injustice and would probably choose to challenge a decision.' This was a factor which was plainly influential in the judge's decision to change her mind. It is relatively clear that the judge's understanding was that these allegations would lead to a need to hear oral evidence about them from the mother, yet she also knew that the father did not anticipate cross-examining her upon them. In the circumstances, the judge's failure to raise the issue that was in her mind and bottom it out through submissions, rather than raising it for the first time in her judgment, was a material error in the fair conduct of the proceedings. The appeal therefore succeeds on that basis.

32. I also consider that the criticism of the judge's approach to the issue of Q's welfare on 22 April is well made. It is difficult to reconcile the approach to welfare on 20 April, which, in part, was the justification for proceeding to hold an immediate hearing conducted remotely on the basis that the child needed finality and the potential for emotional harm must come to an end, with the approach taken on 22 April which was that Q's welfare was currently being maintained by the present arrangements. The

judge, on 22 April, does not refer to the Guardian's opposition to the adjournment or to her professional judgment that Q had 'undoubtedly suffered significant emotional harm' and needed to move from her mother's primary care. No explanation is given for the apparent judicial change of approach to the issue of welfare. In the circumstances it is apparent that the judge was in error, as submitted by Miss Fottrell and Miss Jenkins, in her approach to welfare on 22 April. The appeal therefore succeeds on that basis also.

33. On the issue of remote hearings more generally, and the interpretation of *Re P* in particular, I propose to say little in this judgment. Ironically, although the case has come before me primarily because it was thought that the judge may have fallen into error in her application of *Re P*, it is clear that she did not do so. The decision in *Re P* is expressly tied to the small number of cases in which allegations of Factitious or Induced Illness ['FII'] are made. Paragraph 24 in *Re P* is of more general, obiter, application and the judge was correct in referring to it.

34. At present, in accordance with the Guidance that has been issued and the decisions handed down last week in the Court of Appeal in the cases of *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583 and *Re B (Children) (Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584, each judge or magistrate must consider the individual case before the court and determine whether or not it should proceed remotely in whole or in part. It is to be accepted that a consequence of this approach is that different courts may take a different view on similar cases and that this may inevitably give rise to some inconsistency from court to court, or even from judge to judge. The Family Justice Observatory's speedy research into remote hearings in the Family Court will inform a review of the current situation and indicate whether the present guidance needs to be revised. It is not therefore the place to add to the learning on remote hearings in this judgment. The decision in the present case should be seen as an ordinary appeal, where the issue happens to be a remote hearing, but where the appeal has turned upon a failure of process and an error in approaching the issue of welfare.

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