Neutral Citation Number: [2017] EWHC 3358 (Fam)

Case No: 2017/0136

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**
**IN THE MATTER OF THE CHILDREN ACT 1989**
**AND IN THE MATTER OF A SENIOR COURTS ACT 1981**
**AND IN THE MATTER OF B (A Child) (13th April 2013)**
**ON APPEAL FROM THE CENTRAL FAMILY COURT**
**& AN ORDER DATED 9TH AUGUST 2017**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2017

**Before**:

**MS JUSTICE RUSSELL**

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**Between:**

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|---|---|
| **F** | **Applicant** |
| **- and -** | |
| **H** | **1st Respondent** |
| **and** | |
| **B** | **2nd Respondent** |
| **(by her guardian)** | |

**Judith Murray** (instructed by **Levison Meltzer Piggott**) for the **Appellant**
**Alexander Laing** (instructed by **direct access**) for the **1st Respondent**
**Barbara Hopkin** (solicitor for the child) for the **2nd Respondent**
(by her guardian)

Hearing date: 13th November 2017

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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.

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**The Honourable Ms Justice Russell :**

## Introduction

1. On 9th August 2017, at the Central Family Court in London, an order was made concerning B, a little girl of just over four and a half. This order is the subject of an appeal brought by her father (the Appellant). The order was made on an application by the child's guardian in respect of applications by both parents for child arrangement orders (CAO) that the child should have direct contact with her mother (the 1st Respondent), supervised by the guardian, after a break of almost 2 years following the child's abduction to Israel by the 1st Respondent in late August 2015. This is an unusually fraught and difficult case with a distressing and unhappy history. It is necessary to set that history out in some detail so that the both the order of the court and this appeal can be seen in context.

## Background and history

2. B and the Appellant (her father) now live at a confidential address (known to the court) following proceedings in the Family Court which led to B's being placed in her father's care, after which her mother (the 1st Respondent) abducted the child taking her to Israel. B had originally lived with the 1st Respondent after her parents finally separated (having previously separated temporarily within days of the birth) in September 2013 some five months after she was born on 13th April 2013. B spent time with her father but the 1st Respondent made persistent and unsubstantiated allegations that B had been sexually abused by her father, taking her to be medically examined on numerous occasions. The 1st Respondent involved the police and local authority social services. No evidence was found to support the repeated allegations of the 1st Respondent; the police took no further action and social services concluded in their s47 Children Act (CA )1989 report that there was no role for social services.

3. Throughout 2013 the Appellant's solicitors made efforts to negotiate a contact agreement and he was able to see B in November 2013 but the 1st Respondent remained present and involved the nanny. Notwithstanding the conclusions of the police and social services, that there was no evidence of abuse, the Appellant offered to have the nanny present during contact and a nurse to change B's nappies to avoid further allegations being made.

4. In December 2013, the Appellant applied for a shared residence and Prohibited Steps Orders (forbidding B's removal from the jurisdiction) under the CA 1989. The case first came before a district judge on 17th February 2014; by this time the Appellant had decided to have a nanny present at all times to avoid further allegations. Nonetheless the case came back before the district judge on 19th March 2014 as the Appellant restored the matter as 1st Respondent was not complying with the earlier directions of the court. Her applications to reduce contact and for permission to remove B from jurisdiction were refused.

5. On 17th June 2014 the report of Anna Gupta, an Independent social worker (ISW) was filed with the court recommending *"a Child Arrangements Order with Shared Residence"*. Amongst other observations the 1st Respondent was described as *"controlling and critical"* of the Appellant and the nanny; he was described as *"devoted to [B]and committed to maintaining a consistent and enduring relationship"*.

The 1st Respondent would not accept F's proposal that any court order should include a recital that B is safe and happy in her father's care. In July 2014, prior to the trial, the 1st Respondent emailed the nanny employed by the Appellant to set up a meeting without the Appellant being present so that the 1st Respondent could impart "the truth so you can protect B" and denigrating the 1st Respondent.

6. The trial took place on 14th July 2014 with the ISW in attendance; it concluded with a consent order made by Her Honour Laura Harris (the judge) on 15th July 2014. This very experienced and highly competent family judge has continued to have conduct of this case providing judicial continuity and a comprehensive knowledge of these proceedings.

7. Within days, on 21st July 2014, the 1st Respondent took B for another medical examination and made further allegation about the Appellant. The resulting examination was recorded as normal with nappy rash. A sample was take from the infant's throat. The examining physician wrote (to another doctor) that on inspection B *"appeared healthy and normal"* but that the 1st Respondent complained that the father may be a paedophile. Again, on 6th August 2014, this time while in France the 1st Respondent took B for a developmental check which included a genital examination, with no evidence of abuse.

8. On 22nd August 2014 there was a scene, during which the police were called, when the Appellant tried to drive off with B for contact to take place. B was reported to have been very distressed. On 27th August 2014 the 1st Respondent, again, took B to a doctor for an intimate physical examination. She took B to a different doctor to be examined two days later on 29th August 2014. A letter from one of the doctors [Dr B] dated 30th August 2014 reported very mild redness and normal behaviour. B had not been with her father since 21st July 2014. B was referred for blood test. On 1st September 2014, the 1st Respondent called social services and made allegations of sexual abuse against the Appellant. A social worker contacted Dr B on 14th September 2014 and recorded that the doctor did not find anything suspicious on examination and that the doctor's concerns were based solely on what she had been told by the 1st Respondent. The other doctor [Dr E] emailed social services on 18th September 2014 setting out that there had been no objective signs of sexual abuse and that what had been observed were *"a type of lesion that is frequently found in infants, and cannot be a formal argument of sexual abuse..."*.

9. The case returned to court on 9th and 23rd September 2014 when the Appellant was made aware of the sexual abuse allegations. The judge required that the 1st Respondent did not take the child for any further intimate examinations except in an emergency. She then started to take B to A & E; it was recorded on 4th December 2014 that by that occasion there had been nine previous attendances. The 1st Respondent complained of rashes on B; none were recorded. In the meanwhile, the 1st Respondent continued to take B to the GP with numerous other complaints. The infant child was tested for STD; the results were negative. B, who was now 19 months old, was found to be deficient in iron and not gaining weight because she was not adequately weaned and was still primarily fed on breast milk. The judge later found in her judgment of 24th February 2015 that the 1st Respondent had use breast-feeding as an argument against contact taking place.

10. The 1st Respondent returned the matter to court with allegations of sexual abuse; and on 30th October 2014 the judge warned her about the effect of not allowing B to see her father. The s47 report, prepared by the local authority pursuant to the CA 1989, was filed on 7th November 2014. The 1st respondent continued to present B at the GP's for examination for poor eating and "abnormal behaviour". She emailed the Health Visitor complaining that B had returned from contact with a strange rash on her vagina. She complained that B's eating and growth had been compromised by seeing her father. On 4th December 2014, the 1st Respondent took B to the GP, again, complaining of a rash over her genital area leading to the attendance at A & E referred to above, at which no rash was recorded.

11. On 16th December 2014 before District Judge Hess the 1st Respondent confirmed that she considered the Appellant to be a risk to B and wanted contact to be supervised. The trial took place before Her Honour Judge Harris on 9th to 12th February 2015; judgement was given on 24th February in which the judge concluded that there was no evidence that the Appellant had abused B and that he was able to meet B's emotional and physical need. The judge found that the 1st Respondent was a very manipulative, possessive, over-anxious and over-protective parent who had irrational and distorted perceptions of the Appellant as a father. The judge accepted the professional evidence that the 1st Respondent was B's primary carer and should remain in her mother's care. There was PSO forbidding the 1st Respondent from removing B from the jurisdiction (for anticipated holidays in France) and from taking the child for any medical appointment that was not agreed by both parents. The 1st Respondent was warned that if the contact regime ordered did not take place B could be moved to live with her father. Breast feeding was to cease overnight by September to allow overnight contact to take place.

12. After the judgment was handed down there continued to be difficulties over contact and further court hearings. In the summer of 2015, in breach of court orders, without the consent of the Appellant and without his knowledge the 1st Respondent fled to Israel with B. She was subsequently charged and convicted of child abduction. The following (paragraphs 13 to 19 below) are matters referred to in papers and the second judgment of the court dated 2nd September 2016, some of which have not been the subject of the court's adjudication but are, nonetheless matters which have been brought to the court's attention and remain outstanding matter of concern.

13. According to the Appellant, the 1st Respondent refused to allow contact to take place on 14th and 22nd March 2015. On 24th March 2015, having cancelled the appointment with the GP she took B to see Dr Markiewitz despite the Appellant's explicit refusal of consent. B had no contact with her father on 11th April 2015 (the weekend of her second birthday). In May 2015, the allegations of sexual abuse re-emerge; on 8th May the 1st Respondent emails the Appellant saying she had found cuts on B's genitals. Once again, the child underwent an intimate medical examination in A & E as a result of further allegations from the 1st Respondent.

14. On the 6th and 7th June 2015 B's contact with the Appellant was suspended because of new allegations made by the 1st Respondent. On the 8th B was subjected to a further unnecessary medical examination by Dr W following complaints made by the 1st Respondent to a support worker at JWA. She had also told a social worker that B had been having night terrors and had been in severe pain in her genitalia. M dissatisfied

with examination and seeks examination of hymen. On 2nd July 2015 B the local authority considered and found B to be "child in need".

15. On 1st July, the 1st Respondent took B on holiday until 12th July 2017 and, according to the Appellant, she refused to provide any contact information which would have been contrary to the provisions of the court order. On the 14th July, Her Honour Judge Harris refused the Appellant's application for a passport order. The 1st Respondent failed to attend for a legal conference with her counsel on 24th August 2015. Neither the Appellant or his solicitor or the court was made aware of this despite the applications that had been made to the court and the orders made by the court forbidding the 1st Respondent from removing B from the jurisdiction. On 26th August 2015, the 1st Respondent failed to bring B for contact. A location order is made by Mr Justice Newton sitting in the Royal Courts of Justice. B was made a ward of court.

16. Following this, and as B had not had contact with her father, and although her whereabouts were unknown, the judge made an order on 1st September 2015 that was to B live with the Appellant immediately. The 1st Respondent and B were located in Israel where, on 4th September 2015, she complained to the Israeli police that the Appellant was a child abuser who will be coming to Israel to remove her daughter. The Appellant applied to the Israeli Family Court on 7th September 2017 for B's return of B to England under the jurisdiction of the High Court and was granted temporary custody. The Israeli police have themselves made orders and B was classed as a child in danger. Mr Justice McDonald made a series of disclosure orders on 15th and 29th September 2015. B was located in Netanya in Israel and was placed in the care of the Appellant.

17. On 7th October, there was a hearing in the Israeli Family Court in relation to the Appellant's application in front of Mrs Justice Rakover, at which according to the Appellant, the 1st Respondent told the court that he was a paedophile; despite her allegations, her applications to have B returned to her and for a temporary custody order were refused. At the Royal Courts of Justice, on 8th October 2015 Mr Justice McDonald ordered B's return to the jurisdiction. On 14th October 2015, there was a further hearing in the Israeli Family Court in front of Mrs Justice Rakover at which the 1st Respondent admitted the abduction of B; she sought to argue that the English court had not examined her allegations in depth and applied for the appointment of an expert to examine allegations of abuse. Mrs Justice Rakover gave her judgment on 22nd October in which she found that the 1st Respondent's allegations were baseless and that her conduct was tainted by a lack of good faith. B's return to this jurisdiction was ordered to take place with the utmost urgency; she returned to England with her father on 22nd October 2015 and has remained living with him since (for the past two years).

18. On his return, the Appellant has complained that he was visited by the police on 25th October 2015 following an anonymous 999 call in which it was alleged that he was had had or was having B's genitals cut. The child (then two and a half) was interviewed and said her father had hit her in the face, and on her body. According to the Appellant the police had said that B appeared to have been conditioned to say these things that she did; no action was taken by the police.

19. The 1st Respondent applied for an urgent directions hearing, but in the meanwhile she had posted a petition online and on Facebook including the name and a photo of B, in

which she named the Appellant as an abuser and made various allegations against the judge, the ISW and the police. On 8th November 2015, her sister posted comments online; as a result, Mr Justice Moor granted an injunction against the 1st Respondent on 10th November 2017 to remove the online and Facebook posts. It is said by the Appellant that this order was not complied with by the 1st Respondent.

20. In November 2015, the 1st Respondent made an application for contact with B. On 14th December 2015, while B was removed from the child protection plan and made the subject of a child in need plan, the local authority considered that the risk of re-abduction remained high, that B was to be protected from malicious allegations and there are concerns for future contact between B and the 1st respondent without thorough assessments [my emphasis]. Concerns were raised regarding possibility of fabricated or induced illness by the 1st Respondent. It was noted this risk must be made known to the court at any future hearing. It was recorded that the 1st Respondent posed a serious risk of disrupting B's stability in her father's care. The Appellant has complained that on 28th December 2015 Police attended the Appellants home following an anonymous call to Childline that B was being sexually abused, and that on 10th and 13th January 2016 the 1st Respondent sent abusive and threatening emails to the Appellant.

21. The 1st Respondent herself returned to England on 29th January 2016. A direction hearing before the judge took place on 29th February 2016; at which (to quote from paragraph 7 of her judgement of 2nd September 2016) the judge was so concerned about the 1st Respondent's behaviour that she considered it necessary for the 1st Respondent to be psychiatrically assessed and made a direction to that effect, including directions for the identification and instruction of the expert; as will be seen below the 1st Respondent did not comply with that direction until the summer of 2017. There remained outstanding difficulties in respect of B's passports and a without notice application was made in the High Court by the Appellant to safeguard B; Mr Justice Mostyn made a Port Alert on 16th March 2016.

22. The order which required the 1st Respondent to undergo a psychiatric assessment prior to any resumption of contact between B and her mother remained in place and, in April 2016, the court nominates Dr Van Velsen to undertake psychiatric assessment. In anticipation of the psychiatric report, there was a further dispute resolution hearing before the judge on 25th May 2016 at which the 1st Respondent was in person. She had, while claiming not to be able to afford the costs of the expert report, spent money on an unauthorised report from Dr Beider (rejected by the court). There was still no psychiatric assessment from the court appointed expert and the 1st Respondent was refusing to be assessed (as the judge put it *"reneging on what she had previously agreed to"*). The judge put the case back and when the 1st Respondent returned to court she reluctantly agreed to the assessment, when the judge, as she said in paragraph 10 of her September 2016 judgement, made it clear that it was her only route to seeing B. Notwithstanding the court order, on 11th June 2016, the 1st Respondent failed to attend an appointment with Dr Van Velsen.

23. The Appellant issued applications in July 2016 to dismiss the 1st Respondent's application, and later, in August 2016, for injunctive relief when, it is alleged that the 1st Respondent has gone to his property and been seen rummaging through rubbish bins and following B and her carer at a distance. An injunction was granted. The judge listed the case for hearing, of the court's own motion in September 2016 (the

judgement of 2nd September 2016 refers) at which the judge did not dismiss the 1st Respondent's application but allowed her a further opportunity to be psychiatrically assessed. The judge said at *"the court cannot envisage a situation whereby it could be considering looking at direct contact again other than where she has received extensive psychological therapeutic help."* The decision of the judge in respect of the need for the 1st Respondent to receive treatment prior to contact taking place or to any reintroduction of her mother was based on the welfare of B and the evidence of the 1st Respondent's behaviour. It was wholly justified.

24. The court ordered that the 1st respondent attend an appointment with Dr Van Velsen, the Court appointed psychiatrist, but as the doctor had informed the court, she no longer had the capacity to deal with the case and suggested another psychiatrist as a replacement. The judge had made directions for the instruction of an alternative expert.

25. On August 3rd, 2016, the 1st Respondent attended Wimbledon Magistrates' Court in respect of a criminal charge of child abduction; she is bailed until 30th August 2016 when she is to attend at Kingston Crown Court for a PHMH on 21st August to enter her plea. The criminal case is listed again at Kingston Crown Court on 21st January 2017 the 1st Respondent had sought to run a defence of "duress of circumstance or necessity" but on being advised this was not an available defence she had entered a guilty plea; she submitted in mitigation a unilaterally obtained psychiatric report of Dr Beider (who had not seen to the Family Court papers and had been rejected by the court as a suitable expert witness).

26. The judge had indicated that she was prepared to authorise disclosure of her Judgment to the Judge at the Kingston Crown Court, and that if the 1st Respondent objected she would be required to make her objections known. On 25th January 2016, the judge ordered her judgment may be released to the sentencing judge. The 1st Respondent received a four-month sentence, suspended for six months on 27th January 2017. The Crown Court did not have sight of the judgement of 2nd September 2016 because the 1st Respondent denied that she had received the chain of email correspondence between the Appellant's solicitors and the judge regarding disclosure of the judgment and the Crown Court was not in a position to adjudicate on that issue.

27. Despite the criminal charge and conviction, the 1st Respondent made further allegations this time to the NSPCC and on 30th September 2016 two police officers attended at the Appellant's address. The Appellant's solicitors supplied a further CV from a different psychiatric expert. In November 2016, the 1st Respondent demanded details of B's GP and nursery (which were appropriately withheld from her following the abduction) and was told by the judge that if she wishes to have this information she is required to make an application to the court.

28. There was no psychiatric assessment of the 1st Respondent so that on the 20th March 2017 when there is a further hearing before the judge this issue remained outstanding as the reports ordered by the court on 29th February 2016 and 25th May 2016 have not been produced. In March 2017, the Court again "made it clear" that this is 1st Respondent's last opportunity to cooperate with a psychiatric assessment and she did not attend the next appointment arranged for her, her application would be dismissed and a s91(14) (CA) order would be made for a period of two years.

29. Finally, on 25th May 2017 the 1st Respondent was seen by a psychiatrist, Dr Oyebode, who filed a report on 5th June 2017. For reason that are far from clear to this court and to the court below Dr Oyebode conducted his assessment of the 1st Respondent without reading the court documents provided to him, including the judgments; instead he read and relied on the documents given to him by the 1st Respondent and the report of Dr Beider (who had not seen the documents or had access to them at all). Thus, his assessment was partisan, based on the 1st Respondents version of the history of events and on psychiatric evidence obtained outside the family court proceedings and without the permission of the judge.

30. Moreover, not only had Dr Oyebode had not challenged the 1st Respondent on the basis of the court documents or judgement (because he had failed to read them) he also accepted her assertion that the 1st Respondent had made no further allegations since 2014; this was patently untrue as she had made allegations in 2016 and sought to defend the criminal case on the basis of duress and necessity. He neither referred to or considered the 1st Respondent's behaviour which led the court to make non-molestation injunctions against her. In direct contradiction of the judgment of the court he reached the conclusion that the 1st Respondent was a capable mother who had genuine concerns for her daughter's welfare. He suggested that the Appellant undergo psychiatric treatment, having accepted the 1st Respondent's version of events. Quite rightly the judge, at the hearing on the 9th August 2017, described Dr Oyebode's report as offering the court no assistance and as being *"completely flawed"*.

31. At a further hearing before the judge on 21st June 2017 B was joined as a party to the proceedings and on 5th July 2017 Catherine Callaghan (a Cafcass officer) was appointed as her guardian. Ms Callaghan was provided with some limited papers, consisting of parents' last statements and Dr Oyebode's report on 7th July 2017. She met the Appellant and B briefly on 19th July 2017. The guardian spent some two hours with the 1st Respondent on 26th July 2017. She did not receive the court papers, which include the judgments, until 28th July 2017. She could not have been, and was not in, a position to challenge the 1st Respondent's version of events when she met her; and her views at the time would have be based on what she knew then, which included the flawed and inadequate report of Dr Oyebode. The Guardian did not see the parties or the child again. Although she had had sight of the case papers before preparation of her position statement this was not until after she had seen the parties and her meetings with them to place in ignorance of the circumstances of this case.

32. At six o'clock in the evening of 8th August 2017 the guardian's solicitor sent her position statement to parties which included the recommendation that there should be direct supervised contact for the 1st Respondent with B. I shall return to her position below; but she had not prepared any analysis or report for the court, which considered the welfare of the child with reference to the statutory provisions contained in s1 of the CA 1989; nor did she explain to the court what form the contact would take; any details of the explanation of what was to happen, and by whom, would be given to the child. She did not proffer any advice to the court as to what would happen if, on the receipt of competent psychiatric assessment of the 1st Respondent, it was found that the risks to B of further harm was considered to be high, without some prior professional intervention. The judge did not hear any oral evidence.

33. The next day on 9th August 2017 the judge, in what she described as a finely balanced decision, which from her judgment, was a decision based largely on the oral

submissions made on behalf of the guardian, acceded to the application made on the instructions of Ms Callaghan and made an order which provides for direct contact between B and the 1st Respondent supervised by the guardian herself. The judge stayed the order for direct contact until 30th August to allow for the application for permission to appeal to go before the High Court. In her short judgement, the judge set out her reasons for reaching the decision that some supervised contact should go ahead which, as previously observed were based largely, if not wholly, on the guardian's recommendations.

34. The precondition for any reintroduction of contact, which the judge had repeatedly reiterated, was not only that the 1st Respondent's mental health had to be assessed, but also that there should be some treatment with her commenced to avoid repetition of her previous harmful behaviour towards B. Following the oral submission of the guardian (who is not qualified to assess the 1st Respondent's likely psychiatric or psychological response to any reintroduction to B) the judge reversed the decisions she had made previously. The decisions she had previously made were properly based on the evidence before the court that there should be prior assessment and treatment (as set out above) there was no evidence before the court which supported a reversal of that decision. Moreover, as a result of the inadequacies of the psychiatric report, on 10th August 2017 an agreed letter of instruction was sent to Dr Datta to carry out a further assessment of the 1st Respondent. This letter, agreed by the parties, contained the instruction that the *"Mother continues to be of the view that [B] is not safe in her father's care."*

35. The Appellant issued a notice of appeal on 16th August 2017 and Mr Justice Keehan made an order the following day (17th) listing the case for an oral hearing for permission to appeal followed by the appeal if permission were to be granted. He ordered that the order of 9th August 2017 would remain stayed pending the appeal hearing. Dr Oyebode filed his addendum psychiatric report on the 1st Respondent on 23rd August 2017. At the beginning of September B started full time school. The 1st Respondent attended appointments with Dr Datta (clinical psychologist) on 11th and 12th September 2017; the Appellant did so on 12th September. The report of Dr Datta dated 15th October 2017 was seen by this court and my attention was drawn to paragraph 3.16 where he said that in his opinion *"in the absence of a cognitive shift, it is highly likely that similar concerns about [B's] welfare will be made by [the 1st Respondent]".* That that opinion was not before the judge and her decision was based on the evidence before her at the time is a matter that I have firmly in mind; and the conclusions reached in this judgment are based on the evidence before the judge in August 2017.

36. On 2nd October 2017, the 1st Respondent applied, in the High Court, to lift the stay; her application was refused by order of Mr Justice Keehan, on 5th October and he also vacated the final hearing before the judge listed on 23rd to 25th October 2017. The appeal was due to be heard on 26th October 2017 but was heard on 14th November 2017 because of lack of judicial time.

## Discussion

37. The history of this case has been set out at some length as it forms the background to the decision the judge made on 9th August 2017. When viewed as a whole the harm caused to this child by her mother was significant. Not only was she found to have

repeatedly subjected to intimate examinations, solely at the behest of her mother, she was prevented from having uninhibited relationship with her father as an infant. On any view, the repeated invasive intimate examination, as found by the judge and set out in her judgment, were in themselves abusive and any long-term effects on B, along with any emotional trauma that may have been at the time, has never been investigated or assessed.

38. The guardian has seen this child on one occasion for a brief period yet she has seen fit to reach conclusions as to the child's resilience and current psychological and emotional status and ability to deal not only with the re-introduction of her mother but also with the possible, if not probable, cessation of contact should that prove to be necessary. There is no analysis of how she reaches these conclusions, no details of her qualifications to do so and no application of the welfare checklist in reaching her conclusions. Consequently, the judge was wrong to rely on them and to effectively reverse her previous decisions on what amounts to flimsy evidence.

39. The emphasis and assumptions of the guardian are apparently based on the need to reintroduce contact with the child's mother. If so this is a misinterpretation of the law; although that the amendments to section 8 of the CA and section 1(2A), introduced by the Children and Families Act 2014 emphasised the presumption that unless the contrary is shown, involvement of a parent in the life of a child will further the child's welfare, this presumption is subject to the requirement that the parent concerned may be involved in the child's life in a way that does not put the child at risk of suffering harm. This case includes findings of abusive behaviour towards B by her mother, which, if repeated would compromise the child's safety and reintroduce the possibility of further harm, both physical and emotional.

40. B is a young and vulnerable child whose first few years of life were blighted by her mother's irrational, abusive and harmful behaviour culminating in an B's unlawful abduction. The courts can and should consider ordering no contact when the child's welfare and safety demand it; the Court of Appeal in *Re J-M (A Child)* [2014] EWCA Civ 434 at paragraphs [23]- [25] which set out some guidance where the Court is considering making an order for no direct contact as follows:

    i) *"The welfare of the child is paramount;*

    ii) *It is almost always in the interests of a child whose parents are separated that he or she should have contact with the parent with whom he or she is not living;*

    iii) *There is a positive obligation on the State and therefore on the judge to take measures to promote contact, grappling with all available alternatives and taking all necessary steps that can reasonably be demanded, before abandoning hope of achieving contact;*

    iv) *Excessive weight should not be accorded to short term problems and the court should take a medium and long-term view;*

    v) *Contact should be terminated only in exceptional circumstances where there are cogent reasons for doing so, as a last resort, when there is no alternative, and only if contact will be detrimental to the child's welfare."*

41. This is a case in which there are and have been exceptional circumstances which had, rightly, led the judge, who has conducted the case throughout, to decide that contact should be suspended unless and until there had been an independent assessment of the 1st Respondent and professional intervention to ensure that she did not continue or repeat patterns of behaviour which were harmful to this child. Contact has not been terminated, but should the court ultimately decide that the 1st Respondent is unable or unwilling to behave appropriately and that B would be more likely than not to be subjected to the kind of abusive behaviour she had suffered before the court may conclude that there had to be a termination of direct contact.

42. While at the hearing in August 2017, the judge was not considering the ultimate orders that she might make the judge's decision to emphasis "try out" contact to provide the court with evidence for a *"more informed decision when otherwise it would be faced with the situation that it would have no knowledge whatsoever as to how the mother would react to [B], whether she would be able to manage her own highly emotional state and whether she would be able to comply with the boundaries that had been set in place…"* was flawed and failed, without adequate reason, to follow the course the court had previously decided on which was to provide precisely that evidence, without compromising the safety or welfare of the child, and to base the court's final decisions about the reintroduction of contact on the evidence contained in an expert opinion, along with the prior findings of the court; past behaviour being a clear indicator of future conduct.

43. With the greatest of respect to the judge, the decision she reached focussed on the 1st Respondent and not the child, and the evidence she referred to in her short judgment, was precisely the kind of evidence which the psychiatric assessment had been ordered to provide. It pre-empted and, in essence, would seem to prejudge, outstanding evidence about the 1st Respondent's ability to contain herself and behave appropriately during contact; evidence which the court itself had previously considered to be essential before any consideration of the reintroduction of contact.

44. The judge's conclusion that the reintroduction of B to her mother <u>may</u> [my emphasis] provide B with long-term benefits, in knowing that attempts were made to see her mother again were not based on any cogent evidence other than, it has to be said, the superficial opinion of the guardian without reference to the needs and welfare of this particular child in the light of what she has already been through. There was and are no submissions on behalf of the guardian as to why and on what basis she purported to have reached this conclusion on behalf of this child. A child who as, on any view, be subjected to repeated intimate physical intrusion, flight to Israel and had been fed misinformation about her father throughout her infancy. The solicitor for the child has, apparently, acted solely on the instructions of guardian and failed to include any separate analysis of the child's position in her position statement.

45. Such attempts at contact, which the judge herself accepted may prove fruitless or unsuccessful, to assess the mother's reaction, failed to consider adequately, or at all, the ability of B to cope with it, and centred on the 1st Respondent rather than the child herself. *In ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166. Lady Hale (in considering article 3(1) of the UN Convention on the Rights of the Child said that: *"[23] …… In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child*

*shall be a primary consideration. This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children."*

46. In addition, prior to giving her judgment and in the judgment, itself the judge did not consider what form contact should take, other than that it should be fortnightly and supervised by the guardian. The judgment contained no analysis of the venue, frequency, length of the contact sessions or the contents of the "clear contact agreement" that was to be drawn up and signed by the 1st Respondent. The conditions later contained in the order were not the subject of scrutiny prior the decision being taken and were not considered in the judgment, in addition to which they did not, could not, benefit from the professional advice and recommendations of a psychiatrist as had originally been decided by the judge. Although the judge referred twice (at paragraphs 22 and 24) of her judgement to the contact providing evidence and *"meaningful information"* to the court she did not set out how that evidence would assist the court when there was outstanding evidence, which had been ordered by the court itself as a precondition to any contact taking place, in respect of the 1st Respondent's mental health and ability to conduct herself appropriately when B spent time with her; all the evidence before the court had led to a conclusion that she would cause further harm and distress to the child without such intervention.

## Conclusions

47. While it is understandable that the judge acceded to the guardian's application, it is the decision of this court that she was wrong to do so. The guardian was quite simply not qualified or equipped to reach the conclusions that she did in respect of this child's psychological and emotional resilience. She was even less qualified to assess the 1st Respondent's to mental state and her ability to conduct herself appropriately when B spent time with her. She had carried out anything other than a cursory consideration of the history, evidence and court documents before she briefly met the child with her father; little wonder failed adequately to explain the basis of her conclusions.

48. In a case such as this with a protracted, complex and convoluted history it is incumbent on the professionals who are called on to proffer advice and recommendations to the court, be they Cafcass officers or others concerned with child welfare, to fully inform themselves about the case and, at the very least, read through the judgments before they commence their investigations. Nor should they consider experimenting or trying out with contact for the child or children concerned against a background of previous harmful behaviour and abduction; in this case the guardian even accepted that contact may prove to be unsuccessful and be terminated or suspended again. Any contact that took place would have provided little or no useful evidence for the court as the guardian is unqualified properly to assess this mother's ability to deal with and contain her behaviour. For that reason, and for those set out above this appeal will be allowed.

49. The appeal is allowed; the order of 9th August 2017 in respect of contact is set aside.