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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND FAMILY DIVISION

IN THE MATTER OF THE CHILDREN (NORTHERN IRELAND) ORDER 1995

Between:

AU

Appellant

and

BELFAST HEALTH AND SOCIAL CARE TRUST

Respondent

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AU appeared as a Litigant in Person
Ms S Simpson KC with Mr E Cleland (instructed by the Directorate of Legal Services) for the Respondent
Ms J Hannigan KC and Ms V Ross (instructed by Donnelly & Wall, Solicitors) for the Children's Court Guardian

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Before: Keegan LCJ and McFarland J

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KEEGAN LCJ (*delivering the judgment of the court*)

Nothing must be published which would identify the appellant or the children. The identities of the appellant and the children have been anonymised to protect the identity of the children. This court will use the randomly chosen ciphers AU which represent the appellant and AP the mother of the children as the judge at first instance did. The children will also be referred to as F and M as at first instance.

Introduction

[1] This is an appeal from a decision of Mr Justice Rooney ("the judge") given on 27 October 2023 suspending direct contact between the two children F and M and their father AU.

[2] As will be apparent this case has an international element. It has always had that element given that AU is a British citizen but living in Melbourne, Australia. The children are Filipino and Australian citizens. AU has another child, T, who lives in Australia with her grandfather although we are told that she has just been removed into care. All three children were conceived through surrogacy. There is quite a background in this case which has been set out by the judge in relation to the interaction of Melbourne Social Services, Border Control at Sydney Airport, Irish Social Services, the Garda Siochána ("The Guards") and the Police Service of Northern Ireland ("PSNI").

[3] We do not, for the purposes of this appeal, dwell unduly on the history of the case as we are concerned with an interim decision whether the judge was wrong to suspend contact. Suffice to say that it appears clear that on 5 February 2023 AU left Australia with the twins. On 7 February 2023, an alert was issued at the National Operation State Service Centre to inform Child Protection when AU returns to Melbourne. This much is not controversial. It also appears common case that on leaving Australia, AU travelled with the children to Malaysia and Thailand. He then flew to Dubai on 26 June 2023 and remained there until 9 August 2023. On 10 August 2023, he flew to Italy, then took a train to Paris and arrived in Rosslare in the Republic of Ireland on 13 August 2023.

[4] There was interaction with the Guards and social services in Waterford which resulted in AU obtaining hotel accommodation. We note that the records from the Republic of Ireland did not highlight an acute concern leading to a removal into care. However, AU left the Republic of Ireland after a short time and arrived in Belfast on 18 August 2023. The family were placed in Grosvenor Road Hostel and several days after that there was a referral made due to issues of neglect.

[5] Thereafter AU was arrested by police for child cruelty and the children were placed in care under a police protection order. An emergency protection order was granted by the court on 25 August 2023. An interim care order was made on 29 August 2023 and proceedings thereafter have been before the High Court. There is, in fact, no issue with the making of the interim care order on the basis that there were reasonable grounds to believe that the children were or were likely to suffer significant harm and the likelihood of harm is attributable to the care given to the children or likely to be given to the children if the orders were not made, not being what it would be reasonable to expect a parent to give to the children. As we have said, no issue has been made in this appeal or at first instance with the making of the interim care orders, the issue is simply whether direct contact should have been suspended.

[6] The preamble to this was that a social work meeting between the Trust staff and AU and his legal representatives took place on 30 August 2023 to discuss contact. Contact subsequently took place five times on 31 August 2023, 1 September 2023, 7 September 2023, 8 September 2023, and 15 September 2023. It has not taken

place since then. The substantive case boils down to whether the interactions between AU and the children at those contacts were so extreme as to meet the legal test for suspension of contact.

The decision at first instance

[7] The reasons for the decision are set out in a comprehensive written judgment of the judge which we have considered. The judge made an order on the following terms:

(i) Authority is given to the Trust to continue to suspend direct contact.

(ii) Progression to indirect contact must be carefully planned and monitored.

(iii) Initial contact will be progressed by way of letter/card from the appellant that includes a brief message that can be shared to both children. The message in the letter/card must be appropriate and must be approved by the social worker prior to being shared with the children.

(iv) The card will be given to the children outside of their placement in a library setting or alternatively a quiet and safe place. The foster carers will transport the children to this venue to help them feel comforted and reassured both before and afterwards. The children will be given the choice to keep the card. Should this be refused, the card should be kept in a memory box.

(v) The said indirect contact will occur on a weekly basis until the case is reviewed on 4 January 2024. At this stage, the court will hear submissions as to whether at least one direct contact session should take place subject to the observation of an independent psychologist.

(vi) The Trust will continue to monitor and assess the children's presentation both during and after this contact.

(vii) The appellant will contact the field social worker once weekly at an agreed time and day to receive an update of the children.

[8] Subsequent to this order we are aware that the first instance court has heard the case again on 21 December 2023 when by consent of all parties a declaration was made that the habitual residence of the children is Australia. The date for review of the hearing was also given as 11 January 2024 and further directions were made for the parties to file additional evidence as to the way forward for a return of the children to Australia.

This appeal

[9] The father appeared as a litigant in person before this court to pursue this appeal. That was notwithstanding the fact that he has continued to have the benefit of senior counsel, Ms Smyth KC, along with junior counsel and a solicitor at the lower court.

[10] The appeal notice contains three core grounds expressed as follows by the appellant:

(i) The Honourable Court erred in that it gave no weight to and did not engage with or make any assessment of video evidence produced by the father demonstrating his interactions with his children.

(ii) The Honourable Court made significant findings of fact including findings greatly prejudicial to the father, which findings were wholly unsupported by evidence as no evidence supporting them had been admitted in evidence. These findings include:

    (a) The mother had lived with the father and children for four months after the father travelled to the Philippines to be with the children.

    (b) The father had made admissions that his daughter was frightened of him and traumatised in his care.

    (c) That the father never fully explained his reason for leaving Australia with his children.

(iii) In its judgment, the Honourable Court erred because it presented as the established history of the case, a long introductory summary of facts of the case highly prejudicial to the father without acknowledging such facts were in dispute and had not been proven. This summary coincided entirely with facts presented by the respondent Trust's submissions and, in fact, appear to be directly lifted from their submissions. However, no acknowledgment was made that the facts were unproven and in dispute and, indeed, that the father had produced evidence disproving elements of the facts as summarised.

[11] During the hearing the appellant described ground (i) above as the strongest argument namely that the judge had not weighed up his video evidence of good interactions between him and the children in assessing whether to suspend contact. The appellant also highlighted matters in the judgment that he said were inaccurate and should not stand as a record against him. Finally, the appellant argued that he had not been afforded a fair hearing and so he maintained that there had been a breach of procedural fairness in this case.

[12] We will deal with the above arguments, but first we begin by stating what the legal principles in play are in a case of this nature.

Legal principles in play

[13] It is settled law that the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement, and co-operation in respect of parental responsibilities and measures for the protection of children ("the 1996 Convention") applies to the care proceedings in respect of these two children. Australia is a contracting state of the 1996 Hague Convention as is the United Kingdom. One of the principal objects of the 1996 Convention is to determine the state whose authorities have jurisdiction to take measures directed to the protection of the person or property. This is found in Article 1 Chapter 1 of the Convention. That is why when this case first came to the Court of Appeal for directions, the court prompted the parties to seek a declaration in relation to habitual residence as that should really have followed at the outset of the case.

[14] As a declaration has now been made that the habitual jurisdiction of M and F is Australia our jurisdiction is only engaged in the application of necessary protective measures under Article 11 of the 1996 Convention pending the Australian courts taking the required measures in relation to these children's welfare.

[15] The case of *London Borough of Hackney v P* [2023] EWCA Civ 1213 discusses the law in this area. This has been discussed recently in a case in our Family Division reported at [2023] NI Fam 21 of *A Grandmother v A Mother in the matter of a female child GE aged four years*. In that case at para [11] McFarland J sets out the requirements drawing on the *London Borough of Hackney v P* case as follows:

> "[11] In an examination of the architecture of the Convention, Moylan LJ set out the following propositions concerning its practical application:
>
> (a) The court should first decide where the child is habitually resident ([94]);
>
> (b) Pending a determination on habitual residence, a court can make orders under Article 11 based on the child's presence in the United Kingdom. Article 11 provides that the state in whose territory a child is present, in all cases of urgency, has jurisdiction to take any necessary measures ([96]);
>
> (c) If the court determines that the child is present in the United Kingdom but habitually resident in a contracting state, then that state has substantive jurisdiction, although if the child has a substantial

connection with the United Kingdom (see Article 8(2)) a request could be made to the state with jurisdiction under Article 9 for authorisation to exercise jurisdiction ([95]);

(d) If the court determines that the child is habitually resident in the United Kingdom then the courts here have substantive jurisdiction ([95]);

(e) If the court determines that the child is habitually resident in a non-contracting state, the Convention does not provide for substantive jurisdiction, and therefore, the court can turn to domestic law as an alternative source of jurisdiction ([105]) but a court might decide to make a summary return order should it consider that it would be more appropriate for proceedings to take place in that non-contracting state ([110]).”

[16] Protective measures may be taken according to the national law of the state in which the children are present in this case pursuant to the Children (Northern Ireland) Order 1995 (“the Children Order”). Article 50 of the Children Order provides for care orders to be made including interim care orders which have the effect of placing children in public care as has happened here. However, in this case the spotlight is not upon Article 50 but rather Article 53 of the Children Order which regulates contact between a parent and children in care. AU is a parent for the purposes of this Order having been confirmed as the father of these children by way of a DNA test.

[17] Article 53 reads as follows:

> “53.— (1) Where a child is in the care of an authority, the authority shall (subject to the provisions of this Article) allow the child reasonable contact with—
>
> (a) his parents.
> …
>
> (4) On an application made by the authority or the child, the court may make an order authorising the authority to refuse to allow contact between the child and any person who is mentioned in sub-paragraphs (a) to (d) of paragraph (1) and named in the order.
> ...

(6) An authority may refuse to allow the contact that would otherwise be required by virtue of paragraph (1) or an order under this Article if—

(a) the authority is satisfied that it is necessary to do so in order to safeguard or promote the child's welfare; and

(b) the refusal—

(i) is decided upon as a matter of urgency; and

(ii) does not last for more than seven days.

(7) An order under this Article may impose such conditions as the court considers appropriate."

[18] As an Article 53 Order is a Part V Order the welfare tests also apply pursuant to Article 3 of the Children Order. The welfare of the child is the paramount consideration, and this is a circumstance mentioned in article 3(4) where the court is considering whether to make, vary or discharge an order under Part V. Therefore, the welfare checklist contained in Article 3(3)(a)-(g) applies. The no order principle also applies pursuant to Article 3(5), the test there being the court shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

[19] There is a useful analysis of how these applications are dealt with provided by Peter Jackson LJ in *Re D-S (Contact with Children in Care: Covid-19)* [2020] EWCA Civ 1031 when he considered the differing roles of the court and the Trust in the application of Article 53 (the equivalent of section 34 of the Children Act 1989). We agree with the following observations which are equally applicable in Northern Ireland:

"[11] The statutory framework surrounding parental contact with a child in care is straightforward:

(1) The local authority is under a duty to allow the child reasonable contact with his parents: CA 1989 s.34(1). It must also endeavour to promote contact between the child and his parents unless it is not reasonably practicable or consistent with his welfare: CA 1989 Sch 2 para. 15(1).

(2) Where an application is made to the court, it may make such an order for contact as it considers appropriate: s.34(3). When doing so, the child's welfare is

> its paramount consideration. It must have regard to the welfare checklist and it must not make any order unless it would be better for the child than making no order at all: CA 1989 s.1(1), (3) and (5).
>
> [12] In the first case, the decision about contact is one for the local authority. In the second case, it is one for the court. The fact that there will be mutual respect between the authority and the court cannot mask this distinction. A parent applying for contact is entitled to expect that the court will form its own view of what contact is appropriate in all the circumstances, however influential the professional view of the local authority may turn out to be.
>
> [13] Once the court has formed its own view, it has a broad discretion as to whether or not to make a contact order. It may well decide, applying the 'no order' principle, not to make an order because its conclusion about what contact is appropriate is broadly equivalent to be contact that is being offered, or, for example, because the making of an order may lead to a loss of flexibility, or because practical considerations make an ideal level of contact unachievable. But the essential point is that the court must reach its own conclusion and ensure that it has the information it needs to do that. It does not defer to the local authority, and the local authority is no more entitled than any other party to the benefit of any doubt."

[20] *Hershman and McFarlane, Children Law and Practice* Vol 1 section C1350 also deals with refusal of contact and within that section states as follows:

> "Such an order should only be made where matters are so exceptional and the risk so severe that contact must be stopped. In the context of ECHR, article 8, severing ties between a child and parent can only be justified in very exceptional circumstances. It is a very drastic thing to interfere with contact between a young mother and her newborn baby; the even more drastic step of denying contact altogether at an interim stage lies 'at the very extremities of the court's powers and extraordinary compelling reasons must be shown to justify a section 34(4) order.'"

[21] Of course, article 8 of the European Convention on Human Rights ("ECHR") also contains a positive obligation to promote family life. The promotion of contact

is part and parcel of that obligation within the family law sphere. Proportionality which is central to the approach of the ECHR requires a reasonable relationship between the means employed with the aim sought to be realised. This requirement is particularly important in child law. One illustration of the point is that plans which propose to achieve the permanent separation of a child from parents must be proportionate to the need for child protection. Similarly, plans for the suspension of contact must be proportionate to the best interests of the child. Otherwise, the positive obligation to promote family life is compromised.

[22] These legal principles are explained in the case of *KA v Finland* [2003] 1 FLR 696. The ECtHR had to consider a claim in respect of breaches of article 8 and held:

> "As the court has reiterated time and again, the taking of a child into public care should normally be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and any measures implementing such care should be consistent with the ultimate aim of reuniting the natural parent and the child. The positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the responsible authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child. … a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed. The minimum to be expected of the authorities is to examine the situation anew from time to time to see whether there has been any improvement in the family's situation. The possibilities of reunification will be progressively diminished and eventually destroyed if the biological parents and the child are not allowed to meet each other at all, or only so rarely that no natural bonding between them is likely to occur."

[23] In determining an appeal from an interim order, an appellate court applies an appropriate degree of restraint in interfering with the discretion of the judge in making interim orders because a judge has heard a case and has carriage of a case which is continuing. However, where the effect of a decision taken at an interim stage is to determine the outcome of the substantive application, we accept that it may be appropriate to appeal. This may particularly be the case during care proceedings when the child's removal under an interim order will seriously prejudice the parents at a final hearing, see *RH (A child) (Interim Care Order)* [2002]

EWCA Civ 1932. This point was reiterated in the matter of *Stefan (A minor) (Appeal: Interim Care Order: Immediate Removal)* [2020] NI Fam 22.

[24] An interim order by its nature is not a final order and is, therefore, capable of being altered by the same court that made it. That is why appeals against interim orders are discouraged and are rare. A case such as this falls on the borderline of whether an appeal should be entertained at all. However, as this case has some unusual features, not least the fact that it involves a complete cessation of direct contact, it has an international element, and given that there are strictures of time during which the children will remain in Northern Ireland the court has decided to hear this appeal.

[25] The appellate test to be applied in family appeals is as set out by the Supreme Court in *Re B* [2013] UKSC 33 reiterated by *Re H-W* [2022] UKSC 17. Flowing from these decisions the essential question for the appellate court to ask is whether the judge was wrong. The judge can err in a case by misapplication of the law. The judge may also be found to have erred if the judge has proceeded on a material error of fact. However, as AU himself conceded, matters of weight are not matters which the appellate court should interfere with. That is because too ready an interference by the appellate court risks depriving a family trial judge of the discretion entrusted in him or her by law.

[26] It follows that a court may not interfere with a decision unless it is satisfied that the judge exercised his discretion on a principle of law which is wrong or under a material misapprehension of fact or based on failing to take into account all relevant options in a case or based upon a failure to provide proper reasons.

Our conclusions

[27] We are satisfied that there is evidence before the court from contact sheets of very difficult observations of the children at contact. These are set out in the reports of Ms Shauna Leitch. In many cases when an issue of suspension of interim contact takes centre stage the court will decide based on submissions, but in this case, there was evidence heard over three days on the point at issue. Ms Shauna Leitch, social worker, gave evidence in relation to that. We will not repeat all of her observations which have been set out in some detail by the judge from paras [21]-[38] of the judge's ruling.

[28] The judge summarised this evidence as follows at para [37]:

> "[37] Ms Leitch robustly maintained a position that her evidence was primarily based on her observations during contact. She stated that since contact began on 31 August 2023, M and F have consistently refused to engage with their father and presented as increasingly withdrawn. In particular, F shut her eyes tight and covered them with

> her hands when her father attempted to interact with her on this date. Also, both M and F flinched and pulled away from their father when he touched their hands and hair during contact on 15 September 2023. M and F did not show any emotions at the end of contact. Neither M nor F responded to their father's goodbyes but rather asked if they are going to see their foster carer."

[29] The judge also records some evidence by way of hearsay from the foster carer which, inter alia, referred to the children saying, "no, no daddy" and also behaving in a way adverse to their father in the foster placement.

[30] In addition to this evidence, the Children's Court Guardian ("CCG"), Ms Julie Johnston, attended a contact session on 15 September 2023 and prepared a report dated 27 September 2023. She also gave evidence at hearing in relation to the contact. It is of note, and the judge records, that the guardian made appropriate concessions in relation to observed positive features of the children's interaction with AU during some contact sessions. However, she said that the evidence of positive changes lasted for brief seconds within the contact sessions. The guardian was very concerned about the interactions with the father as the judge records at para [62] of his judgment drawing from her report as follows:

> "5.7 In my role as CCG I have never experienced children of this age consistently saying they don't want contact with a parent (with the exception of parental alienation cases). I would observe that even children who have experienced degrees of adversity in parental care want to see their parent and are excited to go to family time.
>
> 5.8 AU suggests the artificial nature of contact, his children's upsetting separation from him and gaps in contact are the reason for the above presentations in the children. However, these explanations do not explain the children's adverse reaction to their father's presence and their contrasting behaviour in placement. Neither do they explain their consistent express wish to not go to see him.
>
> 5.9 I have observed hundreds of children in contact rooms after removal from parents has occurred. In my experience children of this young age are not as aware of the artificialness of the occasion, especially when there is comfortable space, toys and their primary attachment figure is present.

> 5.10 I would note that the children were only removed from their father four weeks ago and have had twice weekly contact (with the exception of the first week). This has been frequent enough for attachments and memories to be maintained and does not explain the children's responses to their father."

[31] We note that AU gave evidence at first instance and that he had filed a very detailed statement for the lower court. AU repeated his points before this court. In particular, he made the case that he is very concerned about the emotional impact any proposed reduction in contact will have on the children. He relies on videos, two of which are just before the separation of him from the children, others are of longer vintage to show that he has a good relationship. He said that really what this case amounted to was that a moral judgement was made against him as a result of surrogacy arrangements, child protection in Australia making a link that he was a risk of sexual abuse. Therefore, he maintains that bias against him crept into the professionals involved in this case which has resulted in him not having contact with them. AU denies all of the allegations against him and strenuously made that case on appeal.

[32] On the three core elements of the appeal we find as follows. Firstly, in relation to how the judge allegedly failed to weigh up the video evidence, we have considered the points made by AU. We do note that the judge had the video evidence and refers to it in his judgment. We think that AU is correct to say that the judge does not then embark in the decision part of his judgment on an analysis of what weight he gives to this evidence versus the social work observations and the observations of the CCG.

[33] It is unfortunate that the judge did not specifically say how he took the videos into account. However, the failure to articulate is not fatal to a ruling if the appellate court finds that either the analysis is implicit or makes its own assessment of it in a children's case. We are satisfied that the weighing analysis, whilst not specifically mentioned, has been considered in this case on an overall read of the judgment. By that we mean, that the judgment amply refers to positives that have been observed between the father and the children in the past.

[34] To satisfy ourselves, we have also looked at the videos particularly those from just before the children were taken into care. The first video we have seen is 4.10 minutes long, it is in what appears to be a police station. We can see that this is from 17 August 2023. The children are playing with leaflets. There is little interaction with the person who is taking the video who is AU. But we note no adverse presentation issues from either child although it is the male child who appears to be most in the shots. The second short clip is 0.35 minutes long. It seems to have been taken on 22 August 2023. It is not very informative with occasional shots of what appears to be the male child. We see limited use to be made of these videos, and it may well have been that they did not take much prominence at the trial. In addition,

we have seen the bodycam footage sent in by AU after the hearing. This material does appear to show both children as being comfortable in the father's presence on these two dates, and we are satisfied that this is corroborated by the evidence of the Guards and the PSNI.

[35] In any event the videos are only one part of the factual matrix of this case. In our view, the CCG accurately summarises this evidence at para 5.12 of her report when she says as follows:

> "AU has provided some video footage to prove his close relationships with his children. There are no dates attached with the videos and it seems the children are younger, perhaps closer to the time they moved to live with him. The video is of limited information as AU is behind the camera and little information is provided that supports the relationships between him and the children, who are playing away from him and are being observed by him. In the latter video, F is close to AU and smiles, M smiles and some chatter is heard. AU's voice is warm and gentle as it is in family time sessions. The videos do not, in my mind, provide comprehensive evidence of a close parent/child relationship. The videos do not rule out that something traumatic has happened to these children in their father's care. They do not help us understand what has happened to F and M."

[36] Rightly, AU did not dispute that the judge was entitled to assess the witnesses in this case based on their contact observations. There can be no challenge to the judge's exercise of discretion in relation to this. He clearly was struck by the compelling nature of the evidence given by Ms Leitch and Ms Johnston as he says in his judgment. We have not heard the witnesses, but we have read the contact sheets and the reports, which in themselves, are concerning. It is plain to see that these two young children are displaying very concerning features which, to our mind, meet the test of severity whereby on the face of it a court should consider the suspension of contact to at least understand why this is happening.

[37] In relation to the second ground of appeal AU makes some points which are of interest and are accurate in terms of inaccuracies in the judgment. By way of preamble, we must say that if there are inaccuracies in any judgment, they should be drawn to the attention of the first instance judge rather than corrected by the Court of Appeal. However, for the avoidance of any doubt, this court can clearly state that some inaccuracies have been made which should be corrected in the judgment by way of reading it as qualified by this judgment.

[38] Firstly, in the history section we note, and Ms Simpson properly conceded, that para [3] wherein it states from July 2022 to November 2022, AU states that the

children lived in the Philippines with him and AP, is incorrect as this was only for 10 days. That part of the record can be corrected. Secondly, we accept AU's point that he did not concede that the children were traumatised as a result of his care of them. He did say that the female child appeared traumatised at contact, but we agree that this is not to be taken that he accepted that he had caused the trauma. We also consider that the children did not specifically say "don't want to see daddy" as the guardian refers to and that the reference to this at page 230 of the bundle in the social work report is inaccurate. Finally, we think it would have been more accurate to say that AU gave an explanation as to why he left Australia which was to obtain the consent of the mother of the elder child for a passport application.

[39] These are matters which are obviously important to AU, but, in our view, they have no bearing on the overall decision that is made in this case. While the record can now be corrected, we do not consider that these are material errors that would have led the judge away from making the ruling that he did, or which undermine his decision.

[40] The third ground of appeal relates to the alleged finding of fact in this case adverse to AU. We do not find merit in this argument, for the simple reason that we think the judge was alive to the issue. The position is spelt out at para [81] of his judgment where he says:

> "[81] It must be emphasised that this hearing is not engaged in a fact-finding exercise as to whether the respondent poses a potential risk to his children. In making this decision, I have ignored the assertions and allegations that have been made against the respondent, which are unsubstantiated and unproven. However, I have taken into account the potential detrimental impact such allegations could, on a conscious or unconscious level, have on the professionals involved in this case, particularly the social workers, CCG and TSS. The potential for unconscious bias has been highlighted. It is a real risk and must not be overlooked."

[41] There the judge was clearly saying that he was not making any findings of fact which is correct, as this was an interim hearing. Perhaps the judge could have, in the background section, stated clearly that the background facts were in some parts highly contested by AU. However, we reiterate the fact that this is an interim judgment, and we think the judge was alive to that and has made that clear in para [81] and we restate the point that an interim judgment does not make any conclusive findings of fact either way.

[42] We find no substance in the additional arguments made by AU. In particular, he criticised the social worker for relying on the CCG's observations of contact as part of her evidence. This is not impermissible as a complement to her own

observations which she gave in evidence. AU's argument that not enough attention was paid by social services to the cuts and bruises the children sustained whilst in foster care was similarly unconvincing and we think was used to distract attention away from the core issues. AU was on much surer ground when he focussed on the appeal points which we have examined.

[43] It follows from what we have said that the appeal in this case must be dismissed. We commend the judge for the time he took in listening to all the evidence in deciding an interim issue over three days. We do not find any breach of procedural fairness. We do not consider that the failure to explain any balancing of the video evidence AU provided vitiates the decision the judge made. We do not consider that the judge has made any binding or conclusive findings of fact. It is also plain to us that professionals have dealt with this case based on evidence rather than any bias against AU for being a surrogate father in circumstances where Australian child protection had raised potential sexual risk. That is how it should be. The judge has assessed the case based on clear evidence of very adverse reactions at contact which are not normal, and which clearly point to the risk of significant psychological harm being occasioned to the children if not remedied.

[44] We observe that the judge has not specifically mentioned any of the relevant legal tests which is again is unfortunate. However, to our mind the Article 53(4) requirements are satisfied on the stark facts of this case and that the only conclusion that a judge could have reached was that a suspension of direct contact was necessary and proportionate in the best interests of these children on an interim basis. This was also a case where it was better to make an order rather than no order at all and where application of the welfare checklist factors supports the decision.

[45] Going forward, in cases of this nature we recommend that a trial judge recites the statutory provisions in play and the welfare checklist in reaching any conclusion, rather than have an appellate court check the satisfaction of these requirements. All of this said, none of the errors which we have corrected are such to undermine the ultimate decision reached in this case.

[46] As this is an interim order there is a further hearing listed for 11 January 2024. It is our strong view that this hearing should deal with the application made by AU through his legal representatives for a third party to observe contact at Thorndale or somewhere else. We make no findings one way or the other as to why indirect contact has not been successful since the judge made his order, but we think that any court should be open minded to considering how these children could maintain some relationship with their father, whether that be through shorter forms of contact, the trying of contact separately for each child, or other indirect means of contact by way of short video.

[47] The real concern in this case, which is clear for us to see, is that the children are displaying a very adverse reaction to their father at present. We do not know the reason for that and that is what a children's court guardian will have to grapple

with. However, we do agree, that given the Convention obligation to promote family life on an ongoing basis, that there is more to be done to work out whether contact can be reinstated on a direct basis. From the tenor of para [85](v) of the judgment it is clear to us that the judge was open to such an approach when he said that the court would hear submissions as to whether at least one direct contact session should take place subject to the observation of an independent psychologist.

[48] Finally, we observe that there has been some considerable time spent to date in settling the habitual residence issue. We think that is regrettable. In any event all parties agree that Australia has jurisdiction. Therefore, we enjoin all parties to bring finality to the Article 11 of the aspects of this case pursuant to the 1996 Convention within the next number of weeks rather than months. Accordingly, we dismiss this appeal.