CA before Roch LJ, Wall LJ, 29th January 1998.

JUDGMENT : MR JUSTICE WALL:

1. This is an appeal brought with the leave of Thorpe LJ on the papers from an order made by His Honour Judge Curran, sitting in the Cardiff County Court, on 25th July 1997. The case concerns a little girl called SH, born on 1st January 1991 and so just seven years old. The judge had before him the father's application for definition of contact, and, for reasons which will appear as this judgment progresses, the order he made was that the father of the child, JH, should have direct contact with her each Saturday from ten in the morning until 12 noon at the 4C's Contact Centre in Cardiff, and in addition he should have indirect contact with her by way of cards, letters and presents. That situation I have just mentioned, contact at the contact centre, had been going on for some time, and the issue before the judge was a narrow one, namely: should contact be moved from the 4C's Contact Centre to the address in Cardiff where the father was living, which had in fact been the matrimonial home, to which the father had returned after paying the mother a lump sum which enabled her to purchase alternative accommodation also, as I understand it, in the near vicinity.

2. At first blush, therefore, it is somewhat surprising that so narrow an issue should reach the judge, let alone the Court of Appeal, but to understand why it has, it is necessary to look at the facts. I take them from the excellent chronology and skeleton argument prepared in this appeal by Miss Morris on the father's behalf.

3. S is a mixed-race child. Her father is Tunisian and her mother is English. The parties met whilst the mother was on holiday in Tunisia in February 1989, and, following the start of their relationship, the father came to Wales with her at the end of that year and they were married on 20th April 1990. It transpires that the marriage may, depending on what view of the law one takes, have been bigamous. The father was prosecuted in the local magistrates court for bigamy, but we have been told that on appeal, by way of case stated to the Divisional Court, the conviction was quashed. The relevance of that is only, in my judgment, that if he had been convicted there was at least the possibility of the Home Office reinvestigating his situation, notwithstanding he now has British citizenship. In the event it is accepted on all sides that there is no question of the Home Office seeking to review his status in this country and it is his case that he intends to remain here permanently. He obtained British citizen in 1993.

4. Unfortunately the marriage between the parties was not successful. The father left the matrimonial home, which is in Cardiff, and the mother remained there with S. It has never been in issue that the mother should not look after S. She has at all times remained with the mother and the father takes no steps to seek to vary the residence order subsequently obtained by her.

5. The father took divorce proceedings and there has, as I understand it, been a decree. As I indicated earlier, the father has returned to live in the matrimonial home. That took place in early December 1995. The mother lives about 400 yards away in a property she has purchased. Up until January 1996, again by agreement, the father had regular unrestricted contact with S. The arrangement was that he would care for her during the day whilst the mother was at work. There is in the papers some dispute between the parties as to how successful that arrangement was, how regular the father was, how regular the mother was. That is not material to this appeal. There was also an argument about money. The father was unemployed for a time and did not pay the maintenance for S. Again that, in my judgment, is immaterial to this appeal.

6. On 22nd January 1996 there was a most unfortunate incident at the matrimonial home. The father had been having contact. The agreement was that S would be returned by 5 o'clock. The father was late. The mother telephoned the father to enquire what the reason was. She was unhappy with his answer and she went to his house at about 6 o'clock. There was an argument, and it is alleged that the father said to her: "I will make sure you don't see her again", referring to S. The father denies making that remark and alleges that it was the mother who behaved in a threatening manner. Indeed the mother accepts that during the course of the argument she smashed a pane or panes of glass in the front door of the father's property.

7. Most unfortunately that incident has never been the subject of judicial finding. I will return to that point later in this judgment.

8. Following the incident I have just described, the mother terminated contact and applied to the Cardiff County Court on 23rd January 1996 for a residence order and a prohibited steps order. On the following day she was granted an ex parte interim residence order and a prohibited steps order preventing the father from removing S from the jurisdiction. On 12th March the father undertook to surrender his passport to the court. On that basis it was ordered by consent that there should be a residence order in favour of the mother; the father was prohibited from removing S from the jurisdiction, and, in order to re-establish contact, he was to have contact with S on 16th March from 3.00 pm to 4.00 pm, and thereafter from 10.30 am to 1.00 am every Saturday. A court welfare officer's report was ordered on the issue of contact; and the matter was adjourned to 27th June for further consideration.

9. On that day the matter came before the court with the benefit of the court welfare officer's report dated 12th June. The author had observed a session of contact between the father and S and reported that there was an affectionate bond between the two of them. That, I think, is not in dispute. It is accepted by the mother that the father is very fond of the little girl and that she is fond of him. However, by this time there had arisen in the mother what the court welfare officer called "an immovable fear" on her part that S would be abducted by her father, and in these circumstances the mother argued that contact could only go on if it was at a contact centre. The welfare officer was of the view that the father's contact needed sorting out and defining and that the arrangement had to be progressive; in other words the matter must move on. Contact could not go on indefinitely in the contact centre. She concluded: *"It may not be unreasonable in time for Mr H to be allowed to take S from the centre into the town."*

10. At the hearing on 27th June a change in the mother's working arrangements was discovered. She was no longer able to take S to the contact centre on Saturday mornings, so for a time contact took place at the Weston Leisure Centre in Cardiff. Contact was to be from 4.00 pm to 6.00 pm each Sunday. That arrangement was not entirely successful for reasons which I need not go into. The father says the mother ceased to comply with the order, and on 27th November he re-applied for contact to be reviewed. The mother responded by applying to terminate contact, and on 23rd December the matter came before the court. Contact was ordered by consent from Saturday, 11th January 1997 from 10.00 am to 12.00 noon each Saturday at the contact centre, and a further welfare officer's report was ordered for a review in March.

11. On 17th March the court welfare officer reported that mother's concern that S would be abducted appeared to have intensified, and, given the lack of trust between the parties, the welfare officer took the view that the contact centre was the most appropriate venue. In those circumstances it was ordered by agreement that the previous order for contact should continue and that the court welfare service should provide a further report on the issue of contact and the father's application for what amounted to unsupervised contact was adjourned to 25th July. This was the hearing which came before Judge Curran and which is the subject of the instant appeal.

12. As I already indicated, the father was applying for what I think is genuinely described as a modest variation of the contact order. He found the situation of the contact centre somewhat repressive. There were limited facilities, and inevitably a limitation to what he could do with S in that environment. He said that he wanted to take S to the former matrimonial home for identical hours, 10:00 to 12:00 each Saturday. He invited the mother to come into the house whilst he was exercising contact, or, alternatively, she could sit outside in a motorcar to ensure that no attempt was made for S to be removed. The mother opposed the application and sought to maintain the order that S have contact with her father at the contact centre.

13. There was, I think, what is by now the fourth court welfare officer's report before the court. The officer reported that the mother's fears of abduction remained constant and that S had picked up on her mother's anxieties. When asked directly by the court welfare officer about that, the little girl stated that she did not like it when her mother was not there because her father might *"pinch"* her. She also stated: *"If he takes me to the zoo it is a long way. I would fall asleep and wake up in Tunisia."*

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14. The welfare officer reported that the mother has been prescribed medication for depression and stress and had regular counselling sessions with her health visitor. There was produced to the court a letter from the health visitor and the general practitioner, which I think is of some relevance and which I propose to read. It is dated 6th May 1997 and is addressed to the court welfare officers. It says: *"We wish to express our serious concerns about our patient and the adverse indications for her 6 year-old daughter's well-being if the matter of parental access for her ex-husband is not resolved soon. It is clearly not in the interests of mother and daughter - nor the intention of the Court - to otherwise subject them to long term and continuous pressure. [The mother] feels that unsupervised contact between her daughter and former husband is unsafe. She tells us he has violently threatened her, barely over a year ago, with never seeing her daughter again. On this occasion he banged [the mother's] head repeatedly against a wall in front of their daughter (then 5 yrs old) - this was apparently in keeping with Mr H's violent and intimidating* behaviour towards his 2nd wife (WT) during their 4 yrs of marriage."

    Once again, that allegation against the father, if made, has never been the subject of judicial interpretation or finding.

15. The letter continues: *"Judge Graham Jones stated in court on 2 separate occasions that unsupervised access was untenable. W feels nothing has changed and that safe and appropriate paternal access can only be provided at the 4Cs until her daughter is a teenager. We are aware that the Court has done its best to safeguard S's interests by issuing various Orders but this has not put our patient's mind at rest. Past history of similar cases does reveal serious pitfalls and we are sure [the mother's] fears are not unreasonable.*
    To add to [the mother's] difficulties, she has sustained a back injury due to a fall at work - this has been serious enough to force her to give up her job and will clearly take some time to heal properly. This and the worry of the repeated returns to the Court is placing her (as it would anyone) under enormous strain. She is an excellent and conscientious parent and it is not conducive to her or her daughter's welfare that she is being pushed to the limit by this situation. A long-term, safe resolution is urgently required for the best interest of the mother and the daughter."

16. Whilst I have to say I find that letter somewhat tendentious in tone and it is not, in my judgment, the function of doctors or court welfare officers to express a view about whether or not an incident has occurred, it nonetheless raises a serious issue which must be in the mind of the court when deciding what contact to award. Clearly the mother's fears as to abduction are genuine, as the judge found, and are strong, again as the judge found.

17. In the final court welfare officer's report dated 9th July 1997, the welfare officer comments that S has undoubtedly and inevitably picked up her mother's anxieties. The welfare officer described SH nonetheless in other respects as*: "... a happy, well adjusted child, accepting the routine of weekly contact with her father but with an underlying awareness that it might not be safe for her to be separated from her mother."*

18. That underlying awareness clearly stems from her mother's anxieties. The welfare officer comments that: *"[The father] appears to have co-operated with the Orders of the Court, surrendering his passport and prioritising his weekly contact with S. He feels the constraints of the Centre and* would like to spend more time with his daughter through [different] outings and activities."

19. The final paragraph of the report is, in my judgment, of some considerable importance. It reads as follows: *"The Court's decision will undoubtedly be reached having heard the full evidence, and on the basis of S's overall welfare which overrides all other considerations. In my view, S's needs for contact with her father is currently being met. There may be a possibility of emotional harm to the child should the mother feel subjected to ongoing anxiety and fear for her child's long term security and safety. As I said in my previous report, unless a measure of trust develops between the parents contact will continue to be strained. Sadly, the possibility of any trust developing appears to be diminishing rather than growing."*

20. The judge heard evidence from both parties. We have of course a transcript of his judgment. He was clearly anxious to be as sympathetic as possible to both sides and he made fair assessments of their respective positions. He related the history which I have already set out and do not propose to repeat. He accepted the court welfare officer's evidence that S's primary bond of love and affection was with her

mother and that this was so was recognised by her father. He also said that the child had a right to contact with her father and that it was conceded by the mother that the child enjoyed her contact visits, that she loved her father and had a bond of affection with him which was reciprocated.

21. So much is common ground. He goes on in these terms: *"The root of the problem that exists in this case is that although in the majority of instances after a period of supervised contact the court would hope and expect in the interests of the child that the situation would move on, as it were, and that unsupervised contact could be restored, there is still that issue between the parties. Father now seeks contact at what was the former matrimonial home during the same hours on a Saturday morning. Mother contends that because she is afraid father would remove the child from the jurisdiction if he had the opportunity of doing so and if the mood took him, contact should remain on the neutral ground of the contact centre where she fees a sense of security and safety and does not feel threatened by any suggestion that the child would be removed from her care. That is what I have to resolve in this case. The principle of their being direct contact between the father and daughter is not in dispute. The question is, where, in the interests of the child, that should be from now on."*

22. So far, if I may respectfully say so, so good. That is, in my view, a sensitive and concise assessment of the position. The judge said that he was not going to spell out the full welfare checklist under s 1(3)(e) of the Children Act 1989. I agree with him that it is not necessary for a judge to do so, provided that, in the body of his judgment overall, it can be shown that he has had the relevant factors in mind. In this case the judge went through a number of them, so he clearly did. He then referred to the letter from the general practitioner and the health visitor, which I have read, and commented in these terms: *"What is also clear from the letter which has been produced to the court attached to the court welfare officer's report, from the doctor and health visitor, is that mother has been under a considerable degree of stress and strain as a result of her fears that the child might be removed from the jurisdiction."*

23. Then follows the crucial part of the judgment: *"What I am here to decide is, not whether this father does actually intend to remove the child from the jurisdiction. That is not really the central point in this application. The question is, is there a genuine fear by the mother that he would do so if had the opportunity?"*

Having asked that question, the judge finds that the mother does have a genuine fear of abduction, a fear which has been gnawing away at her, as it were, and that it has caused her a great deal of distress and unhappiness which has been undoubtedly communicated to the child.

24. The judge went on: *"Those are the circumstances in which I have to consider the application for contact. This is not a case now where I propose to make an order for contact, with a view to it coming back before the court in another three or four months with a view to further review and a further report from the welfare officer. It seems to me that, one way or another, a contact order has to be made today which the parties can regard as a permanent order, in so far as any order on such a topic is regarded as permanent, because obviously parties have a right to come back before the court and made a fresh application."*

He therefore decided that the status quo should remain and that contact should continue to take place at the contact centre.

25. Ground 1 of the notice of appeal settled by Miss Morris is in these terms: *"The Learned Judge was plainly wrong when he stated that the test was not whether or not the Appellant intended to abduct the child, S, but whether or not the Respondent believed that such a threat existed. It was incumbent upon the Learned Judge to assess the risk of abduction in order to assess whether the Respondent's fears about unsupervised contact were justified."*

26. The second ground is: *"The learned judge was plainly wrong when he failed to make any findings of fact in relation to the incident between the parties on 22nd January 1996, in particular, as to whether or not the Appellant threatened to abduct the child S, as alleged by the Respondent and/or failed to assess the risk of such abduction."*

27. In my judgment those two grounds of appeal are made out. The critical issue in this case was this: was the father likely to abduct the child? The judge saw him and had a great deal of evidence about him, and he saw the mother. Both were examined and cross-examined. There was substantial material put forward on the father's behalf to establish that he was fully integrated into English society, apart from the fact that he referred to Tunisia from time to time as home. He had a good job here, he had a house here, and so on. In my judgment, the judge should have grasped the two nettles set out in paragraphs 1

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and 2 of the notice of appeal. The critical question in the case was: is there a substantial risk that this father will abduct this child? However, that risk could only be properly assessed on the basis of findings of fact made by the judge, critical amongst which were the two questions: what happened on 22nd January? In particular, did the father threaten the mother that she would never see the child again?

28. That this is the correct approach is made clear by **Re M and R (Minors) (Sexual Abuse: Expert Evidence)** [1996] 4 All ER 239. In that case, this court applied to the assessment of risk under section 1(3)(e) of the Children Act the principles set out in the decision of the House of Lords in **Re H and ors (minors) Sexual Abuse: Standard of Proof)** [1996] AC 563 that the assessment of the likelihood of significant harm in care proceedings had to be based on findings of fact made on the balance of probabilities. Thus the assessment of a given risk to a child in private law proceedings must be based on findings of fact.

29. There are of course cases in which a judge takes the view that investigation of a particular issue is likely to cause more distress than the probative value of any findings on that issue. In such circumstances a judge may well say that he is not going to investigate or that he is not proposing to make findings of fact; but where a particular issue is critical to the exercise of his discretion, as was the case here, in my judgment the judge has a plain duty to make findings of fact. As **Re M and R** (supra) shows, he cannot assess risk unless he has made findings of fact. It was of critical importance to the exercise of his discretion to know, firstly, whether or not the father had threatened the mother in the way she suggests and whether or not there was a likelihood of the father abducting the child. In my judgment, therefore, this failure to make these necessary findings of fact vitiates the exercise of the judge's discretion and it is therefore open to this court to substitute its own view.

30. A variety of possibilities are open. We could send the matter back to the judge for re-hearing and for him to make the findings of fact which we believe to be necessary. That is one option. Against it is the fact that litigation clearly causes this family substantial stress. The letter from the doctor makes it quite clear that the mother is under stress and that court proceedings exacerbate that stress. I am also conscious of the fact that further court proceedings are likely to be adversarial, however skilfully conducted and however moderate the tone. So the idea of an immediate further trial on issues of fact when the same incidents have to be gone over again is, on its face, unattractive.

31. Secondly, we could substitute our own view, but the difficulty about that, in my judgment, is that we are of course wholly unable to assess the father's credibility. This court is wholly unable to decide what did happen on 22nd January. We have not heard the witnesses and we have not, in particular, heard the mother and the father's accounts of the relevant incidents alleged.

32. There is therefore a considerable difficulty, and I have not myself found the resolution of it easy. One resolution which greatly appeals to me, given the very strong amount of common ground that there is in this case, is that the parties should attend mediation. A skilled mediator who would have had no contact with the case (not, therefore, the court welfare officer) could, I think, discuss this matter with the parties and build on the common ground which undoubtedly exists between them. There needs to be a mechanism to reduce the mother's anxiety, assuming for this purpose that the father's *bona fides* are established. But that is a matter for the parties. I cannot compel them to mediation and indeed compulsory mediation is a contradiction in terms.

33. In these circumstances I have come to the conclusion, speaking for myself, that I do not think we can properly substitute our own order for that made by the judge. I have to say that on what we have heard today it seems to me highly likely that it is in the interests of this little girl for contact to move on. The father has had ample opportunity to abduct her if he had wanted to. The parties live 400 yards apart. We are told that the contact centre has entrances and exists not all of which have been manned during the contact, and, speaking for myself, I can see little reason why, with suitable safeguards, contact should not take place in the matrimonial home, with the mother, if she does not wish to enter the premises, sitting outside in her car and possibly, if she really feels it necessary, for someone else to be sitting outside the back door. But that again seems to me a matter which is not within the province of this court, however desirable it may be to move the matter on. I cannot make that order, in my judgment, because I am not the trial judge and in the Court of Appeal we lack the vital findings which would make it appropriate.

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34. So what do we do? I have come to the conclusion that the only way forward here, in the exceptional circumstances of this case (and in my judgment they are exceptional), and accepting that the mother's fear, which may be unfounded, is nonetheless genuine, is to make a family assistance order made under section 16 of the Children Act 1989. That order has to be made by consent, and I am grateful to both the mother and the father for giving their agreement to that order being made this afternoon. The order under section 16 requires either a probation officer to become available or the local authority to make an officer of the authority available to advise, assist and, where appropriate, befriend any person named in the order, and the people named in the order will of course be the parents and the child. We cannot make such an order unless the court is satisfied that the circumstances of the case are exceptional (and I am satisfied that this is an exceptional case) and that the parties consent, which they do. The local authority is bound to accept an order provided the child concerned lives or will live within their area, and so that condition is fulfilled as well. Whilst I am acutely aware of the financial constraints on local authorities in their social services budget, I hope very much that this authority will be able to make an officer available. Speaking for myself, I would propose to direct that that officer should have access to the court papers, which should be released to him or her, and that that officer should also see a copy of the judgments of this court.

35. The family assistance orders lasts for six months, unless renewed, and I would leave the matter there. Clearly if progress has not been made during the six months of the family assistance order, it may well be necessary for the father to apply to the court further to define contact, and if that occurs I anticipate and hope that any tribunal dealing with the matter would make the necessary findings of fact as to his *bona fides*. This father needs to know where he stands. At the moment he stands in no-man's-land; he does not know what the court thinks of him and he is entitled to have that finding.

36. This is a difficult and sensitive case and, in my judgment, litigation often polarises when it should bring together, particularly where contact is concerned. Both parents are in court and they have heard me say that there is here a very substantial measure of common ground. Both parties love their child; the child loves both of them. The principle of contact is not in issue. SH is a child of mixed race. It is very important for SH that in due course she should have the opportunity to get to know and fully to understand and appreciate the Tunisian side of her heritage. The mother's fear of abduction, however, needs to be overcome if contact is to move smoothly forward, and if the parties do not choose to go to mediation it seems to me, speaking for myself, that the best way forward is that which I propose, namely a family assistance order, followed by an application to the court by the father to vary the order, if need be.

37. I would therefore leave the order in place, albeit that I am disagreeing with the reasons of the judge for reaching it. It is of course open to the father to go back at any time, but I hope he will take the view that he has a whole lifetime to enjoy his daughter's company and to get to know her. There will come a time, whatever the mother's anxieties, even if they are not resolved, when this little girl will be of an age to come and see him and go out with him and to be part of his life, unrestricted by court orders or injunctions. He has to demonstrate to the mother, as I am bound to say on the papers his conduct appears to me to indicate so far, that he is genuine in his wish for contact and genuine in his expression of protestation against the allegation that he is going to remove the child from the mother's care and the country. So I urge him not to rush back to court. I urge him to give the family assistance order a chance. Equally, I urge the mother to search her mind and conscience very carefully to see whether she can see her way to moving the matter forward in the interests of this little girl.

38. For these reasons, although I am disagreeing with the reasoning of the circuit judge, I would dismiss this appeal but direct there be a family assistance order, directed to the Cardiff City Council, for a period of six months.

LORD JUSTICE ROCH: I agree.

ORDER: Appeal dismissed; family assistance order naming the father, mother and child; no order for costs; legal aid taxation. (Order not part of approved judgment.

MISS SHAN MORRIS (instructed by Messrs North & Nam, Cardiff) appeared on behalf of the Appellant. MISS JANE EVANS (instructed by Messrs Loosemores, Cardiff) appeared on behalf of the Respondent.

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