



Neutral Citation Number: [2016] EWHC 1443 (Fam)

Case No: FD12P01423

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/06/2016

**Before:**

**MR JUSTICE MACDONALD**

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**Between:**

**QS**  
**-and-**

**Applicant**

**RS**  
**-and-**

**First**  
**Respondent**

**T**  
(by her Children's Guardian)

**Second**  
**Respondent**

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**Mr Alistair G. Perkins** (instructed by **Dawson Cornwell**) for the **Applicant**  
**Mr Andrew Bagchi QC** (instructed by **Lightfoot O'Brien Westcott**) for the **First Respondent**  
**Mr Jeremy Ford** (instructed by **CAFCASS Legal**) for the **Second Respondent**

Hearing dates: 7 June 2016  
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**Approved Judgment**

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

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THE HONOURABLE MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

## Mr Justice MacDonald:

### INTRODUCTION

1. The mother, QS, applies for an order pursuant to FPR 2010 r 16.25(1)(b) terminating the appointment of the children's guardian on the grounds that he has expressed a definitive view as to the T's best interests in a Position Statement drafted on his behalf by Mr Hinchliffe of CAFCASS Legal prior to the children's guardian being in receipt of the totality of the evidence in this case.
2. The application by the mother was made orally at this hearing. The Position Statement lodged on behalf of the mother for this hearing dated 6 June 2016 makes no mention of an application to terminate the appointment of the children's guardian. Indeed, whilst deprecating strongly what is described in that Position Statement as "*a partial analysis of emerging material*" by the children's guardian, the Position Statement goes on to state:

"The mother will of course give careful consideration to the Guardian's report which no doubt will include a more fulsome consideration of all the evidence and circumstances of the case."
3. Within this context, the precise grounds of the mother's oral application to terminate the appointment of the children's guardian were not entirely clear. However, the mother appears to base her application on an allegation of "apparent bias", contending that the Position Statement filed and served on behalf of the children's guardian gives the impression of being partial in circumstances where the guardian expresses a view that favours the father's case before all the evidence he was directed to consider has been filed and served. At points during his submissions Mr Perkins also appeared to broaden his attack to encompass wider generalised assertions of unfairness arising out of the conduct of the children's guardian in this respect.
4. Whilst the oral application by the mother to terminate the appointment of the children's guardian appears grounded in what is said to be a perception on her part of 'bias' arising from the contents of the Position Statement, there is no statement of evidence from the mother in support of her application and no application was made to call her to give oral evidence in support of the same.
5. The application is opposed by the father, RS, and on behalf of T. I have heard submissions from Mr Bagchi, Queen's Counsel on behalf of the father and Mr Ford of CAFCASS Legal on behalf of T.

### BACKGROUND

6. The detailed background to this matter is set out in my previous judgment in this case given on 15 October 2015 and reported as *QS v RS* [2015] EWHC 4050 (Fam). It is not necessary for the purposes of this judgment to set out the background again. On 15 October I determined that the High Court could exercise its inherent jurisdiction in proceedings concerning the living arrangements for T in circumstances where she has been adopted in Nepal by British citizens and is a British national resident in Dubai but where the English court is the only court which can remedy the fact that the Nepalese adoption is

not automatically recognised under English law. The case is listed for final hearing before me in July 2016 and is listed to today for a pre-hearing review.

7. Within the context of the matters set out in my judgment of 15 October 2015, the court will be required at the final hearing to determine (a) whether the court should make a declaration under the inherent jurisdiction recognising T's status as the adopted child of the parents and (b) with which of her parents T should live and what should be the arrangements for her to spend time with her non-resident parent. It is the latter issue of child arrangements that gives rise to the application made by the mother to terminate the appointment of the children's guardian.
8. On 5 April 2016 the Court was informed that the then children's guardian was leaving CAF/CASS and that it would be necessary to appoint a replacement children's guardian. Whilst the need to replace the children's guardian meant that the final report of the guardian would not be available for the pre-hearing review, in an effort to maximise the efficacy of that pre-hearing review I directed CAF/CASS to file and serve by 9.00am on the morning of this hearing a Position Statement "summarising the position of the guardian" having regard to the outcome of a meeting with T due to take place on 6 May 2016 (which meeting actually took place on 20 May 2016) and certain further evidence I directed be filed. That further evidence was:
  - i) The report of Ms Hamade on the impact of the law of Dubai on, *inter alia*, the mother's ability to enter and exit unimpeded the United Arab Emirates and the procedure to be followed to enable her to do so;
  - ii) The report of the expert in Nepalese law on the legality of T's adoption in Nepal;
  - iii) The evidence on which the mother intended to rely at the final hearing;
  - iv) A report from T's current treating physician concerning her current physical health;
  - v) The evidence on which the father intended to rely at the final hearing.
9. The direction of the Court that the Position Statement from CAF/CASS be filed and served at 9.00am on the morning of this hearing was made in order to ensure that the children's guardian had had the opportunity to consider all of the evidence listed in the foregoing paragraph ahead of that Position Statement being compiled and submitted. However, the Position Statement prepared on behalf of the children's guardian by Mr Hinchliffe is dated 2 June 2016. In the circumstances, the Position Statement was compiled prior to the children's guardian having seen the report of Ms Hamade (which was due on 10 May 2016 but is late due to delay in CAF/CASS settling Ms Hamade's fees) and the father's evidence (which was due on 3 June 2016). Mr Perkins further criticises the fact that the Position Statement was filed and served prior to "Any 'feedback' from T herself and her parents following the 1<sup>st</sup> occasion of direct contact since 2013 with her mother".
10. As noted above, the children's guardian met with T on 20 May 2016, on which day T also had contact with her mother. On that day T's wishes and feelings were captured in a "How it looks to me" document. In that document T, who is approximately 12 years old (her exact date of birth being unclear), indicated:

- i) Her mother does not live with her but means a lot to her;
  - ii) That she likes living with her father in Dubai, swimming, playing with her friends in Dubai and school;
  - iii) That her three wishes would be to have her passport, to live in Dubai forever and to visit places with her passport;
  - iv) That what makes her feel safe is living in Dubai and people protecting her;
  - v) That the big decision she would like the family court to make for her is to live in Dubai.
11. Within the foregoing context, on behalf of the mother Mr Perkins makes the following specific criticisms of the Position Statement filed and served on behalf of the children's guardian:
- i) That the children's guardian expresses a decided view on the outcome in this case when his position was recorded in the Position Statement prepared on his behalf by Mr Hinchliffe as "*The children's guardian takes the view from talking to T and interpreting her wishes and feelings captured in her 'How it looks to me' submission annexed as MHI that her family life is firmly rooted in Dubai and up until now this appears to have worked for her, even in the absence of M for three years*" notwithstanding that he had not seen all of the evidence directed by the order dated 5 April 2016;
  - ii) That the children's guardian expressed a decided view on the outcome in this case when his position is recorded in the Position Statement prepared on his behalf by Mr Hinchliffe as "*The children's guardian takes the view that T has suffered enough change and suggests a formula of arrangements that add, expand and compliment the advantages that accrue to her living with F in Dubai*" notwithstanding he had not seen all of the evidence directed by the order dated 5 April 2016.
12. Mr Perkins submits that, within the foregoing context both the mother and the father have taken the Position Statement filed and served on behalf of the Children's Guardian as embodying his final views as to the proper welfare outcome in these proceedings.
13. In addition to the matters which are the subject of criticism by the mother, the following matters contained in the report of the Children's Guardian are also in my judgment relevant:
- i) The Children's Guardian is recorded as being "*very impressed with the quality of contact*" between T and her mother and as noting that it "*was as though the mother and daughter had been separated for seconds, not years*";
  - ii) At the conclusion of her contact with her mother on 20 May 2016 the Children's Guardian is recorded as again having met with T on her own and having asked her if her views had changed as a result of her spending time with her mother. T is recorded as stating that they had not and that "*she wants to continue to live*

*with F in Dubai but would like M to return to live in Dubai or visit her*". T told the Children's Guardian that she did not feel able to tell her mother this.

- iii) The Children's Guardian is recorded as recognising "*the enormous hurt*" experienced by the mother in Dubai and understands that she is scared to return but that it "*may be that the advice from Diana Hamade about the legal position in Dubai will when it is available to some extent reassure M*";
- iv) The Position Statement records the view of the Children's Guardian that a further child arrangements order should be made providing for T to spend further time with the mother "*pending the final resolution of the case*".

## THE LAW

14. Where an allegation of apparent bias is made the test set out in *Porter v McGill* [2002] 2 AC 357 falls to be considered, namely "*whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*". There is no difference between the common law test of bias and the requirement for impartiality contained in Art 6 of the ECHR (*Lawal v Northern Spirit* [2003] ICR 856).
15. As the terminology used in the test in *Porter v McGill* suggests, the question of apparent bias is ordinarily considered in the context of the conduct of a person or persons occupying a judicial or quasi-judicial role. Where the person whose conduct is in question is not acting in a judicial or quasi-judicial capacity it is inappropriate for the case to be approached in the same way as one would approach a person performing a normal judicial role or quasi-judicial role; a situation where the person is making a determination (*R v Secretary of State for Trade and others ex parte Perestrello and another* [1981] 1 QB 19 at 35). In such circumstances, the position of the person whose conduct is the subject of criticism is better considered by reference to whether the person in question was under a duty to act fairly, the ambit of that duty, and whether they have acted with the requisite degree of fairness, rather than by reference to the concept of apparent bias (*R v Secretary of State for Trade and others ex parte Perestrello and another* [1981] 1 QB 19 at 34). I pause to note that, pursuant to FPR 2010 r 16.27(1)(b) and PD 16A para 7.6, a children's guardian appointed pursuant to FPR 2010 r 16.4 is required to conduct the proceedings on behalf of child fairly.
16. Art 6 of the ECHR enshrines the right to a fair hearing. When considering whether a hearing has been fair, the court will look at the proceedings as a whole as well as any alleged individual deficiencies (*Barberá, Messegué and Jarbado v Spain* (1988) 11 EHRR 360 at [68]). The right to a fair trial guaranteed by Art 6 is not confined to the 'purely judicial' part of the proceedings. Unfairness at any stage of the litigation process may involve a breach of Art 6 (*Re L (Care: Assessment: Fair Trial)* [2002] 2 FLR 730).
17. Where it is said that biased or unfair conduct on the part of person under a duty to advise the court will lead to bias or unfairness in the proceedings, such a causal link must be demonstrated. In *R v Gough* [1993] AC 646 at 664C the House of Lords held that it must be shown that by reason of the adviser participating in the decision making process there is a real likelihood that he or she would impose his or her influence on the tribunal

(see also *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts and Another* [2012] EWCA Civ 472 at [132]).

18. In this case the children's guardian has been appointed pursuant to FPR 2010 r 16.4. Within this context, the role and duties of the children's guardian are set out in FPR 2010 PD 16A. As I have already noted, pursuant to paragraph 7.6 of that Practice Direction it is the duty of a children's guardian appointed under FPR 2010 r 16.4 to "fairly and competently to conduct proceedings on behalf of the child". Further, pursuant to FPR 2010 PD 16A paragraph 7.7 the children's guardian *must* advise the court on, *inter alia*, the child's wishes and feelings and the options available to the court in respect of the child and the suitability of each such option, including what order should be made in determining the application. Pursuant to FPR 2010 PD 16A paragraph 6.1 the children's guardian must make such investigations as are necessary to carry out his or her duties.
19. Within this context, it is important to note the observations of Macur LJ in *MW v Hertfordshire County Council* [2014] EWCA Civ 405 (a case in which the children's guardian was appointed pursuant to FPR 2010 r 16.3) at [21] and [32] respectively that the children's guardian is not a "*neutral*" party or participant in proceedings and that the children's guardian does not have a "*special*" status within proceedings. Whilst the children's guardian is required to proffer advice to the court, in doing so the guardian becomes a witness subject to the same judicial scrutiny as any other witness. The children's guardian starts with no special advantage in proceedings as compared with other witnesses.
20. When the court is reaching its decision with respect to the welfare of a child it must consider all the evidence in the case including, but not limited to, the evidence of the children's guardian. The court is the decision maker and must reach its decision by reference to the matters set out in the Children Act 1989 s 1 having regard to the totality of the evidence before the court.
21. FPR 2010 r 16.25 provides as follows in respect of the power of the court to terminate the appointment of a children's guardian appointed under FPR 2010 r 16.4:

**16.25 Court's power to change children's guardian and prevent person acting as children's guardian**

- (1) The court may –
  - (a) direct that a person may not act as a children's guardian;
  - (b) terminate the appointment of a children's guardian;
  - (c) appoint a new children's guardian in substitution for an existing one.
- (2) An application for an order or direction under paragraph (1) must be supported by evidence.
- (3) Subject to rule 16.24(6), the court may not appoint a children's guardian under this rule unless it is satisfied that the person to be appointed complies with the conditions specified in rule 16.24(5).

22. FPR 2010 PD16A para 7.17 makes clear that where an application is made for an order under FPR 2010 r 16.25 the applicant must set out the reasons for seeking it and that the application must be supported by evidence.
23. Whilst FPR 2010 r 16.25(1)(b) sets out the power of the court to terminate the appointment of the children's guardian, it articulates no criteria against which the court should consider an application for termination. When examining the almost identical provision in CPR 1998 r 21.7 dealing with the power to terminate the appointment of a litigation friend, Foskett J observed in *Bradbury v Paterson* [2015] COPLR 425 at [31] that the court's discretion is a full one. Within the context of determining an application to terminate the appointment of a children's guardian pursuant to FPR 2010 r 16.25(1)(b) in my judgment the following matters will be relevant to the exercise of the court's discretion.
24. Pursuant to FPR 2010 r 1.2, when exercising its power under FPR 2010 r 16.25 or interpreting FPR 2010 r 16.25 the court must seek to give effect to the overriding objective in FPR 2010 r 1.1 to deal with the case justly having regard to the welfare issues involved. Pursuant to FPR 2010 r 1.1(2) dealing with the case justly includes, so far as is practicable:
  - i) Ensuring that the case is dealt with expeditiously and fairly;
  - ii) Dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
  - iii) Ensuring that the parties are on an equal footing;
  - iv) Saving expense; and
  - v) Allotting to the case an appropriate share of the court's resources while taking into account the need to allot resources to other cases.
25. There are few authorities concerning the termination of the appointment of the children's guardian. In *Oxfordshire County Council v P* [1995] 1 WLR 543, [1995] 1 FLR 552 Ward J (as he then was) allowed the application to terminate the appointment of the children's guardian in circumstances where the mother had disclosed to the guardian that she had caused injuries to the child and the guardian was thereafter interviewed by the Police to obtain a witness statement from her to prove criminal charges arising out of the injuries, during which interview she disclosed the mother's admissions without the leave of the court. Ward J concluded in respect of the guardian that "*To encourage frankness on the part of the parents, she must be replaced even though her work in all other respects has been wholly admirable and my criticism of her is technical not substantial.*"
26. In *Re J (Adoption: Appointment of Guardian ad Litem)* [1999] 2 FLR 86 the Court of Appeal refused an application to terminate a guardian's appointment (made within the context of an application for permission to appeal an order appointing a guardian in adoption proceedings) notwithstanding that at a meeting following the cessation of her appointment in the care proceedings, but prior to her appointment in the adoption proceedings the guardian had expressed agreement to the proposal that the child be placed for adoption. In *Re J* Ward LJ held that it is untenable to assert that there is bias

or the appearance of bias based simply on adverse views expressed in the course of long proceedings.

27. Further, in *Re J* Ward LJ agreed with the observation of the judge at first instance that, frequently, a children's guardian holding a certain view can be persuaded under cross-examination to change their minds, that the "*flexibility, rigidity, competence, balance, wisdom or other aspects of her conduct of the case are matters which the court will be invited to take into account when deciding whether to accept her evidence or recommendations*" and that "*Only in very rare circumstances can such factors disqualify a Guardian from acting at all*". Within this context I also note the observation of Sir Nicholas Wall in *A County Council v K, C and T* [2011] 2 FLR 817 at [117] that:

"The reasoning of the Cafcass guardian, whether given orally or in writing is always open to challenge in cross-examination, which can always go to method. Added to which, of course, where the report is in writing, good practice requires the investigative and reasoning processes to be set out. Once again, the decision is for the *court*, which is heavily dependent upon the quality of the advice it receives."

28. Finally in respect of *Re J*, at 88 Ward LJ agreed with the observations of the judge at first instance that the guardian's function is not a judicial function. In short, and once again, the court and not the children's guardian is the final arbiter of what is in the child's best interests. Within the context of this latter point, it is important, once again, to note the observations of Macur LJ in *MW v Hertfordshire County Council* [2014] EWCA Civ 405 at [32] that the children's guardian is a witness subject to the same judicial scrutiny as any other witness and starts with no special advantage in proceedings as compared with other witnesses.
29. Finally in relation to the authorities, in *Re A (Conjoined Twins: Medical Treatment)*(No 2) [2001] 1 FLR 267 Ward LJ held that the court can terminate the appointment of a Children's Guardian where he or she has acted manifestly contrary to the best interests of the child, observing as follows:

"It was not necessary for the President, in order to dispose of the application, to attempt any comprehensive statement of the circumstances in which it might be expedient to remove a guardian ad litem, and the President wisely did not embark on that course. Neither r 4.10(9) of the Family Proceedings Rules 1991 nor the corresponding provision of the Civil Procedure Rules 1998 (r 21.7(1)) specifies any limit on the court's power to terminate the appointment of a guardian ad litem or litigation friend. The President focused on the particular situation in which the court is asked to replace a guardian ad litem because the guardian has in the conduct of litigation taken a course of action (in which we include an omission), or is about to take a course of action, which is manifestly contrary to the best interests of the child whose interests it is the guardian's duty to safeguard. If the guardian (or litigation friend) does act manifestly contrary to the child's best interests, the court will remove him even though neither his good faith nor his diligence is in issue."

30. Overall, it would appear that whilst the court's discretion to terminate the appointment of a children's guardian under FPR 2010 r 16.25(1)(b) is a full one, it is nonetheless a discretion that should be exercised sparingly, taking into account the imperative of the overriding objective in FPR 2010 r 1.1 to deal with the case justly having regard to the welfare issues involved. Within this context, where the grounds relied on in support of an application to terminate the appointment of the children's guardian concern the methodology adopted by the guardian, the court may terminate the appointment where the guardian acts manifestly contrary to the child's best interests or, but only in very rare circumstances, where the guardian has engaged in conduct that the court would ordinarily be invited simply to take into account when deciding whether to accept or reject the guardian's evidence or recommendations.

## SUBMISSIONS

### *The Mother*

31. As set out above, the mother contends that the Position Statement filed and served on behalf of the children's guardian gives the impression of being biased or partial in circumstances where the guardian expresses a view that she believes favours the father's case before all the evidence he was directed to consider has been filed and served. As also noted above, at points during his submissions Mr Perkins also appeared to broaden his attack to encompass wider generalised assertions of unfairness arising out of the Position Statement authored on behalf of the guardian.
32. Mr Perkins submits that justice must not only be done but must be seen to be done and that, having regard to this cardinal principle, the criticisms the mother levels at the Position Statement filed and served on behalf of the children's guardian justify the termination of his appointment, the appointment of a new guardian and the recommencement of the process of evaluating T's best interests, including a further meeting between T and the new guardian.

### *The Father*

33. The father opposes the application to terminate the appointment of the children's guardian. Mr Bagchi QC submits that the concept of apparent bias is inapt in circumstances where the children's guardian is not the decision maker in the case but rather is a witness. Within this context, Mr Bagchi submits that it would not be appropriate or proportionate to terminate the appointment of the guardian on the basis of the matters relied on by the mother in circumstances where the mother is able to challenge the methodology of the guardian in cross examination (which cross examination will no doubt include the charge that he has pre-judged the issue of living arrangements) and where it is for the court to consider *all* of the evidence and balance the factors set out in s 1(3) of the Children Act 1989 within the context of the child's best interests being the court's paramount concern when reaching its decision.
34. Mr Bagchi submits that any concerns the mother has as to the fairness of the process can be addressed by the court reassuring her in respect of the same and points to the case of *Re J* in which Ward LJ reassured the mother that the judge was confident about the impartiality of the children's guardian, was alive to the issues in the case, and that it was the judge who would have the very difficult task of resolving those issues.

35. Finally, Mr Bagchi submits that, having regard to the statutory duty to avoid delay enshrined in the Children Act 1989 s 1(2), re-starting the process of CAFCASS investigating and analysing T's best interests, with the concomitant requirements that T meet with a further professional and that the final hearing be adjourned for a number of months, cannot be said to be in T's best interests, particularly in circumstances where any issues with the respect to the methodology of the current children's guardian can be addressed through the forensic process of the final hearing as currently listed.

#### CAFCASS

36. On behalf of T, Mr Ford also opposes the application to terminate the appointment of the children's guardian. Mr Ford adopts the submissions of Mr Bagchi on behalf of the father and again emphasises that it is the court that is the final arbiter of T's welfare in this case and that it would not be in T's best interests to further delay this matter. Mr Ford further submits that the Position Statement prepared by Mr Hinchliffe is plainly not the final analysis and recommendations report of the children's guardian, that it is further plain that the Position Statement recognises and records salient matters in respect of both parents and that the Position Statement expressly recognises that the court is yet to make a final determination in the matter.

#### DISCUSSION

37. I have decided that the mother's oral application for an order terminating the appointment of Mr Power as T's children's guardian should be dismissed. My reasons for so deciding are as follows.
38. The mother's allegation of "apparent bias" against the children's guardian (as distinct from the court) as a ground for terminating the appointment of the guardian is in my judgment misconceived. The question of apparent bias falls to be considered in the context of the conduct of a person or persons occupying a judicial or quasi-judicial role. The role of the children's guardian is not a judicial or quasi-judicial role. Whilst he is under a statutory duty to advise the court he is not the decision maker in these proceedings. In the circumstances, it is inappropriate for the mother to seek to approach actions of the children's guardian in the same way as one would approach a person performing a normal judicial role or quasi-judicial role (*R v Secretary of State for Trade and others ex parte Perestrello and another* [1981] 1 QB 19 at 35 A-C).
39. Notwithstanding that the mother's primary contended ground of termination is, in my judgment, misconceived, in circumstances where, pursuant to FPR 2010 r 16.27(1)(b) and PD 16A para 7.6, the children's guardian must conduct the proceedings on behalf of T fairly when, *inter alia*, advising the court on the T's wishes and feelings, the options available to the court in respect of the T and the suitability of each such option, including what order should be made in determining the application, it is nonetheless necessary in my judgment to consider whether the children's guardian has failed to act with the requisite degree of fairness such that the termination of his appointment is justified in accordance with the legal principles I have outlined above.
40. Turning first to the specific passages of the Position Statement in issue, I am not able to accept Mr Perkins' submission that the passage in the Position Statement lodged on behalf of the children's guardian set out at Paragraph 11(i) above setting out his analysis of T's wishes and feelings evidences a lack of impartiality on the part of the guardian.

The views of the guardian are plainly grounded in statements made to him by T. The missing statement of the father could only have acted reinforce the conclusion reached by the guardian. The matters which Ms Hamade has been asked to consider do not go to interpreting the nature or significance of T's wishes and feelings. The child's guardian makes clear in his report that he spoke to T after she had met with her mother specifically to check whether her views had changed.

41. The position in respect of the passage in the Position Statement lodged on behalf of the children's guardian set out at Paragraph 11(ii) above is, I accept, of greater concern. It is clear that in coming to his views the children's guardian considered the position of the mother, both in terms of the quality of T's attachment to her and her travel difficulties with respect to the United Arab Emirates and appreciated that the matter remained subject to final determination by the court. However, statement that "*The children's guardian takes the view that T has suffered enough change and suggests a formula of arrangements that add, expand and compliment the advantages that accrue to her living with F in Dubai*" does have the appearance of a recommendation regarding the final outcome of this matter and both parents appear to have taken it as such. Further, it is beyond dispute that the guardian reached his conclusion without seeing the totality of the evidence he had been directed to consider. Whilst, once again, the missing evidence of the father may well only have reinforced this conclusion, the report of Ms Hamade was potentially relevant to it in circumstances where it bore on the question of how easy ongoing contact between mother and daughter would be to maintain in light of the nature and extent of any continuing issues regarding the mother's ability to enter and leave the United Arab Emirates.
42. In circumstances where, pursuant to FPR 2010 r 16.27(1)(b) and PD 16A para 7.6, the children's guardian must conduct the proceedings on behalf of T fairly, it is unfortunate that the Position Statement lodged on behalf of the children's guardian is expressed what appeared to be a settled recommendation prior to the children's guardian having had sight of all of the evidence and without the Position Statement making clear on its face that the children's guardian acknowledged that his "*suggested formula of arrangements*" had been arrived at in that context. Whilst I accept that the Position Statement is a document drafted on behalf of the children's guardian and not by him and that the document evidences his understanding that the matter remained subject to final determination by the court, I also accept that concern as to the impartiality of the guardian and, accordingly, the fairness of the proceedings has been generated in the mother in circumstances where the children's guardian reached his conclusion without considering all of the evidence he was directed to.
43. However, having considered the position carefully and acknowledging the concerns of the mother, I am not able to accept, having regard to the respective roles of the Guardian and the court, that there is a real likelihood that the approach of the children's guardian will lead to unfairness in the proceedings as a whole such that the criticisms of the methodology of the children's guardian require the termination of his appointment pursuant to FPR 2010 r 16.25(1)(b).
44. As I have already noted, it is the court that is the decision maker in this case and not the children's guardian. The court is required to consider fully and fairly all of the evidence before it when reaching its final decision on the welfare of T, having regard to the matters set out in the Children Act 1989 s 1. Within the context of that process, two

matters are of particular importance when considering the mother's application to terminate the appointment of the children's guardian.

45. First, during the course of that process the children's guardian enjoys no special status relative to other witnesses before the court (*MW v Hertfordshire County Council* [2014] EWCA Civ 405 at [21] and [32]). The fact that the children's guardian is under a duty to advise the court the options available to it to make recommend what order should be made does not mean that the advice and recommendation of the children's guardian carries with it preferential, let alone determinative weight in the proceedings. The views of guardian, even when set out in a final analysis and recommendations report, are not binding on the court. At all times it is the application of the principles and factors set out in the Children Act 1989 s 1 to the totality of the evidence before the court that drives the court's conclusion as to what is in the child's best interests. There would be more force in mother's application if the court was bound to follow recommendations of the children's guardian or if the recommendations of the guardian carried preferential weight in the proceedings. However, neither of these propositions is sound.
46. Second, within the context of this legal framework the evidence of the children's guardian falls to be evaluated by the court in the same way as any other witness having regard to factors including its credibility, internal consistency and fairness, with the results of that evaluation being applied in reaching a final determination. Specifically, the evidence of the children's guardian will be the subject to forensic scrutiny by the court through the medium of cross-examination. Within this context the mother will be able to test the aspects of the guardian's methodology that concern her and make submissions to the court on the consequences of any challenges she makes good. In particular, she will be able to put to the children's guardian that he has pre-judged the issue of T's living arrangements and the court can consider whether the guardian's recommendation is thereby undermined. The court is well used to hearing and considering challenges mounted in cross examination by way of an allegation of prejudgment against social workers and children's guardians.
47. In the foregoing circumstances, and with these procedural protections in place, in my judgment the matters recorded in the Position Statement of the guardian that cause the mother concern do not amount to grounds for terminating the appointment of that guardian on the basis of unfairness. Whilst it is unfortunate that this position has arisen, I am satisfied that the trial process as a whole will allow the mother a fair opportunity at the final hearing to challenge the methodology and reasoning process of the children's guardian, which challenges will be taken into account by the court when deciding what weight to attach to his views. Within this context, I am satisfied that the parties can remain on an equal footing and that the court can deal with the case fairly notwithstanding the statements included in the Position Statement drafted on behalf of the children's guardian.
48. I of course acknowledge the principle that it is not only important that justice is done but that it is seen to be done. However, once again, I am satisfied that the fact that it is the court who is the decision maker in this case, coupled with the opportunity the mother has to challenge the methodology and conclusions of the children's guardian *prior* to the court reaching its decision, meets the requirements of this cardinal principle. I also bear in mind that the children's guardian has yet to file and serve his final analysis and

recommendations report and that he will do so having had sight of all of the evidence that has been placed before the court.

49. In reaching my decision I have also had regard to the delay that will be engendered in these proceedings if the appointment of the current children's guardian were to be terminated and the matter adjourned for a new guardian to commence work. I have also borne in mind that such a course of action would necessitate T having another meeting with a different professional to talk once again about her wishes and feelings. Having regard to the statutory principle that delay is ordinarily inimical to the welfare of the child, and whilst not determinative, this in my judgment is a further reason for refusing the application to terminate the appointment of the current children's guardian.
50. Finally, and again whilst not determinative of my decision on the mother's application, as I have already observed the mother made her application to terminate the appointment of the children's guardian pursuant to FPR 2010 r 16.25(1)(b) orally (without even having given notice of the intention to make such an application in her Position Statement) and absent any written or oral evidence in support of that application, contrary to the requirements of FPR 2010 r 16.25(2). In the circumstances, the court is without the evidence mandated by the rules of court when considering an application to terminate the appointment of the children's guardian.

## CONCLUSION

51. There will, in very rare circumstances, be cases where the court accedes to an application to terminate the appointment of the children's guardian where the guardian has adopted a methodology that the court would ordinarily be invited simply to take into account at a final hearing when deciding what weight to attach to the guardian's evidence or recommendations. This, however, is not such a case. For the reasons given above I am satisfied that the mother's application to terminate the appointment of Mr Power should be dismissed, and I so dismiss it.
52. As I have already observed, in *Re J Ward* LJ endeavoured to reassure the mother that the judge in that case was confident about the impartiality of the children's guardian, was alive to the issues in the case, and that it was the judge who would have the very difficult task of resolving those issues. I reassure the mother in the same terms in this case.
53. Finally, the need for the court to consider the issues set out in this judgment stems, in large part, from the failure by CAFCASS Legal to adhere to the directions made by this court on 5 April 2016. Mr Hinchliffe's decision to complete his Position Statement on 2 June 2016 ahead of the receipt of evidence due to be filed on 10 May 2016 in respect of the report of Ms Hamade and on 3 June 2016 in respect of the statement of the father, which evidence the court required the guardian to consider before the lodging of a Position Statement, together with the terms in which the Position Statement was drafted in those circumstances, have caused the mother unnecessary worry and concern and the court additional work. That worry and work could have been avoided had CAFCASS Legal complied with the directions made by the court or applied to vary the same. I hope that CAFCASS Legal will reflect on this.
54. That is my judgment.