

## Private Law Children

December 2024

**A cautionary tale for practitioners on how unfairness in proceedings need not be apparent, the risk or appearance of unfairness must be considered and acted upon accordingly.**

**[F v M & Anor \(Rev1\) \[2024\] EWHC 3190 \(Fam\)](#)**

### Facts

F applied for permission to appeal a CAO in respect of Z which provided that Z live with M, who was granted permission to relocate to Hungary, and spend time with F in accordance with a contact schedule.

The chronology of proceedings, prepared by F as a litigant in person, showed the all too normal extensive delay experienced by those going through the family justice system. There were 5 hearings, including a fact-finding hearing and despite being first issued on 23 December 2020, the case did not finally come to a head until September 2024. The appeal came about on one essential ground: that the outcome was unjust due to serious procedural irregularity. It was argued on two bases, the first that the Recorder had failed to consider relevant factors and secondly, that *'counsel for M had previously been engaged in discussions with F'* [p5]. It was contended that those discussions created a duty of confidence between counsel for M and F, and her decision to represent, and continue to represent M, was prejudicial to F receiving a fair trial. The first basis of appeal was dismissed as unarguable, but Hayden J allowed permission to hear the appeal on the second.

The facts relevant to that appeal are as follows. F contended that he met M's counsel (Ms O) at a charity social event. In conversation, Ms O told F that she was a family barrister which F said provided him the outlet to discuss the challenges he had faced as a litigant in person. F contended that Ms O gave him her telephone number and invited him to call her the following week to discuss his case, with a view to representing him. F contended that he called Ms O on 5 October 2022 and the call lasted one hour, at the conclusion of which, Ms O indicated she would represent F. Two further contacts took place which appeared to be warm New Year's greetings. F sent Ms O the bundle, accompanied by an email with comments on 21 February 2023 but received no response. At a

hearing on 5 June 2023, F was surprised to find Ms O representing M, he raised it with the judge on the basis that it was inappropriate and unfair. The judge enquired of M whether she was aware that F contacted Ms O, of which M was aware and was content for Ms O to represent her. Hayden J stated that *'if that was the sole focus of the enquiry, then it failed to identify the central danger. The point was not whether M was content for Ms O to represent her, but whether F was'* [p9]. It is worth reiterating that, at the time, F was acting as a litigant in person.

By the time the matter came before the court for final hearing on 18 September 2024, F was under the impression that despite his obvious discomfort with Ms O representing M, F assumed his misgivings were not shared by the court and so the matter continued, and a final decision was made. Ms O, who was contacted for the purposes of the appeal, stated that any and all contact with F, did not lead to a relationship being created. Ms O accepted that F had asked her to represent him, and that F sent her the bundle, but contended that she neither opened or read the bundle, or F's email because F had not signed a contract, nor had he provided proof of identity and address.

## Judgment

In *Re C (Children: Covid 19: Representation)* [2020] EWCA Civ 734, p23 identifies a list of aspects of the right to a fair hearing as guaranteed by law. They include:

*'...(2) There must be a protection not only from actual unfairness but also from the risk of unfairness [...]*

*(5) The principle of equality of arms entails a reasonable opportunity to present one's case, including one's evidence, in a way that does not place one at a substantial disadvantage to one's opponent.*

*(6) The administration of justice requires not only fairness but the appearance of fairness... However, the misgivings of individuals with regard to fairness of the proceedings must be capable of being objectively justified.'*

In *P (A Child: Fair Hearing)* [2023] EWCA Civ 215, the Court of Appeal confirmed at p42:

*'It is a fundamental principle rooted in the common law concept of natural justice and reflected in the ECHR, that a legally valid decision can only spring from a fair hearing. If a hearing is unfair, a judgment cannot stand.'*

Finally, the BSB Code of Conduct requires a barrister to not accept instructions in a particular matter if, inter alia:

*'(4) there is a real risk that information confidential to another former or existing client **or any other person to whom you owe duties of confidence**, may be relevant to the matter, such that if, obliged to maintain confidentiality, you could not act in the best interests of the prospective client and the*

*former [...] person to whom you owe that duty does not give informed consent to disclosure of that confidential information*

*And*

*(10) there is a real prospect that you are not going to be able to maintain your independence' (rC21)*

A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected.

Hayden J stated that it would be inappropriate to determine between the conflicting accounts of Ms O and F, however, the similarities between their accounts allowed him to determine the appeal. F did not need to establish a breach of confidentiality [p18], rather the weight of professional obligation is to avoid the appearance or risk of unfairness and for justice not only to be done, but to be seen to be done. The fact that F plainly considered that a professional relationship had been created, his immediate complaint to the judge clearly pointed to a risk, or an appearance of unfairness [p18]. F perceived there to be unfairness, this was an *'important forensic barometer'* and was *'manifestly authentic'* [p18]. On that basis, the appeal was allowed, and the matter remitted and reallocated to the High Court for determination in advance of any potential relocation of M and Z to Hungary.



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