Neutral Citation Number: [2021] EWCA Civ 748

Case No: B4/2021/0620

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WATFORD
HHJ Vavrecka
WD18C00729

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 May 2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE SINGH
and
LORD JUSTICE STUART-SMITH

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H-M (Children)

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Susan Campbell QC and **Rachel Temple** (instructed by **All Family Matters**) for the **Appellant Mother**
Hannah Markham QC and **Laura Williams** (instructed by **Hertfordshire County Council**) for the **Respondent Local Authority**
Rachael James (instructed by **Bretherton Law**) for the **Respondent Children by their Children's Guardian**
Penny Howe QC and **Saiqa Chaudhry** (instructed by **Hepburn Delaney Solicitors**) for the **Intervenor**

Hearing date: 11 May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Wednesday, 19 May 2021.

Lord Justice Peter Jackson :

Introduction

1. This is an appeal from the refusal of an application to reopen findings of fact made in family proceedings. At the end of the appeal hearing , we informed the parties that the appeal would be dismissed. These are my reasons for agreeing with that decision.

2. The application to reopen was made in the light of the different outcomes in family and criminal proceedings. In broadest summary, the Family Court found that very serious injuries to a one-year-old child were caused either by the appellant mother or by KF, her then boyfriend, and that it was not possible to say which was responsible. In the criminal proceedings, KF was convicted of causing the injuries and the mother was acquitted on those counts, although she was convicted of child cruelty for lying to professionals and preventing the child from getting medical treatment.

3. The family proceedings, which began in July 2018, have a considerable procedural history. In the summer of 2019, His Honour Judge Vavrecka ('the Judge') conducted a three week hearing, leading to the findings of fact and a full judgment in November 2019. Meanwhile, the criminal trial took place in October 2019. The mother at first applied ineffectually for a reopening of the findings of fact, but in the end she chose to appeal. Her appeal, delayed for a variety of reasons, was heard in October 2020 by McCombe LJ, Baker LJ and Roberts J. It was dismissed, with Baker LJ giving the substantive judgment: see *T and J (Children)* [2020] EWCA Civ 1344; [2021] 4 WLR 25. The mother then renewed her application to reopen the findings of fact on the basis of new evidence, and that application was refused by the Judge on 19 March 2021 at a two day hearing. The mother again appealed, with permission granted by Baker LJ, and we heard her appeal on 11 May 2021.

The first appeal

4. The history up to October 2020 is fully set out at paragraphs 1 to 24 of the judgment of Baker LJ. Between paragraphs 25 and 33, he summarised the Judge's lengthy fact-finding judgment. He then addressed the grounds of appeal in turn. Those were that (1) the findings of fact were incompatible with the criminal verdicts; (2) the Judge was wrong not to draw adverse inferences from KF's refusal to give evidence in the family proceedings; and (3) the assessment of KF's evidence was inadequate. He also addressed an application for the admission of evidence from a further expert in odontology (Professor Pretty), who had given evidence in the criminal proceedings.

5. At the first appeal, the mother was represented by Mr Ian Peddie QC, who very sadly died earlier this year. As to ground 1, Baker LJ said this:

> "35. … Overall, it was Mr Peddie's submission that the Crown Court had carried out a more complex analysis of what had happened to J. As a result, the mother was completely exonerated as either a principal or secondary actor in the abuse perpetrated on the boy.
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> 36. The problem with this argument is that it is not a valid ground of appeal against the judge's findings in the care proceedings.

> Instead, as Ms Penny Howe QC pointed out on behalf of KF, it is really a challenge to the judge's refusal to reopen the findings after the conviction at trial. In the skeleton arguments filed on behalf of the appellant in support of this appeal, Mr Peddie at more than one point cited *Re Q (Fact-finding Rehearing)* [2019] EWFC 60, which is a decision on the reopening of findings in care proceedings following an inconsistent verdict in parallel criminal proceedings.
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> 37. In my judgment, neither the fact that a jury has reached a verdict on criminal charges that is inconsistent with earlier findings in care proceedings nor the simple fact (if it be true) that the evidence heard by the jury was different from, or more comprehensive than, that adduced before the judge in the family proceedings is sufficient by itself to justify the conclusion that the findings in the family proceedings were wrong so as to require an appellate court to overturn the findings. It may, however, be sufficient to justify a reopening of all or part of the fact-finding hearing. I shall return to this point of the end of this judgment."

6. At paragraphs 39 to 45, Baker LJ gave reasons for refusing to admit the evidence of Professor Pretty on appeal. In summary, he did not accept that if the report for the criminal proceedings had been available at the fact-finding hearing, it would have had an important influence on the outcome of the case. The existence of the range of opinions expressed in the report was known to the lawyers representing the parties at the fact-finding hearing and to some extent it was canvassed before the Judge.

7. At paragraphs 46 to 52, Baker LJ considered grounds 2 and 3 concerning adverse inferences and the assessment of KF's evidence, reaching this conclusion:

> "51. It follows that Judge Vavrecka was not obliged as a matter of law to draw an adverse inference against KF from his refusal to answer questions. He plainly considered the submission that he should draw such an inference and, in my judgment, cannot be criticised for rejecting it. Furthermore, although he declined to infer from his refusal to answer questions that KF was the perpetrator of the injuries, he took his failure to give evidence into account in his overall analysis, and the fact that he was as a result left with important questions unanswered was a material factor in his conclusion that KF could not be excluded from the pool of perpetrators of the injuries. His careful and considered balancing of this aspect, alongside his detailed analysis of the mother's credibility and the lies she had told during the investigation, was plainly within his discretion as the trial judge.
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> 52. In support of the further ground of appeal, Mr Peddie put forward a number of criticisms of the judge's evaluation of KF's written evidence. In my judgment, none of these give rise to a legitimate challenge in this Court. The judge's evaluation of this

> evidence was measured and careful and I can see no basis on which an appellate court would be entitled to interfere."

8. For those reasons, the mother's appeal from the fact-finding judgment was dismissed.

9. Finally, between paragraphs 55 and 62, Baker LJ considered in detail the alternative route that might be available to the mother in the form of a further application to reopen the findings of fact. In doing so, he referred to a number of authorities, including *Re E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447, and he concluded his judgment in this way:

> "60. … [In] the present case an application was made to the judge on two occasions to reopen the fact-finding hearing. Both applications were refused. Each application was, however, made orally, with no formal notice of application and without identifying with any particularity the evidence and other material on which it was based. In those circumstances, it is unsurprising that the applications were refused at that stage and it would not be appropriate for us to adopt the course taken by this Court in *Re E*.
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> 61. It is, however, open to the appellant to make a further application to the judge to reopen the fact-finding hearing. It must plainly be on notice, identifying the evidence and other material on which it is based. At the time when they made the oral applications for a reopening, the mother's solicitors were not in possession of the evidence from the Crown Court trial. In contrast, they now have a transcript of much of the evidence, including the evidence given by KF.
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> 62. It would not be right for this Court to indicate how the judge should determine a further application to reopen the fact-finding hearing. Like Peter Jackson LJ in *Re E*, I consider that the further evidence might have an important influence on the outcome but emphasise that the extent of its significance is a matter for the judge. It should be recorded, however, that in the course of the hearing before us, Ms Markham indicated that the local authority would not oppose an application for a rehearing of the findings relating to the serious injuries sustained by J on the night of 30 June and 1 July."

The reopening application

10. In his extempore judgment on 19 March 2021, the Judge gave his decision at the outset. He then described the process and the parties' positions (I have removed names where they appear):

> "4 … In the course of the judgment of the Court of Appeal, reference was made to the potential for an application to be made to reopen my findings (Court of Appeal decision para 37, 55-62) V120) and this two-day hearing has been to consider that

application brought on behalf of the children's mother. The mother's application for reopening runs to 24 pages (A844-A867).

5 Most of the references made in this hearing were to the 'core bundle' running to some 2,968 pages, but I also had regard to a police bundle of 894 pages and an authorities bundle of some 142 pages. I also had the initial reopening bundle running to 925 pages. I trust that parties understand that having heard a day of legal argument yesterday, by necessity this judgment will deal only with a fraction of the material but will make my views and findings in relation to the submissions clear.

6 Leading counsel Ms Campbell and her junior Ms Temple have spoken to their written submissions that were filed last year. The grounds for reopening the fact-finding will be analysed later in this judgment.

7 The mother's application was strongly opposed both by Hertfordshire County Council and KF. Whatever indication the local authority gave to the Court of Appeal, I am quite clear that the local authority have not in any sense conceded or agreed to the rehearing of any aspect of the fact-finding.

8 Mr Fletcher, on behalf of T's father, aligned himself with the local authority's submissions. Ms Harrill, for J's father, says it is in J's best interest to have as much clarity as possible as to who caused the injuries to him and the application requires full and proper consideration. She added that the arguments from the local authority were very persuasive.

9 Mrs Bradley, on behalf of the children's guardian, Mr Purpura, had no separate case to put from that of the local authority. The guardian's main concern is the delay to resolving these proceedings which have been going on an extremely long time."

11. The Judge then directed himself on the law.

"12 The legal framework for this reopening application is dealt with comprehensively in the skeleton argument filed on behalf of the mother, particularly at paras.4 through to 9, starting at A846 in the core bundle. I need not recite the authorities which I have considered, which are set out there. All advocates agree the test at stage one, which is effectively that the mother needs to show solid grounds for believing that the previous findings require revisiting. The authorities bundle was supplemented by the Court of Appeal decision in *Re: W (Children: Reopening/Recusal)* [2020] EWCA 1685. So far as what constitutes solid grounds, Sir James Munby in the case of Re: Z-Z put it this way:

> "One does not get beyond the first stage unless there is some reason to believe that the earlier findings require revisiting. Mere speculation and hope are not enough, there must be solid grounds for challenge."
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> By that, there must be solid grounds for believing that the rehearing will result in a different finding. The decision of the Court of Appeal in determining the mother's appeal against my finding does not assist me in the task that is before me. It is me who is left to determine whether those solid grounds exist.
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> 13 Ms Markham, for the local authority, drew my attention to a passage in the case of *Re: E* at p.120 of the authorities bundle where the case of *Re: M and M-C* is cited, highlighting that the … fact-finding process should not be torn up as though it never happened simply because one of the adults subsequently made a statement shifting their position.
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> 14 Ms Howe identified the case of *Re W (Children: Recusal/Opening)* [2009] EWCA Civ 1685 and, together with Ms Markham, highlighted the view at para.26 in that case that an appeal against a fact-finding is the normal procedure which a party aggrieved by finding of fact should take up and it is only in a small subset of cases, where new information casts real doubt on findings, that there can be an application to either admit fresh evidence on appeal or on an application to reopen the fact-finding. Paragraph 28 of *Re: W* emphasises that it is rare for findings of fact to be varied. The process of reopening is only to be embarked upon where the application presents genuine new information. It is not a vehicle for litigants to cast doubt on findings they do not like, and some applications will be no more than attempts to reargue lost causes or escape sound findings.
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> 29 Paragraph 43 of *Re: W* makes the point again. Both the local authority and KF say there is no new information of any significance that should persuade the court to review its findings. I agree."

12. The Judge noted the importance of the issue for the mother, who has not had direct contact with the children since July 2018. Although she was not seeking the return of the children to her care, she does want to see them again, and the findings have serious implications for her future relationships, for any other children she may have, and for her work situation.

13. Turning to the arguments, the Judge recorded the mother's case on what she argued was new material. This essentially consisted of four main strands: the evidence of KF at the criminal trial, the evidence of Dr Haines that some of the injuries had a sexual element, further information about KF's whereabouts in the week of 17-24 June 2017, and the evidence of Professor Pretty that the bitemark evidence was unreliable. The Judge dealt with these sequentially, while noting that they were not to be compartmentalised.

14. The issues arising from KF's evidence at the criminal trial were analysed over the course of paragraphs 21 to 35 of the judgment. The Judge noted that there were 17 areas of evidence that the mother relied upon, and recorded that he had been taken to a great number of passages of transcript. He considered the submission that these showed KF's motivation and his opportunity to cause injury, and the lack of explanation for who else could have done so. It was said that KF had made certain 'concessions' and it had also been shown that he had deleted relevant material from his phone. It was said that he gave an account to the jury of doing far more for J's care then he had described at the fact-finding hearing.

15. The submissions of the local authority and of KF were then recorded. They argued that, although KF had not given evidence before it, the Family Court had had a wider canvas of evidence than the Crown Court. The local authority had produced a comparative table of evidence running to 23 pages which systematically compared the evidence given in each set of proceedings.

16. I will cite quite extensively from the judgment so that my conclusions on the appeal can be more shortly expressed and better understood.

17. The Judge expressed his conclusion on this issue in this way:

> "29 When I look at the evidence, and the local authority comparative table pp.4 through to 10 helpfully sets this out in tabular form, it makes very clear that I did have a great deal of evidence before me, for example: as to the degree of help, assistance, involvement that KF had with J; the degree of affection that he felt for J; the asking for videos; the photograph of J with him; the acceptance of his involvement with J's intimate care and the creaming of his genitals, and his evidence; for example, in relation to who put J to bed on 30 June. These aspects, just by way of summary, were all touched on in submissions, but it is clearly material which was available to me.
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> 30 The fact that the whole area of sexual assault and the sexual aspect of some of the injuries was not explored in great detail in the fact-finding before me is not, in my judgment, a ground for reopening the fact-finding. First of all, the local authority did not seek to run their case in that way. As Ms Markham made clear, their concern in the family court fact finding was to establish that injuries that were seen on J were identified and, where possible, the court made findings as to whether they were inflicted or non-accidental, and, if possible, to identify in relation to those inflicted injuries the perpetrator or, in the absence of being able to find a specific perpetrator, the pool of perpetrators. The motivation for causing or inflicting injuries, as Ms Markham told me, is not only not necessarily a requirement or an ingredient for a finding in a family case, it is frequently ignored and not touched upon. Of course, that did not prevent, if the mother's counsel had chosen to do so, it being pursued on her behalf at the fact-finding hearing.

31 I was also told about the significance of KF's behaviour in deleting phone material, … strengthening the submission that KF was covering up, and attempting to distance himself from his actions on that night. I do not accept this is significant new material in any way. I had a great deal of material in the mobile downloads, voicemail messages and the evidence before me at the fact-finding hearing. I do not accept that this information about deletion of data would have added significantly to that picture.

32 Further examples of important new information were explored in the submission. The bruise and the emergence of the bruise on 30 June on J, and KF's suggestion during his evidence to the criminal court that the mother burnt J on her return that evening, which Ms Campbell described as incredible, and the evidence as to the glass in the nappy, and the use of the knife, and the glass being between layers. All of this material Ms Campbell said went to KF's credibility. Ms Campbell also said the evidence to the criminal court about his heroin use, would not only go to his state of mind and his desperation on that day to get drugs, but equally might be evidence that he was panicking about what he had done. Again, looking at each of these pieces of further information separately or cumulatively, they do not, in my view, take Ms Campbell's submission any further.

33 The list of what was not available at first instance, which is summarised at A845, when compared with what she submitted was now available, as set out at para.13 at A852 is, when analysed, in my judgment not significant new material. As the table of evidence prepared by the local authority shows, in relation to those matters raised, I did have a great deal of information before me at the fact-finding and I do not accept that this amounts to new material which would provide a solid basis for reopening.

34 Of course, I mentioned the evidence I had about KF and his case in the family fact-finding. Much of Ms Campbell's submissions effectively give rise to further attacks on his credibility, his shifts in position, and his inconsistency. Those are often going to arise, these arguments about credibility, when somebody has not given evidence at a family fact-finding hearing and then gives evidence in their own criminal trial. In and of itself, each of the areas raised by Ms Campbell, as I say separately or cumulatively, in my judgment do not provide a ground to review my findings.

35 Ms Campbell says that as well as being able to make findings specifically about KF, if I were to reopen the fact-finding in relation to certain matters, I would be able to recalibrate my findings in relation to the mother. Again, notwithstanding the large number of points raised about KF's evidence, in my

> judgment the findings and the basis for my findings in relation to the mother and her credibility were based on an extremely wide canvass of evidence, and I am simply not satisfied that the additional material put before would have any implications for my findings."

18. The Judge's ruling on the significance of the further evidence of Dr Haines was in these terms:

> "36 The area of evidence relating to Dr Haines arises from Count 3 on the indictment in relation to sexual touching and the injuries to the penis and scrotum caused by squeezing/twisting and biting. KF was found guilty in relation to this count and the mother was not. Ms Campbell effectively, in the light of the way in which the criminal court heard this matter and the specific count on the indictment and the conviction, understandably is critical of the failure of that aspect to be considered at the family court fact-finding. She points to a document produced by Dr Haines for the criminal trial (U446 in the bundle) which was not produced in the family fact-finding hearing. She points to that as confirming Dr Haines' view that there is evidence in relation to, for example, the bruising and gripping marks that were seen on J together with the marks around his genital area that show that there should have been an exploration of KF's sexual motivation. She says that is absolutely crucial.
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> 37 Whilst the finding in the criminal court subsequent to the family court hearing understandably gives rise to that submission, looking back at the way in which the case was conducted before me, it is quite clear that Dr Haines and his views on this was before the family court. He provided evidence in writing and orally to me and was questioned by all the parties, and whilst there is this additional statement in the criminal proceedings which might be described as furthering his preliminary view, if one again uses the comparative schedule at p.4 of the local authority's document, that very quickly highlights that Dr Haines, in the evidence before the family court, did in fact raise these matters. The love bites, or love nips as they are described, the finger and thumb marks on J's body consistent with gripping and forcing the legs apart or holding him down, as well has his opinion that J suffered severe physical and sexual abuse over a long period. These matters, which he canvassed in his report and touched on in the experts' meeting, were before the family court.
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> 38 Dr Haines' evidence was fully before the family court. The additional statement, and the approach of the prosecution in putting a count on the indictment in relation to sexual touching, does not add significantly or at all to the evidential picture that was before me. The local authority, for reasons I have already explained, did not run its case in the way in which the

> prosecution did at the criminal trial. In my judgment, the submissions on this point fail. I do not agree that the evidence of Dr Haines at the criminal trial provides any grounds for reopening.
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> 39 Just by way of final comment on Dr Haines, it has not gone unnoticed that the position of the mother's team on Dr Haines has undergone a complete reversal. At the beginning of the family court trial, I was effectively being told he was not a 'proper 'expert and, looking as I did at Ms Baruah's closing submissions at the fact-finding, Dr Haines was described as not being a Part 25 compliant expert, somebody who was offering opinions outside of commonly accepted standards and somebody who, she submitted, had demonstrated a dogmatic approach. For the reasons I have already given, Ms Baruah's views on Dr Haines were heard at the fact-finding, and the view that the jury took and the conviction in relation to the charge as found against KF does not, in my judgment, change the matters that I have already commented on."

19. In relation to the period of 17-24 June, the judge recorded that the mother had changed her evidence at the criminal trial in relation to KF's presence in the home. In the family proceedings, she had said that she did not believe that he was there, while she now said that he had been there at least twice. The finding that the mother must have been responsible for certain injuries caused during that period should therefore be revisited. The Judge dealt with that in this way:

> "41 … Of course, the mother's case in large part, and a great deal of time was spent on her suggestion, was that of the injuries being organic. I am reminded that she was given ample opportunity to provide an explanation for how those marks had come about, and was unable to do so. There was evidence before me about KF's presence in the home on 17 June, but I am reminded as well in relation to the sending of the photograph by the mother on 19 June and her voicemail note about deciding not to take J to hospital, and that message and the photograph being before KF was then again present on 21 June. Certainly, the photographs which were shown to Dr Cohen on 22 June were taken certainly before KF was in the home on 21 June.
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> 42 The cumulative impact of reviewing the evidence that was available to me in relation to KF's presence on 17 June, which in fact part of the case at the fact-finding, and the new material as it is described, is such that in my view again does not add to the evidential picture and is not a sound basis for reopening those findings."

20. Lastly, the Judge addressed the significance of Professor Pretty's evidence.

> 43 I turn now to the submissions in relation to Professor Pretty, and the evidence at the criminal trial. Ms Campbell's arguments

on this are set out in paragraphs 33-40 (A863-866). Of course, I am aware that Lord Justice Baker, in the appeal against my fact-finding judgment, described Professor Pretty's view and that it may have an important influence on the application to reopen findings. I have carefully reviewed the evidence that was before the criminal court from Professor Pretty. Of course, I have to remind myself of the evidence that was before me at the fact-finding. I had the evidence of odontologists Dr Kouble and Dr Crewe. Both provided written and oral evidence to me. Dr Kouble, in his evidence to the criminal court did, in my judgment, not significantly shift his position. He did revise his views, saying that he could not exclude [two other individuals] as being perpetrators of the armpit bite, and whilst maintaining J's arm would have been outstretched, he accepted it could have been in a number of positions. These changes to his position, in my judgment, would not have, and do not, significantly or at all impact on my judgment.

44 I link that with Professor Pretty and the extent to which his evidence to criminal court should be regarded as new evidence. Of course, it is not, in reality new evidence because the controversy about odonatological evidence was something that was canvassed and was very clear at the fact-finding. Professor Pretty, although he of course gave evidence in the Crown Court and was sceptical about the reliability of odonatological evidence, was another expert in what is a longstanding debate. Of course, Dr Crewe, who gave evidence before me, I accept was 'given away', as it is described in the criminal trial, particularly because of concerns about his methodology of using photocopies, but Dr Kouble's evidence remained remarkably similar.

45 The fact of the bite, the fact that the mother could not be excluded as a possible biter, and the fact it was accepted KF could be, because of his different dentition, and the absence of any other persons in the pool, in my judgment leaves the finding that I made at the fact-finding hearing as a sound finding. The views of Professor Pretty do not, in my judgment, provide a sufficient ground for reopening.

46 I mentioned that the issue of controversy was raised in the fact-finding hearing. In particular, Dr Kouble's first report raised the issues of distortion that may be present and the difficulties of interpretation. The controversy was explored and this whole area was put to the experts, and of course I dealt with this in my fact-finding judgment, in particular paras.133, 134 and 268. The forensic odonatological evidence was, in my judgment, very fully considered in the fact-finding family hearing, and I do not accept that the additional material put before me from the

> criminal trial undermines the solidity of my findings or provide a basis for reopening that aspect."

21. Having approached the individual issue in that way, the Judge stated his overall conclusion:

> "47 Overall therefore, I agree with the submissions put before me by the local authority and KF's counsel. In some respects it could be said that this reopening application is being used to have a second bite of the cherry. I have to recognise that the difference between the findings of the family court and those decisions reached by the jury do quite rightly lead to the family court needing to appraise its findings and whether there is a basis for reopening.
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> 48 I have reviewed the material Ms Campbell has brought to my attention. As invited by Ms Markham I have also looked back at the approach of the mother's team during the fact-finding and, much more importantly, the broad canvas of evidence to which I had to have regard.
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> 49 The lack of evidence from KF, the fact that Professor Pretty gave a different view on the odontological evidence at the criminal trial, and that Dr Haines and the sexual element formed a very significant part of the criminal trial. Those three aspects which I have reviewed have not, in my judgment, produced material which provides a sound basis for me reopening the fact-finding.
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> 50 The criminal and family courts have many differences, not only in relation to admissibility of evidence and to the standard of proof but also the focus and the wide canvas in particular that the family court as distinct from the criminal court has regard to.
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> 51 For all of these reasons, I refuse the mother's application and I do not believe that my earlier findings need revisiting. That is the judgment of the court."

Submissions on appeal

22. For the mother, Ms Susan Campbell QC and Ms Rachel Temple accepted that the mere fact of an inconsistent conviction was not a ground for reopening a finding of fact and that what mattered was the evidence that lay behind the conviction. In her opening submissions to us, Ms Campbell appeared at times to be arguing that the Judge had articulated too stringent a legal test, but on examination it is clear that he directed himself in line with the authorities: in any event, that challenge was not a ground of appeal, still less one for which permission was granted. Ms Campbell further submitted that the Judge had not carried out the necessary careful evaluation to justify his conclusion that the court had been aware of the further material and that it could make no difference to the outcome. Much in the manner described by the Judge, she took us to a range of references in the evidence to show that the criminal trial had revealed new

information. She noted that in his fact-finding judgment, the Judge had referred to "a huge gap" in his understanding of what had happened to J in the weeks leading up to his admission to hospital and she suggested that the further information was capable of filling at least some of that gap. A proper analysis should have caused the Judge to entertain doubt about his findings, but his approach, involving a broad commentary on tables of evidence amounted to no more than a consideration of edited highlights. Particular emphasis was placed on KF having been convicted of an offence with sexual motivation, when no such finding was made in the family proceedings. Similarly, it is said that in his evidence in the Crown Court Dr Kouble attributed a lower forensic value to some of his findings than he had done in the Family Court. Although the evidence in the criminal proceedings did not directly challenge KF's exclusion in respect of a particular bite mark attributed to the mother in the family proceedings, the evidence of Professor Pretty cast general doubt on the reliability of the expert evidence. Ms Campbell made similar submissions in relation to the other grounds for reopening.

23. These submissions were challenged head-on by Ms Hannah Markham QC and Ms Laura Williams for the local authority and Ms Penny Howe QC and Ms Saiqa Chaudhry for KF. They took us to a range of material to show that the Judge had made no error of law or procedure. The original findings of fact had been upheld by this court. The criminal verdicts had rightly made everyone pause to think, but the two sets of proceedings had different purposes and it was not surprising that some differences could be found in the evidence. To take two examples: the odontology experts in the criminal proceedings agreed that the contentious bite mark was a human bite mark and that KF could be excluded on the basis of his distinctive dentition; further, although the Family Court was not aware that KF had deleted material from his phone, his messaging with the mother at critical times remained on her phone and had been closely analysed at the fact-finding hearing. In addition, the evidence in relation to whether there had been a sexual element to the assault on J was no more extensive in the criminal proceedings than it had been in the family proceedings: if anything, the opposite was true.

24. The Children's Guardian does not support the appeal; on his behalf Ms Rachael James submits that the Judge cannot be said to have been wrong to find that there were no solid grounds that would merit a rehearing.

Conclusion

25. For an appeal of this nature to succeed, an appellant must show that a judge has made a material error of law or reached a conclusion that was not reasonably available. In this case, no error of law is properly alleged and the task for the mother has therefore been to demonstrate that the Judge was bound to conclude that the further evidence required him to reopen his previous findings. She has not succeeded in that task, for the following reasons.

26. A decision about whether to reopen findings of fact is highly case-sensitive. An appeal court will be slow to interfere with a reasoned decision one way or the other and will only do so where some error is manifest. In this complex case, the Judge had the marked advantage of having conducted a very substantial fact-finding hearing that left him with a distinctive view of the strengths and weaknesses of the evidence that he had read and heard. He was therefore particularly well placed to compare that evidence

with the evidence given at the criminal trial. As such, his assessment attracts a wide margin of consideration.

27. The differing outcomes of the two proceedings rightly led to the Family Court asking whether there was solid reason to believe that its findings required revisiting. The answer to that question did not depend on the existence of divergent findings, however striking at first blush, but on a careful analysis of the underlying evidence. In this case the most striking feature was, in my view, the conviction of KF for a sexual offence. However, as the Judge explained, the evidence leading to that conviction was not materially different from the evidence that was considered by the Family Court. For reasons that seemed good to the parties and the court in the family proceedings, no party pursued a finding that KF had acted with a sexual motive. On an analysis of the evidence, to which we were taken, that does not represent any shortcoming in the fact-finding process. The same can be said in relation to the other individual issues and as to the cumulative position. The outcome of the two proceedings is in some ways incongruent, but the underlying evidence was not.

28. I also reject the claim that the Judge approached his decision with insufficient care or that he looked into the issues in insufficient detail. On the contrary, his judgment shows conspicuous care and command of the issues, expressed with a relative brevity that is creditable. It is easy to see why he found the comparative table of evidence a useful means of organising the extensive material, and the complaint that this led him into a superficial assessment is unfounded. To my mind, he addressed the issues in appropriate detail for a case of this gravity. He did not read out long passages from the evidence, but incorporated aspects that were very familiar to him by reference to the papers. The extensive citation from his judgment illustrates his method and the quality of his reasoning.

29. In the end, the mother's case was essentially a rehearsal of the submissions made to the Judge, with a complaint that he did not attach more or less weight to certain elements. That approach does not really engage with the appeal test. The submissions might have found favour with the Judge, but after thorough consideration he did not find them persuasive. That was a conclusion he was entitled to reach.

30. I therefore joined in upholding the Judge's decision and in dismissing the appeal.

Lord Justice Singh

31. I agree.

Lord Justice Stuart-Smith

32. I also agree.
