Neutral Citation Number: [2023] EWFC 48

IN THE FAMILY COURT

Date: 03/04/2023

Before:

MRS JUSTICE KNOWLES

- -

Between:

A Father	**Applicant**
- and -	
A Mother	**Respondent**

F v M (Appeal: Fact Finding: Domestic Abuse: Adequate Reasons)

- -

Mr Oliver Latham for the father
Miss Chloe Lee for the mother

Hearing date: 14 February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 April 2023 by circulation to the parties or their representatives by e-mail.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Knowles:

Introduction

1. This is an appeal by a father ("the father") against findings of domestic abuse made by Deputy District Judge Carson ("the judge") following a hearing on 8-13 September 2022. The judge handed down his decision on 21 October 2022, having responded to requests for clarification from the father's counsel. The father was granted permission by HHJ Murden to appeal the judge's decision on 15 November 2022.

2. The essence of the father's challenge was that judicial analysis of important issues of fact and law was either entirely lacking or inadequate. Important and valid points raised on behalf of the father during cross-examination and in submissions were either not considered at all or were dismissed without justification or adequate explanation.

3. The respondent to this appeal is the mother of the father's two children, a little girl aged 6 who I shall call A and a little girl aged 5 who I shall call B. Neither child has direct contact with the father. The mother opposed the appeal and invited me to uphold the judge's findings of serious sexual and other types of domestic abuse.

4. I have read the bundle and skeleton arguments and heard oral argument from counsel for the mother and the father. Both Mr Latham for the father and Miss Lee for the mother made helpful and realistic submissions and, following the hearing, co-operated to produce a chronology of the couple's relationship to assist with the context to this appeal. I indicated that I would reserve my decision. This judgment has been a little delayed in the hope that it might have taken account of the Court of Appeal's decision in the appeal from my decision in A and D v B, C and E [2022] EWHC 3089 (Fam) but no date for that decision has been announced.

5. Following careful consideration, I dismiss the father's appeal.

Background

6. What follows is a summary to give context to the issues engaged in this appeal.

7. The parties met in 1997 and saw each other regularly but did not regard themselves as being a couple. They first had sex in late 2010/early 2011 and began having overnight stays in each other's home in about April 2011. On an unknown date in the first part of 2012, the father allegedly vaginally raped the mother and the couple briefly separated in August 2012, reconciling some 6/8 weeks later. In about 2013/2014, the father allegedly anally raped the mother and, from June to August/September 2014, the parties separated once more. From about late 2014/early 2015, the parties ceased to have anal sex, whether consensual or forced as the mother alleged.

8. In March 2015, there was an incident in which the couple rowed and the mother's phone was smashed. About a month or so later, another incident took place in which damage was caused to the mother's flat. During the autumn of 2015, the couple separated twice, each time reconciling shortly thereafter. Despite the evident turbulence in the relationship, the couple were also pursuing fertility treatment. As a result, A was born in summer 2016 and B was born at the end of 2017. In 2018, the mother moved house but the father did not cohabit with her and the children though

he stayed with them from time to time. By this stage, the couple's relationship can best be described as on/off. In August 2018, the father allegedly attempted to rape the mother orally and their sexual relationship finally came to an end in August 2019.

9. On separation, the father had regular unsupervised contact with both girls each Friday from 10.30am to 6.30/7pm and, on two occasions, the girls slept at the father's home. However, by January 2020, the father's contact with both girls ended. The mother alleged that the father broke their agreement that he was not to have other adults around the children during contact, but the father asserted that contact stopped not because he had broken any rules but because he had introduced the children to his new partner. In February 2020, the parties attended mediation but this was ineffective as, in March 2020, the father issued an application for a child arrangements order.

10. In June 2020 and in September 2020, the mother was interviewed by the police with respect to her allegations of rape and domestic violence against the father. In November 2020, the father's application to the family court resulted in the court making a live with order in favour of the mother and a spend time with order in the form of indirect contact each fortnight by way of cards, letters and gifts between the father and his daughters. The court's order in November 2020 was made by consent and followed the recommendation of the Family Court Advisor that the father would, in future, be able to make a further application to the court. The father was still, at that time, the subject of an active police investigation for rape.

11. In February 2021, the mother obtained a without notice non-molestation order against the father which he did not apply to set aside as was open to him. In April 2021, the mother applied for a specific issue order to change the children's surname from that of the father to her own and, in November 2021, the father made a cross-application for a child arrangements order, seeking contact with his daughters. Both those applications were case managed to a fact finding enquiry before the judge in September 2022 because of the allegations of serious sexual and domestic abuse made by the mother against the father.

The Judge's Findings of Domestic Abuse

12. The judge made the following findings:

a) On occasions during the course of their relationship, the father forced anal sex on the mother and pressurised the mother to have sex when he must or ought to have realised that she did not want sex;

b) The father vaginally raped the mother on one occasion;

c) The father anally raped the mother on four occasions;

d) On some occasions, the father attempted to force oral sex upon the mother and on occasions he was successful in orally raping her. On 17 August 2018 the father attempted to rape the mother orally;

e) The father smashed the mother's phone during an argument in March 2015;

f) In or about April/May 2015, the father was verbally abusive to the mother and smashed up her door and some of her property

g) In early November 2015, the father assaulted the mother by pinning her against a wall, pushing her and being verbally abusive to her;

h) The father blamed the mother for causing damage to A's face during childbirth in the heat of the moment as part of an argument during the parties' turbulent relationship;

i) The father lost his temper with A during one occasion as part of bath time and may well have scared her, but had no intention of causing harm to her;

j) Throughout the parties' relationship, the mother had been subjected to controlling and coercive behaviour in respect of the father's sexual demands and desires.

It is noteworthy that the judge did not make all the findings contended for by the mother which were contained in her schedule of allegations. I observe that active judicial case management reduced the ambit of the mother's schedule of allegations during the course of the fact finding hearing, first on 8 September 2022 and then on 12 September 2022.

The Judgment Under Appeal

13. The judge began by briefly summarising the background to the fact-finding enquiry, noting that the mother had made extremely serious allegations against the father. He explained that case management prior to the fact finding hearing had been far from straightforward and that there had been a number of amended schedules listing the mother's allegations. The judge did not set out the applicable law, noting that this had been agreed between the parties. However, he recorded that the onus was on the mother to prove the allegations she made on the balance of probabilities. The judge observed that, despite the large quantity of documents before the court, the case was largely centred on the mother's word against that of the father, therefore making the credibility of those individuals *"critical"*.

14. The judge then proceeded to give his overall impression of both the father's and the mother's evidence. He noted that the father had made concessions, accepting that his relationship with the mother was volatile at times and that there were verbal arguments during the relationship. The father had also accepted - in relation to another woman - that he had continued to have sex with her when she had asked him to stop. The judge also recorded the father's written admission that there were instances when he would insert his finger into the mother's anus and his acceptance that he would try to do this, despite being told to stop and despite knowing that the mother did not enjoy this sexual act. The judge noted the father's attendance at an anger management course and his admission that he had smashed property in the mother's home. Importantly, the judge addressed the submission made on behalf of the mother that the father had raped two other women in June 2014 and November 2015, recording that the mother accepted these allegations were hearsay and that neither woman had given a statement or were available for cross-examination. Overall, the judge acknowledged that the father presented well when giving his evidence and made some concessions which were to his credit. However, the judge said that these concessions together with the case advanced on behalf of the mother caused him concern.

15. The judge's assessment of the mother as a witness was lengthy, because of the submissions made by the father (a) that there were multiple serious inconsistencies in the mother's oral evidence and (b) that the mother had lied in her written and oral evidence to the family court and had likewise lied in her interview to the police. The judge addressed a number of the submissions made on the father's behalf. First, he set out the mother's and the father's respective submissions about the mother's awareness of what constituted rape. Having done so, the judge said:

> *"... In my judgment, [the mother] gave a credible, powerful and descriptive account when giving evidence of the alleged sexual abuse and despite extensive cross examination of extremely private incidents she provided answers which in my judgment to a very large extent supported her statements. She was able to explain given both her history of being abused as a child and the nature of her relationship with [the father] that what she now knows to be rape was at the time considered by her to be the norm. I do not find that this undermines [the mother's] credibility."*

16. The judge then addressed the father's submission that it was surprising that the mother had failed to make reference to oral rape in her first witness statement. He noted the mother's evidence on this matter and concluded: *".... Whilst it is surprising at first sight that oral rape was not specifically raised in the first statement there are of course accounts of both anal and vaginal rape contained within that statement with one of the exhibits to it being a text message that [the father] "forced her to suck his dick". On [the mother's] account there has been significant, multiple and differing types of sexual abuse over many years and I do not find this example given by Mr Latham as undermining [the mother's] credibility"*. The judge then recorded two further submissions made on behalf of the father, noting that they had some merit but, in the context of the case as a whole, were relatively minor and did not fundamentally undermine the mother's credibility.

17. The judge recorded the father's submissions (a) that the mother's recollection evidence from 2020-2022 should be treated with caution because it came some considerable time after the more serious allegations between 2012-2015; and (b) that the mother was involved in children proceedings, was represented by a solicitor at the time she gave her police interviews and had an incentive to paint the father in a bad light. The judge then went on to give his overall assessment of the mother's credibility, describing her as a very plausible witness who gave honest and insightful evidence. The judge noted that the father was unable to give a reason as to why the mother had made her allegations of abuse and went on to explain how this had come about, concluding that *"...It is unclear to me why [the mother] would repeatedly lie about these matters as submitted by Mr Latham"*.

18. The judge then addressed the specific allegations set out in the final schedule dated 12 September 2022. In respect of the allegation of forced anal sex, the judge noted the evidence about the parties' behaviour in respect of anal sex, some of which supported the father's case. However, the judge said this was primarily a case of the mother's word against that of the father and that he had not come to his finding lightly given the seriousness of the allegation. He found that the mother was honest and fundamentally consistent in comparison to the father who he found less plausible. The judge then addressed the allegation of one occasion of vaginal rape, again finding the mother's account broadly consistent with what the mother had said to the police.

19. The judge then addressed the allegation that the father had anally raped the mother on four occasions, noting carefully the submissions made by Mr Latham on the father's behalf. Those submissions were that the mother had reluctantly submitted to anal sex as part of a routine of consensual anal sex or that she had reluctantly acquiesced to anal sex. Mr Latham also submitted that the father may have been under the impression that the mother was consenting. The judge stated that he found the mother's overall account of the anal rape to be consistent, this being reinforced by other evidence in her medical records. The judge carefully noted that this evidence was based on self-report and came many years later. He stated that he found himself to be persuaded by paragraph 68 of the mother's counsel's submissions and found it more probable than not that the father anally raped the mother on four occasions.

20. With respect to multiple oral rapes, the judge set out the submissions made on behalf of the father, namely that the mother had consented, even if reluctantly, as part of the relationship. The judge said:

> *"…I find the comment at 25b of "[the mother] choosing the path of least resistance, which is part and parcel of a relationship" to be unfortunate. Whilst it may be the case that oral sex is used as an alternative to other forms of penetrative sex this should be on a consensual basis and not to prevent the other partner from "kicking off". It is not rape however if the oral sex was consented to. However, having heard the oral evidence of both parties and along with my findings in respect of the other allegations of sexual violence, I prefer the evidence of [the mother] which I find to be the most plausible".*

The judge went on to note that, with respect to the incident on 17 August 2018, the father accepted in evidence that he had slapped his penis against the mother's face and that, on a previous occasion, he had grabbed the mother's nose to force her mouth open so that he could place his penis in it. The father had also accepted that the mother had threatened to bite his penis if he attempted to insert it into her mouth but had suggested that this was all part of sex play. The judge rejected that suggestion and found the father to have, on occasion, attempted to force oral sex on the mother and, on occasion, to have successfully orally raped her. He found specifically that, on 17 August 2018, the father had attempted to rape the mother orally.

21. Turning from the allegations of sexual abuse, the judge found the mother's account of a violent assault by the father in March 2015 not to be made out, observing this was an incident where *"neither party covered themselves in glory"*. The judge went on to make findings in relation to an incident in April/May 2015, in large part because of the father's admissions of kicking and damaging the mother's property. The judge also found the mother's allegation that the father had assaulted her in early November 2015 to be credible given the father's anger management issues. He then made findings about a row in which the father blamed the mother for the damage to A's face during childbirth but noted this had been said during an argument and in the heat of the moment during what was a turbulent relationship. The judge made a finding in relation to the father's behaviour towards A at bath time when she was a baby but said this was not a deliberate act by the father who had no intention of hurting his child.

22. The judge refused to make a number of findings sought by the mother, for example, about a row between the parties in September 2016; about the father's alleged aggression towards the mother and children; about the father's alleged financial

control of the mother; and about the father admitting to the mother that he had raped her while she was asleep. In conclusion, the judge said this:

> *"... Given my findings in respect of the sexual abuse allegations it is my judgment that throughout the parties' relationship that [the mother] has been subjected to controlling and coercive behaviour in respect of [the father's] sexual demands and desires. I also find that the parties' relationship has been turbulent and I find [the father] does have anger management issues, has damaged some of [the mother's] property and has said some hurtful things in arguments and texts."*

23. On 13 October 2022, Mr Latham on behalf of the father sent a lengthy document seeking clarification of the judge's draft judgement. First, Mr Latham drew some apparent inconsistencies in the oral evidence to the judge's attention but the judge stated that, even if his note of the oral evidence was incorrect, it did not impact upon the findings in question. Mr Latham then set out a list of eleven matters which had not been addressed in the judgment. The judge responded by saying that he had considered in detail the written submissions and did not believe it was necessary to respond to each and every one. If a submission had not been specifically referred to in his judgement, then the judge did not consider it relevant to his overall conclusions. Finally, Mr Latham invited the court to clarify 13 matters within the body of the draft judgment, by posing a series of detailed questions. The matters of clarification went, in essence, to the credibility of the mother's evidence and the judge responded briefly to each question, indicating that he found the mother's evidence to be more compelling than the father's and attributed little weight to the matters of detail raised by Mr Latham.

The Parties' Positions

24. What follows is a brief summary of the written and oral submissions made by the mother and the father in this appeal.

25. On behalf of the father, Mr Latham advanced three grounds of appeal, on which permission was granted by HHJ Murden. First, he contended that the judge failed to provide adequate reasons for his decision and pointed to the relatively brief written analysis in relation to each finding of fact, describing it as superficial in the context of what was an evidentially complex case. Mr Latham also criticised the judge's response to the questions sent by way of clarification which he said was simply inadequate and failed to engage with the detail of the submissions made. Second, Mr Latham submitted that the judge had compartmentalised the mother's oral evidence and had failed to balance it sufficiently or at all against the challenges to the mother's credibility. Third, the judge failed to properly analyse the core issue of consent at the time of the sexual abuse by either failing to deal explicitly with that issue in respect of each occasion of alleged sexual abuse complained of by the mother or by failing to carefully analyse that issue overall.

26. In response, Ms Lee drew the court's attention to the judge's reasoning which she characterised as sufficiently detailed for the parties to understand how and why the judge had reached his decision. It was unsurprising that the judgment did not contain an analysis of all the evidence and submissions which the judge read and heard given the voluminous evidence and submissions before the court. Judgments were not

required to include a factual analysis of everything a judge had read or heard. Second, she submitted that the judge had taken a holistic view of the evidence and was uniquely placed to assess the evidence of both parents during the hearing. The assertion that he had compartmentalised the mother's evidence could not be sustained. Finally, Ms Lee pointed to examples where the judge had clear regard to the issue of consent and had applied it in a manner which was appropriate to the business of the family court.

Legal Framework

27. Rule 30.12(3) of the Family Procedure Rules 2010 provides that an appeal will only be allowed where the decision of the court below was wrong or there was a procedural irregularity such that the decision was unjust. In this case, the grounds of appeal are not concerned with any procedural irregularity.

28. A summary of the correct approach by an appellate court to an appeal against a fact-finding determination by a judge at first instance is contained in [75]-[76] of Re H-N and Others (Children) (Domestic Abuse: Findings of Fact) [2021] EWCA Civ 448, namely:

> *"(75) Although the House of Lords decision in Piglowska v Piglowski [1999] 2 FLR 763 concerned an appeal against the court's exercise of discretion in matrimonial finance proceedings, much of Lord Hoffman's description of the general approach to appeals is expressly applicable to fact-finding cases:*
>
> *"In G v G (Minors: Custody Appeal) [1985] 1 WLR 647, 651-652, this in the speech of Lord Fraser of Tullybelton, approved the following statement of principle by Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343, 345, which concerned an order for maintenance for a divorced wife:*
>
> *'It is, of course, not enough for the wife to establish that this court might, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.'*
>
> *This passage has been cited and approved many times but some of its implications need to be explained. First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc V Medeva Ltd [1997] RPC1:*
>
> *'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis,*

relative weight, minor qualification… of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation'

The second point follows from the first. The exigencies of daily court room life are such that reasons for judgement will always be capable of having been better expressed. This is particularly true of an unreserved judgement such as the judge gave in this case but also of a reserved judgement based upon notes, such as was given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account.'

(76) In hearing and determining the present appeals we have endeavoured to apply the well-established understanding and approach described in Piglowska and elsewhere. Full allowance is to be afforded to the trial judge who has heard the evidence and been exposed to the parties and the detail of each case over an extended period."

29. An appellate court should also be cautious not to strain to find error where there is none, particularly where an appeal is based on a failure to reference a relevant authority or to refer to a particular matter. Applying Piglowska in Re F (Children) [2016] EWCA Civ 546, Sir James Munby P explained at [22]-[23]:

"Like any judgement, the judgement of the Deputy Judge has to be read as a whole and having regard to its content and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and provide sufficient detail and analysis to enable to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 229, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist".

The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360…

"[…] An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself"

It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffman's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".

30. In paragraph 1 of Re A (A Child: Findings of Fact) [2022] EWCA Civ 1652, Jackson LJ succinctly summarised the approach of an appellate court to a fact finding determination in this way:

> *"In the absence of some other identifiable error, an appellate court will only interfere with findings of fact made by a trial judge if it is satisfied that the decision cannot reasonably be explained or justified: Henderson v Foxworth Investments Limited [2014] UKSC 41 at para. 67. In this appeal from findings of fact arising from allegations of domestic abuse, including transnational marriage abandonment ('stranding'), the appellant argues that this stringent requirement has been satisfied."*

Analysis

31. I have addressed the grounds of appeal in what seems to me to be a more coherent sequence in a case where much turned on the oral evidence of the parents, as counsel for the father recognised.

32. **Ground two** asserted that the judge had compartmentalised the mother's evidence rather than bringing into his assessment the challenges to the mother's credibility made by the father. That ground struck me as difficult to sustain given the judge's lengthy analysis of the mother's credibility at the start of his judgment which addressed the key challenges to the mother's evidence mounted by the father. However, Mr Latham submitted the judge had failed to factor into his assessment of the mother's credibility that he had not made some of the findings pursued by the mother, such as being raped in her sleep or that she had been violently assaulted in March 2015. In his analysis of the mother's credibility, the judge acknowledged that, for example, the mother's claim of violent assault was not supported by the evidence, but explained that, in the context of the evidence as a whole, he regarded this issue as relatively minor and not undermining of the mother's overall credibility. In my opinion, the judge was entitled to take that view.

33. Further, the judge's assessment of the mother's credibility did not result in an uncritical acceptance of each and every allegation made by the mother. Thus, the judge failed to find that the father was aggressive around the mother and the children because there was insufficient evidence on which he could properly do so. Likewise, the judge made no finding on the issue of financial control as the mother's allegation did not satisfy the test for abuse of that type and he also made no finding that the father had failed to make a contribution, whether financial or otherwise, when he moved into the mother's home because there was insufficient evidence to do so.

34. Finally, the trial judge had the unique advantage of being able to assess both the mother and the father both during their respective evidence and during the entire hearing. It is clear from the judgment that, especially with regard to the allegations of sexual misconduct, the judge found the mother's evidence more persuasive and that he was troubled by the admissions made by the father, one of which related to the father on one occasion grabbing the mother's nose to force her mouth open so he could put his penis into it and on another occasion slapping his penis against the mother's face during oral sex. The father had also admitted behaving sexually in ways which he knew the mother did not like. Those admissions formed part of the judge's evaluation of the father's evidence, especially with regard to sexual conduct, and

undoubtedly influenced his overall assessment of the parties' evidence. I can see nothing wrong in the judge's approach.

35. In coming to that view, I have had regard to the Court of Appeal's judgment in Re B-M (Children: Findings of Fact) [2021] EWCA Civ 1371 which provided guidance to family judges about the proper approach to the demeanour of a witness when evaluating the credibility of that witness's oral evidence. Giving the court's reasoning, Jackson LJ said this at paragraph 25:

> *"No judge would consider it proper to reach a conclusion about a witness's credibility based solely on the way that he or she gives evidence, at least in any normal circumstances. The ordinary process of reasoning will drawn the judge to consider a number of other matters, such as the consistency of the account with known facts, with previous accounts given by the witness, with other evidence, and with the overall probabilities. However, in a case where the facts are not likely to be primarily found in contemporaneous documents the assessment of credibility can quite properly include the impression made on the court by a witness, with due allowance being made for the pressures that may arise from the process of giving evidence. Indeed in family cases, where the question is not only "what happened in the past?" but also "what may happen in the future?", a witness's demeanour may offer important information to the court about what sort of person the witness truly is, and consequently whether an account of past events or future intentions is likely to be reliable."*

In paragraph 28, Jackson LJ went on to cite with approval paragraph 104 of Re A (A Child) (No. 2) [2011] EWCA Civ 12 in which Munby LJ said this:

> *"Any judge who has had to conduct a fact-finding hearing such as this is likely to have had experience of a witness – as here a woman deposing to serious domestic violence and grave sexual abuse – whose evidence, although shot through with unreliability as to details, with gross exaggeration and even with lies, is nonetheless compelling and convincing as to the central core… Yet through all the lies, as experience teaches, one may nonetheless be left with a powerful conviction that on the essentials the witness is telling the truth, perhaps because of the way in which she gives her evidence, perhaps because of a number of small points which, although trivial in themselves, nonetheless suddenly illuminate the underlying realities."*

36. In this case, I acknowledge that the father did not assert that the judge made his decision exclusively based on the mother's demeanour, but rather that he relied unduly on her oral evidence and did not evaluate the matters drawn to his attention by Mr Latham from the documentary evidence. In my view, the judge did not need to address each of those issues in detail although he clearly had them in mind when formulating his overall assessment of the mother's credibility. His assessment was not based solely on the mother's demeanour, but also on the consistency of her evidence as opposed to that of the father which the judge found concerning and less plausible.

37. **Ground three** complained that the judge had failed to properly analyse issues of consent and the father's state of mind at the time of the alleged instances of sexual abuse. In essence, Mr Latham criticised the judge for failing to explicitly consider

those matters on each and every occasion that he made a finding of sexual abuse. In contrast, Ms Lee highlighted references to consent in the judgment and submitted that the judge understood the concept of consent and had applied it when reaching his conclusions.

38. Perusal of the judgment makes plain that the judge was fully alive to the issue of consent. With respect to the allegation of forced anal sex, the judge recorded that on occasions the mother did consent to anal sex in order to please the father. The judge distinguished this from times when the mother reluctantly acquiesced and thus the judge found the father to have forced anal sex on the mother and pressured her to have sex when he must have known or ought to have realised she did not want sex. Likewise, with respect to the allegation of anal rape, the judge rejected the father's submission that the mother had reluctantly submitted to anal sex as part of a routine of consensual anal sex or that she had reluctantly acquiesced or that the father may have believed the mother was consenting. He instead accepted the mother's evidence (that she was anally raped on four occasions and that she had said no and asked the father to stop) alongside evidence from her medical records. He also relied on paragraph 68 of the mother's counsel's submissions though he did not quote the contents of that paragraph. Paragraph 68 noted, amongst other factors, the father's *"obsession with anal sex"* and the father's admission that he continued more than once to pursue a sex act (inserting his finger into her anus) with the mother even when told to stop. Finally, with respect to the allegation of oral rape on multiple occasions, the judge noted that if there was consent to oral sex, this would not be rape.

39. Mr Latham was highly critical of the judge for stating in response to the clarification questions, *"it is of course implicit that if I have made a finding of rape that there was no consent from the mother"*. Was the judge required to address consent with respect to each and every occasion of alleged rape? I do not think that he needed to given the way in which he addressed both the allegation that the mother had been anally raped four times and the allegation that the mother had been orally raped by the father on more than one occasion.

40. Mr Latham was especially critical of the judge's approach to the father's state of mind when approaching the allegation of vaginal rape and for omitting to make reference to the father stopping penetrating the mother's vagina when she said no and then leaving her alone. The judge recorded that the mother had omitted to tell the police that she had shouted to the father to get off her but he nevertheless accepted the submissions made by Ms Lee and found that, in other respects, the mother's account of the alleged vaginal rape had been consistent over time. As he stated, the judge simply preferred the mother's account having given due consideration to the factors which undermined that account (including the passage of time; the fact that the mother had not specifically said no to sex before the father penetrated her; and that she and the father would sometimes have sex to make up after an argument). Further, Mr Latham's submissions ignored the mother's evidence that the father had taken his penis out of her vagina and then tried to anally penetrate her, a stance she maintained despite challenge in cross-examination.

41. Drawing the threads together, I am unpersuaded that the judge's approach to the issue of consent was flawed. He was not required to apply consent by reference to criminal concepts but to look at the intimate behaviour of the parties towards each other. In that regard, the comments of the Court of Appeal in paragraph 71 of Re H-N and

Others (Children) (Domestic Abuse: Finding of Fact Hearings) [2021] EWCA Civ 448 are apposite, namely that behaviour which falls short of establishing rape may nevertheless be profoundly abusive and should certainly not be ignored or met with a finding akin to *"not guilty"* in the family context. A focus on consent and the father's state of mind as advocated for by Mr Latham would, in my view, have resulted in the judge becoming too narrowly focussed on criminal concepts in his investigation and evaluation of the nature of the relationship between these two parents. This view is consistent with the views I expressed in A and D v B, C and E [2022] EWHC 3089 (Fam) (see paragraphs 23-32).

42. **Ground One** asserted that the judge failed to give adequate reasons for his decision. Mr Latham's submissions on this point were detailed and numerous but really amounted to the overarching criticism that the judge had failed to consider the submissions advanced by the father particularly with respect to the allegations of sexual abuse.

43. It is important to understand that a judge conducting a fact finding enquiry is not obliged to prepare a detailed analysis of each and every submission or point made by a party. To do so would represent an unsustainable burden for the judiciary. What is required of a fact finding judgment is quite simple: (a) for the parties to understand why they won or lost and (b) to provide sufficient detail and analysis for an appellate court to decide – should it need to do so – whether the judgment is sustainable on challenge. My task is not to grade the judgment and find it wanting because I might have found differently or because I might have structured and expressed myself differently in a judgment. My role is to consider the substance of what the judge said, having regard to the generous ambit of decision making accorded to a fact finding determination by a trial judge.

44. Did this judgment do what it needed to do in a case where, as Mr Latham accepted, it was the mother's word against that of the father and the allegations were very serious? It is plain that the judge was fully alive to the need to evaluate carefully the credibility of both parties and did so at some length in his judgment. Further, the judge's conclusions were neither extraordinary nor indefensible given his assessment of the parties' oral evidence which included admissions by the father of sexual misconduct towards the mother and another woman.

45. Mr Latham submitted that the judge had failed to have regard to the mother's alleged lies. He asserted that the judge had failed to adequately address four examples where the mother had lied on key issues. Though these four examples were listed in the section of the judgment dealing with the mother's credibility, Mr Latham said that the judge's analysis was partial and inadequate.

46. With respect to the first example, this being the mother's failure to realise that the additional allegations of sexual abuse amounted to rape until the evening before the fact finding hearing with this explaining their absence from both her police and her first Children Act statement, Mr Latham submitted that (a) the judge should have referred to the allegedly more *"graphic"* and thus memorable nature of the new allegations; and (b) the judge should have noted that no film of the rape had been recovered from the father's phone even though the mother alleged the rape had been recorded. Overall, the judge was said to have failed to critically analyse the father's submissions on this issue including those matters referred to in his judgment. Having

considered this submission carefully, I am not persuaded that the judge's failure to address each of the points made by the father rendered his overall conclusion on this issue defective. That conclusion took account of the submissions made by Ms Lee and the judge's characterisation of the mother's oral evidence as being credible, descriptive, and in alignment with her written evidence.

47. The second example was the mother's allegation that she had spoken to her solicitor about the father having sex with her when she told him to stop but had been advised nothing further could be added to her statement. The judge dealt with it as I detailed in paragraph 16 above. I reject the submission that he was required to do more.

48. The third example was the mother's account of having her face grabbed and bounced really hard off the wall during the alleged physical assault in March 2015. The judge commented that this matter did not fundamentally undermine his assessment of the mother's credibility and went on to address the alleged assault in some detail later in his judgment. At that point he noted, amongst other matters, the lack of medical evidence and of a witness statement from the neighbour who had allegedly witnessed the incident. The judge's conclusion was that neither party had *"covered themselves in glory"* and he found that the mother had failed to meet the evidential hurdle required of her. That finding did not equate to a conclusion that the mother had lied as submitted by Mr Latham. The more detailed consideration contended for by Mr Latham was absent from the judge's reasoning but this did not fundamentally render his conclusion unsafe.

49. The fourth example concerned inconsistencies in the mother's police statement from 2020 which Mr Latham submitted revealed both her untruthfulness and the alleged tailoring of her Children Act written evidence by what was contained in the police disclosure. He submitted that the judge should have addressed this feature of the mother's evidence in detail. In response, Ms Lee submitted that the police document to which the mother was taken in cross-examination by the father lacked clarity as to whether it was a verbatim account and how that it had come to be made. There was no statement from the police addressing those matters and no evidence from the officers as to how this statement had been generated. The judge noted some merit in the matters raised by the father but considered this issue to be relatively minor and one which did not undermine the mother's credibility. Whilst it might have been desirable for the judge to deal with this matter more comprehensively, it seems clear to me that the document relied on by Mr Latham had its own shortcomings and was unlikely to have persuasive weight in demonstrating the mother's alleged lies. I do not consider the judge's failure to address this matter as fatal to the judgment overall.

50. My conclusions are reinforced by dicta in Re F and Another (Children) (Sexual Abuse Allegations) [2022] EWCA Civ 1002 in which Baker LJ said this about the judicial response to requests for clarification of judgments:

"58. In the present case, counsel submitted carefully crafted and detailed "points of clarification raised on behalf of the intervenor". It is neither necessary nor appropriate to set them out in full in this judgment. I make it clear that counsel was manifestly not seeking to reargue the case nor water down the judgment. But in my view the points of clarification raised went beyond what is intended by the authorities and the recorder was not obliged to answer them. The recorder's refusal to respond to any of the points of clarification was not a ground of appeal raised on behalf of the

intervenor. In my view, had it been raised, it would not have led to a successful appeal.

59. When giving judgment in a complex children's case, no judge will deal with every point of evidence or every argument advanced on behalf of every party. The purpose of permitting requests for clarification to be submitted is not to require the judge to cover every point but rather, as the Practice Note emphasised, "to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process." It is therefore rarely if ever appropriate for counsel to enquire as to the weight which the judge has given to a particular piece of evidence. If, as frequently happens, a judge draws together various strands of the evidence in giving reasons, it is neither necessary nor appropriate for counsel to separate out each strand and enquire what weight the judge has or has not attached to each piece, unless it can be said that in giving his reasons in a general way the judge has failed to address material parts of the evidence, or has created an ambiguity, or has failed to provide sufficient reasons for his decision."

51. Here, the father's document headed *"Corrections and Clarifications"* ran to some six closely typed pages, of which three sought clarification of the judge's reasoning. I note that the judge was asked about the weight he had given to at least four matters raised in the father's submissions and responded by indicating he had given little weight to these matters in the context of the evidence as a whole. This appeal was argued, in part, on the judge's alleged failure to give adequate reasons for his decision but, as I have already indicated, I do not consider that the judge failed to do so either generally or because he failed to provide a substantive response to the overly lengthy corrections and clarifications document submitted by the father. Though it might be said that the judge expressed himself in general terms rather than expanding his judgment to encompass the particular matters raised by the father, it is my view that the judge adequately considered the evidence and the extensive submissions made when reaching his decision.

52. Thus, in conclusion, the judge did that which was required of him by giving sufficient reasoning for his decision.

Conclusion

53. On the basis of the analysis above, I dismiss all three grounds of appeal. This matter will now be referred to the judge for further case management and the listing of a welfare hearing.

54. That is my decision.