This judgment was delivered in private. If the judge gives leave for this or any version of the judgment to be published it is 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.

Case No: LV18C02481

IN THE FAMILY COURT AT LIVERPOOL

35 Vernon Street,
Liverpool, L2 2BX

Date:12 November 2018

Before:

HIS HONOUR JUDGE GREENSMITH

- - - - - - - - - - - - - - - - - - - -

Between:

Liverpool City Council **Applicant**
- and –
M (1)
F (2)
C by his Children's Guardian (3)

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Mr Garside appeared for the **Applicant**
Mr Gorton appeared for the **First Respondent**
Miss Parr appeared for the **Second Respondent**
Mr Senior appeared for the **Third Respondent**

HIS HONOUR JUDGE GREENSMITH:

1. This is an application made prior to a fact finding hearing. The substantive application is for section 31 orders in relation to a young child who has been born to the parties. This is a single issue case.
2. The facts which the court is asked to find involve allegations of serious sexual abuse of a physical nature. The allegations are made by the father's sister who alleges that the father sexually abused her over a period of years when she was between the ages of six and ten; the father would have been aged between twelve and sixteen.

3. It is the duty of the court to endeavour to obtain the best evidence that is available. There is disagreement as to whether the father's sister, who is now an adult, should give evidence with the benefit of participation directions by way of either screens or video link. It is the wish of the sister that she is afforded participation directions, the father objects.

4. There is no dispute that the witness is a vulnerable witness for the purpose of FPR 2010 r3A.4 and the court is required, therefore, to follow PD3AA. The question is whether to allow participation directions, bearing in mind that the court has a duty to all parties, to ensure a fair trial and to preserve the parties' Articles 6 and 8 rights.

5. The father's position turns on the relevance of demeanour in assessing the credibility of a witness. The father says that the court's ability to assess the credibility of the witness will be compromised if the court is unable to assess the witness's demeanour when giving evidence. The father goes further to say that it is necessary that *he* should be able to assess the witness's demeanour when she is giving evidence.

6. The relevance of demeanour as an indicator of credibility is questionable. It is the current teaching of the Judicial College during courses on "judge-craft" to the judiciary across all jurisdictions, including newly appointed Deputy High Court Judges, that judges should be very circumspect about the value of demeanour in assessing credibility.

7. This principle is emphasised in the case which I brought the parties' attention to which is *Sri Lanka v. the Secretary of State for the Home Department* [2018] England and Wales Court of Appeal Civ 1391 and in particular paragraphs 33 onwards. I set this out on full to inform how the current approach to demeanour is developed by Leggatt LJ:

> ***Demeanour***
>
> 33. The term "demeanour" is used as a legal shorthand to refer to the appearance and behaviour of a witness in giving oral evidence as opposed to the content of the evidence. The concept is, in the words of Lord Shaw in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36, that:
>
> > "witnesses ... may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw

> and heard them which can never be reproduced in the printed page."

34. The opportunity of a trial judge or other finder of fact to observe the demeanour of witnesses when they testify and to take this into account in assessing the credibility of their testimony used to be regarded as a peculiar advantage over an appellate court which insulated findings of fact based on such observation from challenge on appeal. This approach was encapsulated by Lord Sumner in *Owners of Steamship Hontestroom v Owners of Steamship Sagaporack* [1947] AC 37, 47, when he said that:

> "... not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."

35. Nowadays the reluctance of an appellate court to interfere with findings of fact made after a trial or similar hearing is generally justified on other grounds: in particular, the greater opportunity afforded to the first instance court or tribunal to absorb the detail and nuances of the evidence, considerations of cost and the efficient use of judicial resources and the expectation of the parties that, as Lewison LJ put it in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, para 114(ii):

> "The trial is not a dress rehearsal. It is the first and last night of the show."

36. Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge". That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were

explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval:

> "I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help."

"Discretion" (1973) 9 Irish Jurist (New Series) 1, 10, quoted in Devlin, *The Judge* (1979) p63 and Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 Current Legal Problems 1 (reprinted in Bingham, *The Business of Judging* p9).

37. The reasons for distrusting reliance on demeanour are magnified where the witness is of a different nationality from the judge and is either speaking English as a foreign language or is giving evidence through an interpreter. Scrutton LJ once said that he had "never yet seen a witness giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not": see *Compania Naviera Martiartu v Royal Exchange Assurance Corp* (1922) 13 Ll L Rep 83, 97. In his seminal essay on "The Judge as Juror" Lord Bingham observed:

> "If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in deceit or the reaction of an honest man to an insult? If a Greek, similarly challenged, becomes rhetorical and voluble and offers to swear the truth of what he has said on the lives of his children, what (if any) significance should be attached to that? If a Japanese witness, accused of forging a document, becomes sullen,

> resentful and hostile, does this suggest that he has done so or that he has not? I can only ask these questions. I cannot answer them. And if the answer is given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. *To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm*." (emphasis added)

See Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 Current Legal Problems 1 (reprinted in Bingham, *The Business of Judging* at p11).

38. Ms Jegarajah emphasised that immigration judges acquire considerable experience of observing persons of different nationalities and ethnicities giving oral evidence and suggested that this makes those judges expert in evaluating the credibility of testimony given by such persons based on their demeanour. I have no doubt that immigration judges do learn much in the course of their work about different cultural attitudes and customs and that such knowledge can help to inform their decision-making in beneficial ways. But it would hubristic for any judge to suppose that because he or she has, for example, seen a number of individuals of Tamil origin giving oral evidence this gives him or her a privileged insight into whether a particular witness of that ethnicity is telling the truth. That would be to assume that there are typical characteristics shared by members of an ethnic group (or by human beings generally) which can be relied on to differentiate a person who is lying from someone who is telling what they believe to be the truth. I know of no evidence to suggest that any such characteristics exist or that demeanour provides any reliable indication of how likely it is that a witness is giving honest testimony.

39. To the contrary, empirical studies confirm that the distinguished judges from whom I have quoted were right to distrust inferences based on demeanour. The consistent findings of psychological research have been summarised in an American law journal as follows:

> "Psychologists and other students of human communication have investigated many aspects of deceptive behavior and its

> detection. As part of this investigation, they have attempted to determine experimentally whether ordinary people can effectively use nonverbal indicia to determine whether another person is lying. In effect, social scientists have tested the legal premise concerning demeanor as a scientific hypothesis. With impressive consistency, the experimental results indicate that this legal premise is erroneous. According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments."

OG Wellborn, "Demeanor" (1991) 76 Cornell LR 1075. See further Law Commission Report No 245 (1997) "Evidence in Criminal Proceedings", paras 3.9–3.12. While the studies mentioned involved ordinary people, there is no reason to suppose that judges have any extraordinary power of perception which other people lack in this respect.

40. This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.

41 No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on

the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.

42. This was the approach which the FTT judge adopted in the present case. It appears that the FTT judge did in fact recall when writing the determination the manner in which the appellant gave evidence at the hearing, as he commented (at para 59):

> "When [the appellant] gave evidence before me, some of his answers were inconsistent and variable but there was no suggestion that he could not remember things."

This suggests that the way in which the appellant answered questions did not create a favourable impression. Quite rightly, however, the FTT judge did not attach weight to that impression in assessing the credibility of the appellant's account. Instead, he focussed on whether the facts alleged by the appellant were plausible, consistent with objectively verifiable information and consistent with what the appellant had said on other occasions (in particular, at his asylum interview and in recounting his history to the medical experts). Applying those standards, the FTT judge found numerous significant inconsistencies and improbable features in the appellant's account which he set out in detail in the determination. As the FTT judge explained, it was "the cumulative effect of the implausible and inconsistent evidence" given by the appellant which led him to conclude that the core of the appellant's account was not credible.

43. Accordingly, even if the appellant had through his demeanour when answering questions given the FTT judge the impression that he looked and sounded believable, the suggestion that the FTT judge should have given significant weight to that impression, let alone that he could properly have treated it as compensating for the many inconsistencies and improbabilities in the content of the appellant's account, cannot be accepted.

8. Applying the approach of the Court of Appeal, I am compelled to make it clear to the parties that I am and will be very circumspect about the reliability of demeanour of

any witness in these proceedings, including the father's sister. It follows that if the court takes that approach to demeanour, so should the father in his assessment of the credibility of the sister.

9. I have considered the advantages of both methods of participation, (video link or screens) and it seems to me that the advantage of a video link will give the witness the choice as to whether she is able to see the father when she gives evidence and whether she wishes the father to be able to see her.

10. I have had regard to the fact that I do think that it is potentially desirable, if possible, for the mother to see the witness. These are very serious matters concerning the welfare of her child moving forward. It is not the mother's role to determine credibility. Indeed, she has stated through her counsel that she will accept unequivocally the finding of the court. As the mother will have to live with whatever findings are made I think she may benefit from seeing the sister give evidence as she may be better able to come to terms with whatever findings are made; provided, of course, that both the witness and the mother are comfortable with that arrangement.

11. I have also had regard to the immediacy of somebody actually being in a court room. On balance, whilst I appreciate that may be useful, on balance, I think the advantage of a video link which gives options and is less cumbersome than screens, satisfactorily overrides that objection.

12. I make participation directions for the witness for her to give evidence by way of video link.