Neutral Citation Number: [2024] EWHC 3327 (Fam)

Case No: FA-2024-000235

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT SITTING IN NOTTINGHAM
RECORDER JACK [Case No. NG23P00344]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2024

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

B	**Appellant**
- and -	
E	**Respondent**

- -

Re T (Appeal: Findings of Fact)

- -

Bede Porter (instructed by **Sills & Bettridge**) for the Appellant
The Respondent in person and unrepresented.

Hearing date: 22 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 20 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in public.

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.

The Honourable Mr Justice COBB :

Introduction

1. This appeal concerns a boy aged five years old who I shall refer to as T. The Appellant in this appeal is T's mother ('the mother'); the Respondent is T's father ('the father').

2. By this appeal, the mother challenges a number of findings of fact made by Recorder Jack ('the Judge'), following a three-day hearing at the Family Court sitting in Nottingham. The fact finding hearing was conducted in the context of the father's application, which he had issued in May 2023, for a 'spend time with' order under section 8 Children Act 1989 ('CA 1989'). Judgment was delivered on 1 August 2024.

3. For the purposes of this appeal, I have:

    i) Read the documents filed on this appeal; the Judge produced a second short judgment when refusing permission to appeal;

    ii) Read selected extracts of the transcript of the proceedings at first instance;

    iii) Received the written and oral submissions of Mr Porter, counsel for the mother, and the oral submissions of the father in person.

4. Following an oral permission hearing on 4 October 2024, I granted the mother permission to appeal on some but not all of her grounds.

5. The substantive proceedings have been stayed pending the outcome of this appeal.

Background

6. This background history is taken from the judgment at first instance.

7. The parties met on a dating website in late 2017. The mother has three older children from a previous relationship. It is common ground that the parents' relationship was initially good; the mother became pregnant shortly after the couple met. After T's birth, the parents' relationship changed and, it is acknowledged, deteriorated. The relationship ended at the end of 2022, when the father left the mother. The father has had little or no contact with T since that time. The parties were never validly married; the Judge heard evidence about a 'proxy marriage' which the parties had purportedly entered into in 2018. This does not bear upon the issues arising on this appeal.

8. The father's application was listed before the Judge in the summer of 2024 for a fact-finding hearing. The facts alleged, on which the Judge was invited to make findings, covered a range of behaviours of the father towards the mother, including:

    i) Failure to attend to T's medical care adequately, and/or ensure that T received his medications in a timely manner; failure to take T to nursery on two occasions;

    ii) Controlling and coercive behaviour towards the mother, including isolating the mother in the home; not joining in on her family events; putting pressure on her

to lie in order to advance his visa application; phoning her repeatedly when she left the home; 'gaslighting' the mother; financially abusing the mother;

iii) Insisting that T had to be circumcised.

9. Significantly for this appeal it was also alleged that:

i) The father would regularly use his slider (a form of slipper, with open toes, and a hard sole) to hit T;

ii) The father raped the mother in 2018.

10. The hearing took altogether three days: 26 and 27 June and 11 July 2024. The mother was represented by counsel, the father was unrepresented save when oral evidence was given by the mother and her witnesses, when the father was represented by a Qualified Legal Representative.

11. On 1 August, the Judge gave a detailed reserved judgment. At the conclusion of his judgment, the Judge made a number of findings of fact. He rejected large parts of the mother's case. The key findings relevant to this appeal (referable to the allegations at §9 above) are:

i) "Physical abuse by the father: there was no physical abuse of T. There were three occasions on which father smacked him with a slider, but these constituted reasonable chastisement of a child by his father";

ii) "Sexual abuse of mother by father: not proven".

The Judgment

12. It is not necessary for me to reproduce at length the Judge's judgment. It sufficiently identified and addressed the issues; it adequately rehearsed and evaluated the relevant evidence in support of its conclusions.

13. In the opening section of his judgment ([3]) the Judge set out, in a little detail, the allegations on which his rulings were required. In relation to the allegations which form the basis for this appeal, the Judge recorded this:

> "(2) Physical abuse— the [father] would regularly use his slider to hit [T]. [T] would run off and the [father] would pull him out and hit him again. He told the [mother] that this was allowed in his culture, and it was known as "flogging"".
>
> "(3) Sexual abuse— in 2018, the [father] raped the [mother]. The [mother] had refused sex and the [father] laughed at her and said that he would rape her. The [mother] had sexual intercourse with the [father] through fear of him carrying out this threat and she cried throughout. The [father] showed no affection during sexual intercourse and when the [mother] would ask him to stop because she was bleeding or it was dry and she was finding it painful, he would simply tell her that she needed to spit on it".

14. In the following paragraph ([4]), he reminded himself that the burden of proving the allegations of fact rested upon the person seeking the finding, in this case, the mother.

15. *Credibility and character*: The Judge appropriately made assessments of the parents commenting on their credibility; he indicated that he found both the mother and father to be "unsatisfactory witnesses", having taken "a holistic view of the evidence".

16. The Judge made adverse findings about both parents' conduct in the relationship. He found that the mother could at times be "extremely angry"; she was "not physically intimidated by the father", a finding which was relevant to (though not dispositive of) the Judge's rejection of her allegation that the father controlled her. Later in his judgment, the Judge referred to the mother having "outbursts" and making "irrational decisions"; he accepted the evidence of a friend of the mother's (Ms K) that she was "absolutely petrified" of the mother when her "temper was up". The Judge made a finding that on one occasion the mother had smashed a wine glass and held it to the father's throat; the mother had denied this, but the Judge did not accept her denial (see [37]). The Judge made findings of an occasion when the father grabbed the mother by the hair, and hit her head; the father was arrested by the police but not charged. These findings provide a backdrop against which the two findings under challenge in this appeal should be considered.

17. I turn now to focus on those findings.

18. *Physical abuse: hitting T with the slider*: The Judge recorded the evidence about the alleged physical abuse of T as follows:

> "The direct evidence of this comes from [the mother's older daughter, (J)]. In her oral evidence in chief, she said there were three occasions when she had seen this behaviour. The first occasion was when [T] was about one and a half years old. Father hit the back of [T]'s leg with the slider, which left a mark. He went under a table to escape and father pulled him out. [J] accepted that [T] had been misbehaving. The second occasion was some weeks later. The third occasion was when [T] was two years old. No marks were left on these occasions" [25].

19. The Judge recorded the father's denial of this allegation, indicating that he had "disbelieved" the father when he had said that he had not struck T with the slider ([10]). The Judge continued:

> "[27] On the balance of probabilities I accept the account of [J] that father struck [T] three times with a slider".

20. The Judge went on to develop his finding in this way:

> "[28] This, however, is not sufficient to establish a case of physical abuse in respect of [T]. In England a parent still has a right physically to chastise their child. <u>It is true that professionals no longer generally consider this an appropriate form of discipline</u>. The advice of Proverbs 13.24 ("He that

> spareth his rod hateth his son: but he that loveth him chasteneth him betimes.") is less and less accepted. Nonetheless, it is still the law that reasonable chastisement is lawful." (Emphasis by underlining added).

21. The Judge referred (again [28]) to the nineteenth century decision of *R v Hopley* (1860) 2 F&F 202 at 206, citing this passage (below):

> "By the law of England, a parent… may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable…".

He then continued:

> "[29] This is subject to section 58 of the Children Act 2004, which abolishes reasonable chastisement as a defence if the punishment inflicts on the child grievous bodily harm or actual bodily harm (sections 18, 20 and 47 of the Offences Against the Person Act 1861), amounts to cruelty to a child under sixteen (section 1 of the Children and Young Persons Act 1933) or involves strangulation or suffocation (section 75A of the Serious Crime Act 2015). Actual bodily harm for these purposes "includes any hurt or injury calculated to interfere with the health or comfort of the victim; such hurt or injury need not be permanent, but must be more than merely transient or trifling": see Archbold Criminal Pleading Evidence and Practice (2024 Ed) at para 19-249, citing R v Donovan [1934] 2 KB 498, as approved in R v Brown [1994] 1 AC 212 at 230 and 242".

The Judge developed this theme, comparing the law in England with that in Wales where the defence of reasonable chastisement has been wholly abolished.

22. At [30] the Judge recorded that:

> "… there is no evidence that the mark inflicted on [T] in the first incident was <u>anything other than a transient or trifling mark,</u> so it does not amount to actual bodily harm". (Emphasis by underlining added).

And that:

> "… the mother has not shown that any of the three incidents were anything other than reasonable chastisement".

I remind myself that T was only eighteen months old at the time.

23. The Judge recorded Mr Porter's argument at trial that a finding should be made that father had not acted in T's best interests when he struck him with the slider.

Alternatively, Mr Porter had submitted this was a matter which Cafcass should be asked to consider. The Judge continued ([32]):

> "It may well be that, if the Court had to determine whether [T] should live with his mother or his father, the fact that he might be the subject of physical chastisement in the latter environment was a matter which would stand to be taken into account, possibly in a decisive way. However, the fact which I have to determine is whether father inflicted physical abuse on [T] or not. If the chastisement was lawful, as I have found it to be, in my judgment it does not — and cannot — amount to physical abuse" (Emphasis by underlining added).

24. He concluded ([33]/[34]):

> "… criminal law concepts are not generally relevant in a family law context. The issue here is not, however, primarily of criminal law — it is the acceptableness of father's spanking (sic.) of [T]. Parliament has determined that reasonable physical chastisement of children is an acceptable form of parental discipline. If the chastisement is reasonable, it follows that it cannot be abusive. Accordingly I find that father did not physically abuse [T]". (Emphasis by underlining added).

25. *The allegation of sexual abuse (rape) of the mother*: The mother alleged that she had been the victim of a rape in 2018. The father denied this, and asserted that all sexual intercourse between them had been consensual. The evidence before the court in relation to this incident came from three sources: the mother, her friend (Ms K), and the investigating police officer. The Judge summarised Ms K's evidence in this way ([44]):

> "Ms [K] says that the mother did not say to her that she had been raped. Although mother said she had cried, mother accepted that she had eventually consented to the sex".

The record from the police was reproduced into the judgment at ([45]):

> "I have then discussed with her whether she is the victim of a rape and whether this is to be investigated. She stated to me that she did not consider that she had been raped during their relationship".

26. In the appeal, I was taken to some of the extracts of the evidence. In relation to the alleged rape, I noted one important exchange between counsel for the mother and Ms K about what the mother had told Ms K about the evening on which she now says that she was 'raped':

> "Q: But she said she said "no" and then proceeded to have sex anyway?

> A: She said she said "no" and then she said that they agreed to have sex anyway, so that is not rape.
>
> Q. So, she told you that she cried through it, did she not?
>
> A. She did."

27. The Judge went on to describe how the mother's understanding of what 'rape' actually means had developed ([46]) having spoken in more detail with the police officer:

> "It was only when the police case officer explained that No means No, that she realised that she was a victim. Her understanding now (unlike at the time of the incident) was that No means No, so she had been raped".

28. At [47] the Judge continued:

> "It is now well-recognised, particularly in the criminal sphere, that various "rape myths" are prevalent. One of these myths is the erroneous view that a rape victim will shout and scream whilst being raped… in my judgment this rape myth would not cause a rape victim herself not to believe she had been raped because she did not shout and scream. A rape victim will know that she did not consent. … I find the allegation of rape not proven".

29. Thus, the Judge rejected the mother's case that she had been raped, because he found that (whatever she had understood or not understood about the precise legal characteristics of the offence of rape), she had genuinely consented to sexual intercourse with the father.

30. I have set out the ultimate findings in these two respects at §11 above.

31. In refusing permission to appeal, the Judge supplemented his reasons with a further short judgment, addressing points of challenge raised by Mr Porter. In relation to the use of a slider he said this ([3]):

> "Mr Porter argued that it was inappropriate and unfair to rely on criminal law principles in determining the issue of physical abuse of [T] by his Father. I agree with him up to a point. Whether the father was guilty or not guilty of common assault on [T] is irrelevant to the welfare test in respect of [T]. … However, whether spanking [T] with a slider was acceptable parental behaviour or not is an important question in these family proceedings"…. "in England the legislature in section 54 of the Children Act 2004 determined that in England reasonable physical chastisement of children was (subject to certain exceptions) acceptable".

32. In relation to the alleged rape, the Judge said this ([9]):

> "Mr Porter submitted that it was a "rape myth" to suppose that a woman would always know she had been raped. … Mother's case was that she did not consent and knew she was not consenting. For the reasons I gave in the substantive judgment I did not accept her evidence on this".

Grounds of Appeal

33. When the matter was first presented to me for permission to appeal, there were altogether six Grounds of Appeal. It is unnecessary for me to reproduce all of those grounds in this judgment. On the documents, I took the view that the mother did not enjoy a real prospect of persuading me to disturb the Judge's findings on the primary facts which depended on his assessment of the parties, the evaluation of those facts, and the inferences to be drawn from those facts (see for instance in *Re B (A Child)* [2013] UKSC 33 at [52]). The Judge had had the "distinct advantage" of having seen and heard the parties and their supporting witnesses over three court days: see *Piglowska v Piglowski* [1999] 1 WLR 1360.

34. The grounds on which the appeal has proceeded are:

    i) Ground 1 - The court erred in law by distinguishing these proceedings from the principle as set out in *Re R (Children)(Care Proceedings: Fact-Finding Hearing)* [2018] EWCA Civ 198 that the criminal law concepts of, in this instance, the defence of reasonable chastisement, have neither relevance nor function within the process of fact-finding in the Family Court, and that by considering the father's actions as reasonable following extensive consideration of that defence the learned Recorder was fundamentally wrong.

    ii) Ground 1A – … The learned recorder's function was to find the facts of the father's behaviour, which would then feed into the welfare analysis.

    iii) Ground 3 – The court was wrong in law to conclude that the mother's failure to prove her allegation of rape to the required standard damaged her credibility when the court had not found those allegations to be false.

    iv) Ground 4 – The court erred in law and fact by refusing to accept the mother's account of not realising what had happened to her was 'rape' until she had discussed the matter with professionals when:

        a) … the Judge simply concluded on his own opinion that the mother would have known she did not consent and therefore that she would have known she was raped.

        b) The Judge … relied on the assertion that a rape victim will know that she did not consent. This premise is based on the idea an individual would have an understanding of consent in principle and what would constitute as consent in practice …

35. Plainly, Grounds 1 and 1A should be read and considered together; Grounds 3 and 4 should also be read and considered together. However, there is at least one fundamental complaint about the Judge's approach which underscores all four grounds, namely that

the Judge confused and ultimately contaminated his factual findings in this family case with criminal law concepts.

Law

36. There is well-established and familiar case law which highlights and reinforces the difficulties for an appellant in pursuing an appeal against a first-instance judge's findings of fact, particularly where those findings are materially informed by the assessment of the lay parties. In this regard, I of course have in mind *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 (in particular paragraph at [114-115]), *Volpi & Anor v Volpi* [2022] EWCA Civ 464 at [2] and in the family law context in *Re B (A Child)* [2013] UKSC 33 at [52], and in *Re H-N & Ors* [2021] EWCA Civ 448 at [75]-[76] (see what I have already said at §33 above).

37. But this is an appeal in which the challenge advanced by Mr Porter on the limited grounds now advanced is not against the findings themselves, or indeed even the credibility of the parents, but against the way in which the Judge then contaminated those findings by reference to criminal law concepts.

38. Ironically, it is apparent from the judgment (see §24 above) that the Judge was alert to the issue, and directed himself not to fall into this particular trap.

39. The relevant common law guidance in this area is set out in recent authority to which the Judge himself had made at least partial reference, and which Mr Porter has relied on in this appeal. Given that, in my judgment, the answer to this appeal lies within its text, I set it out in somewhat fuller form than might otherwise have been needed. In *Re R (Children) (Care Proceedings: Fact-Finding Hearing)* [2018] EWCA Civ 198; [2018] 1 WLR 1821, McFarlane LJ (as he then was) considered the interplay of family law and criminal law concepts carefully. I set out the relevant text from his judgment here:

> [62] "The focus and purpose of a fact-finding investigation in the context of a case concerning the future welfare of children in the Family Court are wholly different to those applicable to the prosecution by the State of an individual before a criminal court. The latter is concerned with the culpability and, if guilty, punishment for a specific criminal offence, whereas the former involves the determination facts, across a wide canvas, relating to past events in order to evaluate which of a range of options for the future care of a child best meets the requirements of his or her welfare. … Reduced to simple basics, in both criminal and civil proceedings the ultimate outcome of the litigation will be binary, either 'guilty' or 'not guilty', or 'liable' or 'not liable'. In family proceedings, the outcome of a fact-finding hearing will normally be a narrative account of what the court has determined (on the balance of probabilities) has happened in the lives of a number of people and, often, over a significant period of time. The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court

> will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established". (Emphasis by underlining added).

40. McFarlane LJ went on at [65]

> "… criminal law concepts, such as the elements needed to establish guilt of a particular crime or a defence, have neither relevance nor function within a process of fact-finding in the Family Court. Given the wider range of evidence that is admissible in family proceedings and, importantly, the lower standard of proof, it is at best meaningless for the Family Court to make a finding of 'murder' or 'manslaughter' or 'unlawful killing'. How is such a finding to be understood, both by the professionals and the individual family members in the case itself, and by those outside who may be told of it, for example the Police? The potential for such a finding to be misunderstood and to cause profound upset and harm is, to me, all too clear…
>
> [66]… if the Family Court were required to deploy the criminal law directly into its analysis of the evidence at a fact-finding hearing such as this, the potential for the process to become unnecessarily bogged down in legal technicality is also plain to see….
>
> [67]… as a matter of principle, it is fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based upon criminal law principles and concepts. … 'what matters in a fact-finding hearing are the findings of fact'.". (Emphasis by underlining added).

41. The Court of Appeal returned to this theme in *Re H-N and others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448 from [60] to [74]. At the risk of labouring the point, I reproduce the relevant extracts from this judgment too, particularly because the court there specifically addressed the issues with reference to the issue of 'rape'. The Court of Appeal's judgment in *Re H-N* at [65] reads as follows:

> "… there is a clear distinction on the one hand between judges needing to have a sound understanding of the potential psychological impact serious sexual assault may have on a victim's behaviour, both during and after the event, and in the way that they may give their evidence and present in court, and on the other of the importance of Family judges avoiding being drawn into an analysis of factual evidence based on criminal law principles and concepts".

42. The court continued at [69]-[70]:

> "[69] In *F v M* [2019] EWHC 3177, Cobb J heard an appeal where a judge had concluded that the father had 'raped' the mother. Cobb J, in an unimpeachable analysis said at para.[29]:
>
> > "There is a risk in a case such as this, where the alleged conduct at the heart of the fact-finding enquiry is, or could be, of a criminal nature, for the family court to become *too* distracted by criminal law concepts. Although the family court may be tempted to consider the ingredients of an offence, and any defence available, when considering conduct which may also represent an offence, it is not of course directly concerned with the prosecution of crime."
>
> [70] Having quoted from *Re R*, Cobb J went on:
>
> > "Quite irrespective, therefore, of whether F has committed the offence of 'rape' or is otherwise criminally culpable, there is a range of reasons why the circumstances of N's conception may ultimately be relevant to future child arrangements. Specifically, it was regarded at an earlier case management hearing (and I agree with this direction) that it would be important for there to be a determination of whether F's conduct towards M in the sexual act by which N was conceived was 'violent or abusive', and in turn whether that conduct would be likely to be relevant in deciding whether to make a child arrangements order (see *PD12J FPR 2010, para.4, para.5,* and see further *para.7* [i.e. does the statutory presumption apply having regard to any incident of domestic abuse?])."""

43. The Court of Appeal in *Re H-N* continued:

> "[71] The Family Court should be concerned to determine how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not, come within the strict definition of 'rape', 'murder', 'manslaughter' or other serious crimes. Behaviour which falls short of establishing 'rape', for example, may nevertheless be profoundly abusive and should certainly not be ignored or met with a finding akin to 'not guilty' in the family context. For example in the context of the Family Court considering whether there has been a pattern of abusive behaviour, the border line as between 'consent' and 'submission' may be less significant than it would be in the criminal trial of an allegation of rape or sexual assault.

> [72] That is not to say that the Family Courts and the parties who appear in them should shy away from using the word 'rape' in the manner that it is used generally in ordinary speech to describe penetrative sex without consent. Judges are not required to avoid using the word 'rape' in their judgments as a general label for non-consensual penetrative sexual assault; to do otherwise would produce a wholly artificial approach. The point made in *Re R* and now in this judgment is different; it is that Family courts should avoid analysing evidence of behaviour by the direct application of the criminal law to determine whether an allegation is proved or not proved. A further example can be drawn where the domestic abuse involves violence. The Family Court may well make a finding as to what injury was caused, but need not spend time analysing whether in a criminal case the charge would allege actual bodily harm or grievous bodily harm."

44. Given its prominence in the Judge's finding in relation to the physical assault on T, it is convenient for me to set out here the provisions of section 58 CA 2004. This provides as follows:

> "**Reasonable punishment: England**
>
> (1) In relation to any offence specified in subsection (2), battery of a child taking place in England cannot be justified on the ground that it constituted reasonable punishment.
>
> (2) The offences referred to in subsection (1) are—
>
> > (a) an offence under section 18 or 20 of the Offences against the Person Act 1861 (c. 100) (wounding and causing grievous bodily harm);
> >
> > (b) an offence under section 47 of that Act (assault occasioning actual bodily harm);
> >
> > (c) an offence undersection 1 of the Children and Young Persons Act 1933 (c. 12) (cruelty to persons under 16).
> >
> > (d) an offence under section 75A of the Serious Crime Act 2015 (strangulation or suffocation).
>
> (3) Battery of a child taking place in England causing actual bodily harm to the child cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment.

> (4) For the purposes of subsection (3) "actual bodily harm" has the same meaning as it has for the purposes of section 47 of the Offences against the Person Act 1861."

45. This legislation was passed in the light of the Human Rights Act 1998. As will be apparent, this section removes the defence of reasonable chastisement in respect of a number of statutorily defined criminal offences: an offence of assault occasioning actual bodily harm, unlawfully inflicting grievous bodily harm, causing grievous bodily harm with intent, or cruelty to a child. It also prevents the defence being relied upon in any civil proceedings where the harm caused amounted to actual bodily harm (which has the same meaning as it has for the purposes of section 47 of the Offences Against the Person Act 1861).

46. The significance of this section for present purposes (at least in the view of the Judge) is that the defence of lawful chastisement is therefore relevant where a suspect is charged in a criminal context with an offence *not* specified under section 58(2) CA 2004; one such offence would be common assault. In Scotland and Wales, unlike in England, reasonable chastisement has been abolished completely as a lawful justification for any sort of assault, in the former by an Act of the Scottish Parliament, the Children (Equal Protection from Assault) (Scotland) Act 2019 , and in the latter by an Act of the Senedd Cymru, namely the Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020. For an interesting and wider discussion of this and allied statutory provisions and the common law, reference can usefully be made to the judgment of Julian Knowles J in *R(O) v Chief Constable of the Kent Police* [2024] EWHC 1678 (Admin). It is unnecessary to expand on this further here.

The arguments

47. Mr Porter argued that the Judge strayed inappropriately into the territory of the criminal law in making (or not making) the findings which are under review. The Judge wrongly imported, to the father's benefit, the criminal defence of reasonable chastisement in respect of the three occasions when he struck his infant son with a slider – a defence which in the criminal courts would be available to someone charged with common assault. In finding that the mother had not been 'raped' the Judge had failed to consider adequately or at all her understanding of the term, and had perpetuated a 'rape myth' himself by assuming that a rape victim will necessarily know what rape is: "a rape victim will know that she did not consent".

48. The father opposed the appeal, and argued that the Judge's findings were legitimately made on the evidence. He told me that the mother had lied about the incident of the alleged 'rape', and had only made the allegation as she wanted him to lose his immigration status. He argued that the mother was correct when she had said that she had *not* been raped, and that it made no sense for her to assert now that she did not know she had been raped, when on her own account she had cried throughout the act of sexual intercourse.

Discussion

49. For the reasons which are set out below, I find that the Judge fell into error in respect of the findings which are in focus in this appeal.

Allegation of assault of T with the slider

50. The Judge had found that the father had struck T on three separate occasions with a slider; materially, he found that this had caused transient physical marking on the child's skin on one occasion. The father had denied these acts. These factual findings, which are in themselves serious, are clear from the judgment.

51. Having found the essential facts (i.e., that the father had struck T three times with a slider on different days), I am satisfied that the Judge then erred in going on to consider whether in the *criminal* law context, the father would have had a defence to a criminal charge of common assault. Ironically, as I mentioned above, the Judge had correctly directed himself that criminal law concepts are not generally relevant in a family law context; having rightly directed himself in this respect he then, it appears, became distracted by the criminal law approach to chastisement in his analysis of the circumstances in which T was repeatedly hit (over a period of time) by his father, and how it could or should properly be described. In this regard he inappropriately brought into his reasoning the provisions of section 58 CA 2004, and this led him to conclude that the assaults with the slider represented "reasonable chastisement".

52. In my judgment, once the Judge had considered and determined the facts, he had effectively fulfilled his task. Had he considered it appropriate to do so, he could have gone on to describe his finding of fact by reference to the concept of 'harm' – whether the father had caused 'harm' to T by his conduct, and if so to what degree. In the family law context, in private and public law cases, schedules of allegations or findings are very often defined by reference to 'harm to the child', and rightly so; the court and Cafcass can be assisted when undertaking their later evaluative welfare review to know the fact-finders assessment of harm. Specifically, in a private law case a finding and description of the 'harm' to the child arising from the facts proved can inform welfare issues, with reference to section 1(3)(e) CA 1989. This will be true also in public law cases, where the measure and description of the harm suffered by the child is also likely to be valuable for the court in considering threshold issues under section 31(2)/(9) CA 1989. A judicial assessment of the harm caused by the conduct which is the subject of the factual finding in a private law dispute may well be material for the court in considering how best to apply the provisions of PD12J FPR 2010. Of course, the statutory definitions of 'harm' in section 31(9) CA 1989 and in PD12J FPR 2010 are deliberately widely drawn, and the court has considerable breadth of expression in this regard.

53. Instead, the Judge erroneously turned his focus away from the impact of these incidents on T, and the actual or likely harm to him, to the question of culpability of the father, drawing inappropriately on principles of criminal law. There were at least three points in the Judge's approach to this question at which an alarm may have sounded, warning that his approach was "fundamentally wrong" (see *Re R* at [67]; §39 above). First, as soon the Judge started to consider whether the father would have had a defence in the criminal law to a charge of common assault, as a result of what he had done to T, the Judge should surely have realised that he had crossed into a jurisdictional terrain which he had warned himself about entering. Secondly, in developing these thoughts, and in order to consider whether the father's conduct fell within or outwith section 58(2) CA 2004, the Judge had to consider whether the three strikes of T with the slider (one of which he found had caused a mark) could be said to have constituted 'actual bodily harm'; in that very process, the Judge should have yet more clearly realised that he was

focusing on the wrong question. Thirdly, having expressly (and in my judgment rightly) acknowledged that child care professionals would regard the father's conduct (i.e., striking an infant with an implement causing a mark) as "inappropriate" (see §20 above), he should surely have paused to consider whether he could or should in the circumstances go on then to characterise that conduct as 'reasonable' (as he did), and whether (contrary to his express finding) this was in fact more likely to be regarded in the family law context as 'abusive'.

54. It follows that in determining the allegation of fact in this family law application by reference, in part, to section 58 CA 2004 the Judge fell into error, and the outcome of the fact-finding exercise in this regard became incurably flawed.

Allegation of rape

55. The Judge's finding that the mother was not sexually abused, or more specifically "raped", was primarily based on the mother's own initial statement to her friend (Ms K) and to the police in which she had denied that she had been 'raped'. It was the mother's case before the Judge that at the time she had denied that she had been 'raped', she had, or may have had, an imperfect understanding of the term 'rape'. The Judge recorded the police evidence thus:

> "She stated to me she did not consider that she had been raped during her relationship, and this is the same info she had told the police previously. She assured me she did not consider herself to be the victim of rape, and did not wish this to be progressed." "The mother's case was that she did not consent and knew she was not consenting. For the reasons I gave in the substantive judgment, I did not accept her evidence on this."

56. I was taken by Mr Porter to the transcript of Ms K's evidence; I have set out a short extract above (see §26). The Judge asserted that he had relied on this evidence. I find that the Judge had failed fully to appreciate or consider appropriately the import of Ms K's evidence, which was to the effect that the mother had said 'no' to sexual intercourse with the father initially, and even though she had later 'agreed', she had "cried" throughout. This evidence, which as I say the Judge essentially accepted, should surely have alerted him to the very real possibility, at its lowest, that the mother was *not* in fact truly 'consenting' to sexual intercourse with the father.

57. There was/is nothing inherently wrong with the parties and the Judge using the term 'rape' to describe the alleged act complained of, but the purpose of the fact-finding was to lay a factual framework for future consideration of welfare issues ("… to evaluate which of a range of options for the future care of a child best meets the requirements of his or her welfare": per *Re R* at [62] see above). It was therefore important for the Judge to focus on the narrative account of the *facts* and *events* rather than considering whether what had happened did or did not constitute the criminal offence of rape. The flaw in the Judge's approach is revealed by the fact that, having found that the sexual intercourse in 2018 did not constitute rape, the Judge went on to make a binary finding (expressly cautioned against in *Re R* at [62], cited at §38 above) that the allegation of "sexual abuse" was "not proven". This finding lacks any factual nuance which the evidence placed before the learned Judge, in my assessment, actually revealed.

58. On the mother's case, as it unfolded before the Judge, there was evidence that she had at least been the victim of a serious sexual assault even if it was not rape; the Judge did not appear to discount the fact that what the father did that evening was both violent and abusive. The Judge should have focused more closely on how the father had behaved towards the mother, rather than whether his behaviour did, or did not, come within the strict legal definition of one particular sexual crime (see *Re H-N* at [71], above). In this regard, the Judge fell into the precise error which the Court of Appeal had cautioned against in *Re H-N* at [71] (see §42 above):

> "Behaviour which falls short of establishing 'rape', for example, may nevertheless be profoundly abusive and should certainly not be ignored or met with a finding akin to 'not guilty' in the family context".

59. It is these more nuanced facts which are important for Cafcass and the Family Courts to consider in the context of making welfare decisions for T, particularly given the mother's role as his primary carer. The psychological impact of such an assault or abuse on the mother was likely to have been serious.

60. So, in this this regard, Mr Porter has also succeeded in demonstrating the vulnerability of this finding. As with the finding in relation to the use of the slider on T (discussed above), in my judgment, the Judge erred in not limiting himself to consideration of the relevant facts but strayed into criminal law terminology and concepts to inform his ultimate findings.

61. This is enough to dispose of this part of the appeal. But I ought to comment on one further argument raised by Mr Porter. When the Judge considered the allegation of 'rape' he found it not proved. He had already (at [4]) addressed his mind to the binary nature of proof of facts in civil cases, by reference to (although not specifically citing) the speech of Lord Hoffman in *Re B* [2008] UKHL 25 at [2]:

> "If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

62. The fact that, in the Judge's finding, a value of 0 was returned on the allegation of 'rape' was not the same as (and certainly did not inexorably lead to) a positive finding that the mother had *lied* about it. It is notable that at no point did the Judge find that the mother had made a *false* allegation of rape. However, the Judge appeared to treat the 0 return on the finding of rape as indicative of the mother's dishonesty, a conclusion which I am unconvinced he was entitled to reach.

Outcome

63. It will be apparent from all that I have said above that the Judge wrongly analysed the evidence of the father's behaviour in this case by the direct application of the criminal law to determine whether an allegation is proved or not proved, and he was, in short, wrong to do so.

64. For the reasons set out above, I propose to allow this appeal.

65. In relation to the Ground 1 and 1A, as I have indicated above, I am satisfied that the Judge was in fact entitled in the evidence to find that:

> "The father struck T with a slider on three separate occasions, on one occasion (when T was 18 months old) causing a mark, albeit transitory".

That is the key narrative factual finding which will inform the ultimate welfare assessment undertaken by Cafcass and the court. That finding withstands the criticisms which I have made (above). I can and will remove from the Judge's finding all ancillary wording which effectively incorporates the so-called 'defence' on which the Judge erroneously thought the father could rely.

66. I propose to set aside the Judge's finding in relation to the alleged rape of the mother; I find that the Judge was wrong in his approach to her allegation for the reasons I have set out above, and there is no part of the finding which is salvageable.

67. I shall therefore remit the father's application for an order under the CA 1989 back to the Family Court in Nottingham for further case management. I propose to direct that the file should initially be placed before the Designated Family Judge for Nottingham, either so that he himself can manage the case going forward, or he can re-allocate it. It will be a matter for the judge dealing with case management, having an eye on proportionality, necessity and the overriding objective, to decide whether – and if so in what way – the allegation of sexual assault on the mother should be re-tried.

68. That is my judgment.