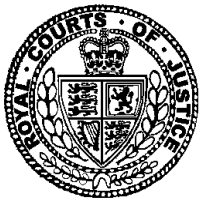

Neutral Citation Number: [2020] EWHC 86 (Fam)

Case No: 2019/0141

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE CENTRAL FAMILY COURT ON AN ORDER OF HIS HONOUR JUDGE TOLSON QC OF 8TH AUGUST 2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2020

Before:

MS JUSTICE RUSSELL DBE

- -

Between:

JH	**Appellant**
- and -	
MF	**Respondent**

- -
- -

Ms Katherine Gittins (instructed by **Adams Harrison Solicitors**) for the **Appellant JH**
The Respondent MF did not attend and was not represented

Hearing date: 5th December 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

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.

The Honourable Ms Justice Russell DBE:

Introduction

1. This is an appeal from an order made on 8th August 2019 following a fact-finding trial in Children Act (CA) 1989 proceedings for child arrangement orders at the Central Family Court in London before the Designated Family Judge. The case concerned complaints of domestic abuse including of the most serious sexual assault. The Appellant (JH who had made the complaints) was represented by counsel, Ms Piskolti, and gave evidence. The Respondent (MF) was unrepresented (but had assistance from a McKenzie friend throughout) and the judge carried out the "cross-examination" of JH. This case is yet another example of the difficulties encountered by litigants when public funding is not available to the party against whom complaints are made; and of the way in which justice or a fair trial is compromised when the judge is required to enter the arena. The judge found against the Appellant.

2. The Appellant appealed against the judgment and order; permission was granted by Mrs Justice Lieven on 25th October 2019 (who gave permission to appeal four days out of time). In her written reasons Lieven J said that she had granted *"permission to appeal on each of the grounds"*, having set out each of the seven grounds advanced on behalf of the Appellant. In essence I agree with the observations made by Lieven J in granting permission to appeal but also find that the judge's conduct of the hearing was fundamentally flawed and unjust for procedural irregularity as set out in Family Procedure Rules (FPR) 2010 (Cf. FPR rule 30.12(3)); and the appeal is allowed for that reason and the reasons set out in full below.

3. The Appellant was represented by counsel, Ms Gittins, before me at the hearing in the Royal Courts of Justice on 5th December 2019, trial counsel (Ms Piskolti) had prepared the written application for permission to appeal and the grounds of appeal referred to in this judgment. The Respondent did not attend the hearing. The Appellant's solicitor was contacted by a supporter of the Respondent on 6th November 2019 who said that the Respondent would not attend the hearing on 4th December 2019 because the appeal was not directed against the Respondent but against the judge. The Respondent himself phoned the Appellant's solicitor on 2nd December 2019 to repeat this message and was aware of the change to the hearing date. The court received no written or oral submissions on behalf of the Respondent.

4. The law. There is no argument in respect of the law which applies in this appeal. I have been reminded of, and keep in mind, the relevant case law; it is unnecessary for me to set it out in full. The approach of the court is succinctly and accurately set out by Lieven J when allowing the application and I would adopt it. In particular, I keep in mind the words of Sir James Munby P in *Re F (Children)* [2016] EWCA Civ 546, at paragraph 22, *"Like any judgment, the judgment of the Deputy Judge has to be read as a whole and having regard to its context 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 to provide sufficient detail and analysis to enable an appellate court 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 228 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". Nonetheless some of the analysis, commentary and the judgment in the instant case requires particular scrutiny.

5. To paraphrase the seminal speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360, I am well aware that *"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case.*" And that *"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."*

Background and history

6. The chronological background and of the case as set out here were taken from the chronology prepared for the court by those representing the Appellant which set out the complaints made about the Respondent and involvement of the Police. The Appellant (then only 17 years old) met the Respondent (then 23) in 2013 when they started their relationship. The Appellant moved in with the Respondent shortly after they met. Prior to their meeting police records indicate that there had been complaints made about the Respondent's violent and abusive behaviour by his own mother, his brother, his aunt and a previous partner. According to the police records which were before the Family Court the parties first came to the attention of the Police in June 2014 as a result of third-party contact or referral; the Respondent was said to have been intoxicated, aggressive and abusive to the Appellant. The police records show a further incident including another verbal altercation in September 2014. The child who is the subject of these proceedings (C now 4 years and 11 months old) was born on 2nd January 2015.

7. There were police records concerning continuing domestic abuse in 2015. Specifically, there were complaints of domestic abuse by the Appellant in February of that year, followed in April by a record of an incident when the Respondent was said to have hit the Appellant on her head. She had fled to a neighbour's home and the police were called. The Respondent was arrested for battery and released on bail. In May 2015 the Appellant contacted the police and retracted her statement. Nonetheless the Police made a referral to Social Services because of domestic abuse. Social Services were recorded to have responded that C would be placed on a Child in Need plan. The Appellant subsequently moved to another local authority area and the case was closed.

8. In May 2016 police recorded a phone call from the Appellant following another incident of domestic abuse; the Appellant was reported to have again fled the family home but without C (then an infant) who was locked inside with the Respondent. In late August 2016 the Appellant had reported to the Police a history of domestic abuse including sexual assault by penetration and was categorised as a high-risk victim. The Respondent was again arrested and released on bail. The Appellant left the family home and moved into a refuge with C. The Respondent then reported the Appellant to Social Services and made allegations about her inability to care for C; he called the Police to report her "missing".

9. Meanwhile the Police had carried out a check on the Respondent following a third-party call raising concerns about him and alleged suicide threats. A day later a neighbour of the

parties called the Police to complain of harassment and threats by the Respondent and his mother.

10. The Appellant was ABE interviewed by the Police at the end of August 2016. A third-party witness (AP) provided a statement to the Police setting out what she knew of the Appellant's complaints about the Respondent's abusive behaviour towards her. The Respondent was again arrested, this time for Controlling and Coercive Domestic Abuse contrary to s76 of the Serious Crime Act 2015 and interviewed under caution about that offence and the sexual assault by penetration, a serious offence under the Sexual Offences Act 2003. The CPS decided not to take further action over the sexual assault on 27th September 2017 the reasons for this decision are unknown.

11. When the Respondent applied for a child arrangements order on 15th October 2018, it was more than two years after the Appellant and C had left him and gone to a refuge away from what had been the family home. His bail conditions had been removed in September 2017, more than a year before he made his application under the CA 1989. The history set out above comes from such police records/disclosure as had been made available to the Family Court; it appears there may be additional material that has not yet been disclosed by the police. The Police also disclosed that the Respondent is *"known to the police"* and had a warning for assaulting a constable in 2008; convictions for theft, common assault also in 2008; criminal damage and resisting arrest in 2009; a conviction for battery and criminal damage involving a former partner in 2011; and a further caution for theft in 2014. There were numerous police "call outs" recorded in respect of the domestic abuse by the Respondent of his two previous partners.

12. The required safeguarding enquiries took place prior to the trial in August 2019 but the author had been unable to complete the checks because of the Appellant's distress (as set out in the second safeguarding letter filed with the court). The Appellant was reported by her support worker as experiencing *"feelings of severe trauma"* and that the proceedings had led to a deterioration in her emotional well-being. No concerns were raised about her ability to care for C. I quote, "*I was told that [the Appellant] continues to experience feelings of severe trauma, and that these proceedings have lead [sic]to a deterioration in her emotional well-being. She has been progressing well and continues to do so in the main but is highly anxious. There are no concerns about her parenting of [C] and Children services in the area that she lives have not been involved with him. He is developing appropriately and is in good health.*"

13. It was and remained the Appellant's case that the Respondent was aggressive, intimidating and that he was also controlling and emotionally abusive during the relationship. It is her case that she had been subjected to domestic abuse which included verbal abuse and that he had physically and sexually assaulted her while the child was present in their home.

14. After police intervention the parties resumed their relationship and it is the Appellant's case that the domestic abuse resumed. The Respondent's abusive behaviour towards the Appellant continued and this had culminated in two occasions where the Respondent had sexual intercourse with the Appellant without her consent on or around 18th May 2016 and mid July 2016. The Appellant had then fled taking C with her and later reported the assaults and abuse to the Police. The Respondent called the police to report the Appellant (but, it is noteworthy, not the child) as missing. On the 28th August 2019 a neighbour had reported the Respondent to the police to complain about the Respondent harassing her and making

threats via third parties, and because the neighbour was concerned that the Respondent was trying find out Appellant's location.

Hearing on 8th August 2019

15. The trial took place on 8th August 2019. The Appellant, as can be seen from the letter alluded to above, is a vulnerable witness as set out and defined by FPR 2010 r3A.7 (a) (i); (d); (e); (j) and (f) and had applied for screens to be made available in the court room (r3A.8 (a)) as a measure to be put in place to assist her in giving her best evidence: to enable her to do so is the court's duty under r3A.5. The judge took the inexplicable step, contrary to the expressed view and request of the Appellant, and contrary to the rules of procedure, of ordering that the Appellant give evidence from counsel's row as *"better"* than using the witness box and screens. In doing this he had not only decided not to follow Part 3A of the FPR 2010, but he also completely failed to give any or adequate reasons for doing so as required by r3A.9 of the FPR 2010. These are serious procedural irregularities which would allow for an appeal to be granted under FPR 2010 r30.12 (3) (b).

16. The Appellant's skeleton argument (as prepared by trial counsel) refers to the unsurprising difficulties that the trial judge then encountered in being able to hear the Appellant's evidence. It is a matter of further complaint that as a result he actually did not hear significant parts of what the Appellant had said in court; a matter the judge himself accepted in paragraph 15 of his judgment. The judge then proceeded to order that the Respondent, too, should give evidence from counsel's row making reference to the "*feng shui*" of the court room and the screens and saying that it was fair and *"created some kind of balance"* without any application having been made by the Respondent that he needed to give evidence in the same manner as the Appellant. Concerns raised by counsel were dismissed without reasons being given for this decision by the judge. The Respondent was then able to give evidence sitting next to his McKenzie friend who was, as a consequence, able to assist the Respondent in the answers he gave when the Respondent was being cross-examined. It follows that the Respondent was given an advantage and assistance denied to the Appellant. As was submitted by trial counsel in her skeleton argument and I accept *"… it is plain and requires no citation that when a witness is giving evidence, they are 'under oath' and are to receive no prompting, assistance or advice during the midst of it."*

17. The 7th ground of appeal, as submitted by counsel, was that the decision was unjust for due to serious procedural irregularity; I would have allowed the appeal on this ground alone, but along with his conduct of this case any broad analysis of his judgment, and approach to the fact-finding is so flawed as to lead to the conclusion that it is unsafe and wrong. Counsel submits that the judge failed to apply the provisions on PD12J of the FPR 2010 and drew this Court's attentions to the following definitions;

    - *"domestic abuse" includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality.*

    - "*coercive behaviour" means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim*

- *"controlling behaviour" means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour*:"

18. It forms part of the Appellant's case that the judge failed to apply these definitions, or at the very least, keep them in mind. That submission is accepted. Moreover, the definition of domestic abuse presently used by the Government (which includes so-called 'honour' based abuse, female genital mutilation (FGM) and forced marriage) reads *"Any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. The abuse can encompass, but is not limited to psychological, physical, sexual, financial, or emotional."*

19. *"[3] Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capabilities for personal gain, depriving them of the means needed for independence, resistance and escape and/or regulating their everyday behaviour."* And *"[4] Coercive behaviour is an act or pattern of acts of assault, threats, humiliation (whether public or private) and intimidation or other abuse that is used to harm, punish, or frighten the victim. Abuse may take place through person to person contact, or through other methods, including but not limited to, telephone calls, text, email, social networking sites or use of GPS tracking devices."*

20. At paragraph 8 the guidance addresses factors affecting the seriousness of the behaviours: *"Domestic abuse offences are regarded as particularly serious within the criminal justice system. Domestic abuse is likely to become increasingly frequent and more serious the longer it continues and may result in death. Domestic abuse can inflict lasting trauma on victims and their extended families, especially children and young people who either witness the abuse or are aware of it having occurred. Domestic abuse is rarely a one-off incident and it is the cumulative and interlinked physical, psychological, sexual, emotional or financial abuse that has a particularly damaging effect on the victims and those around them. 9. Cases in which the victim has withdrawn from the prosecution do not indicate a lack of seriousness and no inference should be made regarding the lack of involvement of the victim in a case."*

21. This judge, as a leadership judge in the Family Court, must be fully cognisant of the relevant guidance and definitions and should have borne it in mind, even if he did not explicitly say so, but he failed to do so in any part of his judgment. Furthermore by dismissing or ignoring the reports from the police, and the complaints of others by considering and concentrating only on the oral evidence of the parties (paragraph 9 of his judgment) he failed to take into account relevant material which formed part of the overall picture of the parties relationship and might reasonably have been found to have indicated a concerning history of reported aggressive, criminal and violent behaviour on the part of the Respondent.

22. According to trial counsel's notes the trial concluded at 16:30, and she, as for the Appellant, was unable to make the all the closing submissions she intended to in the time that was allowed to her which commencing at 16:45, not least as her oral submissions were repeatedly interrupted by the judge. The judge did not then call on the Respondent at all. The real risk of the appearance of a partisan approach in the judge's conduct is self-evident.

This was compounded when, after delivering his judgment at 17:55, the judge ordered a s7 report and invited the Cafcass Officer to consider Cafcass contact intervention, yet no evidence in respect of the need for this was given or considered during the trial, and the Appellant was denied any opportunity to address the court about the necessity for, or the imposition of such conditions. The judge then failed to give any reasons for so doing and further compounded his errors when, on 23rd August 2019, the judge directed Cafcass to investigate any child protection concerns in the Appellant's care of C. Nothing in respect of this was raised at trial, there was no evidence (indeed the opposite was indicated in the safeguarding correspondence) before the court to support such a direction but the trial judge saw fit to impose such a direction, nonetheless.

The judgement

23. The judgment was flawed for a multiplicity of reasons which I shall set out below. In the grounds of appeal and skeleton counsel has set out the principal grounds which I summarise and shall endeavour to deal with each in turn; i) that the judge had erred in his task in balancing the evidence by placing insufficient, indeed it could be said any, weight on corroborative evidence or material before the court and placing undue weight on irrelevant matters. The judge had directed police disclosure which included the independent witness statement of a neighbour along with police records which supported the Appellant's account. In his judgment not only did he find there was no independent evidence he failed to set out why he chose to disregard it, or if he had had regard to it he failed to set out why he found that it was not independent or in any sense corroborative other than to dismiss both a friend and the neighbour's evidence out of hand because they were the Appellant's "friends".

24. It was submitted that ii) the judge failed properly and correctly to balance the evidence before the Court and gave insufficient reason for not finding allegations as set out 1to 6. Specifically, it is submitted, the judge's conclusions in respect of controlling and coercive behaviour on the part of the Respondent are predicated on an assumption that the use of language cannot form a significant part of the basis of a controlling relationship. This is contrary to the provisions of PD12J (as set out above). In the next paragraph the judge goes on to dismiss violent behaviour (throwing objects) as part of controlling or coercive behaviour without explanation. I accept the submission on behalf of the Appellant that the judge failed to make any findings about the Respondent's use of language neither finding proved or dismissing the specific complaints made by the Appellant, which, if taken together, could be found to be part of a pattern of controlling, abusive and coercive behaviour.

25. The grounds of appeal go on iii) to say that the judge was wrong in that he had placed undue weight on the demeanour of the parties in Court when assessing their evidence. Appellate case law is redolent with cautionary guidance and comment on the need to look beyond demeanour when reaching a conclusion about the veracity of any witness yet the judge baldly said at paragraph 13 that the Respondent had the *"better of the argument"* describing the Respondent's demeanour as straightforward without more. In this he failed, as he was required to, to give reasons for preferring the evidence of one party over the other (Cf. Lord Justice McFarlane (as he then was) in *V (A Child) (Inadequate Reasons for Findings of Fact)* (2015) EWCA Civ 274). Certainly the fact that the judge preferred the Respondent's case was patent throughout his judgment. His reasons, such as they were for dismissing the evidence of the Appellant were wrong; specifically, the judge made a finding regarding the Appellant's psychological state of mind without any forensic expert evidence (the absence

of which had been a matter he himself alluded to previously at paragraph 7 of his judgment) when he said, in an exchange during closing submissions with counsel, *"she [the Appellant] gives a description of a woman who is of a highly anxious, it might be said, neurotic, disposition"*. In saying thus the judge had apparently reached a conclusion regarding the Appellant's state of mind without sufficient evidence to support it; moreover it was a conclusion which was contrary to the case of the Respondent. It is necessary to interject here that other than denials it was not possible to decern with any particularity the case put by the Respondent (who was the applicant in the case) because of the absence of reference to it in the judgment.

26. If the Appellant appeared to be, and was in actuality anxious, and the judge referred to her as anxious from the outset of the hearing, and again in his judgment (see paragraph 15) is unsurprising given the judge's comprehensive failure to apply Part 3A. The failure of the judge to provide the Appellant with the means of giving her best evidence was evidenced by the fact that her oral evidence was not heard by the judge and was not picked up on tape. To go on, as this judge did, to use it as one of the reasons he questioned her evidence is aberrant. Moreover, in his judgment the judge wholly failed to consider or even to entertain any likelihood that her anxious presentation was as a result of previous abuse, including the probability that this had included abuse by the Respondent. Or, as was submitted by counsel for the Appellant that, that as a vulnerable witness, she was likely to have been distressed when she gave her evidence which, in turn, would have had an impact on her ability to recall matters that had taken place. During oral her evidence, in response to a question by counsel, the Appellant had said she was *"stressed, nervous. I haven't slept, eaten anything. It's hard if he can be here".* It is of note that there are facilities for witnesses to give evidence by video link near or in the Central Family Court.

27. In ground iv) the Appellant submitted that the judge failed to take into consideration that the Respondent had previously, and repeatedly, been involved with the police in respect of incidents of domestic violence and harassment and/or the judge failed properly to assess the Police reports and intervention not just with this Appellant but also involving previous partners and female relatives. Having ordered disclosure from the Police the judge then made little use of it except in reference to *"inconsistences"* in the Appellant's later evidence; although her complaints to the police about incidents of domestic abuse remained consistent. Of the inconsistencies in the Respondent's evidence, as put to him in evidence, the judge was dismissive but, again, failed to give his reasons for dismissing them [Cf. Lord Justice Moylan in *Re A (Children)* [2019] EWCA Civ 74)].

28. There was one incident of domestic abuse, which the judge appeared to accept, when the Respondent had pinned the Appellant against the wall, at least, the contemporaneous police report was of a more extensive assault, yet no finding was made; the judge's comment that this was *"the only allegation of violence"* serves to underline a failure to consider or appreciate the concepts and reality of domestic abuse, control and coercion as defined by PD12J and set out above, and the fact that such abuse is not confined to physical violence. The judge did not deal with the effect such an assault (being pinned against a wall) would be likely to have on the Appellant particularly if it had taken place within an abusive relationship. The judge's conclusion at paragraph 20 that the Appellant's description *"goes no further, really, in my view, on analysis, than saying that the relationship had its difficulties…"* was reached in the absence of a thorough analysis of domestic abuse as it pertained in this case. Moreover, the judge's comments (at paragraph 19 of the judgment) that the cessation of complaints by the Appellant beyond the end of the relationship were

in anyway reassuring or supportive of a decision that there was minimal domestic abuse are wholly misconstrued as the most obvious reason there were no further incidents or complaints was that Appellant had fled the family home with C and their location was not known to the Respondent, who had remained on conditional police bail himself for another year.

29. The finding by the judge that C was not harmed by the Respondent, given his approach to the case as a whole, and the Appellant's case specifically, cannot be considered safe; particularly as the judge (at paragraph 29) found that the Respondent had used *"more force than normal"* when changing the child's nappy. The phrase itself is indicative of possible abuse, in handling the child roughly which, even if not deliberate or malicious could have been inappropriate or even harmful and was supportive of the Appellant's case.

30. At ground v) the Appellant submitted that the judge *"had been wrong to made findings on matters which were not put to the Appellant".* This ground referred to two matters, the first being that the judge found (at paragraph 30) that the Appellant had been *"guilty of aggressive behaviour herself, on occasions."* This had not been put to the Appellant during the trial and it is improper to make findings against a party when that party is not given an opportunity, when giving evidence, to answer them. In addition it did not appear to form any part of the Respondent's case.

31. Secondly, after failing to deal with the text messages, sent by to the Appellant by the Respondent, during the hearing and on being addressed by counsel in respect of this failure on application for permission to appeal, the judge had concluded that graphic, sexually explicit and threatening texts such as *"If you don't shut up I will stick my cock up your ass"* were consistent with "sexting" and were not "helpful". It had not been the Respondent's case that the texts were "sexting", nor was this put to the Appellant during her evidence. Not only was the content of the texts likely to have been relevant in connection with any consideration of controlling and coercive behaviour, it may well have had relevance in connection with the complaints of sexual assault. Notwithstanding the relevance of the texts as evidence, it would seem that the judge wholly failed to understand that is the effect on the recipient that is pertinent when considering whether any message or communication is threatening and/or abusive.

32. Ground vi) was in respect of findings that the Appellant had not been subjected to sexual penetration without consent (raped) by the Respondent. It is submitted on behalf of the Appellant that the judge was wrong in allowing his *"out-dated views on sexual assault and likely victim responses"* to influence his findings and conclusions on the facts and law on this case. The phrase *"out-dated"* is a euphemistic one on full consideration of the judge's approach to the Appellant's consenting to sexual intercourse in a physical position and manner which she, even on the judge's assessment, found repugnant and was *"sexual intercourse which was not, at the time, towards the [Appellant's] taste or inclination." (*Paragraph 22)

33. The relevant passages in his judgment which make most concerning reading are to be found in paragraphs 23, 24, 25, 26, 27 and 28. I have not set them out in full detail nor should it be necessary to do so as it is clear that the judge's approach towards the issue of consent is manifestly at odds with current jurisprudence, concomitant sexual behaviour, and what is currently acceptable socio-sexual conduct.

34. The judge, having started by accepting that the Appellant *"had difficulties in taking physical enjoyment from sex…"* because of events in her past and had often told the Respondent to stop during intercourse in the past then went on to accept that on the first of the two incidents of penetrative sexual assault the Appellant had been reluctant to have sex, that during intercourse she asked him to stop and he did not and carried on; this appears to have been accepted by the Respondent to some extent as he said both that he stopped and later that the Appellant had not asked him to stop. Paragraph 23 reads *"…the first occasion it is the mother's own case that sexual intercourse began with her consent, and consent was only removed during intercourse when the mother told the father to stop -- but he failed to do so. The difficulties do not end there because this is a mother who very often, and for all I know, always, found that she had difficulties in taking physical enjoyment from sex. She would, she tells me, often tell the father to stop during the times when intercourse between them was more frequent than it was in 2016. The difficulties arose, apparently, because of events in her past…*" The judge then went on to comment both that the Appellant had not physically resisted and that she was upset afterwards but dismissed her distress in this way; *"If the [Appellant] was upset afterwards, which the [Respondent] recognises, this was nothing unusual because of the difficulties I have mentioned."*

35. At paragraph 24 of his judgment the judge dealt with the Appellant telling the Respondent to stop penetrating her in this way *"…the sex in question took place with the mother kneeling on the bed and the father standing behind her. During intercourse she told him to stop, but he did not, and carried on at least for "a couple of minutes", which is a description given, I think, to the police. It is part of the mother's case that she took no physical step to encourage the father to desist. The father's contention is that the sex between them on this occasion, which he recognises because it was one of very few occasions when the parties had sex during the year in question, was entirely consensual from beginning to end, and he was not told to stop. If the mother was upset afterwards, which the father recognises, this was nothing unusual because of the difficulties which I have mentioned."*

36. Further in dealing with her consent the judge continued (at paragraph 25); *"My concern about this occasion centres on the idea that the mother did nothing physically to stop the father. In particular, given the position in which intercourse was occurring, because the mother was not in any sense pinned down on this occasion, but could easily, physically, have made life harder for the father. She did not do so. I do not find that the father was in any way on this occasion so physically forcing her as to cause her not to be able to take preventative measures, nor, in fact, is that case alleged. Following the event, as I have already said, the mother took no immediate action to report the matter to the police, or indeed to anyone else. Her description, of course, does not indicate that the circumstances were such that she might in any way have been thought wise to seek medical advice."*

37. This judgment is flawed. This is a senior judge, a Designated Family Judge, a leadership judge in the Family Court, expressing a view that, in his judgment, it is not only permissible but also acceptable for penetration to continue after the complainant has said no (by asking the perpetrator to stop) but also that a complainant must and should physically resist penetration, in order to establish a lack of consent. This would place the responsibility for establishing consent or lack thereof firmly and solely with the complainant or potential victim. Whilst the burden of proving her case was with the Appellant in any counter allegation the burden lay with the Respondent. Indeed it was the Respondent who had brought the case as the applicant in the Family Court, thus the burden of proof did not lie

solely with the Appellant. Moreover the judge should have been fully aware that the issue of consent is one which has developed jurisprudentially, particularly within the criminal jurisdiction, over the past 15 years (of which more below).

38. The judge's view in respect of consent is underscored by his comment at paragraph 25 (as quoted above) when he said, *"My concern about this occasion centres on the idea that the [Appellant] did nothing physically to stop the [Respondent]."* The judge then went on to say that because the Appellant was on all fours on the bed, at the Respondent's insistence this would have, according to this judge, made it easier for her to resist and *"made life harder for the [Respondent]…"* and that the Respondent had not, the judge found (again the evidence on which he reached this conclusion is absent from the judgment), been *"so physically forcing her as to cause her not to be able to take preventative measures [sic].."*. The judge then comments that the Appellant did not take immediate action to call the police or anyone else and that her description, in the view of this judge, did not *"indicate that the circumstances were such that she might in any way have been thought wise to seek medical advice."* In keeping with his approach thus far the judge had apparently concluded that it is necessary for victims of sexual assault to report the assault or make a contemporaneous report. Yet it is now explicitly accepted that many victims will not do so, out of fear or embarrassment which are based on their cultural, social or religious background and the concomitant pressures, mores or beliefs.

39. The judge then considered the second incident when the Appellant says sexual intercourse took place without her consent at paragraph 26 of his judgment. *"The second occasion, occurring some two months later, began with the parties watching television whilst in bed. The father suggested the television should be turned off. As I understand it, it is common ground that it was, and then the father, again, requested sex of the mother. This time the mother's case is that she refused, and when intercourse began it was not with her consent. She says that she was wearing pyjamas. The father took the pyjamas off and had intercourse with her, again from behind. This was at no point, the mother says, with her consent. The father maintains to the contrary -- that intercourse was initiated by both of the parties and was entirely consensual throughout. Again, he recalls the occasion of which the mother speaks. Here, my difficulty with the mother's account centres on the removal of her pyjama bottoms. I should emphasise that father's account is that in fact she was wearing a nightie. I do not see why the mother could not, should not, have made life difficult for the father in the circumstances in which she found herself by preventing the removal of the pyjama bottoms. There is no evidence of any kind that a struggle pursued, nor again is a case advanced that the father was being physically coercive on this occasion. Insistent in his requests, yes, but physically coercive, no."*

40. The Respondent was once again penetrated by the Respondent from behind. The Respondent said she consented. The Appellant said she did not at any point consent to sexual intercourse taking place. At paragraph 26 (quoted above) the judge said, *"…my difficulty with the [Appellant's] account centres on the removal of her pyjama bottoms…I do not see why the [Appellant] could not, should not, have made life difficult for the [Respondent] in the circumstances by preventing the removal of the pyjama bottoms."* Again the judge's conclusion on whether sex was consensual or not is wrongly predicated on the presumption that to establish non-consensual penetration the complainant should have physically resisted. Similarly, the judge said *"There is no evidence of any kind that a struggle pursued, nor again is a case advanced that the father was being* ***physically coercive*** *(my emphasis) on this occasion"* as can be seen below physical coercion or

violence or the threat of violence is not considered a necessary element when considering consent or the lack of consent, thus the judge was wrong in his approach.

41. This time (as the judge noted in paragraph 27 of his judgment) the Appellant did report a serious sexual assault to the Police. Paragraph 27 reads "The [Appellant] *"was to report these events to the police at the end of August. But there may be some significance in the circumstances in which she did so because one of her friends, [P], in her written statement, appears to imply that the purpose of the visit to the police station at the end of August was to report father's threats made to her [P}, and that it was almost incidental that the question of the mother being forced to have sex (the expression used in [P's] police statement) came to be revealed. Moreover, the terms of [P's] statement, again, can hardly be said to be heavily supportive of mother's case as to the terms in which the mother was reporting what happened to her. [P's] account contains the following sentence: 'I asked her what had then happened and she told me that she had let the father have sex with her as it was easier than to keep saying no.' That can hardly be said to support a coherent account of rape."*

42. Thus the circumstances in which the complaint was made was impliedly, and to some extent explicitly, criticised by the judge because the Appellant had originally accompanied a friend to the police station to complain about the Respondent's aggressive behaviour to that friend, and it was the friend who had raised the incident of sexual assault on the Appellant with the Police. The friend told the Police, as the judge quoted in his judgment (above), '*"I asked her what had happened and she said that she had let the [Respondent] have sex with her as it was easier than saying no."*' This, the judge found, could hardly be said to support a coherent account of rape. This conclusion is obtuse, any decision of consent must include a coherent account (to borrow the judge's own phrase) and consideration of the extent to which the complainant or victim was free to choose and to consent, or to paraphrase the relevant criminal statute (s74 Sexual Offences Act (SOA) 2003), that person has had the freedom and capacity to make that choice. It is arguable, at the very least, that the evidence before the judge was that the Appellant's freedom and capacity to choose had been extinguished or at least gravely compromised.

43. At paragraph 28 of his judgment, which reads *"My findings on this occasion, as to both these occasions, is that the sex between the parties carried the consent of both. This was not rape. It may have been that at a point during both occasions of intercourse the mother became both upset and averse to the idea of the intercourse continuing. But if she did so, I emphasise this was something which was usual for her, the product of events in her past and her psychological state in not being able to take physical pleasure from sex. It was not a consequence of any action on the part of the father. Moreover, at no point during these occasions do I find that the mother withdrew consent or conveyed to the father any discomfiture that she was feeling about the intercourse continuing. I cannot even, on this evidence, find that the father was somehow insensitive to the mother's position. I can accept that he would have asked for sex perhaps on a number of occasions before sex commenced, but that is as far as it goes. Given the nature of these allegations I have felt it necessary to set out these detailed findings in respect of it."*

44. Thus, the judge had accepted that *"at a point during both occasions of intercourse the [Appellant] became both upset and* ***averse to the idea of intercourse continuing.*** *[My emphasis]"* but he continued to reach the conclusion that had the Appellant done so it was not as a consequence of any action on the part of the Respondent because it was "*something that was usual for her, the product of her past and her psychological state in*

not being able to take physical pleasure from sex." The judge went to say that *"at no point do I find that the [Appellant] withdrew consent or conveyed to the [Respondent] any discomfiture that she was felling about intercourse continuing."* The judge failed to explain the reasons for his findings; as to why, if it was evident to the judge that the Appellant had become averse to sexual intercourse continuing it was not evident to the Respondent; and, secondly, why it was acceptable for the Respondent to insist on sexual intercourse knowing that it was distressing and unwelcome to the Appellant. The evidence that the judge had rehearsed thus far did would not support such a finding nor did he give any or adequate reasons for preferring the evidence of the Respondent, other than the bald comment in paragraph 13 that he had found him to be *"the more convincing witness, giving his evidence in a straight-forward, forthright manner…"* The fact is that this judge had largely relied on his view that the Appellant had not vigorously physically fought off the Respondent.

45. Moreover, the judge did not consider or explain in his judgment why, as it was an accepted fact that the Appellant was unable to take physical pleasure from sex, there was no onus on the Respondent to establish that the Appellant was able to and was freely exercising her right to choose whether or not to participate in sexual intercourse. The logical conclusion of this judge's approach is that it is both lawful and acceptable for a man to have sex with his partner regardless of their enjoyment or willingness to participate.

Legal Discussion: serious sexual assault in family proceedings

46. The Court of Appeal has considered the issue of analysing factual findings based upon criminal law principles and concepts in *Re R (Children) (Care Proceedings: Fact Finding Hearings)* [2018] 1 WLR 1821 : [2018] 2 FLR 718, Sir Andrew McFarlane (P) found that as a matter of principle it was fundamentally wrong for the Family Court to be drawn into an analysis of what had happened through the prism of criminal principles and concepts as proceedings could *"…easily become over-complicated and side-tracked from the central task of simply deciding what has happened and what is the best future course for a child".* Nonetheless there are many cases where the approach taken in the criminal courts to the interpretation of facts and analysis of evidence has been considered both helpful to, and applicable, in family cases; in any event there should be congruence of approach in both the family and criminal jurisdictions which would require some knowledge and understanding of the relevant approach criminal law particularly where consent is an issue. Two years previously in *Re H-C* [2016] 4 WLR 85 Lord Justice McFarlane (as he then was) said "*I have taken the opportunity to refer to R v Lucas in the hope that a reminder of the relevant approach taken in the criminal jurisdiction will be of assistance generally in family cases."* It can be taken from this that approach applied in the criminal jurisdiction are of relevance in the Family Court and in family proceedings.

47. While a trial in the Family Court cannot, and must not, set out to replicate a trial or to apply, or seek to apply, Criminal Law or statute it cannot be lawful or jurisprudentially apposite for the Family Court to apply wholly different concepts or to take an approach wholly at odds from that which applies in the criminal jurisdiction when it comes to deciding whether incidents involving sexual intercourse, whether vaginally penetrative or not, and other sexual acts including oral penetration, penetration by an object or in other form were non-consensual. Non-consensual sexual intercourse was considered lawful within a marriage until as late as 1992 (Cf. *R* [1992] 1 AC 599) it has not been lawful in any other sphere for

generations. There is no principle that lack of consent must be demonstrated by physical resistance, this approach is wrong, family judges should not approach the issue of consent in respect of serious sexual assault in a manner so wholly at odds with that taken in the criminal jurisdiction (specifically the changes in place since SOA 2003 and subsequent amendments). Serious sexual assault, including penetrative assault, should be minimised as an example of coercive and controlling behaviour (itself a criminal offence) although such behaviour may form part of the subordination of a potential victim's will (see the guidance set out at paragraphs 19 and 20 above).

48. To consider the relevant approach to be taken reference should be made to the statutory provisions in respect of consent; s 74 of the Sexual Offences Act (SOA) 2003 provides that *"'Consent' (for the purposes of this Part – my parenthesis) a person consents if he agrees by choice, and has the freedom and capacity to make that choice."* There are circumstances in criminal law where there can be evidential or conclusive presumptions that the complainant did not consent set out in ss75 & 76 which, respectively, concern the use or threat of violence by the perpetrator and the use of deception; neither of which preclude reliance on s74 (Cf. *Blackstone's* B3.46 2020 ed.)

49. To quote from *Blackstone's Criminal Practice* [2020 at B3.28] where the absence of consent is considered it is said *"the definition in s74 with its emphasis on free agreement, is designed to focus upon the complainant's autonomy. It highlights the fact that a complainant who simply freezes with no protest or resistance may nevertheless not be consenting. Violence or the threat of violence is not a necessary ingredient. To have the freedom to make a choice a person must be free from physical pressure, but it remains a matter of fact for a jury as to what degree of coercion has to be exercised upon a person's mind before he or she is not agreeing by choice with the freedom to make that choice. Context is all-important."* There can be no reason why this approach should not be followed in the Family Court, whilst applying a different standard of proof. The deleterious and long-term effects on children of living within a home domestic abuse and violence, including serious sexual assault, has been accepted for some years, as is the effects on children's welfare, and their ability to form safe and healthy relationships as adults, if their parents or carers are themselves subjected to assault and harm.

50. In respect of consent in the criminal jurisdiction, which should inform the approach in the Family Court, the authors of *Blackstone's* set out at B3.29 *"Consent covers a range of behaviour from whole-hearted enthusiastic agreement to reluctant acquiescence. Context is critical. Where the prosecution allegation of absence of consent is based on lack of agreement without evidence of violence or threats of violence, there will be circumstances, particularly where there has been a consensual sexual relationship between the parties, where a jury will require assistance with distinguishing lack of consent from reluctant but free exercise of choice."* The Court of Appeal Criminal Division considered that a direction along the lines of the direction of Pill J approved in *Zafar* (Cf. the Crown Court Compendium (July 2019), chapter 20.4, para. 4) may well be appropriate. It should be advisable for Family Court judges to remind themselves of this approach and direct themselves appropriately based on the relevant approach contained in Chapter 20.

51. With further reference to B3.29 (Ibid) and the approach to take in making the distinction lack of consent from reluctant but free exercise of choice; *"submission to a demand that a complainant feels unable to resist may in certain circumstances be consistent with reluctant acquiescence"* (Cf. *Watson* [2015] EWCA Crim 559); or where a complainant's free choice was overborne so that they did not have a free choice; an example of which was when a

complainant gave into a perpetrator's demands because she was scared that if she did not he would have sex with her by force.

52. As a further example of the approach to be taken in respect of consent in civil proceedings in *Archbold Criminal Pleading and Evidence* 2020, Chapter 20, Part II, at A [20-23] reference is made to the case of *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 as "*relied on in R. (F.) v DPP [2013] EWHC 945 (Admin); [2013] 2 Cr. App. R. 21, DC, for the proposition that 'choice' is crucial to the issue of 'consent'; and the evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad common sense way; where, therefore, a woman consents to penetration on the clear understanding that the man will not ejaculate within her vagina, if, before penetration begins, the man has made up his mind that he will ejaculate before withdrawal, or even, because 'penetration is a continuing act from entry to withdrawal' (s.79(2) (§ 20-42)), decides, after penetration has commenced, that he will not withdraw before ejaculation, just because he deems the woman subservient to his control, she will have been deprived of choice relating to the crucial feature on which her original consent was based, and her consent will accordingly be negated."*

53. A further and instructive distinction between consent and submission and the approach to be followed was drawn in *R v Kirk (Peter & Terence)* [2008] EWCA Crim 434: [2008] 3 WLUK 36, by Pill J at [92] where the expression "willing submission" had been used in directing the jury, it was said that the use of the expression was *"not an easy one in this context. Willingness is usually associated with consent. However, we are satisfied that the jury would not, in the context of this very full direction, have been misled by the use of the word "willing". This was not a case where it was alleged that submission had been achieved by physical force. It was willing in the sense that there was no attempt at physical resistance by the complainant and the judge used it in that sense. That leaves open the possibility that the circumstances were such that the complainant submitted to sexual intercourse rather than consented to it. That was the overall effect of the direction. We are satisfied that, having regard to the full direction given, the jury would not have been misled or distracted, by the use of the expression "willing submission", from the question they were told they had to answer. It is not, however, an expression we would commend for use on other occasions."*

54. The judge in the instant case should have considered the likelihood that the Appellant had submitted to sexual intercourse; he singularly and comprehensively failed to do so instead employing obsolescent concepts concerning the issue of consent.

Standard of proof applied

55. Finally, having previously dealt with procedural matters in respect of Part 3A which was ground vii), it is necessary to consider the judge's approach as to the standard of proof he was obliged to apply. As Lieven J said when allowing the appeal *"at paragraph 10 of his judgment the judge made comments on his approach to the standard of proof ought to be considered. The judge appeared to be troubled by the fact that if he made a finding, the binary nature of the law means he would have to proceed on the basis it was correct, even if he were wrong."* It is evident that in making his observations the judge was, in fact, applying a higher standard of proof than the simple balance of probabilities; for at paragraph 10 the judge said, after describing the standard of proof as a difficulty in this case, *"So, if I find myself in respect of a particular allegation 51 percent favouring the evidence of one party and only 49 percent of the other, if in other words it is finely balanced,*

there is a grave risk that I get it wrong – but thereafter would have to treat my findings as absolutely correct." He compounded the impression that he was troubled by applying the correct balance of proof when went on to say *"In short, whilst it is the court's duty to investigate and make findings, as best it can in accordance with the evidence, there is very often so far that the court can safely go before the benefits of a fact-finding begin to diminish."*

56. The standard of proof is the balance of probabilities, as set out by the House of Lords in *Re B (Care Proceeding: Standard of Proof)* [2008] 2 FLR 141. The words of Lord Hoffman in Re B which apply to serious sexual and physical abuse and assault as they would to any finding of fact: *"If a legal rule requires facts to be proved, a judge 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 nought and one."* The judge gave the appearance of being reluctant to apply that standard, moreover, at paragraph 22, having reiterated that the standard of proof is the simple balance of probabilities he went on… *"[t]he difficulty here is that on any view, as I have said the mother's case is poised, it might be said exquisitely poised, on a point between non-consensual and consensual sexual intercourse which was not, at the time towards the mother's taste or inclination."* This comment is a further example of the judge's apparent reluctance to apply the binary system and thus the correct standard of proof. The judge has erred in law by applying, or appearing to apply, a higher standard of proof.

57. Any finding of fact in private law or CA 1989 proceedings, and in all civil cases must be based only on the evidence. As Lord Justice Munby (as he then was) has said in *Re A (A child) (Fact Finding Hearing: Speculation)* [2011] EWCA Civ. [12] *"It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation"*. Yet in the absence of evidence the judge found that the Appellant had been "guilty" of aggressive acts herself. The judge has erred in law by making this finding.

58. For the reasons set out above the judgment was so flawed as to require a retrial; his decision was unjust because of serious procedural irregularity and multiple errors of law. The case is to be remitted for retrial by a High Court Judge or Deputy High Court Judge at the Royal Courts of Justice.

Recommendation

59. Judges in the family courts are regularly required to make decisions and find facts in cases where there is domestic abuse; this will include cases where serious sexual assault is alleged to have taken place. Currently there is comprehensive training on the procedural aspects of such trials and the implementation of PD12J in particular. Judges who sit in the family courts are not, however, required to undergo training on the appropriate approach to take when considering allegations of serious sexual assault where issues of consent are raised. Such training is provided to judges who are likely to try serious sexual allegations in the criminal courts. In principle the approach taken in family proceedings should be congruent with the principles applied in the criminal jurisdiction. I have discussed this with The President of the Family Division, and he is going to make a formal request to the Judicial College for those judges who may hear cases involving allegations of serious sexual assault in family proceedings to be given training based on that which is already provided to criminal judges. This is a welcome development, a

cross-jurisdictional approach to training on this important topic will be of assistance, support and benefit to all judges and will foster a more coherent approach.

Orders

60. These are the reasons for the order allowing the appeal and consequential orders, including for a retrial, which were made in December 2019 following the hearing.

AR January 2020