Neutral Citation Number: [2020] EWCA Civ 1344

Case No: B4/2019/3003

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 October 2020

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE BAKER
and
MRS JUSTICE ROBERTS

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF T AND J (CHILDREN)

Between :

A MOTHER	**Appellant**
- and -	
A LOCAL AUTHORITY (1)	**Respondent**
AH (2)	
AM (3)	
T and J (by their children's guardian) (4) and (5)	
KF (6)	

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- -

Ian Peddie QC and Rachel Temple (instructed by **All Family Matters**) for the **Appellant**
Hannah Markham QC and Laura Williams (instructed by **Local Authority Solicitor**) for the **First Respondent**
Penny Howe QC and Kayleigh Long (instructed by **Hepburn Delaney**) for the **Sixth Respondent**
The Second, Third, Fourth and Fifth Respondents were not present nor represented

Hearing dates: 5 and 6 October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals

Judiciary website. The date and time for hand down is deemed to be 10.30am on Tuesday 20 October 2020.

LORD JUSTICE BAKER:

1. This is an appeal brought by a mother against findings made in care proceedings concerning her two sons, T, now aged rising seven, and J, now four.

2. The background can be summarised briefly. The two boys have different fathers (the second and third respondents to this appeal, who have played no part in the hearing before us). The mother alleged that in both relationships she was the victim of domestic violence. Following the breakdown of her relationship with J's father, there were proceedings under the Children Act 1989 as a result of which a child arrangements order was made that J should live with his mother and have supervised contact with his father.

3. In early 2018, the family came to the attention of social services following concerns about T's behaviour reported by the health visitor. In April 2018, the mother started a relationship with another man, KF, who himself has a child aged six by another relationship. At that point, T was aged five and J aged 18 months.

4. On 31 May 2018, a health visitor noted marks on J's body and as a result he was examined by a GP. Over the course of the following four weeks, J was examined by doctors on several occasions when various bruises and marks were noted on his body. At one stage, it was thought that he was suffering from ringworm or impetigo. After each examination, however, J was allowed to return home. On 22 June, J was again seen at hospital after the mother had sent a photograph of bruises and other marks on his body to the GP. On admission to hospital, a range of further bruises and marks was seen on his body, including in the genital area. Once again, J was allowed home. A further medical examination took place a week later on 29 June when further bruises and marks were seen at various points on his body. It was decided to admit J to hospital for examination and assessment on 2 July.

5. On 1 July, however, J was admitted to hospital with a range of injuries, including bruises to his forehead, face, ear, chest, abdomen and legs, bite marks at various points on his body, burns on his calf and thigh and deep lacerations to his penis and scrotum. According to the mother and KF, the mother had gone out on the evening of 30 June leaving J in KF's care, together with KF's child. According to KF, during the night he noticed blood coming from J's nappy and on removing it found that he had sustained cuts to his penis and scrotum. On examining the nappy, he discovered several pieces of glass.

6. Following this admission to hospital, the mother and KF were arrested on suspicion of inflicting grievous bodily harm. At the time of his arrest, KF was in possession of heroin and a knife. Both adults were interviewed and denied responsibility for the injuries. T was admitted to hospital for medical examination. Both boys were made subject of emergency protection orders.

7. After J's admission to hospital, a blood-soaked nappy, said by KF to be the one J had been wearing when the injuries were discovered, was handed in by the mother. The nappy contained several pieces of glass. In the course of the police investigation, further shards of glass were discovered in the garden of the family home which matched those in the nappy.

8. On 2 July, the local authority started care proceedings in respect of the boys and two days later they were made subject of interim care orders and placed in separate foster placements. There followed a long series of case management hearings in which directions were given for the filing of evidence, including expert medical evidence by a number of specialists. Amongst the experts instructed were two odontologists, Dr Kouble, who had originally been instructed by the police in the course of their investigation, and Dr Crewe, who was instructed jointly by the parties to the care proceedings. Both of the boys' fathers were joined as respondents to the proceedings and KF was joined as an intervenor.

9. Meanwhile, following completion of the police investigation, the mother and KF were charged with four offences relating to the injuries sustained by J, namely two offences of inflicting grievous bodily harm with intent (one relating to the cumulative injuries sustained between 29 May and 1 July, excluding the genital injuries, the other to the genital injuries and facial bruising sustained between 29 June and 1 July), one offence of sexual assault on a child under 13 (relating to the injuries to J's penis and scrotum), and one offence of allowing serious physical harm to a child. The mother was also charged with an offence of cruelty.

10. A fact-finding hearing in the care proceedings, which had been adjourned on a number of occasions, finally took place in June 2019 before HH Judge Vavrecka. The mother, who has some cognitive difficulties, was assisted by an intermediary at the hearing. The findings sought by the local authority were that J had sustained a series of non-accidental injuries between 30 May and 1 July 2020 which been inflicted by the mother and/or KF. The mother and KF each denied responsibility for any of the injuries. In addition, the mother sought findings of domestic abuse against both of the boys' fathers. Both men denied those allegations.

11. At the hearing, the judge heard oral evidence from a number of witnesses, including several medical experts and from the mother. When KF went into the witness box, he was given a warning in accordance with s.98 of the Children Act. He then refused to answer any questions, saying that this was on the advice of his criminal legal representatives. The judge therefore heard no oral evidence from KF, although he had written evidence from him in the form of statements and transcripts of police interviews. In his statements, KF described the events of the evening of 30 June to 1 July 2018 when, while looking after the children on his own, he had noticed J bleeding in his genital area and found pieces of glass in his nappy. Following the conclusion of the evidence and submissions, judgment was reserved.

12. On 2 August 2019, the judge handed down what he described as an "executive summary" setting out his findings, with reasons to follow in a full judgment to be delivered at a later date. In summary, the findings set out in that document were as follows:

    (1) J sustained injuries seen on five dates between 31 May and 1 July 2018, all of which were inflicted.

    (2) The marks seen on 22 June occurred when J was in the mother's sole care and she was the likely perpetrator.

(3) The multiple bruises on J's forehead, face and ears seen on 1 July were likely to have been caused by a pinch or blow. The mother and KF had the opportunity to cause these injuries and there was a likelihood or real possibility that either of them caused these injuries.

(4) Many of the bite marks found on J's body were most likely to have been inflicted by T, save those under the armpit, which on a balance of probabilities were inflicted by the mother. KF was excluded as having caused any bite marks.

(5) The cuts to the scrotum and penis were caused by a sharp implement, possibly the glass found in the nappy. Neither the mother's nor KF's account probably accounts for the cuts. The judge did not know how the cuts had been made but they were clearly caused by a sharp implement. If they were caused by glass in the nappy, somebody must have put the glass there. This had happened when J was in the care of his mother and KF. Either of them was the likely perpetrator of the penis and scrotum injuries.

(6) The bite marks identified as caused by T reflected a failure by the mother to supervise the children properly. The mother had failed to protect J from the other injuries. Her actions on 1 July amounted to a failure to seek prompt medical attention for J.

(7) Several marks on the body had been caused by a shoe, likely to be the mother's "flip-flop".

(8) With regard to the allegations against the boys' fathers, the mother's evidence entirely lacked credibility and, whilst there clearly was volatility in the relationships, the totality of the evidence did not satisfy the court on a balance of probabilities in respect of any of her allegations.

13. At the beginning of October 2019, the criminal trial started. On 10 October, Judge Vavrecka handed down what he described as a "partial judgment", indicating that his final judgment would be available shortly.

14. On 17 October, the criminal trial concluded with the jury returning verdicts convicting KF of both counts of inflicting grievous bodily harm and the count of sexual assault, acquitting the mother of those three charges and of the fourth charge, but convicting her of the charge of cruelty. The mother's solicitor promptly informed Judge Vavrecka of the verdicts. On 26 October, the mother's solicitors sent an email to the judge asking him to consider either substituting the jury's verdict for his findings or consider an application to reopen the fact-finding hearing. On 31 October, KF was sentenced at the Crown Court to a total of 18 years' imprisonment. Sentencing of the mother was adjourned.

15. On 12 November, a case management hearing took place before Judge Vavrecka at which he formally handed down the final version of his judgment. The mother's counsel made an oral application for him to reconsider his findings on the grounds of the convictions. The order recorded by way of recital that the judge "declined to reconsider the findings at this hearing on the basis that there is insufficient material before the court". The order included a provision that "in the event that the mother makes an application to this court to reopen the findings, such application must be made in writing

by 4 pm on 3 December 2019". The judge gave further directions for assessments of family members as long-term carers for the boys. The order also included a recital that "the mother informed the court that she does not seek to care for the children".

16. On 20 November, the mother's solicitor filed an application for an extension of time for filing and serving an application to reopen the findings on the grounds that the further evidence required would not be available by 3 November 2019.

17. On 3 December, the mother's solicitor filed a notice of appeal to this Court, asking for the findings against her to be set aside and relying on the following grounds (in summary):

    (1) The findings that mother had caused non-accidental injuries to J were wrong. They were incompatible with the findings of the criminal court that it was "beyond reasonable doubt" that KF had caused the injuries. It was wrong of the judge to ignore this verdict and not to adjust his findings accordingly.

    (2) The judge failed to (i) properly assess the impact of KF not answering questions in oral evidence; (ii) draw an adverse inference from KF's refusal to be questioned or to explain why he had not drawn such an inference; and (iii) properly assess the evidence that was suggestive of KF having caused injury to J.

    (3) The judge failed to (i) attach proper weight to the mother's cognitive difficulties; (ii) having given himself a *Lucas* direction, failed to apply this when considering the mother's credibility and wrongly adopted a blanket approach that she had been dishonest without analysing other evidence which suggested that she was not, in fact, being dishonest about the injuries to J or the allegations of domestic abuse.

    (4) The judge failed to undertake a proper analysis of the evidence about the allegations of domestic abuse.

    (5) The judge failed to properly assess evidential weight and value of the odontological evidence or consider whether it had a sufficiently sound scientific basis.

    (6) The finding on the shoe imprint was wrong.

18. On 18 December, the mother was sentenced to 18 months' imprisonment suspended for 18 months, with additional requirements of 200 hours' unpaid work and 25 days of rehabilitation activity.

19. On 6 January 2020, the mother filed an application in this Court for permission to rely on fresh evidence in support of her appeal, namely the report of another odontologist, Professor Pretty, who had given evidence in the criminal proceedings. On 14 January, she applied to this Court for a stay of the order of 12 November 2019. On 17 January, Peter Jackson LJ refused the application for a stay and adjourned the application for permission to appeal, stating that a decision on the latter application could not be made until there was clarity about mother's intentions regarding an application to reopen and the family court's response to such application.

20. On the same day, Judge Vavrecka refused the mother's application for an extension of time to file the application to reopen the fact-finding. In the event however, that order was not drawn up before the issues resolution hearing which was listed three days later

on 20 January. At that hearing, the mother made a further oral application for an extension of time for filing her application for reopening of the findings and, in addition, another oral application for reopening of the findings. Both applications were refused, the order recording by way of recital that the further oral application raised no significant new issues requiring directions to be reconsidered. The court proceeded to make further case management directions for the resolution of the welfare issues.

21. On 24 January, Peter Jackson LJ made a further order in respect of the application for permission to appeal. He re-crafted the grounds of appeal, refusing some grounds but adjourning the following which he labelled in these terms:

- Ground 1 - conclusions on injuries to J incompatible with criminal verdicts
- Ground 2 – judge wrong not to draw adverse inferences from KF's refusal to give evidence
- Ground 3 - assessment of KF's evidence is inadequate
- Ground 4 - application to admit new odontology evidence
- Ground 5 - no analysis of finding about shoe imprint.

The application on those grounds was adjourned to an oral hearing. Further directions were given about the filing of documents from the criminal proceedings, including the route to verdict and sentencing remarks.

22. On 9 February, Judge Vavrecka sent an email to the parties in response to requests for clarification of his finding in respect of the shoe imprint.

23. The oral hearing of the application for permission to appeal took place before Peter Jackson LJ on 11 February. The local authority, mother and guardian were represented, but KF was neither present nor represented. At the conclusion of the hearing, permission was granted on the first three grounds. With regard to the fourth ground, the application for permission was adjourned to be considered at the appeal hearing with the appeal to follow if permission was granted. With regard to the fifth ground, permission was refused on the basis that any argument concerning the shoe injury could be pursued under ground 1. Leave was given to file any further necessary evidence from the criminal proceedings. Further directions were given for the provision of a schedule setting out the judge's findings and the parties' respective positions in the light of the criminal verdicts, and for the filing of a summary of the issues on which the parties were agreed and not agreed. Those directions were duly complied with. Further directions concerning skeleton arguments were given by subsequent directions without a hearing.

24. Meanwhile, the welfare hearing was adjourned on several occasions and is now listed for directions on 15 October 2020. At the hearing before us, we were told that the mother's position remains that she does not seek the long-term care of the children but, rather, seeks increased contact with both boys. The local authority's assessments have now been completed and the local authority's plan is for both boys to be placed with members of the family.

The judgment

25. In view of the relatively narrow ambit of this appeal, it is unnecessary to set out a full summary of Judge Vavrecka's judgement. It is sufficient to focus on those aspects relevant to the grounds in respect of which permission to appeal has been granted.

26. In his summary and analysis of the expert evidence, the judge included a description of how Dr Crewe and Dr Kouble had given evidence together using the "hot-tubbing" procedure. He noted (at paragraphs 133 to 134 of his judgment) that

> "in terms of the techniques of odontology, they accepted [that] the uniqueness of dentition has not been established (e.g. if comparing with DNA) but defended the way in which they looked to the injury and the technique of overlays. They accepted a number of limitations and variables which impact on the analysis (including distortion of the skin, limitations of 2D photography) which is why usually they begin by excluding before moving onto identifying possible biters …. Both Dr Crewe and Dr Kouble acknowledge the limitations of odontology, but their evidence was careful and detailed."

The judge summarised the odontologist's conclusions in these terms (at paragraph 282):

> "Both Dr Kouble and Dr Crewe gave clear, balanced and considered evidence that the marks on the left shoulder, under both armpits, on the torso and possibly on the left wrist were bite marks. They agreed that all save under the armpits were most likely to have been inflicted by T. Further the evidence they gave about the bites under the armpits was clear and I accept that they were from a different biter to T, and not KF. The mother's teeth impression fits the marks and given the limited pool of possible biters I make the finding sought."

27. Dealing with the mother's evidence, the judge started by noting her low cognitive functioning and explained the assistance provided to her by an intermediary during the hearing. He noted what he described as "a number of unanswered oddities" about her account of the events of the night of 30 June/1 July, including her failure to return home immediately after KF informed her that J had woken up screaming and that he had found glass in the nappy and cuts to his genital area. He noted that there were many areas where the mother accepted she had not told the truth. At paragraphs 198 to 199, the judge said:

> "It has been commented on in submissions that the mother presented in a variety of ways during her evidence; tearful, distraught, angry and combative. I had the fullest opportunity to assess her, watching and listening carefully throughout her evidence and more generally, thereby enabling me to assess her credibility. Those descriptions certainly catch her demeanour at times. …. My view, on all the evidence, is that [the mother] has regularly and repeatedly lied, and done so not just to professionals but also to family friends."

The judge then gave examples of lies told by the mother in the period in question in 2018, during the police investigation and in the proceedings, and concluded (at paragraph 206):

> "I agree with the local authority submission that she is a clever and accomplished liar, and her lies are most often motivated by a desire to protect her own interests. This significantly undermines the reliability of her accounts, not just in relation to the events of 30 June/1 July, but more widely. It is not to say that I have simply disbelieved everything she says because she has lied about something. It is instead because she has demonstrated such a disregard for the truth, and a willingness to deceive repeatedly and over a long period of friends and professionals alike, that means I have been very careful when I have considered the veracity of her accounts."

28. One piece of evidence given by the mother accepted by the judge was that KF had been absent from the house between 17 and 25 June 2018 which ultimately led him to conclude that the marks seen on J on 22 June had been inflicted by her.

29. In contrast to his conclusion as to the mother's credibility, the judge described the evidence given by the boys' fathers about the mother's allegations of domestic abuse as credible, clear and cogent.

30. When dealing with KF's evidence, the judge described how he had entered the witness box but refused to answer questions. He then summarised KF's account in his written statement and police interviews, including his account of finding blood and glass in J's nappy on the night of 30 June and 1 July when the mother was absent from the house. He recited a number of text messages sent during that night by KF to the mother. Later, when analysing KF's evidence, he said (at paragraph 225):

> "Without an opportunity to assess his evidence myself, I am in some difficulties in assessing KF's credibility or veracity. He has not been cross-examined. This means that none of his account or assertions have been tested. His knowledge of what was going on in the household in the weeks leading up to 30 June and his account of what happened the night J was injured would have been very important to hear and his version of events could then have been tested."

31. The judge proceeded to consider the significance of KF's refusal to give evidence. In view of the challenge to the judge's treatment of this aspect of the case, I shall set out the relevant paragraphs in full.

> "228. I am not intending to look further into his reasons for not giving evidence, but instead focus on the evidence before me. A number of concerns as to his involvement which I have not been able to hear KF's response to [sic] and I have to consider the implications of his decision when considering the allegations made in the standard of proof. The concerns include the following.

KF was a regular visitor to the mother's home. He had concerns as to the poor supervision of the children, T's extreme language, strange bruising on J as well as bite marks and other harm to J he thought were possibly caused by T. He changed J's nappy. He seeks to limit his role in caring for J and describes only occasionally changing his nappy. On one view, he can be said to have taken no protective steps despite these concerns. I have not heard his detailed evidence as to what did he see in this period nor heard what he discussed with the mother. His own involvement during this period was an important part of the evidence. I was simply unable to explore these issue[s].

- The events of the night 30 June/1 July. He was the sole carer in the home alone for long periods, on the very night when J was apparently found with blood in his nappy and distressed. There appears no immediate explanation for this spontaneous event.

- J woke up screaming with nappy full of blood and a cut to his penis, but KF did not seek immediate medical help and later advised the mother not to seek help or go to hospital. His passivity in the face of serious injury to J could not be explored directly with him.

- KF was using heroin on the night in question, the effect this had on KF's behaviour, including his tolerance to a screaming child and his care and attention to a child in distress are all unknown. These events were going on at the time he was desperate for the mother to get home so he could go out to get more drugs.

- Whilst KF accepts responsibility for the bruise to J's face, which he says happened when J fell in [the] bath, there is in fact little understanding of how this happened, and the medical evidence suggests the 'accidental' bruise is more likely to be from a punch.

- As soon as he reasonably can, KF leaves the home, vowing never to return.

229. I have well in mind what Ms Howe [leading counsel for KF] describes in her closing submissions as a 'striking lack of indicators' that would suggest he had any propensity for causing harm of any sort to a child, and the evidence in relation to his care of his son … appears positive. I also acknowledge the other factors listed and which are relied on to suggest he would not harm J.

230. Notwithstanding his denial of any involvement in injuring J, the evidence of KF's presence and possible

involvement is significant, and I reject the suggestion of his involvement being implausible.

231. Whilst he did give an account to police and file a Children Act statement, KF knew that the events of that night were heavily disputed and [the mother] was making allegations against him, and [the] family Court wanted to hear his oral evidence at this fact finding hearing. He was represented by leading counsel in these proceedings. His decision to not give evidence leaves many of my questions unanswered. He says he has nothing to hide, but I cannot possibly evaluate that without hearing him cross-examined. Key questions relate not just to the night of 30 June/1 July but his involvement over the period of his relationship, and the presence and actions whilst involved in the care of J. This includes a full and proper account of:

(a) When he was in the home and the role he took in the care of T and J

(b) His drug use and impact on his behaviour

(c) His observations of the behaviour of the children, including any biting or rough behaviour by T towards J

(d) His observation of any marks on J and the discussions he had with [the mother] as to the cause of any marks

(e) The detail of where and how J was found on night of 30 June

(f) How J was picked up on 30 June, his subsequent actions and the detail as to how the nappy was found with glass in it

(g) The detail as to how J was bathed and how he is said to have fallen

(h) How he cared for J following the discovery of injuries on 30 June

(i) Why J was not taken to hospital immediately.

232. In considering the weight I can give KF's written account and police interview. His account lacks detail in relation to significant aspect[s] of KF's involvement and conflicts significantly with the account of [the mother] in crucial aspects. I am significantly hampered by his decision and this impacts on the weight I can give to his account. I am not satisfied that KF has given me a full or complete picture of his behaviour."

32. In his final analysis, the judge returned to this issue at paragraph 274 of his judgment:

> "The suggestion is made in the mother's submissions that I can infer KF's responsibility for any non-accidental injuries from his failure to submit to cross-examination, and 'the broad canvas of evidence'. I have looked closely at the evidence to see if I can attribute responsibility for the causation of any injuries, looking first to who had the opportunity to cause injury and whether I can identify a single actual perpetrator on the balance of probabilities. In respect of a number of the injuries identified on J in May and June, as well as those discovered on admission to hospital on 1 July, I identify [them] as non-accidental. Where I am not able to identify a single perpetrator, I find there is a likelihood or real possibility that [the mother] or KF inflicted the injuries and are in the pool of perpetrators."

33. At the conclusion of his judgment, the judge set out a final analysis leading to the detailed findings which, with one apparent exception, corresponded with those set out in the "executive summary" sent to the parties on 2 August 2019. The exception related to a bruise on J's face seen in hospital on 1 July 2018. The judge accepted KF's account that it had occurred in his care but not his description of J falling in the bath. He concluded:

> "I am not clear as to how this bruise happened but on the evidence it is likely that it was sustained whilst J was in KF's sole care and he must be the perpetrator."

34. I turn to consider the grounds for which permission to appeal has been granted.

Ground 1 - conclusions on injuries to J incompatible with criminal verdicts

35. On behalf of the appellant, Mr Ian Peddie QC accepted that the fact of KF's convictions by itself was not sufficient reason for this court to allow an appeal against the findings in the care proceedings. He acknowledged that it was necessary to look behind the convictions at the evidence heard by the Crown Court. Much of the evidence was broadly the same in both the family and criminal proceedings, but there were a number of significant differences. One example was that the mother changed her account about whether KF had been absent from the house between 17 and 25 June 2018. Importantly, unlike Judge Vavrecka, the jury heard oral evidence from KF. It was Mr Peddie's submission to this Court that as a result the jury was therefore in a better position to view the whole canvas of the evidence. In addition, the jury heard additional evidence from another expert odontologist, Professor Pretty, who cast doubt on the reliability of the odontology evidence as a whole. Overall, it was Mr Peddie's submission that the Crown Court had carried out a more complex analysis of what had happened to J. As a result, the mother was completely exonerated as either a principal or secondary actor in the abuse perpetrated on the boy.

36. The problem with this argument is that it is not a valid ground of appeal against the judge's findings in the care proceedings. Instead, as Ms Penny Howe QC pointed out on behalf of KF, it is really a challenge to the judge's refusal to reopen the findings after the conviction at trial. In the skeleton arguments filed on behalf of the appellant in support of this appeal, Mr Peddie at more than one point cited *Re Q (Fact-finding*

Rehearing) [2019] EWFC 60, which is a decision on the reopening of findings in care proceedings following an inconsistent verdict in parallel criminal proceedings.

37. In my judgment, neither the fact that a jury has reached a verdict on criminal charges that is inconsistent with earlier findings in care proceedings nor the simple fact (if it be true) that the evidence heard by the jury was different from, or more comprehensive than, that adduced before the judge in the family proceedings is sufficient by itself to justify the conclusion that the findings in the family proceedings were wrong so as to require an appellate court to overturn the findings. It may, however, be sufficient to justify a reopening of all or part of the fact-finding hearing. I shall return to this point of the end of this judgment.

38. In certain circumstances, it may be the case that information arising from the criminal trial can properly be admitted as fresh evidence in support of an appeal to this Court against the findings made in the family proceedings leading to the appeal being allowed. A limited application to admit fresh evidence has been made on this appeal and it is convenient to deal with that ground next.

Ground 4 - application to admit new odontology evidence

39. It should be recorded that the notice of application to admit fresh evidence, dated 6 January 2020, refers only to one document, the report prepared by Professor Pretty for the criminal proceedings. The application notice does not extend to any other document or evidence given in the criminal trial, although in one of the skeleton arguments in support of the appeal Mr Peddie asserted that the evidence which the appellant sought to adduce included not only that report but also the evidence given by Professor Pretty and Dr Kouble in the Crown Court and the ruling by the Crown Court judge on the admissibility of the odontology evidence following a *voir dire*.

40. The points arising from this material on which the appellant seeks particularly to rely are Professor Pretty's observations in his report including his assertions that (1) there is no scientific basis for the identification of, and subsequent analysis of, human bite marks on skin; (2) the science which exists undermines the process rather than supports it, with a range of studies describing high error rates, low reliability and biological implausibility to the process of bite mark "matching"; (3) the evidence in this case relating to the injury on the left armpit was of poor quality and, due to its anatomical location, subject to significant postural distortion that cannot be accounted for in any analysis; (4) it was impossible to determine, to any degree of medical certainty, that the injury to the left armpit was caused by the teeth of any named individual, and (5) that the assessment of injuries caused by either a dental adult or child is problematic, especially in the presence of distortion. In addition, Mr Peddie relies on the fact that the evidence given by Dr Kouble at the Crown Court was materially different to that given in the family proceedings and that he was less certain about his conclusions.

41. The starting point for determining whether fresh evidence should be admitted by this court is the overriding objective in the Civil Procedure Rules of doing justice. As this Court noted in *Sharab v Al-Saud* [2009] EWCA Civ 353, however, the pre-CPR cases "remain of relevance and indeed of powerful persuasive authority". Foremost amongst those cases is, of course, *Ladd v Marshall* [1954] 1 WLR 1489, although in cases relating to children the principles identified in that case are said to be less strictly applied: *Re W (Children)* [2009] EWCA Civ 59. Mr Peddie submitted that the *Ladd v*

Marshall criteria are satisfied in this case, in particular if they are applied with the flexibility required in cases involving children, because (1) Professor Pretty's report was not available at the time of the fact-finding hearing, (2) the odontology evidence was an important factor in the judge's conclusion about the perpetrator of the injuries sustained by J, and (3) the new evidence was plainly credible.

42. In reply, Ms Hannah Markham QC for the local authority, in submissions adopted by Ms Howe on behalf of KF, contended that the application failed to satisfy the first condition in *Ladd v Marshall* because it cannot be shown that the evidence could not have been obtained with reasonable diligence for use at the fact-finding hearing. Professor Pretty's views do not represent a new strand of opinion in expert odontology. At one point in the criminal trial, the mother's counsel described it as a "long-standing debate". There was no reason why that view could not have been put before the family court judge in the fact-finding hearing. Furthermore, Ms Markham submitted that the application also failed to satisfy the second *Ladd v Marshall* condition because the need for caution in interpreting forensic bite analysis was identified by Dr Kouble in his evidence in the family proceedings. Insofar as he subsequently changed his mind about some aspects of his opinion at the criminal trial, these revisions would not have affected the weight to be given to his opinion by the judge in the family court. As for the ruling on the *voir dire*, Ms Markham submitted that the approach taken by the Crown Court judge to the admissibility of the evidence in the criminal trial has no bearing on the application of rules of evidence of the family court.

43. Whilst acknowledging the need for a degree of flexibility in considering the admissibility of fresh evidence in appeals in children's cases, I am satisfied the application to adduce fresh evidence in this case must be refused. It is clear from the passages in the fact-finding judgment cited above that, having considered the evidence of Dr Kouble and Dr Crewe, the judge was well aware of the limitations of odontology. It may be that a third expert such as Professor Pretty may have expressed greater scepticism about the reliability of such evidence in stronger terms, but I am not satisfied that, if his report had been admitted in the fact-finding hearing, it would have had an important influence on the outcome of the case. Furthermore, the fact that there is a degree of scepticism about the reliability of such evidence was plainly known *before* the fact-finding hearing. Mr Peddie may be right to suggest that it would have been difficult to persuade the judge to allow the instruction of a third expert in the field, bearing in mind the provisions of s.13 of the Children and Families Act 2014 and Part 25 of the Family Procedure Rules 2010, but there was nothing to prevent the parties identifying and putting the issues to Dr Kouble and Dr Crewe in cross-examination.

44. In fact, it is clear from the transcript of evidence given by Dr Kouble and Dr Crewe during their "hot-tubbing" session in the witness box that they were asked a number of questions about the reliability of odontology evidence. Counsel then instructed for the mother drew attention to concerns raised in research papers about how such analysis was carried out (see appeal bundle page 1009.43), the differences in techniques used for analysis (page 1009.48) and the absence of a universal standard for the type, qualities, and individual characteristics of a bite mark (page 1009.49). The existence of the range of opinions expressed by Professor Pretty in his subsequent report for the criminal proceedings was therefore known to the lawyers representing the parties at the fact-finding hearing and to some extent canvassed before the judge.

45. For these reasons, I would refuse the application to admit as fresh evidence on this appeal the report prepared by Professor Pretty and the other material identified in counsel's submissions.

Grounds 2 and 3 – adverse inference and assessment of KF's evidence

46. It is convenient to deal with the next two grounds of appeal together, namely that the judge was wrong not to draw adverse inferences from KF's refusal to give evidence and that his assessment of KF's evidence was inadequate. In the course of oral submissions, it became clear that these two grounds overlapped and to a considerable extent amounted to the same point.

47. Mr Peddie submitted that Judge Vavrecka wrongly failed to draw an adverse inference from KF's refusal to answer questions at the hearing. It is the role of the court to consider the totality of the evidence, which should include an adverse inference where the law requires that inference to be drawn. Here, there was no indication why the judge did not draw an adverse inference, notwithstanding his assertion that he had been significantly hampered by KF's refusal to give evidence. The consequences of failing to draw an adverse inference were significant. The local authority was alleging that the physical injuries sustained by J were inflicted either by KF or by the mother. If the judge had drawn adverse inferences against KF on the basis that he had something to hide, he would or should have proceeded to conclude that KF caused all the injuries, including the serious injuries to the genital area. He would thereby reach the decision arrived at by the jury in the later criminal trial. Furthermore, an adverse inference against KF would have had an impact upon the judge's analysis of the mother's credibility on which he relied heavily in reaching his conclusion that there was a real possibility that she was the perpetrator of the injuries.

48. In support of these submissions, Mr Peddie relied on the dicta of Johnson J in *Re O (Care Proceedings: Evidence)* [2003] EWHC 2011 (Fam). In that case, which concerned allegations of violence by a mother against a child, the mother had filed a statement denying the allegations but, as she did not give oral evidence, the district judge attached no weight to her statements and proceeded to make findings that she had injured the child. In dismissing the appeal, Johnson J observed:

> "13. This decision, simply to attach no weight to the mother's statements, was in my view wrong. The judge could, and in my view should, have gone further. As a general rule, and clearly every case will depend on its own particular facts, where a person declines to answer questions or, as here, give evidence, the court ought usually to draw the inference that the allegations are true.
>
> ….
>
> 16. In the present case the district judge went on to consider a number of considerations supporting or discrediting what [the child] had said and eventually concluded that what she had said was true. However, in my view, unless there was some sensible reasons to the contrary, the mother's failure to give evidence should have been determinative of the allegations."

49. In *Re U (Care Proceedings: Criminal Conviction: Refusal to Give Evidence)* [2006] EWHC 372 (Fam) (a case not cited to us by counsel), Holman J was faced with a similar situation to that which arose in the present case. In *Re U*, which concerned care proceedings in respect of a baby, the father, who was in the process of appealing a conviction for murder of another child, refused to file a statement or give oral evidence on the grounds that he had been advised not to do so by his criminal lawyer. Holman J declined to draw an adverse inference against the father, notwithstanding the fact that his failure to file a statement and answer questions was plainly a contempt of court. He referred to the observations of Lord Lowry in the House of Lords decision of *R v IRC and another, ex p T.C Coombs and Co* [1991] 2 AC 283 at p300 F to H:

> "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."

As Holman J observed in *Re U* (at paragraph 30) Lord Lowry's observation does

> "no more than describe and illustrate the very broad discretion of the court to draw adverse inferences, which must be exercised in a very fact-specific context."

He added that Johnson J's observation in *Re O*, cited above, which he described as *obiter*, was "again very fact-specific".

50. In my judgment, Holman J's approach is unquestionably right. The decision whether or not to draw an adverse inference from refusal to answer questions will depend on the circumstances of the case. The fact that KF was advised by his criminal lawyer not to answer questions is a relevant consideration. It is, of course, the case that s.98 of the Children Act provides:

> "(1) In any proceedings in which a court is hearing an application for an order under Part IV or V [i.e. including care proceedings] no person shall be excused from
>
> (a) giving evidence on any matter; or
>
> (b) answering any question put to him in the course of his giving evidence,
>
> on the ground that doing so might incriminate him or his spouse or civil partner of an offence.
>
> (2) A statement or admission made in such proceedings shall not be admissible in evidence against the person making it

> or his spouse or civil partner in proceedings for an offence other than perjury."

In *Re EC (Disclosure of Material)* [1996] 2 FLR 725, however, this Court held that s.98(2) only gives protection against statements being admissible in evidence in criminal proceedings. It does not protect against their use in a police enquiry into the commission of an offence.

51. It follows that Judge Vavrecka was not obliged as a matter of law to draw an adverse inference against KF from his refusal to answer questions. He plainly considered the submission that he should draw such an inference and, in my judgment, cannot be criticised for rejecting it. Furthermore, although he declined to infer from his refusal to answer questions that KF was the perpetrator of the injuries, he took his failure to give evidence into account in his overall analysis, and the fact that he was as a result left with important questions unanswered was a material factor in his conclusion that KF could not be excluded from the pool of perpetrators of the injuries. His careful and considered balancing of this aspect, alongside his detailed analysis of the mother's credibility and the lies she had told during the investigation, was plainly within his discretion as the trial judge.

52. In support of the further ground of appeal, Mr Peddie put forward a number of criticisms of the judge's evaluation of KF's written evidence. In my judgment, none of these give rise to a legitimate challenge in this Court. The judge's evaluation of this evidence was measured and careful and I can see no basis on which an appellate court would be entitled to interfere.

Ground 5 – the shoe imprint

53. Finally, the appellant has sought to challenge the finding that some of the marks on J's body were strike marks from a shoe likely to have been the mother's flip-flop. Permission to appeal on this ground was refused, Peter Jackson LJ stating that any argument concerning shoe injury could be pursued under ground one. For the reasons set out above, I would refuse the appeal on ground one. I should, however, add that, insofar as the judge's reasoning for his finding about the shoe was insufficiently set out in his judgment, the omission was fully rectified in the further reasons provided in the email as described above.

54. For these reasons, I conclude that this appeal should be dismissed.

Final observations

55. Finally, I return to the question of a reopening of the fact-finding hearing.

56. It is well established that the family court has jurisdiction to conduct a rehearing of its findings of fact. When considering an application for a rehearing of findings of fact in these circumstances, the court must adopt a three-stage process, first set out by Charles J in *Birmingham City Council v H and others* [2005] EWHC 2885 (Fam) and endorsed by Sir James Munby P in *Re ZZ and Others* [2014] EWFC 9 and by this Court in *Re E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447. At the first stage of the three-stage process, the court considers whether to permit rehearing of the earlier findings. As Sir James Munby observed in *Re ZZ* at paragraph 33:

> "One does not get beyond the first stage unless there is some real reason to believe that the earlier findings require revisiting. Mere speculation and hope are not enough. There must be solid grounds for challenge."

At the second stage, the court must determine the extent of the investigation and evidence concerning the rehearing. At the third stage, the court conducts the hearing of the rehearing itself. Since the hearing of the appeal in the present case, this Court has delivered a judgment in *Re CDT (A Child: Rehearing)* [2020] EWCA Civ 1316 in which Peter Jackson LJ has drawn together the guidance of the approach to be taken at each of the three stages.

57. One example of a case where a court at first instance reopened a fact-finding hearing is my decision in *Re Q (Fact-finding Rehearing)* [2019] EWFC 60. In that case, I had made findings at the first hearing that the principal injuries sustained by the child were inflicted by the father but at a subsequent Crown Court trial the jury convicted the mother of a charge relating to those injuries. Under s.11 of the Civil Evidence Act 1968, in civil proceedings, including proceedings in the family court, a conviction is prima facie evidence that the convicted person committed the offence but the conviction is not conclusive and the convicted person is entitled to seek to prove the contrary. As Lord Diplock observed in *Hunter v the Chief Constable of West Midlands Police* [1982] AC 529 at p544D:

> "The burden of proof of 'the contrary' that lies upon the defendant under section 11 is the ordinary burden in a civil action: proof on a balance of probabilities; although in the face of a conviction after a full hearing, this is likely to be an uphill task."

In *Re Q* (at paragraph 99) I said:

> "it seems to me that the purpose of section 11 is principally to establish a rule to be applied in circumstances in which the criminal trial and conviction occur before the civil fact-finding process. I accept Mr Storey's submission that it cannot have been the intention of Parliament that a subsequent conviction would lead to a presumption that a prior contrary finding in civil proceedings would be overturned on appeal …. [T]he proper interpretation of section 11 is that the weight to be attached to a conviction in these circumstances will vary depending on all the circumstances. The proper approach in the circumstances of this case is not to rely on this conviction alone but rather to look behind the conviction at the evidence."

58. In *Re E*, Peter Jackson LJ considered the relative merits of challenging findings of fact on the one hand by appeal and on the other hand by application to the first-instance court for a reopening of the findings. At paragraph 52 he observed that comparing

> "the hurdles facing an applicant to the trial court and an applicant to [the Court of Appeal], it can be seen that the processes are by their nature different. The gateway under CPR 52.21(2) and the

> *Ladd v Marshall* analysis concern the admissibility of evidence, while the first stage of an application for review requires a consideration of the overall merits of the application. It cannot be ruled out that the different procedures might throw up different results in similar cases, but on the whole I think that this is unlikely. In both contexts, the balancing of the public interests is carried out with a strong inclination towards establishing the truth in cases where there is good reason for a reassessment and as a result the outcomes would tend to converge."

It was, however, his view (at paragraph 17) that

> "it would generally be more appropriate for the significance of the further evidence to be considered by the trial court rather than by way of an appeal."

Peter Jackson LJ spelt out the importance of such a process at the outset of his judgment in *Re E* (at paragraph 1):

> "Depending on their gravity, findings of fact may be highly relevant to, or even determinative of, the welfare decision not only in the proceedings in which they were made, but also in other proceedings about the same child or proceedings about different children. An incorrect finding one way or another can have lasting consequences."

59. In that case, this Court dismissed the appeal as being a less appropriate means of resolving the matter than applying for a reopening of the hearing. As no application had been made to the trial judge for a reopening, this Court treated the mother as having made such an application and directed the matter be listed for directions before the trial judge so he could consider whether, and if so, how his findings of fact should be reopened. At paragraph 13(5), Peter Jackson LJ added:

> "We consider that the further evidence might have an important influence on the outcome … but emphasised that the extent of its significance was a matter for the judge."

60. In contrast, in the present case an application was made to the judge on two occasions to reopen the fact-finding hearing. Both applications were refused. Each application was, however, made orally, with no formal notice of application and without identifying with any particularity the evidence and other material on which it was based. In those circumstances, it is unsurprising that the applications were refused at that stage and it would not be appropriate for us to adopt the course taken by this Court in *Re E*.

61. It is, however, open to the appellant to make a further application to the judge to reopen the fact-finding hearing. It must plainly be on notice, identifying the evidence and other material on which it is based. At the time when they made the oral applications for a reopening, the mother's solicitors were not in possession of the evidence from the Crown Court trial. In contrast, they now have a transcript of much of the evidence, including the evidence given by KF.

62. It would not be right for this Court to indicate how the judge should determine a further application to reopen the fact-finding hearing. Like Peter Jackson LJ in *Re E*, I consider that the further evidence might have an important influence on the outcome but emphasise that the extent of its significance is a matter for the judge. It should be recorded, however, that in the course of the hearing before us, Ms Markham indicated that the local authority would not oppose an application for a rehearing of the findings relating to the serious injuries sustained by J on the night of 30 June and 1 July.

MRS JUSTICE ROBERTS

63. I agree.

LORD JUSTICE McCOMBE

64. I also agree.