Neutral Citation Number: [2021] EWCA Civ 1371

Case Nos: B4/2021/1194 and 1218

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE FAMILY COURT AT EAST LONDON**
**Her Honour Judge Sapnara**
**ZE20C00084**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 September 2021

**Before :**

**LORD JUSTICE PETER JACKSON**
**LORD JUSTICE PHILLIPS**
and
**LADY JUSTICE ELISABETH LAING**

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**B-M (Children: Findings of Fact)**

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**Mark Twomey QC** and **Rebecca Littlewood** (instructed by **Irvine Thanvi Natas Solicitors**) for the **Appellant Mother**
**John Tughan QC** and **Nathan Alleyne-Brown** (instructed by **SA Law Chambers**) for the **Appellant Father 2**
**Christopher Poole** and **Samuel Marks** (instructed by **Local Authority Solicitors**) for the **Respondent Local Authority**
**Mary Hughes** (instructed by **Farani Taylor Solicitors**) for the **Respondent Father 1**
**Tim Parker** (instructed by **Gary Jacobs & Co Solicitors**) for the **Respondent Children by their Children's Guardian** [written submission only]

Hearing date: 14 September 2021

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# Approved Judgments

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 at 10:30am on Monday, 20 September 2021.

**Lord Justice Peter Jackson:**

*Introduction*

1. After hearing these appeals, we informed the parties that they would be dismissed. These are my reasons for joining in that decision.

2. The appeals are from findings of fact made in a reserved judgment of Her Honour Judge Sapnara on 19 March 2021. I will say something about the delay in hearing the appeal at the end of this judgment, which is drafted so as to preserve the anonymity of the family, and in particular of the children.

3. The Appellant mother ('M') has six children, four older girls and two younger boys: A (19), B (17), C (16), D (8), E (5) and F (3). The Appellant father ('F2') is father of the younger three. The Respondent father ('F1') is father of the older three.

4. The family originates from overseas. M and F1 married in 1999 and the two older children were born. In 2004, M came to this country, alleging domestic abuse by F1; at the time she was pregnant with C. She lived with her mother ('MGM'), who was already here. In 2009, F2 came to England and in 2011 he and M were religiously married, despite M's subsisting marriage to F1, who had remained abroad with the two older children. M and F2 set up home together with C and in due course the younger three children were born.

5. In 2012, with M's support, F1 came to England with A and B. They initially lived with MGM. In 2013, A and B moved to live with M, F2 and C, and the younger children as they came to be born.

6. After A and B left his care, F did not see them or C. He brought proceedings for contact in 2013, which led to a fact-finding hearing in 2015, at which he was represented while M was in person. The District Judge heard evidence from M, F1 and MGM. He rejected M's case that she had been the victim of sexual and physical abuse by F1. For lack of evidence, he made no findings about allegations that F1 had physically mistreated A and B before they came to England. He generally found M to be an unsatisfactory and untruthful witness. However, at a later hearing, after a Cafcass report revealed that the three girls were adamantly opposed to seeing F1, an order was made that there should be no contact. A, B and C therefore remained with M and F2, with some contact with MGM. It is a feature of the case that MGM has been sympathetic to F1 and antipathetic to F2.

*The proceedings*

7. The present proceedings centrally concern the three younger children, for whom a final welfare decision is overdue. They also concern C, who will soon be 17. They arose in this way. In February 2020, C told her school that she, A and B had over a long period been sexually abused by F2 and physically abused by M and F2. A also said that F2 had attempted to kiss her and that she knew that there was what she described as a sexual relationship between F2 and B. The police became involved. F2 was arrested and removed from the home. The local authority brought care proceedings. Interim care orders were made and the younger three children were placed in foster care

together, where they remain. A remained with M. After some weeks B went to live with MGM. C chose to go into foster care and was placed separately.

8. Shortly after C's allegations, she took part in a video interview in which she maintained her account. A refused to give a statement; in March 2020 she retracted her allegation, and in July 2020 she made a statement that she had never been abused by F2. B made a statement in May 2020, alleging sexual behaviour by F2 towards her and stating that she had seen him sexually abusing C on a regular basis and trying to kiss A. M and F2 denied all the allegations, which also extended to evidence of domestic abuse between themselves and physical violence towards the older children.

9. Inquiries conducted during the proceedings included a psychiatric assessment of M and a parenting assessment by an independent social worker ('ISW'), who interviewed M, F2, MGM, A and B.

10. The fact-finding hearing began in January 2021. It was a hybrid hearing in which the evidence of the parents was given in court, while the older children gave evidence by video link from another room in the court building in accordance with arrangements made during *Re W* assessments. Evidence was first given by C, A and B, the order reflecting the chronology of their allegations, with the parents giving evidence later in the hearing. Once the evidence was completed, substantial written submissions were filed and the judge gave an oral judgment at a later date.

11. The hearing had originally been expected to last for twelve days, but in the event it was necessary for sixteen days of evidence to be given, much of it through interpreters. This was largely because, when B came to give her evidence, which was taken in short stretches over the course of four days spanning a weekend, she for the first time made much more extensive allegations against F2 and M. The parties and the court then took stock. There was no application for an adjournment, or for C or A to be recalled, but B returned to answer further questions about her overall account. The local authority then expanded its schedule of findings to include B's further allegations, which were put to M and F2 during the course of their own extensive oral evidence.

12. The judgment is a very substantial one, running to over 80 pages of transcript, and demonstrating the Judge's close command of the evidence. She made nineteen findings of fact in the terms sought by the local authority. In summary, she found that F2 had sexually abused B and C over a number of years, that M had known this and had participated in some of the abuse, that M and F2 had physically abused the three older children, that all the children had suffered emotional harm as a result of witnessing domestic abuse between F2 and M and physical abuse of the children, and that all the children were at risk of further significant sexual, physical and emotional harm. The only finding that the Judge declined to make concerned the allegation previously made, but not determined, in the private law proceedings, that F1 had been physically abusive towards A and B before they came to England.

13. The Judge was faced with a mass of information and argument. I do not propose to summarise the judgment and will refer to it only to the extent that it is necessary when considering the grounds of appeal. For present purposes it is enough to say that the Judge accepted the evidence of B, allowing for what she regarded as some understandable inconsistences and exaggerations, that she broadly accepted the allegations made by C, that she found that A's retraction of her allegations was

untruthful, and that she found the evidence of M and F2 to be comprehensively unreliable and untruthful.

*The appeal*

14. M and F2 have each appealed, with permission granted by Moylan LJ. Their appeals are not symmetrical. F2 appeals from all the findings, while M appeals from some seven findings only, being those that were based on allegations made for the first time in B's oral evidence. These relate to sexual abuse going beyond that previously alleged, and of M's awareness and active participation in the sexual abuse, going beyond a failure to protect. The local authority opposes the appeal, as do F1 and the Children's Guardian.

15. The grounds of appeal advanced by M are as follows:

    (1) The Judge's approach to B's allegations and evidence was flawed, in particular in relation to her assessment of the evidence which contradicted B's account and those matters she found to have corroborated it.

    (2) The Judge's assessment of B's credibility was superficial and based primarily on demeanour to the detriment of a full analysis of her evidence as a whole, of independent evidence and of any inconsistencies.

    (3) The Judge wrongly decided M was a liar on the basis of findings made in the private law proceedings (evidenced by her decision to give herself the *Lucas* direction in relation to those findings). Further, or in the alternative, the treatment of the District Judge's findings as final was unjust because of a serious procedural irregularity.

    (4) The Judge took judicial notice of matters in respect of which it was not open to her to take judicial notice.

16. F2 also advances grounds of appeal in the same general terms as Grounds 1 and 2, and 4. In addition he argues (and I shall label this as Ground 5) that the Judge failed to give any or sufficient consideration to the submissions made on his behalf or to explain why those submissions were either accepted or rejected.

17. Although the evidence in the case is complex, the issues for this court on appeal are relatively straightforward. Mr Twomey QC and Mr Tughan QC, leading trial counsel Ms Littlewood and Mr Alleyne-Brown, made their submissions with creditable economy, as did Mr Poole, Ms Hughes and (in writing) Mr Parker in response. I shall deal with the issues in this order: the Judge's assessment of B's evidence (Grounds 1 and 2) and her reference to judicial notice (Ground 4); the adequacy of her reasons for rejecting F2's arguments (Ground 5); her approach to the findings in the private law proceedings (Ground 3).

*The assessment of B's evidence*

18. The Judge's assessment of B's evidence appears at [126]:

> "In my judgment, of all the witnesses who gave evidence in respect of the allegations of abuse, she was the most reliable witness. Her oral evidence was powerful and compelling,

> delivered calmly and quietly but to devastating effect as to the details of her allegations of abuse."

The course of B's evidence is then summarised in the following fourteen pages, in which the Judge describes not only the information but the manner in which it was imparted.

19. The Appellants say that the Judge effectively decided that she believed B and that the remainder of this long judgment is no more than a supporting argument that fails to grapple with the difficulties facing that conclusion. Mr Twomey argued that the judgment does not engage properly with inconsistencies in B's various accounts nor with improbable exaggerations. In some respects, the Judge purported to find corroboration where there was none, and she dealt inadequately with the fact that B had not made her full complaint sooner.

20. Mr Twomey took us to four main parts of the judgment that he argued were unsatisfactory [346, 374, 390, 367]. For example, at [346], it is said that B and C corroborate each other's account of abuse, while in fact there were inconsistencies between the girls' descriptions of how long the abuse had been continuing, its frequency and the persons who had been present. At [367], the Judge referred to these matters:

> "Such inconsistencies as there were in their evidence, in my judgment, are what can be reasonably expected from a victim of abuse, particularly given their young age and vulnerability. I take judicial notice of the likelihood of there being a significant emotional and psychological impact on them of the abuse that they had suffered in silence for so long. To date they have not have any counselling or therapeutic intervention. I note that C mentioned having flashbacks and difficulty in sleeping."

Similarly the Judge said this about B at [373]:

> "I take judicial notice of the fact that reaching a position where she is able to articulate and acknowledge, firstly to herself what had happened to her, and then to divulge everything and unburden herself, can take a victim years and is very often a slow, incremental, lengthy and painful process for a survivor of abuse such as B. Living in the intensely abusive environment in the mother's home, I consider it likely that B was simply not ready to make these allegations and certainly not allegations of such a sensitive nature. I take into account also her cultural background which is also likely to have inhibited reporting of the abuse because of entrenched issues of shame and honour."

21. Mr Twomey argues that these are inadequate responses to the points of detail that were made in closing submissions and that there was no proper basis for reliance on judicial knowledge where there was no specific evidence about these children's psychological state. As such, the reasoning process is circular, in assuming that flaws in the account are the result of the account being true. He further asserted that in a number of places the Judge wrongly treated commonplace household details mentioned by B when describing very serious abuse as being corroborative. As one would expect, these

arguments were developed with close reference to the evidence and the judgment, but it is not necessary to record the details here.

22. Centrally, Mr Twomey and Mr Tughan argued that the Judge effectively based her conclusion on an assessment of B's demeanour as a witness when giving evidence and that she consequently did not adequately assess B's overall credibility. They rely on a number of passages of judicial *obiter dicta*: Lord Pearce in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at [36]; Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15-22]; Leggatt LJ in *SS (Sri Lanka) v SSHD* [2018] EWCA Civ 1391 at [33-43] and Macur LJ in *Re M (Children)* [2013] EWCA Civ 1147 at [12]. These, they assert, warn judges to a greater or lesser extent against relying upon the way a witness gives evidence as opposed to the content, consistency and probability of the evidence itself. To take one example:

> "… it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth."
>
> "No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts."
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> *SS (Sri Lanka)* at [36] and [41]

23. There is, I think, a distinct difficulty in harvesting *obiter dicta* expressed in one context and seeking to transplant them into another. *Onassis* and *Gestmin* were concerned with the reliability of recollections of business conversations. In *SS (Sri Lanka)*, a tribunal had rejected an account of torture by an asylum seeker. This court was considering an argument (for which permission to appeal had not been given) that a delay of three months in the production of the tribunal's judgment had unfairly lessened the impact that should have been made upon the judge by the appellant's demeanour as a witness, and the above observations were made in that context.

24. Further, and as noted by this court in *Kogan v Martin* [2019] EWCA Civ 1645 at [88-89] *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. Rather, as *Kogan* states, it is one of a line of distinguished judicial

observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. The discussion in *Gestmin* is expressly addressed to commercial cases, where documentary evidence will often be the first port of call, ahead of unaided memory.

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

26. I therefore respectfully agree with what Macur LJ said in *Re M (Children)* at [12], with emphasis on the word 'solely':

> "It is obviously a counsel of perfection but seems to me advisable that any judge appraising witnesses in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment solely by virtue of their behaviour in the witness box and to expressly indicate that they have done so."

That was a case where the trial judge's decision to refuse even supervised contact was based unduly on a father's manner of giving evidence.

27. The same approach was taken by this court in a family case: *Re A* [2020] EWCA Civ 1230, where a finding of unlawful killing by poisoning was based upon recollection of a very brief event years earlier. At [36], King LJ noted that in *Kogan*, the court had emphasised the need for a balanced approach to the significance of oral evidence regardless of jurisdiction and that, although it was a copyright dispute between former partners, the judgment had wider implications. She added:

> "40. I do not seek in any way to undermine the importance of oral evidence in family cases, or the long-held view that judges at first instance have a significant advantage over the judges on appeal in having seen and heard the witnesses give evidence and be subjected to cross-examination (*Piglowska v Piglowski* [1999] WL 477307, [1999] 2 FLR 763 at 784). As Baker J said in in *Gloucestershire CC v RH and others* at [42], it is essential that the judge forms a view as to the credibility of each of the witnesses, to which end oral evidence will be of great importance in enabling the court to discover what occurred, and in assessing the reliability of the witness.

> 41. The court must, however, be mindful of the fallibility of memory and the pressures of giving evidence. The relative significance of oral and contemporaneous evidence will vary from case to case. What is important, as was highlighted in *Kogan,* is that the court assesses all the evidence in a manner suited to the case before it and does not inappropriately elevate one kind of evidence over another.
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> 43. In the present case, the mother was giving evidence about an incident which had lasted only a few seconds seven years before, in circumstances where her recollection was taking place in the aftermath of unimaginably traumatic events. Those features alone would highlight the need for this critical evidence to be assessed in its proper place, alongside contemporaneous documentary evidence, and any evidence upon which undoubted, or probable, reliance could be placed."

28. Of course in the present case, the issue concerned an alleged course of conduct spread across years. I do not accept that the Judge should have been driven by the *dicta* in the cases cited by the Appellants to exclude the impressions created by the manner in which B and C gave their evidence. In family cases at least, that would not only be unrealistic but, as I have said, may deprive a judge of valuable insights. There will be cases where the manner in which evidence is given about such personal matters will properly assume prominence. As Munby LJ said in *Re A (A Child) (No. 2)* [2011] EWCA Civ. 12 said at [104] in a passage described by the Judge as of considerable assistance in the present case:

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

29. Still further, demeanour is likely to be of real importance when the court is assessing the recorded interviews or live evidence of children. Here, it is not only entitled but expected to consider the child's demeanour as part of the process of assessing credibility, and the accumulated experience of listening to children's accounts sensitises the decision-maker to the many indicators of sound and unsound allegations.

30. None of this will be news to specialist family judges and in future I would hope that in conventional family cases any submissions that unduly labour arguments based upon the *dicta* that I have been considering will receive appropriately short shrift.

31. As to the fallibility of memory, the dangers are again familiar to working judges, as are the problems of suggestibility in children. However, in the present case, the issue was not whether the children had misremembered but whether, as the Appellants asserted, they had been put up to lie about abuse by MGM and F1. The Judge firmly rejected this possibility, having extensively assessed the family and its individual members:

> "418 The cultural and religious context of the family has to be considered in assessing the veracity of the allegations. In my judgment it is highly improbable that either the girls, the grandmother or the father would seek to make allegations of a sexual nature, much less tell professionals and the court about such matters. Issues of shame and honour, which I am quite satisfied are relevant and operative in the family's considerations, would have precluded this."

32. Returning to the present case, I acknowledge that the Appellants do not crudely assert that the Judge based her decision exclusively on B's demeanour; rather they say she relied upon it unduly. I disagree. The Judge understandably gave considerable weight to the way in which B and C described what they said they had experienced, but she set this alongside a number of other considerations, for example at [352-353]:

> "352. B and C have provided details of specific and particularised allegations, which are internally consistent and credible when considered against external factors also. By this I mean that each of their evidence remained clear and consistent over time. C gave her account to a series of professionals. Their accounts withstood significant challenge over a lengthy period of time in cross-examination. Their individual oral evidence was consistent and it was also consistent when compared against what they had said previously as contained in the documentary evidence.
>
> 353 In terms of external factors, I am satisfied that actual circumstances existed in reality which support the truth of their allegations. Courts are used to dealing with allegations and circumstances when objective assessment of the facts leads to a conclusion that the abuse simply could not have taken place in the ways, or at the times described. On the facts of this case though I am satisfied that F2 lived in, or was present in their home at the time that the girls have stated, and therefore he had the opportunity to abuse them in the way that they have stated."

The Judge then went on to deal with dates and timeframes, and what she described as the significant amount of dense, contextual detail in B's account which simply had a ring of truth about it. In relation to one most unusual and cruel incident, the Judge found that B was retelling a real incident and not making it up. Generally, she found that B was not seeking to mislead the court, but was describing her "genuine lived experience" of abuse "on an intensively regular basis".

33. I also reject the argument that the Judge brushed aside inconsistencies. In reality, the majority of the matters relied upon are not inconsistencies but differences, for example

as to how often and for how long abuse had been occurring. Such differences are, as the Judge said, commonplace. Nor was she wrong to consider that B's evidence was corroborated by other evidence. She was not asserting that every detail of the abuse was corroborated, but rather that there was a very significant amount of other evidence to support the overall picture of a home in which children had been shockingly mistreated.

34. The Judge went on at [372] to consider the question of coaching and of the timing of the complaint:

> "I reject the suggestion that B was influenced by the grandmother and her own father, because she was living with her grandmother and seeing her father at the time that she gave her police statement and her evidence in court. I accept what B said about this. In my judgment it is likely that she was finally in a place of safety and, in common with very many victims of abuse, she had the time and space firstly to realise and then become comfortable enough to articulate what had been done to her. Having taken the step of saying what she did in the police interview, in my judgement it is likely that she has found the courage and ability to elaborate upon those allegations and to make the further ones that she did for the first time at this hearing. It does not undermine her credibility. Rather, in my judgment, it serves to enhance it. She has not made a set of rehearsed and polished allegations at the first opportunity, as she could have done in her initial statement to the police."

There is nothing exceptionable about any of this. It was, I think, unnecessary to refer to the concept of judicial knowledge when what was really being meant is the common understanding of human behaviour that any judge of the Family Court will have, but that does not invalidate the Judge's reasoning. Mr Tughan did not join in the submission that the Judge should have been troubled by the lack of prior complaint. He was right not to do so. If child victims of sexual abuse usually made prompt allegations, chronic sexual abuse would be rare, but sadly it is not. And as Phillips LJ pointed out in the course of the hearing, the Crown Court Compendium contains a careful specimen direction about the inferences that may or may not be drawn from the timing of a complaint of sexual abuse, particularly by a child.

35. I therefore reject the specific arguments advanced in support of grounds 1, 2 and 4. Before moving on, I make a wider point. There is in my view a fatal flaw in the way in which these Appellants advance their cases. M appeals only from seven of the nineteen findings, those arising from B's additional allegations. She accepts that the Judge was entitled to make the other twelve findings, which include extremely serious matters that hugely reduce the improbability of B's further allegations being false. For instance, unchallenged Finding 5 records that F2 had sexual intercourse with B within the home at night-time, while challenged Finding 6 records that F2 had been sexually abusing M, including by penetration, on a regular basis since she was aged 12. Mr Twomey could only say that there was a difference in degree and that the later allegations directly implicated M. In contrast, F2's case is that all the findings are intertwined. It is not possible to separate them out in the way M seeks to do and he therefore challenges every one of them.

36. Ironically, the Appellants are both right in different ways. F2 is plainly right to say that B's later allegations are inextricably intertwined with the other findings, because the seriousness of the findings M accepts critically undermines her case on the findings she challenges. At the same time, M is plainly right to accept that there was sufficient (indeed, I would say, abundant) evidence to justify the findings that she does not challenge, and in that respect F2's case, to which I now turn, is an empty one.

*The Judge's reasons for rejecting F2's case*

37. The distinct case presented by Mr Tughan amounts to no more than a 'reasons' challenge. He accepts that F2 had a case to answer but asserts that the judgment against him was structurally unsound. The Judge did not properly grapple with the argument that MGM had put B up to making her allegations. Instead she made her decision fit around her acceptance of B's account. For example, she ignored the fact that during a child protection medical examination in 2012, C (then aged 7) had said that MGM had told her to lie about F2.

38. As with the case presented by M, the arguments put by F2 are more detailed than I need to record. That said, I unreservedly reject his challenge to the Judge's reasoning. She repeatedly refers to the possibility of coaching, both by MGM and F1, and by M. In the former respect, this appears at [105], [372] (above) and [460], while at [417] the Judge put it in this way:

> "I accept the evidence of the girls that they were not coached or influenced by anyone else, including their grandmother and their father, into making these allegations. C is presently estranged from her grandmother. She said that her father had not harassed her."

39. The wider suggestion that the judgment is unbalanced cannot withstand a fair reading of a document that apparently took seven hours to deliver orally. While it is always possible in a case of this kind to find detailed submissions that are not reflected in a judgment, I am entirely satisfied that this Judge understood the issues, grappled adequately with them, and gave a decision that explains what she decided and why. In different circumstances, she might have been asked for minor clarifications, but her judgment stands securely as it is. As Mr Poole put it, there is nothing missing.

40. I would nevertheless draw attention to these observations of Edis LJ in *Re H (Children: Findings of Fact)* [2021] EWCA Civ 319.

> "68. Many judges set out, to some extent at least, the submissions which have been made by the advocates as part of the judgment. Often this is useful, but it is not mandatory, and I have not done it in this judgment. However, it is incumbent on a judge who has reached a particular conclusion to identify the best points which have been made in opposition to it, and to explain why they have not prevailed. This is part of explaining that conclusion, and explains to the losing party why they have lost. There is no doubt that the judge had the father's case firmly in mind and that she rejected it for reasons which can be found in the judgment. Tackling that case more directly would have made the judgment

> clearer, and therefore less susceptible to challenge. In saying this, I acknowledge the enormous burdens on the judges of the Family Court, particularly in the current circumstances, hearing these very difficult cases, one after another, and then having to prepare judgments at speed, often without being given time to do so. I think that the suggestions I make should not add to the time required to prepare a judgment."

41. The way in which a judgment is constructed is of course a matter for the judge, and it is not usually helpful to set out lengthy submissions in full detail. However, in the present case the Judge's explanations for the failure of the Appellants' cases are to be found at various points in what is a long document, and it would, I think have been helpful if there had been a section in which those arguments were shortly summarised and directly addressed, perhaps making the judgment less susceptible to challenge in the process.

42. In parting from F2's appeal, I record that the Judge found him to be a wholly unreliable witness for reasons that she gave, and she described his evidence as weak and utterly unconvincing [437, 458]. At [465], she said this:

> "In my judgment this attempt by F2 to portray all of the events and allegations as some complex, elaborate conspiracy against him, drawing in almost all members of the family including the mother, was a desperate attempt to clutch at straws and was utterly lacking in credibility. As was submitted on behalf of the Children's Guardian, it was indeed fantastical. Such a conspiracy involving all of these family members, in my judgment, is inherently improbable. All of the alleged co-conspirators agreed that sexual abuse would bring shame and dishonour on the family and would be detrimental to it. In my judgment, F2 was making it up as he went along and trying to cut the cloth to fit the emerging and evolving evidence."

*The Judge's approach to the private law proceedings*

43. I turn lastly to M's complaint that she was disadvantaged by the findings made in 2015 that her allegations against F1 were unreliable and that she had been an untruthful witness, as reflected in the Judge giving herself a *Lucas* direction. She objects that she alone was treated as a liar from the outset. This argument is hopeless. The Judge was bound to be aware that M had been disbelieved in those proceedings and she quite properly directed herself not to treat this as a justification for disbelieving everything she said. In fact, she assessed the mother's lengthy evidence in great detail and gave reasons, unconnected to the 2015 proceedings, for rejecting it, starting at [469]:

> "The mother was a wholly unreliable witness, who was evasive and was repeatedly untruthful in the evidence that she gave to me. She lied on key issues, and I accept the submission on behalf of the local authority that these lies were deployed for the purpose of avoiding the truth rather than for any other understandable reasons. Where the mother's evidence differed from that of the girls, B and C, I have no hesitation in accepting

> the testimony of those two girls. The mother was deliberately evasive at the outset of cross-examination and it seemed to me that she was not really willing to assist me in getting to the truth."

The Judge then commented upon M's evidence over the course of the following five pages, expressing perplexity at her lack of empathy for her daughters and concluding that, although M did not make this case herself, she appeared to be in thrall to F2.

44. The complaint that the Judge wrongly treated the 2015 rejection of M's allegations of abuse towards her as binding does no better. The local authority did not seek to revisit that issue, but it tried (somewhat to the Judge's surprise) to obtain findings about F1's behaviour towards the children before they came to England. It was M herself who tried to advance a case that she had been a victim of domestic abuse by F1, and she did so after her own evidence had been given and in cross-examination of F1 on Day 10 of the hearing. Ms Hughes understandably objected, since there had been no application to reopen this issue in the manner provided for in the line of authorities ending with *Re E (Children: Reopening Findings of Fact) [2019] EWCA Civ 1447* at [50], approving *Re B (Children Act Proceedings: Issue Estoppel)* [1997] Fam 117 at 128. The Judge dealt with this issue fully at [110-122].

45. Mr Twomey argued that, once it had become clear that M did not accept the findings of fact, it was incumbent on the court itself to seek out the truth, even though no application was made to it. That submission is entirely unrealistic. The issue between M and F1 was at best peripheral to the present proceedings. Had there been any credible application to reopen the 2015 findings, it should have been made long before the final hearing. Had such an application being made, it would almost certainly have been refused, as the jurisdiction to reopen is rarely exercised and depends as a minimum on the existence of genuine new information casting doubt on established findings. It is not a vehicle for litigants to cast doubt on findings that they do not like or a substitute for an appeal that should have been pursued at the time of the original decision: see *Re W (Children: Reopening/Recusal)* [2020] EWCA Civ 1685 at [28]. Moreover, in the present case Ms Littlewood's closing submissions expressly, and in my view correctly, accepted that it was not possible to go behind the judgment made in the private law proceedings, though M continued to maintain her allegations against F1 of a forced marriage, and of physical and sexual abuse. It is not therefore realistically open to M to advance the contrary as a ground of appeal, and in any event the submission lacks any merit.

*Delay*

46. It is not satisfactory or usual for an appeal of this kind to take six months to conclude. The sequence of events is that the Judge delivered her oral judgment on 19 March. Following correspondence with counsel, her order provided for the local authority to take the lead in obtaining an approved transcript and to serve it on the parties by 10 May. The time for making any application for permission to appeal or for clarification of the judgment was extended until 14 days after receipt of the approved transcript, and a further case management hearing was listed for 18 June. In the event, the transcript did not become available until 23 June and the case management hearing was postponed until 20 September, no doubt to await this appeal. The result is that the Appellant's Notices were not issued until 7 and 12 July respectively and no requests for clarification

were made in the light of the delay. Permission to appeal was granted on 18 August and the appeal was heard in vacation.

47. This court is well aware of the difficulties that there can be in obtaining transcripts promptly and of the fact that it may not be realistic for a party to decide whether to make, or for this court to be able to determine, an application for permission to appeal on the basis only of a note of judgment, particularly in a heavy case of this kind. However, I would counsel against orders extending the time for making an application for permission to appeal by reference to the receipt of a transcript rather than by reference to a specific date. In a case involving young children, an open-ended extension is unlikely to be appropriate while a fixed date may be more effective as a means of securing a transcript within a reasonable time.

48. Those then are my reasons for dismissing these appeals.

**Lord Justice Phillips**

49. I agree.

**Lady Justice Elisabeth Laing**

50. I also agree.

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