Neutral Citation Number: [2020] EWCA Civ 1316

Case No: B4/2019/2474

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (FAMILY DIVISION)
Mr Justice MacDonald

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 October 2020

Before :

LORD JUSTICE FLOYD
LORD JUSTICE HENDERSON
and
LORD JUSTICE PETER JACKSON

- -

CTD (A Child: Rehearing)

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Frank Feehan QC and Naomi Hobbs (instructed by **Fountain Solicitors**) for the **Appellant Intervener**
Andrew Bagchi QC and Param Kaur Bains (instructed by **Enoch Evans LLP**) for the **Respondent Father**
Lorna Meyer QC and Orla Grant (instructed by **Thornes Solicitors**) for the **Respondent Mother** (written submissions only)
Richard Hadley and Louise Higgins (instructed by **Walsall MBC**) for the **Respondent Local Authority** (written submissions only)
Piers Pressdee QC and Kristina Brown (instructed by **Baches Solicitors**) for the **Respondent Children by their Children's Guardian** (written submissions only)

Hearing date: 7 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 at 10:30am on Wednesday, 14 October 2020.

Lord Justice Peter Jackson:

1. This is an appeal from findings of fact that were made at a rehearing of care proceedings. I will set out the law concerning rehearings in family cases before turning to the facts of this case, the arguments, and my conclusion.

Rehearings in family cases

2. When an application is made to reopen findings of fact in a family case the court proceeds in three stages:

   (1) It asks whether the applicant has shown that there are solid grounds for believing that the previous findings require revisiting.

   (2) If that hurdle is overcome, it decides how the rehearing is to be conducted.

   (3) It rehears the matter and determines the issues.

   This appeal is an opportunity to draw together and in one respect to simplify the approach to be taken at each of these stages, which I now consider in turn.

The first stage

3. In *Re E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447 at [28-34] I sought to set out the proper approach at the first stage. I recalled that there is no strict rule of issue estoppel in children cases, but that a decision to allow past findings to be relitigated must be a reasoned one and that the considerations identified by Hale J in *Re B (Children Act Proceedings: Issue Estoppel)* [1997] Fam 117 at 128 provide a useful framework:

> "(1) The court will wish to balance the underlying considerations of public policy, (a) that there is a public interest in an end to litigation – the resources of the court and everyone involved in these proceedings are already severely stretched and should not be employed in deciding the same matter twice unless there is good reason to do so; (b) that any delay in determining the outcome of the case is likely to be prejudicial to the welfare of the individual child; but (c) that the welfare of any child is unlikely to be served by relying upon determinations of fact which turn out to have been erroneous; and (d) the court's discretion, like the rules of issue estoppel, as pointed out by Lord Upjohn in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (No.2) [1967] 1 AC 853, 947, "must be applied so as to work justice and not injustice."
>
> (2) The court may well wish to consider the importance of the previous findings in the context of the current proceedings. If they are so important that they are bound to affect the outcome one way or another, the court may be more willing to consider a rehearing than if they are of lesser or peripheral significance.

> (3) Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial. By this I mean something more than the mere fact that different judges might on occasions reach different conclusion upon the same evidence. No doubt we would all be reluctant to allow a matter to be relitigated on that basis alone. The court will want to know (a) whether the previous findings were the result of a full hearing in which the person concerned took part and the evidence was tested in the usual way; (b) if so, whether there is any ground upon which the accuracy of the previous finding could have been attacked at the time, and why therefore there was no appeal at the time; and (c) whether there is any new evidence or information casting doubt upon the accuracy of the original findings."

Hale J observed that there may be other factors to be borne in mind. In *Re E* at [34] I noted that the court will need to be satisfied that the challenged finding has actual or potential legal significance: is it likely to make a significant legal or practical difference to the arrangements that are to be made for these or other children?

4. The decision in *Re B* was taken forward in a number of decisions, of which three are significant: *Birmingham City Council v H (No. 1)* [2005] EWHC 2885 (Fam) (Charles J); *Birmingham City Council v H (No. 2)* [2006] EWHC 3062 (Fam) (McFarlane J); and *Re ZZ* [2014] EWFC 9; [2015] 1 WLR 95 (Sir James Munby P). These establish that at the first stage the applicant must show that there are solid grounds for believing that a rehearing will result in a different finding. Mere speculation and hope are not enough. I will refer to the latter two decisions again in more detail when considering the third stage.

The second stage

5. At the second stage the court makes case management decisions governing the arrangements for the rehearing. This is also an important discipline to ensure that the hearing does not become a free-for-all in which evidence is repeated and issues reopened without good reason. Sometimes (the present case is an example) the court may need to rehear all aspects of the evidence, but in other cases a particular aspect of the case will need to be reheard while leaving the rest of the evidence undisturbed. An example is *F v Cumbria County Council & M (Fact-Finding No. 2)* [2016] EWHC 14 (Fam) where I reheard only the medical evidence and then placed it together with unaffected lay evidence: see paragraphs 109 and 110 for a description of the process. A similar approach was taken by Cobb J in *Re AD and AM (Fact-finding: Rehearing)* [2016] EWHC 2912 (Fam) and by me in *St Helens Council v M and F (Baby with Multiple Fractures: Rehearing)* [2018] EWFC 1.

6. A methodical approach to the tests at the first and second stages will provide important protection against unmeritorious attempts to relitigate settled findings while allowing cases that genuinely require reconsideration to be identified and revisited in a proportionate way that uses the resources of the court sensibly and is fair to all the parties.

7. The importance of framing the rehearing correctly at the second stage can be seen in the decision of this court in *D (A Child) (Fact-Finding Appeal)* [2019] EWCA Civ 2302. The court found that a child had been injured by her mother's boyfriend. The injury was of a kind that was not inevitably the result of abuse, though the medical evidence pointed that way. The boyfriend later produced a solid alibi and at a rehearing limited to the issue of the identity of the perpetrator the judge made an amended finding that the child had been injured by an unidentified man known to the mother. The mother's appeal was allowed on the basis that the judge was wrong to have confined the ambit of the rehearing when the fresh evidence was relevant not only to the identification of a possible perpetrator but also whether the injuries had been inflicted at all. Similarly, an appeal was allowed in the related field of child abduction where a judge had refused an application to set aside a return order without carrying out a full reconsideration of all the evidence: *Re B (A Child) (Abduction: Article 13(b))* [2020] EWCA Civ 1057 at [96].

The third stage

8. The third stage is the rehearing itself. At this stage the issues are determined afresh on the basis of the whole of the evidence. The description of the event as a rehearing rather than a review is deliberate: once a decision has been taken to reopen the case the court approaches the task of fact-finding in the conventional way and reaches its own conclusions. It does not give presumptive weight to the earlier findings, as that would risk depriving the exercise of its fundamental purpose of doing justice and achieving the right outcome for the child. The burden of proof remains throughout on a party seeking findings of fact to prove them to the civil standard in the normal way. The court assesses the evidence on its merits, without privileging earlier evidence over later evidence, oral evidence over written evidence, or contentious evidence over uncontentious evidence. At all events, a rehearing is quite distinct from an appeal, in which findings stand unless they are shown to be wrong.

9. This description of the nature of a rehearing is substantially in accordance with the statements in *Birmingham (No 2)* and *Re ZZ*, but omits some of the more peripheral observations found in those decisions. In *Re ZZ* at [35], Sir James Munby P aptly described the process of rehearing in this way:

> "The judge has to consider the fresh evidence alongside the earlier material before coming to a conclusion in the light of the totality of the material before the court."

However, that description was preceded by a sentence that needs further consideration:

> "There is an evidential burden on those who seek to displace an earlier finding – in that sense they have to 'make the running' – but the legal burden of proof remains throughout where it was at the outset."

10. In arriving at this characterization, Sir James reviewed the *Birmingham* decisions:

> "16. The fullest analysis of the court's function at the third stage is to be found in the judgment of McFarlane J in *Birmingham*

(No 2). In an important passage that needs to be quoted in full, he said this, paras 42-45:

> "42 … Save for one matter of fine tuning to which I shall turn in a moment, there is agreement that the approach to be adopted to the burden of proof is as follows:
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> (i) The burden of proving the CA 1989, s 31 threshold criteria with respect to S is upon the local authority and remains upon them throughout;
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> (ii) The role of issue estoppel in CA 1989 proceedings has been adapted by the family courts. The classic statement of the law remains that of Hale J (as she then was) in *Re B* … I agree with the analysis made by Charles J … in this case ([2005] EWHC 2885 (Fam) at [55]) where he indicated that there were three stages in such cases. At the first stage the court considers whether it will permit any reconsideration or review of, or challenge to, the earlier finding. The second stage relates to and determines the extent of the investigations and evidence concerning the review. The third stage is the hearing of the review;
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> (iii) Questions of issue estoppel are primarily to be considered at the first stage. Once those who seek a review have passed that stage, issue estoppel is unlikely to be directly relevant either to the investigation process or to the hearing itself;
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> (iv) At the review hearing, the previous finding is the starting point of the local authority's evidence in relation to threshold. *A finding of fact is strong evidence and should be followed in the absence of compelling evidence against it.* To this extent those who challenge the finding bear 'an evidential burden' in the proceedings. The legal burden of proof rests upon, and remains with, the local authority throughout (emphasis added):
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> (v) An 'evidential burden' is an imprecise, non-legal term applied to the forensic reality faced by a party who seeks to challenge a presumption that otherwise arises in favour of another party by operation of law, previous finding or apparently conclusive evidence. It is no more than the burden of adducing evidence.
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> [43] In the present case, by adducing the evidence presented at this hearing the parents have discharged the evidential burden of putting up a case to challenge the previous finding. That being accomplished, it is for the court to conduct the process of evaluating that evidence. The legal burden of

proof of maintaining the findings made by Bracewell J remains throughout upon the local authority.

[44] The remaining difference of emphasis that still exists between the parties is not without importance and it relates to whether or not any continuing 'burden' is placed on the parents once the hearing has actually commenced. The parents submit that, once they have discharged the evidential burden of showing that they have an arguable case sufficient to get through the 'gateway' of the court door and start the hearing, there is no continuing burden. The local authority submit that throughout the process priority should be given to the original finding of fact; that finding, they submit, is not simply reduced to the level of evidence in the case alongside any fresh evidence that is called.

[45] Given that I am clear that the extent of any burden upon the parents is limited to an 'evidential burden', and given that such a burden has no effect upon the legal burden of proof that remains with the local authority, I consider that the difference that remains on this point is more appropriately to be viewed in relation to the standard of proof, rather than in terms of burden. The forensic reality remains that throughout the hearing the parents have had to make the running to present evidence that challenges the original finding. The evidential burden is no more than that; a description of its effect does not go to the respective weight or priority that may be afforded to the previous finding."

17. There is a further important passage, paras 55-56:

"55 … once the hearing in a review process of this nature has commenced, the duty of the court is to look at the matter afresh. Issues of public policy relating to the priority to be given to earlier court decisions is in play at 'stage one' of an application to review a finding, when the question of estoppel is considered. Once that stage is passed, and the court is involved in evaluating the evidence itself, it would be wrong to afford some sort of priority to the evidence given and findings made at the earlier hearing that are to be considered within the review. Indeed it would be difficult to do so in any formal way. The starting point will be that a finding has been made. *In a case such as this, that result can only have occurred because there already exists 'strong' evidence in support of it. Thus any fresh evidence, to get anywhere in achieving the aim of those who call it, must be sufficiently robust to challenge this hitherto 'strong' material* (emphasis added)."

56. In analysing the evidence at this hearing I have readily adopted the approach suggested by Charles J at para [79] of

> his judgment. I have considered the fresh evidence alongside the earlier material (such as medical records) upon which it is based. I have taken as fixed points those parts of the detailed findings and judgment of Bracewell J which are either not challenged or remain intact despite the challenge that is being made on the question of the mother's credibility.""

At [35] Sir James endorsed McFarlane J's analysis with the exception of the words in italics at paragraphs 42(iv) and 55.

11. The *Re ZZ* formulation was cited in the first instance cases listed above and by MacDonald J when refusing permission to appeal in the present case, where he described the appellant as bearing "a lighter *evidential* burden to cast doubt on the previous findings sufficient to replace them".

12. In my view the concepts of 'a starting point', 'strong' evidence, 'making the running' and 'an evidential burden' which have ebbed and flowed in the distinguished judgments that developed the ground rules in this area, can now be laid aside as adding nothing and as being a possible source of misunderstanding. Of course the product of the rehearing will be that the earlier finding should or should not to be changed, but it is only in that very limited sense that the original finding is the starting point. Likewise, the original evidence was clearly strong enough to justify the original findings, but to describe evidence as strong before it is reconsidered is to beg the question that has to be decided. Lastly, concepts of 'making the running' and of an 'evidential burden' apply at the first stage (when securing a rehearing) and may do at the second stage (when persuading the court that a particular issue needs to be revisited). By the time of the rehearing itself the applicant will already have made the running by successfully adducing evidence to persuade the court to carry out an appropriate kind of rehearing and there is no need for further safeguards against unwarranted challenges to settled findings.

13. Accordingly, the simple position is that when it carries out a rehearing the court looks at all the evidence afresh and reaches its own conclusions, requiring the party seeking the relevant findings to prove them to the civil standard in the normal way. The practical arrangements for the hearing may well be influenced by what occurred in the earlier proceedings, but insofar as the concepts mentioned in the previous paragraph might suggest that a rehearing is in principle a different process to an ordinary fact-finding hearing, that would be wrong. In saying this, I am reassured that there is no indication that any of the concepts have played any noticeable part in the decision-making in the reported cases. To take an example, in *Re Q (Fact-Finding Rehearing)* 2019 EWFC 60, Baker LJ (sitting as a judge of the High Court) carried out a rehearing of findings that he had made in relation to a father's responsibility for injuries to a child in respect of which the mother was subsequently convicted at a criminal trial. He referred to the above authorities, assessed the evidence and stated his conclusion:

> "104. Drawing all the various threads together and considering the evidence from the criminal trial alongside the earlier material, I conclude on the totality of the evidence that my findings of fact remain unchanged. Having conducted what I hope has been a thorough and

> comprehensive analysis of the individual areas where it is asserted that there was a change of evidence, and having evaluated that alongside the fact and circumstances of the conviction in the context of the totality of the evidence, I adhere to my original findings as to the perpetrator of the head injuries and my findings that I cannot identify the perpetrator of the rib fractures. …"

In carrying out that rehearing, Baker LJ did not ascribe any evidential burden to the father. Instead, he identified the new material in the context of the evidence on which the original findings were based and he synthesized all of the evidence in order to reach his conclusion.

This case

14. In a judgment given on 19 August 2015 in care proceedings concerning four children, Her Honour Judge Hughes found that a family friend, AO, had caused a number of serious injuries to the youngest child, C, a girl who was then under two years old, at times when she was caring for C on behalf of her parents (to whom I will refer as M and F). Those findings were reconsidered at a rehearing by MacDonald J. In a judgment given on 1 May 2019 he confirmed the finding that the last injury (a spiral fracture to the femur inflicted on 7 September 2014) had been caused by AO, but he amended the findings in relation to four earlier bony injuries and substituted a 'pool finding' that those injuries had been caused either by F or by AO. No challenge to that decision has been made by F, but AO now appeals, contending that the wrong approach was taken to the assessment of the evidence at the rehearing.

15. The reason for the rehearing was that in later proceedings concerning a number of children, including the four children of these parents and a child of AO, MacDonald J had heard evidence and made findings of very serious sexual and physical abuse of all four children by both parents at and before the time of C's injuries. That evidence had not been available to Judge Hughes, who had accepted the evidence of the parents in preference to that of AO.

16. The first proceedings began in this way, as described by MacDonald J:

> "On 8 September 2014 C, who had spent the weekend with AO, before being returned to the care of F and M the previous evening, was … found to have a fractured femur and a 0.3 x 1cm blueish bruise over the pinna of her right ear. The history given by M was that she had fallen whilst walking the previous evening. M made clear to doctors that the fall took place at home after C had woken in her cot at around midnight and been taken to the kitchen for a drink. M stated that she did not witness the fall but called a family friend 'AO' and C was given paracetamol, stopped crying and slept until 8am. On 9 September 2018 the history provided changed and it was stated by M that C had been at the property of AO when C sustained injury because of a fall in the kitchen of that property. M stated that she had been told by AO not to reveal the fact that C was at AO's property. Examination of C on 8 September 2014 also

> revealed older injuries, which injuries I shall come to in detail below."

17. In the original proceedings, in which AO was an intervener, Judge Hughes had unchallenged expert radiological and paediatric medical evidence that C had sustained the following injuries, caused by twisting or wrenching forces:

    (1) A fracture of the medial region of the left femur, caused between mid-April 2014 and mid-May 2014;

    (2) A subperiosteal haemorrhage to left femur, caused between early June and early July 2014;

    (3) A subperiosteal haemorrhage to the tibia, caused between 14 and 21 July 2014;

    (4) A fracture to the base of the left acromion, caused on or around 12 to 14 August 2014;

    (5) A spiral fracture of the shaft of the left femur, caused on 7 September 2014;

    (6) A bruise to the right ear, caused on or within days of 8 September 2014.

    The medical evidence strongly pointed towards this series of injuries as being inflicted and not accidental. The two expert witnesses were not required to give evidence.

18. HHJ Hughes heard evidence from the parents and AO. She found that during the period of time when C sustained her injuries she was in the care of her parents and AO; that M had done her best to tell the truth about what had happened and that F was not deliberately seeking to mislead the court; that there were inconsistencies between AO's written and oral evidence; that AO accepted that when she returned C to the care of her parents on the evening of 7 September there was significant swelling to her leg which could be seen through her pyjamas; that AO was a stronger personality than the parents and had persuaded the parents not to take C to hospital that evening; and that AO's behaviour towards the parents indicated that she had something to hide. She concluded that all of the injuries were inflicted by AO and not by either parent.

19. At the rehearing, which occupied two days, MacDonald J heard oral evidence from the two expert witnesses whose reports had been before Judge Hughes, from a second radiologist, and from AO and the parents. In his judgment he described his approach in the following way:

> "In considering whether to amend the findings made by Her Honour Judge Hughes, the task of the court is not to re-try the issue *in toto* but rather to consider whether the findings should be the subject of amendment considering the new information. The forensic focus therefore, must be on that new information evaluated in the context of the evidence previously before the court. …"

20. Over the course of eight pages, the judge then surveyed all the sources of information before coming to his conclusions, first in relation to the final and most serious injury and then in relation to the earlier injuries:

"Having considered the new evidence… and the evidence of the expert witnesses given considering it, I am not satisfied that the new evidence leads to the conclusion that Her Honour Judge Hughes' finding that AO was responsible for the fracture to C's femur prior to her admission to hospital on 8 September 2014 requires amendment. Whilst it is the case that the new evidence regarding the violent conduct of F towards C in the family home indicates F was eminently *capable* of fracturing C's femur after she returned to the care of him and M on the evening of 7 September 2014, on her own statement before this court AO remains the more likely perpetrator of that injury. On AO's *own* account to the police, [and] her own statement before this court, which I am satisfied she did not resile from successfully, and her own concessions in oral evidence, I am satisfied that there is no proper basis in the new evidence for amending the finding of Her Honour Judge Hughes with respect to the fracture to the femur. I am further reinforced in my conclusions by the new evidence that comprises statements by E and the transcript of E's ABE interview. In this context, Her Honour Judge Hughes' finding also remains consistent with the medical evidence as set out above. I of course note the points made by Mr Feehan and Ms Hobbs (which I must also observe are not, strictly, matters arising from the new evidence before the court) that the perception of swelling by a non-expert can be unreliable, that in cross-examination neither parent described swelling to any great extent, that C was returned to their care "whingeing" or "whimpering" rather than "screaming" and that M stated she was able to change C's nappy. However, against this the evidence of Dr Bache was that AO's descriptions of C at her home were consistent with a broken leg and Dr Sprigg stated he was not familiar with the manner in which C expressed pain. Whilst I also acknowledge the *possibility* of an accidental mechanism, I am satisfied that the evidence in this case demonstrates that it is more likely than not that C suffered an inflicted injury to her femur.

I am however satisfied that the finding of Her Honour Judge Hughes that AO was also the perpetrator of the earlier physical injuries to C requires amendment considering the new evidence... The finding made by Her Honour Judge Hughes followed the learned judge's acceptance of the evidence of F and M regarding the circumstances in their home, which evidence was accepted. Within this context and having regard to her conclusions regarding the fractured femur, Her Honour Judge Hughes was satisfied that AO was responsible for all of the injuries. However, this position has significantly altered in light of the new evidence. The allegations made by the children regarding the violent conduct by F towards C are corroborated both by admissions on the part of F himself of physical abuse of the children, and evidence of other adults regarding what they

> saw or were told. The descriptions of violence given by the children are consistent with the type and level of violence the expert witnesses considered would be required to cause the earlier injuries. As set out above, I have made findings against F regarding his physical violence towards the children. This court has concluded that Her Honour Judge Hughes' finding that AO was responsible for the fracture to C's femur is sound notwithstanding the new evidence. However, I am also satisfied that the findings I have made with respect to F's use of physical violence against the children alter the analysis in respect of the earlier injuries. Having considered the totality of the evidence that was not available to Her Honour Judge Hughes, I am satisfied that the learned Judge's finding that the earlier injuries were caused by AO must be amended to a finding that the earlier injuries were caused by one or other or both of F and AO. The Schedule of Findings will be amended accordingly…"

And the judge then listed injuries 1 to 4 above before concluding:

> "I am cognisant of the fact that this amendment to the findings raises the question of inherent improbabilities. Whilst I accept that it is inherently less probable that a child will be deliberately injured by two separate adults than by one adult, the latter does occur. Moreover, where the evidence suggests that there is a real likelihood or possibility that [that] *is* what occurred then that is the conclusion to which the court must come. In the circumstances, whilst I bear in mind the inherent improbabilities involved, I am satisfied that the amended finding follows from the new evidence on the balance of probabilities. Whilst the new evidence provides [the] basis for revisiting findings in relation to the earlier injuries, it does not do so in relation to last injury. Sometimes, sadly, children are injured by more than one person."

The judge refused permission to appeal in a detailed judgment.

The appeal

21. AO now appeals and asks that the matter be remitted for rehearing. The grounds of appeal are that:

> "1. The judge adopted a standard of review in relation to the earlier findings that gave excessive weight to the judgment of HHJ Hughes and insufficient weight to the evidence which had caused him to reopen the findings made by her.
>
> 2. The judge adopted a standard of review in relation to the earlier [finding] that was incorrect in so far as it led him to a conclusion that was not supported by any of, and was contradicted by some of the evidence.

> 3. In adopting the incorrect standard of review the judge reversed the standard of proof, requiring the applicant/appellant to demonstrate that the original findings were wrong rather than requiring the local authority to prove them.
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> 4. In finding that the applicant/appellant was a potential perpetrator of any of the injuries suffered the judge applied the wrong standard of proof, relying solely on the case of *Re B* [2008] UKHL 35 and taking no account of the subsequent case of *R (D) v Life Sentence Review Commissioners* [2008] UKHL 33."

I granted permission to appeal on the first three grounds and refused permission on the fourth.

22. The appeal was advanced by Mr Feehan QC and Ms Hobbs on behalf of AO and opposed by Mr Bagchi QC and Ms Bains on behalf of F. We have also received helpful written submissions on behalf of the other parties, also opposing the appeal.

23. Mr Feehan and Ms Hobbs contend that the judge essentially went wrong in two ways. The first is that he did not approach the reopening of the finding in the right way, as his self-direction (at 19 above) shows. He should have reconsidered all of the evidence but he instead restricted himself to a review of the previous findings in the light of the new evidence. This first error led to a second one, namely that the judge privileged the old evidence over the new, effectively reversing the burden of proof and requiring AO to show that the previous finding was wrong, as if the court was engaged on an appeal and not on a rehearing.

24. In developing the argument, Mr Feehan took us at some length through primary material and transcripts of evidence to sustain a range of submissions he had made to the judge as showing that responsibility for all of the injuries should have been ascribed to the parents. He submitted that while the judge recorded some of these arguments, he did not sufficiently analyse them and take them into account. Specifically, he argued that it was impossible for AO to have been a possible perpetrator of Injury 3 because she did not have care of C during the relevant period. The outcome is in that respect absurd and should have informed the assessment to be made of the other injuries. On examination, this submission was modified to contend that it was not impossible but wholly implausible that AO caused that injury.

25. As to the other earlier injuries, Mr Feehan argued that the only evidence against AO was that she was an occasional carer for the child. Mere opportunity cannot be enough to result in such a finding. As to the final injury, the judge is said to have given inadequate weight to what was known of the parents' character and actions towards their children and relied too strongly on potentially inculpatory statements made by AO.

26. For F, Mr Bagchi QC and Ms Bains defended the judge's approach. He directed himself in relation to the burden of proof and there is no indication that he reversed it. He may not have expressed himself correctly in saying that he was 'not re-trying the issue *in toto*', but at other points, also quoted above, he made clear that he was considering all the evidence. In any case, he carried out the required task in substance. His conclusions

were clearly open to him in the light of a number of serious difficulties with AO's case, some of which the judge noted. Mr Bagchi placed particular focus on the last injury, which is the only one in respect the judge made a formal finding with potential legal consequences. His reasoning, based on AO's own account of the child suffering a leg injury in her home, was clearly open to him. Once that is accepted, there could be no purpose in a rehearing in relation to injuries in respect of which a 'pool finding' was made. In any case, the evidence about the times when C was in AO's care did not lead to the conclusion that she could not possibly have caused Injury 3. Mr Bagchi also referred to the judge's very negative credibility assessment of AO as being an unimpressive witness who had a marked habit of dissembling and obfuscating.

Conclusion

27. When granting permission to appeal, I noted that the complaint about the correctness and consequences of the judge's self-direction justified the appeal being heard, but that his reasoning and preceding survey of the evidence may demonstrate that in substance a proper approach was taken. Having now heard the appeal, that is indeed my conclusion. The judge's description of his task as 'not re-trying the issue *in toto*' was not correct, but the judgment shows that this misdirection did not lead to any error of substance. He fully reheard the case and factored in all of the evidence when reaching his conclusions. He did not privilege the previous findings or discriminate against the later evidence. He did not reverse the burden of proof. I therefore reject the first basis upon which this appeal is brought.

28. Mr Feehan's further submission is that there was a failure to adequately address and act upon the many arguments made on behalf of AO in the changed circumstances where the parents had been revealed as serious child abusers. In making this submission he faces the steep path that any appellant must climb when challenging findings of fact, a path that is all the steeper in this case, where the judge had a panoramic view of the two households arising from his conduct of the later proceedings. I do not accept that he failed to address the arguments sufficiently. The judgment shows that he fully grasped the issues and it was not necessary for him to set out every submission and response in full detail. He was clearly alert to the significance of his findings about the parents and to the inherent probabilities. But for him the key point related to the last injury. Dependable evidence from these adults was in short supply, but it was undoubtedly the case that C suffered a significant injury in the care of AO and in the absence of the parents. The medical evidence was supportive of, or at least consistent with, this being the injury that led to C's admission to hospital the following day. AO's conduct in getting the parents to join her in lying about where the injury had occurred was also plainly relevant to the assessment of culpability, as was the judge's unchallenged assessment of her credibility. The conclusion that AO was responsible for this injury was based on a process of reasoning that cannot be successfully challenged.

29. Against this background it is also impossible to say that the judge was wrong to conclude that there was a real possibility that AO had caused the earlier injuries. There was a lack of detailed evidence about C's movements between these two abusive households, but in the light of the evidence about the last injury, it cannot be said that the case against AO rested solely on opportunity. As to Injury 3, Mr Feehan did not establish that AO could not have caused this injury, or that the evidence about it should have led to a complete reassessment of the evidence overall. I also agree with Mr Bagchi that if the appeal fails in relation to the last injury, there would be no purpose

in remitting the 'pool findings' alone for rehearing, still less one individual 'pool finding'.

30. In the end, this was a case where the revelations about the parents' behaviour were so striking that the court rightly undertook a thorough rehearing of its earlier findings. Having done so, it might have reversed those findings, but its reasoned analysis of the evidence instead led it to amend them. The decision withstands the challenges that have been made and I would dismiss the appeal.

Lord Justice Henderson

31. I agree.

Lord Justice Floyd

32. I also agree.