Neutral Citation Number: [2020] EWCA Civ 1717

Case No: B4/2020/1868

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT SWINDON
HHJ HESS
SN20C00029

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2020

Before :

LADY JUSTICE MACUR
LORD JUSTICE MOYLAN
and
LADY JUSTICE ASPLIN

- -

Between :

M (Children)	**Appellant**
- and -	
Wiltshire Council	**1st Respondent**
- and –	
The Mother	**2nd Respondent**
- and –	
The Father	**3rd Respondent**

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Ms Deirdre Fottrell QC and Ms Anna Lavelle (instructed by **Royds Withy King LLP**) for the **Guardian**
Mr Colin Morgan (instructed by **Wiltshire Council**) for the **Local Authority**
Mr Andrew Bond (instructed by **Forrester Sylvester Mackett Solicitors**) for the **Mother**
Mr David Josty (instructed by **Wansborough Solicitors**) for the **Father**

Hearing dates: 3 December 2020

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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 on Friday 18 December 2020 at 10am.

Macur LJ:

1. The Children's Guardian ("CG") for "R", a girl now aged 4 and "N", a boy now aged 6, appeals against the order of HHJ Hess made on 23 October 2020 which granted permission to the local authority (LA) to withdraw care proceedings in relation to both children in the circumstances I describe below. Permission to appeal was granted on 11 November 2020. The LA and the children's parents oppose the appeal.

2. The names of parties and institutions that may lead to the identification of the children, are omitted. The CG is represented by Ms Fottrell QC and Ms Lavelle. The LA is represented by Mr Morgan. The father ("F") is represented by Mr Josty and, the mother ("M") by Mr Bond.

Background in brief.

3. On 10 February 2020, the RU Hospital Bath referred R to the LA following diagnosis of a gonorrhoeal eye infection on 4 February 2020. A 'section 47 investigation' followed, during which R underwent two paediatric medical examinations; a visual inspection of her genitalia was normal, but a vaginal swab was positive for gonorrhoea. Dr Cutland, Consultant Paediatrician concluded that *"sexual contact is the most likely mode of transmission of genital gonorrhoea and it is likely that [R] has been sexually abused".*

4. The parents underwent tests for sexually transmitted infection on 13 February 2020 at their respective GPs. The test results were negative. Other family and friends who had been known carers for R also underwent STI testing with similar results.

5. Both parents denied that they had ever sexually abused R. However, on 22 Feb 2020, F reported to a social worker that in October/November 2019 *"[R] started asking people if they had willies or vaginas and whether she could touch them".* M confirmed this. Subsequently, in July, the nursery which R regularly attended, reported an incident of R "tickling [another girl] between her legs. The other girl lifted her legs"". The nursery also reported that two other children had seemingly contracted eye infections at about the same time as R, although the nature of the organism causing those infections has not been ascertained. It is also reported that a child living next door to M and the children also suffered from an eye infection at the same time.

6. During a Child Protection Strategy Discussion, on 20 February, Dr C indicated that research into adult gonorrhoea showed that the infection can remain dormant for several months before becoming symptomatic. She said that someone with the infection could have infected R, and then been treated anonymously and thereafter tested negative for the infection.

7. Care proceedings were issued on 3 March 2020 on the basis that sexual contact was the most likely mode of infection transmission. Neither of the parents was excluded as being a possible perpetrator. On 16 March 2020, an

interim supervision order was made with the care plan for the children to remain living with M under a 'safety plan' which included supervision of contact with F. Community based parenting assessments were completed in relation to both parents by the 5 June 2020. No concerns were raised about either parent's ability to meet the children's needs for basic care, emotional warmth, or stimulation. M did not believe that R had been sexually abused. F was more equivocal but sceptical as to whether it had occurred.

8. A jointly instructed expert, Mr Greenhouse, Consultant in Sexual Health Gynaecology & Genito-Urinary Medicine, produced several reports and written responses to questions between 11 May and 9 October 2020, which it will be necessary to refer to in some detail below. Case management hearings took place in June, July, and September 2020 with an appropriate overview of the expert and other evidence filed and matters of disclosure to and by the police, who by then had mounted an investigation. Ultimately, neither R nor the parents have been interviewed by the police and no further criminal proceedings are anticipated at this stage, it appearing to have been determined after an initial question and answer session that R was not a competent witness. The final hearing of the care proceedings was listed for five days before HHJ Hess commencing on 30 November 2020 with a pre-trial review hearing on 21 October 2020.

9. The case summary prepared for the hearing on 21 October is dated 20 October. The position of the parties was revealed in the following terms:

> (1) The LA seek permission to withdraw the proceedings on the basis they are unlikely to be able to satisfy the attributability condition under s 31 CA 1989. The court is referred to the local authority position statement filed with this case summary.
> (2) The parents support the applications to withdraw and are willing to engage with the CIN planning suggested by the LA.
> (3) The Guardian does not support the application and invites the court to test the evidence.

10. The LA in its position statement drafted by Mr Morgan were "clear that based on the expert evidence from both Dr Cutland and Mr Greenhouse that [R] has suffered physical and sexual harm … The difficulty that the [LA] have in formulating a case on the basis of the findings sought in terms of the threshold criteria is the nature of the evidence of the original site and likely timeframe for [R's] gonorrhoeal infection." Referring to several iterations of Mr Greenhouse's opinion relating to the sequential time frame during which the infection could have occurred as potentially affecting his "credibility" the LA were also concerned that, in light of the possible dormant state of the sexually transmitted infection, the pool of potential perpetrators "is widened to such an extent that the inclusion of the parents within the pool…goes far beyond any exercise anticipated by the court in the uncertain perpetrator cases. Put differently, in what way can it be contended as in the children's best interests to pursue findings of an attributability of harm against the parents when they are merely one of a uncertainly large class of potential perpetrators of albeit clearly established harm".

11. F, by his position statement, supported the application indicating that the involvement of the LA had been stressful and upsetting for the family. Whilst understanding the need of LA to be involved as a result of "the infection suffered by [R]", its approach to the parents had been "accusatory and intimidating" in the absence of direct evidence or disclosures. He indicated his frustration at delay and inconsistent messages, but re-iterated his willingness to co-operate with the LA, and sought clarity about the "Keep Safe and Sexual Abuse "awareness work proposed for the children.

12. M, by her position statement echoed much of F's complaints as to the manner of the investigation, and stated "In the [LA's] final evidence, reference is made to their "concern" that I was convinced that [R] had never been sexually abuse "despite the evidence". [M] would like the [LA] to confirm the "evidence" they refer to." M also sought clarification of the work that LA suggested needed to be done, indicated that she would be prepared to continue to work with the LA but wished "for the family to be left to get on with their lives now, without the continued involvement of children's services." She supported the application.

13. The CG, by her position statement noted "that the parents do not accept that [R] has been abused." After referring to the relevant jurisprudence relating to the LA application, accepting that this was an "exceptionally rare case" in which the "expert evidence has not been as clear and consistent as it could have been", with associated difficulty experienced by the parents, the CG asked the court to "test the evidence" before a decision on the application to withdraw the case was made.

Expert reports

14. Dr Cutland, Consultant Paediatrician at the Bridge Sexual Assault Referral Centre examined R on 13 and 27 February 2020. In her report dated 10 March, 2020 she gave as her opinion that so far as the gonorrhoeal infections were concerned, based on the research available in pre-pubertal children, "it is more likely than not that sexual contact is the mode of transmission and thus [R] is likely to have experienced child sexual abuse. It is not possible to say with any certainty when this occurred".

15. In Mr Greenhouse's first report dated 11 May 2020, and in answer to specific questions posed in his letter of instruction, he said as follows:

a. Gonorrhoea is transmitted most usually and almost entirely by penetrative sexual intercourse or direct genital exposure to freshly produced genital secretions and/or ejaculate during sexual activity including finger-to-genital transfer of fresh ejaculate or pre-ejaculatory fluids;

b. The current conventional wisdom among both UK and US paediatricians is that a finding of gonorrhoea in a pre-pubertal child

"over four years old" must be taken as prima facie evidence of sexual abuse until proven otherwise.

c. The interval between exposure to infection and development of symptoms of genital infection with gonorrhoea varies considerably between adult men and women and between women and pre-pubescent girls. The majority of adult pre-menopausal women infected with gonorrhoea will have no obvious symptoms and can carry the infection for many months up to about two years before their immune system gradually diminishes and clears the infection. In pre-pubescent girls, it is clear that among those who do develop obvious symptoms the incubation period is "very short as in adult men", which he described as being within 1 to 14 days of exposure in the case of urethral gonorrhoea. "The incubation period for gonococcal eye infection is likely to be very short as for urethral infection."

d. Since the balance of probabilities demands that in any paediatric case the infection must be considered prima facie evidence of sexual contact, then R may have been exposed to infected fluids initially either in or over the genital area without developing genital symptoms and with subsequent accidental self-inoculation into the eye causing the most immediately obvious signs of disease; alternatively ejaculation of infected fluids over the face with subsequent accidental self-inoculation onto the vulva or into the vagina with this latter site of infection remaining symptomless; or, accidental exposure in her eye from one or other of the two children who were simultaneously diagnosed with conjunctivitis, of unspecified cause, in the same week as R.

e. If the original site of the infection was genital, then the lack of any genital symptoms precludes any possibility of determining the incubation period of the original acquisition. In this scenario subsequent accidental self-inoculation into the eye would have occurred "no more than an absolute maximum of two weeks – and most probably one week or less – prior to the first development of ophthalmic symptoms being noticed. Likewise, if the original site of infection was ophthalmic then the incubation period was most probably one week or less".

f. Dr Cutland was apparently unaware that two other children in the same nursey were diagnosed to have conjunctivitis in the same week as R and that may "significantly affect the overall balance of probabilities – or possibilities – in this case". Accurate diagnosis in General Practice of each of the children's eye infections is "inherently difficult".

g. R was found to have severe and obvious gonococcal eye infection. This diagnosis is not in doubt. Infection would probably have been acquired within a week of onset of symptoms.

h. R probably had symptomless vulvovaginal gonococcal infection but the finding is "less robust" as the sample was taken in suboptimal conditions by her mother, albeit under the direct supervision of the Consultant paediatrician. If accepted to be genuine it is not possible to determine which site of infection was the original source and the incubation period is uncertain.

16. In his subsequent report dated 18 June 2020, in answer to further inquiries he said:

a. The swab from R's once infected eye taken on 13 February was negative, but R had been treated with an antibiotic beginning seven days previously. The vulvovaginal swab revealed a positive result for gonorrhoea which may remain positive for up to two weeks after correcting antibiotic treatment is commenced. The possibility of accidental transference of gonococcal material from R's eye may have occurred, and the possibility of a false positive could not be excluded.

b. In a section headed "Adjustments to answers to questions put by the Instructing Solicitor" , Mr Greenhouse confirmed that the most likely mode of primary infection was that R may have been exposed to infected fluids initially either in or over the genital area without developing genital symptoms and with subsequent accidental self-inoculation into the eye causing the most immediately obvious signs of disease.

c. There remained the possibility that the vulvovaginal swab was contaminated but, if a true positive then, on the balance of probabilities, vaginal infection is likely to have preceded that of the eye, but the incubation period from the original vaginal acquisition is entirely uncertain. In these circumstances, R is likely to have infected the other children in the nursery; but if a false positive then she may have been infected by them. The sequence of infection he postulated was because there was "one verbal suggestion of inappropriately sexualised language having occurred some three months prior to the development of overt eye infection", although there seemed to be no "obvious pointers to the original source of the infection of the precise timing of acquisition".

17. In his report dated 10 July, 2020 , Mr Greenhouse confirmed his opinion that in any case of gonorrhoea in a child, the balance of probabilities must weigh in favour of a sexual mode of acquisition unless there is strongly countervailing evidence of accidental transmission. His suggested sequential infection was given by reason of what may have been considered age inappropriate reference to genitalia by R as recorded above.

18. In an e mail dated 21 August, 2020, he considered that on the balance of probabilities that it was more likely for a male to be the source of the infection, however, in the absence of any evidence of sexual assault, he would "respectfully suggest that this principle is a somewhat less than robust method of reliable adjudication in this case".

19. Dr Cutland filed a report dated 2 October 2020 dealing with the possibility of the vulvovaginal swab producing a false positive result for gonorrhoea. She considered it extremely unlikely that the swab had been contaminated by M, who had recently been tested and was negative for gonorrhoea. She considered the forensic sampling process undertaken to be free from taint.

20. Mr Greenhouse's final report dated 9 October 2020 accepted as speculation the possibility that the other children with conjunctivitis had been caused by gonorrhoea, and that R had been accidentally infected as "most unlikely". Regarding a possible timeline it "remains more likely that [R] was infected vaginally asymptomatically some time – perhaps a few months- before she developed overt eye infection."

Judgment under appeal

21. HHJ Hess prepared a written judgment which, commendably, he handed down within two days of hearing the application. He noted at [5 (x)]:

> "The [LA's] position on these matters has varied over the course of the proceedings, but this is no criticism of them as I am satisfied that they have at all times attempted to analyse in a serious and sincere way both the expert evidence (which, it must be said, has had some inconsistencies within it and has at times been confusing) and the difficult procedural issues (e.g. how widely should an investigation be pitched to produce a fair and meaningful trial?)".

22. At [7], he referred to Ms Stoten's statement which "includes the following…'…the [LA] is concerned that Mr Greenhouse's reports are contradictory and the timeframe for the likely primary site of the infection (i.e. the vagina) is ambiguous and could be anywhere from a couple of days to a couple of months to a couple of years…' "

23. At [9] he said:

> "Both parents wholly support the [LA's] conclusions and are, it seems to me sincerely, willing to continue to work with the [LA] outside the court arena if the case is concluded by my allowing the [LA's] application."

24. At [11] he referred to *Oxfordshire County Council v DP, RS & BS [2005] EWHC 1593* and the factors to be considered when deciding such an application.

25. His reasoning is set out at [13]:

(i) Whilst it is almost always in the interests of a child to ascertain as

much information about what abuse has occurred by whom and when, especially perhaps sexual abuse with its potentially long lasting psychological effects, where a trial would be unlikely to reach a meaningful conclusion on these matters that interest should have significantly less weight attached to it than when the situation is otherwise.

(ii) The evidence suggests that if the timetable were taken at its fullest there would potentially be a very large group of possible perpetrators, perhaps including significant numbers of family members, friends and teachers and helpers at [R's] nursery, possibly also the parents of other children at the nursery who also had eye infections at the same time. The time and expense needed to investigate all these people properly would, in my view, be disproportionately large. Although it is rare to raise financial issues in this sort of context it is right to note that such an exercise could also have tied up a disproportionately large amount of local authority, court and legal aid resources.

(iii) Even if the court accepted the orthodox view that gonorrhea infections are indicative of sexual abuse, the inconsistencies in the medical evidence in this case, if exploited in cross-examination, might render it very difficult for the court to reach any satisfactory positive findings against anybody.

(iv) If, at the end of a trial, a significant number of people were left in the pool of perpetrators, it is unlikely that the actual plans the local authority currently has for ensuring the children's safety would be changed by such a finding. The current evidence suggest that it is most unlikely that a court would be able to find a small group of perpetrators or identify one perpetrator. Whilst somebody might make full admissions in cross-examination, that is fairly unlikely in a case like this where there appear to be no circumstantial evidence pointing to any one person as a greater possibility than any other.

(v) Although the courts are loathe not to attempt to protect children by seeking to identify potential risks of future harm (see for example Lord Nicholls in Re O and N [2003] UKHL 18) there are some cases, and this it seems to me is one, in which it is not possible to do that in a way that is fair and meaningful."

The Grounds of Appeal

26. Application for permission to appeal was filed on 10 November 2020. Three grounds of appeal were drafted by Miss Lavelle, who had not appeared in the court below. In summary:

Ground 1 – The court erred in its approach to the question as to whether there was a realistic prospect that after a fact-finding hearing a pool finding would be made which included the parents.
Ground 2 – The court was wrong to give no or no proper weight to the circumstantial evidence in the case which suggested a real possibility that one of the parents was the perpetrator of the abuse. The circumstantial evidence warranted further investigation through a fact-finding hearing.
Ground 3 -- The learned judge placed too much weight on the purported inconsistencies in the evidence of Mr Greenwood when in fact his written evidence strongly suggested that the child had become infected as a result of sexual contact and the other evidence was more relevant to whether the parents were likely perpetrators of the abuse including the timing of the infection.

The appeal

27. Ms Fottrell QC centred her submissions on Ground 3, from which Grounds 1 and 2 flow. In summary, she made clear that the CG did not necessarily and actively seek a finding against the parents, but did regard it to be in R's, and consequently N's, best interests to have a determination upon the evidence as to whether R had been sexually abused, and if so when this could have occurred and, if possible, by whom. The parents, unlike the LA, did not accept that there had been sexual abuse which potentially presented 'protection' issues, and the judge should have addressed this point. As it was, it was impossible to know from the judgment on what basis the judge had proceeded. The question of harm and attributability were conflated. The judge had fallen into error, led by the error of the LA, in analysing the development of Mr Greenhouse's opinion as to timing and sequence of infection. His judgment contemplated a time frame of two years, inevitably increasing the size of the possible pool of perpetrators and envisioning the creation of an unwieldy court logistical exercise. In any event, it was wrong not to contemplate whether the court forensic investigative process would establish that, on the balance of probabilities the infection occurred within the shorter periods of two weeks or months before appearance of the eye infection.

28. The experts said that the parents' negative testing for gonorrhoea is not conclusive evidence that they have not had it or transmitted it. There was also evidence that the parents had not always given a full and honest account of events. Whilst it may be that the court could make only a pool finding it could include one or both parents, and it was not necessary to 'close the pool' to establish the threshold criteria. Dependent upon the findings, the LA could not sensibly maintain that the care plan would remain unchanged regardless, as is clear from the parenting assessments before the court. The judge did not engage with these issues at all in his judgment.

29. Although the judgment referred to the applicable factors that must be taken into consideration, HHJ Hess did not demonstrate the way he had applied the relevant law, and there was a lack of any analysis of the necessary welfare considerations. Instead, HHJ Hess indicated in his judgement that he had referred the advocates before him to *In Re B* [2019] EWCA Civ 575, which

was concerned with a case also involving gonorrhoeal infection in children and the difficulty in attribution. She submits that the similarity of harm in that case unduly influenced the judge from the task he should have applied to the particular facts of this case.

30. Mr Morgan defends the judgment, in written and oral submissions, arguing that read as a whole it reveals that the judge proceeded on the basis that there was evidence capable of establishing the threshold criteria, certainly as to harm. If the judge had elided the issue of harm and attribution, that is not fatal to the judicial exercise of discretion in this case. His focus on attributability rightly informed his consideration of the necessary criteria regarding welfare and other practical considerations. The judge was right to focus upon the difficulties presented by the potential size of the pool of perpetrators having regard to the well-established principles derived from *Lancashire v B [2000] UKHL 16; North Yorkshire v SA [2003] EWCA Civ 839; Re S-B (Children) [2009] UKSC 17;* and *Re B (Children: Uncertain Perpetrator) [2019] EWCA Civ 575.* Even had the Judge decided to proceed to a fact-finding hearing and had managed to considerably shorten the list of potential perpetrators, it would still have left the outcome as stated in *Re O and N (Minors); re B (Minors) [2003] UKHL 18 @* [28]: "*each of the possible perpetrators is, indeed, just that: a possible perpetrator*." The utility of such a finding would not change the implementation of the intended care plan.

31. The CG had accepted in the court below that there was a wide pool of possible perpetrators; her advocate had not referred the judge to the "circumstantial evidence" now argued in support of ground 2 (see [26]).The CG's argument before this court proceeded on the basis that the timeline of the infection was capable of being significantly shorter than that suggested by an analysis of the expert reports. Dependent upon the original site of infection, the LA's analysis of the evidence suggested a time frame that could mean a dormant infection over two years, and not the one to two months posited by the CG before us. This "open ended period of incubation" had obvious consequences. The fact that "these difficulties may have been ironed out in cross examination" did not mean that the judge had been wrong to consider that the "distinct paucity of evidence apart from the fact of [R's] infection with gonorrhoea itself, to assist the court in making anything more than nominal findings of attributability in respect of the parents on the facts of this case." The court was entitled to examine Mr Greenhouse's evidence in the round in considering the application for withdrawal and assess the potential impact those inconsistencies might have on the ability of the local authority to prove its case without the necessity of hearing the evidence itself.

32. Mr Morgan conceded that the judgment did not address the parents' position in relation to sexual abuse having occurred at all, but submitted that it was clearly before the judge, as indicated by reference in the judgment to the statement of Ms Stoten which, albeit not quoted in respect of the point, did contain information regarding this. In light of the judge's involvement throughout the case prior to 21 October 2020, he may be presumed to have had regard to this fact, but fairly to observe as he did in [9] of the judgment that the parents had indicated a willingness to continue to co-operate with the

LA 'care plan'. He complains that if the CG relies on this ambiguity then the judge should have been asked to clarify the issue before the appeal was launched.

33. Finally, he submits that we should not interfere with the exercise of the broad discretion afforded to the judge at first instance, unless in the clearest of circumstances and cites *Re TG [2013] 1 FLR* in support of this proposition. If the judge was satisfied that there would be no material change to the care plan regardless of his likely findings, as may be inferred from [13(iv)] of his judgment, then his decision should not be overturned.

34. Mr Josty makes clear F's "disquiet" concerning the evidence, and the fact that he "struggled" with the concept that R had been sexually abused, which he submits would be well known to HHJ Hess by virtue of the judge's significant involvement throughout the case. The judge was required to look at the evidence dispassionately and was entitled to consider whether fair process was possible. He draws a comparison between the forensic exercise facing the judge in this case to that of Cobb J in *Lancashire CC v NG, DG [2013] EWHC 4648 (Fam) @ [65 (d)]*. That is, the many inconsistencies arising from the expert's report meant that the evidential result after factual inquiry could not be confidently predicted to be any clearer than it was on the papers at the time of the application. In which case the judge rightly had regard to the welfare and practical interests of the children in pursuing the case to conclusion as may be divined from [13 (ii) and (iv)] of his judgment.

35. Mr Bond, in accordance with M's skeleton argument in the appeal, effectively adopts the submissions of LA and F.

Discussion

36. There is common ground between all parties as to the relevant law to be applied in respect of applications for the withdrawal of care proceedings. The relevant principles to be applied have been summarised in several first instance decisions, invariably including reference to the decision of MacFarlane J (as he then was) in *A County Council v DP, RS, BS (By the Children's Guardian)[2005] 2 FLR. 1031* which lists the relevant factors that the judge should consider when the s 31 Children Act 1989 threshold criteria may otherwise be established. Most recently, Baker LJ in *RE GC (A child) Withdrawal of care proceedings* [2020] 4 WLR 92, [16] – [20], has reviewed and restated the applicable principles. If in the relevant case the threshold criteria might be established then these may be summarised to be judicial consideration of the necessity of the investigation and the relevance of the potential result to the future care plans for the child; the obligation to deal with cases justly; whether the proceedings would be proportionate to the nature, importance and complexity of the issues; the prospects of a fair trial of the issues and the impact of any fact-finding process on other parties; and, the time the investigation would take and the likely cost to public funds.

37. I gratefully adopt Baker LJ's clear exposition of the same, which renders repetition otiose. However, additionally I would endorse the comments made by MacDonald J in *A Local Authority v X, Y and Z (permission to Withdraw)*

[2017] EWHC 3741 (Fam) @ [53], referring to the decision of Cobb J in *J,A,M and X (Children) ([2014] EWHC 4648 (Fam),* to the effect that the court considering such an application must adopt an objective and dispassionate approach, regardless of the "emotive" subject matter in prospect. That is, the nature of the harm that has befallen the subject child cannot by itself be determinative of the outcome of withdrawal proceedings, however serious it may be. Likewise, evidential complexity alone should not be determinative of outcome if forensic scrutiny could reasonably establish the relevant facts upon which to determine welfare considerations, whether by reason of positive or negative 'threshold' findings.

38. Since the application to withdraw is a 'case management' decision, Mr Morgan's citation of *In the Matter of TG (A child) [2013] EWCA Civ 5* is entirely apposite. The most pertinent reminder for this court is no doubt to be found in [35] to [38] of the judgment of Sir James Munby, then President of the Family Division. That is, it is important that the Court of Appeal support first instance judges who make *"robust but fair case-management decisions ….The Court of Appeal can interfere only if satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge…The judge well acquainted with the proceedings because he or she has dealt with previous interlocutory applications will have a knowledge of and 'feel' for the case superior to that of the Court of Appeal."*

39. In [38] the President referred to the speech of Lord Hoffmann In Piglowska v Piglowski [1999] 1 WLR 1360 as "this vitally important observation:

> *"reasons for judgment will always be capable of having been better expressed … reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973] . An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*

40. Equally, it should be recognised that a local authority is under a continuing duty to review the evidence in the case and to take decisions which may appear incongruent to the uninformed observer in light of the nature of the apparent significant harm that has befallen the subject child and which led to the institution of care proceedings. Whilst the application is subject to court scrutiny in accordance with FPR 29, part 4, it is nevertheless a difficult, important, and significant decision for a local authority to take and will not be undertaken lightly. In this case, and particularly in light of the conclusion I reach, I think it right to record that the application was obviously made in good faith after anxious, although in my view inexact, scrutiny of the evidence.

41. Bearing in mind the appropriate strictures that I record in [38] and [39] above, and being all too well aware of the disruption and distress that these proceedings have caused, I nonetheless consider that, subject to my Lord and my Lady, it is clear that this court should intervene and the appeal must be allowed on two fronts.

42. First, a literal reading of [13 (iii)] of the judgement below, makes it difficult to discern whether HHJ Hess proceeded to deal with the application on the basis that this was a case in which the threshold criteria would not be met on his rough evaluation of the evidence as it stood or, was a case where in short parlance, he must apply the 'A County Council' principles he refers to in [11] of his judgment. However, assuming that he regarded it fell into the second category, not least because I do not think it reasonably can be said to be "obvious" that the evidence was insufficient to proceed, as Mr Josty and Mr Bond realistically concede on behalf of F and M, (whilst re-iterating their client's disquiet and scepticism), the judgment does not address the fact that the parents' do not accept that R has been subjected to sexual abuse. Whilst not necessarily determinative of the application, it is a significant factor in the exercise of judicial discretion whether to permit withdrawal of the proceedings, and the judge's reasoning and conclusions on the point should have been addressed in the judgment.

43. In this case the parents do not only deny their participation in any such abuse that may be established but also, in different degrees, the premise that abuse has occurred at all. This has implications for the future parenting and protection of the children and in my view calls for a clear determination as to whether, on the balance of probabilities, R has been victim of sexual abuse .

44. It follows that I agree with Ms Fottrell QC's submissions that the reference to the parents' support of the LA's conclusions in [9] of the judgment below can only relate to the termination of the proceedings, and not their acceptance that sexual abuse has occurred. However, I also agree with Mr Morgan that clarification should have been sought from HHJ Hess regarding [9] of the judgment before the appeal was launched. As it is, I do not regard the issue I deal with immediately below to have been capable of clarification and need not deal with this point further.

45. Secondly, it appears after a careful examination of the several reports and emails prepared by Mr Greenhouse, that the judge was unintentionally misled as to a crucial fact which would impact upon whether a meaningful investigation of attribution was possible, again assuming that harm is found in accordance with Children Act 1989, s 31(2)a. As indicated above, HHJ Hess refers to Ms Stoten's evidence including the following: " … the likely primary site for infection (i.e. the vagina) is ambiguous and could be anywhere from a couple of days to a couple of months <u>to a couple of years</u>" (my underlining) in [7] of his judgment and obviously accepts it as the basis of his determination. I note that this error was compounded in Mr Morgan's submissions to us in that the timeframe was said to be up to "two years or more", but " a couple of years" or "two years or more" are assertions that are not founded on the evidence as indicated in [15 (c) (e)] and [20] above. The dormant period of infection differs for good physiological reasons between pre-menopausal

female and pre-pubertal children as described by Mr Greenhouse in his 11 May report. The two-year period was quoted specifically in reference to the former. The time frame is considerably less in the latter. I accept Ms Fottrell QC's analysis on this evidential point but think it likely that we have had greater assistance in analysing the evidence than did HHJ Hess, as appears from Mr Morgan's claim that the CG did not dispute the potential size of the pool of perpetrators in the court below. However, HHJ Hess's conclusions in [13(ii)] of his judgment are necessarily undermined.

46. In this respect, the fact that Mr Greenhouse's opinion was 'developed' (as Ms Fottrell QC describes it to be) in response to a repeated and regular succession of written questions and follow up requests for clarification, suggests that it was simply not compatible with a paper interrogation and called for oral cross-examination; not least since his opinion formed a corner-stone in the proceedings, and the criticism of it was centre stage to the LA application. I have little doubt that HHJ Hess would have benefitted from hearing Mr Greenhouse's evidence under challenge and may well have rejected or finessed the LA analysis otherwise put before him, with obvious implications as to the utility of proceeding further in accordance with the child protection and welfare principles he refers to in [13 (i) and (v)] of this judgement.

47. Further, I regard it right to observe that whilst Mr Greenhouse attaches several meaningful caveats to his opinion which may not have 'assisted' the LA to a clear view, and which may well account for the way in which the judge articulates the issue in [13(iii)] and, in fairness to the parents have at least contributed to their scepticism that R has been sexually abused at all, that it is right that he should have done so in accordance with his duty as an expert witness to bring any matters that may undermine the integrity of his opinion to the attention of the court. The caveats do not undermine his "credibility" or otherwise undermine his expertise or reliability. It should also be recorded that, subject to these caveats his opinion on the relevance of a positive test for gonorrhoeal infection in a pre-pubertal child and the consequent likelihood of sexual abuse remained firm.

48. Realistically, I would accept HHJ Hess's conclusion regarding the improbability of a confession from the witness box and see the potential limitations in the "circumstantial evidence" against the parents which Ms Fottrell QC seeks to rely upon in support of ground 2. The cross-examination of Mr Greenhouse and others may reveal further 'known unknowns' which are incapable of resolution and may even militate against a finding of harm on the balance of probabilities, or otherwise confirm the impossibility of narrowing down the pool of potential perpetrators for any practical welfare purpose and substantiate the decision reached by HHJ Hess now under review. However, it is also possible that a more certain picture will emerge which will inform future care planning – if state intervention is warranted at all.

49. A shorter time frame of possible non-accidental infective process, if that is what the judge hearing all the evidence determines it to be, makes the identification of a definitive pool, which may include either of the parents, a more feasible proposition. Mr Morgan's submissions that the care plan would not change, even if the parents were included in a pool of possible

perpetrators, is a bold submission in the absence of knowledge of what detailed findings might be made at the hearing, and is also against the evidence filed by the LA in terms that the parenting assessments did not support the care plan if either parent was found to be a perpetrator. What is more, the LA no doubt will wish to consider the CG's views if the threshold criteria are established.

50. Consequently, for the reasons I give above, I am satisfied that the application to withdraw the proceedings was premature and the judge's decision to have been made in error. I would allow the appeal.

Moylan LJ:

51. I agree.

Asplin LJ:

52. I also agree.