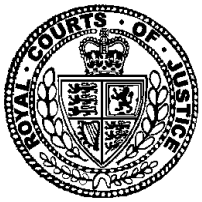

Neutral Citation Number: [2021] EWCA Civ 319

Case No: B4/2020/2140

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT MEDWAY
Her Honour Judge Cove
ME19C00093

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2021

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE EDIS

- -

Re H (Children: Findings of Fact)

- -
- -

George Butler (instructed by **Davis Simmonds & Donaghey Solicitors**) for the **Appellant Father**
Matthew Heywood (instructed by **Invicta Law**) for the **Respondent Local Authority**
Nicole Jennings (instructed by **Pope & Co**) for the **Respondent Mother**
Jeremy Hall (instructed by **Rootes & Alliott Solicitors**) for the **Respondent Guardian**

Hearing date: 24 February 2021

- -

Approved Judgment

Lord Justice Edis:

1. This is an appeal by X (also referred to here as "the father") against findings by Her Honour Judge Cove, following a fact finding hearing in the course of care proceedings brought by the local authority. X had been in a relationship with Y (also referred to here as "the mother") and they had had three children, born in 2010, 2015 and 2018. During a pause in that relationship, the mother had had another daughter, R (born 2013) with another man.

2. The judge had been required to determine eleven allegations. Some had first emerged in October 2017 when D (born 2010) alleged that X had sexually abused her. She retracted them soon afterwards, and no family or criminal proceedings were brought because the police and social worker entertained doubts about D's evidence. X had been with the family for a period in 2017, but had then left. He returned in October 2019. After two incidents of non-sexual domestic abuse by him in public places on 6 and 9 December, all four children were taken into care on 19 December 2019 and on 25 December 2019 D made new allegations to the foster carer of sexual abuse against him which, she said, had occurred during 2019. On 1 and 7 January 2020 R also made allegations to the foster carer of sexual abuse by X.

3. In her Achieving Best Evidence ("ABE") interview on 14 January 2020, D said that the 2017 allegations had been true, and the allegations relating to her which the judge was asked to decide included the 2017 and the 2019 allegations, which were allegations 1-5 on a Schedule. Allegation 6 was an allegation of sexual abuse against R. Allegations 7 and 8 alleged complicity by the mother in the sexual abuse allegations, and failure to protect the children against the behaviour in allegations 9, 10 and 11 against X. Allegations 9, 10, and 11 were allegations of non-sexual domestic abuse against the family by X. The judge found that the following allegations were proved (I have omitted the detail of the abuse contained in the Schedule of Allegations):-

    i) Allegation 1: In or about November/December 2019 X sexually abused D.

    ii) Allegation 3: on an unknown date when D was approximately 9 years old and prior to 11 December 2019, X sexually abused D.

    iii) Allegation 4: On unknown dates prior to 11 December 2019, X sexually abused D on two occasions. This was the third of three allegations comprised within allegation 4. The judge called it 4(c) and so will I, although it appears described differently in the Schedule of Allegations. The other two (4(a) and (b)) were found not to be proved.

    iv) Allegation 5: On unknown dates between October and December 2019, X sexually abused D on multiple occasions by allowing her to watch pornographic films while sexually molesting her. This allegation had first been made by D on 20 October 2017, but the conduct was alleged to have occurred again in 2019 and the judge so found.

    v) Allegation 6: On unknown dates prior to 11 December 2019, X sexually abused R on multiple occasions.

vi) Allegation 9, the hospital: On 6 December 2019, X became abusive at a hospital by creating a loud and aggressive disturbance on the ward, and threatening to cut the throat of the nurse treating S, a daughter of X and Y, and telling the security team that he was going to slash them up.

vii) Allegation 10, the train: On or about the 9 December 2019, X assaulted both the mother and D on a train (while R and one of the other children were also present). He had shouted very loudly and poked D in the face which left an injury to her cheek, and grabbed the mother around the neck area and screamed in her face.

viii) Allegation 11: On or about the 9 December 2019 but after they got home, X kicked D in the buttock area leaving an injury.

4. The sexual abuse allegations were based entirely on the evidence of D and R. That is not true of the domestic violence allegations, 9, 10 and 11. It is at the heart of this appeal that the judge at the same time found other allegations which also rested on the evidence of D, and to a lesser extent R, not proved. The process by which she accepted some of that evidence while rejecting other parts is the origin of the attack on the findings, and it is therefore necessary to set out the allegations which she found not proved, and to refer to one allegation against the mother which she found proved:-

i) Allegation 2: On an unknown date when D was approximately 5 years old, X sexually abused her. This was part of the 2017 allegations which the judge found had not been proved.

ii) Allegation 4 (a) and (b): On unknown dates prior to 11 December 2019, X sexually abused D on multiple occasions. These were part of the 2017 allegations and the judge found that they were not proved. Allegation 4 had also alleged that one form of abuse had occurred on multiple occasions, whereas the judge found that it had happened on two occasions in 2019, see above.

iii) Allegation 8: Allegation 7 alleged that allegations 1, 2, 4, 5 and 6 had taken place in the family home which was presumably intended to set the scene for allegation 8 which alleged that the mother had witnessed abuse of both daughters on multiple occasions and failed to protect them. In the alternative to that, it was alleged in allegation 8 that:-

a) The mother had failed to protect D and R from sexual abuse as she knew or ought to have reasonably known that both or either child was being sexually abused; and in any event:-

b) The mother further failed to protect the children on 9 December 2019 from domestic abuse by not contacting the authorities.

5. The judge found that allegation 8(b) against the mother was found proved, in that allegations 9, 10, and 11 had taken place in her presence and that the mother had failed to protect the children against those events. The judge found that the evidence of D and R that the mother had been present during their sexual abuse was not sufficiently persuasive to enable her to find that this was proved. She did not find that the mother ought reasonably to have known of the sexual abuse, and so found that 8(a) was not

proved. She did conclude, however, that the mother's fear, her difficulty in meeting the children's needs and her mental health problems led her to neglect the children and to fail properly to supervise their time with the father, knowing that he is an aggressive and violent man. That was the basis of her different findings on the allegations within allegation 8.

6. The incident in the hospital was witnessed by the nurse and security staff. There was CCTV of the incident on the train. There was independent evidence of the bruise to the cheek. The father made some admissions in respect of these matters in his evidence. In relation to the kick, allegation 11, he said that he had "tapped her" with his foot. The bruise was seen later by the social worker and the foster carer. D had made detailed allegations about allegations 9, 10, and 11 which were originally strongly disputed by both parents, but her account turned out to be true.

An outline of the context

7. There was some uncertainty about the nature of the relationship between the mother and the father. In interview, he said (in paraphrase) it had lasted about ten years but had been very episodic. He said he had spent about one year altogether in that time living with the mother, and when he was not with her he did not see the children. He was hardly involved in their care at all. He had spent significant periods of that decade in prison, and had also been absent for other reasons. During these absences the mother had relationships with other men. In a summary of that decade, the social worker said when applying for an Emergency Protection Order for D in December 2019:-

> "The family have been known to the Children's Social Work Services since January 2011. Since that time, there have been significant concerns regarding exposure to domestic violence, neglect, poor parental mental health, drug and alcohol misuse and alleged sexual abuse."

8. D was the first child, born in 2010. Between her birth and that of L in 2013, the father had spent a significant period in custody, and he was not the father of R. The next child was born in 2015, and it appears that the father spent 2016 and perhaps some of 2017 serving a substantial prison sentence. It is clear that he was at liberty in 2017, until imprisoned for 8 weeks on 16 October 2017, because when he is at liberty he is frequently convicted of travelling on the railway without paying the fare. These convictions are reliable indicators of points in time when he is not in prison. The October prison sentence would have allowed his release in November, but it is possible that he was also recalled under the terms of an earlier licence for a while. It appears that the 2017 allegations were retracted at around the time he was released, having been made while he was in prison. In July 2018 he was imprisoned again for a further short period. The second set of allegations were said to have occurred in 2019. He began to acquire convictions in February of that year which imply that he was not in prison then. In May 2019 he received a sentence of 6 months, from which he was probably released on or about the 9 August. He appears to have returned to live with Y and the children in October 2019. The sexual abuse of D and R is alleged to have happened between that time and the time of the incident on the train, except that allegation 3, the leisure centre incident, was said by D to have happened earlier in the year.

9. D alleged in October 2017 that her father had repeatedly committed serious sexual assaults on her and gave a graphic description of how that happened and of the effect of that behaviour upon her. She described other forms of sexual abuse being perpetrated on her at that time as well, including watching pornography with the father while being molested. She said that the abuse had happened throughout the time the father had been living with Y and the children between January and June 2017. She retracted those allegations in November 2017, and at that time gave differing accounts of whether they had been true or not. She wrote a letter of apology to her father which has not survived. This was written to him after his release from prison. No medical evidence was found on examination which supported her allegations. At that time, the police and the social worker were concerned that D had been mixing with a female friend of about her own age and watching pornography with her, which might be the source of the detailed sexual information she had been able to provide. The mother said that this was what she believed. In the ABE interview in January 2020, D said that the 2017 allegations had been true, and they therefore appeared in the list of allegations as allegations 2, and 4(a) and (b). It was submitted to us that Allegation 5 was also made in 2017 and that there was no evidence of any such conduct in 2019. If that is right, then the finding on that allegation was an error, because the judge treated it as having been an allegation of abuse of this kind relating to October 2019 as well as in 2017. She had not found any of the 2017 allegations proved.

10. The domestic violence incidents in December at the hospital and on the train resulted in a raised level of concern by Social Services for the welfare of the children. After the incident at the hospital, on 9 December 2019, the mother signed a working together agreement to state that the father would not have any unsupervised contact with the children. That had been a terrifying incident in which a nurse who was treating the fourth child, then just short of her second birthday, for breathing difficulties was threatened with having her throat cut. It was a loud incident in a children's ward where there were other children present. The nurse escaped in fear and her handbag had to be dropped down to her out of the window when security, and later the police, attended and removed the father, still making loud threats of lethal violence with sharp weapons. He has multiple convictions for offences of violence and three convictions for possessing bladed instruments, the most recent being May 2019.

11. On 10 December, D told a teacher at school that the previous day an incident on a train had occurred. I will set out the extract from the statement about this disclosure from the EPO statement. Among other things, it reveals that on 9 December 2019 the father had unsupervised contact with D. It provides the factual basis for the findings on allegations 10 and 11 against the father and some of the basis for the finding against the mother on allegation 8(b). A subsequent police investigation recovered CCTV footage from the train which confirmed much of this account.

> "4. Tuesday 10th December 2019, D disclosed at school that her father had got angry on the train journey on Monday 9th December 2019 because D had told her mother that they had visited 'daddy's partner' in London. 'Daddy asked me to keep a secret from mummy'. D stated that she did not want to keep a secret, so she told her mum who confronted her dad. D states that her father got angry and walked away from them and they thought he had left. She reports that they got on the train and then

> her father appeared running down the train and jumped over the chairs where he grabbed mother by the collar of her coat and put his hands near her neck. He shouted at mummy stating that her 'brat daughter needs to shut up'. He then went over to D and poked her hard in the cheek which has left a bruise. D stated that he then went back to her mother and put his hands around her neck. She described her mother making a weird noise like she couldn't breathe. D said that her mum managed to say she was calling the police and then X ran away.
>
> 5. D stated that X returned to the house later in the evening and sent D straight to her room. When she came down for some water, she alleges that her father kicked her on the buttock and shouted at her to go back upstairs. D has a small bruise (approximately ½ centimetre in circumference on her left buttock). D stated that her mother and father are angry that she has spoken to the social worker as they have told her not to several times. D stated she was 'scared that he would make her dead if she went home'. D stated that her father has threatened to shoot her mother and break the children's necks if they do not behave.
>
> 6. During the s.47 joint investigation, the officer and I tried to discuss with mother about D's concerns about returning home because her mother shouts at her. Mother was adamant that D was 'a liar', 'a div', and used many expletives to describe her daughter's behaviour and disclosure. Mother reported that X did not hurt her this time however has previously been a perpetrator of domestic abuse toward her previously, especially when he was using substances. Mother also reported that she did not want D back at the house if she goes in to care, and she will take the other children and will be 'a nice happy family' without D."

12. A Police Protection Order for D was made on 11 December 2019 and an Emergency Protection Order was made by Judge Cove on 13 December. Interim Care Orders for the other children were made on 19 December and they joined D in foster care.

13. There was a supervised contact session on 24 December 2019 when the children were with their parents, and with their maternal grandmother and maternal uncle. D and the maternal grandmother were undoubtedly together alone for a period during this session and the grandmother gave evidence at the hearing about what D had said to her about the 2017 allegations.

14. On 25 December 2019 D told the foster carer what she said X had done to her (giving details of the sexual abuse), that the mother watches, and that X does this to R. The events which followed are set out in the following extract from a Chronology which was before the judge.

> 27/12/19: Foster carer reports D asking her whether she (the FC) had told Social Services Department about X and Y. She said she was scared to tell anyone as she had told people on previous

occasions and Y had said that nobody believed her, so next time she would end up in a children's prison. This explanation of events in October 2017 was repeated in the ABE.

1/1/20: Foster carer reports R telling her that she was 'worried about mummy' because X hurts her and might be hurting mummy. 'Daddy touches me on my wee wee bits under my knickers and may be doing it to mummy; that it '..hurts and mummy's sometimes there but doesn't like it to happen'.

7/1/20: Further allegations by R to foster carer when in the shower about X and Y, and about Y being present when X touches her private parts.

10/1/20: X interviewed by British Transport Police about the incident on train. Admits grabbing Y but denies assaulting D. Explained that he was 'angry about the lies made about his ex-partner by D to Y'.

13/1/20: Joint visit to see R at home by police officer and social worker - R alleges that X touches 'wee wee' area. D greeted during visit but not spoken to re: allegations.

Both children undertake Sexual Assault Referral Centre medical. Both exhibit normal ano-genital findings which did not confirm, refute or exclude sexual abuse.

14/1/20: D's ABE interview.

24/1/20: R's ABE interview.

11/2/20: X's police interview re sexual abuse allegations. He denied them all.

The Grounds of Appeal

15. Mr. George Butler, who appeared before the judge and before us for the father, has advanced amended Grounds of Appeal. It is said that the judge erred in giving weight to certain factors while ignoring others in the analysis of the evidence in the case. It is said that in consequence the judge as wrong to make findings that the appellant father sexually abused D and R, by upholding allegations 1, 3, 4 (part), 5 and 6. There is no appeal against the findings on allegations 9, 10, and 11 and the mother has not appealed against the finding against her on allegation 8(b). She supports the decision of the judge but did not wish to make any additional submissions to those advanced by the Local Authority and the Guardian. Ms. Nicole Jennings represented her at the hearing of the Appeal but did not make any submissions.

16. It is said that the judge failed to give proper weight to six factors:-

    i) The retraction by D of her allegations made in 2017. This retraction was undoubtedly made by the child when speaking to the Social Worker in November 2017. There had been a police investigation and it had been decided

to take no further action because of the retraction, the mother's views, the lack of supporting medical evidence, and the possible source of sexual knowledge from viewing pornography with D's friend. It said that more weight should have been given to the acceptance of this possibility by the police officer and the social worker. Mr. Butler places emphasis on a distinction between the retraction of an allegation and the denial by the witness that it is true. He said that the judge failed to have proper regard to the fact that D had expressly said to the Social Worker in 2017 that the allegations were not true, and that she had never had sex with her father, or anyone else.

ii) D had said that the father "did what I said to you with R, but only with his fingers in her". There was no evidence to explain how she could know that.

iii) Mr. Butler relies on the similarities between the allegations made by D and R as to what happened in 2019. He says also that they both say similar things about the presence of the mother during sexual abuse. His submission is that this similarity may suggest that the allegations come from D who has influenced R to say something similar, and that the judge does not explain why she did not accept this submission.

iv) It is said that D saying in the ABE interview that she could not remember the name of her friend with whom she had watched pornography in 2017 must be a lie, and that the judge should have given this greater weight (she did not mention it).

v) It is said that the judge should have given greater weight to the possibility that D learnt about sexual behaviour from viewing pornography with her friend, and that she then described things which she had only seen as having been done to her by the father.

vi) D said in her ABE interview that she could not remember speaking to the Social Worker about retracting the 2017 allegations, but she could remember speaking to her mother. It is said that the judge should have dealt with this.

It is then said that the judge dealt inappropriately with the evidence given before her by various people about D's general credibility, or reliability. This evidence came from various professionals who had dealt with her. It is said that it should not have been accepted because there was also evidence that D had said things at school and in her ABE interview which were not true, exaggerated or embellished. A number of submissions are made as to the evidence relating to D's credibility as a witness, and in particular, Mr. Butler sought to demonstrate that she had not been consistent in her allegations about 2019, and that she had said that her mother had watched the abuse, which the judge did not accept. An example from the evidence from school records about D's exaggerations is that on 17 May 2016 D had told staff at school that her dad was in prison for killing someone with a knife. He was in prison at that time, for robbery and possession of an offensive weapon in a public place. There are also records which show D pretending to be ill or injured to get attention.

17. I have referred above to the encounter between D and her maternal grandmother at the contact session on Christmas Eve 2019. The father wished to rely on what D had said, because it was said that she had told her grandmother that her 2017 allegations had been

lies but that she was going to say that they had been true to the foster carers because she wanted to stay living with them. It is submitted that the judge was wrong to give this evidence no weight, when she had seen a contemporaneous record of what had been said.

18. It is said that the ABE interview did not contain any sufficient evidence to support allegation 5, permitting D to watch pornography while molesting her in 2019. This, as I have said, turns on whether there was a new allegation of this behaviour relating to 2019.

19. So far as R is concerned, the Grounds say first that R had alleged that her brother, the third child, had also been abused but that child had made no such complaint. It is said that weight should have been given to this fact when assessing R's credibility about what had happened to her. It is then said:-

    i) That R's ABE account was not consistent in that it gave no detail about the presence of the mother during the abuse and did not repeat the allegation of abuse of the brother.

    ii) That she was prompted to produce an account in the ABE interview by the police officer during the interview. This submission therefore depended on the interpretation of what had been recorded.

    iii) That the court did not consider if R's account had been contaminated by D, given the similarities between what they each said.

    iv) It is said that R's ABE interview did not contain sufficient evidence to support the finding that she had been abused on multiple occasions.

The applicable law: the role of the appellate court in factual appeals

20. It is not suggested that the judge made any error of law. She was supplied with a comprehensive agreed summary of the relevant law which she attached to her judgment as an appendix. This referred, among other things, to the guidance for the conduct of ABE interviews and the legal consequences of the determination which the judge had made on 25 August 2020 that the children would not give oral evidence and that the ABE interviews would be received as their evidence.

21. The attack is simply on her decisions as to the weight to be given to some pieces of evidence. Except in respect of allegation 5, and the frequency with which the abuse in allegation 6 had occurred, it is not said that there was no evidence from which a judge properly directing herself could find the allegations proved. There is a suggestion, in addition to the complaint about her decisions on the weight of the evidence, that certain matters were not "addressed" by the judge. This is presumably an allegation that she gave these matters no weight at all, when she should have done, or at least that she gave insufficient reasons to explain why they did not result in the rejection of the allegations of sexual abuse.

22. This court will not lightly interfere with the findings of fact of a judge, nor is a challenge based on a suggested insufficiency of reasons for reaching a factual conclusion an easy one to sustain. This approach applies across all jurisdictions.

23. The reasons for this high threshold are set out in decisions of the House of Lords and the Supreme Court and have frequently been applied on appeals to this court and on appeal from the Family Court to the Family Division of the High Court. It is not necessary to set out a full historical analysis of the respect shown by appellate courts to the factual findings of the judge who has heard the evidence.

24. In *Piglowska v. Piglowski* [1999] 1 WLR 1360, 1372D, Lord Hoffmann said this about how judges work when finding facts, and how their reasoned judgments should be understood:-

> "If I may quote what I said in *Biogen Inc.* v. *Medeva Pic.* [1997] R.P.C. 1, 45:
>
> > "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."
>
> The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the district judge. These 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."

25. In *Re B (a child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, the Supreme Court adopted these observations as applying, in the words of Lord Wilson JSC at [42], "all the more strongly to an appeal against a decision about the future of a child". Lord Neuberger JSC at [53] explained the reasons for this approach:-

> "…..this is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties

> should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals on fact can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)."

26. Lord Reed summarised the position in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at [67] in this way:-

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

27. This court has recently re-stated the law and practice in relation to the necessity for judgments to contain reasoned conclusions as to fact, and as to the practice concerning appeals where it is suggested that they do not, see *Re O (A Child: adequacy of reasons)* [2021] EWCA Civ 149.

28. In *Re JB (A Child: Sexual Abuse Allegations)* [2021] EWCA Civ 46, this court reviewed the guidance about how ABE Interviews are required to be conducted and also a number of decided cases in which appellate courts have considered the consequences of a failure to comply with that guidance. The court is required to place particular importance on the way in which the evidence was obtained by reference to this guidance, because it is designed to secure reliable evidence. This is especially so where the ABE interview comprises the evidence and where the witness is a young child. Serious departures from the best practice will undermine the weight which can be given to the evidence.

The hearing before the judge

29. The judge conducted a conspicuously careful and thorough hearing on various days in September, October and November 2020. She read 4,927 pages of materials. She watched the ABE interviews of both D and R on at least three occasions. She watched the CCTV footage of the incident on the train on 9 December 2019. There were transcripts of interviews under caution by both the mother and the father and she had read them.

30. Both mother and father were reluctant to attend the whole of the hearing, and it was conducted by means of the Cloud Video Platform so far as they were concerned. The hearing was a "hybrid hearing" for seven of its days, which means that some participants attended remotely, and others were present in court. On four days, the hearing was purely by CVP. The judge set out her reasons for concluding that the hearing had been fair to both the mother and the father, and there is no challenge to that before this court. She set out the progress of the evidence as follows:-

> "I heard evidence over the course of eleven days from:

> 1 October the allocated social worker for 2019 [named];
>
> 2 October [named] family liaison officer and deputy safeguard lead at [named] school and [named] headteacher of [named] school and the children's foster carer;
>
> 9 November 2020 [two police officers who had investigated in 2017 and 2019 respectively];
>
> 10 November 2020 [the allocated social worker from 2017];
>
> 11 November the maternal grandmother [named];
>
> 12 November the mother;
>
> 13 November the father."

In other times this might seem to have been a rather leisurely process, but the task of conducting a hearing of this kind by remote means while ensuring that all witnesses are fairly heard and tested is an extremely demanding one. The judge is to be congratulated on achieving it. It is not suggested on this appeal that the way in which the evidence was taken was inadequate. Some delays were caused by dealing with the parents' wish to be absent, and ensuring that the hearing was nevertheless fair. What this process inevitably achieves is that the judge was able to focus on the evidence over a significant period of time. She then received written submissions before delivering a written judgment on 1st December 2020. That opportunity to hear the evidence as it unfolds and to reflect carefully on it is a substantial advantage which the trial judge enjoys over an appellate court. Moreover, the experience of watching a recording of a child's interview allows a judge to evaluate not only the child's words that appear on a transcript, but the subtleties of the child's demeanour and non-verbal communication in the form of gestures and facial expressions. This is a much richer source of information about the likely reliability of an account than can be found from reading the transcript alone.

31. The matters which it is said the judge "failed to address" or to which she gave inadequate weight are almost all mentioned in her review of the evidence, which was comprehensive. She listed the witnesses in that review and summarised what each had said.

32. In particular, that review set out fully the evidence given by the mother, the father, the allocated social worker and police officer about the circumstances in which the allegations came to be made in 2017 and their retraction by D in that same year. It cannot sensibly be said that she was not aware of these matters, including the evidence that D had been friendly with a person in that year with whom she had watched pornography. That was a potential source of the anatomical and sexual detail which was found in the allegations that year against the father. Indeed, she found that the 2017 allegations were not proved for precisely these reasons. What is said is that she rightly concluded that she could not find that the 2017 allegations were proved, but then relied upon the same source, D, for the 2019 allegations without explaining properly or at all why she could be unreliable in respect of 2017 but reliable in respect of 2019. Where it is claimed that she gave insufficient weight to the evidence about 2017 what

is meant is that she failed to find that its weaknesses refuted equally the 2019 allegations.

33. The judge then summarised the evidence about the 2019 allegations and the way in which they emerged. She included in her review the complaints made by D and R before their ABE interviews, including R's statement to the foster carer on 7 January 2020 that:-

> "Whilst drying in her room R stated that daddy touches her and [the younger brother]'s private parts. R then went on to say that mummy had told her that [the younger brother] had been touched as mummy was in the room. [The younger brother] has also told R that this happened."

34. The judge reviewed the evidence of the foster carer, and the safeguard lead and headteacher from D's school. They had made statements about their dealings with the family, and their professional conclusions. They were cross-examined from the relevant records which were included in the material which the judge read. Her summary was complete and accurate. She did not refer to every example of behaviour at school which was relied upon to show D's tendency to embellish the truth, or exaggerate in order to secure attention, but she did refer to that tendency.

35. The officer who conducted the ABE interviews for both girls was called and said that she did not agree that she had prompted R. She pointed to a passage where R had said that she did not understand the question and asked for it to be clarified rather than simply going along with what was being said. She was asked about a black Alcatel phone and said that the police had not taken possession of such a phone. This is of some importance because in his interview under caution, the father said for the first time that after D had been taken from the home and into care on 11 December, the mother had examined her phone and told him that D had been using it to view a lot of pornography. The father said that he had not seen the phone himself. It was said that the police had it, but they said they did not. This is potentially important because, if the finding of the phone had actually happened, it might suggest that D was sexually active to a degree in her own right in late 2019 which might cast light on her allegations against her father. On the other hand, if the evidence about the phone was invented it might undermine the credibility of those who said it had been found and examined. Production of the phone might answer that question, but neither the mother nor the father produced it.

36. The judge then set out her review of the ABE interviews. She later reminded herself that this evidence had not been subject to cross examination. In view of the centrality of this evidence, and my earlier remarks about the advantage to be derived from viewing interviews of this kind, it is appropriate to set out this review here in full:-

> "126. I have watched the ABE interview of D which took place on 14 January 2020 and the ABE interview of R which took place on 24 January 2020 and read the transcripts.
>
> 127. D's interview is in two parts and is 1 hour 51 minutes long. R's interview is 1hour 49 minutes long.

> 128. D's behaviour in her interview is striking. She presents as confident and open. Her eagerness to talk and her presentation fits with the evidence I heard about her conversations with the social worker in 2017 and her behaviour at medicals. I cannot be clear that her behaviour is indicative of her being untruthful. The Guardian informs me that her observations of D are similar to the behaviour observed in the ABE interview, which leads me to conclude, unsettling as it may be for the professionals involved, D's presentation at her ABE interview is normal for D.
>
> 129. The detail of D's allegations is confused at times, particularly in relation to when she was younger. However, there is clarity in her account of her father showing her pornography and sexually abusing her twice in 2019. She was also clear about her allegation that at a visit to a swimming pool the father had sexually abused her, which would be a third incident of sexual abuse in 2019.
>
> 130. D says that the father told her that he abused her when she was between five and seven years old and seems to base some of the older information on what she says he told her.
>
> 131. D gives a lot of detail about the occasion in or around December 2019 when she alleges she was sexually abused in the bedroom by the father.
>
> 132. The information D gives about abuse on earlier occasions is more confused.
>
> 133. When asked about the 2017 allegations during the ABE interview D said that she had said the allegations were made up because her mum did not believe her and her mum had told her that if you lie you are going to go to kids' jail. The mother confirmed in her evidence to me that she did tell D that people who lie to go to jail.
>
> 134. D alleges that the mother watched the abuse on one occasion but could not remember which occasion and could not remember if the mother said anything.
>
> 135. R's presentation in her ABE interview is very different to D's. R is quieter. Overall, she provides a consistent account of the sexual abuse she alleges took place, which does not change significantly from the allegation she made to the foster carer and the police. Her gestures and demonstrations in the interview add to the consistency of her allegations."

37. The judge then dealt with the evidence of the maternal grandmother, which is chiefly of importance because of the meeting during the contact session on Christmas Eve. The judge was concerned that the mother may be trying to put pressure on her mother to

undermine D's evidence and recorded that on the day when she gave evidence the witness had received this text from her daughter:-

> "why u lying to courts and social about saying I told u to say that D is lying. I didn't tell u to say shit mum tell them the truth that all u need to do I know I'm not getting kids back you must be happy now you got what you want….. You are a vile person. I hate you with a passion… I generally love my kids and [the father] and you was jealous you idiot I had a family this time you should have been happy for me not ruining my life I had what you never was able to give me "Love"… I hope you catch Covid 19 it was created to decrease the population and you're one of them going. Don't go anywhere near my kids they don't need a vile person in their life you've made this happen."

38. The judge found that the maternal grandmother was inconsistent in her account of what D had said to her in the private conversation between them. She was clear that D told her she was going to say that the 2017 allegations were true to the foster carers. She was also clear that D had said that she did not want to go home and preferred being with the foster carers. However, she said at different times both that she understood that D was saying that the allegations in 2017 had in fact been true, and also that she was saying that they had in fact been lies. This appeared to depend on who was asking the question and the judge concluded that the grandmother was suggestible. In the event, it transpired that there was a diary entry made by the witness at the time which set out a contemporaneous record of what had been said. This was finally produced and said:-

> "I will tell [the foster carers] the things that [father] did to me were not lies but were true after all. Also told me she never wants to go back home to mummy and [father] cause it is a lot nicer living with [the foster carers]. Mum and [father] were mean to me a lot."

39. The full note includes additional words at the end in which the grandmother notes that she is going to tell D not to tell any more lies. The judge no doubt omitted these because they are not a record of anything which D is said to have said, which was the point of the evidence she was considering.

40. The judge found that the journal was the best record and that she could place no reliance on the oral evidence of the witness. That being so, the journal entry is consistent with D saying that the 2017 allegations were true, and she was now going to tell the truth because she wanted to stay with the foster carers because of her parents' behaviour to her. This had, on any view, been particularly deplorable in December 2019, so this meaning would make sense. The note is no doubt also capable of bearing other meanings, but it is certainly not proof that D told her grandmother that the 2017 allegations had, in fact, been untrue.

41. The judge then reviewed the evidence of the mother and the father. She did not record her conclusion about them as witnesses in terms, as she did with other witnesses. However, it is clear from what she did say that she did not find either of them worthy of belief on the disputed issues.

42. The judge found that the mother's evidence was confused. She was angry, distressed and defensive about the father. She said she did not communicate with him any more and that the relationship was over. The judge later found that she did not think this was entirely true. The mother was strongly critical of D, her ten year old daughter. She said she was a liar and she blamed her for "the family circumstances". She was shown the CCTV from the train for the first time in evidence, which showed that D was telling the truth and, she, the mother, was not. She shouted while giving evidence that D "was lying." The mother said that she had not witnessed any sexual abuse and that there was no time when it could have happened. She said she had found the black Alcatel phone on the day when D had been taken into care. The mother said she had deleted the pornography from it. She said she had shown it to the father first, something he denies. She said that the father had been alone with D sometimes in 2017 and that there had been one occasion in 2019 when she and the father had been alone in a changing room at the leisure centre. The judge recorded the mother as saying that D was making these allegations not because they were true, but because "I am a crap mum, and she doesn't want to come home."

43. The judge found that the father was also angry while giving evidence. Although there was abundant evidence to support the domestic violence allegations from 6 December and 9 December 2019 (the hospital and the train) he denied aspects of them. He largely accepted what had happened at the hospital, but denied the allegations in relation to the train, even though his behaviour was recorded on CCTV. He said that had been with D for only 20 seconds at the leisure centre and they had changed separately. He said he had never spent any time alone with her. His account of the Alcatel phone involved him denying that he had seen it, claiming that the mother had told him about it after she had deleted the pornography from it. Both parents agreed that D is a liar and an attention seeker, but say that R is neither of these things. He accepted two particular allegations about his behaviour towards D. On one occasion she had been seen at school with the word "Div" (slang for "idiot") visible on her forehead. He agreed that he had written this: he said she had asked him to. There was also evidence about rough games in which he would give her "wedgies" (pulling her underpants up from the back), which she said had caused her pain. He accepted that he did do this to her.

The findings of fact

44. It is right to say that the judge's findings of fact are presented as a series of conclusions, rather than as a reasoned process, in which the arguments are addressed and accepted or rejected. The order in which they are set out is significant.

45. The judge began by dealing with her assessment of the demeanour and parenting history of the parents. She noted that both parents had behaved in a similar way in respect to the hearing, being largely absent except when giving evidence and had said similar things, as identified above. This led her to be concerned that they may still be in communication and doing their best to avoid findings being made. She also noted what they both said about the black Alcatel phone without recording any concluded view. It appears that she was sceptical about whether their account was true, but she does not spell that out. This passage of the findings reads as an explanation of why their evidence should bear little or no weight. That conclusion was certainly open to her on the evidence and would have been soundly based on the matters she identifies.

46. She then turned to the evidence of R. This was really of fundamental importance because R had not previously made and retracted any allegations and was regarded by her parents as a truthful person. If what she said was true, it was capable of supporting the evidence of D. This thought process does not appear expressly set out in the findings, but it was implicitly there: that is why she dealt first with R's evidence. The judge said that R had been consistent in what she had said to the foster carer, then to the police, and finally in the ABE interview.

47. She then dealt with the possibility of collusion between D and R, which is relevant to the extent to which R's evidence was capable of supporting D's evidence. She said:-

> "The foster carer's evidence is that the children would not have had an opportunity to speak privately in December and January 2020 and therefore D would not have had an opportunity to influence R."

48. That was the judge's answer to the suggestion of collusion in which D had enlisted R to support her lies. It is not entirely convincing because it perhaps overstates the extent to which an opportunity for collusion had been excluded. When summarising the foster carer's evidence, the judge had said this:-

> "105 When asked if the children had an opportunity to speak without being supervised, she was clear that they have enough bedrooms so that the children all have a bedroom each. The rules are that they are not allowed into each other's rooms and they spend a lot of time downstairs, there being a lot of family time. In December 2019 and January 2020 in particular she did not allow them to spend time alone. She said it was very unlikely that D and R could have had a conversation without the foster carers being present."

49. This evidence shows that collusion during that time frame was very unlikely, but not that it was impossible. As noted above, when D made her 2019 allegations for the first time, she did say that the father also abused R. This was on 25 December 2019. This means that any collusion must have taken place before then, and R had only arrived with the foster carer on 19 December. The foster carer's evidence was that in the early days she was particularly careful to see that they did not spend time alone with each other. That is to be expected in these circumstances. Although her conclusion may have been somewhat overstated by the judge, the evidence therefore did support a finding that R had probably come forward unprompted by D. Another consideration, not relied on by the judge, which tended to rule out collusion is what R said had happened to her brother. D did not make this allegation. The fact that the brother (aged five) had not made any complaint is not at all surprising whether the allegation is true or not. The fact that R alleged more than D in this respect was, however, a potentially important point against the father on the collusion issue. D was nine years old at this time. It is not probable that she incited R to allege abuse of the brother, while not intending to make that allegation herself. It is true that R did not repeat this allegation in the ABE interview, but there may be a number of reasons for that. What matters on the present issue is that the accounts of abuse given by D and R were materially different on an important issue which makes it substantially less likely that they were the result of collusion.

50. The findings so far, then, justified the conclusion that D's allegations were uncontradicted by any reliable evidence from the parents, and supported to a degree by R. The judge then went on to deal with D. She first summarised the evidence about her truthfulness or otherwise in school and at home. The headteacher had said that she was essentially truthful but had a tendency to embellish and exaggerate. The judge said that she considered that was quite different from telling lies. She also took into account the CCTV of the incident on the train which showed D to be telling the truth, even under heavy pressure not to do so from her mother. The judge summarised her conclusion that "generally D's evidence is reliable and she is not a child who is prone to repeatedly lying". This faithfully reflected the evidence she had heard and, in very succinct terms, expresses an important distinction which was made in evidence by witnesses when dealing with their opinions about D. The word "repeatedly" I think, means that although D was known to exaggerate and lie on occasions, when challenged she would tell the truth. This is not uncommon in young children, and is quite different from a determination to tell complex lies and to stick to them when they are the subject of an official police investigation.

51. Dealing with the 2017 allegations, the judge said that they were inconsistent and concluded that she could not find that on the balance of probabilities they were true. However, she did not find that they were lies. She said this:-

> "I have carefully considered the confusion and inconsistencies in D's allegations in relation to abuse pre-2019 including her retraction of the allegations in 2017. It appears that D did not feel believed in 2017 although the mother did take the allegations seriously and did involve the police and social workers immediately and appropriately. D's accounts of the 2017 abuse are inconsistent. For example, she has alleged over time that the father [committed very serious sexual assaults against] her at the mother's house and at the paternal grandmother's house anywhere between 1, 11, 20 and 80 times. She reported to have thrown away 20 knickers covered in blood. It is noteworthy that in her ABE interview D places some emphasis on what she says the father told her about abusing her between the age of 5 and 7 which would have been 2017 and that she was exposed to pornographic material by the neighbour's child in 2017, which may have contributed to the lack of clarity and consistency."

52. A few sentences of explanation of the significance of these observations would have assisted greatly. It was plainly the father's best point that allegations in 2017 had been made and retracted and that they also seem inherently implausible. The type of assault alleged by D against a child of that age at that frequency is not likely to have gone unnoticed, and some clinical sign of it on examination would probably be expected. The allegations were inconsistently presented by their maker (then aged seven) and there was certainly evidence to contradict the proposition that she could only have known as much as she did about sex if they were true. Why did this not fundamentally undermine the truth not only of what she had said in 2017 but also of what she said in 2019? The answer appears to be that the judge was not satisfied that they were lies. They may well have been true, at least in part, but for the reasons given in the paragraph quoted above they could not be accepted as proved. On that view, their capacity to

undermine the later allegations which were clear and not obviously exaggerated would be much reduced. The judge makes this more explicit later in her findings section when she said this:-

> "The evidence before me in relation to the pre 2019 allegations does not meet the required standard proof. However, I particularly noted [the social worker from 2017]'s evidence to me as to whether she was concerned about the father in 2017 "I am not saying no concerns about that, nothing was substantiated, whilst remaining concerned that she was clearly sexualised but can't determine from which source. It was not the case that I was not concerned about the father." I find myself in the same position namely that the 2017 allegations cannot be substantiated."

53. There is a very important passage in the ABE interview of D where she explains that she had been telling the truth in 2017, but she had not been believed by her mother, and her mother had told her that children who tell lies get sent to "kid jail". The mother agreed that she had said something like this. The importance of this passage is that, if accepted as genuine, it explains why those allegations were retracted and why they were being renewed in 2019. It may not have been, and was not, enough to persuade the judge to find them proved, but it certainly meant that she should not approach D as a proven liar, or anything like it. I would add my own comment that the letter of apology, far from undermining the child's credibility, tends to emphasise the risk that her conduct in retracting the allegations was the result of parental pressure (malicious or otherwise). It appears to have been written just after the father's release from prison.

54. The judge said this about the events in 2017 in her conclusions at paragraph 194:-

> "It appears that D did not feel believed in 2017 although the mother did take the allegations seriously and did involve the police and social workers immediately and appropriately."

55. This passage was criticised by Mr. Butler, but was justified by the content of the ABE interview to which I have referred. It is in the paragraph, set out at [52] above, in which the judge explains why the 2017 allegations lack "clarity and consistency". I read this paragraph, taken as a whole, as a finding that the allegations were not rejected on a finding that they had been lies, but rather that the evidence was not sufficiently cogent to prove them.

56. The judge described the 2019 allegations as clear and consistent and found that D's unusual presentation at medical examinations and on the ABE interview did not undermine her credibility. I have set out in full what she had had earlier said about both children's ABE interviews at [37] above. The section of the judgment which deals with the making of findings does not expressly import that passage which records conclusions about those interviews, but those conclusions were clearly in the judge's mind when deciding the case. In particular, I would make the following points:-

    i) D's presentation was "striking". She was confident and open and eager to talk. The evidence was that she is often like this, and so the judge did not think it undermined her credibility.

ii) She understood that D was alleging two incidents of sexual abuse in 2019 and that it was during these that pornography was shown. In other words, allegation 5 was not an allegation of other episodes of abuse but an aspect of the two of which there was clear evidence in the ABE interview. The third incident, in the leisure centre, was also clearly described. There was a "lot of detail" about these allegations in the interview. I have read the interview and it is true that the child does give details of what happened in 2019 which are convincing as a description of something which actually happened. It appears from the judge's references to detail in this context that this is how she treated this part of the evidence. She later contrasts this with a lack of detail about what the mother was doing at the time, which leads her to doubt the evidence that the mother was watching.

iii) R's presentation was different and, importantly, the judge said:-

> "Her gestures and demonstrations in the interview add to the consistency of her allegations."

iv) It is clear from the transcript that some of R's communication was non-verbal, she showed the officer what she was trying to describe. Given what we know about her from the psychologist's report, that is not surprising. Careful and repeated viewing of the ABE recordings is required to determine whether the officer, in giving words to what has been described, has accurately reflected what the child was demonstrating or simply put words in her mouth. That is the exercise which the judge performed, and her conclusion was properly open to her.

v) This is not a case where there has been any challenge to the cogency of the ABE interviews because of any failure to follow the best practice guidance. Mr. Butler, early in his submissions to us, said:-

> "This is not an appeal which stands or falls on the efficacy or otherwise of the police approach to ABE interview: they were not so fundamentally flawed that the judge could not rely on them."

vi) Experienced counsel, who has also viewed the material carefully, put the matter in that way advisedly. That being so, the judge adopted an approach which was open to her.

57. The judge said in the final section of her judgment that there was insufficient evidence as to what was actually said at the contact session on Christmas Eve 2019 by D to her grandmother. This meant that the episode did not lead her to conclude that what was first said on the following day by D was untrue. That would seem to be right, as I explain above. The judge had concluded earlier in the judgment that the only remotely reliable evidence of what was said was the journal entry. That is capable of more than one interpretation and, in the absence of any reason to prefer a reading which suggests dishonesty, the argument now advanced assumes that which it is seeking to prove. What the judge was saying at this point in the judgment was that the only reliable evidence about this conversation was, in essence, neutral. The fact that D was making

the disclosures so that she did not have to go home, does not make them any less likely to be true.

58. The judge then went on to deal with the defence of lack of opportunity. Both parents had said that the father spent no time alone with the children and could not have done what was alleged by them. The judge first dealt with the leisure centre incident about which the parents had given rather different evidence, but both had agreed that X had been with D alone for a while. He had said it was 20 seconds, but the judge was entitled to disbelieve that, and the time required for this assault need not have been long. The judge found that both parents had minimised his involvement in the care of the children. He did school runs for D, and the mother accepted that she left D alone with him on occasions in 2017. After returning to the home in October 2019, the father had taken D to his mother's home and had taken D to visit his girlfriend in London on 9 December 2019. The accounts of him playing with the children, including the "wedgie" incidents involving D, were inconsistent with the parents' assertions that he had little to do with them.

59. After explaining her approach to the 2017 allegations in the way identified above, the judge concluded the section of findings about sexual abuse in 2019 with these paragraphs:-

> "204. However, I consider the evidence in relation to the three 2019 allegations of sexual abuse made by D and the 2019 allegations of sexual abuse made by R the evidence to be clear and I found D and R's evidence to be consistent. I find on the balance of probabilities that the sexual abuse alleged by both children in 2019 took place.
>
> 205. I therefore make findings 1,3, 5 and 6. In relation to 5 the date will read on dates unknown between October and December 2019. I make finding 7 with reference to the findings that I have made. I only make finding 4e of allegation 4. 4c and 4d relate to pre 2019 allegations. In relation to 4e it will read on two occasions between October and December 2019.
>
> 206. In relation to whether the mother witnessed the sexual abuse in 2019, I have noted that neither child provided the same level of detail as to the mother being present as they did when describing the sexual abuse experienced from the father. It is possible that the mother was in the house at the same time. I have considered the lack of detail of the allegations and cannot conclude on the balance of probabilities that the mother was present when the children were being sexually abused by the father.
>
> 207. There is sufficient evidence for me to determine that the mother was frightened and intimidated by the father, was aware that he could be rough with the children and that the children experienced neglectful parenting from her. However, I cannot conclude on the balance of probabilities that she intentionally ignored that the father was sexually abusing D and R. I do not

> make finding 8 or 8a. However, I have concluded that the mother's fear of the father, her difficulty in meeting the children's needs and her own struggles with her mental health lead her to neglect the children and she failed to properly supervise the father's time with the children knowing that he is an aggressive and violent man and I make this finding."

Discussion and decision

60. The principal issue, so far as this appeal is concerned, was whether the accounts given by D and R in their ABE interviews were reliable in so far as they alleged sexual abuse by the father in 2019. That is a pure question of fact, and the judge correctly directed herself as to the law, adopting the summary of it agreed between counsel. She had to decide whether the ABE interviews were sufficiently credible to prove these allegations on the balance of probability at least until they were credibly answered by the parents. When she found herself unable to accept the parents' answers for the reasons she explained, then it was open to her to accept the truth of the ABE interviews if she found them persuasive. That was a matter for her to decide, having regard to her assessment of all the evidence.

61. As she said, the domestic abuse allegations (which were abundantly proved) were not irrelevant to the decisions on the sexual abuse allegations. They provide context only, but important context. The incident in the hospital showed that the father had behaved in an appalling way and the mother knew it. She was nevertheless willing to allow him to take D away on his own on 9 December, the day when the incident on the train happened. This incident showed that both parents lied about D, and about the father's access to D. The details of it, set out at [11] above, cast a revealing light on the extent to which the father was permitted by the mother to do exactly what he wanted with D. No doubt this was at least partly because of her fear of him. These allegations do not directly support the sexual abuse allegations, because the abuse is of a different kind. However, the climate of fear and control they illustrate is, as I say, not irrelevant. Equally, the light they show on the parents' truthfulness significantly undermines the weight to be given to their evidence generally.

62. The lack of any medical evidence to support the allegations of abuse was an important factor which the judge had well in mind. It was of greater significance in relation to the 2017 allegations than in relation to the 2019 allegations, because the frequency and seriousness of the attacks described in 2017 was greater. It is well known that a normal clinical examination can neither support nor refute an allegation of abuse. There is no rule that an allegation of sexual abuse cannot be found proved without some supportive medical evidence, but in that situation it is necessary for the judge to focus on the evidence which there is with particular care. There are many observations in decided cases to this effect, which are expressions of this obvious point.

63. Apart from broad questions of credibility, there were in this case two particularly significant and connected issues which had to be decided, and these were:-

    i) What is the impact of the finding that the 2017 allegations were not proved on the reliability of the 2019 allegations; and

    ii) To what extent do the allegations made by D and R mutually support each other?

64. It would have helped (and may have avoided this appeal) if the judge had identified those two points in terms, and set out her approach to them. I have sought to extract from her decision the relevant parts which show that she clearly had them both in mind, and that she did have an answer to them which was one she was entitled to reach. The judge regarded the evidence of R as supporting the evidence of D as to what happened in 2019. In her critical passage at her paragraph 204 she says that the evidence of each child about the 2019 abuse was clear, and then went on to say "I found D and R's evidence to be consistent". I take this to mean that the children had each given a consistent account, but also that their evidence was consistent with each other. The focus on the lack of opportunity for collusion is a clear indication that the judge was exploring the extent to which the two children were capable of supporting each other's evidence. She found that they were, and that was a conclusion properly open to her. It is plainly a significant conclusion, and it also provides one of the reasons why the allegations from 2017 were not found proved. They were not supported by any evidence from R. The principal reason, as I have said, was the judge's assessment of the cogency of D's evidence about 2017 in the ABE interview, as opposed to the clear and detailed account of what had happened in 2019.

65. The judge interpreted the ABE evidence carefully with these points in mind. That process was essential to the outcome, and properly so. She was particularly impressed by the detail which D gave of the circumstances of the incidents of abuse she described in 2019, and she was entitled to be. Similarly, her approach to R's non-verbal communication was also properly open to her.

66. It is fair to say that the passages in the judgment where the conclusions are set out would have been clearer if there had been short passages explaining why the factual observations made in the judgment lead to the results stated. This need not have greatly lengthened the judgment.

67. The Grounds of Appeal make some rather poor factual points, for example the suggestion that her failure to name her friend was a lie which enables the rejection all of D's evidence. Not only is it fairly clear that D was saying that she did know the person's name but would rather not say, but also such a lie to protect a friend who might get in trouble is explicable and does not necessarily impact on other evidence not affected by that consideration at all. There is no harm in a judge failing to mention a submission which has struck them as so obviously unsustainable that it does not deserve an answer. The function of the reasons is to explain how the decision has been arrived at, not to list the obviously unimportant things which have not influenced the outcome. Where, however, there is a substantial point or piece of evidence which points away from the judge's finding the judgment should address it, and explain how the judge has approached it.

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.

69. An example of a point which the judge should really have addressed is the evidence that D knew that R had been abused "but only with his fingers", before R had said anything to anyone else. That is indeed what R later alleged, but how did D know this? She said that she had known what was happening to R because she could hear what was going on in the next room. That means of knowledge would not obviously explain how she knew that the abuse was by digital penetration. These facts might justify an inference that the children must have discussed the abuse with each other, and the judge should have explained why she did not draw that inference. I would not, however, reverse the judge's findings on this basis. The mutual support and lack of an opportunity for collusion was an important part of her reasoning, but it was part of a much larger picture which included her careful appraisal of the ABE interviews and her rejection of the parents' evidence. Even if the judge had concluded that there must have been some conversation between the children before D made her allegations on 25 December 2019, this would not undermine the main thrust of the conclusion that collusion as the explanation of these two ABE interviews was implausible.

70. For these reasons, I would dismiss this appeal as to the main issues. I must now deal with two specific points.

71. First, as I have said, it is said that charge 5 was simply wrong because it is clear that the allegations of molestation while viewing pornography were made in relation to 2017 and not repeated in regard to 2019. The key passage here is not in the findings section of the judgment but in the analysis of the ABE interviews at paragraph 129 which I have set out above at [37]. This contains the sentence:-

> "However, there is clarity in her account of her father showing her pornography and sexually abusing her twice in 2019."

72. Whether this is right turns on the interpretation of a passage in the ABE interview of D from which this is the key extract:-

> D: "So what he's done to me, he's been showing, he's been showing me videos of it, of obviously what it is and all that and he's been putting his fingers into my private part"
>
> PC C: Okay, so he's been showing you videos of what is and he's been putting his fingers into your private parts you said.
>
> D: (Nods head) And obviously I was, I was it was a long time ago but he also did what I told you about what sex is, he done that to me"

73. The judge clearly interpreted the first answer as referring to the two incidents of digital penetration she had described as being recent. The second answer is plainly about something which happened "a long time ago". The passage then goes on to a discussion about the father's use of pornography in which it becomes impossible to tell

whether the descriptions relate only to 2017 or might also relate to 2019. In my judgment this is exactly the kind of interpretative exercise which the judge was required to carry out, and she came to the clear conclusion she set out at paragraph 129. This, though reflected in a separate allegation (number 5), was really a subsidiary finding about the circumstances in which the two particular incidents of digital penetration occurred. In these circumstances I am not prepared to reverse the judge's finding which could, in any event, have no impact on the ultimate disposal of these proceedings.

74. The second point is the submission that there was no evidence from which the judge could conclude that the abuse of R had happened "on multiple occasions". The true position is that there was. It is a very brief but clear statement by R in her ABE interview which is not developed or repeated. This is consistent with the foster carer's evidence of what R told her on 7 January 2020, see paragraph [34] above. The complaint was that "Daddy touches her", not "Daddy touched her". I am therefore not prepared to alter the judge's finding on this issue either.

Lord Justice Peter Jackson:

75. I agree.

Lord Justice Moylan:

76. I also agree.